



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.

STATE OF NEW MEXICO'S BRIEF IN CHIEF

On Certiorari from the New Mexico Court of Appeals

Oral Argument Requested

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SUMMARY OF PROCEEDINGS

I. Introduction

Defendant put a GoPro camera in the shower to record his underage stepdaughter naked. His stepdaughter found the camera and reported it to her mother. By the time the police seized the camera, the case was damaged and the lens had been cracked. Due to an administrative error, nearly three years passed between the seizure and the application for a search warrant. When detectives searched the GoPro, they found child sexual abuse material (CSAM) on it. The State charged Defendant with, among other crimes, various CSAM-related offenses as well as tampering with evidence for trying to destroy the camera.

The district court ruled that the length of delay between the seizure and the search was constitutionally unreasonable and suppressed the GoPro and the videos. The court, however, failed to resolve a threshold question: did Defendant prove that he had a possessory interest in the GoPro? Without such an interest, Defendant could not challenge the initial seizure and the delay in securing a search warrant would not have prejudiced his constitutional rights.

The record shows that Defendant did not have a possessory interest in the GoPro. He placed the camera in a common area of a shared residence. He stored contraband CSAM on the camera. He gave the camera to his wife, who lawfully turned it over to the police. He made no effort to retrieve the camera for more than three years. And he attempted to destroy the camera to avoid investigation or prosecution. Although the district court examined some of these factors, it did not consider the effect that Defendant's attempts to tamper with the GoPro had on his possessory interest. This legal error led the court to the wrong conclusion, so this Court should reverse the suppression order.

II. Facts and Procedural Background

Defendant and Jessica Tafoya were together for nearly ten years and married for almost two. **[RP 74]** Jessica had a daughter from a previous relationship, R.C.; R.C. was 17 years old in at the end of 2020. **[Id.]** The three lived together in a house. **[Id. 53]**

On October 20 2020, there was only one functioning bathroom in the house. **[Id. 52]** R.C. was in the bathroom when she noticed that a

GoPro camera¹ was hidden among the shampoo bottles in the shower. **[See *id.* 53, 62]** She told Jessica, who “confronted” Defendant and asked him why he had placed a camera in the bathroom. **[12-10-24 CD 3:59:35-54]** He refused to answer but gave Jessica the GoPro. **[*Id.* 3:59:54-4:00:27]** At this point, the camera was “unbroken.” **[*Id.* 4:00:20-27]**

Jessica and R.C. left the house to stay with Jessica’s mother. **[*Id.* 4:03:29-38]** The next morning, R.C. told her therapist about finding the camera. **[*Id.* 4:03:41-4:04:01]** The therapist reported the matter to the Children, Youth, and Families Department (CYFD). **[*Id.* 4:04:02-10]** In the next few days, both CYFD personnel and Jessica called the police. **[*Id.* 4:04:10-21]**

On October 23, 2020, Jessica returned to the house she used to share with Defendant. **[*Id.* 4:04:30-39, 4:04:58-4:05:11]** At the time, Defendant was hospitalized for unknown reasons. **[*Id.* 4:16:50-4:17:07]** She retrieved the GoPro as well as a laptop computer, suspecting that they had CSAM on them. **[*Id.* 4:01:00-18, 4:04:43-4:05:11]** At this point,

¹ GoPros are a line of “action cameras” sold by GoPro, Inc. *See generally* Wikipedia, *GoPro*, <https://en.wikipedia.org/wiki/GoPro> (last accessed Dec. 30, 2025).

the lens of the GoPro was cracked and the side of the case was damaged.

[Id. 4:01:50-4:02:04]

Albuquerque Police Department (APD) Detective Patricia St. Onge instructed an APD officer to take possession of the GoPro and laptop from Jessica. **[Id. 4:12:00-58]** She ordered the warrantless seizure to prevent evidence from being destroyed: the GoPro had been damaged and electronic devices may be accessed remotely. **[Id. 4:12:58-4:14:01]**

After officers seized the camera and laptop, Detective St. Onge intended to apply for a search warrant. **[Id. 4:14:07-15]** Due to her caseload, she did not. **[Id. 4:15:04-34]** To her knowledge, Defendant never attempted to reclaim the devices. **[Id. 4:15:34-4:16:23]**

Roughly three years later, Detective St. Onge's supervisor reassigned the case to another detective. **[Id. 4:14:17-39]** The other detective obtained a search warrant for the devices on September 19, 2023. **[RP 74]** On the GoPro's SD card, APD officers found at least four videos which depicted R.C. naked. **[Id. 63]** The framing of the videos appeared to be intentional as at least some of the videos focused on her genitals. **[Id.]** Officers also found videos which depicted Defendant setting up the camera. **[Id.]**

The State charged Defendant with four counts of manufacturing CSAM, one count of possessing CSAM, one count of voyeurism, and one count of tampering with evidence. **[Id. 1-3]** According to the indictment, Defendant tampered with evidence because he “destroyed, changed, hid, fabricated, or placed a GoPro camera with the intent to prevent the apprehension, prosecution, or conviction of himself[.]” **[Id. 2]**

Before trial, Defendant moved to suppress the GoPro, the computer, and the videos found on the GoPro. **[Id. 52-59]** He admitted that the camera belonged to him. **[Id. 52]** He argued that he had been subjected to an unreasonable search and seizure for two reasons. First, relying on *State v. Padilla*, 2024-NMCA-073, Defendant argued that the roughly three-year delay following the seizure rendered the subsequent search unreasonable. **[Id. 55-56]** Second, Defendant claimed that Jessica had acted as an agent of the police when she retrieved the GoPro and laptop. **[Id. 56-58]**

