S-1-SC-38937

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

RICKY ANTHONY AYON,

Defendant-Appellee.

No. A-1-CA-38812

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,
BERNALILLO COUNTY,
HONORABLE JUDGE CHRISTINA ARGYRES PRESIDING

DEFENDANT-APPELLEE'S ANSWER BRIEF

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STATEMENT REGARDING RECORD CITATIONS

The preliminary hearing in this case was audio-recorded using For The Record software. FTR CDs were reviewed using The Record Player and are cited by date and timestamp in the form **[mm/dd/yy CD hour:minute:second]**. Citations to the Record Proper are in the form **[RP page number]**. The State's Brief-in-Chief is cited as **[BIC page number]**.

NATURE OF THE CASE

This case presents the question of whether, at a preliminary hearing, the court must consider illegally obtained evidence in its determination of probable cause. In this case, the only evidence presented against Ricky Ayon was found during an unconstitutional stop. A sheriff's deputy testified at the preliminary hearing that he stopped Mr. Ayon on the street because he believed—but was not certain—that there was an active warrant for Mr. Ayon's arrest. He detained and handcuffed Mr. Ayon while he checked for a warrant. Finding that a warrant existed, the deputy searched Mr. Ayon and found what he believed to be heroin. Before the stop, Mr. Ayon had done nothing suspicious.

At the preliminary hearing, the district court held that there was no reasonable suspicion for the stop. It dismissed the heroin possession charge against Mr. Ayon.

Mr. Ayon asks this Court to affirm the dismissal of the case and hold that the district court correctly refused to consider illegally obtained evidence in its bindover determination.

SUMMARY OF FACTS AND PROCEEDINGS

In July 2018, Deputy Andrew Limon of the Bernalillo County Sheriff's Office saw Ricky Ayon on Isleta Boulevard, "walking with his bicycle and groceries." **[1/9/20 CD 11:18:29-49, 11:25:22-40]** Mr. Ayon was not doing anything illegal. **[*Id.* 11:25:40-43]** However, Deputy Limon recognized Mr. Ayon and said that he "knew" there was an active warrant for Mr. Ayon's arrest. **[*Id.* 11:18:41-49]**

Deputy Limon later testified that Mr. Ayon frequented a house where police were often called. **[*Id.* 11:30:10-43]** Deputy Limon had anticipated that he might be called to the house again, so he had looked up people associated with the house in the N.M. Courts database to see if they had warrants. **[*Id.*]** He found a warrant for Mr. Ayon in the system. **[*Id.* 11:30:10-20]**

Deputy Limon testified that he was not sure exactly when he checked for warrants. **[*Id.* 11:34:28-39]** He thought it was "within the week" that he stopped Mr. Ayon. **[*Id.* 11:34:19-28]** When he saw Mr. Ayon, he was not certain that the warrant was still active. **[*Id.* 11:34:39-49]** He did not check the status of the warrant before approaching Mr. Ayon. **[*Id.* 11:26:23-37]**

Deputy Limon called Mr. Ayon by name and told him there was a warrant for his arrest. **[*Id.* 11:25:43-11:26:00, 11:33:57-11:34:06]** Mr. Ayon came over to speak with Deputy Limon. **[*Id.* 11:25:43-11:26:00]** Deputy Limon immediately

handcuffed him, since Mr. Ayon had run away from him in the past. **[*Id.* 11:26:00-23]**

While Mr. Ayon was in handcuffs, Deputy Limon checked with the National Crime Information Center (NCIC) to confirm that there was in fact an active warrant for Mr. Ayon. **[*Id.* 11:26:23-11:27:07, 11:28:40-45, 11:31:26-44]** There was a warrant in the NCIC system, so Deputy Limon formally placed Mr. Ayon under arrest and searched him. **[*Id.* 11:19:09-20, 11:28:45-55]** He found a small bag containing a black substance he believed was heroin; it field-tested positive for opiates. **[*Id.* 11:19:13-42, 11:24:20-48]**

The State charged Mr. Ayon with one count of heroin possession. **[RP 1]** Eighteen months after Mr. Ayon's arrest, the district court in Albuquerque held a preliminary hearing for his case, with Judge Christina Argyres presiding, to determine whether there was probable cause. **[RP 5; *see generally* 1/9/20 CD 11:15:50-11:37:26]** Deputy Limon was the State's only witness.

