

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

STATE OF NEW MEXICO,

Plaintiff,

v.

D-101-CR-2023-00040

HANNAH GUTIERREZ-REED,

Defendant.

MOTION TO DISMISS FIRST AMENDED INFORMATION

Defendant Hannah Gutierrez-Reed, by and through her counsel of record, Jason Bowles of Bowles Law Firm, and Todd J. Bullion of Bullion Law Office, respectfully moves this Court to Dismiss the First Amended Information, based on lack of prosecutorial authority, and violations of Reed's due process rights, in violation of the Fourteenth Amendment to the U.S. Constitution and Article II, Section 14 of the New Mexico Constitution. In the alternative, Reed asks the Court to consider lesser sanctions, including suppression of certain evidence.

FACTUAL BACKGROUND

This prosecution arises out of a tragic accident that took place on October 21, 2021, on a movie set near Santa Fe. Halyna Hutchins was killed and Director Joel Sousa was wounded, when a live round was discharged during a rehearsal for a scene for the Western film *Rust*.

Ryan Smith was the primary producer of the film, with overall responsibility for the production. Under Smith's authority were Line Producer Gabrielle Pickle, Unit Production Manager Row Walters, and First Assistant David Halls, who was also the film's "Safety Coordinator." Pickle's responsibilities included hiring, supervising, and disciplining individuals,

and crews in any department—including the art department. Within the art department, Sarah Zachry served as Property Master (“Props Master”) and supervised Reed, the film’s Armorer. On October 22, 2021, the Sheriff’s Office secured and executed the first of five search warrants as it launched an investigation into the accident.

CHARGING BACKGROUND

On February 17, 2023, Reed was charged by First Amended Information with two alternative counts of involuntary manslaughter pursuant to NMSA 1978, § 30-2-3(B). Before and after those charges were filed, the investigation and prosecution of Reed was tainted by improper political motives of District Attorney Mary Carmack-Altwies and New Mexico State Republican Representative Andrea Reeb, who both used the tragic film set accident that resulted in the death of Halyna Hutchins as an opportunity to advance their personal interests. Together, they were unauthorized to investigate and prosecute Reed. And, rather than exercising integrity and caution in a criminal investigation that could lead to deprivation of Reed’s liberty at a jury trial, they delayed and sought to extract wins in the court of public opinion. They directed a sloppy investigation in which key evidence was destroyed, made overly aggressive charging decisions, including an elementary Constitutional mistake, and undertook road shows to disparage Reed and to promote their own personal brands.¹

The first amended information was signed by District Attorney Carmack Altwies. On February 3, 2023, Ms. Carmack Altwies filed a Certificate of Appointment, appointing Andrea Reeb to act as Special Prosecutor and “co-counsel.” That appointment was subscribed before a

¹ The firearm enhancements in the initial information were voluntarily dismissed by the State when they realized after defense motion that they had made an elementary mistake, charging ex post facto punishments. The State filed a First Amended Criminal Information reflecting the change in the charges on February 17, 2023.

notary on January 3, 2023, and at the time of the filing of the information, Andrea Reeb had already been acting as special prosecutor and co-counsel.²

EARLY STATEMENTS

On October 26, 2021—five days after the accident—District Attorney Carmack-Altwhies started giving media interviews regarding the investigation and details about the evidence. Rather than limiting such statements to those that serve a legitimate law enforcement purpose and that were necessary to inform the public of the nature and extent of the prosecutor’s action, the District Attorney revealed that, for example, there “were an enormous amount of bullets on this set,” and she previewed that criminal charges would be filed, albeit “probably weeks, if not months” later.³ Despite the fact that the District Attorney has never determined the source of the live bullets and didn’t complete her investigation for over a year, in later media statements it was disclosed that a decision was made to charge Reed criminally “pretty close to the beginning” of the investigation.⁴

Throughout the fall of 2021 and first half of 2022, the District Attorney’s Office repeatedly gave nationally televised interviews and issued statements to the press that improperly commented on important—and contested—factual conclusions.⁵

² On August 3, 2022, prior to Ms. Reeb’s general election contest, Ms. Carmack Altwhies announced Reeb’s involvement as special prosecutor in the Rust investigation under NMRA, Section 36-1-23.1, the special prosecutor appointment statute. Under that statute, the appointed special prosecutor is vested with “all the powers and duties” of the appointing District Attorney for the specific matter and case.

³ Simon Romero, Graham Bowley, & Julia Jacobs, *Criminal Charges Possible in Shooting on Alec Baldwin Set*, *D.A. Says*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/10/26/movies/criminal-charges-shooting-alec-baldwin.html?smid=tw-nytimes&smtyp=cur>.

⁴ Alexander, Harriet, *New Mexico prosecutors say they knew ‘pretty close to the beginning’ that they would charge Alec Baldwin and armorer for fatal Rust shooting – and are confident of CONVICTIONS*, DailyMail.com (Jan. 19, 2023), <https://www.dailymail.co.uk/news/article-11656215/New-Mexico-prosecutors-knew-pretty-close-beginning-file-charges-Rust-death.html>.

⁵ See, e.g., Ted Johnson, *Santa Fe D.A. Refutes Claims of Sabotage on ‘Rust’ Set*, DEADLINE (Nov. 10, 2021), <https://deadline.com/2021/11/alec-baldwin-shooting-rust-set-santa-fe-district-attorney-sabotage-1234871332/> (Good Morning America); *Santa Fe DA Speaks About Fatal Shooting on Set of ‘Rust’*, NBC NEWS (Oct. 28, 2021), <https://kobi5.com/news/santa-fe-da-speaks-on-alec-baldwin-fatal-shooting-171821/> (NBC News). Notably, though the prosecution would later call it a red herring, Carmack-Altwhies stated early on that finding out how a live round got on the set was one of the most important elements of the charging decision-making process, calling it the “lynchpin of the entire case.” To date, the origin of the live rounds remains unknown.

A. Reeb Joins the Prosecution

On June 9, 2022, Andrea Reeb, at the time a Republican candidate for the New Mexico State House of Representatives, emailed Carmack-Altwies, assuring her that Reeb would not disclose to the media that she had been chosen as Special Prosecutor. “At some point though,” Reeb went on in the email, “I’d at least like to get out there that I am assisting you ... as it might help in my campaign lol.”⁶ Carmack-Altwies responded: “I am intending to either introduce you or send it in a press release when we get the investigation!” *Id.* Four days later, Carmack-Altwies contributed to Reeb’s campaign.

On August 3, 2022, the District Attorney’s office announced that Andrea Reeb would join the investigative team. Reeb immediately became the point of contact for defense counsel and indicated that she was the primary attorney reviewing the sheriff’s report and handling the investigation, which she has confirmed in television and news interviews.⁷ Reeb interviewed witnesses, took proffers, engaged experts, and handled other important matters. On August 30, 2022, Carmack-Altwies requested \$635,000 from New Mexico’s Board of Finance to pay for Reeb’s salary, as well as the hiring of other personnel, including Heather Brewer as public information officer on the Rust investigation—the State granted the District Attorney’s Office \$317,750. The District Attorney’s Office cited the need for a dedicated public information officer to direct and manage inquiries from the media and to read and respond to information from the public. On September 15, 2022, counsel for First Assistant Director Dave Halls contributed \$250.00 to Reeb’s legislative campaign.⁸ When uncovered by the media, counsel for Halls stated

⁶ Jacobs, Julia, *Ex-Prosecutor in ‘Rust’ Case Suggested Role ‘Might Help’ Her Campaign*, N.Y. TIMES (Mar. 21, 2023), <http://bitly.ws/BUtv>.

⁷ See, e.g., Interview by Griffin Rushton, KOB4 Writer, with Andrea Reeb, *available at* <https://www.kob.com/new-mexico/rust-special-prosecutor-also-balancing-job-as-state-legislator/> (noting that she was chosen “to handle everything while she [Mary Carmack-Altwies] was doing office duties”).

