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STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO,

PLAINTIFF,

VS.

ALEXANDER RAE BALDWIN III,

DEFENDANT.

No. D-0101-CR-2024-0013
Judge Mary Marlowe Sommer

BALDWIN'S EXPEDITED MOTION FOR RELIEF FOR STATE'S *BRADY* AND STATE LAW DISCLOSURE VIOLATIONS RELATED TO NON-FIREARM DISCOVERY

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PRELIMINARY STATEMENT

In the past ten weeks alone, the State has disclosed ***thousands*** of files, including ***over 150,000 pages*** of documents and ***dozens of gigabytes*** worth of data. Virtually all of these files have been in the State's possession for *months*—and in many cases *over a year*. Many of them contain critical evidence that is favorable to Baldwin's defense and that fundamentally reshapes the way Baldwin would have prepared for trial.

The State's violation of its discovery obligations violates Baldwin's constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963), as well as New Mexico law. *See, e.g.*, *State v. Allison*, 2000-NMSC-027, 129 N.M. 566. The State's repeated violations of its duty of disclosure warrants dismissal—which is exactly what other courts have done under analogous circumstances. Whether the State's misconduct was intentional or careless, severe remedies are warranted. *See State v. Davidson*, No. A-1-CA-40209, 2024 WL 2889839, at *5 (N.M. Ct. App. May 31, 2024). Baldwin respectfully requests the following relief: (1) an order dismissing the indictment with prejudice; or (2) in the alternative, (a) immediate disclosure of outstanding document productions, including answers to Baldwin's questions relating to the State's investigation, with redactions submitted to the Court for *in camera* review as appropriate; (b) an order requiring the State to provide a log of all communications between or among any member of the Santa Fe Sheriff's Office, District Attorney's Office, Special Prosecutor's Office, and any witness who has contacted or been contacted by any of the foregoing entities; (c) adverse inferences/preclusion; and (d) permission for Baldwin to add witnesses to his witness list based on these new disclosures.

FACTUAL BACKGROUND

On May 23, 2024, the State disclosed dozens of audio recordings of interviews that the State's investigator, Connor Rice, had conducted over the past year. *See* Ex. M at 1-2. Morrissey claimed that only "five interviews" were "relevant to the case against Mr. Baldwin" and the rest

were "unrelated," despite admitting that the "unrelated" interviews "specifically related to the involuntary manslaughter case against Ms. Gutierrez or the pending felony case against Ms. Gutierrez for bringing a firearm into a liquor establishment" (*id.* at 1)—*i.e.*, that they were inherently related to Baldwin's case. In any event, Morrissey described the "five interviews" that she claimed *were* relevant to Baldwin's case as follows:

> The interviews of Andy Graham, Cynthia Neidland and Raleigh Wilson were in Mr. Rice's possession but not provided for disclosure until this week. *He has been notified that such a delay is* ***unacceptable****.* The interview of Kristin Gonzales was shared with me by Mr. Rice on March 29, 2024 but it was diverted into my spam folder for some reason I did not see it. […]

Id. (emphasis added). In the recording of Rice's interview of Andy Graham, which took place nearly three months ago, Graham states, among other things, that he did not think Baldwin's behavior on set was unusual for an actor of his caliber; that actors do not commonly inspect prop firearms; that an actor should never have to worry about a gun being handed to him loaded; and that he thinks individuals other than Baldwin should be held responsible for Hutchins' death. Graham, a camera operator with firsthand knowledge of conditions on the set of *Rust* whose exculpatory statements have been known to the State for months, has never been listed on the State's witness list. Since the recording of his interview with Rice was not disclosed by the State until after the May 6, 2024 deadline for witness disclosures, the defense was unable to list him.

