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**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellant,**

**vs.**

**CHRISTOPHER HEYSER,**

**Defendant-Appellee.**

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

SEP 23 2016

*Monte Renteria*

**No. 35,564**

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
DONA ANA COUNTY  
THE HONORABLE MARCI E. BEYER, PRESIDING**

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**STATE OF NEW MEXICO'S BRIEF IN CHIEF**

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## **CITATIONS TO THE RECORD**

The record in this case consists of the Record Proper and one compact disk containing digital audio recordings of the proceedings. When citing these sources, this brief follows the conventions of Rule 23-112 NMRA and its appendix.

The digital audio recordings are playable with the For-The-Record software. Citations to the recorded proceedings are in the form of [CD \_\_/\_\_/\_\_, \_\_:\_\_:\_\_] The time and date stamp indicates the actual time of the day that the recording was made, not the elapsed time from the beginning of the recording. For example, the citation [CD 8/29/14, 11:12:50-13:25] refers to the recording contained on the CD made on August 29, 2014 at 11:12:50 a.m. through 11:13:25 a.m.

The one-volume Record Proper filed on June 24, 2016 is cited by the abbreviation "RP" followed by a page number. For example, the citation [RP 131] refers to page 131 of the Record Proper.

## **STATEMENT OF COMPLIANCE**

In accordance with Rule 12-213(F)(2) NMRA, this brief was prepared using Times New Roman, a proportionally-spaced typeface, and the body of the brief is less than thirty-five (35) pages. This brief was prepared using Corel WordPerfect 12.

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## NATURE OF THE CASE

This is the State's appeal from the District Court's Order Granting Defendant's Motion to Dismiss, dismissing a one-count grand jury indictment charging Defendant with felony possession of a controlled substance (cocaine). The charge arose out of cocaine found in Defendant's boot by personnel from the Dona Ana County Detention Center while booking Defendant into the facility after his arrest for aggravated DUI.

By Criminal Complaint, on the date of Defendant's arrest, the State charged Defendant with the aggravated DUI (and traffic offenses) in Dona Ana County Magistrate Court. Defendant's indictment in this case, in District Court, occurred while the Magistrate Court proceedings were pending. Defendant pleaded guilty to the Magistrate Court charges and subsequently moved to dismiss the cocaine possession charge pursuant to our compulsory joinder rule, Rule 5-203(A) NMRA, and the remedy for violating the rule announced in *State v. Gonzales*, 2013-NMSC-016, ¶¶ 1, 25-26, 30, 301 P.3d 380 (holding that the State's failure to join a charge as required by Rule 5-203(A) to an initial prosecution bars a subsequent prosecution for that charge).

The District Court erred by applying Rule 5-203(A) (1) where Defendant's conduct forming the basis of the respective prosecutions (DUI and cocaine

possession) was not based on a series of acts “connected together” under Rule 5-203(A), (2) where the two respective prosecutions do not implicate the purposes underlying compulsory joinder, and (3) contrary to *State v. Aragon*, 2016-NMCA- \_\_\_, \_\_\_ P.3d \_\_\_ (July 7, 2016, No. 34,653), in which this Court held a defendant’s plea of guilty or no contest to a lesser offense in an initial prosecution does not bar a subsequent prosecution for a greater offense.

Alternatively, this Court should apply two well-established limitations to compulsory joinder: Rule 5-203(A) should not apply where (1) the court in the initial prosecution lacks jurisdiction over the offense charged in the second prosecution, and (2) at the time of the initial prosecution, the state lacks sufficient evidence to warrant trying the offense charged in the second prosecution. Accordingly, the State of New Mexico respectfully requests that this Court reverse the District Court’s Order Granting Defendant’s Motion to Dismiss and remand this case for trial.

#### **SUMMARY OF PROCEEDINGS**

On June 5, 2015, Officer Ruben Herrera of the Las Cruces Police Department initiated a traffic stop of Defendant’s vehicle for failure to dim headlights. [RP 29, 36-39] Upon making contact with Defendant, Officer Herrera smelled the odor of alcohol and asked Defendant if he had drinking, and Defendant admitted having two beers and a shot. [RP 39] Officer Herrera observed further signs of intoxication



(bloodshot watery eyes, slurred speech, and a flushed face) and Defendant exhibited impairment during field sobriety tests. [RP 39]

Officer Johnny Rivera assisted Officer Herrera during the traffic stop. [RP 39; 57] Officer Rivera read Defendant the Implied Consent Act, and Defendant refused to submit to chemical testing. [RP 39]

Defendant was placed under arrest for aggravated DUI (refusal), driving while license suspended or revoked (DUI-related), and failure to dim headlights. [RP 36-39] The same day, June 5, 2015, through a Criminal Complaint, Officer Herrera<sup>1</sup> initiated an action in Magistrate Court in Cause No. M-14-DR-201500400 charging Defendant with these three offenses (hereafter, the State refers to these three charges collectively as the “Magistrate Court charges (or convictions)”). [RP 36-39; 29-30]

Following his arrest, Defendant was transported to the Detention Center. [RP 29; 57] During the booking process, Detention Center personnel found three zip-loc bags containing a substance suspected, and later confirmed, to be cocaine in Defendant’s boot. [RP 29; 57; 58] Detention Center personnel contacted Officer Rivera after finding the cocaine, and Officer Rivera contacted Agent Ernest DiMatteo

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<sup>1</sup>In its briefing below and in its docketing statement, the State identified Officer Rivera as initiating the Magistrate Court action. [See, e.g, RP 49, 69] Although the handwriting on the signature line of the Criminal Complaint is not clear, it appears to undersigned counsel that the Criminal Complaint was signed by Officer Herrera, not Officer Rivera. [RP 37, 39]

of the Dona Ana County Interagency Drug Task Force to investigate Defendant's cocaine possession. [RP 49; 56-57] Agent DiMatteo's incident report noted that the cocaine was being sent to the Southern New Mexico Crime Laboratory (SNMCL) for testing of the substance and that Defendant is pending grand jury indictment pending further investigation. [RP 57] The cocaine found during booking forms the basis of Defendant's charge in this case.

