

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

S-1-SC-39309

Plaintiff-Respondent,

vs.

MICHELLE L. PEREA,

Defendant-Petitioner.

STATE OF NEW MEXICO'S ANSWER BRIEF

On Writ of Certiorari to the New Mexico Court of Appeals

HECTOR H. BALDERAS
Attorney General

MERYL E. FRANCOLINI
Assistant Attorney General

Attorneys for Plaintiff-Appellee
201 Third Street NW Ste. 300
Albuquerque, New Mexico 87102
(505)717-3591

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INTRODUCTION

Defendant is charged with possession of methamphetamine and possession of drug paraphernalia. The district court granted Defendant's motion to suppress evidence obtained through a search warrant of her home on the ground that the supporting affidavit failed to establish the confidential informant's basis of knowledge. The Court of Appeals correctly concluded that the affidavit was sufficient to establish probable cause.

SUMMARY OF FACTS AND PROCEDURE

On February 19, 2019, an Otero County magistrate judge issued a warrant for the search of Defendant's home in Alamogordo upon finding that the affidavit submitted in application for the warrant established probable cause. **[RP State's ex.**

1] The affidavit, drafted by a narcotics agent with the Alamogordo Police Department and approved by the local district attorney, stated in relevant part:

Affiant learned from a documented confidential reliable informant, hereinafter referred to as CI, that within the last 72 hours, a quantity of Methamphetamine seen by the CI consistent with trafficking has been seen by the CI at, 1712 North Florida Avenue, Alamogordo, Otero County, New Mexico, which is being handled by a female subject identified as Michelle Perea, hereinafter referred to as the above named defendant. CI stated the above named defendant keeps a continuous supply of illicit narcotics at her residence and on her persons at all times.

The CI is reliable in that the CI has given information, which has been corroborated and was proven to be accurate. The CI has given

information involving narcotics and houses which sell narcotics. The CI has made controlled substance buys for the Otero County Narcotics Enforcement Unit in Otero County, New Mexico.

Affiant knows the CI is familiar with what Methamphetamine looks like, how it is packaged and sold, as the CI is an admitted past user of illicit drugs. Affiant questioned [sic] the CI carefully regarding drug trafficking and the appearance, price, use and effects of various street drugs. The CI's Answer's demonstrated extensive knowledge about street drugs, including methamphetamine. Affiant states the CI is currently working for consideration of his/her charges and/or monetary compensation, and has no reason to provide information that is proven to be untrue or false in that if the information is proven to be false, CI will not gain any consideration toward those charges or monetary compensation. CI is aware that providing false information can lead to the filing of criminal charges against the CI.

[RP State's Ex. 1 at 4 (unnumbered)] The affiant went on to detail his awareness, through training and experience, of certain evidence or other contraband that "drug traffickers" often keep in their residences such as firearms, stolen property, and electronic storage devices. **[Id. at 4-5]**

The search warrant was executed the following day, and agents uncovered a small amount of methamphetamine as well as paraphernalia including syringes, a scale, "empty jeweler baggies," and multiple glass and plastic smoking devices, inside Defendant's residence. **[RP 17-18]** Defendant was arrested and transported to the Otero Country Detention Center, where officers found another 1.4 grams of methamphetamine hidden in her clothing. **[RP 18]**

Defendant ultimately was not charged with trafficking, but on February 27, 2019, a criminal complaint was filed in the magistrate court charging Defendant with

possession of a controlled substance (methamphetamine), possession of drug paraphernalia, and bringing contraband into a jail.¹ **[RP 15-17]** An indictment was filed in the district court charging Defendant only with possession of methamphetamine and possession of drug paraphernalia on April 3, 2019. **[RP 38-39]**

Defendant filed a motion to suppress all evidence discovered during the search, arguing that the affidavit failed to demonstrate the basis of the CI's knowledge because it did "not state the amount of methamphetamine seen or how the informant knows that it is a 'quantity consistent with trafficking,'" rendering the search warrant deficient. **[RP 54-58]** Defense counsel conceded in the motion, however, that the affidavit did sufficiently establish the CI's credibility. **[RP 56]** In response, the State argued the affidavit plainly established that the CI made first-hand, personal observations of methamphetamine in an amount consistent with trafficking in the Defendant's home, as well as methamphetamine on her person, demonstrating an adequate basis of personal knowledge. **[RP 61-64]**

At a hearing on Defendant's motion on August 5, 2019, the court heard argument by the parties and a copy of the search warrant and supporting affidavit were introduced by the prosecution without objection. **[8-5-2019 CD, 2:06:31-**

¹ An amended Criminal Complaint omitting the charge of bringing contraband into was filed on March 13, 2019. **[RP 31-32]**

08:12; RP State's Ex. 1] Defense counsel argued in part that the affidavit was flawed because it failed to state how the CI knew the amount of methamphetamine seen in Defendant's house was consistent with trafficking, and that even assuming the CI was credible, the affidavit did not "show the conditions under which [the CI] made his or her observations" as required by cases like *State v. Belknap*, A-1-CA-35195, mem. op. (N.M. Ct. App. Mar. 6, 2017), *State v. Whitley*, 1999-NMCA-155, and *State v. Baca*, 1982-NMSC-016. **[8-5-2019 CD, 2:08:17-11:48]** Counsel further asserted that the search warrant was overbroad in that it authorized a search of Defendant's person, which should have required an arrest warrant, but conceded there was no case law to support the argument. **[Id. 2:11:49-12:20]**

The State argued that it was clear on the face of the affidavit that not only was the narcotics investigator extensively experienced with respect to controlled substances, but as paragraph three of the affidavit demonstrates, the CI had given information that had been corroborated and proven to be accurate, had provided information about narcotics generally and houses from which narcotics were being sold, and made controlled substance buys for the Otero County Narcotics Enforcement Unit. **[Id. 2:16:49-17:50]**

