IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

RICKY ANTHONY AYON, No. S-1-SC-38937

Defendant-Petitioner.

DEFENDANT-PETITIONER'S BRIEF IN CHIEF

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STATEMENT ON RECORD CITATIONS

The preliminary hearing in this case was audio-recorded using For The Record software. The FTR CD was reviewed using The Record Player and is 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]**.

NATURE OF THE CASE

In its opinion below, the Court of Appeals held that a judge who presides over a preliminary hearing lacks the authority to determine whether the evidence in front of her was illegally obtained. The judge may not exclude illegally obtained evidence from her determination of probable cause, even if the constitutional violation is obvious, and even if the State's only evidence was the product of an illegal search or seizure.

This holding is inconsistent with the judge's role at preliminary hearing and the nature of the exclusionary rule in New Mexico. Judges at preliminary hearings already must determine whether evidence is admissible under the rules of evidence and the Fifth Amendment. The Article II, Section 10 exclusionary rule is part of the individual right to be free from unreasonable searches and seizures, and New Mexico cases suggest that it applies throughout a criminal case, including at preliminary hearing. The Court of Appeals based its opinion below in large part on case law about grand juries, which function differently than preliminary hearings and are governed by different rules.

Ricky Ayon asks this Court to hold that a judge at preliminary hearing may determine that evidence was illegally obtained and exclude it from her determination of probable cause. He asks this Court to reverse the Court of Appeals and affirm the district court's dismissal of the charge against him.

SUMMARY OF FACTS AND PROCEEDINGS

Detention and arrest:

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 to which police were often called. **[*Id.* 11:30:10-43]** Anticipating that he might be called to the house again, Deputy Limon had preemptively looked up people associated with the house in the N.M. Courts database to see if they had warrants. **[*Id.*]** At the time Deputy Limon had checked, there had been a warrant for Mr. Ayon in the system. **[*Id.* 11:30:10-20]**

Deputy Limon testified that he was not sure exactly when he had 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 that field-tested positive for opiates. **[*Id.* 11:19:13-42, 11:24:20-48]**

District court proceedings:

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, defense counsel 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]**

Court of Appeals proceedings:

The State appealed the district court's dismissal. The Court of Appeals reversed, holding that "the district court's authority at a preliminary hearing does not include the authority to determine the illegality of evidence." *State v. Ayon*, 2021-NMCA-___, ¶ 1, ___ P.3d ___, 2021 WL 3197772 (No. A-1-CA-38812, July 27, 2021). The Court did not reach the question of whether the evidence against Mr. Ayon was illegally obtained. *Id.* ¶ 5.

The Court of Appeals observed that there was "no specific statutory authority that authorizes a district court to review the illegality of the evidence." *Id.* ¶ 11. The Court drew an analogy to grand jury proceedings, reasoning that because it is improper to have a court review the admissibility of evidence presented at grand jury, it should also be impermissible in a preliminary hearing. *See id.* (citing *State v. Martinez*, 2018-NMSC-031, 420 P.3d 568).

Additionally, the Court of Appeals raised practical concerns. The Court worried that having different rules for grand juries and preliminary hearings "may encourage favoring one proceeding over another, undercutting efficient judicial administration and causing confusion." *Id.* The Court thought that having different evidentiary rules apply in preliminary hearings than in suppression hearings would create "inherent difficulties" and "cause confusion." *See id.* ¶ 13. The Court did not want to "encourage mini-trials on evidentiary issues" or "increase the number of pretrial motions." *See id.* ¶ 15. Finally, the Court worried that the compressed timeline of preliminary hearings could result in "insufficiently informed rulings based on undeveloped arguments." *Id.* ¶ 16.

Mr. Ayon sought certiorari on three questions:

1) Is a judge at preliminary hearing required to consider evidence obtained in violation of the Fourth Amendment and Article II, Section 10, or may the judge exclude this evidence from her determination of probable cause?

2) Does a judge conducting a preliminary hearing have the authority to determine that evidence was obtained in violation of the Fourth Amendment or Article II, Section 10?

