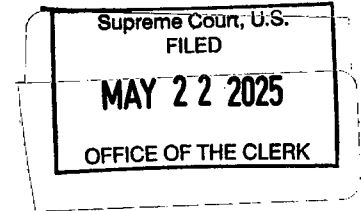


No. 25-6318 **ORIGINAL**

IN THE
SUPREME COURT OF THE UNITED STATES



EDWARD BINGHAM — PETITIONER
(Your Name)

vs.

STATE OF NEW MEXICO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF NEW MEXICO
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Edward Bingham
(Your Name)

10 McGregor Range Rd.
(Address)

Chaparral, New Mexico 88081
(City, State, Zip Code)

325 340 5373
(Phone Number)

QUESTION(S) PRESENTED

1) Did the New Mexico Supreme Court (hereinafter NMSC) deny this Petitioner of "Equal Protection of the Laws"?

2) Did the New Mexico Court of Appeals (hereinafter COA) Violate appellate practice and procedure and deny Petitioner "Equal Protection of the Laws"?

3) Is it permissible for an appellate court to construct and brief the State's arguments for them during the appeal?

4) Is the COA correct in determining that this Petitioner was not subjected to an unlawful de facto arrest without probable cause?

5) Did the COA deny this Petitioner of "Equal Protection of the Laws" when conducting its analysis of the affidavit for search warrant?

6) Is a reviewing court permitted to cure an insufficient affidavit by supplementing it with additional information during review?

7) Does a search and seizure comply with the probable cause and particularity requirements if an affiant establishes probable cause for one crime, but then requests and executes the warrant to search for evidence of other crimes instead?

8) If a potential witness/alleged Victim refuses to answer questions from the police,

does that refusal establish probable cause in an affidavit for search warrant that a crime has occurred?

9) Is it permissible that the COA refused to address several contentions raised on appeal concerning the insufficient affidavit for search warrant?

10) Did the Fifth Judicial District Court of New Mexico and the COA deny Petitioner of "Equal Protection of the Laws" by refusing to correctly apply the "Exclusionary Rule" to the circumstances of this case?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

D-504-CR-2018-543

A-1-CA-40639

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

[✓] For cases from state courts:

The date on which the highest state court decided my case was 2/21/2025. A copy of that decision appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. AMENDMENTS § AMENDMENTS IV

U.S. Const. art. AMENDMENTS § AMENDMENTS XIV

N.M. Const. Art. 11, § 10

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N.M. Const. Art. VI, § 2

N.M. Const. Art. VI, § 3

STATEMENT OF THE CASE

The basic facts material to consideration of the questions presented are outlined in this section; additional facts are developed in greater detail in the following section as necessary. Police held this Petitioner in the back of a police car for hours while they attempted to develop probable cause for an arrest after he was found in his car with a female passenger, K.S. This was even though they determined that she was over the age of consent, and she continued to deny any sexual involvement with Petitioner. Only hours into this unlawful detour arrest did police discover a pending case and no-contact order between the parties. Petitioner was charged with four counts related to child sexual exploitation material (CSFM) after police illegally seized and searched his cellular phone. Petitioner represented himself. [RP Vol. 3, 401, 417]; [CD 8/28/2020, 10:46:41]. He filed multiple pretrial motions, including suppression motions. [BIC 1, 4]. Appen- dix G. Petitioner filed a motion to suppress based on de facto arrest. He argued that due to the manner he was detained (in a locked patrol vehicle), the lack of diligence in the investigation as well as the excessive amount of time he was detained, he was subjected to a de facto arrest. [RP Vol. 3, 626-795]. Based on exhibits attached to the motion, Petitioner established the following: 1) That police officers on scene immediately determined that the female passenger, K.S., was sixteen (16) years of age. [RP Vol. 3, 650-651]; [RP Vol. 3, 673-674]; [RP Vol. 3, 697]; 2) That Petitioner was detained at 7:57 P.M. on May 14, 2018. [RP Vol. 3, 647]; 3) That police officers on scene, after immediately determining that K.S. was above the age of consent, determined, by inter viewing K.S., that sexual activity had not occurred, thereby dispelling reasonable suspicion. [RP Vol. 3, 651-652, 661-663, 665-670, 673]; 4) That Petitioner was detained in the locked patrol vehicle for three (3) hours without reasonable suspicion or probable cause while officers made no attempt to investigate; 5) Detective Valderaz discovered the no-contact order sometime after he arrived on scene at 2237(1037 P.M.). [RP Vol. 3, 654-655], Appendix E. Importantly, the State stipulated to all facts presented in the motion to suppress. [RP Vol. 6, 1333-1340], Appendix E. The motion to suppress, filed in the district court on December 15, 2020 (12/15/2020) is based on U.S. CONST. ART. AMENDMENTS § 8 AMENDMENTS IV (Fourth Amendment); N.M. CONST. ART. 11 § 10 (Article 11, Section 10); and New Mexico Supreme Court case State v. Werner, 1994-NMSC-025, 117 N.M. 315, 871 P.2d 971, which was determined utilizing the Fourth Amendment. [RP Vol. 3, 626]. And relied on an abundance of United States Supreme Court rulings. Petitioner established that it was the State's burden to establish that the seizure was reasonable. Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) [RP Vol. 3, 629], cited United States v. Sharpe, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985) [RP Vol. 3, 630]. See number 1, page 1 of Appendix F for quote. And while relying on the Sharpe case, argued that the detention was unreasonable because in fact, police did not diligently pursue a means of investigation after K.S. conclusively dispelled reasonable suspicion for illegal sexual activity. Sharpe, 470 U.S. at 686. And also quoted from the Sharpe case that "a seizure that in duration, scope, or means goes beyond the bounds of Terry, [392 U.S. 1] cannot be reconciled with the Fourth Amendment in the absence of probable cause." Sharpe, 470 U.S. at 691. [RP Vol. 3, 632-633]. Based on that quote, Petitioner argued that the three (3) hour

detention could not be reconciled with the Fourth Amendment because it was conducted without probable cause. *Id.* [RP Vol. 3, 664]. And argued that the detention was transformed into a *de facto* arrest because it lasted too long under the circumstances and relied on *Sharpe*, 470 U.S. at 682-688. [RP Vol. 3, 669] and provided the applicable quote on [RP Vol. 3, 635]. And argued that it was the officer's intention to conduct an arrest even without probable cause and that they believed that they were authorized to execute a *de facto* arrest and that the detention was not meant to be temporary. [RP Vol. 3, 661-662] and relied on *Royer*, 460 U.S. at 500 to support that position. [RP Vol. 3, 630-631]. see number 3 of page 3 of Appendix P for quote. And clarified that "[a] Terry stop 'cannot continue for an excessive period of time... or resemble a traditional arrest.'" *Royer*, 460 U.S. at 500. [RP Vol. 3, 637] and argued that because Petitioner was detained on scene for an excessive period of time while not being free to leave, it resembled a traditional arrest, which is not permitted for a Terry stop. *Id.* [RP Vol. 3, 670-671]. Petitioner argued that "[t]his [Petitioner] was seized excessively based on nothing more than mere suspicion. This arbitrary invasion is the exact circumstance that the Fourth Amendment was adopted to prevent." [RP Vol. 3, 671-672] and quoted *Delaware V. Prouse*, 440 U.S. 648, 654, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) to support that position. [RP Vol. 3, 638-639]. see number 5 of pages 2-3 of Appendix P for quote. Concerning an examination under a state analysis, Petitioner quoted Article 11, Section 10 [RP Vol. 3, 628] and indicated that case law establishes that it provides broader protection than does the Fourth Amendment. [RP Vol. 3, 627-628]. Petitioner quoted portions of *Werner*, *Supra* at ¶ 19. [RP Vol. 3, 629]. see number 6 of page 3 of Appendix P for quote. And while citing that quote, argued that officers on scene arrested Petitioner without probable cause by locking him in a patrol vehicle and that the reason for the arrest was to keep him available in case probable cause was later developed. [RP Vol. 3, 659].

Petitioner argued that the continued detention after K.S. conclusively dispelled officer's suspicions involved awaiting the development of circumstances off of the scene and was impermissible. [RP Vol. 3, 662-663]. And quoted portions of *Werner*, *Supra* at ¶ 19 concerning "[d]iligence in the investigation". [RP Vol. 3, 631-632] see number 7 of page 3 of Appendix P for quote. Petitioner argued that the detention became a *de facto* arrest because it lasted too long under the circumstances. [RP Vol. 3, 669] and relied on *State V. Flores*, 1996-NMCA-059, ¶ 15, 122 N.M. 84, 920 P.2d 1038 and United States Supreme Court decision *Dunaway V. New York*, 442 U.S. 200, 212, 99 S. Ct. 2248, 2256-57, 60 L. Ed. 2d 824 (1979) [RP Vol. 3, 636]. see number 8 of page 4 of Appendix P for quote. Petitioner incorporated that "[i]t is likewise settled law that evidence 'discovered as a result of the exploitation of an illegal seizure must be suppressed.'" *State V. Portillo*, 2011-NMCA-679, ¶ 25, 150 N.M. 187, 258 P.3d 466 [RP Vol. 3, 637]. And relied on that quote when demanding for evidence to be suppressed. [RP Vol. 3, 671].

In its response, filed on June 24, 2021 (6/24/2021) the State of

New Mexico only argued that the motion should be denied without a hearing due to res judicata because the State of New Mexico (hereinafter State) believed that a previous order (entered on January 10, 2019) concerning the initiation of the detention decided all issues. [RP Vol. 6, 1336-1337] Appendix E. The State included a copy of the January 10, 2019 order (hereinafter the Romero order) as State's Exhibit A. [RP Vol. 6, 1341-1350] see Appendix E. The State did not contest any facts established in the motion. Crucially, the State did not argue, or offer evidence to indicate, that exigent circumstances justified the detention in the patrol vehicle. See Appendix E. Additionally, the Romero order does not contain rulings on:

- 1) The reasonableness of the detention in the police vehicle;
- 2) Whether or not exigent circumstances existed to justify the detention;
- 3) Whether or not K.S., whom at sixteen (16) years of age, and over the age of consent, was in danger of being sexually assaulted;
- 4) That the laws concerning the age of consent did not apply to the circumstances of the encounter;
- 5) The time that officers discovered the alleged pending case;
- 6) The time that officers discovered the alleged no-contact order. See Appendix E (State's Exhibit A).

The court held a hearing, where Petitioner requested suppression of all evidence allegedly discovered after the point of de facto arrest. [CD 5/24/2021, 3:15:43-4:26:51]; [BLC 15]; Appendix G. The State did not contest any of the facts established in the motion, nor did the State present testimony or any other evidence at the hearing. Furthermore, the State did not argue that exigent circumstances justified the detention of this Petitioner in the locked police vehicle. The district court denied the motion, ruling that "Defendant relies on attachments to his motions to support a factual basis for his arguments." and that "Defendant was detained in a reasonable manner." Appendix F. However, the district court did not find that the long investigation was diligent, nor did it find that exigent circumstances justified the detention in the patrol vehicle. Appendix F. The district court simply refused to consider Petitioner's arguments. (emphasis added.)

