IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v. **No. A-1-CA-40496**

BILLY JIMENEZ,

Defendant-Appellee.

STATE OF NEW MEXICO'S BRIEF-IN-CHIEF

Appeal from the Fifth Judicial District Court
Lea County, New Mexico
The Honorable Lee A. Kirksey

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INTRODUCTION

Following a traffic stop and the discovery of evidence of various crimes at his nearby residence, Defendant was charged with numerous offenses including two counts of abuse of a child (not resulting in death or great bodily harm). Defendant filed a motion to suppress the evidence found at his residence, which the court granted after a suppression hearing. This suppression should be reversed because the court erroneously failed to apply the plain view exception, despite the fact that the only evidence at the hearing clearly supported this exception. Narcotics were in plain view within the residence from the exterior of the residence.

The evidence also supports the existence of exigent circumstances, because the only adult in the residence was effectively under arrest and admitted to the fact that there were two small children in the residence who would otherwise be unattended at the time, late at night. The same basic facts support both the plain view and exigent circumstances exceptions to the warrant requirement, and both exceptions were preserved at the hearing and in related briefing. As detailed below, no evidence supported the trial court's findings that the officer observed illegal narcotics on a table only after he entered the residence.

Accordingly, the State respectfully submits that this Court should reverse the trial court's decision on the motion to suppress and remand this matter for further proceedings.

SUMMARY OF PROCEEDINGS

Defendant was the subject of a traffic stop on December 11, 2021 from which he fled on foot.[1] **[5-16-22 CD 11:30:28-11:32:57; RP 40, 80-81, 86]** Lovington Police Department Sergeant Michael Garcia, who stopped Defendant, knew that he lived about a block away and proceeded to his house. **[5-16-22 CD 11:33:00-11:35:05]** When he arrived at Defendant's house, the officer observed a partially open front door and, upon knocking, the door freely opened further. **[*Id.* 11:35:05-50]** The officer heard what he thought was a moaning behind the door and, to ensure his own safety, the officer moved on the porch while remaining on the exterior of the residence. **[*Id.* 11:35:45-11:36:28]** According to the officer:

> I did step up on the porch uh at the point that I stepped up on the porch I was I did [sic] cross the door **on the outside of the residence**. From the outside of the residence, I clearly observed a subject sitting directly in the opening of the door from the outside of the residence.

[*Id.* 11:36:07-28] (Emphasis added.)

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[1] The magistrate court record, consisting of forty-four pages from M-25-FR-2021-00196, appears in the record at pages 25-68. **[RP 25]**

While still *outside* the residence, the officer noticed a glass pipe typically used to ingest illegal narcotics and a bag containing a clear, crystalline substance that appeared to be methamphetamine, within arm's reach of the sitting subject. **[*Id.* 11:37:00-11:37:33]** The glass pipe and bag were on what appeared to be a kids' table, which had cartoon or similar markings on it. **[*Id.* 11:37:37-11:38:24]** The officer recognized the subject through prior encounters and knew that there were several warrants for his arrest. **[*Id.* 11:36:28-11:37:00]** Through the partially open door, the officer told the subject that he was going to be arrested, and the subject admitted that he knew about the warrants. **[*Id.* 11:38:24-42]** The subject told the officer that he was watching Defendant's very young children, described as infants, and that he was the only adult in the residence. **[*Id.* 11:38:43-11:39:05]**

The officer testified that he had an obligation to ensure the kids' safety because the subject, who was effectively under arrest,[2] was the only adult in the residence. **[*Id.* 11:39:06-11:40:06]** The apparent existence of illegal narcotics and an associated glass pipe on a child's play table concerned the officer for obvious reasons, as well as the general condition of the residence which had open electrical sockets and a wood burning stove with a makeshift gate. **[*Id.* 11:40:06-54; 11:47:57-11:48:20]** Officers eventually found two children, one of whom was

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[2] The subject, who was named at the hearing, was arrested on the arrest warrants. **[RP 43 (portion of amended criminal complaint against Defendant, referencing arrest of other subject)]**

crying, in the residence. **[*Id.* 11:40:55-11:41:45]** The weather was cold due to the season and time of night. **[*Id.* 11:41:43-11:42:07]** The officers waited about five hours for Children, Youth and Families Department personnel to arrive to take custody of the children, during which time the house was secured and the officers took turns holding the children. **[*Id.* 11:42:15-11:43:40]** Defendant showed up at the house during that time and was arrested. **[*Id.* 11:43:37-44; RP 43-44]**

Defendant was charged with various offenses[3] arising from the traffic stop and related to his nearby residence, including several counts of abuse of a child relating to the allegation that the children were left in the care of the other subject using a controlled substance. **[*Id.* 11:44:47-11:45:03; RP 1-3]** *See* NMSA 1978, § 30-6-1(D) (2009). Defendant later filed a motion to suppress the evidence from his residence. **[RP 80-91]** Although the State's response discussed the exigent circumstances and emergency assistance doctrines, the response also asserted that the front door was already partially open and that the officer had a "clear view" into the living room from the front porch. **[RP 96 ¶ 6; 97-100]** The State's response further stated that "methamphetamine and a meth pipe" were "visible from the door." **[RP 98]**

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[3] Specifically, Defendant was charged with two counts of abuse of a child (no death or great bodily harm), possession of a controlled substance (methamphetamine), battery upon a peace officer, two counts of resisting arrest, no insurance, expired registration, and driving while license revoked (not DWI related). **[RP 1-3]**

At the May 16, 2022 suppression hearing, the officer testified that, after arriving at the residence and knocking, he remained outside and observed in plain view narcotics and an ostensibly related glass pipe on a table within arm's reach of an adult male in the living room of the residence. **[*Id.* 11:50:30-11:51:15]** Defense counsel asked the officer whether moving to a more tactically sound position on the porch resulted in him being partially inside the residence. **[*Id.* 11:48:30-11:49:55]** In response, the officer reiterated several times that, although he could see into the residence, he was ***not*** in the residence when he first observed the contraband. **[*Id.*]** That answer was not challenged further by Defendant; the defense rested immediately after the officer's answer. **[*Id.* 11:49:55-59]**

The State argued that, because the subject of the arrest warrant admitted that he was the only adult at the house in which illegal narcotics were visible within a child's reach, the officers had exigent circumstances[4] that allowed them to enter

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[4] The State's briefing also mentioned the emergency assistance doctrine. **[RP 98-100]** Because that doctrine is closely related to the warrant exception for exigent circumstances, particularly when involving entry into a residence, this brief for simplicity refers to exigent circumstances. *See State v. Ryon*, 2005-NMSC-005, ¶¶ 29-39, 137 N.M. 174 (discussing these interrelated topics generally and concluding that police may enter a home without a warrant when responding to a strong sense of an emergency). In this matter, there is little practical difference between the emergency assistance doctrine, not requiring probable cause, and the exigent circumstances exception requiring probable cause, because the officer could see contraband in plain view from outside the residence. *Id.* ¶ 25 n. 4 (entry into home under exigent circumstances requires probable cause in addition to exigency, whereas the emergency assistance doctrine does not require probable cause).

the home and ensure that the young children were safe. **[*Id.* 11:51:10-11:52:22]** As a result, both plain view and exigent circumstances, somewhat intertwined and overlapping in this case, were asserted as valid bases allowing admission of the evidence against Defendant. Crucially, at all times the State argued that the narcotics were plainly visible on a table from the front door prior to any officer's entry into the residence, a fact relevant to the application of both warrant exceptions in this case in which the presence of children played a factor. Despite the evidence, and related arguments, presented at the hearing, the court granted Defendant's motion. **[RP 108-12]** The order focused on whether exigent circumstances existed and did not squarely address the State's contention that the officer had a plain view basis for entering the residence. **[*Id.*]**

Following the court's order, the State appealed to this Court.[5] **[RP 115-21]**

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO SUPPRESS.

The district court erred in granting Defendant's motion to suppress because the plain view and exigent circumstances exceptions to the warrant requirement squarely applied. This Court reviews factual matters with deference to the district court's findings if substantial evidence exists to support them, and reviews the

[5] Plain view, exigent circumstances, and the emergency assistance doctrine were raised as issues in the Docketing Statement. **[DS 6-8]**

district court's application of the law de novo. *State v. Almanzar*, 2014-NMSC-001, ¶ 9, 316 P.3d 183.

A. The plain view exception was asserted by the State at the suppression hearing and in related briefing, preserving this issue.

As summarized above, the plain view exception as a valid basis for the officer's entry into the residence was preserved by the State's argument at the hearing and in related briefing. **[5-16-22 CD 11:50:30-11:51:15]** Despite this preservation, the district court found, somewhat inexplicably, that "once[,]" *i.e.* ***after***, the officer was inside the residence, he then observed the subject of the arrest warrant and what appeared to be methamphetamine, an associated glass pipe, and other hazards. **[RP 109, ¶¶ 9-10]** That is, the court found that Sergeant Garcia moved to a position "just inside the door" and it was only then that he could observe illicit drugs and associated contraband. **[*Id.* ¶ 8]** As explained below, these findings are not supported by any evidence, let alone substantial evidence. Nevertheless, they show that the court considered this issue and that it was preserved.

B. The plain view exception was supported by the evidence that the officer observed controlled substances and related contraband from outside the residence, making a search warrant unnecessary.

