

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO,

Plaintiff,

vs.

D-101-CR-2024-0013

ALEXANDER RAE BALDWIN III,

Defendant.

**HANNAH GUTIERREZ-REED'S OPPOSITION TO STATE'S AMENDED OPPOSED
EXPEDITED MOTION FOR USE IMMUNITY FOR HANNAH GUTIERREZ**

Hannah Gutierrez-Reed, by and through her counsel, Jason Bowles of Bowles Law Firm, and Monnica L. Barreras of the Law Office of Monnica L. Barreras, hereby responds to the State's Amended Opposed Expedited Motion for Use Immunity for Hannah Gutierrez, and states as follows:

BACKGROUND

Earlier this year, Ms. Gutierrez-Reed was tried for involuntary manslaughter and was convicted and is appealing. Ms. Gutierrez-Reed is challenging various asserted errors and is seeking to have her conviction reversed and is asking for a new trial.

Additionally, Ms. Gutierrez Reed is also currently charged with a felony of bringing a firearm into a bar, and that case is before Judge Ellington. *State of N.M. v. Hannah Gutierrez-Reed*, D-101-CR-2023-00418. Currently, it is set for trial in August. This charge is separate from the ongoing appeal. The State failed to mention or discuss this separate prosecution in its motion to compel use immunity.

Meanwhile, the State is preparing to go to trial in its related prosecution of Mr. Baldwin, and it seeks to compel Ms. Gutierrez-Reed to testify at Mr. Baldwin's trial, notwithstanding her

constitutional right not to. The State claims that Ms. Gutierrez-Reed's testimony is necessary to allow the jury to hear "all of the information" Ms. Gutierrez-Reed has regarding Mr. Baldwin. But the State's examples of the testimony Ms. Gutierrez-Reed would be likely to give are based on statements Ms. Gutierrez-Reed has already made. It is therefore unnecessary to elicit those statements from her on the witness stand because she is "unavailable" having invoked her fifth amendment privilege. At the same time, compelling her to testify at Mr. Baldwin's trial would generate tremendous publicity while the appeal of her conviction is still pending, seriously prejudicing Ms. Gutierrez Reed if a new trial is granted, and in her separate prosecution for bringing a firearm into a bar.

There is simply no way to account for the various forms of prejudice—not to mention the constitutional harm—that Ms. Gutierrez-Reed would suffer if she were compelled to testify, because there is no way to shield potential jurors from her testimony at Mr. Baldwin's trial, which will be one of the most watched, publicized, and discussed trials in New Mexico history. The Court should not permit the State to circumvent Ms. Gutierrez-Reed's constitutional rights or to inflict extreme and unfair prejudice when the State has no need for Ms. Gutierrez-Reed's testimony in the first place.

ARGUMENT

I. Law

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against [herself]." U.S. Const. amend. V. But under the New Mexico Rules of Criminal Procedure, a district court "may issue an order . . . upon the written application of the prosecuting attorney" "requiring [a] person to testify . . . notwithstanding the person's privilege against self-incrimination." Rule 5-116 NMRA. To grant such an application, the Court must find that "(1) the testimony . . . may be necessary to

the public interest; and (2) the person has refused or is likely to refuse to testify or to produce the record, document or other subject on the basis of the person's privilege against self-incrimination."

Id. "The use of any testimony . . . given pursuant to an order issued under [Rule 5-116] is subject to the provisions of Rule 11-413 NMRA," which provides that the testimony "may not be used against the person compelled to testify or to produce evidence in any criminal case," except for in a prosecution for perjury during that testimony or in a contempt proceeding for failure to comply with immunity order. Rule 11-413 NMRA.

