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 REPLY BRIEF

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

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References to the State's Answer Brief are set forth as **[AB page]**

STATEMENT OF COMPLIANCE

The body of the attached reply brief exceeds the page limits set forth in Rule 12-318(F)(2) NMRA because counsel used Times New Roman, a proportionally-spaced type face.

As required by Rule 12-318(A)(1)(c), (F)(3), (G) NMRA, I certify that this brief is proportionally spaced and that the body of the reply brief contains 4,229 words (not to exceed 4,400). This brief was prepared using Microsoft Word, version 2016.

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REPLY ARGUMENT

In its Answer Brief, the State argues that the Court of Appeals' majority opinion correctly based its ruling on the unique facts and circumstances of this case while Ms. Wright is seeking to create a bright-line standard based on general principles protected by NMSA 1978, Section 66-8-124(A) (2007), the statute violated by Reserve Deputy Thompson in this case. **[AB 19-21]** However, the majority opinion did not base its ruling on the unique facts and circumstances of this case *as found by the district court*. *Cf. State v. Martinez*, 2018-NMSC-007, ¶ 15, 410 P.3d 186 ("Factfinding frequently involves selecting which inferences to draw." (internal citation omitted)). On the contrary, the majority overlooked or refused to consider key findings by the district court: that Reserve Deputy Thompson was unnecessarily aggressive in his pursuit and detention of Ms. Wright **[12/08/15 CD 2:53:08-2:54:08]**; that Thompson was prone to overstepping his authority due to his deep desire to be a fully-authorized police officer (which he was not) **[*Id.* 2:53:08, 2:56:40]**; and that he had *unnecessarily* detained Ms. Wright outside her home in winter weather even though she no longer presented a danger to anyone and lawful options for enforcing the law existed. **[*Id.* 2:54:08]; [RP 209-10]**

Similarly, it is the State and the majority, rather than Ms. Wright, that seek resort to a bright-line approach, relying heavily on the general importance of DWI laws while overlooking the competing societal interests served by Section 66-8-

124(A) as well as the degree to which each of these interests is served by suppression here. Under the facts found by the district court, the State's interest in enforcing DWI laws was not significantly furthered by Reserve Deputy Thompson's unlawful detention of Ms. Wright: she did not present a danger to others at the time of her detention and other lawful avenues of enforcing the law were available.[1] On the other hand, Ms. Wright's privacy rights and the public's interest in limiting the authority of non-police officers acting under color of law would be furthered by suppression in this instance, especially in light of Reserve Deputy Thompson's apparent inclination to exceed his authority. **[12/08/15 CD 2:53:08, 2:54:40, 2:56:30]** (the district court expressing a desire to ensure that Thompson and individuals like him—volunteers prone to zeal and overstepping in exercising their limited duties—are adequately overseen and held to answer for abuses). The district court's suppression of evidence in this case should be affirmed.

[1] Indeed, the district court noted that even without the suppressed evidence, the State could continue to prosecute Ms. Wright with the evidence it had lawfully obtained. The State itself indicated its intent to do so until defense counsel expressed an intent to file a motion to dismiss based on the timing of the case. **[4/05/16 CD 1:38:11]**

I. THE MAJORITY MISAPPLIED THE STANDARD OF REVIEW ON APPEAL AND FAILED TO SHOW SUFFICIENT DEFERENCE TO THE DISTRICT COURT'S FINDINGS. AS A RESULT, THE MAJORITY FAILED TO RECOGNIZE THAT THE THE INTERESTS AT STAKE WERE BEST SERVED BY SUPPRESSION.

This Court recently reaffirmed "that appellate courts must afford a high degree of deference to the district court's factual findings if supported by substantial evidence." *State v. Yazzie*, 2019-NMSC-008, ¶ 14, 437 P.3d 182 (overturning the Court of Appeals' reversal of a district court's order denying suppression where insufficient deference was shown); *Martinez*, 2018-NMSC-007 (overturning the Court of Appeals' reversal of a district court's order denying suppression because insufficient deference was shown to the district court's presumptive findings). Indeed, the standard of review applicable to a district court's ruling on a suppression motion requires the reviewing court to not only show "deference to the district court's review of the testimony and other evidence presented," *Martinez*, 2018-NMSC-007, ¶ 8, but also to draw "all inferences and indulge all presumptions in favor of the district court's ruling." *State v. Jason L.*, 2000-NMSC-018, ¶ 11, 129 N.M. 119.

This Court has not hesitated to reverse when the Court of Appeals failed to follow the applicable standard of review—*see Yazzie*, 2019-NMSC-008; *Martinez*, 2018-NMSC-007—and it should not hesitate to reverse the majority opinion from the Court of Appeals for failing to do so here.

