No. S-1-SC-40576

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Respondent,

v.

ALIKA ARISUMI,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS PURSUANT TO RULE 12-502 NMRA

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Petitioner Alika Arisumi, by and through counsel of record, Scott M. Davidson, respectfully requests a writ of certiorari to the Court of Appeals of New Mexico pursuant to Rule 12-502 NMRA, to review its memorandum opinion affirming Mr. Arisumi's conviction and sentence. *See* Attachment A (memorandum opinion).

The decision of the Court of Appeals conflicts with established New Mexico case law regarding constitutional rights, evidence, sentencing and appeals.

Court of Appeals Decision

The Court of Appeals affirmed Mr. Arisumi's conviction and sentence. *See* Attach. A.

Questions Presented

1. The trial court excluded evidence showing Mr. Arisumi's state of mind at the time of the allegedly fraudulent transaction, depriving him of the right to present his defense that he lacked fraudulent intent. Applying the wrong standard of review, the panel below affirmed the lower court's erroneous decision. Does the Court of Appeals' opinion conflict with *State v. Campbell*, 2007-NMCA-051, ¶ 14, 141 N.M. 543; *State v. Belanger*, 2009-NMSC-025, ¶ 8, 146 N.M. 357;

State v. Neal, 2007-NMSC-043, ¶ 15, 142 N.M. 176; and *State v. Martinez*, 2021-NMSC-002, ¶ 25?

2. Over Mr. Arisumi's objection, the trial court admitted unfairly prejudicial testimony about events *after* the allegedly fraudulent transaction, which was not probative of Mr. Arisumi's intent or any other factual issue. Without identifying a single factual issue to which the evidence was probative, the appellate panel affirmed this erroneous decision. Does the Court of Appeals' opinion conflict with *State v. Maxwell*, 2016-NMCA-082?

3. After Mr. Arisumi began serving his sentence, the district court increased the probation term by two years without Mr. Arisumi being present, in violation of his constitutional right, as recognized in *State v. Stejskal*, 2018-NMCA-045, ¶ 14. Applying the wrong standard of review, and ignoring *State v. Ballard*, 2012-NMCA-043, ¶ 47, the panel below affirmed this erroneous decision. Does the Court of Appeals' opinion conflict with *Stejskal* and *Ballard*?

4. At sentencing, the district court imposed a restitution amount that was approximately double the amount of the victim's actual damages, exceeding the scope of restitution authority under

NMSA 1978, § 31-17-1(A). The Court of Appeals affirmed the erroneous restitution order. Does the Court of Appeals' opinion conflict with *Matter of Contempt of Maestas*, 2022-NMCA-057, ¶ 37, and *State v. Lack*, 1982-NMCA-111, ¶ 12, 98 N.M. 500?

Facts

Mr. Arisumi was convicted of fraud and improper sale, disposal, removal or concealing encumbered property, in connection with the sale of a used car.

At trial, one of the key issues was whether he intended to deceive or defraud the buyer, Jodette Miller. The trial court excluded evidence of his intent at the time of the transaction, which hobbled his attempt to show that he lacked fraudulent intent. It admitted clearly prejudicial testimony with no probative value, increased his probation term by two years *after* he began serving his sentence, and ordered restitution that was approximately double the victim's actual damages.

Without oral argument, a panel of the Court of Appeals overlooked these errors, twice applying the wrong standard of review, and ignoring well-settled New Mexico law.

Basis for Granting the Writ

1. The Court of Appeals' exclusion of evidence showing that Mr. Arisumi lacked fraudulent intent conflicts with *Campbell*, *Belanger*, *Neal*, and *Martinez*.

Because the central question at trial was whether or not Mr. Arisumi intended to defraud Ms. Miller, he sought to introduce a written draft of a contract to prove his intent. He expressly noted several times that he was aware that it was not a valid contract, was not signed by Ms. Miller, and that he had no intention of arguing that it was a valid contract, or that it expressed her intent. The trial court excluded this evidence, even though his intent was an essential element of both charges he faced.

The Court of Appeals incorrectly applied an abuse of discretion standard, even though *de novo* is the proper standard of review for interference with a defendant's constitutional right to present a defense. *See Belanger*, 2009-NMSC-025, ¶ 8 (*de novo* review applies to issue implicating right to fair trial); *Neal*, 2007-NMSC-043, ¶ 15 (applying *de novo* review of constitutional issue); *Martinez*, 2021-NMSC-002, ¶ 25 (same; citing *Belanger* and *Neal*).

Despite acknowledging that this is a constitutional matter, the panel incorrectly applied an abuse of discretion standard that does not apply where a constitutional issue is at stake. *See* Attach. A at 5, ¶¶ 8-9.