At the preliminary hearing, Mr. Ayon's attorney argued that Deputy Limon could have confirmed the existence of a warrant before stopping Mr. Ayon, but did not. Instead, he stopped Mr. Ayon without reasonable suspicion. Based on the lack of reasonable suspicion for the stop, she asked the court not to find probable cause to bind over the charge for trial. **[1/9/20 CD 11:35:02-56]**

Judge Argyres agreed. **[*Id.* 11:36:08-12, 11:37:00-24]** She dismissed the case without prejudice, finding that "there was no reasonable suspicion to detain the defendant and therefore the search was illegal." **[RP 8]** The State appealed the dismissal.

ARGUMENT

I. Illegally obtained evidence is inadmissible in a preliminary hearing.

This case raises the question of whether the exclusionary rule applies to a preliminary hearing. Because this is a question of law, this issue is reviewed de novo. *See State v. Snyder*, 1998-NMCA-166, ¶ 6, 126 N.M. 168, 967 P.2d 843 (considering de novo the scope of the exclusionary rule); *see also State v. Lopez*, 2013-NMSC-047, ¶ 7, 314 P.3d 236 (considering de novo the applicability of confrontation right in preliminary hearing).

A. Structure and function of preliminary hearings

To charge a defendant with a felony, the State may pursue either of two paths. The State's first option is to obtain an indictment from a grand jury. N.M. Const. art. II, § 14. The second option is for a prosecutor to file a criminal information, in which case the defendant has a right to a preliminary hearing. *Id.*

"The preliminary hearing is an evidentiary, adversarial hearing where the defense can test the prosecutor's evidence, present its own evidence, and have a neutral and detached magistrate decide whether there is probable cause to believe

the defendant committed a felony." Michael D. Cicchini, *Improvident Prosecutions*, 12 Drexel L. Rev. 465, 467 (2020). If the court finds that there is probable cause to believe that the defendant committed a felony, the court will "bind the defendant over" for trial, starting the process of a felony case in the district court. *See* Rule 5-302(D)(2) NMRA. If the court does not find probable cause for a charge, it will dismiss the charge without prejudice. Rule 5-302(D)(1).

A preliminary hearing, like a grand jury, ensures that there is some independent review of the State's charging decisions. *See State ex rel. Whitehead v. Vescovi-Dial*, 1997-NMCA-126, ¶ 5, 124 N.M. 375, 950 P.2d 818. The preliminary hearing is designed

> to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.

Thies v. State, 189 N.W. 539, 541 (Wis. 1922); *accord Whitehead*, 1997-NMCA-126, ¶ 6. The preliminary hearing serves other functions as well, including allowing the parties to gather impeachment material or preserve testimony. *Whitehead*, 1997-NMCA-126, ¶ 6; *State v. Garcia*, 1968-NMSC-119, ¶ 5, 79 N.M. 367, 443 P.2d 860.

Although a grand jury and a preliminary hearing protect similar interests, they function very differently. A grand jury is "a judicial tribunal with inquisitorial

powers"; its proceedings are secret, and its decision to indict is largely unreviewable. *See State v. Chance*, 1923-NMSC-042, ¶ 8, 29 N.M. 34, 221 P. 183; NMSA 1978, §§ 31-6-4(B) (2003), 31-6-6(A) (1979), 31-6-11(A) (2003). Courts will intervene only "to prevent prosecutorial abuse of the structural protections that safeguard the grand jury's ability to perform its constitutional function." *State v. Martinez*, 2018-NMSC-031, ¶ 27, 420 P.3d 568 (cleaned up).[1] The grand jury "is [neither] equipped [nor] called upon to decide" suppression issues, as grand jurors are not judges or lawyers. *Id.* ¶ 31. The rules of evidence do not apply to a grand jury proceeding. Section 31-6-11(A). The "target," or potential defendant, may have an attorney present and may testify, but does not have a right to be personally present or to participate. *See* §§ 31-6-4(B), 31-6-11(C).

By contrast, a preliminary hearing resembles a bench trial. It may be held in district court, as it was in this case, or in the magistrate or metropolitan courts. Rule 5-302 (committee commentary); *State v. White*, 2010-NMCA-043, ¶ 10, 148 N.M. 214, 232 P.3d 450. In New Mexico—although not in all states[2]—the rules of

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[1] This brief uses "(cleaned up)" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017); *see, e.g.*, *Brownback v. King*, 141 S.Ct. 740, 748 (2021).

