



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Petitioner

v.

S-1-SC-41012

LIONEL BERKELEY FISKE,

Defendant-Respondent

DEFENDANT-RESPONDENT'S ANSWER BRIEF

On Certiorari from the New Mexico Court of Appeals

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STATEMENT REGARDING CITATIONS

Citations to the record proper are in the form **[RP page]**. References to the one digitally recorded audio of the suppression hearing on 12/10/24 are cite **[CD time]**. The State’s Brief in Chief in this Court is cited **[BIC SCT page]**. The State’s Brief in Chief in the Court of Appeals is cited **[BIC CA page]**

STATEMENT OF COMPLIANCE

Pursuant to New Mexico Rule of Appellate Procedure 12-318(G), I certify that this answer brief is written in the proportionally-spaced font of Times New Roman. While the brief exceeds 35 pages, it contains 10,999 words and therefore complies with Rule 12-318(F)(3) NMRA. Word count was prepared using Word for Microsoft Office.

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INTRODUCTION

Law enforcement seized Lionel Fiske's GoPro camera¹ from his home without a warrant. His wife had informed police that she suspected it contained nude images of her 17-year-old daughter, RC, while showering. At the time of seizure, the lens of the camera was newly damaged.

The government did not seek a search warrant for the camera's digital data for nearly three years. Once searched, Fiske was charged with child exploitation, voyeurism, and tampering. Fiske filed a suppression motion alleging the lengthy delay caused the seizure to be unreasonable pursuant to *State v. Padilla*, 2024-NMCA 073, a case applying long-established federal constitutional principles for assessing reasonableness of seizures in light of a defendant's possessory interests and competing government interests, including governmental diligence in pursuing its case. The government conceded it had no reason for the delay but emphasized that Fiske's possessory interest was reduced for a variety of reasons, including the lens damage it suspected Fiske caused.

At a suppression hearing, the government informed the court it was not eliciting evidence regarding the circumstances of the lens damage and expressly

¹ The district court also suppressed seizure of a computer from the home, but the State's briefing contests only the camera.

stated that it was not arguing abandonment. The district court issued an order suppressing the evidence. The court made factual findings and conclusions of law and applied the *Padilla* test, noting Fiske’s possessory interest in the camera was diminished for a variety of reasons but that the length of the delay rendered the seizure constitutionally infirm.

The Court of Appeals rejected the States’s sole assertion that the district court erred in its assessment of evidence, including the damaged camera, in light of *Padilla* and therefore reached the wrong result. *State v. Fiske*, A-1-CA-42595, mem. op. ¶ 8 (N.M. Ct. App. June 20, 2025) (“*Mem. Op.*”)

The State filed a petition for writ of certiorari presenting this single question:

Whether a defendant who either destroys or attempts to destroy an item has abandoned any possessory interest in that item for search and seizure purposes.

The State’s briefing in this Court now asserts that the argument by the parties in district court about the *Padilla* balancing test, which necessarily included discussion of possessory interest, alerted Fiske and the district court that Fiske had not established the “threshold” requirement of search and seizure standing. The State asks this Court not to view the prosecution’s statements regarding abandonment as concession or waiver. The State now asks this Court to hold that Fiske had no possessory interest or, if he did, he abandoned it. Alternatively, the State argues the district court’s *Padilla* ruling was incorrect.

Single certiorari question aside, Fiske cannot meaningfully respond to the State’s brief without addressing: (1) whether standing (including abandonment) was preserved; (2) if not, whether standing can be waived²; (3), if it can be waived, whether that occurred here; (4) if not waived, whether Fiske had a possessory interest, including whether it was abandoned; and (5) whether the *Padilla* application here was erroneous.

Fiske explains here that standing was not preserved where the parties argued possessory interest solely in the context of *Padilla*. Implicit in that argument was that Fiske had a possessory interest, albeit, according to the prosecution, reduced for a variety of reasons but not abandoned. Standing – or the right to avail oneself of the protection of constitutional protections regarding search and seizure - is a merits issue, not a jurisdictional one. It can be waived. Although New Mexico has at times referred to “standing” as a “threshold” issue, in practice it has treated standing as it has treated other significant merits issues. This approach is consistent with United States Supreme Court precedent and the majority of federal circuits. Finally, both courts below applied *Padilla* correctly.

The suppression ruling should be affirmed.

² This Court recently ordered supplemental briefing on the issue of whether standing can be waived in *State v. Causey*, S-1-SC-40763.

FACTS AND SUMMARY OF PROCEEDINGS

One day in October 2020 when taking a shower, Lionel Fiske's 17-year-old stepdaughter, RC, noticed a GoPro camera among the shampoo bottles. **[RP 52, 62]** This was the only functioning bathroom in Fiske's house, which was also the marital residence. **[RP 52; CD 3:59:30-4:00:25]** RC told her mother, Jessica Tafoya (Fiske's then-wife) who confronted Fiske. **[RP 53, 62]**

Tafoya immediately left the marital residence with RC. **[RP 53; CD 4:03:17-4:04]** RC disclosed the camera incident to her regular therapist the next day, who reported it to CYFD. **[RP 53; CD 4:03:17-4:04:20]** CYFD contacted law enforcement as did Tafoya. **[RP 53; CD 4:00:56-4:01:32, 4:03:17-4:04:20]**

Three days later, Tafoya met law enforcement at the residence, went inside to retrieve the computer and GoPro, and handed them over. **[CD 4:04:52-4:05:10]** Tafoya was concerned there was illegal material on them. **[CD 4:00:56-4:01:48, 4:12:09-4:13:28]**

A detective (St. Onge) told the field officers no warrant was necessary. **[RP 54]** (no warrant necessary if Tafoya turned over the property); **[CD 4:12:09-4:14:15]** (exigent circumstances due to damage to GoPro plus electronic devices can "transfer data to any electronic device"). Fiske was in the hospital at the time of seizure. **[CD 4:16:37-4:17:33]**

In late September 2023, nearly three years later, newly assigned detective, Brown, applied for and obtained a warrant to search the devices. [RP 63] Police “extracted the SD card³ within the camera” and located at least four (4) videos which appeared to capture RC’s naked body. [RP 63] In October 2023 Fiske was indicted on counts of child exploitation (manufacturing), voyeurism, and tampering for allegedly destroying, changing, hiding or placing the GoPro to prevent apprehension, prosecution, or conviction. [RP 1-2]

Pleadings. Fiske filed a motion to suppress the GoPro, including videos or evidence obtained from the unlawful seizure and subsequent unlawful search. [RP 52-58] Regarding issues pertinent to this Court⁴, Fiske argued that the seizure of the devices was unreasonable under *Padilla* because of the lack of diligence in pursuing the case due to the three-year delay. [RP 55-56]

The prosecution responded in the context of *Padilla*. [RP 63-65] It “concede[d] the length of delay and absence of justification weigh against” it. [RP 64] It argued the defense analysis was “cursory” because it did not address

³ An SD card is a “Secure Digital Memory Card.” See Encyclopedia, Definition of: SD Card, PC Mag., <http://www.pcmag.com/encyclopedia/term/50962/sd-card> (last visited February 26, 2025). A GoPro camera’s SD card stores images. <https://www.gopro.com/en/us/shop/mounts-accessories/sd-cards> (last visited February 26, 2025)

⁴ The motion contains another suppression argument regarding Tafoya acting as the state’s agent [RP 58], and the government’s response includes independent source and inevitable discovery arguments [RP 67-68] These rulings have not been raised on appeal.

“possessory interest.” [RP 64] The prosecution variously described Fiske’s possessory interest in light of some federal cases involving phones and computers where possessory interests were “hamstrung” [RP 64], “disregard[ed],” and “severely diminished.” [RP 65] (because Fiske did not retrieve his property; he lacked standing regarding contraband; the camera’s lens was broken and it was not password protected).