This Court should reverse the panel opinion not only because it applied the wrong standard of review, conflicting with *Belanger*, *Neal*, and *Martinez,* but because its holding and reasoning conflict with *Campbell*, which held that exclusion of evidence is reversible error where it "may have made a potential avenue of defense unavailable" to the defendant. *See* 2007-NMCA-051, ¶ 14.

As required by *Campbell*, Mr. Arisumi showed that the erroneous evidentiary exclusion precluded him from showing the jury his understanding at the time of the sale. *See* Brief in Chief at 39. His intent and knowledge were at issue in Essential Elements #s 1 and 2 of Count 1, and Essential Element #1 of Count 2. *See* R.P. 272, 273. Although the unsigned agreement was not a valid contract, Mr. Arisumi never contended that it was such; he intended to introduce it to show the jury what he understood Ms. Miller had agreed to and what he believed his ex-wife Faith Arisumi had negotiated with Ms. Miller. *See*

R.P. 87, ¶ 7.

The worry that Mr. Arisumi would "attempt to use the unsigned contract to argue that it encompassed the agreement of the parties," Attach. A at 6, ¶ 10, was unfounded. Mr. Arisumi made it clear multiple times that this was not his intent in introducing the contact. *See* R.P. 78, ¶ 7.

Under *Campbell*, it was reversible error for this evidence to be excluded. "[A]n avenue for [Mr. Arisumi's] defense was foreclosed by an evidentiary ruling" because it "may have made a potential avenue of defense unavailable to the defendant." 2007-NMCA-051, ¶ 14. The appellate panel below made no attempt to distinguish *Campbell*; in its treatment of this issue, it wholly ignored *Campbell* and the question—*viz.*, whether the district court erred as a matter of law by denying Mr. Arisumi a potential avenue of defense by excluding this probative evidence of his intent. *See* Attach. A *passim*.

The panel's application of the wrong standard of review invalidates its decision. For instance, the panel concluded that Mr. Arisumi had not shown "that the district court lacked the discretion to exclude the evidence." Attach. A at 8, ¶ 14. This appeal should be

remanded to the Court of Appeals to apply the correct standard of review—*de novo*, *see Belanger*, 2009-NMSC-025, ¶ 8; *Neal*, 2007-NMSC-043, ¶ 15; *Martinez*, 2021-NMSC-002, ¶ 25—and to consider the implications of *Campbell* for this case.

2. The Court of Appeals ignored *Maxwell* in allowing the admission of unfairly prejudicial testimony with zero probative value.

Ms. Miller testified that she "had to wait for about . . . an hour to get a cab. We had to get a cab and then we had to get car seats to put the grandkids in the cab." 3/9/23 at 4:03:21 PM.

Mr. Arisumi's lawyer objected, arguing this testimony had zero probative value: "What does that have to do with anything about whether or not there was an attempt to deceive, cheat?" 3/9/23 at 4:03:52 PM. The state argued that it showed that the alleged victim suffered, endured extreme hardship, and was harmed. 3/9/23 at 4:04:27-56 PM. Stating that it showed "the stuff that they've gone through," the court refused to instruct the jury to disregard it. *See id.*

This testimony was not relevant to any essential element of either Count 1 or Count 2. *See* R.P. 272-73. As such it had zero probative value. The purported basis for affirmance is that the testimony of events that took place *after* the alleged fraud and repossession of the car is that it provided

"context." Attach. A at 10-11, ¶ 18. But events taking place after the completion of the alleged fraud and even after the repossession of the car could not possibly provide context. Ms. Miller's testimony about what happened *after* the car was repossessed was pure prejudice, with no probative value.

The panel's affirmance of the trial court's admission of highly prejudicial testimony with no probative value conflicts with *Maxwell*, 2016-NMCA-082, ¶ 15.[1]

In *Maxwell*, a defendant sought to introduce financial statements that had been prepared at the victim's request. The *Maxwell* Court explained why this evidence was inadmissible:

> Defendants fail to explain how [victim's] recollection of whether he requested the account statements was relevant or would have impacted anything in the case. . . . [S]uch a purported gap in [victim's] memory *is not relevant to any element of the charges* against Defendants. Defendants argue that the reason for [a defendant's] proposed testimony was to show why he had prepared the statements. The reason behind the production of the account statements is also *not relevant to any element of any of the charges* brought against the Defendants.

Maxwell, 2016-NMCA-082, ¶ 15 (emphases added).

[1]There is no truth to the panel's assertion that Mr. Arisumi did not develop this argument on appeal. *See* Attach. A at 11, ¶ 19. He devoted approximately fifteen pages in his briefs to this issue. *See* BC at 24-25, 41-53; RB at 13-15. Mr. Arisumi cited no less than eight appellate cases, one statute, two rules of evidence, and one treatise; citations to the record and audio log notes from the trial number in the dozens. *See* BC at 24-25, 41-53; RB at 13-15.

