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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-39668

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

vs.

CHRISTOPHER GARCIA,

Defendant-Respondent.

ON CERTIORARI TO THE NEW MEXICO COURT OF APPEALS
Original Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Brett Loveless

STATE OF NEW MEXICO'S BRIEF IN CHIEF

ORAL ARGUMENT IS REQUESTED

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Citations to the record proper are in the form **[RP ___]**. Citations to the transcript are in the form **[date vol. Tr. page]**. Citations to briefs filed in the Court of Appeals take the form **[COA (Brief) ___]**. Exhibits attached to the State's Brief in Chief before the New Mexico Court of Appeals are cited as **[COA BIC Ex. __]**

INTRODUCTION

This case involves a printout of a prior conviction from Odyssey. At a preliminary hearing, the State offered this printout as proof of a prior conviction for the charge of possession of a firearm by a felon. The Court of Appeals held that, because the document did not contain a certification or seal, and the testimony of a records custodian was not provided, it was not admissible. This case offers this Court the opportunity to clarify its intent in Order 13-8500, which directs that Odyssey records "shall be considered the official record of the court and shall have the same force and effect as a traditional paper court record." New Mexico Supreme Court Order 13-8500, ¶ A. This Order also allows for destruction of a paper record upon conversion to Odyssey, unless the law requires otherwise. *Id.* ¶ B. Odyssey is, therefore, the sole location where most court records can be accessed, all parties have equal access to these records, and the records are reliable. Because this makes Odyssey records self-authenticating under Rule 11-902 NMRA and, alternatively, the district court should have taken judicial notice of its own records, the Court of Appeals' decision should be reversed.

SUMMARY OF PROCEEDINGS

A. Statement of Facts

On March 13, 2021, Defendant was charged via criminal information with one count of possession of a firearm by a felon, contrary to NMSA 1978, Section 30-7-16(A) (2020) and one count of driving while license revoked, contrary to NMSA 1978, Section 66-5-39.1 (2013). **[RP 1]** A preliminary hearing was scheduled for June 2, 2021. **[RP 4]**

Five days before the preliminary hearing, the State filed an Exhibit List and Notice of Intent to use Rule 11-807. **[RP 18]** This filing stated that it was done pursuant to Supreme Court Order No. 20-8500-025, which requires that documentary exhibits in remote proceedings be provided "no later than forty-eight (48) hours before the start of any hearing held by telephonic or audio-video connection." **[COA BIC Ex. 3 at 13]** Attached to this filing was a printout from Odyssey of a Repeat Offender Plea and Disposition Agreement and a Judgment and Sentence from case number D-202-CR-2019-01871. These documents showed that, on September 11, 2019, Defendant: (1) pled guilty to receiving or transferring a stolen motor vehicle; and (2) admitted his identity in three prior felony convictions. Following that plea, he was sentenced to a suspended sentence of 17 months for the fourth-degree felony and the State agreed not to impose habitual offender enhancements "at initial sentencing only." **[RP 19-26]** Also contained on the face of

these documents were Defendant's full name, date of birth, FBI number, address, the last four digits of his social security number, and his signature. **[*Id.*]**

At the preliminary hearing, the State moved to introduce the prior felony conviction as an exhibit. Defense counsel objected, stating that it was not a certified copy and, therefore, not properly authenticated. **[6/2/21 CD 9:02:28-9:03:42]** The State argued that the exhibit was "in compliance with the letter from the second judicial district court [dated] December 19, 2014," which "basically says these are certified copies."[1] **[*Id.* 9:04:43-9:04:05]** The judge responded: "That is not how the court reads the letter. That only says that they're legitimate copies – it doesn't replace certification requirements." **[*Id.*]** The court also considered admissibility arguments from the State under Rule 11-902 and Rule 11-807. **[*Id.* 9:04:06-58, 9:04:59-9:06:56]** Following these arguments, the district court found that the documents did not "meet the rules of evidence and I will not admit them." **[*Id.* 9:13:44-9:16:08]** The court then dismissed the State's case without prejudice. **[*Id.*]**