A. The Court of Appeals did not defer to the district court's credibility determinations or belief that Reserve Deputy Thompson had previously overstepped his authority and did not draw reasonable inferences in support thereof.

The State acknowledges that deference to the district court's factual findings is required, but maintains that it was shown here. First, with respect to the district court's stated belief that Reserve Deputy Thompson had previously violated the statute, the State asserts that the Court of Appeals was not required to show deference to this finding because it was not set out in the district court's *written* findings of fact or conclusions of law. **[AB 11-12]** As noted, the law does not require the district court to reduce to writing all of its findings in order to ensure that those findings will be construed in its favor on appeal. *See e.g., Martinez*, 2018-NMSC-007, ¶ 15 (construing facts in light most favorable to the district court's ruling even though "the district court did not make an explicit finding regarding the officer's credibility"); *see also Jason L.*, 2000-NMSC-018, ¶ 11 (noting that the district court did not make any findings of fact and that "[t]his is a regular occurrence," but indulging in all reasonable presumptions in support of the district court's ruling nonetheless).

Moreover, in its oral ruling, the district court stated its belief that, contrary to Reserve Deputy Thompson's claims otherwise, Thompson had violated the statute previously. **[12/08/15 CD 2:53:08]** Thus, the district court made its view of the evidence (and the witness's credibility) apparent even if the court did not feel the

need to write down its more critical views of Reserve Deputy Thompson.[2] Finally, under the applicable standard of review, the Court of Appeals was required to presume that the district court had resolved the conflicting information in front of it against the State even if the district court had not made its views plain. *Cf. Yazzie*, 2019-NMSC-008, ¶¶ 36-37 (noting that the Court of Appeals should have accepted the officer's recollection and testimony over conflicting video evidence as the Court was obligated to view the facts in the light most favorable to the prevailing party); *Jason L.*, 2000-NMSC-018, ¶ 11.

The State further argues that even if the district court had believed Reserve Deputy Thompson violated the statute previously, the only evidence substantiating this was comments by defense counsel. **[AB 13, n. 3]** On the contrary, the district court's ruling was based on testimony given by Thompson during cross-examination and Thompson's demeanor on the stand. First, Thompson was questioned about the case of Donald Duffle. **[12/08/15 CD 2:32:42]** Thompson recalled the case and

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[2] The Answer Brief repeatedly claims that because the district court did not adopt the stronger wording for some factual findings which the defense had suggested in its proposed findings of fact, this Court cannot infer that the district court was inclined to agree with that view (even when the district court directly verbalized that belief during the hearings). **[AB 12, 14-15]** However, the district court's election of more diplomatic language in its written findings does not alter the standard of review—which requires the reviewing court to draw "all inferences and indulge all presumptions in favor of the district court's ruling." *Jason L.*, 2000-NMSC-018, ¶ 11. In fact, the district court may well have deemed it unnecessary to disparage a state actor in writing *because* the standard of review made doing so unnecessary.

remembered engaging emergency equipment to pull Mr. Duffle over for careless driving. **[*Id.* 2:32:42, 2:33:44]** When asked whether he recalled the appeal to the district court and whether the seizure was eventually found to be illegal, Thompson first claimed he did not remember that at all, **[*Id.* 2:33:53, 2:34:24]**, but then took issue with defense counsel's statement that it was deemed illegal because he had engaged his emergency equipment. Thompson said that it was not because he had engaged his emergency equipment. **[*Id.* 2:34:41]** When defense counsel offered to submit the transcript, the district court determined that it did not need the transcript. **[*Id.* 2:34:50]** Defense counsel then asked about a case involving Carl Varner. Thompson recalled the case, recalled that he had detained Mr. Varner at a rest area, and verified that some of the evidence was suppressed in that case due to the illegal detention. **[*Id.* 2:34:59-2:35:35]**

"[O]ur cases have long held that it is the prerogative of the finder of fact … to select which parts of the witnesses' testimony to believe or disbelieve." *Peters Corp. v. New Mexico Banquest Inv'rs Corp.*, 2008-NMSC-039, ¶ 49, 144 N.M. 434 (collecting cases). Hence, the district court could consider Thompson's sworn testimony verifying his past behavior (stopping one defendant and illegally detaining another), while simultaneously rejecting Thompson's claims minimizing the suppression ruling or his role in bringing it about. *Cf. State v. Foxen*, 2001-NMCA-061, ¶ 17, 130 N.M. 670 (noting that the finder of fact was not obligated to adopt a

witness's view of the incident). In sum, there was substantial evidence in the record supporting the district court's belief that Thompson had previously exceeded his authority and was prone to do so because of his adamant desire to be fully salaried and commissioned police officer. **[12/08/15 CD 2:56:40]** The Court of Appeals should have, but did not, credit the district court's finding or its credibility determination of Thompson.

