



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40715

BRYCE FRANKLIN,

Petitioner-Appellant,

v.

STATE OF NEW MEXICO, and
RONALD MARTINEZ, Warden,

Respondents-Appellee.

STATE OF NEW MEXICO'S ANSWER BRIEF

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INTRODUCTION

This case is, at heart, about a Sony PlayStation. The New Mexico Corrections Department (NMCD) confiscated a game console from Petitioner, a convicted murderer, because, due to its opaque casing, Petitioner could use it to hide contraband. Petitioner was allowed to keep another game console with clear casing, but he will not rest.

He cloaks his urgent desire to repossess the PlayStation in an overreaching constitutional claim about NMCD vendors and policy. But his true motivation is revealed by his repeated supplications following (and prior to) the court's denial of his habeas petition, aimed primarily at regaining the game console. *See* Petitioner's Motion to Amend August 8th, 2024 Order; [*id.* 255-256] Petitioner's Motion to Hold NMCD in Contempt; [*id.* 260] Petitioner's letter to Judge Richard Jacquez. [*Id.* 293] *See also* Petitioner's inmate grievance. [RP 199 ("My primary concern is the return of the playstation")]

Here, Petitioner claims that NMCD violated his due process rights when it "expected [him] to acquire items from only one vendor, Union Supply." [BIC 2] However, within the same timeframe, Petitioner made similar claims, asserting a constitutional right to purchase items *from Union*

Supply, the same vendor from which he now complains he is obliged to order. See *Plaintiff's Civil Complaint, Franklin v. Martinez*, D-307-CV-2023-1751 (3rd Jud. Dist. Ct., August 17, 2023).

Despite the dubious pretenses under which this appeal is framed, the issue before the Court warrants examination.

The Court is asked to infer a constitutional property interest from NMCD policy which allows inmates to purchase approved items from a list of approved vendors. To read beyond the prison's reasoned policy and confer a constitutional interest in Petitioner's purported will to buy *any* item from *all* approved vendors 1) misreads the policy; 2) is constitutionally unfounded, and 3) would create an unwieldy and potentially dangerous condition under which inmates will bring untenable and precedentially baseless due process claims, forcing courts to make administrative decisions properly left to the discretion of prison officials. See *Overton v. Bazzetta*, 539 U.S. 126, 132, (2003) (affirming that substantial deference is given to the professional judgment of prison administrators because they have "significant responsibility for defining the legitimate goals of [the prison] and for determining the most appropriate means to accomplish them.").

The district court did not err when it found that NMCD's property policy does not rise to a constitutionally protected interest. This Court should therefore affirm its decision.

SUMMARY OF PROCEEDINGS

On October 27, 2022, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus [RP 1] and on April 4, 2023, after defense counsel was appointed, he filed an Amended Petition (Petition). [*Id.* 26-40]

His Petition complained that NMCD "refus[ed] to allow [him] to purchase items from...Walkenhorst's," one of several vendors contracted with the prison. [*Id.* 26] None of the items at issue were listed on the NMCD Personal Property Matrix, which lists items inmates are generally allowed to purchase, upon prison approval. [*Id.* 46, 74 (CD-150201.B)] Additionally, Petitioner complained that his opaque-sided Sony PlayStation game console had been confiscated upon his transfer from Lea County Correctional Facility (LCCF) to Southern New Mexico Correctional Facility (SNMCF). He was allowed to keep a similar, clear-sided game console. [*Id.* 198, 276]

The prison refused Petitioner's requests to order from Walkenhorst's, explaining that pursuant to a "directive across state facilities[, i]nmates may order from inmate canteen or Union Supply[,] an approved vendor." [*Id.* 45]

Accordingly, Petitioner, was permitted to order items from Union Supply. And he was advised that “[according [to an] Officer/Property Ofcr. [] [the Sony Playstation was] confiscated because [it was] not allowed at [SNMCF] specifically.” ***Id.* 198]**

Petitioner claimed that obliging him to order from Union Supply infringed on his constitutional property interest, citing vendor price differences, and unfair treatment. ***Id.* 26-40]**

On July 1, 2022, the State filed a Response to the Petition, arguing that prisoners do not have a constitutionally protected property interest in personal purchases, or in ordering from a specific vendor. It further argued that NMCD policy requires prison approval for all inmate purchases. ***Id.* 175-179]**

On April 30, 2024, the district court held a preliminary disposition hearing pursuant to Rule 5-802(H)(4) NMRA. At the end of the hearing, the district court found that Petitioner’s property interest did not rise to a protected level under either the federal or state constitution and dismissed the Petition. **[4-30-24 CD 2:16:32-2:16:55]** After further argument the court ordered return of the PlayStation. At the time, neither the court nor either

attorney knew what the Sony PlayStation looked like, or the relevance of such information.

