IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs. **No. S-1-SC-37589**

SOMER WRIGHT,

Defendant-Petitioner.

ON CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

STATE OF NEW MEXICO'S ANSWER BRIEF

Appeal Originating From the Seventh Judicial District Court
Torrance County
The Honorable Matthew G. Reynolds, Presiding

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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 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.

The record proper is cited by the abbreviation **RP** followed by the page number.

STATEMENT OF COMPLIANCE

In accordance with Rule 12-318(F)(2) NMRA, this brief was prepared using Times New Roman, a proportionally-spaced typeface, and the body of the brief is less than 35 pages. This brief was prepared using Microsoft Word.

TABLE OF AUTHORITIES

New Mexico Case Law

New Mexico Constitutional Provisions, Statutes, Court Rules

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NATURE OF THE CASE

This case originated as a State's appeal from the district court's order granting Defendant's motion to suppress evidence. The State charged Defendant with DWI following her arrest by a Torrance County deputy sheriff. Prior to Defendant's arrest and supported by probable cause that Defendant was DWI, a commissioned, volunteer Torrance County reserve deputy seized Defendant by asking her to "hang tight" for 4-5 minutes while the deputy sheriff was en route. During the seizure, Defendant was unrestrained and remained seated in her vehicle with the engine running and on her driveway. The reserve deputy retreated to and sat in his patrol car during the 4-5 minute seizure.

The district court determined that the reserve deputy lacked statutory authority pursuant to NMSA 1978, § 66-8-124(A) (2007) to seize Defendant, which the State does not dispute. However, the district court determined that the statutorily unauthorized seizure violated Article II, Section 10 of the New Mexico Constitution. Because the district court erred in determining that the reserve deputy's statutorily unauthorized seizure was a violation of Article II, Section 10, because the State's compelling interests promoted by the seizure far outweighed the minimal intrusion on Defendant's privacy under the specific facts of the case, the Court of Appeals

reversed the district court's order. *See State v. Somer Wright*, 2019-NMCA-026, __ P.3d __. This Court issued a writ of certiorari to review the Court of Appeals' opinion.

Because the Court of Appeals correctly analyzed the constitutional reasonableness of the reserve deputy's brief seizure under Article II, Section 10, the State of New Mexico respectfully requests that this Court quash its writ of certiorari, or, alternatively, affirm the Court of Appeals' opinion on the merits.

SUMMARY OF PROCEEDINGS

Trial Court Proceedings

The State charged Defendant with aggravated DWI in Moriarity magistrate court following an arrest. **[RP 1-4]** The State ultimately filed a nolle prosequi and re-filed the charge in district court. **[Id.]** The State subsequently filed an amended criminal information, reducing Defendant's charge to a simple, petty misdemeanor DWI. **[RP 187-188]**

Defendant filed a motion to suppress evidence and dismiss (hereafter, the motion to suppress). **[RP 171-173]** The district court held an evidentiary hearing. **[CD 12/8/15]** It entered findings of fact and conclusions of law, tentatively granting the motion to suppress. **[RP 207-210]** Because the parties disputed the language of Defendant's proposed order, the district court held a presentment hearing and

subsequently issued an order granting Defendant's motion to suppress evidence, from which the State appealed.[1] **[RP 226-7]**

The Suppression Hearing

Defendant's charge arose out of events that occurred on the night of March 15, 2014. At the suppression hearing, the State presented the testimony of Reserve Deputy Roy Thompson.

Reserve Deputy Thompson is a volunteer, reserve deputy with the Torrance County Sheriff's Department. **[CD 12/08/15, 2:15:45-55; 2:49:00-20; 2:28:40-55]** He has been a reserve deputy for almost 16 years. **[CD 12/08/15, 2:15:55-16:05]** Reserve Deputy Thompson holds a commission as a "special deputy," or reserve deputy, by the Torrance County Sheriff but is not a certified law enforcement officer. **[CD 12/08/15, 2:16:05-18:05 (defense counsel stipulating that Reserve Deputy Thompson is a commissioned reserve deputy); 2:30:50-31:25]** He defined his duties as assisting the Torrance County Sheriff, supporting the full-time deputies, and generally keeping the people of Torrance County safe. **[Id.]** He participates in annual training, which includes DWI-related training such as field sobriety testing. **[CD 12/08/15, 2:18:05-20]** Reserve Deputy Thompson graduated from the New

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[1]The dispute between the parties centered on Defendant's inclusion of language dismissing the case with prejudice. **[RP 211-214; 216-219]** The district court clarified that it did not dismiss the case. **[CD 4/5/16, 1:37:03-1:41:09]**

Mexico Reserve Academy, which is a collaborative effort of various law enforcement agencies such as the Bernalillo County Sheriff's Office, Torrance County Sheriff's Office, Albuquerque Police Department, and the New Mexico State Police. **[CD 12/08/15, 2:28:50-29:45]**

Reserve Deputy Thompson testified that he has express authority from the Torrance County Sheriff to effectuate traffic stops when he observes a dangerous or unsafe situation (ie. an exigency). **[CD 12/08/15, 2:31:30-32:45]** Further, Reserve Deputy Thompson has authority to effectuate a traffic stop when a certified deputy directs him to make the stop. **[CD 12/08/15, 2:50:00-30]** As it pertains to this case, the State conceded that as a reserve deputy, Reserve Deputy Thompson did not have statutory authority to detain Defendant. **[CD 12/08/15, 2:35:30-36:15]**

Reserve Deputy Thompson was on duty and on patrol on Highway 41 just before midnight on March 15, 2014, a day before the upcoming St. Patrick's day holiday. **[CD 12/08/15, 2:19:50-20:10; 2:39:20-30]** He was dressed in a uniform, displaying a badge of office stating "Deputy R. Thompson" embroidered onto his shirt, and driving a marked patrol vehicle of the Torrance County Sheriff's Office. **[CD 12/08/15, 2:20:10-25; 2:48:45-49:45]**

