IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Petitioner,

vs.

S-1-SC-39668
A-1-CA-39874

CHRISTOPHER GARCIA,

Defendant/Respondent.

ON CERTIORARI REVIEW TO THE
NEW MEXICO COURT OF APPEALS

DEFENDANT/RESPONDENT'S ANSWER BRIEF

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY, NEW MEXICO

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INTRODUCTION

In this appeal, the State is arguing that Supreme Court Order Number 13-8500 (Aug. 28, 2013) (Order 13-8500), discussing changes to the manner in which court records are stored and accessed, dispenses with authentication requirements under the rules of evidence when the State is seeking to admit documents purporting to be from Odyssey at a hearing or trial where the rules of evidence apply. Order 13-8500 does not mention the rules of evidence or in any way suggest it was intended to nullify a proponent's burden in admitting court records at such proceedings. Nor is such an interpretation consistent with the reasons authentication has traditionally been required—reasons which are even more important as technology makes fraudulent alterations easier and mistakes likelier. The district court and Court of Appeals were therefore correct in holding that the authentication requirements under the rules of evidence still had to be met for the admission of evidence and that such requirements were not met here.

Likewise, the State argues that the district court abused its discretion in failing to take judicial notice of the records, if not the content within them. However, as the lower courts correctly recognized, the State never asked the court to take judicial notice of the records, let alone articulated what within them it wanted noticed. Moreover, because the records went to the heart of its case against Christopher

Garcia, the lower courts correctly recognized that judicial notice was not required here.

For these reasons, Christopher Garcia respectfully asks this Court to Affirm the Court of Appeals Opinion and the district court's ruling dismissing the case without prejudice to the State. Alternatively, he asks this Court to quash certiorari.

SUMMARY OF FACTS AND PROCEEDINGS

On April 13, 2021, the State charged Christopher Garcia with one count of felon in possession of a firearm, contrary to NMSA 1978, Section 30-7-16(A)(1) (2020). **[RP 1]** The following day the district court issued a notice indicating that a preliminary hearing was scheduled for June 2, 2022, giving the State 50 days from the time the complaint was filed to prepare for the preliminary hearing. **[RP 4]**

Five days before the hearing, the State filed a document containing an exhibit list and a notice of its intent to use Rule 11-807 NMRA, the residual hearsay exception. **[RP 18]** The notice indicated it was filed in compliance with Supreme Court Order Number 20-8500-025 (July 6, 2020) (Order 20-8500) NMRA and the State set forth arguments for its admissibility under Rule 11-807. **[RP 18]** The notice did not mention Rule 11-201 NMRA, Rule 11-902 NMRA, Supreme Court Order Number 13-8500 (Aug. 28, 2013) (Order 13-8500), or a 2014 letter drafted by Second Judicial District Court Chief Judge Nash (the Odyssey Letter). The exhibit list included two exhibits, which were attached to the pleading: (1) a plea agreement and (2) a judgment and sentence related to case D-202-CR-2019-01871 (Exhibits).

[RP 18-31] The State did not obtain certified copies of the Exhibits from the district court clerk's office or include any other attachments.

On June 2, 2022, the court conducted the preliminary hearing. **[6/2/21 CD 9:01:23-39]** At the commencement of the hearing, the State informed the district court that its sole witness would be a law enforcement officer. **[*Id.* 9:01:50-56]** The State then moved to admit the Exhibits under Rule 11-902(2), (4), and (11) the rule for self-authentication of documents. **[*Id.* 9:02:34-43, 9:03:55-04:43, 9:15:21-33]** The State intended to use the Exhibits to prove that Mr. Garcia was a "felon," an essential element under Section 30-7-16. **[*Id.* 9:05:21-52]**.

