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

MARY ANN McCONNELL, as personal representative of the Estate of Elizabeth Garcia, deceased, and as next friend of XAVIER MENDOZA, a minor, JEROME MENDOZA, a minor, and CENE MENDOZA, a minor,

Plaintiffs,

v. No. CV-200500045

ALLSUP'S CONVENIENCE STORES, INC.,
A New Mexico Corporation.

Defendant.

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF *ALBERICO* MOTION TO EXCLUDE TESTIMONY OF ALLSUP'S "EXPERT" GREGG McCRARY

The family of Elizabeth Garcia, through attorneys MCML, P.A., pursuant to New Mexico Rules of Evidence 11-403, 11-406, 11-702, 11-703 and the due process clause of the New Mexico constitution, files this reply in further support of its motion to exclude all testimony by the Allsup's "profiler" Gregg McCrary because:

1.) Despite Mr. McCrary's unsupported claim that he has the power to do so, it is impossible to determine based upon the number of stab wounds in a homicide, whether a criminal came to a particular location because he targeted a particular person;

2.) New Mexico courts have never admitted "profiler" testimony into evidence on the issue of a known murder's intent. This court should not be the first to do so, but should follow the vast majority of other jurisdictions across the country in excluding this speculative and improper testimony because it will confuse rather than assist the jury.

ARGUMENT

I. JUST BECAUSE AN EXPERT CLAIMS HE CAN DO THE IMPOSSIBLE DOESN'T MEAN THE COURT HAS TO BELIEVE OR ADMIT HIS TESTIMONY, PARTICULARLY WHERE THAT TESTIMONY IS CONTRADICTED BY THE EVIDENCE

Despite Mr. McCrary's admission in his deposition that he holds himself out as an **expert in profiling**, which he agrees is also known as behavioral analysis, Allsup's brief scrupulously avoids use of that term and tries to make Mr. McCrary over into something else. Ex. A, McCrary Dep., p. 59. The url address for Mr. McCrary's website is www.criminalprofiler.com. Regardless of what he is called, Allsup's claims Mr. McCrary has the ability to do the impossible, i.e., look at the "characteristics of a crime scene" and, from those characteristics, testify about the "motivations of criminals." Allsup brief, p. 1.

The primary basis for Mr. McCrary's opinion that Paul Lovett was "fixated" upon Liz Garcia and came to the Allsup's that night not to rob the store, but to rape and murder her as a specifically targeted victim, is the large number of stab wounds found at autopsy. Ex. A, McCrary Dep., p. 152. Mr. McCrary speculates that the large number of stab wounds indicate a great deal of anger and from this alone, comes up with his theory that Paul Lovett must have fixated on Liz and come there to kill her. This theory is completely contrary to the actual evidence in the case. Consider these excerpts from Mr. McCrary's deposition, Ex. A:

Q. Is there any evidence that Elizabeth Garcia knew Paul Lovett?

R. No. Ex. A, p. 109

Q. Do you have any evidence that anybody ever told him (Paul Lovett)that she (Liz Garcia) was working at Allsup's?

R. Not that I recall. Ex. A, p. 110

The only evidence that Mr. McCrary has that Paul Lovett even knew Liz Garcia's name, is Randy DeMoss' statement that he once told Paul Lovett and Shelly Lovett that he had crush on

Liz Garcia. There is no evidence that Paul Lovett ever met or saw Liz Garcia before her death. There is no evidence that, before this killing he or some unknown person was stalking her, following her or otherwise displaying obsessive behavior toward her.

Mr. McCrary acknowledges that the large numbers of stab wounds, what he calls an "overkill" situation may also be indicative of scenarios other than that someone had targeted Liz Garcia, for example:

1.) An inexperienced killer who is surprised when the person doesn't immediately die after a few stab wounds, but keeps moving and making sounds. Not recognizing the sounds of death, the inexperienced killer keeps stabbing and stabbing until all movement and noise is stopped; Ex. A, McCrary depo., pp. 80-82

2.) A desperate attempt to kill or eliminate the one witness who could identify Paul Lovett; Ex. A, McCrary depo., pp. 78-79;

3.) Any "anger" indicated by the many stab wounds, may have come from Paul Lovett's inability to fully perform the rape he attempted of Liz Garcia; Ex. A, McCrary depo., p. 130; or

4.) Paul Lovett may just have been a mean, violent killer.