Reserve Deputy Thompson was driving the posted speed limit, 55 MPH, and traveling southbound on Highway 41. **[CD 12/08/15, 2:20:25-55]** Through his rear

view mirror, he observed two vehicles traveling in the same direction and which appeared to be traveling in excess of the posted speed limit based on the fact that the vehicles were gaining ground on his patrol vehicle. **[Id.]** He noticed that one of the vehicles was weaving back and forth on the highway. **[Id.**; ***see also*** **2:21:10-22:00]** Reserve Deputy Thompson pulled his patrol vehicle off to the side of the road and into the dirt, off the edge of the highway. **[CD 12/08/15, 2:21:30-22:10]**

As Reserve Deputy Thompson was parked off the highway, one of the two vehicles, Defendant's Dodge truck, crossed the white edge line of the highway and almost struck Reserve Deputy Thompson's patrol vehicle, coming so close that it rattled his mirrors. **[CD 12/08/15, 2:21:55-22:30]** Reserve Deputy Thompson immediately began following Defendant and noticed that she was weaving and crossing the center line and edge line of the highway. **[CD 12/08/15, 2:22:25-50]** Reserve Deputy Thompson clocked Defendant at 68 MPH as she passed his patrol vehicle, and, in order to pursue Defendant, he sped up to around 80 MPH and had to pass the second vehicle that was following behind Defendant to catch up. **[CD 12/08/15, 2:40:55-42:05; 2:42:48-55]** Reserve Deputy Thompson would have conducted a traffic stop if a vehicle was approaching from the opposite direction in order to prevent a head-on collision with Defendant. **[CD 12/08/15, 2:22:50-23:00]** Fortunately, he did not have to initiate a traffic stop or engage his emergency lights.

[CD 12/08/15, 2:24:00-35] As he was following Defendant, he ran the license plate confirming Defendant's address. **[CD 12/08/15, 2:23:00-35]** After following Defendant for about one-and-one-half miles, Defendant turned off the highway onto another road, and Reserve Deputy Thompson continued following Defendant. **[CD 12/08/15, 2:23:00-20]**

While these events were occurring, Reserve Deputy Thompson was on the phone with Deputy Ron Fulfer, who was the only deputy on duty in Torrance county that night. **[CD 12/08/15, 2:23:20-35; 2:42:05-50; 2:50:15-35]** Reserve Deputy Thompson advised Deputy Fulfer of his observations regarding Defendant and requested his assistance. **[Id.]** Deputy Fulfer told Reserve Deputy Thompson that he was en route, directed Reserve Deputy Thompson to follow Defendant, and that "he would be right there." **[CD 12/08/15, 2:42:25-50; 2:50:30-45]**

Defendant pulled into the driveway of her home, and Reserve Deputy Thompson parked on the street and off Defendant's property. **[CD 12/08/15, 2:23:35-24:00]** As she was pulling into her driveway, Defendant struck another vehicle parked in her driveway, causing a paint transfer between the vehicles. **[Id.; *see also* 2:24:42-55; 2:46:20-35]** Defendant then put her vehicle in reverse, started backing up, and almost struck Reserve Deputy Thompson's patrol vehicle on the street. **[CD 12/08/15, 2:24:42-59]** At this point, Reserve Deputy Thompson

spotlighted Defendant's vehicle for safety purposes and approached Defendant's vehicle on foot. **[CD 12/08/15, 2:24:55-25:25]**

Defendant was seated in the driver's seat of her vehicle and the lights and engine were on. **[CD 12/08/15, 2:25:25-50]** Reserve Deputy Thompson introduced himself as a Torrance County reserve deputy and asked Defendant if she was okay. **[CD 12/08/15, 2:25:50-26:45]** He then stated that he saw Defendant strike the vehicle in the driveway and almost back into his patrol vehicle, to which Defendant responded "That's my vehicle, I can hit it if I want to." **[Id.]** Reserve Deputy Thompson noticed a strong odor of alcohol on Defendant, asked if she had been drinking that night, to which Defendant responded that she had four green beers. **[Id.]** Reserve Deputy Thompson asked Defendant if she could "hang tight for [him] because [he] had another deputy en route." **[CD 12/08/15, 2:26:40-27:00]** Reserve Deputy Thompson did not ask Defendant to exit her vehicle, asked no further questions, did not request Defendant's license or registration, and simply retreated and sat in his patrol car while waiting for Deputy Fulfer to arrive. **[CD 12/08/15, 2:26:40-27:20]** Deputy Fulfer arrived at Defendant's residence within 4-5 minutes. **[Id.]** Until Deputy Fulfer's arrival, Reserve Deputy Thompson "s[at] on the situation" in his patrol vehicle **[Id.]**

The District Court's Ruling

At the conclusion of the suppression hearing, the district court stated that it was inclined to rule in favor of Defendant and grant the motion to suppress under Article II, Section 10. **[CD 12/8/15, 2:52:15-53:10]** It directed the parties to submit proposed findings of fact and conclusions of law and any additional briefing. **[CD 12/8/15, 2:55:00-57:25; see also RP 196-204 (State's Proposed Findings of Fact & Conclusions of Law); 189-195 (Defendant's Proposed Findings of Fact and Conclusions of Law]**

The district court issued findings of fact and conclusions of law. **[RP 207-210]** The district court determined that Reserve Deputy Thompson's detainment of Defendant pending arrival of Deputy Fulfer was a statutorily unlawful "arrest," concluding that (1) Reserve Deputy Thompson detained Defendant and she was not free to leave, **[RP 209, ¶ 1]** (2) the term "arrest" in Section 66-8-124(A) includes a temporary detention, **[RP 209, ¶ 3]** (3) Reserve Deputy Thompson lacked statutory authority under Section 66-8-124(A) to "arrest" Defendant because he is not is not a sworn, certified, salaried, full-time law enforcement officer, **[RP 209, ¶¶ 2, 4]** and (4) Reserve Deputy Thompson was a state actor because he was acting in his capacity as a reserve deputy for the Torrance County Sheriff's Office. **[RP 209, ¶ 5]**