The State responded to each argument. **[Id. 62-68]** It argued that “Defendant has *no* possessory interest” and a reduced privacy interest in both of the electronic devices given “his storage of child sexual abuse materials depicting R.C. on them, *his attempts to destroy the GoPro to*

avoid criminal liability, and the government's strong interest in removing novel images of child exploitation from any individual's possession." **[Id. 63 (emphasis added)]** In addition, a third party, Jessica, had been able to retrieve both items for the police, the GoPro was not password protected, and Defendant took no action to retrieve the devices. **[Id. 64-65]** The State conceded that the length of the delay and the absence of any justification for the delay weighed against it in the *Padilla* analysis, but argued that Defendant failed to "address any specific possessory interest" he might have in the devices. **[Id. 64]** The State also argued that Jessica did not act as an agent of the police, that exigent circumstances justified the warrantless seizure of the devices, and that excluding evidence would not serve the purposes of the exclusionary rule. **[Id. 66-68]**

At the suppression hearing, Defendant did not offer any witnesses or put forward any exhibits. When offered the opportunity to do so, Defendant claimed that the burden at the hearing rested entirely on the State. **[12-10-24 CD 3:56:44-3:57:06]** The State called Jessica and Detective St. Onage. Jessica related her interactions with R.C. and Defendant, described how the GoPro was initially undamaged but then

was damaged after she and R.C. left the house, and stated that she acted of her own volition when she turned the devices over to the police. [*Id.* 3:58:18-4:09:22] Detective St. Onage explained why she ordered the warrantless seizure of the devices and admitted that she did not seek a search warrant for the devices. [*Id.* 4:10:40-4:18:17]

The State again conceded that the length and reasons for the delay weighed against it. [*Id.* 4:23:30-51] But it argued that, under *Padilla*, the court had to consider the importance of Defendant's property interest in the devices. [*Id.* 4:23:51-4:24:07] Defendant had a reduced property interest in the GoPro because he: (1) voluntarily gave the GoPro to Jessica, (2) made no effort to retrieve the camera, and (3) damaged the camera in an attempt to tamper with evidence. [*Id.* 4:24:07-4:25:58]

At this point in the State's argument, the court stated that it was "unclear" on what the State was getting at when it discussed Defendant's efforts to tamper with the camera. [*Id.* 4:25:58-4:26:58] After the State explained its theory again, the court said that it had not heard any testimony about how the camera was damaged and believed that the issue involved facts "not necessary to the [c]ourt's determination in this case." [*Id.* 4:26:58-4:28:05] The court mistakenly thought that the State

alleged that *Jessica* had damaged the camera. [*Id.* 4:28:05-17] The State again articulated its theory that, because Jessica did not damage the camera and that it became damaged after she and R.C. left Defendant alone in the house, Defendant was the one who damaged the camera to avoid investigation. [*Id.* 4:28:17-55]

In response, Defendant focused largely on the *privacy* interest he had in his home. [*Id.* 4:35:02-37] He claimed that the “starting point” of the analysis was that the State had to justify its warrantless seizure of the devices. [*Id.* 4:35:37-45] Although he “underst[ood]” the State’s argument about a reduced “possessory interest,” he responded only that the computer was password protected. [*Id.* 4:40:53-4:41:31] Similarly, he noted that federal precedent recognized privacy and possessory interests in computers. [*Id.* 4:41:31-4:41:51] Reminding the court that the GoPro was originally intended to surveil the living room, he argued that it likely had captured “scenes . . . from [Defendant’s] life.” [*Id.* 4:41:51-4:42:31]

In response to the State’s argument that he damaged the GoPro, Defendant claimed that “we don’t have a clear view of what happened with that” and that the court would have to impermissibly “stack

inferences” to conclude that he damaged the camera with the intent to avoid investigation or prosecution. [*Id.* 4:42:33-4:43:15] Defendant recognized that the State was claiming that he “abandon his possessory interest” in the camera. [*Id.* 4:43:09-20] Again conflating possessory and privacy interests, Defendant responded that “there is no way for the court in that manner to get to a reduced *possessory interest* because the only testimony that we’ve heard is that [the GoPro] was used as a security camera and it was trained on the interior of the home, which as we know is where our *privacy interest* is at its highest.” [*Id.* 4:43:20-45 (**emphasis added**)]

The State began its reply nine minutes before the courthouse closed. [*Id.* 4:56:36-48] Telling the court that it would be “very brief” in light of the looming deadline, the State told the court:

We’re not asking the court to stack and impute motive, rather we’re simply arguing that the Defendant has a reduced property interest in something that is broken, and even more so something that he is breaking himself. We’re not stating that he either abandoned it or that he was trying to avoid prosecution, but that rather that because it was a broken device that he has reduced interest in that property. He obviously can’t use that to continue to surveil his home when the lens is not working properly. That’s why we’re arguing he has a reduced property interest in that.

