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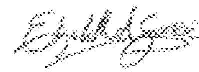

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Respondent,

vs. **Case No. S-1-SC-38980**

NINA LUNA,

Defendant/Petitioner.

DEFENDANT-PETITIONER'S REPLY BRIEF

On Certiorari to the New Mexico Court of Appeals
Oral Argument Requested

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TRANSCRIPT OF PROCEEDINGS

The proceedings in this case include audio recordings, cited as **[DATE CD Hour:Minute:Second]** and the Record Proper, cited as **[RP (page number)]**. *See* NMRA, Rule 23-112.

INTRODUCTION

> When a state transitions from a Prohibition Regime to a Regulated Regime it must embark on the task [of] finding a practical, legally admissible, and scientifically valid way to determine whether a person is impaired as result of marijuana use.

William J. McNichol, Jr., *Toward a Rational Policy for Dealing with Marijuana Impairment -- Moving Beyond "He Looked Buzzed to Me, Your Honor."* 45 S. Ill. U. L.J. 1, 8 (Fall 2020).

In her Brief in Chief, Nina Luna contended that the officer's opinion that she was impaired by cannabis based on two field sobriety tests designed to correlate with blood alcohol content, and an ad hoc observation of pupil size, was improperly admitted, unreliable, and prejudicial. The State argues the opinion testimony was admissible because the SFSTs correlate with marijuana use [**AB 14-19**], an officer need not be DRE certified to assess impairment based on SFSTs alone [**AB 19-30**], and that, in any case, the evidence was harmless [**AB 30-34**]. In support of its position, the State then surveys select case law from other jurisdictions. [**AB 34-40**] Incorporating the discussion in her Brief in Chief, Ms. Luna here replies to points in the State's brief.

REPLY ARGUMENT

I. Because Field Sobriety Tests designed to correlate to blood alcohol content are not reliable to determine cannabis impairment, they should not be admitted absent a full DRE protocol and DRE expert witness.

A. Standardized Field Sobriety Tests are not reliably correlated to impairment by cannabis.

As an initial matter, the State characterizes Ms. Luna's position as arguing "the tests are incapable of suggesting marijuana *use* without a full 12-step DRE investigation." [**AB 14** (emphasis supplied)]. That is not Ms. Luna's position, and in fact, because "use" is not at issue in this case, nor is it likely to be the main question in DWI-cannabis cases generally, it is not the determinative question before this Court. Rather, the question is whether the three SFSTs used in alcohol DWI investigation -- without a complete 12-step DRE protocol -- reliably demonstrate *impairment* by cannabis (in New Mexico, to the point of being unable to safely drive). [**See BIC 30-36**]

In its review of select research, the State conflates these points. For instance, a 2005 study by Papafotiou et. al. aimed to determine the relationship between recent consumption of THC and driving impairment, based on SFSTs. [**AB 15, fn. 2**] The study tracked participants given low and high doses of THC, and assessed SFST performance at three time intervals. It found that while THC-impaired drivers did poorly on SFSTs, the SFSTs did a poor job of screening out drivers

who were *not* impaired. For instance, in the low THC group, at 105 minutes after dosage, "of 26 participants who were impaired on the driving task, 100% were correctly identified as impaired but of the 14 participants who were not impaired on the driving task, *none were correctly identified as not impaired*." Papafotiou K, Carter JD, and Stough C., *An evaluation of the sensitivity of the Standardised Field Sobriety Tests (SFSTs) to detect impairment due to marijuana intoxication*. Forensic Science Int'l. 155 (2005) 172-178, 176.

In other words, according to the study:

> in some cases the high correct classification rate of the SFSTs was due to a high percentage of individuals being scored as impaired on the SFSTs. For instance, at SFST Time 3 after the consumption of low dose cannabis, SFST performance correctly classified all participants whose driving performance was impaired. However, a large number of participants whose driving performance was not impaired were also classified as impaired. This suggests that the SFSTs provide a more sensitive measure of THC *consumption* than driving ability itself.

Id. (emphasis supplied). In fact, the "large number" of unimpaired participants who were wrongly classified as impaired in this example were *all* of them. Thus, the study concludes, "in real-world scenarios, the amount of false positives could be quite high if the SFSTs alone are used to determine whether an individual is driving under the influence of drugs." *Id*. at 177.

