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 MOTION TO DISMISS THE INDICTMENT FOR FAILURE TO ALLEGE A CRIMINAL OFFENSE

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PRELIMINARY STATEMENT

The State has not alleged facts that constitute a crime. 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.

The parties were on a movie set, where "the prospect of live ammunition" being present "is incomprehensible"—as the State itself has argued in open court. Ex. F[1] (Gutierrez-Reed Trial ("HGR Trial"), Transcript of 2/22/24 Proceedings ("Day 1")) at 26:23-27:4. The firearm had been in the custody of the set's armorer, who was responsible for ensuring that the firearm did not contain live rounds. Both the armorer and the assistant director had opened the chamber and examined the ammunition immediately before handing the gun to Baldwin. At that moment, the assistant director announced to the crew "cold gun," which led "everyone" to believe the gun contained only dummy rounds, as the State has also admitted. *See, e.g.*, Ex. D (HGR Trial, Day 10) at 119:6-9 (State admitting that Gutierrez-Reed "told Dave Halls this is a cold gun" and "[h]e told the crew [in the church] it's a cold gun. At that point, everyone certainly assumed that there wasn't a live round.").

In light of those undisputed facts, the State has not even *alleged* that Baldwin had a subjective awareness of a substantial risk that the firearm held live ammunition. And without such a subjective awareness, he could not have committed the crime of Involuntary Manslaughter, which requires that the defendant consciously disregarded a substantial and unjustifiable risk that his actions could cause another person's death. With no awareness that the firearm might contain

[1] All exhibits not previously attached to filings in this proceeding are attached to the affidavit of Sara Clark ("Clark Aff.") filed concurrently with this motion.

live rounds, Baldwin had no reason to believe—zero—that his manipulation of the firearm could lead to death, let alone a belief that his alleged actions posed a *substantial* risk to Hutchins. Indeed, in the State's own words, Baldwin could not have been an intervening cause of Hutchins' death because it was "completely foreseeable" to the people responsible for ensuring that the gun was safe (Gutierrez-Reed and Halls) that Baldwin was going to manipulate the gun in exactly the way that he did. *See* Ex. D (HGR Trial, Day 10) at 77:23-78:1 ("That was the whole point of him having it. Of course he was going to manipulate it. It's foreseeable. Everything is so completely foreseeable."); *see also id.* at 119:15-18 ("There is no intervening event. If you think the intervening event is that Baldwin manipulated the gun, that's the whole purpose of the prop. He's going to manipulate it.").

Accordingly, Baldwin now moves under SCRA 5-601 to dismiss the indictment with prejudice for failure to allege a criminal offense. *See State v. Pacheco*, 2017-NMCA-014, 388 P.3d 307; *State v. Foulenfont*, 1995-NMCA-028, 895 P.2d 1329. The State has sought to convict and imprison Baldwin for an accident caused by the mistakes of other people. The State's own allegations and admissions show that Baldwin is legally innocent—that he committed no crime defined by New Mexico law. Under basic principles of criminal culpability, fair notice, and due process, the prosecution may not proceed.

FACTUAL BACKGROUND

This Court is familiar with the tragic events on the set of *Rust*. On January 19, 2024, the grand jury returned an indictment charging Baldwin with one count of Involuntary Manslaughter, stating alternative theories of Negligent Use of a Firearm and Without Due Caution or Circumspection. *See* NMSA 1978, § 30-2-3(B) (1994).

In its subsequent filings and argument, the State has explained its theory of the case. The State acknowledges, of course, that the accident occurred on a movie set where live ammunition

should never have been found. Ex. F at 26:23-27:4. As the State told the jury in the trial of armorer Hannah Gutierrez-Reed, "[t]he prospect of live ammunition landing up on a film set is *incomprehensible*." *Id.* at 26:23-25 (emphasis added). That is because "[i]t's a *hard and fast industry rule* that live ammunition should be miles away from a film set at all times[.]" *Id.* at 27:1-4 (emphasis added).[2]

The State has also explained that Gutierrez-Reed had sole responsibility for ensuring that the firearm contained no live ammunition before it was handed to Baldwin. As the armorer, Gutierrez-Reed "ha[d] no supervisor when it comes to weapons and gun safety on the movie set." Ex. D at 70:16-22. For those areas of responsibility, Gutierrez-Reed had "autonomy" and got "to do what she want[ed]." *Id.* at 71:15-18; *see also id.* at 70:16-22, 72:1-2.

