IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Respondent,

vs. **S-1-SC-37589**

SOMER WRIGHT,

Defendant/Petitioner.

ON CERTIORARI REVIEW TO THE
NEW MEXICO COURT OF APPEALS

DEFENDANT/PETITIONER'S BRIEF IN CHIEF

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
TORRANCE COUNTY, NEW MEXICO
THE HONORABLE MATTHEW G. REYNOLDS, PRESIDING

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INTRODUCTION

In *State v. Slayton*, 2009-NMSC-054, 147 N.M. 340, this Court addressed the question of whether a seizure conducted by a Public Service Aide (PSA) in violation of NMSA 1978, Section 66-8-124(A) (2007)—limiting such detentions to certified and salaried law enforcement officials—was a *per se* violation of the Fourth Amendment. Noting that the preeminent concern for Fourth Amendment purposes is whether probable cause exists to justify the seizure, this Court held that an illegal arrest or detention in violation of Section 66-8-124(A) is not a *per se* violation of the Fourth Amendment. 2009-NMSC-054, ¶¶ 30-33. This Court left open the possibility that a seizure done in violation of Section 66-8-124(A) could be unconstitutional under Article II, Section 10 of the New Mexico Constitution. 2009-NMSC-054, ¶ 1.

Reaching the issue left open by this Court in *Slayton*, the district court judge in this case concluded that Somer Wright's detention by volunteer Reserve Deputy Roy Thompson, done in direct violation of Section 66-8-124(A), was an unreasonable detention under Article II, Section 10. In reaching its decision, the district court considered the importance of Section 66-8-124(A) as well as the manner in which the volunteer deputy executed the detention in this case. Bothered by the volunteer deputy's aggressive conduct in pursuing and detaining Ms. Wright, the absence of an adequate justification for the volunteer deputy's unlawful detention, and the fact the volunteer deputy had violated this statute in the past, the

court deemed Ms. Wright's detention constitutionally unreasonable and suppressed the evidence resulting from it.

The State appealed and the majority opinion in the Court of Appeals reversed the district court's ruling. *State v. Wright*, 2019-NMCA-____, ___ P.3d____, No. A-1-CA-35497, slip op. (N.M. Ct. App. Feb. 14, 2019). In doing so, the majority purported to weigh the government's interests against the intrusion on Ms. Wright's privacy interests in accordance with the balancing test from *State v. Bricker*, 2006-NMCA-052, 139 N.M. 513. Yet, as Judge Vargas' dissent pointed out, the majority did not defer to the district court's factual findings or consider the important societal interests served by Section 66-8-124(A).

When the *Bricker* balancing test is applied to the facts found by the district court and with due regard to the statutory interests at stake, suppression of the evidence for the unlawful detention of Ms. Wright was warranted. The Court of Appeals' majority opinion should be reversed and the district court's order suppressing evidence should be affirmed.

FACTUAL & PROCEDURAL SUMMARY

On March 17, 2014, Somer Wright was charged with aggravated driving while intoxicated (first offense) under NMSA 1978, Section 66-8-102 (2010); the charge was later amended to DWI (first offense) on December 18, 2015. **[RP 2, 57, 187]** The case was originally filed in the Moriarty magistrate court and Ms. Wright

initially sought suppression there. **[RP 92-93]** Despite prevailing on the suppression issue in the magistrate court, the State filed a *nolle prosequi* on March 20, 2015, and refiled the case in district court hoping to obtain a faster trial date. **[RP 1, 62, 64-65]**; **[12/01/15 CD 1:41:34, 1:57:43]** When district court Judge Kevin Swazea informed the State that the district court would not be able to try the case before the rule expired, the State had the case briefly and improperly remanded to the magistrate court. **[RP 12-13]**; **[12/01/15 CD 2:04:56]**; **[12/08/15 CD 2:09:32]** The case was again sent to the district court due to the disputed remand order. **[RP 14]** Judge Swazea recused himself and, after the defense excused the next judge, the case was transferred to district court Judge Matthew G. Reynolds. **[RP 126, 128-29]**

Ms. Wright's Motion to Suppress

The defense filed a Motion to Suppress in district court, arguing that volunteer Reserve Deputy Roy Thompson's detention of Ms. Wright was illegal and that suppression of the evidence obtained as a result of that illegal detention was warranted under the Fourth Amendment and Article II, Section 10 of the New Mexico Constitution. **[RP 171-72]**

Citing *State v. Slayton*, 2009-NMSC-054, 147 N.M. 340, the State responded that the unlawful detention which occurred was not a violation of the Fourth Amendment. **[RP 177]** The State further argued that the detention was not an unreasonable seizure under Article II, Section 10 of the New Mexico Constitution

because volunteer deputy had acted as any reasonable citizen would when confronted with a person suspected of driving under the influence of intoxicating liquor, making his conduct constitutionally reasonable. **[RP 177-78]**

The Suppression Hearing

At the hearing on Ms. Wright's suppression motion, the State presented testimony from Torrance County Reserve Deputy Roy Thompson. **[12/08/15 CD 2:15:45]** Thompson testified that he had been a volunteer reserve deputy with the Torrance County Sheriff's Department for fifteen to sixteen years. **[*Id.* 2:15:57-2:19:48]** He was appointed by the Torrance County Sheriff and worked at the pleasure and instruction of the deputies. **[*Id.* 2:17:34]**