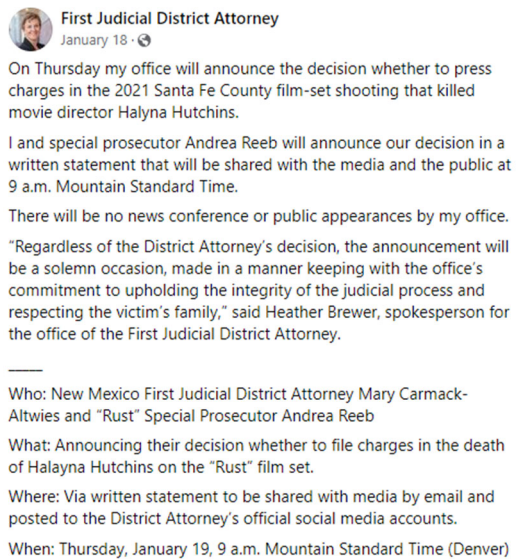
⁸ See KOAT Action 7 News, “Rust defense attorney made contributions to special prosecutor,” Feb. 8, 2023.

that she assumed that Reeb would recuse herself from the investigation if she won the election. Reeb then won her election for state representative in early November 2022.

In the meantime—between October 31, 2022, and January 12, 2023, Carmack-Altwies and Reeb offered First Assistant Director Halls a plea to a misdemeanor, with a suspended sentence and only six months of probation, in exchange for his cooperation and testimony.

CHARGING DECISIONS

On January 18, 2023, the District Attorney’s Office announced that it would reveal its charging decisions related to the *Rust* shooting the following day.⁹ Featuring headshots of Carmack-Altwies and Reeb, the District Attorney’s Office promised¹⁰ that there would “be no news conference or public appearances by [the D.A.’s] office” in connection with the decision:



First Judicial District Attorney
January 18 · 🌐

On Thursday my office will announce the decision whether to press charges in the 2021 Santa Fe County film-set shooting that killed movie director Halyna Hutchins.

I and special prosecutor Andrea Reeb will announce our decision in a written statement that will be shared with the media and the public at 9 a.m. Mountain Standard Time.

There will be no news conference or public appearances by my office.

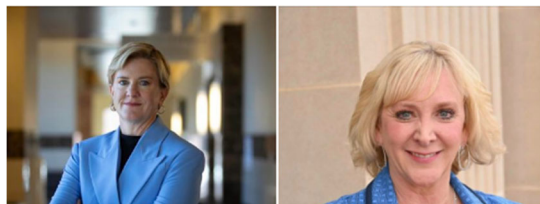
“Regardless of the District Attorney’s decision, the announcement will be a solemn occasion, made in a manner keeping with the office’s commitment to upholding the integrity of the judicial process and respecting the victim’s family,” said Heather Brewer, spokesperson for the office of the First Judicial District Attorney.

Who: New Mexico First Judicial District Attorney Mary Carmack-Altwies and “Rust” Special Prosecutor Andrea Reeb

What: Announcing their decision whether to file charges in the death of Halyna Hutchins on the “Rust” film set.

Where: Via written statement to be shared with media by email and posted to the District Attorney’s official social media accounts.

When: Thursday, January 19, 9 a.m. Mountain Standard Time (Denver)



⁹ Julia Jacobs, *Prosecutors To Announce Whether They Plan Charges in ‘Rust’ Case*, N.Y. TIMES (Jan 18, 2023), <https://www.nytimes.com/2023/01/18/arts/rust-charging-decision.html>.

¹⁰ First Judicial District Attorney, FACEBOOK (Jan. 18, 2023, 3:32 PM), <https://www.facebook.com/1stJDA/>.

The District Attorney and Reeb issued a press release on January 19, 2023, and announced that they planned to charge Reed with two counts of involuntary manslaughter, plus a sentencing enhancement for the use of a firearm. The press release stated that “[t]he firearm enhancement makes the crime punishable by a mandatory five years in jail.”¹¹ The press release did not explain why they were making an announcement before actually filing charges.

Contrary to the “solemn occasion” without media appearances promised by Carmack-Altwhies and Reeb, both the District Attorney and the Special Prosecutor then appeared on several national television programs to comment on the evidence, their legal theories of Reed’s culpability, the impending charges, and Reed’s possible sentence. Less than an hour after a decision to charge Reed was announced by press release on January 19, 2023, Carmack-Altwhies appeared on CNN and discussed “key pieces of evidence” with a reporter from the *Santa Fe New Mexican*.¹² The State made numerous statements on national television that did not serve a legitimate law enforcement purpose. Later on January 19, 2023, Carmack-Altwhies and Reeb appeared on Jeanine Pirro’s program on Fox News to continue making such extraordinary statements.¹³

In yet another interview with NBC News on January 19, 2023, Reeb continued to make unnecessary statements for the purpose of self-promotion and to taint the prosecution.¹⁴ The same day, Bryan Carpenter, who has been identified by the State as a purported expert witness, appeared

¹¹ *News Release from DA Mary Carmack-Altwhies on Charges Against Alec Baldwin, Hannah Gutierrez-Reed*, SANTA FE NEW MEXICAN (Jan. 19, 2023), https://www.santafenewmexican.com/news-release-from-da-mary-carmack-altwhies-on-charges-against-alec-baldwin-hannah-gutierrez-reed/article_f843a8fc-9814-11ed-9526-032214a2e9cb.html.

¹² Interview by Josh Campbell, CNN Security Correspondent, with Mary Carmack-Altwhies (Jan. 19, 2023, 9:42 AM m.s.t.), *available at* <https://transcripts.cnn.com/show/ath/date/2023-01-19/segment/02>.

¹³ Interview by Jeanine Pirro with Mary Carmack-Altwhies, District Attorney, and Andrea Reeb, Special Prosecutor (Jan. 19, 2023), *available at* <https://twitter.com/JudgeJeanine/status/1616239686262947841>.

¹⁴ Prosecutors say the new early in the probe that the fatal “Rust” shooting would lead to charges (Jan. 19, 2023) Almaguer, Dasrath & Li, *available at* <https://www.nbcnews.com/news/us-news/prosecutors-say-knew-early-probe-fatal-rust-shooting-lead-charges-rcna66575>

on the Fox News program *Hannity* and vouched for the prosecution team as “unbiased” and as having done an “excellent job.”¹⁵ Reeb appeared on *Hannity* a few days later to continue tainting the jury pool.¹⁶

As background, Carpenter appears to reside in Mississippi and has credited and uncredited experiences as a key armorer, assistant armorer, and armorer on 11 television shows, mini-series, and films. He was an early commenter in national media interviews about the accident, first appearing in the *Hollywood Reporter* on October 23, 2021.¹⁷ On June 30, 2022, he stated an incorrect view of the legal standard for criminal liability, which made it into the byline of the *Hollywood Reporter*: “It’s strictly liability.”¹⁸ On January 19, 2023, Carpenter—now representing himself as a member of the prosecution team—continued to make inaccurate statements of the law and facts.

On February 17, 2023, the government filed a first amended information charging Reed with two alternative felony counts of involuntary manslaughter under NMSA 1978, § 30-2-3(B). Disclaiming any intent for Carmack-Altwies or Reeb to make public appearances or grant media interviews because they were “fully focused on pursuing justice for Halyna Hutchins,” the District Attorney’s Office posted on Facebook the day before the charges were filed: “The evidence and the facts speak for themselves.”¹⁹

¹⁵ Interview by Sean Hannity with Bryan Carpenter, State witness and weapons master (Jan. 19, 2023), available at <https://www.foxnews.com/video/6318941869112>.

¹⁶ Interview by Sean Hannity with Andrea Reeb (Jan. 21, 2023), available at <https://www.foxnews.com/video/6319006222112>.

