No. 07-37

In The
Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

vs.

ANTHONY ROMERO,

Respondent.

On Petition For Writ Of Certiorari To The New Mexico Supreme Court

REPLY BRIEF

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I. The Court Has Jurisdiction Over the New Mexico Supreme Court's Final Decision on an Issue of Federal Constitutional Law.

Respondent's Brief in Opposition to the State of New Mexico's Petition for Certiorari argues that this Court is without jurisdiction because the order entered by the New Mexico Supreme Court is not final. In making that argument, the Brief in Opposition asks the Court to make numerous unwarranted assumptions about New Mexico state court practice.

The Brief in Opposition asks the Court to assume that, by using the word "pretrial" in its decision (Pet. App. at 20), the New Mexico Supreme Court ensured that the trial court will decide the issue on remand before a new jury is sworn and jeopardy re-attaches. *See Crist v. Bretz,* 437 U.S. 28, 38 (1978) ("jeopardy attaches when the jury is empaneled and sworn"). Only on that assumption can Respondent state so confidently that there is "zero chance" that the trial court will fail to decide the issue before a jury is sworn. (Brief in Opposition at 8.) However, as Defendant's California counsel is perhaps unaware, it is not unusual in New Mexico's First Judicial District for juries to be sworn days or weeks before opening statements are made.[1] A ruling may be made "pretrial" and still be made after jeopardy has attached. If a ruling is made after the jury is sworn, double jeopardy considerations would flatly prohibit the state from appealing that ruling. *See State v. Lizzol,* 160 P.3d 886, ¶ 24 (N.M. 2007); N.M.

[1] A recent example is offered by *State v. Maestas,* Rio Arriba County Nos. CR 2002-01057 and CR 2007-00058, tried in Santa Fe County, in which the jury was sworn on June 5, 2007, but opening statements were not made until July 26, 2007.

Stat. Ann. § 39-3-3(C) (1978 comp.). Thus, while it is true that the state supreme court mandated that the trial court decide the issue on remand "pretrial", it is not true that it ordered the trial court to decide the issue before jeopardy re-attaches.

Furthermore, New Mexico case law authorizes trial judges to suppress evidence on constitutional grounds in the middle of trial. *State v. Gutierrez,* 105 P.3d 332, ¶ 21 (N.M. App. 2005). Thus, even if the trial judge were to rule in favor of the state at the pretrial hearing, nothing would prevent the judge from changing his mind based on evidence presented at trial, or based on arguments Respondent's counsel declined, for tactical reasons, to make at the pretrial hearing. And if the judge does change his mind during trial, the state would, once again, be flatly prohibited from appealing. *Lizzol,* 160 P.3d 886, ¶ 24; N.M. Stat. Ann. § 39-3-3(C).

In its Petition, the state explained that it "would be able to appeal an adverse ruling only if both defense counsel and the trial court cooperated to permit that procedure." (Pet. at 2.) Respondent professes great confidence that defense counsel and the trial court will cooperate, and that events on remand will necessarily follow one course rather than another. The state respectfully submits that Respondent's professed confidence is far in excess of what experience with practice in Santa Fe County courts would justify.

Moreover, the Brief in Opposition essentially asks the Court to assume that the forfeiture issue is open for unbiased resolution in the trial court. But the state supreme court directed the trial court to rule against the state unless "there is evidence *in the record* to which we

have not been directed" that might support a contrary finding. (Pet. App. at 20; italics added.) The italicized words certainly seem to indicate that the trial court is not to hear additional evidence on remand. There is no evidence pertaining to Respondent's subjective state of mind contained in the current record to which the state supreme court's attention was not directed, for the very good reason that that topic was not relevant until the supreme court's ruling made it so. Thus, only if the trial court disobeys the state supreme court's seemingly-clear mandate to decide the issue on the existing record, and allows the state to present additional evidence, would there be even the remotest possibility of the state prevailing on remand.

But even accepting *arguendo* that the Brief in Opposition's core assumption is correct, and that events on remand will follow one course rather than the other with the result that the state obtains a right to interlocutory appeal from an adverse pretrial order, the state's right would be to review of the trial court's ruling on remand – that is, of the trial court's application of federal law as announced by the New Mexico Supreme Court to the facts of the case. Even on Respondent's core assumption, then, the state would have no right to further appellate review of the question presented in the Petition for Certiorari. Rather, it would have the right to appellate review of a *different* question.

Any theoretical state's appeal following an adverse pretrial ruling would be heard by the New Mexico Court of Appeals. N.M. Const. art. VI, § 29; N.M. Stat. Ann. § 39-3-3; N.M. Stat. Ann. § 34-5-8(A)(3) (1978 comp.). The New Mexico Court of Appeals lacks authority to overrule the New Mexico Supreme Court. *State ex rel. Martinez v. City of Las Vegas,* 89 P.3d 47, ¶¶ 18-22 (N.M. 2004). Thus the

of Las Vegas, 89 P.3d 47, ¶¶ 18-22 (N.M. 2004). Thus the state would *not* have a right to obtain further appellate review of the constitutional issue presented by the Petition, namely,

> When the defendant kills a witness who had previously made testimonial statements against him, does he forfeit his constitutional right to confront her only if he killed her with the specific intent to prevent her from testifying at trial?

(Pet. at i.)