[Id 5:00:55-5:03:40] The State closed by asking the court to suppress the computer but not the GoPro. **[Id. 5:03:30-35]**

The court granted Defendant's motion and suppressed the computer, the GoPro, and any evidence contained on the devices. **[RP 73-93]** In its order, it recognized the State's argument that Defendant's possessory interest in the GoPro was reduced for a number of reasons, including because "due to the damage, it showed Defendant did not want to own the item and intended on destroying the item, which diminishes the his possessory interest." **[Id. 77]** The court concluded that the initial seizure of the devices was lawful because Jessica was not acting as an agent of the police and had common authority to enter the home and retrieve the devices. **[Id. 80-82]**

The court found, however, that the delay between the seizure and the search rendered the search unreasonable. **[Id. 83-93]** The court recognized that, in balancing the State's interests against Defendant's, "[o]n the individual person's side of this balance, the critical question relates to any possessory interest in the seized object, not to privacy or liberty interests." **[Id. 84 (quoting U.S. v. Burgard, 675 F.3d 1029, 1033 (7th Cir. 2012))]** The court concluded that Defendant had a

significant possessory interest in the computer “for the reasons discussed in” *U.S. v. Mitchell*, 565 F.3d 1347, 1351 (11th Cir. 2009). [***Id.* 85**] In *Mitchell*, the Eleventh Circuit recognized that computers “are relied upon heavily for personal and business use. Individuals may store personal letters, e-mails, financial information, passwords, family photos, and countless other items of a personal nature in electronic form on their computer hard drive.” *Id.*

The court also concluded that Defendant had a possessory interest in the GoPro. [***Id.* 86**] It acknowledged that “the GoPro is not a computer[.]” [***Id.***] After noting that Jessica testified that the camera originally acted as a security camera in the living room, the court ruled that “Defendant does not have the same level of possessory interest in the GoPro as Defendant does in the computer, but he still maintains a level of possessory interest over an item that was retained by the detectives for nearly three years without his consent and before securing a warrant.” [***Id.***]

The court recognized that several factors undercut Defendant’s possessory interest in the devices: “there is reason to believe alleged child pornography was being manufactured by use of the GoPro in the

bathroom,” neither device was “taken from Defendant’s immediate custody and control,” there was no evidence that Defendant attempted to reclaim the devices, and the devices were taken from common areas in a shared residence.” **[Id. 87-89]** Nonetheless, the court reasoned that the Defendant’s possessory interest over the devices “was not eradicated” due to the “imputed high standard of possessory interest over computers” and the lack of evidence linking the computer to the crime. **[Id. 89]** The court did not consider the effect that Defendant’s efforts to damage the camera had on his possessory interest in that device. **[See id. 86-90 (mentioning several facts but not discussing the damage to the camera)]**

Concluding Defendant had at least some possessory interest in both devices, the delay in searching was lengthy, the State did not establish a legitimate reason for the delay, and the independent source doctrine did not apply, the court granted Defendant’s suppression motion. **[See RP 90-93]**

The State appealed, arguing that the “district court erred when it concluded that the delay in obtaining a warrant was constitutionally unreasonable given Defendant’s diminished possessory interest.” **[COA**

BIC 5] The State pointed to all of the indicia reducing Defendant’s possessory interest in the GoPro, including the damage to the camera.

[*Id.* 8-9]

The Court of Appeals affirmed without ordering Defendant to file an answer. *State v. Fiske*, A-1-CA-42595, mem. op. ¶ 1 (N.M. Ct. App. Jun. 20, 2025) (nonprecedential). It noted that the district court had found that Defendant had a possessory interest in both devices but that this interest was reduced. *Id.* ¶¶ 8-10. Like the district court, the Court of Appeals did not consider the damage to the camera. *See id.* The Court held that the “thirty-five-month delay was constitutionally unreasonable.” *Id.* ¶ 14.

ARGUMENT

I. Defendant Did Not Have a Possessory Interest in the GoPro.

The district court excluded the GoPro and its videos after applying a test designed to determine when a delay between a warrantless seizure and a subsequent search becomes unreasonable. *See Padilla*, 2024-NMCA-073, ¶ 11 (discussing the law surrounding a “temporary warrantless seizure,” relying on *Illinois v. McArthur*, 531 U.S. 326 (2001) for the conclusion that temporary warrantless seizures may be

permissible, and framing the issue as whether a delay in obtaining a warrant following a seizure is reasonable). But the district court missed a threshold issue: it did not first consider whether Defendant carried his burden of demonstrating that he had a possessory interest in the GoPro. Without such an interest, Defendant could not challenge the warrantless seizure of the GoPro; there was no unreasonable seizure at all. Because the record shows that Defendant did not have a possessory interest in the GoPro, this Court should reverse the district court.

A. Search and seizure standing.

Both the Fourth Amendment to the U.S. Constitution and Article II, Section 10 of the New Mexico forbid unreasonable searches and seizures. Search and seizure protections are “personal rights which, like some other constitutional rights, may not be vicariously asserted.” *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978) (quoting *Alderman v. U.S.*, 394 U.S. 165, 174 (1969)). To invoke the exclusionary rule, a defendant “has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.” *Id.* at 132 n.1; *see also State v. Van Dang*, 2005-NMSC-033, ¶ 7, 138 N.M. 408 (“To establish standing,

Defendant must demonstrate . . .”). A defendant continues to bear this burden on appeal. *U.S. v. Russell*, 26 F.4th 371, 375 (6th Cir. 2022).

Courts often refer to the question of whether a defendant’s rights were violated by a challenged search or seizure as one of standing. In *Rakas*, however, the Supreme Court clarified that the concept is “more properly subsumed under substantive Fourth Amendment doctrine.” 439 U.S. at 139. This distinction makes little practical difference: “[t]he inquiry under either approach is the same.” *Id.* However, standing to challenge a search or a seizure “should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits.” *Terrence Byrd v. United States*, 584 U.S. 395, 410-11 (2018). Regardless of whether this is characterized as a question of standing or a necessary element of a search and seizure claim, it is a “threshold question.” *State v. Van Dang*, 2005-NMSC-033, ¶ 7, 138 N.M. 408; *see also State v. Marquez*, __-NMCA-__, ¶ 10 n.1 (A-1-CA-41488, July 28, 2025) (describing abandonment as being either “a question of standing or a substantive threshold question”) (emphasis added).