July 9, 2024, the court issued an order denying Petitioner's other, non-PlayStation-related claims, finding that, 1) NMCD policy CD-150200, which allows inmates to make purchases from approved vendors, "does not rise to a protected property or liberty interest;" 2) CD-023400 identifies potential contraband and limits even approved items from inmate purchase if the prison deems them a potential safety or security threat; 3) CD-150200 does not guarantee inmates an automatic right to purchase any item from an approved vendor, and all inmate purchases are subject to Warden approval; 4) CD-150200 allows inmates selected purchase items to be denied or rejected for prisoner or prison employee safety, and 5) neither CD-150200 nor CD-023400 imposed an atypical and significant hardship upon [Petitioner] in relation to the ordinary incidents of prison life, alluding to *Sandin v. Connor*, 515 U.S. 472 (1995). *See id.* 483-84 ("Under *Wolff*...liberty interests that are protected by the Due Process Clause...will generally be limited to freedom from restraint which...impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."). **[RP 232]**

In the days following the preliminary disposition hearing, the State was provided—and shared with Petitioner—a photograph of the PlayStation and learned that it had been confiscated due to its opaque casing, inside which prison officials believed contraband could be hidden. This record is unclear as to whether this reasoning had been previously provided to Petitioner.

On July 10, 2024, the parties jointly presented to the court the material difference between the opaque PlayStation game console and the clear one from Union Supply, which Petitioner still possesses. [*Id.* 231]

On July 26, 2024, Petitioner filed two motions, asking the court to 1) reconsider the July 9, 2024 Order Denying the Petition; [*id.* 234] and 2) amend its July 9, 2024 findings and conclusions. [*Id.* 241] The court denied both motions. [*Id.* 259, 266]

On August 8, 2024, armed with the new information about the PlayStation's physical characteristics and related reason for its confiscation, the court issued another order, granting and denying the Petition in parts. [*Id.* 244] The Court incorporated its July 9, 2024 Order by reference, reiterating denial of Petitioner's "remaining"/non-PlayStation claims. The Court granted partial relief only as to the PlayStation, finding that Petitioner

“was unreasonably deprived of property” when it was confiscated, and directing NMCD to store it and return it to Petitioner “when he reaches the appropriate classification, and if possession of [it] complies with facility policy.” [*Id.*]

Petitioner was granted certiorari, and this appeal followed.

ARGUMENT

I. This Court may not consider Petitioner’s argument that the state constitution provides broader protection than its federal counterpart because it was not preserved below.

As a preliminary matter, Petitioner argues, for the first time on appeal, that Article II, Section 4 (the Inherent Rights Clause) “conjoined with” Article II, Section 18 of the New Mexico Constitution (the state Due Process Clause), “gives its citizens greater rights to enjoy and defend property than its federal counterpart.” [**BIC 1**] He thus asks this Court to find that under our state constitution, NMCD policy confers a protected property interest in inmates’ desire to purchase any item from “all approved [prison] vendors.” [*Id.* **3**] He did not preserve this argument in district court and therefore this Court may not consider it.

“[W]hen a party asserts a state constitutional right that has not been interpreted differently than its federal analog, a party also must assert *in the*

trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart *and* provide reasons for interpreting the state provision differently from the federal provision.” *State v. Gomez*, 1997-NMSC-006, ¶¶ 23-25, 122 N.M. 777 (emphasis in original). *Accord State v. Leyva*, 2011-NMSC-009, ¶¶ 36, 40, 149 N.M. 435. As such, this Court mandates a strict preservation requirement for Petitioner’s argument.