[2] *See, e.g.*, Haw. R. Penal P. 5(c)(6) (West 2014) ("The finding of probable cause may be based in whole or in part upon hearsay evidence when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."); Ky. R. Crim. P. 3.14(2) (West 1999)

evidence apply. Rule 5-302(B)(5). The defendant has the right to counsel. Rule 5-302(B)(1); *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970). The parties may call witnesses, and they have the right to cross-examine adverse witnesses. Rule 5-302(B)(4). Although the defendant does not have a Sixth Amendment confrontation right at the preliminary hearing, *Lopez*, 2013-NMSC-047, ¶ 2, he has a right to be present for the witnesses' testimony. Rule 5-302(B)(4). The defense has a right to discovery, but it is limited to evidence in the prosecution's possession. Rule 5-302(B)(2).

B. Allowing preliminary hearing judges to consider search-and-seizure issues is consistent with New Mexico law on preliminary hearings and the exclusionary rule.

The issue in this case is whether a judge (or magistrate) presiding over a preliminary hearing in New Mexico may rule that evidence was unlawfully acquired and refuse to consider it in the bindover determination. The State's position is that the exclusionary rule does not apply to preliminary hearings. **[*See* BIC 7-10]** If this were the rule, it would require a judge to bind over a case even if, as here, the only evidence to support a finding of probable cause was obtained through unconstitutional means.

("The finding of probable cause may be based upon hearsay evidence in whole or in part.").

Jurisdictions differ on whether the exclusionary rule applies at a preliminary hearing. Several jurisdictions specify by rule or statute that the exclusionary rule does or does not apply. *Compare, e.g.*, Cal. Penal Code § 1538.5(f)(1) (West 2007) (allowing motion to suppress at preliminary hearing); Tenn. R. Crim. P. 5.1(a)(1) ("Rules excluding evidence acquired by unlawful means are applicable."); *with* Fed. R. Crim. P. 5.1(e) (a defendant "may not object to evidence on the ground that it was unlawfully acquired"); Ariz. R. Crim. P. 5.3(b) ("A court must not exclude evidence during a preliminary hearing solely on the ground that it was obtained unlawfully.").

New Mexico does not have a statute or rule either allowing or prohibiting the use of illegally obtained evidence at the preliminary hearing stage. Therefore, this Court must look for clues in New Mexico's law about preliminary hearings more generally, as well as New Mexico law on the exclusionary rule. These clues suggest that illegally obtained evidence should not be admissible in preliminary hearings.

Under New Mexico law, New Mexico judges and magistrates at preliminary hearings already make determinations about the admissibility of evidence. The rules of evidence apply at a preliminary hearing, Rule 5-302(B)(5), so the judge must identify and exclude hearsay, privileged material, prior bad acts used to prove propensity, and other inadmissible evidence. *See, e.g.*, Rules 11-404, 11-503, 11-

504, 11-802 NMRA. The reason for applying evidentiary rules is "that reliance upon evidence inadmissible at trial undercuts the screening function of the preliminary hearing." Wayne R. LaFave et al., 4 Crim. Proc. § 14.4(b) (4th ed.), Application of the Rules of Evidence. By the same token,

> allowing the prosecutor to utilize illegally obtained evidence is viewed as more pernicious than allowing use of hearsay. In many instances, the hearsay used at the preliminary hearing will be replaced at trial by admissible testimony, as the declarant will himself testify at trial. The character of illegally obtained evidence, on the other hand, cannot be altered, and it will necessarily be inadmissible at trial. Moreover, where the prosecution relies on such evidence at the preliminary hearing, the evidence is likely to be a critical part of the prosecution's proof, and not simply cumulative in impact.

Id. Because the same principles support applying the exclusionary rule and the rules of evidence, and the judge is already tasked with applying the rules of evidence, it is reasonable to infer that the exclusionary rule is applicable to preliminary hearings.

Judges at preliminary hearings make other determinations of admissibility as well. They apply the *corpus delicti* rule to determine the admissibility of a confession at preliminary hearing. *State v. Hardy*, 2012-NMCA-005, ¶ 10, 268 P.3d 1278 (citing *People v. Herrera*, 39 Cal.Rptr.3d 578, 585-86 (Cal. Ct. App. 2006)). They also apply the exclusionary rule in the context of the Fifth Amendment, because in the Tenth Circuit, the use of illegally compelled statements in preliminary hearings violates the Fifth Amendment. *Vogt v. City of*

Hays, 844 F.3d 1235, 1241-42 (10th Cir. 2017).[3] If a judge in a preliminary hearing must exclude evidence collected in violation of the Fifth Amendment, there is no logical reason she should not exclude evidence collected in violation of the Fourth.