II. Compelling Ms. Gutierrez-Reed to Testify at Mr. Baldwin's Trial Would Violate Ms. Gutierrez-Reed's Constitutional Rights

The Fifth Amendment's "guarantee against testimonial compulsion . . . 'was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.'" *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Accordingly, "the Amendment must be accorded liberal construction in favor of the right it was intended to secure." *Id.* Furthermore, the availability of the privilege "does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *State v. Archunde*, 1978-NMCA-050, ¶ 12, 579 P.2d 808. "The privilege protects against compelled disclosures which the witness may reasonably apprehend could be used to deprive him of liberty." *Id.*

Here, given the national prominence of Mr. Baldwin's prosecution, compelling Ms. Gutierrez-Reed to testify would generate significant publicity and would expose future jurors, directly or indirectly, to her compelled statements. For that reason, even if the State cannot formally use her testimony in Mr. Baldwin's trial against her, she "reasonably apprehend[s]" being "deprive[d] . . . of liberty" if she is compelled to testify in that trial. *Id.*

Use immunity is intended to leave the prosecution and witness “in essentially the same position as if the witness had retained his Fifth Amendment privilege and never testified” in that the “witness is not exposed to criminal liability for the testimony given, and the prosecution loses little with respect to its ability to prosecute.” *State v. Belanger*, 2009-NMSC-025, ¶ 12, 210 P.3d 783. But here, granting use immunity for Ms. Gutierrez-Reed and compelling her to testify at Mr. Baldwin’s trial would have the opposite effect: It would expose Ms. Gutierrez-Reed to significant criminal liability and would give the State a significant leg up in its ability to prosecute including in the separate case before Judge Ellington.

While the State may claim that it has no interest in prosecuting Ms. Gutierrez-Reed based on any testimony she would be compelled to give at Mr. Baldwin’s trial, that does not eliminate the constitutional burden that testimonial compulsion would place on her Fifth Amendment rights. *Belanger*, 2009-NMSC-025, ¶ 43 (the “Fifth Amendment right against self-incrimination does not vanish merely because the prosecution claims it will not prosecute.”); *see also United States v. Jones*, 703 F.2d 473, 478 (10th Cir.1983) (“Once the court determines that the answers requested would tend to incriminate the witness, it should not attempt to speculate whether the witness will in fact be prosecuted.”). To begin with, Ms. Gutierrez-Reed has appealed her conviction on numerous grounds, and there is a very real possibility that she will be retried on the same charges as before. “Given the possibility of reversal . . . courts overwhelmingly hold that the claim of privilege may be raised while a direct appeal is pending.” *State v. Crislip*, 1990-NMCA-054, ¶ 7, 796 P.2d 1108, *overruled on other grounds by Santillanes v. State*, 1993-NMSC-012, ¶ 7, 849 P.2d 358; *see also Ellison v. State*, 310 Md. 244, 250, 528 A.2d 1271, 1274 (1987) (“It is well settled that a witness may invoke his privilege against self-incrimination where . . . an appeal is outstanding.”) (collecting cases).

Although the State would be barred from using any testimony obtained at Mr. Baldwin’s trial against her in a retrial, that does not solve the issue. As stated above, the Fifth Amendment privilege “protects against compelled disclosures which the witness may *reasonably apprehend* could be used to deprive [her] of liberty.” *Id.* Mr. Baldwin’s case will be broadcast live on national television and streaming on YouTube channels throughout the world. Millions of viewers—including a substantial number of Ms. Gutierrez-Reed’s future potential jurors—will likely watch portions of the trial live, read summaries of it in newspapers or online, or view archived clips of Ms. Gutierrez-Reed’s testimony that will be freely available and promoted across the worldwide web. Indeed, given Mr. Baldwin’s celebrity status, his trial will almost certainly be followed much more widely than the first trial of Ms. Gutierrez-Reed. These concerns cannot be resolved through voir dire under these unique circumstances, because jurors may not recall whether they have already been exposed to Ms. Gutierrez-Reed’s statements through the blanket media coverage of Mr. Baldwin’s trial. Whether the State seeks to affirmatively introduce these statements or not is beside the point—once the statements are out of the bag, their origin is irrelevant. *See Kastigar v. United States*, 406 U.S. 441, 453 (1972) (“proscription of the use in any criminal case of ‘testimony or other information compelled under the order (or any information *directly or indirectly derived from such testimony* or other information)’ is consonant with Fifth Amendment standards.”) (emphasis added). !