The district court next concluded that the statutorily unauthorized arrest did not violate the Fourth Amendment of the United States Constitution pursuant to *State*

v. Slayton, 2009-NMSC-054, 147 N.M. 340. **[RP 210, ¶ 7]**[2] However, the district court found that Reserve Deputy Thompson's seizure of Defendant violated Article II, Section 10 of the New Mexico Constitution. **[RP 210, ¶ 8]** The district court accordingly suppressed all "[e]vidence obtained after Deputy Fulfer arrived on scene." **[RP 210, ¶ 12; 226 (Order)]**

The district court based its decision that the seizure violated Article II, Section 10 exclusively on the fact that Reserve Deputy Thompson's brief seizure of Defendant was statutorily unauthorized. **[RP 209-10, ¶¶ 1-8]** At the suppression hearing, the district court indicated that a "constitutional barrier" was necessary in order to deter reserve deputies from making statutorily unauthorized arrests or detainments. **[CD 12/8/15, 2:53:10-57:24]** The district court was concerned that Reserve Deputy Thompson did not appear to know the limits of his authority as a reserve deputy and is "getting in some shady or sketchy situations." **[Id.]** Accordingly, the district court made a "policy decision" that a seizure violating Section 66-8-124(A) is a violation of Article II, Section 10. **[Id.; RP 209-10, ¶¶ 1-8]** These oral pronouncements were not contained in the written findings and conclusions.

Court of Appeals' Opinion

[2]Defendant agreed with the district court at the suppression hearing that Reserve Deputy Thompson's seizure of Defendant did not violate the Fourth Amendment. **[CD 12/08/15, 2:52:20-30]**

The Court of Appeals reversed the district court, in a 2-1 decision. It applied the Article II, Section 10 balancing test that it had previously applied in analyzing the reasonableness of a statutorily-unauthorized seizure under the State Constitution. *Opinion*, ¶ 13. It concluded that the under the specific facts of the case, Reserve Deputy Thompson's temporary detention of Defendant was constitutionally reasonable. *Id.* The Court held that the intrusion on Defendant's privacy from the 4-5 minute seizure was "minimal." *Id.* It then determined that "the State's need to temporarily detain Defendant far outweighed whatever brief, minimal privacy intrusion that Defendant may have experienced." *Id.* ¶ 14. The Court reasoned that the State has a compelling interest in removing drunk drivers from its roadways and that exigent circumstances supported Reserve Deputy Thompson's temporary detention because it was necessary to avoid delay and complication of the DWI investigation and to prevent the risk that Defendant might have tried to drive away. *Id.* ¶ 14. Judge Vargas dissented. *Id.* ¶¶ 21-26 (Vargas, J., dissenting).

ARGUMENT

I. Standard of review

This Court's review of a district court's ruling on a motion to suppress involves a mixed question of fact and law. *State v. Rowell*, 2008-NMSC-041, ¶ 8, 144 N.M. 371. This Court "observe[s] the distinction between factual determinations

which are subject to a substantial evidence standard of review and application of law to the facts, which is subject to de novo review." *State v. Hubble*, 2009-NMSC-014, ¶ 5, 146 N.M. 70. This Court conducts a de novo review on the ultimate issue concerning the reasonableness of an alleged constitutional violation. *State v. Flores*, 1996-NMCA-059, ¶ 6, 122 N.M. 84.

II. The Court of Appeals correctly applied the standard of review

As an initial issue, Defendant contends the Court of Appeals "did not show appropriate deference to the district court's findings or draw reasonable inferences from those findings in favor of the court's ruling." **[BIC 15]** Defendant points to three facts that she argues were entitled to and did not receive deference from the Court of Appeals.

Defendant first contends that the Court of Appeals did not "defer to the district court's conclusion that [Reserve Deputy] Thompson had a history of overstepping his authority." **[BIC 15]** Defendant's argument is mispremised. The district court's written findings of fact and conclusions of law contained no finding that Reserve Deputy Thompson had overstepped his authority on other occasions. **[RP 207-201]** Defendant's argument focuses on a comment made by the district court at the conclusion of the hearing that it believed that Reserve Deputy Thompson had "done this on more than one occasion." **[BIC 15-16]** But the district court's musings occurred after it stated that it was inclined to rule in Defendant's favor but directed

the parties to submit proposed findings of fact and conclusions of law. The district court was not providing binding oral findings at that time and, in fact, had yet to determine whether Reserve Deputy Thompson's seizure was constitutionally reasonable. *See State v. Jaramillo*, 2004-NMCA-041, ¶¶ 16, 27, 135 N.M. 322 (recognizing that it is well settled that an oral ruling is merely evidence of what a judge intends to do, it is not binding, and it can be changed at any time before a written order is filed)

In fact, Defendant's proposed findings of fact and conclusions of law specifically asked the district court to find that (1) "Reserve Deputy Thomson has on prior occasions illegally detained other defendants without the proper authority and those detentions have been ruled illegal by other judges and courts. Reserve Deputy Thompson was on notice that he could not effectuate a traffic stop or detain defendants," and (2) "Reserve Deputy Thompson, despite being on notice of his inability to statutorily issue citations, make traffic stops or detain individuals, continued to do so as in this matter." **[RP 193]** The district court declined to include these findings in its findings of fact and conclusions of law. The Court of Appeals did not err in failing to give deference to a finding that the district court did not make.