The State further agrees that both Gutierrez-Reed and assistant director David Halls checked the firearm in Baldwin's presence before handing it to him. *E.g.*, Ex. F at 23:22-24:4, 25:3-6; Ex. D at 119:6-9. And the Special Prosecutors told the jury at Gutierrez-Reed's trial that Gutierrez-Reed had informed Halls that it was a "cold gun," and that Halls had then "told the crew it's a cold gun." Ex. D at 119:6-9; *see also id.* 77:19-23 (stating that Gutierrez told "the crew that it has a dummy round in it"). "At that point," the State agrees, "*everyone* certainly assumed there wasn't a live round." *Id.* at 119:6-9 (emphasis added); *see also id.* 115:18-20 ("The crew didn't

[2] The State is bound by its prior statements made in open court and in filings. *Snyders v. Hale*, 1976-NMCA-110, ¶ 8, 557 P.2d 583; *accord United States v. Ganadonegro*, 854 F. Supp. 2d 1088, 1120, 1122 (D.N.M. 2012). Principles of judicial estoppel also prevent the State from taking inconsistent positions about the same facts for two defendants. *See*, *e.g.*, *People v. Gayfield*, 261 Ill.App.3d 379, 199 Ill.Dec. 123, 128–29, 633 N.E.2d 919, 924–25 (1994) (suggesting that the state would be estopped from inconsistently claiming in separate proceedings that different defendants shot the same victim); *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996). And the National Prosecution Standards published by the National District Attorneys Association provide that prosecutors "shall not knowingly make a false statement of fact or law to a court." Nat'l Prosecution Standards, 6-1.1.

believe there were live rounds on set. They believed that she was going to do her job. They believed that she did her job."). Indeed, in describing Gutierrez-Reed's actions, the State has said: "Imagine I hand you a gun and I tell you that it's basically empty and I walk away when, in fact I put live ammunition in it." Ex. D at 78:1-4. In other words, through her actions and words, Gutierrez-Reed conveyed to Baldwin that the firearm was "basically empty," *i.e.*, did not contain live rounds.

Throughout these proceedings, the State has never contended that Baldwin had even the slightest reason to believe there might be live ammunition in the gun—no more so than any other actor handed a prop gun by the crew members responsible for checking it. And there would be no plausible basis for such an allegation given the State's own allegations and admissions: that it was "incomprehensible" that there would be live ammunition on the set in violation of a "hard and fast industry rule"; that two people had checked the chamber in Baldwin's presence; and that Halls had announced "cold gun" before handing the firearm to Baldwin, confirming for "everyone" that it contained only dummy rounds.

But the State nevertheless maintains that "Baldwin's behavior was a violation of the law . . . because he pointed a gun at a person, cocked it and pulled the trigger having no personal knowledge what type of ammunition was in the gun." State's Response to Defendant's Motion to Dismiss the Indictment (Apr. 5, 2024) ("MTD Opp.") at 30. By "personal knowledge," the State apparently means that Baldwin relied on the fact that the armorer and the assistant director had checked the gun and had announced that it was a "cold gun" without himself opening the chamber and examining each round to assess whether it was inert or live. As the State's own allegations show, that would have required far more than just visually examining the rounds in the chamber. The State told the Gutierrez-Reed jury that it is not possible "to distinguish [a dummy

round] from a live bullet if you were just looking at it with your eyes" because dummy rounds "are designed to look exactly like live ammunition." Ex. F at 18:18-25.

Accordingly, the State's theory is presumably that Baldwin should have removed each round from the chamber and shaken it or looked for a hole in its side before manipulating it in a way that might cause it to discharge (*see id.*)—even as the State admits that it was the exclusive responsibility of the armorer to perform this check *before* handing the gun off to an actor, and that the crew (including Baldwin) was made to believe that she *had* performed this check moments before the gun went off. *See* Ex. D at 70:16-22, 70:16-22, 71:15-18, 72:1-2; *see also id.* at 119:6-14 (State admitting that Gutierrez-Reed, "the only person on the movie set in charge of firearms," "told Dave Halls," who then told the crew, "this is a cold gun," at which point "everyone certainly assumed that there wasn't a live round.").

