STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO,

PLAINTIFF,

VS.

ALEXANDER RAE BALDWIN III,

DEFENDANT.

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

DEFENDANT ALEC BALDWIN'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO DISMISS THE INDICTMENT FOR FAILURE TO ALLEGE A CRIMINAL OFFENSE

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INTRODUCTION

The State's opposition brief confirms that the State does not—and cannot—allege that Baldwin was subjectively aware of a substantial risk that the firearm contained live ammunition. That defeats the State's case, because without a subjective awareness of such a risk, Baldwin could not have committed the crime of Involuntary Manslaughter. None of the State's arguments undercut that simple conclusion.

The State's principal substantive argument is that Baldwin violated industry guidelines on the use of firearms on set. That is not a colorable argument, as the State's own arguments make clear: The primary guideline that it invokes merely says that an actor ***may*** observe the armorer's examination of the gun—***not*** that the actor ***must*** do so—and the State's own expert has explained that the guideline is designed to give the actor peace of mind, not to ensure safety. In any event, the State has already conceded that "Baldwin's failure to . . . observe the armorer load the dummy rounds into the gun . . . ***was not a violation of the SAG safety bulletins***"—perhaps because, according to the State's own cited guidelines, the "right" to observe the loading of the gun applies to the actors *standing in the line of fire*, not the actor handling the gun.

But even if the guidelines meant what the State implies, that would be irrelevant. This is not a prosecution for violating industry guidelines. The charged offense of Involuntary Manslaughter requires that a defendant have a subjective awareness of a substantial and unjustifiable risk that his or her actions could cause the victim's death. If Baldwin did not believe that there was a risk that the firearm contained live ammunition—as the State has effectively conceded—then he cannot legally be guilty of that offense. Whether he failed to take prophylactic measures recommended by industry guidelines has no bearing on that question.

The State also makes a procedural argument that is legally unsound and ethically alarming. The State claims that it is free to disavow the factual representations that it made in open court in

prosecuting armorer Hannah Gutierrez-Reed for the same incident. That is dead wrong under basic due process principles, as explained below. *See infra* at 3-8. And it is deeply concerning that an office charged with wielding the prosecutorial authority of this State would claim that it can take starkly inconsistent positions about what happened—for example, telling the jury in the Gutierrez-Reed case that "everyone" on set believed the firearm was empty and that it was "incomprehensible" that live ammunition would be on set, and then turning around and suggesting that Baldwin was somehow aware of the possibility that live ammunition was brought to set and aware of the possibility that the armorer had put a live round into his gun right before announcing to everyone in the room that the gun contained only dummy rounds.

Finally, the State continues to advance the argument that Baldwin can be charged with Involuntary Manslaughter *regardless* of whether he had reason to believe the firearm might be loaded. But that is simply a legal argument designed to circumvent the undisputed fact that Baldwin—like everyone else in the church that day—could not even "comprehend" that the gun might be loaded. And that argument has no merit. The State does not point to a single case of Involuntary Manslaughter involving a firearm in which the "danger" presented by the firearm was premised on any other than the risk that it might be loaded.

The reality is this: Both the representations that the State made and the testimony that it elicited in Gutierrez-Reed's trial demonstrate that Baldwin was not subjectively aware of the risk that the "cold gun" he was handed contained live ammunition. Those representations—which happen to be true—bind the State now. As a result, Baldwin cannot be guilty of Involuntary Manslaughter. The Court should dismiss this case with prejudice for failure to allege a crime.

ARGUMENT

To sustain its charge of Involuntary Manslaughter, the State must allege that Baldwin was subjectively aware of a substantial risk that the firearm placed in his hand contained live

ammunition. *See* Mot. 8-11 (citing *State v. Henley,* 2010-NMSC-039, ¶ 16, 237 P.3d 103).[1] But based on the State's previous assertions of fact and the testimony it has elicited from its own witnesses, no reasonable jury could make such a finding. *See id.* at 11-16.

That the State now "disagrees" with, and won't stipulate to, the factual positions that it asserted at Gutierrez-Reed's trial is not a justifiable basis to sustain the charges against Baldwin. Because the *State's* asserted facts establish Baldwin's innocence as a matter of law, the Court should dismiss the indictment with prejudice.

I. THE FACTS REQUIRING DISMISSAL ARE NOT GENUINELY DISPUTED

A. The State Is Barred From Pursuing Factually Contradictory Theories In Different Criminal Trials

The State argues that the Court should deny Baldwin's motion because it "contains numerous asserted facts with which the State disagrees and to which the State does not stipulate."

