IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

S-1-SC-39004

STATE OF NEW MEXICO

Plaintiff-Respondent,

vs.

FRANCISCO JAVIER GRANADOS,

Defendant-Petitioner.

A-1-CA-37417
D-1215-CR-2013-00328

APPEAL FROM THE TWELFTH JUDICIAL DISTRICT COURT,
OTERO COUNTY,
HONORABLE JUDGE STEVEN E. BLANKINSHIP, PRESIDING

DEFENDANT-PETITIONER'S BRIEF IN CHIEF ON CERTIORARI TO THE COURT OF APPEALS

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STATEMENT REGARDING RECORD CITATIONS

The record proper (**RP**) appears in two continuously paginated volumes cited by bates stamp page number. The district court proceedings were audio recorded and are cited by FTR date and timestamp. Some exhibits (Ex.) are passingly referenced based on the testimony but are not crucial to the issues on appeal.

CERTIFICATION OF COMPLIANCE

The body of this brief exceeds the page limits (35 pages) set forth in Rule 12-213(F)(2) NMRA. Counsel used Times New Roman, a proportionally-spaced type style / type face. As required by Rule 12-213(F)(3) NMRA, I certify that this brief is proportionally spaced and the body of the brief contains **10,466** words, not to exceed 11,000. This brief was prepared using Microsoft Word, version 2016.

TABLE OF AUTHORITIES

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NATURE OF THE CASE

Francisco Granados possessed a single bag of cocaine and threw it out his car window during a police pursuit. However, the pursuit arose out of an unconstitutional seizure: when officers saw Mr. Granados's mother talk to him through his car window, they assumed a drug transaction was afoot and decided to detain him but he fled from their show of authority.

While the district court denied suppression by erroneously ruling that Mr. Granados was not seized, the Court of Appeals Majority affirmed by finding reasonable suspicion to support the seizure. In doing so, it misapplied this Court's analysis from *State v. Martinez*, 2020-NMSC-005, ¶ 22, 457 P.3d 254. The Court's dissenting opinion correctly evaluated the facts of record, carefully applied established precedent, and concluded that the district court should have suppressed the single bag of cocaine underlying both convictions.

At trial, Mr. Granados admitted to simple possession but denied intent to distribute. He described the nature of his addiction to explain how the quantity he possessed was for his personal use. The State proved intent to distribute with multiple police officer opinions based on "training and experience" that the quantity possessed was for distribution. Assuming it was error to admit such expert opinions as lay opinions, the Court of Appeals independently found the officers were qualified experts. However, the State never designated or qualified them as

experts and the defense directly challenged their expertise on cross-examination. Alongside propensity evidence revealing the *underlying facts* of his priors, which the State emphasized in closing argument, the inadmissible opinion testimony warrants reversal.

Finally, as the Court of Appeals has since held in *State v. Jackson*, 2021-NMCA-059, __ P.3d __ (Aug. 9, 2021), tossing drugs in full view of the police who immediately recover them is not an overt act of tampering with evidence.

This Court granted its writ of certiorari to review the Court of Appeals opinion. Mr. Granados asks this Court to reverse his convictions.

SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

Based on a single bag of cocaine tossed from his car window, the State charged Francisco Granados with trafficking a controlled substance (possession with intent) and tampering with evidence. [**RP 1-2, 40**]

Before Trial, the District Court Denied Suppression of Drug Evidence

Before trial, Mr. Granados moved to suppress the drug evidence. [**RP 44-45**] At the suppression hearing, members of the Otero County Narcotics Enforcement Unit (NEU) testified that they had an informant tip that Mr. Granados was selling cocaine. [**6/27/14, 2:34:45, 2:36:11**] Officers wanted to investigate more before seeking a warrant. [**2:40:04, 2:56:22**] Two days later, two NEU members came

upon Mr. Granados and detained him but let him go without arrest. [**6/27/14, 2:58:30, 2:59:30-3:00:04-01:16, 3:31:52**, **3:32:36**]

On May 2, four NEU officers spotted Mr. Granados driving a black truck in a Lowe's grocery store parking lot. [**6/27/14, 2:42:07-42:49**, **2:43:24**] They contacted Mr. Granados's probation officer who asked the officers to stop Mr. Granados; they asked dispatch to send a marked unit. [**2:42:49**] The officers followed Mr. Granados across Alamogordo to a Giant gas station. [**2:43:11**]

Mr. Granados reversed into a parking space and a white truck pulled in behind him. [**6/27/14, 2:44:13, 2:45:14**] One officer believed the truck belonged to a known male narcotics suspect. [**3:28:20**] However, a female got out of the white truck and approached Mr. Granados's window. [**2:45:32, 2:46:15; 3:28:01**] Officers later learned that the woman was Brenda Montoya, Mr. Granados's mother. [**2:53:36, 3:03:50, 3:21:16**] "[T]hey engaged in conversation, which appeared through our training and experience that **it was possibly a drug transaction**," so the officers decided to "make contact with Mr. Granados." [**2:46:18**] (Emphasis added.) The officers did not observe any exchange or transaction, but believed they had reasonable suspicion nonetheless. [**3:03:50**, **3:31:17, *see also* 3:28:52**]

Driving a tan, unmarked, older model car, [**6/27/14, 3:20:12**] the officers "pulled up in front of his vehicle, a little off to the side of his vehicle, and we

began to exit" the unmarked car wearing civilian clothes. [**2:47:19, 3:04:38**] One officer testified his "firearm was not drawn" but could not remember if it was "holstered." [**3:05:00**] Another had his hand on his holstered weapon. [**3:22:32**] They testified that they displayed their badges, which they wore around their necks. [**2:47:25**] They announced "Sheriff's Office" and Mr. Granados began to flee. Three of the officers jumped back in their vehicle to pursue. [**2:47:32; 3:08:10; *accord* 3:29:38.**]

One of the NEU officers, Commander Neil LaSalle, had been part of Mr. Granados's previous drug arrest. Officers testified that when LaSalle exited the car, Mr. Granados appeared to flee in response to his presence. [**6/27/14, 2:48:24; 3:08:58**] When Mr. Granados drove off, three of officers got back in their unmarked car and "gave chase." [**2:48:39, 2:49:23, 2:50:13; 3:21:06**]

When Mr. Granados turned onto a cross-street, NEU Agent Timothy Huffman saw Mr. Granados "throw a white object onto the ground." [**6/27/14, 2:50:48**] Huffman made a mental note where it landed. [**3:18:03, 3:18:30**] Mr. Granados continued to make a couple more turns before coming to a stop and exiting the car with his hands in the air. [**2:51:20**] The officers detained Mr. Granados and LaSalle retrieved a baggie of cocaine in the location "where Agent Huffman said that he observed an object fly out of the window." [**2:52:00**]

The officers were not intending to arrest Mr. Granados when they pulled into the Giant parking lot, but were only going to "make contact." [**6/27/14, 3:10:40, 3:11:16;** ***accord*** **3:21:49** (Huffman).] They testified that Mr. Granados was free to leave the Giant. [**3:12:32**] The officers nevertheless believed they had reasonable suspicion to pursue him because "we observed what appeared to be a drug deal or a drug transaction, and when he became very surprised and nervous and sped off, then we had the right to stop him for that." [**3:12:42**] They acknowledged that they did not see anything pass between Mr. Granados and his mother, stating "At that point we didn't. That's why we furthered our investigation." [**3:13:00**]

Agent Huffman testified, "we observed what looked like a narcotic transaction between two individuals, one in a black truck and one in a smaller truck." [**6/27/14, 3:15:12;** ***see also*** **3:17:31, 3:21:44**] He later clarified: "I believe that we saw like, **almost**, like an exchange." [**3:17:44** (emphasis added)**;** ***see also*** **3:22:50**] Agent Marte testified "it looked like there was **about to be** some sort of narcotic exchange, essentially a drug deal about to happen." [**3:28:52** (emphasis added).]

