

CAUSE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

=====

RAYMOND MOYA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

=====

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

=====

Respectfully submitted,

J. Lance Hopkins
219 W. Keetoowah
Tahlequah, OK 74464
(918) 456-8603

Counsel for Petitioner
Raymond Moya

- a. The Questions Presented for Review Expressed in the Terms and Circumstances of the Case.

PROPOSITION ONE: *Whether the District Court erred in denying Moya's Motion to Dismiss Count 2 in that there was insufficient evidence that the heroin Moya allegedly sold to Dyson killed Weiss nine hours after Weiss' last heroin use.*

PROPOSITION TWO: *Whether the District Court erred in denying Moya's Motion in Limine to suppress the untimely collection of blood/urine collected by the New Mexico Office of the Medical Examiner.*

PROPOSITION THREE: *Whether the District Court erred in denying Moya's Motion in Exclude the Expert testimony of Dr. Sam Andrews.*

PROPOSITION FOUR: *Whether the District Court erred in allowing the Government to pose hypothetical questions which went to the ultimate issue of the case.*

b. List of All Parties to the Proceeding.

United States of America vs. Raymond Moya

c. Table of Contents and Table of Authorities.

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Petitioner, by and through his attorney, J. Lance Hopkins, respectfully submits this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. On Petitioner's behalf, counsel has submitted a Motion to Proceed In Forma Pauperis, a Proof of Service, and a copy of the Order and Judgment from the appellate court.

This petition has been arranged in the order specified by Rule 14.1 of this Court. The individual sections have been lettered to correspond with the subparagraphs of Rule 14.1. Pursuant to Rule 39.2 of this Court, ten copies of this petition are being submitted for filing.

d. Reference to the Official and Unofficial Reports of Any Opinions.

United States v. Moya, 10th Cir. No. 20-2006.

e. Concise Statement of Grounds on Which Jurisdiction of this Court is Invoked.

- i. Date of Judgment sought to be reviewed: July 27, 2021
- ii. Date of any order regarding rehearing: None
- iii. Cross-Petition: None
- iv. Statutory Provision Believed to Confer Jurisdiction:

This case involves review of a count of conviction involving a United States Criminal Statute, and this Court has jurisdiction over such interpretation and application of United States Statutes.

f. Constitutional Provisions, Statutes and Rules Which this Case Involves.

i. Constitutional provisions:

ii. Statutes involved: U.S.S. G. §2K2.1(c)(1) and §2X1.1(c)(1),

g. Statement of the Case:

DEATH OF WEISS.

On August 13, 2011, Weiss was found not breathing by his mother, Jennifer Weiss-Burke (“Weiss-Burke”) at 7:30 a.m. He was pronounced dead by Investigator Daniel Wasko (“Wasko”) with the New Mexico Office of Medical Investigator (“OMI”) at 8:30 a.m. It is undisputed Weiss had a serious/chronic drug addiction which he indulged during the days and hours before death. Weiss used cocaine, heroin, meth, ecstasy, marijuana and alcohol. Weiss had injected a “speed-ball” consisting of meth and heroin or cocaine and heroin. Weiss’ post-mortem toxicology indicated in his system, among other drugs, were heroin and cocaine.

Weiss was released from jail after 30 days’ incarceration for a probation violation. Weiss’ family was in California when he was released. Weiss’ grandparents picked him up on August 7, 2011. Due to his drug addiction, Weiss’

grandparents stayed with Weiss until he left to meet his family. As soon as Weiss and his grandparents arrived at home, Chris Speis (“Speis”) and Weiss’ friends came over. Weiss stayed up until 3:00 a.m. The next morning Weiss borrowed his grandfather’s cell-phone to contact friends. Later that day, his grandfather noticed this text, “do you want these Fing drugs or not.” Leaving the house with Speis and Cody Rondeau (“Rondeau”), Weiss and Rondeau returned around 3:00 p.m. Weiss was “flushed and incoherent, his eyes were bloodshot, and he [could] barely stay awake.” After dinner, Weiss left with Rondeau and did not return until 3:00 a.m. on August 8, 2011. Rondeau testified he and Weiss used heroin the night before Weiss left for California.

On August 8, 2011, Weiss flew to Los Angeles. Upon his arrival Weiss’ dad and sister testified he was in withdrawal and looking for drugs. Weiss and his family returned August 11, 2011.

Weiss left home on Friday, August 12, 2011, and Curtis Weiss (“C. Weiss”) heard Weiss return through the garage door between 3:00–3:30 a.m., Saturday, August 13, 2011. C. Weiss heard a “gurgling sound” come from Weiss’ room when he left for work between 5:20 a.m. and 5:30 a.m. C. Weiss was called at work by Weiss-Burke to return home, and he learned Weiss died.

NEW MEXICO OFFICE OF THE MEDICAL INVESTIGATOR.

Wasko arrived at Weiss' house to investigate. At 8:30 a.m. on August 13, 2011, Wasko pronounced Weiss' death. OMI received Weiss' body at 9:30 a.m. The body was not in rigor or livor mortis, indicating a recent time of death.

Shannon Bowman ("Bowman"), an OMI autopsy assistant, testified an autopsy was conducted two-days after Weiss' body was received. Bowman said Andrews requested a "NMS Expanded" toxicology panel because drugs were involved in the death.

At the time of autopsy, nearly *49 hours* after Weiss' death, Bowman assisted Andrews in the collection of femoral/heart blood, vitreous fluid, and urine. Andrews determined Weiss' cause of death was heroin toxicity.

WEISS' DRUG ADDICTION.

Weiss constantly looked for drugs wherever and whenever he could with the help of his friends. They shoplifted, stole from stores and their families, and hocked items to get money for drugs. Rondeau committed residential burglary because he owed drug dealers money. Weiss stole an amp from his family and exchanged it for drugs the night before leaving for California. Weiss' cellmate, Joseph Dyson ("Dyson"), testified that he sold foods stamps, stole, and did whatever needed for his addiction.