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[1] The State "acknowledges the criminal negligence standard requires the prosecution to show that [Baldwin] had subjective knowledge of an actual risk of danger." No. D-0101-GJ-2023-00008, "State's Motion to Exclude Target's Requested Elements Instructions to the Grand Jury" (Dec. 1, 2023) ("Mot. to Exclude"), at 4. Nevertheless, the State continues to argue that it can sustain that burden *without* alleging that the "risk" Baldwin ignored was that the gun might be loaded. *See id.* at 7 ("[W]hether or not [Baldwin] had subjective knowledge of an actual risk that the firearm placed in his hand had been loaded with live ammunition has nothing to do with the other ways in which the State intends show [that Baldwin] negligently handled a firearm resulting in death."); *see also* Opp. 14 ("The defendant . . . claims that his case should be dismissed because he has chosen to define the *substantial and unjustifiable risk* as having subjective knowledge that the firearm was loaded with live ammunition. The State disagrees."). Tellingly, the State does not cite to a single legal authority to support this view. And it has never articulated what "other" risks Baldwin ignored—other than the possibility of a live round—that could endanger a human life. Because there is none. Indeed, in its instructions to the grand jury, the State defined the allegedly reckless act as the discharge of a firearm "during the production of a movie ***without first verifying the firearm contained no live ammunition*** and while the firearm was pointed in the direction of another." Ex. D (Transcript of 1/19/24 Grand Jury Proceeding ("GJ (Day 2)") at 97:7-16 (emphasis added). The reason the State gave that instruction is because it knows that the *only* danger in handling a firearm stems from the possibility that the gun might be loaded. The State's vague allusion to some "other" danger unrelated to whether the gun might be loaded has no support in the case law or in basic reality.

Opp. 1. Baldwin's motion, however, is based on the *State's* assertions, not Baldwin's. *See, e.g.*, Mot. 1 ("Even taking every allegation that the State has presented as true solely for the purposes of this motion, defendant Alec Baldwin could not have been aware of a substantial risk that his alleged actions could cause the death of Halyna Hutchins because he had no reason to believe that the firearm contained live ammunition."); *id.* 6 ("Based on the facts alleged or admitted by the State, no reasonable jury could conclude that Baldwin was subjectively aware of a risk that the firearm contained a live round.").

While the State is not necessarily "bound by its arguments made during the Gutierrez trial" (Opp. 10), it is bound—at the very least—by the ***factual positions*** that it asserted in presenting those arguments. Federal courts have consistently recognized "that due process prevents the prosecution from presenting ***inherently factually contradictory*** theories in different criminal trials." *Unite States v. Ganadonegro*, 854 F. Supp. 2d at 1097 (emphasis added) (citing *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *vacated on other grounds* 523 U.S. 538 (1998); *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (en banc) (Clark, J., specially concurring)). While this restriction may apply "only in limited circumstances" (Opp. 9), those circumstances are presented here.

For example, in *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), the State of Missouri used a witness statement to convict one defendant, then used a contradictory statement from the same witness in prosecuting a second defendant. *Id.* at 1050-52. "In short, what the State claimed to be true in [the first] case it rejected in [the second] case, and vice versa." *Id.* at 1050. In granting habeas relief to the first defendant (Smith), the Eighth Circuit concluded that "the State's zeal to obtain multiple murder convictions on diametrically opposed testimony render[ed] Smith's convictions infirm," because "the use of inherently factually contradictory theories violates the

principles of due process." *Id.* 1052. The court went on to admonish the prosecutors for pursuing factually inconsistent theories in their zeal to obtain as many convictions as they could:

> Even if our adversary system is 'in many ways, a gamble' . . . that system is poorly served when a prosecutor, the state's own instrument of justice, stacks the deck in his favor. The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth.

Id. at 1051; *see also Ganadonegro*, 854 F. Supp. 2d at 1097 (noting that *Smith* "provides a helpful factual illustration of a typical case where such a violation arises.").

The en banc Ninth Circuit has reached the same conclusion. In *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 U.S. 538 (1998), the court held that the State of California had violated a defendant's due process rights by arguing at trial that he alone committed a murder, while arguing at a subsequent trial that another defendant had actually committed the murder. *Id.* at 1058-59. The court reasoned "it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." *Id.* at 1059.