On June 23, 2015, the State sent Defendant a Target Notice, stating that he was under a grand jury investigation for possession of a controlled substance, occurring on or about June 5, 2015. [RP 30; 40] On August 13, 2015, a grand jury indicted Defendant for one felony count of possession of a controlled substance (hereafter, the State refers to the charge as the "cocaine possession charge"), and the filing of the Grand Jury Indictment initiated this case in the District Court. [RP 1-4]

Meanwhile, the prosecution for the Magistrate Court charges against Defendant proceeded. On November 24, 2015, Defendant pled guilty to, and was sentenced for, aggravated DUI and driving with a suspended or revoked license (DUI-related). [RP 44-45] The State dismissed the remaining charge, ending the proceedings in Magistrate Court. [RP 44-45] The prosecutor in Magistrate Court is a different prosecutor than the prosecutor prosecuting the cocaine possession charge in the District Court. [RP 45 (identifying Elizabeth Ferrell as the prosecutor in

**Magistrate Court); RP 25 (entry of appearance by Drew Inman)]**

SNMCL completed its laboratory testing on the substance recovered from Defendant at the Detention Center, confirming that Defendant possessed cocaine, on March 16, 2016. [RP 58]

**Defendant's Motion to Dismiss**

After pleading guilty to the Magistrate Court charges, Defendant filed a Motion to Dismiss the cocaine possession charge in District Court. [RP 29-35] Defendant argued that the Magistrate Court convictions and the cocaine possession charge in this case "are a bundle - all based upon the same conduct, a series of connected acts, or parts of a single scheme or plan that occurred at the same time." [RP 32] Accordingly, Defendant argued that the compulsory joinder rule, Rule 5-203(A), and our Supreme Court's decision in *Gonzales*, 2013-NMSC-016 required dismissal of the cocaine possession charge. [RP 29-35] The State countered that the purposes furthered by Rule 5-203(A) were not implicated under these circumstances, and, therefore the remedy set forth in *Gonzales* should not be applied, or, alternatively, that our courts should apply three limiting principles/exceptions in construing Rule 5-203(A), limitations that are incorporated in model rules and accepted by the

majority of jurisdictions with compulsory joinder rules.<sup>2</sup> [RP 47-55]

After a hearing, the District Court issued an Order Granting Defendant's Motion to Dismiss, from which the State appeals. [CD 4/15/16, 11:03:10-11:11:33; RP 65-66]

## ARGUMENT

### I. Statement of preservation and standard of review

The State preserved the arguments made herein in its Response to Defendant's Motion to Dismiss and during the April 15, 2015 hearing. [CD 4/15/16, 11:03:10-11:11:33; RP 47-55] This Court determines whether Rule 5-203(A) applies to bar a subsequent prosecution under a de novo standard of review. *Aragon*, 2016-NMCA-\_\_\_, ¶ 7.

This Court applies the same rules of construction to procedural rules adopted by our Supreme Court as it does to statutes. *State v. Miller*, 2008-NMCA-048, ¶ 11, 143 N.M 777. The underlying inquiry is to determine the underlying intent of the enactment. *Id.* Although the plain meaning is the primary indicator of intent, our Supreme Court has held that "we must exercise caution in applying the plain meaning

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<sup>2</sup>As will be discussed, this Court has recently applied one of these limiting principles in *Aragon*, 2016-NMCA-\_\_\_, ¶ 9. *See, supra*, § II.A.ii.

rule.” *State v. Martinez*, 1998-NMSC-023, ¶ 9, 126 N.M. 39 (internal quotation marks and citation omitted).

**II. The District Court erred in granting Defendant’s Motion to Dismiss**

**A. Rule 5-203(A) does not apply to bar this prosecution**

- i. As construed by our Supreme Court and this Court, the language of Rule 5-203(A) NMRA did not require joinder of the cocaine possession charge with Magistrate Court charges under the facts of this case**

This case requires this Court to determine whether this cocaine possession prosecution in District Court is barred by the compulsory joinder rule because it was not joined with the Magistrate Court charges. In pertinent part, the compulsory joinder rule states that

Two or more offenses shall be joined in one complaint, indictment or information with each offense stated in a separate count, if the offenses, whether felonies or misdemeanors or both:

...

(2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

Rule 5-203(A). Thus, in order for Rule 5-203(A) to arguably be implicated, the respective charges must first be based on the “same conduct” or a “series of acts either connected together or constituting parts of a single scheme or plan.” Rule 5-203(A).

