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 REPLY BRIEF

On Certiorari to the New Mexico Court of Appeals

Oral argument is requested.

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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]**. Mr. Ayon's brief-in-chief is cited as **[BIC page number]**, the State's answer brief is cited as **[AB page number]**, and the amicus brief from the New Mexico Criminal Defense Lawyers' Association is cited as **[NMCDLA page number]**.

Ricky Ayon relies on the facts, argument, and authorities set out in his brief-in-chief for all issues not discussed below. He takes this opportunity to respond to a few points in the State's answer brief.

REPLY ARGUMENT

I. A preliminary hearing court's authority to consider search-and-seizure issues comes from the Constitution.

The crux of Mr. Ayon's argument is that a judge who conducts a preliminary hearing has the authority to determine whether the evidence before her was illegally obtained. The State disagrees, and its argument relies heavily on its analysis of the rules of criminal procedure. **[*See generally* AB 9-23]** In particular, the State argues that Rule 5-302 NMRA and Rule 5-212 NMRA do not discuss exclusion of illegally seized evidence at the preliminary hearing stage, and therefore the judge at preliminary hearing may not consider search-and-seizure issues. **[*See* AB 11-12, 15-17]**

But Mr. Ayon has never argued that either Rule 5-302 or Rule 5-212 authorizes a judge to address search-and-seizure issues at preliminary hearing. That authority does not come from the rules. Instead, Mr. Ayon has argued, supported by amicus NMCDLA, that the constitutional protections against illegal searches and seizures apply throughout a criminal proceeding, including at the preliminary hearing. **[*See generally* BIC 16-21; NMCDLA 7-23]** Article II, Section 10 and its exclusionary rule as interpreted in *State v. Gutierrez*, 1993-NMSC-062, ¶ 54, 116

N.M. 431, 863 P.2d 1052, require courts to "return the parties to where they stood before the right was violated." In order to do that, the judge at preliminary hearing must be able to consider whether evidence was illegally seized and to exclude it from her determination of probable cause.

"[T]he New Mexico Constitution is the supreme law and each department of government must comply with it." *State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 21 n.14, 487 P.3d 815 (cleaned up). The Constitution authorizes judges to determine whether evidence was illegally seized, and no additional authorization by rule is necessary. *Cf. State v. Young*, 2007-NMSC-058, ¶ 19, 143 N.M. 1, 172 P.3d 138 ("As guardians of the constitution, we must enforce the rights guaranteed by the constitution and further the intent of its provisions.").

II. No New Mexico law, other than the Court of Appeals' opinion in this case, prohibits judges at preliminary hearing from addressing evidentiary or constitutional issues.

The State asserts that "New Mexico jurisprudence" supports a conclusion that "the preliminary hearing serves a narrow purpose . . . which does not include decisions on the legality of evidence," and "this Court has long recognized that the inquiry at a preliminary hearing is narrow and does not include consideration of evidentiary issues apart from whether probable cause exists to believe the defendant committed the charged offense." **[AB 12-13]** These statements are not supported by the authorities cited in the answer brief.

In support of these statements, the State cites *State v. Garcia*, 1968-NMSC-119, 79 N.M. 367, 443 P.2d 860. **[AB 12-13]** *Garcia* did not address admissibility of evidence or the scope of a preliminary hearing judge's authority to consider evidentiary or constitutional issues. The question in *Garcia* was the burden of proof that the prosecution must meet at a preliminary hearing, and this Court held that the standard was simply probable cause. *See id.* ¶¶ 3-5.

In the same discussion, the State quotes *State v. Masters*, 1982-NMCA-166, ¶ 6, 99 N.M. 58, 653 P.2d 889: "at a preliminary hearing the *only* issue is whether there exists probable cause to believe defendant committed the offense." **[AB 14 (emphasis in answer brief)]** *Masters*, like *Garcia*, addressed the burden of proof at preliminary hearing and had nothing to do with admissibility of evidence. The

State also cites *State v. White*, 2010-NMCA-043, 148 N.M. 214, 232 P.3d 450, and *State v. Vallejos*, 1979-NMCA-089, 93 N.M. 387, 600 P.2d 839, **[AB 14]** neither of which addresses the preliminary hearing judge's authority to determine admissibility or constitutionality of evidence. There is no authority to support the State's assertion that "this Court has long recognized that the inquiry at a preliminary hearing . . . does not include consideration of evidentiary issues." **[*See* AB 13]**

On the contrary, a judge who conducts a preliminary hearing *must* address evidentiary and constitutional issues. **[*See* BIC 7, 16-18]** The State agrees that the preliminary hearing judge must determine whether evidence is admissible according to the rules of evidence. **[*See* AB 12, 17, 22]** The State does not discuss the preliminary hearing judge's obligation to rule on Fifth Amendment issues pursuant to *Vogt v. City of Hays*, 844 F.3d 1235, 1237 (10th Cir. 2017). **[*See generally* AB]**

III. Protections against illegal searches and seizures attach before trial.

The State says that Mr. Ayon "fail[s] to acknowledge is that it is well-settled in New Mexico that not all constitutional trial rights apply at a preliminary hearing." **[AB 27]** The State cites *State v. Lopez*, 2013-NMSC-047, 314 P.3d 236, in which this Court held that a defendant's Sixth Amendment right to confront witnesses does not apply at preliminary hearings. **[AB 27]** The State also argues that other states "agree that not all constitutional trial rights must be afforded at a preliminary hearing," again citing cases about the confrontation right. **[AB 30]** Two points about this are worth noting.