In still another case, the Eleventh Circuit evaluated two prosecution arguments for two defendants convicted of the same murder. On rehearing en banc, the majority declined to reach the inconsistent prosecution issue and granted relief on other grounds. *Drake v. Kemp*, 762 F.2d 1449, 1451, 1461 (11th Cir. 1985) (en banc). But in a special concurrence, Judge Clark addressed the due process issue. After recounting the evidence regarding what he concluded were totally inconsistent theories of the same crime, he explained that "the state cannot divide and conquer in this manner," because "[s]uch actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth." *Id.* at 1479.

Taken together, *Smith*, *Thompson*, and *Drake* stand for a simple proposition: The government may not prosecute separate defendants in different criminal trials using factually contradictory theories. The role of the prosecutor is to obtain convictions based on what really happened, not to obtain as many convictions as possible. *See, e.g.*, *Thompson*, 120 F.3d at 1058 ("The prosecutor, as the agent of the people and the State, has the unique duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and to administer justice."); N.D.A.A. Nat'l Prosecution Standard 1-1.1 ("The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth."). The State's main counterargument is non-responsive. It claims that *Ganadonegro* "supports the theory that there are cases involving multiple defendants wherein the prosecution is permitted to argue inconsistent theories in separate trials and the prosecution is not bound by the theories argued in a prior trial involving a different defendant." Opp. 10 (citing *Ganadonegro*, 854 F. Supp. 2d at 1109). That is true but irrelevant. Baldwin is not entitled to dismissal simply because the State has chosen to "argue inconsistent *theories*" against Baldwin and Gutierrez-Reed (Opp. 10) (emphasis added); he is entitled to dismissal because the State's inconsistent theories are indisputably based on inherently contradictory *facts*, which the State cannot ignore. *See* Mot. 2-5. Those are precisely the circumstances in which the *Ganadonegro* court recognized a "compelling argument for a due-process violation." *Id.* at 1109.[2]

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[2] The State argues that *Ganadonegro* "holds the opposite view than [what Baldwin] presents to the Court here." Opp. 9. That is not accurate. In fact, *Ganadonegro* explicitly recognizes the principle underlying the holdings of *Smith, Thompson*, and *Drake*. 854 F. Supp. 2d at 1097. But because *Ganadonegro* involved a *single* defendant who was being prosecuted a second time for the same offense, those holdings did not control. 854 F. Supp. 2d at 1109; *cf. United States v. Elmardoudi*, 611 F. Supp. 2d 872, 877 (N.D. Iowa 2007) ("Defendant is the only person charged in the Indictment. Therefore, by definition, there can be no due process violation by way of inconsistent prosecutorial theories.").

The State does not deny its previous assertions, or claim that new evidence has come to light to justify its apparent rejection of the factual positions it took just three months ago to secure the conviction of Gutierrez-Reed. Instead, it argues that the "facts underlying the charge against Mr. Baldwin are not stipulated to," and "absent a stipulation of facts, [Baldwin's] motion must be denied." Opp. 1, 9. But a stipulation is not necessary when the State is bound to its prior statements as a matter of due process. Nothing in the law supports the State's unexplained contrary view.

The State argues that one of Baldwin's cited cases, *Snyders v. Hale*, 1976-NMCA-110, 557 P.2d 583, is "wildly distinguishable from the instant case" because it involved a stipulation. Opp. 10. But *Snyders* merely stands for "the general proposition that statements or admissions made by an attorney in open court, during the trial of a case . . . are binding on his client." 1976-NMCA-110, ¶ 8. The State does not dispute this general proposition or that it applies with equal force to admissions, both written and oral. *See id.* (citing *Dubinsky v. Lindburg Cadillac Co.*, 250 S.W.2d 830, 833 (Mo. Ct. App. 1952) (involving an admission, not a stipulation)); *see also, e.g.*, *Springer v. Wasson*, 1919-NMSC-038, ¶ 7, 183 P. 398 ("Statements of fact made by counsel in a brief, if undisputed, can be considered by us the same as an admission made on the trial of the case."). And the State does not cite to a single authority to support its extreme view that it can take factually inconsistent positions against two different defendants in prosecutions arising from the same set of facts. The overwhelming weight of authority contradicts the State's position. *See Smith*, 205 F.3d at 1052 (granting habeas relief because "the State's zeal to obtain multiple murder convictions on diametrically opposed testimony renders [the defendant's] convictions infirm"); *In re Sakarias*, 35 Cal. 4th 140, 162, 106 P.3d 931, 946 (2005) (finding due process violation where prosecutor omitted evidence "for the purpose of making possible his use of inconsistent and irreconcilable theories" as between two defendants); *Drake*, 762 F.2d at 1479 (Clark, J., concurring) (holding

that the "flip flopping of theories of the offense was inherently unfair" where "the prosecution's theories of the same crime in the two different trials negate[d] one another" and were "totally inconsistent"); *Thompson*, 120 F.3d at 1056 (finding due process violation where closing arguments demonstrated the "glaring inconsistency between the prosecutor's theories, arguments, and factual representations at the two trials").[3]

Prosecutors need not "present precisely the same evidence and theories in trials for different defendants"—but prosecutors may not proceed based on two "inherently factually contradictory theories." *Smith*, 205 F.3d at 1052. Yet that is precisely what the State is attempting to do in this case.