Lastly, without citing any authority to support its position, the State argues that any finding that Thompson had previously violated the statute should not factor into the balancing approach anyway. **[AB 12-13]** However, suppression turns on the overall reasonableness of the encounter in view of the particular facts and circumstances of the case as well as the societal and privacy interests involved. *See e.g., State v. Leyva*, 2011-NMSC-009, ¶ 22, 149 N.M. 435 (adopting a view of reasonableness that turned not solely on the length of the stop, but on whether—under the totality of the circumstances—the duration was reasonable as reasonableness is "a fact-bound, context-dependent inquiry in each case") (internal citation omitted); *see also State v. Granville*, 2006-NMCA-098, ¶ 18, 140 N.M. 345 ("In all cases that invoke Article II, Section 10, the ultimate question is reasonableness.").

Past overstepping by a volunteer officer in similar circumstances should be part of the totality of the circumstances that a court can properly consider when

determining if that volunteer (or the officer overseeing him) acted reasonably in unnecessarily violating the statute again in a particular case. *Cf. State v. Ochoa*, 2009-NMCA-002, ¶¶ 23-26, 146 N.M. 32 (recognizing that because New Mexico courts "have consistently rejected federal bright-line rules in favor of an examination into the reasonableness of officers' actions under the circumstances of each case," New Mexico should consider the subjective motivations of the officer in determining the reasonableness of his conduct).

After all, evidence of similar violations in the past substantiates the volunteer officer's knowledge that he was acting improperly, his potential intent or proclivity to violate the statute, and the lack of oversight by the officer monitoring the volunteer—all of which bear upon the egregiousness of the statutory violation. *State v. Tapia*, 2018-NMSC-017, ¶¶ 15, 38, 47, 414 P.3d 332 (listing the "purpose and flagrancy of the official misconduct" as a relevant consideration when determining whether suppression is warranted under both state and federal attenuation analysis).

Moreover, under Article II, Section 10, an officer's knowledge, subjective beliefs, and motivations are factors bearing upon the reasonableness of the encounter and the need for suppression. *See id.*; *Yazzie*, 2019-NMSC-008, ¶¶ 20-22, 47-48 (noting that New Mexico initially took view that the Fourth Amendment considered the subjective beliefs of officers under the emergency assistance doctrine and holding that, although Fourth Amendment analysis had since shifted, New Mexico

would continue to consider the officer's subjective beliefs under Article II, Section 10); *see also State v. Ryon,* 2005-NMSC-005, ¶¶ 33-37, 137 N.M. 174 (noting that consideration of subjective beliefs of officer furthers goal of protecting individual privacy and regulating police conduct); *Ochoa*, 2009-NMCA-002, ¶ 1 (prohibiting pretextual stops under Article II, Section 10 for similar reasons).

There is no reason to bar consideration of such evidence here. Indeed, doing so would be inconsistent with New Mexico's typically inclusive approach to factual analysis. It would also hinder New Mexico's goal of interpreting and applying protections under the State Constitution in a manner that upholds individual privacy interests while regulating police conduct. *Cf. Ochoa*, 2009-NMCA-002, ¶¶ 25-26 (acknowledging that consideration of the officer's subjective intent is necessary to protect against unreasonable searches and seizures); *Tapia*, 2018-NMSC-017, ¶ 46 (noting that 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").

As there is no reason to ignore evidence of similar violations by a relevant actor and considering it helps ensure that suppression furthers the interest of regulating police conduct (including police oversight of individuals prone to zealousness), the majority undoubtedly erred in refusing to defer to the district court's finding or factor the court's finding into its balancing of interests.

B. The majority erred in substituting its own factual finding—that Ms. Wright posed an ongoing threat because she might drive off—for the district court's determination otherwise.

The district court found that Ms. Wright did not intend further driving when she was detained outside her home on a winter night, making her detention less justified as a vindication of society's interest in protecting individuals from drivers who are intoxicated. **[RP 209-10]** On appeal, the majority found that Ms. Wright could have driven off and then relied on that fact to hold that suppression in this case would not further society's interests in protecting the public from intoxicated drivers. *State v. Wright*, 2019-NMCA-026, ¶ 14, __P.3d__. Thus, the majority plainly misapplied the standard of review by substituting its own finding for the district court's and then by reweighing the evidence. *See Yazzie*, 2019-NMSC-008, ¶¶ 36-37 (observing that the Court of Appeals applied the standard of review incorrectly and improperly rested its decision on its independent factual findings instead of deferring to the district court's findings and viewing the facts in the light most favorable to the district court's ruling).