As recited above, the State elicited extensive testimony that the narcotics were visible in plain view on a children's style table from the porch of, *i.e.* from the exterior of, Defendant's residence. The officer's testimony at the suppression

hearing added detail but was consistent with the State's response having asserted that the officer had a "clear view" into the living room from the porch and that methamphetamine and an associated pipe were "visible from the door." **[RP 96 ¶ 6; 97 ¶ 21; 98]** No affirmative evidence to the contrary was admitted at the hearing.[6]

Given the clear testimony summarized above, the district court's findings and conclusions unjustifiably overlooked the plain view basis that supported the admissibility of the narcotics evidence relevant to the child abuse charges. Sergeant Garcia never testified that he moved "inside" or "just inside" the door, or anything remotely similar, prior to actually observing contraband within the residence.[7] In fact, the evidence was exclusively to the contrary, as the only

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[6] Defendant did not call any of his own witnesses at the suppression hearing, which is not surprising as Defendant himself was not at the residence during the key time period. Instead, Defendant, through counsel, simply cross-examined the officer, but failed to produce any affirmative evidence negating the officer's key testimony.

[7] The officer's testimony, set forth in the block quote in the summary above, that he did "cross the door **on the outside of the residence**," simply means that he changed his viewing ***angle***, while still remaining outside the residence, to obtain a better line of sight of the house interior. **[5-16-22 CD 11:36:10-20]** (Emphasis added.) This tactic is commonly used by law enforcement to reduce the chance of being surprised by someone inside a building, *e.g.*, who could pose a danger. Often termed "slicing the pie," it involves obtaining, via incremental movement, a better view or angle of observation of a possible suspect or danger while maintaining cover and attempting to minimize one's own visibility. A federal Office of Justice Programs webpage mentions this tactic, as have some appellate cases. *See, e.g., Slicing the Pie* (July 2006), https://www.ojp.gov/ncjrs/virtual-

evidence showed that the officer could observe the drugs and paraphernalia from the porch outside the residence, ***prior to*** the officer's entry into the residence. As an example of the disconnect between the court's findings and the evidence, the court's order included this particular finding:

> 11. Sgt. Garcia's testimony was consistent with the State's pleading that "Sgt. Garcia entered the house" (State's Response, ¶ 14) before discovering any "drugs and drug paraphernalia" (*id.*, ¶¶ 21, 23).

[RP 110 ¶ 11]

The State, however, never asserted or claimed, even in the referenced paragraphs, that Sergeant Garcia entered the house prior to observing illegal drugs. To the contrary, the State's response stated that the officer "stepped in front of the door" and observed a man sitting in a chair next to a blue table or chair that looked like a child's "highchair." **[RP 96, ¶ 9]** Although the officer eventually entered the residence, nothing in the State's response refuted that the officer was able to observe the narcotics in plain view on the table or "highchair" *from outside* the residence **prior to entering**, as he clearly testified to as detailed above. **[RP 96-97]**

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library/abstracts/slicing-pie (last visited April 21, 2023); *see also Newman v. City of Philadelphia*, 509 F.Supp.3d 291, 295 (E.D. Pa. 2020) (referencing officer's use of term "slicing the pie" in describing careful approach of a stopped van to avoid being directly in front of it); *Baskin v. Martinez*, 2018 WL 4373795 *2 (N.J. Super. Ct. App. Div. 2018) (noting officer's testimony that he began to "slice the pie" as he incrementally approached rear corner of a house pursuing armed suspect, explaining tactic's purpose is to allow officer to "slowly look a little" to avoid rushing into dangerous situation).

The undisputed facts in this matter involve an officer who, while standing outside the residence on the porch, observed through an open door what appeared to be narcotics and an associated glass pipe. The officer was, therefore, able to observe contraband in plain view from a spot where he was validly standing. New Mexico, like other states, recognizes the plain view exception. *See*, *e.g.*, *State v. Ochoa*, 2004-NMSC-023, ¶ 9, 135 N.M. 781 (when officer is lawfully positioned to observe evidence and its incriminating nature is immediately apparent, plain view exception applies as recognized exception to the warrant requirement).

It is a simple application of the plain view exception to conclude that an officer who observes contraband in plain view from the porch or other valid position on the exterior of a residence, can validly rely on that plain view basis. *See, e.g.*, *State v. Lupek*, 712 S.E.2d 915, 917-918 (N.C. Ct. App. 2011) (entry into residence was proper after police officer validly on defendant's front porch observed contraband associated with marijuana); *State v. Edgeberg*, 524 N.W.2d 911, 913-915 (Wis. Ct. App. 1994) (officer was validly on porch when he observed marijuana plants growing inside house); *State v. Lyons*, 307 S.E.2d 285, 285-287 (Ga. Ct. App. 1983) (officers were able to observe marijuana plants from vantage point on back porch of residence; trial court erred in granting motion to suppress). The trial court erred by finding, albeit somewhat implicitly, that the plain view exception did not apply, despite that finding being contrary to the only record

evidence. *Almanzar*, 2014-NMSC-001, ¶ 9; *see also State v. O'Neal*, 2009-NMCA-020, ¶ 16, 145 N.M. 604 (district court's findings must be supported by substantial evidence).

Admittedly, the officer could not have entered the residence if all that was known was that a non-resident,[8] known to be the subject of an arrest warrant, was inside the residence. *See State v. Krout*, 1984-NMSC-008, ¶ 10, 100 N.M. 661 (arrest warrant authorizes officers to enter dwelling in which the subject of arrest warrant lives when there is reason to believe subject is currently within residence); *see also Steagald v. United States*, 451 U.S. 204, 213-214 (1981) (due to resident or owner's privacy interests, search warrant is normally required to enter residence when seeking to arrest a non-resident third party believed to be present in the residence). But this is not such a case involving only an issue of warrants or the

[8] The suppression hearing testimony did not shed much light on whether the subject, who admitted to watching Defendant's children and to knowing about his own arrest warrants, was a resident or whether the officers had reason to believe that may be the case. If the subject was a co-resident, despite that Defendant may have owned the house, then Defendant would have no basis to object to law enforcement's entry on the basis of the arrest warrant for that subject. That is because an arrest warrant allows law enforcement to enter a residence to arrest a resident, or co-resident, who is the subject of such warrant, if police reasonably believe he or she is present. *See Payton v. New York*, 445 U.S. 573, 576 (1980). However, a resident may have a basis to object to the entry if the subject of the arrest warrant was only a guest or visitor, even if the arrestee himself would not have a basis to object to his own arrest due to being a visitor with less of a privacy expectation in the residence. *State v. DeLottinville*, 877 N.W.2d 199, 204-05 (Minn. Ct. App. 2016).

lack thereof. This is a simple plain view case in which the trial court failed to apply this clearly applicable exception to the warrant requirement.

C. Although exigent circumstances was emphasized in district court as a basis supporting entry into the home, that should not distract from the clear application of the plain view exception.

A review of the State's response shows that the exigent circumstances exception was emphasized in briefing, but that should not detract from the fact that the plain view exception was also preserved below and clearly supported by the evidence. **[RP 98-100]** On the facts present here, having observed narcotics and paraphernalia in plain view, the officers could enter and arrest the subject on that basis, apart from whether they had a warrant for his arrest. *Ochoa*, 2004-NMSC-023, ¶ 9. Particular to this matter, the State could use that evidence as pertinent to the child abuse counts filed against Defendant, as relevant to the conditions in which his children were living.[9]

Accordingly, the State's response and argument in the district court, supported by the officer's testimony, demonstrated the plain view basis by

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[9] For clarity, according to the prosecutor who argued against suppression, Defendant was not charged with possession of a controlled substance nor any paraphernalia-related charge as a result of items found in his residence. Rather, Defendant was charged with child abuse counts related to the presence of illegal narcotics in his residence. Although Defendant was charged with possession of a controlled substance, that specific charge related to items found in connection with the earlier traffic stop from which Defendant ran. **[RP 1-3, 42 (portion of amended criminal complaint referencing narcotics found, while awaiting tow truck, in area through which Defendant ran from traffic stop)]**

establishing that the front door was partially open and that, from the front porch, the officer had a "clear view" into the living room, resulting in methamphetamine and an associated pipe being "visible from the door." **[RP 95-96, 98]** Therefore, apart from the exigent circumstances issue addressed in the next section, the trial court should have relied upon the plain view nature of the contraband and should have denied Defendant's motion to suppress on that basis alone given the clear law and facts in this matter. *Id.*

D. Evidence of exigent circumstances also supported the entry into the residence due to the officer's legitimate concern with two small children being left alone in a residence with accessible illegal narcotics.

The undisputed evidence showed that the officer was able to observe illegal narcotics in plain view on a fairly low children's table, prior to entering the residence. The officer testified to his equally valid, related concern about the safety of the children, who would otherwise be unaccompanied within reach of illegal narcotics, late at night, considering that the only adult present was within moments of being physically arrested. *Ryon*, 2005-NMSC-005, ¶¶ 29-31; *see also State v. Arbino*, 677 N.E.2d 1273, 1274-75 (Hamilton County Municipal Court, Ohio, 1996) (denying motion to suppress illegal drugs located during brief apartment check based on exigent circumstances; after arresting apparent sole adult occupant, police saw approximately eighteen-month old child in apartment and

were justified in quickly looking through apartment to determine if another responsible adult was present).