Further, Reserve Deputy Thompson's "history" is not relevant and should not be considered as to whether his seizure of Defendant was reasonable in this case. Whether Reserve Deputy Thompson has effectuated unconstitutional traffic stops in

the past has no bearing on whether his actions on the night of Defendant's arrest were unreasonable.[3]

Defendant also contends that the Court of Appeals "was not free to suggest, contrary to the district court's finding that [Defendant] presented an ongoing danger because she might have driven off again after arriving at her home." **[BIC 16]** Defendant's argument focuses on an alternative legal rationale by the Court of Appeals. The Court of Appeals noted the State's compelling interest in removing drunk drivers from its roadways. It primarily held that the State's interest in ensuring Defendant's cooperation with the investigation and preventing her from entering her home created exigent circumstances in light of the nature of DWI evidence. *Opinion*, ¶ 14. Alternatively, it concluded that Defendant might have tried to drive away. *Id.* Although the district court found that Defendant would entered her home if not for the detention and Reserve Deputy Thompson testified that he did not subjectively believe that Defendant was going to flee, Defendant was actively DWI at time Reserve Deputy Thompson approached her vehicle – in other words, she was

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3 Further, the record does not support a finding that Reserve Deputy Thompson has a history of violating Section 66-8-124(A) or that he generally has a history of exceeding his authority. Although defense counsel questioned Reserve Deputy Thompson regarding two other cases, the record does not contain any information as to the exact basis for suppression and the specific facts of those cases except for the editorial comments from defense counsel. **[CD 12/8/15, 2:32:42-35:35]**

actively engaged in the crime and the detention was necessary to stop the criminal activity.

Defendant still had the keys in the ignition and the engine of her vehicle running. She was still inside the vehicle and had, just moments before, struck another vehicle in her driveway and almost backed into Reserve Deputy Thompson's patrol vehicle. Defendant, though she might have been on private property, was still committing the ongoing crime of DWI. *State v. Johnson*, 2001-NMSC-001, ¶ 1, 130 N.M. 6 ("After a careful and in-depth analysis . . . we reject any public/private property distinction with respect to the offense of DWI."); *id.* ("[T]he State may charge a person who is in actual physical control of a non-moving with DWI despite the fact that he or she is on private property."). The Court of Appeals did not err in determining that the State's compelling interest in this case was supported by ensuring that Defendant, who was still actively DWI, did not return to a public roadway or otherwise continue operating the vehicle and injure herself, others, or property.

Defendant lastly contends that the Court of Appeals "erred in rejecting the district court's finding that [Reserve Deputy] Thompson had acted in an unnecessarily aggressive[4] manner in pursuing and detaining [Defendant]." **[BIC**

4 The district court directly declined to characterize Reserve Deputy Thompson's pursuit in such language. The most tersely worded finding was that that he

17] But the Court of Appeals did not reject any factual findings. It is undisputed that Reserve Deputy Thompson increased his speed to over the speed limit, passed a vehicle, and followed Defendant. Defendant's argument as to his actions being "unnecessarily aggressive" is a legal application of these facts to a reasonableness analysis. No deference was required. Nor was the Court of Appeals incorrect in determining that Reserve Deputy Thompson's pursuit of Defendant did not make the ultimate seizure of Defendant unreasonable.

First, the pursuit is not germane to the ultimate question of whether Defendant's seizure was reasonable in light of Section 66-8-124(A). Section 66-8-124(A) does not, nor does any other authority, restrict a reserve deputy from following an intoxicated driver for the purpose of ensuring the safety of the motoring public. His conduct in following Defendant was independent of the challenged detention. There is nothing prescribing a reserve deputy from following a dangerous driver, monitoring the situation, and relaying information to law enforcement.

"immediately engaged in a high speed pursuit." **[RP 208]** The district court specifically rejected a finding requested by Defendant that he engaged in "further questionable and aggressive driving behavior." **[RP 191]** In contending that the Court of Appeals was not deferential to the district court's findings of fact, Defendant should accurately characterize the district court's findings especially here where the district court directly declined to characterize Reserve Deputy Thompson's as "aggressive."

Second, even if the pursuit should be considered, Reserve Deputy Thompson was justified in catching up to Defendant and following Defendant's vehicle to ensure that Defendant's intoxicated driving did not endanger other motorists. Reserve Deputy Thompson's conduct in following Defendant's vehicle furthered the interest of protecting the public and was not reckless conduct in derogation of public safety. **[CD 12/08/15, 2:16:05-18:05]** It was necessary for Reserve Deputy Thompson to follow Defendant's vehicle in order to monitor Defendant - who was speeding, swerving and failing to maintain her lane, and almost struck Reserve Deputy Thompson's vehicle as he was stopped completely off the paved shoulder of the highway. It was also necessary in order to relay information on Defendant's condition and provide Defendant's location to Deputy Fulfer and to effectuate an emergency traffic stop to prevent a head on collision, if necessary. **[CD 12/08/15, 2:20:25-22:50; 22:50-23:00]**

Although he had to speed and pass another driver to catch up, Reserve Deputy Thompson's actions were necessitated by Defendant's own speeding and the fact that he began following Defendant after accelerating from a fully stopped position off the highway. **[Id.]** To reason that an experienced, trained, and commissioned reserve deputy[5] is unjustified in positioning his marked patrol vehicle to monitor a

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[5]Contrary to Defendant's characterizations, Reserve Deputy Thompson is an experienced and highly trained reserve deputy. He is a 16 year veteran, passed the

potentially drunk driver speeding down a two-lane highway at night in furtherance of the interest of protecting the public is simply unsound and incorrect policy. *See* NMSA 1978, § 4-41-10 (2006) (providing authority for a sheriff to appoint reserve deputies "for the purpose of preserving the peace"); *Loya v. Gutierrez*, 2015-NMSC-017, ¶ 23, 350 P.3d 1155 ("Today, county sheriff's maintain that authority under New Mexico law to appoint special sheriff's deputies to preserve the public peace and to prevent and quell public disturbances[.]").

III. The Court of Appeals did not afford the statutory violation insufficient weight

Relying mainly on *State v. Bricker*, 2006-NMCA-052, 139 N.M. 513 Defendant contends that the Court of Appeals "accorded insufficient weight to the statutory violation that occurred in this case." **[BIC 18]** Defendant goes as far as to posit that the Court of Appeals "did not accord the violation of the statute in this case any significance." **[BIC 18]**

However, as an initial matter, the Court of Appeals afforded great weight to the statutory violation in this case. Its opinion cannot reasonably be characterized as downplaying the significance of statutory authority on law enforcement officers. The Court of Appeals appropriately cautioned that

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reserve academy, and participates in annual training that includes DWI-specific training.