Despite Baldwin's numerous requests for communications from witnesses that were in the State's possession, the State didn't disclose them for several months. Once they were disclosed, it was clear that the State had failed to disclose text messages involving several key witnesses (including one of the targets in this case). The State also waited until May 14, 2024, to disclose dozens of previously undisclosed lapel videos, while refusing to answer routine questions about the lead detective's file and refusing to provide a copy of the binder. Indeed, Baldwin has good reason to believe that documents are still missing, given that the State repeatedly stood on its

assertion that neither Detective Hancock nor Detective Cano kept handwritten notes—until those notes magically appeared after it was undeniable from witness interviews that the notes existed.

The State's careless and disordered disclosure methods have compounded the issues above. From April 2023, when the State dropped its initial complaint, until May 2, 2024, those "methods" involved throwing piles of unmarked documents from unidentified sources into unmarked (or inaccurately marked) folders on a shared drive without telling Baldwin where, what, or how disclosures were made—and then refusing to have a discussion about it until four days before the deadline for dispositive motions and witness disclosures. For example, to find photos comparing live rounds discovered on the set of *Rust*, Baldwin would have needed to look in a folder called "CDR Photos 627203," housed in a folder called "misc disclosure 10.21.23," which was housed in a folder "1," which was housed in a folder inexplicably labeled "Souza Interview (7), Allred Images, initial rust items." *See* Ex. Y. Baldwin sought for months to make sense of the State's Russian-doll disclosure methods, but the State refused to "communicat[e] verbally with members of the defense team" about *any* issue. Ex. N; *see also, e.g.*, Ex. O at 1-2 (April 9, 2024 email).

With pre-trial deadlines approaching, Baldwin continued to request transparency from the State. On April 22, 2024, counsel for Baldwin "reiterate[d]" its request that the State notify Baldwin when "the defense share has been updated, and with respect to which file folder(s)" so that Baldwin "can appropriately prepare the defense." Ex. P at 6. In response, the member of the prosecutorial team who had been managing the share drive agreed "it can be a challenge to notice what might have been updated within that mountain of data." *Id.* at 5. On April 25, Baldwin emailed again to notify the State about gaps in its expert disclosures, noting that "materials do not make it to the share file that should." Ex. Q at 1. On April 30, 2024, Baldwin proposed a system of disclosure intended to eliminate gaps and confusion going forward, noting, however, that this

system "does not resolve our ongoing concern that there appear to be materials that are not timely provided (or not provided at all)." *Id.* The email also expressed concern that Morrissey and Johnson had repeatedly asserted that Baldwin had access to all discovery, while neither prosecutor was actually familiar with the contents of the share site where the discovery had been uploaded for Baldwin. *Id.* The email concluded with another of many offers to confer about these issues. *Id.*

The following morning, Morrissey responded that the State was "working to address any outstanding discovery issues as quickly as possible," but again asserted, inexplicably, that the State had met its disclosure obligations. *See id.* Baldwin responded that same day, noting that "[t]he State's unwillingness to discuss these issues only increases our concerns," and "reiterating [Baldwin's] request to have a meaningful conferral to address these issues and hear from the state how it intends to ensure compliance in light of the concerns . . . raised below." *Id.* at 2. In response, Morrissey wrote that she and Special Prosecutor Johnson, as well as one of the State's paralegals, were "being granted full access to the defense share tomorrow morning (or so I'm being told) so that we can meet and confer with you in a manner that will meaningful and we can solve any remaining issues without relying on" a different paralegal, who had been, in Morrissey's words, "less than responsive to my requests." *Id.* at 1. By Morrissey's own admission, therefore, it was not until May 2, 2024—three days before the dispositive motion deadline and witness list cutoff date—that *anyone* from the State (other than a "less than responsive" paralegal) was given access to the defense share drive that Baldwin had been complaining about for months.