Defense counsel objected "on the basis that this is not a certified copy," or otherwise authenticated, and thus the Exhibits failed to comply with the New Mexico Rules of Evidence. **[*Id.* 9:02:43-03:02]** Counsel further argued that the State was trying "to circumvent a very important element here by just simply submitting a document that has been filed with the court," without having to present other evidence substantiating that the person who pled guilty in the prior case was the same person charged with the offense in this case. **[*Id.* 9:06:56-07:40, 9:10:18-47]**

After the district court noted that the rules of evidence applied and expressed concern about admitting uncertified Exhibits "[w]hen it is the crux of one of the fundamental issues of the case," **[*Id.* 9:03:02-42]**, the State argued that it did not need certified copies and relied on the Odyssey Letter, Rule 11-902, and "then the Supreme Court Order referenced in the State's exhibit list, Your Honor. Which is

20-8500-025, which has been updated, but not regarding this particular fact." **[*Id.* 9:03:42-04:43, 9:11:37-12:00]**

The district court observed that the State could have obtained certified copies **[*Id.* 9:06:11-56]** and had, in fact, done so recently in another case. **[*Id.* 9:12:51-13:10]** The district court further indicated that the State had not actually provided the court with the Odyssey Letter or the Supreme Court Order it was relying upon. **[*Id.* 9:13:44]** However, from the court's recollection of them, they were

> basically saying this paper copy from Odyssey, it's stored correctly and it's stored like it is in the court file. Back before the days of Odyssey, if you got a copy from the court file to use as evidence, you would still need to get it certified. You wouldn't just make a regular copy from the court file and say, "Well, I got it from the court file. So it's fine." You would need a certified copy.
>
> The way that this court reads [the Odyssey Letter] is simply saying that the copies on Odyssey are the same as the copies in a court file. That does not circumvent the rules of evidence, however.

[*Id.* 9:13:44-14:28]

When the State quoted a portion of the Odyssey Letter saying that certification was not necessary, the district court noted the State was reading it out of context and that the letter was not written with the rules of evidence in mind, before reiterating that "[i]f you want the court to consider that letter, you should have tendered it." **[*Id.* 9:14:28-44]; [*Id.* 9:15:33** (remarking that the Odyssey Letter "does not count the rules of evidence")**]**

The court concluded that the Exhibits "do not meet the rules of evidence. I will not admit them." The State responded that without the Exhibits, it "can't proceed. I'm going to have the court issue a dismissal order." **[*Id.* 9:14:33-15:00]** The district court agreed to do so, explaining that the basis for the dismissal was the State's failure to "tender exhibits that can be admitted under the rules of evidence. That those exhibits were the crux of the State's case to prove that this was a person who was not allowed to have a firearm." **[*Id.* 9:14:33-15:21]**

Following the hearing, the district court issued a written order finding the State's Exhibits inadmissible and dismissing the case without prejudice, thereby allowing the State to refile when it obtained certified copies of the Exhibits. **[RP 34-37]**

With respect to whether the Exhibits were admissible under the evidentiary rules argued by the State, the court found:

> - In order to be admissible under Rule 11-902, the Court finds that the documents generated from Odyssey must bear an additional indicia of reliability through an official seal ([Rule] 11-902(1)), a certified signature ([Rule] 11-902(2)), the testimony of a custodian ([Rule] 11-902(4)), or certification by the custodian if the requirements of [Rule] 11-803(6)(a) to (c) are met ([Rule] 11-902(11)). **[RP 35, ¶ 6]**
>
> - Mere printouts from the Odyssey system do not meet any of these requirements. **[RP 35, ¶ 7]**
>
> - For the same reasons, the documents presented by the State do not fall under an exception to the hearsay rule under [Rule]

11-803(6) without the testimony of a records custodian. **[RP 35-36, ¶ 8]**

- The Court also finds that the State did not make reasonable efforts, or seemingly any efforts at all, to obtain the certified copies or the testimony of a records custodian as required under the Rules of Evidence. **[RP 36, ¶ 12]**

Addressing whether the court would judicially notice the Exhibits, the district court found as follows:

- The Court further finds that merely taking judicial notice of the evidence sought to be admitted by the State is not appropriate given the burden of evidence on the State and the nature of the controversy. *See* [Rule] 11-201 NMRA ("[t]he court may judicially notice a fact that is not subject to reasonable dispute"). **[RP 34, ¶ 2]**

