



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

S-1-SC-39668

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

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 REPLY BRIEF

RAÚL TORREZ
Attorney General

EMILY C. TYSON-JORGENSEN
Assistant Attorney General

Attorneys for Plaintiff-Petitioner
408 Galisteo Street
Santa Fe, New Mexico 87501
(505) 490-4868

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CITATIONS TO THE RECORD

Citations to the record proper are in the form [**RP ____**]. Citations to Defendant’s Answer Brief take the form [**AB ____**]. Citations to FTR recordings take the form [**Date CD HR:MIN:SEC**]. Exhibits attached to the State’s Brief in Chief before the New Mexico Court of Appeals are cited as [**COA BIC Ex. ____**].

INTRODUCTION

When a court record is uploaded to Odyssey it becomes the official court record.¹ New Mexico Supreme Court Order 13-8500 (Aug. 28, 2013) (“Order 13-8500”) mandated: “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 have the same force and effect as a traditional paper court record.” Order 13-8500 at 2. In adherence to this Order, then Chief Judge Nan Nash issued a letter to all judges in the Second Judicial District Court (“Odyssey Letter”), directing that “a court document retrieved and printed directly from Odyssey or emailed directly from the court, is in fact a ‘true and correct copy of the original’” and “manual certification is not required.” **[COA BIC Ex. 2]**

Defendant asks this Court to affirm the Court of Appeals because the State did not comply with the authentication requirements of Rule 11-902 NMRA and the district court was not required to take judicial notice of its own records. **[AB 1-2]** This result would undermine the purpose of Odyssey, which is to provide parties

¹ At the time of this case, court records were accessed via accounts under Secured Odyssey Public Access (“SOPA”). Recently, these accounts were migrated over to re:SearchNM. This application, however, is simply a different platform by which to access Odyssey records, so this change of platform does not alter the relevance of arguments throughout this brief and prior briefing. *See re:SearchNM, Frequently Asked Questions*, <https://researchnm.tylerhost.net/CourtRecordsSearch/Home#!/faq> (last visited April 13, 2023) (explaining that “re:SearchNM is a software application that provides access to Odyssey court case information and documents”).

with equal access to New Mexico's court records. Because Odyssey records are inherently reliable, they are self-authenticating under Rule 11-902. Additionally, the records at issue in this case are from the Second Judicial District Court, and there was no claim the documents were altered or unreliable. The district court, therefore, abused its discretion when it decided not to take judicial notice of its own records. For these reasons, as well as those argued below and in the Brief in Chief, the Court of Appeals' decision should be reversed.

ARGUMENT

I. THE ODYSSEY PRINTOUTS WERE ADMISSIBLE UNDER RULE 11-902 AND ORDER 13-8500

Defendant argues that the plain language of Rule 11-902 requires authentication via "seals, attestations, and/or certifications from an appropriate public official." [AB 12] While this claim is technically correct, the utilization of an electronic storage system for court records, to which all parties have equal access, has made these additional certifications redundant. This was recognized by Order 13-8500, which states that documents uploaded to Odyssey *are* the official court record. Order 13-8500, ¶ A. To find that Rule 11-902 is satisfied only if a court clerk accesses the exact same online system, prints out the exact same document, and then attaches a seal requires an additional step that this Court seemingly eliminated in Order 13-8500. While Defendant is correct that Order 13-8500 does not address "the admissibility of documents or the authentication requirements in Rule 11-902," [AB

14-15], it does state that these documents have the “same force and effect as a traditional paper court record” 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. The State interprets this language to mean that Odyssey records are official court records and that additional authentication is unnecessary.

Defendant is correct that this Court has the final authority in the interpretation of its own orders. **[AB 14]** (citing *Alexander v. Delgado*, 1973-NMSC-030, ¶ 8, 84 N.M. 717 (this Court has “the power to regulate pleading, practice and procedure in inferior courts”)). The State believes that this was the purpose of Order 13-8500 – to direct inferior courts on the transition of records from paper copies to Odyssey. Defendant’s case involves interpretation of Order 13-8500 and affords this Court an opportunity to clarify its intent in this Order.