Suppression hearing. The court told the defense it “had the floor,” and the defense responded that since this involved the suppression motion “the State bears the burden.” [CD 3:55:47-3:57:11] Without objection, the prosecutor explained witnesses Tafoya and St. Onge were ready. [CD 3:57:11-3:58:08]

Tafoya testified the GoPro was used to monitor the home while it was under renovation, it “had no accessories,” and “it was not a camera [she] really handled until that day.” [CD 4:00:25-4:00:56, 4:08:48-4:09:23] Tafoya said when Fiske handed her the GoPro after being confronted it was not “broken” but when she later retrieved it from the house “there was damage to the side and the lens was cracked.” [CD 4:00-4:02:04]

Tafoya had “no idea” if the GoPro was password protected. [CD 4:08:48-4:09:23] St. Onge said “electronic devices” could be tampered with even when not at home. [CD 4:17:52-4:18:14]

St. Onge testified she was going to “get a warrant” to “look into” the items but that she was “unable to get to that case” due to other cases. [CD 4:14:15-4:15:34]

In argument, the prosecution characterized the legal issue as application of the Padilla balancing test. It conceded the length of delay weighed against it but said Fiske “has a reduced property interest in the GoPro.” [CD 4:23:20-4:25:57] The prosecutor indicated the GoPro was voluntarily handed over to Tafoya, Fiske made no attempt to retrieve his “property,” and “damaging his GoPro indicates that [Fiske] had a diminished interest in the property.” [Id.]

The court stated that, regarding **damage**, it was “unclear on what the State’s theory of that is.” [CD 4:26:12-4:26:51] The prosecution explained its theory was that “the defendant tampered with [the GoPro].” [CD 4:27:05-4:27:58] The court observed “**I haven’t heard testimony about how it was damaged, only that it was damaged.**” [Id.] (Emphasis added.) The court indicated “**those are facts not necessary to the court’s determination in this case**” since there was “some separate...alleged tampering that hasn’t been testified to in this hearing.” [Id.] (Emphasis added.) The prosecution agreed, indicating “we did separately charge that” and “**[t]hat’s not necessarily the basis of this hearing. And so I didn’t seek to elicit testimony to prove that it was him.**” [Id.] (Emphasis added.) The prosecutor added, “**I do want to make argument that him damaging his**

property shows that he has a diminished interest in it.” [CD 4:27:58-4:28:53]

(Emphasis added.) After some confusion from the court about who was alleged to have damaged the property and circumstantial evidence, the prosecutor reiterated that it was the state’s “theory” Fiske damaged it. **[Id.]**

The defense emphasized that the prosecution conceded the three-year delay occurred with no reason. **[CD 4:40:17-4:40:53]** Regarding the GoPro, it was used for security in the home where privacy was its highest. As for the broken lens, the defense asserted **“we don’t have a clear view of what happened with that.” [CD 4:42:31-4:44:20]** (Emphasis added.) He indicated the prosecution was stacking inferences to get to the reduced possessory interest by asking the court to infer it was Fiske who did the damage. Counsel surmised the prosecution was “trying to say” the circumstances were “indicative of [Fiske’s] desire to...abandon his possessory interest in it, that he no longer has a use for it.” **[CD 4:42:31-4:43:20]**

The prosecutor asked the Court to find that **“when the device was handed to [Tafoya], the GoPro was not damaged, and at the time that [Tafoya] went back to retrieve the property...it had a damaged lens.” [CD 4:52:37-4:58:09]** (Emphasis added.) Additionally, there was “reason to believe” the device had explicit images on it, and Fiske never tried to retrieve his property. **[CD 4:58:09-4:59:07]** As for it being broken, the prosecutor explained **“we’re not stating that he abandoned it...but that rather, because it was a broken device that he has**

reduced interest in that property.” [CD 5:00:44-5:01:39] (Emphasis added.)

Noting that all of the *Padilla* “prongs” had to be considered, the prosecutor concluded “defendant simply has reduced or zero property interest in the GoPro.” [CD 5:01:39-5:03:11]

Order. The court issued an in-depth written ruling. [RP 73-93] In its factual findings, the court acknowledged both motions addressed the balancing test. [RP 73-74]

The court indicated:

- St. Onge testified that Tafoya advised officers that on October 20, 2020, when she first “saw” the GoPro it was not damaged but that on October 23, 2020 it had a broken lens. [RP 76]
- St. Onge could not recall if Fiske asked for return of the items but that she would have been notified and she would not have released them anyway due to presence of possible child sexual images. [76-77]
- The prosecution argued that Fiske had a reduced possessory interest in the GoPro because he did not attempt to retrieve it, he handed it to Tafoya when confronted, and the lens was damaged. [RP 77]
- The prosecution “argued that, due to the damage, it showed that [Fiske] did not want to own the item and intended on destroying the item, which diminishes his property interest.” [RP 77]

- The defense argued “the State has not shown it was [Fiske] who broke the lens on the GoPro.” **[RP 78]**
- The defense also argued the GoPro was used for security in the home (where Fiske had privacy interests). **[RP 78]**
- Defense counsel asserted a three-year delay with no explanation was sufficient to warrant suppression. **[RP 78]**

In its conclusions of law with respect to *Padilla*, the court said

- The prosecution “conceded” in its written response and at the hearing that there “is no valid reason for the delay.” **[RP 85]**
- Regarding the GoPro, Fiske’s level of possessory interest was not as strong as in his computer, but he still had possessory interest in an item retained for three years without his consent and before securing a warrant. **[RP 86]**
- Fiske’s possessory interest in the GoPro was diminished by some facts, including that it was discovered in the bathroom, there was reason to believe it was being used to manufacture child pornography, the seizure did not involve Fiske’s immediate custody and control of the item but rather it came from Tafoya, there was no evidence Fiske asserted a claim to it after the seizure even if for work, Fiske’s liberty interests were not affected. **[RP 86-88]**

- The government had a strong interest in retaining the GoPro given the likelihood that it contained child sexual images. **[RP 88]**
- Regarding police diligence in pursuing investigation, there was no explanation for the three-year delay. **[RP 88-89]**
- The court “agree[d] with the State” that Fiske’s possessory interests were diminished (use in common area, lack of inquiry by Fiske), but they were “not eradicated.” **[RP 89-90]**
- Three years is a great infringement on possessory interests. **[RP 90]**
- Applying the factors to the case and looking at Fiske’s interests against the government’s interest, the court found the nearly three-year delay was so long that the seizure was made constitutionally unreasonable. **[RP 89-90]**

The prosecution did not seek reconsideration. It appealed the ruling. **[RP 95]**

On appeal, the State’s brief-in-chief raised one issue of whether the district court erred in its *Padilla* analysis given Fiske’s “diminished” possessory interests. **[BIC CA 5]**

The Court of Appeals conducted the same balancing analysis with the undisputed facts, which did not include disputed attribution of damage to Fiske,

and concluded that the government’s three-year delay was constitutionally unreasonable. *Mem. Op.*, ¶ 9-13.

This Court granted the State’s petition for writ of certiorari posing the sole question of whether “a defendant who either destroys or attempts to destroy an item has abandoned any possessory interest in that item for search and seizure purposes.”

ARGUMENT

I. The State did not preserve the issue of standing, including loss of it due to abandonment, in the district court or Court of Appeals.

