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KATHLEEN VIGIL CLERK OF THE COURT
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STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO,

Plaintiff,

vs. D-101-CR-2023-00040

HANNAH GUTIERREZ-REED,

Defendant.

HANNAH GUTIERREZ-REED'S REPLY TO HER *EXPEDITED* MOTION FOR NEW TRIAL OR FOR DISMISSAL FOR DISCOVERY VIOLATIONS AND UNDER THE COURT'S INHERENT POWER

Defendant Hannah Gutierrez-Reed, by and through her counsel of record, Jason Bowles and Monnica L. Barreras, respectfully submits her reply to her motion for new trial or for dismissal for severe and ongoing discovery violations by the State and in further support states as follows:

INTRODUCTION

Ms. Gutierrez-Reed was charged with the same crimes as Mr. Baldwin (involuntary manslaughter), arising out of the same set of facts and circumstances, the same flawed investigation, and, as she has learned since her conviction, the same pattern of prosecutorial misconduct that ultimately led to the dismissal of Mr. Baldwin's case. Though Ms. Gutierrez-Reed did not discover this misconduct during her trial, while her case is pending on appeal she has the same rights, and she is entitled to the same relief.

THIS COURT'S ORDER OF DISMISSAL IN BALDWIN'S CASE

This Court in dismissing Mr. Baldwin's case to preserve the integrity of the judicial system for intentional and egregious discovery misconduct by the State, by written order, made some very important findings applicable to Ms. Gutierrez Reed as well:

In paragraph 30, the Court provided an alternative theory to how the live rounds got on to the Rust set, which completely contradicts the government's theory at Ms. Gutierrez Reed's trial that she brought the live rounds onto set. The Court's order states that testimony of Seth Kenney at the evidentiary hearing in Baldwin's case established the following timeline: *(a) .45 colt ammunition was once possessed by Troy Teske; (b) some of that ammunition was then possessed by Seth Kenney and Thell Reed for use at the cowboy training camp on the set of 1883; (c) Seth Kenney then took leftovers of that live ammunition to PDQ's business location in Albuquerque, NM; (d) Seth Kenny (doing business as PDQ) then gave purported .45 colt dummy rounds with brass casings and nickel (or silver in color) primers to Sarah Zachary on or about October 12, 2021; and, (e) Sarah Zachary then introduced those rounds onto the set of Rust before the October 21, 2021 incident.*

In paragraph 35 the Court found that "*Special Prosecutor Kari Morrissey's testimony was internally inconsistent in part and conflicted with testimony given by at least one other witness.*" This adverse credibility finding is highly relevant when analyzing Ms. Gutierrez Reed's motion and the credibility of the assertions by the State.

In paragraph 48, the Court found, "The suppressed evidence (of the Teske rounds) is favorable impeachment evidence and also potentially exculpatory. For instance, the suppressed evidence was used as impeachment evidence during the defense's cross-examination of CST Poppell." The Court also finds, "evidence regarding the source of the live round that killed Ms. Hutchins, and additional information concerning how that live round arrived on the Rust set, likely

affects the jury's calculus of proximate cause and negligence by a third person or persons." These findings apply to Ms. Gutierrez Reed too since a major defense for her was causation.

In paragraph 52 the Court found, "The State, through the actions of SFSO agents and Special Prosecutor Morrissey, intentionally and deliberately withheld this evidence from Defendant (Baldwin) when deciding to place the supplemental report and Teske-supplied ammunition in a non-Rust investigation case number. In addition, at least one member of the prosecution team, i.e., CST Poppell, knew of the physical characteristics and attributes of the Teske-supplied ammunition." Even though this was after Hannah's trial, at this point, the state knew that the characteristics of some of the "Teske ammo" was very similar or identical to the live ammunition found on the Rust set, which again links back to Seth Kenney and PDQ props as noted in the Court's paragraph 35. Although Ms. Gutierrez Reed knew of the existence of the Teske ammunition, the state still did not seize it before her trial as they indicated they would, thereby causing Mr. Teske to essentially hold it in place. The State also did not disclose the report on Teske bringing it to the Sheriff's Office or the lapel video, and instead buried the fact that Teske's ammunition was stored under a different case number.