- a. **This Court should not accept the State's erroneous concession that the Magistrate Court convictions and cocaine possession charge were based on a series of acts connected together**

As an initial matter, in its Response to Defendant's Motion to Dismiss, the State conceded that the Magistrate Court convictions and the cocaine possession charge were based on a series of acts connected together or constituting part of a single scheme or plan. [RP 48] After argument, at the conclusion of the hearing on Defendant's Motion to Dismiss, the District Court initially disagreed with the State's concession and indicated that Defendant's acts forming the basis of the respective prosecutions (DUI and possessing cocaine) were too attenuated to be "connected together" as contemplated by Rule 5-203(A). The State essentially talked the District Court out of its decision.

The following exchange took place:

District Court: But my mind is not going there with [the State] and it's not going there with [Defendant]. I don't think, I don't think it's based on the same conduct, it's not part of a single scheme or plan. So then it has to be a series of acts connected together in some way. At what point does the behavior become attenuated. If it was two hours later, would you still think it's based on a series of acts connected together? I don't see how these acts are connected together.

State: Judge, he is charged with DUI under the influence of alcohol and drugs and he has cocaine in his shoe, To me, these are connected together. I will concede that in this scenario.

District Court: Alright (audibly laughs). Then I'm going to . . .  
[interrupted by State]

State: I know what you have to do but . . . [trails off]

District Court: Then I'm going to grant the motion. I was going to deny it based on a different analysis because I don't think the two are necessarily the same but you know more about the case than I do. Given that the State concedes that they're connected, on the basis of the law, I'm granting the Motion to Dismiss.

**[CD 4/15/16, 11:10:05-11:24]**

This Court should not accept the State's concession below that the Magistrate Court charges and the cocaine possession charge are based on a series of acts "connected together" for Rule 5-203(A) purposes, and should conduct an independent analysis applying the language of the rule as construed by our courts. First, it is well-established that a concession is not controlling. *See State v. Neatherlin*, 2007-NMCA-035, ¶ 21, 141 N.M. 328 ("[W]e are not bound by the State's concession; thus, we examine the issue to reach an independent conclusion.").

Further, if this Court were to accept the State's concession that the Magistrate Court convictions and the cocaine possession charge implicate Rule 5-203(A), it would require this Court to address the State's arguments as to whether to adopt limitations/exceptions to the rule. It could therefore require this Court to address issues broader than necessary to resolve this appeal. *See State v. Sanchez*, 2015-NMCA-084, ¶ 8, 355 P.3d 795 ("Consistent with our policy of judicial restraint and

our rule requiring preservation, we decide this case on the preserved and narrowest possible grounds.”). In other words, it would be unnecessary for this Court to consider limitations/exceptions to Rule 5-203(A) without first determining whether the charges in the two prosecutions even implicate the rule.

Moreover, as the above-quoted discussion shows, the District Court considered whether the Magistrate Court convictions and cocaine possession charge were based on a series of acts connected together (and tentatively ruled in the State’s favor). The parties briefed Rule 5-203(A). [RP 29-35; 47-55] The hearing on Defendant’s Motion to Dismiss included argument and questioning from the District Court regarding whether the charges were based on conduct too attenuated to be considered “connected together” for purposes of Rule 5-203(A). Accordingly, despite the State’s concession, the purposes underlying the preservation rule were met as to this issue. *See State v. Nichols*, 2006-NMCA-017, ¶ 27, 139 N.M. 72 (“The primary purposes of the preservation requirement are (1) to alert the trial court to a claim of error so that it has an opportunity to correct any mistake, and (2) to give the opposing party a fair opportunity to respond and show why the court should rule against the objector.” (internal quotation marks and citation omitted)).

Lastly, this Court should not accept the State’s concession because to do so would conflict with at least two New Mexico cases (discussed in the next section)



construing the language of Rule 5-203(A). One of these cases, *Aragon*, 2016-NMCA-\_\_\_, was decided by this Court on July 12, 2016, after the State's concession. In order to maintain consistency in our compulsory joinder caselaw, this Court should first determine whether the District Court erred in determining the factual bases of Defendant's respective charges were based on a series of acts "connected together."

**b. The District Court erred in determining that Defendant's Magistrate Court charges and cocaine possession charge were based on a series of acts connected together**

In order to implicate Rule 5-203(A), the Magistrate Court charges and the cocaine possession charge must be based on the "same conduct" or a "series of acts either connected together or constituting parts of a single scheme or plan." Rule 5-203(A).

The Magistrate Court convictions were based on Defendant's conduct of driving under the influence of alcohol (and refusing a chemical test) and driving with a suspended license. In this case, Defendant is charged with the conduct of possessing cocaine, a controlled substance. Clearly, the charges are not premised on the same conduct or a series of acts constituting a single scheme or plan. The operative question becomes whether the acts of DUI/driving with a suspended license and possessing cocaine are "connected together" under these circumstances, despite the fact that their only link is that the cocaine possessed by Defendant was discovered

during his booking following his DUI arrest.<sup>3</sup> Based on precedents construing the phrase “connected together,” the answer is no.

