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2ND JUDICIAL DISTRICT COURT
Bernalillo County
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KATINA WATSON
CLERK OF THE COURT
Adilene M Miramontes-Vargas

SECOND JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO,
COUNTY OF BERNALILLO

STATE OF NEW MEXICO,

Plaintiff,

v. **No. D-202-CR-2026-00405**

TIMOTHY BUSFIELD,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO QUASH GRAND JURY INDICTMENT

Defendant replies in support of his Motion to Quash Grand Jury Indictment and urges the Court to dismiss the Indictment in this matter for its structural violations of the grand jury process. The State's Response confirms, rather than refutes, the central premise of Defendant's Motion. Throughout its Response, the State treats this case as one governed by *Jones v. Murdoch*, 2009-NMSC-002, 145 N.M. 473 — a case regarding the State's own affirmative duty to present evidence — and fails to engage with *Herrera v. Sanchez*, 2014-NMSC-018, 328 P.3d 1176, which governs the structural violations at issue here: the prosecutor's interference with the grand jury's inquiry into additional evidence, his misstatement of the law, and his abandonment of his duty of fairness and impartiality. That confusion is not incidental. It is the foundation on which the entire Response rests, and once it is corrected, the Response offers no answer to the Motion at all.

The State's Response does not engage with the central facts this Motion presents. It does not acknowledge that the grand jury asked, three times, to hear from witnesses waiting outside the grand jury room. It does not acknowledge that the prosecutor repeatedly ignored those requests. It does not acknowledge that the prosecutor invented facts about the polygraph examination, telling the grand jury that its questions failed to specify the victim when the report he possessed said otherwise. Instead of confronting these failures, the State recasts the entire proceeding as a consequence of Mr. Busfield's decision not to submit a *Jones* letter before he chose to testify. That argument, however, inverts the record. Mr. Busfield did not forfeit any right by exercising another.

The State's Response reveals something more fundamental about the State's flawed approach to grand jury proceedings: a philosophy in which to serve as an "aide" to the grand jury means only to aid it toward an indictment, not to facilitate its independent and impartial assessment of the evidence. That is precisely the danger our supreme court has warned against. "[I]f the grand jury is to play any role at all as a credible, independent entity charged with determining whether the prosecution has probable cause to go forward with criminal charges against the accused, the grand jury must remain free of the taint that would come from being perceived to be under the complete and absolute control of the prosecutor." *De Leon v. Hartley*, 2014-NMSC-005, ¶ 8, 316 P.3d 896. In this case, the State treated the grand jury not as an independent body, but as the arm of the prosecution our courts have forbidden. The resulting indictment must be dismissed.

ARGUMENT

I. The State Applies the Wrong Legal Standard.

Throughout its Response, the State fails to contend with the fundamental premise of Defendant's argument: that the grand jury prosecutor's refusal to permit the grand jurors to examine the waiting witnesses that they repeatedly asked to interview, the abdication of his duty of neutrality, and his misrepresentation of the law each constitute violations of the structure and integrity of the grand jury, such that each of these actions independently requires dismissal of the indictment. Nowhere in its Response does the State contend with or acknowledge the New Mexico Supreme Court's central holding in *Herrera* that a prosecutor's interference with the grand jury's duty to make an independent inquiry into the evidence supporting a probable cause determination is a structural violation that entitles the accused to dismissal. 2014-NMSC-018, ¶ 17.