> This is not to suggest that we are unsympathetic to Defendant's concerns, and we take this opportunity to warn law enforcement agencies that this opinion does not give them carte blanche to allow reserve deputies to detain motorists. Under New Mexico's case-by-case approach in reviewing claimed violations of Article II, Section 10, it is easy to envision a case involving a greater intrusion on a motorist's privacy than occurred here, or a less compelling state interest than existed here, either of which might be sufficient to justify suppression.

Opinion, ¶ 16. Here, Court of Appeals carefully noted that its holding was premised on the unique and specific facts of this case and that it was in no way empowering reserve deputies to violate the law.

Defendant relies primarily on *Bricker* in asserting that this Court should elevate violations of Section 66-8-124(A) to a "constitutional dimension." **[BIC 22]** But *Bricker* is inapposite and the facts of that case evinced a much greater intrusion on the defendant's privacy and a lesser-state interest to support that intrusion than this case.

In *Bricker*, 2006-NMCA-052, ¶¶ 1, 3-4 an officer placed the defendant under a full-blown custodial arrest for driving with a suspended license, and the defendant moved to suppress drug-related evidence found during booking procedures. The Court of Appeals concluded that the custodial arrest violated a statute that required the officer to issue a citation and release a defendant, not arrest a defendant, driving with a suspended license. *Id.* ¶¶ 8-14. The Court of Appeals went on to conclude, that "[h]owever, this holding alone does not resolve the question of whether the

evidence obtained from the search of [d]efendant's wallet should have been suppressed. That question requires an analysis of whether the unlawful custodial arrest violated the Fourth Amendment to the United States Constitution or Article II, Section 10 of our State Constitution." *Bricker*, 2006-NMCA-052, ¶ 14. Agreeing with the State's argument that "an arrest in violation of a statute does not elevate the issue to a constitutional level," the Court of Appeals proceeded to analyze the reasonableness of the arrest under both the framework of the federal and state constitution in determining whether suppression was warranted. *Id.* ¶¶ 15-30; *see also Slayton*, 2009-NMSC-054, ¶ 29 (analyzing *Bricker*). Although Bricker concluded that the statute in that case had constitutional significance, *Bricker* is clearly distinguishable because the offense at issue in that case (and therefore the State's interest) was minor and the statute at issue in that case barred full-blown-custodial arrests (which always results in a great intrusion on the privacy of the subject than a temporary detention). *Bricker* does not support elevating a violation of Section 66-8-124(A) to a "constitutional dimension."

Because constitutionality of a seizure depends on reasonableness analyzed on a case-by-case basis, the Court of Appeals appropriately considered the statute here, Section 66-8-124(A), in light of the specific intrusion on Defendant's privacy and the State's interest in the context of the offenses for which the statute is directed compared to the DWI offense for which Defendant committed. Section 66-8-124(A)

at issue in this case is dissimilar from *Bricker* in that it limits a broader range of seizures than did the statute in *Bricker* and also applies to offenses with varying degrees of punishment and classifications. Section 66-8-124(A) provides that

> No person shall be arrested for violating the Motor Vehicle Code or other law relating to motor vehicles punishable as a misdemeanor except by a commissioned, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating the peace officer's official status.

Although Section 66-8-124(A) is plainly limited to "arrest[s]," our appellate courts have construed the term arrest to include even temporary detentions for purposes of the statute. For example, this Court in *Slayton* recognized that "[a]s used in Section 66-8-124(A), the term 'arrest' does not refer solely to a custodial arrest or incarceration; it also includes a temporary detention." *Slayton*, 2009-NMSC-054, ¶ 19; *see also id.* ¶ 20 ("[L]egislative intent and previous New Mexico case law leads us to conclude that temporary detentions are covered under the term 'arrest' . . . and [a police service aid's] actions in detaining [d]efendant constitute an arrest under Section 66-8-124(A)."). By using the term "arrest," however, the Legislature indicated that its primary concern in enacting Section 66-8-124(A) was to protect citizens from intrusive custodial arrests by officers lacking the proper credentials. Because there is a wide degree of officer conduct that is covered under Section 66-8-124(A) that create varying levels of intrusions on a subject's privacy, the Court of Appeals appropriately did not elevate a violation of Section 66-8-124(A) to a per se

"constitutional dimension." After all, the constitutionality of a seizure requires a balancing of the intrusion on a defendant's privacy with the State's interest furthered by the seizure. A court must look into the specific nature of the intrusion in order to properly apply this test.

The Court of Appeals' treatment of the statute is consistent with our policy that reasonableness is determined on a case-by-case basis and that bright-line rules are disfavored. *See State v. Rodarte*, 2005-NMCA-141, ¶ 13, 138 N.M. 668 ("New Mexico courts have avoided bright-line per se rules, and "each case must be reviewed in light of its own facts and circumstances."). Defendant asks this Court to set a bright-line rule based on a prior case (*Bricker*) involving only the common fact of a statutorily unauthorized seizure while failing to appreciate the substantial differences between the intrusion on privacy (five minute detention v. full blown custodial arrest) as well as the State's interest (minor traffic infraction v. DWI, an offense for which the State has a compelling interest) between this case and *Bricker*.