Below, Petitioner argued that “NMCD’s refusal to allow [him] to order directly from Walkenhorst’s as outlined in NMCD policy[] violates his rights under Article 2, Sections 4[] and 18 of the New Mexico Constitution, and the 14th Amendment to the United States Constitution.” [RP 32] And in his Motion to Reconsider Order Denying Petition, he conceded that “[b]oth parties argued under the [federally framed] Sandin atypical hardship standard.” [*Id.* 234]

Petitioner did not argue in district court that the New Mexico Constitution provides greater property protections than the federal Constitution. Nor did he provide the district court with principled reasons why it should interpret the New Mexico Constitution’s due process provision more broadly than its federal counterparts. *Gomez*, 1997-NMSC-006, ¶ 23.

He raised that argument first in his Petition for Writ of Certiorari. [*See* **Pet. 9** (“If this court finds NMCD CD-150201 does not create a property interest under the atypical and significant hardship standard, Franklin...requests this court examine the state constitution and find it offers broader protection then [*sic*] its federal counterpart[.]”)]

And he impermissibly raises the argument now, to the exclusion of any other theory. [*See* **BIC 1** (“[T]he New Mexico Constitution is a fully independent source of protection of its fundamental [property] rights. Federal law has little to no relevance in deciding [Petitioner’s] claim. His arguments center on the State Constitution and its interpretation by this Court.”)]

Petitioner does not assert that he preserved his argument—which subsumes, by his admission, the entirety of his claim. [*Id.*]

Nor does he argue for the application of any exception provided in Rule 12-321(B) NMRA, which allows the Court to consider unpreserved issues on a discretionary basis. *See id.* (“Exceptions. (a) general public interest; (b) plain error; (c) fundamental error; or (d) fundamental rights of a party.”). *See also State v. Jaramillo*, 1973-NMCA-029, ¶ 11, 85 N.M. 19 (explaining that fundamental error review will only be done to prevent a plain miscarriage

of justice where a party has been deprived of rights essential to the defense); *State v. Barber*, 2004-NMSC-019, ¶ 17, 135 N.M. 621 (explaining that fundamental error review is only exercised to correct injustices that shock the conscious of the court, such as where a defendant is indisputably innocent); *State v. Rogers*, 1969-NMCA-034, ¶ 10, 80 N.M. 230 (explaining that the presence of a fundamental right does not equate to the presence of fundamental error); *State v. Olivas*, A-1-CA-30486, mem. op. (N.M. Ct. App. Mar. 11, 2013) (nonprecedential) (explaining that, even in the presence of error, the New Mexico Court of Appeals “routinely decline[s] to hear unpreserved arguments implicating fundamental rights” (internal citations omitted)).

Further, this Court should disregard any argument for Rule 12-321(B) exceptions that Petitioner may assert for the first time in his reply brief; it was not included in his Brief in Chief and would be assertion of a new preservation theory to which the State has not had opportunity to review and respond. *See* Rule 12-213(A)(4) NMRA; *State v. Garcia*, 2013-NMCA-005, ¶ 9 (stating that the Court of Appeals does not review arguments not raised in the brief in chief); *Doe v. City of Albuquerque*, 1981-NMCA-049, ¶ 9, 96

N.M. 433 (declining to review argument raised for the first time in appellant's reply brief).

This Answer Brief does not raise any new arguments that could trigger exception to the general rule that appellate courts will not consider arguments raised for the first time in reply brief. *See* Rule 12-213(C); *see, e.g., Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶¶ 29, 127 N.M. 282 (employing the exception in Rule 12-213(C) where the answer brief raised new substantive arguments regarding federal preemption in response to a brief in chief that only argued issues related to the merits of a *prima facie* tort claim). Here, the State has made no new substantive arguments like the appellees in *Mitchell-Carr*, and the general rule controls.

Because Petitioner did not preserve his argument that the state constitution provides greater property rights than the federal constitution, this Court must decline to consider any of Petitioner's arguments to that effect. And because Petitioner's entire claim rests on arguments to that effect, this Court should decline to consider his claim and either affirm the district court or quash its writ of certiorari.

If the Court declines to affirm or quash, it must limit its analysis to Petitioner's rights under the federal constitution. *See State v. Dyke*, 2020-

NMCA-013, ¶ 23 (“Petitioner failed to preserve or adequately argue in the district court for protections under the New Mexico Constitution, and we therefore limit our analysis to Petitioner’s claimed right under the United States Constitution.”).