Instead, the State treats Defendant's Motion as though it were brought under *Jones*, 2009-NMSC-002, for the State's failure to alert the grand jury to exculpatory evidence during its own presentation. *See, e.g.*, Response at 9, 14. In doing so, the State confuses the discretion a prosecutor enjoys in deciding what evidence to present in his own presentation with his obligations once the grand jury has exercised its independent authority to ask for more. The former is a matter of prosecutorial judgment. The latter is not. References, therefore, to the discretion the State enjoys as to which evidence to present to the grand jury, *see* Response at 14, are irrelevant when the grand jury prosecutor instead interferes with or improperly influences the grand jury's right to "order that evidence be produced over and above that initially presented by the State." *Herrera*, 2014-NMSC-018, ¶ 24 (quoting *State v. Ulibarri*, 1999-NMCA-142, ¶ 11, 128 N.M. 546). The same is true of the grand jury prosecutor's failure to fulfill his duty of "scrupulous" neutrality. *Id.* ¶ 28 (quoting *State v. Augustin M.*, 2003-NMCA-065, ¶ 25, 133 N.M. 636). These errors are structural, and the State's exclusive reliance on cases expressing the State's discretion in its own presentation is entirely inapposite and unhelpful to the Court.

In this same vein, the State relies on *State v. Yaw*, 2011-NMCA-023, ¶ 11, 150 N.M. 279, for the proposition that "the prosecutor has broad discretion as to what evidence to present to, or exclude from, the grand jury, and courts will not review any good-faith decisions the prosecutor makes in that regard once an indictment is returned." Response at 14. But *Yaw* governs only the State's discretion in its *own* evidentiary presentation. It does not address the State's obligations of neutrality, nor its obligations in response to the grand jury's direct requests asking for additional evidence, which instead fall under *Herrera*. 2014-NMSC-018, ¶¶ 24-25. It is to *Herrera* the State must — but fails — to answer.

Prosecutorial discretion is entirely absent from a grand jury prosecutor's duty of neutrality and facilitation of requested evidence. *See id.* ¶¶ 24, 28. So too, therefore, is the showing of bad faith or prejudice that accompanies an abuse of that discretion. *See* Response at 15 (citing *Buzbee v. Donnelly*, 1981-NMSC-097, ¶ 86, 96 N.M. 692, and *Yaw*, 2011-NMCA-023, ¶ 11). Instead of grappling with the controlling law and its failure to comply with it, the State invokes cases and concepts entirely inapplicable to Defendant's Motion. Even then, however, our courts have always acknowledged that, in a case like this one, where "the prosecutor's conduct infringed upon the independent judgment of the grand jurors," dismissal is warranted. *See Buzbee*, 1981-NMSC-097, ¶ 86. It is this influence on the independence of the grand jury that defines the case before this Court. The grand jury prosecutor did not merely decline to volunteer favorable evidence in his own presentation — he misstated the law, foreclosed the grand jury's own requests to hear from witnesses, and conducted the proceeding in a manner that supplanted the grand jury's independent judgment with his own. That conduct falls outside any discretion the State's cited authority recognizes, and it is precisely the structural violation *Herrera* was decided to remedy.

II. The Prosecutor Repeatedly Dismissed, and Ultimately Denied, the Grand Jury's Requests to Hear from the Waiting Witnesses Through a Misrepresentation of Law.

Nowhere in the State's Response does it acknowledge or refute the fact that the grand jury asked — <u>three times</u> — to hear from the witnesses waiting outside the grand jury room. Instead, the State attempts to frame this issue, as it does with the others, as one of the State's affirmative duty to present evidence, asserting that "Defense argues that the State should have called in the witnesses who were waiting in the hall[.]" Response at 9. But Defendant makes no such argument. Defendant argues, instead, that the State was required to facilitate the grand jury's repeated requests to call those witnesses — an obligation entirely independent of whatever discretion the State enjoys over its own presentation.

a. The State Failed to Facilitate the Grand Jury's Repeated Requests to Hear from Additional Witnesses.

Just as the State fails to acknowledge that grand jurors repeatedly asked to hear from those witnesses, so too does it ignore the prosecutor's repeated deflection of those requests. *See* ***Defendant's Exhibit E*** at 196:4–8, 205:25–206:4, 229:15–17. Rather than abiding by the grand jury's explicit requests to hear from the waiting witnesses, Mr. Speer instead first deferred them until after lunch, then ignored them entirely upon Detective Brown's recall, and finally addressed them only when a grand juror raised the issue a third time, immediately before deliberation. *Id.* These were not isolated lapses. They were a pattern of evasion that culminated in an affirmative misrepresentation of the law.

