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 SUPPORT OF MOTION TO DISMISS THE INDICTMENT WITH PREJUDICE BASED ON THE STATE'S DESTRUCTION OF EVIDENCE

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PRELIMINARY STATEMENT

There is no dispute that the State knowingly destroyed the most important piece of evidence in the case without taking even the most basic steps to document its original condition. Defendant Alec Baldwin now has no ability to examine or test the gun in its original state to disprove the government's theory that he pulled the trigger on the day of the accident.

In trying to explain how that conduct comports with basic notions of due process and fair play, the State does not dispute almost any of the key facts: that defendant Alec Baldwin repeatedly told investigators that he had not pulled the trigger and the gun just "went off"; that Detective Hancock of the Santa Fe Sheriff's Office (SFSO) ordered testing for the express purpose of disproving Baldwin's exculpatory statements; that the SFSO knew ahead of time that the FBI testing would destroy the firearm; that neither prosecutors nor law-enforcement agents made any effort to document the firearm's internal components before destroying it or even notify Baldwin about their plans; and that whether the firearm could discharge without the pull of a trigger is central to the State's theory of guilt.

At the same time, the government selectively omits critical, but equally indisputable, facts:

New Revelations by State's Expert. The State's brief ignores a stunning concession by its own expert—a concession that the defense learned about only recently during the expert's interview. As Baldwin's opening brief explains, the firearm shows telltale signs of preexisting modifications, such as smoothing and toolmarks on the hammer and sear. Although the State has (implausibly) attributed those alterations to the FBI testing, without any support, the State's own expert has now rejected that claim. As the defense learned for the first time in the May 21, 2024 interview of one of the State's firearm experts, Michael Haag, last year the State performed a supplemental examination of the trigger and sear—critical components of the firearm designed to prevent it from misfiring. The purpose of that supplemental examination was to identify the origin

of certain "unexplained toolmarks present on the working surface and sides of the evidence trigger/sear." Ex. 1 (8/31/23 Haag Report) at 2. A previously undisclosed August 2023 report, which the State did not disclose to defense counsel until Haag revealed its existence in the interview, concludes that the source of those "diagonal toolmarks of an unknown origin" remain just that—unknown. *Id.*[1] Critically, the report admits that it is "***unlikely*** . . . ***that these toolmarks are the result of the damage incurred during the FBI's impact testing***" and that they "do not appear to original manufacturing marks or use and abuse toolmarks based on [their] irregular orientation." *Id.* (emphasis added).

These admissions leave the State with no colorable argument that its knowing destruction of the firearm satisfied due process. It is clear that the internal components of the firearm designed to prevent accidental discharges had likely been modified before the accident. But because of the State's needless destruction of the firearm, the defense can never examine and test the gun to determine whether those modifications corroborate Baldwin's statements that he did not pull the trigger.

Experts' Admissions About the Testing. The State's own experts have admitted that the FBI testing—basically, hitting the gun with a mallet—was inappropriate, unnecessary, and untethered to the circumstances of the case. The FBI failed to conduct tests that would have made sense here, such as the "push-off" test. *See* Mot. 9. Indeed, Detective Hancock and the SFSO did not provide the FBI with details about the facts and circumstances of the case that might have informed their testing decisions.

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[1] This is the third time the State has failed to provide an expert's statement in advance of pretrial interviews, in violation of its disclosure obligations.

Nor is it clear the FBI preserved every piece of the broken gun in its testing. Lucien Haag noted that it appeared a piece of the hammer had been "shaved off," but no fragment of that critical component had been included when the FBI returned the firearm. It is impossible to know whether that loss is attributable to the FBI or the SFSO. What is certain, however, is that the firearm was returned in an incomplete state, on top of having been destroyed in unnecessary testing.

Experts' Lack of Knowledge. The State's arguments obscure that neither its own experts nor the FBI examiner knows the condition of the firearm on October 21, 2021, and they have each admitted as much. They took no pictures of the internal components and failed to video-record the FBI's testing, because prosecutors and state investigators never asked for those basic steps to preserve this critical evidence. In short, the State's actions have ensured that no witness can testify about the firearm's original condition.