Although there is really no way to know which one of these scenarios occurred out in the field where Liz Garcia was abducted and no scientific, statistical, experiential or other way to know, Mr. McCrary intends to offer his "opinion" that Mr. Lovett pathologically fixated on Liz Garcia and could not have been stopped in his quest to kill her based upon the number of stab wounds.

This is not a sound, rational opinion, but one contradicted by the actual evidence in the case. No matter what his background, Mr. McCrary should not be allowed to manufacture evidence contrary to the actual evidence in the case to try and create a defense for Allsup's.

II. NEW MEXICO COURTS HAVE NEVER ADMITTED PROFILER TESTIMONY ON THE ISSUE OF THE STATE OF MIND OF A KNOWN KILLER JUST LIKE THE VAST MAJORITY OF JURISDICTIONS ACROSS THE COUNTRY AND THIS COURT SHOULD NOT BE THE FIRST TO DO SO

No New Mexico court has ever allowed the testimony of a "profiler" or expert in criminal

behavioral analysis to testify about the motive of a known killer. After conducting an *Alberico* hearing, State District Judge Neil Mertz specifically excluded such testimony in the criminal case of serial rapist and murderer David Parker Ray. Ex. B, Order of Judge Mertz. In rejecting the same type of testimony that is being offered here, Judge Mertz found that:

1.) "behavioral science" is not, itself, an academic discipline;

2.) The methodology employed by the proposed FBI agent witness was "experiential" and, as such is not susceptible to experimentation, extensive statistical analysis or reproducibility;

3.) The analysis provide by the FBI agent is not supported by peer reviewed articles or studies;

4.) The FBI agent's opinions on the motive for rape is not testable or reviewable for error and that there was no base rate of error for other professionals to refer to in assessing the agent's opinions;

5.) The testimony would not assist the jury; and

6.) The probative value of such testimony was substantially outweighed by its prejudicial effect. Ex. B.

The rejection of this kind of "profiler" testimony by New Mexico courts is consistent with the case law across the country. No federal court in any district has ever allowed this testimony into evidence. Although Allsup's cited many federal cases on expert testimony in criminal cases on the "tools of the trade" or the meaning of physical evidence like bongs or other paraphernalia found at drug scenes, it neglected to mention the federal cases that universally reject the kind of "profiler" testimony offered by Mr. McCrary. *United States v. Gillespie,* 852 F.2d 475, 480 (9th Cir., 1988); *United States v. Hernandez-Cuartas,* 717 F.2d 552 (11th Cir., 1983).

In *Gillespie*, the Ninth Circuit Court of Appeals stated, "we have stated in dictum that **testimony of criminal profiles is highly undesirable as substantive evidence because it is of**

low probativity and inherently prejudicial." *Gillespie, supra.* 864 F.2d at 480. In *Hernandez-Cuarta*, the Eleventh Circuit excluded a criminal profile because "[e]very defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officers in investigating criminal activity" *Hernandez-Cuartas, supra.,* 717 F.2d at 555.

State courts have been no more willing to admit profiles into evidence than federal courts. The Supreme Court of Idaho held that a trial court was correct to exclude a psychological profile because the profile was "**nothing more than the Bureau's guess**...A profile, of course is not a physical scientific test conducted upon actual evidence using well-established scientific principles." *State of Idaho v. Fain,* 774 P.2d 252, 257 (1989). The state of Ohio has consistently excluded criminal profiling. *State v. Haynes*, 1988 Ohio App. LEXIS 3811 (Sept. 21, 1988) The Ohio Court of Appeals reversed a conviction based, in part, upon the introduction of profiler testimony because:

> Although this testimony may indicate that profiles may be a reliable investigative tool, there is little indication in the record that they can be said to be reliable for the purposes for which they were used by the state in the instant case." *Id.* at 8.