Dyson gave Weiss a note containing contact information for Colin Riley (“Riley’). The note read, “[s]ee if he can hook you up with Riot and Elmo” [to get heroin].

On August 12, 2011, Weiss called a-then-released Dyson for drugs. Weiss and Rondeau “were sick,” withdrawing from heroin before meeting Dyson. When the three met, Rondeau gave Dyson \$20.00 to buy heroin.

WEISS’ DRUG DEALERS.

Riley was granted immunity by the government in exchange for his testimony. Riley sold drugs to support his habit. He was arrested for drug possession, shoplifting, and convicted of misdemeanor crimes.

Dyson was Riley’s “best friend,” and they used drugs so many times Riley “couldn’t even count.” Since he was 15 years-old, Riley testified he used drugs with Dyson.

Riley met Weiss after Dyson gave Weiss his number in jail. Weiss texted Riley asking for heroin. Dyson, Weiss, and Rondeau met at a parking lot to get an amp from Weiss to exchange for heroin.

After receiving the amp, Riley drove and picked up the heroin. Riley didn’t take Weiss and Rondeau to buy the heroin so he could “take a little bit of heroin for myself.” Riley “broke off a part and put it into a separate bag.” Returning to

Weiss and Rondeau, Riley, “gave them their heroin, and we got high.” Riley never saw Weiss again, but Rondeau bought heroin from him after Weiss died.

On August 12, 2011, in late afternoon, Dyson met Rondeau and Weiss at a McDonald’s to get money from them to buy heroin. All three left in Rondeau’s car, waiting to hear from Moya. Between 8:00–9:00 p.m., Dyson, Rondeau, and Weiss met Moya, a.k.a. Riot, and Moya’s cousin at Wendy’s, where Dyson bought 2 grams of heroin. Acting alone, Dyson got into the backseat of Moya’s vehicle. Dyson paid \$100.00 for heroin packaged in a 1.8 gram package for Dyson, and a .2 gram package for Weiss and Rondeau.

Dyson explained 2 grams of heroin is smaller than the size of a quarter, or a little packet of sweetener. Dyson gave Rondeau and Weiss the .2 grams in Rondeau’s car. They all injected heroin from Dyson’s 1.8 gram package once. Rondeau and Weiss dropped Dyson off at his house.

Initially, Dyson was charged with Heroin Trafficking Resulting in Death for Weiss’ death, but he cooperated and pleaded guilty to the lesser-included charge, Heroin Distribution. He was sentenced to 15-21 months’ imprisonment.

AFTER THE DRUG PURCHASE.

Rondeau and Weis injected heroin two additional times that evening. After their third use of heroin, Rondeau and Weiss went to visit their friends at Estevan

Martinez's ("Martinez") house. Weiss and his friends smoked marijuana in the driveway.

Hours after Weiss' heroin and marijuana use, Rondeau dropped Weiss off at his house, but he did not know what time it was. C. Weiss heard the garage door open between 3:00 and 3:30 a.m. Rondeau did not know what Weiss did after he dropped him off. Rondeau could not remember that he told a DEA Agent that Weiss threw his drug paraphernalia out the car window before they arrived at Weiss' house.

While Rondeau remembered he and Weiss injected cocaine and heroin quite frequently, and purchased heroin and cocaine together "countless" times, remarkably, Rondeau could not remember whether he and Weiss used cocaine during the last days of Weiss' life.

THE SYRINGE IN WEISS' POCKET.

Weiss-Burke testified she searched Weiss' room multiple times after his death. She found a syringe in "his pocket of a pair of pants." She gave the syringe to DEA Agent David Howell ("Howell"), not immediately after Weiss' death, but a year later. Weiss-Burke said she put the syringe in a baggie in Weiss' room, but didn't know why she held onto it for a year.

Former DEA Chemist James Iwamoto (“Iwamoto”) retrieved the syringe at the DEA Dallas laboratory evidence vault. Iwamoto analyzed its contents on August 20, 2012, a year after Weiss’ death. Iwamoto found the presence of cocaine residue in the syringe.

On March 2, 2016, Moya filed a Motion to Dismiss Count 2, arguing the government couldn’t prove that Moya’s alleged distribution of heroin to Dyson was the cause of Weiss’ death. On May 6, 2016, in a footnote, the government argued its evidence was sufficient. Moya’s Reply argued that the government’s response did not contest that discovery of its evidence was complete, and raised insufficient evidence to prove the heroin Moya allegedly sold to Dyson killed Weiss.

On July 15, 2016, the District Court denied Moya’s motion finding it attacked the sufficiency of the indictment based on “facts not alleged,” and because the government objected to the consideration of those facts, Moya’s motion did not present the “rare exception” that the Circuit precedent contemplates.

During trial, Moya argued in his Rule 29 Motion that the government’s evidence was insufficient, but the Court deferred ruling allowing the case to proceed. On May 13, 2019, the court denied Moya’s Rule 29 motion.

SCIENTIFIC EXPERT TRIAL TESTIMONY.

Trial Testimony of Dr. Sam Andrews.

Andrews testified as the government's medical expert in the field of Forensic Pathology. Andrews described two-ways heroin causes death. Heroin is a "central nervous system depressant." It can decrease an individual's consciousness, their heart rate, their breathing rate, and blood pressure. First, where an individual gets sleepy, loses consciousness and slips into a coma, "they die a slow progression." Also, individuals can inject heroin and they die rapidly with the needle still in their arm.

Andrews opined, in typical cocaine deaths, there is not much to see. "Sometimes you can see heavy and wet lungs (pulmonary edema)." Cocaine is a stimulant drug, where blood pressure and heart rate rise; those people can be agitated, hyperactive, alert. "The typical mechanism of a cocaine death, again, is still not entirely known, but typically cocaine has adverse effects on the heart." After death, during an autopsy, cocaine's effects cannot be seen in the body.