The standing inquiry asks “whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant

who seeks to exclude the evidence obtained during it.” *Rakas*, 439 U.S. at 140. To answer this question, a court must examine “whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.” *Id.*

Searches and seizures implicate different interests. “A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A seizure of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984) (footnotes omitted).

So, as a threshold matter, a defendant challenging the seizure of property must demonstrate that the seizure meaningfully interfered with his or her possessory interest in that property. If a defendant satisfies this threshold showing, the burden shifts to the government to justify the seizure. *See State v. Wright*, 1995-NMCA-016, ¶ 9, 119 N.M. 559 (“Once a defendant has established that law enforcement officers have entered the premises of another and conducted a warrantless search and seizure in an area wherein the defendant has a reasonable expectation of privacy, the state has the burden of coming forward with evidence to show that the search and seizure came within a valid exception to the search

warrant requirements imposed by the State and United States Constitutions.”).

B. Standard of review.

Appellate courts review de novo whether a defendant has standing to challenge a search or seizure. *See State v. Silvas*, 2013-NMCA-093, ¶ 9, *aff'd on other grounds*, *State v. Silvas*, 2015-NMSC-006, ¶ 9 (stating in the search and seizure context that “[w]hether a party has standing to bring forth a claim is a question of law that we review de novo”). *See also Van Dang*, 2005-NMSC-033, ¶ 7 (describing standing as a “threshold question”); *State v. Attaway*, 1994-NMSC-011, ¶¶ 8, 10, 117 N.M. 141 (stating that “threshold constitutional issues” such as “the validity of search warrants” or whether exigent circumstances justified a warrantless search or seizure, are reviewed de novo).

C. Preservation.

To preserve an issue for appeal, a party must “fairly invoke” a ruling from the trial court. Rule 12-321(A) NMRA. Below, the State did not expressly state that it challenged Defendant’s standing to challenge the seizure. But it squarely invoked a ruling from the district court about whether Defendant had a possessory interest in the GoPro.

In its response, the State argued that Defendant “has no possessory interest in the GoPro or computer,” in part because of the damage to the camera. **[RP 63]** The district court recognized that the State argued that Defendant’s possessory interest in the GoPro was reduced for a number of reasons, including because “due to the damage, it showed Defendant did not want to own the item and intended on destroying the item, which diminishes the his possessory interest.” **[Id. 77]** The court analyzed Defendant’s possessory interest in the devices for three pages of its order. **[Id. 85-88]** Because Defendant was on notice about the State’s argument, he had a full opportunity to develop the record he needed to establish a possessory interest in the devices. The parties expressly argued the issue. So, the State preserved for appeal the issue of whether Defendant had a possessory interest in the GoPro. Because the question of whether Defendant had standing turns on whether he had a possessory interest in the GoPro, that issue is preserved as well.

At the suppression hearing, the prosecutor, speaking of Defendant’s possessory interest in the GoPro, stated: “We’re not stating that he either abandoned it or that he was trying to avoid prosecution, but that rather because it was a broken device that he has a reduced interest in that

property.” [12-10-24 CD 5:00:58-5:03:24] This single statement should not be taken as a waiver or concession that Defendant had standing.

The prosecutor’s comment was, at most, a simple misstatement of the State’s consistent position below. For one, the prosecutor certainly did not mean that Defendant did not damage the camera “trying to avoid prosecution”: the State charged Defendant with tampering with evidence precisely because he tried to evade investigation or prosecution. Nor did the prosecutor intend to completely change the State’s possessory interest argument at the last moment. In its response, the State argued that Defendant had no possessory interest in the camera in part because he tried to break it. During the hearing, the State argued that Defendant’s possessory interest was reduced because, among other facts, he tried to break the camera. The statement came in reply when the prosecutor was under pressure to conclude before the courthouse closed. *Cf. State v. Sosa*, 2009-NMSC-056, ¶ 24, 147 N.M. 351 (“[C]losing argument, *and rebuttal argument in particular*, is necessarily responsive and extemporaneous, not always capable of the precision that goes into prepared remarks.” (emphasis added)).

The district court understood the State’s actual position: that the damage showed that “Defendant *did not want to own the item and intended on destroying the item*, which diminishes his property interest.” **[Id. 77 (emphasis added)]** It made no note of the prosecutor’s statement when describing what occurred in reply. **[See RP 78-79]** Accordingly, the isolated statement by the prosecutor did not change the reality of the case: the State squarely invoked a ruling from the trial court about whether Defendant had a possessory interest in the GoPro.

Alternatively, if this Court holds that the State did not preserve its arguments, it should still exercise its discretion to review them. *See* Rule 12-321(B)(2) (permitting discretionary review of plain error, fundamental error, or issues involving the fundamental rights of a party). A mere failure to make a timely argument operates as a forfeiture, not a waiver, and forfeited arguments may still be reviewed under certain circumstances. *See U.S. v. Noble*, 762 F.3d 509, 528 (6th Cir. 2014) (discussing the difference).

The Court of Appeals has held that the State cannot challenge standing for the first time on appeal. *See State v. Leyba*, 1997-NMCA-023, ¶ 6, 123 N.M. 159 (“The State cannot raise the issue of Defendant’s

standing for the first time on appeal because standing is a fact-based issue on which Defendant must be given the opportunity to present evidence to the trial court.”); *State v. Porras-Fuerte*, 1994-NMCA-141, ¶ 10, 119 N.M. 180 (same). However, when the State raised standing for the first time on appeal in *State v. Sanders*, the Court reached the merits of the State’s standing claim. *See* 2024-NMCA-030, ¶¶ 9-12 (noting that the defendant argued that the State could not raise standing for the first time on appeal but reaching the merits anyway).