The panel asserted that the testimony provided "context." Attach. A at 10-11. But the events that were the subject of Ms. Miller's testimony occurred *after* the repossession of the vehicle. The panel offered no explanation of how this "context" assisted the jury in determining Mr. Arisumi's intent at an earlier time. The irrelevant testimony had only one purpose—to inflame the passions of the jury, prejudicing them against Mr. Arisumi.

3. Increasing Mr. Arisumi's sentence in his absence *after* he began serving the sentence conflicts with New Mexico case law in multiple ways.

The district court's increase in the probation term by two years without Mr. Arisumi being present—*after* he began serving his sentence—violated his constitutional right to be present when sentence is pronounced. Applying the wrong standard of review, *see State v. Ballard*, 2012-NMCA-043, ¶ 47, the panel below affirmed this erroneous decision, conflicting with *State v. Stejskal*, 2018-NMCA-045, ¶ 14.

The district court's authority to alter its sentence is a legal issue reviewed *de novo*. *See Ballard*, 2012-NMCA-043, ¶ 47 ("[W]e review the legal issue of authority *de novo* . . . ."). Failing to cite *Ballard*, the panel

erroneously relied on *State v. Cumpton*, 2000-NMCA-033, ¶¶ 9-10, 129 N.M. 47. *See* Attach. 12, ¶ 21. But *Cumpton* did not involve any question of the sentencing court's authority; at issue there was whether the district court's sentence fully took into consideration mitigating evidence. *See* 2000-NMCA-033, ¶ 9. By applying the wrong standard of review, the panel decision conflicts with *Ballard* and decades of well-established New Mexico law. *See, e.g.,*

On the merits, the Court of Appeals mistakenly relied on *State v. Rushing*, 1985-NMCA-091, 103 N.M. 333. *See* Attach. A at 12, ¶ 21. In *Rushing*, after a dogfighting felon deliberately misrepresented at sentencing that he kept his pit bills "as pets," 1985-NMCA-091, ¶ 1, it came to light that he made money from fighting them, *see id.* at ¶ 2, whereupon the state moved for reconsideration of sentence. *See id.* After a hearing—at which the dogfighter was present—the court changed his sentence from a deferred sentence to a term of incarceration, noting that he had made deliberately false statements, which the court later discovered. *See id.* at ¶¶ 3 & 8. The issue on appeal in *Rushing* was whether this was double jeopardy because the

probation term had been commenced prior to reconsideration. *See id.* at ¶ 5.

In Mr. Arisumi's case, by contrast, he was not present for any resentencing hearing; there was no motion to reconsider; there was no misrepresentation at sentencing. *Rushing* has nothing to do with this case.

The panel also erroneously relied on *State v. Jenkins*, 2024-NMCA-019. *See* Attach. A at 12, ¶ 21. *Jenkins* held that a motion to reconsider filed within 90 days of the entry of the judgment is timely, an issue that is far afield from Mr. Arisumi's case.

The Court of Appeals also relied on *State v. Kenneman*, 1982-NMCA-145, ¶ 8, which held that in sentence revocation proceedings, the court may impose "any sentence it could originally have given." Attach. A at 12, ¶ 21. In so holding, the *Kenneman* court noted that at the original sentencing, the court confused "the language connoting suspension with the language connoting deferral," but "the written sentence was clearly a deferral under [NMSA 1978], § 31-20-3(A)." 1982-NMCA-145, ¶ 9. But in Mr. Arisumi's case, there was

no issue of suspension versus deferral, and there was no revocation proceeding. *Kenneman* does not apply.

The Court of Appeals opinion conflicts with *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246; *State v. Porras*, 1999-NMCA-016, 126 N.M. 628; Rule 5-612(A) NMRA (requiring defendant's presence at "all proceedings" and "all hearings"). In *Garcia*, this Court observed that "[a] defendant's right to be present at every stage of the trial is grounded in the Sixth" and Fourteenth Amendments. 1980-NMSC-132, ¶ 15. And *Porras* teaches that a sentencing court "cannot increase a valid sentence once a defendant begins serving that sentence." 1999-NMCA-016, ¶ 7.

Mr. Arisumi began serving his sentence May 11, 2023 after the sentencing hearing held April 27, 2023, in which he was ordered to serve three years of probation after completion of the incarceration. *See* 4/27/23 at 3:59:41 to 4:02:11 PM. Approximately one month later, on June 6, 2023, the court added two years to the probation term, even though Mr. Arisumi had already commenced the sentence nearly one month earlier. *See* R.P. 290-95. The increase was not the result of any

motion, or hearing; it was an illegal increase in his sentence without his presence.