The Court's findings in Baldwin's case are relevant to the State's credibility and the pattern and practice of discovery misconduct by the State that impacted the entire prosecution, not just Mr. Baldwin's case. As this Court stated in her oral findings on July 12, 2024, if the integrity of the system is compromised by State misconduct, the appropriate remedy is dismissal with prejudice, as no one case is more important than the integrity of the system as a whole.

ARGUMENT

As this Court put it, "[I]nformation concerning the source of the live ammunition that arrived on the *Rust* set likely affects the calculus of proximate cause and negligence by third

parties." *State v. Baldwin*, No. D-101-CR-2024-00013, Order Granting Defendant Alec Baldwin's Expedited Motion for Dismissal and Sanctions Under *Brady, Giglio,* and Rule 5-501 NMRA ("Baldwin Order"), at 18-19. The same is true of the firearm that fired that fatal round.

The evidence suppressed by the State is directly relevant to both the firearm, and the ammunition. Who was responsible for those mistakes was a critical question at Ms. Gutierrez-Reed's trial. As the defense emphasized in closing, the individuals who supplied both components—firearm and ammunition—Mr. Kenney and Ms. Zachry, were not thoroughly investigated, and important evidence was not gathered or tested.

Taking into consideration the withheld evidence—expert evidence of "unexplained" modification of the firearm, evidence that Mr. Kenney received rounds from Thell Reed that the State learned matched those on set (but disregarded and hid), evidence that Mr. Kenney believed Hannah was a competent armorer—it is considerably less likely a jury would have concluded beyond a reasonable doubt that Ms. Gutierrez-Reed was responsible. She should be granted a new trial, or a dismissal.

The prosecution seeks to minimize the importance of *Brady* to this motion, but "a prosecutor's *Brady* and *Giglio* obligations remain in full effect on direct appeal . . . because the defendant's conviction has not yet become final, and his right to due process continues to demand judicial fairness." *See Fields v. Wharrie*, 672 F.3d 505, 515 (7th Cir. 2012); *see also Gonzalez v. Thaler,* —— U.S. ——, 132 S.Ct. 641, 645–46, 652–54, 181 L.Ed.2d 619 (2012) ("a defendant's conviction is not final as a matter of law until he exhausts the direct appeals afforded to him, and, until that exhaustion, he is entitled to the full breadth of due process available."). The State had (and has) a continuing Constitutional obligation to provide Ms. Gutierrez-Reed with exculpatory

evidence. It has deliberately, repeatedly, and recently failed to meet those obligations, much less those imposed by NMRA 5-501, and concedes as much in its response.

The appropriate remedy for these repeated and compounding failures is a dismissal or a new trial. The parties agree, in large part, that a motion for a new trial based on newly discovered evidence is appropriate where that evidence (1) "will probably change the result if a new trial is granted"; (2) was "discovered [after] the trial"; (3) "could not have been discovered before the trial by the exercise of due diligence; (4) is material; (5) is not "merely cumulative"; and (6) is not "merely impeaching or contradictory." *State v. Garcia*, 2005-NMSC-038, ¶ 8, 138 N.M. 659, 661, 125 P.3d 638, 640 (quotations omitted).

Here, the improperly withheld evidence, individually and even more so taken together, would likely change the result at a subsequent trial.

A. The Aug. 31 Haag Report and Missing Haag Communications

The suppression of the Aug. 31 Haag report and a large volume of communication between the State and Mr. Haag severely undermines the credibility of the State's firearms expert, Lucien Haag, and the conclusions he provided at Ms. Gutierrez-Reed's trial.