The State acknowledges that "the district court found that Defendant would [have] 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." Nevertheless, the State continues to argue that the majority in the Court of Appeals could properly find that Ms. Wright presented an ongoing threat because she was

actively DWI when she was approached by Reserve Deputy Thompson and could have driven in the future. **[AB 13-14]** In support of its argument that she was still in actual physical control of the vehicle when she was detained, the State cites *State v. Johnson*, 2001-NMSC-001, ¶ 1, 130 N.M. 6 (discussing actual physical control). **[AB 14]**

As an initial matter, actual physical control requires a finding of both demonstrable control over the vehicle and a general intent to drive in order to constitute DWI. *State v. Sims*, 2010-NMSC-027, ¶ 4, 148 N.M. 330 ("[A] fact finder cannot simply assume or speculate that the individual in question might sometime in the future commence driving his or her vehicle. Instead, the fact finder must … find that (1) the defendant was actually, not just potentially, exercising control over the vehicle, and (2) the defendant had the general intent to drive so as to pose a real danger to himself, herself, or the public."). Given the district court's determination that Ms. Wright would have simply gone inside her home, the State's argument continues to rely on a factual claim contrary to the district court's ruling.

In addition, assuming that Ms. Wright simply being in her car outside of her home meant that she posed an ongoing danger because she remained in her car, then Reserve Deputy Thompson's detention of her in her car helped exacerbate the very exigency the State now seeks to rely upon to justify Ms. Wright's detention. Generally, law enforcement officers may not "create" the exigency used to justify a

violation of the law. *Cf. State v. Wagoner*, 1998-NMCA-124, ¶ 13, 126 N.M. 9 (setting out the limits of warrantless entry under the exigent circumstances exception and noting that "the exigency should not be one improperly created by law enforcement officers").

Finally, while the State argues that the threat of future driving was merely an alternative basis the majority offered to support its decision **[AB 13-14]**—the other being the State's interest in the investigation—it is clear that this erroneous factual finding by the majority nonetheless factored into the majority's balancing of interests. *See Wright*, 2019-NMCA-026, ¶ 14. Indeed, it factors into the State's application of the balancing test as well. **[AB 28, 31]** And the district court also found that had Ms. Wright entered her home, it was too speculative to say that this would have significantly hindered the investigation or prosecution of her case. **[RP 209-10]** In other words, the district court actually rejected both alternative findings offered by the majority to justify the detention and instead found that Ms. Wright's detention was not clearly necessary to protect the investigation or to protect the public. **[12/08/15 CD 2:54:08]** However laudable the general goals of enforcing DWI laws may be, the facts as found by the district court demonstrated that these goals were not significantly furthered by the unlawful detention here. Had the majority accepted the district court's findings, as it was required to do under the applicable standard of review, it would have reached a similar conclusion.

C. The district court's findings substantiate that Reserve Deputy Thompson pursued Ms. Wright in an *unnecessarily* aggressive manner.

The State argues that the district court did not explicitly find Reserve Deputy Thompson's pursuit to be unduly aggressive in its written findings and that, even if it had, Thompson's pursuit of Ms. Wright should not factor into the balancing test's evaluation of his unlawful detention of her anyway. **[AB 14-17]** When the factual findings are reviewed in conjunction with the district court's verbal findings at the hearing, the record reflects that the district court found Reserve Deputy Thompson's pursuit to be *unnecessarily* aggressive. *See* **[12/08/15 CD 2:53:08-2:54:40]; [RP 207-09]** In other words, the district court was not saying Reserve Deputy Thompson should not have followed at all—as the State appears to believe—but the court did not believe he needed to speed, tailgate, or, ultimately, detain her in order to be effective in his monitoring role.