¹⁷ See Baum, Gary, and Gardner, Chris, “Guns, Ammo, Accountability: Hollywood Munitions Experts Grapple with ‘Rust’ Tragedy,” *Hollywood Reporter* (Oct. 23, 2021), available at <https://www.hollywoodreporter.com/movies/movie-news/alec-baldwin-shooting-rust-movie-munitions-experts-gun-safety-1235035713/>.

¹⁸ Baum, Gary, and Giardina, Carolyn, “‘Rust’ Rallied Hollywood, But Has Spurred Limited Action So Far,” *Hollywood Reporter* (June 30, 2022), available at <https://www.hollywoodreporter.com/movies/movie-features/after-rust-gun-changes-limited-1235174055/>.

¹⁹ First Judicial District Attorney, FACEBOOK (Jan. 30, 2023), <https://www.facebook.com/1stJDA/>.

The same day, the District Attorney’s Office announced that negligent use of a deadly weapon misdemeanor charges were filed against Halls, who pleaded no contest, with the plea agreement to a suspended sentence and six months of probation pending approval.

MOTIONS

On February 7, 2023, Mr. Baldwin filed a Motion to Disqualify the Special Prosecutor Under Article III of the New Mexico Constitution. Therein, Baldwin noted that Ms. Reeb, as a member of the House of Representatives, was prohibited under Section 1 of Article III from “exercise[ing] any powers belonging” to either the executive or judicial branch. The motion noted that “[a]s a special prosecutor, Representative Reeb is vested by statute with ‘all powers and duties’ of a District Attorney, who is considered to be a member of either the judicial or executive branch of the New Mexico government.” Motion to Disqualify, at 1 (citing *State v. Surratt*, 2016-NMSC-004, para. 26). Ms. Reed joined in this motion.

However, the District Attorney and Special Prosecutor first attacked Defendants for filing these motions. On February 7, 2023, immediately after the Disqualification Motion was filed, the District Attorney and Special Prosecutor’s spokesperson told the news media that Baldwin and his lawyers can “use whatever tactics they want to distract from the fact that Halyna Hutchins died because of gross negligence and a reckless disregard for safety on the ‘Rust’ film set.”²⁰ After Baldwin filed the Ex Post Facto Motion on February 10, 2023, the spokesperson immediately issued a statement to the media: “Another day, another motion from Alec Baldwin and his attorneys in an attempt to distract from the gross negligence and complete disregard for safety on the Rust film set that led to Halyna Hutchins’ death,” claiming that the District Attorney and

²⁰ Diana Dasrath and David Li, *Alec Baldwin Asks To Have Special Prosecutor Removed from ‘Rust’ Case*, YAHOO (Feb. 7, 2023), <http://bitly.ws/BTsc>.

Special Prosecutor would remain focused on justice and ensuring “that everyone—even celebrities with fancy attorneys—is held accountable under the law.”²¹

But Baldwin filed a Notice of Withdrawal of the Ex Post Facto Motion and supporting exhibits to show that the prosecution team was not telling the truth. Those exhibits contained emails between Reeb and Baldwin’s counsel. Specifically, Reeb emailed counsel to Baldwin on February 16, 2023, demanding that the motion be withdrawn and threatening sanctions. About twenty minutes later, she emailed to indicate they were going to review the “specific numbers and sections” of the statute “to make sure [they had] it correct.” Less than two hours later, claiming that she had been “busy in session all week,” Reeb emailed Baldwin’s counsel and indicated that she “100 percent agree[d]” that charging the firearm enhancement violated the ex post facto clause of the constitution. When the State eventually filed an amended information without the firearm enhancement, the District Attorney publicly announced not that it had filed an unconstitutional charge, but that it was withdrawing the enhancement to “avoid further litigious distractions by Baldwin and his attorneys”; the District Attorney’s Office told the media that the prosecution’s priority is “securing justice, not securing billable hours for big-city attorneys.”²²

Similarly, after Reeb and Carmack-Altwies responded to the Disqualification Motion, Reeb announced that she was stepping down as Special Prosecutor on March 14, 2023. Rather than acknowledge the constitutional violation, Reeb issued another public statement and characterized her choice to step down as a way to avoid questions regarding her dual roles “cloud[ing] the real issue at hand.”²³ She went further and again vouched for Reed’s ultimate

²¹ Gabrielle Fonrouge, *Alec Baldwin attorneys seek to reduce possible penalty in Rust movie set manslaughter case* (Feb. 10, 2023), <https://www.cnn.com/2023/02/10/rust-shooting-alec-baldwin-possible-penalty.html>.

²² Julia Jacobs, *‘Rust’ Prosecutors Downgrade Alec Baldwin’s Manslaughter Charges*, NY Times (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/arts/alec-baldwin-manslaughter-charge-rust.html?smid=nytcore-ios-share&referringSource=articleShare>.

²³ Jacobs, Julia, *‘Rust’ Prosecutor Steps Down After Baldwin Challenges Appointment*, N.Y. TIMES (Mar. 14, 2023), <http://bitly.ws/BTsK>.

guilt, remarking that “the best way I can ensure justice is served in this case . . . is to step down so that the prosecution can focus on the evidence and the facts, which clearly show a complete disregard for basic safety protocols led to the death of Halyna Hutchins.” Reeb had, at this point, already accomplished her goal and assumed elected office.

On March 15, 2022, Reeb withdrew as Special Prosecutor. The District Attorney and Special Prosecutor have never acknowledged the constitutional violations or issued corrective statements.

Thereafter, in a letter to counsel dated March 20, 2023, this Court informed the parties that the State had requested that the Court swear in a new special prosecutor. The Court stated that it had reviewed NMSA 1978, Section 36-1-23.1, *State v. Surratt*, and *State v. Hollenbeck*, 1991-NMCA-060, and noted that “[i]t seems that once a special prosecutor is appointed under the statute for ‘good cause’, the special prosecutor steps into and takes over the prosecution, thereby fulfilling the statute’s purpose. Therefore, before a new special prosecutor is appointed and takes an oath, the Court requests that the parties submit limited briefing . . . to address the issue.” Ms. Gutierrez Reed filed her brief indicating that the plain language of Section 36-1-23.1 was aligned with the Court’s statements in the letter, and that once Ms. Reeb was appointed, she stepped into the shoes of the District Attorney and assumed all the duties and authority for the prosecution. *See also, Surratt*, 2016-NMSC-004, at para. 26. The State responded that it was overwhelmed with other cases, and needed a taxpayer funded co-counsel to handle the Rust manslaughter prosecution. Reading through the lines, the request was made due to the resources that Baldwin was able to bring to bear and the intense publicity that this case had generated.²⁴

²⁴ Part of the taxpayer funding Ms. Carmack Altwies requested was for a Public Relations consultant, who was paid and has made several extrajudicial statements to the press over the course of this case. Ms. Gutierrez Reed, being 25 years old, lacks the resources of the State, let alone a separate, individualized, taxpayer-funded war chest.

This Court held a hearing and ruled that the language of the statute was clear and that Ms. Carmack Altwies was prohibited from proceeding as co-counsel once a special prosecutor was appointed. This Court stated in its Order, “I find that once the Santa Fe District Attorney invoked the special counsel statute, for ‘good cause,’ the authority for prosecution was transferred to the appointed special prosecutor and the district attorney lacked authority to continue as co-counsel in the prosecution.” Court’s Order on Briefing on Statute, April 20, 2023. On March 30, 2023, the State informed the Court that Kari Morrissey would enter and substitute as counsel for the State in the Rust prosecution.