B. The Undisputed Assertions To Which The State Is Bound Establish Baldwin's Innocence As A Matter Of Law

Having asserted facts in open court that establish Baldwin's innocence as a matter of law, the State cannot turn around and dispute those same facts in an effort to avoid dismissal of its inherently flawed prosecution. *Supra* at 3-8; *see also* Mot. 2-5.

The State is therefore bound by its assertion that "[t]he prospect of live ammunition landing up on a film set is *incomprehensible*." Ex. A (HGR Trial, Day 1) at 26:23-25 (emphasis added); *see also* Ex. B (HGR Trial, Day 10) at 115:18-20 ("The crew didn't believe there were live rounds on set."). It is bound by its assertion that Gutierrez-Reed—"the only person on the movie set in

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[3] The State further relies on *State v. Gomez*, 2003-NMSC-012, 70 P.3d 753, and *State v. Serna*, 2017 WL 3484745 (N.M. Ct. App. July 26, 2017), to argue that there are factual disputes in this case precluding dismissal. Opp. 11-13. Both cases are inapposite. Unlike in *Gomez*, where the New Mexico Supreme Court expressly based its holding on that fact that the State had "***not*** concede[d]" the crucial facts, *Gomez*, 2003-NMSC-012, ¶ 7 (emphasis added), here Baldwin's motion to dismiss rests on the State's concession of crucial facts that make it impossible as a matter of law for a reasonable jury to conclude that Baldwin was subjectively aware of a risk that the firearm contained a live round. In *Serna*, the State hadn't conceded facts that established the defendant's innocence as a matter of law. 2017 WL 3484745, at *5 (¶ 18).

charge of firearms"—told Dave Halls "cold gun" and that Halls then announced to the crew, "this is a cold gun," before the gun was handed to Baldwin. Ex. B (HGR Trial, Day 10) at 119:6-14. It is bound by its assertion that the crew "believed that [Gutierrez-Reed] was going to do her job" and "believed that she did her job." *Id.* at 115:18-20. And it is bound by its assertion that, in light of the foregoing facts, "everyone" on set "certainly assumed that there wasn't a live round" in the gun that was handed to Baldwin. *Id.* at 119:6-9.

Moreover, just as the State is barred from presenting "inherently factually contradictory theories in different criminal trials," *Ganadonegro*, 854 F. Supp. 2d at 1097, it may not elicit testimony from one of its witnesses "that is inconsistent with [that witness's] previous testimony elsewhere," *Smith*, 205 F.3d at 1052. *See also, e.g.*, *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959) (recognizing due process violation "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears"). The State is therefore bound by the testimony proffered by its expert, Bryan Carpenter, who told the jury that it is the armorer's responsibility "to ferret out any possible live rounds on a movie set," that it is not an actor's job to perform firearm safety checks by "taking the ammunition in and out [and] looking at it," and that it is not a violation of any safety protocols for an actor to decline to observe the armorer's loading of the firearm. *See* Ex. C (HGR Trial, Day 6) at 13:16-14:6 ("[S]ometimes you'll have an actor that says, 'nah, I don't want to see it' and they'll just brush it off. But as long as you've done your safety check with at least two other sources and moved through that process then you've done what you should've done."); *see also id.* at 23:9-24:1; *id.* at 102:21-23. Although many of those facts are in any event irrelevant to whether Baldwin had a subjective awareness of the risk that the firearm contained live rounds, *see infra* at 10-18, to the extent that this Court concludes that Baldwin's compliance with industry safety guidelines has relevance to whether he committed

Involuntary Manslaughter, the State may not contradict the testimony that it elicited to convict Gutierrez-Reed.