Despite the clear testimony that the officer's observations established objective concerns through his valid perceptions ***prior to*** entry into the residence, the trial court inexplicably found that it was only once (*i.e.* after) the officer was inside the residence that he observed items that could be dangerous to children. **[RP 109 ¶ 10; 111 ¶ 16]** Although the trial court must be presumed to understand the law of exigent circumstances and closely related doctrines,[10] including as related to concerns for the safety of the children, its factual findings in contravention of that doctrine are similarly unsupported by evidence.[11] Moreover, the trial court's findings narrowly focused on whether the adult subject in the residence required immediate aid, and failed to address in any substantial manner whether the ***children*** needed attending to or checking in light of the imminent

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[10] The trial court's ruling referenced *Ryon*, 2005-NMSC-005. **[RP 110 ¶ 12]** In this matter, there is little practical difference between the emergency assistance doctrine, not requiring probable cause, and the exigent circumstances exception requiring probable cause, because the officer could see contraband in plain view from outside the residence. *Id.* ¶ 25 n. 4 (entry into home under exigent circumstances requires probable cause in addition to exigency, whereas the emergency assistance doctrine does not require probable cause).

[11] Nor is there any evidence supporting the trial court's implicit factual finding, contained in a conclusion of law, that Sergeant Garcia crossed any threshold "**into** the property" to assume a more tactically sound position. **[RP 111 ¶ 15]** (Emphasis added).

arrest of that subject which would leave the children unaccompanied, at night and into the early a.m. hours, in the presence of illegal narcotics. **[RP 110-11 ¶ 14 (noting lack of evidence that the *adult subject* was needing aid)]** Accordingly, its decision must be reversed. *Almanzar*, 2014-NMSC-001, ¶ 9; *O'Neal*, 2009-NMCA-020, ¶ 16.

CONCLUSION

For the reasons set forth above, the State asks that this Court reverse the district court's decision on the motion to suppress and remand this matter for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on April 27, 2023, 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 of record to be served by electronic means at luz.valverde@lopdnm.us.

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

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APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
THE HONORABLE LEE A. KIRKSEY, PRESIDING

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TRANSCRIPT OF PROCEEDINGS

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INTRODUCTION

Billy Jimenez was surveilled for unknown reasons by Lovington Police Sergeant M. Garcia throughout the afternoon of December 10 and into the early morning of December 11, 2021. After Sergeant Garcia attempted to detain Mr. Jimenez on the street near his parked car, Mr. Jimenez took off and Garcia chased him. Garcia ordered another officer be posted near Mr. Jimenez's home to ensure "he did not go back there." When he lost sight of Mr. Jimenez, Garcia went to Jimenez's home himself, to "follow up." He claimed the door swung "completely open" when he knocked, allowing him to see inside. Although the state's position in its written motion appeared to be that he spotted suspected narcotics *after* he entered the home, at the suppression hearing he testified he saw them from the threshold through the open door.

Properly considering all the evidence in addition to the officer's hearing testimony, and implicitly making a credibility determination, the district court found that the State violated Mr. Jimenez's right to be free from governmental intrusion. Mr. Jimenez asks this Court to affirm the district court.

SUMMARY OF RELEVANT FACTS

The state appeals the district court's order suppressing illegally obtained evidence.

The state appeals from the trial court's suppression order. On appeal, the state's attorney argues "the [district] court erroneously failed to apply the plain

view exception." [**Brief in Chief (BIC) 1**] But that is not what the state's attorney argued below. There, the prosecutor argued (1) an "exigent circumstance arose" *after* (2) Sergeant Garcia identified that the only occupant of the house had an active arrest warrant, and, once arrested, would leave children inside the house alone. [**RP 95-98** (State's Response to Motion to Suppress)] Here is what happened.

The traffic stop and later search of Billy Jimenez's home.

According to Sergeant Garcia's report in support of the criminal complaint, at about 5:30 p.m. on December 10, 2021, he was in front of Billy Jimenez's home on South 2nd Street in Lovington. Even though Mr. Jimenez's garage was closed with a makeshift sheet metal door, the officer watched as "several subjects inside [were] doing something to Mr. Jimenez's lime green Ford Focus." Given that he saw the car emerge shortly after, now painted almost entirely red, it is safe to say these persons were helping Jimenez paint his vehicle.

Although Garcia added that he had "prior knowledge that the license plate did not belong to the vehicle," he did not state that he suspected the car or plate to be stolen. On these bases, he decided to attempt a traffic stop. However, Mr. Jimenez turned left before the officer activated his lights, and Garcia did not

follow. [**RP 86-87** (12/11/21 Amended Criminal Complaint, attached as Exhibit A to the defense motion to suppress)][1]

At about 12:30 a.m. the next morning, on December 11, Sergeant Garcia again spotted Jimenez's Ford Focus, now parked on South 1st Street. He stayed to watch the car. When it pulled away from the house and headed north, Garcia followed Mr. Jimenez's Ford, but went north by an adjacent route to catch up to it on Avenue L near 3rd Street where he turned on his patrol lights. Meanwhile, Mr. Jimenez had made a right on 3rd and parked in front of a house. As he got out of his car and walked up to the house, Garcia "began ordering him to come back to the vehicle as he was the subject of a traffic investigation." [**RP 87**] Jimenez returned to his vehicle but disputed that the traffic stop was valid; as the officer tried to grab his arm, Jimenez turned and took off. [**RP 87**] The officer followed on foot, and Mr. Jimenez was seen headed north on 2nd when the officer lost sight of him. [**RP 87-88**]

Meanwhile, Officer Hill had joined the pursuit and Garcia told him to update Lovington Police Dispatch. As soon as Garcia saw Mr. Jimenez headed north, he told Officer J. Pando to go to the corner of Avenue H and 2nd Street, in front of

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[1] The officer later ran the plates and the VIN on Mr. Jimenez's Ford Focus. He learned that the registration on the license plate was unexpired but matched a red Chevrolet. He presumed that both the insurance and registration on the Ford Focus had expired. [**RP 88**]

Mr. Jimenez's house, "to ensure that Mr. Jimenez did not go there." [**RP 88**] After losing sight of Mr. Jimenez, Garcia searched "the area in which [he] had last seen Mr. Jimenez" "with negative results." [**RP 88**] Garcia then walked back to Mr. Jimenez's parked car and found a small baggie of suspected methamphetamine, attached to the key to Mr. Jimenez's car, in the front area of the house he had parked in front of. Sergeant Garcia also ordered Officer Hill to search Mr. Jimenez's car prior to it being towed. Garcia then went to Mr. Jimenez's house to "follow up." [**RP 88**]

Garcia and Pando went up to the front door, based on Pando's report of seeing a person in the window when he was watching the house. [**RP 88**] Once he was on the porch and approaching the door, Garcia saw the door was open a few inches. "Due to the door being ajar [Garcia] deemed it necessary to conduct a welfare check." [**RP 88**] Garcia reported that "[p]rior to making entry into the residence, I knocked on the front door and announced myself . . . ." [**RP 88**] Hearing a "grunt" or moan from behind the door, the officer moved in front of the door. At that point the door had opened as he knocked, and he stepped in front of the door "so I could see in the residence through the now near fully open front door." [**RP 88**]

Garcia saw Manuel Gardea-Gandarilla inside the house, who he knew to have an active warrant. He began ordering Gardea-Gandarilla out of the house,

when he saw a glass pipe and a clear plastic bag with suspected methamphetamine within Gardea-Gandarilla's arm's reach. Mr. Gardea-Gandarilla responded that he could not come out because he was watching Mr. Jimenez's children, and said he would call Mr. Jimenez. Garcia "told him not to get on his phone and then went into the house to detain him for failing to follow lawfully given orders." [**RP 88-89**] Police arrested Mr. Gardea-Gandarilla and located the two children in the bedrooms of the house. Garcia then called CYFD and reported the "living conditions" in the house, and CYFD agreed to come and take the children. Sergeant Garcia's report does not state he reported the presence of drugs to CYFD. [**RP 89**]

While the officers waited for CYFD, Mr. Jimenez returned through the back door of his home and attempted to shut the front door, "telling [officers] that we couldn't come into his home." [**RP 89**] Sergeant Garcia forced the door open and tried to detain Mr. Jimenez, wrestling him to the ground as he struggled. [**RP 89**] During the ordeal with police, Mr. Jimenez's young children "were crying and screaming around us in the living room." [**RP 90**]

Mr. Jimenez was charged with two counts of child abuse, possession of methamphetamine, battery and resisting an officer, no insurance, expired registration, and driving on a revoked license. [**RP 1-2** (Information)]

The motion to suppress and the district court's findings of fact and law.

Before trial, the defense filed a motion to suppress evidence. [**RP 80-85**] The motion attached Sergeant Garcia's report, and relying on the report, emphasized that (1) Garcia was no longer in "hot pursuit" when he went to Mr. Jimenez's home "to conduct a follow up," (2) due to the open door, Garcia found it necessary "to conduct a *welfare check* of the residence," and (3) that when he knocked on the door it swung fully open. [**RP 81** (emphasis in original)] Defense counsel then argued that Garcia's search was not warranted as a welfare check as it failed to meet all three criteria of the emergency assistance doctrine. [**RP 82-83**] Because Garcia had not relied on any "plain view" exception, counsel's motion did not address this exception to a warrantless search.