Later that same day, the district court filed an Order finding State's Exhibits Inadmissible and Dismissing Without Prejudice. **[RP 34-7]** In this order, the court made the following relevant findings:

1. Although "the State's burden at a preliminary hearing in proving a [d]efendant's status as a felon is lower than to prove guilt of criminal

[1] This letter from the Second Judicial District Court was attached to the State's brief in chief as "Exhibit 2" and is referred to throughout the Court of Appeals' opinion and this brief as the "Odyssey Letter."

charges at trial, the rigor of the Rules of Evidence remains the same." **[RP 34]**

2. Judicial notice of the evidence "is not appropriate given the burden of evidence on the State and the nature of the controversy." ***[Id.]***

3. Rule 11-201(B) does not apply because "the evidence is disputed and serves to constitute the foundation of criminal charges." ***[Id.]***

4. "Because the content and validity of the Odyssey documents the State seeks to introduce are in fact the *central* subject of dispute in a preliminary hearing on [Possession of a Firearm by a Felon], the Court finds that taking judicial notice of this evidence would be improper." **[RP 35]** (emphasis in original).

5. The New Mexico Supreme Court Order 13-8500 does not make Odyssey records self-authenticating.[2] ***[Id.]***

6. To be admissible, documents from Odyssey "must bear an additional indicia of reliability" through "an official seal," "a certified signature," "the testimony of a custodian," or "certification by the custodian." ***[Id.]***

7. The documents "do not fall under an exception to the hearsay rule under 11-803(6) without the testimony of a records custodian." ***[Id.]***

8. The documents do not meet the requirements of Rule 11-807 NMRA because, although they do have "guarantees of trustworthiness and are offered as evidence of the material fact of [Defendant's] status as a felon," they are not "*more* probative on the point for which they

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[2] The district court, in a footnote to this finding, wrote that: "[C]ounsel for the State argued that the updated version of this Supreme Court Order applies (No. 20-8500-025)," but the State "did not present this order to the Court and failed to explain how it might be different or more applicable than the order named in this paragraph." **[RP 35]** But Supreme Court Order 20-8500-025 **[COA BIC Ex. 3]** is not an updated version of Supreme Court Order 13-8500 **[COA BIC Ex. 1]** and the State made no such argument. Instead, the State simply informed the district court that it disclosed its exhibit list prior to the preliminary hearing in accordance with Order 20-8500-025.**[RP 18; 6/2/21 CD 9:11:07-9:13:43]**

are offered than certified copies or copies offered through the testimony of a custodian of records." **[RP 36]**

9. The State made no efforts to obtain certified copies or the testimony of a records custodian and admission of these documents would "circumvent the Rules of Evidence rather than serve the purpose of the rules or the interest of justice as required under Rule 11-807(A)(4)." ***[Id.]***

B. The Court of Appeals' Notice of Assignment to the General Calendar

After the State timely appealed the district court's decision and filed a docketing statement, the Court of Appeals assigned the case to the General Calendar. **[2/7/22 Notice (A-1-CA-39874)]** At the bottom of this notice, the Court of Appeals wrote:

> We instruct the State to attach to its brief in chief the New Mexico Supreme Court order and any other court order or letter upon it [sic] relied in district court to support the admissibility of court documents printed from Odyssey to establish Defendant's prior convictions.

Following this specific directive by the Court of Appeals, the State attached the following documents to its brief in chief: (1) New Mexico Supreme Court Order No. 13-8500 (Aug. 28, 2013); (2) Letter from the Second Judicial District Court (December 19, 2014); and (3) New Mexico Supreme Court Order 20-8500-025 (July 6, 2020). **[COA BIC Ex. 1-3]**

C. The Court of Appeals' Opinion

The Court of Appeals affirmed the district court's decision to exclude the State's exhibits. *State v. Garcia*, 2023-NMCA-010, ¶ 9, 523 P.3d 650. The Court

addressed the State's arguments regarding the "admissibility of documents printed from Odyssey as self-authenticating documents under Rule 11-902." *Id.* ¶ 13. The Court first noted that Rule 11-901(1), (2), and (4) "require either a government seal and a signature, a certification and a signature, or a certification alone in order to be self-authenticating" while Subsection 11 allows a copy to be admitted if it "meets the requirements of Rule 11-803(6)(a) to (c)" and the "record is certified and the adverse party is given prior notice and an opportunity to inspect the document." *Id.* ¶ 13.