As to the CI's basis of knowledge specifically, the prosecutor asserted that as illustrated in paragraph four of the affidavit, the CI was an admitted previous user of methamphetamine, was familiar with the appearance of the drug and how it is

packaged and sold, and when questioned carefully by the affiant about drug trafficking, demonstrated extensive knowledge regarding narcotics. **[Id. 2:17:51-20:00]** The CI also had personal knowledge in that he or she personally observed the methamphetamine within 72 hours of the execution of the search warrant. From these facts, the prosecutor concluded, the CI had a sufficient basis of knowledge of methamphetamine in a particular location in an amount consistent with trafficking. The prosecutor also pointed out that a separate search warrant had been issued for, but not executed at, the same location several weeks prior, further supporting a finding that there was sufficient information from which to conclude drugs could be found both on the premises and Defendant's person. **[Id.]** The prosecutor concluded by arguing that regardless of whether Defendant was in fact trafficking methamphetamine, if the affidavit established probable cause to believe there was *any* amount of methamphetamine within Defendant's residence, the search warrant was valid. **[Id. 2:26:16-40]** At the close of the hearing, the district court took the warrant, affidavit, and arguments of the parties under advisement.

In a written order filed on August 8, 2019, the district court granted Defendant's motion and suppressed all evidence obtained during the search of her residence. **[RP 70-73]** The court looked to the two-prong inquiry used by New Mexico courts to analyze the adequacy of information provided by confidential informants in applying for search warrants, as set out in *State v. Cordova*, 1989-

NMSC-083, ¶ 6, 109 N.M. 110. **[RP 71]** First, the court found the veracity prong of the inquiry had been satisfied in that the affidavit established the CI's credibility.

[Id.]

As to the basis-of-knowledge prong, however, the court found it lacking because the affidavit stated only that a quantity of methamphetamine consistent with trafficking had been observed within the preceding 72 hours, but did not state “the amount of methamphetamine seen or how the informant knows that it is a ‘quantity consistent with trafficking,’” nor did it “show the conditions under which the informant made his/her observations, the quantity of methamphetamine allegedly seen or how it was packaged which might indicate an intent to distribute.” **[RP 71]** The court also noted that there was “no evidence that the informant had seen any sales of methamphetamine by the defendant.” **[RP 72]** Thus, the court concluded the search warrant was defective and required the suppression of all evidence uncovered in the search. **[RP 73]** The court relied in part on *Belknap* and also looked to *Whitley* to support its reasoning.²

The State filed a motion for reconsideration alerting the court that in its order, it had misquoted and potentially misperceived the critical portion of the affidavit explaining that the CI had personally seen methamphetamine in the Defendant's

² The court also formally rejected the defense's argument that the search warrant was overbroad. **[RP 72-73]**

home. **[RP 74-78]** The prosecutor reiterated that these first-hand observations were “the best possible basis of knowledge,” particularly when recounted by a CI who all parties agreed was undeniably credible. **[Id.]**

The prosecutor further asserted that because the credibility of the CI had been established, the CI’s observations of an amount of methamphetamine “consistent with trafficking” were also credible. **[RP 74-75]** As to the court taking issue with a lack of detail regarding the circumstances under which the methamphetamine was observed, the State argued that requiring such detail could undermine the confidential nature of the informant’s information by revealing his or her identity. **[RP 76-77]** Finally, the prosecutor re-asserted that the State is not required to prove “trafficking” or an intent to distribute in order to obtain a valid search warrant – the CI’s statement that a quantity of methamphetamine consistent with trafficking was observed established a fair probability of an ongoing crime and the presence of evidence of that crime in Defendant’s home, which is all the law requires. **[RP 77]**

On August 9, 2019, the district court filed an amended order that differed from its original order only in that the previously misquoted portion of the affidavit was corrected. **[RP 79-82]** The State timely appealed. **[RP 84-85]**

In its memorandum opinion, the Court of Appeals limited its review of the affidavit to the sufficiency of the CI’s basis of knowledge, as the CI’s credibility was

conceded. *State v. Perea*, A-1-CA-38407, mem. op. ¶ 6 (N.M. Ct. App. Mar. 7, 2022)(nonprecedential). In rejecting the district court’s analysis of the basis-of-knowledge prong, the Court first noted that a careful reading of the affidavit makes clear that the CI *personally* observed, first-hand, methamphetamine inside Defendant’s home, being handled by Defendant. The affidavit also demonstrates that the CI was “familiar with what [m]ethamphetamine looks like, how it is packaged and sold,” and demonstrated an extensive knowledge about narcotics as a past drug user, including “the appearance, price, use and effects of various street drugs” including methamphetamine. *Id.* ¶ 8. Because it is well-established in New Mexico that first-hand observations satisfy the basis-of-knowledge requirement, the Court reasoned, “the CI’s personal observation of methamphetamine at Defendant’s residence was sufficient” despite the district court’s conclusion. *Id.* ¶ 8.

The Court next addressed the district court’s reliance on *Belknap* for the proposition that the affidavit was insufficient purely for its lack of detail regarding the amount of methamphetamine the CI observed or other circumstances under which the observations were made. Noting that a CI’s personal observations of marijuana inside a home were deemed inadequate to establish probable cause for a search in *Belknap* partly because marijuana could often be legally possessed, “making the additional allegation of trafficking critical,” the Court distinguished this case from *Belknap*. *Id.* ¶ 10. While the marijuana observed in that case may have

been legally possessed, “in this case the mere possession of methamphetamine is categorically prohibited in New Mexico.” *Id.* ¶ 11.