Thompson stated that he had graduated from the police academy several years ago, but later clarified that he had attended the reserve deputy academy—a series of classes put on by various law enforcement entities in New Mexico—but had not attended the New Mexico law enforcement academy. **[*Id.* 2:17:11, 2:28:55-2:30:05];** *cf.* NMSA 1978, § 29-7-7(A) (2015) (defining "academy" for purposes of the Law Enforcement Training Act as referring to the New Mexico law enforcement academy). He testified that he received annual training and was a commissioned reserve officer or "special deputy," but not a certified or salaried police officer. **[*Id.* 2:16:33-2:17:34, 2:18:09]**; *cf.* NMSA 1978, §§ 4-41-5 (1975); 4-41-10 (2006) (allowing appointment of "special deputies"); NMSA 1978, § 29-1-9 (2006) (citizen

certification). Thompson admitted that he drove a Torrance County Sherriff's Department vehicle and both his uniform and his badge of office identified him as a deputy with the Torrance County Sheriff's Department; thus, an individual essentially had no way of knowing that there were any limits on his authority. **[*Id.* 2:31:02, 2:48:26-2:49:48]** When asked about the limits on his authority to conduct traffic stops, Thompson explained his understanding that he was permitted to conduct traffic stops in emergency situations or at the specific direction of a certified Sheriff's deputy. **[*Id.* 2:32:26, 2:42:33, 2:51:00]**

In reference to the events of March 15, 2014, Thompson testified that he was on duty that night, wearing his uniform and badge of office and driving a marked police unit. **[*Id.* 2:20:20]** At around midnight, Thompson was driving south on Highway 41 when he noticed two vehicles coming up behind him. **[*Id.* 2:20:20]** Thompson recalled that the first vehicle was a white Dodge pickup while the second was a green truck. Thompson said the white pickup truck's headlights appeared to be "going back and forth," **[*Id.* 2:20:26-2:21:00, 2:21:57]** Thompson pulled over to the side of the road to let the cars by since they were driving faster than the posted 55 mile per hour speed limit. **[*Id.* 2:20:39, 2:21:20]**

Thompson claimed that when the white Dodge pickup passed Thompson's car, it crossed the white edge line and nearly struck his vehicle. **[*Id.* 2:21:57]** In response, Thompson immediately pulled back onto the roadway and sped up to

around 80 miles per hour to catch up to the vehicles. **[*Id.* 2:22:25, 2:40:59-2:41:18]** Thompson called Torrance County Sheriff's Deputy Ron Fulfer on his cellular phone and was instructed to follow the pickup and only initiate a stop if he felt he needed to do so for safety reasons. **[*Id.* 2:23:26, 2:43:44, 2:50:35]**

Reserve Deputy Thompson pulled around the green truck to get behind the Dodge pickup, ran the license plate number, and continued following the vehicle. **[*Id.* 2:24:22, 2:42:51]** Thompson did not initiate a stop or activate his emergency equipment. **[*Id.* 2:24:00]** When the Dodge pickup turned and eventually pulled into the driveway of a private residence, Thompson parked his patrol unit on the street behind the pickup. **[*Id.* 2:23:42]** There was another car in the driveway of the residence which the pickup bumped, before reversing and, according to Thompson, nearly striking his vehicle again. **[*Id.* 2:24:47]**

Once the pickup was parked, Thompson turned his spotlight on the vehicle and approached the driver, who was later identified as Somer Wright. **[*Id.* 2:23:50]** Thompson did not record the encounter, but said that he identified himself as Reserve Deputy Roy Thompson with the Torrance County Sheriff's Department. **[*Id.* 2:25:57]** When he pointed out that Ms. Wright had hit the car parked in the driveway and nearly backed into his car, Thompson recalled Ms. Wright responding that it was her car and she could hit it if she wanted to. **[*Id.* 2:26:00]** Thompson asked her if she had been drinking and Ms. Wright said she had four green beers,

presumably in honor of St. Patrick's Day. **[*Id.* 2:26:08]** Thompson told her to sit tight because another deputy was en route. **[*Id.* 2:48:12, 2:48:24]** He did not tell her she was free to leave. **[*Id.* 2:48:20]** Ms. Wright remained in her car until Deputy Fulfer arrived four to five minutes later. **[*Id.* 2:27:00]**

During cross-examination, defense counsel questioned Thompson about two additional cases in which evidence had been suppressed as a result of his conduct; in one he had initiated a traffic stop, while in the other he had detained someone at a rest stop. **[*Id.* 2:32:42-2:35:34]** Thompson generally recalled the cases and that evidence had been suppressed in them, but could not recall the basis for the suppression. **[*Id.* 2:33:44, 2:34:41, 2:35:20]** Defense counsel offered to submit transcripts of the interviews in one of the proceedings, but the district court indicated that it did not need to review the transcripts for purposes of reaching a decision in this case. **[*Id.* 2:34:44]**

Referencing *Slayton*, the district court asked if the State would concede that Thompson lacked statutory authority to detain Ms. Wright. The State agreed. **[*Id.* 2:35:35]** The district court further observed that while the *Slayton* Court had found that a similar detention was not a violation of the Fourth Amendment, it had not reached the issue of whether the detention violated Article II, Section 10 of the New Mexico Constitution. **[*Id.* 2:30:14]** The district court asked defense counsel if he

was asking the court to reach that issue and defense counsel said he was. **[*Id.* 2:30:45]**

After Thompson testified, the district court indicated that it was inclined to agree with the defense and suppress the evidence resulting from Ms. Wright's unlawful detention under Article II, Section 10 of the New Mexico Constitution. **[*Id.* 2:55:01, 2:55:50]** The district court determined that Ms. Wright had been detained because Mr. Thompson used his authority to keep her in her car until the other deputy arrived. **[*Id.* 2:55:01]** Noting that "[Thompson] has done this on more than one occasion," the district court expressed concern about his pursuit in this case:

> We also have an issue of him speeding in a 55 mile per hour speed zone, and he admitted – or there is some issue of whether the roads were good or not. But it's 80 miles per hour in a 55 mile per hour zone.