Furthermore, New Mexico takes the exclusionary rule seriously. Article II, Section 10 of the New Mexico Constitution provides greater protections against unreasonable searches and seizures than does its federal counterpart in the Fourth Amendment. *State v. Leyva*, 2011-NMSC-009, ¶ 3, 149 N.M. 435, 250 P.3d 861. New Mexico's constitutional right "to be free from unreasonable search and

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[3] It is not clear whether, in most circumstances, the Tenth Circuit Court of Appeals' analysis would be binding on New Mexico state courts. *Compare Snyder*, 1998-NMCA-166, ¶ 9 ("In applying federal law, we follow the precedent established by the federal courts, particularly the United States Court of Appeals for the Tenth Circuit.") *with Dunham v. Walker*, 1955-NMSC-089, ¶ 15, 60 N.M. 143, 288 P.2d 684 ("While an opinion by the United States Circuit Court of Appeals of which New Mexico forms a part, is not binding on this Court; nevertheless, where . . . well supported in reason and logic . . . it is highly persuasive."). *See also United States v. Basurto*, 117 F.Supp.3d 1266, 1287 n.6 (D.N.M. 2015) ("only the Supreme Court of the United States—and not the Courts of Appeals—can bind state courts, even on matters of federal law").

However, as a practical matter, the Tenth Circuit's opinion in *Vogt* establishes that within New Mexico, the use of a compelled statement in a preliminary hearing creates the basis for liability under 42 U.S.C. § 1983 (2020). *Vogt*, 844 F.3d at 1246. A judge who refused to hear challenges to illegally obtained statements at the preliminary hearing would be setting up the jurisdiction for lawsuits. *Cf. LaFave*, 4 Crim. Proc. § 14.4(b) ("[S]tates disallowing challenges to the government's use of compelled statements at the preliminary hearing must take into account that several circuits would view their position as creating, at a minimum, a potential for § 1983 liability.").

seizure includes the exclusionary rule and precludes a good-faith exception," unlike the federal right. *State v. Gutierrez*, 1993-NMSC-062, ¶ 50, 116 N.M. 431, 863 P.2d 1052. "The exclusionary rule under Article II, Section 10 of the State Constitution is a constitutional right belonging to the individual." *State v. Wagoner*, 2001-NMCA-014, ¶ 29, 130 N.M. 274, 24 P.3d 306.

The New Mexico Constitution "expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions," and it "*requires* that [courts] deny the state the use of evidence obtained in violation of Article II, Section 10 in a criminal proceeding." *Gutierrez*, 1993-NMSC-062, ¶¶ 45-46 (emphasis added). Once a violation has been established, the courts "return the parties to where they stood before the right was violated." *Id.* ¶ 54. The central role that the exclusionary rule plays in New Mexico search-and-seizure law suggests that illegally obtained evidence should not be admissible at any point in a criminal case, including a preliminary hearing. *See Vogt*, 844 F.3d at 1239 (concluding that a "'criminal case' includes probable cause hearings").

Finally, defendants in New Mexico have a constitutional right to a preliminary hearing. N.M. Const. art. II, § 14. This is not true in every state. In Wisconsin, the state supreme court rejected an exclusionary rule at preliminary hearing in part because "[t]he right to a preliminary hearing [in Wisconsin] is

solely a statutory right." *State v. Moats*, 457 N.W.2d 299, 303 (Wis. 1990). The preliminary hearing's status as a constitutional right in New Mexico is another indication that the proceedings in front of it should comply with other constitutional protections.

Taken together, these circumstances—the constitutional status of preliminary hearings, the importance of the exclusionary rule in New Mexico, and the fact that judges at preliminary hearings already must identify and exclude inadmissible evidence—strongly suggest that evidence obtained from an illegal search and seizure should play no role in preliminary hearings in New Mexico. To require a judge to bind over a felony charge based on illegally obtained evidence would "[put] an end to a meaningful judicial examination at the preliminary hearing." *People v. Walker*, 189 N.W.2d 234, 238 (Mich. 1971), *overruled on other grounds by People v. Hall*, 460 N.W.2d 520 (Mich. 1990).

C. The court correctly dismissed the charges because there was no admissible evidence of probable cause.

The brief-in-chief argues that the district court exceeded its authority by dismissing the case at the preliminary hearing, and that the appropriate remedy for the unconstitutional detention of Mr. Ayon would have been suppression of the evidence, not dismissal. **[BIC 6, 16-17]** The brief-in-chief emphasizes that the only issue at a preliminary hearing is whether there is probable cause to believe that the defendant committed the offense. **[BIC 8]**

The State's argument assumes that rather than limiting her analysis to the probable cause determination, Judge Argyres found that the detention was illegal and then dismissed the case as a sanction. The State also implicitly assumes that a probable cause determination may be based on illegally obtained evidence.