II. The district court did not err by finding there is no protected property interest in NMCD policy allowing inmates to make purchases from approved vendors.

Petitioner complains that he was “expected to acquire items only from one vendor.” [BIC 2] and asks this Court to hold that “a constitutionally protected interest is embedded in the NMCD...property policy,” which he mischaracterizes as guaranteeing purchases from all approved vendors. [BIC, 2, 24] Petitioner thus advances a procedural due process argument.

Claims involving the denial of procedural due process are legal questions that this Court reviews de novo. *Miller v. Tafoya*, 2003-NMSC-025, ¶ 9, 134 N.M. 335.

In New Mexico, “our [courts’] tacit approach to interpretation of the [state] Constitution has been interstitial[.]” *Gomez*, 1997-NMSC-006, ¶ 20, 122 N.M. 777. “Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then

the state constitutional claim is not reached. If it is not, then the state constitution is examined.” *Id.* ¶ 19.

As discussed, this Court should not consider Petitioner’s claim under the state constitution because he failed to preserve that argument below. Nevertheless, his due process claim fails under an interstitial analysis.

A. Petitioner’s claim fails under federal analysis.

To claim a due process violation under the federal constitution, Petitioner must first demonstrate he has a protected liberty or property interest under the Fourteenth¹ Amendment. *See Couture v. Bd of Albuquerque Pub. Sch.*, 535 F.3d 1243, 1256 (10th Cir. 2008) (explaining that “[a] person alleging that he has been deprived of his right to procedural due process must prove two elements: that he possessed a constitutionally protected liberty or property interest such that the due process protections were applicable, and that he was not afforded an appropriate level of process.”) (citation and internal quotation marks omitted). *See also Steffey v. Orman*, 461 F.3d 1218, 1221 (10th Cir. 2006) (“a predeprivation hearing is

¹ Petitioner’s brief—unlike his argument below—cites to only the Fifth Amendment. [*Compare BIC 1 with RP 32*]

relevant only if an inmate first demonstrates that he has a protected property interest”).

Petitioner cannot demonstrate that he has a protected property interest under the federal constitution because regulation of his purchases in prison does not impose an atypical and significant hardship in relation to the ordinary incidents of prison life. *Sandin*, 515 U.S. 472, 484 (1995).

1. The analysis began with liberty interests.

This Court has recognized that a protected liberty interest under federal law must not be inferred from a prison regulation’s language. *See Cordova v. LeMaster*, 2004-NMSC-026, ¶ 19 (explaining that the previous methodology² regrettably disincentivized the codification of prison management and “led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone” (citation omitted)).

Conforming to *Sandin*, this Court thus affirmed that a liberty interest may arise from a prison regulation only when it “works an atypical and

² “[T]he *Hewitt* methodology...look[ed] to mandatory language in statutes or regulations to determine whether the right in question rises to a level which can only be withdrawn by observing due process standards.” *Cosco v. Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999), discussing *Hewitt v. Helms*, 459 U.S. 460.

significant hardship in relation to the ordinary incidents of prison life." *Id.* ¶ 20 (citation omitted).

And because prisoners, by virtue of their confinement, face inherent restrictions on their liberty, the liberty interest contemplated by the Due Process Clause must measure "freedom from restraint" against "the ordinary incidents of prison life." *Sandin*, 515 U.S. at 483, 484 ("[Liberty] interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." (Citations omitted.))

2. The analysis extends to property interests.

The Tenth Circuit has held that the *Sandin* analysis also applies to the deprivation of property protected under the Fifth and Fourteenth Amendments to the U.S. Constitution.

In *Cosco v. Uphoff*, 195 F.3d 1221 (10th Cir. 1999), inmates claimed that prison regulations created a constitutionally protected right to keep certain property in their cells, plus any income derived from it. *Id.* at 1222. Noting that inferring a constitutionally protected interest from prison regulations

“is precisely the methodology rejected by the Supreme Court in *Sandin*,” the court rejected the inmates’ claim and held that “[t]he Supreme Court mandate...is that henceforth we are to review property and liberty interest claims arising from prison conditions by asking whether the prison condition complained of presents the type of atypical, significant deprivation in which a State might conceivably create a liberty [or property] interest.” *Id.* at 1224 (internal quotation marks omitted, alteration in original).