A. Standing is a merits argument not a jurisdiction argument.

“[R]ights assured by the Fourth Amendment are personal rights [which]...may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure.” *Rakas v. Illinois*, 439 U.S. 128, 138 (1978) (cleaned up). *Rakas* clarified that no useful purpose is served by considering the notion of “standing” under the Fourth Amendment as “distinct from the merits of a defendant’s Fourth Amendment claim.” *Id.* at 138-139. The analysis “forthrightly focuses on the extent of a particular defendant’s rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.” *Id.* at 139. This personal rights

approach is “more properly placed within the purview of substantive Fourth Amendment law than within that of standing.” *Id.*

The salient question is “whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude evidence obtained during it.” *Id.* at 140. That inquiry requires determination of whether the disputed search or seizure “has infringed an interest of the defendant which the Fourth Amendment was designed to protect.” *Id.* A seizure occurs when there is a meaningful interference with an individual’s possessory interests in that property and a search occurs when an expectation of privacy society considers reasonable is infringed. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

B. Appellate preservation, including in the suppression context, requires a timely objection which apprises the trial court of an error and invokes an intelligent ruling.

“In order to preserve an issue for appeal, it is essential that a party must make a timely objection that specifically apprises the trial court of the claimed error and invokes an intelligent ruling thereon.” *State v. Jacobs*, 2000-NMSC-026, ¶ 12, 129 N.M. 448, *overruled on other grounds in State v. Martinez*, 2021-NMSC-002; *see also* Rule 12-321(A) NMRA (“it must appear that a ruling or decision by the trial court was fairly invoked”). The requirement “provides the lower court an opportunity to correct any mistake, ... provides the opposing party a fair opportunity to show why the court should rule in its favor, and...creates a record

from which [and appellate court] may make informed decisions.” *State v. Lopez*, 2008-NMCA-002, ¶ 8, 143 N.M. 274; *State v. Mosely*, 2014-NMCA-094, ¶ 13 (appellate court will not reverse trial court on grounds that it was not asked to consider).

Preservation applies in the suppression context. *See State v. Leyba*, 1997-NMCA-023, ¶ 6-7, 123 N.M. 159 (government cannot raise issue of standing for first time on appeal because issue is fact-based and requires opportunity to present evidence related to standing in district court); *State v. Janzen*, 2007-NMCA-134, ¶ 10-11, 142 N.M. 638 (citing the appellate preservation rule and *Jacobs*, 2000-NMSC-026, among others). The requirement has been applied to defendants who raise a new issue regarding suppression on appeal. *See State v. Hartman*, A-1-CA-36365, mem. op. ¶ 5 (N.M. Ct. App. Dec. 27, 2017) (nonprecedential) (refusing to address defendant’s suppression argument not made in district court).

It has also been applied against the government’s attempt to characterize a particular legal argument as encompassing standing. In *Janzen*, codefendants lived together, and police conducted a warrantless search of the home that yielded drugs. 2007-NMCA-134, ¶ 1. At the scene, one co-defendant (the “controlling” resident) consented to the search and the other did not. *Id.* In the district court, both defendants requested and were granted suppression pursuant to the then new holding in *Georgia v. Randolph*, 547 U.S. 102 (2006) that a warrantless search of a

dwelling over the express refusal of consent by a physically present resident renders the search illegal. *Id.* ¶ 5, 7-9. On appeal, the State asserted that its arguments in the district court equated to an argument that the controlling resident could not challenge the search given his consent. *Id.* ¶ 10, 13. The Court of Appeals declined to address it, explaining that the arguments below did not apprise the district court of a standing argument. *Id.* ¶ 11-14. *See also United States v. Golson*, 743 F.3d 44, 55 (3d Cir. 2014) (parties argued in district court about reasonableness of government postal seizure of items based on applicable totality of circumstances analysis; despite totality analysis below, government’s challenge to standing for first time on appeal was waived).

C. The State’s standing arguments are not preserved.

The State acknowledges that a standing ruling was not invoked by the government at the suppression hearing [**BIC SCT 17**] but asserts that the government “squarely invoked a ruling from the district court about whether Defendant had a possessory interest in the GoPro.” [**Id. 17-18**] (possessory interest discussed in pleading, at hearing, in court’s order) The argument proceeds that because possessory interest was discussed and standing turns on possessory interest, the issue of standing was preserved as well. [**Id.**] The record reveals that whether Fiske had *standing* was not the contentious issue before the district court. Rather, the issue before the district court was unreasonableness of the seizure in

light of the *Padilla* balancing test that looked at government interest and defendant's *level* of possessory interest, even if reduced.

Thus, the State bootstraps any discussion of “possessory interest,” regardless of legal context, to a standing argument. Aside from acknowledging the general preservation rule [**BIC SCT 17**], the State cites no supporting authority for this proposition nor does it counter New Mexico authority such as *Jacobs*, *Martinez*, *Lopez*, and *Janzen* describing the need for specificity and invocation of an informed district court ruling. What the State is doing here, in even more remote fashion because standing was not raised in the Court of Appeals, is similar to *Janzen* and *Golson* where, on appeal, the government attempted to characterize a specific legal argument in the district court as encompassing standing.

Further undercutting its preservation argument, the State contends that the prosecution's indication to the district court that it was not arguing abandonment and therefore did not waive or concede standing was simply a misstatement born of pressure at the end of the day. [**BIC SCT 19**] (citing CD 5:00:58-5:03:24 and *State v. Sosa*, 2009-NMSC-056, ¶ 24, 147 N.M. 351). This position contradicts the notion that there was not “a clear view” of what happened with the GoPro [**CD 4:42:31-4:44:20**] and the prosecution was not going to elicit evidence in that regard.

Sosa is inapt. The prosecution here was not responding in closing in a particular timeframe before a jury about to deliberate. This prosecutor could have requested the hearing continue at another time or that she be allowed to submit further argument in writing. No motion for reconsideration was filed. *See State v. Suskiewich*, 2014-NMSC-040, ¶ 1 (aside from ability to appeal district court suppression order, state may “ask the district court to reconsider its ruling” while preserving right to appeal).

The State does not address that the Court of Appeals briefing does not raise standing.

II. Standing may be waived.

A. *Porras-Fuerte* and *Leyba*’s holdings are consistent with precedent of the United States Supreme Court and the majority of federal circuits.

The State generally contends that foreclosure of raising standing for the first time on appeal “ignore[s] the special nature of standing in the search and seizure context.” [BIC SCT 21] (citing *Rakas*, 439 U.S. at 132 n. 1; *United States v. Russell*, 26 F.4th 371, 375 (6th Cir. 2022)) The suggestion is that a defendant bears the burden of establishing standing; a defendant is “always” [BIC SCT 21] alerted to standing and given an opportunity to present evidence in the trial court; and standing is “an essential element of a claim under the Fourth Amendment and Article II, Section 10.” [BIC SCT 21-22]

The State acknowledges the holdings in *State v. Porras-Fuerte*, 1994-NMCA-141, ¶ 10, 119 N.M. 180 and *Leyba*, 1997-NMCA-023, ¶ 6 for the proposition that the State cannot challenge standing for the first time on appeal but says little about their reasoning. Nonetheless, it contends they should be overruled given standing's "special nature." [BIC SCT 20-21]

Both cases are well-reasoned.

Porras-Fuerte involved an issue of defendant's standing related to search of a co-defendant's car. 1994-NMCA-141, ¶ 8. The government did not challenge standing in the trial court. *Id.* On appeal, the State challenged standing asserting that it was jurisdictional. *Id.* Citing, among others, *Rakas*, the reviewing court clarified that standing is a "substantive doctrine that identifies those who may assert rights against unlawful searches and seizures." *Porras-Fuerte*, 1994-NMCA-141, ¶ 9. Relying on *Steagald v. United States*, 451 U.S. 204, 209 (1981), the Court noted that where the failure to raise the objection left the defendant without notice that he was required to address standing, the argument is waived. *Porras-Fuerte*, 1994-NMCA-141, ¶ 9. The Court of Appeals further observed that federal courts have sometimes found waiver where the government has not shown good reason for failing to raise the issue in district court. *Id.* (citing *United States v. Dewitt*, 946 F.2d 1497, 1499-1500 (10th Cir. 1991)). It reasoned that, were standing jurisdictional, cases like *Steagald* and *DeWitt* would not exist. *Id.*

However, the Court of Appeals held that the stop of the co-defendant's car was unreasonable and fruits of that search, which were necessary to support what was seized from defendant's car, should have been suppressed. *Porras-Fuerte*, 1994-NMCA-141, ¶ 12, 26. The case was remanded to the trial court for matters related to that where defendant's standing as to the co-defendant's car could be raised because the Court of Appeals had not addressed standing and therefore the law-of-the-case doctrine did not apply. *Id.* ¶ 12.