There is another way of looking at the court's actions, however: that a probable cause determination must be based solely on admissible evidence. *Cf. Hardy*, 2012-NMCA-005, ¶ 2 (requiring *corpus delicti* to be established with admissible evidence). Therefore, in order to determine whether there was probable cause, Judge Argyres first needed to determine the legality of the search and exclude any evidence that was obtained illegally. This is the rule in Idaho, for example: "[I]f at the preliminary hearing the evidence shows facts which would ultimately require the suppression of evidence sought to be used against the defendant, the evidence must be excluded and must not be considered by the

magistrate in determining probable cause." Idaho Crim. R. 5.1(b)(4). Similarly, in Michigan, there must be probable cause "from legally admissible evidence." *Walker*, 189 N.W.2d at 239.

This exclusion does not have preclusive effect later in the case. *See* LaFave, 4 Crim. Proc. § 14.4(b) ("Like all evidentiary rulings at a preliminary hearing, the ruling on a challenge to evidence as illegally acquired will not be binding upon the trial court."); Kan. Stat. Ann. § 22-3216(4) (West 1971) (allowing motions to suppress during a preliminary hearing, but "[i]f the defendant is bound over for trial, the suppressed evidence shall thereupon become subject to the orders of the district court"). The judge at preliminary hearing considers admissibility solely in order to decide whether the evidence should be excluded from the probable cause determination.

If a case may not be bound over on illegally obtained evidence, then Judge Argyres's actions make sense, and they fall within the bounds of her authority at the preliminary hearing. Judge Argyres determined that there was no reasonable suspicion for Deputy Limon to detain Mr. Ayon, and therefore the resulting search of Mr. Ayon was illegal. **[RP 8]** There was no evidence that Mr. Ayon possessed heroin except for the substance found during the search. Once Judge Argyres held that the search was illegal and excluded the resulting evidence from her bindover determination, there was no evidence to support a determination of probable cause.

Finding no probable cause, she dismissed the case without prejudice, as mandated by Rule 5-302(D)(1).

Because the dismissal was based on lack of probable cause, this Court does not need to consider the cases cited by the State about the appropriateness of dismissal for other reasons.[4] **[*See* BIC 10-13]** The dismissal without prejudice also means that prosecution is not barred in the future. **[*See* BIC 17]** The State has appealed the merits of the exclusion; it may also bring the case to a new preliminary hearing, using admissible evidence, or it may present the case to a grand jury, where there are no suppression determinations and no judicial review of the evidence considered by the jury, *see Martinez*, 2018-NMSC-031, ¶¶ 17, 23, 31.

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[4] One of the cases the State cites is *In re Jade G.*, 2001-NMCA-058, 130 N.M. 687, 30 P.3d 376, which the State says involved "circumstances similar to those at issue here." **[BIC 10-11]** *Jade G.* did not involve a preliminary hearing or the exclusionary rule. Instead, the question was whether a court could dismiss a juvenile delinquency case as a sanction for egregious police misconduct. *Id.* ¶¶ 1, 3-12. This Court concluded that neither the Children's Code, nor common-law doctrines of entrapment, nor the court's inherent authority authorized dismissal under the circumstances. *Id.* ¶¶ 20, 22-25, 26. In Mr. Ayon's case, by contrast, Judge Argyres applied a well-established legal doctrine, the exclusionary rule, and then dismissed the case consistent with her authority and duty under Rule 5-302(D)(1).

D. Responses to other arguments in the State's brief-in-chief

1. Case law about grand juries is inapplicable.

The brief-in-chief cites several cases that involve grand juries rather than preliminary hearings. **[BIC 13-14]** *See Martinez*, 2018-NMSC-031, ¶ 1; *Buzbee v. Donnelly*, 1981-NMSC-097, ¶ 2, 96 N.M. 692, 634 P.2d 1244; *State v. Eder*, 1985-NMCA-076, ¶ 1, 103 N.M. 211, 704 P.2d 465. As discussed in Part I.A above, grand juries and preliminary hearings are entirely different processes, and they are governed by different bodies of law. *Martinez* reaffirmed the appellate courts' lack of authority to review the admissibility of evidence considered by a grand jury, and its analysis was grounded in the structure and role of grand juries specifically. *See generally Martinez*, 2018-NMSC-031, ¶¶ 15-32, 39. *Martinez* does not mention preliminary hearings or affect the analysis in this case.

