**STATE OF NEW MEXICO**
**COUNTY OF SANTA FE**
**FIRST JUDICIAL DISTRICT COURT**

**STATE OF NEW MEXICO,**

**Plaintiff,** **No. D-101-CR-2024-00013**

**vs.** **Judge Mary Marlowe Sommer**

**ALEXANDER BALDWIN,**

**Defendant.**

**STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE No.2 TO PRECLUDE INADMISSIBLE CHARACTER AND PRIOR ACT EVIDENCE AND STATEMENTS UNRELATED TO THE EVENTS OF OCTOBER 21, 2021**

COMES NOW the State of New Mexico by and through Special Prosecutors, Kari T. Morrisey and Erlinda O. Johnson, and hereby respectfully submits the following response in opposition to Defendant Alexander Baldwin's motion *in limine* number two to preclude inadmissible character and prior act evidence and statements unrelated to the events of October 21, 2021, and in support thereof submits the following.

On June 17, 2024, the State filed its notice of intent to introduce other act evidence as intrinsic evidence to the offense charged and in the alternative as admissible evidence pursuant to Rule 11-404(B) NMRA. In its notice, the state detailed the nine different categories of other act evidence it intends to introduce at trial. For the reasons set forth in its notice of intent to introduce other act evidence and below, the State respectfully requests this Court deny the defendant's motion in limine to preclude other act evidence.

**Involuntary Manslaughter**

Under New Mexico law, involuntary manslaughter is an unintentional killing, *State v. Henley,* 2010–NMSC–039, ¶ 14, 148 N.M. 359, that consists of an "unlawful killing of a human being without malice ... committed in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection." NMSA 1978 § 30–2–3; *State v. Henley,* 2010–NMSC–039, ¶ 14, 148 N.M. 359. (internal quotation marks and citations omitted).

The "lawful act" portion of the involuntary manslaughter statute includes "[t]he statutory phrase 'without due caution and circumspection' [which] involves the concept of 'criminal negligence.' Criminal negligence includes conduct which is reckless, wanton, or willful." *State v. Yarborough,* 1995-NMCA-116, ¶ 20, 120 N.M. 669 *(quoting State v. Arias,* 115 N.M. 93, 96, 847 P.2d 327, 330 (Ct.App.1993) (citation omitted). Accordingly, the State must present evidence of criminal negligence, irrespective of the underlying statutory basis for the charge. *State v. Yarborough*, 1995-NMCA-116, ¶ 20, 120 N.M. 669; *State v. Salazar,* 1997–NMSC–044, ¶ 54, 123 N.M. 778, 945 P.2d 996 ("[I]nvoluntary manslaughter, whether premised upon a lawful or unlawful act, requires a showing of criminal negligence.").

Criminal negligence exists where the defendant "act[s] with willful disregard of the rights or safety of others and in a manner which endanger[s] any person or property." *State v. Henley,* 2010–NMSC–039, ¶ 16, 148 N.M. 359, 237 P.3d 103 (internal quotation marks and citation omitted); *State v. Skippings,* 2011-NMSC-021, ¶ 18, 150 N.M. 216. Criminal negligence includes conduct which is reckless, wanton, or willful. *State v. Arias,* 1993-NMCA-007, ¶8, 115 N.M. 93 (citation omitted); *overruled on other grounds by State v. Abeyta,* 1995-NMSC-051, 120 N.M. 233.

In this case, the defendant is charged with involuntary manslaughter under the theory of negligent use of a firearm and the alternative theory charging the commission of involuntary manslaughter, without due caution and circumspection by an act committed with total disregard or indifference for the safety of others. The theory charging an act committed without due caution and circumspection requires proof of criminal negligence. In proving criminal negligence, the State will present evidence of the defendant's reckless, wanton and willful conduct. Defendant's acts on set in the days preceding the shooting form part of that willful and reckless conduct. The State carries the burden of proof and as such must introduce relevant evidence that satisfies the elements of the offense as charged. That the evidence presented at trial supplements the evidence presented before the grand jury is of no moment since the trial evidence does not change the charge. The State's introduction of evidence of the other acts set forth in its June 17, 2024, notice does not change the charge with which defendant is charged or create a variance.