Second, the Court of Appeals also appropriately took the offense for which Defendant was suspected of committing into account when examining the gravity of the statutory violation in this case. Section 66-8-124(A) prevents reserve deputies from arresting those suspected of "violating the Motor Vehicle Code or other law relating to motor vehicles punishable as a misdemeanor." It is plainly geared toward minor misdemeanor offenses, essentially traffic offenses. DWI on the other hand has

been recognized by our Courts as not a minor offense and has often been treated as a felony for constitutional purposes. *See City of Martinez v. Santa Fe*, 2010-NMSC-033, ¶ 13, 148 N.M. 708 ("Given the compelling public interest in eradicating DWI occurrences and the potentially deadly consequences, the crime of DWI should be treated as a felony for purposes of warrantless arrests[,]" excusing the in presence requirement of the misdemeanor arrest rule); *State v. Nance*, 2011-NMCA-048, ¶¶ 7, 13-17, 149 N.M. 644 (upholding a warrantless arrest occurring at the defendant's home where the officer had probable cause that the defendant had committed DWI based partially on reasoning that DWI is not a minor offense). Further, depending on the number of previous DWI convictions that the intoxicated driver has incurred, a DWI may be a felony offense, which would not violate the statute and for which a reserve deputy would have no ability to determine prior to a seizure. NMSA 1978, § 66-8-102(G) (2016). Considering that DWI is an arrestable offense, a major offense, a felony for constitutional purposes, and can actually be classified as a felony that would not violate Section 66-8-124(A), the Court of Appeals was correct in not giving the statutory violation dispositive effect in this case involving a DWI.

Defendant also seeks to distract from the minimal intrusion in this case by pointing to the "evident" "danger of individual liberties and safety presented by citizen arrests, vigilantism, or citizens exercising police powers," citing media articles and a case involving a "citizen's arrest" that discusses "vigilantism." **[BIC**

20-21] But here, Reserve Deputy Thompson was an experienced and trained reserve deputy recognized by New Mexico statutory law. *See* Section 4-41-10 (providing authority for a sheriff to appoint reserve deputies for the purpose of preserving the peace); *Loya*, 2015-NMSC-017, ¶ 23 ("Today, county sheriff's maintain that authority under New Mexico law to appoint special sheriff's deputies to preserve the public peace and to prevent and quell public disturbances[.]"). More importantly, the Court of Appeals' opinion is narrowly decided on the specific facts of this case and does not stand for the proposition that reserve deputies can flagrantly violate statutory authority without constitutional consequences. The warnings in the opinion make that point clear. Contrary to Defendant's concerns, it is hard to imagine any set of facts that would allow a reserve deputy to make a custodial arrest (even for a DWI) or a seizure involving a greater intrusion that would pass constitutional muster. *Bricker* and *Rodarte* as well as the opinion in this case would present a tough hurdle for the State to overcome to justify such an arrest.

Because of the wide range of seizures that are included in our appellate court's interpretation of the term arrest in Section 66-8-124(A) and because a DWI is not a minor offense for constitutional purposes, the Court of Appeals rightfully looked closely at the minimal nature of the intrusion on Defendant's privacy interest while stressing that reserve deputies must refrain from exceeding statutory authority. It

concluded that under the circumstances of this case, Reserve Deputy Thompson's seizure of Defendant was reasonable.

IV. Reserve Deputy Thompson's brief, minimally intrusive seizure was reasonable under Article II, Section 10 of the New Mexico Constitution

Left without reliance on her perceived errors regarding deference to factual findings and the weight the Court of Appeals assigned to the statutory violation, the only issue remaining is whether the Court of Appeals correctly applied the balance of interest approach pursuant to Article II, Section 10. Generally, under Article II, Section 10, "New Mexico courts have consistently rejected bright-lines rules in favor of an examination into the reasonableness of officer's actions under the circumstances of each case." *State v. Ochoa*, 2009-NMCA-002, ¶ 24, 146 N.M. 32. As it applied in this case, our Court of Appeals previously adopted a two-part test for examining whether a statutorily unauthorized arrest is unreasonable under Article II, Section 10. The Court of Appeals adopted the test enunciated in Justice O'Connor's dissenting opinion in *Atwater v. City of Largo Vista*, 532 U.S. 318, 361 (2001). *See Rodarte*, 2005-NMCA-141, ¶¶ 1, 8. The majority in *Atwater* held that the Fourth Amendment was not violated by a statutorily unauthorized custodial arrest for a seatbelt violation because the arrest was supported by probable cause. *Id.* at 323. However, in her dissent, Justice O'Connor would have applied a balancing test to determine the reasonableness of the arrest. Specifically, reasonableness

should be determined by balancing "the degree to which [the arrest] intrudes upon an individual's privacy" and "the degree to which [the arrest] is needed for the promotion of legitimate governmental interests." *Id.* at 361 (O'Connor, J. dissenting). The latter is the rule that New Mexico applies in examining the reasonableness of statutorily unauthorized arrests under Article II, Section 10. *See Rodarte*, 2005-NMCA-141, ¶¶ 1, 8; *Bricker*, 2006-NMCA-052, ¶ 26.

Applying the balancing test, the Court of Appeals correctly determined that Reserve Deputy Thompson's temporary detention of Defendant was reasonable under Article II, Section 10 of the New Mexico Constitution. First, the Court of Appeals correctly determined that the degree of intrusion on Defendant's privacy was minimal under the specific facts of the case. Defendant was not seized until Reserve Deputy Thompson asked her to "hang tight" in her driveway. Deputy Fulfer arrived on scene 4-5 minutes later. Therefore the seizure was only 4-5 minutes in duration. *See State v. Ryder*, 1981-NMCA-017, ¶ 13, 98 N.M. 453 (determining that a tribal officer's 10 minute detention of a non-indian, for which he could not arrest for violating state law, was reasonable where the purpose of the seizure was to wait for the assistance of a state police officer); *Cf. State v. Sewell*, 2009-NMSC-033, ¶ 17, 146 N.M. 428 (noting that no New Mexico court has held that a ten-minute detention is intrusive enough to give rise to a de facto arrest under any set of circumstances); *State v. Skippings*, 2014-NMCA-117, ¶ 25, 338 P.3d 128 (same).

The manner in which Reserve Deputy Thompson seized Defendant was non-invasive in nature. Reserve Deputy Thompson did not use handcuffs, force, did not immobilize Defendant in any manner, or did not otherwise use any physical restraints on Defendant. *Cf. Skippings*, 2014-NMCA-117, ¶¶ 18, 20-21 (addressing the use of handcuffs as an intrusion on a detainee's liberty that could lead to an investigatory detention becoming a de facto arrest). Reserve Deputy Thompson's manner of seizing Defendant, merely politely asking her to "hang tight," while Deputy Fulfer was en route, was minimally intrusive.

