IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

CRISTAL CARDENAS, **No. S-1-SC-39517**

Defendant-Appellant.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
DOÑA ANA COUNTY,
HON. JUDGE CONRAD F. PEREA PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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NOTE ON RECORD CITATIONS

The district court proceedings were audio-recorded using For The Record software. FTR CDs were reviewed using The Record Player and are cited by date and timestamp in the form **[mm/dd/yy CD hour:minute:second]**. Citations to the Record Proper are in the form **[RP page number]**. Exhibits are cited as **[Ex. number]**. The brief-in-chief is cited as **[BIC page number]**, and the State's answer brief is cited as **[AB page number]**.

CERTIFICATION OF COMPLIANCE

The body of this brief exceeds the limit of 15 pages set forth in Rule 12-318(F)(2) NMRA. Undersigned counsel certifies that this brief is written in Times New Roman, a proportionally spaced font, and that the body of the brief contains fewer than 4,400 words (specifically, 3,993). This word count was obtained using Microsoft Word 2016.

Cristal Cardenas relies on the facts, arguments, and authorities set out in her brief-in-chief for all issues not discussed below. In particular, she stands on the prejudice analysis and double jeopardy analysis from the brief-in-chief and does not address them below. **[*See* BIC 42-44, 49-50]**

REPLY ARGUMENT

I. The ban on note-taking constituted a court closure for purposes of the right to a public trial.

The State argues in its answer brief that the district court's ban on note-taking did not constitute a closure of the court. **[AB 23]** The brief focuses on the fact that Kay Lilley, Ms. Cardenas's guest, was allowed to remain in the courtroom and observe the proceedings, although her notes were confiscated and she was prohibited from taking more. **[*See* AB 23-24]**

The State concedes that the district court was "generally mistaken as to the permissibility of note-taking in a courtroom," but argues that in the cases cited in the brief-in-chief, the appellate courts did not reverse any underlying convictions. **[*See* AB 21, 24-25]** This is because none of the cases were defendants' appeals from criminal convictions. Other parties cannot appeal a defendant's conviction or assert his Sixth Amendment right, but other parties *can* assert a public trial right under the First Amendment. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 379-80 (1979) (Sixth Amendment right "is personal to the accused"); *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 603 (1982) (public has a

First Amendment right of access to criminal trials). Several courts have recognized that this First Amendment right of public access to the courts encompasses a right to sketch or take handwritten notes. *See United States v. Columbia Broadcasting System*, 497 F.2d 102, 106 (5th Cir. 1974); *Goldschmidt v. Coco*, 413 F.Supp.2d 949, 953 (N.D. Ill. 2006); *Somberg v. Cooper*, 582 F.Supp.3d 438, 443 (E.D. Mich. 2022). *Cf. United States v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985) ("cameras are qualitatively different from reporters' notetaking and sketching"). The State cites no authority that the public's First Amendment right is broader than a defendant's Sixth Amendment right to a public trial, and U.S. Supreme Court case law suggests the opposite is true.

The U.S. Supreme Court treats the First and Sixth Amendment public trial rights as two sides of the same coin. The Court has written:

> This Court's rulings with respect to the public trial right rest upon two different provisions of the Bill of Rights . . . .
> The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other. Still, there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant. There could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit.

Presley v. Georgia, 558 U.S. 209, 211-13 (2010) (per curiam) (cleaned up).[1] *See also Waller v. Georgia*, 467 U.S. 39, 46 (1984) ("[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public."); *Rovinsky v. McKaskle*, 722 F.2d 197, 199 (5th Cir. 1984) ("Because the public's first amendment right and the defendant's sixth amendment right serve common interests . . . the legal principles appropriate for enforcing one are usually applicable to the other."); *Commonwealth v. Cohen*, 921 N.E.2d 906, 918 (Mass. 2010) ("The same constitutional analysis applies to a public trial claim brought under the First Amendment as one brought, as here, under the Sixth Amendment."). Therefore, if the right to take notes is part of the First Amendment right of public access to the courts, it must also be part of a defendant's Sixth Amendment right to a public trial.