Detective Hancock's Knowledge of Baldwin's Statements. Detective Alexandria Hancock, the lead investigator in the case, knew that Baldwin had claimed that the firearm "went off" and that he did not pull the trigger. *See* Ex. 2 (SFSO Report of 10/21/21 Interview of Alec Baldwin) ("Alec advised in the scene he slowly takes the gun out of the holster, then very dramatically turns it and cocks the hammer, which is when the gun goes off."). The State cannot truthfully maintain that investigators never knew Baldwin was claiming the firearm had malfunctioned. *See* Opp. 15-16. Moreover, Detective Hancock also knew that other people on the movie set had told investigators in the immediate aftermath of the accident that the gun just "went off." Mot. 16.

Timeline and Purpose of Testing. The State also ignores that the FBI conducted the testing *six months* after the accident and that Detective Hancock requested the testing to "disprove" Baldwin's statement that he had not pulled the trigger. (The State's assertion that the testing was

"not part of the original request" by the SFSO (Opp. 3) is irrelevant.) The exculpatory value of the firearm was not only obvious, it was acknowledged by the State's key witness who set out to investigate it.

No Notice. The State fails to address that Detective Hancock, once informed that the proposed testing she sought could destroy the firearm, authorized the testing without providing any notice to Baldwin or others identified at the time as "persons of interest."

In short, if this case does not meet the standard of a due process violation for the destruction of evidence, then no case will. The State knowingly ordered destructive testing on the most critical piece of evidence in the case without making any effort to document its internal condition so that the defense would have access to that information. The testing method was not relevant to the circumstances of this case, and the State failed to conduct more appropriate tests that can now never be performed. The indictment should therefore be dismissed with prejudice. At minimum, the Court should instruct the jury that Baldwin did not pull the trigger and prohibit the State from introducing evidence or argument suggesting that he did. To the extent the Court believes any factual disputes are relevant to resolving this issue, it should hold an evidentiary hearing.

ARGUMENT

The State's intentional destruction of the firearm without documenting its original condition violated Baldwin's federal due process rights for two distinct reasons. First, the government violates due process if it destroys evidence that "possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489 (1984). Second, the government violates due process if it in bad faith destroys evidence that is "*potentially* useful," even if the evidence is not apparently exculpatory. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (emphasis added). The State's

intentional destruction of the firearm also violates New Mexico law, because either the original state of the firearm was material and its destruction caused prejudice, or because the State acted intentionally or in breach of a legal duty. For each of these separate reasons, this prosecution should be dismissed with prejudice.

I. THE STATE FAILS TO SHOW THAT THIS PROSECUTION COMPORTS WITH DUE PROCESS

A. The State Violated The *Trombetta* Standard

This Court need not probe the government's intent and bad faith to resolve the due process question presented here. Under the objective *Trombetta* standard, the government's destruction of the firearm without first documenting its internal condition violated due process. The firearm was "apparently exculpatory"—the whole point of the FBI testing was to try to dispel its exculpatory value—and the State's failure to document its internal condition leaves the defense with no comparable evidence to rebut the State's theory that Baldwin must have pulled the trigger.

1. The State's narrow understanding of the "apparently exculpatory" standard would mean that a defendant could never prevail

As Baldwin's motion explains, the firearm has exculpatory value that was readily apparent to law-enforcement agents before they destroyed it. The centerpiece of the State's allegations is that Baldwin pulled the trigger, and the State knew that Baldwin had repeatedly denied that he had done so—saying that the gun just "went off." Mot. 16 (citing SFSO Report of statements by R. Addiego, T. Gandy, K. Kuehn, D. Curtin, R. Price, and R. Gandy). Whether the firearm was capable of discharge without a pull of the trigger was therefore the critical exculpatory question in this case. And indeed, the State does not dispute that its entire purpose of testing the firearm was to "figure out how to disprove" Baldwin's statement that he did not pull the trigger. Ex. 4 (Gutierrez-Reed Trial ("HGR Trial"), Transcript of 2/27/24 Proceedings ("Day 4")) at 146:2-9.