3) Did the district court in this case correctly determine that Mr. Ayon was subjected to an unconstitutional search and seizure?

This Court granted certiorari on all questions presented.

ARGUMENT

I. District courts can and should exclude illegally obtained evidence from a preliminary hearing.

New Mexico does not have a statute or rule either allowing or prohibiting the use of illegally obtained evidence at preliminary hearings. States differ on this question, and many 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.").

The lack of a statute or rule does not mean that the exclusionary rule is inapplicable. 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 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"); *People v. Walker*, 189 N.W.2d 234, 238-39 (Mich. 1971) (holding

there was no showing of probable cause without "a proper determination from legally admissible evidence at the preliminary examination stage"), *overruled on other grounds by People v. Hall*, 460 N.W.2d 520 (Mich. 1990).

Judges who preside over preliminary hearings in New Mexico already must exclude evidence if it is inadmissible under the Fifth Amendment or the rules of evidence. Rule 5-302(B)(5); *Vogt v. City of Hays*, 844 F.3d 1235, 1237 (10th Cir. 2017). Furthermore, the New Mexico Constitution protects both the right to a preliminary hearing and the Article II, Section 10 exclusionary rule. N.M. Const. art. II, § 14; *State v. Gutierrez*, 1993-NMSC-062, ¶ 50, 116 N.M. 431, 863 P.2d 1052. This context suggests that the exclusionary rule *does* apply to preliminary hearings, and judges presiding over preliminary hearings can and should exclude evidence obtained in violation of the Fourth Amendment and Article II, Section 10.

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. Preliminary hearings are structurally and legally different from grand juries, and the law of grand juries does not apply to them.

The Court of Appeals reversed the district court based in part on this Court's opinion in *Martinez*, 2018-NMSC-031. In *Martinez*, this Court held a court may not review the admissibility of evidence considered by a grand jury or overturn a grand jury indictment on the basis that it relied on inadmissible evidence. *See id.* ¶¶ 1, 39. The Court of Appeals in this case found "the reasoning of *Martinez* persuasive" for preliminary hearings as well. *Ayon*, 2021-NMCA-___, ¶ 11. The Court of Appeals reasoned that grand juries and preliminary hearings serve a similar purpose, and the Court did not want to "create inconsistencies" between the two or "encourage favoring one proceeding over another." *See id.*

Although a grand jury and a preliminary hearing protect similar interests, they are different proceedings with entirely different structures. By their nature, they are governed by different rules. This inconsistency is not a flaw; it is inherent in having two distinct systems for charging defendants. *Martinez* was grounded in the history and structure of grand juries specifically, and it does not apply to preliminary hearings.

To charge a defendant with a felony, the State may either obtain an indictment from a grand jury or file a criminal information. N.M. Const. art. II, § 14. "The choice to proceed by information or indictment is that of the State." *State v. Burk*, 1971-NMCA-018, ¶ 6, 82 N.M. 466, 483 P.2d 940. If the prosecutor

files an information, the defendant has a right to a preliminary hearing. N.M. Const. art. II, § 14. The State's choice about how to proceed determines the rules that it must follow in order to prosecute the defendant.

"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). The preliminary hearing 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.

A preliminary hearing 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, secondary functions as well, including allowing the parties to gather impeachment material and preserve testimony. *Whitehead*, 1997-NMCA-126, ¶ 6; *State v. Garcia*, 1968-NMSC-119, ¶ 5, 79 N.M. 367, 443 P.2d 860.

A preliminary hearing resembles a bench trial, and the defendant has trial-like rights. In New Mexico—although not in all states[1]—the rules of evidence apply to the preliminary hearing. Rule 5-302(B)(5).[2] The defendant has the right to counsel. Rule 5-302(B)(1); *Coleman v. Alabama*, 399 U.S. 1 (1970) at 9-10 (plurality opinion), 12 (Black, J., concurring). 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, to cross-examine adverse witnesses, and to call witnesses in his defense. Rule 5-

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

[2] There is an exception in Rules 6-608(A) and 7-608(A) NMRA, which allow the admission of lab reports under some circumstances that would be considered hearsay at trial.