II. THE STATE'S REMAINING ASSERTIONS AND ARGUMENTS DO NOT ALTER THE FACTUAL OR LEGAL LANDSCAPE REQUIRING DISMISSAL

Aside from arguing that it is not bound by the assertions it made in open court to secure Gutierrez-Reed's conviction, the State points to a hodgepodge of unrelated factual issues and arguments in an attempt to avoid dismissal. Those issues and arguments largely related to whether Baldwin complied with industry guidelines in his handling of the firearm. But they are all irrelevant. Even taking all of the State's assertions as correct for the sake of argument, they do not establish that Baldwin was subjectively aware of a risk that the gun might be loaded, leaving aside the fact that there is no plausible basis for such an allegation given the State's binding admissions at Gutierrez-Reed's trial.

A. Baldwin's "Failure" To Witness The Loading Of The Gun Does Not Preclude Dismissal

The State claims that Baldwin was reckless because under industry guidelines, he had a "right" to witness the loading of the firearm—which "would/should have consisted of [Gutierrez-Reed] demonstrating that all rounds to be loaded into the gun were inert"—and he "fail[ed] to assert" that right. *See* Opp. 6-8 ("The charge against Mr. Baldwin is based on his failure to assert his right to witness the loading of the weapon."). Again, this theory is undermined by the State's own allegations.

As an initial matter, the safety guidelines cited by the State make clear that the "right" to witness the loading of firearms applies to "actor[s] who [are] required to stand near the line of fire," not the actor who is handling the firearm. *See* State's Ex. 7 (Safety Bulletin #1) at 4 of 4 (¶ 12) ("The Property Master (or, in his/her absence, a weapons handler . . .) is responsible for . . . Ensuring that any actor ***who is required to stand near the line of fire*** be allowed to witness

the loading of the firearms."). And even if Safety Bulletin #1 did give Baldwin the "right" to witness the loading of the firearm, the State has already conceded that his "failure" to do so did ***not*** violate the safety guidelines. *See* No. D-0101-CR-2024-0013, "State's Response to Defendant's Motion to Dismiss the Indictment" (April 5, 2024) ("Mr. Baldwin's failure to exercise his option to simply observe the armorer load the dummy rounds into the gun and visually and/or audibly demonstrate to the actor that the rounds are safe, inert dummy rounds ***was not a violation of the SAG safety bulletins*** but it was a violation of New Mexico law.").

More importantly, the argument that Baldwin acted recklessly by declining to participate in the loading and/or inspection of the firearm cannot be squared with the fact that Gutierrez-Reed was "the autonomous decision-maker" with "no supervisor when it comes to weapons and gun safety on the movie set." Ex. B (HGR Trial, Day 10) at 70:18-23, 72:1-2. Nor can it be squared with the State's assertion that "nothing would have changed" if Gutierrez-Reed *had* performed "an additional safety check," because her "safety checks didn't consist of pulling the dummy rounds out of the cylinder [and] shaking them in front of the actor and the assistant director." Ex. B (HGR Trial, Day 10) at 75:15-18. The State cannot argue that Baldwin acted recklessly by failing to witness a safety check that the State concedes would not have led to the discovery of the live round in any event. *See* Ex. B at 75:9-15 ("Mr. Bowles is going to argue to you that if Mr. Halls had just called Ms. Gutierrez back into the church, she would have done an additional safety check and that live round would have been found. Well, for heaven's sakes, we all know that if she had been called back into the church for an additional safety check, nothing would have changed.").

Finally, the argument that Baldwin acted recklessly by *failing* to witness a negligent safety check makes no sense. To demonstrate that Baldwin was subjectively aware of the possibility that the gun was loaded, the State would have to allege that he *did* see Gutierrez-Reed perform an

incomplete safety check. Instead, the State alleges that he "skipped" the safety check—which the State's own expert said is common among actors—and therefore had no reason to know that the safety check was done improperly. *See* Opp. 6; Ex. C (HGR Trial, Day 6) at 14:1-6 ("[S]ometimes you'll have an actor that says, nah, I don't want to see it, or they'll just, you know, brush it off. But as long as you've done your safety check with at least two other sources and moved through that process, then you've done what you should have done."); *id.* at 23:9-24:1 (testifying that it is "rare" for actors to "tak[e] the ammunition in and out" to "look[] at it"). To the contrary, the State's own assertions of fact demonstrate that Baldwin had every reason to believe the gun was empty: He "failed to witness" Gutierrez-Reed's negligent loading of the firearm and the negligent safety check she performed with Halls, but was nonetheless present when Gutierrez-Reed and/or Halls announced that the gun was "cold." Ex. B (HGR Trial, Day 10) at 119:6-9.