To the extent that *Porras-Fuerte* and *Leyba* hold that the State may never raise standing for the first time on appeal, they should be overruled. In *Porras-Fuerte*, the Court held that the State could not challenge a defendant’s standing for the first time on appeal because “it is a fact-based issue. The defendant must be alerted to the issue and given the opportunity to present evidence thereon at the trial court level.” 1994-NMCA-141, ¶ 10.

But that reasoning ignores the special nature of standing in the search and seizure context. A defendant bears the burden of establishing his or her standing to challenge a search or seizure. *Rakas*, 439 U.S. at 132 n.1.; *Russell*, 26 F.4th at 375. Accordingly, a defendant *always* is

“alerted to the issue and given the opportunity to present evidence thereon at the trial court level.” *Porras-Fuerte*, 1994-NMCA-141, ¶ 10. If a defendant fails to demonstrate standing in the district court, then he or she has failed to establish an essential element of a claim under the Fourth Amendment and Article II, Section 10.

Here, Defendant had plenty of notice that the State was challenging his possessory interest in the GoPro. He had a full opportunity to introduce additional evidence on the subject. Accordingly, it would not be unfair to Defendant to review standing. Moreover, examining whether Defendant had any interest in the GoPro would better serve the purposes of the exclusionary rule. As discussed above, search and seizure rights are personal. If a defendant fails to establish that he or she had a meaningful privacy or possessory interest in a piece of property, he or she has failed to establish that he or she was subjected to an “unreasonable search[] or seizure[.]” N.M. Const. Art. II, § 10; U.S. Const. amend. IV.

If this Court could not consider standing even when the record plainly reflects that Defendant failed to establish standing, it would be placed in the strange position of having to hold that Defendant’s search and seizure rights were violated when the search and seizure did not

implicate the defendant's rights at all. Under Article II, Section 10, "the key inquiry is still one of reasonableness, which 'depends on the balance between the public interest and the individual's interest in freedom from police intrusion upon personal liberty.'" *State v. Tapia*, 2018-NMSC-017, ¶ 46 (quoting *State v. Ketelson*, 2011-NMSC-023, ¶ 20, 150 N.M. 137). Requiring or affirming the suppression of the GoPro and its videos when Defendant's personal liberty was not violated would ignore the public's substantial interest in prosecuting CSAM related offenses.

D. Defendant failed to establish that he had a possessory interest in the GoPro.

Below, Defendant and the district court overlooked the threshold question of standing. As discussed above, Defendant bore the burden of establishing that he had standing to challenge the seizure. *See Rakas* 439 U.S. at n.1 ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure."); *Russell*, 26 F.4th at 375 (stating that this burden continues on appeal); *Wright*, 1995-NMCA-016, ¶ 9 (stating that a defendant must establish a legitimate privacy interest in property before the burden shifts to the State to justify a warrantless search). Defendant failed to establish that he had a possessory interest in the

GoPro when he stored the camera in a common area of a shared residence, stored contraband CSAM on it, damaged the camera with the apparent intent to avoid prosecution, handed the camera to Jessica, and failed to make any effort to retrieve the camera.

Defendant put forward two reasons why he had a possessory interest in the GoPro: he owned the device and it was given to him to record events in the living room. **[See RP 52 (stating that the GoPro “belonged to” Defendant; 12-10-24 CD 4:43:20-44, 4:35:02-37 (discussing Defendant’s privacy interest))]** Although legal ownership of property may give rise to a possessory interest, it is not determinative: “[w]hile property ownership is clearly a factor to be considered in determining whether an individual’s Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of this Court’s inquiry.” *U.S. v. Salvucci*, 448 U.S. 83, 91 (1980) (internal citation omitted).

Defendant’s second proffered reason missed the mark. Defendant argued that he had a *privacy* interest in the camera because it was located in the home and had captured scenes within the home. But whether Defendant had a privacy interest in the camera’s recordings

does not establish that he had a possessory interest in the camera to challenge the seizure. *See U.S. v. Miller*, 799 F.3d 1097, 1101-03 (D.C. Cir. 2015) (holding that a challenge to the seizure of property based only on a violation of privacy interests was “flawed at its foundation” because “his argument sounds exclusively in *privacy* interests he ostensibly held”). So, Defendant was left only with his claim of legal ownership.

The facts found by the district court should have led it to conclude that Defendant did not have a possessory interest in the GoPro by the time Jessica handed the camera to the police. To begin with, there contraband CSAM images on the GoPro. A defendant does not have a possessory interest in contraband. *See State v. Bomboy*, 2008-NMSC-029, ¶ 10, 144 N.M. 151 (“Likewise, there can be no infringement on Defendant's possessory interest in the methamphetamine because an individual does not have a lawful right to possess such contraband.”).

The GoPro was not taken from Defendant's person or immediate control. To the extent that Defendant may have once used the camera for lawful purposes, Defendant chose to use the camera to commit crimes by placing it in the shower. Defendant handed the camera to Jessica, who had the legal authority to dispose of the phone. She then lawfully handed

the camera to the police. He did not make any effort to reclaim the GoPro. Defendant failed to rebut these facts below, which reduce his possessory interest. *See Padilla*, 2024-NMCA-073, ¶ 13 (stating that, even with computers, courts have found reduced possessory interests “when the computer is taken from another person rather than directly from the possession of the defendant; when the computer's contents lack password protection or other security; and when the individual fails to make diligent efforts to have the computer returned.”). So, taking the facts as the district court found them, Defendant failed to establish that he had a possessory interest in the GoPro when it was seized. Moreover, as discussed below, Defendant damaged the GoPro with the apparent intent to evade investigation or prosecution. In light of these facts, Defendant failed to carry his burden of demonstrating a possessory interest in the GoPro.