As an initial matter, the State acknowledges that the language of Rule 5-203(A) and, particularly, the phrase “connected together” is susceptible to a broad reading. See *Aragon*, 2016-NMCA-\_\_\_, n.4 (acknowledging the breadth of the language in Rule 5-203(A)). However, in discussing the purposes of Rule 5-203(A), our Supreme Court has discussed the rule as preventing successive prosecutions for crimes arising out of the same “criminal episode.” *Gonzalez*, 2013-NMSC-016, ¶ 26 (internal quotation marks and citation omitted); see also *State v. Radosevich*, 2016-NMCA-060, ¶ 21, 376 P.3d 871 (stating that “[o]ur Supreme Court construed [Rule 5-203(A)] to mean that the criteria for the mandatory joinder of offenses are satisfied where

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<sup>3</sup>It appears that Defendant’s position is that the Magistrate Court charges and the cocaine possession charge were based on a series of acts connected together because the State’s allegations in Magistrate Court could be construed as alleging that Defendant’s DUI was premised on cocaine intoxication. [RP 30-31] Although the aggravated DUI charge alleged that Defendant was driving under the influence of alcohol “or any drug,” the factual basis supporting the Criminal Complaint established that the State’s allegation was that Defendant was under the influence of alcohol (based on Defendant’s odor of alcohol, bloodshot, watery eyes, slurred speech, flushed face, and Defendant’s admission to drinking) and the aggravation of the charge was based on Defendant’s refusal to submit to a chemical test. [RP 36-39] The Criminal Complaint, although it tracks NMSA 1978, Section 66-8-102(B) (2016) and contains the statutory-alternative allegation that Defendant was under the influence of “any drug,” should not be construed as the State alleging that Defendant was DUI based on him being under the influence of the cocaine possessed and later recovered at the Detention Center.

under the facts of the case there are ‘two crimes based on the same conduct.’ ”). By framing Rule 5-203(A) as encompassing offenses arising out of the same “criminal episode,” our Supreme Court has recognized that the broad language of Rule 5-203(A) is not without restriction.

Consistent with the principles that our courts construe rules using a common-sense approach, *see State v. Isaiah A.*, 1997-NMCA-116, ¶ 10, 124 N.M. 237, and will not construe a rule outside its relevant context considering the objective of the rule, *see Martinez*, 1998-NMSC-023, ¶ 9, both our Supreme Court and this Court have recently construed and limited the application of Rule 5-203(A) in similar factual contexts.

Our Supreme Court limited the phrase “connected together” in *State v. Paiz*, 2011-NMSC-008, ¶¶ 1, 11-17, 249 P.3d 1235. In *Paiz*, the Court held that murder/shooting-related charges were improperly joined with a drug trafficking charge. *Id.* After a confrontation resulting a deadly shooting, as part of the murder investigation, officers executed a search warrant on the defendant’s residence. *Id.* ¶¶ 3-4. During the search, the officers found drugs and other evidence of drug trafficking. *Id.* ¶ 4. The State joined a drug trafficking charge to the charges arising directly from the murder. *Id.* ¶¶ 1, 4. Our Supreme Court held that joinder was improper under Rule 5-203(A), rejecting the State’s argument that the acts were

connected together because the drug trafficking evidence was found during the murder investigation. *Id.* ¶¶ 11-17. The Court relied on two rationales. First, there was no “logical relationship” between the shooting and the drug trafficking, as there were no allegations that the shooting was trafficking related. *Id.* ¶ 17. Second, joinder was improper because “[i]t was not [the d]efendant’s offenses that could be construed as a series of acts either connected together or constituting parts of a single scheme or plan, but rather, it was [the d]efendant’s shooting offense combined with the detectives’ actions following the shooting that led to the joinder of the drug trafficking offense with the shooting offenses.” *Id.* (internal quotation marks and citation omitted).

*Paiz* stands for the proposition that joinder is not required where evidence of one offense is discovered during the investigation of another offense absent a “logical relationship” established as to a defendant’s conduct forming the bases of the offenses. The fact that the investigation of one offense led to officers discovering evidence of the second offense does not establish a logical relationship because the focus of the inquiry should be on the relationship as to the defendant’s conduct, not officers’ conduct in discovering and investigating the offenses.

Applying *Paiz*, the cocaine possession charge and the Magistrate Court charges are not based on acts “connected together.” Similar to the drug trafficking evidence

in *Paiz* being incidentally discovered during the investigation of the murder, the cocaine possession evidence in this case was discovered during a booking search that was incidental to his arrest for the conduct comprising the Magistrate Court charges. Under *Paiz*, the mere fact that the arrest for DUI led to the discovery of Defendant's cocaine possession is an insufficient link to bring the charges within the purview of Rule 5-203(A) absent a logical relationship between Defendant's conduct comprising the charges.

Further, there is no logical relationship between Defendant's DUI/driving with a suspended license and his possession of cocaine. The DUI charge was based on indicators of alcohol impairment and Defendant's refusal to submit to chemical testing, not cocaine-related impairment. [RP 36-39; see also *Infra*, fn. 2] The mere fact that Defendant possessed cocaine in his shoe during booking after the DUI arrest does not establish a logical relationship between the DUI conduct and his cocaine possession conduct. The District Court's conclusion in this case suffers the same fatal flaw as the State's position in *Paiz*, and it is not the rule in New Mexico that Rule 5-203(A) requires joinder where evidence of one offense is found during a search incident to another unrelated offense. *Paiz* mandates reversal.