The 2019 Canadian study cited by the State produced even less reliable results. [**AB 16**] While that study purported to assess the validity of SFSTs to

identify drug impairment, it surveyed "2,142 DEC evaluations conducted across Canada involving a single drug category [] during 1995-2009" -- where admittedly the evaluations themselves sought to predict the *category* of drug used, not impairment. Porath-Waller, Amy and Bierness, Douglas, Canadian Centre on Substance Abuse, *An Examination of the Validity of the Standardized Field Sobriety Test (SFST) in Detecting Drug Impairment*, at 4-5 (2019) (available at https://docket.wp.txstate.edu/files/2019/06/An-Examination-of-the-Validity-of-the-Standardized-Field-Sobriety-Test-in-Detecting-Drug-Impairment-Using-Datafrom-the.pdf) Even putting that distinction aside, however, the final numbers are less than overwhelming. As the State notes, the classification rates for cannabis were 55.4% on the one leg stand, and 39.7% on the walk and turn. *Id.* at 4-5. The accuracy in determining cannabis *use* based on these numbers amounts to a coin toss. Worse, the relationship between use and impairment is not clearly defined by the study.

The Canadian study also examined discrepancies between its review and the Papafotiou results. It questioned Papafotiou's findings that "cannabis was related to impairment on all three tests of the SFST battery," noting that according to the DEC protocol, cannabis is not one of the drugs that produce HGN. *Id.* at 5. It also noted that Papafotiou found cannabis related to poor performance on the walk and

turn, a finding not evident in its current review. By way of explanation, it posited that the Papafotiou group were occasional users, whereas the suspected impaired drivers in its review "had self-administered drugs in doses that would be expected to exceed those that are ethically allowed in laboratory settings." *Id.* Of course, its study did not track actual dosage or recency of use. Finally, it attributed the higher correlation of cannabis use to poor performance on the one leg stand in its review to the possibility "that the OLS may be too sensitive for determining drug use and that many individuals may not have very good balance even when they are not under the influence of drugs." *Id.*

These are but a few studies surveyed by *Gerhardt*, which concluded that because the science is unsettled and evolving, SFSTs are not reliable as a definitive indicator of cannabis impairment. *Commonwealth v. Gerhardt*, 81 N.E.3d 751, 757-758 (2017). Both Ms. Luna and the State discuss *Gerhardt* at length, in apparent agreement with the approach taken there. [**See BIC 27-28, 34-37; accord AB 34-37**]

More recently, in April 2021, the Department of Justice published an article, "Field Sobriety Tests and THC Levels Unreliable Indicators of Marijuana Intoxication." The article summarized a 2020 study conducted at Johns Hopkins University designed to better define "pharmacodynamics of cannabis . . . in order

to evaluate methods of determining whether or not an individual under the influence of cannabis is impaired." Megan Grabenauer, *Differences in Cannabis Impairment and its Measurement Due to Route of Administration*, U.S. Dept. of Justice (Mar. 31 2020), p. 1. Participants were dosed with brownies containing placebo, 10, or 25 mg THC, or with a vaporized dose containing placebo, 5, or 20 mg THC. *Id.*, p. 2. At every hour for eight hours after dosage, psychomotor effects were assessed, and blood, oral and urine samples were taken. *Id.* After analyzing compounds in biofluid samples (*id.*, pp 4-8), the study advised "that THC is not a reliable marker of cannabis impairment" (*id.*, p. 10). As to SFSTs specifically, the study found "One leg stand, walk and turn, and modified Romberg balance field sobriety tests, which are part of a battery of tests administered to detect alcohol impairment, were not sensitive to cannabis intoxication." *Id.*, p. 4.

B. While New Mexico has not yet squarely addressed the reliability of SFSTs to determine cannabis impairment, precedential authority suggests a determination of cannabis impairment must be based on assessments done as part of a full 12-step DRE protocol.

Lasworth *established that SFSTs do not measure impairment.*

The State plainly acknowledges "SFSTs are designed to correlate with a driver's blood alcohol content and are validated for that purpose." **[AB 12]** Yet the State takes issue with Ms. Luna's discussion of *State v. Lasworth*, 2002-NMCA-

029, 131 N.M. 739. [**AB 17-19**] Ms. Luna discussed *Lasworth* at length for its precedential value in establishing that the three SFSTs commonly used in roadside assessment were designed to correlate with blood alcohol content. [**BIC 16-20**] While *Lasworth* held the government failed to establish impairment based on the HGN in that case, the opinion analyzed the development, methodology and purpose of *all three* alcohol SFSTs: the HGN, walk and turn, and one leg stand. [See **BIC 16-20**] Finding that the objective of the SFSTs is *not* to measure impairment, the Court noted "'scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.'" *Lasworth*, 2002-NMCA-029, ¶ 15 (citation omitted).

