

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Respondent,

v.

S-1-SC-38937

RICKY ANTHONY AYON,
Defendant-Petitioner.

**AMICUS BRIEF OF
NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION**

SCOTT M. DAVIDSON
Counsel for Amicus NMCDLA
The Law Office of Scott M. Davidson, Ph.D., Esq.
1011 Lomas Boulevard NW
Albuquerque, NM 87102
505-255-9084
scott@justappeals.net

JAMISON BARKLEY
Chair of Amicus Committee of NMCDLA
Jamison Barkley Law
316 Garfield Street
Santa Fe, NM 87501
505-995-9602
jamison@jamisonbarkley.com

ANGELICA HALL
111 Lomas Blvd. NW, Ste, 501
Albuquerque, NM 87102
angelicahall@gmail.com
(505)346-2489
President, NMCDLA

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	4
ISSUE PRESENTED FOR REVIEW.....	6
SUMMARY OF ARGUMENT.....	7
ARGUMENT.....	8
Requiring a district court to consider illegally-obtained evidence in determining whether probable cause supports further criminal proceedings against a defendant is incompatible with <i>Gutierrez</i> , Article II, Section 10 and New Mexico’s unique exclusionary rule.....	8
A. Unlike the federal exclusionary rule, New Mexico’s exclusionary rule is constitutional, and is designed to effectuate the right protected in Article II, Section 10.....	9
B. <i>Gutierrez</i> requires exclusion of evidence at a Rule 5-302 preliminary examination.....	11
C. Reading Rule 5-302 to create a constitutional loophole is incompatible with <i>Gutierrez</i>	12
D. Preserving the individual’s rights requires denying use of illegally-obtained evidence, and restoring parties to where they would be without the constitutional violation.....	16
E. The plain language of Rule 5-302 entails the authority to apply the exclusionary rule during a preliminary examination.....	19

F. Judicial integrity and deterrence are advanced by application of New Mexico’s exclusionary rule in Rule 5-302 preliminary examinations.....21

CONCLUSION AND REQUEST FOR ORAL ARGUMENT.....22

CERTIFICATE OF SERVICE.....24

STATEMENT REGARDING COMPLIANCE WITH RULE OF APPELLATE PROCEDURE 12-318(F)(3): Pursuant to Rule of Appellate Procedure 12-318(G), Amicus NMCDLA hereby states that this brief was prepared using a proportionally-spaced typeface. The brief contains 2810 words, using the word count feature of Google Docs, Version 1.2021.16203.

TABLE OF AUTHORITIES

NEW MEXICO CASES

<i>State v. Gutierrez</i> , 2011-NMCA-088.....	<i>passim</i>
<i>State v. White</i> , 2010-NMCA-043.....	19-20

FEDERAL CASES

<i>Mapp v. Ohio</i> , 367 U.S 643 (1961).....	10
<i>Silverthorne Lumber Co. v. United States</i> , 251 U.S. 385 (1920).....	21
<i>United States v. Calandra</i> , 414 U.S. 338 (1974).....	10-11
<i>United States v. Leon</i> , 468 U.S. 897 (1984).....	10-11
<i>United States v. Mounday</i> , 208 F. 186 (D. Kan. 1913).....	13-15
<i>Weeks v. United States</i> , 232 U.S. 383 (1914).....	9, 21
<i>Wolf v. Colorado</i> , 338 U.S. 25 (1949).....	9

CASES FROM OTHER STATES

State v. Colson,
163 S.E.2d 376 (N.C. 1968).....15

State v. Davis,
666 P.2d 802 (Or. 1983).....16-17

State v. Sheridan,
96 N.W. 730 (Iowa 1903).....21

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV.....6, 8, 10, 11, 13

NEW MEXICO CONSTITUTIONAL PROVISIONS

N.M. Const., Art. VI, § 10.....*passim*

NEW MEXICO COURT RULES

Rule 5-302 NMRA.....*passim*

Rule 12-320(C) NMRA.....6

SECONDARY AUTHORITIES

Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 Creighton L. Rev. 565 (1983).....10

ISSUE PRESENTED FOR REVIEW¹

Whether a district court, while conducting a preliminary examination under Rule 5-302, must consider evidence illegally obtained in violation of Article II, Section 10 or the Fourth Amendment, when that evidence is the only evidence presented by the State, or may it apply New Mexico's unique exclusionary rule and exclude such evidence due to the constitutional violation.²

¹Rule 12-320 Disclosures: Pursuant to Rule 12-320(C), Amicus NMCDLA states that Mr. Davidson authored the brief, which was reviewed by Ms. Barkley and Ms. Hall. No monetary contribution has been made by the NMCDLA or any other party to fund the preparation or submission of this brief. Pursuant to Rule 12-320(D)(1), Amicus NMCDLA states that Ms. Jamison notified the Criminal Appeals Division of the Office of the Attorney General on February 24, 2022 of the intention to file a motion and brief pursuant to Rule 12-320.