- "Rule 11-201 (B) applies to evidence that is 'not subject to reasonable dispute.' It does not apply where, like here, the evidence is disputed and serves to constitute the foundation of criminal charges." *State v. Perez*, 2014-NMCA-023, 11, 318 P.3d 195[.] **[RP 34, ¶ 3]**

- Because the content and validity of the Odyssey documents the State seeks to introduce are in fact the <u>*central*</u> subject of dispute in . . . the case here, the Court finds that taking judicial notice of this evidence would be improper. **[RP 35, ¶ 4]**

"Rather than obtaining certified copies of the documents and refiling, as the district court's order permits, the State … appealed the exclusion of the documents from evidence and the dismissal of the charges." *State v. Garcia*, 2022-NMCA-010, ¶ 9, 523 P.3d 650. On appeal, the State sought clarification of Order 13-8500's authentication requirements and argued, in relevant part, that the documents were

admissible under several provisions of Rule 11-902 or Rule 11-803(6), or subject to judicial notice under Rule 11-201. *Id.* The Court of Appeals affirmed the district court's ruling. *Id.*

First, the Court of Appeals observed that the interpretation of Order 13-8500 and the rules of evidence were questions of law subject to de novo review on appeal. *Id.* ¶ 11. The Court then considered the requirements of Rule 11-902 and the impact of Order 13-8500 on the rules for self-authenticating documents. It recognized that under Rule 11-902(1), (2), and (4)—relating to the self-authentication requirements for public records and documents—the documents required a government seal and signature, a certification and signature, or a certification alone in order to qualify as self-authenticating. *Id.* ¶ 13. Under Rule 11-902(11)—related to copies of records of a regularly conducted activity—the record also had to be certified and the adverse party must have been given prior notice and an opportunity to inspect the document. *Id.* Since none of these requirements were directly met, the Court considered whether Order 13-8500 amended or supplemented Rule 11-902, to make pleadings "printed from the Odyssey electronic system self-authenticating documents admissible into evidence without any certification or seal attesting that they are true and correct copies of the original court record." *Id.* ¶ 14.

The Court determined that the plain language of Order 13-8500 did not alter or amend the requirements of Rule 11-902. In particular, the Court looked at

Subsections A and D of Order 13-8500, reflecting that "[a]ll electronic court records … shall be considered the official record of the court and shall have the same force and effect as a traditional paper court record," and that the paper record could be destroyed once converted to an electronic record. *Id.* ¶¶ 15-16. With respect to the language in Subsection A, the Court found it

> plainly and unambiguously states the intent of our Supreme Court to apply the provisions of law, including the rules of evidence governing the traditional court paper record to the new electronic court record. A copy of a document printed directly from Odyssey is to have "the same force and effect" as a paper copy, neither more nor less.

Id. ¶ 17. Consequently, the Court determined that the authentication requirements applied to the electronic documents no less than they applied to a printed copy of a traditional paper court record. *Id.*

Additionally, the Court of Appeals found it "significant that [Order 13-8500] nowhere states that it is amending or supplementing any rule of evidence. There is no mention of Rule 11-902 to alert our courts and the bar that our Supreme Court intended to bypass the need for certification or for a seal." *Id.* ¶ 18.

While acknowledging that "removing the need for certification of a pleading might streamline the prosecution's work in proving prior criminal convictions," the Court of Appeals rejected the State's argument about certification since it had not shown that applying the certification requirements to electronic documents imposed an undue burden on the State. *Id.* ¶ 19.

Finally, the Court of Appeals addressed the question of whether the district court abused its discretion by refusing to take judicial notice of the Exhibits under Rule 11-201. Recognizing that the district court had raised the issue *sua sponte*, thereby permitting but not requiring the court to take judicial notice of the Exhibits, the Court of Appeals found no abuse of discretion here. The Court considered New Mexico precedent in this area and found that "the general rule is that a district court should not take judicial notice of proceedings in other cases, even proceedings involving the same parties and in relation to the same subject matter." *Id.* ¶ 26. Likewise, the Court recognized that Rule 11-201 should not be "used as a substitute for more rigorous evidentiary requirements and careful fact-finding." *Id.* (quoting *State v. Perez*, 2014-NMCA-023, 318 P.3d 195). Accordingly, the Court of Appeals did not believe the district court had abused its discretion in declining to take judicial notice here.