Over several months, during the time of the prohibited “co-counsel” arrangement with Ms. Carmack Altwies and Ms. Reeb, the prosecutors made several very prejudicial and improper extrajudicial statements in the media, in violation of ethical rules for prosecutors. In these statements, the prosecutors commented on their belief in the guilt of Ms. Gutierrez Reed for the filed charges, without any law enforcement purpose. These statements have been widely reported throughout the internet in a myriad of articles too numerous to exhaustively cite. See e.g., www.cnn.com , “Why Santa Fe district attorney decided to charge Alec Baldwin over ‘Rust’ Shooting,” January 19, 2023; Court TV, District Attorney Explains Decision to Charge Alec Baldwin and armorer Hannah Gutierrez Reed with involuntary manslaughter over the fatal shooting on the set of the movie ‘Rust’”, January 19, 2023 (commenting on alleged complacency on set and safety complaints and that actions rise to recklessness); Law and Crime, “Alec Baldwin rips Andrea Reeb’s ‘abuse of the system’, March 23, 2023 (noting Ms. Reeb’s making the rounds on Fox news commenting on guilt with no conceivable law enforcement purpose); NBC News, Miguel Almaguer, Diana Dasrath and David K. Li, “Prosecutors say they knew early in the probe that fatal ‘Rust’ shooting would lead to charges,” January 19, 2023. In one of many interviews on

NBC, prosecutors commented on the guilt of Alec Baldwin and Hannah Gutierrez Reed, saying that the conduct of Reed and others was “reckless;” that Hannah as armorer didn’t check the gun and bullets “multiple times;” that she should have caught “live rounds” on set; that Hall’s case merits probation because they couldn’t say he handed the gun to Baldwin and he “would testify” in the case; that this was “more than mere negligence,” and was “people acting recklessly”; that this “was a criminal accident” and that prosecutors wanted “people to take accountability” for their alleged recklessness. *Id.*; *see also* YouTube, January 19, 2023 interviews of prosecutors on KOAT 7, CNN, NBC News and comments to those stories (numerous comments regarding perceived guilt of Hannah Gutierrez Reed and Alec Baldwin in responding to the prosecutor’s statements) (transcripts on YouTube of the interviews); Harriet Alexander, “New Mexico prosecutors say they knew ‘pretty close to the beginning’ that they would charge Alec Baldwin and armorer for fatal Rust shooting – and are confident of convictions,” Daily Mail, January 20, 2023 (Reeb confident they will win convictions).

I. LAW

Ninety years ago, in *Berger v. United States*, 295 U.S. 78, 88 (1935), the Supreme court pronounced that the government’s interest in a criminal prosecution “is not that it shall win a case, but that Justice shall be done.” It is the prosecutor’s duty “to refrain from improper methods calculated to produce a wrongful conviction.” *Id.* Both the federal and state constitutions guarantee the right to due process. *See* U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18; *see also State v. Brule*, 1999-NMSC-026, ¶ 8, 127 N.M. 368, 371, 981 P.2d 782, 785.

This Court possesses the “inherent power to dismiss a criminal prosecution as a sanction against the government.” *Harrison*, 311 P.3d at 1243; *see, e.g., State v. Candelaria*, 2008-NMCA-120, 192 P.3d 792, 801; *State v. Lopez*, 99 N.M. 385, 388, 658 P.2d 460, 463 (Ct. App. 1983). As

the court of appeals has explained, “[t]he policy behind a district court’s inherent authority is the need to prevent abusive litigation practice and preserve the integrity of the judicial process.” *Harrison*, 311 P.3d at 1243. The exercise of that power is appropriate when the government “engage[s] in unethical conduct for which a private litigant would surely be sanctioned.” *Id.* To be sure, in fashioning a sanction, the Court must also take into account the public’s interest in the prosecution of the defendant, and for that reason the “extreme sanction” of dismissal is “to be used only in exceptional case.” *State v. Jackson*, 135 N.M. 689, 694, 92 P.3d 1263, 1268 (Ct. App. 2004). Dismissal of criminal charges is an “extreme sanction to be used only in exceptional cases,” but this case is exceptional. *Mathis v. State*, 1991-NMSC-091, ¶ 13, 112 N.M. 744, 747, 819 P.2d 1302, 1305.

It is axiomatic that a criminal charging instrument must be signed and filed by someone with the power to do so, whether that be a grand jury in the event of an indictment, or a prosecutor with authority for an information. See N.M. Const., Art. II, sec. 14 (information filed by district attorney and indictment filed by grand jury). NMRA 1978, Section 36-1-23.1 and *Surratt*, 2016-NMSC-004, at para. 26, specify that once a special prosecutor is appointed, that person assumes all duties and responsibilities for the case and “steps into the shoes” of the District Attorney. Those authorities prohibit a “co-counsel” arrangement, whereby the District Attorney can appoint a special prosecutor yet remain on the case. Court’s Order on Briefing, April 20, 2023 (citing authorities).

In *State v. Eder*, 103 N.M. 111 (Ct. App. 1985), the Court of Appeals upheld suppression of evidence due to prosecutor misconduct in improperly issuing subpoenas in that case. There the Court discussed the alternative remedies of suppression versus dismissal. “To support a dismissal of a criminal charge because of prosecutorial misconduct, the alleged misconduct must result in

actual and substantial prejudice to a defendant.” *Eder*, 103 N.M. at 113 (citing *People v. Barton*, 122 Ill. App.3d 1079, 78 Ill. Dec. 419, 462 N.E.2d 538, 542 (1984)). The *Eder* Court cited various authorities and discussed suppression of evidence and testimony as the appropriate remedy in most instances of prosecutor misconduct rather than outright dismissal, absent a showing of actual and substantial prejudice. *Eder*, 103 N.M. at 113-115.

The Court should dismiss the information because Carmack-Altwies and Reeb were not authorized to file the charges, and the Court lacks jurisdiction under New Mexico law to proceed. But the Court should also independently dismiss the information for various due process, equal protection, and ethical violations—or as a due process violation from the cumulative error of numerous problems in the investigation and prosecution. In the alternative, Reed requests that certain evidence should be excluded from any motion hearings in this matter, the preliminary hearing, as well as any trial in this matter. Reed additionally requests that favorable inferences be drawn regarding the inability to test rounds or the firearm. The tests would have been exculpatory for Hannah. However lab analysts disassembled the rounds for chemical testing with their bare hands destroying the ability to test these rounds for fingerprints and DNA.

II. The Prosecution Team Was Unauthorized, Undermining the Court’s Jurisdiction to Proceed.

The prosecution team who investigated and charged Reed by information was not authorized under New Mexico law, making the continuation of this case constitutionally invalid. Under New Mexico law, the Court lacks jurisdiction to adjudicate an unauthorized prosecution. *State v. Hollenbeck*, 1991-NMCA-060, ¶ 10, 112 N.M. 275, 277 (citing *State v. Baca*, 101 N.M. 716, 688 P.2d 34 (Ct. App. 1984)) (reversing conviction and remanding with instructions to dismiss indictment). “[A] court obtains no jurisdiction over an action brought without authority

and that, if an individual who does not have authority to prosecute does prosecute, the court will lack jurisdiction.” *Id.*

In *Hollenbeck*, the Court of Appeals reversed a criminal sexual penetration conviction because it was prosecuted by someone who was not authorized to prosecute the matter, interpreting the same statute used for Reeb’s appointment here—NMSA 1978, Section 36–1–23.1. *Id.* Based on statutory interpretation, the Court of Appeals found that the state Medicare fraud attorney lacked authority to prosecute the case. The Court of Appeals further rejected out-of-state precedent cited by the State for some other “inherent or general statutory power” to prosecute the case. *Id.* Finding no basis for which the Court could maintain jurisdiction to hear the criminal prosecution, the Court of Appeals reversed the conviction and remanded with instructions to dismiss the indictment.