By ignoring the factual underpinning of this failure, the State has avoided grappling with *Herrera*'s mandate that the State must facilitate rather than obfuscate the grand jury's request to hear additional evidence. When "serving as an aide to the grand jury, a prosecuting attorney must facilitate the grand jury's inquiry into any lawful, relevant, and competent evidence not initially presented by the State and cannot unilaterally withhold evidence or witnesses requested by the grand jury." *Herrera*, 2014-NMSC-018, ¶ 25. The prosecutor did precisely what *Herrera* forbids, first ignoring the request to facilitate the grand jury's inquiry altogether and then foreclosing that inquiry by citing a prohibitive process of his own invention. When the grand jury's third and final request could no longer be deferred, Mr. Speer told the grand jurors that the witnesses "have to be subpoenaed," that they "have to be given 36 hours' notice" before being allowed to testify, that all twelve grand jurors would have to unanimously agree to call them, and that doing so would require the grand jury to return the following week. ***Defendant's Exhibit E*** at 229:18–230:3. Every one of those representations was false.

b. The State's Construction of § 31-6-12 is Incorrect as a Matter of Law and the Contention that it was Invoked to Protect Witnesses is Disingenuous.

The State now attempts to salvage this "procedural instruction" as a correct statement of the law governing the grand jury's subpoena power. Response at 9. That effort fails for two independent reasons: the State's reading of the statute is wrong on its face, and its asserted concern for witness protections is unsupported by the record.

First, the State's reading of Section 31-6-12(A) contradicts both the statute's own terms and the State's own practice. The statute reads, in relevant part:

> The grand jury has ***power to order the attendance of witnesses*** before it, to cause the production of all public and private records or other evidence relevant to its inquiry and ***to enforce such power by subpoena*** issued on its own authority through the district court convening the grand jury and executed by any public officer charged with the execution of legal process of the district court; provided that all ***subpoenaed witnesses shall be given a minimum of thirty-six hours' notice*** unless a shorter period is specifically approved for each witness by a judge of the district court.

§ 31-6-12(A) (emphasis added). The statute, by its own terms, contemplates only the grand jury's power to compel evidence, not to hear voluntary testimony. *Id.* Similarly, the 36-hour notice requirement applies, by its plain language, to "subpoenaed witnesses" — it is a condition of the subpoena process itself, not a prerequisite to any witness's appearance before the grand jury. *Id.* Nothing in the statute conditions the grand jury's ability to hear evidence on a subpoena, nothing in the statute requires voluntary witnesses to be provided 36 hours' notice, and nothing in the statute requires unanimity among the grand jurors to call a witness. If the State's reading were correct, its own presentation would have violated it: the only witness it called to testify before this grand jury — Detective Brown, both in his initial testimony and his recall — appeared without a subpoena, without unanimity among the grand jurors and without 36 hours' notice. ***Defendant's Exhibit H***. The State's strained reading of the statute is contrary to its plain language and its own practice in this very case.

Second, the State's contention that it was merely protecting the procedural rights of the waiting witnesses rings hollow on this record. Response at 9 ("it is impossible for the State to know the circumstances of their presence"). Mr. Busfield testified, repeatedly, that the witnesses were present and willing. ***Defendant's Exhibit E*** at 142:10-14, 165:5-7, 171:15-16, 196:5-6, 205:25-206:1. Mr. Speer himself saw them sitting outside the grand jury room throughout the day — where they remained until after 4:00 p.m. — and commented on their presence directly. ***Defendant's Exhibit G***, ¶¶ 5, 6. If the State genuinely harbored doubt about whether those witnesses wished to testify voluntarily, the remedy was simple: ask them. It did not. Instead, the State fabricated a multilayer procedural barrier that rendered witness examination all but impossible *after* first ignoring and deflecting grand jury requests throughout the proceeding.