[12/08/15 CD 2:53:08-2:54:08]

The district court suggested

> What he should have done is—like [Deputy Fulfer] said—is follow her. You don't have to speed after her. All he had to do was get her license number. And then he saw her go into her house and when the deputy arrived, he could have done what he had to do. He could have remained as a witness, but he injected himself as a deputy—as a commissioned deputy.

[*Id.* 2:54:08]

The district court believed that Mr. Thompson ardently wanted to be a salaried deputy, but recognized that he was not one. **[*Id.* 2:56:40]** Thus, "for the protection of everyone involved," the court felt it was necessary for volunteers like Thompson

to know and respect the legal limits placed on their authority. **[*Id.* 2:56:30]** Since Thompson and other volunteer reserve deputies were state actors with limited authority, as a "policy matter," there needed to be some deterrent "to the State's power of having these volunteer" reserve deputies illegally detaining and arresting people. **[*Id.* 2:53:08]** Accordingly, the district court felt suppression was necessary under Article II, Section 10 of the New Mexico Constitution. **[*Id.* 2:54:40]**

The District Court's Findings of Fact and Conclusions of Law

Following the suppression hearing, the parties filed proposed findings of fact and conclusions of law. **[RP 185-95]** (Defendant's); **[RP 196-204]** (State's). The district court filed its own findings of fact and conclusions of law on February 15, 2016. **[RP 207-10]** Among the district court's more salient findings of fact are the following:

- Reserve Deputy Thompson never has been and was not at any time a full time, sworn, salaried, commissioned sheriff's deputy, including while on his volunteer duty on March 15, 2014.

- The uniform of a reserve deputy and a sworn and salaried deputy are virtually identical.

- There is nothing to distinguish the marked patrol vehicle driven by a reserve deputy and one driven by a sworn salaried and commissioned law enforcement officer.

- While stationary, Reserve Deputy Thompson testified he saw two vehicles approach and claimed his patrol vehicle was almost struck by Defendant's vehicle while he was parked well off the roadway on Highway 41.

- Reserve Deputy Thompson immediately engaged in a high speed pursuit of Defendant's vehicle.

- Contemporaneously, Reserve Deputy Thompson contacted Deputy Fulfer via personal cell phone, who instructed him only to follow the vehicle.

- Although not engaging emergency lights and equipment, Reserve Deputy Thompson closely followed and pursued Defendant up and to her driveway.

- Reserve Deputy Thompson instructed Defendant "to stay put" in her vehicle until another deputy arrived.

- Reserve Deputy Thompson went back to his vehicle and "sat on the situation" until Deputy Fulfer arrived four (4) to five (5) minutes later.

[RP 207-09] The district court made the following conclusions of law:

- The Defendant was not free to leave and was detained by Reserve Deputy Thompson.

- Under 66-8-124(A) … Reserve Deputy Thompson's temporary detention of Defendant was without statutory authority.

- Reserve Deputy Thompson was on-duty, acting in his capacity as a reserve deputy for the Torrance County Sheriff's Office and assisting Deputy Fulfer in his duties. Therefore, Reserve Deputy Thompson was a state actor.

- The actions of Reserve Deputy Thompson resulted in an illegal detainment.

- Reserve Deputy Thompson's illegal "arrest" of Defendant did not violate the Fourth Amendment, pursuant to *State v. Slayton*, 2009-NMSC-054, 147 N.M. 340.

- Reserve Deputy Thompson's illegal detention of Defendant violated Article 2, Section 10 of the New Mexico Constitution.[1]

[1] The district court did not address, nor did the parties discuss, whether suppression of evidence was a necessary remedy under the statute itself. Insofar as additional evidence related to Thompson's history of violations (or of violations of the statute

- The State claimed inevitable discovery, but did not present any evidence to that effect.[2]

- From the totality of the circumstances, the Court finds that but for the illegal detention, Defendant would have gone inside her house before the certified deputy arrived four to five minutes after the illegal detention.

- Whether Defendant would have opened the door for the certified deputy, Deputy Fulfer, who later arrived on scene, and whether the deputy would have taken action afterwards to seek an arrest warrant or would have entered Defendant's home without permission is all speculative.

- Evidence obtained after Deputy Fulfer arrived on scene should be suppressed.

[RP 209-10] Notwithstanding the court's findings and conclusions, the parties disputed the language and practical effect of the district court's decision to suppress evidence, necessitating a presentment hearing on the order. **[RP 216-17]**

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elsewhere or by other reserve deputy's acting under Deputy Fulfer's direction) could impact the determination of the need for such a remedy, it does not appear that this Court must address this issue in the current appeal. *Cf. State v. Cooper*, 1998-NMCA-180, ¶ 21, 126 N.M. 500 (suggesting exclusionary rule may apply to violations of the Posse Comitatus Act (PCA) if the record establishes repeated violations of a statute); *State v. Ribe*, 876 P.2d 403, 413 (Utah 1994) (noting that bad faith in violating a knock-and-announce statute was one justification for suppressing evidence); *see generally* Francis Barry McCarthy, *The Exclusionary Rule as a Remedy in Pennsylvania Criminal Prosecutions for Non-constitutional Rights and Wrongs*, 65 TEMP. L. REV. 865 (1992) (discussing various tests or factors looked at including bad faith and the pervasiveness of violations).