Relying on *State v. Maez*, 2009-NMCA-108, 147 N.M. 91, the State argued a seizure requiring reasonable suspicion only occurs with a *submission* to a show of authority. [**/27/14, 3:34:57**, **3:35:44**] The State initially argued that submission occurred when Mr. Granados stopped his car after the road chase, which occurred

after he fled from them at the Giant and after he threw something out the window, providing reasonable suspicion at that time. [**3:35:37-36:47**]

The defense argued that Mr. Granados's interaction with his mother did not give rise to reasonable suspicion of trafficking. [**6/27/14, 3:41:26**] Counsel also pointed out that officers had declined to arrest Mr. Granados on May 1 despite the then-active informant tip. [**3:41:08**]

On rebuttal, the State argued that there was never any seizure because Mr. Granados ultimately stopped his car *voluntarily*. [**6/27/14, 3:43:05**] Nevertheless, the State insisted that the officers had reasonable suspicion at that time based on "flight and throwing it out the window." [**3:44:13**]

The district court denied suppression, stating that the State's "analysis is correct." [**6/27/14, 3:44:42**] The court found the officers "reasonably thought" they observed a possible drug transaction. [**3:45:21**] The court also found that Mr. Granados's flight from the Giant and throwing "what appeared to be contraband out the window" provided additional grounds for a later stop. [**3:45:48**] Ultimately, the district court adopted the State's argument that Mr. Granados "voluntarily initiated the encounter by doing his own stop." [**3:46:05**] The district court denied suppression of the cocaine. [**6/27/14, 3:46:15; RP 134**].

At Trial, Officers Provided More Details About the Stop and Mr. Granados Insisted on Personal Use

Mr. Granados's defense was that he possessed the cocaine for personal use and did not know the men were police when he fled the gas station, so that he was not tampering with evidence when he threw the cocaine out of his car. *See* [**1/20/15, 11:00:12** (defense opening statement)]. All four NEU officers who had pursued Mr. Granados on May 2, 2013 testified at trial: Alamogordo Police Officer Rodney Scharmack, Border Patrol Officer Timothy Huffman, Otero County Sheriff's Deputy Obed Marte, and NEU Commander Neil LaSalle. *See* [**11:22:48**].

As outlined below, the officers added some details about the initial encounter at trial that was not presented at the suppression hearing. On May 2, 2013, Scharmack, Huffman, Marte, and LaSalle were in an undercover car in plain clothes, when they spotted Mr. Granados in the Lowe's parking lot. [**1/20/15, 11:22:20, 11:23:51; 1:40:54; 2:07:10; 2:28:01**] The officers' car was a tan 1980s model Buick with no police markings or lights. [**11:23:06**] It was a "surveillance vehicle, so this was like a low rider. It was … just a plain old vehicle; it looks like a low rider." [**2:31:45**]

Agent Huffman was driving and Officer Scharmack was in the front passenger seat; Agent Marte and Commander LaSalle were in the back seat. [**1/20/15, 11:23:24, 11:30:10**] When the officers saw Brenda Montoya, later identified as his mother, converse with Mr. Granados at his open window

[**11:24:13; 11:25:38-26:32; 2:07:52**], they did not see an exchange between them. [**11:26:43**]

The officers decided to "make contact" with Mr. Granados. [**1/20/15, 11:28:30; 2:08:12; 2:28:48**] Agent Huffman drove up to Mr. Granados's truck, but "[w]hen he went to hit the brakes, he slid on the gravel." [**11:28:50; *accord* 1:46:49, 2:09:08**] After skidding to a stop in their lowrider, all four officers exited at once "with our badges displayed" on lanyards. [**11:29:05, 11:30:01; 1:47:08; 2:29:15; 2:30:36** (Marte testifying "so I had my badge in my hand.")] Scharmack testified that the officers announced they were "sheriff's office." [**11:31:04; 2:09:19; *see also* 1:41:32** (Huffman)] Huffman testified that he announced them as "Otero County." [**1:47:15; *see also* 2:09:25** (Marte)] Officers testified that Mr. Granados appeared to flee the scene in response to seeing Commander LaSalle then fled the scene. [**Id.; *see also* 11:29:05**]

Mr. Granados sped out of the Giant parking and the officers followed through residential streets, staying close behind him. [**1/20/15, 11:31:51-35:10, 2:10:09, 2:32:15**] Agent Huffman saw Mr. Granados throw something out his window and noted its location. [**1:49:35, 1:53:12**] A few blocks later Mr. Granados stopped his car and surrendered. [**11:35:07; 2:33:18**] Huffman told LaSalle where the object was thrown; LaSalle backtracked on foot and found a bag of cocaine. [**11:36:45, 11:41:38; 1:53:26; *accord* 2:33:47; Ex.4-6**] When they told

Mr. Granados that they found cocaine, he began to "panic and cry." [**1:23:18**] He told them he had an addiction and was sorry. [**1:24:51**]

The parties stipulated that a laboratory report (Exhibit 3) concluded that the baggie (Exhibit 2) contained 49.97 grams of cocaine, just under two ounces. [**1/20/15, 1:17:53-19:43; 1:21:09**]

Over various defense objections, Scharmack, Marte, and LaSalle all provided lay opinions that the amount of cocaine was consistent with trafficking.[1] [**1/20/15, 1:20:27, 2:14:18; 2:38:23**]

On May 2, the officers only saw him talk to his mother, never saw him transfer cocaine to anyone, and never found any cash, jewelry, or other form of "consideration" on Mr. Granados. [**1/20/15, 1:28:02, 2:16:31, 2:40:16**] Acknowledging that distributors would need to weigh out gram baggies, LaSalle admitted they did not find any small plastic bags or a scale on Mr. Granados. [**1/20/15, 2:39:39-40:16, 2:48:45**]

LaSalle testified cocaine is highly addictive and the duration of the high varies by person but does not last long. [**1/20/15, 2:41:57**] He agreed cocaine is often "cut" with an additive, explaining you can make three ounces out of two, so you have more to sell. [**2:44:31, 2:47:58**] Scharmack agreed the lab results did not indicate purity and agreed that it is often mixed with a cutting agent so that dealers

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[1] Additional details of their testimony is developed in the Argument, **Issue III**.

can make more money. [**1:30:57, 1:33:49**] He acknowledged he had no personal knowledge about how long the high from cocaine lasts or how addictive it is. [**1:31:28**] They did not drug-test Mr. Granados when he was arrested. [**1:32:31**]

After the State rested, the defense moved for directed verdict and simultaneously renewed its motion to suppress evidence, arguing that there was no basis to confront Mr. Granados at the Giant or to give chase. [**1/20/15, 2:50:23, 2:51:33**] Counsel also argued that the officers' testimony describing *other users'* statements about typical use amounts was insufficient evidence of Mr. Granados's intent to distribute, noting the absence of individualized intent evidence like scales, baggies, or a transaction. [**2:52:06-53:04**] The district court denied both defense motions. [**1/20/15, 2:55:52**, **2:56:36**]

Mr. Granados testified that he was 27 years old and had been addicted to crack cocaine since age 17, explaining it is highly addictive, and the high only lasts 15 minutes, so that he constantly wants the next high. [**1/20/15, 3:07:07, 3:09:07-10:29**] Mr. Granados explained that on May 2, he was at Lowe's because his wife worked there, and on his way home, he spotted his mother driving near the Giant station, seemingly headed toward his house. He did not want his mother to come to his house because he wanted to go home and get high, so he flagged her down to dissuade her from coming over. [**3:14:40-15:22**]

Mr. Granados denied any intent to sell the cocaine he possessed on May 2, explaining he was going through a lot of personal problems and just wanted to "get away from reality." [**1/20/15, 3:12:41-13:56**] He emphasized that he did not possess scales or packaging for distribution. [**3:14:12**]