The State then sought certiorari review, which this Court granted.

ARGUMENT

I. PRINTOUTS FROM ODYSSEY ARE NOT SELF-AUTHENTICATING DOCUMENTS UNDER RULE 11-902(1), (2), OR (4), OR ORDER 13-8500.

In our system of justice, the proponent of evidence is responsible for establishing its admissibility under the rules of evidence. *State v. Hanson,* 2015-

NMCA-057, ¶¶ 10-11, 348 P.3d 1070; *see also* Rule 5-302(B)(5) NMRA[1] (setting out that at preliminary hearings, "[t]he Rules of Evidence apply, subject to any specific exceptions in the Rules of Criminal Procedure for the District Courts"). This includes establishing that a document the party seeks to admit is authentic—that is, the document is what it purports to be. *Continental Baking Co. v. Katz*, 68 Cal. 2d 512, 525-26, 67 Cal. Rptr. 761, 439 P.2d 889, 898 (1968) ("We understand that in some legal systems it is assumed that documents are what they purport to be unless shown to be otherwise. With us it is the other way around. Generally speaking, documents must be authenticated in some fashion before they are admissible."). "Authentication is a prerequisite to the admission of evidence, satisfied by establishing that the proffered item is in fact what it purports to be." *State v. Alvirez,* 831 F.3d 1115, 1123 (9th Cir. 2016). Generally, evidence is authenticated by presenting testimony from an individual with sufficient familiarity with the evidence to identify it and discuss the circumstance under which it was made or stored. *Id.* However, if certain requirements are met, a limited set of documents can be deemed self-authenticating, "requir[ing] no extrinsic evidence of authenticity in order to be admitted." Rule 11-902; *see also Murken v. Deutsche Morgan Grenfell, Inc*, 2006-

[1] The District Court Rules Committee recently set out some exceptions to the Rules of Evidence at preliminary hearings, including to the authentication requirements for particular types of evidence. *See* Rule 5-302.1(D) NMRA. However, none apply here, and Rule 5-302.1 otherwise indicates that certification is still required. *See* Rule 5-302.1(D)-(E).

NMCA-080, ¶ 18, 140 N.M. 68 (holding that unless the document falls within the narrow exception for self-authentication, the document must be authenticated).

At the preliminary hearing, the State sought to admit the Exhibits as self-authenticating documents under Rule 11-902(1), (2), (4), and (11), but the district court concluded that the requirements in these subsections were not met. **[RP 35, ¶¶ 6-7]** While a district court's evidentiary rulings are normally reviewed for an abuse of discretion, *State v. Jesenya O.*, 2022-NMSC-014, ¶ 10, 514 P.3d 445, when the correctness of the ruling involves the interpretation of a court rule or order, the issue is reviewed de novo. *State v. Aslin*, 2020-NMSC-004, ¶ 9, 457 P.3d 249; *see also Fed. Nat'l Mortgage Ass'n v. Chiulli*, 2018-NMCA-054, ¶ 14, 425 P.3d 739 ("The interpretation of a court order presents a question of law which we review de novo"). "When construing our procedural rules, we use the same rules of construction applicable to the interpretation of statutes." *Aslin*, 2020-NMSC-004, ¶ 9 (internal citation omitted). "We begin by examining the plain language of the rule as well as the context in which it was promulgated, including the history of the rule and the object and purpose." *Id.* (citation omitted). If the language in the rule or order is "clear and unambiguous, we must give effect to that language." *Gelinas v. New Mexico Taxation & Revenue Dep't*, 2020-NMCA-038, ¶ 5, 472 P.3d 123.