In response, the prosecutor filed a motion maintaining that after the attempted detention, Sergeant Garcia went to Mr. Jimenez's home "to determine if [he] had fled to his residence at 818 S. 2nd Street in Lovington, NM." [**RP 95**] The prosecutor maintained that when Garcia knocked, the door swung open, allowing him to see into the living room which contained children's toys, clothing and furniture. [**RP 96**] According to the prosecutor's motion, it was only after officers entered to arrest Mr. Gardea-Gandarilla, and did a sweep of the house to collect the children, that they found and collected drugs and paraphernalia. The prosecutor emphasized "The officers did not search the house -- with the specific exception of

collecting the controlled substance which was within reach of both the child walking around and the dog." [**RP 97**]

The prosecutor's motion went on to argue the entry and seizure were valid under the emergency assistance doctrine. According to the prosecutor's argument, "an exigent circumstance arose" once officers saw Mr. Gardea-Gandarilla -- who had an arrest warrant -- from the door way. Although the prosecutor argued that the suspected controlled substance was "visible from the door" [**RP 98**], she wrote "the officers saw the controlled substance out in the open" only **after** officers were inside the home [**RP 99**]. Based on this, the prosecutor argued that preventing the children from ingesting methamphetamine satisfied the "rendering aid" prong of the emergency assistance doctrine. [**RP 99-100**] The prosecutor did not argue a "plain view" exception to the warrantless search.

The district court held a hearing on the motion. The prosecutor called Sergeant Garcia to testify via video online. [**5/16/22 CD 11:30:15**] Sergeant Garcia relayed the details of the attempted detention outside Mr. Jimenez's parked Ford, and his chase of Mr. Jimenez. He then asserted that when he lost sight of Mr. Jimenez, about a block from his home, Garcia searched the area -- including the carports and yards of about 6 to 8 homes -- between that point and Mr. Jimenez's home. [**Id. 11:34:30-:35:05**] Sergeant Garcia testified he then went to Mr. Jimenez's home "to make contact there." [**Id. 11:35**]

Garcia continued that he waited for back up officers to arrive and then went up the three to four steps to the front door. The door was ajar and opened further when he knocked. [**Id. 11:35**] Hearing "moaning" from behind the door, Garcia testified he "stepped onto the porch and crossed the door on the outside of the residence." [**Id. 11:36:20**] He then testified he saw Mr. Gardea-Gandarilla with suspected methamphetamine nearby, from the doorway. [**Id. 11:36-:39**] In reply to the prosecutor's leading questions, Sergeant Garcia agreed he was "worried about the substance present in the home" as well as the condition of the home generally. [**Id. 11:40:10-:50**]

On cross-examination, Sergeant Garcia said defense counsel had "taken out of context" the statement in his report that "due to the door being ajar, I determined I needed to do a welfare check," [**Id. 11:45:45**] For context, defense counsel read the full paragraph from which the statement was taken, and Garcia confirmed that is what he reported. [**Id.; see RP 88**] And Sergeant Garcia denied that his moving in front of the door meant he stepped *into* the door. [**Id. 11:48-11:50**]

The district court rejected this distinction. In its written findings of fact, the court noted (1) Sergeant Garcia "moved to a more 'tactically sound' position just inside the door," (2) from this position *inside*, he observed Mr. Gardea-Gandarilla and, (3) from this position *inside*, he observed suspected methamphetamine. [**RP 109**] The court therefore found that Garcia's testimony was consistent with the

prosecutor's motion characterizing Sergeant Garcia as entering the house "**before** discovering any drugs and drug paraphernalia." [**RP 110, No. 11** (citing state's response ¶¶ 14, 21, 23) (emphasis supplied)]

In its conclusions of law, the court noted "Sgt. Garcia's observation of a 'grunt' or 'groan' from behind the open door does not objectively support a reasonable belief that any person inside the residence 'was in need of immediate aid to protect or preserve life or avoid serious injury.'" [**RP 110, No. 14**] The court further noted that accepting Garcia's testimony with regard to seeing Mr. Gardea-Gandarilla supported the same conclusion: "[nothing] indicated that Mr. Gardea-Gandarilla was in need of any aid whatsoever, still less so that such aid was needed immediately. [**RP 110-111**] The court concluded "[n]othing about what Sgt. Garcia observed was sufficiently exigent a circumstance to justify his crossing the threshold *into the property* to assume the 'more tactically sound position' about which Sgt. Garcia testified." [**RP 111, No. 15** (emphasis in original)] Based on these findings, the court suppressed all evidence seized or recorded from within Mr. Jimenez's home. [**RP 111-112**]

ARGUMENT

I. Mr. Jimenez's right to be free from unlawful search and seizure was properly upheld by the district court here.

A. Introduction.

The right to be free from unreasonable search and seizure is a fundamental constitutional right enjoyed by all New Mexicans, regardless of their socio-economic status, criminal history, reputation within the community, or struggles with addiction. N.M. CONST. art. II, § 10. *State v. Gomez*, 1997-NMSC-006, ¶ 31 n. 4, 122 N.M. 777.

Mr. Jimenez walked away from Sergeant Garcia after he had parked his car, gone up to the front door of a residence, and returned to his parked car to talk to the officer, disputing that the officer's attempted detention was lawful in the first place. After chasing Mr. Jimenez, then retracing his route, Garcia discovered methamphetamine in the yard of the residence in which Mr. Jimenez had parked his car. Meanwhile, knowing that Mr. Jimenez lived a block away from where he was last seen, Sergeant Garcia sent Officer Pando to watch Mr. Jimenez's front door, to ensure Jimenez did not return to his house. Garcia then went to the house himself to continue his investigation, although he knew that Mr. Jimenez was not at his house, since Officer Pando had kept watch.

After the fact, Garcia characterized his warrantless search as justified by an emergency assistance exception because he heard children inside the home and

identified through the doorway a person caring for the children, who was known to have an active warrant. Rejecting Garcia's assertions that he had also seen suspected drugs and paraphernalia from *outside* the doorway, and finding that in any case no exigent circumstances justified the warrantless search, the court suppressed the evidence.

B. Standard of review.

The suppression issue in this case presents a mixed question of fact and law. *See State v. Tuton*, 2020-NMCA-042, ¶ 8 (citing *State v. Funderburg*, 2008-NMSC-026, ¶ 10, 144 N.M. 37); *State v. Ryon*, 2005-NMSC-005, ¶ 11, 137 N.M. 174. This Court views the facts in the light most favorable to the prevailing party, but the legality of the entry and search presents a legal issue which this Court reviews *de novo*. *See id*. This Court reviews the factual findings for substantial evidence. *Tuton*, 2020-NMCA-042, ¶ 8. (citation omitted). In reviewing the court's factual findings, this Court must "indulge all presumptions in favor of that ruling." *State v. Jason L.*, 2000-NMSC-018, ¶ 11, 129 N.M. 119.

When there is a lack of factual findings, this Court will presume the court believed "all uncontradicted evidence," *unless* there is "an indication on the record that the district court rejected the uncontradicted evidence." *Jason L.*, 2000-NMSC-018, ¶ 11.

However, "a trial court is not required to accept uncontradicted testimony as true if (1) the witness is shown to be unworthy of belief, or (2) his testimony is equivocal or contains inherent improbabilities, or (3) concerns a transaction surrounded by suspicious circumstances, or (4) is contradicted, or subjected to reasonable doubt as to its truth or veracity, by legitimate inferences drawn from the facts and circumstances of the case." *State v. Lovato*, 1991-NMCA-083, ¶ 12, 112 N.M. 517.

After indulging all presumptions in favor of the court's ruling, this Court then performs a de novo legal analysis. *Tuton*, 2020-NMCA-042, ¶ 8. "This entails assessing the totality of the circumstances to 'decide the constitutional reasonableness of the police conduct' as a matter of law." *Id.* (quoting *State v. Martinez*, 2020-NMSC-005, ¶ 16).

C. Sergeant Garcia went to Mr. Jimenez's door to continue his criminal investigation; the district court properly found that the state's later supplied emergency assistance justification was not supported by substantial evidence.

"An officer's warrantless entry into a person's home is the exact type of intrusion against which the language of the Fourth Amendment to the United States Constitution ... is directed." *State v. Gutierrez*, 2008-NMCA-018, ¶ 16, 143 N.M. 422; U.S. CONST. Amend. IV; N.M. CONST. Art. II, § 10. The essential issue in all search and seizure cases is whether the search and seizure was reasonable. *See State v. Attaway*, 1994-NMSC-011, ¶ 20, 117 N.M. 141. Thus, "[w]arrantless

searches and seizures inside a home are presumptively unreasonable, subject only to a few specific, narrowly defined exceptions." *Ryon*, 2005-NMSC-005, ¶ 23.

The emergency assistance doctrine is one of those exceptions. *See Ryon*, 2005-NMSC-005, ¶ 27. The doctrine addresses the tension between the sanctity of the home under the Fourth Amendment and the legitimate need to intervene in good faith to deal with a genuine emergency. *See id.* ¶¶ 24, 25, 28. As an exception to the warrant requirement, the State bears the burden of proving the doctrine is applicable. *See State v. Zamora*, 2005-NMCA-039, ¶ 15, 137 N.M. 301 (stating that the State has a heavy burden to justify a warrantless search).