2. The search-and-seizure issue in this case is a pretrial right, unlike the Sixth Amendment right to confrontation, and it applies at the preliminary hearing.

The State's brief-in-chief correctly points out that "the full panoply of constitutional trial rights" does not apply at a preliminary hearing, quoting *Lopez*, 2013-NMSC-047, ¶ 19. **[BIC 9-10, 14]** *Lopez* is about the right to confrontation under the Sixth Amendment and Article II, Section 14. The Supreme Court held that the right to confrontation is a trial right that does not attach at the preliminary hearing. *Id.* ¶¶ 11, 21, 26.

The Court's ruling was grounded in a long history of treating the rights in the Sixth Amendment, as well as their state analogues, as trial-specific rights. *See Lopez*, 2013-NMSC-047, ¶¶ 9, 14-20. *See also Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("The Constitution . . . defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). By contrast, pretrial rights are grouped together in the Fourth and Fifth Amendments. *See Vogt*, 844 F.3d at 1245-46 (discussing Fifth and Sixth amendments); Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1010-12 (2003) ("Madison separated the criminal procedure provisions in the federal Bill of Rights into several provisions that were ordered to follow a procedural sequence."). The Fourth Amendment and Article II, Section 10 protect citizens well before trial, from unreasonable and unwarranted encounters on the street or in their homes. *See, e.g.*, *State v. Jason L.*, 2000-NMSC-018, 129 N.M. 119, 2 P.3d 856 (affirming suppression based on illegal stop of pedestrians); *State v. Ramos*, 2017-NMCA-041, ¶ 15, 394 P.3d 968 (discussing constitutional protections against unreasonable search of a home).

Unlike the confrontation right, protections against unreasonable search and seizure attach before trial and even before arrest. Like the right against self-

incrimination, *see Vogt*, 844 F.3d at 1239, these protections should apply at the preliminary hearing as well.

3. The out-of-state authority cited in the brief-in-chief would not require New Mexico judges to consider illegally obtained evidence in their bindover determinations.

The brief-in-chief cites two out-of-state cases in support of its arguments, *Moats*, 457 N.W.2d 299, and *State v. Kane*, 588 A.2d 179 (Conn. 1991). **[BIC 14-15]** The reasoning in those cases would not compel reversal in this one.

In *Moats*, the Wisconsin Supreme Court held that an unconstitutionally obtained confession could be used at a preliminary hearing, even though the rules of evidence generally apply at preliminary hearings in Wisconsin. 457 N.W.2d at 302-03. However, Wisconsin had a statute dictating this result: "motions to suppress evidence . . . or objections to the admissibility of statements of a defendant shall not be made at a preliminary examination." *Id.* at 304 (quoting Wis. Stat. Ann. § 971.31(5)(b) (West 2009)). Furthermore, the right to a preliminary hearing in Wisconsin is "solely a statutory right." *Moats*, 457 N.W.2d at 303. In New Mexico, there is no statute limiting the applicability of the exclusionary rule at preliminary hearing, and preliminary hearings are a constitutional right. N.M. Const. art. II, § 14; *Whitehead*, 1997-NMCA-126, ¶ 12 (preliminary examination "stands shoulder to shoulder with the most basic guarantees of individual liberty *against* the power of the state"). Therefore, even if

this Court finds the reasoning in *Moats* persuasive, the background law in New Mexico is entirely different.

In *Kane*, 588 A.2d at 182, the defendant challenged the constitutionality of a Connecticut statute precluding a motion to suppress during the probable cause hearing. In New Mexico, again, there is no such statute. Unlike the courts in *Moats* or *Kane*, this Court must decide the applicability of the exclusionary rule based on other sources of law.

If this Court affirms the district court and determines that the exclusionary rule applies to preliminary hearings, it will join other state courts that have done the same thing. In at least two other states where the statutes appear to be silent on this issue, courts treat illegally obtained evidence as incompetent or insufficient to support a finding of probable cause. *See Batie v. State*, 1976 OK CR 14, 545 P.2d 797, 803 (Okla. Crim. App. 1976) (holding that because some the only evidence establishing probable cause was illegally obtained, "the exclusionary rule . . . must be applied and thus the examining magistrate erred in binding over the defendant"); *Walker*, 189 N.W.2d at 238-39.