In *Leyba*, relying on *Porras-Fuerte*, the Court of Appeals stated that the government cannot raise standing for the first time on appeal because such an issue is fact-based and the defendant must have an opportunity to respond. *Leyba*, 1997-NMCA-023, ¶ 6-7.⁵ The specific facts in *Lebya* indicate that, at the suppression hearing, the government informed the district court it was relying on its written opposition to defendant's suppression motion on the basis of standing. *Id.* The Court of Appeals held that this was sufficient to preserve the issue of standing. *Id.*

The State also appears to argue that waiver cases should be overturned because affirming any order suppressing evidence when a defendant's personal liberty is (allegedly) not at interest would defy the "reasonableness" inquiry

⁵ That the reviewing court in *State v. Sanders*, 2024-NMCA-030, ¶ 9-12 [**BIC SCT 21**] *confirmed* for the first time on appeal that the defendant had standing to challenge the search there may have been judicially expedient.

avored by Article II, Section 10 of New Mexico’s constitution and would also ignore the public’s “substantial interest” in prosecuting certain offenses involving, for instance, children **[BIC SCT 23]** (citing *State v. Tapia*, 2018-NMSC-017, ¶ 46). While New Mexico may have an interest in, for instance, prosecuting alleged child exploitation and assault cases, *Tapia* makes clear that “the key inquiry is still one of reasonableness” which depends on balancing public interests and individual interests “considering the totality of the circumstances of each case.” *Tapia*, 2018-NMSC-017, ¶ 45-47. The State’s argument fails because it presupposes that the societal disdain for child sex cases or other cases of equivalent interest categorically tip the balance in favor of the government.

Similarly, the State’s assertion that consideration of standing at any juncture would better serve New Mexico’s exclusionary rule by considering a defendant’s personal rights **[BIC SCT 22]** is also unavailing. This Court has indicated that New Mexico’s exclusionary rule is one of constitutional import directed at the right to be free from unreasonable search and seizure as opposed to deterrence of police conduct or focus on judicial integrity. *See State v. Gutierrez*, 1993-NMSC-062, ¶ 53-56, 116 N.M. 431 (acknowledging however those policies can be advanced by the exclusionary rule). But the argument that allowing the State to contest, at any stage of a criminal case, that the defendant has no such personal rights somehow furthers New Mexico’s exclusionary rule similarly relies on presupposition that the

challenged person has no such rights. Rights are not necessarily furthered by challenging them.

There is a countervailing concern that search and seizure violations that go unraised in district court by defendants and are therefore waived on appeal put courts in the position of allowing the government to secure a conviction by introducing evidence the law recognizes should have been suppressed. *See United States v. Mayomi*, 873 F.2d 1049, 1056 n. 8 (7th Cir. 1989) (defendant did not raise warrant accuracy issue with respect to affidavit supporting probable cause in accord with procedural requirements in district court and therefore waived issue on appeal).

B. U.S. Supreme Court precedent indicates standing can be waived.

Footnote 1 in *Rakas*, relied upon by the State as support for its no-waiver stance due to the “special nature” of “standing,” reflects that standing is a merits issue driven by facts just like any other substantive Fourth Amendment claim that can be waived. In *Rakas*, on appeal the petitioners claimed that they were never asked whether they owned the property that was seized during a search. *Rakas*, 439 U.S. at 130 n. 1. However, below, the prosecutors explicitly argued that the defendants lacked standing in the items, and, significantly, the defendants did not challenge the factual basis offered by the government. *Id.* Instead, the defendants indicated they did not have to prove ownership to object to the search. *Id.* The

Court observed “[t]he prosecutor’s argument gave petitioners notice that they were to be put to their proof on an issue as to which they had the burden, and because of their failure to assert ownership, we must assume...that petitioners do not own [the items].” *Id.*

In *Steagald*, the defendant’s suppression motion was denied in the district court and in the Fifth Circuit. 451 U.S. at 207-208. Only when the case reached the United States Supreme Court did the government also assert that Steagald lacked an expectation of privacy in the house that was searched and yielded the drugs. *Id.* at 208. The Supreme Court observed that the government had never made this assertion “in the courts below.” *Id.* It noted that even in its response to the defendant’s petition, the government referred to the house as “petitioner’s residence.” *Id.* The Supreme Court explained the government was “initially entitled to defend against petitioner’s charge of unlawful search by asserting that petitioner lacked a reasonable expectation of privacy in the searched home, or that he consented to the search, or that exigent circumstances justified the entry.” *Id.* at 209. But where the government makes contrary assertions in the courts below or has “acquiesced in contrary findings by those courts,” or has “failed to raise such questions in timely fashion during the litigation,” it “may” lose its right to raise such factual issues. *Id.* The Supreme Court concluded that was the case in *Steagald* where the government never sought to recharacterize the district court’s take on the

issue as one of whether the arrest warrant was sufficient to justify the search of the home of a third person and that, overall, “during the course of these proceedings,” the government connected petitioner with the house and acquiesced in statements below characterizing the house as petitioner’s residence. *Id.* at 210-211.

Set against this substantial backdrop, the State’s assertion that New Mexico’s cases should be overruled for not paying sufficient attention to the nature of standing is unpersuasive.

C. The State does not explain why forfeiture should apply here. The Sixth Circuit cases it cites do not support it.

Absent preservation, the State requests that this Court should exercise its discretion to review standing. **[BIC SCT 20]** (citing Rule 12-321(B)(2) allowing review for plain error, fundamental error, or issues involving the fundamental rights of a party) The State asserts that failing to preserve its standing argument in district court and the Court of Appeals acts as a forfeiture rather than a waiver, **[BIC SCT 20]** (citing *United States v. Noble*, 762 F.3d 509, 528 (6th Cir. 2014) for its “discussi[on] of the difference”), and, regardless, a defendant continues to bear the burden of establishing standing on appeal. **[BIC SCT 15]** (citing *United States v. Russell*, 26 F.4th 371, 375 (6th Cir. 2022)).

Noble referenced *United States v. Olano*, 507 U.S. 725 (1993). *Olano* clarifies that forfeiture is the failure to make timely assertion of a right while waiver is intentional relinquishment of a known right. 507 U.S. at 732-735. The

gist of forfeiture is that it applies where a previously unasserted right may be raised to avoid a miscarriage of justice. *Id.* at 736. *Noble* indicates that, even where an appellate court would allow the government to raise an objection to a defendant's Fourth Amendment standing for the first time on appeal because it can show that standing is plainly lacking and failure to recognize this would affect the "fairness, integrity or public reputation of judicial proceedings," "if the government fails to raise the issue in its opening brief on appeal, then the objection is waived." *Noble*, 762 F.3d at 528. So, in *Noble*, the government waived standing. *Id.* at 526 (indicating the government "to its credit" informed the appellate court that it "waived the non-jurisdictional argument of [Fourth Amendment standing] by failing to raise the issue in its initial brief.") (cleaned up).