At issue here are subsections (1), (2), and (4) of Rule 11-902,[2] related to the admission of public documents and records. The authentication requirements in each of these provisions require seals, attestations, and/or certifications from an appropriate public official in order for the documents to be admitted under them. *See* Rules 11-902(1) (requiring that the document bear a "seal" and "a signature purporting to be an execution or attestation"); 11-902(2) (requiring a signature of an officer or employee of specified entity which is "certifie[d]" by a "public officer who has a seal and official duties within that same entity"); 11-902(4) (requiring "[a] copy of an official record…if the copy is certified as correct … by the custodian or another person authorized to make the certification or … a certificate that complies with Rule 11-902(1), (2), or (3), a statute, or a rule prescribed by the Supreme Court").

These authentication requirements originate from concerns about fraud, innocent mistakes, and "'jury credulity,' the natural tendency to take matters at face value." *Dumes v. State*, 723 N.E.2d 460, 462-63 (Ind. Ct. App. 2000); *see also State v. Jenkins*, 195 W. Va. 620, 623-24, 466 S.E.2d 471, 474-75 (1995) (recognizing that authentication requirements stem "from a healthy common law skepticism that

[2] The State's Brief in Chief only refers to subsections (1), (2), and (4). **[BIC 9]** However, as the Court of Appeals observed Rule 11-902(11) also has certification requirements and there is no suggestion the State met the requirements of that provision either. *Garcia,* 2022-NMCA-010, ¶ 14.

courts should not blindly assume that an offered piece is what it appears to be or what the proponent claims it is"); Wright and Miller et al., 31 Fed. Prac. & Proc. Evid. § 7132 (2d ed.) (acknowledging that documents admitted pursuant to the requirements of Rule 902 "are almost always genuine" because "documents under seal are difficult to fake because both the document and the seal must be counterfeited. Acknowledged documents also are unlikely to be fraudulent because the notary's seal is difficult to copy."). Given modern technological developments, which make it easier to produce counterfeit, altered, or incomplete documents, the protections provided for in these provisions take on added importance. *Cf. In re Vee Vinhnee,* 336 B.R. 437, 445 (B.A.P. 9th Cir. 2005) ("Some of these questions [about authentication] are becoming more important as the technology advances. For example, digital technology makes it easier to alter text of documents that have been scanned into a database, thereby increasing the importance of audit procedures designed to assure the continuing integrity of the records"); *see also* Colin Miller, *Even Better Than the Real Thing: How Courts Have Been Anything but Liberal in Finding Genuine Questions Raised As to the Authenticity of Originals Under Rule 1003*, 68 MD. L. REV. 160, 208-09 (2008) (suggesting that even stricter authentication requirements should be utilized given that "most computer evidence can still be altered electronically—in dramatic ways or in imperceptible detail—without any sign of erasure.").

As the district court and Court of Appeals recognized—and the State does not deny—the Exhibits in this case did not contain a seal, certification, or attestation and thus did not meet the plain requirements of Rule 11-902(1), (2), or (4). **[RP 35, ¶¶ 6-7]**; *Garcia*, 2022-NMCA-010, ¶ 14. Notwithstanding this fact, the State continues to assert that printouts from Odyssey are self-authenticating under Rule 11-902 without a seal, certification, or signature from an appropriate public official based on its interpretation of Order 13-8500. **[BIC 9-12]**; *but see Alvirez,* 831 F.3d at 1123 (recognizing that "a party may not circumvent the requirements of authentication when the plain language of the rule lists the requirements necessary for authentication" (internal citation omitted)).

In particular, the State argues that because Order 13-8500 makes the electronically stored court record the official court record and because it is equally accessible to all persons with access to Odyssey, authentication under Rule 11-902 is satisfied or otherwise unnecessary. **[BIC 9-12]**

Certainly, this Court has final authority in interpreting the requirements of its orders and rules of evidence. *Alexander v. Delgado,* 1973-NMSC-030, ¶ 8, 84 N.M. 717 (recognizing that the New Mexico Supreme Court has "the power to regulate pleading, practice and procedure in inferior courts"). However, Order 13-8500 was promulgated to explain a change in how court records are stored and accessed; it says nothing about the admissibility of the documents or the authentication

requirements in Rule 11-902. **[Ex. 1]**; *Garcia*, 2022-NMCA-010, ¶ 18; *cf. State v. Duhon*, 2005-NMCA-120, ¶ 11, 138 N.M. 466 ("[W]e do not read language into a statute, especially where the statute makes sense as written." (internal citation omitted)).