And in *Steffey*, 461 F.3d 1218, prison officials confiscated a fifty-dollar money order from an inmate because prison regulations prohibited the receipt of money from family members of other inmates. The inmate claimed a constitutional deprivation of property in violation of his due process rights. *Id.* at 1220. The court, here again, applied the *Sandin* analysis. (“[P]roperty interest claims by prisoners are...to be reviewed under *Sandin’s* atypical-and-significant-deprivation analysis.” *Id.* at 1221. The *Steffey* court noted that “[p]rison officials...have a legitimate interest in controlling both the amount and source of funds received by inmates.” *Id.* at 1222. And, citing *Sandin*, that, “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the

considerations underlying our penal system.” *Id.* (citation and quotation marks omitted).

The court added that “it is well-established that prisons have broad discretion in regulating the entry of materials into prison[,]” *id.* at 1222-1223, and therefore concluded that, like Petitioner, “Mr. Steffey has presented no evidence or authority for the proposition that the deprivation here was an ‘atypical and significant hardship’ that subjected him to conditions much different from those ordinarily experienced by inmates serving their sentences in the customary fashion.” *Id.* at 1222.

The United States Supreme Court has long recognized that an inmate’s right to receive mail and other packages may be limited by prison regulations that are reasonably related to legitimate penological interests. *See Thornburgh v. Abbott*, 490 U.S. 401, 416, (1989) (holding that prison authorities have broad discretion in regulating the entry of material into a prison); *Turner v. Safley*, 482 U.S. 78, 91–92, (1987) (upholding prison restrictions on mail as reasonably related to legitimate security concerns); *Bell v. Wolfish*, 441 U.S. 520, 550, 555, (1979) (upholding ban on inmate receipt of certain hardback books and packages containing personal property and food in order to counter risk of smuggled contraband).

The same reasoning applies to ordering merchandise from prison vendors, which, like in the foregoing Supreme Court cases, is about material entering the prison. It also applies to Petitioner's opaque PlayStation, which the warden recognized as a security risk.

Under the federal analysis to which he is here confined, Petitioner would have this Court abdicate substantial precedent and infer a constitutional property interest in NMCD regulations, "precisely the methodology rejected by the Supreme Court in *Sandin*," *Cosco v. Uphoff*, 195 F.3d 1221 at 1224.

And under the same analysis, he asks the Court to find that allowing him to buy personal items from one approved vendor instead of another, imposed an "'atypical and significant hardship' that subjected him to conditions much different from those ordinarily experienced by inmates serving their sentences in the customary fashion." *Steffey*, 461 F.3d 1218, at 1222.

This Court has now the opportunity to clarify that the same approach applies to property interests as to liberty interests under the federal Due Process Clause in the prison context.

Thus, applying the reasoning from the U.S. Supreme Court in *Sandin*, 515 U.S. 472, and as adopted by the Tenth Circuit in *Cosco*, 195 F.3d 1221, and *Steffey*, 461 F.3d 1218, constitutionally protected property interests in the prison context, 1) are not created by prison regulations, and 2) are implicated only when the claimed deprivation imposes an atypical and significant hardship in relation to the ordinary incidents of prison life.

In following, this Court should hold that 1) NMCD's property policy does not create a constitutionally protected property interest; 2) restricting Petitioner's purchases to NMCD's preferred approved vendor is allowed under NMCD policy; and 3) the regulation of Petitioner's purchases does not impose an atypical hardship in relation to the ordinary incidents of prison life.

B. Petitioner's claim fails under a state analysis.

Petitioner asks this Court to "conjoin" the Inherent Rights Clause with the state Due Process Clause, thereby finding broader protection in the state constitution than in the federal Due Process Clause. **[BIC 1]**

As discussed, Petitioner's claim fails under a federal due process analysis and this Court must decline to consider Petitioner's claim under the state constitution because he did not preserve that argument. But even if

scrutinized for broader state protection or divergence from federal precedent, the claim fails.

1. The Inherent Rights Clause does not create a colorable right to due process.

The Due Process Clause of the New Mexico Constitution mirrors its federal counterpart. *Compare* N.M. Const, Art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law") *with* U.S. CONST. AMEND. V ("No person shall ... be deprived of life, liberty, or property, without due process of law[.]"); U.S. CONST. AMEND. XIV ("...nor shall any State deprive any person of life, liberty, or property, without due process of law[.]").