One interpretation, by then Chief Judge Nan Nash of the Second Judicial District, supports the position taken by the State in this case. In her letter to “All Second Judicial District Court Judges” dated December 19, 2014, Judge Nash wrote that, with the advent of Odyssey, “[m]any of the functions performed in the old paper system *are not necessary* in the electronic system.” **[COA BIC Ex. 2]** (emphasis added). She went on to explain the process of copy requests, where a “court clerk prints a hard copy of the requested document [and] manually stamps a certification.” **[Id.]** She went on to reason that Order 13-8500 made “[m]annual certification by the

clerk [un]necessary” because “a court document *retrieved and printed directly from Odyssey . . .* is in fact a ‘true and correct copy of the original.’” [*Id.*] (emphasis added). This direction from the chief judge could have been interpreted by the court clerks in the Second Judicial District to longer require them to provide manual certification of documents from Odyssey.

Defendant claims that the State’s interpretation “would effectively make Rule 11-902 a nullity with respect to court records.” [**AB 16**] This is not so. The State’s arguments apply only to court records that are stored in Odyssey, the electronic system specifically approved of and maintained by this Court. Any court records outside Odyssey – from other states or federal courts – would still require authentication via seals, attestations, or certifications.

Defendant also addresses the State’s argument that all parties could access Odyssey to verify the correctness of the documents by responding that this argument:

[A]ssumes 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 the 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.

[**AB 17-18**] He continues, asserting that requiring this confirmation “in the middle of a hearing or trial is infeasible.” [**AB 18**] But this is not what happened here. In Defendant’s case, the State filed the printouts from Odyssey with the district court five days before the preliminary hearing. [**RP 18-26**] This was pursuant to New

Mexico Supreme Court Order No. 20-8500-025 (July 6, 2020), which required 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]** This meant that the court and opposing party had advance notice of and access to these documents and were able to verify their veracity prior to the preliminary hearing, thus eliminating the day-of-hearing verification concerns raised by Defendant. Importantly, despite this advance notice, no issue was raised with the actual content or veracity of the documents by either opposing counsel or the district court.

Defendant also argues that the State’s interpretation “invites error and fraud.” **[AB 18]** He notes that the “authentication requirements originate from concerns about fraud, innocent mistakes, and ‘jury credulity,’ the natural tendency to take matters at face value.” **[AB 12]** (internal citation omitted). He writes: “[G]iven modern technological developments, which make it easier to produce counterfeit, altered, or incomplete documents, the protections provided in these provisions take on added importance.” **[AB 13]** Finally, he cites *In re Vee Vinhee*, 336 B.R. 437, 445 (B.A.P. 9th Cir. 2005), a bankruptcy case, which cautioned: “[D]igital 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.” Despite these inflammatory concerns about

alteration of records, the fact remains that there was never a claim that the Odyssey printouts offered by the State were altered in any way. The documents 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]**

Defendant's purported concerns about alteration of Odyssey records are not only irrelevant to this case but less than one step away of accusing future prosecutors of professional and criminal misconduct. Alteration of Odyssey records by an attorney is the very definition of misconduct. Rule 16-804(A)-(D) NMRA (defining misconduct as an attorney "violating or attempt[ing] to violate the Rules of Professional Conduct"; "commit[ting] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"; "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation"; and "engag[ing] in conduct that is prejudicial to the administration of justice"). The Rules of Professional Conduct that would be violated by alteration of, and then attempted introduction to the Court, of Odyssey records include: Rule 16-303(A)(1), (3) NMRA (Candor Toward the Tribunal) (a lawyer shall not knowingly "make a false statement of fact or law to a tribunal" or "offer evidence that the lawyer knows to be false"), Rule 16-304(A)-(B) NMRA (Fairness to Opposing Party and Counsel) (a lawyer shall not "unlawfully alter, destroy, or conceal a document or other

material having potential evidentiary value” or “falsify evidence”), and Rule 16-401(A) NMRA (Truthfulness in Statements to Others) (a lawyer shall not knowingly “make a false statement of material fact or law to a third person”).

In addition to the clear professional misconduct that Defendant seems to indicate prosecutors would commit, if a lawyer were to alter an Odyssey record and then try to introduce it to the Court as evidence, such alteration would also be a crime. At the very least, a person who alters Odyssey records in the manner suggested by Defendant would be guilty of Forgery, contrary to NMSA 1978, Section 30-16-10(A)(1)-(2) (2006), which consists of “falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injury or defraud” or “knowingly issuing or transferring a forged writing with intent to injure or defraud.” This individual would also be guilty of Tampering with Public Records, contrary to NMSA 1978, Section 30-26-1 (1963). Ultimately, no claim of alteration of records has been made in this case, and it is exceedingly unlikely that any representative of the State would alter Odyssey records and printouts in the future. This is so because any alterations would be easily discoverable by the judge looking up the record in Odyssey and such alterations would lead to criminal charges and likely disbarment.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DID NOT 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.” 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”).