He admitted that he threw the bag of cocaine out the window of his car but said he did not realize the pursuing car was the police, so he was not tampering with evidence. [**1/20/15, 3:16:42**] He explained that he recognized the "mid-80s Caprice Classic, it had about 22-inch rims, the windows were tinted" and it belonged to someone "I did not get along with." When four armed men in plain clothes got out of that car, he was expecting a confrontation with a potential adversary, so Mr. Granados threw his cocaine out the window, intending to recover it after the confrontation. [**3:15:31-17:16**] He did not recognize Commander LaSalle until after he was arrested. [**3:37:25, 3:40:50**]

Mr. Granados disagreed with the officers' testimony regarding drug quantities and street prices, explaining, "I'm out there on the streets and I know how much it costs." [**1/20/15, 3:17:55, 3:34:38**] He testified that he usually bought a single gram for $50, not $100, [**3:34:03**], and that a bag the size he possessed would typically cost about $1000 but that he purchased it for $300 and "still owed money on it" when he was arrested. [**3:18:26**] He acknowledged that with straight math, $50 per gram would make the 500-gram bag worth $2500 but denied that

was the price of *this* bag. [**3:35:00**] He explained that his seller fronted him the drugs without payment in full because they knew Mr. Granados and his wife had incomes. [**3:48:00; *see* 3:13:05, 3:24:45**]

He testified he would consume however much he had access to and sometimes went on 2-3-day binges, just sitting in a room smoking crack, then get clean, then go on another binge. [**1/20/15, 3:10:46**, **3:18:49**] As a result, he could smoke a 49.97-gram bag of poor purity in a day-and-a-half, noting the cocaine he possessed on May 2 was not good. [**3:11:51**] He explained the process of "rocking" powder cocaine, and that when it is impure, you end up "putting a whole bunch in a spoon and getting back really nothing" so you have to use a lot of powder cocaine to get enough crack for a 15-minute high. [**3:51:56-52:45**]

Mr. Granados denied that he "sells[s] to use." [**1/20/15, 3:33:20**] He clarified that, at that time, he was exclusively a user because he was already on his way to prison for another case. [**3:33:30**] He acknowledged he did not have smoking utensils with him and he possessed cocaine, not crack. [**3:45:45**] He explained that he was on his way to prepare the crack and smoke it at home. [**3:45:45, 3:52:46**]

On direct examination, Mr. Granados admitted prior felony convictions for trafficking, attempt to traffic, and fleeing. [**1/20/15, 3:13:56**] Over a defense objection, the State impeached Mr. Granados with the underlying facts of his prior

case; specifically, that he previously threw a particular quantity of drugs out the window while being pursuit by police.[2] [**3:50:20**]

After the defense rested, the court instructed the jury with the elements of Trafficking (possession with intent) with a lesser-included offense of simple possession, and Tampering with evidence. [**RP 285, 203-06**] The defense declined a definition of possession because "We've admitted that he possessed it." [**1/20/15, 4:11:00, 4:12:35**]

In closing, the State argued that drug users sell drugs "to finance their use" and that his claim of personal use was not credible because he did not have smoking utensils in his car. [**1/20/15, 4:28:45-30:14**] The State attacked Mr. Granados's credibility in general. [**4:31:19-34:25**] The defense's closing argued that Mr. Granados only committed simple possession. [**1/20/15, 4:47:33-5:01:00**] The jury convicted Mr. Granados of trafficking and tampering with evidence. *See* [**RP 214-18**].

ARGUMENT

I. THE COURT OF APPEALS' REASONABLE SUSPICION ANALYSIS MISAPPLIES NEW MEXICO PRECEDENT. SUPPRESSION IS REQUIRED.

In denying suppression, the district court applied outdated precedent to determine that a seizure requires *submission* to a show of authority. In fact, Mr.

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[2] Additional details are developed in the Argument, **Issue IV**.

Granados was seized when the officers approached him at the gas station. On appeal, the Court of Appeals avoided deciding whether Mr. Granados was seized during the initial show of authority, holding only that the officers had reasonable suspicion at that time. Neither a vague informant tip nor Mr. Granados's conversation with his mother provided reasonable suspicion for the officers' show of authority at the gas station, and suppression was required.

A. Standard of Review.

A suppression ruling presents "a mixed question of law and fact wherein [appellate courts] review any factual questions under a substantial evidence standard and we review the application of law to the facts de novo." *State v. Neal,* 2007-NMSC-043, ¶ 15, 142 N.M. 176 (internal quotation marks and citation omitted). "Determining whether a seizure and search are reasonable under the law is a legal determination for this Court." *State v. Crystal B.*, 2001-NMCA-010, ¶ 7, 130 N.M. 336.

"Rather than being limited to the record made on a motion to suppress, appellate courts may review the entire record to determine whether there was sufficient evidence to support the trial court's denial of the motion to suppress." *State v. Monafo*, 2016-NMCA-092, ¶ 10, 384 P.3d 134 (internal quotation marks and citation omitted); *accord State v. Martinez*, 1980-NMSC-066, ¶ 16, 94 N.M. 436 (holding that appellate courts consider the entire record on appeal, not just

evidence presented during a suppression hearing, in affirming the denial of a motion to suppress))).

B. Mr. Granados was seized when multiple officers approached him in a show of force.

The State argued to the district court that there was reasonable suspicion by the time Mr. Granados "submitted to the show of authority" by stopping his vehicle after a car chase. [**RP 102-03; 6/27/2014, 2:32:46-33:25** (citing *Maez*, 2009-NMCA-108).] The district court relied on the State's argument that a seizure requires "actual submission to a show of authority" and therefore ruled that Mr. Granados was not seized at the gas station. [**RP 102-03; 6/27/14, 2:33:18, 3:34:57-38:27**] The district court therefore relied on Mr. Granados's flight from the officers and discarding drugs out the window as *providing* reasonable suspicion for the eventual traffic stop. [**6/27/14, 3:36:12, 3:37:46, 3:43:08; *see also* 3:45:21 (court's ruling).**]

The district court's seizure analysis relied on outdated precedent following the federal standard. *See Maez*, 2009-NMCA-108, ¶ 16 (citing *State v. Garcia*, 2008-NMCA-044, 143 N.M. 765 ("*Garcia I*") (following *California v. Hodari D.*, 499 U.S. 621 (1991) (seizure requires submission to a show of authority)). Two months after *Maez* was decided, this Court reversed *Garcia I*, rejecting that standard under the state constitution, focusing on whether a reasonable person would feel free to leave in light of the *officers'* conduct. *State v. Garcia*, 2009-

NMSC-046, ¶¶ 27-35, 147 N.M. 134 (*Garcia II*). *Garcia II* was settled law by the time Mr. Granados moved for suppression under the New Mexico Constitution. *See* [**RP 44 ¶ 4**]; *State v. Gomez,* 1997-NMSC-006, ¶ 19, 122 N.M. 777 (stating preservation requirements for a state constitutional claim). The district court's reliance on *Maez* constitutes a mistake of law.

The Court of Appeals declined to formally decide whether Mr. Granados was seized at the gas station. This Court should hold that he was.

The question of whether a person has been seized is itself a mixed question of law and fact. *State v. Jason L.*, 2000-NMSC-018, ¶ 19, 129 N.M. 119. Determining "what were the circumstances surrounding the stop, including whether the officers used a show of authority" is a factual inquiry, but whether "the circumstances reach such a level of accosting and restraint that a reasonable person would have believed he or she was not free to leave" is a question of law. *Id.*

Under Article II, Section 10 of the New Mexico Constitution, a seizure determination is governed by the *Mendenhall* test for whether a person would reasonably believe they were free to leave. *Garcia II*, 2009-NMSC-046, ¶ 37 (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Under that standard, factors include: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's

request might be compelled." *Id.* ¶ 39 (quoting *State v. Lopez*, 1989-NMCA-030, ¶ 3, 109 N.M. 169 (quoting *Mendenhall*, 446 U.S. at 554)). "While police are free to engage people consensually to gather information, when they 'convey a message that compliance with their requests is required[,]' the reasonable person would not feel free to leave and a seizure has occurred." *Id.* (quoting *Jason L.*, 2000-NMSC-018, ¶ 14 (internal citation omitted)).