This exception allows police, when acting in their community caretaker role under the emergency assistance doctrine, to enter a home without a warrant or consent. *See Ryon*, 2005-NMSC-005, ¶¶ 25-26 (stating that of the three distinct doctrines, under the community caretaking exception, the one that is applicable to warrantless intrusions into personal residences is the emergency assistance doctrine). The emergency assistance doctrine justifies a warrantless entry where police have "a strong perception that action is required to protect against imminent danger to life or limb[.]" *Id.* ¶ 31.

For the emergency assistance doctrine to apply, the State must establish that (1) the police had reasonable grounds to believe that there was an emergency at hand and "an immediate need for their assistance for the protection of life or

property[,]" (2) the search must not have been "primarily motivated by intent to arrest and seize evidence[,]" and (3) there was "some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." *Ryon*, 2005-NMSC-005, ¶ 29 (internal quotation marks and citation omitted).

1. The First Ryon *Factor*

As to the first factor, the *Ryon* Court indicated that the emergency assistance doctrine requires an emergency. *See* 2005-NMSC-005, ¶ 31. *Ryon* emphasized that there must be "an emergency, a strong perception that action is required to protect against imminent danger to life or limb, an emergency that is sufficiently compelling to make a warrantless entry into the home objectively reasonable under the Fourth Amendment." *Id.* ¶ 31. "[O]nly a genuine emergency will justify entering and searching a home without a warrant and without consent or knowledge." *Id.* ¶ 26. In evaluating this factor, courts should consider "the purpose and nature of the dispatch, the exigency of the situation based on the known facts, and the availability, feasibility[,] and effectiveness of alternatives to the type of intrusion actually accomplished." *Id.* ¶ 32 (internal quotation marks and citation omitted.); *see State v. Trudelle*, 2007-NMCA-066, ¶ 37, 142 N.M. 18 (rejecting the officers' stated general safety concerns and explaining that, absent "credible and specific information about possible victims [,]" the officers were not entitled to

enter a private residence as community caretakers). In this case, the stated purpose of Garcia's approach to the front door was to "follow up" his investigation of Mr. Jimenez.

The district court here specifically found that the "grunt" heard by Sergeant Garcia did not constitute an emergency and justify further intrusion into the home. [**RP 110-111**] The court further found this conclusion was supported by Garcia's further testimony that once he observed Gardea-Gandarilla, there was nothing suggesting he was in need of immediate aid. [**RP 111**] In this case, "the State did not meet its burden to justify entering the home without a warrant." *State v. Baca*, 2007-NMCA-016, ¶ 31, 141 N.M. 65. The court's order should be affirmed.

2. *The Second* Ryon *Factor*

The second *Ryon* factor calls for an examination of the subjective intent of the officers in making the warrantless entry.[2] *Ryon*, 2005-NMSC-005, ¶¶ 33, 37. Under this factor, the Court examines the "primary motivation" behind the officers' decision to enter the home. *Id.* ¶ 36. "The protection of human life or property in imminent danger must be the motivation for the initial decision to enter the home rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding." *Id.* (citations omitted). "The ultimate issue is whether officers had a reasonable concern that an individual's health would be endangered by a delay, and in fact were motivated by a need to address that concern." *Id.*

This was the primary factor put at issue by Garcia's stated rationales, and later briefed by the parties. Sergeant Garcia was actively engaged in a criminal investigation and his "primary motivation" was to continue his investigation at Mr. Jimenez's home. He had been apparently surveilling Jimenez since the afternoon

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[2] *See State v. Yazzie*, 2019-NMSC-008, ¶ 47 (maintaining the subjective element of the *Ryon* test under state constitution, as a "judicial sieve through which courts may scrutinize warrantless police action"); *accord State v. Crocco*, 2013-NMCA-033, ¶ 22, f.n. 1, 296 P.3d 1224, *rev'd on other grounds by* 2014-NMSC-016, 327 P.3d 1068 (noting that "[s]ince our Supreme Court decided *Ryon*, the United States Supreme Court in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 405, 126 S.Ct. 1943 (2006), clearly renounced consideration of the officers' subjective motivation in determining whether a warrantless entry was justified under the emergency assistance doctrine[]" but continuing to apply the three-factor *Ryon* test.)

before. After he lost sight of Mr. Jimenez in the early hours of December 11th, he searched the yards and carports of the homes in the area Jimenez was last seen. [**Compare RP 88 with 5/16/22 CD 11:34:30-:35:05**] He reported that he then went back to the street on which Mr. Jimenez parked his Ford, searched the area in front of the home Mr. Jimenez had walked up to, and ordered Officer Hill to search Jimenez's Ford before it was towed. [**RP 88**] Meanwhile, he had Officer Pando watch Mr. Jimenez's home "to ensure that Mr. Jimenez did not go there." [**RP 88**] Sergeant Garcia then went to Mr. Jimenez's home himself "to attempt a follow up." [**RP 88**]

At trial, Garcia's justifications changed in one important way -- he testified that after losing sight of Mr. Jimenez, he went directly to Mr. Jimenez's home "to make contact there." [**5/16/22 CD 11:35**] And the prosecutor argued that Garcia "went to [Mr. Jimenez's] residence to determine if [he] had fled to his residence . . . ." [**RP 95**] According to Sergeant Garcia's report, however, this was plainly not true; after all, he had immediately positioned Officer Pando in front of Mr. Jimenez's home "to ensure Mr. Jimenez did not return there." [**RP 88**] In other words, Sergeant Garcia knew full well that Mr. Jimenez was not home and the court reasonably inferred he was motivated to continue searching for evidence. In either case, whether or not Sergeant Garcia intended to "follow up" at the house, or

"follow up" with Mr. Jimenez himself, it is clear his primary motivation was to further his criminal investigation.

As the district court found, and this Court must credit, Garcia's added justification about the sound "of a 'grunt' or a 'groan' from behind the open door does not objectively support a reasonable belief that any person inside the residence was in need of immediate aid to protect or preserve life or avoid serious injury." [**RP 110, No. 14**] Because it was at this point that he swung the door fully open, and stepped in front of the door, that his intrusion was not warranted by any apparent emergency.

Instead, Sergeant Garcia admitted, he next entered the property to arrest Mr. Gardea-Gandarilla when he began to call Mr. Jimenez. [**RP 110-111** (court finding that Garcia's testimony did not indicate "that Gardea-Gandarilla was in need of any aid whatsoever"): **RP 88-89** (Garcia's report that he "went into the house to detain him" for failing to follow orders); **5/16/22 CD11:36:20-:37:05, 11:39:00-:05** (Garcia testified he warned Gardea-Gandarilla he would be arrested on a warrant)]

At trial, Sergeant Garcia emphasized his training to "ensure child safety," which required him to ensure the children were safe upon the arrest of their caretaker. [**5/16/22 CD 11:39:05-:40:15**] Attempting to tie this in with its rationale that the suspected methamphetamine posed the emergency, the state asked leading

questions and Garcia readily agreed "[that] substance being on a child's table [was] also worrisome." **[Id. 11:40:10-:50]** *Cf. State v. Cook*, 2006-NMCA-110, ¶ 12, 140 N.M. 356 (where factual description of a charge was presented in the prosecutor's question, not a witness's answer, finding insufficient evidence of distinctness in the charge under double jeopardy, and noting "The question is not evidence"); *State v. Orona*, 1979-NMSC-011, ¶ 27, 92 N.M. 450 ("[t]he fact that the witness adopted her prior statement by her simple affirmative answers to the prosecutor's leading questions did not cure the error.")

The second *Ryon* factor was not satisfied under the circumstances known to the officers.

3. The Third Ryon *Factor*

As to the third *Ryon* factor, whether there was some reasonable basis approximating probable cause to associate the emergency with the area or the place to be searched, there is nothing in the record to suggest that Sergeant Garcia had any concerns about an emergency as he walked up to the front door and knocked, pushing it fully open. Only then did he hear a "grunt" -- which the district court explicitly found did not warrant an emergency intrusion. The court's finding that the facts were insufficient to justify a warrantless police entry into the home under the emergency assistance doctrine, must be given deference on appeal. *See id.*, 2005-NMSC-005, ¶ 42 (explaining that "[t]o justify the warrantless intrusion into a

private residence under the emergency assistance doctrine, officers must have credible and specific information that a victim is very likely to be located at a particular place and in need of *immediate aid to avoid great bodily harm or death*" (emphasis added)).

In *Ryon*, deputies saw people outside the home and observed "that there was blood all over[.]" 2005-NMSC-005, ¶ 2. Ultimately, a second set of deputies approached the home, found the door to be partially open and no one answering. *Id.* ¶ 4. The deputies in *Ryon* had information that the occupant may have sustained a head wound or head injury. The district court found the facts insufficient to elevate the officers' primary role to that of community caretakers. *Id.* ¶ 7. The Supreme Court agreed. *Id.* ¶ 1.

In this case, evidence of a present emergency was far less than that in *Ryon*. Sergeant Garcia simply maintained that he heard a "grunt" and the district court properly found this evidence was insufficient to justify the officer swinging the door open to view inside. This, coupled with the fact that Garcia repeatedly reported and later testified that he sought to prevent Mr. Jimenez from returning to his home, actively searched the areas Jimenez had been, including in his car, and then went to Jimenez's home to "follow up" shows that criminal investigation, not an actual emergency, motivated the officers' entry into Mr. Jimenez's home. The

district court properly granted the motion to suppress in this case and Mr. Jimenez respectfully requests that this Court affirm the district court.