III. Any Need for Ms. Gutierrez-Reed’s Testimony Is Outweighed by Extreme and Unfair Prejudice

As a threshold matter, the State has not demonstrated that compelling Ms. Gutierrez-Reed’s testimony is “necessary to the public interest.” Rule 5-116 NMRA. Other than arguing that “[t]he jury should hear all of the information Ms. Gutierrez Reed has regarding Mr. Baldwin,

both exculpatory and inculpatory,” the State has not identified a particularized necessity for her testimony or identified a specific public interest that would be served by compelling her to testify.

In any event, regardless of the constitutional harm identified above, and even if it did serve some unexplained need, Ms. Gutierrez-Reed would suffer extreme prejudice if she were compelled to testify at Mr. Baldwin’s trial, as it would virtually eliminate the possibility of a fair trial if Ms. Gutierrez-Reed’s conviction is reversed, and she is retried. It would also eliminate the possibility of a fair trial in her separate case before Judge Ellington. The Court should exercise its broad discretion to ensure that doesn’t happen. “New Mexico use immunity law, unlike its federal counterpart, is a creature of the courts.” *State v. Belanger*, 2009-NMSC-025, ¶ 35, 210 P.3d 783. Courts in New Mexico therefore have “more latitude” than courts in other jurisdictions to exercise discretion and authority in this area—particularly where, as here, it is necessary to protect a criminal defendant from the unwarranted and unfair prejudice that would result from granting the State’s motion. *Belanger*, 2009-NMSC-025, ¶ 44 (giving the State “unchecked control over immunity determinations . . . puts the prosecution in control of critical constitutional rights of the accused, while excluding the moderating influence of an impartial judiciary.”); *id.*, ¶ 52 (“It is rare in criminal jurisprudence that a court is completely foreclosed from enforcing or protecting the constitutional rights of the accused.”).

If Ms. Gutierrez-Reed were compelled to testify at Mr. Baldwin’s trial, the prejudicial impact would be severe. Given the timing of Mr. Baldwin’s trial and Ms. Gutierrez-Reed’s appeal, the publicity surrounding his trial—which will undoubtedly persist for months after the trial is completed—will have the same prejudicial impact as if it emerged during the middle of Ms. Gutierrez-Reed’s own trial (which, if she is retried, will effectively be the case). In considering whether midtrial publicity is “inherently prejudicial” to a defendant, courts in New Mexico “are

advised to consider (1) whether the publicity goes beyond the record or contains information that would be inadmissible at trial, (2) how closely related the material is to matters at issue in the case, (3) the timing of the publication during trial, and (4) whether the material speculates on the guilt or innocence of the accused.” *State v. Holly*, 2009-NMSC-004, ¶ 20, 201 P.3d 844. Each of these factors demonstrate that the publicity surrounding Mr. Baldwin’s trial will be “inherently prejudicial” to Ms. Gutierrez-Reed, and that it will be *especially so* if she is compelled to testify and face cross-examination by the zealous advocates on both sides.

“In addition, the trial court should consider the likelihood of juror exposure by looking at (1) the prominence of the publicity, including the frequency of coverage, the conspicuousness of the story in the newspaper, and the profile of the media source in the local community; and (2) the nature and likely effectiveness of the trial judge’s previous instructions on the matter, including the frequency of instruction to avoid outside materials, and how much time has elapsed between the trial court’s last instruction and the publication of the prejudicial material.” *Id.* Again, these factors demonstrate the unavoidable prejudice that Ms. Gutierrez-Reed would suffer if compelled to testify, since (1) Mr. Baldwin’s trial will be one of the most prominent trials in the history of the State, and (2) there is no way to issue an effective instruction to a venire that does not yet exist and has no reason or incentive to avoid media coverage of Baldwin’s trial. The measures taken to ensure a fair trial—*e.g.*, prohibiting jurors from watching news coverage of the trial or discussing the evidence or testimony they heard in court—would not be fully effective, because many jurors would have already discussed and consumed media regarding the testimony given at Mr. Baldwin’s trial and would have no way of knowing if, when, where, and how they had already been exposed to it. *See id.* (“It is significant whether the trial court merely told the jury to disregard such material or whether the jury was properly instructed to avoid looking at such material