On September 11, 2020 Petitioner filed a motion to suppress the search of his SUV, arguing that the affidavit for the search

warrant was lacking probable cause, particularity and was overbroad. [RP Vol. 3, 497-541]; [BIC 41]; Appendix G. Petitioner based the motion on the Fourth Amendment of the United States Constitution and Article 11, Section 10 of the New Mexico Constitution. [RP Vol. 3, 497]. And several United States Supreme Court cases as well as Rule 5-211 NMRA and several cases from the New Mexico Court of Appeals (COA) and Supreme Court (NMSC). Petitioner quoted the Fourth Amendment. U.S. CONST. art. AMENDMENTS § AMENDMENTS IV. [RP Vol. 3, 498-499]. See number 9 of page 4 of Appendix P for quote. Petitioner relied on *Giordenello v. United States*, 357 U.S. 480, 486 (1958). [RP Vol. 3, 502] see number 10 of page 5 of Appendix P for quote. Petitioner argued that the affidavit for search warrant (hereinafter affidavit) lacked probable cause altogether because it is not confirmed that a crime occurred inside the place to be searched (the vehicle) because the occupants are not identified. Furthermore, even if the occupants of vehicle were identified, it is still not clarified how they were identified. [RP Vol. 3, 526-528]. Petitioner also argued that a "basis of knowledge" for K.S.'s age is not contained in the affidavit. [RP Vol. 3, 532-533]. And also argued that the affidavit lacked probable cause for the two crimes that the warrant was issued and executed to investigate (NMSA 30-6A-3; and NMSA 30-24-3) [RP Vol. 3, 533-534]. Cf paragraph 9 of Appendix N. And argued "Affiant did not explain why he believed he would find evidence of the statutes of NMSA 30-24-3 (Bribery or Intimidation of a Witness); and NMSA 30-6A-3 (Sexual Exploitation of Children). He made a failed attempt to establish probable cause for violating the no-contact order but requested evidence of completely different statutes." [RP Vol. 3, 539]. and Cf Appendix N. Neither statute is mentioned in the affidavit until paragraph 9, when the Affiant requested the warrant to be issued so he could investigate those crimes. Appendix N. Petitioner argued that "The wording [in the affidavit, paragraph 9] 'to assist affiant with his investigation' enabled the officers [executing the warrant] unlimited discretion to rummage through all contents of the vehicle to determine what would and wouldn't 'assist' affiant with his investigation. That language allowed for a 'fishing expedition' to attempt to confirm affiant's 'mere

suspicion' that the two listed crimes even occurred. By asking for items to 'assist with his investigation', Affiant was granted permission to seize any and all items within the vehicle and claim after his inspection that the items would further drive his investigation forward. Nothing is to be left to the discretion of the officer executing the search." [RP Vol. 3, 537-538]. Cf Appendix N. Petitioner relied on *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506 (1965). [RP Vol. 3, 512]. See number 11 of page 5 of Appendix P for quote. And *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) [RP Vol. 3, 511-512]. And *Illinois v. Gates*, 462 U.S. 213, 239, 273, 276 (1982). [RP Vol. 3, 502-503]. And *Nathanson v. United States*, 290 U.S. 41, 47, 54 S.Ct. 11 (1933) [RP Vol. 3, 505; 510-511]. See number 12 of page 5 of Appendix P for quote. Petitioner quoted Rule 5-211(F)(4). N.M.R. CRIM. P. DIST. Ct. 5-211 [RP Vol. 3, 500] see number 13 of page 6 of Appendix P for quote. Relied on *State v. Miller*, 1966-NMSC-041, 76 N.M. 62, 67, 412 P.2d 240, 243 (while relying on *Aguilar v. State of Texas*, 378 U.S. 108 (1964), invalidated a search warrant because the affidavit in support of the warrant did not indicate how the informant (a police officer), arrived at his conclusion that the defendant committed a crime.) [RP Vol. 3, 503-504]. And *State v. Cordova*, 1989-NMSC-083, 109 N.M. 211, 213, 784 P.2d 30, 32. And clarified that "[d]etailed search warrant affidavits 'must show: (1) that the items sought to be seized are evidence of a crime[.]' And, 'search and seizure is only lawful where the search warrant affidavit sets forth a factual basis establishing 'a sufficient nexus between (1) the criminal activity, and (2) the things to be seized, and (3) the place to be searched.'" *State v. Sabeerin*, 2014-NMCA-110, ¶ 10, 336 P.3d 990. [RP Vol. 3, 508]. And "a mere suspicion that the objects in question are connected with criminal activity will not suffice." *Id.* see also *State v. Turkal*, 1979-NMSC-071, 93 N.M. 248, 599 P.2d 1045 [RP Vol. 3, 511]. Quoted that "[S]earch warrants must be specific in both particularity and breadth. Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *State v. Hinahara*, 2007-NMCA-116, ¶ 8, 142 N.M. 475, 166 P.3d 1129. [RP Vol. 3, 518].

And that "[t]he particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Sabeerin*, *Supra*, at ¶ 26. [RP Vol. 3, 516]. Importantly, Petitioner argued that "The warrant was issued by [the district court] even though the warrant application (affidavit) lacked the necessary probable cause for the two broad statutes for which the warrant was issued to investigate." [RP Vol. 3, 523]. And "Furthermore, neither the affidavit, nor the warrant itself contained adequately particularized language to describe with specificity the items to be seized as is mandated by constitutional law." [RP Vol. 3, 523]. In the CONCLUSION, Petitioner pointed out that "the 'Good-Faith' exception to the exclusionary rule is incompatible with Article II, Section 10 of the New Mexico Constitution. Because 'To 'effectuate the constitutional right to be free from unreasonable search and seizure,' the government is denied 'the use of evidence obtained pursuant to an unlawful search.'" *State v. Gutierrez*, 1993-NMSC-062, ¶ 50, 116 N.M. 431, 863 P.2d 1052. [RP Vol. 3, 541]. The court held a hearing. [CD 12/18/2020, 2:47:20-2:56:03]. At the hearing, Petitioner argued that the affidavit was insufficient because it did not establish a nexus between the criminal activity and the place to be searched. — The Affiant attempted to establish probable cause for violation of a no-contact order and mentions two occupants of a vehicle. However, he never clarified the identities of those occupants. Furthermore, he did not provide the "basis of Knowledge" for the hearsay source of that unconfirmed information. see Appendix N. As a result, violation of a no-contact order did not occur inside the vehicle. Petitioner also argued that probable cause does not exist in the affidavit for the crimes the warrant was designed and issued to investigate, Sexual Exploitation of Children (hereinafter SEC) and Bribery or Intimidation of a Witness. As a result, the warrant also lacked particularity and was over broad. — A nexus does not exist between the things to be seized (the cellphones), the criminal activity (SEC and Bribery or Intimidation of a Witness) and the place to be searched (the vehicle).

The district court orally ruled that the warrant was issued to investigate SEC and Bribery or Intimidation of a Witness, and further ruled that probable cause does not exist for those crimes. (emphasis added). The State argued that the Affiant should not be punished for failing to show probable cause. And that probable cause existed for SEC because the alleged Victim refused to answer if she sent nude photographs. [CD 12/18/2020, 4:06:20-4:16:10]. THE COURT RULED SHE WAS INVOKING HER FIFTH AMENDMENT. The State conceded that the affidavit lacked probable cause. [CD 12/18/2020, 4:15:28-4:16:10]. The court denied the motion, claiming it was permitted to infer the identities of the vehicle occupants but did not address the lack of a "basis of Knowledge". And determined the warrant was valid because it found probable cause for violation of a no-contact order. And found that the particularity and breadth requirements were satisfied because the affidavit asked for cellphones. See Appendix D.

On May 14, 2018, police exploited an unlawful detention by conducting an investigation after they expanded the scope of investigation by asking about weapons without reasonable suspicion during an investigation for CSPM, a nonviolent crime. The police held Petitioner in the back of a police car for hours after they determined that a female passenger, K.S., was over the age of consent. K.S. verified the relationship to be consensual and continued to deny any sexual involvement with Petitioner. Due to the lack of diligence in the investigation as well as the excessive amount of time (three hours) and manner he was detained (in the back of a police vehicle), Petitioner was subject to an unlawful de facto arrest. Officers on scene made no attempt to confirm or dispell their suspicions of a CSPM (The cause of the investigation).

THOUGH POLICE DETERMINED K.S.'S IDENTITY AND CONFIRMED HER AGE TO BE OVER THE AGE OF CONSENT, APPROXIMATELY AN HOUR INTO THE DETENTION (according to the State and the COA), THEY CONTINUED TO DETAIN PETITIONER WITHOUT REASONABLE SUSPICION. (emphasis added). This was to keep him available for arrest in case probable cause was later developed.

On January 5, 2021, Petitioner filed a motion to suppress (scope).

This was due to officers on scene expanding the scope of investigation without reasonable suspicion to do so, in violation of New Mexico law. [RP Vol. 5, 1017]. The motion was based on N.M. Const. art. 11 § 10 of the New Mexico Constitution and a multitude of New Mexico cases. The court held a hearing. [CD 5/24/2021, 3:15:43-4:26:51]. The State refused to recognize that Article 11, Section 10 offers broader protection than does the Fourth Amendment. Furthermore, the State did not provide testimony or any other evidence at the hearing. The court denied the motion and ruled that officers were investigating CSPM when the question concerning weapons was asked and further ruled that CSPM is a violent offense. [RP Vol. 9, 2082-2086]. Appendix F. The district court abused its discretion by denying this Petitioner's motions to suppress. Petitioner presented in his Brief-In-Chief that the district court found that "Deputy Valderaz discovered the no-contact order (the reason for the arrest)." and that "Mr. Bingham was detained uncuffed in a deputy's vehicle for about three hours, ... while waiting for Deputy Valderaz." [BIC 15, 17] Appendix G. However, in its Answer Brief, the State demanded for the COA to violate appellate practice and procedure by acting as the fact-finder and over-ruling those findings. The State demanded the COA to determine that it was Deputy Padilla that discovered the no-contact order an hour into the detention. [AB 6-7, 11-12]. Appendix H. Petitioner therefore requested for the lower court's rulings to be given deference. [RB 14-15]. And argued that the State's timeframe is too long considering the lack of justification. [RB 15-20].

Appendix I.