II. The district court correctly determined that the evidence against Mr. Ayon was the result of an illegal detention.

Applications of the exclusionary rule are reviewed "as a mixed question of law and fact wherein [courts] review any factual questions under a substantial evidence standard and . . . review the application of law to the facts de novo." *State v. Neal*, 2007-NMSC-043, ¶ 15, 142 N.M. 176, 164 P.3d 57. Courts view the facts in the light most favorable to the prevailing party. *State v. Widmer*, 2020-NMCA-___, ¶ 4, ___ P.3d ___, 2020 WL 6111476 (No. A-1-CA-34272, Sept. 15, 2020), *cert. denied*, No. S-1-SC-38500 (N.M. Nov. 3, 2020). Appellate courts "will draw all inferences and indulge all presumptions in favor of the district court's ruling." *Jason L.*, 2000-NMSC-018, ¶ 11.

A. Deputy Limon did not confirm that there was an active warrant before detaining Mr. Ayon, so he was not executing a warrant, and he stopped Mr. Ayon without reasonable suspicion of a crime.

At the preliminary hearing, Judge Argyres treated the evidence against Mr. Ayon as the result of an illegal search and seizure because "there was no reasonable suspicion to detain [Mr. Ayon] and therefore the search was illegal." **[RP 8]** The brief-in-chief argues that despite the lack of reasonable suspicion, Deputy Limon was justified in detaining Mr. Ayon because the deputy was executing a warrant. **[BIC 17, 20]**

However, Deputy Limon testified that when he told Mr. Ayon there was a warrant for his arrest and then handcuffed him, he could not be certain that there in

fact was an active warrant. **[1/9/20 CD 11:34:39-49]** Deputy Limon *believed* there was a warrant, but he had only checked "within the week," not immediately before stopping Mr. Ayon. **[*Id.* 11:26:23-37, 11:34:19-28]** In the interim, Mr. Ayon could have gone to court (or even been arrested), and the warrant would have been canceled.

The brief-in-chief cites no cases authorizing police to detain a person based on their belief that the person *might* have a warrant. On the contrary, the case law implicitly assumes that if police are executing a warrant, they have verified that the warrant exists. In *State v. Grijalva*, 1973-NMCA-061, ¶ 12, 85 N.M. 127, 509 P.2d 894, this Court held that police executing a warrant do not need to have the warrant physically in hand. But in that case, the radio dispatcher told a patrol officer that the defendant had outstanding warrants, and the officer went directly to arrest the defendant. *Id.* ¶¶ 5-6. There was no uncertainty about the existence of the warrants. Similarly, in *State v. Peterson*, 2014-NMCA-008, ¶¶ 1, 12, 315 P.3d 354, this Court held that stopping a person to execute a warrant does not violate the rule against pretextual stops. In that case, police investigating the defendant learned that he had an outstanding warrant, then spotted him in his car and "stopped him in order to execute the warrant." *Id.* ¶ 2. Again, there was no ambiguity about the status of the warrant.

In the absence of a warrant, in order to detain a person, police must "have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51 (1979). *See also Jason L.*, 2000-NMSC-018, ¶ 20 ("A reasonable suspicion is a particularized suspicion, based on all the circumstances[,] that a particular individual, the one detained, is breaking, or has broken, the law."). Executing a warrant justifies a suspicionless stop, but the officer must actually be executing a warrant, not stopping the person to check for warrants.[5] There is no doctrine of "reasonable suspicion of a warrant."

The existence of an active warrant is a straightforward factual question, and an officer can determine the answer by checking a database. Deputy Limon was able to check for warrants with NCIC while out on patrol; the problem was that he waited to check until after he had stopped and handcuffed Mr. Ayon. To make a valid stop to execute a warrant, Deputy Limon first needed to make sure there was a warrant to execute. Because he did not, his initial detention of Mr. Ayon was a suspicionless stop in violation of the Fourth Amendment and Article II, Section 10.

"[T]he exclusionary rule applies not only to evidence unlawfully seized, but also to evidence derived from the original illegality." *State v. Lujan*, 2008-NMCA-

[5] Critics of stop-and-frisk policies have argued that police often use illegal stops in order to run warrant checks. When police uncover a warrant, they can then arrest the person and perform a search incident to arrest, and the arrested person can be charged with possessing any contraband found during the search. *See Utah v. Strieff*, 136 S.Ct. 2056, 2068-69 (2016) (Sotomayor, J., dissenting).