As to the district court’s view that the affidavit lacked sufficient specificity, the Court of Appeals reasoned that it is not clear in New Mexico law that more specificity was required under the circumstances at issue here. *Id.* ¶ 12. Nevertheless, “a common-sense reading of the affidavit reflects that the CI’s visual observation supplies the basis of knowledge,” the Court concluded. *Id.* ¶ 12.

Finally, regarding the district court’s concern that the affidavit did not state that the CI saw Defendant selling methamphetamine, the Court found that while the omission “may diminish the value of the CI’s basis of knowledge,” it did not render the search warrant invalid because CI’s observation still established probable cause that Defendant was in possession of methamphetamine. *Id.* ¶ 13. Based on these considerations, the Court of Appeals found the district court erred in granting Defendant’s motion to suppress. *Id.* ¶ 13.

Defendant petitioned this Court for a writ of certiorari, which this Court granted on May 4, 2022. In her brief in chief, Defendant asserts the Court of Appeals’ memorandum opinion must be reversed because it “directly conflicts” with *Belknap*. **[BIC 1]** This answer brief is timely if filed on or before August 8, 2022.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT IMPROPERLY GRANTED THE MOTION TO SUPPRESS

On an appeal from an order suppressing evidence on the ground that it was obtained through an invalid search warrant, the inquiry “focuses on the issuing court’s finding of probable cause.” *State v. Price*, 2020-NMSC-014, ¶ 12, 470 P.3d 265. This means that “we look at the magistrate’s conclusions, not the district court’s. If we conclude that the magistrate’s conclusions as to probable cause were correct, we uphold those conclusions regardless of the decision reached by the district court,” *State v. Evans*, 2009-NMSC-027, ¶ 12, 146 N.M. 319, and “regardless of how the reviewing court might have handled the warrant as the issuing judge.” *State v. Gurule*, 2013-NMSC-025, ¶ 17, 303 P.3d 838.

The issuing court’s determination of probable cause

must be upheld if the affidavit provides a substantial basis to support a finding of probable cause. . . . A reviewing court should not substitute its judgment for that of the issuing court. Rather, we clarify that the reviewing court must determine whether the affidavit as a whole, and the reasonable inferences that may be drawn therefrom, provide a substantial basis for determining that there is probable cause to believe that a search will uncover evidence of wrongdoing.

State v. Williamson, 2009-NMSC-039, ¶ 29, 146 N.M. 488. The substantial basis standard is “more deferential than the de novo review applied to questions of law,

but less deferential than the substantial evidence standard applied to questions of fact.” *Id.* ¶ 30. The reviewing court gives the issuing court’s probable cause determination ““great deference”” because “deference to the warrant process encourages police officers to procure a search warrant.” *Id.* ¶¶ 17, 28 (citation omitted).

“[W]hen an application for a search warrant is based on an affidavit, the affidavit must contain sufficient facts to enable the issuing magistrate independently to pass judgment on the existence of probable cause.” *State v. Cordova*, 1989-NMSC-083, ¶ 5, 109 N.M. 211. Probable cause “is ‘more than a suspicion or possibility but less than a certainty of proof.’” *Evans*, 2009-NMSC-027, ¶ 11 (citation omitted). An informant’s allegations can provide probable cause for a search warrant if the application establishes the credibility of the informant and the basis of his knowledge. *Cordova*, 1989-NMSC-083, ¶ 6. Because affidavits “normally are drafted by non-lawyers ... in the midst and haste of a criminal investigation,” however, “technical requirements of elaborate specificity have no proper place in a court’s evaluation.” *Id.* ¶ 15 (citation omitted). This Court has explained that, rather:

- (1) only a probability of criminal conduct need be shown; (2) there need be less vigorous proof than the rules of evidence require to determine guilt of an offense; (3) common sense should control; [and] (4) great deference should be shown by courts to a magistrate’s determination of probable cause.

Id. (internal citation omitted).

In the district court, Defendant conceded that the affidavit satisfied the reliability prong. The affidavit also stated the informant's basis and source of knowledge when it averred that "within the last 72 hours, a quantity of Methamphetamine ... consistent with trafficking has been seen by the CI at [Defendant's residence] which is being handled by ... Michelle Perea." **[RP State's Ex. 1]** The affidavit also indicated that the CI knew "defendant keeps a continuous supply of illicit narcotics at her residence and on her persons at all times," and recognized that the quantity of methamphetamine that he or she saw was "consistent with trafficking or distribution" when it averred that the CI was "familiar with what Methamphetamine looks like, how it is packaged and sold, as the CI is an admitted past user of illicit drugs ... [and the CI] demonstrated extensive knowledge about street drugs, including methamphetamine." **[*Id.*]**

As the Court of Appeals noted in its opinion, the affidavit reveals that the CI made "first-hand observations of the methamphetamine at Defendant's home, and personal observations of a CI are generally sufficient to establish a basis of knowledge under New Mexico law. *Perea*, A-1-CA-38407, mem. op. ¶ 8. The Court looked in part to *State v. Barker*, 1992-NMCA-117, ¶ 5, 114 N.M. 589, where it held that first-hand observations by a CI "serve to meet the 'basis of knowledge' prong" per *Cordova*. The Court of Appeals also referenced *State v. Lujan*, 1998-NMCA-

032, ¶ 12, 124 N.M. 494, where it reasoned that: “The first-hand observation of the informant satisfies the ‘basis of knowledge’ prong; the words “observed” or “personally observed” are not required as technical formalities in all cases to establish first-hand knowledge.”