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).

A grand jury, like a preliminary examination, is "an inquiry into probable cause. To this extent there is a similarity between grand jury proceedings and a preliminary examination." *See State v. Salazar*, 1970-NMCA-056, ¶ 5, 81 N.M. 512, 469 P.2d 157 (cleaned up).[3] "But the nature of the two procedures is different." *Id.* ¶ 6.

A grand jury is "a judicial tribunal with inquisitorial powers." *State v. Chance*, 1923-NMSC-042, ¶ 8, 29 N.M. 34, 221 P. 183. "The grand jury proceedings are not prosecutions; they are inquests into whether there should be a prosecution." *Salazar*, 1970-NMCA-056, ¶ 8. The grand jury's proceedings are secret. *Id.* ¶ 6; *see* NMSA 1978, §§ 31-6-4(B) (2003), 31-6-6(A) (1979), 31-6-11(A) (2003). The rules of evidence do not apply. Section 31-6-11(A). No judge presides over the grand jury proceedings. *See* § 31-6-4(B), (C) (listing persons required or entitled to be present).

The "target" of the grand jury, the potential defendant, has very limited rights. The target may testify and have an attorney present for that testimony, but

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[3] 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).

the target does not otherwise have a right to be present. *See* §§ 31-6-4(B), 31-6-11(C), (D). The attorney of the target may submit proposed questions and exhibits in advance, but may not otherwise speak or participate. *See* § 31-6-4(D); § 31-6-11(B); *State v. Tisthammer*, 1998-NMCA-115, ¶ 22, 126 N.M. 52, 966 P.2d 760, *modified on other grounds in State v. Cleve*, 1999-NMSC-017, ¶ 27, 127 N.M. 240, 980 P.2d 23. "The attorney cannot object to questions, cannot speak to the prosecutor or to the grand jury members, and when advising the target witness, must take care that the attorney is not overheard." *Tisthammer*, 1998-NMCA-115, ¶ 22. The target has no right to cross-examine witnesses. *See Salazar*, 1970-NMCA-056, ¶ 7.[4]

A grand jury's decision to indict is largely unreviewable. *Chance*, 1923-NMSC-042, ¶ 8. Courts will intervene only "to prevent prosecutorial abuse of the structural protections that safeguard the grand jury's ability to perform its constitutional function." *Martinez*, 2018-NMSC-031, ¶ 27 (cleaned up).[5] They will not dismiss "otherwise valid grand jury indictments based on disputes about the

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[4] *Salazar* also says that the target has no right to appear before the grand jury. 1970-NMCA-056, ¶ 7. This is no longer true. The target of a grand jury investigation now has a statutory right to testify. *State v. Pareo*, 2018-NMCA-040, ¶¶ 6-7, 420 P.3d 605; § 31-6-11(C)(3), (4).

[5] Under very limited circumstances, a judge may order the prosecutor to alert the jury to the existence of exculpatory evidence. *See Jones v. Murdoch*, 2009-NMSC-002, ¶ 35, 145 N.M. 473, 200 P.3d 523. Once alerted, the jury is not required to hear or consider the evidence. *Id.* ¶ 24.

source or trial admissibility of the evidence considered by the grand jury." *See id.* ¶ 15; *see also id.* ¶ 1.

This holding in *Martinez* is about grand juries, and it is grounded in the structure and history of grand juries specifically—not preliminary hearings. The *Martinez* opinion never mentions preliminary hearings or purports to apply to them.