003, ¶ 9, 143 N.M. 233, 175 P.3d 327. When Deputy Limon used the illegal detention to search for a warrant, then arrested Mr. Ayon based on the warrant and searched him incident to arrest, the evidence found in the search was "derived from the original illegality," and was correctly excluded under the "fruit of the poisonous tree" doctrine. The doctrine "has specifically [been] applied . . . where the challenged evidence was obtained after an illegal arrest or detention." *Id.* (quoting *State v. Bedolla*, 1991-NMCA-002, ¶ 27, 111 N.M. 448, 806 P.2d 588).

B. The cases cited in the brief-in-chief do not permit police to detain a person based on the suspicion that the person has a warrant.

None of the cases cited in the brief-in-chief permits a suspicionless stop to check for the existence of warrants. The brief-in-chief cites *Peterson*, 2014-NMCA-008, for the proposition that a suspicionless stop to execute a warrant is valid. **[BIC 18-19]** This is true as far as it goes, but it does not address Mr. Ayon's situation, where the stopping officer had not checked for a warrant immediately before the stop.

The brief-in-chief also cites *Widmer*, 2020-NMCA-___, ¶ 5, for the proposition that police do not need "some secondary confirmation that [a] warrant is accurate or remains active." **[BIC 21]** But in *Widmer*, this Court was talking about "secondary confirmation," not an initial check to see if a warrant existed.

In *Widmer*, police were investigating a possibly stolen scooter, and the defendant was stopped as part of that investigation. *Id.* ¶¶ 2, 8 (describing an

"already valid stop, investigating whether a scooter was stolen"). Police ran the defendant's information through NCIC and found warrants for his arrest. *Id.* ¶ 2. Police handcuffed him, then checked with dispatch to confirm the warrants. *Id.* ¶ 2. On appeal, the defendant argued that "his arrest was unlawful because local police department policy prohibits making an arrest based on dispatch's preliminary report regarding the existence of an outstanding warrant until such warrant is confirmed." *Id.* ¶ 3. This Court rejected that argument, holding that it was legal to arrest the defendant "when a NCIC database search revealed the existence of two outstanding felony arrest warrants for Defendant, regardless of police department policy regarding secondary confirmation of the accuracy of the arrest warrant or warrants." *Id.* ¶ 6.

Widmer holds that when a person is validly stopped based on reasonable suspicion, and then police check for warrants and find one, they may arrest him without further verification of the warrant. The case does not allow police to make a suspicionless stop and then check for warrants, nor does it allow police to arrest a person based on a warrant check conducted days earlier.

Finally, the brief-in-chief cites *Utah v. Strieff*, 136 S.Ct. 2056 (2016), and *State v. Edwards*, 2019-NMCA-070, 452 P.3d 413. **[BIC 19-20]** In both cases, police detained suspects illegally, without adequate reasonable suspicion, and then discovered that the suspects had valid warrants and arrested them. *Strieff*, 136 S.Ct.

at 2060; *Edwards*, 2019-NMCA-070, ¶¶ 3-4. The arrests (and searches incident to arrest) were upheld based on the "attenuation doctrine." *Strieff*, 136 S.Ct. at 2059; *Edwards*, 2019-NMCA-070, ¶¶ 1, 12. The idea is that the discovery of a warrant is an "intervening event" that "break[s] the causal chain between the unlawful stop" and a search incident to arrest. *Strieff*, 136 S.Ct. at 2061.

In this case, unlike in *Strieff* or *Edwards*, Deputy Limon's stated reason for detaining Mr. Ayon was that he thought Mr. Ayon had a warrant. The discovery of a warrant did not come as a surprise to Deputy Limon; it was the entire basis for the stop. The State cannot claim both that Deputy Limon was executing a warrant and that discovering the warrant was an "intervening event." Discovery of a warrant does not attenuate the illegality of a detention premised on the existence of that very warrant.

CONCLUSION

In New Mexico, there is an individual constitutional right both to a preliminary hearing and to the exclusion of illegally obtained evidence. Furthermore, judges and magistrates at preliminary hearings are already tasked with ruling on the admissibility of evidence outside of the search-and-seizure context. Therefore, it was appropriate in this case for Judge Argyres to determine that Mr. Ayon was detained illegally.

Because the only evidence presented at the hearing was found during an unconstitutional search and seizure, Judge Argyres properly excluded the evidence from her probable cause determination. No admissible evidence supported a finding of probable cause, so Judge Argyres dismissed the case without prejudice. Mr. Ayon asks this Court to affirm the dismissal.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that on March 12, 2021, a copy of this pleading was uploaded to Odyssey File & Serve for service on Meryl Francolini in the Office of the Attorney General.

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Law Offices of the Public Defender