The CI’s observations of Defendant handling a quantity of methamphetamine plainly constituted first-hand knowledge. *See, e.g., State v. Ramirez*, 1980-NMCA-108, ¶¶ 3-4, 95 N.M. 202 (holding that a statement in an affidavit that the CI saw the defendant possessing heroin was sufficient to satisfy the basis of knowledge prong, as it clearly established that the informant obtained the information through personal observation and ultimately holding that this was sufficient to establish probable cause); *State v. Gonzales*, 1999-NMCA-027, ¶ 24, 126 N.M. 742 (the informant “reported having seen methamphetamine in the [defendant’s] vehicle,” which meant that he “possessed personal knowledge of unlawful activity; the informant was not merely passing on a rumor”); *State v. Montoya*, 1992-NMCA-067, ¶ 14, 114 N.M. 221 (statement that informant had “personal knowledge, through observation, of defendant’s trafficking activities” was sufficient to satisfy basis of knowledge requirement); *State v. Cervantes*, 1979-NMCA-029, ¶¶ 11-16, 92 N.M. 643 (finding affidavit supporting search warrant established probable cause by reciting that CI was “present in the residence to be searched during the late evening hours of January 26, 1978, and personally observed the heroin, with which he was familiar because

he was an heroin addict,” which “informed the judge issuing the search warrant as to the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were[.]” (internal quotation marks omitted)); *State v. Whitley*, 1999-NMCA-155, ¶¶ 2-4, 128 N.M. 403 (finding affidavit satisfied the basis of knowledge prong “because the informant was in the motel room and personally observed Defendant selling marijuana,” where affidavit simply stated that a CI “has observed [the defendant] sell marijuana in the past 48 hours.” (emphasis added)); *State v. Marshall*, A-1-CA-38288, mem. op. (N.M. Ct. App. Dec. 6, 2021) (finding affidavit established CI’s basis of knowledge regarding the defendant’s possession of “a quantity of methamphetamine consistent with trafficking” because it “clearly reflect[ed] that the information supplied by the CI was based on first-hand knowledge, gained by virtue of the CI’s visual observations of Defendant.”).

By contrast, this Court has found an informant’s basis of knowledge inadequate where an informant made no claim that he personally observed narcotics or drug sales and no claim that he was present in the defendant’s home. In *Cordova*, an affidavit contained a tip from a CI who “advised that a subject driving a red Chrysler Cordova with Texas Plates, was currently selling heroin at a residence” and claimed the “Subject John Doe was from out of town and had brought the heroin in.” 1989-NMSC-083, ¶ 2. The CI also described the subject and “did state that through personal knowledge, several heroin users had been to this residence.” *Id.* This Court

deemed the affidavit “devoid of any indication of how the informant gathered this information” and found that “although the affidavit states the informant has personal knowledge that ‘heroin users’ have been at the residence, there is nothing in the affidavit to indicate the source of his knowledge, or even how the informant knows the persons in question to be ‘heroin users.’” *Id.* ¶ 21.

In this case, unlike *Cordova*, the affidavit provided a substantial basis for concluding the CI gathered information of Defendant’s illegal activity in a reliable way—through first-hand, personal observation inside the Defendant’s home. *State v. Haidle*, 2012-NMSC-033, ¶ 23, 285 P.3d 668. The CI was at Defendant’s residence and personally observed Defendant to be in possession of a quantity of methamphetamine. Per *Lujan*, the CI’s “first-hand knowledge naturally and logically flows from a common-sense reading of the affidavit,” which suffices to establish the informant’s basis of knowledge, even without additional explanation of the circumstances under which the observation was made. 1998-NMCA-032, ¶ 12; and compare *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (search warrant was improperly issued upon sworn affidavit stating simply that affiant “has cause and does believe” that certain illegal liquors were to be found in the specified location).

Contrary to the district court’s conclusion, there is no requirement that the affidavit had to provide detail as to the exact amount of methamphetamine seen or “how it was packaged which might indicate an intent to distribute” in order to

adequately establish the CI's basis of knowledge. [RP 71-72] As previously mentioned, this Court has made clear that "technical requirements of elaborate specificity have no proper place in a court's evaluation." *Cordova*, 1989-NMSC-083, ¶ 15; see also *State v. Donaldson*, 1983-NMCA-064, ¶ 13, 100 N.M. 111 (a court must interpret the affidavit in a common sense and realistic fashion and must not require technical requirements of elaborate specificity."). Thus, the Court of Appeals was correct in its finding that "it is not clear [in New Mexico law] that such specificity is required under the circumstances present in this case." *Perea*, mem. op. ¶ 12.

This Court has suggested that only when an affiant fails to affirmatively state the CI's basis of knowledge—which is not the case here—is greater detail required. See *Cordova*, 1989-NMSC-083, ¶ 9 ("[W]hen an affidavit does not affirmatively state an informant's basis of knowledge, it may be inferred that an informant who otherwise is known to be credible obtained the information set forth in the affidavit in a reliable fashion if the tip contains enough detail to be self-verifying."); *Haidle*, 2012-NMSC-033, ¶¶ 16, 25-27 (explaining that a detailed description may compensate where an affidavit fails to indicate that first-hand observation supplied the basis of informants' knowledge); *Baca*, 1982-NMSC-016, ¶¶ 16-18 (explaining detail was required because the affidavit did not set forth a factual basis for the CI's conclusory assertion of personal knowledge of criminal conduct, such as

observations or dealings with the defendant, such that the judge could not ascertain whether the CI had actually seen the defendant engage in criminal conduct); *see also Lujan*, 1998-NMCA-032, ¶¶ 11-12 (explaining that where the affidavit does not explicitly state that a CI personally observed the criminal conduct in question, the basis of knowledge requirement may be satisfied if first-hand knowledge naturally and logically flows from a common-sense reading of facts set forth in the affidavit).