More recently and independently dispositive, in *Aragon*, 2016-NMCA \_\_\_, ¶ 2, the defendant was stopped for speeding and subsequently arrested during the traffic

stop for DUI. The State charged the defendant with DUI and speeding in separate magistrate court cause numbers, but quickly dismissed the DUI charge pending investigation into whether it was the defendant's sixth offense. *Id.* ¶ 3. The defendant pleaded no contest to the speeding charge, and the State subsequently re-charged the DUI in magistrate court in the original DUI cause number, which the defendant moved to dismiss on the basis that it had to be joined with the speeding charge. *Id.* ¶¶ 3-4. This Court "conclude[d] that nothing in the language of Rule 5-203(A) required compulsory joinder in this case." *Aragon*, 2016-NMCA- \_\_\_, ¶ 8. Reasoning that the speeding charge played no role in prosecuting the DUI charge, this Court concluded that Rule 5-203(A) was not implicated by any failure to join defendant's offenses. *Id.* ¶ 9. Implicit in *Aragon*'s holding that the language of Rule 5-203(A) did not require joinder was that the defendant's conduct of DUI and speeding are not sufficiently "connected together" despite arising out of the same traffic stop.

*Aragon* is instructive in this case. If Rule 5-203(A) is not implicated by speeding and DUI charged from the same traffic stop, the same result is mandated as to Defendant's conduct of DUI and cocaine possession in this case. The fact that both the Magistrate Court charges and the cocaine possession charge had their genesis from the same traffic stop does not make joinder mandatory under Rule 5-203(A). Possessing cocaine and DUI are distinct acts. As with *Aragon*, Defendant's DUI and

driving with a suspended license will play no role in this prosecution for cocaine possession. Stated another way, the District Court was initially correct in concluding that the degree of attenuation between the conduct comprising the Magistrate Court charges and the later discovered cocaine possession charge was too great to require joinder.

Based on the authority of *Paiz* and *Aragon*, the State was not required to join the cocaine possession charge in this case with the Magistrate Court charges merely because the cocaine possession evidence was discovered during a booking search incidental to the DUI arrest. Defendant's acts, DUI/driving with a suspended revoked license and possessing cocaine were not "connected together" as contemplated by Rule 5-203(A).

**ii. Alternatively, Defendant's guilty plea to the Magistrate Court charges does not bar this subsequent prosecution for cocaine possession under the limitation applied by this Court in *Aragon***

As an alternative basis, in *Aragon*, this Court adopted a limitation to the compulsory joinder rule applicable to this case.

In *Aragon*, this Court held that a defendant's entry of a no contest (or guilty) plea to a lesser offense in one prosecution does not bar the subsequent prosecution of an additional, greater offense even if the two offenses arose from one criminal episode. 2016-NMCA-\_\_\_, ¶ 9. In formulating its holding, this Court relied on

exceptions contained in the model criminal joinder provisions promulgated by the American Bar Association (ABA) Standards for Criminal Justice Section and the Model Penal Code. *Id.* ¶ 9; *see* ABA Standards for Criminal Justice Section 13-2.3(a), (d) (1980) (“Entry of a plea or guilty or nolo contendere to one offense does not bar the subsequent prosecution of any additional offense based upon the same conduct or the same criminal episode.”); Model Penal Code Section 1.11(2) (Am. Law Inst. 2015) (allowing a second prosecution for an offense arising out of the same conduct as a former prosecution where the first prosecution “was procured by the defendant without knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence that might otherwise be imposed”); *see also* Wayne R. LaFave, 5 *Crim. Proc.* § 17.4(c), n. 173 (2015) (collecting court rules and case law adopting exceptions to joinder and allowing a second prosecution for offenses based on the same conduct where the defendant pleads guilty or no contest to one or more offenses in an initial prosecution). Applying this rule, this Court held that Rule 5-203(A) did not bar the State from prosecuting the defendant for DUI, where the defendant previously pleaded no contest to traffic offenses arising out of the same traffic stop, and where the State did not join the DUI charges to the traffic offenses. *Id.* ¶¶ 8-9. In this Court’s view, holding that joinder was mandatory would not be a “rational disposition.” *Aragon*, 2016-NMCA-\_\_\_, ¶ 9.



A rather straightforward application of *Aragon* mandates a conclusion that Rule 5-203(A) does not bar this prosecution for cocaine possession. The District Court erred in determining that, once Defendant pleaded guilty in Magistrate Court, Rule 5-203(A) bars a subsequent prosecution for the cocaine possession charge. Its determination was contrary to *Aragon* and was therefore error. *Aragon*, 2016-NMCA-\_\_\_, ¶ 9. Rule 5-203(A) does not apply to defeat this felony prosecution for cocaine possession where Defendant pleaded guilty to the lesser Magistrate Court charges, even if all offenses arose out of a series of acts connected together.

**iii. Alternatively, the purposes of the compulsory joinder rule are not furthered by its application under the facts of case**

Both in support of the preceding arguments and, alternatively, this Court should not apply the compulsory joinder rule to this case, because to do so would not further the salutary purposes underlying the compulsory joinder rule. *See State v. Benally*, 2016-NMSC-010, ¶ 10, 368 P.3d 403 (statutes are construed to give effect to their object and purpose); *Miller*, 2008-NMCA-048, ¶ 11 (“We apply the same rules of construction to procedural rules adopted by the Supreme Court as we do to statutes.”). The purpose of Rule 5-203(A) is two-fold: (1) To protect a defendant from governmental harassment of being subject to successive trials for offenses stemming from the same criminal episode; and (2) to ensure finality without unduly burdening the judicial process by repetitious litigation. *Gonzales*, 2013-NMCA-016,

¶ 26. Further, joinder “is designed to protect a defendant’s double jeopardy interests where the state initially declines to prosecute him for the present offense, electing to proceed on different charges stemming from the same criminal episode.” *Id.* (quoting *Commonwealth v. Laird*, 988 A.2d 618, 628 (Pa. 2010) (alteration omitted) (emphasis added)).