Defendant first argues that the State’s argument, that courts can take judicial notice of documents but not the facts contained therein, was not presented below so “the district court did not abuse its discretion in failing to consider it.” [AB 20] But the district court raised the issue of judicial notice sua sponte. *State v. Garcia*, 2023-NMCA-010, ¶ 23. Although the State did not raise this argument below, there was also no issue regarding the authenticity of the documents themselves. In cases where there is no actual controversy regarding the validity of the proffered documents, its reliability can be “accurately and readily determined from sources whose accuracy cannot be reasonably questioned.” Rule 11-201(B)(2).

Defendant also argues that the district court properly decided to not take judicial notice of the documents because they “related to a matter central to its burden at the preliminary hearing.” [AB 20-21] In this case, this burden was proof

that Defendant was a felon. But the introduction of these documents would not immediately satisfy this burden as Defendant was still free to attack the validity of the prior conviction as well as argue that he was not the individual who received the prior felony conviction. Indeed, defendants routinely challenge the validity of prior convictions proffered by the State, and there is no reason that Defendant could not have done this in his case. Because there was no claim that the documents themselves were not reliable, the district court abused its discretion when it did not take judicial notice of the Odyssey documents.

III. THE ODYSSEY LETTER SUPPORTS THE STATE’S POSITION

Defendant argues that the Odyssey Letter was not provided to the district court so it “did not review it in the first instance.” **[AB 22]** But this letter was specifically addressed to “All Second Judicial District Court Judges,” a group to which this judge belongs. **[COA BIC Ex. 2]** Further, the district court judge discussed the contents of this letter during the preliminary hearing, stating that she read the letter to say that printouts from Odyssey are “legitimate copies [but they don’t] replace certification requirements.” **[6/2/21 CD 9:02:43-9:04:05]** This shows that the district court did consider the Odyssey Letter, even if it did not agree with the State’s interpretation.

Defendant also argues that the “State has not explained how consideration of the Odyssey Letter would have altered the Court of Appeals’ interpretation and analysis in any way.” **[AB 22]** First, the State argued that the Court of Appeals erred

when it directed the State to attach the letter to its Brief in Chief, but then determined that it could not consider the letter because “the State failed to make the Odyssey Letter part of the record on appeal.” **[BIC 18-19]** Second, had the Court of Appeals considered this letter, its interpretation may have been impacted by the fact that Judge Nash interpreted Order 13-8500 as making printouts from Odyssey “a true and correct copy of the original” that does not require additional certification. **[COA BIC Ex. 2]** Finally, Defendant’s claim that the Odyssey Letter “was [not] interpreted in the manner suggested by the State” based on a single reference to another case at the preliminary hearing of a prosecutor “obtaining and submitting sealed or certified court documents” is not indicative of the overall practice in the Second Judicial District. **[AB 23]** During that same hearing, the prosecutor told the judge that, when obtaining copies of prior convictions, the State “go[es] under Judge Nan Nash’s letter, the rules of authentication, and then the Supreme Court order referencing the State’s exhibit list.” **[6/2/21 CD 9:11:07-9:13:43]** This statement, at the very least, shows that the procedure followed by the State in Defendant’s case was not an isolated incident. Regardless, the Odyssey letter should have been considered by the Court of Appeals because it was properly before the Court and provided insight into the State’s reasoning that Odyssey printouts are self-authenticating and considered the official court record under Order 13-8500.

CONCLUSION

For the reasons set forth above, as well as those argued in the Brief in Chief, the State respectfully requests that this Court reverse the Court of Appeals.

Respectfully submitted,

RAÚL TORREZ
Attorney General

/s/ Emily C. Tyson-Jorgenson
Emily C. Tyson-Jorgenson
Assistant Attorney General
408 Galisteo Street
Santa Fe, New Mexico 87501
(505) 490-4868

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief was e-filed on April 17, 2023, which caused it to be served on counsel of record Mary Barket at mary.barket@lopdm.us.

/s/ Emily C. Tyson-Jorgenson
Assistant Attorney General