On June 5, 2024, in an email from Baldwin that identified numerous continuing discovery violations by the State, Baldwin again requested production of *Brady*/*Giglio* materials. *Id.* The State responded that "as it relates to law enforcement officers," it was "not aware of any" such materials, and that "[i]f there is anything specific you are interested in please say so." *Id.* at 3. On

June 10, 2024, Baldwin's counsel emailed the State to request a number of outstanding discovery items that had been repeatedly requested before, including: (1) confirmation that "there are no additional emails, text messages, notes, or recordation from any prosecutor or investigator for the prosecution of the state's communications (including meetings or interviews) with any witnesses or potential witness in this case that have not been produced"; (2) a report that was prepared by its expert Paul Jordan, which Baldwin was not aware of until Jordan mentioned it during his pretrial interview on May 23, 2024, and which the State has yet to provide despite agreement from Jordan and the State to provide it (*see* Ex. V at 37:11-38:4); and (3) "any material subject to disclosure under *Brady*, *Giglio*, and their progeny, as well as for material subject to disclosure under 5-501(A)(5)-(6) and 5-501(G) NMRA." Ex. S at 1. In response to Baldwin's first request, Morrissey asserted that Baldwin "[has] received everything pursuant to 5-501 NMRA," therefore representing that in the two and a half years since the State's investigation began, not a single prosecutor or investigator employed by the District Attorney's office took a single note of a single conversation with a single witness. *Id*.[1] In response to Baldwin's second request, Morrissey stated,

[1] In a follow-up email, counsel for Baldwin made clear that it was requesting "any notes that were taken by any members of the prosecution team from conversations with witnesses for which the defense was not present," excluding privileged work product. *See* Ex. X at 1. Baldwin further noted that the State "has an affirmative duty to disclose documented witness statements" under Rule 5-501(A)(5) NMRA, and that "a 'statement includes notes that are in substance recitals of an oral statement.' *State of New Mexico, ex rel. Brandenburg v. Blackmer*, 2005-NMSC-008, ¶ 26, 137 N.M. 258, 264 (citing Rule 5–501(G)(3))." *Id.* Counsel for Baldwin further made clear that its request for notes regarding any witness statements applied to any member of the prosecution team, "including but not limited to current and former prosecutors, investigators, and Victim's Advocates." *Id.* In response, Morrissey stated, "Ms. Reeb, Ms. Padgett and Ms. Carmack-Altwies have confirmed that they have no notes from the interviews they participated in (all of which were also recorded, thus lessening the importance for note taking)." *Id.* She did not confirm whether notes had ever existed but were since destroyed, and at least one witness recalled that notes *were* taken during an interview with investigators at the District Attorney's office. *See* Ex. W (Transcript of 4/1/24 Interview of S. Kenney) at 55:24-56:12.

"I don't know what report you're referring to. Please be more specific." *Id.* Finally, Morrissey said "Brady/Giglio materials were provided to the defense on March 28, 2023." *Id.*

In the past two months alone, the State has disclosed, among other things, communications with IATSE, communications with the FBI and related documents, numerous miscellaneous scanned documents without proper labeling, otherwise unidentified photos and videos from the *Rust* production, materials from Pietta and EMF, hundreds of thousands of pages of text messages contained in cell phone reports, previously undisclosed expert reports, previously undisclosed lapel videos, and emails and text messages by and among various witnesses and members of the prosecution team including Seth Kenney, Connor Rice, Alexandria Hancock, Joel Cano, Luke Haag, Michael Haag, Kent Jorgensen, Marissa Poppell, Kristen Gonzales, and FBI personnel.

ARGUMENT

Because of the unique role that prosecutors play in our system, they owe heightened discovery obligations under the Constitution. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667 (1985). Under *Brady*, the State is required to disclose favorable evidence to the defense. *See State v. Turrietta*, 2013-NMSC-036, ¶ 35, 308 P.3d 964. The State violates due process when it suppresses "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, *irrespective* of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Moreover, "the 'prosecution' for *Brady* purposes encompasses not only the individual prosecutor handling the case, but extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects [of the case]." *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995).