altogether.”); *see also Harper v. People*, 817 P.2d 77, 83 (Colo. 1991) (en banc) (“A presumption that jurors follow court instructions not to permit themselves to be exposed to media reports, therefore, does not adequately take into account either the likelihood that a juror could acquire information without violating the court’s instructions or the difficulty of discovering whether jurors were exposed to such a report,” and “resolv[ing] the issue of prejudice on the basis of such a faulty presumption fails to provide adequate protection for the defendant’s constitutionally based right to a fair trial.”).

While the State would be barred from relying on her testimony down the road, there is no way to guarantee that the widespread publicity surrounding her testimony would not poison the jury in Ms. Gutierrez-Reed’s second trial. Even if Ms. Gutierrez-Reed does not utter a single incriminating statement at Mr. Baldwin’s trial, she would still face significant exposure. For example, if her testimony at Mr. Baldwin’s trial is later contradicted by evidence or testimony that emerges at her second trial, her credibility may be diminished in the minds of future jurors regardless of the nature of her testimony or the inferences the State attempts to draw from it. The same is true for counsel’s comments and arguments about her testimony during summation. *See State v. Lovett*, No. S-1-SC-34815, 2016 WL 3213174, at *5 (N.M. June 2, 2016) (when “comments [by counsel] materially altered the trial or likely confused the jury by distorting the evidence, the State has deprived the defendant of a fair trial, and reversal is warranted.”). No matter what happens at Mr. Baldwin’s trial, Ms. Gutierrez-Reed cannot be compelled to testify without suffering a constitutional injury. *See Archunde*, 1978-NMCA-050, ¶ 12 (Fifth Amendment “protects against compelled disclosures which the witness may reasonably apprehend could be used to deprive him of liberty.”).

Finally, if Ms. Gutierrez-Reed were compelled to testify at Mr. Baldwin's trial, the State would gain a tremendous strategic advantage over Ms. Gutierrez-Reed at any subsequent trial resulting from a reversal of her conviction or in the separate case before Judge Ellington. The State would essentially be given a free pass to cross-examine Ms. Gutierrez-Reed on any topic it wanted, free of risk, on a range of topics that it would have no other means to explore through other witnesses. This would allow the State to hone its trial strategy in a manner that would be unachievable under any other circumstances. Rather than leave the State and Ms. Gutierrez-Reed "in essentially the same position as if [Ms. Gutierrez-Reed] had retained [her] Fifth Amendment privilege and never testified," it gives the State a key strategic advantage that it would not otherwise have. For example, for the case before Judge Ellington, either the State or defense counsel, if permitted by the Court, could question Ms. Gutierrez Reed about this separate case, even on the elements of the crime. There would be no way to stop that constitutional injury if Ms. Gutierrez Reed were examined on the facts of the separate case, and she had to discuss that case, when she ordinarily would have the right not to remain silent through those trial proceedings. !

Whatever public interest that would be served by compelling Ms. Gutierrez-Reed to testify is significantly outweighed by the numerous forms of prejudice identified above, as well as the numerous ways in which the compulsion would violate or endanger her constitutional rights. The only circumstances under which it would be even remotely fair for Ms. Gutierrez-Reed to be compelled to testify at Mr. Baldwin's trial is if the State agreed not to retry her if her appeal is successful and to dismiss the separate prosecution before Judge Ellington. Absent such a stipulation from the State, the State's motion should be denied.

CONCLUSION

For the foregoing reasons, Ms. Gutierrez-Reed respectfully requests that the Court deny the State's Opposed Expedited Motion for Use Immunity for Hannah Gutierrez-Reed.

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 10th day of June 2024, to the counsel listed below:

Kari Morrisey, Special Prosecutor

Jason Lewis, Special Prosecutor

Erlinda Johnson, Special Prosecutor

/s/ Jason Bowles

Jason Bowles

Bowles Law Firm