Petitioner argued in Brief-In-Chief that the affidavit for search warrant was invalid. [BIC 40-43]. Appendix G. This is because the affidavit did not establish probable cause for SEC and Bribery or Intimidation of a Witness. As a consequence of that flaw, the invalid search warrant was also overbroad and lacked particularity and the resulting search itself was not limited in scope. [BIC 42]. Though the Affiant attempted to establish probable cause for violation of a no-contact order, he requested the search warrant to be issued for his investigation of SEC and Bribery or Intimidation of a Witness instead. See paragraph 9 of Appendix N.

Petitioner relied on *State v. Williamson*, 2009-NMSC-039, ¶ 29, 146 N.M. 488; *State v. Cordova*, 1989-NMSC-083, ¶ 17, 109 N.M. 211; *State v. Evans*, 2009-NMSC-027, ¶ 11, 146 N.M. 319; *State v. Gurule*, 2013-NMSC-025, ¶ 15; *State v. Hinahara*, 2007-NMCA-116, ¶ 8, 142 N.M. 475; Article 11, Section 10 of the New Mexico Constitution; and the Aguilar-Spinelli test outlined in Rule 5-211 NMRA. [BIC 41]. Appendix G. Additionally, the affidavit failed to establish K.S.'s age or a nexus to any criminal activity inside the place to be searched (the vehicle) because K.S. and Petitioner are not confirmed to be the occupants of the vehicle. Furthermore, a basis of knowledge for any of that information is not contained in the affidavit. (emphasis added), [BIC 42, 43], Appendix G. On appeal, the COA disregarded the district court's findings of fact; developed or altered fact-dependent arguments to justify expanding the scope of investigation and the de facto arrest; engaged in fact-finding to rule on those and other arguments; cured the insufficient affidavit by supplementing it with additional information; applied the "Totality of the Circumstances" test to speculate the occupant's identities; ruled warrant was valid because affidavit established probable cause for a crime other than the crimes it was designed and issued to investigate; further ruled that probable cause existed for SEC because the alleged victim refused to answer questions; refused to address the lack of probable cause for Bribery or Intimidation of a witness, the lack of particularity, overbreadth, and the concern that a basis of knowledge for the alleged victim's age is not contained in the affidavit. See *State v. Bingham*, A-1-CA-40639, mem. op. (N.M. Ct. App. Sept. 23, 2024) (nonprecedential) (Mem. Op.)). The COA violated appellate practice and procedure by considering and ruling on several issues that were not raised in the district court below because it required for the (COA) to act as the fact finder, which is the duty of the district court. These include but are not limited to: 1) That exigent circumstances justified confining Petitioner in a locked patrol vehicle. — The issue of exigent circumstances was raised for the first time on appeal by the State [AB 9-10] see Appendix H. And then determined by the COA in its memorandum opinion. Mem. op. ¶ 11. See Appendix A; 2) That law enforcement did not believe K.S.'s declaration of age and date of birth. — This issue was

raised for the first time, sua sponte, on appeal, by the COA and decided on in its memorandum opinion. Mem. op. ¶ 11. Appendix A. Please note that both parties briefed that law enforcement believed K.S.'s assertion of age and birth date. Appendix G, [BIC 7]; Appendix H, [AB 1, 4-14]; Appendix I, [RB 4-12]; 3) The timeline for when law enforcement allegedly discovered the pending case. — This issue was raised and determined sua sponte for the first time on appeal by the COA in Mem. op. ¶ 10. see Appendix A; 4) That the protracted investigatory detention was diligent. — This issue was raised and determined sua sponte for the first time on appeal by the COA in Mem. op. ¶ 12. see Appendix A; 5) That the detention was justified for law enforcement to determine K.S.'s identity and arrange for her to be picked up. — The COA raised this issue sua sponte for the first time on appeal and then ruled on it in its memorandum opinion. Mem. op. ¶ 10. see Appendix A; 6) That law enforcement was investigating dead bodies and a stolen vehicle when Deputy Padilla asked if Petitioner had any weapons. — The COA raised this issue sua sponte for the first time on appeal and then ruled on it in Mem. op. ¶ 8. see Appendix A. Note that both parties briefed that officers were investigating CSPM when the question was asked. see Appendix G, [BIC 46]; Appendix H, [AB 41-42]; Appendix I, [RB 100-109]. Furthermore, the district court ruled that law enforcement was investigating CSPM when Deputy Padilla asked about weapons. see Appendix F. In fact, many of the arguments made by the COA are actually in conflict with the arguments briefed in the State's Answer Brief, [AB 4-14]. see Appendix H. Concerning those rulings made throughout State v. Bingham, No. A-1-CA-40639 (Appendix A), none of those arguments briefed by the COA throughout Mem. op. ¶¶ 8-13 were briefed by the State on appeal in the Answer Brief. Cf Appendix H, [AB 4-14]. In its Answer Brief, the State briefed that law enforcement immediately realized that K.S. was sixteen years of age due to "K.S.'s admission that she was only 16." [AB 1], Appendix H. — And then, obviously not realizing that at sixteen (16) years of age, K.S. had passed the age of consent in New Mexico, the State proceeded to brief that probable cause for CSPM justified the detention in the patrol vehicle from the

beginning because law enforcement immediately realized that K.S. was sixteen (16) years of age. [AB 1, 7-10], Appendix H. — So the State actually briefed law enforcement believed "K.S.'s admission that she was only 16." [AB 1, 7-10], Appendix H. This is consistent with Petitioner's Brief-In-Chief because he actually briefed that "Deputy Padilla eventually established she was 16 years old, her birthday was April 29, 2002[.]" [BIC 7], Appendix G. Note that this information is based on Deputy Padilla's testimony and is therefore supported by substantial evidence. see [BIC 7], Appendix G. The following three arguments briefed by the State are all dependent on the State not understanding that the age of consent in New Mexico is sixteen (16) years of age: 1) The State briefed that "Probable Cause was cemented when, within ten minutes, K.S. admitted she and Defendant were 'seeing each other' [.]" [AB 8], Appendix H; 2) The State clearly and fully briefed that this Petitioner was arrested for CSPM when law enforcement detained him in a patrol vehicle. [AB 7-12], Appendix H; 3) And also briefed that "deputies could not very well leave Defendant and K.S. alone... to continue, potentially subjecting K.S. to an additional CSPM." [AB 9], Appendix H. But because Petitioner reminded the COA in his Reply Brief that the age of consent in New Mexico is sixteen (16) years of age and therefore reasonable suspicion of a crime did not exist to justify the detention of Petitioner, the COA constructed a new argument for the State in its memorandum opinion. The COA actually violated appellate practice and procedure by briefing that law enforcement was not required to believe K.S.'s declaration of age. Mem. Op. ¶ 11. Appendix A and CF [RB 4-14], Appendix I. CF [AB 1, 7-10]. The COA briefed, without evidence, and contrary to the State's briefing in its Answer Brief that Deputy Padilla needed to determine her (K.S.'s) identity in order to "Verify her assertions" that she was sixteen, which actually occurred "about an hour into the [detention]." Mem. Op. ¶ 10. Appendix A. The COA acknowledged that law enforcement continued to detain Petitioner after they verified her identity and her assertion that she was over the age of consent and that the search for the pending court case and the no-contact order occurred, at times unspecified, as

a result of that unlawful detention. Mem. op. ¶ 13. Appendix A. Petitioner briefed the issue of de facto arrest in his Brief-in-Chief [BIC 14-22], Appendix G. — This is because he was detained “in the back of a patrol car” and “police were not diligent in conducting the investigation where it took them hours to discover the no-contact order and did not let [him] go after there was no confirmation that he and K.S. were engaged in unlawful sexual activity”, that he was subjected to an unlawful de facto arrest. Relying on Werner, Supra [BIC 17-18], Appendix G. On appeal, the State briefed that probable cause immediately existed because K.S. admitted that she was “16” and the relationship was consensual [AB 1, 7-14], Appendix H. And briefed on appeal for the first time that exigent circumstances justified the immediate warrantless arrest in the patrol vehicle. [AB 9-10], Appendix H. In his Reply Brief, Petitioner briefed that he should have been released as soon as K.S. confirmed she was sixteen, denied sexual activity and confirmed the relationship was consensual because the age of consent is sixteen (16). [RB 4-8, 9-12, 15-19], Appendix I. And relied on State v. Samora, 2016-NMSC-031, ¶ 30, 387 P.3d 236 (officially clarifying that the age of consent in New Mexico is sixteen (16) years of age). [RB 5-6], Appendix I. And that the arresting officer, Deputy Whitzel, immediately recognized K.S. to be sixteen years of age. [RB 6], Appendix I. (emphasis added). And that exigent circumstances did not exist because K.S. was over the age of consent and the State did not argue the issue or present evidence of exigent circumstances below. [RB 6-12], Appendix I. And relied on State v. Duffy, 1998-NMSC-014, ¶ 71, 126 N.M. 132, 967 P.2d 807 [RB 1], Appendix I. and State v. Campos, 1994-NMSC-012, ¶ 14, 117 N.M. 155, 870 P.2d 117 [RB 1], Appendix I. Petitioner requested for the COA to refrain from fact-finding. [RB 12, 100, 106], Appendix I. The trial court did not rule on the presence of exigent circumstances, therefore, there was no decision for the COA to affirm. Petitioner relied on State v. Flores, 1996-NMCA-059, 122 N.M. 84, 920 P.2d 1038 [BIC 18, 20-21], Appendix G. And this is because “[t]he district court in this case made the same error in finding that the search of the case lookup data base was not a fruit of the illegal de facto arrest.” [BIC 21], Appendix G. Police continued to confine Petitioner even though “there was no confirmation that he and K.S. were engaged in unlawful sexual activity.” [BIC 17], Appendix G. IN FACT, ACCORDING TO THE COA, POLICE CONTINUED TO UNLAWFULLY CONFINED PETITIONER EVEN AFTER THEY CONFIRMED K.S. WAS OVER THE AGE OF CONSENT. Mem. op. ¶¶ 11-12, Appendix A. And even though the COA acted as the fact-finder to determine that law enforcement confirmed K.S.’s identity and age an hour into the detention, it did not rule why or even if it was necessary to continue to confine this Petitioner after that confirmation. Mem. op. ¶¶ 11-12, Appendix A. Additionally, the COA did not rule what time the search of the case lookup data base occurred. Mem. op. ¶¶ 11-12, Appendix A. The district court only ruled that “Defendant was detained in a reasonable manner” and that the information was not “the fruit of [Petitioner’s] detention and arrest”, but refused to rule on whether or not the investigation was diligent. See paragraphs 15-18 of Appendix F.