Mr. Granados was seized as soon as four armed officers swarmed his vehicle and ordered him out of the car because it involved the "threatening presence of several officers, the display of a weapon by an officer, … [and] the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *See Mendenhall*, 446 U.S. at 554. The officers' car approached so suddenly that it *skidded* to a stop, then all four approached at the same time. While the officers were in plain clothes, they displayed their badges and verbally identified themselves as law enforcement; they were armed and shouting orders for Mr. Granados to get out of his vehicle. This was a show of authority that conveyed a message that compliance with their requests was required. A reasonable person would not have felt free to leave.[3]

[3] Because trial defense counsel accepted the viability of *Maez*, he asserted below that Mr. Granados was *legally* free to leave to negate reasonable suspicion arising from the flight itself. **[6/27/14, 3:42:40]**

C. The officers lacked reasonable suspicion when they swarmed Mr. Granados's truck at the gas station.

Reasonable suspicion exists when police officers "are aware of specific articulable facts that, judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592. "Reasonable suspicion must exist at the inception of the seizure. … The officer cannot rely on facts which arise as a result of the encounter." *Jason L.*, 2000-NMSC-018, ¶ 20 (citations omitted). Because (1) the informant tip was unreliable, stale, and affirmatively dispelled, and (2) Mr. Granados's conversation with his mother failed to provide reasonable suspicion of a drug transaction, suppression is required.

1. The informant tip was stale and unreliable.

When NEU officers received an informant tip April 29, 2013, the officers knew Mr. Granados from previous drug investigations. The tip alleged Mr. Granados "was in possession of a large amount of cocaine … and they advised us of two separate vehicles that he travels in." [**6/27/14, 2:39:22**] Scharmack believed they "needed further information" to pursue an investigation of his residence. [**2:40:04**] Officers then "detained" Mr. Granados two days later on May 1 but let him go. [**2:59:30-3:01:15**] By May 2, the tip was stale.

Reviewing for probable cause, admittedly a higher standard, this Court has previously rejected such a finding where a tip regarding drug activity was 48 or 72

hours old. *See, e.g.*, *State v. Whitley*, 1999-NMCA-155, ¶ 5, 128 N.M. 403 (where the information involved a motel room and was at least forty-eight hours old at the time the warrant was issued) (citing *State v. Lovato*, 1994-NMCA-042, ¶ 10, 118 N.M. 155 (controlled buy 72 hours earlier "fails to support a conclusion that criminal activity at the motel room was of an ongoing, continuous nature"). *Whitley* noted the consumable nature of drugs (as opposed to other contraband, like guns), the transient nature of a motel room, and the general uncertainty that the past events in that case actually provided grounds to believe the criminal activity was continuing 48 hours later. *Id.* ¶ 9. In this case, the informant tip presents the same uncertainty raised in *Whitley*. The consumable nature of drugs makes the passage of time particularly concerning three days after the informant allegedly saw Mr. Granados with them.

The Court of Appeals Majority claimed that Mr. Granados did not "challenge the reliability of the CI's tip on appeal." *State v. Granados*, A-1-CA-37417, ¶ 8 (July 26, 2021) (non-precedential). While Mr. Granados did not challenge the *informant's* credibility, he expressly argued that the tip itself was not a reliable indicator of criminal activity on May 2. [**Ct.App.BIC 24-25; Ct.App.RB 1-4**]; *accord id.* ¶ 32 (Attrep J., dissenting) (recognizing the jurisprudential distinction between reliability of information and credibility of the informant).

The Majority declined to consider Mr. Granados's staleness arguments because the cited cases involved probable cause determinations and reasonable suspicion is a lower standard. *Id.* ¶ 9. As the dissenting opinion notes, *id.* ¶ 35 n.8 (Attrep J., dissenting), the Majority's reasoning is unsound, as the reliability of an informant tip – informed by staleness considerations – also applies to a reasonable suspicion assessment. *See State v. Robbs*, 2006-NMCA-061, ¶ 13, 139 N.M. 569 (argued extensively at **Ct.App.RB 2-4**). The NEU officers also provided no context from which to assess the reliability of the informant's belief that Mr. Granados was selling drugs at all. *Accord Granados*, A-1-CA-37417, ¶ 33 (Attrep, J., dissenting). Furthermore, the NEU officers had detained Mr. Granados on May 1 and let him go, such that any suspicion arising from the April 29 tip was at least partially dispelled by that interaction.

Most critically, the fact that officers corroborated the description of Mr. Granados's *truck* did not corroborate the report of criminal activity. *See id.* ¶ 8 (Majority). The informant tip did not connect the vehicle – the only aspect of the tip the officers corroborated – to the drug activity, as the informant did not say Mr. Granados was selling cocaine *from his car*. *See id.* ¶ 31, n.6 (Attrep J., dissenting). As the Dissent explains, ownership of the vehicle itself is a "status quo" fact "observable by the general public," corroboration of which is generally not sufficient to support reasonable suspicion. *Id.* ¶ 35 (citing *Robbs*, 2006-NMCA-

061, ¶ 17); *see also id.* ¶¶ 31, 33, and n.6. Any suspicion arising from the tip carried minimal weight on May 2.

2. Mr. Granados's conversation with his mother did not provide reasonable suspicion of a drug transaction.

Surveilling him on May 2, the officers followed Mr. Granados's truck across Alamogordo to a gas station. Soon after he parked, a white truck pulled in behind him. Although one officer believed it belonged to a particular male narcotics suspect, a female got out of the white truck and approached Mr. Granados's window. That woman was Mr. Granados's mother. Officers testified, "they engaged in conversation, which appeared through our training and experience that it was possibly a drug transaction," so the officers decided to "make contact with Mr. Granados." [**6/27/14, 2:46:18**] They did not observe any exchange.

In plain clothes and driving an undercover car, the four officers all rapidly approached Mr. Granados's truck announcing "Sheriff's Office," and Mr. Granados sped off. The Court of Appeals held that the officers had reasonable suspicion for this seizure by show of authority. *Granados*, A-1-CA-37417, ¶¶ 8-14. Although the Court of Appeals emphasized that the officers did not know at the time it was his mother, *id.* ¶ 12, the Majority disregarded the fact that the officers initially thought Mr. Granados was speaking to a male narcotics suspect who turned out to be a female. The officers' suspicion that he was interacting with a

known drug user was immediately dispelled. *See id.* ¶ 36 n.9 (Attrep J., dissenting); [***see also* Ct.App.RB 7** (arguing same)].

To the extent that the officers in this case knew Mr. Granados from past investigations, prior associations with narcotics is insufficient to provide *present* reasonable suspicion. In *Neal*, an officer was surveilling a residence associated with drug trafficking when he observed the defendant drive up and talk to a known drug felon who lived at the location. *Neal*, 2007-NMSC-043, ¶ 4 (cited at [**Ct.App.BIC 25-26, Ct.App.RB 8-9**]). This Court held that these circumstances **did not** amount to "the type of individualized, specific, articulable circumstances necessary to create reasonable suspicion that [the d]efendant himself was involved in criminal activity." *Id. Neal* noted that the officer "could not see what if anything, they were doing, aside from talking, and could not hear what they were saying." *Id.* ¶ 27. Thus, even with his specialized training, the officer could not reasonably infer that a drug transaction had occurred. *Id.* ¶ 31. This Court concluded that the officer had initiated a traffic stop based on circumstances that "smack more of the type of conjecture and hunch we have rejected in the past as insufficient to constitute reasonable suspicion…." *Id.* ¶ 31. The officers here had no more basis for their suspicion than in *Neal*.

Furthermore, no exchange occurred. The Majority relies heavily on *State v. Martinez*, 2020-NMSC-005, 457 P.3d 254, to defer wholesale to the officers'

subjective belief, based on training and experience, that a drug transaction was *going* to occur. This analytical approach overstates *Martinez* and nullifies any need for judicial review of officers' reasonable suspicion determinations.