It is also clear that the State had strong and obvious reasons to believe the firearm might be defective: Several witnesses said that it just "went off," and the gun had telltale signs of modifications or defects. In fact, the State knew by the time it authorized testing that other accidental discharges had occurred on set, and that some witnesses had reported that the firearms had "hair triggers." Ex. 5 (Transcript of 11/1/21 OSHA Interview of T. Gandy) at 23:10-5, 26:6-8. But, as the State's experts themselves have admitted, the FBI's testing was inappropriate, unnecessary, and untethered to the circumstances of the case. Ex. 4 (HGR Tr. Day 4) at 111:4-20. The State has failed to provide a justification for the type of aggressive, destructive testing performed given the firearm's obvious exculpatory value. Because there isn't one.

In response, the State argues that the pre-destruction state of the firearm is "indeterminate," and because Baldwin cannot produce "objective evidence regarding the actual signs of modification and alteration" on the day of the accident, he has no due process claim. Opp. 10. That makes no sense. The reason Baldwin cannot establish the pre-testing state of the firearm is because the State destroyed it. The State's argument is thus a blueprint for the government to destroy critical evidence with impunity: Under the State's view, the only defendants who could succeed on *Trombetta*'s first prong (apparently exculpatory evidence) would be those who have "objective evidence" of the exculpatory value of the object that the government destroyed. But those defendants would then always fail the second prong of *Trombetta* because they would have comparable evidence. No defendant could ever prevail under that standard. *See also* Opp. 7 (claiming incorrectly that *Trombetta* requires that the evidence be "actually exculpatory").

That is not the law. The legal rule is that where a defendant or others inform the government that evidence is exculpatory, the government is on notice of its exculpatory value and must take steps to preserve it—at a minimum, through documentation before destruction. *See*

United States v. Cooper, 983 F.2d 928, 929-931 (9th Cir. 1993); *United States v. Soriano*, 401 F. Supp. 3d 396, 404-05 (E.D.N.Y. 2019); *State v. Blackwell*, 537 S.E.2d 457, 461 (Ga. Ct. App. 2000). Here, both Baldwin and other witnesses said the gun had just "went off," and Baldwin was adamant that he had not pulled the trigger. That clearly alerted the State that it needed to preserve the evidence—at least by documenting the firearm's internal condition before running destructive tests. The State cannot escape that obligation by saying that, as the result of the very testing in question, Baldwin cannot prove with certainty the original state of the firearm.

The State also makes the strange argument that it was free to destroy the firearm because Baldwin did not explicitly tell law enforcement that the internal components of the gun were modified or altered. But Baldwin is not a firearms expert. He is an actor, and he said the gun "went off" without his having pulled the trigger. That unmistakably conveyed that the gun was defective—as the State understood when it ordered the gun to be tested.

Equally strange is the State's contention that the defense cannot "show how . . . the 'file marks' or smoothed parts would serve as direct evidence that [Baldwin] did not pull the trigger." Opp. 10. Of course, a defect in the trigger mechanism of the firearm is not "direct evidence" like eyewitness testimony. But it is powerful evidence of innocence. The parts of the gun that show signs of modification—the hammer and the sear—are precisely the parts that prevent the gun from going off without the trigger being pulled. If those defects existed at the moment of the accident, they would powerfully corroborate the assertion that Baldwin did not pull the trigger, seriously undermining the State's theory of the case.

Notably, the State has acknowledged that it previously dismissed all criminal charges against Baldwin because it believed it was possible that the gun was modified and, therefore, that Baldwin did not pull the trigger. No. D-101-CR-2024-00013, State's Response to Defendant's

Motion to Dismiss the Indictment (April 5, 2024), at 15-17. That alone demonstrates how critical this issue is to this prosecution—and how severely Baldwin has been prejudiced by the State's destruction of the firearm. Put that in context: the State, by its conduct of dismissing the case, conceded that it would not bring this prosecution if Baldwin could prove the gun was modified. Yet the State's intentional and inexplicable actions have ensured that we can never know whether those defects were present on October 21, 2021.