Martinez includes a long discussion of the history of judicial review of grand jury indictments, relying on "the entire body of state and federal case law rejecting review of the admissibility of evidence considered by the grand jury." *Id.* ¶ 31; *see id.* ¶¶ 17-24. This history is solely about grand juries; it does not discuss preliminary hearings. The *Martinez* Court emphasizes that courts *will* step in when prosecutors abuse the grand jury process—for example, if the prosecutor manipulates the composition of the grand jury or incorrectly instructs the grand jury on the law. *See id.* ¶ 27. These structural protections are specific to grand juries; no equivalents exist in a preliminary hearing. The *Martinez* Court also observed that a grand jury "is [neither] equipped [nor] called upon to decide" suppression issues. *Id.* ¶ 31. This would not be true in a preliminary hearing, which is conducted under the supervision of a judge who is equipped (and expected) to make decisions about admissibility.

In this case, the Court of Appeals worried that allowing judges to make decisions about admissibility "would create inconsistencies" between preliminary hearings and grand jury proceedings and "encourage favoring one proceeding over another." *Ayon*, 2021-NMCA-___, ¶ 11. But there are necessarily differences between the two types of proceedings, and prosecutors already make strategic choices about which to use. A prosecutor in one New Mexico case testified that he preferred grand juries "because the preliminary hearing is a cumbersome[,] time consuming, expensive procedure the defense counsel uses as a . . . vehicle for discovery." *Burk*, 1971-NMCA-018, ¶ 5 (cleaned up).

Grand juries, which have a reputation of being willing to "indict a ham sandwich,"[6] are generally considered more favorable to the State, while preliminary hearings are more favorable to the defendant. "[D]efendants charged by a prosecutor alone often receive *greater* procedural protections in the charging process than those indicted by the grand jury." Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L. Rev. 1, 19 (2004). The California Supreme Court once held that charging a defendant by grand jury violated the state's equal protection clause by denying the defendant the

[6] For a history of this aphorism, see Josh Levin, *The Judge Who Coined "Indict a Ham Sandwich" Was Himself Indicted*, Slate (Nov. 25, 2014), https://slate.com/human-interest/2014/11/sol-wachtler-the-judge-who-coined-indict-a-ham-sandwich-was-himself-indicted.html.

protections of a preliminary hearing. *Hawkins v. Superior Court*, 586 P.2d 916, 917 (Cal. 1978), *superseded by constitutional amendment as discussed in Strauss v. Horton*, 207 P.3d 48, 75 (Cal. 2009). "It is undeniable that there is a considerable disparity in the procedural rights afforded defendants charged by the prosecutor by means of an information and defendants charged by the grand jury in an indictment." *Hawkins*, 586 P.2d at 917.

New Mexico law recognizes the differences between grand juries and preliminary hearings, and it allows prosecutors to make strategic use of the existence of two types of proceedings. If the State is unsuccessful at bringing charges through one type of proceeding, it may try again at the other. *State v. Isaac M.*, 2001-NMCA-088, ¶ 8, 131 N.M. 235; *White*, 2010-NMCA-043, ¶ 12.

It makes no sense to apply *Martinez* to preliminary hearings in order to avoid "inconsistencies" when the two types of proceedings are inherently different. *See Salazar*, 1970-NMCA-056, ¶ 6. The question of whether a judge in a preliminary hearing may exclude illegally obtained evidence is a separate question, and it is not resolved by *Martinez*. Instead, it is answered by other areas of the law.

B. The characteristics of preliminary hearings and the exclusionary rule in New Mexico suggest that the rule applies to preliminary hearings.

The Court of Appeals' opinion below does not permit a judge at preliminary hearing to consider whether evidence was seized in violation of the Fourth Amendment or Article II, Section 10. According to the Court of Appeals, a judge is required to bind over a case even if, as here, the only evidence to support a finding of probable cause was obtained through unconstitutional means. This is inconsistent with the judge's role at a preliminary hearing, and it improperly treats the right against illegal search and seizure as exclusively a trial right.

Under New Mexico law, judges and magistrates at preliminary hearings must frequently 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.