As for the assertion that Reserve Deputy Thompson's conduct during his pursuit is not relevant to the detention, the State cites nothing to support its claim that New Mexico law precludes consideration of the officer's conduct directly prior to the alleged illegality. Certainly, Reserve Deputy Thompson's conduct and overzealousness were relevant to the district court's consideration of the egregiousness of the violation as well as the need for suppression as a remedy—both proper considerations. *See* **Reply Argument I(B)**, *supra*. Thompson's behavior in creating unnecessary risks when pursuing Ms. Wright reflected his proclivity to

exceed his authority, which proclivity concerned the district court. **[12/08/15 CD 2:54:08, 2:56:40]** (noting that the reserve deputy went too far and that he ardently desired to be a police officer). This finding, in turn, made suppression more likely to ensure future compliance by Reserve Deputy Thompson or better oversight by his superiors because it was targeting a known tendency of this particular volunteer to go a bit too far in his zealous pursuit of his duties. *Cf. State v. Crane*, 2014-NMSC-026, ¶ 16, 329 P.3d 689 (explaining that New Mexico's preference for warrants stems from an acknowledgement that warrants help reign in police officers engaged in the often competitive enterprise of ferreting out crime).

Finally, the State itself relies on prior behavior by Reserve Deputy Thompson—namely, his training and experience—to argue that his behavior was reasonable and not the kind of conduct Section 66-8-124(A) was intended to target. **[AB 16-17 n. 5, 23]** If the court was required to consider his training and experience, it was certainly free to consider whether that training had the desired impact by looking at Thompson's actual behavior in this and similar cases. If the State was free to portray Reserve Deputy Thompson as a consummate professional, the defense was free to suggest he had difficulty acting within his authority notwithstanding his training. Most importantly, however, the district court, as the finder of fact, was free to and did believe the latter. The majority on the Court of Appeals should have deferred to that determination. *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.").

D. Proper consideration of the district court's factual findings and the policy considerations underlying its ruling substantiate that the district court's ruling should be affirmed.

As did the majority opinion, the State focuses heavily on the importance of enforcing DWI law. In fact, the State would effectively read out of Section 66-8-124(A) any limitation on non-commissioned, non-salaried officers stopping people for DWI. **[AB 21-23]** However, the statute does not include the State's desired DWI exception and there are valid policy reasons against reading such an exception into the statute. First, individuals who are not adequately trained or actually employed as police officers may well escalate an already dangerous situation, as Reserve Deputy Thompson did in this case, by engaging in unnecessarily risky driving activities or starting unnecessary physical confrontations with inebriated individuals which escalate rather than diffuse the situation. In addition, it is not clear that police volunteers or similar persons will be able to correctly distinguish inebriation (particularly inebriation due to drug use) from disability or tiredness or another medical condition.

More importantly, however, in view of the district court's findings of fact in this case, the unlawful detention did not significantly further these interests in

enforcing DWI laws. Thus, while the State focuses on how much worse it could have been (she could have been handcuffed or detained for longer), the facts substantiate that no detention at all was necessary. Ms. Wright did not pose a further threat to the public when the detention happened. Similarly, while the district court found she would have entered her home but for the detention, the court also found that it was too speculative to say that this would have hindered the investigation and her prosecution in any significant way. **[RP 210]** In fact, even suppressing the evidence obtained as a consequence of that unlawful detention did not result in the State dismissing the case against Ms. Wright. **[4/05/16 CD 1:38:11]** In short, the district court found that the State could have pursued its investigation and her prosecution without traversing the law, making the statutory violation unnecessary and, by implication, unjustified.

On the other hand, in view of the important policy goals served by Section 66-8-124 and Ms. Wright's privacy interests against being subjected to unlawful detentions, suppression was warranted under the facts of this case as found by the district court. At the time she was detained, Ms. Wright was outside of her home on a cold night. She did not present a further danger to the public and may well have cooperated in a further investigation or been prosecuted regardless. Yet, having been told merely to monitor where she went, Reserve Deputy Thompson detained Ms. Wright. He did so without checking with his supervising officer and without

apparent necessity. The district court found he had done this in the past, felt he had pushed the envelope in his aggressive pursuit of Ms. Wright earlier, and was concerned about Thompson's adamant desire to exercise police authority without possessing it. To ensure that such tendencies did not go unnoticed or unchecked, the district court correctly held that suppression to protect privacy rights and the integrity of the statute was necessary. **[12/08/15 CD 2:53:08, 2:56:30]**

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. The district court's ruling suppressing evidence did not prevent the State from enforcing the law. It did no more than restore the parties to the position they would have been in had Reserve Deputy Thompson not violated the statute—an outcome wholly in keeping with the goals of Article II, Section 10. *State v. Trudelle*, 2007-NMCA-066, ¶ 40, 142 N.M. 18 ("The purpose of the state exclusionary rule[, to ensure freedom from unreasonable search and seizure,] is accomplished by doing no more than return the parties to where they stood before the right was violated.").

CONCLUSION

For these reasons and those set forth in the Brief in Chief, 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 9th day of September, 2019.

/s/ *Mary Barket*
Mary Barket
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