The Court considered the State's arguments regarding Order 13-8500 and the letter from the Second Judicial District Court ("Odyssey Letter"). The Court completely dismissed all arguments regarding the Odyssey Letter because "the State failed to make the Odyssey Letter part of the record on appeal." *Id.* ¶ 14. The Court went on to explain that "one district court judge's interpretation of Order 13-8500 is not controlling because our Supreme Court has 'the power to regulate pleading, practice and procedure in the inferior courts.'" *Id.*

The Court of Appeals then interpreted Order 13-8500, which states, in relevant part:

> A. All electronic records, whether electronically filed or filed as a traditional paper court record and subsequently converted by the court into an electronic format shall be considered the official record of the court and shall have the same force and effect as a traditional paper court record.
> ....

> D. When a paper court record is converted into an electronic court record, the paper court record may be destroyed unless the original paper format of the record must be preserved as provided by law.

The Court found that the portion of paragraph "A" stating that Odyssey records "have the same force and effect as a traditional paper court record" "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." *Garcia*, 2023-NMCA-010, ¶ 17. So, to have the same "force and effect," any documents printed from Odyssey "must be authenticated, just as a printed copy of a traditional paper court record would have to be authenticated." *Id.* The Court also noted that Order 13-8500 did not amend any rules of evidence or indicate the Supreme Court's intent to "bypass the need for certification or for a seal … or the testimony of the custodian and a certification or seal." *Id.* ¶ 18. Finally, the Court addressed the State's policy argument that the "inherent reliability of the Odyssey system is sufficient to treat any document printed from Odyssey as self-authenticating." *Id.* ¶ 19. The Court held: "[I]t is not clear that Rule 11-902, which allows the admission of many types of evidence to authenticate a document, does not provide adequate avenues of authentication to the State without any undue burden on it" and left any resolution of these questions to this Court. *Id.*

The Court of Appeals also considered the State's other arguments for the admissibility of the documents. First, it held that Odyssey printouts are not self-

authenticating documents under Rule 11-902. *Id.* ¶ 20. Second, it held that hearsay exceptions are not substitutions for authentication. *Id.* ¶ 21. If the documents are not self-authenticating, then the document must be authenticated prior to statements being examined under the hearsay rules. *Id.* ¶ 22. Finally, the Court determined that the district court did not abuse its discretion by refusing to take judicial notice of its own records. *Id.* ¶ 23. This was because the court considered the issue sua sponte and determined that "it should not take judicial notice of a fact that the State had the burden to prove, that was disputed by Defendant, and that constituted the foundation for criminal charges." *Id.* Because Rule 11-201(B)(2) is permissive in this context, the district court did not err "in deciding not to take judicial notice of prior criminal proceedings against Defendant, even though those proceedings were held in the Second Judicial District Court." *Id.* ¶¶ 25, 27.

ARGUMENT

The Court of Appeals erred in two ways when it affirmed the district court's order finding the Odyssey printouts inadmissible. First, the Court erred when it found that the Odyssey printouts were not self-authenticating under Rule 11-902 NMRA and affirmed the district court's refusal to take judicial notice of its own records. Second, the Court of Appeals incorrectly disregarded the letter from the Second Judicial District Court, which was relied upon by the State below, considered

by the district court, and made part of the record before the Court of Appeals pursuant to its specific order.

I. THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE ODYSSEY PRINTOUTS WERE INADMISSIBLE

When a record is uploaded to Odyssey, there is no dispute that it becomes the official court record. The remaining question is whether a printout of this electronic record is sufficient for admissibility or if additional authentication is required. As explained below, the realities of the electronic court file system render the authentication requirements of stamps, signatures, or testimony superfluous because all parties have equal access to the *original* court records.

a. The Court of Appeals erred when it found that the exhibits were inadmissible under Rule 11-902.