The Court of Appeals' opinion conflicts with *Garcia*, *Porras*,

4. Restitution that is approximately double the victim's actual damages conflicts with *Maestas* and *Lack*.

At sentencing, the district court erroneously imposed a restitution amount that was approximately double the amount of the victim's damages, contrary to NMSA 1978, § 31-17-1(A). In the Court of Appeals' one-paragraph treatment of this issue, it ignores statutory language and case law. *See* NMSA 1978, § 31-17-1(A)(2) (defining "actual damages" as "all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish and loss of consortium"); § 31-17-1(A)(4) (defining "restitution" as "full or partial payment of actual damages to a victim"). The panel opinion conflicts with *Matter of Contempt of Maestas*, 2022-NMCA-057, ¶ 37, and *State v. Lack*, 1982-NMCA-111, ¶ 12, 98 N.M. 500.

It is undisputed that there was no evidence to support a restitution award of $8400. *See* AB at 17-20; RB at 17-18.

The Court of Appeals' affirmance of the excessive restitution amount conflicts with statutory language, *Maestas* and *Lack*. *See* Attach. A at 13-14, ¶ 22.

Oddly, the Court of Appeals contended that Mr. Arisumi "failed to develop an adequate legal argument on appeal concerning this claimed error." Attach. A at 13, ¶ 22. Mr. Arisumi's argument on this point is longer than the Court of Appeals' cursory one-paragraph treatment. *See* BC at 55-57; RB at 17-18. The Court of Appeals cited a case for the proposition that it "will search the record for facts, arguments, and rulings [to] support generalized arguments." Attach. A at 13, ¶ 22 (citing *Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451).

But this case does not apply because Mr. Arisumi presented a fully-developed legal argument.

- Mr. Arisumi discussed the standard of review, *see* BC at 55;
- he quoted from the relevant sub-subsections of the applicable statute, *see* BC at 56;
- he quoted from a published appellate decision, and underlined the purpose of the restitution statute, *see id.*;

- he argued that the restitution order was fundamental error because "the evidence showed the victim's out of pocket payments for the car did not exceed $4725," *id.*;

- he cited to the specific place in the trial where this evidence was presented—*viz.*, 3-9-23 at 3:5:25;

- he specified what the testimony was—*viz.*, "Ms. Miller testifying she paid Mr. Arisumi $4725 for the car", BC at 56;

- he argued that there was "no evidence showing that she suffered damages in the amount of $8400," *id.*;

- he argued that compelling him "to pay approximately twice the amount of actual damages is contrary to Section 37-17-1," BC at 57;

- he argued that it is "fundamental error because it has neither legal nor factual support; it is a miscarriage of justice," *id.*;

- he asked for specific relief in the form of "reversal and remand with instructions to impose restitution that is no greater than the amount of actual damages," *id.*;

- he argued that imposition of a restitution amount that is $4125 more than the amount of actual damages is unauthorized by statute and defies logic, *see* RB at 17;

- he noted that "the State does not dispute that the evidence did not support a restitution award of $8400," *id.*;
- he argued that the State tacitly conceded "that the restitution amount was erroneous," *id.*;
- he argued that "it was approximately double the maximum amount supported by the evidence," RB at 18; and
- he argued that forcing Mr. Arisumi "to pay in excess of $4000 more than what the evidence would support qualifies as fundamental error." *Id.*.

The panel did not explain how this argument is undeveloped or inadequate, or what is missing. *See* Attach. A at 13-14, ¶ 22. Mr. Arisumi's argument is not a "surface presentation only" as in *Muse*; on the contrary, his citation to the specific testimony in the record, the specific statutory provision, case law, and refutation of the state's argument, including noting that the state did not dispute that there was no evidence to support the restitution award amount, demonstrated the claimed error below, as required by *State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393. Moreover, Mr. Arisumi's argument demonstrated that a restitution amount that is double the

amount of actual damages constitutes a miscarriage of justice. *See* BC at 55-57; RB at 17-18.

Prayer for Relief

The Court of Appeals' affirmance of Mr. Arisumi's conviction and sentence conflicts with well-established precedent of this Court and the Court of Appeals. For this reason, Mr. Arisumi respectfully requests that a writ of certiorari be issued to the Court of Appeals.

Respectfully submitted,

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Certificate of Compliance with Rule 12-502(D)

Pursuant to Rule 12-502(E), I, Scott M. Davidson, hereby certify that this petition complies with the limitations of Rule 12-502(D)(3) (allowing no more than 3150 words). The body of the petition contains 3081 words.

/s/ Scott M. Davidson
SCOTT M. DAVIDSON

Certificate of Service

I hereby certify that a true and correct copy of this petition was served electronically through the Odyssey system to counsel for the Respondent, Van Snow, Solicitor General, New Mexico Department of Justice, this 30th day of October 2024.

/s/ Scott M. Davidson
SCOTT M. DAVIDSON