**Other Acts Evidence is *Res Gestae* or Intrinsic Evidence of the Offense Charged**

"'Res gestae, also known as intrinsic evidence, is 'evidence of wrongful conduct other than the conduct at issue. . .offered for the purpose of providing the context in which the charged crime occurred.'" *United States v. Parks*, 902 F.3d 805, 813 (8th Cir. 2018) ((*quoting United States v. Campbell*, 764 F.3d 880, 888 (8th Cir. 2014); *United States v. Coughlin,* 821 F.Supp.2d 35, 45 (D.D.C.2011) (finding evidence of the defendant's medical and athletic activities amounted to intrinsic evidence of the charged offense of making a fraudulent claim to the September 11th Victim Compensation Fund). Intrinsic evidence is admissible "to complete the story or provide a total picture of the charged crime." *Parks*, 902 F.3d at 813-14 (citations omitted). Indeed, courts have held that other act evidence is intrinsic "when the evidence of the

other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged," and are not subject to Rule 404(B) analysis. *United States v. Lambert,* 995 F.2d 1006, 1007 (10th Cir. 1993) (quoting *United States v. Williams,* 900 F.2d 823, 825 (5th Cir.1990)) (internal quotation marks omitted); *United States v. Badru*, 97 F.3d 1471, 1474-75 (D.C. Cir. 1996); *United States v. Allen*, 960 F.2d 1055, 1058 (D.C. Cir. 1992); *United States v. Diaz*, 878 F.2d 608, 614-16 & n.2 & 3 (2d Cir. 1989). Courts "have never required that the other-act evidence establish an element of the charged offense." *United States v. Irving,* 665 F.3d 1184 (10th Cir. 2011). Rather, intrinsic evidence is that which is "directly connected to the factual circumstances of the crime and provides contextual or background information to the jury." *Id*. at 1212.

In this case, the other acts detailed in the State's June 17, 2024, notice are inextricably intertwined with the charged offense and provide contextual background information to the jury. The other acts are also necessary preliminaries to the involuntary manslaughter as charged in the alternative in that defendant engaged in reckless conduct on set and with the firearm, consciously disregarding a substantial risk of harm to others that could result from his conduct. *State v. Henley,* 2010-NMSC-039, ¶16, 148 N.M. 359.

It is important to note that "[t]he jury instruction on involuntary manslaughter states that the defendant 'should have known of the danger involved in [his or her] actions,'" and "continued to act." *Id.* (quoting UJI 14-231 NMRA). That language suggests that in an involuntary manslaughter case it is permissible to introduce evidence of the defendant's acts leading up to the fatal moment which show his reckless conduct that disregarded the rights and safety of others. Evidence of the defendant's conduct during the ten days before he shot and killed Ms. Hutchins goes to the defendant's subjective knowledge that his actions during the

filming in the days leading up to October 21, 2021, posed a danger or risk to others on set. *See* 2010-NMSC-039, at ¶17("criminal negligence in the context of involuntary manslaughter requires subjective knowledge by the defendant of the danger or risk to others posed by his or her actions.").

The defendant proposes that the State only be permitted to introduce evidence of the events that occurred in the minutes before the defendant shot Ms. Hutchins. Such a narrow interpretation of the element requiring proof of the defendant's criminal negligence by actions and conduct which posed a risk and utter disregard for the safety of others, is absurd. All evidence of the defendant's conduct from October 12-21, 2021, is res gestae evidence. It should be noted that other courts have allowed the introduction of other acts evidence as res gestae in involuntary manslaughter cases where the other acts are relevant to the defendant's reckless state of mind.