This case does not implicate the purposes of compulsory joinder. This is not a case where the State elected to hold back the cocaine possession charge to harass Defendant with subsequent prosecutions or to disrupt finality of the judicial proceedings. The two separate prosecutions arose out of the unique circumstances: The bases of the respective charges were discovered by different investigative officers, at different times and locations, and the prosecutions were each timely initiated in different courts with distinct jurisdiction over criminal offenses. The State initiated the Magistrate Court charges on the day of Defendant’s arrest through a Criminal Complaint filed by one of the arresting officers from the Las Cruces Police Department. [RP 29; 36-39;49] The instant case was initiated through the Grand Jury Indictment, almost three months later and premised on an investigation conducted by Agent DiMatteo of the Dona Ana County Interagency Drug Task Force. [RP 56-57] The cases proceeded parallel, not successive, to one another until Defendant pleaded guilty to the Magistrate Court charges. Moreover, the State could not have joined the

cocaine possession charge in the first-in-time Magistrate Court prosecution because the Magistrate Court is a court lacking jurisdiction over felony cases. *See* NMSA 1978, § 35-3-4(A) (1985)<sup>4</sup>; *see also supra*, § II.B.ii. (arguing for a jurisdictional exception). The State is not requiring Defendant to run through a gauntlet of successive prosecutions, and its actions actually furthered Defendant's interest in finality as to the Magistrate Court charges and saved judicial resources in District Court. *See Gonzales*, 2013-NMCA-016, ¶ 26.

Moreover, the facts of *Gonzales* are instructive as to why joinder was not required under the circumstances of this case. In *Gonzales*, this Court held that the State's failure to join a charge of vehicular homicide to a child abuse resulting in

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<sup>4</sup>Because the Magistrate Court charges were filed first, the only joinder option for the State would have been to abate the Magistrate Court proceedings and join the misdemeanor Magistrate Court charges to the cocaine possession charge in the District Court after the Grand Jury Indictment. This option would have thwarted the very purposes of compulsory joinder. Contrary to Defendant's interest in finality and to avoid governmental harassment, this option would have unnecessarily extended the time to reach resolution of the Magistrate Court charges. *See* Rule 5-101(B) NMRA (stating that the rules of criminal procedure "shall be construed to secure . . . fairness in administration and the elimination of justifiable expense and delay"). Further, the misdemeanor Magistrate Court charges were more appropriately (as well as timely) resolved in the Magistrate Court, a court of limited jurisdiction designed to hear misdemeanor offenses. Requiring joinder of these misdemeanor offenses in District Court based on a formalistic reading of Rule 5-203(A) would have squandered judicial resources in the District Court, a court of general jurisdiction, especially where they were already pending in the Magistrate Court.

death charge was a fatal barrier to a subsequent prosecution for vehicular homicide. The State charged the case only as child abuse, and this Court subsequently determined that there was insufficient evidence of proof to sustain that conviction. 2013-NMSC-016, ¶ 19. Our Supreme Court held that Rule 5-203(A) obligated the State to charge vehicular homicide in the first instance. The Court stressed that the State had “at least three different opportunities” to do so but made the conscious decision to proceed on an “all-or-nothing trial strategy” and proceeded only under a child abuse theory. *Gonzales*, 2013-NMSC-016, ¶¶ 32-33. The State’s decision “ha[s] consequences” and a bar against retrial was the remedy for violation of the rule. *Id.* ¶ 33; *see also State v. Radosevich*, 2016-NMCA-060, ¶ 23, 376 P.3d 871 (applying *Gonzales* to bar retrial on remand where the State made a conscious charging decision based on an all-or-nothing trial strategy).

This case is different. The State’s charging decisions were not an “all-or-nothing trial strategy” and, as argued, arose reasonably out of the circumstances. *Gonzales*, 2013-NMSC-016, ¶ 33. The State did not “initially decline” or “elect[.]” to forego prosecuting Defendant for the cocaine possession charge when the Magistrate Court proceeding was initiated. The discovery of the factual basis for the possession charge arose after Defendant’s arrest and after the arresting officers initiated the Magistrate Court proceedings. The State is not seeking to go back and change its

mind to proceed under a separate charge and theory but to only fully and fairly prosecute Defendant for all the offenses he committed. Rule 5-203(A) should not apply to this case.

**B. Alternatively, even if Rule 5-203(A) is implicated, this Court should apply two additional limitations to excuse joinder**

**i. This Court has recognized the need for, and already has applied, limitations on Rule 5-203(A) to ameliorate the overbreadth of New Mexico's compulsory joinder rule**

Based on the breadth of the language contained in Rule 5-203(A), this Court has pointed out the need for court imposed, reasonable, case-by-case limitations in applying the rule. *Aragon*, 2016-NMCA-\_\_\_, n.4 (citing Ryan C. Shotter, *State v. Gonzales: Reinvigorating Criminal Joinder in New Mexico*, 44 N.M. L. Rev. 467 (2014)); see also Shotter, 44 N.M. L. Rev. at 467 (“As a result, New Mexico’s compulsory joinder rule is strikingly underdeveloped by comparison to the compulsory joinder provisions of other states, which have explicitly recognized the remedy embodied in the *Gonzales* decision for decades and have restricted its application to situations in which the policies behind the rule are best served without punishing legitimate prosecutorial conduct.”). As discussed, the *Aragon* Court therefore relied on a limiting principle/exception contained in the ABA Standards for Criminal Justice Section and the Model Penal Code in concluding that applying the compulsory joinder rule would not be a “rational disposition” under the facts of that

case. *See Aragon*, 2016-NMCA-\_\_\_, ¶ 9.