No more specific estimate of quantity or packaging was required because possession of any amount of methamphetamine is illegal. And because the CI was identified as an admitted “past user of illicit drugs” including methamphetamine, and was quite familiar with “drug trafficking and the appearance, price, use and effects of various street drugs,” and “how [methamphetamine] is packaged and sold,” **[RP State’s Ex. 1 at 4]** it was apparent that he or she knew what a trafficking amount is. *See State v. Rubio*, 2002-NMCA-007, ¶ 8, 131 N.M. 479 (although there was no precise estimate of the amount in the affidavit, it could be “reasonably inferred” that an informant who is “familiar with cocaine and its use, packaging, and methods of sale . . . would be qualified to know what constituted a large amount of cocaine as opposed to an amount that could be rapidly consumed or sold”). Additionally, “[i]ntent to distribute may be inferred when the amount of controlled substance possessed is inconsistent with personal use.” *State v. Hubbard*, 1992-NMCA-014, ¶ 9, 113 N.M. 538.

Federal courts have likewise concluded that a CI's personal observations of drugs inside a residence, coupled with his or her detailed knowledge of narcotics and their cultivation or sales, can support the issuance of a search warrant even absent precise details surrounding the observations. *See U.S. v. Long*, 774 F.3d 653, 657-69 (10th Cir. 2014) (holding affidavit for search warrant satisfied probable cause standard where it stated that a CI with extensive knowledge of cocaine sales "observed an amount of cocaine...packaged for distribution" inside an apartment); *Mahdy v. Cearley*, 92 F. Supp. 3d 1145, 1149-50 (D.N.M. 2015) (holding that although affidavit did not describe the basis for a CI's tip that marijuana was being grown in an RV, it nonetheless provided probable cause for the issuance of a search warrant because it clearly stated that the CI had seen marijuana plants in the RV, that the CI had knowledge of and was familiar with the cultivation, appearance, and odor associated with marijuana, and that the CI was known to be credible).

Defendant urges reversal of the Court of Appeals' holding on the grounds that it conflicts with the court's opinion in *Belknap*, A-1-CA-35195, mem. op. ¶¶ 11-15, where the Court of Appeals held that a statement that a "confidential informant 'observed a quantity of [m]arijuana consistent with trafficking or distribution' both inside the residence and on Defendant's person" was "insufficient to establish probable cause." But as the Court recognized in this case, marijuana may be "legally possessed under certain circumstances," whereas possession of methamphetamine is

“categorically prohibited in New Mexico.” *Perea*, ¶¶ 10-11. Indeed, the *Belknap* defendant was “authorized to possess and grow a limited amount of marijuana under New Mexico’s Compassionate Use Act” and “had a valid medical marijuana card,” but the affidavit for the search warrant failed to disclose these facts. *Belknap*, ¶ 3.

Thus, “substantiation of the additional allegation of trafficking [in *Belknap*] [was] critical.” *Perea*, ¶ 10. The *Belknap* affidavit alleged that the CI saw a quantity of marijuana consistent with trafficking, but was “devoid of any information which would assure the magistrate court of the reliability of the informant’s knowledge” and was therefore insufficient. *Belknap*, ¶ 14. The affiant also knew the defendant was allowed to lawfully produce and possess a certain amount of marijuana, but failed to mention that fact in the affidavit. *Id.* ¶ 5. In contrast, the affidavit here demonstrated that the CI’s information regarding Defendant’s possession of an amount of *categorically illegal* methamphetamine consistent with trafficking—and exactly where it was located—was based on first-hand knowledge. That by itself established probable cause that, at the very least, Defendant was illegally possessing a narcotic.

Possession of any amount of methamphetamine is a crime. *See* NMSA 1978, § 30-31-23 (making it a felony in this state to possess methamphetamine). This Court’s task is to “determine whether the affidavit [for search warrant] as a whole, and the reasonable inferences that may be drawn therefrom, provide a substantial

basis for determining that there is probable cause to believe that a search will uncover *evidence of wrongdoing*.” *Williamson*, 2009-NMSC-039, ¶ 29 (emphasis added); *accord Cordova*, 1989-NMSC-083, ¶ 15 (“[o]nly a probability of criminal conduct need be shown” to justify the issuance of a search warrant). In *State v. Snedeker*, 1982-NMSC-085, ¶ 34, 99 N.M. 286, this Court held that even where there are “items in [an] affidavit that do not by themselves show probable cause[,]” a warrant “is not rendered invalid” if “the remaining allegations demonstrate probable cause.” The CI’s first-hand observation of methamphetamine on Defendant’s property amounted to probable cause to believe Defendant was engaged in a crime. **[RP 1]**

“Affidavits are to be read with common sense,” *State v. Garcia*, 1977-NMCA-056, ¶ 9, 90 N.M. 577, and here, a common sense reading permitted the issuing magistrate to infer that the CI had been physically present inside Defendant’s residence on at least one occasion within the preceding 72 hours and made first-hand observations of a quantity of what the CI knew through experience to be methamphetamine. *Lujan*, 1998-NMCA-032, ¶ 12. The CI had a basis of knowledge to support the issuance of a search warrant. Accordingly, the Court of Appeals correctly reversed the district court’s decision to suppress the evidence.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the Court of Appeals' opinion.

Respectfully submitted,

HECTOR H. BALDERAS
Attorney General

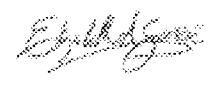
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/s/ Meryl E. Francolini
Meryl E. Francolini
Assistant Attorney General
201 Third St. NW, Suite 300
Albuquerque, New Mexico 87102
(505) 717-3591

CERTIFICATE OF SERVICE

I certify that on August 8, 2022, I filed the foregoing pleading electronically through the Odyssey/E-File & Serve System, which caused opposing counsel, Carrie Cochran, to be served by electronic means at ccochran@lopdm.us.

/s/ Meryl E. Francolini
Assistant Attorney General



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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S-1-SC-39309

MICHELLE L. PEREA,

Appellant-Petitioner.