The appellate court was concerned that admission of the profile would result in the possibility that the jury "**could decide the facts based on typical, and not actual facts**." *Id.* at 13 (citation omitted). *Cf, State v. Roquemore,* 85 Ohio App.3d 448 (1993). The concurring opinion expressed that same concern this way, "[A] jury should be allowed to weigh the evidence in this case **free of a conjectural portrait by a criminal profilist**." *Id.* at 22.

In another Ohio case, the testimony of John Douglas, one of the fathers of the profiling technique, was excluded at trial after the state attempted to call him as in expert in "criminal investigative analysis to give his opinion as to the motive for a crime." *State v. Lowe* (1991), 75

Ohio App.3d 404. In 1991, Douglas had been with the Federal Bureau of Investigations for 20 years. He worked in the National Center for Analysis of Violent Crime at the academy. While trying to avoid describing what he did as "profiling," Douglas defined criminal investigative analysis as "a process through which the crime scene is examined to determine the perpetrator's motivation for the crime." *Id,* at 406. On cross-examination, Douglas "conceded that none of his testimony, whether related to the motivation for the murder of Mullet or the motivation for defendant's writing, could be stated to a reasonable scientific certainty." *Id*, at 407. After a hearing, the trial court found that "Mr. Douglas' opinion is an investigative tool like a polygraph**; it might be used to investigate, but it does not have the reliability to be evidence**" Id at 408, *citing* the trial court opinion. The trial court's decision to exclude this testimony was upheld on appeal where the Ohio Third District Court of Appeals found:

> [T]he purported scientific analytical processes to which Douglas testified are **based on intuitiveness** honed by his considerable experience in the field of homicide investigation. While we in no way trivialize the importance of Douglas' work in the field of crime detection and criminal apprehension, **we do not find that there was sufficient evidence of reliability** adduced to demonstrate the relevancy of the testimony or to qualify Douglas as an expert witness. *Id* at 408.

In Washington, an appellate court held that "[p]rofile testimony identifies a group as more likely to commit a crime and is generally 'inadmissible owing to its relative lack of probative value compared to the danger of unfair prejudice'" State v. Avendano-Lopez, 79 Wash. App. 706 (1995). A Georgia appellate court found it was error for a trial court to admit a serial arsonist profile. "Unless a defendant has placed [his] character in issue or has raised some defense which the [profile] is relevant to rebut, the state may not introduce evidence of the [profile], nor may the state introduce character evidence showing a defendant's personality traits and personal history as its foundation for demonstrating the defendant has the characteristics of a typical [profilist]" Penson v. State, 474 S.E.2d 104, 106, (1996) *citing* Sanders v. State (1983),

303 S.E.2d 13.

<u>The Exclusion of Gregg McCrary's Testimony</u>

In addition to the nationwide general exclusion of profiler or criminal behavior analysis testimony about the motive of a known killer, plaintiff located and provided this court with the cites to 4 cases – 2 reported decisions and 2 trial decisions – in which this same expert, Gregg McCrary's testimony was excluded, limited or withdrawn. *State v. Stevens,* 2001 Tenn. Crim. App. LEXIS 398, *47 (Tenn. Crim. App. May 30, 2001); *State v. Garcia*, 2002 Ohio 4179 (Ohio App. 8 dist 2002) LEXIS 4362 **19-20; *U.S. v. O'Brian Cleary Smith*, Crim. No. 04-20054, United States District Court, Western District of Tennessee; *Estate of Sam Sheppard v. State of Ohio,* Cuyohoga County App. No. CV 96- 312322 (case filed July 24, 1996). This, despite Mr. McCrary's indication in his deposition that there was only one case in which that had occurred. Ex. A, McCrary depo., p. 181.

