STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

v. D-101-CR-2023-00040

HANNAH GUTIERREZ-REED,

Defendant.

DEFENDANT'S REPLY TO THE STATE'S RESPONSE TO DEFENDANT'S MOTION TO SEVER CHARGES AND EXCLUDE MENTION OF ALLEGED OTHER BAD ACTS

Defendant Hannah Gutierrez Reed, by and through her counsel of record, Jason Bowles of Bowles Law Firm, and Todd J. Bullion of Bullion Law Office, offers this Reply in their support of their motion for severance and exclusion of other acts under NMRA 11-404. In support the following is offered:

I. The Government's Argument for 404 Admissibility is based on Speculation and Requires the Jury to Make Inferences that the Defendant Acted in Conformity with a Character Trait

The government's entire argument is based on speculation and conjecture. Several arguments in the State's response make this clear.

Speculation Regarding Nervousness and Anxiety

The government in its response avers that Ms. Gutierrez Reed was placed in the back of a police car because she appeared to be having a panic attack. State's Response at page 1. States without any citation to a treatise, expert affidavit, or other authoritative source that the effects of cocaine in the human body generally last an hour or less. *Id.* at 2. And further avers that Ms. Gutierrez Reed's nervous and anxious behavior while having contact with the police after two

people were unexpectedly shot on the movie set she was working on was attributable to cocaine use instead of the excitement and stress of the situation at hand. *Id.*

Speculation Regarding the Contents of the Bag Allegedly Handed to Ms. Smith

The government states that a baggie containing what the government avers is a white powdery substance was handed to Rebecca Smith by Ms. Gutierrez Reed *after* she was interviewed by SFSO detectives and released. The government concedes the actual contents in this alleged baggie are unknown.

The Government Actually States that they Will Ask the Jury to Speculate that Ms. Gutierrez Reed was Impaired Based on How they Describe Her Character

The government at page 7 of their motion makes the following argument, "A jury could reasonably conclude that **a person who uses** marijuana, alcohol, and cocaine in the evening and begins work at 6:00 am may still be impaired in the morning". *Id.* at 7 (emphasis added). The government does not actually aver facts that Ms. Gutierrez Reed actually used alcohol, cocaine or marijuana the day prior to date of incident. They instead say a "person who uses", i.e. explicitly referring to Ms. Gutierrez Reed's character rather than specific articulable facts of supposed drug or alcohol use.

The jury will presumably not include a panel of toxicologists or other similarly experienced and credentialed individuals who could make an informed assessment about whether someone was impaired at a particular time after using alcohol or drugs. This particular type of "inference" is sometimes used in DWI prosecutions and is referred to as retrograde extrapolation. To make this type of argument as to someone's impairment status hours after a controlled substance is used expert testimony is required.

Even when an expert is competent to testify on retrograde extrapolation such opinions are excluded from evidence when they are based on factual assumptions rather than facts in the record:

"{31} Smock testified that his relation-back calculations were predicated on three essential facts: (1) the time of the collision; (2) the time of the blood draw; and (3) the results of Defendant's BAC test. Smock did not know when Defendant had begun or ceased drinking and, therefore, he assumed that "no beverages were consumed during this time period" and that Defendant was post-absorptive both at the time the BAC test was administered and at the time of driving.[2] Using an average elimination rate of .015 to .022 grams per hundred milliliters of blood per hour. Smock calculated backward six hours and concluded that Defendant must have had a BAC between .075 to .11 at the time of driving.
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Smock did not know when Defendant had consumed his last drink and, therefore, whether Defendant was pre-absorptive, post-absorptive, or at the peak of alcohol absorption either at the time of the collision, or at the time his BAC test was administered. This information is critical to perform retrograde extrapolation calculations because if Defendant was in the pre-absorptive phase of the BAC curve, both at the time of the collision and at the time his BAC test was administered, then his BAC at the time of the collision would have been *lower than* the results of his BAC test. On the other hand, if Defendant was in the post-absorptive phase of the BAC curve, both at the time of the collision and at the time his BAC test was administered, then his BAC at the time of the collision would have been *higher than* the results of his BAC test as Smock testified. If Defendant peaked somewhere in between, then his subsequent BAC could have been higher or lower depending on the facts and circumstances.

{33} Given that Smock did not have the facts necessary to plot Defendant's placement on the BAC curve, he could not express a reasonably accurate conclusion regarding the fact in issue: whether Defendant was under the influence of intoxicating liquor at the time of the collision. Smock's testimony did not "fit" the facts of the present case because he simply assumed for the purpose of his relation-back calculations that Defendant had ceased drinking prior to the collision and, therefore, was post-absorptive.