In *Martinez*, this Court explained that "[w]hen an officer relies upon training and experience to effectuate a stop, it is necessary that the officer explain why [their] knowledge of particular criminal practices gives special significance to the apparently innocent facts observed." *Id.* ¶ 22 (internal quotation marks and citation omitted). Critically, in *Martinez*, the officer was surveilling a location due to a pattern of the exact criminal activity observed, *id.* ¶ 24, **and** watched Mr. Martinez engage in *two* apparent transactions with other vehicles during his surveillance. *Id.* ¶ 25. This Court held that "Officer Garrison was not speculating when he formed suspicion that Martinez might be selling drugs." *Id.*

While officers may be more capable of recognizing a potential drug deal than an "untrained person," *see Neal*, 2007-NMSC-043, ¶ 21, *Neal* and *Martinez*, read together, clarify the line between interactions that do or do not give rise to a reasonable suspicion of a drug transaction. As the dissenting opinion recognizes, *Martinez* requires officers to *explain* a belief based on training and experience, something they utterly failed to do here. *See Granados*, A-1-CA-37417, ¶¶ 37-38 (Attrep J., dissenting).

The NEU officers did not attest the location was known for drug trafficking, and did not witness multiple contacts. Furthermore, although the officer in *Martinez* also did not witness a hand-to-hand exchange, the suspected transactions occurred in the back seat of a closed car where an exchange *could have* occurred without being visible. 2020-NMSC-005, ¶¶ 4-6. Mr. Granados's mother stood in full view outside his window and all four officers testified that no exchange occurred. The officers lacked reasonable suspicion and reliance on *Martinez* does not indicate otherwise.

3. The Court of Appeals' affirmance was flawed and reversal is appropriate.

The Majority opinion emphasizes the need to consider the informant tip and the officers' observations on May 2 *together* to evaluate reasonable suspicion. *Granados*, A-1-CA-37417, ¶¶ 7-8, 14. Even taken together, the informant tip and gas station observations do not provide reasonable suspicion. The tip was not a reliable indicator of criminal activity on May 2, and the events at the gas station neither corroborated the tip nor independently provided an objective basis to believe drug trafficking was afoot. Had the officers actually observed a transaction on May 2, this would have corroborated the informant tip and justified an investigatory detention. However, the officers admitted they did *not* see any exchange take place, and only *subjectively* believed they were about to. But no observations made that belief reasonable.

Finally, Mr. Granados's flight from the gas station cannot provide renewed reasonable suspicion. New Mexico has previously held that "officers cannot improperly provoke—for example, by fraud—a person into fleeing and use the flight to justify a stop." *State v. Harbison*, 2007-NMSC-016, ¶ 19, 141 N.M. 392 (quoting *United States v. Franklin*, 323 F.3d 1298, 1302 (11th Cir. 2003) (citation omitted)); *see also Franklin*, 323 F.3d at 1305 (Pogue, J., dissenting) ("The police may not frighten an individual into fleeing, and then assert his flight as a justification for pursuing and stopping him.").

Because the officers lacked reasonable suspicion when they seized Mr. Granados by a show of authority, all evidence, including the fact of his flight and the bag of cocaine thrown from his car during flight, should have been suppressed.

II. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENTS OF TAMPERING WITH EVIDENCE.

While tossing drugs in full view of the police may constitute *attempted* tampering with evidence, it is not an overt act of tampering. Evaluating substantial evidence of tampering, this Court has said:

> [I]n order for [the d]efendant's conviction on tampering with evidence to be upheld, there must be sufficient evidence from which the jury can infer: (1) the **specific intent of the [d]efendant to disrupt the police investigation**; and (2) that [the d]efendant **actively destroyed or hid physical evidence**.

State v. Duran, 2006-NMSC-035, ¶ 14, 140 N.M. 94 (emphasis added).

Two weeks after it affirmed Mr. Granados's tampering conviction, the Court of Appeals published *State v. Jackson*, 2021-NMCA-059, __ P.3d __ (Aug. 9, 2021), *cert. denied* S-1-SC-38981. In *Jackson*, the Court held that tossing drugs in full view of police officers, where the officers immediately retrieved the evidence from where it landed, is insufficient to constitute tampering with evidence. The affirmance in this case directly conflicts with *Jackson*.

In *Jackson*, the Court of Appeals emphasized that "[t]he tampering statute punishes those who try to frustrate the criminal justice system by obstructing access to evidence of a crime." 2021-NMCA-059, ¶ 6 (quoting *State v. Radosevich*, 2018-NMSC-028, ¶ 10, 419 P.3d 176). *Jackson* concluded:

> Here, Defendant's actions plainly occurred in the presence of the police. The officers saw Defendant throw the baggie and were able to immediately recover it. The evidence was never concealed from the officers, and we therefore agree with the parties that Defendant's conviction for tampering with evidence is not supported by sufficient evidence.

Jackson, 2021-NMCA-059, ¶ 8. These same considerations were present in Mr. Granados's case, creating a tension if not a conflict between the two opinions.

The Court of Appeals appears to distinguish an act of throwing an item nearby and throwing it somewhat further away. *Granados*, A-1-CA-37417, ¶¶ 26-27. However, its analysis simply double-counts the intent element, holding that Mr. Granados committed an overt act because one can "infer [the defendant's] **intent to thwart** the officer's investigation." *Id.* ¶ 26 (emphasis added) (quoting *State v.*

Roybal, 1992-NMCA-114, ¶ 26, 115 N.M. 27). At most, Mr. Granados took substantial steps toward tampering, but failed to commit the crime. That is attempted tampering, not tampering. *See* NMSA 1978, § 30-28-1 (1963).

Applying *Jackson* to the facts of this case is consistent with other states, which have held that when a defendant does not actually interfere with law enforcement recovering the evidence, a conviction for tampering cannot be sustained. *See e.g., Anderson v. State*, 123 P.3d 1110, 1119 (Alaska Ct. App. 2005) (holding that tossing away evidence constitutes evidence tampering only when the evidence is destroyed or its recovery is made "substantially more difficult or impossible"); *State v. Hawkins*, 406 S.W.3d 121, 125, 133 (Tenn. 2013) (tossing a shotgun over a short metal fence while running from police or the scene of the crime constitutes abandonment, not tampering with evidence); *Commonwealth v. Delgado*, 679 A.2d 223, 224-225 (Pa. 1996) (tossing drugs on the roof of a garage while being pursued by officers does not constitute tampering with evidence); *Boice v. State*, 560 So.2d 1383, 1384-1385 (Fla. Dist. Ct. App. 1990) (dropping a bag of cocaine in the presence of arresting officers amounts to mere abandonment and not felony tampering with evidence); *State v. Jones*, 983 So.2d 95, 100 (La. 2008) ("[In jurisdictions using a version of the Model Penal Cod's tampering statute, i]t has only been in cases where the defendant did something to impair the

evidence's integrity, veracity, or availability at trial that courts have found the defendant guilty of [tampering].").

Mr. Granados threw cocaine out the window *hoping* that it would result in "hiding" it from the police but Agent Huffman watched him throw it, saw where it landed, made note of where it landed, and immediately sent officers to retrieve it. Commander LaSalle walked to that location and found the cocaine exactly where Huffman said it would be. As there was no "act of concealment," and Mr. Granados did not commit tampering with evidence.

III. BASED ON TRAINING AND EXPERIENCE, BUT WITHOUT EXPERT DESIGNATION OR QUALIFICATION, THE OFFICERS' OPINIONS THAT THE SINGLE BAG OF COCAINE WAS CONSISTENT WITH TRAFFICKING REQUIRE REVERSAL.