See 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. *State v. Hardy*, 2012-NMCA-005, ¶ 10, 268 P.3d 1278. 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*, 844 F.3d at 1237.[7]

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[7] There is a circuit split on this issue. *See Vogt*, 844 F.3d at 1240. In most circumstances, it is not clear that 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

The Court of Appeals did not address these other determinations of admissibility that a judge must make at preliminary hearing. Many of the Court's concerns in this case—that allowing judges to exclude inadmissible evidence would increase the number of motions, "encourage mini-trials on evidentiary issues," or cause confusion—would apply equally to a Fifth Amendment claim or a complicated question of privilege. But courts at preliminary hearings are required to address these issues, and they do so routinely. It is not clear why ruling on search-and-seizure claims would be more onerous for a district court than addressing any of the other evidentiary or constitutional issues that arise at preliminary hearing.

Furthermore, New Mexico's law on the exclusionary rule strongly suggests that it attaches at the preliminary hearing stage. There does not appear to be clear authority on whether the Fourth Amendment exclusionary rule applies at a preliminary hearing. But Article II, Section 10 of the New Mexico Constitution provides greater protections against unreasonable searches and seizures than the

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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 exclude illegally obtained statements at the preliminary hearing would be creating the basis 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.").

Fourth Amendment does, *see State v. Leyva*, 2011-NMSC-009, ¶ 3, 149 N.M. 435, 250 P.3d 861, and there is reason to believe that it applies at preliminary hearing.

"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 exclusionary rule in New Mexico is not merely a "judicial remedy"; instead, the constitutional right "to be free from unreasonable search and seizure includes the exclusionary rule." *See Gutierrez*, 1993-NMSC-062, ¶¶ 50, 54. 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." *Id.* ¶¶ 45-46 (emphasis added).

The *Gutierrez* Court's use of the term "criminal proceeding" is interesting in light of *Vogt*. "The Fifth Amendment protects individuals against compulsion to incriminate themselves 'in any criminal case.'" *Vogt*, 844 F.3d at 1239 (cleaned up). The Tenth Circuit concluded that "the phrase 'criminal case' includes probable cause hearings." *Id.* A "criminal proceeding" should likewise include a preliminary hearing. The Article II, Section 10 right is broad, and there is no reason to believe that it applies only at trial. On the contrary, once a violation has

been established, the courts must "return the parties to where they stood before the right was violated." *Gutierrez*, 1993-NMSC-062, ¶ 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. Just as the use of illegally compelled statements in a preliminary hearing violates the Fifth Amendment, *Vogt*, 844 F.3d at 1246, the use of illegally obtained evidence in a preliminary hearing violates Article II, Section 10 and potentially the Fourth Amendment. Under the logic of *Vogt* and *Gutierrez*, it is possible that a judge at preliminary hearing is constitutionally *required* to exclude illegally obtained evidence; however, that is not the question presented in this case. The question in this case is whether a judge is even *permitted* to exclude illegally obtained evidence from the preliminary hearing.

The Court of Appeals held that a judge at preliminary hearing lacks authority to consider whether evidence was illegally obtained. *Ayon*, 2021-NMCA-___, ¶ 5. Even if the evidence was obtained in blatant violation of the Fourth Amendment or Article II, Section 10, the judge must consider it. Effectively, the judge must participate in the violation of the defendant's rights. This is inconsistent with this Court's acknowledgment in *Gutierrez* that "admission of improperly seized evidence denigrates the integrity of the judiciary—judges become

accomplices to unconstitutional executive conduct." 1993-NMSC-062, ¶ 56. "The real and perceived affront to the integrity of the New Mexico judiciary is a critical state interest that militates in favor of the exclusionary rule." *Id.*

Finally, defendants in New Mexico have a constitutional right to a preliminary hearing—a preliminary hearing is one of the "guarantees of liberty to be invoked by the accused in a criminal prosecution." N.M. Const. art. II, § 14; *Whitehead*, 1997-NMCA-126, ¶ 12. 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." *Walker*, 189 N.W.2d at 238.

C. The practical concerns raised by the Court of Appeals do not justify requiring district courts to consider illegally obtained evidence.