However, the COA violated appellate practice and procedure by ruling that "Victim's equivocation also contributes to our conclusion that the long investigation was diligent." Mem. op. ¶ 12, Appendix A. The district court ruled that the reason officers inquired about weapons was because they were investigating CSPM. See paragraph 27 of Appendix F. — That ruling is supported by substantial evidence because officers testified to investigating CSPM. See Appendix M. Petitioner briefed in his Reply Brief that the circumstances were not violent and would not involve weapons. [RB 103-108], Appendix I. Therefore, the COA overruled the district court by finding that the question was asked because they were investigating a stolen vehicle and dead bodies. Mem. op. ¶ 8, Appendix A. The COA acknowledged throughout its opinion that the vehicle occupants are never identified in the affidavit. Mem. op. ¶ 19, Appendix A. Therefore, reliance on the "Totality of the Circumstances" test to determine their identities is in conflict with the ruling from *State v. Cordova*, 1989-NMSC-083, 109 N.M. 211, because the NMSC rejected the "Totality of the Circumstances" test. In Mem. op. ¶¶ 19, 21, the COA claims that the requirements of Rule 5-211(E) NMRA are "hyper technical". And that "a common-sense reading of the Affidavit allows for the inference that the occupants of the vehicle were Defendant and Victim[.]" Appendix A. And relied on *State v. Williamson*, 2009-NMSC-039, ¶ 30; and *State v. Donaldson*, 1983-NMCA-064, ¶ 13, 100 N.M. 111 to justify circumventing the requirements outlined in Rule 5-211(E) and Article II, Section 10. And the logic for reliance on those cases is based on the flawed premise that "the occupants... identified themselves." Mem. op. ¶ 18; Mem. op. n. 2. See Appendix A. The COA supplemented the affidavit by adding that "Deputy Whitzel was on the scene with the occupants of the vehicle when they identified themselves". Mem. op. ¶ 18 of Appendix A and CF Appendix N. The COA also supplemented the affidavit by adding the following information in order to promote the "Totality of the Circumstances" test: 1) Interviews were conducted after "the arrest" Mem. op. ¶ 19, Appendix A; 2) "[B]ecause the two were found inside Defendant's vehicle" Mem. op. ¶ 21, Appendix A; 3) "Defendant and Victim were removed from the vehicle" Mem. op. ¶ 22, Appendix A. CF Appendix N. As a result of the impermissibly considered information, the COA proceeded to find, in Mem. op. ¶¶ 20-21, that the affidavit was sufficient because "there [were] reasonable grounds to believe that [violation of the no-contact order] ha[d] been committed in [the vehicle]". However, the COA acknowledged that the warrant was "requested [to] search for evidence of [SEC and bribery or intimidation of a witness]." Mem. op. ¶ 22, Appendix A and CF paragraph 9 of Appendix N. In Mem. op. ¶ 22, the COA ruled that "Victim's disinclination to answer questions about nude photographs supports an inference that the cellphones ... contained evidence of SEC". Appendix A. In order to support that ruling, the COA impermissibly supplemented the affidavit by adding that the alleged Victim was found "lying next to an obviously older male." Mem. op. ¶ 22, Appendix A and CF Appendix N. The COA cured the insufficient affidavit by claiming that nonexistent but probative information is contained within the document's four corners. This conduct serves the same effect as altering/amending the document on review. See Appendix A and CF Appendix N.

Because the probative information is not actually contained within its four-corners, the affidavit lacks the necessary probable cause. Therefore, the COA resorted to deceptive conduct by falsifying information in its memorandum opinion. Then Judge Wray, along with Judge Medina, and Judge Baca, ruled that this falsified information satisfied the probable cause standard outlined in Rule 5-211(E) NMRA. The place to be searched in this instance was a Black 2012 Ford Expedition. In order to establish probable cause for violation of a no-contact order and establish a nexus between the alleged crime and the Expedition, it was necessary to place Defendant and K.S. inside the vehicle. The affidavit does not claim that the occupants of the vehicle were in fact Defendant and K.S., nor did it clarify if or even how the informing officer, Deputy Whitzel, identified the occupants of the vehicle. As a result, not only does the affidavit not place Defendant and K.S. inside the vehicle, even if it did, it does not provide a "basis of knowledge" for Deputy Whitzel's hypothetical determination of identities. The COA acknowledges the "basis of knowledge", or "factual basis" requirement set out in Rule 5-211(E) NMRA. And obviously realized that the rule is not satisfied in the affidavit, so took a concerted effort to resolve this severe deficiency by falsely claiming that the affidavit reflects that the vehicle occupants identified themselves in the presence of Deputy Whitzel. The affidavit does not indicate that Deputy Whitzel identified the vehicle occupants at all. See Appendix N. On multiple occasions, the COA directly acknowledges "the Affidavit does not identify either occupant by name". See Mem. Op. ¶ 19. Appendix A.

In this case, the COA entered an official order extending the filing deadline to file a Motion for Rehearing to November 22, 2024. See Appendix J. In accordance with that order, Petitioner filed the last motion for rehearing on November 20, 2024. See Appendix K and CF Appendix J. The COA accepted Petitioner's last motion for rehearing and in fact considered the motion and made a ruling on it. See Appendix L. Unfortunately, the NMSC prohibited this Petitioner from filing a petition for writ of certiorari to them by disregarding Rule 12-502(B) NMRA. The NMSC DISMISSED Petitioner's appeal in its entirety on January 9, 2025

(01/09/2025). see Appendix B. - This was seven(7) days before the COA disposed of the last motion for rehearing. Appendix K. The COA disposed of the last motion for rehearing on January 16, 2025 (01/16/2025) by denying the motion. Appendix L. Because the NMSC dismissed Petitioner's appeal before the COA ruled on the last motion for rehearing, Petitioner filed a motion on January 21, 2025, requesting for the NMSC to reopen the appeal. See Appendix C. The purpose of the motion was to inform the NMSC of Rule 12-502 NMRA and to allow them the opportunity to correct the mistake. Petitioner specifically requested for the NMSC to recognize the wording of Rule 12-502(B) NMRA and to allow him to file the petition for writ of certiorari within the allowed thirty(30) days from the date the COA made its ruling on the motion for rehearing. As a result, because Petitioner asked specifically for permission to file the petition to them(NMSC) in accordance with Rule 12-502(B) NMRA, when the NMSC denied the motion, through official court order, it served the same effect as commanding this Petitioner not to file the petition. In other words, the order of denial barred Petitioner from filing the petition for writ of certiorari. see Appendix D and CF Appendix C.

REASONS FOR GRANTING THE PETITION

The majority of the reasons relied on for granting this writ have not been raised before because the questions arose for the first time during appeal as a result of inappropriate appellate practice and procedure. It is essential for this Court to review questions concerning a state court's deprivation of Due Process Rights in order to ensure the preservation of our United States Constitution. Without such review, state courts would be free to continue the degradation of our Constitutional Amendments without consequence. see *Ames v. State of Kansas* Johnston Kansas Pac Ry Co V. Same, 111 U.S. 449, 471, 4 S. Ct. 437, 28 L.Ed. 482 (1884). The Fourteenth Amendment clarifies that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." US. CONST. ART. AMENDMENTS § AMENDMENTS XIV. The Fifth Judicial District Court of New Mexico, the New Mexico Court of Appeals, and the New Mexico Supreme Court have all denied Petitioner of his fundamental right of "Equal Protection of the Laws" under the Fourteenth Amendment of the United States Constitution. When the NMSC denied Petitioner's motion for reconsideration (Appendix D), it not only denied Petitioner of "Equal Protection of the Laws" of New Mexico, it also served the same effect as "denying discretionary review" of the COA's opinion and the trial court's rulings. CF Appendix C. Rule 12-502(B) NMRA describes the deadline for filing a petition for writ of certiorari to the NMSC by explaining "[t]he petition for writ of certiorari shall be filed with the Supreme Court clerk within thirty(30) days after final action by the Court of Appeals[.]" And continued by ex-

plaining the meaning of "final action" by stating "final action shall be the disposition of the last motion for rehearing that was timely filed."

N.M.R. App. P. 12-502. In this case, Petitioner filed his last timely filed motion for rehearing on November 20, 2024 (11/20/2024). See Appendix K.

The NMSC committed an abuse of discretion by dismissing the appeal before Petitioner had the opportunity to timely file the petition for writ of certiorari. The due date of December 23, 2024 listed on the order of dismissal is not in accordance with Rule 12-502(B) NMRA

because the COA had not disposed of Petitioner's last motion for rehearing (filed November 20, 2024). see Appendix K and CF Appendix L and Appendix B and CF Rule 12-502(B) NMRA. Rule 12-502 NMRA does not contemplate allowing the NMSC to restrict the time limit to file the petition for writ of certiorari or to disregard the rule. Therefore, the order of dismissal is arbitrary and unlawful. See Appendix B and CF Rule 12-502(B) NMRA. The NMSC is not permitted to ignore Rule 12-502 NMRA. see *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S. Ct. 1293, 134 L.Ed.2d 440 (1996); *Brecht v. Abrahamson*, 507 U.S. 619, 632-633, 113 S. Ct. 1710, 123 L.Ed.2d 353 (1993).

Because filing a petition for writ of certiorari to the NMSC is part of the appeal in New Mexico (according to Rule 12-502 NMRA), the process for filing the writ must be kept free of unreasoned distinctions that have impeded Petitioner's equal access for filing of the writ. This is because "[t]his Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310, 16 L.Ed.2d 577, 86 S. Ct. 1497 (1966). Petitioner's last motion for rehearing, filed on November 20, 2024 (Appendix K), was timely filed because Rule 12-404(A) NMRA permits the COA to enlarge the filing deadline. see N.M.R. App. P. 12-404. In this case, the COA extended the filing deadline to November 22, 2024. And because the NMSC has deprived Petitioner of that right, which all citizens of New Mexico similarly situated are permitted to exercise, Petitioner has been denied of "Equal Protection of the Laws." This Court provides guidance for determining claims of violations of the Equal Protection clause and has clarified that "a [petitioner] who 'alleges that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the differences in treatment' states a claim for violation of [his] right to equal protection." *Willowbrook v. Olech*, 528 U.S. 562, 564, 126 S. Ct. 1073, 145 L.Ed.2d 1060 (2000).

Article VI, Section 2 of the New Mexico Constitution states that "an aggrieved party shall have an absolute right to one appeal." N.M. CONST. ART. VI § 2. Petitioner, Edward Bingham, is the aggrieved party and has the right to appeal. Article VI, Section 3 of the New Mexico Constitution states that "[t]he Supreme Court shall have... superintending control over all inferior courts; it shall also have power to issue writs of... certiorari... and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same." N.M. CONST. ART. VI § 3.