First, Carmack-Altwhies was not authorized to conduct this investigation or prosecution. In this case, the Court has already ruled that the Special Prosecutor’s appointment superseded the District Attorney’s authority to participate in the investigation of Halyna Hutchins’s death or the prosecution of responsible parties. Specifically, on March 27, 2023, this Court held, pursuant to NMSA 1978, Section 36–1–23.1, that the District Attorney, after appointing the special prosecutor, lacked authority to continue to work on this investigation or prosecution—they could not serve as co-counsel. Thus, since Reeb assumed the role of Special Prosecutor no later than June 9, 2022, every action taken by Carmack-Altwhies was unauthorized as a matter of New Mexico law.²⁵ The

²⁵ The State has confirmed there is no other statutory authority for the District Attorney to operate as co-counsel. On March 29, 2023, the State notified the Court that it would not be seeking to appoint associate counsel to serve alongside the District Attorney pursuant to NMSA 1978, Section 30-1-19 because it “does not apply,” acknowledging that there was no statutory authority for Carmack-Altwhies to stay on the matter and retain private co-counsel.

first amended information charging Reed was therefore unauthorized. It was signed by Carmack-Altwhies on February 17, 2023—long after she lacked legal authority to prosecute this case.

Second, Reeb should have been disqualified from serving as Special Prosecutor because she had a concurrent conflict of interest in this investigation and prosecution. New Mexico Rules of Professional Conduct 16-107 and 16-108 describe circumstances constituting a concurrent conflict of interest that prohibits representation. In particular, representation is prohibited where “the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer” or where “the representation is . . . prohibited by law.” N.M. R. Prof’l. Cond. 16-107. Representation is also prohibited where the attorney “knowingly acquire[s] an ownership, possessory, security or other pecuniary interest adverse to a client”—i.e. campaign contributions from an adverse party—or where the attorney has “a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client”—i.e. where Reeb believed her campaign’s success was dependent upon her role in the prosecution of Reed. N.M. Prof’l Cond. 16-108. These prohibitions are imputed to other lawyers associated with the conflicted attorney. N.M. Prof’l Cond. 16-108(k).

As a Republican candidate for office who explicitly disclosed to Carmack-Altwhies that she had a personal interest—she believed her election campaign would benefit from her involvement in investigating and prosecuting the case—Reeb had a concurrent conflict in representing the State in this case. When a preexisting conflict is identified before undertaking the representation, “the representation must be declined.” Comment 3, N.M. R. Prof’l. Cond. 16-107. Carmack-Altwhies did not have authority to consent to this conflict on behalf of the State, and Reed certainly did not provide informed consent for this conflict.

Third, as of January 1, 2023, Reeb was also a sitting legislator and thus also lacked legal authority to investigate or prosecute this case pursuant to the New Mexico Constitution. The New Mexico Constitution states that “no person . . . charged with the exercise of powers properly belonging to one of [the legislative, executive, and judicial] departments shall exercise any powers properly belonging to either of the others[.]” N.M. Const. art. III, § 1. As privately conceded by Carmack-Altwies, Reeb was squarely prohibited from serving as a Special Prosecutor while simultaneously serving as a state legislator.

However, Reeb did not recuse herself or resign after she won her election in the first week of November. And after assuming office in the first week of January, then-Representative Reeb led proffers and negotiations with Sarah Zachry and David Halls—whose counsel contributed to Reeb’s legislative campaign. Reeb exercised authority over charging decisions, explaining them to the national media, and ultimately gave Halls a misdemeanor no contest plea deal, decided not to charge Zachry, and charged Reed by information with two felony counts of involuntary manslaughter. Every charging decision in this investigation and prosecution has been made by individuals who were unauthorized to do so as a matter of New Mexico law.

Finally, the separation-of-powers doctrine is grounded in the concern that wielding the authority of two branches of government is too much power for any individual but also in the concern that inherent conflicts of interest are present when someone serves in both roles. Reeb’s dual service thus also constitutes a conflict of interest that arose when she won the election in November 2022. “If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation.” Comment 3, N.M. R. Prof’l. Cond. 16-107. As reported by the media, Halls’s defense attorney, who contributed to Reeb’s campaign, assumed Reeb would recuse herself immediately after the election: “I honestly thought that come the first

week of November, she would be resigning from the special prosecutor role,” Halls’s attorney said.²⁶ “Who in their wildest imagination would think that she would still be special prosecutor?”²⁷

Thus Carmack-Altwies lacked authority to make charging decisions or sign charging documents in this case as of June 9, 2022. Reeb also lacked authority to prosecute this case—during her campaign, after her election win, and after she assumed office as a state legislator. The Court should dismiss the information with prejudice because it was filed without legal authority.

The dismissal should be with prejudice as Ms. Gutierrez Reed has suffered actual and substantial prejudice from the unauthorized combination of prior prosecutors on the case. While Carmack Altwies and Reeb were in an unauthorized co-counsel arrangement, they interviewed numerous witnesses, conducted investigation, retained expert witnesses, and cut a plea deal with Halls indicating that he would testify, presumably for the prosecution. That favorable plea deal to a misdemeanor with 6 months of unsupervised probation, provides Halls an incentive to testify in favor of the prosecution. Yet, his deal was cut by the unauthorized combination of the District Attorney and special prosecutor. It may be all but impossible now to unravel the extent to which one or the other influenced Halls, or which prosecutor ultimately made the decision on the deal. Upon information and belief, however, that decision was made by Ms. Carmack Altwies, and again would have been unauthorized. In addition, it will be incredibly difficult, if not impossible to now unravel the extent to which Carmack Altwies influenced the prosecutorial decisions and expert and lay witness testimony, with her involvement with Reeb in the pre charging and after charge interviews. Hannah Gutierrez Reed can demonstrate actual and substantial prejudice due to the

²⁶ Cardinale, John, “Rust’ defense attorney made contributions to special prosecutor.” KOAT7 Action News (Feb. 8, 2023), *available at* <https://www.koat.com/article/rust-defense-attorney-made-contributions-special-prosecutor/42806633>.

²⁷ Haywood, Phaedra, “Rust’ lawyers: DA erred with firearm enhancement,” SANTA FE NEW MEXICAN (Feb. 10, 2023), *available at* https://www.santafenewmexican.com/news/local_news/rust-lawyers-da-erred-with-firearm-enhancement/article_565fc376-a968-11ed-bb5a-9769b42d2efd.html.

unauthorized combined efforts of the District Attorney and conflict-laded special prosecutor, in cutting a deal with a target defendant, David Halls, and in the retention of experts and interviews of those experts and witnesses while she was not authorized to do so.

III. Separately, the Prosecution of Reed Should Be Dismissed for Due Process, Equal Protection, and Ethical Violations by the Prosecution Team.

When unauthorized individuals wield the power of the State to promote their personal interests, other harm and prejudice follows. Carmack-Altwhies and Reeb appear to have put on blinders to the facts and the law to advance their own personal interests, which led to a litany of other harms, including equal protection and due process violations and evidentiary failings.

A. The Selective Prosecution of Reed Violates the Equal Protection Clause.

The prosecution of Reed is constitutionally invalid. The United States Supreme Court has been clear that selective prosecution violates the Equal Protection Clause of the Constitution. *Wayte v. United States*, 470 U.S. 598, 608 (1985). “To establish a claim of selective prosecution, a defendant must prove both a discriminatory effect and a discriminatory purpose.” *State v. Villas*, 2002-NMCA-104, ¶ 16, 132 N.M. 741, 745 (citations omitted). The prosecution of Reed has a discriminatory purpose and discriminatory effect.