This was neither an effort to comply with a statutory mandate nor an attempt to "protect" the witnesses who sat waiting outside the grand jury room for more than six hours. It was instead a last-ditch effort to prevent the grand jury from exercising the very authority *Herrera* requires the prosecutor to facilitate, not foreclose.

III. The State Conflates the *Jones* Process and the Target's Right to Testify.

The State's Response rests on a single, unstated assumption: that without a letter submitted pursuant to *Jones*, 2009-NMSC-002, a target has no recourse against structural error and forfeits the protections the grand jury statutes otherwise guarantee. That assumption is incorrect, and once it is examined, the rest of the State's Response collapses with it. As explained at length in Defendant's Motion, the *Jones* process has no bearing on the target's statutory right to testify before the grand jury or on the content of that testimony. Instead, *Jones* and its resulting process pertain only to the State's independent and affirmative duty to alert the grand jury to exculpatory evidence proposed by the target. It does not touch, much less displace, any other constitutional or statutory duty the prosecutor owes the grand jury or the target— whether the duty of fairness and impartiality or the duty to facilitate the grand jury's own inquiry into evidence beyond what the State elicits in its presentation. The State's selective reliance on *Jones* only reinforces the fundamental confusion running throughout its Response: an evidentiary screening mechanism the State alone may invoke is not a gatekeeping requirement the target must satisfy before he may exercise his own statutory rights or hold the prosecutor to his own statutory duties.

a. The Absence of a *Jones* Letter Does Not Function to Suppress Evidence.

The *Jones* process governs one thing: the State's obligation to alert the grand jury to exculpatory evidence the State itself does not intend to present. NMSA 1978, § 31-6-11(B); *Jones*, 2009-NMSC-002, ¶¶ 14–18. It prescribes a procedure by which the target may give the State advance notice of such evidence, triggering the State's duty either to present it or to seek a ruling from the grand jury judge alleviating it of that duty. *Id.* ¶¶ 34–35. That is the entire function of the letter. It says nothing about, and has no bearing on, the target's own testimony or the State's standing duties of fairness and impartiality.

Indeed, our supreme court has already foreclosed the argument the State now makes. In *Herrera*, the district court had entered an order under *Jones* that relieved the State from its obligation to present the evidence requested by the defense; however, the target then testified, and during her testimony, the grand jury inquired about information that the order had addressed. In response, the State foreclosed the grand jury from hearing the information. On appeal, the supreme court held that the order "did not purport to limit [the target's] own testimony before the grand jury, which she had a statutory right to present." 2014-NMSC-018, ¶ 23. If a judicially issued *Jones* order, obtained through the very process the State insists is mandatory, cannot limit a target's testimony, then the absence of a *Jones* letter cannot do so either. The State asks this Court to hold that a procedural mechanism has greater preclusive force when it is never invoked than when a judge actually rules on it. That notion lacks support in logic or in law.

Instead, *Herrera* reflects the structure Defendant explains and that the State attempts to cast as nefarious: that a target may submit a *Jones* letter; he may testify; he may do both; he may do neither; or he may do one and not the other. This is not gamesmanship or "unclean hands." *See* Response at 3. Instead, the target, limited though his options may be, maintains discretion as to whether he seeks to compel the State to alert the grand jury to exculpatory evidence, whether he chooses to testify on his own behalf, whether he does neither, or whether he does both. None of these choices is gamesmanship. Each is simply Mr. Busfield exercising the rights the law gives him.

b. The Jones Process Has No Bearing on the Claims Before the Court.