{34} Experts may, and often do, base their opinions upon factual assumptions, but those assumptions in turn must find evidentiary foundation in the record. Here, by contrast, the State did not produce any evidence regarding when Defendant last consumed alcohol, much less the quantity consumed, which rendered Smock's assumption mere guesswork in the context of this particular case. Accordingly, because Smock's expert conclusions were nothing more than mere conjecture and should have been excluded, the trial court abused its discretion in permitting this evidence to go to the jury. *See, e.g., Hathaway v. Bazany*, 507 F.3d 312, 318–19 (5th Cir.2007)

(concluding that testimony of expert witness was unreliable and inadmissible because it was premised on a series of factual assumptions unsupported by the evidence)."

State v. Downey, 2008-NMSC-061, ¶¶ 31-34, 145 N.M. 232, 239–40, 195 P.3d 1244, 1251–52

Lay jurors will have no idea at what rate cocaine is metabolized in the body and how it affects a person as it is metabolized. They will likewise have no idea about elimination rates. Here like in *Downey* there are no facts in the record as to when any drug or alcohol use occurred and no evidence as to any quantity consumed. An actual qualified expert in *Downey* had his opinion ruled inadmissible by the New Mexico Supreme Court as "mere guesswork" because he made the exact same assumptions to reach his opinion that the prosecutors will ask the jury to draw in the instant case. *Id.* What is even worse in this case is that the foundation for the assumption of drug use is based wholly on a propensity argument which impermissibly suggests that the Defendant acted in conformity with a character trait – a prejudicial character trait at that.

The government again reiterates that it is in fact making a propensity argument at page 11 of their motion arguing, "Ms. Gutierrez' substance abuse is more than relevant to her inability to tell the difference between dummy rounds and live rounds." Again – this is not tied to specific evidence of drug use observed on the day of incident or the day before – the government is explicitly stating that they will ask the jury to make an adverse inference based on the Defendant's alleged character flaw – substance abuse. The government also outright states that they cannot prove their contentions with direct evidence. *Id.* at 11 ("The State concedes that it cannot prove with direct evidence such as a blood test that Ms. Gutierrez may have been impaired (at least slightly) on October 21, 2021…).

Legal Authority on Speculative Evidence

New Mexico appellate courts roundly condemn the admission of evidence or conclusions that can only be drawn by speculation, this rule is codified in Uniform Jury Instruction 14-6006:

You are the sole judges of the facts in this case. It is your duty to determine the facts from the evidence produced here in court. Your verdict should not be based on speculation, guess or conjecture.

NM R CR UJI 14-6006

In other words, "[e]vidence from which a proposition can be derived only by speculation among equally plausible alternatives is not substantial evidence of the proposition." *Baca v. Bueno Foods*, 1988–NMCA–112, ¶ 15, 108 N.M. 98, 766 P.2d 1332. This principle necessarily requires a reviewing court to distinguish between conclusions based on speculation and those based on inferences,""

State v. Slade, 2014-NMCA-088, ¶ 14, 331 P.3d 930, 933

"A reasonable inference is a conclusion arrived at by a process of reasoning [which is] a rational and logical deduction from facts admitted or established by the evidence[.]" *Samora v. Bradford*, 1970–NMCA–004, ¶ 6, 81 N.M. 205, 465 P.2d 88; *see Bowman v. Inc. Cnty. of Los Alamos*, 1985–NMCA–040, ¶ 9, 102 N.M. 660, 699 P.2d 133 ("An inference is more than a supposition or conjecture. It is a logical deduction from facts which are proven, and guess work is not a substitute therefor." (internal quotation marks and citation omitted)). An ultimate inference may not be based on a series of inferences. *See United States v. Pettigrew*, 77 F.3d 1500, 1521 (5th Cir.1996) ("[A] verdict may not rest on ... an overly attenuated piling of inference on inference."); *Hisey v. Cashway Supermarkets, Inc.*, 1967–NMSC–081, ¶ 7, 77 N.M. 638, 426 P.2d 784 ("It is true that [the] plaintiff is entitled to [resolution of] all inferences in [its] favor but such inferences must be reasonably based on facts established by the evidence, not upon conjecture or other inferences."). Finally, even when a permissible logical inference may be drawn from the facts, if it "must be buttressed by surmise and conjecture" in order to convict, the conviction cannot stand. *State v. Tovar*, 1982–NMSC–119, ¶ 8, 98 N.M. 655, 651 P.2d 1299 (internal quotation marks and citation omitted).

