STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

STATE OF NEW MEXICO

Plaintiff,

No. D-1116-CR-2017-00404-6

ANTHONY WAGON,

Defendant,

DEFENDANT'S SUPPLEMENTAL BRIEF RE: DEFENDANT'S MOTION TO SUPPRESS

Comes now Anthony Wagon, by and through undersigned counsel and respectfully submits this supplemental brief regarding the defendant's motion to suppress, and the supplemental brief filed by the State on August 16, 2019.

Defense maintains that Mr. Wagon's statements should be suppressed. According to the findings in the Court's Order dated July 31, 2019, while the Court found Mr. Wagon did voluntarily make statements to the officers, it further concluded his seizure was unconstitutional. The taint of the original illegality was not purged by the subsequent acts of law enforcement.

"[T]he burden of showing admissibility rests, of course, on the prosecution." *Brown v. Illinois*, 422 U.S. 590, 604 (1975). This Court has already found that Mr. Wagon's statements were voluntary, however "the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2(d), at 76 (4th ed.2004), cited in *Monteleone* 2005 NMCA 129 ¶16. The State has the burden to show that the illegal seizure did not taint the statements made by Mr. Wagon. *Brown*, 422 U.S. at 604.

In order to be purged of a taint of initial illegality, there must be a break in the causal chain between the initial illegality and the consent. A break in the causal chain, an attenuation, from the

initial illegality is an exception to the fruit of the poisonous tree doctrine's bar to admitting evidence legally obtained through past police illegalities. *Monteleone*, 2005-NMCA-129, ¶ 17. Attenuation is measured using three factors: (1) the temporal proximity of the illegal stop and the consent, (2) the presence of intervening circumstances, and (3) the flagrancy of the official misconduct. *Id.*

I. First Factor: Temporal Proximity

The first factor in the *Brown/Monteleone* analysis is the time between the unconstitutional conduct and the discovery of evidence. Although no time frame was established at the hearing in this matter, one can be gleaned from the reports of the involved officers. The time between the unconstitutional seizure and Mr. Wagon's potentially incriminating statements is nearly instantaneous.

According to the provided discovery, Detectives Briggs, Stanton, and Herrera arrived at Mr. Wagon's house at about 11:19 p.m. on April 24, 2017. Corporal Spruell left Mr. Wagon in an interrogation room at about 12:32 a.m. on April 25th. Detective Jason Solomon then interrogated Mr. Wagon at the police station, and although numerous officers were involved at this point, there is no recording of this interrogation, nor is there notation regarding when it ended.

> The temporal "factor often favors suppressing the evidence unless 'substantial time' elapses between an unlawful act and the time the evidence is obtained. *Kaupp v. Texas*, 538 U.S. 626, 633, (2003)(per curiam). The Supreme Court has previously concluded that a time span of 'less than two hours' between the unconstitutional arrest and the confession was too short an interval, and, therefore, counseled in favor of suppressing the evidence. *Brown v. Illinois*, 422 U.S. at 604, *United States v. Ramos*, 194 F. Supp. 3d 1134, 1162 (D.N.M. 2016), aff'd, 723 F. App'x 632 (10th Cir. 2018).

This first factor weighs in favor of suppressing the evidence because the State failed to establish a time line different than the one established in the written reports. Based on this time line there was less than two hour from Mr. Wagon's unlawful seizure and the conclusion of his

interrogation. The initial statements occurred immediately, then continued throughout these two hours. Two hours is not considered by the U.S. Supreme Court to be a "substantial" or "significant" amount of time as applied to these factors. *Brown*, 422 U.S. at 604.

II. Second Factor: Intervening Circumstances

In order for Mr. Wagon's statements to be admitted, the State must show that there was a break in the chain of events that started with the unlawful seizure of Mr. Wagon. "That is, there must be a break in the causal chain between the illegality and the consent." *See Jutte,* 1998–NMCA–150 ¶ 22, ("If there is a break in the causal chain from the unlawful arrest to the search, then the evidence may be admitted.")*Monteleone*, 2005-NMCA-129 ¶ 17.

> The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. *Brown v. Illinois*, 422 U.S. at 603.

This Court should look at the totality of the events surrounding the subsequent transportation and interrogation of Mr. Wagon. *Id.* This includes the effects of the ongoing encounter had on Mr. Wagon in determining whether the taint of the initial unconstitutional seizure was attenuated from the subsequent statements.

"An intervening circumstance is one that breaks the relationship between the illegal conduct and the evidence obtained." *State v. Tapia*, 2018-NMSC-017, ¶ 36. The State alleges the following intervening events: officers telling Mr. Wagon they could not arrest him; officers telling Mr. Wagon they could not take him off the reservation against his will; officers telling Mr. Wagon his Miranda rights; officers asking Mr. Wagon whether he wanted to leave the reservation; officers

taking time to seek advice from the FBI; and officers asking Mr. Wagon if anyone else could take him to the police station to make a statement.

The following relevant facts were established during the Hearing:

1. Mr. Wagon was intoxicated;
2. Mr. wagon was confronted by police at his home;
3. Mr. Wagon initially tried to avoid contacting the police by hiding;
4. the police likely drew their guns on Mr. Wagon as they shouted commands at him;
5. the police repeatedly commanded Mr. Wagon to come out from hiding;
6. at the time of this incident, Mr. wagon was 20 years old at the time without any sophisticated knowledge of the criminal justice system;
7. Mr. Wagon asked to be arrested multiple times;
8. Mr. Wagon was not allowed to drive himself to the police station because the officers believed that he was either too intoxicated or may flee;
9. Mr. Wagon was never out of the sight of a police officer from the time of unconstitutional seizure to the time of his formal arrest at the police station; and
10. Mr. Wagon was never out of arms reach of a police officer from the time of unconstitutional seizure to the time of his formal arrest at the police station.