That is also why the State's claim that "defendant failed to present any evidence that the smoothed parts and file marks actually caused the revolver to discharge without a pull of the trigger" is so cynical. Opp. 10. The defense cannot marshal evidence that the defects "actually caused" the gun to fire, because the State prevented the defense from examining or testing the firearm in its original state. But if the parts that prevent the gun from accidentally discharging were seriously defective at the time of the accident, that would almost certainly establish *reasonable doubt* of guilt. And that is sufficient to meet the "apparently exculpatory" standard.

The State's other points are irrelevant. For example, the State says that Baldwin "admi[tted] that the gun worked without issue on the days before October 21st and properly test fired in later testing." Opp. 11. But a defective gun does not constantly misfire. Otherwise all defects would be identified immediately. The government also asserts that "[a]t least one witness observed his finger on the trigger" during the accident (without identifying the witness). *Id.* But that is exactly the point: The government plans to present a case that relies on the claim that Baldwin pulled the trigger, but it intentionally deprived the defense of the evidence that could refute that allegation. And it has done so without any explanation whatsoever for why investigators did not at least document the internal condition of the firearm before destroying it.

This is not a case of mere speculation or conjecture, and the cases cited by the State on that point all involve facts and circumstances far afield from those before this Court. For example, in *United States v. Martinez*, 744 F.2d 76, 79-80 (10th Cir. 1984), the defendant argued that evidence that was accidentally destroyed might have contained a range of exculpatory information, from differing blood groups, to differing prints, to the non-explosive nature of a device. Similarly, in *United States v. Turner*, 287 F. App'x. 426, 432 (6th Cir. 2008), the defense's own expert acknowledged that there was nothing about the boot print at issue that would have made its exculpatory value apparent. Here, the potential exculpatory value was not only obvious from the statements by Baldwin and others—it was overtly acknowledged by the State as the very reason to conduct further testing. And that value continues to be apparent today: The State's experts remain unable to explain file marks indicative of potential modification on the trigger, but have concluded that the FBI testing likely did not cause it (a finding they made in August of 2023, but that was only disclosed to the defense in the last weeks). The firearm's exculpatory value was therefore apparent before the State destroyed it, without documenting its internal condition.

2. Comparable evidence is not reasonably available

The defense does not have any evidence available that is comparable to the original, unaltered firearm. That means both that the defense cannot conduct its own tests on the firearm *and* that the defense cannot adequately respond to the State's claim that the FBI testing caused the modifications to the hammer and the sear. Mot. 18-19. That satisfies the second factor under *Trombetta*. Through the State's own actions—both its destruction of the gun and the failure to first document its internal condition—the State has prevented the defense from accessing this critical evidence.

The State asserts that the FBI's testing and the State's experts' testimony provide an adequate substitute for the original firearm. But that is nonresponsive to the problem that the

State's actions created. The defense should not be required to blindly trust the State's paid experts, who, in any event, did not examine the internal components of the firearm in its original state. And there is no evidence to substantiate the State's implausible claim that striking the gun with a mallet somehow smoothed out the hammer and the sear. In fact, the FBI's testing did not make any effort to replicate the circumstances under which the revolver fired, because state investigators did not inform the FBI about those circumstances. *See* Ex. 6 (Transcript of 4/25/2024 Interview of B. Ziegler) at 30:14-22, 37:2-38:16; Ex. 7 (Transcript of 5/10/2024 Interview of E. Small) at 13:3-9, 18:5-15; *see also id.* at 14:4-17 (noting that all substantive communication, including all communication that would "impact the exam plan," would be reflected in the communication log). No communications regarding the circumstances of the firing of the gun were ever included on any log, nor could any witness interviewed recall such communications. While the State's experts have described a different test that would have been appropriate and would not have resulted in damage (the "push-off" test), that is not the test the State elected to carry out.