Defendant's Motion is based on the grand jury prosecutor's interference with the grand jury's inquiry into additional evidence, his misstatement of the law, and his abdication of his statutory duty of neutrality. These are simply not the kinds of disputes *Jones* addresses. The *Jones* process exists to adjudicate whether proposed evidence is "lawful, competent, and relevant" so as to trigger the State's affirmative duty to alert the grand jury to it. § 31-6-11(B). It does not, and cannot, authorize a prosecutor to misstate the grand jury's ability to hear from witnesses who are willing to voluntarily testify, to influence the grand jury's assessment of evidence, or to spend a significant portion of a presentation undermining evidence a target raises in his own testimony. The State's argument boils down to the untenable position that because Mr. Busfield did not send a letter attempting to govern what the State must present, he forfeited his right to complain about what the State did and said once he chose to testify. That is not how the statute works, and it is not what *Herrera* held. The structural protections of neutrality, facilitation, and accurate legal instruction exist independent of, and do not depend upon, whether a *Jones* letter was ever sent.

c. It Was the Prosecutor, Not the Defense, Who Declined to Invoke Judicial Oversight.

Like the testimony of the State's witnesses, the target's testimony is not confined by the Rules of Evidence. § 31-6-11(A). He may, therefore, testify as to the existence of documents, witnesses, or the statements of others without running afoul of any rule or statute. And he need not first screen his testimony with the State. That stated, if the State fears that the evidence is not lawful, competent and relevant within the meaning of Section 31-6-11(A), the prosecutor may seek guidance from the grand jury judge, as the court in *Herrera* stated they must.

Contrary to the State's assertion that seeking evidentiary rulings in the context of grand jury are disfavored, our supreme court has held the opposite. Where a prosecutor has doubted the admissibility of a target's testimony,

> the prosecutor should have sought further guidance. And if the judge had ruled that the evidence requested by the grand jury did not meet the evidentiary standard set forth in Section 31–6–11(A), the prosecutor could have excluded that evidence and cautioned Petitioner and any other witnesses regarding any court-ordered limitations on their testimony. The prosecutor failed, however, to obtain any such guidance.

Herrera, 2014-NMSC-018, ¶ 25. Indeed, the prosecutor is the only party able to seek such relief in the middle of the proceeding. *See id.*

Mr. Speer never sought such guidance. Not when Mr. Busfield testified to the Warner Bros. investigation. Not when Mr. Busfield offered to read witness statements aloud. Not when the grand jury itself asked to hear from the waiting witnesses. At every one of those junctures, the only party authorized to invoke judicial review — the State — declined to do so, and instead made the relevant rulings himself, unilaterally, as advocate rather than as neutral aide. But the law is clear that, "[w]hen serving as an aide to the grand jury, a prosecuting attorney must facilitate the grand jury's inquiry into any lawful, relevant, and competent evidence not initially presented by the State and cannot unilaterally withhold evidence or witnesses requested by the grand jury." *Id.* ¶ 25. Mr. Speer plainly violated the requirements of *Herrera* and the grand jury statutes.

d. The State's Slippery Slope Has No Footing.

Finally, the State warns that permitting Mr. Busfield to testify without first sending a *Jones* letter will "encourage counsel and others to try this again in the future," lengthening grand jury proceedings and "rendering *Jones* inapplicable in the 2nd Judicial District." Response at 12–13. This argument misunderstands both the right at issue and the incentives it imagines. Testifying before the grand jury is not a loophole, and it is not "trying" anything. It is an independent statutory right that predates the *Jones* decision. § 31-6-11(C)(3)–(4). A target who exercises that right takes the same risk any witness takes in testifying: his account can be used at trial; if dishonest, he opens himself up to perjury charges; and the grand jury may disbelieve him. That risk is precisely why most targets, as a matter of strategy, choose not to testify at all — a reality the State's own experience in this district bears out.