Needless to say, if Baldwin *had* witnessed Gutierrez-Reed's safety check, the State would be arguing that it was reckless of him to handle a weapon that he "knew" hadn't been properly checked. But instead of faulting him for what he did know, the State seeks to hold Baldwin criminally liable for what he *didn't*, essentially flipping the involuntary-manslaughter burden on its head. *See, e.g.*, *State v. Smith*, 2021-NMSC-025, ¶ 19, 491 P.3d 748 (defendant's claim that his actions were justified "does not impose a requirement that Defendant must *prove*" as much," because "[s]uch a requirement would impermissibly shift the burden to the Defendant to prove the lawfulness of his conduct, which would disturb a fundamental principle of criminal law—a defendant is innocent until the prosecution proves every disputed element of the alleged crime beyond a reasonable doubt"). To sustain a charge of Involuntary Manslaughter, the State must allege that Baldwin *was* aware of a "substantial" risk that the gun might be loaded, not that Baldwin can't prove that he *wasn't*. *See Henley*, 2010-NMSC-039, ¶ 17; *State v. Cardenas*, 2016-NMCA-

042, ¶ 20, 380 P.3d 866. The State cannot sustain its charge by alleging that Baldwin was reckless for failing to *disprove* what every other person on set believed to be true: that there were no live rounds on set. Ex. A (HGR Trial, Day 1) at 26:23-27:1-4; Ex. B (HGR Trial, Day 10) at 119:6-9, 115:18-20; Ex. E (transcript of 12/12/23 deposition of Dave Halls) at 51:4-7; Ex. F (transcript of 11/16/21 OSHA interview of J. Souza) at 41:20-25; Ex. G (transcript of State's 9/8/23 interview of J. Souza) at 35:24-36:4.

B. The State Cannot Meet The Subjective Knowledge Requirement By Alleging What Baldwin *Should* Have Known Based On Information He Didn't Have

Unable to allege that Baldwin was actually aware of a substantial risk that the firearm was loaded, the State attempts to create an inference that Baldwin "should have known" there might be live rounds on set based on information that was indisputably unknown to Baldwin at the time. The State does not allege, for example, that Baldwin had witnessed Gutierrez-Reed perform an improper safety check on other occasions, and so it cannot allege that Baldwin had reason to believe that her loading or checking the weapon posed a risk to those around her. Instead, the State points to *other* witnesses who purportedly expressed concerns (after the fact) that Gutierrez-Reed "was not adhering to safety protocols." Opp. 3-4.[4] Critically, however, the State does not allege that a single one of these witnesses ever made Baldwin aware of his or her purported concerns contemporaneously. And although the State points to two alleged instances in which a producer (Gabrielle Pickle) received complaints about Gutierrez-Reed's performance—first regarding "long guns . . . being left unattended" and then regarding a pair of "accidental discharges" that took place five days before the fatal accident (Opp. 3)—the State does not allege that Baldwin was ever made aware of either of these incidents (because multiple witnesses have confirmed that he was not).

[4] True to form, these statements—along with dozens of other facts asserted throughout the State's response, which are irrelevant to deciding this motion—are not supported by any citations.

In any event, even if Baldwin had been aware of these issues (which he indisputably wasn't), two isolated incidents that have nothing to do with dummies or live rounds would not have given Baldwin any reason to suspect there could be live rounds on set—what the State told the jury was an "incomprehensible" possibility. This is confirmed by the State's own assertion that the crew members in the church on October 21—several of whom *had* witnessed the two previous accidental discharges—still "didn't believe there were live rounds on set," and still believed that Gutierrez-Reed "did her job" to ensure there never would be. Ex. B (HGR Trial, Day 10) at 115:18-20. *Compare, e.g.*, Ex. H (HGR Trial, Day 3) at 179:7-180:4 (R. Addiego testifying that he was standing "within feet" of the first accidental discharge on October 16), *with id.* at 203:19-204:14 (Addiego testifying that he "went back to focusing on [his] task at hand" in the church on October 21, because Dave Halls "called out 'Cold gun' or 'Cold weapon,'" which is what Addiego "need[ed] to hear" to feel safe). After asserting that no one in the church had any reason to believe there were live rounds on set, the State cannot now argue that Baldwin—and only Baldwin—"knew or should have known that [Gutierrez-Reed] was not to be entirely trusted," that he "needed to have confirmed this with his fellow producers" that Gutierrez-Reed was a "qualified, professional armorer who adhered to standard industry safety protocols," and that it was negligent of him "to rely on the armorer and the first assistant director to perform their jobs properly." Opp. 3.