²Counsel for Petitioner Ayon has ably addressed each of the three questions presented to the Court. *See* Petitioner's Brief in Chief *passim*. Amicus NMCDLA writes separately to address an issue that overlaps Questions 1 and 2—*viz.*, a district court's role in enforcing Article II, Section 10 and New Mexico's unique exclusionary rule during a preliminary examination under Rule 5-302, particularly where the only evidence presented was illegally-obtained in violation of Article II, Section 10.

SUMMARY OF ARGUMENT

Decades ago, in *State v. Gutierrez*, 1993-NMSC-062, this Court held that the constitutional right to freedom from unreasonable search and seizure protected in Article II, Section 10 of the New Mexico Constitution is effectuated by putting the parties in the position they were in prior to the invasion of the constitutional right. New Mexico's exclusionary rule, unlike the federal exclusionary rule, has a constitutional dimension, and is not merely an evidentiary rule. It follows that a district court, while conducting a Rule 5-302 preliminary examination, must be allowed to find that probable cause does not support additional criminal proceedings where the prosecution relies exclusively on evidence tainted by violation of Article II, Section 10. To preclude a district court from so finding would be incompatible with *Gutierrez*, Article II, Section 10, and New Mexico's unique exclusionary rule.

ARGUMENT

Requiring a district court to rely on illegally-obtained evidence to determine whether probable cause supports further criminal proceedings against a defendant is incompatible with *Gutierrez*, Article II, Section 10 and New Mexico's unique exclusionary rule.

This Court's opinion in *Gutierrez*, 1993-NMSC-062, contains an extended and well-reasoned exegesis of New Mexico's exclusionary rule under Article II, Section 10, its differences from the federal exclusionary rule under the Fourth Amendment, its history, and its purposes. Justice Ransom's eloquent articulation of the foundational principles underlying Article II, Section 10 and our exclusionary rule, *see Gutierrez*, 1993-NMSC-062, ¶¶ 15-56, cannot be ignored as this Court reviews the Court of Appeals' ruling that the district court must rely on illegally-obtained evidence as it determines whether probable cause supports continued criminal proceedings against Petitioner Ayon.

In 1993, Justice Ransom explicated the purpose of the exclusionary rule in Article II, Section 10. *See* 1993-NMSC-062, ¶¶ 15-56. *Gutierrez* recounts the history of the exclusionary rule

in federal jurisprudence, and provides a penetrating analysis of the purposes underlying New Mexico’s exclusionary rule, in contrast to the much-narrower federal rule. *See id.* *Gutierrez* supports the district court’s decision to effectuate Petitioner Ayon’s rights under Article II, Section 10 by excluding illegally-obtained evidence as it examined the evidence presented by the State in support of its allegation that he committed a crime. The Court of Appeals’ reversal is incompatible with *Gutierrez*.

A. Unlike the federal exclusionary rule, New Mexico’s exclusionary rule is constitutional, and is designed to effectuate the right protected in Article II, Section 10.

New Mexico’s exclusionary rule is not merely evidentiary, it has a constitutional dimension: “There are in the cases of [the United States Supreme Court] some passing references to the [*Weeks v. United States*, 232 U.S. 383 (1914)] rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in [*Wolf v. Colorado*, 338 U.S. 25 (1949)]—to the effect that the *Weeks* rule is of constitutional origin, remains

entirely undisturbed.” *Mapp v. Ohio*, 367 U.S 643, 649 (1961),
quoted in Gutierrez, 1993-NMSC-062, ¶ 20.

Although the federal courts “gradually moved away from the constitutional theory of the exclusionary rule . . . to a view premised on deterrence,” *Gutierrez*, 1993-NMSC-062, ¶ 21 (citing Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 Creighton L. Rev. 565, 627-45 (1983)), New Mexico’s exclusionary rule is firmly rooted in Article II, Section 10 and is designed to effectuate the right of the accused by restoring the parties to where they would have been in the absence of governmental intrusion into the individual’s search and seizure rights under Article II, Section 10.