In *Russell*, the Sixth Circuit confirmed *Noble* – standing may be forfeited instead of waived if the government meets the plain error inquiry under Fed. R. Crim. P. 52(b). *Russell*, 26 F.4th at 374 (citing *Noble*, among others). *Russell* reiterates that, in that Circuit, the government can waive standing because it is not a question of jurisdiction if it either expressly abandons it or "fail[s] to raise it in its first brief on appeal." *Russell* 26 F.4th at 374-375. In *Russell*, unlike in *Noble*, a forfeiture rather than abandonment occurred because the government raised an objection to standing in its opening brief in the Sixth Circuit. *Id.* at 375.

D. The federal circuits do not all take the same approach as the Sixth Circuit. The majority of them adhere to the idea of raise-or-waive. A minority treats standing like jurisdiction.

While not exhaustive, Fiske provides a summary of cases here.

Majority view. The majority of federal circuits follow a general rule of raise-or-waive with respect to standing.

The **Third Circuit** has held that the government may not raise the issue of standing for the first time on appeal. *See Golson*, 743 F.3d at 55 n. 9 (government's argument raised on appeal that defendant had no standing because searched parcel not sent by him or addressed to him waived where not litigated in district court). *Golson* acknowledges *Rakas* and *United States v. Mosley*, 454 F.3d 249, 253 n. 5 (3d Cir. 2006) for its explanation that standing is one element of a Fourth Amendment claim, does not implicate jurisdiction, and may be conceded.

The **Fourth Circuit** has held the same. In *United States v. Moss*, 963 F.2d 673, 675 (4th Cir. 1992), the defendant raised on appeal the issue of his denied motion to suppress due to exigent circumstances. On appeal, the government raised Moss's standing for the first time. *Id.* at 675-676. The Fourth Circuit explained that generally appellate courts do not consider issues not raised below and that, in this case, injustice would likely be caused by "first instance consideration of a fact-intensive theory on appeal." *Id.* at 676 (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). *Moss* lauds *Singleton* for its "general rule" that appellate courts do not

consider issues not raised below given, typically, lack of notice and evidence unless, in the discretion of appellate courts, proper resolution is beyond doubt or injustice might otherwise result. *Moss*, 963 F.2d at 676 (injustice might be caused rather than avoided by entertaining the government's new theory).

So has the **Seventh Circuit**. In *United States v. Price*, 54 F.3d 342, 345 (7th Cir. 1995), the defendant appealed denial of his suppression motion on grounds of voluntary consent to search. Because Price had been a passenger in the vehicle that was searched, the Seventh Circuit said “we are at a loss to understand why the government did not contest Price’s standing” since he was attempting to suppress evidence based on the driver’s rights. *Id.* But, noting that Rakas’ principle of standing is substantive and not jurisdictional, the court held that the government waived the objection. *Id.* at 346.

The **Tenth Circuit** aligns with this thinking. Citing *Steagald*, the Tenth Circuit in *Dewitt*, 946 F.2d at 1499 rejected the government’s attempt to raise standing for the first time on appeal, noting it had allowed such claims only when “a party demonstrates an impediment which prevented raising the argument below.” *Id.* (government not held to waiver rule in case where it was excusable due to confusing circumstances surround the defendant’s challenges below).

In a similar vein to *DeWitt*, the **Fifth Circuit** has held that where the government raises standing for the first time on appeal, there is an exception to

waiver only in situations where “no facts are adduced [by the defendant] at the hearing from which the government could reasonably infer the existence of defendant’s standing.” *United States v. Gonzales*, 79 F.3d 413, 419 (5th Cir. 1996). In *Gonzales*, the reviewing court held that the government waived the issue where the facts elicited by the prosecution established defendant leased and drove a car which was searched and was asked by agents if they could search it. *Id.* These facts and Gonzalez’s inquiry on cross-examination about the car as well triggered a government response. *Id.* Because of this, the government waived standing.

The **Eleventh Circuit** has also endorsed waiver. In *United States v. Ross*, 963 F.3d 1056, 1057, 1060-1063 (11th Cir. 2020), the reviewing court affirmed that standing is not an issue of jurisdiction when it held that the government’s failure to argue abandonment in the district court where the defendant’s standing was effectively raised, the issue was waived. The *Ross* Court acknowledged that, by mistake, it previously equated standing with jurisdiction. 963 F.3d at 1061 (noting “our sister circuits...have overwhelmingly (if not quite uniformly) treated abandonment as an issue that runs to the merits of a suspect’s Fourth Amendment challenge rather than his Article III standing.”).

The **D.C. Circuit** has confirmed that standing is “merely an aspect of the substantive merits of a Fourth Amendment claim[.]” *United States v. Sheffield*, 832 F.3d 296, 304 (D.C. Cir. 2016) (standing may not be considered distinct from

merits of such claims). As such, the D.C. Circuit has indicated that the notion of “standing” is subject to “ordinary rules of waiver and forfeiture, as “a number of circuits have held.” *Id.* (citing cases from the Third, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits, acknowledging it had previously approached standing as jurisdictional issue).

Minority view. The **Second Circuit** treats the issue of whether the defendant has a right protected by the Fourth Amendment as a question akin to jurisdiction. *See United States v. Smith*, 621 F.2d 483, 486-489 (2d Cir. 1980) (acknowledging *Rakas* but addressing standing for first time on appeal as “threshold” question and stating “only after that analysis is completed and the answer is yes may the defendant challenge” the search or seizure, also calling the “threshold” question “entirely separate and distinct”).

Similarly, the **First Circuit** has indicated that the reviewing court itself may raise standing on appeal even where the government “conceded” standing below, apparently because of the lack of an assertion that the vehicle searched was defendant’s and *Rakas*’s “entitlement” to contest language. *United States v. Bouffard*, 917 F.2d 673, 674-679 (1st Cir. 1990) (defendant only appealed issue of whether police exceeded scope of warrantless search but reviewing court raised issue of standing and held that “fundamental fairness” required remand as to that issue).

The **Eighth Circuit** has adopted the approach that standing is the functional equivalent of jurisdiction and cannot be waived by the government because it relates to “justiciability.” *United States v. Rodriguez-Arreola*, 270 F.3d 611, 617 (8th Cir. 2001). There, the government never raised standing in the district court but was allowed to do so on appeal. *Id.* (justiciability).

Hybrid. The **Ninth Circuit** has adopted a hybrid approach. In *United States v. Taketa*, 923 F.2d 665, 669-670 (9th Cir. 1991), the reviewing court looked to *Rakas* for the proposition that standing under the Fourth Amendment is a merits issue different from Article III case or controversy standing. Acknowledging *Steagald* and the government’s acquiescence there in the district court and appellate courts to contrary findings, the Ninth Circuit indicated that where the government is contesting a suppression motion that has been granted, it is proper to decline to consider the government’s untimely challenge on appeal. *Id.* at 670. But where the defendant raises the issue of a denied suppression motion on appeal and the government has never assented to contrary findings or abandoned the issue, it could be raised on appeal even though not raised in district court. *Id.*

E. New Mexico should continue to align itself with the idea of raise-or-waive that is followed by the United States Supreme Court and the majority of federal circuits.

The minority approach regards standing as a “threshold” issue, treating it as if it were jurisdiction which is simply at odds with *Rakas* and the majority of

federal circuits. The minority result is that, even though many issues in the Fourth Amendment context are issues upon which the outcome of a case may turn, including validity of a warrant or consent, standing is treated differently. Basically, defendants are treated differently than the government. The Sixth Circuit allows standing to be raised for the first time on appeal, but under circumstances where known facts reflect that fairness of judicial proceedings weigh in the balance. The hybrid approach, while interesting, still poses concerns about appellate courts addressing issues without adequate factual development.