Indeed, the State's theory is undermined by the testimony of its own expert, who testified at the Gutierrez-Reed trial. Specifically, when asked if "actors generally do their own safety checks of the weapon" by "taking the ammunition in and out [and] looking at it," the expert, Bryan Carpenter, testified that it is "rare" for actors to do so—and that, in any event, the purpose of such a check would be to give the actor a "warm and fuzzy feeling," not to verify the safety check performed by the armorer. Ex. C (HGR Trial, Day 6) at 23:9-24:1 ("[A]s long as my safety checks occurred, they can do as many more safety checks as they feel. However, those safety checks are more for . . . a warm and fuzzy feeling for them, not for me as a professional, [be]cause I'm going to make sure that we check it the way that I need to check it . . . and individually if they feel like they need to do it again, then by all means."); *see also id.* at 12:19-23, 13:16-14:6 (CARPENTER: "You clear that weapon with at least two representatives on set. Anybody that wants to see it, it gets cleared with them if they request, but generally it's going to be your first AD and possibly the

DP as well." MORRISSEY: "Are you testifying that you show the individual dummy rounds to the AD and whoever else wants to see?" CARPENTER: "Absolutely." MORRISSEY: "And the actor?" CARPENTER: "The actor may or may not be on set yet, but when they get there, this is done again. So, with the actor. And sometimes 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."); *id.* at 102:21-23 (MORRISSEY: "And whose responsibility is it to ferret out any possible live rounds on a movie set?" CARPENTER: "It's the armorer's responsibility.").

The State has pointed to no criminal prosecution in U.S. history predicated on the theory that an actor should have independently confirmed the safety of a prop after the responsible crewmembers had already done so. This is the first.

ARGUMENT

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. The State does not allege otherwise. And if Baldwin had no reason to believe that the firearm contained a live round, he also had no reason to believe that manipulating the firearm could cause Hutchins' death—let alone that his actions posed a "substantial risk" of her death. Without that essential element, the State cannot prove Involuntary Manslaughter as a matter of law. For that reason, the Court should dismiss the indictment with prejudice.

I. THE GOVERNING LEGAL STANDARDS ARE WELL SETTLED

A. The Motion to Dismiss Standard

The legal principles governing this motion are well settled. SRCA 5-601(C) provides that "[a]ny defense, objection or request which is capable of determination without trial may be raised before trial by motion." Under *State v. Foulenfont*, 1995-NMCA-028, 895 P.2d 1329, and its

progeny, a defendant may move to dismiss the indictment on the ground that the State has failed to properly allege a criminal offense. As refined in *State v. Pacheco*, 2017-NMCA-014, 388 P.3d 307, that standard asks "whether the undisputed facts—whether stipulated by the State or alleged in the indictment or information—show that the State cannot prove the elements of the charged offense at trial[.]" *Id.*, ¶ 10.

The court of appeals has confirmed that *Foulenfont* applies to the question of whether the State can prove a defendant's subjective awareness that his actions created a substantial and unjustified risk of harm to others. For example, in *State v. Muraida*, 2014-NMCA-060, 326 P.3d 1113, the State had charged the defendant, a doctor, with violating the Resident Abuse and Neglect Act in connection with the death of a nursing-home resident. 2014-NMCA-060, ¶ 8 (citing NMSA 1978, §§ 30-47-1 to -10 (1990, as amended through 2010)). One prong of the statute could be satisfied by showing that the defendant had acted knowingly, intentionally, or recklessly. *See* 2014-NMCA-060, ¶ 9. Although *Muraida* was factually distinguishable from this case, its analysis made clear that a court can properly determine at the motion-to-dismiss stage whether a reasonable jury could infer the requisite mental state from the alleged or stipulated facts. *See id.*, ¶ 15. In *Muraida*, the defendant had "argue[d] that the complaint alleged insufficient facts to prove Defendant's intent." *Id.* ¶ 18. Rather than rejecting that argument outright, the court of appeals canvassed the factual allegations to determine whether the "[d]efendant's awareness of the substantial and unjustifiable risk of harm to [the victim] caused by his actions can be inferred from the facts stated in the complaint and affidavit." *Id.* The court concluded that the defendant's awareness could be inferred from the record, because an elder-care specialist had explained in great detail the ways in which the defendant had been aware of the victim's risk of death from blood loss—a known side-effect of the drug the defendant had prescribed (and then increased)—