Rule 11-902 NMRA (Evidence that is Self-Authenticating) allows certain items of evidence to be admitted with "no extrinsic evidence of reliability." The Court of Appeals found that the Odyssey printouts did not fall under Rule 11-902. *Garcia*, 2023-NMCA-010, ¶¶ 10, 13-14. Specifically, the Court found that Rule 11-902(1), (2), and (4) all require "a government seal or signature, a certification and a signature, or a certification alone in order to be self-authenticating." *Garcia*, 2023-NMCA-010, ¶ 13. While the Court of Appeals is correct about the requirements of Rule 11-902, Order 13-8500 directs that, when a document is uploaded to Odyssey, it becomes the official court record. Order 13-8500, ¶ A. Because the official record

is now stored electronically, *every person with access to Odyssey* now has equal access to true and correct copies of the original. If a copy were requested from the court clerk, he or she would simply print a copy directly off Odyssey and attach a seal to said item. As Judge Nash recognized in the Odyssey Letter, this step is "not necessary in the electronic system." **[COA BIC Ex. 2]** *See generally State v. Miller*, 1968-NMSC-054, ¶¶ 3-4, 79 N.M. 117 (discussing the introduction of a fingerprint from FBI files accessed by an FBI Agent and finding that the rule for proof of authenticity is: "If a writing purports to be an official report or record and is proved to have come from the proper public office where such official papers are kept, it is generally agreed that this authenticates the offered document as genuine. This result is founded on the probability that the officers in custody of such records will carry out their public duty to receive or record only genuine official papers and reports") (internal citation and quotation omitted).

There is simply no argument that the State's exhibit was not a true and correct copy or that it was altered in any way from the record that was present in Odyssey. The documents printed from Odyssey contained multiple indicia of reliability including the court's file stamp, the contents of a standard plea agreement and judgment and sentence, multiple identifiers of Defendant, and signatures of all parties and the judge. **[RP 19-31]** Requiring additional certification is redundant, at best.

The Court of Appeals interprets this Court's "rules of procedure just as [they] interpret statutes: by determining the underlying intent of the acting authority." *State v. Cabral*, 2021-NMCA-051, ¶ 25, 497 P.3d 670. This is accomplished 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," while also "taking care to avoid an absurd or unreasonable result." *Id.* Here, the Court of Appeals interpreted Order 13-8500 as "plainly and unambiguously stat[ing] the intent of [this Court] to apply the provisions of law, including the rules of evidence governing the traditional court paper record to the new electronic court record." *Garcia*, 2023-NMCA-010, ¶ 17. The Court went on to conclude that, because Order 13-8500 did not include any language mentioning Rule 11-902, the requirements for authentication remain unchanged. *Id.* ¶ 18.

While this Court is clearly the authority on what it meant when it wrote Order 13-8500, the State posits that the Court of Appeals' interpretation belies the reality of electronic records. Court clerks no longer need to access the sole paper record of a case, take out the requested pleading, make a copy of the original, and then affix a seal or signature to certify that it is a true and correct copy. The originals now reside in an online database where parties and judges can access the case file directly. All parties have access and confirmation that a record is unaltered takes mere minutes, if not seconds. Further, this Court specifically wrote that electronic records "shall be

considered the official record of the court" and that the "paper court record may be destroyed unless the original paper format of the record must be preserved as provided by law." Order 13-8500, ¶¶ A, D. Taking into account the context under which Order 13-8500 was issued — the advent of Odyssey and the transferring of court records to an online forum — it seems that this Court likely meant to create a system whereby everyone has equal access to court records and originals. To then take a system that was meant to streamline court records and increase access but not trust that these records are authentic would lead to an absurd result.

b. The Court of Appeals erred when it held that the district court did not abuse its discretion in refusing to take judicial notice of its own records.