The limited scope of Order 13-8500 is further clear from the plain language of Order 13-8500. First, as the lower courts observed, the plain language of Order 13-8500 says only that "[a]ll electronic court records … shall be considered the official record of the court and shall have the same force and effect as a traditional paper court record." **[Ex. 1]** It does not imbue printouts from Odyssey with special admissibility powers beyond those applicable to copies from the traditional paper court record. **[RP 35, ¶ 5]**; *Garcia*, 2022-NMCA-010, ¶ 17.

Nor would an interpretation relieving a party of authentication requirements be consistent with this Court's general view that the existing rules of evidence *are* applicable and sufficient to address the admissibility of electronically generated and stored evidence. *Jesenya O.*, 2022-NMSC-014, ¶ 18 ("Today we clarify that, in New Mexico, the authentication of social media evidence is governed by the traditional authentication standard set out in Rule 11-901"); *cf. In re Vee Vinhnee*, 336 B.R. at 444 ("[a]uthenticating a paperless electronic record, in principle, poses the same issue as for a paper record, the only difference being the format in which the record is maintained: one must demonstrate that the record that has been retrieved from the

file, be it paper or electronic, is the same as the record that was originally placed into the file").

The State's interpretation of Order 13-8500 also would not accord with principles of construction that rules and orders should "[w]henever possible" be read "as harmonious instead of as contradicting one another." *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768. In fact, adopting the State's interpretation would effectively make Rule 11-902 a nullity with respect to court records—a situation which principles of construction also disfavor. *Id.* ¶ 18 ("We are generally unwilling to construe on provision of a statute in a manner that would make other provisions null or superfluous").

Finally, the State's analysis is flawed in that it conflates expanded access to the court file with the admissibility of evidence purporting to be from it and thus, does not accord with the purposes of or protections afforded by Rule 11-902. As explained, authentication under the applicable provisions of Rule 11-902 is not based upon a party's ability to access the original and verify its correctness (something the court and opposing party could do with traditional paper court records as well). *Cf. Washington v. City of N. Las Vegas*, 161 F. App'x 637 (9th Cir. 2005) (non-precedential) ("Washington fails to cite any authority to support his contention that the documents were authenticated by virtue of being accessible through PACER."). Instead, self-authentication is meant to allow for the direct admission of evidence

without the court or opposing party having to take additional steps to ensure that the document in question is what it purports to be. Stated otherwise, a document covered by Rule 11-902 can be "authenticated by reference to the evidence itself; no other proof is needed in most cases." *State v. Troutman*, 327 S.W.3d 717, 722 (Tenn. 2008) (internal citation omitted); *see also* Wright and Miller et al., 31 Fed. Prac. & Proc. Evid. § 7133 (2d ed.) ("[I]f an item of evidence is self-authenticating under Rule 902, nothing more need be done to authenticate that item"). A party handing the court a document without a seal, certification, or attestation guaranteeing its accuracy and completeness, and then telling the court and opposing counsel it is from Odyssey does not provide for the type of automatic admissibility envisioned by Rule 11-902(1), (2), or (4). *Cf. Dumes*, 723 N.E.2d at 462-63 ("The Indiana Supreme Court has stated that public records cannot be placed into evidence merely upon a party's offering a copy and claiming it is an accurate copy of the original.")

The State argues that the court and opposing party could themselves verify the accuracy and completeness of the document in minutes by looking the documents up in Odyssey. **[BIC 11]** ("All parties have access and confirmation that a record is unaltered takes mere minutes, if not seconds"). However, this assumes that there are no technological issues in the courtroom preventing one or both from doing this, shifts the burden of verification from the proponent of the evidence to the court and opposing party, and imposes an additional step upon the court and opposing party

which the certification, seal, and attestation requirements in Rule 11-902 were meant to render obsolete. Moreover, as a practical matter, requiring the court and/or opposing side to look up and independently review and verify a document (or multiple lengthy documents) in the middle of a hearing or trial is infeasible and inconsistent with the smooth administration of justice. Such a situation is particularly inefficient when, as here, the State apparently undertook no efforts to obtain the seal or certified documents in advance even though it had ample time to do so and made no showing that adherence to the authentication requirements in Rule 11-902 was onerous. **[RP 36, ¶ 12]** (finding that "the State did not make reasonable efforts, or seemingly any efforts at all, to obtain the certified copies").