Rule 12-502 NMRA explains the process for a petitioner to request for the NMSC to issue writs of certiorari. In fact, Rule 12-502(A) NMRA states "[t]his rule governs petitions for the issuance of writs of certiorari seeking review of decisions of the Court of Appeals." N.M. R. App. P. 12-502. The NMSC has superintending control over the COA and the Fifth Judicial District Court of New Mexico. N.M. CONST. ART. VI § 3. In fact, the NMSC accepts the time line designated for filing the petition for writ of certiorari explained in Rule 12-502(B) NMRA. The NMSC also accepts that Rule 12-404(A) NMRA permits the COA to extend the filing deadline for motions for rehearing. The correct application of both of the aforementioned rules are discussed in detail in *Rivera v. Am. Gen. Financial Serv. Inc.*, 2011-NMSC-033, ¶¶ 11-14, 150 N.M. 398, 259 P.3d 803. In that case, the NMSC noted that the petitioner filed a motion for rehearing with the COA late. *Id.* ¶ 12. And continued by recognizing that the "written order denying [Petitioner's] motion for rehearing explicitly stated: 'Appellant having filed a motion for rehearing which has been considered by the Court. IT IS ORDERED that the motion for rehearing is denied.'" *Id.* And then the NMSC clarified that "[i]n the absence of an indication from the Court of Appeals that the motion for rehearing was rejected as untimely, we look to the order denying rehearing as the 'final action by the Court of Appeals' under Rule 12-502(B)." *Id.* ¶ 13. Therefore, under the Fourteenth Amendment's Equal Protection and Due Process clauses of the United States Constitution, the NMSC was required to provide this Petitioner with the same considerations under Rule 12-502(B) NMRA; Article VI, Sections 2 and 3 that were provided to the petitioner in *Rivera v. Am. Gen. Financial Serv. Inc.*, *Supra*. This is because the NMSC "have 'consistently followed a policy of construing [procedural] rules liberally, to the end that causes on appeal may be determined on the merits where it can be done without impeding or confusing administration or perpetrating injustice.'" *Id.* ¶ 13. Regarding this Petitioner's last motion for rehearing, in the "ORDER DENYING APPELLANT'S SECOND MOTION FOR REHEARING", the COA explicitly indicated "After careful review of the motion by the original panel, the Court has concluded that the motion should be denied." see Appendix L. So, just as in *Rivera v. Am. Gen.*

Financial Serv. Inc., Supra, the COA considered this Petitioner's motion. And because the COA did not indicate in the order that the motion was rejected as untimely or for any other defect, the NMSC should have looked to the denial of the motion for rehearing as the "final action by the Court of Appeals" under Rule 12-502(B). "Id. ¶ 13 CF Appendix L. Instead, the NMSC deprived this Petitioner of "Equal Protection of the Laws" by dismissing the appeal while the COA still had jurisdiction over the appeal and then ruled that Petitioner was not permitted to file a petition for writ of certiorari in accordance with Rule 12-502 NMRA. see Appendix B; Appendix D and CF Appendix C (emphasis added). Therefore, the standards outlined by this Court for establishing a claim for violation of his right to equal protection are satisfied. see Willowbrook V. Olech, 528 U.S. at 564. Please note that the Olech case establishes that the "Equal Protection" clause applies to a "class of one". Id. The memorandum opinion from the COA was subject to discretionary review by the state court of last resort (the NMSC). See Appendix A and CF Article VI, Section 3; and Rule 12-502.

This Court's Rule 13(1) states that "[a] petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." The NMSC entered the order denying discretionary review on February 21, 2025. See Appendix D and CF Appendix C. The NMSC's refusal to permit this Petitioner to file a timely petition for writ of certiorari is the equivalent of denying discretionary review. Therefore, the petition for writ of certiorari to this Court is due before 90 days after the NMSC denied Petitioner's motion for reconsideration on February 21, 2025. see Appendix D.

Accordingly, this petition is timely filed.

Turning to the COA's memorandum opinion (Appendix A), the COA deprived Petitioner of his "Equal Protection of the Laws" under the Fourteenth Amendment and Article II, Section 18 by refusing to follow correct appellate practice and procedure throughout Petitioner's appeal.

All of the aforementioned decisions by the Court of Appeals are unfair to Petitioner for a multitude of reasons and in fact do not comply with the procedural scheme established by this Court.. For instance, this Court has declared that "[o]rdinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

Hormel V. Helvering, 312 U.S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941)

The Hormel case applies to the current case in the following ways:

The COA should not have considered any of the issues that were not raised, briefed and considered in the district court below. Id. This is because this Court makes clear in the Hormel case that "our procedural scheme contemplates that" the State of New Mexico and this Petitioner should have "come to issue" on the following issues in the district court because it was "vested with authority to determine questions of fact": 1) Whether or not exigent circumstances justified confining Petitioner in a locked patrol vehicle; 2) Whether or not law enforcement believed K.S.'s declaration of age and date of birth; 3) That the continued detention even after law enforcement confirmed K.S.'s age and identity was constitutional, Raised and determined by the COA in Mem. Op. ¶ 11. Appendix A; 4) The timeline for when law enforcement allegedly discovered the pending case; 5) Whether the protracted investigatory detention was diligent; 6) Whether or not the detention was justified for law enforcement to confirm K.S.'s identity and arrange for her to be picked up; 7) Whether or not law enforcement was investigating CSPM or dead bodies and a stolen vehicle. Id. Therefore, based on this Court's ruling in the Hormel case, the COA should not have considered and ruled on the aforementioned issues because they were not raised and deter-

mined in the district court. Id. It was "essential" for the district court to determine the fact-dependent questions "in order that [this Petitioner] may have [had] the opportunity to offer all the evidence [he] believed relevant to the issues which the trial tribunal [was] alone competent to decide" Id. This Petitioner has been deprived of the opportunity to offer all the evidence on the issues raised by the State of New Mexico and the COA for the first time on appeal. Furthermore, only the trial court was competent to decide those issues. Id. It was also inappropriate for the COA to surprise this Petitioner on appeal by "final decision[s]" without allowing him to "introduce evidence" on the issues. Id. This is because this Court makes clear "it is equally essential in order that [Petitioners] may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." Id. — This Petitioner was absolutely surprised on appeal by "final decision." (Emphasis added.) The COA's inappropriate conduct has also denied this Petitioner of "Equal Protection of the Laws" of New Mexico. To be exact, Rule 12-321(A) NMRA states that "[t]o preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked." N.M.R. App. P. 12-321 (Recompiled from N.M.R. App. P. 12-216). see *State V. Martinez*, 2021-NMSC-002, ¶ 31, 478 P.3d 88 (Recognizing that Rule 12-216(A) NMRA has been recompiled as Rule 12-321(A) NMRA.) Appellate courts in New Mexico clearly recognize and apply Rule 12-321(A) NMRA to all cases other than this Petitioner's. In fact, the NMSC considers the rule fundamental to appellate practice and procedure. see *State V. Gomez*, 1997-NMSC-006, ¶ 14, 122 N.M. 777, 932 P.2d 1 (stating "It is a fundamental rule of appellate practice and procedure that an appellate court will consider only such questions as were raised in the lower court.") citing Rule 12-216(A) NMRA (Now Rule 12-321(A) NMRA). The COA also recognizes the significance of Rule 12-321 NMRA and acknowledges that adherence to the Rule is mandatory for performing its duties and clarifies that "[t]he rule, [(12-321 NMRA)], is not a mere formality; it ensures that this Court may meet its primary role, to cor-

rect trial court error. Our primary role is not to arrive at a conclusion we believe would be just by deciding issues that were not raised below." *State v. Joanna V.*, 2003-NMCA-100, ¶ 7, 134 N.M. 232, 75 P.3d 832. Therefore, the fact-dependent questions that were raised for the first time on appeal by the State of New Mexico and the COA should not have been considered because they required for the COA to abandon its primary role of correcting trial court error and instead to arrive at conclusions it believed "would be just by deciding issues that were not raised below." *Id.* In Mem. op. ¶ 11, the decision that Petitioner's detention in a locked patrol vehicle was "justified to ensure Victim's safety" is a fact-dependent determination of exigent circumstances. This is confirmed by the COA's explanation that "[e]xigent circumstances means an emergency situation requiring swift action to prevent imminent danger to life..." *State v. Copeland*, 1986-NMCA-083, 105 N.M. 27, 31, 727 P.2d 1342, 1346. And to be sure, the COA confirms that this is a fact-dependent determination by stating "[q]uestions of the exigency of the circumstances are fact questions for the trial court..." *Id.* And the NMSC accepts not only that exigency is a question of fact, but also that it is a question for the trial court to determine, not an appellate court. See *State v. Attaway*, 1994-NMSC-011, 117 N.M. 141, 144, 870 P.2d 103, 106 (stating "questions of 'good faith' and 'exigent circumstances' are questions of fact for the trial court to determine."). Therefore, it was inappropriate for the COA to determine exigent circumstances because the State of New Mexico did not raise the fact-dependent question in the district court. See Appendix E. Furthermore, the district court did not determine the presence of exigent circumstances. *Id.* See Appendix F. The COA explains that "[t]he preservation rule ([12-321(A)NMRA]) is applied to advance its three primary purposes: (1) to specifically alert the [trial] court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the [trial] court should rule against the

claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue." State V. Bell, 2015-NMCA-028, ¶ 12, 345 P.3d 342. Those three primary purposes were not satisfied in this Petitioner's appeal because the COA relied extensively on unpreserved issues throughout its opinion. Appendix A. As a result, this Petitioner has been denied the "equal protection" of Rule 12-321(A) NMRA, and the following well established case law: The NMSC has established that "[i]t would be unfair to an appellant to affirm on a fact-dependent ground not raised below because it is improper for an appellate court to engage in fact-finding and because appellant would have lacked an opportunity to present admissible evidence relating to the fact." State V. Marquez, 2023-NMSC-029, ¶ 32, 539 P.3d 303. And the COA agrees. See State V. Sanchez, 2001-NMCA-060, ¶ 12, 130 N.M. 602, 28 P.3d 1143 (declining to apply the right for any reason doctrine where the trial court's ruling required a determination on a disputed factual issue.). The NMSC provides that "[i]t is a fundamental rule of appellate practice and procedure that an appellate court will consider only such questions as were raised in the lower court." State V. Gomez, 1997-NMSC-006, ¶ 14, 122 N.M. 777, 932 P.2d 1. And that "[a] reviewing court does 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." State V. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964. And the COA normally accepts that restriction. See State V. Randy J., 2011-NMCA-105, ¶ 28, 150 N.M. 683, 265 P.3d 734 (stating "[t]his Court will not, however, assume the role of the district court and delve into fact-dependent inquiries."). See also Freeman V. Fairchild, 2015-NMCA-001, ¶ 29, 340 P.3d 610 (determining that it is improper for an appellate court to apply the right for any reason doctrine to unpreserved arguments where the party opposing its application "had no opportunity in the district court to respond to the unasserted argument."). The NMSC explains that "under the right for any reason doctrine, we will affirm the district court's order on grounds not relied

upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below." *State V. Vargas*, 2008-NMSC-019, ¶ 8, 181 P.3d 684, 143 N.M. 692. And the COA explains "[a]lthough we may affirm a district court ruling on a ground not relied upon by the district court (internal citation omitted), we will not do so if reliance on the new ground would be unfair to the appellant. (internal citation omitted). In particular, it would be unfair to an appellant to affirm on a fact-dependent ground not raised below. First, ordinarily it is improper for this Court to engage in fact-finding; that is a trial-court function. Second, it would be improper to make a finding on a fact relevant only to an issue that had not been raised below, because the appellant lacked an opportunity to present admissible evidence relating to the fact." *State V. Franks*, 1994-NMCA-097, ¶ 8, 119 N.M. 174, 889 P.2d 209. The COA acknowledges that it is inappropriate for them (COA) to develop and rule on inadequately briefed issues to benefit the State because "[t]o rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties' work for them. (internal citing omitted). This creates a strain on judicial resources and a substantial risk of error. It is of no benefit to the parties or to future litigants for this Court to promulgate case law based on our own speculation rather than the parties' carefully considered arguments. Furthermore, it would be unfair for us to construct the State's argument without the opportunity for Defendant to respond." *State V. Serna*, 2018-NMCA-074, ¶ 33, 429 P.3d 1283; see also *State V. Flores*, 2015-NMCA-002, ¶ 17, 340 P.3d 622 (stating "[t]his Court will not rule on an inadequately-briefed issue where doing so would require this Court to develop the arguments itself, effectively performing the parties' work for them."). The NMSC makes clear that "[t]he trial court is responsible for determining the historical facts that animate the transaction to be evaluated." *State V. Martinez*, 2020-NMSC-005, ¶ 15, 457 P.3d 254