Andrews did not offer an expert opinion about the mechanism of death when *both* heroin and cocaine were used by an individual prior to death.

Andrews performed the autopsy of Weiss on August 15, 2011. In 2011, OMI autopsied Monday-Friday from 8:00 a.m. to 5:00 p.m.

Andrews determined Weiss' cause of death to be heroin toxicity. Andrews opined that a significant finding was the white froth in the tube placed in Weiss used during resuscitation, which suggested pulmonary edema or fluid in Weiss' lungs.

He noted Weiss' brain was swollen, or cerebral edema was present, and his lungs were heavy and wet, and contained aspiration pneumonia. Brain swelling could result from a number of potential causes, but Andrews opined, "in this particular case the central nervous system depression, the slowing of the breathing, the decrease in the heart rate and blood pressure can deprive the [brain of] oxygen."

Andrews ordered toxicology testing on Weiss' femoral blood/urine. The samples were sent to NMS. He ordered an "NMS Expanded" panel which tests for alcohol, drugs of abuse, and prescription medications.

Andrews testified that "there were other tests that I could have ordered. They would have required permission and justification to do so. But these are the most common."

Andrews stated, foam in Weiss' mouth and trachea could have come from other medical causes, because it comes from pulmonary edema. Cocaine toxicity can cause pulmonary edema. A cocaine death can also cause brain swelling.

The NMS Expanded panel tests for cocaine, but it does not test for other cocaine metabolites or ecgonine (“EG”), another breakdown product of cocaine. Andrews did not request to test for EG.

Andrews reviewed the NMS toxicology findings. Caffeine, cotinine, nicotine, and theobromine were present in Weiss’ blood. Delta-THC and Delta-9 Carboxy-THC, the active and breakdown products of marijuana were present, with their respective concentrations. Andrews testified that Benzoylecgonine, (“BE” or “BZE”), an inactive metabolite of cocaine, was also in Weiss’ blood. Codeine, morphine, (a breakdown product of codeine), and atropine (a drug given during resuscitation) were found.

The drugs present in Weiss’ urine were Cocaine/Metabolites, Cannabinoids, and 6-monoacetylmorphine-free, or (“6-MAM”). Andrews opined the codeine, the morphine, and the presence of 6-MAM told him that heroin was used, as it rapidly breaks down in that manner. He discounted the cocaine, the cocaine metabolite, and codeine as impurities seen in elicit preparations of morphine.

Andrews recognized the presence of BE, the active metabolite or breakdown product of cocaine in the toxicology report, but when explaining why he didn’t conclude that cocaine was the cause of death, he answered that he looked at the “toxicology results and the other testing that I may have ordered, as it related to the autopsy examination and its findings and the circumstances surrounding the

death.” “In this particular case I didn’t think that the circumstances and the autopsy findings were consistent with the cocaine or cocaine contributing to the death and so [I] called it just heroin.”

Andrews stated his results might have been different if he had taken the blood samples *immediately after death*, rather than when he did. “It is possible that there were drugs present that may not have been detected. We are talking about cocaine so, yes, there is that possibility.” “I can’t say with any certainty that the cocaine would not have all been broken down, but I also can’t say that it was.”

Cocaine continues to breakdown or metabolize after death due to a short half-life. He agreed, “[t]hat would be a reason why we wouldn’t see the actual drug, cocaine, in the NMS toxicology.” Andrews said if cocaine was detected in the blood, he would have had to consider it, yet he refused to discuss why he didn’t consider cocaine as a contributory cause of death; he opined there was no competing cause.

Andrews wasn’t told by investigators or Weiss’ family that Weiss was a cocaine user, and a syringe with cocaine residue was found in Weiss’ room at the time Andrews drafted his report. He denied any cognitive bias from others’ reports, but relied wholeheartedly on other people’s reports of Weiss’ behavior prior to death.

Trial Testimony of Dr. Steven Pike.

On May 10, 2019, Pike testified for Moya as an emergency room (“ER”) physician and medical toxicologist. He was admitted as an expert in the field of forensic toxicology. Pike routinely treats overdose patients in the ER with his experience numbering in the thousands. Pike reviewed exhibit YY, which established that 9.5 hours passed between Weiss’ last use of heroin to his death.

Pike opined, someone who survives intravenous heroin use for an hour has survived it entirely. “That specific use, that instance of use is not a cause of death 9 hours later. It is physiologically and medically impossible.” “Nine-and-a-half hours after someone uses heroin and they haven’t used it again . . . they are in withdrawal.” “Deaths from heroin occur immediately after use.” At 3:19 a.m., August 13, 2011, Weiss was awake, conscious, able to execute normal mobility; he found his way home through the garage – “able to produce purposeful activities from a brain that had higher levels of functioning that direct his muscles and his arms and legs to do what he wants them to do.”

Pike was asked his opinion whether the heroin Weiss used around 11:00 p.m. on August 12, 2011 was the cause of Weiss’ death. He answered, “[i]t is wrong, it is impossible . . . [i]f you survive that first hour, you’re going, you are already past the danger point. There is no further risk of death from heroin after that point.”

Pike's opinion was based on world-wide experience, since there are hundreds-of-millions of heroin users throughout the world, and lots of overdoses are treated by emergency departments and paramedics. Paramedics are called to a scene where a patient is found unconscious, unresponsive, sometimes not breathing, without blood pressure, and are given Narcan. If the patient responds to Narcan and survives an hour after that response, the patient is no longer at risk of death from that heroin they used, even though the heroin they used completely caused them to experience a death-like or near-death experience.