including being "informed that [the victim] had a nose bleed, knee swelling, and bright red blood in her stools after she suffered falls getting out of bed." *Id.*, ¶¶ 3, 6. Based on those alleged facts, the court concluded that "the fact finder may infer from circumstantial evidence that the defendant acted with the requisite intent." *Id.*, ¶ 18; *see also id.* ¶ 20 (noting the State's allegations that "it was Defendant who prescribed an increased amount of Coumadin and failed to take precautions to monitor [the victim] thereafter and that it was Defendant who failed to order the proper care for [the victim] upon discovery of blood in her stool").

B. The Involuntary Manslaughter Standard

The requirements of Involuntary Manslaughter are also well-settled. The Supreme Court has held that "[c]riminal negligence in the context of involuntary manslaughter requires subjective knowledge by the defendant of the danger or risk to others posed by his or her actions." *State v. Henley*, 2010-NMSC-039, ¶ 17, 237 P.3d 103. In particular, the defendant must have "'consciously disregard[ed] a substantial and unjustifiable risk' that harm will result from his conduct." 2010-NMSC-039, ¶ 16 (quoting Model Penal Code § 2.02(c)); *see also State v. Cardenas*, 2016-NMCA-042, ¶ 20, 380 P.3d 866 ("Criminal negligence . . . exists where there is a conscious disregard of a substantial and unjustifiable risk that harm will result from certain conduct."); *State v. Calhoun*, No. A-1-CA-36559, 2019 WL 6789519, at *6 (N.M. Ct. App. Nov. 22, 2019) ("'The showing of criminal negligence required for an involuntary manslaughter jury instruction [also] includes the concept of recklessness, in which a defendant consciously disregards a substantial and unjustifiable risk that harm will result from his conduct.'") (quoting *Henley*, 2010-NMSC-039, ¶ 16). The State does not dispute these basic requirements. *See* State's Motion to Exclude Target's Requested Elements Instructions to the Grand Jury (Dec. 1, 2023) ("Mot. to Exclude"), at 4-5 (citing *Henley*, 2010-NMSC-039, ¶ 17).

Courts in New Mexico and elsewhere have followed these principles by analyzing whether a jury could infer that the defendant was subjectively aware of the risk posed by a weapon or other object. For example, in *State v. Campos*, No. A-1-CA-36700, 2019 WL 13156049, at *3 (N.M. Ct. App. Dec. 23, 2019), the court of appeals concluded that the trial evidence could support Involuntary Manslaughter where the defendant claimed that he had "kicked [a] knife and picked it up so he would not get stabbed and his daughter would not get injured," and that after he picked it up he accidentally stabbed the victim when the victim came at him. *Id.* at *2. That explanation, the court of appeals held, "show[ed] that Defendant understood he or another could be injured by the knife given the circumstances," allowing "a rational jury [to] infer Defendant possessed the subjective knowledge of the danger posed to others by picking up the knife." *Id.* at *3.

Similarly, in *State v. Skippings*, 2011-NMSC-021, 258 P.3d 1008, the defendant and the victim had been engaged in a physical altercation when the defendant threw the victim to the ground, cracking her skull and ultimately resulting in her death. *Id.*, ¶ 6. The Supreme Court concluded that a jury could have rationally inferred that the defendant "possessed the required subjective knowledge" of the risk of his action because "he caused [the] [v]ictim to fall on the hard asphalt, a commonly understood peril." *Id.*, ¶¶ 18, 19.