And that "[i]t is the district court's responsibility to select the factual inferences that shall govern[.]" *Id.* Furthermore, "[c]onflicts in evidence are to be resolved by the finder of facts, in this case the trial court, and this includes conflicts in the testimony of a witness, as in the testimony of the police officer in this case." *State v. Bloom*, 1977-NMSC-016, 90 N.M. 192, 194, 561 P.2d 465, 467. Additionally, "[t]he realities of the factual situation [are] for the trial court to determine, and not for the Court of Appeals. The determination of the weight and effect of the evidence, including all reasonable inferences to be drawn from both the direct and circumstantial evidence, is a matter reserved for the determination of the trier of the facts." *Id.* And the COA understands that concept, see *State v. Fierro*, 2014-NMCA-004, ¶ 40, 315 P.3d 319 (stating "[w]e emphasize that the finder of fact, not an appellate court, must reconcile any conflicts in the evidence and determine where truth and credibility lies."). And "[t]hose findings are facts upon which appeal must be determined." *Valdez v. Garcia*, 1968-NMCA-066, 79 N.M. 500, 501, 445 P.2d 103, 104. Importantly, the NMSC clarifies that "when the facts are not in dispute on a motion to suppress, we determine whether the law was correctly applied to those facts." *State v. Tapia*, 2018-NMSC-017, ¶ 10, 414 P.3d 332; see also *State v. Padilla*, 2024-NMCA-073, ¶ 9, 556 P.3d 588.

According to the aforementioned quotes, the COA violated appellate practice and procedure in this Petitioner's appeal. As a result of that conduct, Petitioner has been deprived of his right to appeal. — The COA did not perform an actual appeal. (emphasis added). This Petitioner will now establish a correlation to the aforementioned quotes and the specifics of this case. Additional case law will be cited throughout this section as necessary.

Concerning the COA memorandum opinion, *State v. Bingham*, No. A-1-CA-40639 (N.M. App. Sept. 23, 2024), attached as Appendix A, according to the aforementioned rulings, the majority of the rulings made throughout Appendix A are invalid.

These include but are not limited to the following: 1) In Mem. Op. ¶ 10, that "The detention was justified for law enforcement to investigate the seeming contradiction between their observations and Victim's statements."; 2) Mem. Op. ¶ 10, that "In order to confirm or dispel their reasonable suspicion, law enforcement kept Defendant and Victim separated at the scene while they conducted their investigation."; 3) Mem. Op. ¶ 10, that "Although Victim reported that she was sixteen and the relationship was consensual, Victim had no identification, initially gave a false name, withheld guardian contact information..."; 4) Mem. Op. ¶ 10, that "Victim did not reveal her true identity until about an hour into the investigation, and Deputy Padilla therefore could not verify any of Victim's assertions or arrange for Victim to be picked up."; 5) Mem. Op. ¶ 10, that "Also at the scene, Deputy Padilla searched police and court records and discovered that Defendant had two pending cases..."; 6) Mem. Op. ¶ 10, that "Victim reported that she was sixteen — above the 'age of consent' — and the relationship was consensual. To the contrary, these statements did not dispel suspicion, based on the circumstances."; 7) In Mem. Op. ¶ 11, that "As we have described, Victim was slow to provide information, gave some contradictory responses, and law enforcement was not required to believe Victim when her assertions appeared to be contradicted by the circumstances."; 8) Mem. Op. ¶ 11, that "Nevertheless, law enforcement had an ongoing and unresolved reasonable suspicion to investigate those crimes while Defendant was detained."; 9) Mem. Op. ¶ 11, that "After Victim's true identity was revealed, law enforcement was able to connect Defendant and Victim to the pending case and no-contact order."; 10) Mem. Op. ¶ 11, that "The present case did not involve a resolution of reasonable suspicion followed by an unjustified 'expansion of the investigation to look, search, or fish elsewhere.'"; 11) Mem. Op. ¶ 11, that "The continued investigation was therefore supported by reasonable suspicion and justified to ensure Victim's safety."; 12) In Mem. Op. ¶ 12, that "Vic-

tim's equivocation also contributes to our conclusion that the long investigation was diligent." ; 13) Mem. Op. ¶ 12, that "The investigation moved forward slowly because Victim gave a false name and her identity could not be confirmed for nearly an hour." ; 14) Mem. Op. ¶ 12, that "When law enforcement discovered the other pending cases, reasonable suspicion of Criminal activity involving Victim and Defendant continued." ; 15) In Mem. Op. ¶ 13, that "The present case is different, because law enforcement's suspicions were never dispelled after the initial encounter." ; 16) Mem. Op. ¶ 13, that "When Victim was identified and the pending court cases and no-contact order were discovered as a result of the investigation, the reasonable suspicion that developed and persisted throughout the encounter developed into probable cause." ; 17) In Mem. Op. ¶ 8, that the question concerning weapons was asked because law enforcement was investigating dead bodies and a stolen vehicle ; 18) Mem. Op. ¶ 8, that the question was asked "Based on training, experience,". — Each of the above referenced determinations from the New Mexico Court of Appeals (Appendix A) are unfair to this Petitioner because they are "fact-dependent ground[s]" that were "not raised" and determined in the "district court. see Appendix F, and Appendix E. And they required for the COA to engage in "fact-finding", which is improper and because Petitioner "lacked an opportunity to present admissible evidence relating to th[ose] fact[s]." Marquez, Supra, at ¶ 32. Furthermore, the COA should have "declined to affirm" on those "fact-dependent grounds" because they required "determination[s] on *disputed factual issue[s]." Sanchez, Supra, at ¶ 12. For instance, Petitioner disputes that the detention was justified. — Law enforcement was not actively conducting an investigation during the detention and exigent circumstances did not exist. [BIC 14-22], Appendix G ; [RB 4-14], Appendix I. The district court only ruled that Petitioner "was detained in a reasonable manner." Appendix F. The district court did not determine that law enforcement was investigating "Vic-

tim's statements" or that law enforcement was attempting to confirm or dispel their reasonable suspicion or that "Victim did not reveal her true identity until about an hour" or that Deputy Padilla was attempting to "verify any of Victim's assertions or arrange for Victim to be picked up." Or even that she intended to, and Deputy Padilla did not testify to any such claim or that suspicion was never dispelled after K.S. "reported that she was sixteen" — and etc... See Appendix F and CF Appendix A; see also Appendix E. "It is a fundamental rule of appellate practice and procedure that [the COA] will consider only such questions as were raised in the lower court." Gomez, Supra, at ¶ 14. The COA violated that "fundamental rule of appellate practice and procedure" by considering the questions that were raised for the first time on appeal. For the COA "does not sit as a trier of fact" because the district court [was] in the best position to resolve [the] questions of fact and to evaluate the credibility of [the] witnesses." Urioste, Supra, at ¶ 6. — Here, it is unknown whether or not the district court believed any of the facts that the COA now asserts and relies on for its decisions made for the first time on appeal. Furthermore, Deputy Padilla did not testify about any of the fact-dependent grounds that the COA relied on. Additionally, the COA did not point to any evidence to support its decisions. Therefore, those decisions are not based on substantial evidence, and required for the COA to speculate about law enforcement officers' state of mind during the detention, as to what was occurring during the detention, and other fact-dependent issues as well, which are not supported by evidence (emphasis added). It was for the district court to determine the findings of fact, not the COA. Then on appeal, the COA was to review those findings for substantial evidence. See State v. Gutierrez, 2008-NMCA-018, ¶ 15, 143 N.M. 422, 176 P.3d 1154 (stating "[I]n determining whether a district court properly denied a motion to suppress, we review its findings of fact for substantial evidence and review its legal analysis de novo.") CF Appendix F and Appendix A.

The COA did not specify how it arrived to its conclusions and it was inappropriate for the COA to "assume the role of the district court and delve into [those] fact-dependent inquiries." Randy, J., Supra, at ¶ 28. CF Appendix A. And the conclusions are improper because this Petitioner "had no opportunity in the district court to respond to th[ose] unasserted arguments." Freeman V. Fairchild, Supra, at ¶ 29. And the COA should not have affirmed on those fact-dependent grounds because they "require[d] for [the COA] to look beyond the factual allegations that were raised and considered below." Vargas, Supra, at ¶ 8. — In the case at hand, the State of New Mexico did not raise any of the "factual allegations" in the district court that the COA relied on to affirm. CF Appendix E. And the district court did not "consider" them. Id. CF Appendix F. To reiterate, it was inappropriate for the COA to affirm the district court's denial of Petitioner's motion to suppress on "ground[s] not relied upon by the district court" because reliance on those new grounds was unfair to this Petitioner. — This is because "it is improper for the [COA] to engage in fact-finding; that is a trial-court function." And because the "issue[s] had not been raised below", Petitioner "lacked an opportunity to present admissible evidence relating to th[ose] fact[s]." Franks, Supra, at ¶ 8. It is important to remind this Court that the State of New Mexico only argued that Petitioner's motion to suppress should be denied due to res judicata. See Appendix E. However, the district court ruled against the State on that issue by refusing to make a finding of res judicata. See Varela V. Arizona Public Service, 1989-NMCA-104, 109 N.M. 306, 309, 784 P.2d 1049, 1052 (clarifying that "[t]he legal effect of a refusal to make a finding is a finding against the party requesting it.") CF Appendix F. The COA committed transgressions by developing/constructing the arguments to benefit the State. In fact, many of the arguments made by the COA are actually in conflict with the arguments briefed in the State's Answer Brief. See [AB 4-14]; see Appendix H.