The *Jones* process and the right to testify will continue to coexist exactly as the Legislature designed them, because they serve entirely different functions: one tells the State to alert the grand jury to exculpatory evidence it does not otherwise intend to present; the other lets the target speak for himself. Neither renders the other obsolete, and the exercise of one has never depended on the invocation of the other. The State's professed fear that defendants will begin exercising a right the statute has always granted them is not a basis to deny Mr. Busfield the protections that right carries with it — it is an admission that the State would prefer targets not use it at all.

IV. The Prosecutor Failed to Refrain from Words and Conduct That Improperly Influenced the Grand Jury.

Our courts have repeatedly made clear that the State's role before the grand jury is not one of advocacy, but instead of "scrupulous[]" neutrality. *Herrera*, 2014-NMSC-018, ¶ 28 (quoting *Augustin M.*, 2003-NMCA-065, ¶ 25); *see also Ulibarri*, 1999-NMCA-142, ¶ 11; *De Leon*, 2014-NMSC-005, ¶ 8. Adhering to this standard means that the grand jury prosecutor must "refrain from words or conduct that may influence the decision of the grand jury." *Herrera*, 2014-NMSC-018, ¶ 28 (quoting *Augustin M.*, 2003-NMCA-065, ¶ 25) (emphasis added). This duty of neutrality is not limited, as the State would have it, to tone of voice. It extends to the structure of the target's examination, the prosecutor's treatment of exculpatory evidence, and his facilitation of the grand jury's own inquiry into additional evidence. A prosecutor who is unfailingly calm while undermining exculpatory evidence, obstructing the grand jury's own requests for further inquiry, or otherwise influencing the decision of the grand jury has not satisfied his duty of neutrality merely because he never raised his voice.

The State defends Mr. Speer's repeated interruptions of Mr. Busfield's testimony as proper "redirecting" — necessary, in the State's telling, because Mr. Busfield was "repeating himself" and the prosecutor was simply "guid[ing] the presentation." Response at 10. But "guiding the presentation" looks markedly different depending on which direction the guidance runs and to what evidence the prosecutor did, or did not, wish the grand jury to give credence. When Mr. Busfield testified, Mr. Speer told him, before he had spoken a single substantive word, to direct his responses only to the prosecutor's questions. ***Defendant's Exhibit E*** at 79:1–2. He reduced multi-part contextual answers to forced yes-or-no responses, *id.* at 82:1–5, 87:20–21, told Mr.

Busfield to “stop right there” while he was mid-explanation, refusing to let him finish his point, *id.* at 83:20–23, and refused to let him address the grand jurors directly even when Mr. Busfield asked to do so. *Id.* at 93:20–24. When Detective Brown testified, by contrast, Mr. Speer’s “guidance” took the opposite form: rather than narrowing Brown’s answers, he expansively elicited extended, unprompted commentary on subjects far afield from anything Brown had personal knowledge of — grooming psychology, the general profile of a child sex offender, the mechanics of defeating a polygraph, and his opinion that a fellow witness had made “a false statement.” *Id.* at 7:8–8:8, 61:10–25, 215:20–24. “Guiding the presentation,” in other words, meant constraining the target and expanding the detective. That is not neutral “guidance.” Nor is it fair and impartial, as the prosecutor is required to be “at all times during grand jury proceedings.” § 31–6–7(D); *see also Herrera*, 2014-NMSC-018, ¶ 28. It is advocacy aimed at securing an indictment.

The State’s Response itself reveals this same asymmetry. The State argues that Mr. Busfield was never prevented from telling the grand jury what witnesses like Kristin Karr or Alan Caudillo would say — that he was free to summarize their accounts in his own testimony. Response at 6-7. Yet when Mr. Busfield asked to read the witnesses’ own statements aloud — rather than merely characterize them secondhand — Mr. Speer’s answer was a single word: “No.” ***Defendant’s Exhibit E*** at 205:2. The State fails to acknowledge this exchange.