The Court of Appeals cited several pragmatic concerns in support of its holding that a judge at a preliminary hearing may not rule on the admissibility of evidence. None of these concerns is insurmountable, and judges routinely manage similar issues in preliminary hearings.

"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." LaFave, 4 Crim. Proc. § 14.4(b); *see also, e.g.*, 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 determination of probable cause. The trial court considers any Fourth Amendment or Article II, Section 10 issues *de novo*. Just as a preliminary hearing judge's determination that a statement was hearsay would not bind the trial court, the preliminary hearing judge's determinations about admissibility have no preclusive effect later in the case.

The Court of Appeals was concerned that allowing challenges to illegally obtained evidence at preliminary hearing "would encourage mini-trials on evidentiary issues." *Ayon*, 2021-NMCA-___, ¶ 15. It worried that allowing

determinations of inadmissibility both at the preliminary hearing and later, at a suppression hearing, could "increase the number of pretrial motions and strain judicial resources." *Id.*

The record in this case suggests that the district court was able to handle the search-and-seizure claim efficiently. The preliminary hearing took twenty-two minutes, with a single witness. **[*See generally* 1/9/20 CD 11:15:50-11:37:26]** No written motions were filed. **[*See* RP 1-8]** The evidence of unlawful search and seizure came out during cross-examination of the State's witness, defense counsel raised her concerns during oral argument, and the district court ruled on it on the spot. **[*See* 1/9/20 CD 11:25:00-11:29:40, 11:32:46-11:37:07]** It is certainly possible that it might take time to address a search-and-seizure issue at a preliminary hearing, but this would be equally true of Fifth Amendment issues and other admissibility questions, which judges are expected to handle.

The Court of Appeals also expressed concerns because the rules of evidence applied at preliminary hearing, but would not apply at a later suppression hearing. *Ayon*, 2021-NMCA-___, ¶ 13. "Applying different evidentiary rules within the same proceedings could cause confusion and create an unreasonable risk of error." *Id.* The Court of Appeals did not identify what confusion this might cause or how it might cause errors. Later in the opinion, though, the Court expressed concern

that judges at preliminary hearings might make "insufficiently informed rulings based on undeveloped arguments." *Id.* ¶ 16.

Even if a judge erroneously rules that evidence is inadmissible at the preliminary hearing, the impact of that error will generally be low. As discussed above, the ruling at preliminary hearing does not bind the trial court. Additionally, even if some evidence is excluded, the State will often have other evidence with which it can prove probable cause. *Cf. Garcia*, 1968-NMSC-119, ¶ 6 (finding of probable cause requires only "that degree of evidence to bring within reasonable probabilities the fact that a crime was committed by the accused"). In cases like this one, where the State's only evidence was illegally obtained, the State may still bring charges in any of several ways. It may appeal the dismissal of the information (as it did here). NMSA 1978, § 39-3-3(B)(1) (1972). It may produce additional evidence and present it in a second preliminary hearing. *See White*, 2010-NMCA-043, ¶ 16. Finally, it may present the case to a grand jury, *id.* ¶ 12, where no judicial review of the evidence is permitted, *see Martinez*, 2018-NMSC-031, ¶¶ 17, 23, 31. *See also United States v. Calandra*, 414 U.S. 338, 350 (1974) (holding Fourth Amendment exclusionary rule inapplicable to grand jury proceedings).

On the other hand, the Court of Appeals' holding that a judge may not consider search-and-seizure issues at preliminary hearing *guarantees* that there will

errors in cases where evidence was illegally seized. Illegally seized evidence will never be excluded from preliminary hearing, even if it is the product of an egregious constitutional violation. The Court of Appeals correctly noted that the evidence could be excluded later, on a motion to suppress. *See Ayon*, 2021-NMCA-___, ¶¶ 12-15. But there is a real difference to defendants between dismissal at preliminary hearing and a favorable ruling on a motion to suppress, which may not happen for months or years. In the meantime, the charges will remain pending, and the defendant will be subject to conditions set by the court, up to and including pretrial detention. The defendant will be subject to "the humiliation and anxiety of a public prosecution." *See Whitehead*, 1997-NMCA-126, ¶ 6. In some cases, there will be no motion to suppress, because the defendant will enter a plea bargain before the case ever reaches that stage. If the purpose of a preliminary hearing is to screen out cases that are unsupported by adequate, admissible evidence, a suppression hearing is not a substitute. *See id.* ¶ 5 ("The primary purpose of the preliminary examination is to provide an independent evaluation of whether the state has met its burden of demonstrating probable cause.").