[2] The State first raised the issue in its proposed findings, filed after defense counsel's proposed findings of fact and conclusions of law, and did not pursue the matter on appeal. **[RP 203]**

At the presentment hearing on April 5, 2016, the district court indicated that it was not suppressing all of the evidence, and the State indicated that it was prepared to try the case notwithstanding the excluded evidence. **[4/05/16 CD 1:38:11]** When defense counsel pointed out that the time limits appeared to have run, the district court told defense counsel to file a separate motion on that issue and that he would hold off on the trial setting to permit him to do so. **[*Id.* 1:40:45]**

The district court filed the Order Suppressing Evidence on April 11, 2016, and the State filed an interlocutory appeal. **[RP 226-28]**

The Court of Appeals Opinion

On appeal, the Court of Appeals issued a majority opinion reversing the district court's ruling. *State v. Wright*, 2019-NMCA-____, ___ P.3d____, No. A-1-CA-35497, slip op. (N.M. Ct. App. Feb. 14, 2019). Drawing from the balancing test set out in *State v. Rodarte*, 2005-NMCA-141, 138 N.M. 668,[3] and applied to a similar statutory violation in *State v. Bricker*, 2006-NMCA-052, 139 N.M. 513, the majority recognized that a statutory violation could give rise to an unreasonable detention under Article II, Section. However, the majority found that the seizure here was not unreasonable because Thompson's violation of the statute was minimal and he was furthering an important state interest in enforcing DWI laws. *Wright*, 2019-

[3] The balancing test adopted in *Rodarte* was taken from the dissent in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

NMCA-____, ¶¶ 13-14. In reaching this determination, the majority did not accord weight to the district court's findings that reserve deputy Thompson had previously overstepped his authority or that the manner of Thompson's pursuit and detention was unnecessarily aggressive. *Id.* ¶¶ 15-18.

Judge Vargas dissented, arguing that while enforcing DWI laws was important, the majority did not accord sufficient weight to certain factual findings by the district court indicating that the violation in this case was not de minimis and generally failed to appreciate the important privacy interests and oversight functions served by Section 66-8-124(A) and. *Wright*, 2019-NMCA-____, ¶¶ 21-26 (Vargas, J., dissenting); *id.* ¶ 24 ("Further, and perhaps more importantly, the majority fails to consider the broader public interest in requiring that police and their volunteer officers comply with our statutory laws").

Ms. Wright sought certiorari review, which this Court granted as to the following issues:

> I. DID THE STATUTORY VIOLATION OF SECTION 66-8-124(A) WHICH OCCURRED IN THIS CASE CONSTITUTE A VIOLATION OF SOMER'S RIGHTS UNDER ARTICLE II, SECTION 10 SO AS TO WARRANT SUPPRESSION OF EVIDENCE AGAINST HER?
>
> II. IN CONCLUDING THAT SUPPRESSION WAS NOT WARRANTED, DID THE COURT OF APPEALS MAJORITY OPINION SHOW SUFFICIENT DEFERENCE TO THE DISTRICT COURT'S FACTUAL FINDINGS OR PROPERLY BALANCE THE PRIVACY AND SOCIETAL INTERESTS EMBODIED BY SECTION 66-8-124(A)?

ARGUMENT

I. THE DISTRICT COURT'S SUPPRESSION ORDER SHOULD BE AFFIRMED. ARTICLE II, SECTION 10 OF THE NEW MEXICO CONSTITUTION REQUIRED SUPPRESSION OF EVIDENCE FOR THE NON-SALARIED VOLUNTEER DEPUTY'S VIOLATION OF SECTION 66-8-124 IN THIS CASE.

A. The majority misapplied the standard of review on appeal by showing insufficient deference to the district court's findings of fact.

A district court's suppression ruling involves a mixed question of law and fact. *State v. Garcia*, 2009-NMSC-046, ¶ 9, 147 N.M. 134. On appeal, "we look for substantial evidence to support the [district] court's factual finding, with deference to the district court's review of the testimony and other evidence presented." *State v. Martinez*, 2018-NMSC-007, ¶ 8, 410 P.3d 186 (*quoting State v. Yazzie*, 2016-NMSC-026, ¶ 15, 376 P.3d 858 (internal quotation marks omitted)). "We then review the application of the law to those facts, making a de novo determination of the constitutional reasonableness of the search or seizure." *Id.* On appeal, this Court defers "to the district court's evaluation of witness credibility" because an appellate court is "unable to view the witness's demeanor or … manner of speech, and therefore [is] not in a position to evaluate many of the aspects of witness credibility that the trier of fact may evaluate." *Id.* ¶ 14 (internal citations and quotation marks omitted). Even when the district court does not make explicit credibility findings, "we will indulge in all reasonable presumptions in support of the district court's

ruling." *Id.* (*quoting State v. Jason L.*, 2000-NMSC-018, ¶ 11, 129 N.M. 119 (internal quotation marks and citation omitted)).