As previously noted in the State's notice of intent to introduce other acts evidence, in an involuntary manslaughter case before the U.S. District Court for the District of New Mexico, the Honorable William P. Johnson ruled that evidence of the defendant's prior commercial driver's license medical exam and medical records were probative of the involuntary manslaughter charge and admissible against the defendant as res gestae evidence "that his conduct conformed to a reckless *mens rea*." *United States v. Riego*, 2022 WL 4295185, *2 (D.N.M. September 16, 2022)*(citing United States v. Bryant*, 892 F.2d 1466, 1468 (10th Cir. 1989) (involuntary manslaughter requires a proof of defendant's recklessness). In ruling to admit evidence of the defendant's prior driver's license record, the Court noted,

> It is well settled that Rule 404(b) does not apply to other act evidence that is intrinsic to the crime charged. *United States v. O'Brien*, 131 F.3d 1428, 1432 (10th Cir. 1997). [I]ntrinsic evidence is directly connected to the factual

> circumstances of the crime and provides contextual or background information to the jury. Extrinsic evidence, on the other hand, is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense. *United States v. Parker*, 553 F.3d 1309, 1314 (10th Cir. 2009).

*Id*. at * 2 (quotations omitted). Similarly here, the defendant's acts in mishandling the firearm and playing with the firearm are evidence of the defendant's reckless state of mind. Therefore, the defendant's acts preceding the shooting are probative to a jury's determination of whether, in filming Rust and in handling the firearm in question, the defendant acted in a manner that endangered the safety of others, including Ms. Hutchins on October 21, 2021. Accordingly, defendant's acts between October 12 through 21, 2021, are relevant to his reckless mens rea and thus res gestae intrinsic of the charged offense and Rule 11-404(B) does not apply. *United States v. Thomas*, 760 F.3d 879, 883 (8th Cir. 2014).

**Alternatively, Other Acts Evidence is Admissible Pursuant to Rule 11-404(B)**

"Relevance of evidence is established by any showing, however slight, that the evidence makes it more or less likely that the defendant committed the crime in question." *United States v. Mora*, 81 F.3d 781, 783 (8th Cir. 1996). "Whenever the proof of another act or crime tends to prove the guilt of the person on trial, it is admissible, notwithstanding the consequences to the defendant. The State has the right to show the guilt of the defendant by any relevant fact." *State v. Allen,* 1978-NMCA-054, ¶¶ 2-3, 581 P.2d 22 (citations omitted). "'Such evidence may * * * properly be received if it is relevant to, and its probative force is sufficiently great upon, some material element of the crime charged which is in issue...'" *Id.* (*quoting State v. Mason*, 79 N.M. 663, 448 P.2d 175 (Ct.App.1968)); s*ee also State v. Schifani,* 1978-NMCA-080, 584 P.2d 174 (Persons other than victims, in the counts being tried, were allowed to testify to dealings with defendant similar in nature to victims' dealings with defendant in order to show defendant's intent and common scheme or plan); *State v.*

*McCallum,* , 1975-NMCA-030, 535 P.2d 1085 (In a case of fraud, related incidents of accused's acts are relevant and admissible to establish motive, absence of mistake or accident, common scheme or plan.).

As set forth in the State's notice of intent to introduce other act evidence, [r]ule 11-404(B)(1) states that evidence of another crime, wrong or act "is not admissible to prove a person's character" to show that "the person acted in accordance with the character." But under Rule 11-404(B)(2) NMRA 2024, evidence of another crime, wrong or act may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Thus, "evidence of other acts is admissible under Rule 11-404(B) if relevant to a material issue other than the Defendant's character or propensity to commit a crime." *State v. Kerby,* 2007-NMSC-014, ¶ 25, 141 N.M. 413; s*ee also State v. McGhee,* 1985-NMSC-047, ¶¶ 24-26, 703 P.2d 877, 881 (holding that evidence of prior bad acts is admissible "if it is probative of a material element at issue"); *State v. Niewiadowski,* 1995-NMCA-083, ¶ 10-14, *901 P.2d 779* (holding that "evidence of Defendant's other bad acts can be admissible if it bears on a matter in issue, such as intent, in a way that does not merely show propensity").