APPELLANT-PETITIONER'S REPLY BRIEF

Bennett J. Baur
Chief Public Defender
Kimberly Chavez Cook
Appellate Defender

Carrie Cochran
Assistant Appellate Defender
Law Offices of the Public Defender
1422 Paseo De Peralta, Bldg. 1
Santa Fe, New Mexico 87501
(505) 395-2890

Attorneys for Michelle L. Perea

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I. REPLY

Relying on the arguments and authorities already presented in the brief in chief, Michelle Perea offers the following reply to points specifically raised in the State's answer brief.

II. ARGUMENT

A. **The Court of Appeals erroneously reversed the district court's ruling granting Ms. Perea's motion to suppress.**

The State asserts that this Court should affirm the Court of Appeals' memorandum opinion because the Court of Appeals properly distinguished this case from *State v. Belknap*, A-1-CA-35195, mem. op. (N.M. Ct. App. Mar. 6, 2017) (nonprecedential). **[State's AB 18-19]** The State argues that the Court of Appeals correctly concluded that a confidential informant's (CI) first hand observations are *always* sufficient to satisfy the CI's "basis of knowledge." **[State's AB 12-13]** However, the Court of Appeals' misapplied *Belknap* in erroneously concluding that the holding in that case was proper because the defendant was allegedly trafficking marijuana, not methamphetamine as alleged here. *State v. Perea*, A-1-CA-38407, mem. op. ¶ 14, (N.M. Ct. App. Mar. 7, 2022) (nonprecedential). The Court of Appeals also concluded that the CI's first hand observations of methamphetamine automatically satisfied the "basis of knowledge" prong, in further conflict with

Belknap. Perea, A-1-CA-38407, mem. op. ¶ 8.

The State contends that the warrant in *Belknap* failed because the Court of Appeals recognized that the defendant there had a “valid medical marijuana card” and was “authorized to possess and grow a limited amount of marijuana[,]” although those facts were not provided in the affidavit for the search warrant. **[State’s AB 19]** However, those facts were not dispositive of whether the search warrant was supported by probable cause. The *Belknap* Court did not consider that the alleged substance being trafficked was marijuana, which the defendant *may* have legally possessed as a valid medical marijuana card holder, in its review of whether the CI’s statements in the affidavit for the search warrant satisfied the “basis of knowledge” prong sufficient to support probable cause.

An affidavit for a search warrant must state with “particularity the place to be searched and the items to be seized.” *State v. Light*, 2013-NMCA-075, ¶ 22, 306 P.3d 534; U.S. Const. amend. IV. This requirement prevents general searches and ensures that the “search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013. The fact that possession of methamphetamine is illegal does not negate the particularity requirement for search warrants required under the United States Constitution, and does not diminish whether the a CI’s statements satisfy the “basis of knowledge” prong when analyzing whether

probable cause existed to support the issuance of a search warrant.

The affidavit for a search warrant in this case is not supported by probable cause for the same reasons as those in *Belknap*. Irrespective of the substance allegedly being trafficked, both warrants failed to provide how the CI's observations were consistent with his familiarity of the "appearance, packaging methods, pricing, quantity, methods of ingestion, and distribution methods of narcotics." *See Belknap*, A-1-CA-35195, mem. op. ¶¶ 13-14. Moreover, while first-hand observations *may* be sufficient to satisfy the "basis of knowledge" prong, those observations are not *always* sufficient. *See id.* ¶ 11 (concluding that the CI's first-hand observation, alone, was insufficient to satisfy the "basis of knowledge" prong in assessing whether the affidavit for a search warrant was supported by probable cause).

The affidavit in this case failed to establish the basis of the CI's basis of knowledge. The district court properly granted Ms. Perea's motion to suppress and the Court of Appeals erroneously reversed the district court's ruling.

III. CONCLUSION

Ms. Perea respectfully requests this Court reverse the Court of Appeals and affirm the district court's ruling granting Ms. Perea's motion to suppress.

Respectfully submitted,

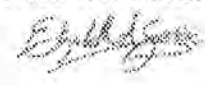
Bennett J. Baur
Chief Public Defender
Kimberly Chavez Cook
Appellate Defender

//S//Carrie Cochran
Carrie Cochran
Assistant Appellate Defender
1422 Paseo de Peralta, Bldg. 1
Santa Fe, NM 87501
(505) 395-2890

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was served electronically via Odyssey EFile & Serve to Meryl Francolini (mfrancolini@nmag.gov) at the Attorney General's Criminal Appeals Division this **15th** day of August, 2022.

//S//Carrie Cochran
Law Offices of the Public Defender



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Appellee-Respondent,

vs.

S-1-SC- 39309

MICHELLE L. PEREA,

Appellant-Petitioner.

APPELLANT-PETITIONER'S BRIEF IN CHIEF

Bennett J. Baur
Chief Public Defender
Kimberly Chavez Cook
Appellate Defender

Carrie Cochran
Assistant Appellate Defender
Law Offices of the Public Defender
1422 Paseo De Peralta, Bldg. 1
Santa Fe, New Mexico 87501
(505) 395-2890

Attorneys for Michelle L. Perea

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I. NATURE OF THE CASE

The Court of Appeals' memorandum opinion in this case, *State v. Perea*, A-1-CA-38407, mem. op. (N.M. Ct. App. Mar. 7, 2022) (nonprecedential), directly conflicts with the unpublished opinion, *State v. Belknap*, A-1-CA-35195, mem. op. (N.M. Ct. App. Mar. 6, 2017) (nonprecedential). Although unpublished, *Belknap* is factually on point and relies heavily on well-established principles of New Mexico law. *Belknap* and the instant case addressed the question of whether the information provided by a criminal informant (CI) in an affidavit for a search warrant was sufficient to support a finding of probable cause. Each case arose from the same jurisdiction and was presided over by the same district court judge. Each involved a warrant alleging that the defendant possessed drugs in an amount consistent with trafficking and that those drugs were being distributed for sale.