In addition to *Brady*, New Mexico imposes even stricter disclosure requirements. Rule 5-501(A) NMRA provides, "[u]nless a shorter period of time is ordered by the court, within ten (10) days after arraignment or the date of filing of a waiver of arraignment . . . the state shall disclose

or make available to the defendant," among other things, "any . . . documents . . . which are material to the preparation of the defense or are intended for use by the state as evidence at the trial . . . ; any results or reports … of scientific tests or experiments … made in connection with the particular case . . .; . . . any statement made by [a State] witness …; and any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution." Rule 5-501(A)(3)-(6) NMRA. *State v. Allison*, 2000-NMSC-027, ¶ 8 n.1 (Rule 5-501 "create[s] disclosure obligations beyond those required by the Due Process Clause").

To determine whether exclusion is warranted, courts must consider culpability, prejudice, and lesser sanctions. *State v. Le Mier*, 2017-NMSC-017, ¶ 15, 394 P.3d 959. Courts do not define "culpability" as bad faith. *Davidson*, 2024 WL 2889839, at *8 (affirming dismissal "even though the [district] court fell short of labelling [the state's conduct] as 'bad faith'"). In any event, bad faith has been found where, as here, the State failed to disclose evidence concerning a witness's credibility without providing a "reasonable explanation for [the] nondisclosure." *Mathis v. State*, 1991-NMSC-091, ¶¶ 14, 16, 819 P.2d 1302. The Court can order exclusion without finding in Baldwin's favor on all three factors. *Davidson*, 2024 WL 2889839, at *6.

Culpability. The State's culpability in failing to disclose favorable evidence in this case is undeniable. The State has "unilaterally withheld" evidence favorable to Baldwin's defense, *State v. Harper*, 2011-NMSC-044, ¶ 17, 266 P.3d 25, including "evidence dealing with . . . credibility" that "could be expected to have a significant impact on the jury," *Mathis*, 1991-NMSC-091, ¶ 14, while failing to provide a "reasonable explanation" for its nondisclosure, *id.*, ¶ 16. Even if the State's failures have been unintentional (which is unlikely), they have been caused by the State's own "intransigence" in refusing to facilitate Baldwin's access to the discovery he is entitled to,

State v. Harper, 2011-NMSC-044, ¶ 17, 266 P.3d 25, and are, "at a minimum," sufficiently reckless to warrant dismissal, *Davidson*, 2024 WL 2889839, at *8.

Although the State said, as recently as this month, that "Brady/Giglio materials were provided to the defense on March 28, 2023" (Ex. U), the facts above demonstrate otherwise. Morrissey *acknowledges* that the State's delay in disclosing dozens of audio recordings that contain statements favorable to Baldwin's defense was "unacceptable." Ex. M. Yet Morrissey provides no explanation for the delay other than her investigator's negligence and the fact that some of the recordings somehow ended up in her "spam" box. *See id.*; *see also Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995). Yet there is no "spam" exception to the State's duty to disclose evidence favorable to the defendant. *See Brady*, 373 U.S. at 87 (violation occurs when suppressed evidence "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *Davidson*, 2024 WL 2889839, at *5. As to another audio recording of a relevant witness, Morrissey is simply "unsure" why it was "never uploaded to the server." Ex. F. The State cannot be excused because its paralegal was "less than responsive" to Morrissey's requests for information about the State's disclosures. Ex. S at 1. *See United States v. McCluskey*, No. 10-CR-2734 JCH, 2012 WL 13081295, at *3 (D.N.M. May 11, 2012) ("A prosecutor may not avert *Brad*y obligations by keeping himself ignorant or compartmentalizing information"). And at the end of May, the State also belatedly disclosed approximately 150,000 pages of documents from a target in this case.