Discriminatory Purpose. The District Attorney and Reeb have admitted they made an early decision to prosecute Reed. The purpose was always discriminatory. Reeb’s June 9, 2022 request to publicly announce her role in the investigation to “help her campaign” is an explicit admission that she had a personal interest here. She believed that aggressively prosecuting Reed would help her win political office, and her road show on national (primarily conservative) opinion television programs is concrete evidence that her personal interests—not justice—were the purpose of this prosecution. The prosecution team’s announcement also demonstrated that Reed was collateral

damage to the prosecution team’s selective decision to prosecute Alec Baldwin because of his celebrity. The prosecution explicitly referred to Baldwin in its announcement, referring to other targets of criminal charges filed at the same time as “other members of the ‘Rust’ film crew.”²⁸ It emphasized that Baldwin was being prosecuted to send a message *because of who he was*: “On my watch, no one is above the law, and everyone deserves justice.” Reed was collateral damage to this improper, selective, and overzealous prosecution.

Discriminatory Effect. The discriminatory effect—Reed’s disparate treatment compared to others similarly situated or with more culpability—is plain. Perhaps the best illustration of the discriminatory effect is that Halls was offered a misdemeanor plea to negligent handling of a firearm with a suspended sentence and only six months of probation. Halls, unlike Reed, held the title “Safety Coordinator,” was the set manager, and was responsible for general workplace safety.²⁹ He was “responsible for identifying and correcting hazardous conditions related to firearms safety.”³⁰ OHSB made a specific finding that the firearm safety standards of Bulletin #1 “were not enforced” by Halls, who was the production’s “top-level management safety official,” was present “prior to and at the time the firearm discharged a live round,” and “did not consult with the Property Master or Armorer during or after the firearm was loaded, handed to the actor, and pointed toward crew members in order to determine that pointing the firearm at persons was ‘absolutely necessary.’”³¹ According to OHSB, Halls was culpable. However, Halls's defense team donated to Reeb’s campaign. And Halls was rewarded with a very favorable deal, with a promise to testify in other cases, including Reed’s.

²⁸ First Judicial District Attorney, FACEBOOK (Jan. 19, 2023), <https://www.facebook.com/1stJDA/>.

²⁹ OHSB report at ¶ 9.

³⁰ *Id.* at ¶ 11.

³¹ *Id.* at ¶ 21(a), (e), (g)

Reeb and Carmack-Altwies’s self-serving political ends are an “impermissible consideration.” *Villas*, 132 N.M. at 745. This alone warrants dismissal. *See State v. Cochran*, 1991-NMCA-051, ¶ 5, 112 N.M. 190, 191 (“Selective prosecution is an application for dismissal on constitutional grounds to be decided by the trial judge[.]”)

B. Constitutional and Ethical Violations Have Tainted this Prosecution.

Because this prosecution was motivated by personal interests—not the facts or the law—it was shaped with the goal of prevailing in the court of public opinion, not a jury trial. As a result, corners were cut and the prosecution team committed other due process and ethical violations.

Extrajudicial Statements. The prosecution team’s extrajudicial statements resulted in such prejudice to Reed as to constitute a due process violation requiring dismissal.

Members of the New Mexico bar—and their agents³²—are prohibited from “mak[ing] any extrajudicial or out-of-forum statement in a proceeding that may be tried to a jury that the lawyer knows or reasonably should know . . . creates a clear and present danger of prejudicing the proceeding.” NM R RPC Rule 16-306. The commentary to the Rules explains that “[c]riminal jury trials will be most sensitive to extrajudicial speech,” NM R RPC Rule 16-306, cmt. 5. Of particular sensitivity are statements that go to the “character, credibility, [or] reputation” of a defendant, refer to any “statement given by a defendant,” discuss the “results of any examination or test,” or offer any “opinion on the guilt or innocence of a defendant.” NM R RPC Rule 16-306, cmt. 4(1)-(4).

Prosecutors may make extrajudicial statements only if they “are necessary to inform the public of the nature and extent of the prosecutor’s action” and “serve a legitimate law enforcement purpose.” NM R RPC Rule 16-306(F). The commentary to the rule explains: when “a defendant

³² The government’s attorneys are responsible for the statements issued by their public-relations specialist Heather Brewer and their purported expert witness Bryan Carpenter. NM R RPC Rule 16-308(F).

has been charged with a crime,” extrajudicial statements are “more likely than not to have a prejudicial effect” “unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.” NM R RPC Rule 16-306 cmt. 4(6); *see also id.* cmt. 3(7)(a). Finally, the rules prohibit an attorney from “mak[ing] any extrajudicial or out-of-forum statement in a proceeding that may be tried to a jury that the lawyer knows or reasonably should know . . . is false.” NM R RPC Rule 16-306. The prohibition is also underscored for prosecutors. NM R RPC Rule 16-308(F); *see also*, Bennet L. Gershman, “The Prosecutor’s Duty of Silence,” Pace Law Faculty Publications, 79 Alb. L. Rev. 1183, 1183-84 (2016), (“a prosecutor’s public statements are potentially dangerous,” and “with the ability of the media to saturate the public with pervasive, repetitive, and often inflammatory news coverage about a case, a prosecutor’s public statements almost always have the potential to prejudice future jurors in that case and thereby inflict prejudice to person suspected or charged with wrongdoing.”)³³

The reason for these ethical rules is that extrajudicial statements by the prosecutor—especially those opining on the guilt of criminal defendant—are directly at odds with due process. *State v. House*, 1999-NMSC-014, ¶¶ 26, 59, 127 N.M. 151 (explaining that due process requires “a fair and impartial trial” and that “prejudice from pretrial publicity [can] evolve[] to such a degree that a fair trial is improbable”); *State v. Trujillo*, 2002-NMSC-005, ¶ 48, 131 N.M. 709 (stating that New Mexico courts “review each of Defendant’s allegations of prosecutorial misconduct individually in addition to considering their cumulative effect” in determining whether a due process violation exists).

³³ The prosecution is held to a different standard in our system, as the duty of a prosecutor is to do justice, and not merely to seek a conviction. In contrast, the duty of defense counsel is to vigorously defend the accused, including by “going public” when warranted. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1990).

During the investigation and prosecution by Carmack-Altwies and Reeb, the State made false statements that denigrated counsel and the Defendants for filing meritorious motions based on violations of the United States and New Mexico constitutions.³⁴ False extrajudicial statements and statements expressing “scorn toward opposing counsel”—delivered to the national media—are extreme and outrageous examples of prosecutorial misconduct, for which New Mexico’s Supreme Court has delivered the harshest of sanctions. *State v. Breit*, 1996-NMSC-067, ¶ 41, 122 N.M. 655, 668, 930 P.2d 792, 805 (reversing murder conviction and finding double jeopardy barred new trial; holding that the “pervasive, incessant, and outrageous nature of prosecutor’s misconduct” barred re prosecution of the case”).

Carmack-Altwies and Reeb, along with their public information officer Heather Brewer and expert witness Bryan Carpenter, have publicly commented on the case in wildly inappropriate ways, including saying that Reed faced a mandatory five years in prison after conviction—based on a basic Constitutional error that falsely amplified the seriousness of the charges. Not once have they noted the presumption of innocence. Carmack-Altwies and Reeb’s national media blitz, with contributions from Brewer and Carpenter, constitutes severe prejudice and has made a fair trial highly improbable.

Preaccusation Delay. Despite Carmack-Altwies and Reeb publicly announcing that they decided almost immediately to charge Reed, they took over 15 months to charge her. Under the circumstances, such preaccusation delay constitutes a due process violation.