In *Belknap*, Judge Angie Schneider denied the motion to suppress and was reversed by the Court of Appeals. In this case, Judge Schneider, presented with almost identical facts and having been previously reversed, granted the motion to suppress. The Court of Appeals reversed again, leaving this judge and others with conflicting guidance from the appellate courts. *Cf. State v. Smith*, 230 A.3d 638, 639 (Conn. 2020) (“as the highest court in our judicial system, we play a critical role in providing guidance to lower courts”).

II. SUMMARY OF FACTS AND PROCEEDINGS

Police applied for and obtained a search warrant from an Otero County magistrate judge to search Ms. Perea's residence. **[RP State's Ex. 1 at 4 (unnumbered)]** The affidavit for search warrant stated that the affiant had learned from a CI that within the last 72 hours, the CI had observed an unknown amount of methamphetamine that was "consistent with trafficking" at Ms. Perea's residence. **[RP State's Ex. 1 at 4 (unnumbered)]** The affidavit also provided that the CI was an "admitted past user of illicit drugs" and had "made controlled substance buys for the Otero County Narcotics Enforcement Unit" previously. **[RP State's Ex. 1 at 4 (unnumbered)]** When the search warrant was executed, police recovered a small amount of methamphetamine and various paraphernalia. **[RP 17-18]** Ultimately, Ms. Perea was not charged with trafficking. **[RP 15-17]**

Ms. Perea moved to suppress all evidence recovered in the search, arguing that the affidavit failed to demonstrate the basis of the CI's knowledge. **[RP 54-58]** The district court agreed with Ms. Perea and suppressed the evidence, finding that the affidavit failed to provide a sufficient basis of knowledge with respect to the CI's statements regarding trafficking. **[RP 70-73]** The court noted that the affidavit failed to include how much methamphetamine was observed, or how the CI knew the purported quantity was consistent with trafficking. **[RP 71]** The court also noted that there was no evidence that the CI had seen Ms. Perea engaged in any sales of

methamphetamine. **[RP 72]**

The State moved to reconsider, arguing that the district court misquoted a sentence in the affidavit for the search warrant¹ and explaining why that mistake could have caused the court to misperceive whether the CI had personal knowledge of the evidence to be seized. **[RP 74-78]** The State also argued that it was not required to prove trafficking in order to obtain a warrant because the CI's statement that that a quantity of methamphetamine consistent with trafficking was observed established a "fair probability of an ongoing crime." **[RP 77]** Although the district court did not explicitly deny the motion, the district court subsequently filed an amended order granting Ms. Perea's motion to suppress, which corrected the misquoted sentence from the affidavit. **[RP 79-82]**

On the State's appeal, the Court of Appeals reversed the district court's decision to grant Ms. Perea's motion to suppress, concluding that the motion should not have been granted because the affidavit for a search warrant "contained sufficient facts to support the court's finding of probable cause." *Perea*, A-1-CA-38407, mem. op. ¶ 14.

¹ The State asserted that the district court order misquoted the affidavit in stating that a quantity of methamphetamine "has been seen" by the CI at Ms. Perea's home. The State argued that the affidavit actually stated that that the methamphetamine was "seen by the CI[.]" indicating that the CI had personally seen the substance at Ms. Perea's home. **[RP 74-75]**

III. ARGUMENT

- A. The Court of Appeals erred in reversing the district court's decision to grant Ms. Perea's suppression motion when it concluded that there was a substantial basis to support a finding of probable cause for police to obtain a search warrant to search Ms. Perea's home.**

A district court's ruling on a motion to suppress is reviewed to determine "whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party." *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119 (internal quotation marks and citation omitted). "[T]he appellate courts draw all reasonable inferences in favor of the ruling and defer to the district court's finding of fact as long as they are supported by substantial evidence" *State v. Murry*, 2014-NMCA-021, ¶ 10, 318 P.3d 180.

A finding of probable cause sufficient to support the issuance of a search warrant must be based upon substantial evidence, which may be hearsay so long as "there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. *State v. Baca*, 1982-NMSC-016, ¶ 9, 97 N.M. 379 (internal quotation marks omitted). Thus, in order to assist the judge in making a probable cause determination, the "affidavit must provide a factual basis for the informant's personal knowledge." *Id.* ¶ 16.

In this case, the district court relied primarily upon *State v. Belknap*, No. 35,195, mem. op. (N.M. Ct. App. March 6, 2017) (non-precedential), an unpublished

case, in making its decision to grant Ms. Perea's suppression motion. In *Belknap*, police obtained a search warrant based on information from a CI that he had observed a quantity of marijuana consistent with trafficking inside the defendant's residence. *Id.* ¶ 5. The CI was a "self-admitted drug user" and was "familiar with narcotics in their appearance, packaging methods, pricing, quantity, methods of ingestion, and distribution methods." *Id.* (Internal quotation marks omitted). The district court denied the defendant's motion suppress, but on appeal, the Court of Appeals reversed the district court. *Id.* ¶¶ 2, 4.

Under the Court of Appeals analysis for the "basis of knowledge prong," it relied on *State v. Cordova*, 1989-NMSC-083, ¶ 11, 109 N.M. 211, for the proposition that an affidavit for a search warrant "must establish a substantial basis for concluding the informant gathered the information of illegal activity in a reliable fashion." *Belknap*, No. 35,195, mem. op. at 10. Further relying on *Baca*, 1982-NMSC-016, ¶ 18, the Court of Appeals provided that an affidavit which sufficiently establishes probable cause requires that the CI describe the "criminal activity in such detail that a judge will know the informant relied on more than a casual rumor or reputation of the defendant." *Belknap*, 35,195, mem. op. at 10.