First, Mr. Ayon did not "fail to acknowledge" that some constitutional rights apply at trial only. He cited *Lopez* in his brief-in-chief and wrote that a "defendant does not have a Sixth Amendment confrontation right at the preliminary hearing." **[BIC 10]**

Second, it is true that not every *trial* right applies at preliminary hearing. The State correctly identifies the confrontation right as specific to trial. But the Fourth Amendment and Article II, Section 10 rights against illegal search and seizure are not solely trial rights.

This Court's opinion in *Lopez* 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 from unreasonable and unwarranted encounters on the street or in their homes, well before trial. *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. Furthermore, because the protections of Article II, Section 10 go beyond the analogous protections of the Fourth Amendment, there is

even more reason to believe that they attach at the preliminary hearing stage. **[*See* BIC 18-21; NMCDLA 9-18]**

The State asserts that "it appears clear in New Mexico law that suppression of unlawfully gathered evidence is a trial right not necessarily implicated during early stages of criminal proceedings." **[AB 30]** In support of this assertion, the State cites *State v. Eder*, 1985-NMCA-076, 103 N.M. 211, 704 P.2d 465; *State v. Martinez*, 2018-NMSC-031, 420 P.3d 568; and *State v. Fierro*, 2014-NMCA-004, 315 P.3d 319. **[AB 31]** All three cases are about the appropriate remedy for presenting unlawfully obtained evidence to a grand jury. *See Eder*, 1985-NMCA-076, ¶ 1; *Martinez*, 2018-NMSC-031, ¶ 1; *Fierro*, 2014-NMCA-004, ¶¶ 33-34.

None of these cases addresses preliminary hearings or any other pretrial proceedings. The fact that exclusion of unlawfully obtained evidence is not available at grand jury does not make the Fourth Amendment and Article II, Section 10 "trial rights," nor does it mean they are inapplicable "during early stages of criminal proceedings" in general, rather than to grand juries specifically.

Grand juries and preliminary hearings are different proceedings, and it is by no means settled that the same law applies to both—this is one of the central questions in this case. **[*See* BIC 8-15]** The State says that "this Court has suggested" that because grand juries and preliminary hearings serve a similar

purpose, "the same general rights apply at each." **[AB 23]** It is not clear what this assertion is based on; the State cites no authority for this point.

IV. When police stop a suspect because they believe (but are not certain) that there is a warrant for his arrest, discovery of a warrant does not attenuate the illegality of that stop.

In its answer brief, the State argues that "even where an officer does not discover the existence of a valid arrest warrant until after a detention has occurred, the warrant essentially cures the lack of reasonable suspicion under the 'attenuation doctrine.'" **[AB 38]** For this point, the State cites *Utah v. Strieff*, 579 U.S. 232 (2016), and *State v. Edwards*, 2019-NMCA-070, 452 P.3d 413. **[AB 38-39]** In both cases, police detained suspects illegally, without reasonable suspicion, and then discovered that the suspects had valid warrants and arrested them. *Strieff*, 579 U.S. at 235; *Edwards*, 2019-NMCA-070, ¶¶ 3-4. The arrests (and searches incident to arrest) were upheld based on the attenuation doctrine. *Strieff*, 579 U.S. at 235; *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*, 579 U.S. at 239.

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.

Moreover, both *Strieff* and *Edwards* are Fourth Amendment cases. It is an open question whether the *Strieff* attenuation analysis applies under Article II, Section 10 of the New Mexico Constitution. *See State v. Ramey*, 2020-NMCA-041, ¶ 28, 473 P.3d 13 (finding illegal seizure was insufficiently attenuated under Fourth Amendment analysis, and therefore not reaching Article II, Section 10 claim); *State v. Baca*, No. A-1-CA-36722, ¶ 9, 2020 WL 605181 (N.M. Ct. App. Jan. 7, 2020) (non-precedential) (treating as unresolved whether discovery of a preexisting arrest warrant breaks the chain of causation under Article II, Section 10).

CONCLUSION

Mr. Ayon asks this Court to reverse the Court of Appeals and affirm the district court's dismissal of his case without prejudice.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that on April 11, 2022, a copy of this pleading was uploaded to Odyssey File & Serve for service on Meryl Francolini in the Office of the Attorney General.

_/s/ *Caitlin Smith*_____
Law Offices of the Public Defender