Courts have interpreted the right to a public trial broadly, and a courtroom may be "closed" for public trial purposes even if the doors are unlocked and no spectators are turned away. For example, in *People v. Jones*, 750 N.E.2d 524, 526 (N.Y. 2001), a court posted an officer outside during an undercover officer's

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[1] This brief uses "(cleaned up)" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017); *see, e.g.*, *Brownback v. King*, 141 S.Ct. 740, 748 (2021).

testimony. The officer was instructed to admit attorneys and the defendant's family members, but to ask other visitors who they were and why they were coming to court. *See id.* In fact, no one other than attorneys and family tried to come in, and no one was turned away. *Id.* at 527.

The New York Court of Appeals noted that there was dispute over whether this kind of screening was "an alternative to closure" or a partial closure of the courtroom. *See id.* at 528-29. In the end, the Court concluded that the designation did not matter. "Whatever we call it, the device implemented here raises the same secrecy and fairness concerns that a total closure does. The defendant's Sixth Amendment right to a public trial is still implicated." *Id.* at 529 (cleaned up).

By this measure, the district court's ban on taking handwritten notes was a courtroom closure. The note-taking ban limited Ms. Lilley's ability to remember what she saw in court and share it with others, implicating the same secrecy and fairness concerns as a total closure. The State insists that Ms. Lilley was "able to report" what she heard and saw during trial, **[AB 24]** but her ability to report was hobbled by her inability to take notes. "In our society, starting no later than junior high school, students are taught and expected to take notes at lectures, seminars, and in libraries so that they may have the ability to revisit what they have heard or read." *Goldschmidt*, 413 F.Supp.2d at 952-53.

This Court has already held that the test from *Waller*, 467 U.S. at 48, is appropriate for "something less than a full closure" of the courtroom. *State v. Turrietta*, 2013-NMSC-036, ¶ 19, 308 P.3d 964. The *Waller* test directs courts to consider the scope of the closure and alternatives to closure; therefore, it is flexible enough to apply to full or partial closures. *See id.*; *see also Jones*, 750 N.E.2d at 529 ("*Waller* already contemplates a balancing of competing interests in closure decisions. . . . The breadth of the closure request therefore will always be measured against the risk of prejudice to the asserted overriding interest."). Even for "something less than full closure, the *Waller* standard should still apply as originally intended because any courtroom closure is an infringement on a defendant's Sixth Amendment right to a public trial, and therefore, such a request should not be granted lightly." *Turrietta*, 2013-NMSC-036, ¶ 19.

II. The *Waller* test requires reversal in this case.

The first prong of the *Waller* test requires the party seeking closure to "advance an overriding interest that is likely to be prejudiced." *Turrietta*, 2013-NMSC-036, ¶ 19 (quoting *Waller*, 467 U.S. at 48). On appeal, the State asserts that the overriding interest "was potential prejudice to the co-defendant, [Luis] Flores, whose trial was still pending." **[AB 25-26]**

The prosecutors did not assert this interest at trial. A prosecutor initially raised the note-taking issue on the grounds that "I don't think somebody should record the proceedings or write notes about what is happening," and the judge agreed with him. **[3/9/22 CD 3:00:59-3:01:18]** The judge considered ejecting Ms. Lilley from the courtroom, over defense counsel's concerns about public trial, and then asked the State whether having Ms. Lilley stop taking notes and turn over her existing notes would address the State's concerns. **[*Id.* 3:01:18-3:04:13; *see* BIC 17-18]**

At that point, three minutes into the discussion about Ms. Lilley's notes, the prosecutor said:

> I'm not sure if she should have those notes, and I'm not sure what's the purpose of this inquiry, because in this case, Judge, there is also a co-defendant who's pending trial, and what is the purpose of this happening, because it is somewhat unusual for a visitor to come in and—even for the media, Judge, they have to ask permission from the court. If there are circumstances that the court decides that they cannot record it or they cannot, there is—so Judge, I believe there is some issue to that.