The Court of Appeals concluded that the information supplied by the CI was "made up of two generalized conclusions" where the affidavit first lacked "any information regarding the quantity of marijuana see by the [CI], other than to say it

was consistent with trafficking[.]” and second, contained “no information about any drug transactions the [CI] allegedly witnessed, the frequency of the alleged distribution, or the quantities sold.” *Id.* ¶¶ 11, 12. This Court observed that such conclusory statements, without further context, lacked probable cause, notwithstanding that the CI was “familiar with the appearance, packaging methods, pricing, quantity, methods of ingestion, and distribution methods of narcotics.” *Id.* ¶ 13. Rather, the Court concluded that it was necessary that the CI explain how his observations were consistent with his aforementioned knowledge. *Id.* Absent such details, the Court held that the affidavit did not “adequately set forth the CI’s ‘basis of knowledge’ as required by *Cordova*.” *Id.* ¶ 14.

Here, the Court of Appeals reversed the district court’s order of suppression, although the district court had properly applied this Court’s holdings in *Baca* and *Cordova*. Here, the affidavit for a search warrant alleged the following:

Affiant learned from a documented criminal reliable informant, hereinafter referred to as CI, that within the last 72 hours a quantity of Methamphetamine seen by the CI consistent with trafficking has been seen by the CI at 1712 North Florida Avenue, Alamogordo, Otero County, New Mexico, which is being handled by a female subject identified as Michelle Perea, [hereinafter] referred to as the above-named defendant. CI stated above named defendant keeps a continuous supply of illicit narcotics at her residence and on her persons at all times.

[RP State’s Ex. 1 at 4 (unnumbered)] While the affidavit states that the CI is familiar with how methamphetamine is packaged and sold generally, it contains no other facts specific to the methamphetamine purportedly observed at Ms. Perea’s

home. The most that can be ascertained from the affidavit is that the CI observed some amount of methamphetamine which the CI believed to be consistent with trafficking. There is no description of an approximate amount, how it was packaged, or whether the CI ever observed the actual sale of methamphetamine.

Although the affidavit lacked the same detail as the affidavit in *Belknap*, the Court of Appeals reversed the district court's decision to grant Ms. Perea's motion to suppress, concluding that the affidavit contained a substantial basis to support a finding of probable cause to issue a search warrant. *Perea*, A-1-CA-38407, mem. op. ¶ 14. The Court of Appeals concluded that the CI's statements satisfied that "basis of knowledge" prong because the CI had made a "first-hand observation of methamphetamine" in Ms. Perea's home. *Id.* ¶ 8.

The Court of Appeals distinguished *Belknap* from the instant case because in *Belknap*, "possession of marijuana was not always illegal, whereas in this case the mere possession of methamphetamine is categorically prohibited in New Mexico." *Perea*, A-1-CA-38407, mem. op. ¶ 14. As a result, the court concluded that it was not necessary to demonstrate that Ms. Perea engaged in distribution where mere possession was sufficient to establish probable cause. *Id.* ¶ 11.

The Court's reading of *Belknap* is incorrect. In this case, the Court of Appeals was presented with an affidavit for a search warrant that was almost identical to that in *Belknap*, but chose to distinguish *Belknap* on the basis that the substance in that

case was marijuana, and therefore legal under certain circumstances. *Belknap*, No. 35195, ¶¶ 12-13. However, the *Belknap* Court did not specifically consider that the substance was marijuana and that possession of marijuana was not always illegal² in its determination of whether there was probable cause to support the issuance of a search warrant. Rather, the Court considered whether the information provided by the CI had satisfied the “basis of knowledge” prong. *See id.* ¶ 14 (concluding that the affidavit for a search warrant did not adequately set forth the CI’s “basis for knowledge”).

The Court of Appeal’s conclusion that the CI’s first-hand knowledge, alone, is sufficient to satisfy the “basis of knowledge” prong is erroneous. As stated in *Belknap*,

Though it is reasonable to infer from this language that the confidential informant gained first-hand knowledge of the presence of marijuana through observation, there is no information in the affidavit from which to infer the conditions under which the observation was made or what the confidential informant observed. The affidavit lacks any information regarding the quantity of marijuana seen by the confidential informant, other than to say that it was “consistent with trafficking or distribution[.]” The affidavit similarly contains no information about its condition, storage, or packaging, which might support an inference regarding quantity, stage of production, or intent to distribute.

Id. ¶ 11. Although the CI stated that he had observed the defendant, within the last 72 hours, with the amount of marijuana consistent with trafficking on the defendant’s

²² When *Belknap* was decided, recreational marijuana was not yet legal in the State of New Mexico. *See* NMSA 1978, § 26-2C-25 (2021).

person and inside his home, this did not satisfy the “basis of knowledge” prong, and was insufficient to establish probable cause. *Id.* ¶¶ 14-15.

The affidavit in this case failed to establish the basis of the CI’s knowledge. The district court properly granted Ms. Perea’s motion to suppress and the Court of Appeals erroneously reversed the district court’s ruling.

IV. CONCLUSION

Ms. Perea respectfully requests this Court reverse the Court of Appeals and conclude that the affidavit in question was not supported by probable cause and affirm the district court’s ruling granting Ms. Perea’s motion to suppress.

Respectfully submitted,

Bennett J. Baur
Chief Public Defender
Kimberly Chavez Cook
Appellate Defender

//S//Carrie Cochran
Carrie Cochran
Assistant Appellate Defender
1422 Paseo de Peralta, Bldg. 1
Santa Fe, NM 87501
(505) 395-2890

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I hereby certify that a copy of this pleading was served electronically via Odyssey EFile and Serve to Meryl Francolini (mfrancolini@nmag.gov) at the Attorney General's Criminal Appeals Division, this **5th** day of July, 2022.

//S//Carrie Cochran
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