Concerning the previously mentioned rulings made throughout State V. Bingham, No. A-1-CA-40639 (Appendix A), none of those arguments, made by the COA throughout Mem. Op. ¶¶ 8-13 were briefed by the State of New Mexico on appeal in the Answer Brief. see Appendix H, [AB 4-14]. One major conflict can be observed between the State's Answer Brief (Appendix H) and the COA's memorandum opinion (Appendix A): The State acknowledged that law enforcement immediately realized that K.S. was sixteen years of age due to "K.S.'s admission that she was only 16." [AB 1], Appendix H. — And, then obviously not realizing that at sixteen years of age, K.S. had passed the age of consent in New Mexico, the State proceeded to argue that probable cause for Criminal Sexual Penetration of a Minor (CSPM) justified the detention in the patrol vehicle from the beginning because law enforcement immediately realized that K.S. was sixteen years of age. [AB 1, 7-10], Appendix H. — So, the State actually briefed that law enforcement believed "K.S.'s admission that she was only 16." This is also consistent with Petitioner's Brief-In-Chief because Petitioner actually briefed that "Deputy Padilla eventually established she was 16 years old, her birthday was April 20, 2002 [.] " [BIC 7], Appendix G. That information is based on Deputy Padilla's testimony and is therefore supported by substantial evidence. The State also briefed that "Probable cause was cemented when, within ten minutes, K.S. admitted she and Defendant were 'seeing each other' [.] " [AB 8], Appendix H. The State clearly and fully briefed that this Petitioner was arrested for CSPM when law enforcement detained him in a Patrol Vehicle. [AB 7-12], Appendix H. And also briefed that "deputies could not very well leave Defendant and K.S. alone ... to continue, potentially subjecting K.S. to an additional CSPM." [AB 9], Appendix H. Because both parties briefed that law enforcement realized that K.S. was sixteen (16) years of age immediately upon contact, due to her statements, it

was inappropriate for the COA to act as the fact-finder by determining otherwise because "th[ose] facts [were] not in dispute". Tapia, Supra, at ¶ 10. Therefore, the COA should have only "determine[d] whether the law was correctly applied to th[e] fact" that K.S. had passed the age of consent. Id.; see also Padilla, Supra, at ¶ 9. And CF [BIC 7] Appendix G; [AB 1], Appendix H; [RB 4-14], Appendix I. Instead, because Petitioner reminded the COA in his Reply Brief that the age of consent in New Mexico is sixteen (16) years of age and "therefore reasonable suspicion of a crime did not exist to justify the detention of Petitioner, the COA constructed a new argument for the State in its memorandum opinion. Appendix A. The COA actually violated appellate practice and procedure by briefing that law enforcement was not required to believe K.S.'s declaration of age. Mem. op. ¶ 11. Appendix A. That determination is "based on [the COA's] own speculation rather than the [State's] carefully considered arguments" that law enforcement believed K.S.'s statement of age. Serna, Supra, at ¶ 33 and it was "unfair for [the COA] to construct the State's arguments [based on speculation] without the opportunity for [Petitioner] to respond." Id. see also Flores, Supra, at ¶ 17. "The trial court [was] responsible for determining th[ose and all other] historical facts that animate[d] the transaction" as well as "the factual inferences that... govern[ed]" and therefore "[c]onflicts in evidence [were] to be resolved by the [district court]", "not for the Court of Appeals". Bloom, 90 N.M. at 194, 561 P.2d at 467. See also Fierro, Supra, at ¶ 40.

In Mem. op. ¶ 11, the decision that the detention in the police vehicle was "justified to ensure Victim's safety" is in conflict with State v. Duffy, 1998-NMSC-014, ¶ 70, 126 N.M. 132 because the State did not even argue the presence of exigent circumstances below. The NMSC has ruled "the presence of exigent circumstances must be supported by specific articulable facts. The State bears the

burden of proving the existence of exigent circumstances. The decision of the trial court in this matter will be affirmed on appeal if supported by substantial evidence." (internal citations omitted) *Id.* at ¶ 71. The opinion recites that: Multiple deputies were in control of the scene. *Mem. Op.* ¶ 8; That "Victim reported that she was sixteen and the relationship was consensual." *Mem. Op.* ¶ 10; That "law enforcement kept Defendant and Victim separated." *Mem. Op.* ¶ 10; And that the alleged Victim was "moved into Deputy Padilla's vehicle[.]" *Mem. Op.* ¶ 11. As a result, the decision is also in conflict with the NMSC's ruling in *State v. Werner*, 1994-NMSC-025, ¶ 17, 117 N.M. 315 (Recognizing that law enforcement was in control of the scene; that "there was no indication in the record that [they] feared for [their] safety", and then disavowing the Court of Appeals' ruling that it was necessary to confine the defendant.). Another conflict is that the decision violates appellate practice and procedure. The NMSC has ruled "it is a fundamental rule of appellate practice and procedure that an appellate court will consider only such questions as were raised in the lower court." *Fullen v. Fullen*, 21 N.M. 212, 225 (1915). The decision is fact-dependent. *Duffy*, *Supra* at ¶ 71. And is in conflict with *State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692 (holding that "we will affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below.") The decision is unfair, thus is in conflict with Court of Appeals holdings such as *State v. Franks*, 1994-NMCA-097, ¶ 5, 119 N.M. 174 (holding that unfairness precludes appellate court from affirming on a fact-dependent ground not determined below.). And is improper because Petitioner was deprived of the opportunity to present evidence to contest the claim. *Id.* at ¶ 8. The Court of Appeals claims in *Mem. Op.* ¶ 10 that "Victim did not reveal her true identity until about an hour into the investigation, and Deputy

Padilla therefore could not verify any of Victim's assertions or arrange for Victim to be picked up." And then in Mem. Op. ¶ 12, that "[t]he investigation moved forward slowly because Victim gave a false name and her identity could not be confirmed for nearly an hour." However, those fact-dependent questions were not raised and determined below, therefore the decision is in conflict with Vargas, Supra, at ¶ 8. It is also in conflict with Fullen, Supra; and Franks, Supra. And because the State refused to satisfy its burden in the district court, the decision is in conflict with State V. Ortiz, 2017-NMCA-062, ¶ 14 (stating "[i]f the State fails to 'present testimony or other evidence showing that the arrest or search met constitutional muster[,] the defendant's motion should be granted.") see also Werner, Supra, at ¶ 19. The decision is in conflict with State V. Flores, 1996-NMCA-059, because reasonable suspicion for CSPM was quelled before law enforcement searched for and discovered the pending case. The COA acknowledged that "Victim reported that she was sixteen and the relationship was consensual[.]" Mem. Op. ¶ 10. But also that "law enforcement was not required to believe Victim[.]" That decision is in conflict with cited quotes from: Fullen, Supra; Vargas, Supra; and Franks, Supra because that fact-dependent question was not raised and determined below. Nonetheless, the appeal panel asserts Sua Sponte, without evidence, that Deputy Padilla needed to determine her identity in order to "verify her assertions" that she was sixteen, which the COA claims occurred "about an hour into the [detention]." Mem. Op. ¶ 10. She was over the age of consent, see NMSA 1978, Section 30-9-11(G)(1)(2009); and State V. Samora, 2016-NMSC-031, ¶ 30 (explaining the age of consent in New Mexico is sixteen years of age.) The COA acknowledged that law enforcement continued to detain Petitioner after they verified her identity and her assertion that she was over the age of consent and that the search for the pending court case occurred, at an unspecified time, as a result of that unlawful detention. Mem. Op. ¶ 13. Therefore,

the decision is in conflict with Flores, Supra because "[h]aving failed to ripen into probable cause, unverified suspicion could not justify further detention. The reasonableness of the investigatory stop ended after the first search revealed nothing unusual." Id. at ¶ 13. The internet search for the pending case was outside the scope of reasonable activities because the alleged Victim's age had already been confirmed; the search did not contribute to confirming her age; and the COA did not clarify what time the search occurred. As a result, the decision is in conflict with Werner, Supra, at ¶ 13 (ruling "[t]he scope of activities during an investigatory detention must be reasonably related to the circumstances that initially justified the stop.") citing United States V. Sharpe, 470 U.S. 675, 682 (1985). The fact-dependent determinations of exigent circumstances in Mem. op. ¶ 11; that officers were not required to believe Victim's declaration of age and denial of sexual activity in Mem. op. ¶ 10; and the reason that the "investigation moved forward slowly" in Mem. op. ¶ 12, are all in conflict with Randy J., Supra, at ¶ 28. Citing Meiboom V. Watson, 2000-NMSC-004, ¶ 20; see also State V. Campos, 1994-NMSC-012, ¶ 14, 117 N.M. 155. [RB 11], Appendix I.

The following fact-dependent determinations by the COA all violate appellate practice and procedure because these questions were not raised below: 1) Exigent circumstances in Mem. Op. ¶ 11; 2) That officers were not required to believe Victim's declaration of age and denial of sexual activity in Mem. Op. ¶ 10 (and compare to [AB 1, 7-9, 12], Appendix H); 3) The reason for the investigation moving slowly in Mem. op. ¶ 12; 4) The detention was justified so Deputy Padilla could determine Victim's identity in order to "verify her assertions" that she was sixteen and denial of sexual activity and arrange for her to be picked up in Mem. op. ¶ 10; 5) That officers were investigating dead bodies and a stolen vehicle when inquiring about weapons in Mem. op. ¶ 8 (and compare to [AB 41-42], Appendix H; [B1C 46], Appendix G; and [RB 100, 103-107], Appendix I.) Id. See also State V. Saiz, 2008-NMSC-048,

¶ 12, 144 N.M. 663; State V. Contreras, 1995-NMSC-056, ¶ 23, 120 N.M. 486. And in Mem. op. ¶ 8, the decision that the inquiry was based on training and experience is in conflict with Ortiz, Supra, at ¶ 14; Fullen, Supra; Franks, Supra, at ¶¶ 5, 8; and Vargas, Supra; and State V. Leyva, 2011-NMSC-009, ¶ 61, 149 N.M. 435; State V. Duran, 2005-NMSC-034, ¶ 40, 138 N.M. 414. According to Franks, Supra, at ¶ 5, the COA's inappropriate conduct is unfair to this Petitioner because he was deprived of the opportunity to present evidence in the lower court to indicate that K.S. was safely "moved into Deputy Padilla's vehicle" and specific articulable facts do not indicate that Petitioner was attempting to break into Deputy Padilla's vehicle to sexually assault Victim and that multiple deputies were in control of the scene and that "Victim reported that she was sixteen and the relationship was consensual," that "law enforcement kept Defendant and Victim separated", that Deputy Whitzel observed K.S. to be sixteen and that Deputy Padilla believed her assertion of age but was not diligent with attempting to determine her identity until after an hour into the detention and that reasonable suspicion for dead bodies and a stolen vehicle had dissipated before officers inquired about weapons. Franks, Supra at ¶ 8; Duffy, Supra, at ¶ 70; Werner, Supra, at ¶ 17, and see Mem. op. ¶¶ 8, 10-12.