[3/9/22 CD 3:04:13-47] This was the State's only mention of Mr. Flores during this discussion. The prosecutor did not articulate any concerns about prejudice to Mr. Flores or say how, exactly, Ms. Lilley's notes might have affected Mr. Flores's trial. (The answer brief does not explain this either.) **[*See* AB 25-26]** This post hoc rationale fails the "overriding interest" prong of the *Waller* test, and therefore the partial courtroom closure was unconstitutional. *See Turrietta*, 2013-NMSC-036, ¶ 22 (a closure must meet all four *Waller* prongs).

The State also argues that the fourth prong, which requires the district court to make findings, is inapplicable because "there was no closure to make findings about." **[AB 26]** But *Waller* is the test for determining whether a courtroom closure is constitutionally permissible; if the *Waller* test is applicable, the court has already determined that there is a total or partial closure, and findings are required. *See Turrietta*, 2013-NMSC-036, ¶ 19.[2] In the alternative, the State suggests that the court's discussion with the parties "contain[s] the necessary findings," without specifying what those findings would be. **[AB 26]** Both of the State's arguments amount to a concession that the State cannot meet the fourth *Waller* prong. The

[2] Citing *Turrietta*, the State says that an appellate court would apply the *Waller* test "[t]o conclude that a district court closed a trial." **[AB 25]** This is not what *Turrietta* says; the *Waller* test determines whether a closure is constitutional. *See Turrietta*, 2013-NMSC-036, ¶ 22 ("Therefore, the first prong of the *Waller* standard was not satisfied and the closure was unconstitutional.").

partial closure created by the note-taking ban fails the *Waller* test, it is unconstitutional, and it requires reversal.

III. The evidence about the drug test on Ms. Cardenas's daughter was inadmissible under Rule 11-404(B) NMRA for several reasons.

A. The State did not provide the notice required by Rule 11-404(B).

Below and in the brief-in-chief, Ms. Cardenas argued that the State failed to give adequate notice that it planned to introduce evidence that her daughter tested positive for methamphetamine. **[*See* BIC 31-33; 3/10/22 CD 3:00:10-3:01:12, 3:02:21-3:03:24]** The brief-in-chief cited *State v. Acosta*, 2016-NMCA-003, 363 P.3d 1240, for its explanation of the notice required by Rule 11-404(B). **[*See* BIC 32-33]** The answer brief argues that *Acosta* is not applicable and that the notice requirement is met if the defense knows that the evidence exists. **[*See* AB 29-31]**

This Court recently clarified that notice of the underlying evidence does *not* satisfy the Rule 11-404(B) notice rule. *See State v. Marquez*, 2023-NMSC-___, ¶ 33, ___ P.3d ___, 2023 WL 6631538 (No. S-1-SC-38502, Oct. 12, 2023). Quoting *Acosta*, 2016-NMCA-003, ¶ 19, this court wrote that "disclosing the information in discovery rather than in response to the specific rule misses the point of the rule, which is to inform the defendant of crimes the state intends to introduce and to allow the defendant time to respond by motion in limine or otherwise." *Marquez*, 2023-NMSC-___, ¶ 33 (cleaned up). Even if the defendant were on actual notice of uncharged allegations, "the State's failure to provide

notice pursuant to Rule 11-404(B)(2) would have suggested to Defendant that the State would not seek to introduce that evidence at trial." *Id.* ¶ 34. This Court described the State's introduction of evidence without Rule 11-404(B) notice as "essentially ambushing Defendant and the district court." *Id.*

The State presents no argument that prosecutors gave notice that it intended to introduce this evidence under Rule 11-404(B), as required by *Marquez* and *Acosta*. The State also appears to abandon the argument it advanced at trial, which was that Rule 11-404(B) does not require notice for evidence presented during a defendant's testimony. **[*See* BIC 32; AB 30 (calling argument a "mistaken presentation")]** Because the State did not comply with Rule 11-404(B)'s notice requirements, the admission of this evidence violated the rule.