Nevertheless, the State urges that since *Lasworth* dealt with HGN evidence, it "should not be construed as holding that the standard battery of SFSTs cannot produce evidence of whether a person has used drugs." [**AB 18**] Indeed, the standard three SFSTs should not be used to determine *impairment* by drugs. A lay officer may certainly testify to their observations of a suspect's behavior such as balance or ability to follow directions. In this case, and other unpublished cases since *Lasworth*, this distinction has been eroded. [**See AB 22**, citing, e.g., *State v. Plyer*, A-1-CA-31652, mem. op. (N.M. Ct. App. Mar. 23, 2012) (non-precedential)]

***The anomaly of* Aleman.**

In the context of cannabis DWI, in 2008 the New Mexico Court of Appeals determined that DRE testimony relates not to scientific expertise but only to "specialized knowledge." *State v. Aleman*, 2008-NMCA-137, ¶ 18, 145 N.M. 79. While, under *Daubert*, this should still require the State to meet the foundational requirements for expert testimony, *Aleman* effectively created a "702-lite" category for DRE testimony. The *Aleman* court acknowledged the State's foundation as to DRE protocol "would not be sufficient to qualify an expert who would establish a scientific foundation, [but] we conclude that it is a sufficient foundation to qualify an expert to testify regarding specialized knowledge." *Id.*, ¶ 19.

Aleman is an outlier. This precise approach has been rejected by the United States Supreme Court in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (holding "[Rule 702] makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge . . . . the Rule applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope.") (citation omitted).

However, *Aleman*'s holding was specifically premised on the threshold finding of reliability in the DRE opinion: it was expertise under Rule 11-702, the

DRE was qualified based on extensive training, and all 12 steps of the protocol were performed, including confirmation of THC by a toxicologist. [**See BIC 21-22**, citing *Aleman*, 2008-NMCA-137, ¶ 18]

Aleman therefore established minimum requirements for expert testimony of impairment based on SFSTs *as part of* the DRE protocol. These observations would be "meaningless without the DRE's ability to interpret those observations through the lens of the Protocol training." *Id.*

The State and the unpublished cases it relies on are pushing the bounds of *Aleman*. The State argues that "even a DRE's testimony on SFSTs is not necessarily considered scientific testimony in every case," noting that *Aleman* found parts of the protocol "observations" which are "self-explanatory." [**AB 25**] The State then argues that because DRE observations are "less than scientific testimony" under *Aleman*, Officer Lujan's testimony was permissible because he did not testify about scientific aspects of the protocol, or draw conclusions requiring specialized training. [**26-27**] The State's argument highlights the slippery slope here: the prosecutor made an end run around *Aleman* by offering semi-expert testimony about "clues" on SFSTs designed to correlate with BAC, and an opinion Ms. Luna was impaired based on that assessment. Without the full DRE protocol, this testimony was inadmissible.

C. Using Field Sobriety Tests to determine cannabis impairment is not reliable.

Taking the approach the State urges here -- relying on "clues" during SFST performance to render an opinion of cannabis impairment by a lay witness -- is not reliable and has real-life consequences. (*See* "The Drug Whisperer: 'It Happened to Me'" (Dec. 10 2017) (describing Georgia motorists arrested for cannabis-DWI and detained overnight, even though they were found not to have THC or metabolites in their systems -- in three out of four instances, "the Drug Recognition Officer did not do the full DRE Evaluation;" and noting that even as trained DRE officers have increased in the state, the number of full, 12-step protocols conducted has decreased) (available at https://acluga.org/the-drug-whisperer-it-happened-to-me/).