First, there is no doubt that the prosecution withheld the report. Regardless of the production of the unfavorable reports, by the time of Ms. Gutierrez-Reed's trial, the State has conceded it had not provided the *favorable* August 31, 2023, Haag Report. Notably, the State has offered no reason or justification for its failure. Whether the omission was intentional, or failure of diligence is of no moment—as with myriad other discovery materials, the State failed to meet its obligations. *Case v. Hatch*, 2008-NMSC-024, ¶ 45, 144 N.M. 20."[T]he first element requires proof that the prosecution suppressed or withheld the evidence in question[;] it 'does not require a finding of bad faith or any other culpable state of mind on the part of the prosecutor.' " (citation

omitted). Nor can the State credibly assert that the defense could have discovered the report by simply asking Mr. Haag in a pre-trial interview. *See* Resp. at 33. But, as the Court knows, Mr. Haag did not disclose the Aug. 31 Report when Mr. Baldwin's counsel asked that same question, even *after* it had become clear that Mr. Baldwin's counsel lacked one of Mr. Haag's three reports.[1]

Second, the Aug. 31 Report is favorable to Ms. Gutierrez-Reed because it further suggests that someone other than Ms. Gutierrez-Reed was responsible for the condition of the firearms and ammunition on the set on October 21, 2021. "The second Brady element is whether the suppressed evidence was favorable to the accused, either as impeachment or exculpatory evidence." *Id.* ¶ 50. That report notes "unexplained toolmarks" on the working surface of the sear—i.e., evidence of damage to critical components of the firearm. As became apparent during the Baldwin case, once the report and its conclusions came to light (during a pretrial interview not of Lucien, but of his son, Michael Haag), Lucien Haag and the prosecution moved quickly to unwind those conclusions, hastily meeting with the FBI in an effort to shore up a *new* (and, as to date unwritten) conclusion that the marks were, in fact, caused by the F.B.I. *See* State Resp. at 27-28. The State cites to this new opinion at length in its Response, but by all accounts, at the time of Ms. Gutierrez-Reed's trial Mr. Haag would have still held the view that the observed marks were unexplained.

Of course, he testified otherwise, and the State sat by while Mr. Haag swore in open court, contrary to his report, that he "didn't see ***any*** other evidence of modification or damage," other than that caused by the FBI. *See Exhibit D, to Hannah Gutierrez-Reed's Motion for Immediate*

[1] The State's suggestion that all the defense had to do was ask is directly contrary to what the State knows to be true—that Lucien Haag and the state both failed to identify the Aug. 31 Report to Mr. Baldwin's counsel, even after Mr. Baldwin's counsel learned about a *different* supplemental report in Lucien Haag's initial interview. It was not until more than a month later that Michael Haag disclosed the Aug. 31 Report's existence. Neither Lucien Haag nor the State acted with candor in diligence in Mr. Baldwin's proceeding, and there is no reason the Court should accept the State's self-serving conclusory assessment that things would have been any different for Ms. Gutierrez-Reed. *See* Dismissal Order, ¶ 35 (noting "Special Prosecutor Morrisey's testimony was internally inconsistent in part and conflicted with testimony given by at least one other witness").

Release from Detention Under Rule 5-402 filed on June 27, 2024, Trial, Day 4 at 112:15–18 (emphasis added). This was not an exchange that requires careful contextual consideration—this was an open-ended question that allowed Mr. Haag the opportunity to identify ***any*** other issues with the firearm beyond those discussed. He did not do so, and the Defense lacked the necessary report to refresh or clarify—thereby likely eliciting the opinion Mr. Haag in fact held that the time—that there was damage, *or* to impeach him, because the State failed to provide it.

The Report was more than mere impeachment evidence, assuming the facts and circumstances as they were at Ms. Gutierrez-Reed's trial. It is exculpatory. While the State is also quick to brush aside the Aug. 31 Report because the report concludes that the identified marks were unlikely to have impacted the firearm's function, Ms. Gutierrez-Reed was never able to test that opinion, nor was she able to cross examine Mr. Haag regarding the source of those marks. If the firearm had malfunctioned, had a hair trigger, or otherwise operated other than as intended, that would be a significant intervening cause.[2] And while the State asserts Ms. Gutierrez-Reed was the most likely person to modify the firearm, the State conveniently omits Seth Kenney—the individual who prepared the firearms and provided them to Ms. Gutierrez-Reed, who was more skilled at disassembling and fixing firearms than Ms. Gutierrez-Reed, and to whom Ms. Gutierrez-Reed consistently deferred when she had questions about the firearms on set.