The State argues that Baldwin should have known what no one else knew at the time because, as the person with "the gun in his hand," he was "not similarly situated" to the others in the church. Opp. 6. But that has nothing to with whether the State can plausibly allege that Baldwin had subjective knowledge of a risk that there were live rounds in the gun. Rather, it has to do with the State's assertion that, as the person handling the gun, Baldwin incurred an additional

responsibility to "witness the loading of the firearm." Opp. 6 (citing Safety Bulletin #1). But Safety Bulletin #1 does not confer such a right or responsibility on the actor. Rather, as explained above, it tasks the *Property Master* with "[e]nsuring that any actor ***who is required to stand near the line of fire*** be allowed to witness the loading of the firearms," and says ***nothing*** about the gun ***handler's*** right to inspect or witness the loading of the gun. State's Ex. 7 at Page 4 of 4 (¶ 12). Indeed, the State's own expert testified at Gutierrez-Reed's trial that it is not uncommon and does not violate any safety protocols for the actor handling the weapon to "brush . . . off" such an inspection. *See* Ex. C (HGR Trial, Day 6) at 23:9-24:1; *id.* at 13:16-14:6 ("[S]ometimes you'll have an actor that says, 'nah, I don't want to see it' and they'll just brush it off. But as long as you've done your safety check with at least two other sources and moved through that process then you've done what you should've done.").

The State further argues that Baldwin should have known the gun might contain a live round because he "understood that dummy rounds are made to look exactly like live rounds, thereby increasing the possibility that live rounds could be mixed in with dummy rounds and not be easily distinguishable or discovered by a less than adequate safety check between the armorer and the assistant director." Opp. 5. But again, the claim that Baldwin should have known that "live rounds could be mixed in with dummy rounds" contradicts the State's unequivocal assertion that such a mix-up is "*incomprehensible*." Ex. A (HGR Trial, Day 1) at 26:23-25.[5] And even if

[5] The State's unsupported claim that Baldwin—after the fact—"suspected and asked whether [Gutierrez-Reed] co-mingled live rounds with dummy rounds" (Opp. 5) is equally irrelevant. What matters is Baldwin's state of mind *before* the gun went off—when it was "incomprehensible" that there would be live rounds on a movie set—not after the fact, when it became clear that the "unfathomable" had occurred. Ex. E (transcript of 12/12/23 deposition of Dave Halls) at 51:4-7 ("[T]he idea that there would ever be a live round of ammunition on a movie set was just unfathomable. It was uncomputable. It was just no way that that could happen."). Indeed, the presence of live ammunition on a film set was so unfathomable that even *after* Souza was told by doctors that they had removed a real bullet from his shoulder, he told them "that wasn't possible"

the possibility of live rounds getting mixed in with dummy rounds *were* "comprehensible" to Baldwin (which it wasn't), the State is stuck with its admitted fact that "[i]t's the armorer's responsibility" to "ferret out any possible live rounds on a movie set," and that the crew in the church that day "believed that [the armorer] did her job." Ex. C (HGR Trial, Day 6) at 102:21-23; Ex. B (HGR Trial, Day 10) at 115:18-20. After admitting these facts, the State cannot plausibly assert that it was *Baldwin's* responsibility to "ferret out" any possible live rounds on set, or that Baldwin had any reason to doubt that Gutierrez-Reed "did her job" that day. And even if it could plausibly assert these facts, it cannot do so now without creating an "inconsistency . . . at the core of [its] cases against defendants for the same crime," thus violating Baldwin's due process. *Smith*, 205 F.3d at 1052.

In sum, the State claims that the "substantial and unjustifiable risk disregarded by [Baldwin] included but was not limited to" the following four items:

(1) Baldwin "knew he had a real gun in his hand."

(2) Baldwin "failed to participate in a standard and custom safety check wherein the armorer demonstrates the inertness of each live round."

(3) Baldwin "understood that dummy rounds and live rounds are made to look identical and can easily be co-mingled."

(4) Baldwin "violated decades-old guns safety and set safety standards by pointing the gun at a person, cocking it, and pulling the trigger."

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because they were on a movie set. *See* Ex. F (transcript of 11/16/21 OSHA interview of J. Souza) at 41:20-25 ("They kept telling me that there was a bullet in me, and I kept explaining to them that that wasn't possible, because it had to have been a blank because there's no reason under heaven or earth that there would ever be a bullet on a movie set. It's just not possible. It's just – it's inconceivable that that could be."); *see also* Ex. G (transcript of State's 9/8/23 interview of J. Souza) at 35:24-36:4 ("[T]he doctor kept saying there's a bullet in your shoulder. And I kept saying, 'No, you don't get it. I was on a movie set.' And he kept saying no – and then he'd come back and talk about the bullet. [And] I go, 'You got to stop saying that. It's not possible.'").