In *State v. Xavion M.*, No. A-1-CA-39411, 2021 WL 5213110 (N.M. Ct. App. Nov. 9, 2021), the defendant was in the backseat of a car full of teenagers, holding an AR-15 rifle. *Id.* at *1. After returning from a trip to the bathroom and seeing that the clip of live ammunition had been removed from the rifle, the defendant "grabbed" the rifle, held it "downward toward the driver's seat of the occupied car, [and] pulled the trigger, firing a bullet into the driver's seat" where the victim was seated. *Id.* at *1. Following the unexpected discharge, the defendant asked

the other teenagers in the car "if anyone had 'put [a bullet] in the head' when he left to go to the restroom, but no one would answer him." *Id.*

On appeal, the defendant argued that there was insufficient evidence to support a guilty verdict for Involuntary Manslaughter because the evidence established that the magazine was removed from the rifle and therefore he could not have acted with "willful disregard" or "known how dangerous his actions were." *Id.* at *3-4. In rejecting these arguments, the court of appeals noted that the defendant's own statements—*i.e.*, that he had asked his friends if the rifle had a bullet in the chamber even though the magazine was removed—demonstrated that he "was aware that the AR-15 could still be loaded and fired even though the magazine was removed." *Id.* at *4. Therefore, the court held, a jury could reasonably conclude that the defendant "should have known how dangerous it was to pull the trigger of the rifle when he got back in the car" and his doing so showed a "willful disregard for the safety of others." *Id.* at *3-4 (citing *Skippings*, 2011-NMSC-021, ¶¶ 18-19).

In *O'Berry v. State*, 348 So. 2d 670 (Fla. Dist. Ct. App. 1977), the deceased victim, allegedly "in a jovial mood, gave [the defendant] a gun and urged her to point it at him and pull the trigger." *Id.* at 670. The defendant, who "believed the gun to be unloaded, took the weapon, pointed it at [the victim] and pulled the trigger." *Id.* In affirming the defendant's manslaughter conviction, the court of appeals stated that "[t]he only real questions to be answered by the jury were whether [defendant] believed the weapon to be loaded at the time of the shooting and, notwithstanding her belief, whether she was culpably negligent in proceeding with the aforementioned course of conduct." *Id.* at 671.

In each of these cases, the courts properly applied the requirement that a defendant be subjectively aware of a substantial and unjustifiable risk to be convicted of Involuntary

Manslaughter by asking whether a rational jury could infer from the facts that the defendant knew that the weapon or object was capable of causing death. And they establish that to support a charge of Involuntary Manslaughter in a case where the state does *not* dispute that the defendant believed the firearm was unloaded, prosecutors must still allege—without contradicting themselves in open court—that the defendant "consciously disregard[ed] a substantial and unjustifiable risk'" that the firearm was loaded. *Henley*, 2010-NMSC-039, ¶ 16. *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."); *see also* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72 (1933) ("To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice").

II. THE INDICTMENT MUST BE DISMISSED UNDER NEW MEXICO LAW

Under the above legal standards, the indictment here must be dismissed. Accepting the State's factual assertions as true for the sake of this motion, no reasonable jury could find that Baldwin "'consciously disregard[ed] a substantial and unjustifiable risk' that harm will result from his conduct." *Henley*, 2010-NMSC-039, ¶ 16. The reason is simple: the State agrees that Baldwin had no reason whatsoever to believe that a live round was in the firearm. None. It was a movie set and the gun was a prop. Ex. D at 119:15-18. Indeed, the State emphasized in open court that it was "*incomprehensible*" that the live ammunition would be present *anywhere* on the set, let alone loaded into the firearm that was handed to Baldwin, given the "*hard and fast industry rule* that live ammunition should be miles away from a film set at all times[.]" Ex. F at 26:23-27:4 (emphases added). That admission alone—which a special prosecutor made in open court at Gutierrez-Reed's trial—defeats this prosecution. If it was "incomprehensible" that live ammunition would even be on set, how could Baldwin have possessed a subjective awareness of

a *substantial risk* that his actions could injure another person? He couldn't. It doesn't make sense. A firearm loaded with dummy rounds is not reasonably capable of causing death.