Pike added that heroin is a very short-acting drug and it quickly metabolizes to morphine. Within 30-40 minutes of heroin use, there is no more heroin in the blood, it is all morphine. It is almost impossible to find or detect heroin in blood.

Pike explained morphine does not have a long duration or effect – only 2-3 hours. Morphine will be out of the bloodstream within 12-15 hours, depending on the person's metabolism. “It is physiologically impossible, it is medically impossible, for any narcotic, short-acting narcotic dose, such as heroin, given at 9 [p.m.] or taken at 11 [p.m.] . . . to produce a death effect . . . it is not going to happen.” If [death] is going to happen, it has to happen within an hour; typically it happens within minutes.

Pike testified about the limitations of post-mortem blood samples, due to postmortem redistribution. “Post-mortem blood samples, in my opinion, have no

probative value . . . they aren't able to tell us, or they are not representing what was present at the time of death, which is what we really want to know." "When you measure something after [a person is dead 49 hours later], it is going to be artificially elevated and it is not in any way useful for determining what was present before they died."

Pike stated Dyson purchased about 2 grams, so each person had about 100 milligrams to use. Assuming they cut the heroin in half for each dose, 50 milligrams were used the second time, and 50 milligrams were used the third time.

Id. Typical heroin users in the ER use 200-500 milligrams per injection.

Pike reviewed the autopsy performed by Andrews, including the NMS toxicology report. Pulmonary edema could be caused by a number of things including heart attacks, congestive heart failure, and drug use, including heroin, morphine, Fentanyl, and cocaine. With heroin use, pulmonary edema is very rare, and presents immediately, within the first hour. He opined that pulmonary edema resulting from heroin use at 11:00 p.m. the night before, is too far removed to cause death and discounted it as a credible theory. The other problem with pulmonary edema, is it can develop after aspiration (when a person vomits and it gets inhaled into the lungs).

Pulmonary edema could also occur secondary to resuscitation attempts. There was a 45-minute resuscitation attempt on Weiss. Edema is a lung change that occurs with these efforts.

Weiss' autopsy showed brain edema, and aspiration in his lungs. "The aspiration doesn't come after death . . . it occurred while he was alive and contributed to his death."

Pike described the significance of the presence of 6-MAM in Weiss' urine. "You never find 6-MAM unless heroin has been used." "Its presence is absolute proof that heroin has been used." Pike stated that 6-MAM does not last in the blood very long – typically it is gone after a few hours, so it is found in the urine, within 12-24 hours from heroin use.

Pike stated NMS didn't identify the presence of cocaine, which is typical, due to its half-life of about 45-60 minutes. Often, the presence of its metabolite BE, or BZE is only identified. Based on the NMS testing, Pike opined that Weiss' last use of cocaine had to have occurred before or at 3:00 a.m. on August 13, 2011. "The other problem, of course, is that the blood samples that were used for the forensic analysis . . . were not collected until 49 hours after death." Cocaine continues to undergo decomposition post-mortem, and in a test-tube. "[I]f you waited 49 hours to draw the blood, that is way too long to prevent any decomposition of cocaine to its metabolites, the BE, or BZE."

Pike opined that aspiration was Weiss' cause of death, "I can't exclude cocaine as a cause of his death," as its effects on the heart cannot usually be detected at autopsy. It can cause arrhythmias, and basal spasm of the coronary arteries. That in itself can produce heart dysfunction pathology, it could result in pulmonary edema. "*What I can say definitely is that the heroin that was purchased earlier that previous evening . . . that heroin is absolutely not the cause of death.*" (emphasis added). If heroin is to be attributed as the cause of Weiss' death, it has to be heroin from another additional source. Weiss died of acute respiratory failure caused by either aspiration pneumonia as a result of regurgitation, or the result of the effects of cocaine or some other source of heroin, other than what was purchased by Dyson.

Trial Testimony of Dr. Laura Labay.

Labay testified as a government rebuttal witness. She was the director of toxicological services and forensic toxicologist at NMS. Labay has a Ph.D. in toxicology; she is not a physician/medical doctor. Labay has no experience with treating overdose patients and does not perform autopsies. She does not determine cause of death.

Labay was admitted as an forensic toxicology expert. Labay disagreed with the statement, "a person who injects heroin is totally safe after an hour has gone by

if they have not died by an hour after injecting.” Labay opined heroin’s metabolite, 6-MAM, is converted to morphine, and its half-life is about 30 minutes. “Morphine is pharmacologically active and if you have sufficient quantities of morphine in your circulatory system, you can feel the effects of that morphine and that can extend beyond 60 minutes.”

Labay was not the Certifying Scientist who released the toxicology results. Labay was uncertain that she knew 49 hours had passed from when Weiss died to when the blood/urine samples were drawn. She testified the samples were collected August 15 and the specimens were received at NMS on August 19, 2011.

Labay wrote three reports for the government answering its questions. Labay denied cognitive bias in her opinions, but verified she was not told that Weiss used pills from a friend’s medicine cabinet on August 11, 2011, or that Weiss was a cocaine and marijuana abuser, and a syringe with cocaine residue was found in Weiss’ pocket the morning he died. She confirmed that information was not in her reports.

Labay did not do any toxicology testing. She reviewed the Chain of Custody report, confirming NMS received the blood/urine samples on August 19, 2011. NMS testing continued until August 29. On August 31, 2011, her first report was issued. Labay confirmed Weiss’ samples weren’t taken until 49 hours after he died. Labay articulated cocaine was not found in NMS testing either

because it was not present at the time of death, or at the time of sample collection there was some concentration change.

Labay could not estimate the time of Weiss' last use of heroin, based on only the toxicology data, but she stated she would look at "case history" to make the assessment that someone used heroin.