A. Preservation and Standard of Review.

Scharmack testified he was in the NEU for two and a half years working narcotics cases. [**1/20/15, 11:11:01**] During that time, he talked regularly with "self-admitted drug users and traffickers." [**11:12:17**] He had purchased drugs undercover before, but never cocaine. [**11:12:55**] He testified that, during his investigations, he learned the street values of drugs, including cocaine, and the typical quantities sold. [**11:15:15**]

Over a relevance objection, Scharmack testified that cocaine is sold "point-for-point" so that grams and half-grams are equivalent in price; $100 and $50, respectively. [**1/20/15, 11:16:01**] Over another defense objection to relevance and

confrontation, Scharmack testified that cocaine is usually purchased by the gram or half-gram. [**11:17:22**] Over a confrontation objection, Scharmack testified – based on what users told him – that most users buy $50-100 at a time. [**11:18:23**] Without objection, he testified that "most traffickers often sell to support their habit." [**11:19:26**, **11:19:43**] Marte similarly testified that the most common quantity of cocaine purchased is from a fraction of a gram to a couple grams, that a gram costs $100 and fractions are proportionally priced. [**2:05:03-06:25;** ***accord*** **1:23:06** (LaSalle)]

Referencing 49.97 grams of cocaine, the State asked Officer Scharmack, "In your experience and training, what is the significance of the weight … based on your experience in NEU?" The defense objected that the question called for speculation. [**1/20/15, 1:20:07**] The district court ruled: "Based upon the officer's testimony regarding his experience and training, **I'll allow his lay opinion**." [**1:20:20**] (Emphasis added.) Thus Scharmack testified the amount was "Consistent with [an] amount for distribution or trafficking" with a bulk price between three and four thousand dollars [**1:20:27**] Scharmack explained that in Alamogordo cocaine is commonly sold gram-for-gram at $100 per gram. [**1:21:20**] When asked how much value that would give Exhibit 2, the defense raised the "same objection" and also objected to lack of confrontation and lack of expertise. [**1:21:40**] The court ruled the question only asked him to "do the math" and overruled the

objections. [**1:22:39**] Scharmack testified that, if sold gram-for-gram it would be worth $5000. [**1:22:51**]

Agent Marte similarly described his narcotics experience and similarly admitted he had *never* purchased cocaine during undercover buys. [**1/20/15, 2:03:11, 2:04:22**] He similarly spoke with users and traffickers. [**2:04:35**] The State made no effort to qualify Marte as an expert witness. Over a defense hearsay objection due to lack of personal knowledge, Marte testified to common quantities of cocaine purchased and—over renewed objections to hearsay and confrontation—that a gram costs $100 and fractions are proportionally priced. [**2:05:03-06:25**] He testified cocaine is usually packaged in those amounts in small plastic bags. [**2:06:25**] Over the "same [defense] objection," Marte also testified that "based on my training and experience" the amount was consistent with trafficking. [**2:14:18**]

Commander LaSalle described similar experience in NEU, talking to known drug users, addicts, and traffickers. [**1/20/15, 1:21:20**] LaSalle testified he had experience with the street prices of different drugs, including cocaine. [**1:22:09**] Without asking if LaSalle had personally purchased cocaine undercover, the State asked how much a gram of cocaine costs. The "same" defense objection was overruled. [**1:22:54**] LaSalle testified a gram costs $100, a half gram costs $50. [**1:23:06**] Asked what "in your training and experience" is the most common

quantity purchased by cocaine users, the defense objected and was granted voir dire of the witness. [**1:23:26**] The defense established that the NEU did not do scientific studies regarding purchased quantities and his answer would be based on "what we see" and "experience." [**1:23:48-24:27**] The court overruled a renewed objection. [**1:24:30**] LaSalle then testified that the NEU keeps a "price list" of what they see in undercover buys and what users tell them. [**1:24:33**] He testified that the quantity purchased will depend on the money available to people. [**1:25:05**] Without objection he testified that 80% of users also sell and that many dealers use. [**1:26:41**]

LaSalle agreed with Scharmack 50 grams of cocaine was worth $5000 if sold by the gram [**1/20/15, 2:46:02**], but acknowledged that south of the border checkpoint, you could get 50 grams "wholesale" at half price and in El Paso, for as little as $1000. [**2:46:20-47:30**]

Although there were multiple objections, Mr. Granados recognizes that defense counsel did not clearly or consistently object to a lack of expert qualification or insist upon expert qualification to render an opinion. Thus, Mr. Granados asked the Court of Appeals, and now asks this Court, to review this issue for plain error. *See* Rule 11-103(E) NMRA; *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056.

> Plain error applies only where the substantial rights of the accused are affected, and exists where the admission of the testimony "constituted

> an injustice that created grave doubts concerning the validity of the verdict." *Montoya*, 2015-NMSC-010, ¶ 46[]. It is intended to be used sparingly as an exception to the rule requiring objections, which promotes efficient and fair proceedings. *See State v. Paiz*, 1999-NMCA-104, ¶ 28, 127 N.M. 776, 987 P.2d 1163. "[I]n determining whether there has been plain error, we must examine the alleged errors in the context of the testimony as a whole." *Montoya*, 2015-NMSC-010, ¶ 46[].

State v. Miera, 2018-NMCA-020, ¶ 13, 413 P.3d 491.

"[W]e review de novo [a] misapprehension of the law upon which a court bases an otherwise discretionary evidentiary ruling[.]" *State v. Duran*, 2015-NMCA-015, ¶ 11, 343 P.3d 207 (internal quotation marks and citation omitted). When expert opinions are "improperly admitted under Rule 11-701 [NMRA], that admission would indicate a misapprehension of our law and constitute an abuse of discretion by the district court." *State v. Vargas*, 2016-NMCA-038, ¶ 10, 368 P.3d 1232 (citation omitted). "Rule 11-702 NMRA allows a witness 'who is qualified as an expert" to testify "in the form of an opinion or otherwise' if the witness has "scientific, technical, or other *specialized knowledge*." *Duran*, 2015-NMCA-015, ¶ 13 (quoting Rule 11-702). Thus, expertise acquired through "training and experience" is subject to Rule 11-702, especially if an opinion purports to provide statistical evidence. *Id.* ¶ 16.

B. The Court of Appeals' analysis is flawed.

The Court of Appeals assumed that admitting the officers' "lay" opinions was error, but held it was not *plain error* based on its own independent

determination that the officers were indeed experts. *Granados*, A-1-CA-37417, ¶¶ 17-18. The Court of Appeals ignored contrary evidence, including the fact that the officers lacked experience related to cocaine in particular,[4] and the fact that their "opinions" were simply relaying hearsay from drug users they talked to.

New Mexico has indicated that expertise in drug cases must be tied to the particular drug, especially for opinions related to common sale quantities and street value, which varies from substance to substance. *See State v. Rael-Gallegos*, 2013-NMCA-092, ¶ 21, 308 P.3d 1016 (the relevant inquiry is whether the officer's "knowledge and experience were sufficient to support a determination that [his] conclusions regarding the distinction between personal use amounts versus trafficking amounts of **crack cocaine** may be trusted.").

The Court of Appeals asserted – erroneously – that "reliability is not an issue" in this case, *see Granados*, A-1-CA-37417, ¶ 8, where Mr. Granados vehemently disputed those opinions. The Court also ignored authority that categorical opinions about "average" user's consumption of cocaine are inherently suspect because there is a wide range of users. [***See* Ct.App.BIC 35** (citing *Commonwealth v. Acosta*, 969 N.E.2d 720, 842, n.11 (Mass. App. 2012)).] Mr. Granados's testimony directly contradicted the substance of the opinions. The

[4] [*See* **1/20/15, 11:12:55** (Scharmack admitting no undercover experience related to cocaine); **2:03:11, 2:04:22** (Marte admitting same); **1:22:09** (LaSalle testifying without being *asked*) (as argued at **Ct.App.BIC 28-30**).]

officers' opinions were not reliable and the Court's independent determination of expertise on appeal was improper. There is no such finding to which to defer and this Court should not itself engage in fact-finding on appeal. *See State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686 (recognizing that the appellate court defers to the factfinder).