Because the State's interpretation is inconsistent with established rules of interpretation, invites error and fraud by weakening authentication requirements for easily manipulated documents, and shifts the burden for establishing the admissibility of evidence to the court and opposing parties, this Court should reject the State's interpretation and affirm the Court of Appeals Opinion.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO TAKE JUDICIAL NOTICE OF THE EXHIBITS.

Rule 11-201 (B) provides that a district court "may judicially notice a fact that is not subject to reasonable dispute[.]" During the preliminary hearing, the district court declined to exercise judicial notice pursuant to Rule 11-201 because it was the

State's burden to submit admissible evidence and establish probable cause, the State had made no effort to obtain a certified copy despite having ample time in which to do so, and the content of the Exhibits was the "central subject of dispute in this case." **[RP 34-36, ¶¶ 2-4, 12-13]**

On appeal, the State acknowledges that because the court considered the possibility of taking judicial notice sua sponte, it had discretion to decline to do so, making the issue reviewable under an abuse of discretion standard. **[BIC 15]**; Rule 11-201(C)(1); *see also City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 6, 147 N.M. 693 ("A court has discretion to take judicial notice sua sponte…"). "An abuse of discretion occurs when the [evidentiary] ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the [district] court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *Jesenya O.*, 2022-NMSC-014, ¶ 10. A district court does not abuse its discretion simply because another court might have reached a different conclusion. *State v. Layne*, 2008-NMCA-103, ¶ 7, 144 N.M. 574 ("The very essence of discretion is that there will be reasons for the district court to rule either way on an issue, and whatever way the district court rules will not be an abuse of discretion.").

The State argues that the district court and Court of Appeals erred in finding no abuse of discretion based on its assertion that the Exhibits were not the foundation

of its case since the court could have admitted them while not accepting as true the claims therein. In support of this position the State cites a number of federal cases recognizing a court's *discretion* to judicially notice documents, while declining to judicially notice facts contained in them. **[BIC 13-15]**

However, this is not an argument the State made to the district court below, and thus the district court did not abuse its discretion in failing to consider it. *See United States v. Bychak*, 2021 WL 734371, at *4 (S.D. Cal. Feb. 25, 2021) ("[T]he requesting party should accordingly identify what facts within the document it seeks to have judicially noticed"); *Capaci v. Sports Research Corp.*, 445 F. Supp. 3d 607, 617 (C.D. Cal. 2020) ("Because defendant does not identify which facts within the exhibits it asks the court to judicially notice nor does it explain why the court can judicially notice those facts, the court denies defendant's request for judicial notice."); *Riley v. Chopra*, No. CV 18-3371 FMO (SKx), 2020 WL 5217154, at *2 (C.D. Cal. June 19, 2020) (finding requesting party's arguments "unpersuasive" given party's failure to identify what facts were to be judicially noticed). In fact, the State's position below was narrow: the Exhibits were admissible under Rule 11-807, and then, at the hearing, they were also admissible under Rule 11-902 and Order 13-8500. **[RP 18]; [6/2/21 CD 9:02:35, 9:03:55-04:17, 9:04:58-05:21, 9:15:21-33]**

Moreover, as both the district court and Court of Appeals observed, the Exhibits the State sought to have noticed related to a matter central to its burden at

the preliminary hearing of establishing that "there [was] probable cause to believe that the defendant committed the offense and should be bound over for trial." *State ex rel. Whitehead v. Vescovi-Dial*, 1997-NMCA-126, ¶ 5, 124 N.M. 375. Specifically, the State intended to introduce the Exhibits to prove that Mr. Garcia was a felon, a necessary element of the crime of felon in possession of a firearm. And lest there be doubt as to how critical the evidence was to the State's case, one need look no further than its own acknowledgement at the hearing that without the Exhibits "the State would basically … can't proceed. I'm going to have the Court issue a dismissal order." **[6/2/21 CD 9:14:33-15:00]**