Posing a hypothetical, the government asked, if I told you that while neither Rondeau nor Weiss might be described as naïve, one had been at Disneyland all week with their family and hadn't had access to heroin for several days, would that affect your analysis of their potential tolerance?" Labay answered, tolerance ebbs and flows, it can quickly build and it can quickly dissipate. Cocaine does not continue to metabolize in the blood after death, but can continue to breakdown after death.

The prosecutor asked a question (likely meant as a hypothetical), about a person's gag reflex and their risk of aspirating. Labay's unresponsive answer was, she reviewed the witness reports about Weiss' behavior, and, "taking into account the toxicology findings and the autopsy findings, the heroin was lethal –Weiss suffered a lethal outcome as a consequence of using heroin."

The government asked, "[d]o you have any indication given all . . . you reviewed and everything that you have heard today that Weiss would have died but-for the heroin?" Labay responded, "[b]ased upon the toxicology findings and

the signs and symptoms he displayed, to me this is all consistent with a heroin intoxication. . . . [t]he cocaine is just inactive, the BZE is inactive [so] there is no pharmacological effect there, so what you are left with is the heroin.” Labay opined that Weiss died of heroin intoxication, and only heroin.

h. Review of the Judgment of a State Court: Not Applicable

i. Review of the Judgment of a Federal Court:

The Petitioner was convicted in the United States District Court for New Mexico. The Conviction was affirmed by the United States Court of Appeals for the Tenth Circuit.

j. Direct and Concise Argument Amplifying the Reason Relied on for Allowance of the Writ.

PROPOSITION ONE: *Whether the District Court erred in denying Moya’s Motion to Dismiss Count 2 in that there was insufficient evidence that the heroin Moya allegedly sold to Dyson killed Weiss nine hours after Weiss’ last heroin use.*

1. Standard of Review:

“In reviewing the sufficiency of the evidence and denial of a motion for judgment of acquittal, this court reviews the record *de novo* to determine whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt.” *United States v. Irvin*, 682 F.3d 1254, 1266 (10th Cir. 2012) (citing *Wood*, 207 F.3d at 1228); *see also Medina-Copete*, 757 F.3d at 1106. The

Court presumes “the jury’s findings in evaluating the credibility of each witness are correct.” *Irvin*, 682 F.3d at 1266 (quoting *United States v. Evans*, 318 F.3d 1011, 1018 (10th Cir. 2003). “Evidence must ‘reasonably support the jury’s finding of guilt beyond a reasonable doubt.’” *Medina-Copete*, 757 F.3d at 1106 (quoting *United States v. Bowen*, 437 F.3d 1009, 1014 (10th Cir.

2. Argument and Authority:

The Government’s evidence did not support the element of the crime that the heroin Moya allegedly sold to Dyson killed Weiss nine hours after Weiss’ last heroin use. There is an insufficient evidentiary nexus to prove that heroin from Moya killed Weiss.

No admissible evidence supported the government’s theory that the heroin Moya sold was the heroin that killed Weiss. The elements of 21 §§ 841(a)(1), (b)(1)(C), must be proven beyond a reasonable doubt. To the contrary, expert testimony was presented that the alleged Moya sale of heroin could not have scientifically been the heroin that killed Weiss.

“Due process requires that every conviction be supported by sufficient evidence.” *Varoz*, 740 F.2d at 775 (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979)). Taken in the light most favorable to the government, evidence is sufficient to support a criminal conviction if the factfinder may find the defendant guilty beyond a reasonable doubt. *Varoz*, 740 F.2d at 775 (citing *Jackson*, 443 U.S. at

316, 319). “The evidence must be substantial; it must do more than raise a mere suspicion of guilt.” *Varoz*, 740 F.2d at 775. “If the evidence is consistent with both innocence and guilt it cannot support a conviction.” *Id.* (citing *United States v. Ortiz*, 445 F.2d 1100, 1103 (10th Cir.1971), cert. denied, 404 U.S. 993 (1971)).

A “defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use” of the drug distributed by the defendant “is a *but-for cause* of the death or injury.” *Burrage*, 571 U.S. at 218-19 (emphasis added); *see also Burkholder*, 816 F.3d at 621; *MacKay*, 610 Fed.Appx. at 798. “The language Congress enacted requires death to ‘result from’ use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed.” *Burrage*, 571 U.S. at 216. “But-for” causation can be an ill-defined term and often does not designate legal liability. *Krieger*, 842 F.3d at 505. However, the Supreme Court designated specific and required parameters as to the level of proof required to convict under § 841(b)(1)(C), “by stating ‘this requires proof that the harm would not have occurred in the absence of – that is, ‘but-for’ – the defendant’s conduct.’” *Id.* (quoting *Burrage*, 134 S.Ct. at 892).

Burrage held that to secure a conviction for distributing a drug that ‘results’ in death, the government must prove the decedent’s use of the drug “is a ‘but-for’ cause of the death,” at least when the drug isn’t “an independently sufficient cause of the victim’s death.” *MacKay*, 610 Fed.Appx. at 798 (citing *Burrage*, 134 S.Ct. at

892). The Supreme Court specifically declined to adopt the government’s permissive interpretation of § 841(b)(1), finding the “language Congress enacted requires death to ‘result from’ use of the unlawfully distributed drug, *not from a combination of factors to which drug use merely contributed.*” *Burrage*, 571 U.S. at 216 (emphasis added).

At trial, the court erred in ruling against defendant’s renewed Rule 29 motion, as the government failed to present sufficient evidence to prove Count 2. Moya argued “but-for” causation is an element of § 841(b)(1)(C) that the government must prove beyond a reasonable doubt. The government failed to create a factual and evidentiary bridge between the heroin Moya allegedly sold Dyson, and that such heroin was the heroin that killed Weiss. *Id.*

The government failed to establish evidence beyond a reasonable doubt that the heroin allegedly distributed by Moya was sufficient itself to be the cause in fact of Weiss’ death. *Burrage*, 571 U.S. at 216, 218-19. Pike testified scientifically, that heroin could not have killed Weiss. The government did not meet its burden of proof mandated by the § 841(b)(1)(C) penalty enhancement. The court erred by permitting the government to present evidence that heroin was the cause of Weiss’ death.