Rule 11-201(B)(2) NMRA directs that a district court "may judicially notice a fact that is not subject to reasonable dispute" because it "can be accurately and readily determined from sources whose accuracy cannot reasonable be questioned." Decisions made by the district court regarding evidentiary rulings are reviewed for an abuse of discretion, which occurs when the evidentiary ruling is "clearly untenable or not justified by reason." *State v. Jesenya O.*, 2022-NMSC-014, ¶ 10, 514 P.3d 445.

The records at issue in this case are records from the Second Judicial District Court. A district court may take judicial notice of its own records. *Lopez v. LeMaster*, 2003-NMSC-003, ¶ 32, 133 N.M. 59 ("We see no reason not to permit the court to take judicial notice of its own records"). *See also State v. Vigil*, 1973-NMCA-089, ¶

23, 85 N.M. 328 ("We take judicial notice of the records of the New Mexico Supreme Court"); *State v. Griego*, No. A-1-CA-37273, ¶ 2 (N.M. Ct. App. Mar. 13, 2019) (nonprecedential) (district court did not err in taking judicial notice of a copy of an indictment); *State v. Dunsworth*, No. A-1-CA-37692, ¶ 6 (N.M. Ct. App. Oct. 12, 2021) (nonprecedential) (same).

To justify the conclusion that the Odyssey documents were inadmissible, both the district court and Court of Appeals relied on the fact that Rule 11-201 NMRA is not "used as a substitute for more rigorous evidentiary requirements and careful fact-finding." *State v. Perez*, 2014-NMCA-023, ¶ 11, 318 P.3d 195. Specifically, the Court of Appeals found that the evidence sought to be admitted by the State "served to constitute the foundation of criminal charges." *Garcia*, 2023-NMCA-010, ¶ 26. This is not so.

The State offered a document that was a prior conviction printed from Odyssey. Introduction of this document would not immediately result in the State satisfying the "felon" element of the crime of felon in possession. The court could, and should, have taken judicial notice of the document itself, still preserving Defendant's right to attack the validity of the conviction and provide evidence that he was not the same individual who was convicted in the prior case. Indeed, multiple federal courts have specifically recognized the distinction between judicial notice of a document itself versus its contents. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d

992, 998-9 (9th Cir. 2010) (appropriate to take judicial notice of information available on a website that "was made publicly available by government entities" when "neither party disputes the authenticity of the web sites or the accuracy of the information contained therein"); *United States v. Bychak*, 2021 WL 734371, at *6 (S.D. Cal. Feb. 25, 2021) ("a document from a trusted source like a government website can be noticed, but its contents cannot be noticed if disputed"); *Dimas v. JPMorgan Chase Bank, N.A.*, 2018 WL 809508, at *5 (N.D. Cal. Feb. 9, 2018) ("public records, including judgments and other publicly filed documents, are proper subjects of judicial notice" but disputed facts within the documents are not); *Spaulding v. Islamic Republic of Iran*, 2018 WL 3235556, at *3 (N.D. Ohio July 2, 2018) ("a court may 'take judicial notice of related proceedings and records in cases before the same court'"); *Moore v. Saniefar*, 2016 WL 2764768, at *2 (E.D. Cal. May 12, 2016) (public records, including electronic court records, are "judicially noticeable … only for the purpose of determining what statements are contained therein, not to prove the truth of the contents or any party's assertion of what the contents mean") (internal citations and quotations omitted).

Importantly, there was no claim below that the Odyssey record *itself* was altered or unreliable, so there was no actual controversy. Additionally, the document's reliability could be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Rule 11-201(B)(2). Odyssey is

the electronic filing system used by all courts and, if the district court did not believe this printout was accurate, it could have easily checked the records on Odyssey itself. So, although the Court of Appeals is correct that the judicial notice rule is permissive because the judge raised the issue sua sponte, *Garcia*, 2023-NMCA-010, ¶ 25, it nevertheless erred when it found that the district court did not abuse its discretion. This is because at no point during the pendency of this case was the authenticity of the documents *themselves* questioned. Therefore, the Court of Appeals misinterpreted Rule 11-201 and the district court abused its discretion when it did not take judicial notice of the Odyssey documents.