New Mexico considers Rule 11-404(B) a rule of inclusion. That is, New Mexico allows use of other bad acts for many reasons, including those not specifically listed in Rule 11-404(B). *See State v. Williams,* 1994-NMSC-050, ¶ 17, 874 P.2d 12 (overruled on other grounds by *State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110). For example, New Mexico appellate courts have approved the admission of other-bad-acts evidence to show the context of other admissible evidence and to show consciousness of guilt, neither of which purposes appears in the list of proper Rule 11-404(B) purposes. *State v. Ruiz,* 1995-NMCA-07, ¶¶ 11-

13, 892 P.2d 962. Thus, the issue in New Mexico is whether there is a probative use of the evidence that is not based on the proposition that a bad person is more likely to commit a crime.

The other act evidence at issue here is relevant to show the defendant's reckless and wanton conduct for several days preceding October 21st as proof that on October 21, 2021, defendant knew that failing to inspect the gun, pointing it at Ms. Hutchins, cocking the hammer and pulling the trigger was reckless and wanton and not a simple mistake.

Courts have uniformly held that in cases where there is an issue as to a material element of the offense charged, evidence of other acts tending to establish said material element is generally admissible. *See United States v. Johnson,* 934 F.2d 936 (8th Cir. 1991). In particular, "evidence of another crime that tends to undermine defendant's innocent explanation for his or her act will usually be admitted." 2 WEINSTEIN'S FEDERAL EVIDENCE, § 404.22[1][a] at 404-100-02 (2d ed. 2015) (WEINSTEIN) (footnote omitted).

The detailed list of other act evidence set forth in the State's notice of intent to introduce other act evidence is admissible to prove defendant's knowledge that his conduct was reckless and placed others in danger and not a mistake. Indeed, the other act evidence proves that on October 21, 2021, the defendant acted willfully and with reckless disregard for the safety of others, by cocking a real gun, pointing it at another and pulling the trigger. Therefore, admission of the proposed evidence is proper under Rule 11-404(B). *State v. Bailey,* 2015-NMCA-102, 357 P.3d 423.

Evidence may only be excluded under Rule 11-403 if its probative value is significantly outweighed by the risk of unfair prejudice. Rule 11-403 provides that "[t]he court may exclude

relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." If found by the Court to fall under Rule 11-404(B), the probative value of the proposed other acts evidence is not outweighed by the danger of unfair prejudice. Unfair prejudice "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Stanley,* 2001–NMSC–037, ¶ 17, 131 N.M. 368, 37 P.3d 85 (internal quotation marks and citation omitted); *United States v. Tan*, 254 F.3d 1204, 1211 (10th Cir. 2001). However, "[e]vidence is not unfairly prejudicial simply because it is damaging to an opponent's case." *United States v. Curtis*, 344 F.3d 1057, 1067 (10th Cir. 2003). Indeed, Rule 403 was never intended to exclude relevant evidence simply because it is detrimental to one party's case. *United States v. Hattaway,* 740 F.2d 1419, 1425 (7th Cir. 1984). By its very nature "[r]elevant evidence is inherently prejudicial" to one side or the other. *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979).

Here, in sum, the other acts evidence listed on the State's notice is relevant to an element of the charged offense in that it demonstrates defendant's criminally negligent conduct as it relates to the gun and his actions on the set of Rust which prove wantonness and recklessness. Evidence of the listed other acts also go to defendant's knowledge of the danger or risk to others which his conduct posed as well as absence of mistake. Finally, simply because the evidence is detrimental to the defendant does not mean its probative value is outweighed by the danger of unfair prejudice. Accordingly, this Court must allow its admission.

Wherefore, for the foregoing reasons the State respectfully requests this Court deny the defendant's motion in limine to preclude other act evidence as detailed in the State's notice of intent to introduce other acts evidence filed on June 17, 2024.

Respectfully Submitted,

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I hereby certify that a true and accurate copy of the foregoing was provided to counsel for the defendant via e-mail this 29th day of June 2024.

/s/ *Erlinda O. Johnson*
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