The federal exclusionary rule is attenuated from the constitutional right protected in the Fourth Amendment. In *United States v. Leon*, 468 U.S. 897, 906 (1984), citing *United States v. Calandra*, 414 U.S. 338, 348 (1974), the exclusionary rule was described as “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its

deterrent effect, rather than a personal constitutional right of the party aggrieved.” The United States Supreme Court in *Leon* went further: “the use of fruits of a past unlawful search or seizure ‘work[s] no new Fourth Amendment wrong.’” 468 U.S. at 906 (quoting *Calandra*, 414 U.S. at 354). New Mexico’s exclusionary rule stands in sharp contrast to the much-narrower federal rule.

B. *Gutierrez* requires exclusion of evidence at a Rule 5-302 preliminary examination.

New Mexico’s exclusionary rule requires that the district court deny the state the use of evidence obtained in violation of Article II, Section 10. *See Gutierrez*, 1993-NMSC-062, ¶ 54 (“Once violation of Article II, Section 10 has been established, we do no more than return the parties to where they stood before the right was violated.”). This Court stated in *Gutierrez* that “the New Mexico constitutional prohibition against unreasonable searches and seizures requires that we deny the state the use of evidence obtained in violation of Article II, Section 10 in a criminal proceeding.” 1993-NMSC-062, ¶ 45. Forcing a district court to rely on illegally-obtained evidence as it conducts a preliminary

examination as to the existence of probable cause would be directly contrary to this Court's pronouncements and reasoning in *Gutierrez*.

This Court emphasized “the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions. This broad right that we find implicit in Article II, Section 10, considered in the context of criminal prosecution brought to bear after violation of that right, is the paramount principle that underlies our conclusion.” *Gutierrez*, 1993-NMSC-062, ¶ 46.

C. Reading Rule 5-302 to create a constitutional loophole is incompatible with *Gutierrez*.

The reasoning of this Court in *Gutierrez* entails that district courts have the authority to enforce constitutional freedoms at any stage of a criminal prosecution. Carving out a procedural “free fire zone” where law enforcement’s violations of the constitution are ignored is contrary to New Mexico case law.

Precluding district courts from finding that evidence relied on by the prosecution in a Rule 5-302 preliminary examination was obtained in violation of Article II, Section 10, or the Fourth Amendment, would create a loophole in the constitution where violations of the fundamental right to freedom from unreasonable search and seizure are excused. Under the Court of Appeals' ruling, law enforcement may violate an individual's constitutional rights and force him to face criminal charges, while enlisting the complicity of the judiciary in the constitutional wrongdoing. This is incompatible with *Gutierrez*.

In *Gutierrez*, the Court quoted with approval—and at length—from a 1913 federal court decision in Kansas, *United States v. Mounday*, 208 F. 186, 189 (D. Kan. 1913). See *Gutierrez*, 1993-NMSC-062, ¶ 48. In *Mounday*, the court considered defendants' pre-grand jury request for the return of property seized pursuant to an illegal search. This Court quoted the following from *Mounday*:

As yet, defendants stand charged with the commission of not criminal offense. Even if so charged, this court must and will presume their innocence until the contrary is proven beyond a reasonable doubt. In order

to secure such proof and assist the government in overcoming the presumption of innocence which attends upon defendants and all other citizens until lawful conviction had, shall this court wink at the unlawful manner in which the government secured the proofs now desired to be used, and condone the wrong done defendants by the ruthless invasion of their constitutional rights, and become a party to the wrongful act by permitting the use of the fruits of such act? Such is not my conception of the sanctity of rights expressly guaranteed by the Constitution to a citizen.

Munday, 208 F. at 189, *quoted in Gutierrez*, 1993-NMSC-062, ¶ 48.

Were this Court to agree with the Court of Appeals' ruling and compel district courts during a Rule 5-302 preliminary examination to rely on illegally-obtained evidence in making a probable cause finding, it would be forcing the district judges of New Mexico to "wink at the unlawful manner in which the government secured the proofs . . . , condone the wrong done defendants and . . . become a party to the wrongful act by permitting the use of the fruits of such act." *Munday*, 208 F. at 189, *quoted in Gutierrez*, 1993-NMSC-062, ¶ 48. This Court endorsed *Munday's* embrace of the "sanctity of rights expressly

guaranteed by the Constitution to a citizen,” and agreed with its rejection of complicity in governmental wrongdoing. *Id.*

The federal district court’s lengthy articulation of the practical implications of recognition of the sanctity of the fundamental constitutional continued:

No one, under our Constitution and laws may be adjudged guilty until the presumption of innocence is overcome by evidence lawfully offered and lawfully received against him in open trial in a court of justice, as provided by and in accordance with the Constitution and laws of our country In this case it is the object of the government to cause defendants to be punished, if convicted, and to use such evidence now in the custody of the court to aid in securing such conviction. Surely such a flagrant violation of defendants’ conceded constitutional rights should not in justice be permitted to be used to their prejudice. One wrong plus another does not make a right.