But that is far from all. The State *agrees* that it was Gutierrez-Reed's responsibility to check the gun—indeed, the State alleges that she had full "autonomy" on gun-safety issues on set and that no one had authority to supervise her exercise of those duties. Ex. D at 70:16-22, 71:15-18, 72:1-2. The State *agrees* that Gutierrez-Reed and Halls both checked the gun in Baldwin's presence by examining the rounds loaded into the chamber immediately before handing it to him. Ex. F at 23:22-24:4, 25:3-6; Ex. B at 119:6-9. The State *agrees* that Gutierrez-Reed told Halls "cold gun" and that Halls then announced "cold gun" to the crew. Ex. D at 119:6-9; *see also id.* 77:19-23. Baldwin was not informed that the gun was safe by some random person on the street; he was told by the safety professionals whose job was to make that determination. Indeed, the State *agrees* that "everyone" understood that the firearm did not contain live ammunition based on the words and actions of Gutierrez-Reed and Halls. Ex. D at 119:6-9; *id.* at 115:18-20 ("The crew didn't believe there were live rounds on set. They believed that she was going to do her job. They believed that she did her job."); *see also, e.g.*, Ex. E (HGR Trial, Day 3) at 203:19-204:14 (witness testifying that "Dave [Halls] called out 'Cold gun' or 'Cold weapon' . . . and that's when I went back to focusing on my task at hand . . . I heard the word, 'cold,' which typically, for me, is what I need to hear.").

The State's own factual assertions confirm what was already clear to anyone who works in the film industry and anyone who was in the church when this fatal accident occurred: it was "incomprehensible" that the firearm contained live rounds. And the State does not allege that Baldwin had any special reason to believe otherwise, or any special duty to double-check the safety inspection that was performed by the safety professionals. Instead, the State told the Gutierrez-

Reed jury that "the armorer has no supervisor when it comes to weapons and gun safety on the movie set," and that even the assistant director—the primary safety officer on set—"is just there to be a second pair of eyes." Ex. D at 70:20-23; *see also* Ex. C at 23:9-24:1 (State's expert testifying that actors "can" check the gun "as many [times] as they feel," however, "those safety checks are more for a . . . warm and fuzzy feeling for [the actor]," and it's "rare" for them to do their own check); *id.* at 102:21-23 (testifying that it's "the armorer's responsibility" to "ferret out any possible live rounds"). *Compare Muraida*, 2014-NMCA-060, ¶ 15 (jury could find criminal negligence where doctor failed to monitor patient after prescribing a potentially lethal anticoagulant, even after patient showed signs of endangered health), *with State v. Berry*, 1932-NMSC-061, ¶ 20, 14 P.2d 434 ("There must be a legal or contractual duty" to charge a defendant with "neglect to perform an act"); *see also People v. Beardsley,* 150 Mich. 206, 113 N.W. 1128, 1129 (1907) (manslaughter charge based on a failure to act must be based on "a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death.").[3]

[3] The State may assert that Baldwin acted with criminal negligence because he did not inspect the firearm after the designated safety professionals had already done so. *See supra* at 6 (citing MTD Opp. at 30). Putting aside the fact that the State already took the opposite position at Gutierrez-Reed's trial (*supra* at 6-7, 13-14), and that, regardless, this argument doesn't change the absence of Baldwin's subjective awareness of a substantial risk to human life on the set, the State's own admissions demonstrate that Baldwin's alleged failure to act would not have led to a different outcome. Specifically, the State told jurors in Gutierrez-Reed's trial that it is not possible "to distinguish [a dummy round] from a live bullet if you were just looking at it with your eyes" because dummy rounds "are designed to look exactly like live ammunition." Ex. F at 18:18-25. Thus, even if the State's theory were legally sound or consistent with its prior admissions (which it is not), its own assertions defeat any possibility that Baldwin's alleged failure to triple-check the gun was "the immediate and direct cause of [Hutchins'] death." *Beardsley,* 113 N.W. at 1129; *see also* Ex. D at 119:15-18 (Special Prosecutor Morrissey stating at Gutierrez-Reed's trial that "[t]here is no intervening event. If you think the intervening event is that Baldwin manipulated the gun, that's the whole purpose of the prop. He's going to manipulate it.").