The concerns identified by the Court of Appeals are manageable. The State has recourse in the event of a wrongful ruling. And the possibility of inefficiency or error does not justify infringing the rights of defendants or requiring judges to

be complicit in constitutional violations. Exclusion of illegally obtained evidence is how our courts "effectuate . . . the constitutional right of the accused to be free from unreasonable search and seizure." *Gutierrez*, 1993-NMSC-062, ¶ 53.

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

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]** She was correct: Deputy Limon did not confirm that there was an active warrant for Mr. Ayon's arrest before detaining him, so he was not executing a warrant, and he had no other basis on which to stop Mr. Ayon. The State argued below that Judge Argyres was incorrect; the Court of Appeals did not reach this question. *Ayon*, 2021-NMCA-___, ¶ 5.

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*, 2021-NMCA-003, ¶ 4, 482 P.3d 1254, *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." *State v. Jason L.*, 2000-NMSC-018, ¶ 11, 129 N.M. 119, 2 P.3d 856.

Deputy Limon testified that he stopped Mr. Ayon because he "knew" there was a warrant for Mr. Ayon's arrest. **[1/9/20 CD 11:18:41-49]** However, he also testified that at the point when he told Mr. Ayon that he had a warrant and handcuffed him, he could not be certain that there was in fact 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.

There does not appear to be authority in New Mexico for 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 who are 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.

The closest case is *Widmer*, in which police were investigating a possibly stolen scooter, and the defendant was stopped as part of that investigation. *Widmer*, 2021-NMCA-003, ¶¶ 2, 8 (describing an "already valid stop"). 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. 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. The Court of Appeals 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.

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.[8]

New Mexico has no doctrine of "reasonable suspicion of a warrant." It is possible (although by no means settled) that this would be an acceptable theory under the Fourth Amendment. *Cf. Arizona v. Evans*, 514 U.S. 1, 3-4 (1995) (holding that arrest based on quashed warrant fell within good-faith exception to exclusionary rule); *United States v. Hensley*, 469 U.S. 221, 232 (1985) (allowing police to stop a suspect on the basis of a flyer or bulletin from another jurisdiction). But this would not fly under the New Mexico Constitution. There is no exception

[8] Critics of stop-and-frisk policies have argued that police 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).

to the Article II, Section 10 exclusionary rule for police who rely in good faith on a defective warrant. *See Gutierrez*, 1993-NMSC-062, ¶ 1. An officer's belief that a warrant is valid is insufficient to satisfy Article II, Section 10. Therefore, an officer's belief that a warrant *exists* should also be insufficient to support a suspicionless detention; it would be the officer's responsibility to check for a warrant before stopping the suspect. Part of the role of Article II, Section 10 is "to curb the state's zeal in execution of the criminal laws." *Gutierrez*, 1993-NMSC-062, ¶ 54.

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-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).

CONCLUSION

Defendants in New Mexico have a constitutional right to a preliminary hearing and to the exclusion of illegally obtained evidence. A judge at preliminary hearing must have the authority to identify and exclude illegally obtained evidence from her determination of probable cause, just as she would exclude any other inadmissible evidence. In this case, Judge Argyres excluded the fruits of an illegal seizure, and because there was no admissible evidence to consider, she correctly dismissed the case without prejudice.

Mr. Ayon asks this Court to reverse the Court of Appeals and affirm the district court's dismissal of his case.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that on March 1, 2022, 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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