Munday, 209 F. at 189, *quoted in Gutierrez*, 1993-NMSC-062, ¶ 49. *See also State v. Colson*, 163 S.E.2d 376, 384 (N.C. 1968), *quoted in Gutierrez*, 1993-NMSC-062, ¶ 52 (“Evidence unconstitutionally obtained is excluded in both state and federal courts as an essential to due process, not as a rule of evidence but as a matter of constitutional law.”).

D. Preserving the individual's rights requires denying use of illegally-obtained evidence, and restoring parties to where they would be without the constitutional violation.

This Court asked “how this Court can effectuate the constitutional right to be free from unreasonable search and seizure. The answer to us is clear: to deny the government the use of evidence obtained pursuant to an unlawful search.” *Gutierrez*, 1993-NMSC-062, ¶ 50. Denying the prosecution the use of illegally-obtained evidence in a Rule 5-302 preliminary examination is logically required by the rationale of this Court’s opinion in *Gutierrez*.

In New Mexico, one of the aims in excluding evidence from a criminal proceeding is to return the parties to the status quo ante, placing them where they stood prior to the invasion of the constitutional violation. *Gutierrez*, 1993-NMSC-062, ¶ 54. This Court quoted with approval from an Oregon Supreme Court opinion as follows: “The object of denying the government the fruits of its transgression against the person whose rights it has invaded is not to preserve the self-regard of judges but to preserve

that person's rights to the same extent as if the government's officers had stayed within the law." *State v. Davis*, 666 P.2d 802, 806-07 (Or. 1983) (*en banc*), *quoted in Gutierrez*, 1993-NMSC-062, ¶ 52.

As applied to Petitioner Ayon's case, prior to the unconstitutional seizure of him, he was not under arrest or investigatory detention. Preserving the constitutional right protected in Article II, Section 10 in criminal proceedings requires allowing a district judge to find, as part of her preliminary examination, that a prosecution predicated on illegally-obtained evidence is not supported by probable cause. *See* Rule 5-302(D)(1).

In New Mexico, illegally-obtained evidence is excluded to effectuate the right to the accused. This Court's approach to the exclusionary rule "focuses not on deterrence or judicial integrity, nor do we propose a judicial remedy; instead, our focus is to effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure." *Gutierrez*, 1993-NMSC-062, ¶ 53.

Allowing the prosecution of Petitioner Ayon to proceed beyond the preliminary hearing solely on the basis of evidence obtained in violation of his Article II, Section 10 rights would be “turning the other cheek,” contrary to *Gutierrez*. “If, after consideration of the substantive constitutional issue, the court decides that the state has transgressed the constitutional rights of a person accused of a crime, we will not sanction that conduct by turning the other cheek.” *Gutierrez*, 1993-NMSC-062, ¶ 53.

Exclusion of the tainted evidence from the preliminary examination finding returns the parties to where they stood before Petitioner Ayon was unreasonably seized. “Once violation of Article II, Section 10 has been established, we do no more than return the parties to where they stood before the right was violated.” *Gutierrez*, 1993-NMSC-062, ¶ 54. The rationale of *Gutierrez* forbids the pointless continuation of a prosecution that relies on illegally-obtained evidence.

E. The plain language of Rule 5-302 entails the authority to apply the exclusionary rule during a preliminary examination.

A district court is required to *examine* the prosecution's evidence in a hearing under Rule 5-302. Rule 5-302 repeatedly refers to "examination" of evidence presented by the prosecution. The title of the rule, and the proceeding governed by it, is "Preliminary Examination." Rule 5-302, Rule 5-302(A)(1), Rule 5-302(A)(2), Rule 5-302(A)(3), Rule 5-302(B), Rule 5-302(B)(1), Rule 5-302(B)(2), Rule 5-302(C), Rule 5-302(D)(1), Rule 5-302(E). The rule speaks of "examination" of witnesses. Rule 5-302(B)(4). After the district court has completed its "examination," it is required to dismiss the charges without prejudice if it "*finds* that there is no probable cause to believe that the defendant has committed a felony offense." Rule 5-302(D)(1) (emphasis added).