As the district court and Court of Appeals correctly recognized, judicial notice should not be used when "evidence is disputed and serves to constitute the foundation of criminal charges." *Perez*, 2014-NMCA-023, ¶ 11. Since the State intended to use the Exhibits to prove a critical element of the crime it was pursuing against Mr. Garcia and Mr. Garcia was contesting the matter **[6/2/21 CD 9:06:56-07:40, 9:10:18-11:06]**, the district court acted within its discretion in declining to judicially notice the Exhibits and the Court of Appeals properly affirmed that ruling.

III. THE COURT OF APPEALS WAS NOT REQUIRED TO CONSIDER THE ODYSSEY LETTER AND EVEN IF IT SHOULD HAVE DONE SO, THERE IS NO PREJUDICE TO THE STATE FROM ITS FAILURE TO DO SO.

The State argues that the Court of Appeals erred in refusing to consider the Odyssey Letter after it had the State attach it to its Brief. **[BIC 15]** However, the

State did not provide a copy of the Odyssey Letter to the district court so that court did not review it in the first instance. In addition, as the Court of Appeals recognized, "one district court judge's interpretation of Order 13-8500 is not controlling" on another district court or the Court of Appeals. *Garcia*, 2022-NMCA-010, ¶ 14; *cf. State v. Norush*, 1982-NMCA-034, ¶ 17, 97 N.M. 660 ("Lower courts (District Courts and the Court of Appeals) must comply with orders of the Supreme Court"). This is especially true since interpretation matters are reviewed de novo on appeal. *Aslin*, 2020-NMSC-004, ¶ 9.

Moreover, the State has not explained how consideration of the Odyssey Letter would have altered the Court of Appeals' interpretation or analysis in any way. In fact, the Court of Appeals Opinion strongly suggests it would not have had any impact on its analysis. *Garcia*, 2022-NMCA-010, ¶ 14.

Finally, as the district court suggested to the State below, the Odyssey Letter does not clearly and unambiguously support the State's position. **[6/2/21 CD 9:14:28-44, 9:15:33-39]** The language in it discusses record requests *generally*—this can represent post-trial requests from a defendant for a copy of his file for general purposes (to review it, to replace lost pleadings or orders, or to work on a habeas petition), requests from members of the public seeking copies of certain documents, requests from pro se litigants or other interested parties. *See* **[Ex. 2]** It indicates that when such requests come in, it is not necessary for the printed or

emailed record to be certified or sealed as was previously done. **[Ex. 2]** The Odyssey Letter does not, however, specifically discuss requests made with the intent to admit the evidence at a hearing or trial. In fact, as the district court observed, the Odyssey Letter does not specifically mention Rule 11-902 or the rules of evidence at all. **[Ex. 2]; [6/2/21 CD 9:14:28-44, 9:15:33-39]** And, lastly, it does not appear that the Odyssey Letter was interpreted in the manner suggested by the State, since practitioners in the Second Judicial District continued obtaining and submitting sealed or certified court documents to district courts there. **[*Id.* 9:12:51-13:14]**

In sum, the Court of Appeals did not err in declining to consider the Odyssey Letter and if even if the Court should have considered it, there is no prejudice from its failure to do so.

CONCLUSION

Because there was no error in the district court's ruling or the Court of Appeals Opinion affirming it, Mr. Garcia respectfully asks this Court to quash certiorari or issue an Opinion affirming the Court of Appeals ruling in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was filed in the Odyssey File & Serve System and electronically delivered to Francesca Narro (fnarro@nmag.gov) and Assistant Attorney General Emily C. Tyson-Jorgenson (etyson-jorgenson@nmag.gov) at the New Mexico Attorney General's Office this 7th day of April, 2023.

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