Consistent with this Court’s recognition that the contours of Rule 5-203(A) need further development on a case-by-case basis and consistent with this Court’s reading of the rule in conjunction with the Model Penal Code and the ABA Standards for Criminal Justice, this Court should consider and apply the following well-established limitations to Rule 5-203(A), which do not conflict with the purposes furthered by joinder under the facts of this case. *See Aragon*, 2016-NMCA-\_\_\_, ¶ 9; *see also State v. Gallegos*, 2007-NMSC-007, ¶ 12, 141 N.M. 185 (stating that the “trend toward mandatory joinder in order to protect a defendant from multiple prosecutions was largely motivated by the American Law Institute’s Model Penal Code”).

- ii. This Court should apply a jurisdictional exception to compulsory joinder where the initial Magistrate Court prosecution occurred in a court without jurisdiction over the cocaine possession charged in District Court**

This Court should adopt a limitation excusing joinder where the State initially prosecutes a defendant for an offense(s) in a court lacking jurisdiction over an offense(s) charged in a subsequent prosecution. The Model Penal Code’s joinder rule embodies this limitation. *See Model Penal Code Section 1.11(1)* (Am. Law Inst. 2015) (a second prosecution is not barred by failure to join where the first prosecution “was before a court that lacked jurisdiction over the defendant or the offense). The

ABA Standards for Criminal Justice Section 13-2.3(a), (c) (1980) similarly allow a second prosecution arising out of the same conduct as a former prosecution where “the two offenses are not within the jurisdiction of the same court.” Jurisdictional exceptions are prevalent in jurisdictions with compulsory criminal joinder rules. *See* 5 Crim. Proc. § 17.4(c), n. 170 (noting jurisdictions that have jurisdictional exceptions to compulsory joinder rules).

A jurisdictional exception is consistent with both purposes embodied by Rule 5-203(A). Neither protection from governmental harassment by successive prosecutions nor finality/judicial economy are implicated where the State’s initial prosecution occurs in a court lacking jurisdiction over an offense charged in a second prosecution. Failure to excuse joinder in such a situation is unreasonable in light of the State’s inability to charge the subsequent offense in the initial prosecution. In such a situation, joinder does not further a defendant’s interest in finality and, instead, would have had the opposite effect of dragging out the disposition of pending lower court charges while wasting judicial resources in district court by preventing their disposal in the court of limited jurisdiction designed to hear such offenses. *See infra*, *fn. 4*.

Further, supporting adopting a jurisdictional exception to Rule 5-203(A), our courts apply a jurisdictional exception in the double jeopardy context. *See State v.*

*Darkis*, 2000-NMCA-085, ¶¶ 8-11, 129 N.M. 547 (holding that a jurisdictional exception exists in the double jeopardy context); *see also State v. Rodriguez*, 2005-NMSC-019, ¶ 17, 138 N.M. 21 (holding that the jurisdictional exception is still recognized and adopting inapplicable limitations).<sup>5</sup> Because of the relationship between compulsory joinder and double jeopardy protections, this Court should not apply the compulsory joinder rule in a manner that is inconsistent with the double jeopardy jurisdictional exception. *See Gonzales*, 2013-NMSC-016, ¶ 26 (“In terms of barring successive prosecutions, however, compulsory joinder and double jeopardy are closely related - two sides of the same coin.”). If this Court were to decline to apply a jurisdictional exception to Rule 5-203(A), because the rule is broader than

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<sup>5</sup> In *Rodriguez*, our Supreme Court held that the jurisdictional exception does not apply (1) to permit a successive prosecution for a greater offense following an acquittal of a lesser-included offense, (2) where the successive prosecution pertains to a lesser offense for which the defendant has been convicted, or (3) where the State deliberately sought a separate prosecution on a lesser-included charge in a court of limited jurisdiction, which would constitute abuse of our multi-tiered judicial system. 2005-NMSC-019, ¶ 17. These limitations show a policy from our Supreme Court favoring the jurisdictional exception as long as it does not violate a defendant’s double jeopardy protections regarding lesser-included and greater-inclusive offenses or where the State takes a deliberate course of action or otherwise acts with an improper purpose. In appropriate cases, our courts can apply the jurisdictional exception to Rule 5-203(A) in the same manner and with the same restrictions as the jurisdictional exception recognized in double jeopardy cases in light of the salutary purpose of joinder and its close relationship to double jeopardy. *See Gonzales*, 2013-NMSC-016, ¶ 26.



double jeopardy protections based on its conduct-based focus, the effect would be to eradicate the double jeopardy jurisdictional exception based on application of a court rule designed to further, not contradict, double jeopardy protections.