B. Defense counsel did not have actual notice of this evidence.

Marquez, 2023-NMSC-___, ¶¶ 33-34, makes clear that defense counsel's actual knowledge of uncharged allegations would not substitute for Rule 11-404(B) notice. That said, the record does not support the State's assertions that defense counsel "demonstrated familiarity with the issue raised by the State's Rule 11-404(B) evidence" and that "[d]efense counsel stated he 'knew' about the [child abuse] case" against Mr. Flores. **[*See* AB 30-31]**

During cross-examination of Ms. Cardenas, the prosecutor asked, "So why is it that your child tested positive for meth when y'all got arrested?" Defense counsel immediately objected, and the parties left the courtroom for a sidebar. From the objection to the beginning of the sidebar took about a minute. **[*See* 3/10/22 CD 2:59:04-3:00:10]**

Defense counsel told the district court, "That's the first I ever heard of a child testing positive and I think it's the younger one . . . . And I think Luis [Flores] had a CYFD case about that and beat it." **[*Id.* 3:00:34-43]** Later, he said, "It sounds like Luis was charged with something. My understanding is that case was dropped or I don't know if there was a conviction for any endangerment." **[*Id.* 3:04:16-42]**

Defense counsel told the court that this was the first he had heard of the issue. His statements were full of "I think" and "it sounds like" and were not fully

accurate (there was a criminal case, not merely a CYFD case). Defense counsel was not sure of the outcome of the case and did not correct prosecutors when they incorrectly asserted that Mr. Flores had pleaded guilty. **[*See id.* 3:01:32-3:03:24, 3:07:11-52]** Defense counsel's statements sound like he quickly asked Ms. Cardenas for information during the minute between the objection and the bench conference. They do not suggest any reason to disbelieve his statement, as an officer of the court, that this issue was new to him.

The State's assertion that "[d]efense counsel stated he 'knew' about the case" **[AB 31]** comes from the following exchange:

Defense counsel:	Judge, I'd like to know if there's any disclosures that the State has showing this evidence.
Judge:	What says the State?
Prosecutor:	And a disclosure as to—?
Defense counsel:	Was there a CYFD report, or—
Prosecutor:	There's a court case that is against Mr. Luis. He had pled guilty, I believe, in 2020.
Defense counsel:	I know, but—
Prosecutor:	I can give you the case number.
Defense counsel:	But what—
Prosecutor:	This became relevant once you guys opened the door, and we looked at it.

[3/10/22 CD 3:07:11-36] In context, defense counsel's "I know, but—" expressed that he understood the prosecutor's argument. It did not mean that defense counsel previously knew of the child abuse case against Mr. Flores.

C. The State has never articulated a permissible basis for admitting the evidence.

"[I]t is incumbent upon the party seeking to offer Rule 11-404(B) evidence to identify the consequential fact to which the proffered evidence of other acts is directed. The proponent of the evidence must demonstrate its relevancy to the consequential facts, and the material issue, such as intent, must in fact be in dispute." *Acosta*, 2016-NMCA-003, ¶ 18 (cleaned up). In the proceedings below, the State never articulated the relevance of Ms. Cardenas's daughter's drug test to any disputed issue. *See* Rule 11-404(B)(2) (permitted uses include "proving motive, opportunity, intent," etc.). On appeal, the State similarly does not identify a consequential fact at issue. **[*See* AB 31-33]**