D. The district court's order should also be affirmed as right for any reason.

On appeal, the state argues that the plain view exception was preserved below. This is so, according to the state, because "the court found that Sergeant Garcia moved to a position just inside the door and it was only then that he could observe illicit drugs." [**AB 7**] Although the state takes issue with the court's findings, it argues "they show the court considered this issue and it was preserved." [**AB 7; see AB 8** (maintaining court "unjustifiably overlooked the plain view basis" for warrantless search)] But in fact, the court could not "overlook," the plain view exception when the parties did not present it at all. [**See RP 108-112** (court's order based on state's proffer of "welfare check" and analyzing lack of exigent circumstances)]; Rule 12-321(A) NMSA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked").

Putting preservation aside, the state argues a search warrant was unnecessary because the officers observed contraband from outside the residence. [**AB 7-12**] Therefore, the state asks this Court to find the court's order was not supported by substantial evidence. [**Id.**] The state relies on out of state cases from North Carolina, Wisconsin, and Georgia, to argue "[i]t is a simple application of the plain view exception to conclude that an officer who observes contraband in plain view

from the porch or other valid position on the exterior of a residence can validly rely on that plain view basis." [**AB 10** (citing cases)]

The state's position ignores both the district court's factual finding -- which implicitly rejected the officer's characterization that when he swung open the door and stepped in front of it, he was not within the threshold -- and New Mexico law on this point.

First, Mr. Jimenez's front steps and porch should have properly been respected as curtilage to his home. In this regard, "[t]he curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *State v. Sutton*, 1991-NMCA-073, 112 N.M. 449 (citing *United States v. Dunn,* 480 U.S. 294, 300 (1987)); *see State v. Hamilton*, 2012-NMCA-115, ¶ 16 ("curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes.").

The cases on which the state relies to argue that Sergeant Garcia's approach and opening of the front door was valid based on his location on the porch, rely on those states' definition of curtilage and / or the officer's separate reason for approaching the premises. *See State v. Lupek*, 712 S.E.2d 915, 917-918 (N.C. App. 2011("In North Carolina, however, no search of the curtilage occurs when an

officer is in a place where the public is allowed to be, such as at the front door of a house."); *State v. Edgeberg*, 524 N.W.2d 911, 914 (Wis. App. 1994) (marijuana was "were in the officer's plain view as he stood knocking at the door" where he went to house on a dog complaint); *State v. Lyons*, 307 S.E.2d 285, 285-287 (Ga. App. 1983) (under "prior valid intrusion" analysis, officers entitled to approach back door in response to animal complaint and belief that residents were at home).

In contrast, Sergeant Garcia had no valid reason to climb the steps to Mr. Jimenez's front door. He had reported that he went to Mr. Jimenez's house to "follow up" on his criminal investigation. But at that point he knew full well that Mr. Jimenez was not back home, since Officer Pando had kept watch. Only as he approached the front door was he supplied the additional justification that since the front door was ajar, he needed to do a "welfare check." And at that point, he acknowledged, his "knocking" on the door caused it to swing nearly fully open, allowing him to see inside as he stepped forward in front of the door. [**RP 88-89**]

Second, the district court implicitly made a proper credibility determination. Under the totality of the circumstances here, where the officer repeatedly overstepped the bounds of Fourth Amendment privacy concerns -- from watching Mr. Jimenez inside his garage, to searching the yards and carports of neighboring houses -- the district court could have reasonably considered that Garcia's conduct offended constitutional protections. *State v. Tapia*, 2018-NMSC-017, ¶¶ 15, 38, 47

(listing the "purpose and flagrancy of the official misconduct" as a relevant consideration when determining whether suppression is warranted under both state and federal attenuation analysis). Of course, the court may properly consider the characteristics and experience of its jurisdiction in suppressing unlawfully obtained evidence. *See* Matthew C. Ford, *The Fourth Amendment Hearing: Prompt Judicial Review of All Fourth Amendment Warrantless Conduct for an Imprisoned Defendant*, 55 Cath. U. L. Rev. 473, 507 (2006) ("when . . . warrantless searches are not regularly subject to the unbiased, critical eye of a neutral magistrate, a police officer has no way of knowing if his conduct truly complies with the Fourth Amendment . . . Only by consistently having an independent judiciary [review] all warrantless search cases will the prevention of police misconduct be accomplished.").

Moreover, the district explicitly found that Sergeant Garcia did not observe either Mr. Gardea-Gandarilla or any suspected methamphetamine until he was "inside the residence." [**RP 109**] Given the testimony and the prosecution argument, it is reasonably likely that the district court implicitly found that Garcia intentionally swung the front door open and stepped into the threshold as he repositioned himself, and that this constituted the unlawful entry. The state emphasizes in its brief that on cross examination, Sergeant Garcia denied stepping into the home. [**BIC 5, citing 5/16/22 CD 11:48-:49**] The district court clearly

made a credibility determination and rejected Garcia's testimony. This Court must defer to the district court's findings. *See State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592 ("As a reviewing court we do not sit as a trier of fact; the district court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses.").

CONCLUSION

Because suppression of the evidence was squarely supported by the district court's credibility determinations and factual findings, Mr. Jimenez respectfully requests this Court affirm the district court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was filed via Odyssey File and Serve which caused service by electronic delivery to Assistant Attorney General Michael J. Thomas at the Attorney General's Office, Criminal Division, this the 23rd day of October, 2023.

/s/ Luz C. Valverde
Law Offices of the Public Defender

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v. **No. A-1-CA-40496**

BILLY JIMENEZ,

Defendant-Appellee.

STATE OF NEW MEXICO'S REPLY BRIEF

Appeal from the Fifth Judicial District Court
Lea County, New Mexico
The Honorable Lee A. Kirksey

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INTRODUCTION

In his answer brief, Defendant essentially attempts to muddy the record in this fairly simple matter.[1] The law enforcement officer, as Defendant expressly admits, testified at the suppression hearing that he saw narcotics through the open door. **[AB 1]** As demonstrated in the Brief-in-Chief, and as discussed below, it was clear that the officer observed narcotics in plain view ***prior to*** entering the residence. Defendant's answer brief (a) argues that the plain view exception was not preserved; and (b) erroneously attempts to rely on the district court's own findings as bootstrap-type support for those findings without regard to the actual testimony.

As to preservation, the plain view exception was preserved as demonstrated by the prosecutor's argument at the suppression hearing, defense counsel's own questioning, and the district court's express (albeit mistaken) findings. As to the merits, Defendant attempts to de-emphasize the actual suppression hearing testimony of the sole witness (Sgt. Garcia) and fails to squarely dispute that the

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[1] Defendant alleges that Sgt. Garcia was somehow improperly surveilling him in the day before the early a.m. traffic stop. **[AB 1]** Defendant fails to show how this negates the applicability of the plain view exception here or is otherwise relevant in light of the suppression hearing testimony. Defendant also writes that the officer "repeatedly overstepped" privacy concerns. **[AB 23]** At bottom, Defendant seems to be pointing only to the apparent, but irrelevant, fact that the officer, from a public street, had earlier observed Defendant's residence and observed subjects doing something to a vehicle in the garage. **[AB 2]**

testimony not only clearly and unequivocally supported the applicability of the plain view exception, but utterly failed to support the district court's inexplicable findings that the officer entered the house first and then saw the narcotics. Defendant's reliance on the court's findings is unavailing because no evidence, let alone substantial evidence, supported the court's findings that the officer observed narcotics only after he entered the residence. Rather, the officer's uncontroverted testimony at the hearing was that he observed the narcotics in plain view from outside the residence, through the open door, ***before*** he entered the residence.

ARGUMENT

I. THE PLAIN VIEW EXCEPTION WAS PRESERVED BY THE STATE.

Defendant's assertion that the plain view exception was not preserved is demonstrably false. **[AB 21]** As detailed below, the prosecutor's arguments, particularly at the suppression hearing, preserved the issue. The preservation of the plain view issue is also demonstrated by defense counsel's implicit acknowledgment of the issue and the court's own findings, even if those findings are unsupported by evidence.

a. The prosecutor preserved the plain view exception.

In the State's response to Defendant's motion to suppress, the State asserted that Sgt. Garcia could see through the open door and there was a "clear view" into the

living room. **[RP 95-96, ¶¶ 5-6]** Those same paragraphs also asserted that the officer could see what appeared to be a child's high chair. **[RP 96, ¶¶ 6, 9]** The State's response also asserted that the methamphetamine and a meth pipe, which were on top of the "highchair," were "visible from the door." **[RP 97 ¶ 21, RP 98]** That was sufficient to preserve the plain view exception. *See* Rule 12-321(A) NMRA (an issue is preserved if a ruling or decision by trial court was fairly invoked).

Additionally, the State asserted plain view at the subsequent suppression hearing.[2] That the State also argued the emergency assistance doctrine does not negate the applicability of the plain view exception. To aid in illustrating that the plain view exception was clearly preserved, and in fact demonstrably proven, it warrants setting forth key testimony below, partly made necessary due to Defendant's failure to expressly quote any notable parts of the record:

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[2] Defendant did not call any of his own witnesses at the suppression hearing, which is not surprising as Defendant himself was not at the residence during the key time period. Instead, Defendant, through counsel, simply cross-examined the officer, but failed to produce any evidence negating the officer's key testimony. The lapel camera video was not admitted, or even offered, at the suppression hearing. The prosecutor stated to the undersigned that she had intended to provide the video as an exhibit but she admittedly missed the deadline for submission of exhibits. At the same time, had the lapel camera video been helpful to Defendant, he could have sought its admission.