The only case which needs to be re-discussed here is the *Garcia* decision, in which the reported decision incorrectly reports that the expert's name was "Mark" McCrary when, in fact, as evidenced by the affidavit of trial counsel, the expert was our same expert – Gregg McCrary. See Ex. B to Plaintiff's original motion, Aff. of trial counsel Doughten.

In response to these 4 cases limiting this same expert's testimony, the only reported case cited by Allsup's in which an appellate court discussed whether Mr. McCrary should be allowed to testify on motive was **not a jury trial**, but a **bench hearing** in a juvenile case regarding a decision by the court on whether a 15 year old should be tried as an adult. *Commonwealth v. O'Brien*, 1996 LEXIS 324, 672 NE 2d 552 (Dec. 6, 1996). In that decision, the appellate court found that the judge (not a jury) should have considered the testimony of McCrary on the issue of the defendant's motive **only *after*** the defendant opened the door by presenting testimony from a psychologist that the nature of the defendant's involvement in the offense and his motive and

state of mind were important in assessing the likelihood of rehabilitation. *Id.* at para. 24. This case is a far cry from finding that Mr. McCrary's testimony was reliable or valid enough as evidence before a jury.

After searching state and federal law nationwide, Allsup's could find only one case, which allowed the testimony of a profiler into evidence on the issue of the motive of a known killer. *See, U.S. v. Meeks,* 35 M.M. 64, 1992 CMA LEXIS 159 (1992). The only case in the nation which supports the admission of profiler testimony on the issue of motive was one brought under the more liberal evidentiary rules of the U.S. Code of Military Justice. Under Military Rule of Evidence 702 admissibility of expert testimony is broader than NM Rule of Evid. 702, in that any person with "substantive knowledge," whether or not qualified or an outstanding practitioner in the field may give information if it will merely "help" the members of the military tribunal. *Id.* at HN 2. The Military Rules of Evidence for a tribunal made up of military officers do not apply to a New Mexico jury trial.

Every other case cited by Allsup's did not allow the testimony of a "profiler" on the issue of motive, but they say exactly the opposite -- **profiler evidence on motive should be excluded.** *People v. Prince,* 2007 Cal. LEXIS 4272, 156 P.3d 1015 (Ap. 30, 2007); *Simmons v. State,* 797 So. 2d 1134, 2000 Ala. Crim. App. LEXIS 98.[1] In *Prince,* after an extensive *Daubert* hearing:

> "The court did not believe the witnesses' training or experience (as FBI agents) qualified them to express an opinion regarding the probably state of mind of the perpetrator and that aspect of the proposed testimony was excluded." *Id.* at *1220.

[1] A third case cited by Allsup's, *State v. Code*, 627 So. 2d 1373, 1993 La. LEXIS 3431, is a death penalty case in which an FBI agent was called to testify that a series of crimes all appeared to be committed by the same person because of a signature knot that was used to tie up the victims. Neither the trial court or the appellate court was asked to exclude/review this evidence for lack of reliability or lack of expertise. Instead, the only motion to exclude was based on the violation of the Rule 404(b), in allowing in evidence of other crimes or bad acts. The FBI agent was not asked to testify about the motive of the killer in that case, who was accused of 6 homicides.

The *Prince* court limited the testimony of the FBI special agent to testifying that the six charged murders appeared to have been committed by the same person. *Id.*

In *Simmons*, the Alabama Court of Criminal Appeals stated:

> Initially, we find it imperative to note that the evidence offered through (FBI Agent) Neer's testimony was **not "profile" testimony….Such evidence is of little probative value and extremely prejudicial to the defendant since he is, in a sense, being accused by a witness who was not present at any of the crimes.** *Id.* at **12, *1150.

This Court should follow the rulings virtually every state and federal court across the country which has considered this issue and exclude the profiler testimony of Gregg McCrary in this case.

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I hereby certify that a copy of the foregoing was faxed to all counsel of record on February 8, 2008.

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No special expertise in con. Store crime or profiling – pp. 72-75