Rakas and *Steagald* and the majority of federal circuits recognize standing as one of many significant merits issues that may be waived. The cases reflect that they turn on fairness and practicality having to do with notice and absence of facts. There may be instances where appellate courts view the issue raised for the first time as resolvable beyond doubt with what is in the record but, generally, “injustice [is] more likely to be caused than avoided by deciding [an] issue without [the other party] having had an opportunity to be heard.” *Singleton*, 428 U.S. at 121. *Porras-Fuerte* and *Leyba*, in the spirit of the majority of federal circuits, *Rakas*, and *Steagald*, have taken this equitable approach. There is no reason for this Court to now take a contrary approach. Grounded in fairness, this approach also respects New Mexico’s interests in both personal rights and deterrence of misconduct.

III. The State waived standing even under the forfeiture approach.

Here, the government failed to raise standing in the district court *and* the Court of Appeals. The State suggests it may raise the issue for the first time in this Court because the defendant's burden of establishing standing "continues on appeal." [BIC SCT 16, 23] (citing *Russell*, 26 F.4th at 375 and *State v. Wright*, 1995-NMCA-916, ¶ 9, 119 N.M. 559)

The State fails to mention that in *Russell*, a Sixth Circuit case, standing was nonetheless forfeited by the government and therefore had to satisfy the plain error test. *Russell*, 26 F.4th at 373. Acknowledging that "forfeiture" and "waiver" are terms sometimes used "loosely," the reviewing court decided that forfeiture applied because the government had not expressly abandoned standing *and had raised the issue in its opening brief on appeal. Id.* at 375. It is in the context of this forfeiture versus standing discussion as well as a citation to *Noble* (which cites to a Ninth Circuit case explaining that the burden of showing standing continues in a defendant's appeal of denial of a suppression motion) that the continuing burden comment is made. That is hardly the case here where this is a State's appeal, not a defendant's appeal, and the State did not raise standing in the Court of Appeals.

Wright also does not support the State. There, the district court ruled that the defendant lacked standing to object to search of a bedroom because she failed to prove she was an overnight guest. *Wright*, 1995-NMCA-016, ¶ 7. The Court of

Appeals held that, as a matter of law, defendant had such standing. *Id.* ¶ 8. It is in this context that the Court of Appeals merely notes that once defendant has established standing then the state has the burden of coming forward with evidence to show the search and seizure fell within a valid exception to the warrant requirement. *Id.* ¶ 9.

The State correctly notes that appellate courts review whether a defendant has standing to challenge a search or seizure de novo. **[BIC SCT 17]** (citing *State v. Van Dang*, 2005-NMSC-033, ¶ 7, 138 N.M. 408 (standing as a “threshold issue”) and *State v. Attaway*, 1994-NMSC-011, ¶ 7, 117 N.M. 141 (threshold constitutional issues include validity of search warrants and whether exigent circumstances exist)) The above review of the federal circuits establishes that the minority view relies on the notion of standing as a threshold issue. Notably, *Van Dang* simply refers to “the threshold question raised by the State” without further explication. *Van Dang*, 2005-NMSC-033, ¶ 7. It describes what the State raised. It does not present as a repudiation of *Steagald*, *Rakas*, *Porras-Fuerte*, *Leyba*, and the majority approach of the majority of the federal circuits. *Attaway* supports that there are multiple kinds of threshold issues, which is consistent with *Rakas*’s discussion of standing as another merits issue.

Therefore, under *Rakas*, *Steagald*, the approach of the majority of federal circuits, and *Porras-Fuerte* and *Lebya*, the State has waived standing. In the

district court, Fiske’s motion repeatedly describes the GoPro as Fiske’s property and characterizes the legal issue as one of balancing under *Padilla*. **[RP 54-57]** The prosecution’s responsive pleading does not recharacterize the legal issue but rather applies *Padilla*, variously asserting Fiske’s interest in the GoPro was “diminished,” “reduced,” “hamstrung,” “disregarded,” “undercut” and possibly “zero” due to contraband and its belief that he attempted to destroy it, among other things. **[RP 62-68]**

At the suppression hearing, the parties addressed *Padilla* with the prosecution making similar claims to its written pleading and expressly indicating it was not arguing abandonment. **[CD 12/10/24]**

In the Court of Appeals, the State also acknowledged the legal issue related to the *Padilla* balancing test and asserted the district court erred in its ruling because “the State had a significant interest in seizing and maintaining the items and [Fiske] suffered little to no harm to his diminished possessory interest in the items.” **[BIC CA 1]**

In sum, standing is being raised for the first time before this Court.

Even the Sixth Circuit approach, which the State appears to rely on given its citations, does not allow for the State to raise standing for the first time here. Recall that in *Noble*, the Sixth Circuit case cited by the State as support for application of forfeiture here, the government did not raise standing in its opening

brief in the appellate court and the issue was deemed waived. Clearly, in Fiske's case, the State did not raise standing in the Court of Appeals and so the waiver outcome in *Noble* is apt.

IV. Assuming, arguendo, the State has not waived standing, the district court's factual findings supported by substantial evidence and applied to the relevant law establish Fiske had standing to object to seizure of the camera.

A. The district court's finding that Fiske had a possessory interest in the GoPro, albeit reduced, is supported by substantial evidence. Its application of the balancing test was correct.

Standard of Review. A district court's ruling on a motion to suppress presents a mixed question of fact and law. *State v. Vasquez-Salas*, 2023-NMSC-023, ¶ 9. The reviewing court first examines whether substantial evidence supports the district court's findings, deferring to the district court's review of the testimony and other evidence presented. *Id.* The reviewing court reviews de novo the district court's application of the law to the facts to determine whether the evidence complies with constitutional requirements. *Id.* See *Leyba*, 1997-NMCA-923, ¶ 8, (viewing the facts in the light most favorable to the prevailing party).

When the trial court makes specific written factual findings that are supported by substantial evidence, such findings prevail over inconsistent conclusions of law or an inconsistent judgment. *State v. Walker*, 1998-NMCA-117, ¶ 7, 125 N.M. 603. Where evidence is conflicting, the trial court resolves disputed

issues. *Id.* “[I]t is the district court’s responsibility to select the factual inferences that shall govern.” *State v. Martinez*, 2020-NMSC-005, ¶ 15.

Merits. The State contends Fiske did not establish that he had a possessory interest in the camera because he only put forward two reasons. **[BIC SCT 24]** (Fiske’s motion to suppress referring to the GoPro “belonging” to him and two moments at the hearing where defense counsel discussed Fiske’s “privacy interest.”) The State’s contentions are belied by the record.

In his motion, Fiske asserted that a GoPro was “seized by law enforcement” **[RP 52]** which “belong[ed] to [Fiske].” **[RP 52]** The motion refers to “[Fiske’s] Go Pro” **[RP 54]**, “[Fiske’s] property” **[RP 54]**, a “warrant to search [Fiske’s] GoPro” **[RP 54]** and “[Fiske’s] property” **[RP 55]**. Tafoya did not know if the camera was password protected, and she said “it was not a camera I had handled until that day.” **[CD 4:08:48]** St. Onge testified that R.C. “returned” the camera “back” to Fiske after seeing it in the shower. **[CD 4:12:09]**

At the hearing, defense counsel acknowledged the possibility of “diminished possessory interest” in the camera but also noted that the camera was “used as a security camera inside the home,” which was Fiske’s. **[CD 4:40:53]** Counsel asserted that Fiske’s possessory interest in the camera was perhaps not reduced where the camera was used for security purposes in a home which is where privacy interests are at their highest. **[CD 4:41:51]** Counsel emphasized that Tafoya left

while Fiske remained and was the only person with a possessory interest in the camera. **[Id.]** The prosecutor argued the camera had been damaged during the time Tafoya was gone from the residence and that Fiske “didn’t make any requests to obtain or retrieve *his* property.” **[CD 4:57:37-4:59:07]** (Emphasis added.) Thereafter the prosecutor repeatedly argued that Fiske had a reduced “property interest” in the camera. **[CD 4:59:40-5:03:11]**