Sgt. Garcia: . . . [i]n order to put myself in a more tactical position, I did step up on the porch. At the point that I stepped up on the porch, I was I did cross the door **on the outside of the residence**. **From the outside of the residence, I clearly observed** a subject sitting directly in the opening of the door, from the outside of the residence.[3]

[Sgt. Garcia explains that he knew the subject to have an outstanding arrest warrant]

Prosecutor: And what else was of note about what you could see around that subject?

Sgt. Garcia: **Right there within his reach, within arm's reach, there was a glass pipe that's typically used to ingest, based on my training and experience, it's typically used to ingest, illegal narcotics into the human body, as well as a little bag that contained a clear crystalline substance that's consistent with methamphetamines**.

Prosecutor: And where were those in, where were those sitting?

Sgt. Garcia: They were on, I believe it was a without being able to go right off of hand, I believe there was a little kid table that was directly to the right [of the subject] . . .

[5-16-22 CD 11:36:03-11:38:00] (Emphasis added.)

During later legal argument, the prosecutor asserted that the testimony showed that Sgt. Garcia, upon arriving at Defendant's house, saw that the door was open and, upon knocking, the door opened further. **[*Id.* 11:50:30-45]** The State

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[3] *See* **[BIC 8, n. 7** (providing context for why a police officer may, while remaining ***outside*** a building, change his viewing angle for officer safety due to possible unknown dangers inside building)**]**

also noted that the testimony showed that the officer, from "in front of the door, not inside the door," saw an individual who, besides being the subject of an arrest warrant, had narcotics "***within view and within reach***." **[*Id.* 11:50:46-59 (emphasis added)]** It is difficult to imagine the plain view exception being more clearly preserved, and actually established, than as just described.

Defendant at numerous points attempts to implicitly discount the actual suppression hearing testimony. The suppression hearing testimony, as shown above, made the plain view exception salient. Although the written motions and responses applicable to a suppression issue are relevant, many New Mexico appellate decisions emphasize that the actual evidence presented at the hearing, including the testimony, is typically just as important, if not practically dispositive, in preserving and establishing key facts and legal theories. *See*, *e.g.*, *State v. Paananen*, 2015-NMSC-031, ¶ 11, 357 P.3d 958 (agreeing with Court of Appeals that the state preserved its alternative search incident to arrest theory; state "clarified during the suppression hearing" that it was also relying on that theory and adduced "the evidence necessary to support the legal principle"); *State v. Mosley*, 2014-NMCA-094, ¶ 3, 335 P.3d 244 (noting that factual background is based on "testimony presented at the hearing" on defendant's motion to suppress). That applies with perhaps greater force here where the district court ***granted*** the motion to suppress, substantially impacting the State's case. *Cf. State v. Monafo*,

2016-NMCA-092, ¶ 10, 384 P.3d 134 (in reviewing a district court's ***denial*** of a motion to suppress, appellate court will consider the entire record, not just evidence presented during suppression hearing).

The hearing in this matter was held May 16, 2022, a month and a half after the State filed its response to Defendant's motion. **[RP 95-100]** As is not out of the ordinary, the testimony at the actual hearing further clarified matters even if asserted in the response. The plain view issue was preserved because the district court was presented with the legal assertions and facts needed to rule on the issue and the opposing party had a chance to respond. *See Paananen*, 2015-NMSC-031, ¶ 11 (noting that defendant had an opportunity to respond in the court below).

b. Defense counsel implicitly acknowledged that the plain view exception had been put in issue.

Moreover, defense counsel's cross-examination further corroborated the applicability of the plain view exception, as set forth here:

Def. Attorney: You then said that you moved to a more tactically sound position, is that not correct?

Sgt. Garcia: Yes.

Def. Attorney: And you also stated that that more tactically sound position got you slightly inside the residence, did it not?

Sgt. Garcia: Negative. I didn't go inside the residence. I could see inside the residence but my mere vision seeing inside the residence doesn't place me inside the residence. I can see clearly, I can see miles. That doesn't mean that

I'm where I'm looking at.

. . .

Def. Attorney: OK because what you said earlier was that you went inside the residence slightly in order to see the items that you . . .

Sgt. Garcia: [talking over defense attorney] . . . No no no you're twisting my words. I said I can see inside the residence. I said I stepped up **on** the porch. **Never once did I say I went into the residence**. I can see into a residence. I mean I can see into your office that doesn't mean I'm in your office.

Def. Attorney: (slight pause) Your honor, no further questions.

[5-16-22 CD 11:48:30-11:49:58] (Emphasis added.)

As shown, defense counsel somewhat abruptly, and perhaps tellingly, rested, apparently because it was obvious that further questions would only emphasize what was already apparent, *i.e.*, that the plain view basis had been not only preserved but objectively proven.

It also warrants observation that there appears to be no record, good faith basis for trial defense counsel's implicit assertion that there was some earlier statement made by the officer that is anywhere close to supporting a conclusion that he entered the residence prior to observing illegal narcotics. The suppression hearing audio shows that any statements by the officer about entering the residence were clearly in regard to a point in time ***after*** he observed (from outside the residence, before crossing door threshold) the narcotics on a small table next to the

subject in Defendant's residence and after the subject, known to have an arrest warrant, had mentioned that he was watching Defendant's two small children.

c. The district court's own findings demonstrated its awareness of the plain view issue.

The district court's findings reveal that it was aware of the plain view exception's relevance here, even if those findings, as explained in the next section, were unsupported by any evidence. For example, the district court made these findings:

> 9. *Once inside the residence*, Sgt. Garcia testified that he could observe a subject whose arrest he knew to be authorized by warrant: [subject's name].
>
> 10. *Once inside the residence*, Sgt. Garcia testified that he observed other evidence of illegal activity: a white crystalline substance consistent with methamphetamine; [and] a glass smoking device consistent with the ingestion of illicit controlled substances[.]

[RP 109, ¶¶ 9-10] (Emphasis in original). Those findings were mistaken factually as to the chronology, as will be discussed more in the next section. However, they demonstrate that the district court was aware that the plain view issue was squarely before the court for decision. That the court was mistaken as to the chronology, given the uncontradicted evidence demonstrating that the officer observed the narcotics and paraphernalia from outside the residence ***before*** entering the residence, does not detract from the obvious conclusion that the court was aware of the front and center nature of the plain view exception.

II. THE DISTRICT COURT'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE CONTRARY TO THE UNCONTRADICTED TESTIMONY ELICITED AT THE SUPPRESSION HEARING.

This Court reviews factual matters with deference to the district court's findings if substantial evidence exists to support them, and reviews the district court's application of the law de novo. *State v. Almanzar*, 2014-NMSC-001, ¶ 9, 316 P.3d 183; *see also State v. O'Neal*, 2009-NMCA-020, ¶ 16, 145 N.M. 604 (district court's findings must be supported by substantial evidence). The district court found, completely contrary to the evidence, that Sgt. Garcia stepped into the residence before he could observe the narcotics. **[RP 108-11]** For example, the district court somewhat incredulously found:

> 8. In response to direct questioning by the State, Sgt. Garcia testified that his training as a police officer taught him to avoid tactically-compromised situations such as that presented by an unknown and unseen person grunting or groaning from behind a door. Sgt. Garcia testified that he therefore moved to a more "tactically sound" position just inside the door.

[RP 88, ¶ 8]

However, the evidence, as set forth in the Brief-in-Chief and above, clearly shows that Sgt. Garcia was outside the residence when he first observed the narcotics, ***prior to*** stepping through the door threshold. As set forth earlier in this reply brief, Sgt. Garcia consistently stated that he remained ***outside*** the residence and observed the narcotics and paraphernalia through the open door. The

suppression hearing testimony crystallized and supported the applicability of the plain view exception already raised in the State's response to Defendant's motion to suppress. Defendant fails to summarize any evidence purportedly supporting the district court's contrary findings.

Even the amended criminal complaint, upon which Defendant attempts to rely to support his argument, makes it clear that Sgt. Garcia remained outside the residence and, from that vantage point ***outside*** the residence, was able to observe the narcotics in plain view in the residence. Specifically, the amended criminal complaint notes that "[p]rior to making entry to the residence," and while remaining on the steps of the porch, Sgt. Garcia could see "through" the near fully open front door. **[RP 88]** Sgt. Garcia also wrote that as he looked "into the residence" from "in front of the door," he observed a subject and a glass smoking device and a clear plastic bag containing a clear crystalline substance consistent with methamphetamine. **[RP 88-89]** After the subject stated he was not exiting and started using a phone, Sgt. Garcia "***then*** went into the house to detain" that subject. **[RP 89 (emphasis added)]** The use of the word "then" supports, and only supports, a finding that the officer entered the house ***after*** having already observed illicit narcotics in plain view from outside the residence.