As suggested by the dissent, the Court of Appeals majority 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. On the contrary, it addressed the court's findings as if they were merely arguments forwarded by the defense and not findings made or supported by the district court's ruling in this case. *Wright*, 2019-NMCA-___, ¶¶ 17-18 (characterizing findings either made by or consistent with the district court's ruling as arguments forwarded by the defense).

First, the majority did not defer to the district court's conclusion that Thompson had a history of overstepping his authority even though it was based on testimony the district court had observed and involved a credibility determination the district court was entitled to make. *Wright*, 2019-NMCA-___, ¶ 18. The district court observed defense counsel question Thompson about his conduct in two past cases and watched Thompson's responses claiming either a lack of memory or that he had done nothing wrong, although Thompson acknowledged evidence had been suppressed. **[12/08/15 CD 2:32:42-2:35:34]** When defense counsel started to impeach Thompson with transcripts from those past cases, the State objected and the district court deemed it unnecessary to go into such detail. **[*Id.* 2:34:44]** The court later indicated that, despite Thompson's denials or claimed lack of memory, it

believed Thompson had "done this on more than one occasion." **[*Id.* 2:53:08-2:54:08]**

Although additional discussion of what occurred in the other cases could have clarified the number of times Thompson traversed the bounds of his authority (or resulted in a corresponding number of denials by the witness), the district court was permitted to believe that Thompson had previously gone beyond his statutory authority based upon Thompson's demeanor and nonresponsive or argumentative answers when testifying. *See State v. Gonzales*, 1997-NMSC-050, ¶ 18, 124 N.M. 171 ("Determining credibility and weighing evidence are tasks entrusted to the trial court sitting as fact-finder."). Under well-established authority, the Court of Appeals was obligated to show appropriate deference to the court's findings on appeal. *See State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592 ("As a reviewing court we do not sit as a trier of fact; the district court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses."). It is clear such deference was not shown here. *See e.g., Wright*, 2019-NMCA-____, ¶ 18.

Likewise, the majority was not free to suggest, contrary to the district court's finding, that Ms. Wright presented an ongoing danger because she might have driven off again after arriving at her home. *Wright*, 2019-NMCA-____, ¶ 14. The district court had concluded otherwise, **[RP 209-10]**, and the record supported the court's determination that Ms. Wright had arrived at her intended destination for the night.

It was late, on a cold evening, and Ms. Wright had pulled into the driveway of her home (instead of parking on the street). Short of pure speculation, there was no reason to believe, as the majority did, that Ms. Wright presented a threat to public safety at the time she was detained. Regardless, the district court had found otherwise and the majority was required to defer to that determination.

Finally, the majority erred in rejecting the district court's finding that Thompson had acted in an unnecessarily aggressive manner in pursuing and detaining Ms. Wright. After hearing Thompson's account, the district court specifically found that Thompson had sped, while talking on his cell phone and closely following Ms. Wright's vehicle, when all he needed to do was follow at a reasonable distance, get her information, and report what he saw to Deputy Fulfer. *See* **[RP 207-09]; [12/08/15 CD 2:53:08-2:54:08]**

The majority's failure to defer to these findings or to generally draw inferences in support of the district court's ruling undermined the balancing of interests approach the majority later applied in determining the reasonableness of the seizure. Because the majority's ruling resulted from a view of the facts that was inconsistent with factual determinations made by the district court, the majority's analysis was erroneous and reversal is required. *Cf. Martinez*, 2018-NMSC-007, ¶ 18 (reversing Court of Appeals reversal of district court suppression order after

finding the Court "erred by reweighing the evidence on appeal and failing to view the facts in the manner most favorable to the prevailing party").

B. The majority accorded insufficient weight to the statutory violation which occurred in this case.

The majority purported to apply the balancing approach from *Rodarte* and *Bricker*. Where *Bricker* turned heavily on the fact the police had violated a statute, however, the majority did not accord the violation of the statute in this case any significance though it too protects important privacy interests from government overreach.

In *Bricker*, a defendant was arrested in violation of a statute specifically requiring that a person driving on a suspended license be cited and released when the suspension was not for DWI. 2006-NMCA-052, ¶ 4. The defendant argued that his arrest in violation of the statute was an unreasonable seizure under the United States and New Mexico Constitutions. *Id.* Recognizing that the Fourth Amendment's concern was whether the arrest was supported by probable cause, the Court of Appeals found that the violation of the arrest statute in *Bricker* did not require suppression under the Fourth Amendment since the arrest was supported by probable cause. *Bricker*, 2006-NMCA-052, ¶ 21. As probable cause alone was insufficient to justify an arrest under Article II, Section 10, however, the Court considered whether the violation would rise to the level of an unconstitutional seizure under Article II, Section 10.