The Rule's repeated references to examination of witnesses, examination of evidence, and findings, and New Mexico's court's requirement that the prosecution establish probable cause that the defendant committed the charged crime "to the satisfaction of the examining judge," *State v. White*, 2010-NMCA-043, ¶ 11,

logically entail that the district judge must exercise judicial independence and employ the traditional tools of judicial scrutiny to test the adequacy of the prosecution's evidence that a crime was committed by the defendant. This independent scrutiny necessarily includes application of Article II, Section 10, and New Mexico's exclusionary rule.

The effect of a probable cause finding at the conclusion of a Rule 5-302 preliminary examination is to "vest[] jurisdiction with the district court to bring the accused to trial." *White*, 2010-NMCA-043, ¶ 11. Compelling an individual to stand for trial on the basis of illegally-obtained evidence is incompatible with Article II, Section 10, New Mexico's exclusionary rule, and *Gutierrez*. Article II, Section 10, and New Mexico's independent state constitutional jurisprudence over the last three decades forbid a ruling that would require a district court to rely on evidence that violates Article II, Section 10, and force an accused to answer charges that rest entirely on illegally-obtained evidence.

F. Judicial integrity and deterrence are advanced by application of New Mexico’s exclusionary rule in Rule 5-302 preliminary examinations.

Judicial integrity and deterrence are also advanced by application of the exclusionary rule in preliminary proceedings. In *Gutierrez*, this Court noted that “[i]mplicit in the rationales of [*State v. Sheridan*, 96 N.W. 730, 731 (Iowa 1903)], *Weeks*, and [*Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)], is the notion that admission of improperly seized evidence denigrates the integrity of the judiciary—judges become accomplices to unconstitutional executive conduct. 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. Similarly, deterrence of future constitutional violations is a critical state interest that is a by-product of the exclusionary rule.” *Gutierrez*, 1993-NMSC-062, ¶ 56.

Although the State has an interest in enforcing the criminal code and prosecuting those who violate the criminal code, it also has an overriding interest in preserving the integrity of judicial

proceedings and deterring future violations of New Mexico's Constitution. Effectuating the rights protected in Article II, Section 10 is best accomplished by not requiring district courts to rely on illegally-obtained evidence in Rule 5-302 preliminary examinations. New Mexico law requires the prosecution to produce legally-obtained evidence to support the allegation that an individual committed a crime. This is true at trial, and a Rule 5-302 preliminary examination is not a "free fire zone" where illegally-obtained evidence is treated as if it were untainted.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Requiring a judge to consider illegally-obtained evidence at a preliminary examination is incompatible with Article II, Section 10, *Gutierrez*, and New Mexico's exclusionary rule. It follows that a district court must be allowed to find that probable cause does not support a prosecution where the only evidence introduced during a Rule 5-302 preliminary examination was obtained in violation of Article II, Section 10.

Accordingly, Amicus NMCDLA respectfully requests reversal of the Court of Appeals' opinion, and affirmance of the district court's finding of no probable cause. Amicus NMCDLA also respectfully requests oral argument, where Court and counsel may engage in constructive dialog about any matters not adequately addressed in the briefs.

Respectfully submitted,

/s/ Scott M. Davidson (electronically filed)

SCOTT M. DAVIDSON

THE LAW OFFICE OF SCOTT M. DAVIDSON, PH.D., Esq.

1011 Lomas Boulevard NW

Albuquerque, NM 87102

scott@justappeals.net

505.255.9084 (ph)

Counsel for Amicus NMCDLA

THE LAW OFFICE OF JAMISON BARKLEY, LLC

JAMISON BARKLEY

316 Garfield St.

Santa Fe, NM 87501

jamison@jamisonbarkley.com

(505) 995-9602

Chair, NMCDLA Amicus Committee

ANGELICA HALL

111 Lomas Blvd. NW, Ste, 501

Albuquerque, NM 87102

angelicahall@gmail.com

(505)346-2489

President, NMCDLA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing amicus brief (conditionally filed) was served on the Criminal Appeals Division, Attorney General's Office, State of New Mexico, through the Odyssey electronic filing system and/or email, on the 10th day of March 2022.

/s/ Scott M. Davidson (electronically filed)
SCOTT M. DAVIDSON