But the State cannot have it both ways. A target may either be held to his own unsupported summary of what an absent witness would say, or he may be permitted to put the witness’s actual words before the grand jury. Mr. Speer chose to confine Mr. Busfield to the former while denying him the latter — and then, through the recall of Detective Brown, supplied the grand jury with the State’s own characterization of what those same witnesses would say, delivered through a detective with no personal knowledge of the underlying facts and offered without the constraints Mr. Busfield's testimony was held to. An impartial aide does not place one set of evidentiary constraints on the target and a different, far looser set on his own witness. That asymmetry is evidence that Mr. Speer was not facilitating the grand jury's inquiry; he was managing its outcome.

The State further argues that Mr. Busfield's repeated apologies during his testimony reflect nothing more than a "verbal pause" rather than any indication of distress or pressure. Response at 10. But the record, read against the conduct described above, does not bear that out. Mr. Busfield did not simply punctuate his sentences with "sorry" as filler. He substantively apologized for the length of his own testimony — telling the grand jury, "I'm going through this as quick as I can. I know this must be rough. I've never even done jury duty. I can't imagine." ***Defendant's Exhibit E*** at 129:13–18. That apology followed Mr. Speer's comment that Mr. Busfield had "been explaining himself for over an hour," *id.* at 121:7–8, his admonition that Mr. Busfield was "repeating himself," *id.* at 128:1–3, and his pointed question — "Do you have more to say? . . . I'm sure you do. Go ahead" — when Mr. Busfield asked whether he was on a time constraint. *Id.* at 129:10–15. Those apologies were not a speech habit. They were the predictable response of a target held on a tight leash throughout his own testimony, told repeatedly that he was taking too long, and denied the latitude the State's own witness was freely given. A target who feels compelled to apologize to the grand jury for exercising his own statutory right to testify has not been given a meaningful opportunity to do so. He has been made to feel that the right itself was an imposition — precisely the message a prosecutor exercising scrupulous neutrality must take care not to send.

V. The Prosecutor's Treatment of the Polygraph Evidence Was Neither Accurate Nor Neutral.

The State's failure of fairness and impartiality is nowhere better epitomized than in its approach to Mr. Busfield having unequivocally passed a polygraph examination. The State nonetheless insists that its persistent and devoted presentation of evidence impeaching that polygraph — both before and after Mr. Busfield testified — functioned as no more than an 'aide' to the grand jury's independent assessment of the evidence. It was not. The State's Response asks this Court to accept that systematically constructing a case against a piece of favorable evidence — before the target ever enters the room, through a witness who admittedly never reviewed the document at issue, and continuing through the target's own testimony — is simply "balanced" assistance. It is not. It is advocacy and constitutes structural error.

a. The Audio Record and Transcript.

As the State points out, ***Defendant's Exhibit F***, the audio recording of the grand jury proceedings, was missing the portion corresponding to transcript pages 75–119 due to an administrative error in compiling the audio files as an exhibit. That error has since been resolved, and the full audio is attached to this Reply as ***Defendant's Exhibit N***. Defendant relies primarily on the certified transcript, which was compiled by Jennifer Bean of Bean and Associates, and which remains the verbatim record of the proceeding.

To the extent, however, the State suggests that Mr. Speer's precise wording — whether he told Mr. Busfield that polygraphs are "not allowed in this state" or qualified that statement in some other respect — is in dispute, the Court is the finder of fact and is invited to listen to the audio in full, including the exchange the State itself highlights at Disk 3, beginning at 12:30. Response at 8. But however the Court resolves that factual question, it does not resolve this Motion. The argument here is not limited to a single sentence. It concerns a sustained, multi-stage effort — beginning before Mr. Busfield ever entered the room — to strip the grand jury of confidence in a piece of evidence the State does not dispute is exculpatory.

b. The State Fails to Counter its Factual Misrepresentations Regarding the Polygraph.