“[I]n a landscape requiring ‘but-for’ causation” focusing only on the heroin by law enforcement, medical examiners and the like “makes a difference.”

Krieger, 842 F.3d at 504-05. In *Krieger*, the Seventh Circuit Court of Appeals carefully analyzed the “but-for” causation requirement set forth in *Burrage*, finding insufficient evidence presented by the government that experts believed the decedent, “had a lethal level of fentanyl in her system and therefore concluded that the cause of [decedent’s] death was fentanyl toxicity.” *Id.* “In a world that *did not* require but-for causation, this evidence was sufficient to satisfy the ‘death resulting’ language of the enhancement by a preponderance of the evidence, as the district court found.” *Id.* (emphasis added). Notably, the *Krieger* court made such finding when analyzing the evidence under a lower burden of proof for sentencing purposes, preponderance of the evidence, and found the government failed to meet its burden of proof with the evidence presented. *Id.*

There was trial evidence that Weiss used a combination of drugs in the hours before his death. Testimony detailed that OMI failed to draw Weiss’ blood/urine timely, and requested additional toxicology tests for other possible causes of death by excluding other drugs and drug metabolites found in Weiss’ system post-mortem. Weiss’ mother found a syringe with cocaine residue in Weiss’ room and did not provide the evidence to the DEA until a year after Weiss’ death. Moya’s Toxicology expert testified that it was scientifically impossible Weiss was killed by heroin.

The government failed to present sufficient evidence beyond a reasonable doubt proving that Moya’s alleged distribution of heroin to Dyson, and “but-for” Moya’s conduct, Weiss would not have died. Stated another way, the government did not present sufficient evidence in the absence of Moya’s conduct, the harm to Weiss would not have occurred. The government failed to provide evidence that other causes of death were investigated and determined not to be the causes or contributing causes of Weiss’ death. The court erred by not requiring the government to present sufficient evidence required to satisfy the “but-for” causation element for § 841(b)(1)(C). *See Burrage*, 571 U.S. at 216, 218-219; *Burkholder*, 816 F.3d at 621; *Krieger*, 842 F.3d at 504-05. The court’s error is not insignificant considering that had Moya not been convicted of the §§ 841(a)(1), (b)(1)(C) penalty enhancement, he would not be facing a sentence of life imprisonment. Accordingly, the district court’s judgment should be reversed.

PROPOSITION TWO: *Whether the District Court erred in denying Moya’s Motion in Limine to suppress the untimely collection of blood/urine collected by the New Mexico Office of the Medical Examiner.1*

1. Standard of Review:

“We review evidentiary decisions, including determinations of relevance, only for an abuse of discretion.” *Medina-Copete*, 757 F.3d at 1105-1106. “In order to reverse a district court judgment because of an erroneous evidentiary ruling, [appellant] must make a clear showing she suffered prejudice, and the

ruling was inconsistent with substantial justice or affected her substantial rights.”

Coletti, 165 F.3d at 773.

2. Argument and Authority:

Moya filed a Motion in Limine to exclude blood/urine samples taken by OMI 49 Hours Post-Mortem. The government moved to strike Moya’s motion as untimely. The court did not rule on the merits of Moya’s Motion *in Limine* claim, and instead, struck the motion as untimely. Moya argued the evidence was irrelevant and prejudicial under Rule 401, 403, since the government essentially destroyed exculpatory evidence by delaying the collection of decedent’s blood and urine.

The delay in taking the evidence, and analysis of the blood and urine samples resulted in a *de facto* loss of this evidence, and “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87; *see also Arizona v. Youngblood*, 488 U.S. 51 (1988); *California v. Trombetta*, 467 U.S. 479 (1984); *McCormick v. Parker*, 821 F.3d 1240 (10th Cir. 2016) (prosecutor’s failure to disclose a witness’s lack of certification violated defendant’s due process rights); *Carter v. Bigelow*, 787 F.3d 1269 (10th Cir. 2015) (petitioner had the right to add supplemental evidence to his *habeas* petition under *Brady*).

Under the *Trombetta* test, a defendant's right to due process is violated when: (1) it destroys evidence whose exculpatory significance is "apparent before" destruction; and (2) the defendant remains "unable to obtain comparable evidence by other reasonably available means." *United States v. Bohl*, 25 F.3d 904, 909-10 (10th Cir. 1994) (quoting *Trombetta*, 467 U.S. at 489). The destruction of crucial evidence of concentrations of cocaine and heroin in Weiss' blood resulted from OMI's delay in obtaining and testing samples of Weiss' blood, which violated Moya's due process rights under *Brady* and its progeny, since the lost evidence had apparent exculpatory value. The appropriate remedy would be the exclusion of the evidence. *See Trombetta*, 467 U.S. at 487 (1988); *United States v. Harry*, 927 F. Supp.2d 1185, 1215-1216 (D.N.M. 2013).

The court's order did not address Moya's *Brady* claim, only summarily excluded Moya's Motion in Limine, without citing any precedence, simply because it erroneously deemed it was late. The court's inclusion of irrelevant and unfairly prejudicial blood and urine testimony and evidence was a violation of Moya's Due Process rights and in opposition to the relevant authorities.

PROPOSITION THREE: *Whether the District Court erred in denying Moya's Motion in Exclude the Expert testimony of Dr. Sam Andrews.*

1. Standard of Review:

"We review evidentiary decisions, including determinations of relevance, only for an abuse of discretion." *Medina-Copete*, 757 F.3d at 1105-1106.