There is no federal analog to the Inherent Rights Clause and shoehorning it to "conjoin" with the state Due Process Clause [BIC 1] overreaches.

The Inherent Rights Clause states: "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."

If anything, it resembles the preamble to the 1776 Declaration of Independence, which states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain

unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

But the Declaration of Independence does not mention property and is neither part of the U.S. Constitution nor otherwise legally binding. *See Morris v. Brandenburg*, 2016-NMSC-027, ¶ 43, (“The Declaration of Independence...is not a legal prescription conferring powers upon the courts...[and] does not create judicially enforceable rights.”) (internal quotation marks and citations omitted).

More critically, “the Inherent Rights Clause has never been interpreted as an exclusive source for a fundamental or important constitutional right, and on its own has always been subject to reasonable regulation.” *Morris*, 2016-NMSC-027, ¶ 51.

The constitutional protection against seizure of property under the Due Process Clause is fundamentally inequivalent to, and not properly “conjoined” with, the right—if any—to acquire property under the Inherent Rights Clause. Petitioner’s argument to impute due process protections—*by merger*—to the non-binding “right” to acquire and possess property under the Inherent Rights Clause is a baseless and impractical stretch; by the same

token, Petitioner could claim a protected due process right in “enjoying life...and...seeking...happiness.” N.M. Const. art. II, § 4.

The unfounded merger of these two disparate clauses is especially inappropriate in prison, where constitutional protections are justifiably limited. *See Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (“Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a ‘retraction justified by the considerations underlying our penal system.’”).

Here, the state Due Process Clause is properly examined next to its federal counterpart. And it provides no broader protection than the federal Due Process Clause, under which precedent governs that a due process violation requires a deprivation that imposes an atypical hardship in relation to the ordinary incidents of prison life. The district court correctly concluded that Petitioner’s claim does not meet that standard.

2. There is no reason to diverge from federal precedent.

"A state court adopting [an interstitial] approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state

characteristics.” *Gomez*, 1997-NMSC-006, ¶¶ 19. None of these reasons apply here.

There is no New Mexico precedent faulting the federal analysis. To the contrary, this Court affirmed the *Sandin* analysis in *Cordova*, 2004-NMSC-026, ¶¶ 20, 136 N.M. 217. And it is unlikely that such analysis—controlling, now, for 30 years, contains latent flaws the state needs to correct. Nor are there any structural differences or distinctive state characteristics that indicate divergence from the federal analysis.

Therefore, the federal analysis should be applied as discussed and under such application, the district court affirmed.

C. NMCD’s property policy does not provide the protections Petitioner attributes to it.

Even if examined for “constitutional significance,” there is no evidence that NMCD policy “intends to give inmates a protected interest in acquiring property.” [BIC 10]

1. NMCD policy does not “pattern” itself after the state constitution.

Petitioner argues that the mutual use of the verb “to acquire” in both NMCD policy and the Inherent Rights Clause indicates that NMCD “pattern[ed] its policy’s language after the New Mexico Constitution,” and

thereby “embedded” in it a property interest. **[BIC 10, 2]** His argument is both frail and illogical.

For one, the solitary word “acquire” in NMCD policy does not make a “pattern;” there is nothing else in the policy that mirrors the state constitution.

Two, Petitioner’s assertion that “NMCD could have used the verb ‘purchase’ [but] instead chose to use ‘acquire’” **[*id.* 10]** is untrue. The policy uses “purchase” and “acquire” interchangeably. **[*See e.g.* RP 63** (CD-150201(E) “Procedure for Canteen and Approved Vendor *Purchases*”) (emphasis added)); ***Id.*** (CD-150201(E)(1) “The Wardens at each Unit shall designate appropriate personnel to address the orderly control and documentation of all property *purchased or acquired* by inmates.” (emphasis added)); ***Id.* 67** (CD- 150201(K)(1) “Hobby Shop supplies may be *purchased* by inmates through the Hobby Shop officer.” (emphasis added))]

Three, what possible motivation could NMCD have for “deliberately” imbuing its property policy with “constitutional significance”? **[BIC 11]** By doing so, it would veritably invite inmate challenges like this at every turn.

NMCD neither patterned its policy after the constitution, nor intended to embed in it a constitutionally protected property interest.