The State's Response is silent on the most concrete misrepresentation in this record: that the polygraph examination's questions were not specific to the named alleged victim in this case. Before Mr. Busfield testified, Mr. Speer elicited from Detective Brown that the examination "didn't specify what boy" the questions concerned. ***Defendant's Exhibit E*** at 57:8–9. The prosecutor's implied statement, and the testimony it elicited, was false. The polygraph report — which the State possessed and did not share with the grand jury — specifies five separate questions, each referencing "S[REDACTED] L[REDACTED]" by name, including: "Regarding whether or not you ever touched the intimate parts of S[REDACTED] L[REDACTED], do you intend to answer truthfully each question about that?" ***Defendant's Exhibit I***. Detective Brown had never seen the report or the questions administered. ***Defendant's Exhibit E*** at 56:21–22. But he followed Mr. Speer's lead and testified that the polygraph failed to specify what "boy" was at issue, confirming Mr. Speer's point that the polygraph was not reliable as exculpatory evidence. The State's Response does not mention this testimony, does not defend it, and does not explain how the prosecutor led the detective to agree to a characterization of the evidence that was verifiably false. This is not a matter of tone, balance, or scientific debate over polygraph reliability. It is a specific and false assertion about the content of a document the State had in its possession and chose not to produce to the grand jury — made to discredit exculpatory evidence.

c. The Prosecutor Did not Facilitate the Grand Jury's Consideration of the Polygraph but Instead Steered Their Conclusions About It.

The State defends its presentation of polygraph evidence as a "balanced view" — acknowledging admissibility in New Mexico while asserting that the same stands on "shaky grounds." Response at 8. That framing fundamentally misreads what neutrality requires. A fair and impartial aide does not assess the credibility of exculpatory evidence for the grand jury. That is the grand jury's exclusive, and independent, function. *See* § 31-6-11(B) (grand jury is to weigh evidence). The prosecutor's job is instead to facilitate access to the evidence, not to manage the grand jury's conclusions about it. Here the prosecutor did not seek to aid the grand jury's inquiry, but instead to steer its verdict.

Before Mr. Busfield testified or had mentioned a polygraph, Mr. Speer led Detective Brown through an extended discussion establishing that polygraphs "do not measure lies," that "someone who has been acting since they were a child" can "remain calm" enough to defeat one, and that Brown's skepticism reflects "standard practice" across New Mexico law enforcement. ***Defendant's Exhibit E*** at 7:13–8:8, 61:21–25. Only after laying that foundation did Mr. Speer call Mr. Busfield to testify — and when Mr. Busfield disclosed that he had passed the examination, Mr. Speer told him directly that the result was "not allowed" in court, before repeatedly suggesting that Mr. Busfield's professional training as an actor allowed him to beat the polygraph. *Id.* at 94:17–18, 109:22–24, 110:14–15. The cumulative message delivered to the grand jury — through framing, sequencing, and the false specificity testimony addressed above — was that the polygraph could not be trusted regardless of its result. Further, whether Mr. Speer told the grand jury that polygraph results are not admissible in New Mexico or that those results are not admissible in most states, the implication of either statement was the same: that polygraph results are not to be trusted. Far from scrupulously refraining from words or conduct that would influence the grand jury's verdict, this campaign was one of pure and calculated advocacy and mandates dismissal.

CONCLUSION

For the foregoing reasons, Defendant Timothy Busfield respectfully requests that the Court grant his motion to quash the indictment in this matter. The State violated Mr. Busfield's structural grand jury protections, and the indictment must be dismissed without any showing of prejudice or bad faith. *Herrera*, 2014-NMSC-018, ¶ 17.

Respectfully submitted,

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I HEREBY CERTIFY that on June 30, 2026, a copy of the foregoing pleading was filed via NM File & Serve, which caused all counsel of record to be served electronically.

/s/ Amber Fayerberg
Amber Fayerberg

<u>Defendant's Exhibit N</u>

Audio of Grand Jury Recordings
Available for Download at:
[redacted]