It is the burden of the State to show, based on the facts of each specific case, the confession was a product of free will under *Wong Sun. Brown v. Illinois*, 422 U.S. at 603.

Though law enforcement told Mr. Wagon that they could not arrest him, and they could not remove him from the reservation, they didn't leave him alone after the initial unconstitutional seizure. These circumstances, confusing at best, only further exploited the initial illegality, as shown by Mr. Wagon's behavior—a reasonable person in his position would have understood he was not free to decline Detectives' repeated commands to come out of hiding and not free to leave.

In *State v. Monafo*, 2016-NMCA-092, law enforcement officers illegally stopped a truck, then released it, only to them stop them again approximately a minute later resulting in a, "complete end to the first stop, and a clear beginning to the subsequent stop". The defendant in *Monafo* was told he was free to leave, put his truck in gear, and began to move prior to the subsequent stop, the officer in that case, "returned Defendant to the position that he would have

been in had his rights not been violated, *i.e.*, traveling down the road of his own free will, before the second stop." *Id.*

Mr. Wagon was initially reluctant to speak with law enforcement, as shown by his hiding from the officers at his home. After the initial unlawful seizure Mr. Wagon was never again put in a position where he was able to avoid law enforcement. The officers exploited the unconstitutional seizure to obtain an investigatory statement from Mr. Wagon at the police station and there are not attenuating circumstances alleged which would be sufficient to purge the taint of the initial unconstitutional seizure.

III. Third factor: Extent of official misconduct

The third factor to consider is the extent of police misconduct in violating Mr. Wagon's rights. There are two distinct ways that there can be purposeful and flagrant misconduct, as shown in *Monafo*:

> To fulfill the third *Brown* factor, Defendant would have to establish purposeful and flagrant official misconduct where: (1) the impropriety was obvious, or the official knew his conduct was likely unconstitutional but continued nonetheless; or (2) the misconduct was investigatory in design and purpose. *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006); *Brown*, 422 U.S. at 605. *State v. Monafo*, 2016-NMCA-092, ¶ 15.

These two distinct ways to demonstrate flagrant conduct are better shown in *U.S. v. Simpson*:

> Courts have found purposeful and flagrant conduct where: (1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and (2) the misconduct was investigatory in design and purpose and executed "in the hope that something might turn up. *Brown,* 422 U.S. at 605, 95 S.Ct. 2254; *see also United States v. Cantu,* 230 F.3d 148, 160 (5th Cir.2000); *United States v. Causey,* 818 F.2d 354, 358–59 (5th Cir.1987). *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006).

The detention of Mr. Wagon was investigatory. Three officers walked 25 yards towards Mr. Wagon with at least one gun likely drawn. The seizure of Mr. Wagon was nothing more than

a fishing expedition. The original purpose of the officers trip to Mr. Wagon's home was to look for a truck that matched a description and if found, to ensure the truck did not leave. However, they left the truck in the driveway with a man inside when they had Mr. Wagon come with them off the reservation. The officer's approach of Mr. Wagon was investigative, and the officers knew that the seizure of Mr. Wagon was illegal.

The facts of *Monteleone* are similar to the present facts:

> Defendant was in a very vulnerable position when he consented to the search. Two armed police officers entered his apartment in the early morning hours and awakened him, demanding that he show them his hands. They then immediately told Defendant they suspected the presence of a methamphetamine lab and asked if they could search. Under the circumstances, the "request" to search could have easily been construed as a "demand" to search. To this extent, at least, the officers "exploited" their illegal entry into Defendant's apartment. Therefore, despite the inadvertence of the intrusion, we conclude, based on the weight of the applicable factors of our analysis, that Defendant's consent "was not obtained by means sufficiently distinguishable as to be purged of the primary taint. *Monteleone*, 2005-NMCA-129 ¶19.

Mr. Wagon was also in a vulnerable position when he consented to go with and speak to the detectives. He was intoxicated and only spoke to detectives after they approached him with a gun drawn and yelled repeated commands for Mr. Wagon to come out from the spot in which he had hidden. Detectives' subsequent seizure of Defendant was an exploitation of their unlawful activity and Defendant's consent to go with and speak to Detectives was not sufficiently distinguishable to be purged of the primary taint.

Finally, policy supports the suppression of the statements and evidence derived therefrom. "The objective of the exclusionary rule in New Mexico is not to deter police misconduct but to 'effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure.'" *Monteleone*, 2005 NMCA 129 ¶20, citing *State v. Gutierrez*, 116 N.M. 431, 446 (1993). Suppression of the evidence derived from the Detectives unlawful activity in this

case, best effectuates the constitutional proscription of unreasonable searches and seizures by preserving the rights of the accused to the same extent as if the government's officers had stayed within the law. *Id.*

Because the unconstitutional seizure of Mr. Wagon occurred less than 2 hours prior to all statements being made, because Mr. Wagon was never out of reach of law enforcement and never returned to a situation similar to he had been in prior to the unconstitutional seizure, and because the officers knew the seizure was unconstitutional and seized Mr. Wagon in an investigatory way, defense requests this Court to suppress all statements made by Mr. Wagon after his arrest because all of these statements are tainted due to the initial unconstitutional seizure.

This will certify that a copy of the foregoing was placed in the District Attorney's incoming basket and mailed to other counsel of record on the date of filing.

Attorney for Defendant

Respectfully Submitted,
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