The district court’s findings of fact refer to “his GoPro.” **[RP 74, 80]** The district court found that the prosecution argument that Fiske’s “possessory interests” were outweighed by the government’s interest in seizing child pornography. **[RP 74]** The court’s findings referred to “his items” and whether he tried to retrieve them. **[RP 76]** The findings note that the government argued that “Defendant had a reduced possessory interest” and the government’s belief that Fiske intended on destroying the camera “which diminishes his possessory interest.” **[RP 77-78]** The court’s conclusions of law refer to “Defendant’s possessory interest” **[RP 85]**, note Fiske “maintains a level of possessory interest” **[RP 86]**, indicate the government seized “his property” **[RP 87]**, agree with the government that “Defendant’s possessory interests were diminished” **[RP 89]**, and refer to “Defendant’s possessory interest.” **[RP 90]** In sum, the district court’s findings were supported by substantial evidence in the record, and the State is incorrect about the content of the defense argument.

The State tries to draw a bright-line distinction between possessory interests and privacy interests, claiming that a seizure argument based on privacy interests is “flawed at its foundation.” **[BIC SCT 24-25]** (citing *United States v. Miller*, 799 F.3d 1097, 1101-1103 (D.C. Cir. 2015) for this proposition). The above facts indicate Fiske did not rely on a privacy argument. Even so, Miller challenged the seizure of boxes of documents based on a privacy interest in what was inside the boxes for which the government obtained a warrant several weeks after seizure. *Id.* Unlike here, Miller did not request suppression based on an unreasonable seizure of the boxes due to the delayed search warrant. *Id.* The reviewing court revealed its annoyance by noting the difference between possessory interests and a seizure versus privacy interests and a search and then stating Miller invoked his privacy interest “more than fifty times” in his briefing but “never once” made reference to any loss of possessory interest. *Id.*

Possessory interests and privacy interests often merge as issues in the suppression context, including the context of this case. *See United States v. Salvucci*, 448 U.S. 83, 92-93 (1980) (noting *Rakas*’s rejection of “blind adherence” to superficial clarity that acts as a “thin veneer of all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment”).

Regardless, the State contends that the district court should have concluded Fiske had no possessory interest in the camera. [BIC SCT 25-26] This is because “there [were] contraband [child sexual] images on the GoPro.”⁶ [BIC SCT 25] (citing *State v. Bomboy*, 2008-NMSC-029, ¶ 10, 144 N.M. 151 for the proposition that a defendant cannot have a possessory interest in methamphetamine). The State does not explain how a GoPro camera with digital images on its SD card, some alleged to include sexual child images, is like methamphetamine in what *Bomboy* describes as “plastic baggie” in plain view that “contained several smaller plastic baggies that contained a ‘clear crystal substance’” that a police officer “immediately recognized as contraband.” *Id.* ¶ 3. This Court stated that the defendant could not have had a subjective expectation of privacy in an area visible through the passenger window of a car. *Id.* ¶ 10. Beyond that, even if the defendant did have an expectation of privacy, there is no lawful right to possess “*such* contraband.” *Id.* (Emphasis added.) A camera is not a baggie of obvious illicit drugs.

⁶ It is axiomatic that the fruits of an illegal search or seizure cannot be used by the government to justify the search or seizure in the first instance. *United States v. Mitchell*, 565 F.3d 1347, 1351 (11th Cir. 2009); *State v. Randall*, 496 P.3d 844, 858 (Idaho. 2021), (Stegner, J. concurring “If the illegal nature of an item discovered upon a search offers a post hoc justification for that search, then ordinary citizens possess no Fourth Amendment right to be free from unreasonable searches at all.”)

The State further argues that the camera was not taken from Fiske’s presence, Fiske “chose to commit crimes” by placing the camera in the shower, Tafoya “had the legal authority to dispose of the phone [sic] **[BIC SCT 25]**, and Fiske did not try to reclaim the camera **[BIC SCT 26]** (citing *Padilla*, 2024-NMCA-973, ¶ 13. The State does not explain how placing a camera in a shower, on its own, is a criminal offense unless, as was the case here when the unlawful search occurred, it contained sexual images of a woman under eighteen. But the result of a search premised on an unlawful seizure cannot justify the unlawful seizure in the first instance. *See Mitchell*, 565 F.3d at 1351 (allegation that computer contained child pornography may justify seizure but police cannot be certain the computer contains such images until a search warrant is obtained). That Tafoya may have had access to the camera does not mean her access negated the possessory interest of Fiske, in whose home it was left and where it was located while he was in the hospital.

The district court acknowledged the camera was not taken from Fiske’s presence, and that it may have had sexual images on it, but indicated that these reasons all diminished Fiske’s possessory interest, not eliminated it. **[RP 85-87]** As for trying to retrieve the camera, the court noted “there is no evidence [Fiske] made these types of inquiries after the Detective seized his property.” **[RP 87]** Asking for return of an item is “helpful, though not essential” to assessment of possessory

interest. *United States v. Wilkins*, 538 F.Supp.3d 49 (D.C. Cir. 2021) (defendant was not legally trained, and notion that it was his legal right to request return or bear cost of legal representation in that regard is a high burden to place on ordinary citizen).

In sum, the district court’s finding that Fiske had a possessory interest in the camera, albeit diminished, was supported by substantial evidence in the record and by applicable law.

B. There are no facts here that establish abandonment by clear, unequivocal, and decisive evidence. A grand jury indictment for tampering does not meet the standard.

Standard of Review. Fiske incorporates the standard of review in Section IV.A.

Merits. The State further argues that, even if Fiske had a possessory interest, he abandoned it by “damaging the camera with the intent to avoid investigation or prosecution” **[BIC SCT 27]** because this “matches the grand jury’s view of the evidence that there was probable cause that [Fiske] tampered with the GoPro to ‘prevent the apprehension, prosecution or conviction of himself.’” **[BIC 33]** (citing RP 2, grand jury indictment)

Ownership or lawful possession may give rise to, for instance, an expectation of privacy establishing standing (for a search), this can be relinquished if the property is abandoned. *State v. Celusniak*, 2004-NMCA-070, ¶ 25, 135 N.M.

728. The State acknowledges the significant legal requirement to establish abandonment in the Fourth Amendment context. **[BIC SCT 27-28]** (citing *State v. Clark*, 1986-NMCA-095, ¶ 12, 105 N.M. 10 and *Celusniak*, 2004-NMCA-070, ¶ 26) *Clark* indicates that “intent to abandon will not be presumed and must be affirmatively shown by the party relying on abandonment” by “clear, unequivocal and decisive evidence.” 1986-NMCA-095, ¶ 12. While proof of intent can be inferred from words, actions, and other facts, it still must meet that standard. *Celusniak*, 2004-NMCA-070, ¶ 26.

Significantly, in contrast with Fiske’s case, *Celusniak* suggests there was a conclusion regarding abandonment in the lower court, even if overturned on appeal, based on the facts of the case. 2004-NMCA-070, ¶ 27 (trial court made finding regarding abandonment of expectation of privacy because defendant’s purse was crammed under driver’s seat, explaining this conclusion did not answer the legal question of abandonment). The same is true of *Clark*. The record indicates there was “evidence offered in support of abandonment” in the form of testimony followed by a finding in the lower court. 1986-NMCA-095, ¶ 15, 18 (“[t]here was...testimony from which the court could determine that defendant intended to abandon the trailer” and that testimony was “view[ed]...in a light most favorable to the court’s findings”).