“In order to reverse a district court judgment because of an erroneous evidentiary ruling, [appellant] must make a clear showing she suffered prejudice, and the ruling was inconsistent with substantial justice or affected her substantial rights.” *Coletti*, 165 F.3d at 773.

2. Argument and Authority:

The court ordered a new Scheduling Order and denied Moya’s request for *Daubert* motions. Afterwards, the government disclosed *Giglio* information about Andrews, and Moya filed a Motion to Exclude Andrews. The untimely information disclosed by the government revealed Andrews and his lab were under investigation and called into question his reliability as an expert witness. *Id.*

The government’s late disclosure pertinent to Andrews’ denied Moya a *Daubert* hearing. The district court is required to determine under Federal Rule of Evidence 702 that an expert’s testimony is both reliable and relevant. *Nacchio*, 555 F.3d at 1241, 1252; *Rodriguez-Felix*, 450 F.3d at 1122-23; *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). “Under *Daubert*, any step that renders the expert’s analysis unreliable . . . renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.” *Nacchio*, 555 F.3d at 1241 (quoting *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 782 (10th Cir. 1999)). The court improperly performed its gatekeeping role in denying a *Daubert* hearing to

disqualify Andrews as an expert, and by denying Moya’s motion to exclude Andrews’ testimony. Both decisions by the court unduly prejudiced Moya and allowed the jury to hear unreliable expert testimony.

PROPOSITION FOUR: *Whether the District Court erred in allowing the Government to pose hypothetical questions which went to the ultimate issue of the case.*

1. Standard of Review:

A district court’s admission or exclusion of expert testimony is reviewed for abuse of discretion. *United States v. Rodriguez-Felix*, 450 F.3d. 1117, 1122 (10th Cir. 2006). “To sustain a conviction based on an expert’s opinion as to an ultimate issue, [the court] must be able to find that rational minds could have found beyond a reasonable doubt that such opinion was correct . . .[b]ecause the jury must weigh the expert’s testimony, the testimony must be accompanied by presentation for the facts and premises underlying the expert’s opinions and conclusions.” *United States v. Varoz*, 740 F.2d 772, 775. “[R]everse is appropriate where an error has a substantial influence on the outcome of a trial or leaves one in grave doubt as to whether it had such effect.” *United States v. Richter*, 796 F.3d 1173, 1197 (10th Cir. 2015) (citing *United States v. Medina-Copete*, 757 F.3d 1108 (10th Cir. 2014)).

2. Argument and Authority:

The court twice deferred ruling on Moya’s Motion in Limine to Limit Opinion Testimony Regarding Ultimate Issues In Response to Hypothetical Questions at trial. Moya anticipated that the government would pose hypothetical questions to expert witnesses which could elicit testimony which would go to the ultimate issue in this case, and take the jury’s role from it. During Pike’s cross-examination, the government asked multiple hypothetical questions which elicited testimony impacting the ultimate issue of the case, allowing the government to circumvent the rules of evidence by inaccurately referring to another witness’ trial testimony. The court failed in its gatekeeping role and allowed Pike and Labay to answer hypothetical questions, which invaded on the jury’s province.

An “expert may not simply tell the jury what result it should reach without providing any explanation of the criteria on which that opinion is based or any means by which the jury can exercise independent judgment.” *United States v. Dazey*, 403, F.3d 1147, 1171 (10th Cir. 2005) (citing *United States v. Simpson*, 7 F.3d 186, 188-89 (10th Cir. 1993)). Reversal of conviction is proper in light of erroneously admitted expert testimony when the testimony “has a substantial influence on the outcome of the trial or leaves one in grave doubt as to whether it had such an effect.” *Richter*, 796 F.3d at 1197 (citing *Medina-Copete*, 757 F.3d at 1108). An expert’s testimony may not be harmless when there is a danger that the

jury may simply adopt the expert's opinion rather than making its own conclusions and may be detrimental to the trial process. *See, e.g. Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988) (en banc).

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Case law addressing Federal Rule of Evidence 704(b) is instructive as to the permissibility of hypothetical questions eliciting expert testimony. Courts cannot permit a party to use hypothetical questions in a manner to circumvent Rule 704(b) which in turn may elicit testimony on the ultimate issue of the case. *See, e.g. United States v. Manley*, 893 F.2d 1221, 1223-25 (11th Cir. 1990); *United States v.*

Goodman, 633 F.3d 963, 970 (10th Cir. 2011). An “expert may not simply tell the jury what result it should reach; he or she must explain the basis for any summary opinion.” *United States v. Schneider*, 704 F.3d 1287, 1293 (10th Cir. 2013) cert. denied, 133 S. Ct. 2868 (2013).

Proper expert testimony explains to the jury how the expert reached his opinion and permits the jury to make relevant inferences. *Id.*; *McKay*, 715 F.3d 907, 838 (10th Cir. 2013). The expert may not “expressly draw the conclusion or inference that [the defendant] acted with the necessary mens rea” to commit a crime. *United States v. Wood*, 207 F.3d 1222, 1236 (10th Cir. 2000); *accord, e.g.*, *United States v. Cooper*, 286 F.Supp.2d 1283, 1295 (D. Kan. 2003). Expert witnesses “may not testify as to the ultimate issues of law” in a jury trial. *United States Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, LTD*, 582 F.3d 1131, 1150 (10th Cir. 2009) (citing *Specht*, 853 F.2d at 808).

Expert testimony is improper whether the opinion is presented as an interpretation of the facts of the case, or by hypothetical matching the facts of the case. *United States v. Dennison*, 937 F.2d 559, 565 (10th Cir. 1991) (expert testimony that hypothetical person with disorders and conditions of defendant could not form intent violates Rule 704(b)); *cf Goodman*, 633 F.3d at 970.

An expert cannot testify to “legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion.”