The state would have, at best, a right to appellate review of the trial court's factual determination predicated on the New Mexico Supreme Court's affirmative answer to the federal constitutional question. The state submits that a theoretical opportunity to seek further appellate review of question *X* cannot logically make the ruling of a state's highest court on question *Y* non-final. As to the federal issue presented, the New Mexico Supreme Court's decision could not be more final. There is no possibility that the hearing on remand would "require the decision of other federal questions that might also require review by the Court at a later date". *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477 (1975).

Finally, the Brief in Opposition assumes that the state's right to appeal an adverse pretrial ruling would be unaffected by the limitation placed on that right by the New Mexico Legislature. (Brief in Opposition at 7.) The New Mexico Legislature has decreed that the state may appeal only if the prosecutor certifies in writing that the appeal is taken in good faith. Section 39-3-3(B)(2) (state may appeal from order suppressing or excluding evidence "if the district attorney certifies to the district court that

the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding"). But, for reasons given above, the state would have no right to appellate review of the constitutional issue. Rather, its theoretical right to appeal would be limited to the trial court's application of law to the facts, and the trial court's decision will be shaped by the following operative circumstances: (1) the state's highest court has already ruled on the constitutional issue; (2) the state's highest court seemingly limited the trial court to consideration of evidence contained in a record compiled before the state had any reason to present evidence regarding Respondent's subjective state of mind; and (3) the state's highest court announced that it "doubt[ed] that there is sufficient evidence, even by a preponderance of the evidence standard, to support a finding of intent" – a pretty strong hint as to how it thinks the trial judge should rule. (Pet. App. at 20.)

If, as seems foreordained, the trial court rules against the state, could any prosecutor claim in good conscience that *the trial court's ruling* based on the above operative circumstances was wrong? Despite Respondent's professed confidence, it seems doubtful that the New Mexico Legislature intended to give the state the right to appeal from an adverse pretrial ruling on the ground that, while the trial court's order is justified by the New Mexico Supreme Court's extremely narrow mandate, that mandate itself was erroneous – especially since, as shown above, the appeal would be to the New Mexico Court of Appeals, which would lack authority to consider the propriety of the mandate anyway. *State ex rel. Martinez,* 89 P.3d 47, ¶¶ 18-22.

In sum, the Brief in Opposition's finality argument is based on a Platonic conception of New Mexico practice and procedure that is unjustified by the untidy reality on the ground. The state will obtain a theoretical right to a pretrial interlocutory appeal only if events occur in one sequence rather than another, and even then its right would be to ask the intermediate appellate court to review a trial court's obedience to the highest court's mandate. Only after that futile appeal met its inevitable rejection could the state file a petition for discretionary review asking the New Mexico Supreme Court to reconsider its ruling – a request that that court has already denied once. (Pet. App. at 74.)

Respondent's argument, boiled down, is that the ruling of the state's highest court is non-final because the state might have the opportunity to make a series of futile gestures with the hope of one day returning to a position in which it could present the same issue to this Court in a second petition for certiorari that would be identical to the present Petition but for a longer Statement of the Case. To describe that argument as elevating form over substance denigrates form. The argument elevates empty busywork and the systematic waste of judicial resources over both form *and* substance.

II. The Four-Way Split in the Lower Courts Ensures that One of Two Negative Outcomes Is Regularly Occurring in American Courts: Either Some Defendants Are Being Wrongfully Convicted, or Other Defendants Are Profiting from Wrongdoing Directed against the Legal System Itself.

The Brief in Opposition uses the anodyne metaphor of "percolation" (Brief in Opposition at 12) to describe the current situation, in which lower American courts have adopted at least four mutually-exclusive approaches to the forfeiture issue.[2] The majority rule has been adopted by such populous states as California, Texas, Michigan and Wisconsin, and by the federal Sixth Circuit in a particularly influential opinion. (Pet. at 8-9.) If the majority position is erroneous, it can only mean that some Americans are currently being convicted in trials that violate the Sixth Amendment. On the other hand, if the extreme rule adopted by New Mexico, and half-adopted by Illinois and Colorado, is mistaken, it means that courts in those states are rewarding the violent disregard of the law for no higher purpose. Years lost to wrongful convictions can never be recovered, but neither can lives lost to violent retaliation. Nor is it easy for courts to reclaim respect they have surrendered. A legal culture that rewards the intimidation and even murder of witnesses – as New Mexico's legal culture now does, based on the state supreme court's misreading of this Court's constitutional precedent – can only produce a

[2] Three approaches are described in the Petition at 6-10. A fourth approach was adopted by the Washington Supreme Court after the Petition was filed. *State v. Mason,* 162 P.3d 396 (Wash., July 19, 2007). The state submitted *Mason* as additional authority by letter addressed to the Clerk on July 26, 2007.

long-lasting dynamic that, as Justice Jackson warned, "no court should regard . . . with indifference." *N.L.R.B. v. Indiana & Michigan Electric Co.,* 318 U.S. 9, 29 (1943).

In short, further "percolation" of this issue would not involve seepage through geologic strata over geologic time, or the cheerful bubbling of a coffee maker. The issue involves people's lives, today. Twice this Court has directed the lower courts to consider carefully the forfeiture principle. *Crawford v. Washington,* 541 U.S. 36, 62 (2004); *Davis v. Washington*, 547 U.S. ___, 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224 (2006). The lower courts have done so, and assigned it four different meanings. Only this Court can say which courts, if any, drew the correct lesson.

CONCLUSION

For the foregoing reasons and for the reasons given in the Petition for Writ of Certiorari, this Court should issue its writ of certiorari to review the judgment and opinion of the New Mexico Supreme Court.

Respectfully submitted,

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