Moreover, recent untimely disclosures from the State have revealed that the hammer and the sear *do* have unexplained modification or damage not apparently attributable to original manufacture or the FBI's testing. *See supra* at 1-2. Specifically, on May 21, 2024, the State disclosed—almost *a year and a half* after it was created—a third supplemental report that one of its firearms experts, Lucien C. Haag, which was "prepared for [Special Prosecutors] Kari T. Morrissey and Jason J. Lewis" on or before August 31, 2023. Ex. 1 at 1. The report was not known to Baldwin or disclosed by the State until Mr. Haag's son, Michael Haag, alluded to it during a pre-trial interview conducted on May 21. Special Prosecutor Morrissey's only explanation for why the State did not disclose the report sooner is that she "intended to forward it for disclosure" the day it was received but, for some unexplained reason, but that she "can see

from [her] email that [she] did not."[2] Notwithstanding the report's exculpatory conclusions, the State's experts maintain that it is impossible to determine today whether and to what extent that damage contributed to the malfunction of the firearm on October 21, 2021. Ex. 1 (8/31/23 Haag Report). Put simply, because of the State's deliberate decision to conduct destructive testing on the firearm without documenting its original condition, there is not a single witness who can offer comparable evidence (or any evidence at all) as to the condition of the firearm's internal components on the date of the accident.

Unsurprisingly, courts have not allowed the prosecution to escape the requirements of *Trombetta* when investigators had an opportunity to document the evidence before destroying it but failed to do so. *See, e.g.*, *Cooper*, 983 F.2d at 930 (concluding "there [wa]s no adequate substitute" for laboratory equipment destroyed by the government after the government had been notified that the lab equipment had exculpatory qualities); *Soriano*, 401 F. Supp. 3d at 402-03 ("[A]n accurate assessment of the impact of the Government's inexplicable destruction of patently relevant evidence is not possible since the physical evidence is gone and there are no reliable

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[2] The 8/31/23 Haag Report is not the only exculpatory evidence relevant to this motion that the State failed to disclose in a timely manner. For example, on May 6, 2024, the State disclosed email communications between the State and Bryan Carpenter—who, although not qualified as a firearms expert does have a military background—in which Special Prosecutor Morrissey noted the "stark difference" between the hammer notches on the gun Baldwin was given on the set of *Rust* and the notches that appear on a "brand new hammer from the exact same gun." *See* Ex. 8. In response, Carpenter stated that he "cannot see any reason that's functionally necessary or does not compromise the safety integrity and/or the operation of the gun." *Id.* The State's egregiously late disclosures underscore the exculpatory nature of the evidence it destroyed. And the timing of the disclosures only compounds the prejudice Baldwin has suffered as a result of its destruction, such that dismissal is the only appropriate remedy. However, if the Court is not inclined to grant dismissal, it should at the very least preclude the State from introducing evidence or argument relating to its contention that the gun could not have discharged unless Baldwin pulled the trigger. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

substitutes given the Government's admitted ***failure to document in any comprehensive form what was destroyed***.") (emphasis added). The State's cited cases did not involve such a failure of documentation. *See State v. Duarte*, 2007-NMCA-012, 149 P.3d 1027 (evidence at issue was a videotape of a field sobriety test observed by a law enforcement officer who documented the interaction in a report provided to the defense, and who was available for questioning); *United States v. Harges*, 128 F.3d 1358, 1364 (10th Cir. 1997) (concluding the loss of a load ticket and check exchanged in a sting operation was only potentially useful, and relying in part on "the recorded conversation between Hargus, Johnson, and the investigator [to] support[] the view that Mr. Hargus knew the oil was stolen and the load ticket was fake").