Moreover, a retroactive finding of expertise does not negate the prejudice to Mr. Granados's defense. Properly disclosing the officers as expert witnesses would have provided the defense with pretrial notice of the basis for their opinions and provided the defense an opportunity to present their own expert rebutting those opinions. *See* Rule 5-501(A)(5) NMRA.

C. The opinions in this case were improper.

"New Mexico law is clear that 'a witness must qualify as an expert in the field for which his or her testimony is offered before such testimony is admissible.'" *Parkhill v. Alderman-Cave Milling and Grain Co. of New Mexico*, 2010-NMCA-110, ¶ 28, 149 N.M. 140 (quoting *State v. Downey*, 2008-NMSC-061, ¶ 26, 145 N.M. 232). Accordingly, Scharmack, Marte, and LaSalle all needed to be qualified as experts in order to provide the opinions they gave about common quantities and values of street transactions of cocaine. They also needed to be qualified to give opinions that the quantity involved in this case—49.97 grams—was consistent with drug trafficking, as opposed to simple possession.

While they provided some foundational testimony, they were never offered as or found to be qualified experts and the trial court explicitly allowed their opinions about drug prices and quantities as "lay opinion." [**1/20/15, 1:20:20** ("Based upon the officer's testimony regarding his experience and training, I'll allow his lay opinion."). Applying plain error review, it is plain and undisputable that their opinions on these topics were improperly admitted, as they clearly do not constitute lay opinions admissible under Rule 11-701. *See Vargas*, 2016-NMCA-038, ¶ 10. As this Court explained in *Vargas*:

> The testimony of law enforcement officers presents a particular challenge to courts given that an officer's personal perception of events is often informed by technical or other specialized knowledge obtained through the officer's professional experience. The training and daily interactions undertaken by law enforcement officers are not part of the "common knowledge and experience of an average person."

Id. ¶ 16 (quoting *State v. Winters*, 2015-NMCA-050, ¶ 11, 349 P.3d 524). Futhermore, "[w]hen the line between lay and expert opinion is blurred during the course of a single witness's testimony, it is the proper function of the district court, as gatekeeper, to correct the error when raised." *Id.* ¶ 17.

In *Vargas*, this Court noted that the officer's "testimony indicates that his experience with stun guns is based upon his law enforcement training and experience, rather than from life experience outside the law enforcement context." *Id.* ¶ 22. Here, testimony about the most "common" quantities and prices of cocaine street sales, as well as opinions that a particular quantity possessed is

consistent with trafficking constitutes specialized knowledge based on the officers' training and experience. Without qualifying these officers, the district court erred in admitting the testimony over multiple defense objections. Furthermore, where Scharmack nor Marte had *never* done undercover purchases of cocaine and LaSalle was not asked either way, the foundation for such qualification is clearly lacking. Admission of their opinion testimony was plainly in error.

D. The officers' opinion testimony was not harmless.

Quantity was the *only evidence* to support the intent to distribute distinguishing first-degree trafficking and fourth-degree possession. The officers did not observe any transactions or attempt a controlled buy. Mr. Granados did not have any cash, scales, or individual baggies. Although not necessarily required for conviction, the absence of paraphernalia or transaction evidence reveals the officers' opinions were critical to the verdict. *See State v. Becerra*, 1991-NMCA-090, ¶ 22, 112 N.M. 604 (although [i]n some cases, the quantity recovered is sufficient to support an inference of intent to distribute," "in this case, where there was no evidence of the concentration of the drug, and no evidence of how long it would normally take a single drug user to consume a given quantity, the weight of the amount recovered could not in itself enable a fact finder to conclude, beyond a reasonable doubt, that defendant intended to distribute the substance").

"In ascertaining whether a plain error affects substantial rights, the plain error rule is not as strict as the doctrine of fundamental error in its application." *Paiz*, 1999-NMCA-104, ¶ 28. Plain error does not require a miscarriage of justice, but need only "create[] grave doubts concerning the validity of the verdict." *State v. Barber*, 2004-NMSC-019, ¶ 40, 135 N.M. 621.

The non-constitutional harmless error standard requires reversal when there is a reasonable probability that the error contributed to the defendant's conviction. *See State v. Tollardo*, 2012-NMSC-008, ¶¶ 43-44, 275 P.3d 110. This determination "requires an examination of the error itself, which depending upon the facts of the particular case could include an examination of the source of the error and the emphasis placed upon the error," in addition to an examination of "the importance of the [erroneously admitted evidence] in the prosecution's case" and of "whether the [error] was cumulative" or instead introduced new facts. *Id.* ¶ 43.

The primary disputed issue in this case was whether Mr. Granados possessed the bag of cocaine for personal use or with the intent to distribute it to others. Mr. Granados disputed the officers' pricing and "typical use quantity" testimony. He asserted that the particular cocaine seized was of poor quality requiring consumption of larger amounts to get high; and that when he is on a two-to-three-day binge, he smokes crack constantly in order to maintain the short-lived high.

Mr. Granados testified he could have consumed the cocaine seized in two days. *Cf. Acosta*, 969 N.E.2d at 842, n.11 (recognizing that consumption varies among a wide range of users).

Officers did not observe any drug transactions and did not attempt a controlled buy. Mr. Granados did not have any cash, scales, or individual baggies, either empty or containing drugs. Although not necessarily required for conviction, the absence of paraphernalia or transaction evidence is telling in terms of harmless error. Because the officers' expert opinions were the *only* evidence of an intent to distribute, their admission cannot be deemed harmless. *See Becerra*, 1991-NMCA-090, ¶ 22.

Although quantity alone can be sufficient, a broad array of New Mexico cases involving "possession with intent" have specifically relied on the presence of other trafficking accoutrement to prove intent, such as scales, small-portion baggies, cash from past transactions, etc. *See, e.g., State v. Bejar*, 1984-NMCA-031, ¶ 7, 101 N.M. 190 (finding possession of a small quantity "coupled with the presence of three sets of scales which could be used for weighing heroin, packages of balloons, cash, tinfoil, and items for personal use (syringe and "cookers"), is enough evidence to support the charge."); *State v. Sandoval*, 1979-NMCA-006, ¶ 17, 92 N.M. 476 ("The ten pounds of marijuana, the scale, the packaging of the marijuana in plastic bags, and the testimony that the marijuana was in a wholesale

amount, was substantial evidence that possession of the marijuana was with the intent to distribute."); *State v. Vallejos*, 1998-NMCA-151, ¶ 22, 126 N.M. 161 (recognizing scales "inconsistent with personal use" as "circumstantial evidence which allowed the jury to infer that Defendant used them to weigh specific portions of marijuana so as to distribute."). Even if sufficient, quantity alone is hardly "overwhelming" evidence of guilt. Reversal is appropriate.

IV. WHILE THE FACT OF A PRIOR FELONY IS ADMISSIBLE FOR IMPEACHMENT, ADMITTING THE DETAILS OF MR. GRANADOS'S PRIOR CONVICTIONS REQUIRES REVERSAL.

Because many critical facts were disputed below, the State made its case against Mr. Granados entirely about character to attack his credibility. When Mr. Granados chose to testify, his attorney identified his prior felonies on direct examination. Over objection, the district court allowed the State to establish the underlying facts of Mr. Granados's prior convictions on cross-examination, and the State exploited that error in closing arguments.