Critically, the State does not even *allege* that Baldwin had reason to believe there was a live round in the chamber. To the contrary, it acknowledges that he had every reason in the world to think that it contained only inert rounds—as any other actor would believe in similar circumstances. *Compare* Ex. F at 23:22-24:4, 25:3-6, 26:23-27:4 *and* Ex. D at 119:6-9 *with Xavion M.*, 2021 WL 5213110, at *3-4 (holding that jury could reasonably conclude that defendant acted with "willful disregard for the safety of others" and "should have known how dangerous it was to pull the trigger of the rifle when he got back in the car" because the evidence established that defendant "was aware that the AR-15 could still be loaded and fired even though the magazine was removed").

That should end this case. As the respected UCLA law professor Eugene Volokh has explained in analyzing the charges here, "[t]he prosecution would have to prove, beyond a reasonable doubt, that [Baldwin] was subjectively aware of the danger: that he actually thought about the possibility that the gun might be loaded, and proceeded to point it and pull the trigger despite that." *What Exactly Is "Manslaughter" in the Alec Baldwin Case?*, REASON (Jan. 19, 2023).[4] But the State hasn't even attempted to meet that burden—because it can't—which requires dismissal.

The State's responses to this basic problem are inadequate. The State says, for example, that "New Mexico's lawbooks are filled with defendants charged with and convicted of involuntarily manslaughter who all said some version of the same thing: that they did not know there was a bullet in the gun," and those defenses failed because the defendants "did not inspect the gun prior to pointing it at another human being and pulling the trigger, resulting in death."

[4] https://reason.com/volokh/2023/01/19/what-exactly-ismanslaughter-in-the-alec-baldwin-case/.

Mot. to Exclude, at 7.[5] The State did not actually cite any of the supposedly numerous cases from the "lawbooks," much less discuss their facts. But it is almost certain that those cases did not involve anything like the unique circumstance here: a defendant who was an actor on a movie set where the State admits the presence of live ammunition was "incomprehensible," and the firearm at issue was a prop that had been checked by the only people who were qualified and required to do so before they gave it to the defendant and told him that it was a "cold gun." The State inexplicably disregards that undisputed context.

The State also advances an erroneous legal argument: "if [Baldwin] had actual knowledge of the risk that the firearm was loaded with live ammunition, yet still pointed the gun in the direction of another living person and pulled the trigger," the State argues, "his exposure under the law would increase significantly" because that would satisfy the elements of second-degree murder. Mot. to Exclude, at 8; *see also* MTD Opp. at 30. But second-degree murder requires a "strong probability of death," not just a "substantial and unjustified risk," so the State is incorrect that an awareness of some unidentified level of risk would necessarily suffice for second-degree murder. *Id.* (quoting UJI 14-201 NMRA (2010)); *see also Campos*, 2019 WL 13156049, at *4. That is precisely why the defendant in *Xavion M.* was found guilty of involuntary manslaughter: he knew there was a substantial risk that the gun was loaded (indeed, he knew the AR-15 had been loaded with a clip of live ammunition shortly before he handled the gun), but asserted that he believed the live ammunition had been removed. Because the State does not even allege that

[5] Although not relevant on this motion, this further highlights why the State's destruction of the firearm requires dismissal, as the State's allegation that Baldwin pulled the trigger finds its way into every angle from which the State attempts to defend the charges. That's especially the case when the State's own expert has explicitly undermined the second part of the State's argument above (that Baldwin was required to check the gun) in his testimony at Gutierrez-Reed's trial. *Supra* at 6-7, 13-14.

Baldwin was aware of any level of risk (let alone a substantial risk) that the gun was loaded with live ammunition, he is innocent as a matter of law.

Ultimately, the State knows its case has this devastating flaw, which is why it has misstated the law of Involuntary Manslaughter and, in its continued effort to hide the defects of its case, claimed that it "has no obligation to disclose to [Baldwin] the theory of its case." Mot. to Exclude, at 7. If the State cannot allege that Baldwin was subjectively aware that his actions created a substantial risk of Hutchins's death, this is not a viable criminal case. And there is no conceivable way in which Baldwin could have been aware that pulling the trigger could result in death if he had no reason to believe that the firearm contained live ammunition—which the State admits he didn't. A gun with no live rounds does not pose a substantial risk of death, even if the trigger is pulled. The State cannot overcome that fatal problem with this case.

CONCLUSION

For the above reasons, 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 May 6, 2024, a true and correct copy of the foregoing brief was emailed to opposing counsel.

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