Instead, the answer brief asserts that Ms. Cardenas "opened the door" to the evidence of her daughter's drug test and invokes the doctrine of curative admissibility. **[AB 33]** Curative admissibility is a different doctrine; it allows a party to introduce otherwise inadmissible evidence "to counteract the prejudice created by their opponent's earlier introduction of similarly inadmissible evidence." *State v. Gonzales*, 2020-NMCA-022, ¶ 12, 461 P.3d 920. Curative admissibility was never mentioned in the trial court, nor did the State argue that any of Ms. Cardenas's testimony was inadmissible. **[*See* 3/10/22 CD 3:00:10-3:13:10]**

The State writes that the prosecutors asked the question about the positive drug test "to rebut the image Defendant had painted of herself on direct." **[AB 33]** The State's argument, both at trial and on appeal, is essentially that because Ms. Cardenas's testimony made her seem sympathetic, the State was permitted to introduce evidence that made her look unsympathetic. But on cross-examination, the State (like all parties) is bound by the rules of evidence; it cannot introduce inflammatory bad acts evidence just because a testifying defendant comes across as a nice person.

IV. The vouching problem was not cured by cross-examination.

The State briefly asserts that even if FBI Agent George Dougherty impermissible vouched for the credibility of Edward Alonso, the alleged hitman, the vouching would be harmless because Mr. Alonso testified and was subject to cross-examination. **[AB 36-37]** The State cites no authority that confrontation cures a vouching error, and the courts have reversed for vouching or "bolstering" when the vouched-for witness testifies. *See State v. Garcia*, 2019-NMCA-056, ¶¶ 1, 2, 12, 450 P.3d 418.

V. The exculpatory crime-scene evidence rendered the evidence of murder insufficient.

The brief-in-chief argues that there was insufficient evidence to support a murder conviction because, in order to explain away exculpatory evidence from the crime scene, the State encouraged the jury to engage in improper conjecture. **[BIC 45-48]** The answer brief does not directly respond to this argument. It lists the evidence against Ms. Cardenas, omits the exculpatory evidence, and does not discuss speculation or conjecture. **[*See* AB 41-42]**

Elsewhere in its brief, the State describes the exculpatory evidence as merely inconclusive. The answer brief says that shell casings collected from the crime scene "were tested for fingerprints and no fingerprints were conclusively identified." **[AB 10]** This is correct but incomplete. Police were able to determine that the prints on the shell casings were not from Ms. Cardenas's boyfriend, Luis Flores, who the State asserted was the shooter. **[*See* 3/10/22 CD 10:56:40-10:59:43 (fingerprint evidence); 3/11/22 CD 8:58:50-8:59:40 (State's theory)]** Similarly, the answer brief says that "[p]olice did not find any shoes, at any searched residence or in any searched vehicles, that matched those shoe impressions" at the crime scene. **[AB 10]** Police specifically testified that they seized Mr. Flores's shoes, and the seized shoes "didn't match" the footprints. **[*See* 3/10/22 CD 10:31:30-51, 10:47:55-10:49:32]**

Sufficiency review requires viewing the evidence in the light most favorable to the State. *See State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. In this case, however, the physical evidence from the crime scene was exculpatory in *any* light, including the light most favorable to the State and the verdict. Sufficiency review must still take this evidence into account. *See State v. Salazar*, 1967-NMSC-187, ¶¶ 2, 5-6, 78 N.M. 329, 431 P.2d 62 (in substantial-evidence analysis, considering undisputed evidence that defendant was incapacitated during the crime). Here, there was no battle of experts or dispute over what was found, nor did the evidence conflict. The State's own witnesses testified that the fingerprints on the shell casings did not match Mr. Flores and the footprints did not match his shoes; they compared the tire marks to Ms. Cardenas's vehicles but found nothing "conclusive," and they presented no evidence that any of the cars could have made the marks. **[*See* 3/10/22 CD 10:31:30-59, 10:47:55-10:50:07, 10:56:40-10:59:43]**

The State's theory of guilt at Ms. Cardenas's trial was that Mr. Flores was the shooter, but the undisputed physical evidence contradicted that theory. The State had no evidence—only speculation—to explain this discrepancy.