Reserve Deputy Thompson did not remove Defendant from her vehicle, did not move Defendant's person in any way, and the entire seizure took place as Defendant sat comfortably in her vehicle on her own driveway. *Cf. State v. Werner*, 1994-NMSC-025, ¶ 14, 117 N.M. 315 (noting that the back of a patrol car is not an ideal location for an investigative detention and that a detention in the back of a patrol car is a factor creating a more significant intrusion on a defendant's liberty). Further, after asking Defendant to "hang tight," Reserve Deputy Thompson retreated off Defendant's property and sat in his patrol car, which was parked on the street, until Deputy Fulfer arrived. *See Nance*, 2011-NMCA-048, ¶ 26 (holding that the intrusion on defendant's liberty resulting from officers waiting outside the defendant's home for 15 minutes unaccompanied by a show of any force was de minimis)

Moreover, Reserve Deputy Thompson's seizure did not include a search or further investigation of Defendant. After asking Defendant to "hang tight," Reserve Deputy Thompson did not conduct a search of Defendant's vehicle or person, did not ask any additional questions, and did not even ask Defendant for her license and registration. He merely "s[at] on the situation," away from Defendant, and off Defendant's property until Deputy Fulfer arrived on the scene. *See Ryder*, 1981-NMCA-017, ¶¶ 2-3, 13-14 (detention effectuated by a tribal officer for purpose of waiting for the assistance of a state police officer with authority to search non-indian defendant for violations of state law was reasonable); *Nance*, 2011-NMCA-048, ¶ 26 (holding that the intrusion on defendant's liberty resulting from officers waiting outside the defendant's home for 15 minutes unaccompanied by a search was de minimis).

Moreover, as discussed more fully in Section I.B., the Court of Appeals was correct in not weighing Reserve Deputy Thompson's initial pursuit of Defendant as weighing against the reasonableness of the ultimate seizure. First, the pursuit is not relevant to the ultimate question of whether Defendant's 4-5 minute seizure was reasonable in light of Section 66-8-124(A) because a subject driving on a public highway has no expectation of privacy from observation. Second, Reserve Deputy Thompson's actions in following Defendant were justified and the only reasonable alternative under the circumstances. Even after observing Defendant speeding,

weaving in her lane of travel, almost hitting his patrol vehicle, and crossing over the edge line and center line of the highway, Reserve Deputy Thompson did not conduct a traffic stop. Reserve Deputy Thompson merely followed Defendant's vehicle, ensured that she did not endanger any vehicles traveling northbound, and allowed Defendant to make it home unimpeded. Reserve Deputy Thompson showed restraint is his actions and refrained from actions that could have been more of an intrusion on Defendant's privacy while monitoring the situation to prevent a head-on collision and potential tragedy.

Reserve Deputy Thompson's 4-5 minute detention was minimally invasive on Defendant's privacy. *Compare Rodarte*, 2005-NMCA-141, ¶¶ 1, 4 (addressing a full-blown custodial arrest for minor, non-jailable offenses); *Bricker*, 2006-NMCA-052, ¶¶ 1, 2 (addressing full-blown custodial arrest for traffic violation where a statute required a citation and release).

Second, the Court of Appeals correctly concluded that "under the circumstances of this case, the State's need to temporarily detain Defendant far outweighed whatever brief, minimal privacy intrusion that Defendant may have experienced." *Opinion*, ¶ 14 (emphasis added). Our courts have long recognized that "the public's interest in deterring individuals from driving while intoxicated is compelling.' *Martinez*, 2010-NMSC-033, ¶ 13, 148 N.M. 708 (*quoting State v. Harrison*, 1992-NMCA-139, ¶ 18, 115 N.M. 73). This interest "is due to the dangers

of the practice, not only to those who operate the motor vehicles while under the influence, but also to those innocent individuals who are injured or killed as a result of DWI accidents." *Id.*; *see also Martinez*, 2010-NMSC-033, ¶ 13, 148 N.M. 708 ("[N]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion." (*quoting Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444 (1990))

Based on this compelling interest, our courts have declared that DWI is not a "minor crime" and have treated DWI as a major offense in evaluating the constitutional reasonableness of law enforcement action in the DWI context. *Id.; see id.* ("Given the compelling public interest in eradicating DWI occurrences and the potentially deadly consequences, the crime of DWI should be treated as a felony for purposes of warrantless arrests[,]" excusing the in presence requirement of the misdemeanor arrest rule); *Nance*, 2011-NMCA-048, ¶¶ 7, 13-17 (upholding a warrantless arrest occurring at the defendant's home where the officer had probable cause that the defendant was DWI based partially on reasoning that DWI is not a minor offense). Likewise, our Legislature has declared a policy permitting DWI-related arrests as an exception to the general rule that an officer must cite and release an individual who commits misdemeanor violations of the Motor Vehicle Code. *See Bricker*, 2006-NMCA-052, ¶¶ 8-10, NMSA 1978, § 66-8-122(B), (G) (1985). The

compelling State interest in deterring and eradicating DWI strongly supports the reasonableness of Reserve Deputy Thompson's brief seizure of Defendant based on probable cause that Defendant was DWI.