A. Preservation.

At trial, the prosecutor tried three times during trial to admit evidence that an informant had told Scharmack Mr. Granados was selling drugs. Each time the objection was sustained, although Scharmack did testify, "we received information on Mr. Granados and a couple other subjects that were trafficking or selling

narcotics" before the final objection cut him off. The court did not instruct the jury to disregard. [**1/20/15, 11:20:53-21:52**]

When Mr. Granados chose to testify in his defense, his attorney identified his prior convictions during direct examination. [**1/20/15, 3:13:56**] Thereafter, the State asked to cross-examine Mr. Granados about the underlying *facts* of his aggravated fleeing case, in which he threw drugs out the window during the police pursuit. [**3:21:10**] The State argued it would impeach his testimony that he fled the gas station fearing a confrontation with "some lowriders." [**3:21:26**]

Defense counsel objected that Mr. Granados already admitted the convictions and that Rule 11-404(B) NMRA did not permit the details. [**1/20/15, 3:22:39**] The court allowed the inquiry to show "absence of mistake" regarding Mr. Granados's claim that he believed "someone other than the police" pursued him. [**3:23:17**]

During cross-examination, the State asked if Mr. Granados threw cocaine out his car window during his previous case. Mr. Granados answered "Yes." The prosecutor continued, "And in that situation, you threw out 11.7 grams, didn't you?" to which defense counsel objected. [**1/20/15, 3:50:20**] The court overruled and the prosecutor against asked "You threw out about 11 grams didn't you?" After a renewed objection, the court held a bench conference regarding the

quantity evidence and the prosecutor withdrew the quantity question. [**3:50:40-51:15**] No curative instruction was given.

In closing argument, the State specifically relied on the factual details of Mr. Granados's prior conviction to argue he did not mistakenly believe "bad guys were behind him." [**1/20/15, 4:35:20**] Six minutes later, the State also pointed to Mr. Granados's felony convictions as relevant to credibility, going so far as to emphasize the nature of those convictions for "attempt to traffic cocaine, aggravated fleeing, and in another case, convicted of trafficking cocaine." [**4:41:36**] The subsequent argument diminishes the credibility value of Mr. Granados's admission to possessing the cocaine. [**4:42:21**]

Indeed, Mr. Granados admitted to everything alleged against him except (1) he denied knowing the men following him were officers and (2) he asserted the cocaine was for personal use, not trafficking. Thus, the only disputed trial fact was Mr. Granados's specific intent (to tamper or distribute). By telling the jury they could consider *multiple* trafficking-related convictions and invoking a propensity inference for the act of throwing drugs out the window, the State's argument emphasized propensity evidence improperly admitted by the court.

B. Standard of Review.

"The basic rationale for excluding character evidence that only shows a propensity to commit various crimes is that such evidence is not probative of the

fact that the defendant acted consistently with his past conduct in committing the acts at issue." *State v. Sandate*, 1994-NMCA-138, ¶ 32, 119 N.M. 235 (internal quotation marks and citation omitted). Therefore, "[t]estimony which amounts to evidence of a defendant's bad character, or disposition to commit the crime charged, when not offered for a legitimate purpose, is inadmissible and unfairly prejudicial." *Id.* (internal quotation marks and citation omitted). "If the evidence is probative of something other than propensity, then we balance the prejudicial effect of the evidence against its probative value." *State v. Ruiz*, 2001-NMCA-097, ¶ 15, 131 N.M. 241.

A trial court's decision to admit evidence under Rules 11-404(B) and 11-403 NMRA is reviewed for abuse of discretion. *State v. Otto*, 2007-NMSC-012, ¶¶ 9, 14, 141 N.M. 443. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case [,] ... clearly untenable or not justified by reason." *Id.* ¶ 9 (internal quotation marks and citation omitted).

C. Propensity evidence in a credibility contest requires reversal.

To attack a witness's character for truthfulness under Rule 11-609(A)(1) NMRA, evidence of a criminal conviction *not* involving dishonesty "must be admitted in a criminal case in which the witness is a defendant, if the probative

value of the evidence outweighs its prejudicial effect to that defendant." This Court has provided the following guidance for admitting prior convictions:

> Some of the factors which should be considered by the trial court when deciding whether to admit evidence of prior convictions not involving dishonesty, for impeachment purposes, include (1) the nature of the crime in relation to its impeachment value as well as its inflammatory impact; (2) the date of the prior conviction and witness's subsequent history; (3) similarities, and the effect thereof, between the past crime and the crime charged; (4) a correlation of standards expressed in Rule 609(a) with **the policies reflected in Rule [11-]404 [NMRA]**; (5) the importance of the defendant's testimony, and (6) the centrality of the credibility issue.

State v. Lucero, 1982-NMCA-102, ¶ 12, 98 N.M. 311 (emphasis added) (citing *United States v. Mahone*, 537 F.2d 922 (7th Cir. 1976); *United States v. Luck*, 348 F.2d 763 (D.C. Cir. 1965); 3 Weinstein's Evidence, § 609(04) (1981)).

In this case, there was no non-propensity purpose to which the prior convictions were highly probative *other than credibility*. The district court's determination that it went to absence of mistake was actually to contradict his claim that he did not know the police pursued him; it was a prototypical impeachment purpose. The fact that Mr. Granados had previously thrown evidence while pursued by *marked* police units was not probative of his knowledge that the plain clothes officers in a lowrider were indeed police. Further, the State did not use it for that purpose in closing.

Lucero requires considering "the policies reflected in Rule 11-404," i.e., the concerns surrounding propensity evidence. *Lucero*, 1982-NMCA-102, ¶ 12. The

State's emphasis of Mr. Granados's prior trafficking convictions during closing strongly pressed for a propensity inference of his intent to traffic. Thus, the "404" factor from *Lucero* is of critical import in this case. The risk of unfair prejudice to the defendant "will vary from case to case … but will be substantial whenever the [evidence of the prior act] would be arresting enough to lure a juror into a sequence of bad character reasoning." *Old Chief v. United States*, 519 U.S. 172, 185 (1997). *Old Chief* recognized that for an act or crime "similar to other charges in a pending case the risk of unfair prejudice would be especially obvious." *Id.*

Without any admonishment *not* to rely on the prior convictions for a propensity purpose, it is reasonably likely that the jury did so. Moreover, the existence of even overwhelming other evidence of guilt does not render the prior bad act testimony harmless. *See Tollardo*, 2012-NMSC-008, ¶ 40 (rejecting primary reliance on "overwhelming evidence" to determine harmless error). As the Supreme Court explained in *Tollardo*:

> There are several reasons why it is improper for "overwhelming evidence" of a defendant's guilt to serve as the main determinant of whether an error was harmless. First, such an approach moves the inquiry away from **its appropriate "central focus," which is "whether there is a reasonable possibility" or probability**, depending on whether the error offends the defendant's constitutional rights, **that "the erroneous evidence might have affected the jury's verdict."** [citation omitted] In addition, excessive reliance on "overwhelming evidence" of guilt also ignores the principle that **"even if conviction appears inevitable, there is a point at which an error becomes too great to condone** as a matter of constitutional integrity and prosecutorial deterrence." [citation omitted].

Id. (emphasis added).

In three paragraphs, the Court of Appeals concluded that prior conduct of tossing drugs while fleeing marked police units was "probative of his knowledge [] that he was being followed by law enforcement officers in this case." *Granados*, A-1-CA-37417, ¶ 22. While arguably impeaching Mr. Granados's credibility, that knowledge was not an element of any charged offense. The prejudicial impact from the factual details of his prior charges *far* outweighed any probative value because Mr. Granados's credibility was generally impeached by the identification of his priors alone.

Moreover, the Court of Appeals focused only on evidence that Mr. Granados previously fled from police and tossed drugs out the window, but failed to address the full issue presented on appeal. [***See* Ct.App.BIC 36-44**] After the prior conduct was established, the State proceeded to question Mr. Granados about the *quantity* of drugs in particular in order to suggest a propensity for possessing quantities *larger* than what the officers described as personal use amounts. Mr. Granados specifically challenged introduction of "the 11-gram quantity for the prior conviction," [**Ct.App.BIC 43-44**] yet the Court of Appeals failed to address this aspect of the claim. During closing argument, the prosecutor emphasized Mr. Granados's prior convictions specifically suggesting a propensity for *trafficking*, and *not* to rebut a mistake about the officers' identities. Reversal is appropriate.

CONCLUSION

For the foregoing reasons, Francisco Granados respectfully asks that this Court reverse his convictions.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that a copy of this pleading was served electronically to Charles Gutierrez at the Attorney General's Criminal Appeals Division, this **20th** day of December, 2021.

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