The *Bricker* Court first considered the nature of the statute and recognized that the statute's prohibition on arrests for minor infractions was meant "to protect liberty and privacy in circumstances in which the violation of law does not warrant a custodial arrest," an objective coinciding with the privacy and liberty interests protected by Article II, Section 10. 2006-NMCA-052, ¶ 20. Noting New Mexico's long-standing preference for balancing tests in lieu of bright-line approaches, the Court "assess[ed] the intrusion upon individual privacy against the need to promote legitimate governmental interests." *Bricker*, 2006-NMCA-052, ¶¶ 22, 26. In doing so, however, the Court recognized: "That the Legislature has zeroed in on the traffic offense at issue here and has only required citation and release is evidence of an intent to protect liberty over perceived governmental need." *Id.* ¶ 29 (citing *United States v. Mota*, 982 F.2d 1384, 1388-89 (9th Cir. 1993) (recognizing that state law should be addressed to determine the reasonableness of inventory searches)). In other words, the fact there was a statute limiting arrest authority in such circumstances tempered the weight of the governmental interest in pursuing the violation of the traffic code at issue in *Bricker*. Similarly, the fact there was a statute limiting arrest authority placed the burden on the State to "articulate a legitimate reason" for the violation. *Bricker*, 2006-NMCA-052, ¶ 24 (quoting *Rodarte*, 2005-NMCA-141, ¶¶ 9, 16)); *see also Campos v. State*, 1994-NMSC-012, ¶ 14, 117 N.M. 155 (finding that even a statutorily authorized warrantless arrest required probable

cause and some showing by the State of an exigency precluding the officer from securing a warrant); *State v. Leyva*, 2011-NMSC-009, ¶ 30, 149 N.M. 435 ("The burden to show reasonableness is on the State.").

Like the statute in *Bricker*, Section 66-8-124(A) protects many of the same privacy interests as Article II, Section 10. As this Court indicated in *Slayton*, Section 66-8-124 was meant to guard against the violation of rights and endangerment of individuals attendant to the exercise of police authority by non-police officers. *See Slayton*, 2009-NMSC-054, ¶ 16 ("The Legislature intended that only commissioned officers may arrest a person who is suspected of violating the Motor Vehicle Code. Therefore, any municipal grant of authority to the contrary would 'permit[ ] an act the general law prohibits' and would be impermissible."); *id.* ¶¶ 21, 26-27 (finding citizen's arrest authority was specifically abrogated and suggesting that limiting such arrest authority was desirable to avoid encouraging vigilantism and further violations of the law). Thus, as acknowledged by the dissent, it protects citizens from overreach by persons who lack the qualifications, training, or oversight required to safely exercise police authority. *Wright*, 2019-NMCA-____, ¶ 24-25.

The danger to individual liberties and safety presented by citizen arrests, vigilantism, or citizens exercising police powers is evident.[4] *See State v. Emmons*,

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[4]*See* Chris Spangler, *DA warns citizens against becoming involved in vigilante sex predator sting*, Daily Jefferson County Union, June 25, 2019, electronically retrieved 6/27/2019 from https://www.dailyunion.com/news/d-a-warns-citizens-

2007-NMCA-082, ¶ 15, 141 N.M. 875 (noting that the Supreme Court has declined to favor an expansive application of citizen's arrest power "stemming from their concern that such an expansion of citizen power might likely lead to more breaches of the peace and encourage vigilantism. 'Vigilantism' is 'unreasonable self-help action by citizens that tends to disrupt the administration of the criminal justice system.'" (internal citation omitted)); *see also* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1191 (1999) (recognizing that police regulations developed "largely because they were thought necessary to control the uniformed, armed, quasi-military forces patrolling our streets" and that private policing presents a challenge because it is uncontrolled, unregulated, and invites abuse).

Significantly, the statutes allowing for the appointment of deputies and special deputies—Section 4-41-5; Section 4-41-10—do not impose significant limits or proscribe consistent regulation of these individuals. This lack of clarity has resulted in some notable abuses.[5] Section 66-8-124, therefore, acts as one of the few means

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against-becoming-involved-in-vigilante-sex/article_53a561c7-a98c-5a12-b0e1-6fc6b6a2c92a.html (quoting the district attorney as saying, "I cannot stress enough how dangerous it is for citizens to take matters of law enforcement into their own hands," she said. "Confronting suspects even in a public place, not only endangers the vigilantes themselves, but also puts members of the public at risk. It puts citizens directly in harm's way and it negatively impacts our ability to keep our children safe and protect them from dangerous individuals.").

[5] *See e.g.*, Larry Barker, *Playing Cop: The Lake Arthur Badge Scheme,* KRQE News 13, last retrieved 7/1/19 from https://www.krqe.com/news/investigations/larry-barker/playing-cop-the-lake-arthur-badge-scheme/1143209880 (detailing abuses of

of protecting the privacy interests of New Mexicans from overstepping by insufficiently trained, inadequately overseen, or simply overzealous individuals. *Cf. State v. Baca*, 2005-NMCA-001, ¶ 9, 136 N.M. 667 (holding that a reviewing court should consider the statute as a whole and "looks to the function of a particular statute within a comprehensive legislative system"); Karen Clouse, *Special Police: A Benefit or a Threat?*, 47 OHIO ST. L. J. 261, 275 (1986) (recognizing the need for oversight of special deputies in Ohio to "protect the public from unauthorized detentions, arrests, and tortious conduct engendered by the current system" and ensure they operate within their statutory authority). The limits of Section 66-8-124(A) could, in fact, be viewed as directly responsive to concerns about special deputies exceeding their authority and as a significant and important limit on the otherwise expansive authority granted to volunteers appointed by elected sheriffs and other uncertified and unsalaried officers.