Despite this, Defendant appears to nebulously imply that there was some discrepancy between the amended criminal complaint and the suppression hearing

testimony, when in fact there is no material discrepancy. **[AB 8]** Further, that the amended criminal complaint refers to a welfare check does not negate the chronology of the observations as reported in the amended criminal complaint, a chronology which supports the plain view exception's applicability and which was corroborated by the suppression hearing testimony. Defendant fails to demonstrate how the reference to a welfare check negates the chronology involving a clear sight of narcotics in plain view from the outside of the residence prior to entry into the residence. **[*Id.*]**

Although this Court may review the amended criminal complaint itself, the following are excerpted from that document in the order in which they appear:

> Prior to making entry to the residence, I knocked on the front door and announced myself as Lovington Police Department[.] . . .
>
> As I looked into the residence directly in front of the door, I observed a subject [known to have an outstanding warrant] . . . As I was ordering him out of the residence, ***I observed a glass smoking device within arms reach of his left hand. Next to the glass smoking device I observed a clear plastic bag containing a clear crystalline substance which was consistent with methamphetamine.*** . . . I told [subject] not to get on his phone and ***then*** [I] went into the house to detain him for failing to follow lawfully given orders.

[RP 88-89 (emphasis added)] The use of "then" clearly supports a chronology consistent with the officer's testimony at the hearing supporting the plain view exception. Yet, despite that clear chronology, established in the amended criminal complaint and corroborated at the suppression hearing, that Sgt. Garcia could

observe the narcotics in plain view from outside the residence ***prior to entering***, Defendant incredulously cites to that same page of the amended criminal complaint as if it supports the court's findings. **[AB 8 (citing RP 88)]**

The district court also found as follows without any record support:

> 11. Sgt. Garcia's testimony was consistent with the State's pleading that "Sgt. Garcia entered the house" (State's Response, ¶ 14) before discovering any "drugs and drug paraphernalia" (*id.*, ¶¶ 21, 23).

[RP 110 ¶ 11] As the State noted in the Brief-in-Chief, the State never asserted or claimed, even in the paragraphs referenced by the district court,[4] that Sgt. Garcia entered the house prior to observing illegal drugs. **[BIC 9]** The referenced paragraphs of the State's Response, individually or collectively, do ***not*** support any finding that the officer first entered the house before observing narcotics in plain view. By way of example, the court's citation of paragraph 14 of the State's response is unavailing; that paragraph simply stated that Sgt. Garcia "entered the house as the man pulled a phone from his pocket and ignored the officer's requests to show his hands and come outside." **[RP 96, ¶ 14]** As noted above, the amended

[4] It appears that the district court read too much into the superficial order in which the State asserted certain items in the State's Response, in a "paragraph ordering" sense, without regard to the actual underlying chronology of events, particularly as established at the suppression hearing. That simply demonstrates why the actual evidence and testimony put forth at a suppression hearing, with an opportunity for the court to clarify matters through its own questions is typically, as here, paramount.

criminal complaint makes it clear, consistent with the hearing testimony, that before the officer entered the residence, he had already observed the narcotics. Likewise, paragraphs 21 and 23 fail to support the court's finding. **[RP 97, ¶¶ 21, 23]**

The State's response stated that the officer "stepped in front of the door" and observed a man sitting in a chair next to a blue table or chair that looked like a child's "highchair." **[RP 96, ¶ 9]** Nothing in the State's response detracts from the established fact that the officer had a "clear view" observation of narcotics in plain view on the "highchair" ***from outside*** of, and ***prior to entering***, the residence, as to which he clearly testified as detailed above. **[RP 96-97, ¶¶ 6, 21]** Likewise, there is no record basis for the district court's finding that the officer crossed the threshold into the property when he assumed a more tactically sound position on the porch. **[RP 111 ¶ 15; BIC 8, n. 7]**

It is acknowledged, as noted above, that the State has the burden to show that the district court's findings are unsupported by substantial evidence. At the same time, in order to defend the result in good faith on appeal, Defendant should ideally strive to point out where substantial evidence allegedly supports the court's findings. Yet, Defendant has utterly failed to point to any evidence, particularly hearing testimony, even superficially supporting the suppression order. Instead, Defendant either (a) makes misstatements about the record despite citing to the

record to make it appear that the assertions are supported, or (b) makes assertions with no record citations whatsoever. For example, Defendant asserts that, according to the State's response, it was only "after" officers entered to arrest the subject that they found drugs. **[AB 6 (fourth line up from bottom)]** However, Defendant provides no record cite at the end of that sentence. The very next sentence of the Answer Brief refers to a single paragraph of the State's response which merely references the drugs being collected but does not touch on the ***chronology*** of the key events and, therefore, fails to support Defendant's asserted chronology. **[AB 6-7 (citing RP 97)]**

Defendant cites *State v. Lovato*, 1991-NMCA-083, ¶ 12, 112 N.M. 517 for the proposition that a trial court is not required to accept uncontradicted testimony as true. **[AB 12]** However, *Lovato* made it clear that, as part of facilitating effective appellate review, the district court typically must indicate specifically in the record the reasons for rejecting such "uncontradicted testimony." *Id.* ¶¶ 19-21, 36 (remanding for specific findings because it did not appear that district court rejected testimony of the officer and, regardless, it was not possible to ascertain a basis for the trial court's possible rejection of such uncontradicted testimony). Here, the district court's order did ***not*** contain any such specific findings as called for by *Lovato*. **[RP 108-12]** Rather, the court simply made findings that are woefully unsupported in the record. This Court should reverse the district court's

decision as the court improperly rejected, with no basis whatsoever, the officer's correct reliance on the plain view exception. Defendant, aware of this issue, offers only speculation in this regard. **[AB 24 (asserting it is "likely" that the court "implicitly" found certain facts)]** The problem, however, is that there is no evidence to support the district court's factual findings, even apart from its failure to explain why it ignored the clear testimony.

As to the emergency assistance doctrine also asserted in the district court, the State largely relies on its argument in the Brief-in-Chief that that doctrine is an independent basis for properly reversing the district court's decision. **[BIC 13-15]** Defendant has failed to show how, even apart from the uncontradicted evidence that the officer observed narcotics in plain view (and within reach of a child) from the exterior of the residence, the officer was not separately justified in also entering the residence due to the subject (about to be arrested on an arrest warrant) admitting that he was the only caretaker of Defendant's two small children in the residence who would otherwise be alone. **[*Id.*]** Defendant admits that the officer testified to his concern with the presence of narcotics around otherwise unattended children[5] given the imminent warrant arrest of the sole adult subject present in

[5] As noted in the Brief-in-Chief, the court's findings in this regard were focused on the subject and failed to address Sgt. Garcia's concern with the ***children*** being unattended. **[BIC 14-15]**

Defendant's house. **[AB 18-19 (conceding that officer testified that the narcotics on the table were worrisome given presence of small children)]** The officer's testimony on that issue is not negated because of Defendant's inflated and misplaced concern that the prosecutor allegedly asked "leading" questions.[6] **[*Id.*]** Defendant fails to reasonably develop his implicit argument about some issue or fact he contends was referenced only in passing in some assertedly leading question. Nor does Defendant explain how a fairly mundane "Evidence 101" concern with leading questions is relevant to his practical (if not legal) obligation, as the appellee, to at least attempt to show, even out of self-interest, what evidence purportedly supports the district court's findings.

Finally, Defendant asserts that the court's ruling should be affirmed for any reason, arguing that his rights were violated because the porch was part of the curtilage of the residence. **[AB 22]** Defendant's attempt to rely on the ability of a

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[6] The cases upon which Defendant's appellate counsel relies are patently inapplicable. **[AB 19]** The cited case of *State v. Cook*, 2006-NMCA-110, ¶¶ 12-13, 140 N.M. 356, merely confirms that a "fact" stated for the first time in a prosecutor's question, and not affirmatively by the victim who simply answered "uh-hum," is not evidence, particularly in that case's larger context involving "vague and equivocal" evidence about how many counts of tampering with evidence were justified. Defendant also cites *State v. Orona*, 1979-NMSC-011, ¶ 27, 92 N.M. 450, which concerns the proper way to refresh a witness's recollection, a topic simply inapplicable here. **[*Id.*]** It is unclear why Defendant's appellate counsel cites these cases when the focus (purely from Defendant's perspective) in the Answer Brief should presumably be on citing actual evidence that superficially supports the district court's chronology-related findings.

reviewing court to affirm a lower court if it is right for any reason is erroneous here. Defendant did not raise the curtilage issue below and it would be unfair to the State, as appellant here, to affirm on that basis, particularly given the fact intensive nature of that aspect within the larger Fourth Amendment context. *See, e.g., State v. Gonzales*, 2011-NMCA-007, ¶ 14, 149 N.M. 226 (noting that the right for any reason doctrine should not be applied when it would be unfair to the appellant who did not receive notice in the district court of the ground upon which the doctrine is asserted on appeal). It would be unfair to the State, as appellant, to allow Defendant to now attempt to uphold the erroneous district court suppression order on that or any related basis. *Id.*

Defendant has failed to rebut the nigh inescapable conclusion that no substantial evidence—in fact, no evidence in the record—supports the district court's factual findings in its suppression order. The unrebutted testimony demonstrates that the officer observed narcotics in plain view from ***outside the residence prior to*** entering the residence. Accordingly, the district court's suppression order must be reversed. *Almanzar*, 2014-NMSC-001, ¶ 9; *O'Neal*, 2009-NMCA-020, ¶ 16.

CONCLUSION

For the reasons set forth above, the State asks that this Court reverse the district court's order granting the motion to suppress and remand this matter for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on November 13, 2023, I filed a true and correct copy of the foregoing Reply Brief electronically through the Odyssey E-File & Serve System, which caused opposing counsel of record to be served by electronic means at luz.valverde@lopdnm.us.

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