E. To the extent Defendant had a possessory interest in the camera, he abandoned it by attempting to destroy it with the intent to evade investigation or prosecution.

If this Court concludes that Defendant had some possessory interest in the GoPro, this Court should hold that he abandoned it by

damaging the camera with the intent to avoid investigation or prosecution.

“Abandonment is akin to the issue of standing because a defendant lacks standing to complain of an illegal search or seizure of property which has been abandoned.” *U.S. v. Garzon*, 119 F.3d 1446, 1449 (10th Cir. 1997); *see also State v. Celusniak*, 2004-NMCA-070, ¶ 25, 135 N.M. 728 (“While ownership or lawful possession generally gives rise to a legitimate expectation of privacy, one can relinquish this expectation if he or she abandons the property.” (internal citations omitted)).

Abandonment “is an ultimate fact or conclusion based upon a combination of acts and intent.” *State v. Clark*, 1986-NMCA-095, ¶ 12, 105 N.M. 10. “The intent to abandon will not be presumed and must be affirmatively shown by the party relying on abandonment. The showing must be by clear, unequivocal and decisive evidence.” *Id.* Because there is often not direct evidence of a defendant’s intent, “[i]ntent can be inferred from words, actions, and other facts.” *Celusniak*, 2004-NMCA-070, ¶ 26. New Mexico courts reviewing abandonment arguments defer to factual findings supported by substantial evidence but review “conclusions from the facts” de novo. *See id.* ¶ 27.

To resolve an abandonment claim, “the basic inquiry is whether the defendant either denied ownership of the item or physically relinquished it.” *Id.* ¶ 28. In *Celusniak*, the Court of Appeals reviewed authority from other jurisdictions and identified several common scenarios in which other courts had found that a defendant had abandoned property: “where the defendant disclaims ownership of the property, throws the property out a window or from a moving vehicle, *unsuccessfully attempts to destroy the property*, or leaves the property behind in a vacated premises or vehicle.” *Id.* (emphasis added). Most abandonment cases involve defendants attempting to evade investigation or prosecution: in “[t]he great majority of the court decisions having to do with the abandonment of effects in a search and seizure context[,] . . . the defendant tried to dispose of certain incriminating objects upon the lawful approach of or pursuit by the police.” 1 Wayne R. La Fave, Search and Seizure § 2.6(b) (6th ed., Nov. 2025 Update).

Hester v. United States, 265 U.S. 57 (1924) appears to be the origin of the modern abandonment doctrine. *See id.* at 58-59 (1924) (not citing earlier precedent); La Fave, Search and Seizure § 2.6(b) (not citing earlier cases). In *Hester*, revenue agents during Prohibition surveilled

two suspected bootleggers. *See* 265 U.S. at 58. After one suspect handed the other a bottle, the revenue agents revealed themselves and gave chase. *See id.* One suspect dropped a jug, which broke on the ground, while the other threw away a bottle. *Id.* Both broken containers still held some moonshine whiskey. *Id.* The agents followed the suspects to a house and were told by an occupant that there was no whisky left. *Id.* An officer, however, found “a jar that had been thrown out” nearby that also contained some moonshine despite being broken. *Id.* The Court rejected the defendant’s argument that he had been subjected to an illegal search or seizure: “[t]he defendant’s own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned.” *Id.*

In *State v. Everidge*, 1967-NMSC-035, 77 N.M. 505, a defendant’s attempt to conceal evidence from the police prevented him from challenging a seizure. There, police officers had an arrest warrant for a woman. *Id.* ¶ 18. They arrived at a hotel to serve the warrant; one officer entered the hotel while the other remained in the police car. *See id.* ¶¶ 18-19. The officer who went into the hotel knocked on the door of Room

110 and found the defendant inside but not the woman. *Id.* ¶ 18. The defendant let the officer in to search for the woman. *Id.* The officer, finding nothing, left the room to return to the car. *Id.*

Meanwhile, the officer who stayed in the car saw “an arm and hand” emerge from the room’s window and drop a “small, bright object” to the ground. *Id.* ¶¶ 19-20. When the officers examined the object, they found that it was a small tinfoil package containing marijuana cigarettes. *Id.* ¶ 20. The officers returned to Room 110, confirmed that nobody else was in the room with the defendant, and arrested him. *Id.* ¶ 21. “At no time before they picked up the package and examined its contents did they have reason to believe [the defendant] had committed a crime.” *Id.* ¶ 22.

This Court rejected the defendant’s argument that the officers illegally seized the package without a warrant. *See id.* ¶¶ 23, 34. This Court reasoned that “there was no search for the package containing the marijuana cigarettes, and there was no seizure” because the package was dropped “at a place where [the defendant] had no more right to be than the officers.” *Id.* ¶ 26. After examining similar cases from other jurisdictions, the Court concluded that “[t]he total atmosphere of the present case is one of proper and permitted conduct on the part of the

officers.” *Id.* ¶ 33. Because the initial entry into and search of Room 110 was lawful, “[n]o unlawful act of the officers can be said to have forced the [defendant] to drop the marijuana cigarettes out the window.” *Id.* The Court noted that the defendant’s reasons for dropping the package out of the window were not contained in the record. *Id.*²

Most reported New Mexico cases discussing abandonment involved searches and, accordingly, turned on whether the defendant had intended to abandon a privacy interest in property. *See, e.g., State v. Crane*, 2014-NMSC-026, ¶¶ 32-33 (rejecting the argument that New Mexicans abandon privacy interests in garbage when it is placed outside for collection); *Celusniak*, 2004-NMCA-070, ¶ 35 (stating that finding abandonment under the circumstances “would be inconsistent with commonly held notions about expectations of privacy); *State v. Esguerra*, 1991-NMCA-147, ¶ 13, 113 N.M. 310 (“When an individual’s behavior