These violations warrant severe sanctions. It took *months* for the State to investigate Baldwin's disclosure concerns, let alone have a meaningful discussion about the issues. *See supra* at 3-5. It was not until *four days* before the dispositive motion deadline that the State agreed to have a conversation about these issues, at which point the Special Prosecutors could not answer

basic questions about how the defense share drive worked or what was on it—*because they didn't even have access to it themselves*. Without having access to the State's own disclosures, Morrissey could not have represented, in good faith, that the State "[has] continued to disclose discovery as we are required to do under the rules." *See* Ex. S at 1-2. Moreover, the State rejected Baldwin's requests to confer. Had the State taken *any* steps to confirm whether it had complied with its obligations, it would have learned *months* ago that substantial evidence had not been disclosed. Instead, the disclosures came during or after the witnesses' pre-trial interviews, so that Baldwin had no opportunity to review the materials ahead of time. *See also* Rule 5-501(A)(4)-(5) NMRA. The State has conducted itself, at best, with reckless disregard for Baldwin's rights under *Brady* and 5-501 NMRA. *See Davidson*, 2024 WL 2889839, at *8 (finding a "high degree of culpability" where the State "recklessly or grossly negligently lost" evidence favorable to the defendant).

Prejudice. Baldwin has been severely prejudiced by the State's misconduct. The State withheld over 150,000 pages of documents, over four hours of lapel video, countless hours of audio recordings, and numerous other documents for several months and, in certain instances, over a *year*—the entire time Baldwin was deciding defense strategy. *See United States v. Lujan*, 530 F. Supp. 2d 1224, 1255 (D.N.M. 2008) ("Exculpatory evidence will usually require significant pretrial investigation to be useful to a defendant at trial"); *accord United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976); *United States v. McVeigh*, 923 F. Supp. 1310, 1315 (D. Colo. 1996). For example, had the State disclosed Graham's interview when it was recorded in March, Baldwin would have had weeks to contact Graham and make other investigative decisions before it was too late to add Graham or others to the witness list. And Graham may have referred Baldwin to crew members who, like him, believe individuals instead of Baldwin should be held responsible. *See United States v. Reid*, 553 F. Supp. 3d 882, 893 (W.D. Wash. 2021) (rejecting State's argument

that failure to produce recordings until three weeks before trial caused no prejudice).

The State's strategy—trial by ambush—is grossly prejudicial and abhorred by courts. *See Le Mier*, 2017-NMSC-017, ¶ 25 (dismissal affirmed where State's incomplete disclosures "subjected [defense counsel] to the possibility of trial by surprise"). The reason for that is obvious: Baldwin has had to divert substantial time and resources just to pursue the growing list of undisclosed discovery that continues to emerge from hiding—not to mention the time it takes to review more than 150,000 pages of documents and countless hours of audio recordings and videos that have been dumped on Baldwin just weeks before trial. Moreover, most of the State's late disclosures were made *after* the dispositive motion and witness deadline. This alone demonstrates how seriously Baldwin has been prejudiced by the State's misconduct. *McCluskey*, 2012 WL 13081295, at *8 (*Brady* violation occurs when the government fails to disclose material "in time for a defendant to make meaningful use of it"); *United States of Am., Plaintiff, v. Brant Daniel, Defendant.*, 2021 WL 2808706, at *3 (E.D. Cal. July 6, 2021) (same).

Lesser Sanctions. Lesser sanctions will not be effective. Baldwin has been unable to fully examine the State's expert witnesses, conduct full factual and expert discovery (such as interviewing fact witnesses about information in the new disclosures and retaining testifying defense experts to address the disclosures), or file grand jury alert letters, grand jury-related dismissal motions, and other dispositive motions containing these critical disclosures. The State's violations, especially in combination with the violations presented in Baldwin's firearm related *Brady* motion, have caused severe prejudice that cannot be remedied short of dismissal. Baldwin deserves to be treated just like any other criminal defendant, and both federal and state law point in one direction: dismissal.

CONCLUSION

Baldwin respectfully requests the remedies set forth on Page 1 above.

Date: June 24, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2024, a true and correct copy of the foregoing brief was emailed to opposing counsel.

/s/ Heather LeBlanc
Heather LeBlanc