II. THE COURT OF APPEALS SHOULD HAVE CONSIDERED THE ODYSSEY LETTER BECAUSE IT WAS PART OF THE RECORD

The Court of Appeals refused to consider the Odyssey Letter that the State attached to its Brief in Chief. **[COA BIC Ex. 2]** While the State recognizes that Rule 12-318(F)(4) NMRA prohibits attachments to briefs, the Court of Appeals directed the State to attach documents to its brief in chief. In its Notice assigning this case to the General Calendar, the Court included the following: "We *instruct* the State to *attach to its brief in chief* the New Mexico Supreme Court order and any other court order *or letter* upon it [sic] relied in the district court to support the admissibility of court documents printed from Odyssey to establish Defendant's prior convictions." **[2/7/22 Notice (A-1-CA-39874)]** (emphasis added).

In reliance upon this specific directive, the State attached both the Odyssey Letter and this Court's Order 13-8500 to the brief in chief. Although the Court of Appeals considered Order 13-8500, it took a different approach with the Odyssey Letter. The Court recognized that the State "relie[d] heavily on the Odyssey Letter for what it claims is an interpretation of Order 13-8500 supportive of the State's argument" but it would not consider the letter because "the State failed to make the Odyssey Letter part of the record on appeal." *Garcia*, 2023-NMCA-010, ¶ 14. While it is true that the State did not supplement the record with this letter, the district court was aware of the letter, the State relied upon the letter in all arguments, *and* the Court of Appeals directed the State to include this letter as an attachment to its brief in chief.

This letter was also relied on by both parties throughout briefing before the Court of Appeals. *See* **[COA BIC 5-6, 11; COA AB 7, 11; COA RB 1, 3]** At no time did either party raise an issue about the inclusion of this letter, and it should have been treated as either part of the official court record as an attachment to the brief in chief or a stipulated supplementation of the record. *See generally Quintana v. Univ. of California*, 1991-NMCA-016, ¶ 23, 111 N.M. 679, *overruled on other grounds by Harger v. Structural Servs., Inc.*, 1996-NMSC-018, ¶ 23, 121 N.M. 657 (recognizing that parties can stipulate to supplement the record with erroneously

omitted documents). Given the fact that the State adhered to the Court of Appeals' order, additional supplementation of the record was unnecessary.

Even though the Court of Appeals was correct that one district court judge's interpretation of the Order 13-8500 is not controlling, *Garcia*, 2023-NMCA-010, ¶ 14, the lack of consideration of the Odyssey Letter was still error because this document was properly before the Court based on its own directive. This letter, authored by Judge Nan Nash, who was the Chief Judge of the Second Judicial District Court, was issued on December 19, 2014. The letter addressed changes to procedure as a result of moving to the Odyssey system. The letter stated:

> One of these processes is copy requests. Many times, requests for copies of documents come to the court on a paper form. A court clerk prints out a hard copy of the requested document, manually stamps a certification, signing the clerk's name certifying that it is a " … true and correct copy of the original …" and the embossed court seal is applied.

[COA BIC Ex. 2] The Letter then went on to quote Order 13-8500 and concluded: "Therefore, a court document retrieved and printed directly from Odyssey or e-mailed directly from the court, is in fact a 'true and correct copy of the original'. *Manual certification by the clerk is not necessary.*" (emphasis added.) **[*Id.*]**

This letter was sent to all Second Judicial District Court Judges. Based on this letter, the State reasonably concluded that the procedure of requesting copies from a clerk, having the clerk print out a copy from the system now accessible by everyone, and affix a certification was no longer necessary. Further, Order 13-8500 specifically

directed that paper court records could be destroyed upon uploading to Odyssey, thus making Odyssey the only location where *anyone* could access court records. This Odyssey Letter, therefore, should have been considered because it was properly before the Court, clarifies the State's reliance upon print-outs from Odyssey and informs the State's argument surrounding Order 13-8500.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2023, I filed the foregoing Brief in Chief electronically through the Odyssey/E-File & Serve System, and caused opposing counsel to be served electronically at:

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