Opp. 14. As explained above, however, the first, third, and fourth points are contradicted by the facts, which the State does not (and cannot) genuinely dispute, that the presence of live ammunition on set was "incomprehensible" (Ex. A (HGR Trial, Day 1) at 26:23-25) and that "nothing would have changed" if Gutierrez-Reed *had* performed "an additional safety check," because her "safety checks didn't consist of pulling the dummy rounds out of the cylinder [and] shaking them" (Ex. B (HGR Trial, Day 10) at 75:12-19). And the second point is contradicted by Safety Bulletin itself and the testimony of the State's own gun safety expert. *See supra* at 9-11.

Finally, after striving mightily to reconcile the factual positions it took to secure Gutierrez-Reed's conviction with the contradictory positions it now wishes to take to sustain charges against Baldwin, the State ultimately boils its theory down to a single fact: that "guns kill and everyone, including Mr. Baldwin, knows it." Opp. 14. The problem with that theory is that guns kill only when loaded with live ammunition, and the State has already admitted that by the time Gutierrez-Reed and/or Halls announced "cold gun" and handed the gun to Baldwin, *nobody* believed the gun Baldwin was holding was capable of discharging anything, let alone a live bullet. It was a prop on a movie set, and the actor had been told by the responsible professionals that it held no live ammunition.

While simply alleging that "guns kill" may be sufficient to satisfy the subjective knowledge requirement in some Involuntary Manslaughter cases involving firearms, it is insufficient here, in the context of a prop on a movie set, where the State has admitted that the risk that the gun contained live ammunition—and therefore the risk of death—was "incomprehensible." *See* Opp. 14 ("It is a substantial and unjustifiable risk to point a real gun at another human being, cock it and pull the trigger under ***nearly*** all circumstances"). This is not the *Xavion* case, where the State could allege that the teen knew the AR-15 he was holding might have a bullet in the chamber.

Mot. 9, 10, 13 (citing *State v. Xavion M.*, No. A-1-CA-39411, 2021 WL 5213110 (N.M. Ct. App. Nov. 9, 2021)). It is not the *O'Berry* case, where the defendant's friend handed her a gun and she pointed the gun at his face and pulled the trigger without *anyone*—let alone an industry professional—claiming to have verified that it was empty. Mot. 10 (citing *O'Berry v. State*, 348 So. 2d 670 (Fla. Dist. Ct. App. 1977)).[6] This is a case where, according to what the State told the jury, everyone on set believed that there was no chance the firearm contained live ammunition. The State simply cannot, as a matter of either law or logic, square that admission with the claim that Baldwin was subjectively aware of a ***substantial*** risk that death could result from his actions.

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The State's fundamental interest in criminal prosecution is "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). That means while the state "may strike hard blows" it "is not at liberty to strike foul ones." *Id.* The State cannot prosecute Baldwin when it has effectively admitted that he was not subjectively aware of a substantial and unjustified risk of death when he handled the weapon. And while courts are understandably reluctant to dismiss a criminal prosecution as a matter of law, the Judiciary plays a critical gatekeeping role in ensuring that prosecutors do not misuse their authority by charging

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[6] The State does not bother to address either of these cases, which Baldwin cites in his motion and which demonstrate why the case against Baldwin is an aberration. If the State's position were taken to its logical conclusion, it would mean Baldwin had a legal duty to check the gun even if *50* armorers had checked it right before it was handed to him. It would mean a driver with faulty brakes could be charged with Involuntary Manslaughter for running a stop sign 30 seconds after leaving a professional mechanic who told her that the brakes had been fixed. It would mean a train conductor could be charged with Involuntary Manslaughter for causing a collision after the dispatcher told her the coast was clear. And so on. In each of these scenarios, the charges would be unjustified and subject to dismissal. *See State v. Conner*, 292 N.W.2d 682, 686 (Iowa 1980) ("[C]onvicting someone of involuntary manslaughter . . . when that individual was not conscious of the grave risks of his acts is unjust. It stigmatizes and punishes one who is morally blameless.").

innocent conduct or advancing factually inconsistent theories of guilt for different defendants. The Court should dismiss this prosecution with prejudice.

CONCLUSION

For the foregoing reasons and those stated in the original motion, the Court should dismiss the indictment with prejudice because the State has failed to allege a criminal offense.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2024, a true and correct copy of the foregoing brief was emailed to opposing counsel.

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