Richter, 796 F.3d at 1195 (citing to *United States v. Bedford*, 536 F. 1148, 1158 (10th Cir. 2008)). A hypothetical question which distorts instead of reflecting the evidence should not be permitted. *New York Life Ins. Co. v. Doerksen*, 75 F.2d 96, 102 (10th Cir. 1935) (acknowledging the trial court's discretion as to form and length of hypothetical questions and proffered questions are to "aid the jury and not mislead or confuse them").

During Pike's cross-examination, multiple hypotheticals designed to elicit misleading and confusing testimony were asked. Repeatedly, the government's questions were intended to elicit testimony that required a conclusion that Weiss' death was caused by the heroin distributed from Moya. These ultimate-issue questions were only thinly veiled by the hypotheticals offered which circumvented evidentiary rules.

These questions asked Pike to speculate about what could *not* have caused Weiss' death in a hypothetical situation, the ultimate issue in this case. The government circumvented the rules of evidence by asking hypothetical questions about White's, Andrews', Rondeau's, Teeters', and Bowman's trial testimony. *See Harris v. Smith*, 372 F.2d 806, 810 (8th Cir. 1967). "It has long been recognized in this circuit as well as most other jurisdictions that it is improper, when asking a hypothetical question of an expert witness, to incorporate within the question being asked the opinion of other expert witnesses, for opinion upon opinion diverges

much too far from the plain facts upon which all proper hypothetical questions must be grounded.” *Id.* (citing *Laughlin v. Christensen*, 1 F.2d 215, 219 (8th Cir. 1924)).

Despite Moya’s Motion *in Limine* and objections raised prior to and during cross-examination, Pike was allowed to answer the hypotheticals. Pike’s expert testimony would normally carry enough weight that it should, at the very least, “[leave] one in grave doubt as to whether” it had a substantial impact on the outcome of the trial. *Richter*, 796 F.3d at 1197 (citing *Medina-Copete*, 757 F.3d 1108). Pike’s responses to the hypothetical questions were prejudicially admitted, and had a substantial impact on the outcome of the trial. Therefore, Moya’s conviction should be reversed.

Hypothetical questions posed to experts need not include all the facts in evidence but should incorporate facts which have evidentiary support in the record. *Taylor v. Reo Motors, Inc.*, 275 F.2d 699, 703 (10th Cir. 1960); *see also BNSF Ry. Co. v. Lafarge Southwest, Inc.*, 2009 U.S. Dist. LEXIS 117407 (D.N.M. 2009).

The hypotheticals to Pike were composed of multiple parts and forced Pike to note myriad assumptions and only tangentially related to the facts in evidence. For example, the government’s hypothetical about atropine-contaminated cocaine was not factored into Pike’s expert report and not mentioned during direct examination.

The prosecutor told Pike he would set forth hypothetical facts, “that I would like you to continue to rely on as I ask you these hypothetical questions.”

Throughout, Pike answered and opined based on the facts *in this case, not the hypothetical facts*. To compound matters, the government posed hypothetical questions about Rondeau’s prior testimony, which not only confused Pike, but also resulted in Pike responding to hypothetical questions with actual case facts. This allowed the prosecutor to circumvent the rules of evidence by having Pike opine on a prior witness’ testimony.

Pike had to stop the prosecutor and ask for clarification of the hypotheticals posed to him. At one point, the government admitted its line of questioning was unclear. If the hypotheticals were confusing to the expert witness, the jury – composed of laypersons – also likely were confused.

The prosecutor presented Labay with an improper hypothetical statement that went to the toxicity of heroin. Labay’s response was (1) outside the scope of her permissible expert testimony, and (2) asserted adverse effects might occur from heroin use an hour after use, which may have lead the jury to make an illogical conclusion that adverse effects equals death.

The hypothetical to Labay deceived the jury about Teeters’ previous testimony regarding his and Weiss’ use of cocaine, heroin, air duster, and “anything that we could find in my medicine cabinet.” The government asked, “Q:

If hypothetically Cody Teeters testified that he and Cameron both injected *cocaine* Thursday, August 11, the day or two before his death, would that be consistent with what you see on this tox screen? A: Yes, so the BZ at 150 nanogram[s] [sic] per milliliter to me represents cocaine use maybe within the day at some point, like within the 24-hour period.” The hypothetical misled the jury about Teeters testimony that he and Weiss *only* injected cocaine that evening.

The government’s hypothetical questions posed to Labay were improperly admitted by the court. The hypothetical questions to Pike and Labay were overly involved, confusing, misleading to the jury, and highly prejudicial to Moya.

k. Appendix:

- i. Opinion delivered upon the rendering of judgment by the Tenth Circuit Court of Appeals, which is the subject of this Petition: *United States v. Raymond Moya*, 10th Cir. No. 20-2006, opinion dated July 27, 2021.
- ii. Any other opinions rendered in the case necessary to ascertain the grounds of judgment: None
- iii. Any order on rehearing: None
- iv. Judgment sought to be reviewed other than opinion referenced in (1): None

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari issue for review of the Order and Judgment of the United States Court of

Appeals for the Tenth Circuit in *United States v. Moya*, 10th Cir. No. 20-2006 (10th Cir., July 27, 2021.

Respectfully submitted,

BY: /s/ J. Lance Hopkins
J. Lance Hopkins, OBA#14852
219 W. Keetoowah
Tahlequah, OK 74464
(918) 456-8603
(918) 456-1407 (fax)
Lance.Hopkins@lunalunallp.net
bacaviola@yahoo.com
Counsel for Petitioner
Raymond Moya

CERTIFICATE OF COMPLIANCE

As required by Fed.R.App. P.32(a)(7)(C), I certify that this petition for certiorari is proportionally spaced and contains 8,067 words. I relied on Microsoft Word count to obtain word count, and I used Times New Roman, 14 pt.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ J. Lance Hopkins
J. Lance Hopkins