Many of the older studies, including those discussed in *Aleman*, analyzed drug recognition protocol in the context of a "Prohibition Regime" where "[i]f the driver of an automobile can be shown to have used or to be in possession of marijuana, then the driver is subject to criminal penalties." McNichol, Jr., 45 S. Ill. U. L.J. 1, 1. However, "[i]n a Regulated Use state, only if the driver is *impaired* by the *legally used* marijuana does the driver run afoul of the law." *Id*., p. 11 (emphasis in original). In New Mexico, this requires proof beyond a reasonable

doubt that a driver was impaired "to a degree that renders the person incapable of safely driving." NMSA § 66-8-102(B).

And given the evolving state of the science in this area, researchers are developing more reliable measures for roadside assessment of cannabis impairment. *See* Grabenauer, U.S. Dept. of Justice, *supra*. To this end, with the passage of recreational marijuana in New Mexico, the legislature allocated "distribution . . . be made to the road safety fund in an amount equal to two percent of the net receipts attributable to the cannabis excise tax." *See* 2021 NM S.B. 288 (Mar. 10, 2021) § 43 (B); see also **BIC 14** (discussing NM DRE program). The state should also ensure cannabis impairment is determined by qualified experts -- both for the safety of the public and the rights of individual drivers.

Presumably, DRE training and protocol will track evolving science in detecting cannabis impairment; meanwhile lay officers should not be permitted to determine cannabis impairment based on SFSTs designed to detect alcohol impairment.

II. A determination of impairment based on SFST performance is not properly in the realm of lay witness testimony.

The State argues that an officer may offer "lay opinion" of cannabis impairment based on SFST results because "administration of the tests allows officers to observe commonly-known signs of impairment by *either* alcohol or

drugs." [**AB 19** (emphasis in original)] Notwithstanding the admissibility of an officer's *observations*, opinion of drug impairment based on SFST performance should be based on a DRE's specialized training, after completion of the complete DRE protocol. [**BIC 30-33**]

The State's suggestion that SFST performance merely demonstrates "commonly known signs of impairment from drugs" is not supported by the cases it cites. [**See AB 21-22**, citing *State v. Neal*, 2008-NMCA-008, ¶ 29, 143 N.M. 341; *State v. Torres*, 1999-NMSC-010, ¶ 31, 127 N.M. 20; *State v. Baldwin*, 2001-NMCA-063, ¶ 16, 130 N.M. 705] These cases all deal with signs of intoxication by *alcohol*. Of course, "attributes of alcohol intoxication are so well-known and generally understood that courts early on ruled that any person is competent to testify as to their opinion that a driver was alcohol impaired." McNichol, Jr., 45 S. Ill. U. L.J. 1, 3; *People v. Foltz*, 934 N.E.2d. 719, 723 (Ill. Ct. App. 2010) ("It is well-established that the average adult is competent to testify regarding alcohol intoxication because it is within the common experience of most adults.")

On the other hand, signs of cannabis impairment are not yet "commonly known" -- often they are not even commonly apparent between users. Ms. Luna addressed this point in her brief, noting "lay people are [not] sufficiently knowledgeable about common symptoms of drug consumption . . . to offer lay

opinion testimony." [**BIC 34-35**, citing *State v. Nobach*, 46 P.3d 618 (2002). *See also*, *State v. Bealor*, 902 A.2d 226 (2006) (court declined "to place lay opinion testimony regarding marijuana intoxication on the same footing as lay opinion testimony as to alcohol intoxication")] The State does not address this point at all.

III. In accord with the majority of jurisdictions, lay testimony should not offer opinion on the ultimate question of cannabis impairment based on SFST performance.

Finally, the State reviews select case law from other jurisdictions to argue that "performance on SFSTs can be probative not only of blood alcohol content, but potentially of the subject's possible drug use." [**AB 34**] As noted, the State discusses *Gerhardt* at some length, noting that an officer's observation of a "defendant's balance, coordination, ability to retain and follow directions, and ability to perform tasks requiring divided attention" may be relevant to a factfinder's assessment of impairment. [**AB 36**, citing *Gerhardt*, 81 N.E.3d at 759] Ms. Luna agreed. [**BIC 33, 35-36**]

However, consistent with *Gerhardt*, (1) a lay witness may not opine on the ultimate issue of impairment based on SFSTs, "clues" on SFSTs, nor that a subject "passed" or "failed" an SFST [**BIC 34-35**], (2) neither a DRE or lay witness may be referred to as an "expert" absent a *Daubert* analysis [**BIC 36**], and (3) SFSTs should not be treated as scientific "tests" of impairment and the jury should be so

instructed [**BIC 37**]. None of the cases relied on by the State support a contrary conclusion.