³⁴ As legal commentator and former federal prosecutor Andrew McCarthy put it, “ethical prosecutors do not denigrate the exercise of due process rights, especially in a manner designed to prejudice the jury pool against the defendant.” Andrew McCarthy, *Alec Baldwin Charge Dropped, but Prosecutor Should Throw the Whole Thing Out*, FOX NEWS (Feb. 21, 2023), <http://bitly.ws/BTsW>; *see also, e.g.*, Thomas Frampton (@TFrampton), TWITTER (Feb. 20, 2023, 8:30 PM) (University of Virginia Law School Professor), <http://bitly.ws/BTt2>:

“Although a crime’s statute of limitations provides the primary protection against prejudice arising from the delay between the occurrence of a crime and the filing of charges, ‘the due process clause of the [F]ifth [A]mendment provides additional, albeit limited, protection against improper preaccusation delay.’” *State v. Stallings*, No. A-1-CA-38784, 2022 WL 601926, at *4 (N.M. Ct. App. Mar. 1, 2022) (quoting *Gonzales v. State*, 1991-NMSC-015, ¶ 4, 111 N.M. 363, 805 P.2d 630). Preaccusation delay constitutes a due process violation when there is “(1) prejudice to the defense as a result of the delay, and (2) an intentional delay by the state to gain a tactical advantage.” *Id.*

Both requirements are met here. The delay was intentional. The prosecution team has disclosed that their decision to charge Reed happened at the very beginning of the investigation—i.e. in late October or early November 2021.

As described above, Reeb became involved no later than June 9, 2022. The FBI firearm testing results were provided to the District Attorney’s Office soon thereafter, in July 2022. On August 30, 2022, the District Attorney’s Office submitted a request for funding to the New Mexico Board of Finance, repeatedly asserting that it was ready to file charges “immediately.”³⁵ And yet—it took *several more months* to file charges. What happened in those months? Reeb had a political campaign to conduct and an election to win in November. And Reeb and Carmack-Altwives—and their agents—courted local, state, and national media to disparage Reed, to advance their own personal brands, and to increase the likelihood of a jury predisposed to convict Reed. They used the ongoing investigation and the dangle of criminal charges as a launchpad for their own ambitions.

³⁵ See Funding Submission at 1, Attachment 1 at ¶¶ 4, 6 (Aug. 30, 2022), available at <https://www.washingtonexaminer.com/news/new-mexico-da-rust-crew-charges-expected>.

The delay also resulted in prejudice and gave the prosecution team a tactical advantage. Between October 21, 2021, and January 31, 2023, the prosecution team maximized Reeb and Carmack-Altwies's personal exposure—to the detriment of Reed's ability to receive a fair trial. Indeed, the period from January 18, 2023, when it was announced that Reed would be charged with involuntary manslaughter, until such charges were filed on January 31, 2023, perhaps best illustrates that the prosecution team chose to milk the filing of the information itself for almost two weeks of media coverage. There was no legitimate law enforcement or legal justification for the media appearances or the pre-filing announcement of the charges that would be filed two weeks later. That delay was not caused by a careful and measured investigation or significant deliberations over who would face criminal charges or what criminal charges were available in the law as of October 21, 2021. Indeed, during those two weeks in January, the prosecution team touted the firearm enhancement—an unconstitutional *ex post facto* application of a law that was not on the books on October 21, 2021—falsely exaggerating the seriousness of the planned charges against Reed and her possible sentence of imprisonment. The only reasonable explanation for the delay is that Reeb and Carmack-Altwies used it to achieve maximum effect with a national audience and the potential jury pool in New Mexico.

Under these circumstances, this preaccusation delay constitutes a due process violation that requires dismissal.

IV. Evidentiary Problems Constitute Due Process Violations Requiring Dismissal or Alternative Remedies.

Because the investigation and prosecution of Reed was designed to advance the personal interests of Carmack-Altwhies, Reeb, and their agents—not to secure justice at a jury trial—the investigation is rife with simple mistakes, evidentiary problems, and discovery violations.

Failure to Secure the Crime Scene or to Investigate Origin of Live Round. Despite a duty to preserve evidence and to seek justice for those responsible, law enforcement on the prosecution team failed to follow important leads and failed to secure material evidence.

“It is generally understood that the State has a duty to preserve evidence obtained during the investigation of a crime.” *State v. Pacheco*, 2008-NMCA-131, ¶ 28, 145 N.M. 40, 47. When the state fails to preserve evidence that is material to the defense, and the absence of which will prejudice the defense, sanctions are appropriate. *See State v. Chouinard*, 1981-NMSC-096, ¶ 16, 96 N.M. 658, 661–62.³⁶

As recognized by the national media and acknowledged by the prosecution team, the key question related to the accident is how live rounds ever made it onto the film set. However, in the immediate aftermath of the accident, law enforcement left the prop cart—an actual cart on which weapons and ammunition were stored—unattended. Moreover, Prop Master Sarah Zachry discarded ammunition from the set.

Finally, it has been publicly reported that the Sheriff’s Office “as a team” decided not to seek fingerprint or DNA testing of live rounds found on the set to identify who was responsible

³⁶ Notably, Reed need not show that the state intended the destruction of evidence because “[t]he good faith of the state is irrelevant when the evidence lost is material and prejudicial to the accused.” *State v. Chouinard*, 1981-NMSC-096, ¶¶ 23-25, 96 N.M. 658, 662–63

for bringing them there.³⁷ Apparently, the FBI is unable now to conduct such testing because they handled all of the live rounds and disassembled them in testing, without conducting any fingerprint or DNA testing. Such information would be exculpatory and material to Reed’s defense.

Destruction of the Firearm sear. The firearm that discharged a live round—one of the most significant, if not the most significant, pieces of material evidence—had its sear or sear notch destroyed by the FBI in testing.

The Federal Bureau of Investigation notified the prosecution team that its planned testing of the firearm might result in its being damaged, and on April 21, 2022, the case agent authorized the testing: “Enhanced test fire to verify if the firearm functions without pressing the trigger. We’re tracking that this will alter the firearm and it will not longer [sic] be in the same physical condition that it was seized in.” The prosecution team did not provide notice to the attorneys for potential criminal targets of this plan. No inspection of the firearm by defense counsel was invited or allowed before the testing was authorized by the State. This calculated decision to destroy key evidence is especially egregious because at the time this testing was conducted Reeb and Carmack-Altweis had already decided that they would be bringing charges against Reed and Baldwin and they knew that the gun in an unaltered state would be key evidence for the defense.

Rather, on July 12, 2022, shortly after Reeb joined the case, the F.B.I. conducted reckless and destructive testing on the revolver.³⁸ After repeatedly striking the firearm with a rawhide mallet, internal components of the firearm broke.³⁹ The defense has received no documentation

³⁷ Patten, Dominic, and D’Allesandro, Anthony, “‘Rust’ Armorer Hannah Gutierrez-Reed Slams Santa Fe Cops For Lack Of Thorough Testing On Live Rounds On Set,” *Deadline* (Aug. 18, 2022), available at <https://deadline.com/2022/08/alec-baldwin-rust-armorer-hannah-gutierrez-reed-police-fbi-probe-1235095856/>.

³⁸ FBI Report Notes at p. 14

³⁹ *Id.*

reflecting the testing was recorded or witnessed by anyone other than the agent who conducted the test.

The unavailability of this material evidence is prejudicial to Reed. Mr. Baldwin's charges have now been dismissed, on grounds that the firearm was "modified," and that the FBI's destruction of the sear renders an ultimate determination now impossible or near impossible. The new special prosecutor must have determined these facts were exculpatory to Baldwin, as she dismissed his charges. If so, they were also exculpatory as to Hannah Gutierrez-Reed. In conjunction with the other investigative errors, evidentiary problems, and discovery violations, the absence of the firearm supports dismissal for a due process violation.

Facially Defective Search Warrants. The prosecution team secured five search warrants in this investigation. Demonstrating that the point of the investigation was to convict Reed in the court of public opinion and to force a plea to advance the personal interests of the prosecutors—rather than to prevail at a fair jury trial—every search warrant was facially invalid and violated the particularity requirement of the Fourth Amendment.