Grasping at straws, the State argues that Baldwin can question one of the State's paid experts who tested the gun using ***replacement parts***—in particular, a new sear. Opp. 12. In other words, to determine whether the gun's *defective* parts caused an accidental discharge, the State ***replaced one of those parts***. Obviously, this says nothing about whether the firearm could have gone off with the original parts. Although the State's expert used the original hammer, it is the interaction of the hammer with the sear that prevents a properly functioning firearm from discharging. Without using the original sear, that testing showed nothing. Moreover, the expert admitted that it was not possible to test the firearm with the original parts, and in particular with the original trigger—the same part that bears unidentified modifications—because the damage done to the trigger was such that it would not be possible to replicate the functioning of the firearm on October 21, 2021. *See United States v. Belcher*, 762 F. Supp. 666, 672 (W.D. Va. 1991) ("[T]he Belchers' alleged crimes concern formerly distinct plants that no longer exist and that were never tested to determine what they were. The information those plants contained is lost forever and will never be available to the Belchers.").

B. The *Youngblood* Standard Is Met

The distinct, alternative *Youngblood* standard is also satisfied because the record contains overwhelming evidence of the government's bad faith.

1. The original state of the firearm was at minimum "potentially useful"

As set forth above, if the firearm was not apparently exculpatory (and it was), it was certainly "potentially useful," which requires no more than "a possibility that the [evidence] would have exonerated the defendant." *State v. Watley*, 1989-NMCA-112, ¶ 11, 788 P.2d 375; *see* Mot. 20-21. Other than a single conclusory assertion, Opp. 14, the State makes no argument that the firearm in its original state (or documentation of that original state) was not at least "potentially useful" to the defense.

2. The evidence of the State's bad faith is overwhelming

It is hard to find a more striking precedent of governmental bad faith leading to the destruction of potentially exculpatory evidence. Both prosecutors and law-enforcement agents knew—*months* before testing—that Baldwin claimed he did not pull the trigger and that other witnesses had said the gun just "went off." They knew the testing would destroy the gun. And as the State's own experts have confirmed, the testing that the SFSO ordered was not tailored to determining whether the firearm could have discharged without the pull of the trigger. Yet the State failed to document the original condition of the firearm's internal components through photographs or video, even though it would have been simple to do so, before they destroyed the gun. The State also failed to alert Baldwin or his attorney about what they were about to do. The State thus took no reasonable steps to preserve potentially (indeed, apparently) exculpatory evidence for the defense, because prosecutors and agents were convinced Baldwin was guilty and gave no consideration to Baldwin's right to put on a defense. The bad faith is palpable.

Tellingly, the State's brief does not even *address* FBI Special Agent Cortez's statement that he and Detective Hancock were "tracking that the requested testing will alter the firearm and it will no longer be in the same physical condition that it was seized in." Mot. Ex. K (Email Chain) at 3. Nor does the State offer any explanation whatsoever for why these law-enforcement agents and others who were aware of the imminent destruction did not first disassemble the firearm and document its internal components for the defense. The State's silence speaks volumes. It has no legitimate justification for its staggering disregard of Baldwin's rights.

The State argues that there was no bad faith because the FBI supposedly followed standard operating procedures when carrying out the testing. Opp. 14. The State cites the Tenth Circuit's decision in *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994), for the proposition that "courts have held that the government does not necessarily engage in bad faith conduct when the destruction of evidence results from a standard procedure employed by the government department or agency regarding the disposal of like evidence, at least then there is adequate documentation of the destroyed evidence." *Id.* at 912-13. But this passage from *Bohl* addresses the "disposal of like evidence" and presumed "***adequate documentation of the destroyed evidence***." *Id.* (emphasis added). Here, however, the State did ***not*** create "adequate documentation of the destroyed evidence," such as by photographing the internal components of the firearm. That is the problem. Moreover, unlike in *Bohl*, the firearm was not destroyed as part of a disposal process—the damage it suffered was an anticipated consequence of testing that should never have been performed.