² Although *Everidge* did not use the term abandonment and instead concluded that there was no seizure at all, it is best classified as an abandonment case. *See State v. Crane*, 2014-NMSC-026, ¶ 32 (discussing *Everidge* in the abandonment context); La Fave, Search and Seizure § 2.6(b) (“Sometimes the fact of abandonment is relied upon in order to find that a particular defendant was without standing, but more often courts take the position that if certain property is abandoned it is *beyond the protections of the Fourth Amendment.*” (footnote omitted) (emphasis added)).

indicates an intent to abandon his possessions, he is divested of any expectation of privacy, and the fourth amendment will no longer protect him against a warrantless search.”).

This Court should hold that, consistent with *Hester* and *Everidge*, a defendant abandons any possessory interest in an item by damaging the item with the intent to avoid investigation or prosecution. This rule would also be consistent with holdings from other jurisdictions. See *Celusniak*, 2004-NMCA-070 (“a review of cases from across the nation reveals several general factual scenarios that give rise to a finding of abandonment, including cases where the defendant . . . unsuccessfully attempts to destroy the property[.]”); see also La Fave, Search and Seizure § 2.6(b) (“The great majority of the court decisions having to do with the abandonment of effects in a search and seizure context are similar to *Vaughn* in that it appears the defendant tried to dispose of certain incriminating objects upon the lawful approach of or pursuit by the police.”). And it would match common sense: if a defendant is willing to destroy his property so that the police cannot use it as part of an investigation, then that defendant does not have any further interest in retaining that property.

Here, the evidence showed that Defendant damaged the GoPro with the intent to avoid investigation or prosecution. This matches the grand jury's view of the evidence; it concluded that there was probable cause that Defendant tampered with the GoPro to "prevent the apprehension, prosecution or conviction of himself[.]" **[RP 2]**

When Defendant gave Jessica the GoPro, it was undamaged. Jessica and R.C. left the house after discovering the camera, leaving Defendant. There was no evidence that anybody else stayed in the house during that period. When Jessica returned to the house to retrieve the devices, the GoPro had been damaged on its side and the lens was cracked. True, there was no direct evidence conclusively establishing that Defendant was the one who damaged the camera. But the same was true in *Everidge*: the officer who remained in the car saw only "an arm and hand extend past the curtains and through a window." 1967-NMSC-035, ¶ 19. The officers, and this Court, concluded that the hand belonged to the defendant because there was nobody else in Room 110. *See id.* ¶¶ 18, 21, 33 (describing fruitless searches and reasoning that "the appellant" dropped the cigarettes). That Defendant happened to be at the hospital when Jessica returned to the house does not change this reasoning; he

likely damaged the GoPro before leaving the house. Because Defendant had an incentive to destroy the GoPro and was the only person known to be staying in the house after Jessica and R.C. left, it is more than reasonable to infer that he damaged the camera.

The evidence also shows that Defendant acted with the intent to avoid investigation or prosecution. Defendant knew that Jessica and R.C. suspected that he had filmed R.C. in the shower: R.C. gave the camera to Defendant after she found it in the shower, Jessica confronted Defendant, then Jessica and R.C. left the house. R.C. had regularly-scheduled therapy appointments. So, Defendant must have known that there was a good chance that someone—R.C., her therapist, or Jessica—would tell the police that he had recorded R.C. in the shower. Defendant knew that there was CSAM on the GoPro: he put the camera in the shower for precisely that purpose.

Again, there was no direct evidence of Defendant's intent. This is not unusual in criminal cases: defendants have the right to remain silent. But "[i]ntent can be inferred from words, actions, or other facts." *Celusniak*, 2004-NMCA-070, ¶ 26. In *Everidge*, this Court noted that the defendant's reasons for dropping the cigarettes were "not made to appear

in the record on this appeal.” 1967-NMSC-035, ¶ 33. So it was at least theoretically possible that the defendant in that case simply dropped them out of the window intending to retrieve them later. But it was eminently reasonable to infer that a defendant possessing contraband who was interacting with police officers would want to dispose of the evidence to evade detection.

The same is true of other defendants who discard items while the police are in pursuit. *See, e.g., State v. Harbison*, 2007-NMSC-016, ¶¶ 5, 10, 141 N.M. 392 (stating that, if a defendant was not been seized, throwing crack cocaine and paraphernalia under a car while police approached would constituted abandonment); La Fave, Search and Seizure § 2.6(b) (stating that he “great majority” of abandonment cases involve attempts to “dispose of certain incriminating objects upon the lawful approach of or pursuit by the police”). True, the police were not in hot pursuit when Defendant damaged the GoPro. But, as discussed above, he had to know that there was a good chance that the police would soon become involved.

Below, Defendant’s only response to these points was that the court could not impermissibly “stack” inferences to conclude that he

intentionally damaged the GoPro. This appears to have been a reference to precedent stating that a conviction “may not rest on . . . an overly attenuated piling of inference on inference.” *State v. Slade*, 2014-NMCA-088, ¶ 14 (quoting *U.S. v. Pettigrew*, 77 F.3d 1500, 1521 (5th Cir. 1996)). But even in that context, factfinders may properly make multiple logical inferences based upon the facts. *See State v. Revels*, 2025-NMSC-021, ¶¶ 55-60 (rejecting a claim that making two inferences would impermissibly “pil[e] inference upon inference.”). The reasoning outlined above, like in *Revels*, rested on two inferences: that Defendant was the one who damaged the camera, and that he did so with the intent to evade liability. Because those inferences were logically supported by the evidence, they are proper.