State v. Slade, 2014-NMCA-088, ¶ 14, 331 P.3d 930, 934

"{20} The chain of inferences relied on by the State to support a conclusion that Defendant intended to perform any act of aiding and abetting amount to no more than guess or conjecture, rather than a sufficient basis upon which to find guilt beyond a reasonable doubt. "For the jury to have reached [the conclusions necessary to the verdict, it] had to speculate. This it may not do." *State v. Malouff*, 81 N.M. 619, 621, 471 P.2d

189, 191 (Ct.App.1970) (reversing a conviction for insufficiency and noting that while a reviewing court views the evidence and inferences in the light most favorable to the verdict, this proposition does not replace the requirements of proof)."

State v. Vigil, 2010-NMSC-003, ¶ 20, 147 N.M. 537, 541–42, 226 P.3d 636, 640–41

NMRA 11-404A Expressly Forbids Propensity Arguments

"(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." NMRA 11-404(A)(1). As described above the government is asking the jury to do precisely what Rule 404 is designed to prevent – impermissible arguments based on the character, or supposed character traits, of a criminal defendant.

II. No Experts will Support the State's Requested Speculation

The speculation the government is asking the jury to engage in is squarely within the realm of expert testimony. The government has not noticed any experts to opine that the Defendant was in fact impaired or hungover, has not noticed any experts on retrograde extrapolation, has not introduced any experts to opine that Defendant has the medical diagnosis of a substance abuse disorder[1], and have not noticed any experts on the effects cocaine has on a person after ingested. These experts would be needed to support the conclusions the government is asking the jurors to draw because they are well outside the realm of what a lay jury would be expected to understand without the aid of expert testimony. NMRA 11-701 and NMRA 11-702.

[1] See DSM-5, defining a substance use disorder (SUD) involves patterns of symptoms caused by using a substance that an individual continues taking despite its negative effects. Based on decades of research, DSM-5 points out 11 criteria that can arise from substance misuse, available at https://www.gatewayfoundation.org/addiction-blog/dsm-5-substance-use-disorder/#:~:text=These%20criteria%20fall%20under%20four,than%20you're%20meant%20to.

III. Case Law Doesn't Support the Government's Position

None of the case law cited by the prosecution actually supports their arguments. The bulk of the cases cited discuss sufficiency of the evidence for accomplice liability when an accomplice is seen at the scene of the crime committed by a principal and both the accomplice and principal flee. Ms. Gutierrez Reed did not flee the set of Rust and did not conceal evidence concerning the rust shooting. She stayed at the movie set and cooperated with investigators. This is indisputable given the observations of police and their body cam video. This distinguishes the vast majority of the case law cited by the government.

IV. The Proffered Evidence is More Prejudicial than Probative

Even assuming for the sake of argument that government is in fact offering the evidence for a legitimate 11-404(B) reason the jury would still be exposed to what they would reasonably perceive as a propensity argument which would cause extreme prejudice to Ms. Gutierrez Reed. "For purposes of Rule 11-403, the term unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Evidence is unfairly prejudicial if it is best characterized as sensational or shocking, provoking anger, inflaming passions, or arousing overwhelmingly sympathetic reactions, or provoking hostility or revulsion or punitive impulses, or appealing entirely to emotion against reason. *State v. Martinez*, 2021-NMSC-002, ¶ 101, 478 P.3d 880, 910 (internal citations and quotations omitted). This is exactly the kind of reaction that the speculative argument is designed to produce with the jury – outrage that someone would perform a job concerning the safety of others while impaired or hungover. The typical juror in Santa Fe County would also tend to be prejudiced against recreational users of cocaine as it is extremely atypical behavior that would serve to alienate a

defendant from jurors. The balancing of interests clearly points to exclusion – there is zero probative value and substantial risk of prejudice.

Wherefore, Defendant prays that the counts be severed and that the government's proffered evidence in their response be excluded and that any mention of the tampering charge be excluded from evidence in the manslaughter case. In the event the court grants this motion to sever the Defendant reserves the ability to file a motion to exclude the evidence the government will offer in Ms. Gutierrez Reed's involuntary manslaughter trial in the trial for tampering with evidence.

Respectfully submitted,

/s/ Jason Bowles
Jason Bowles
Bowles Law Firm
4811 Hardware Drive, N.E., Bldg D, Suite 5
Albuquerque, N.M. 87109
Telephone: (505) 217-2680
Email: jason@bowles-lawfirm.com

-and-

Todd J. Bullion
4811 Hardware Drive, N.E., Bldg D, Suite 5
Albuquerque, N.M. 87109
Telephone: (505) 494-4656
Email: todd@bullionlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent through the ESF system, which caused the following parties to be served by electronic means, as reflected on the Notice of Electronic Filing this 9th day of February 2024, to the counsel listed below:

Kari Morrisey
Jason Lewis
Special Prosecutors
1st Judicial District Attorney's Office

/s/ Todd J. Bullion
Todd J. Bullion
Law Office of Todd J. Bullion