Contrary to the State's position, had Ms. Gutierrez had the Aug. 31 Report, there is a reasonable probability the outcome of the trial would have been different. At that time Mr. Haag

[2] The State faults undersigned counsel for disagreeing that certain modifications identified by Baldwin's counsel justified the initial dismissal. Resp. at 25-26. Those defects, of course, are not the same damage discussed in the Aug. 31 Report. It is far from clear that undersigned counsel would have held the same view of the modification arguments raised by Mr. Baldwin had he been aware that the State's own experts had independently concluded the firearm had been damaged or modified. The State cannot credibly fall back on arguments made by defense counsel based on incomplete information, and in particular information the State itself failed to correct when it withheld an expert report.

had not changed his opinion, had not met with the prosecutors to discuss how to rehabilitate the report, and had not met with Mr. Ziegler to discuss his testing, and had not reviewed testimony by Mr. Pietta. *See* Resp. at 27-28. He thus would have been expected, on cross-examination and with the benefit of the Aug. 31 Report to refresh him, to have conceded the critical elements of the Aug. 31 Report—that there was evidence of damage to the firearm, and that the damage was both unexplained and unlikely related to the FBI's testing. This, in turn, would have provided additional indicia of doubt related to Mr. Kenney's operation, and the state of the firearms (and ammunition) he provided to Ms. Gutierrez-Reed.

Finally, there is an additional element that counsels in favor of relief for Ms. Gutierrez related to the Aug. 31 Report, even though relief was denied to Mr. Baldwin. Unlike Mr. Baldwin, who prior to trial was made "aware of and able to use the late-disclosed [report] in preparation for and during his trial," *State v. Baldwin*, July 3, 2024, Order Denying Baldwin's Expedited Mot. for Relief for State's Brady & State Law Disclosure Violations Related to the Firearm ¶ 16, Ms. Gutierrez was not. Neither her counsel, nor her expert had any opportunity to explore, test, or cross-examine Mr. Haag on the exculpatory conclusions of the Aug. 31 Report.[3] Nor did they have the chance to consider the additional Haag communications not previously disclosed (including those regarding the Aug. 31 Report itself).

C. Teske Ammunition

Until March 6, 2024, the defense and the State both knew that Teske had ammunition from the same batch that Thell Reed and Seth Kenney took to Texas. They both knew that Seth Kenney

[3] The State asserts that Ms. Gutierrez-Reed's expert should have identified the marks from the photographs provided. But the state provided thousands of photographs taken by the Haags during their examination, the vast majority unlabeled. And, without any indication that the Haags had opined on the specific photographs referenced in the Aug. 31 report, Ms. Gutierrez, her counsel, and her expert would have been effectively throwing a dart blindfolded at the sea of pictures, hoping to hit one that was usable. This is not substitute for an expert report that specifically calls out the evidence at issue and forms an opinion about it.

had brought some of that ammunition back to New Mexico. And they both knew that Teske had been preserving that ammunition for the State to collect and test.

Yet, the State—which had specifically asked Teske to preserve the ammunition so that the ***State*** (not the defense) could collect it—is the only entity that could test the ammunition (Ms. Gutierrez-Reed did not have the ability to have the FBI conduct the testing). But rather than immediately send that ammunition for testing, as had been done with all the other live ammunition collected in the course of the investigation, the State—"decid[ed] to place the supplemental report and Teske-supplied ammunition in a non-*Rust* investigation case number." Dismissal Order ¶ 52. Neither the report nor lapel were provided to defense counsel.

The State had the same obligation to make the existence of the Teske ammunition report available to Ms. Gutierrez-Reed (at or after her conviction), that it had to Mr. Baldwin. Consistent with its pattern of non-disclosure, it failed to do so, and instead buried the report under an unrelated case number. That Teske might have testified for the defense, but ultimately did not, is no excuse for the State's willful and deliberate failure to properly account for and disclose the contents of the report and aftermath.