The facts and circumstances show by clear, unequivocal and decisive evidence that Defendant damaged the GoPro to avoid prosecution or investigation. Accordingly, he abandoned any possessory interest he had in the GoPro.

F. Conclusion.

Defendant failed to show he had a possessory interest in the GoPro containing contraband that he handed to another and made no effort to

retrieve for three years. Even if this Court concludes that he had some sort of possessory interest in the camera, he abandoned that interest by damaging it with the intent to avoid investigation or prosecution. The legal framework that Defendant and the district court relied upon applies only if there has been a seizure for the purposes of the Fourth Amendment or Article II, Section 10. *See Padilla*, 2024-NMCA-073, ¶ 11 (discussing the law surrounding a “temporary warrantless seizure,” and framing the issue as whether a delay in obtaining a warrant following a seizure is reasonable). Regardless of whether Defendant failed to establish standing or the State established abandonment, Defendant did not have standing to challenge the seizure of the GoPro. Accordingly, the district court erred by suppressing the GoPro and the videos under *Padilla*.

II. Even if Defendant Had Some Possessory Interest in the GoPro, the District Court Did Not Consider His Attempt to Destroy It.

Even if this Court concludes that Defendant had a possessory interest in the GoPro in the first place and did not abandon that interest, it should still reverse because the district court failed to consider Defendant’s attempts to destroy the GoPro. This Court reviews

suppression orders under a mixed standard, deferring to factual findings so long as they are supported by evidence and reviewing the overall reasonableness of the search or seizure de novo. *See Padilla*, 2024-NMCA-073, ¶ 9.

In *Padilla*, the Court of Appeals adopted a test used by federal courts when, following a warrantless seizure of property, there is a delay in obtaining a search warrant. *See* 2024-NMCA-073, ¶ 11. Under this test, courts judge whether the delay was unreasonable by balancing the defendant’s private interest against those of the government. *Id.* Because this framework operates upon the assumption that the government has seized property without a warrant, the defendant’s private interest in this analysis is his or her possessory interest in the seized property. *See id.* ¶¶ 12-14 (examining the defendant’s possessory interest); *Burgard*, 675 F.3d at 1033 (“[T]he critical question relates to any possessory interest in the seized object, not to privacy or liberty interests.”).

On the government’s side of the scale, courts consider the government’s interest in seizing the property; “a government interest based on probable cause to believe a computer contains child pornography . . . weighs more heavily in favor of the government than a

seizure made with only reasonable suspicion.” *Padilla*, 2024-NMCA-073, ¶ 15. When balancing the interests, courts “must take into account whether the police diligently pursued their investigation.” *Burgard*, 675 F.3d at 1033 (quotation marks omitted).

The district court found that Defendant had a reduced possessory interest in the GoPro for several reasons: he had the devices in “common areas in a shared residence,” it was unclear whether he used a password to protect the contents, and “Defendant never inquired as to the location of these items over the course of three years.” **[RP 89]** The devices were not taken from Defendant’s “immediate custody and control.” **[Id. 86]** That Defendant stored contraband CSAM on the camera diminished his possessory interest even further. **[Id. 87]**

The court acknowledged that, while Defendant had a “significant possessory interest” in the computer, he did not have the same level of possessory interest in the GoPro. **[Id. 85-86]** The court nonetheless found that Defendant had “a level of possessory interest” in the GoPro because Jessica testified that it “originally acted as a security camera in their living room.” **[Id. 86]** This conclusion was flawed: while a defendant may have a *privacy* interest in recordings of his or her home,

he or she does not automatically have a possessory interest in them. *See Jacobsen*, 466 U.S. at 113 (distinguishing interests of searches and seizures); *Miller*, 799 F.3d at 1101-03 (rejecting a challenge to the seizure of evidence when the defendant articulated only a privacy interest).

Moreover, the court did not expressly consider what effect Defendant's attempts to tamper with evidence had on his possessory interest in the GoPro. [*See id.* 84-90 (**considering Defendant's possessory interest but not mentioning the damage to the camera**)] It did so even though it found that Jessica told the police that the GoPro was undamaged on October 20 but damaged on October 23, [*id.* 76], that Jessica and R.C. "moved out" of the house on October 20, [*id.* 75], and acknowledged that the State had argued that Defendant's attempts to destroy the GoPro reduced his possessory interests [*Id.* 77] Yet the district court did not mention those findings or that argument in its discussion of Defendant's possessory interest. If it had, then the court should have reached a very different result.

The district court agreed that the State "had a strong interest in retaining the GoPro and not returning it to Defendant, given the likelihood that it contained evidence of crimes of child pornography and

sexual abuse” which “weigh[ed] heavily against Defendant’s possessory interest.” [*Id.* 88, 90] When Defendant tampered with the GoPro, he reduced his possessory interest in the camera even further. Even if Defendant had some sort of possessory interest left in the GoPro, that interest was less significant than the district court thought. So, even though the delay in obtaining a search warrant was very long and unjustified, the State’s extremely strong interest in keeping new child exploitation images away from Defendant and out of circulation should have prevailed.

CONCLUSION

The State respectfully requests that this Court reverse the district court’s order suppressing the GoPro and the evidence contained on its SD card.

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 8,269 words as calculated by Microsoft Word 365.

CERTIFICATE OF SERVICE

I certify that, on January 14, 2026, I filed a true and correct copy of the foregoing Brief in Chief electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served by electronic means.

/s/ Van Snow
Deputy Solicitor General