Absent evidence of abandonment in the district court, the State attempts to equate a charge of tampering under NMSA 1978, Section 30-22-5 (2003) in a grand jury indictment with legally sufficient proof of abandonment. **[BIC SCT 28], [BIC SCT 32]** (“This Court should hold that...a defendant abandons any possessory interest in an item by damaging the item with intent to avoid investigation or prosecution”) There is no legal support for this.

The State references La Fave (the “great majority of court decisions” have to do with the defendant trying to “dispose of incriminating objects” when pursued by police) and *Celusniak* (survey of jurisdictions indicates abandonment can include attempts to destroy property) for support. **[BIC SCT 32]** (citing 1 Wayne R. La Fave, Search and Seizure § 2.6(b) (6th ed. Nov. 2025 Update) and *Celusniak*, 2004-NMCA-70, ¶ 28) Neither suggests the prosecution can carry its burden simply by charging tampering because a grand jury found there was probable cause to do so.

The State focuses on the *absence* of evidence at the suppression hearing, to argue Fiske legally abandoned the camera. **[BIC SCT 33-34]** The State indicates that the camera was undamaged when Tafoya left the home, damaged when she returned, and that “[t]here was no evidence that anybody else stayed in the house during that period.” Thus, the prosecution’s choice *not* to introduce evidence that would confirm nobody else stayed in the home must be used against Fiske. This upends the burden of proving abandonment – a burden that rests with the

government when it asserts abandonment, not the defendant. *Celusniak*, 2004-NMCA-070, ¶ 26 (“[t]he party seeking to prove abandonment must show this by ‘clear, unequivocal, and decisive evidence.’”) (citation omitted).

The State also argues that evidence of Tafoya’s absence from a home for three days and return to a cracked lens is akin to police watching in real time a hand drop marijuana from a window in a motel room which officers immediately confirmed was occupied only by the defendant. **[BIC SCT 29-30, 33-34]** (citing *State v. Everidge*, 1967-NMSC-035, 77 N.M. 505) There is no meaningful comparison of those facts with the facts here.

The State concludes that Fiske “likely damaged the GoPro before leaving the house [to go to the hospital]” because Fiske “had an incentive to destroy the GoPro and was the only person known to be staying in the house after [Tafoya] left is more than reasonable to infer that he damaged the camera.” **[BIC SCT 33-34]** How the State knows that Fiske was the only person in the house during those three days is unclear since it was not based on evidence presented below. The State further surmises that Fiske knew that RC had regularly scheduled therapy and so “there was a good chance” he would have known police would become involved because the camera had sexual images on it. **[BIC SCT 34]** The conclusion is pure conjecture by the State without evidentiary support that Fiske knew anything of

RC's therapy appointments or, if he did, the timing of them and what they were intended to cover.

The State again attempts to liken the absence of facts here to *Everidge* because there “it was theoretically possible” that the defendant dropped the drugs from the window intending to return later. [BIC SCT 35] (citing *Everidge*, 1967-NMSC-035, ¶ 33). The facts here do not compare to *Everidge*. The State's citation to another obvious real-time drug drop and real-time alcohol drop (during Prohibition) similarly do not support the State. [BIC SCT 35] (citing *State v. Harbison*, 2007-NMSC-016, 141 N.M. 392); [BIC SCT 28-29] (citing *Hester v. United States*, 265 U.S. 57 (1924))

The State's conclusion that only “two inferences,” namely that Fiske was the one who damaged the camera and he did so with intent to evade liability, were being permissibly “stacked” is speculation with no basis in the record except a bare grand jury charge. [BIC SCT 36] (citing *State v. Revels*, 2025-NMSC-021, ¶ 55-60 for proposition that two inferences is not impermissible stacking).

V. The district court's suppression ruling is supported by the record and was correct. Further, the Court of Appeals' holding affirming the district court's suppression ruling was correct.

Standard of Review. Fiske incorporates the Argument IV.A. standard of review.

Merits. The State argues the district court’s ruling was flawed because it did not consider what effect “Defendant’s attempts to tamper with the evidence had on his possessory interest in the GoPro” [BIC SCT 40], it relied on a defense argument the State alleges was incorrectly grounded in privacy interests, and the court did not mention the *government’s* argument that it believed Fiske damaged the GoPro with regard to analysis of possessory interest. [BIC SCT 39-40] Per the State, had the court done so, the result of the balancing of interests would have been different. The State is incorrect.

A warrantless seizure supported by probable cause, and to prevent loss of evidence, is constitutional as long as “police diligently obtained a warrant in a reasonable period of time. *Padilla*, 2024-NMCA-073, ¶ 1 (quoting *Illinois v. McArthur*, 531 U.S. 326, 334 (2001)). That is, a seizure may violate the Fourth Amendment “because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment’s prohibition on ‘unreasonable seizures.’” *Jacobsen*, 466 U.S. at 124 (seizure implicates possessory interests while a search implicates privacy interests). In determining whether any delay in obtaining a warrant is reasonable, “the Fourth Amendment requires courts to ‘balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged

to justify the intrusion.”” *Padilla*, 2024-NMCA-973, ¶ 11 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

On the individual’s side, the “critical question relates to any possessory interest in the seized object[.]” *United States v. Burgard*, 675 F.3d 1029, 1033 (7th Cir. 2012). The longer the government takes to seek a warrant, the greater the infringement on that interest. *Id.* A defendant checking on the status of the seizure is “helpful, though not essential.” *Id.* On the government’s side, a key factor is the basis for the seizure (i.e., probable cause rather versus reasonable suspicion). *Id.* When those competing interests are balanced, the court must take into account whether the government diligently pursued their investigation. *Id.* (citing *Place*, 462 U.S. at 709). Neglecting to seek a warrant “without any good explanation for that delay” creates the appearance that the government is indifferent to the search and the intrusion on the person’s possessory interest is less likely to be justifiable. *Id.* Grounded in this federal case law, *Padilla* evaluated the “private” possessory interest and the government’s interests, including whether the investigation was diligently pursued. 2024-NMCA-073, ¶ 12-14.

Here, the district court did what was required. It made factual findings supported by the record. The State takes issue with the fact that, although the court found that the camera had been damaged some time in the period after Tafoya left the home and that the State *argued* that it believed Fiske had done the damage

(reducing his possessory interest), the district court did not mention those findings or that argument in its evaluation of Defendant's interest. **[BIC SCT 40]** The State has a blind spot: argument is not evidence. The State's *belief* sans evidence that Fiske caused the damage and the defendant's counterargument that nobody knew what happened does not support a conclusion that Fiske caused the damage. Indeed, had the court found that Fiske caused the damage, that would not have been supported by substantial evidence.

The State's second point suffers the same fate. The court could not consider what effect "Defendant's attempts to tamper with evidence" had on his interests when there was no evidence presented that Defendant perpetrated the damage and did so with motivation to evade prosecution. Finally, the State's third point that the defense incorrectly relied on a privacy interest rather than possessory interest is belied by the record as explained above.

The State does not reference the Court of Appeals' opinion. But the Court of Appeals undertook the proper analysis. Consistent with the district court, the Court of Appeals noted defendant's diminished interest in the camera and the government's interest in pursuing a possible child pornography case. However, it reasoned, like the district court, that the government's 35-month delay in seeking a warrant for no valid reason rendered the seizure constitutionally unreasonable. To the extent that the State asks this Court to conduct the same balancing test, when

this Court must observe the same standard of review, the result will also be the same.

CONCLUSION

Based on the arguments made and authorities cited in Arguments I-V, Mr. Fiske requests that this Court affirm the suppression ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was filed with the court's e-filing system on February 28, 2026. Through that system, Van Snow in the New Mexico Department of Justice will be served a copy.

/s/ Anne Amicarella
Law Offices of the Public Defender