But at any rate, regardless of the applicability of *Bohl* to the FBI's testing, that is not where the bad faith lies in this case. Rather, as each and every FBI witness in this case has confirmed, under the FBI laboratory procedures, what testing to conduct is a decision that rests with the "contributor"—here, lead SFSO detective, Alexandria Hancock. It was Detective Hancock, not

the FBI, who set out to "disprove" Baldwin's statement. It was Detective Hancock, not the FBI, who failed to provide information about the relevant circumstances of the incident, and who requested testing that she knew would likely destroy the firearm. It was Detective Hancock, not the FBI, who decided not to request photos, videos, or other information about the internal condition of the firearm before its destruction. And it was Detective Hancock who declined to inform the targets of the investigation that she was planning to destroy a piece of evidence at the center of this case. Were it not for each of these deliberate decisions, the firearm (or documentation of its internal components) would have been available to the defense today. The State's efforts to hide behind the FBI's standard procedures should be rejected.

The State also discusses five factors that the Tenth Circuit has employed to conduct the bad-faith inquiry, *see* Opp. 14 (citing *United States v. Simpson*, 845 F.3d 1309, 1059 (10th Cir. 2017)), but those factors weigh heavily in favor of bad faith here.

First, Detective Hancock was clearly on notice of the firearm's evidentiary value—as she said, the testing was done to disprove Baldwin's statements that the firearm "went off." There can be no doubt the State was on notice that the defense viewed the firearm as exculpatory. The State's argument that Baldwin didn't specifically say the gun malfunctioned (Opp. 15) is not serious: Explaining that the gun discharged without the trigger being pulled is the same thing as stating that it malfunctioned. And of course Baldwin—an actor, not a gun expert—had no idea whether "the gun had been altered and was malfunctioning prior to October 21, 2021" (*id.*). All he knew was that it went off without his pulling the trigger, and he repeatedly told investigators that months before the destructive testing.

Second, it is clear from the third (and untimely disclosed) Haag report that the firearm *does* have markings indicating modifications not attributable to the FBI's testing. *See supra*, at 1-2.

The State claims that Baldwin "does not present any objective evidence to substantiate his bold claims that the gun was altered and modified prior to" the accident. Opp. 15-16. But the State's own evidence makes that clear.

Third, the government has had control of the firearm from October 21, 2021 through today, and was in possession of it when Baldwin disclaimed pulling the trigger. And it was the SFSO, not the FBI, that ordered the testing.

Fourth, the centrality of the firearm to this case could not be more obvious. It was clear when Detective Hancock set out to disprove Baldwin's statements by requesting the destructive testing. It was clear when the State dismissed the case last year based on its belief that the firearm may have been modified. And it remains clear today given that the State's witness list includes two firearms experts, the manufacturer of the firearm, and the importer of the firearm (all of whom are expected to testify about the firearm, though none of whom observed the firearm as it was on October 21, 2021).

Fifth, the State has not offered any explanation for Detective Hancock's decision to authorize destructive testing untethered to the circumstances of the case, with no notice to the targets, including the target whose statements she had set out to disprove.

Finally, the State misstates the legal standard. The State says, for example, that the FBI testing was not "conducted to destroy 'exculpatory' or 'potentially exculpatory' evidence," Opp. 16, and that "Baldwin cannot show that officers damaged the firearm for the sole purpose of depriving defendant of exculpatory evidence," Opp. 17. But *Youngblood* does not require that the "sole purpose" of the testing was to destroy the evidence. Rather, bad faith turns on whether the government knew the evidence was potentially exculpatory and then destroyed it without reasonable steps to document or preserve a record of the evidence.

The State's cited legal authority (at Opp. 22) is equally unavailing. *United States v. Fleming*, 19 F.3d 1325 (10th Cir. 1994), was a *Brady* case involving the alleged destruction of a handwritten statement by a witness that was later questioned at trial. *See id.* at 1330-31. Unlike in *Fleming*, where the Court concluded the defendant had a comparable alternative to the witness's written statement because the witness was testifying at trial, here there is no comparable alternative available to Baldwin. *Id.* at 1331. In *United States v. Parker*, 72 F.3d 1444 (10th Cir. 1995), the defendant failed to show either that the evidence had apparent exculpatory value or that it was destroyed in bad faith. *Id.* at 1451-52. Finally, in *United States v. Harges*, 128 F.3d 1358 (10th Cir. 1997), there was significant evidence elsewhere in the case that diminished the value of the destroyed evidence, and there were no allegations of bad faith. *Id.* at 1364. As a result, the Tenth Circuit simply reviewed the district court's conclusion that the evidence was at most potentially useful for clear error. *Id.* Here, in contrast, the destroyed evidence is clearly exculpatory, there is no comparable evidence elsewhere in the case, and the evidence was destroyed in bad faith. *Supra* at 5-11, 12-15.