In Mem. op. ¶ 18, the decision to supplement the affidavit by adding that "Deputy Whitzel was on the scene with the occupants of the vehicle when they identified themselves" is in conflict with State V. Price, 2020-NMSC-014, ¶ 15, because the NMSC explicitly declared that "[i]n our review of an affidavit for probable cause, we cannot consider '[a]ny information that was not provided to the issuing judge at the time the search warrant affidavit and warrant were presented[.]' This requires our review to focus on 'the information contained in the four corners of the affidavit.'" (internal citations omitted). Id. And that ruling conforms to Article II, Section 10 because

"no warrant to search any place, or seize any person or thing, shall issue... Without a written showing of probable cause..." N.M. CONST. ART. II, § 10. The COA's conduct serves the same effect as altering/amending the affidavit. Because the vehicle occupants did not actually identify themselves, the COA's reliance on Williamson, Supra and Donaldson, Supra is in conflict with Cordova, Supra; Price, Supra; Rule 5-211(E) NMRA; Article II, Section 10; and State v. Haidle, 2012-NMSC-033, ¶ 17 (stating "the components of th[e] two-prong test, often referred to as the 'veracity' (or 'credibility') and 'basis of knowledge' (or 'factual basis') requirements for evaluating information from hearsay sources 'effectuate the principles behind Article II, Section 10 of the New Mexico Constitution.'" (referring to Rule 5-211(E) NMRA).) As indicated in Mem. op. ¶ 19 (Appendix A), Williamson, Supra requires "the factual basis for the warrant [be] sufficiently detailed[.]" Id. at ¶ 30. The "factual basis" for Deputy Whitzel's and the Affiant's conclusion about the occupant's identities is not "sufficiently detailed[.]" Therefore, the COA falsified information that the occupants "identified themselves" in order to rely on Williamson and Donaldson. Please compare to Appendix N. The decision to supplement the affidavit with the following information in order to promote the "Totality of the circumstances" test is also in conflict with Price, Supra and Article II, Section 10: 1) Interviews were conducted after "the arrest". Mem. op. ¶ 19; 2) "[B]ecause the two were found inside Defendant's vehicle". Mem. op. ¶ 21; 3) "Defendant and Victim were removed from the vehicle". Mem. op. ¶ 22. Please compare to affidavit (Appendix N). In Mem. op. ¶¶ 20-21, the decision that the affidavit was sufficient because "there [were] reasonable grounds to believe that [violation of the no-contact order (a crime)] ha[d] been committed in [the vehicle]" is in conflict with Article II, Section 10 because the COA acknowledged that the warrant was "requested [to] search for evidence of [SEC and bribery or intimidation of a witness]." Mem. op. ¶ 22. And compare to paragraph 9 of Appendix N.

Article II, Section 10 explains "[t]he people shall be secure in their... effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any... thing, shall issue without... a written showing of probable cause[.]" N.M. CONST. ART. II, § 10. Therefore, the reason for the search and seizure must be based on the "written showing of probable cause" in order for the search and seizure to be reasonable. The decision also conflicts with the particularity and breadth requirements and thus conflicts with State v. Sabeerin, 2014-NMCA-110, ¶ 26 (stating "[t]he purpose of the particularity requirement ensures that a search is confined in scope to particularity described evidence relating to a specific crime for which there is demonstrated probable cause."); and State v. Hinahara, 2007-NMCA-116, ¶ 8, 142 N.M. 475 (stating "Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based.") In Mem. Op. ¶ 22, the ruling that "Victim's disinclination to answer questions about nude photographs supports an inference that the cellphones... contained evidence of SEC" is in conflict with Rule 5-211(E) NMRA; Article II, Section 10; Rule 11-801(a) and 11-801(c) NMRA, as well as decisions from the COA and NMSC as well. Rule 5-211(E) requires that "'probable cause' shall be based on substantial evidence". An inference does not equate to "substantial evidence", nor does it satisfy the "written showing of probable cause" requirement of Article II, Section 10 (there is not written confirmation that cellphones contained evidence of SEC). Though Rule 5-211(E) NMRA allows for "substantial evidence" to be based on "hearsay", a "Victim's disinclination to answer" is not "hearsay". "'Hearsay' means a statement". Rule 11-801(c) NMRA. A "'Statement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Rule 11-801(a) NMRA. Because her "disinclination to answer questions" was not intended as an assertion to mean she did send nude photographs, it was neither a statement, nor hearsay for purposes of satisfying the "factual basis" requirement of Rule 5-211(E) NMRA. At best, her actions could be construed to be nonverbal conduct. However, "nonverbal conduct

may be a statement for hear say purposes only if intended by actor as an assertion." State v. Lovato, 1993-NMCA-163, ¶ 6, 117 N.M. 68 citing United States v. Butler, 763 F.2d 11, 14 (1st Cir. 1985) (Invalidating a warrant because the affidavit did not indicate that the informant "was deliberately seeking to mislead observer."). Evidence does not exist to indicate that the alleged Victim was deliberately seeking to mislead the Affiant, so therefore the COA's ruling is in conflict with Lovato, Supra. Another conflict is realized regarding State v. Rendleman, 2003-NMCA-150, ¶ 44, 134 N.M. 744 (while referring to SEC and clarifying "the photographs must be identifiable as hard-core child pornography; that is, it must display visible signs of sexual eroticism, rather than merely depict a naked child."); and NMSA 30-6A-2(A)(5) (Defining the essential elements for violating NMSA 30-6A-3). The alleged Victim refused to answer whether she sent nude photographs, so therefore a "factual basis" does not exist to determine whether the unsolicited and unverified photographs even "display[ed] visible signs of sexual eroticism." Therefore, the decision is also in conflict with Rule 5-211(E) NMRA and Haidle, Supra for that reason as well. The COA supplemented the affidavit by adding that the alleged Victim was found "lying next to an obviously older male." Mem. op. ¶ 22 (Appendix A). and compare to Appendix N. This information was added so that the COA could find probable cause for SEC. The decision is in conflict with Price, Supra because a reviewing court must "focus on 'the information contained in the four corners of the affidavit.'" Id. at ¶ 15. The search warrant was issued to seize evidence of SEC and Bribery and or Intimidation of a Witness. see Appendix N, paragraph 9. Therefore, the COA ruling in Mem. op. ¶ 22 (Appendix A) is in conflict with Williamson, Supra, at ¶ 29 because the affidavit (Appendix N) as a whole, does not "provide a substantial basis for determining that there is probable cause to believe that a search will uncover evidence of [SEC and Bribery or Intimidation of a Witness]." Id. and CF Rule 5-211 NMRA. And because the affidavit (Appendix N) does not indicate Deputy Whitzel's or Detective Valderaz's basis of knowledge for the identities of the vehicle occupants and for K.S.'s age, the COA's ruling in Mem. op. ¶ 22 is in

Conflict with Cordova, Supra, at ¶ 17. See also Rule 5-211 NMRA. The rulings from the Fifth Judicial District Court and COA that the affidavit was sufficient because it established probable cause for violation of a no-contact order does not comport with the Fourth Amendment or Article 11, Section 10. This is because the search warrant was designed, issued for and executed for evidence of SEC and Bribery or Intimidation of a Witness, not for violation of a no-contact order. Therefore, the search and seizures were unreasonable because they were conducted without probable cause. Based on both Amendments, it is unreasonable for an affiant to establish probable cause for one crime but then request and execute a search warrant to search for evidence of different crimes without probable cause. U.S. CONST. art. AMENDMENTS § AMENDMENT IV; Article 11, Section 10. CF Appendix N, paragraph 9. CF Mem. Op. ¶¶ 20-22, Appendix A. Additionally, the COA decision to cure the insufficient affidavit by supplementing it with additional information does not comport with the Fourth Amendment or Article 11, Section 10. This is because the information was added on review and therefore, probable cause did not exist on the affidavit at the time the search warrant was issued and executed. Not to mention that because the information was added by the COA, during the appeal, it did not exist within the four corners of the affidavit at the time the search warrant was issued and therefore was not "supported by oath or affirmation" as is required by the Fourth Amendment. — The Affiant did not swear or affirm under oath that the information that was supplemented into the affidavit was true and correct. Furthermore, it required for the COA to speculate and then construct the State's argument for them, which is unacceptable. Serna, Supra, at ¶ 33. It is important to recognize that "the purpose of the exclusionary rule [in New Mexico] is... to effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure." State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 18, 130 N.M. 386. The only appeal filed in this case is the one applicable to this petition.

PRAYER FOR RELIEF

WHEREFORE, Petitioner, Edward Bingham, respectfully requests that this Court issue its writ of certiorari in order to review the memorandum opinion of the Court of Appeals as well as all of the necessary records in this case. The case should be reversed and remanded to the district court with instructions to suppress all evidence seized as the result of the unlawful detention and invalid warrant. In the alternative, the case should be remanded back to the Court of Appeals with instructions from this Court on correct appellate practice and procedures and to consider all issues, or remanded to the New Mexico Supreme Court with instructions to allow Petitioner to file a petition for writ of certiorari. Because the Fifth Judicial District Court of New Mexico; the Court of Appeals of New Mexico; and the Supreme Court of New Mexico have all denied this Petitioner of "Equal Protection of the Laws" of the United States of America and the State of New Mexico under the Fourteenth Amendment and Article II, Section 18, this case should be reversed and remanded to the appropriate court with instructions to apply the applicable laws. See *Douglas V. Green*, 363 U.S. 192, 80 S.Ct. 1048, 4 L. Ed. 2d 1142 (1960) (The United States Supreme Court reversed and remanded the case to the District Court of the Northern District of Ohio because the Ohio Supreme Court denied the petitioner of equal protection of the laws.) Mr. Bingham petitions this Court to issue its writ of certiorari to the New Mexico Court of Appeals or the Fifth Judicial District Court of New Mexico for review of the New Mexico Court of Appeals Memorandum opinion, *State V. Bingham*, A-1-CA-40639, mem. op. (N.M. Ct. App. Sept. 23, 2024). This petition is filed pursuant to 28 U.S.C. §1257(a). This case was resolved on the Court of Appeal's general calendar and after two motions for rehearing, which were denied on 10/17/2024 and 1/16/2025. The state court of last resort denied discretionary review on February 21, 2025 (02/21/2025).

The detention of Petitioner in the patrol vehicle was unreasonable because in New Mexico "[e]ll warrantless arrests must comply with the 'reasonableness' component of Article II, Section 10 of the New Mexico Constitution." *Campos*, *Supra*, 117 N.M. at 157, 870 P.2d at 119.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
Edward Bingham

Date: November 25, 2025