Search warrants are "clearly invalid under the particularity clause of the Fourth Amendment" when they fail to "mention . . . any particular crime" and "essentially authorize[] a 'general exploratory rummaging' . . . for any unspecified 'criminal offense.'" *Mink v. Knox*, 613 F.3d 995, 1011 (10th Cir. 2010) (finding no qualified immunity for officers who executed clearly unconstitutional search warrant); *see also Cassady v. Goering*, 567 F.3d 628, 635 (10th Cir. 2009) (same); *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir.1985) ("The particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.").

Each search warrant in this investigation was facially invalid for this reason. The first search warrant, secured on October 22, 2021, authorized a search of the church where the accident occurred, but nowhere in the affidavit or the warrant itself did law enforcement identify any *crime* for which probable cause was alleged to exist. Rather, the affiant stated “there is probable cause that items of evidentiary value may me [sic] identified within the home [sic], which could corroborate or refute the statements that have been provided at this time.” Church Warrant at 5. Another subsequent warrant for the church contained identical language about evidence “within the home”; the prop truck warrant is nearly identical but refers to a “vehicle”; and the phone warrant makes generic statements that “suspect(s), victim(s) and/or witnesses may document information . . . [and] make and/or receive telephone calls and/or messages before, during and/or after the commission crime(s) [sic].”

Law enforcement never included *any* language to describe a crime under investigation, rendering every search warrant facially invalid. Here, for example, the warrants purported to authorize seizure of an extraordinary broad category of materials, including “[a]ll contacts,” all “digital images, digital movies, emails, social network accounts, social network private messages, . . . text messages, . . . passwords, access to any ‘cloud’ drives,” “[a]ny ‘Global Positioning System’ (GPS) data,” and “all information and data from the cellular phone in relation to the production of Rust, and any member working on the production.” These search warrants underscore that the prosecution team was willing to abuse its power to advance its own objectives and strongarm cooperation and guilty pleas.

Missing Exculpatory Evidence. In advance of the preliminary hearing, Reed is entitled to discovery of evidence material to her defense, but the prosecution team has disclosed exculpatory evidence to the national media that has been withheld from discovery.

Under N.M. R. Crim. P. Dis't. Ct. 5-302 (B)(2), Reed is entitled to “any tangible evidence in the prosecution’s possession, custody, and control, including records, papers, documents, and recorded witness statements that are material to the preparation of the defense” in advance of the preliminary hearing.

First, based on information uncovered by the New York Times with public records requests, the District Attorney’s Office failed to disclose that Reeb and the District Attorney discussed the prosecution of Reed as an opportunity to help Reeb’s political career. As described above, such information is material to serious concerns about violations of Reed’s equal protection and due process rights.

Second, the District Attorney told *Vanity Fair* in February 2022⁴⁰ that she requested an “unofficial test inside her office” regarding the firearm:

“One of the investigators in my office happens to have a very old type revolver, and so he brought it, at my request, so that we could look at it and see if that was at all possible,” Carmack-Altwhies told *Vanity Fair*.

She said the group cleared a room in her office, made sure the weapon was empty, and attempted to reenact Baldwin’s actions leading up to the deadly shooting.

“They visually showed me,” Carmack-Altwhies said. “You can pull the hammer back without actually pulling the trigger and without actually locking it. So you pull it back partway, it doesn’t lock, and then if you let it go, the firing pin can hit the primer of the bullet.”

No report or documentation has been provided to the defense about this testing, despite Carmack-Altwhies’s public description of the testing as including “[o]ne of the investigators in [the District Attorney’s] office.”

⁴⁰ Dillon, Nancy, “DA’s Informal Experiment Could Corroborate Alec Baldwin’s Claim He Didn’t Pull Trigger in ‘Rust’ Shooting,” *Rolling Stone* (Feb. 18, 2022), available at <https://www.rollingstone.com/tv-movies/tv-movie-news/das-inforalec-baldwin-claim-didnt-pull-trigger-corroborated-da-1302508/>.

In addition, Reeb told counsel that their investigator on the case had shaken a round and had been unable to identify whether it was a “dummy” or “live round” and indicated he would need to submit it to further testing to make that determination. No report of that incident or testing has been produced. If the DA investigator was unable to determine the difference between a live round and dummy, through shaking and examining it in a quiet office, that fact would be exculpatory as to Ms. Reed, who was asked to perform the same task on a hectic, frantic and very loud movie set.

Third, the District Attorney’s Office repeatedly referenced a significant volume of information from the public regarding this investigation, but no such information has been provided in discovery. At a September 20, 2022 meeting regarding the District Attorney’s request for additional funding, the District Attorney referred to substantial public outreach and inquiries to her office related to the *Rust* case as evidence to support her request for a dedicated public information officer.⁴¹ “Our PIO right now is also a working attorney in our office,” Carmack-Altwhies said, “We do not have the capacity to handle those requests to answer emails, or even read them, and so that is why we have asked for this budget.”⁴² Given such a large volume of alleged emails from the public to the District Attorney’s Office, and the sheriff’s solicitation for the public to contact his office, it is surprising that the discovery does not include *any* such emails.

These three categories of material, exculpatory evidence have been conspicuously absent from the discovery produced in advance of the preliminary hearing.

V. Cumulative Error

⁴¹ Regular Meeting Minutes, NEW MEXICO STATE BOARD OF FINANCE (Sept. 20, 2022), at 10.

⁴² Wilson, Brianna, “State grants half of requested funding to DA for potential ‘Rust’ prosecutions,” KOB4 (Sept. 23, 2022), available at <https://www.kob.com/new-mexico/state-grants-half-of-requested-funding-to-da-for-potential-rust-prosecutions/>

The prosecution has been publicly condemned, and with good reason, given the litany of errors and abuses detailed above.⁴³ The prosecutorial misconduct in this case began at inception and has infected this prosecution at every turn: initial missteps in the collection and preservation of evidence, destruction of the firearm, appointment of a conflicted special prosecutor, continued participation by the district attorney without statutory authority, the special prosecutor's simultaneous service as a legislator, delay in filing charges, extrajudicial statements, and charging a firearm enhancement that was not a law at the time of the accident. Perhaps aware of the case's weaknesses on the merits, the prosecution has eschewed professional norms and instead attempted to try Reed in the court of public opinion, irreparably tainting the jury pool not only in Santa Fe, but nationwide.

Even if the Court concluded that one or more of the instances of gross misconduct or Constitutional, statutory, or ethical violations do not rise to the level of a due process violation, the cumulative effect of these violations certainly establishes a failure of due process. While Reed submits that this is the exceptional case where dismissal is appropriate, and respectfully requests the same, should the court decline to dismiss the case, Reed requests the Court impose alternative remedies, including (1) suppression of evidence, including all fact and expert witnesses jointly interviewed by the unauthorized combination of Carmack-Altwies and Reeb, the forensic testing on the live rounds and firearm; (2) adverse inferences against the government in connection with the live rounds, firearm and other exculpatory evidence.

⁴³ See, e.g., Kyle Clark and Andrew George, *Guest Column: Alec Baldwin's 'Rust' Prosecutors Should Do Their Talking in Court*, The Hollywood Reporter (Mar. 3, 2023), <https://www.hollywoodreporter.com/news/general-news/alec-baldwin-rust-shooting-prosecutors-talk-court-lawyers-1235340165/>; Rebecca Picciotto, *Prosecutors in Alec Baldwin 'Rust' shooting case are getting heat over apparent missteps*, CNBC (Mar. 6, 2023), <https://www.cnbc.com/2023/03/06/alec-baldwin-rust-prosecutors-criticism.html> (describing the case as a “media circus” and noting that “poison[ing] the jury pool” “certainly could be an issue” in this case).

In sum, for all these reasons, The First Amended Information should be dismissed with prejudice.

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 18th day of May, 2023, to the counsel listed below:

Kari Morrissey
Jason Lewis
Special Prosecutors
1st Judicial District Attorney's Office

/s/ Jason Bowles

Jason Bowles
Bowles Law Firm