In light of Section 66-8-124's role in protecting individual rights, it is, like the statute at issue in *Bricker*, of constitutional dimension. 2006-NMCA-052, ¶ 29; *cf. Commonwealth v. Hernandez*, 924 N.E.2d 709, 712 (Mass. 2010) (recognizing that the "requirement that a police officer have lawful authority when he deprives [an]

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the reserve deputy statute in New Mexico by one local sheriff's office); *see also* Nicholas Riccardi, *Arrests by reserve officer raise questions in Albuquerque*, Los Angeles Times, (Sept. 8, 2009) last retrieved 7/1/19 from https://www.latimes.com/archives/la-xpm-2009-sep-08-na-fake-cop8-story.html.

individual[ ] of [his] liberty is closely associated with the constitutional right to be free from unreasonable searches and seizures" (internal citation omitted)); *United States v. Master*, 614 F.3d 236 (6th Cir. 2010) (finding that the Fourth Amendment was violated where a judge issued a search warrant for premises outside his county, contrary to state law, because "the requisite qualifications [for persons authorized to serve as a magistrate] are determined by state law"); *United States v. Sawyer*, 441 F.3d 890, 898 (10th Cir. 2006) ("A state's interest in controlling law enforcement personnel within its boundaries is very strong.").

Furthermore, like the statute at issue in *Bricker*, a violation of Section 66-1-124 should be accorded substantial weight in determining whether the seizure was unconstitutional. Indeed, some jurisdictions appear to consider statutorily unauthorized arrests to be per se unconstitutional. *See e.g.*, *State v. Barker*, 25 P.3d 423, 426 (Wash. 2001) (finding arrest conducted without legal authority violated the state constitution, requiring suppression); *State v. Cuny*, 595 N.W.2d 899, 903 (1999) (holding stop of defendant in Nebraska by South Dakota officers violated federal and state constitutions because officers lacked Nebraska authority to stop); *Hernandez*, 924 N.E.2d at 712 (holding exclusion of evidence is "an appropriate remedy when a defendant is prejudiced by an arrest made without statutory or common-law authority"); *Commonwealth v. Roberts*, 514 A.2d 626, 630 (PA 1986) (suppressing evidence following arrest by park police officer who was acting

without statutory authority); *State v. Griffin*, 376 N.E.2d 1364, 1366 (Ohio 1977) ("Criminal statutes must be strictly construed and a reading of R.C. 2935.041 authorizes a store security employee to detain only such persons as may be believed to have unlawfully taken merchandise. This is not blanket authority for detention of a person committing any misdemeanor in a department store, it must be a theft.").

While New Mexico prefers to utilize a balancing of interests approach in place of a per se rule, *Bricker* substantiates that the statutory violation should factor into the court's balancing of interests in a meaningful way. 2006-NMCA-052, ¶ 26; *Leyva*, 2011-NMSC-009, ¶ 55 ("The overall reasonableness of the stop continues to be 'determined by balancing the public interest in the enforcement of traffic laws against an individual's right to liberty, privacy, and freedom from arbitrary police interference.'"); *see also State v. Brown*, 39 N.E.3d 496, 502 (Ohio 2015) (employing the same balancing approach, taken from the dissent in *Atwater*, in determining whether an unauthorized arrest violated the state constitution). As the dissent recognized, the majority did not accord sufficient consideration to the statutory violation in this case. *Wright*, 2019-NMCA-___, ¶¶ 24-25.

C. When the balancing test from *Bricker* is properly applied to the facts found by the district court, Thompson's seizure of Ms. Wright was constitutionally unreasonable under Article II, Section 10.

The majority focused heavily on the government's compelling interest in "removing drunk drivers from its roadways." *Id.* ¶ 14. However, notwithstanding

that interest, the Legislature specifically limited the authority of non-police officers to exercise police powers in this area. Accordingly, much as in *Bricker*, the government's claimed interest in pursuing the underlying law is tempered by the government's interest in ensuring adequate oversight of individuals of varying skills and motives who are appointed to act under color of law. *See Bricker*, 2006-NMCA-052, ¶ 27 ("That the traffic offense is jailable is irrelevant. Jailability cannot justify overlooking an unlawful custodial arrest and permitting searches based on the unlawful arrest.").

In addition, the interest in "removing drunk drivers from roadways" was not furthered by the detention here. Ms. Wright was already at her home when she was unlawfully detained. And, contrary to the majority's suggestion, the district court specifically found that Ms. Wright would have simply gone inside her home instead of heading out on the roads again. **[RP 210]** Hence, the detention here was not necessitated by an ongoing threat to public safety.

As for the majority's assertion that Ms. Wright would enter her home and not answer the door, *Wright*, 2019-NMCA-___, ¶ 14, the district court correctly recognized that it was, in fact, unclear what would happen after she went inside her home. **[RP 210]** Ms. Wright may well have answered her door when Deputy Fulfer arrived as did the defendants in *City of Santa Fe v. Martinez*, 2010-NMSC-033, ¶ 2, 148 N.M. 708, and *State v. Flores*, 2008-NMCA-074, ¶ 3, 144 N.M. 217.

Alternatively, Thompson could have allowed Ms. Wright to enter her home while helping Deputy Fulfer obtain an arrest warrant. Or, if exigent circumstances were found to have existed after Deputy Fulfer's arrival, Fulfer could have entered her home to effectuate a lawful detention. *See e.g., State v. Nance*, 2011-NMCA-048, 149 N.M. 644.