It bears noting the State's efforts to deprive Baldwin of relevant and exculpatory evidence related to the firearm has continued. The State's brief ignores what Haag revealed to the defense on May 21, 2024—that, even *after* taking into account the FBI's testing, the State's own experts can't explain markings and indicia of modification of the trigger. That is the kind of confirmatory evidence the State pretends does not exist. The State's unjustifiable decision to destroy the firearm without documenting its internal components means that the defense cannot definitively establish how the internal components interacted in their original state and whether they caused the accidental discharge.

II. THIS PROSECUTION ALSO VIOLATES NEW MEXICO LAW

This prosecution also violates New Mexico law. As recognized by *State v. Chouinard*, 1981-NMSC-096, 634 P.2d 680, and its progeny, the New Mexico Constitution's guarantee of Due Process under Article 2, § 18 provides even more robust protections than its federal counterpart for defendants in criminal cases where exculpatory evidence has been destroyed. For all the above reasons, the firearm's original condition is material: The State's theory of guilt would be refuted if the firearm could discharge without the pull of a trigger, and the destruction of the firearm prejudiced Baldwin because the defense no longer can test or examine the firearm in that original state. *See* Mot. 19-25. As the State admits, those two findings alone would establish a violation of New Mexico law. Opp. 23. In addition, the State acted in bad faith by intentionally destroying the firearm without documenting its original condition and by violating its evidence-preservation obligations under *Brady* and New Mexico law (an argument the State fails to address). The State's characterization of the destruction as "[a]ccidental" (Opp. 23, 24) is inaccurate; investigators knew the testing would destroy the gun and acknowledged that fact in writing. And in any event, the "accidental" destruction of material evidence can lead to severe remedies under New Mexico law. *See, e.g.*, *Scoggins v. State*, 1990-NMSC-103, ¶ 3 (dismissal was the appropriate remedy even where the destruction of evidence was inadvertent).

The State's other responses also obscure the record. The State says, for example, that "law enforcement carefully documented and recorded the revolver's condition, pre-test, by photographing it, examining it, and testing firing it." Opp. 24. No, they did not. They failed to disassemble the weapon and photograph its internal parts—steps that would have determined whether the gun was defective or altered on the day of the accident. The State also says that Baldwin "has not presented any objective evidence that shows the gun was modified or altered prior to October 21, 2021." Opp. 24. Wrong again. The State's own expert has now confirmed

that the visible alterations on the hammer and sear are not attributable to the FBI testing. *See supra*, at 1-2. To be sure, Baldwin will never be able to establish that *all* of the defects and modifications to the parts pre-existed the FBI's testing. But that is because the State destroyed the gun without first documenting its internal condition. And the State cannot seriously dispute that whether the gun was functioning properly is central to the issues in this case. That is why, after all, the State sought the testing in the first place.

Finally, the State says that none of its conduct amounts to a legal violation because Baldwin can cross-examine the FBI examiner, the State's firearms expert, and Detective Hancock. Opp. 25. As explained above, these examinations have no chance of revealing the original state of the firearm because none of those witnesses examined the internal components of the firearm before destroying it. *See supra*, at 9-12. The State has no answer to that problem.

CONCLUSION

For the foregoing reasons, Baldwin respectfully requests the Court dismiss this action with prejudice, or, in the alternative, preclude evidence or argument from the prosecution regarding whether Baldwin pulled the trigger, and instruct the jury that he did not do so.

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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 filed in the Court's electronic filing system, which caused opposing counsel to be served.

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