2. Inmate purchases are permissive and subject to approval.

"[The New Mexico] Court [of appeals] has explained that constitutionally protected 'property interests are those to which an individual has a claim of entitlement.'" *Albuquerque Commons P'ship v. City Council*, 2009-NMCA-065, 146 N.M. 56 ¶ 8 (citation omitted). And "'[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls v. Roth*, 408 U.S. 564, 577 (1972).

NMCD policy does not guarantee inmate purchases with unfettered disregard for official discretion. Nor does the policy guarantee purchases from "all" approved vendors. Therefore, NMCD policy does not create an entitlement in the acquisition of personal property, much less from specific vendors.

The property policy, current at the applicable time, provided that:

In addition to the property which inmates are allowed to retain upon admission, inmates *may* acquire additional personal property through the current institutional canteen services and the following list of approved vendors:

- a. Access Securepak;
- b. Keefe Group;
- c. Walkenhorst's; and
- d. Union Supply Group

[RP 62 (CD- 150201 (D)(1) (emphasis added))]

The word “may” means that the acquisition of additional personal property through canteens and vendors is permissive, not mandatory. *See Romero v. Tafoya*, 2023-NMCA-024, ¶ 9 (“The word ‘may’ indicates the party asserting the action has discretion.”). And nothing in the policy guarantees purchase from every listed source.

Additionally, NMCD policy governing “Procedure for Canteen and Approved Vendor Purchases” requires approval for non-consumable personal property purchases. An inmate must “submit a debit memo to the business office [and] the property officer shall...recommend[] approval or disapproval of the purchase [by] a Deputy Warden for final approval.” The property officer must also ensure that the proposed “purchase is in accordance with [NMCD] policy and procedure.” **[Id. 63 (CD- 150201(E)(2))]**

Further demonstrating NMCD’s inherent discretion, the Property Matrix **[id. 73 (CD-150201.B)]** lists items inmates may generally purchase. But any proposed purchase may be refused if an item “can reasonably be expected to cause physical injury or adversely affect the security and safety of the

institution,” [*id.* 58 (CD-150200 (C) Definitions)] even one “which may have previously been authorized for possession by an inmate, but whose possession is prohibited when it presents a threat to security.” [*Id.* (b)]

And many items listed in the vendor catalogs are restricted. The catalog Petitioner referenced in his exhibits includes the disclaimer that “[s]ome items in this catalog may not be allowed at every facility. Please check the rules and regulations for your facility prior to ordering.” [RP 55]

NMCD policy—and the vendor catalog—demonstrate that prison officials retain discretion to approve or not approve inmates’ proposed purchases. There is no guarantee in the policy regarding any item or from specific vendors. This makes sense. Prison officials are responsible for maintaining safe and secure facilities. Many inmates, including Petitioner, are confined because they were found guilty of committing serious violent crimes. For NMCD to provide a safe and structured rehabilitative environment, it must be able to control the flow of material into its facilities. Recognizing an unfettered constitutional right to obtain goods not permitted by policy would compromise NMCD’s mission.

Finally, Petitioner’s analogy to *N.M. Dep’t. of Workforce Solutions v. Garduno*, 2016-NMSC-002 is unpersuasive. [BIC 15] The facts and issues there

are soundly distinguishable from those here. But even if distorted to comparison with the state unemployment compensation scheme as examined in *Garduno*, 2016-NMSC-002, ¶¶ 12-19, such comparison fails.

NMCD's property policy has always regulated inmate purchases according to policy: from an approved vendor, following prison approval, depending on multiple factors, at prison discretion. That has not changed. Proof includes Petitioner's fluctuating complaints about NMCD steering him either *toward* or *away from* Union Supply. *Compare* this cause of action *with Franklin v. Martinez*, D-307-CV-2023-1751.

CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the district court's Order Denying Petitioner's Amended Writ of Habeas Corpus or quash its writ of certiorari.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

The body of this brief complies with the limitations of Rule 12-318(F)(3) NMRA because it contains 5,188 words as calculated by Microsoft Word 365.

CERTIFICATE OF SERVICE

I certify that, on August 11, 2025, I filed or caused to be filed a true and correct copy of the foregoing Answer Brief electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served electronically.

/s/ Sarah M. Karni

Assistant Solicitor General