The Court of Appeals was also correct in concluding that probable cause that Defendant was DWI created exigent circumstances under the facts of this case. *Opinion*, ¶ 14. Deputy Fulfer would not have been able to enter Defendant's home without obtaining a warrant, and the district court found that Defendant's compliance with a subsequent DWI investigation was speculative. **[RP 210]** *See Nance*, 2011-NMCA-048, ¶ 23 (dissipation of alcohol alone does not justify warrantless entry into a home). Thus, the detention was necessary to ensure compliance and preserve the DWI evidence, a rationale consistent with Article II, Section 10 caselaw. *See Martinez*, 2010-NMSC-033, ¶ 15 ("Also, given the time sensitive nature of the evidence inherent in DWI investigations, the requirement that an officer observe the offense in order to make a warrantless arrest would seriously hinder such investigations and would make it very difficult for subsequent prosecutions."); *id.* ¶ 13 (using this rationale to exempt DWI from the misdemeanor arrest rule in presence requirement); *Nance*, 2011-NMCA-048, ¶ 26 ("Furthermore, this slight intrusion was well-tailored to the exigency in this case - that evidence material to the DWI case police were investigating was dissipating."); *see also City of Las Cruces v. Sanchez*, 2009-NMSC-026, ¶ 15, 148 N.M. 315 (holding that an

officer's arrest authority under Section 66-8-125(A)(1) permits officers to arrest an individual who is removed from the scene of an accident before officers arrive to investigate based on the reasoning that "evidence of intoxication fades over time, officers must promptly locate and investigate an individual suspected of DWI.").

Further, the Court of Appeals correctly reasoned that the State's interest was, alternatively, supported because Defendant might have driven away. Although the district court found that Defendant would have entered her home, at the time of the temporary detention, Defendant was still actively DWI. *See Johnson*, 2001-NMSC-001, ¶ 1 ("After a careful and in-depth analysis . . . we reject any public/private property distinction with respect to the offense of DWI."); *id.* ("[T]he State may charge a person who is in actual physical control of a non-moving with DWI despite the fact that he or she is on private property."). She was still in the midst of her criminal activity. Moments before, she had hit a parked vehicle in her driveway and almost backed into Reserve Deputy Thompson's patrol vehicle. Reserve Deputy Thompson's detention, even though he may not have believed that Defendant intended to flee, was objectively reasonable to ensure that Defendant did not reenter a public roadway and further endanger the innocent public and to stop the ongoing criminal activity.

Moreover, as a matter of policy, a holding that a seizure in violation of Section 66-8-124(A) is a per se violation of Article II, Section 10, as Defendant essentially

argues in this case, would undermine the State's substantial interest in allowing county sheriffs to supplement its police forces with volunteer, reserve deputies. Our Legislature has granted county sheriffs authority to appoint deputies. *See* NMSA 1978, § 4-41-5 (1975) ("The sheriffs in all the counties of this state shall have the power to appoint deputies, who shall remain of office at the pleasure of such sheriffs[.]"). In addition to full-time, salaried deputies, our Legislature granted sheriffs authority "to appoint any respectable and orderly persons as special deputies to serve any particular order, writ[,] or process or when in the opinion of any sheriff the appointment of special deputies is necessary and required for the purpose of preserving the peace." Section 4-41-10; *see also Loya*, 2015-NMSC-017, ¶ 23 ("Today, county sheriffs maintain that authority under New Mexico law to appoint special sheriff's deputies to preserve the public peace and to prevent and quell public disturbances[.]"). As Defendant conceded below, Reserve Deputy Thompson is a commissioned special deputy pursuant to Section 4-41-10. **[CD 12/8/15, 2:30:50-31:25 (conceding that Reserve Deputy Thompson is commissioned as per the "reserve statute")**. He attended the New Mexico Reserve Academy and participates in annual training in his capacity as a special deputy. **[12/8/15, 2:18:05-20; 2:28:50-29:45]** He was acting within his capacity as a special deputy during the events involving Defendant. **[RP 209, ¶ 5]**

In light of Reserve Deputy Thompson's commission as a special deputy and in light of the broad authority a county sheriff can confer upon a special deputy to maintain the public peace and prevent and quell public disturbances, if this Court were to hold that a 4-5 minute, minimally intrusive seizure supported by probable cause of DWI is a per se Article II, Section 10 violation as a matter of policy, such a holding would conflict with the countervailing public policy allowing and favoring the use of volunteer sheriff deputies to supplement a sheriff's force to protect the safety of the public. This is especially true in a large county with little population density such as Torrance County. As Reserve Deputy Thompson testified, Deputy Fulfer was the only full-time deputy on duty in Torrance County the evening of Defendant's seizure, showing the necessity to allow reserve deputies to take minimally intrusive steps to maintain the public peace and assist in investigating crimes. This Court should not fashion a constitutional rule per se prohibiting a reserve deputy from effectuating a 4-5 minute, unintrusive temporary detention occasioned by the need to wait for a certified deputy to arrive on scene. *See Ryder*, 1981-NMCA-017, ¶¶ 2-3, 13-14 (detention effectuated by a tribal officer for purpose of waiting for the assistance of a state police officer with authority to search non-Indian defendant for violations of state law was reasonable).

In sum, under the specific facts and circumstances, Reserve Deputy Thompson's 4-5 minute, minimally intrusive seizure of Defendant was reasonable

under Article II, Section 10. Reserve Deputy Thompson had probable cause that Defendant was DWI, an offense that created an exigency to detain Defendant and an offense for which the State has a compelling State interest to prosecute and eradicate. The intrusion on Defendant's liberty was de minimis, as she was not searched, not restrained, not removed from her vehicle, and she remained seated in her vehicle in her own driveway while Reserve Deputy Thompson retreated from her property and sat in his patrol car during the entirety of the seizure, which only lasted a mere total of 4-5 minutes. The purpose of the seizure, to simply wait for the arrival of a certified deputy whose assistance was requested, supports the reasonableness of the seizure. Additional considerations such as Reserve Deputy Thompson's experience, training, and commissioned status as a special deputy, his lack of a reasonable alternative short of releasing Defendant, and that he was in communication with, and directed to follow Defendant by, the only salaried, certified deputy on duty in Torrance County that evening, further support the reasonableness of the seizure.

CONCLUSION

The State of New Mexico respectfully requests that this Court quash its writ of certiorari or, alternatively, issue an opinion affirming the Court of Appeals on the merits.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2019, I filed the foregoing brief electronically through the Odyssey/E-File & Serve System, which caused opposing counsel to be served by electronic means.

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