In short, there were a number of lawful means open to law enforcement in this case which would have protected both the governmental interest in enforcing DWI laws and the government's interest in limiting detentions for such a violation to people who are adequately trained, qualified, and overseen. Consequently, the majority accorded too much weight to the government's interest in enforcing DWI laws since that legitimate interest was tempered by a competing governmental interest and *could have been furthered without the unlawful detention which occurred here*. *Cf. Campos*, 1994-NMSC-012, ¶ 15 (noting that the reasonableness question revolves around whether it was reasonable for the officer to avoid getting a warrant and that such failure would not be viewed as reasonable absent probable cause and some exigent circumstances); *see also State v. Paananen*, 2015-NMSC-031, ¶ 27, 357 P. 3d 958 (same); *State v. Coyle*, 621 P.2d 1256, 1262 (Wash. 1980) (finding right of privacy protected by a knock and announce statute was "impermissibly infringed" where "[t]here was simply no need for the police to enter without announcement in this case").

Additionally, the intrusion in this case was not as minimal as the majority held. *Wright*, 2019-NMCA-___, ¶ 13. The district court specifically found that Thompson's pursuit had been fairly aggressive in that he was speeding, while talking on his phone, and "closely" following Ms. Wright's vehicle up to her driveway. **[RP 208-09]; [12/08/15 CD 2:53:08-2:54:08]** The court doubted that he needed to engage in such conduct and specifically found that he did not need to inject himself into the situation by detaining Ms. Wright in the manner he did. **[12/08/15 CD 2:54:08]**

That Thompson had violated this statute in the past only made the intrusion here more egregious since Thompson specifically knew or should have known of the statutory limits on his authority, but chose to overstep his bounds again. And, as mentioned, he did so unnecessarily since there were alternative lawful options open to him. As the purpose of Section 66-8-124 is to curb overreach by individuals like Thompson, characterizing repeated violations by the same person as "minimal" undermines the efficacy of the statute. *Cf. Bricker*, 2006-NMCA-052, ¶ 23 (substantiating that exclusion of evidence is necessary to ensure that statutes limiting arrest authority are followed). Instead, as the district court recognized, it is particularly important to reign in such individuals. **[12/08/15 CD 2:53:08, 2:56:30]**

Finally, Ms. Wright's privacy interests were infringed upon. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of

every individual to the possession and control of his own person, free from all restraint or interference of others, *unless by clear and unquestionable authority of law*." *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (internal quotation omitted) (emphasis added). Although the detention was only four to five minutes, it was undertaken by an individual who, although lacking authority to detain her, made no effort to explain that to her and, instead, utilized his apparent authority to question her and unlawfully detain her. *Cf. State v. Figueroa*, 2010-NMCA-048, ¶ 30, 148 N.M. 811 (finding statement that the person was free to leave relevant to, but not determinative of, whether the encounter was merely consensual); *cf.* NMSA 1978, § 30-27-2.1(A)(1) (1999) ("Impersonating a peace officer consists of: (1) without due authority exercising or attempting to exercise the functions of a peace officer."). In addition, her detention occurred late at night, in winter weather, and just outside of her house at a time when there was no reason to believe she would be further endangering the public. Thompson's unlawful detention of Ms. Wright was not, therefore, a minor intrusion upon her liberty and privacy rights; it was a blatant and unnecessary violation of a statute specifically promulgated to protect against arbitrary detentions by persons like Thompson.

Balancing the government's interests and the intrusion in this case in view of the facts found by the district court and the interests served by Section 66-8-124, the

district court properly held that the unlawful seizure of Ms. Wright was unreasonable under Article II, Section 10 of the New Mexico Constitution.

D. Suppression of the evidence resulting from the unlawful detention of Ms. Wright was necessary.

Because Ms. Wright's right to be free from an unreasonable seizure was violated by her unlawful detention in this case, suppression of the evidence against her is necessary under Article II, Section 10. *See State v. Creech*, 1991-NMCA-012, 111 N.M. 490 (suppressing evidence following conservation officer's unconstitutional stop of vehicle where statutory arrest authority required an emergency and individualized suspicion which were not shown to exist); *see also State v. Gutierrez*, 1993-NMSC-062, ¶ 55, 116 N.M. 431 (rejecting the good-faith exception because "[d]enying the government the fruits of unconstitutional conduct at trial best effectuates the constitutional proscription of unreasonable searches and seizures *by preserving the rights of the accused to the same extent as if the government's officers had stayed within the law*") (emphasis added). To hold otherwise and allow the fruits of unlawful detentions such as the one which occurred here to be used in criminal trials, "has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry*, 392 U.S. at 13; *see Gutierrez*, 1993-NMSC-062, ¶ 56 (expressing concern that admitting improperly seized evidence simply because the officer acted in good-faith would "denigrate[ ] the integrity of

the judiciary—judges become accomplices to unconstitutional executive conduct"). Article II, Section 10 is "a foundation of both personal privacy and the integrity of the criminal justice system, as well as the ultimate regulator of police conduct." *Garcia*, 2009-NMSC-046, ¶ 31. To further these interests—deter future misconduct *and* remedy the violation of privacy rights which occurred here—suppression of the evidence against Ms. Wright was warranted.

CONCLUSION

Because the majority opinion in the Court of Appeals accorded insufficient deference to the district court's factual findings and overlooked the significance of the statutory violation which occurred here, Somer Wright respectfully requests that this Court overrule the Court of Appeals majority opinion and affirm the district court's suppression of evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was filed in the Odyssey File & Serve System and electronically delivered to Charles J. Gutierrez, Assistant Attorney General, at the New Mexico Attorney General's Office this 2nd day of July, 2019.

/s/ *Mary Barket*
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