For instance, the State cites several cases it argues support a ruling that cannabis impairment may be based on SFSTs. [**AB 37-39**] In *State v. Pfleger*, 341 S.W.3d 876 (Mo. 2011), defendant admitted to smoking marijuana, possessed marijuana, failed certain SFSTs, and chemical testing revealed the presence of marijuana. [**AB 37-38**] What the State omits is that "*an expert witness* testified that, in his opinion, defendant was impaired by marijuana." *Pfleger*, 341 S.W.3d 876 (emphasis supplied). While the one-paragraph opinion does not offer further facts, given the expert opinion and chemical testing, it is reasonably likely that a DRE evaluation was in fact performed in that case.

Next, the State argues *State v. Wynne*, 190 A.3d 955 (Conn. Ct. App. 2018) found sufficient evidence of impairment where defendant drove poorly, admitted to using alcohol and marijuana, smelled of both substances and performed poorly on SFSTs. [**AB 38**] Again, the State omits that in *Wynne*, a *DRE expert* testified to the combined effects of marijuana and alcohol on SFSTs. *Wynne*, 190 A.3d at 721-722.

Next, the State claims *Woziak v. Galati*, 30 P.3d 131, 135 (Az. 2001) found evidence sufficient "for driving under the influence of drugs," where defendant

admitted using marijuana, failed SFSTs, had slurred speech, and "pinpoint" pupils. [**AB 38**] In fact, the conviction was *not* for "driving under the influence," but instead for "driving with any drug or metabolite in the person's body." *Woziak*, 30 P.3d at 135, citing A.R.S § 28-1381. Thus, the State in that case was not required to prove that the defendant was impaired by cannabis, and it does not appear the court relied on SFST performance for that purpose.

Next, the State argues that *Perkins v. State*, 812 N.E.2d 836, 841 (Ind. Ct. App. 2004), found "failure of field sobriety tests" along with other evidence established impairment. [**AB 38**] But yet again, the State mischaracterizes the evidence -- the detective did *not* testify that defendant "failed" SFSTs, instead he testified "Perkins did not follow instructions;" "when asked to recite a portion of the alphabet, Perkins sang the alphabet in a childish, joyful manner;" and "on the walk and turn test, Perkins did not remain in position . . . and had to ask for clarification on how to complete the test." *Perkins*, 812 N.E.2d at 841-842. *Perkins* did not sanction evidence of SFSTs as determinative of cannabis impairment, and did not admit testimony that defendant "failed" those assessments.

Next, the State claims that *State v. Levin*, 101 P.3d 846, 847 (Ut. Ct. App. 2004) "acknowledge[ed] that performance on FSTs can indicate that a driver has been smoking marijuana." [**AB 38**] In fact, in *Levin*, "The officer that conducted

the field sobriety tests . . . *was a certified Drug Recognition Expert*." After conducting SFSTs, the officer believed Defendant was possibly under the influence of marijuana; however, because he was not impaired he was merely given a citation and allowed to drive away. *Levin*, 101 P.3d at 849-850.

Next, the State cites *State v. Morin*, 349 P.3d 1213 (Id. Ct. App. 2015), again arguing evidence of cannabis impairment was sufficient where, along with other evidence, defendant failed SFSTs. [**AB 38**] But again, the State omits the fact that in *Morin*, *a DRE protocol was completed*, found no signs of HGN, ruled out the presence of central nervous system inhibitors, inhalants or anesthetics, and that the evaluator's findings were confirmed with chemical testing. *Morin*, 349 P.3d at 1214-1215.

Next, the State argues *Thomas v. D.C.*, 942 A.2d 645, 647 (D.C. 2008), held that performance on SFSTs supported a finding of drug impairment. In fact, in that case, the officer testified that the walk and turn and one leg stand "*cannot indicate drug impairment*." *Id.* at 648, n. 1 (emphasis supplied). Nonetheless, defendant was convicted under an "impaired to the slightest degree" standard based on the cannabis possession and his physical symptoms of heavy sweating and stumbling. The finding in *Thomas* was explicitly *not* based on an SFST assessment.