The Illinois Appellate Court addressed a similar problem in *People v. Rivera*, 962 N.E.2d 53 (Ill. App. Ct. 2011). In *Rivera*, the defendant was convicted of a rape and murder based on the defendant's confession, which was obtained

after several days of interrogation, and testimony from jailhouse informants. *Id.* ¶¶ 9, 14, 22. But the physical evidence was exculpatory: DNA testing excluded the defendant as the source of semen in the victim's vagina, unidentified fingerprints at the crime scene did not match him, and no other evidence tied him to the scene. *See id.* ¶¶ 4, 16, 18, 29. To explain this evidence, the State speculated that there had been laboratory contamination or that the 11-year-old victim had recently been sexually active. *Id.* ¶ 32.

Viewing the evidence in the light most favorable to the prosecution, the Illinois Court held that the evidence was insufficient to sustain the conviction. *Id.* ¶ 46. The Court wrote that "[a]lthough the the DNA evidence does not completely exonerate defendant, it significantly impeaches the theory of the State's case." *Id.* ¶ 35. "[T]he DNA evidence embedded reasonable doubt deep into the State's theory [of guilt]." *Id.* ¶ 31.[3]

The crime-scene evidence in this case serves the same role as the DNA evidence in *Rivera*. Even if the other evidence against Ms. Cardenas would have been sufficient *without* the physical evidence, the existence of the exculpatory

[3] The Illinois Court used a definition of insufficient evidence that might be helpful here: "Insufficient evidence is that which is unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Rivera*, 962 N.E.2d 53, ¶ 25 (cleaned up). This is similar to New Mexico's doctrine of "inherent improbability." *See State v. Armijo*, 1931-NMSC-008, ¶ 34, 35 N.M. 533, 2 P.2d 1075.

physical evidence changed things. It impeached the State's theory that Mr. Flores was the shooter, embedding reasonable doubt in the State's case against Ms. Cardenas. Because the State had no evidence to counteract this reasonable doubt, it resorted to impermissible speculation and conjecture.

CONCLUSION

Cristal Cardenas's trial was notable for the number and severity of its errors. Prosecutors asked the judge to prohibit Ms. Cardenas's sole guest from taking notes, for no apparent reason, and the judge agreed. Even though defense counsel argued against the prohibition, invoking Ms. Cardenas's right to a public trial, the district court did no fact-finding and appeared to give no consideration to the constitutional issue.

The prosecutors repeatedly violated the rules of evidence and engaged in inappropriate conduct. The clearest example is the cascade of errors surrounding the evidence of Ms. Cardenas's daughter's drug test: Prosecutors failed to give notice that they planned to introduce it, ambushed Ms. Cardenas with it on the witness stand, misled the court about the factual basis for the evidence, failed to articulate a valid basis for its admission, and finally, when defense counsel brought it up in closing argument, falsely accused the defense of "misrepresenting things." The effect—even without any other errors—was that the jury heard inflammatory bad-acts evidence in a close case, then heard the State say that Ms. Cardenas and her

lawyer were misleading them, and finally heard the district court ratify that accusation by sustaining the State's objection.

The State had a weak case. It rested heavily on the testimony of an alleged coconspirator, and it was undermined by physical evidence that suggested that Mr. Flores—and by extension, Ms. Cardenas—was innocent. The evidence was insufficient to support a murder conviction, and weak enough on the other counts that there is a reasonable probability that errors changed the result of the trial. Ms. Cardenas asks this Court to dismiss the murder charge with prejudice and to remand for retrial on the remaining two counts.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that on November 21, 2023, a copy of this pleading was uploaded to Odyssey File & Serve for service on Serena Wheaton in the Office of the Attorney General.

_/s/ *Caitlin Smith*_____
Law Offices of the Public Defender