Applying the jurisdictional exception, the State did not violate Rule 5-203(A) by not joining the cocaine possession charge with the Magistrate Court charges. The State initiated the Magistrate Court charges on the date of Defendant's arrest. Once indicted, the State could not have joined the cocaine possession charge in Magistrate Court because New Mexico magistrate courts do not have jurisdiction over felony offenses. *See* Section 35-3-4(A); NMSA 1978, § 30-31-23(E) (2011) (possession of a Schedule I or Schedule II controlled substance is a fourth-degree felony) [RP 1-4]. It would not be a "rational disposition," *see Aragon*, 2016-NMCA-\_\_\_, ¶ 9, to apply Rule 5-203(A) here where the court in the first prosecution could not hear the offense charged in the subsequent prosecution. The circumstances present in this case, Defendant seeking to escape a felony prosecution based on an earlier-in-time misdemeanor prosecution in a court without jurisdiction over felony charges, are precisely the situation jurisdictional exceptions to joinder rules are designed to prevent. *See Schotter*, 44 N.M. L. Rev. at 482 ("The purpose of [a jurisdictional exception to joinder] is to prevent the defendant from escaping a felony prosecution simply because he was already prosecuted for a joinable offense in a different court

of limited jurisdiction.”); *see also id.* at 493 (“Absent some explicit limitation that takes vulnerability into account, prosecutors would be expected to forestall prosecuting misdemeanor offenses that are joinable with their felony counterparts, thereby delaying the administration of justice and imperiling defendant’s right to a speedy trial under the Sixth Amendment.”).

If Rule 5-203(A) is implicated, the Court should excuse the State’s failure to join the cocaine possession charge in this case to the Magistrate Court charges by applying a jurisdictional exception.

- iii. **This Court should apply a limitation to compulsory joinder where the State lacked sufficient evidence to warrant trying the cocaine possession charge while the Magistrate Court prosecution was pending and disposed**

Both our Supreme Court and this Court have hinted that they would be inclined to excuse the State’s failure to bring all joinable offenses together in one prosecution where the State is unaware of the factual basis for an offense at the time that the initial prosecution was initiated. *See Gonzales*, 2013-NMSC-016, ¶ 32 (“This is not a case in which the charge the State now seeks to bring . . . was unknown at the time Defendant was indicted.”); *Radosevich*, 2016-NMCA-060, ¶ 22 (“In an effort to limit unfairness to the state in the application of the joinder rule, it appears our Supreme Court would be inclined to excuse the state’s failure to bring all joinable offenses in one charging document where . . . a charge was unknown to the state when the

defendant was indicted[.]”). Both the ABA Standards for Criminal Justice Section and the Model Penal Code recognize what are often referred to as knowledge exceptions, which are consistent with the observations of our courts in *Gonzales* and *Radosevich*.

The State urges this Court to adopt the exception consistent with the ABA Standards for Criminal Justice Section 13-2.3(a), (c), which recognizes that compulsory joinder does not bar a subsequent prosecution where “the prosecuting attorney did not have sufficient evidence to warrant trying the additional offense at the time of the first trial.” *See also* Model Penal Code Sections 1.07(2), 1.09(1)(b) (allowing a second prosecution for an offense arising out of the same conduct as a former prosecution where the second offense is not “known to the appropriate prosecuting officer at the time of the commencement of the first trial”) Similar exceptions are applied in other jurisdictions with compulsory joinder rules. 5 Crim. Proc. § 17.4(c), n. 171, 174 (collecting court rules and case law adopting these exceptions); *see also Shotter*, 44 N.M. L. Rev. at 482 (The model codes take the sensible position that if the prosecuting attorney lacks sufficient evidence regarding offenses that might otherwise be joinable, the interests of justice excuse joinder as to that offense and allow the prosecutor to try the offense separately when the necessary evidence develops.”); *cf. United States v. Lovasco*, 431 U.S. 783, 790-1 (1977)

("[P]rosecutors do not deviate from 'fundamental conceptions of justice' when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.").

The purpose furthered by such exceptions is apparent: "[T]o permit the diligent and ethical prosecutor to pursue a valid charge that would otherwise be barred by compulsory joinder provisions where, due to circumstances beyond his control, he was not aware of the facts giving rise to the charge at the time the first prosecution was initiated." Schotter, 44 N.M. L. Rev. at 488. In addition to the statements in *Gonzales* and *Radosevich*, such an exception is consistent with this Court's decision in *Aragon*. 2016-NMCA-\_\_\_, n.4 (courts have "explicitly recognized the remedy embodied in the *Gonzales* decision for decades and have restricted its application to situations in which the policies behind the rule are best served without punishing legitimate prosecutorial conduct"). Compulsory joinder should not apply to require the State to hold back the disposition of charges (especially here by plea) while the State is still gathering evidence to warrant trying another offense.

Applying the limitation, the State's failure to join the possession charge with the Magistrate Court charges should not be a bar to prosecution of the possession charge. Defendant's Magistrate Court charges were disposed of by plea on November 24, 2015. On this date, as well as during the entire pendency of the Magistrate Court action, the State did not have sufficient evidence to warrant trying the cocaine possession charge. Although the State suspected that Defendant possessed cocaine at the Detention Center on June 5, 2015, SNMCL did not confirm the substance possessed was cocaine until March 16, 2016. It therefore was not until that time that the State had sufficient evidence to try to the cocaine possession charge. Accordingly, if Rule 5-203(A) is implicated, this Court should excuse the State's failure to join the possession charge in this case to the Magistrate Court charges.

### **CONCLUSION**

For the various reasons argued herein, the State respectfully requests that this Court reverse the District Court's Order Granting Defendant's Motion to Dismiss and remand this case for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by placing it in the mail on or before the close of business on the next business day following the filing of this brief in the Court of Appeals on September 23, 2016:

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