The additional out-of-state cases it cites do not support the State's position. [**AB 39-40**] *See People v. Briseno*, 799 N.E.2d 359, 365-366 (Ill. Ct. App. 1995) (excluding performance on SFSTs not conducted in accordance with NHTSA guidelines, and finding remaining evidence sufficient); *State v. Lesac*, 437 N.W.2d 517, 518 (Neb. 1989) (expert Federal Drug Enforcement graduate opined defendant was impaired based on driving, defendant's admission, and possession of marijuana, *not* on SFST performance); *Commonwealth v. Fudge*, 213 A.3d 321 (Penn. 2019) (probable cause determination supported SFSTs after stop; jury deadlocked on DWI charge and that charge vacated on appeal). *Accord* **AB 39-41** (collecting probable cause cases).

In sum, *every single one* of the cases relied on by the State support a rule that (1) where lay testimony of SFST performance is offered in cannabis cases, the testimony must only describe observations, not an opinion of impairment and (2) where an opinion of cannabis impairment based on SFSTs is offered, it must be through a certified DRE in the context of a complete 12-step DRE protocol.

IV. The error was not harmless where the evidence was the only "scientific" testimony presented, and there is no indication that the district court did not consider the testimony.

Throughout its brief, the State repeats that Lujan's "ultimate conclusion of impairment was [not] based *solely* on a DRE assessment or SFSTs." [**AB 28**

(emphasis in original); **see also AB 18, 19-20, 23, 27**] This argument is more appropriately addressed in terms of prejudice. [**See AB 30-33, compare BIC 38-41**] Here, the State argues that there is no reasonable probability that any error contributed to the conviction. [**AB 31**, citing *State v. Tollardo*, 2012-NMSC-008, ¶ 25] The State simply ignores Ms. Luna's constitutional error argument. [**See BIC 38-39**]

The State acknowledges "the metropolitan court reasoned that an officer may use 'clues' exhibited during the SFSTs to 'determine impairment, or whether someone can safely operate a vehicle without being DRE qualified.'" [**AB 32** (citation omitted)] Although it made this ruling just before the bench trial, the court's own language reflects the specificity and importance it apparently accorded the evidence. On this record, there is "no indication that the district court did not consider testimony concerning the [SFST] test results." *See State v. Franklin*, 2020-NMCA-016, ¶ 10.

The State relies on *Town of Taos v. Wisdom*, 2017-NMCA-066, to analogize the testimony here as "very narrow." [**AB 33**] But *Wisdom* found the officer's testimony not subject to specialized knowledge precisely because he "made no references to 'clues,' drew no conclusions, and made no correlation between Defendant's performance on the field sobriety tests and his BAC." *Wisdom*, 2017-

NMCA-066, ¶ 29. Not so here: Lujan testified to his training and experience, his belief that a full DRE evaluation was not needed, the "clues" he saw on the SFSTs, and his determination, based on that assessment, that Ms. Luna was impaired. Admissibility was closely contested, indicating the parties felt it critical to the issue of impairment. And the court's ruling indicated that it, too, found the testimony critical.

The remaining evidence was not overwhelming. Lujan stopped Ms. Luna past the flyover connecting southbound I-25 with westbound I-40, and clocked her speeding as she made several lane changes to the left. [**11/14/18 CD 10:20:-:21, 10:36-:39, 10:39-:40**] Typically, this merge requires a motorist quickly increase speed from about 35 miles per hour up to the rate of traffic, and quickly get to the left in order to avoid being forced off the highway at upcoming exits. Ms. Luna admitted to using cannabis and Lujan smelled it on her. The evidence at most established *use*, but not impairment. Because the SFST evidence was critical to a finding of impairment, reversal is required.

CONCLUSION

WHEREFORE, Nina Luna respectfully requests that this Court reverse her conviction.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that a copy of this pleading was served electronically to Assistant Attorney General Meryl E. Francolini at the Attorney General's Criminal Appeals Division this 23rd day of June, 2022.

/s/ Luz C. Valverde
Law Offices of the Public Defender

The body of the attached petition exceeds the page limit set forth in Rule 12-318 (F)(2) NMRA. As required by Rule 12-318 (F)(3), undersigned counsel certifies that this petition is printed in proportionally-spaced Times New Roman 14 point type style, and the body of the petition contains 4,212 words and therefore does not exceed 4,400. This brief was prepared using Microsoft Word version 2016.

/s/ Luz C. Valverde
Law Offices of the Public Defender