Finally, the Teske ammunition, the process by which it was deliberately hidden, and the fact that, even after the State learned that it matched the live ammunition on *Rust*, the State declined to send it for testing is further evidence that the State's investigation was never about running down all viable leads and pursuing the truth. The Teske ammunition could well lead back, not to Ms. Gutierrez-Reed, but straight to Seth Kenney and Sarah Zachry. *See Baldwin Dismissal Order*, ¶ 30 (summarizing a potential timeline for the ammunition based on evidence developed during the hearing as follows: "*(a) .45 colt ammunition was once possessed by Troy Teske5; (b) some of that ammunition was then possessed by Seth Kenney and Thell Reed for use at the cowboy training*

camp; (c) Seth Kenney then took leftovers of that live ammunition to PDQ's business location in Albuquerque, NM; (d) Seth Kenny (doing business as PDQ) then gave purported .45 colt dummy rounds with brass casings and nickel (or silver in color) primers to Sarah Zachary on or about October 12, 2021; and, (e) Sarah Zachary then introduced those rounds onto the set of Rust before the October 21, 2021 incident.")

The State never bothered to test the ammunition, even after it was apparent the ammunition could be a match, undermining the State's assertion that it simply declined to test the evidence because it was not visibly similar. This failure to investigate others who provided or handled firearms and ammunition was a key theme in Ms. Gutierrez-Reed's trial, and one that would be aided substantially by the revelation that the State declined to thoroughly investigate clearly relevant evidence. The Teske ammunition, and its cover-up are favorable to Ms. Gutierrez-Reed.

B. Seth Kenney Interview

The State once again concedes that it did not timely turn over this entirely new and separate Seth Kenney interview. In fact, this interview was suppressed until after the trial. The State now seeks to downplay the suppressed interview, indicating that the information was already out there in essence. First, this was a blatant violation of Rule 5-501, and the State does not even try to defend that idea and its significance under the *Allison* case, cited in the opening motion. Second, turning to the prejudice, several matters, coming directly from Mr. Kenney himself were new: 1) that there is a standard that Ms. Zachry is the boss, and she is managing things which allows the armorer to focus on guns; 2) Hannah has more experience in Westerns than Mr. Kenney did up until 1883; 3) Prop masters who handle guns won't call out armorers to test bullets; 4) Sheriffs confused replica guns with real guns; 5) Mr. Kenney heard nothing but good things about Hannah on set and all the concerns about safety that came out later he hadn't heard and that people were

"piling on" after the fact; 6) sabotage could be anyone on set; 7) the idea that if the camera crew had gotten their hotels would they have still felt "unsafe"?; 8) that AD and Baldwin didn't give Hannah every ounce of support and she got pushed around.

These matters would have been used to cross examine Mr. Kenney at trial and confront him on his statements directly to investigators. These statements and rebut many of the themes raised by the State at trial. The State embraced Mr. Kenney during the trial and in closing, even suggesting that anyone who said anything contradictory about Mr. Kenney was lying (meaning the undersigned). Yet, the State suppressed many favorable statements about Mr. Gutierrez Reed from *Mr. Kenney himself* that would have been powerful coming from him, as the State essentially vouched for his credibility at trial. Mr. Kenney also sets up the idea that Ms. Zachary as props master was in charge and since she was handling guns also, wouldn't call out the armorer to test the bullets. Again, this goes to the idea mentioned by the Court of negligence of third parties and intervening cause. Mr. Kenney's interview was suppressed, favorable, and prejudiced Ms. Gutierrez Reed. The suppression was a clear violation of Rule 5-501, with prejudice to Ms. Gutierrez Reed.

The cumulative nature of these discovery violations rendered Ms. Gutierrez Reed's trial constitutionally unfair and violative of her rights to due process. Consistent with this Court's statements in the order in Mr. Baldwin's case, the integrity of the judicial system demands that Ms. Gutierrez Reed's conviction be vacated, and that a dismissal or new trial be ordered.

Respectfully submitted,

/s/ Jason Bowles

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent through the ESF system, which caused the following parties to be served by electronic means, as reflected on the Notice of Electronic Filing this 27th (also electronically mailed to opposing counsel on August 15, 2024), 2024, to the counsel listed below:

Kari Morrisey, Special Prosecutor

/s/ Jason Bowles
Jason Bowles
Bowles Law Firm