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Criminal Procedure - Curbing Prosecutorial Power - Right to Waive Preliminary Hearings Remains within Discretion of Defendant - State ex rel. Whitehead v. Vescovi-Dial

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CRIMINAL PROCEDURE—Curbing Prosecutorial Power—Right to Waive Preliminary Hearing Remains Within Discretion of Defendant—*State* ex rel. *Whitehead v. Vescovi-Dial*

I. INTRODUCTION

The first impression case *State of New Mexico* ex rel. *Whitehead v. Vescovi-Dial*[1] addressed a subtle, yet serious, question of state constitutional interpretation—whether a prosecutor in New Mexico can compel a preliminary examination[2] over the waiver of a defendant. The New Mexico Court of Appeals answered in the negative, reasoning that the New Mexico Constitution, the textual decree which affords the criminally accused a preliminary hearing,[3] does not grant impliedly the state such a concomitant right.[4] Accordingly, the court held that a prosecutor may not force a defendant to submit to a preliminary hearing.[5]

The decision in *Whitehead* is demonstrative of the Court's faithfulness to doctrinal due process principles underlying the state Bill of Rights.[6] These principles embody the axiomatic view that persons accused of crimes must receive a number of safeguards, such as the rights to counsel and to an impartial jury, in order to prevent a capricious deprivation of their liberty.[7]

The *Whitehead* decision also evinced the Court's predilection towards interpreting the New Mexico Constitution in accordance with an originalist/interprevist approach to constitutional interpretation, which allows judges to enforce only norms stated or clearly implicit in the Constitution.[8] This approach compelled the *Whitehead* court to find that the absence of language in the Constitution excludes prosecutors among its Article II, Section 14 beneficiaries.[9] The Court alluded that those rights enumerated in the New Mexico Bill of Rights, such as the right to a preliminary hearing, belong exclusively in the discretion of the accused, either to accept or waive, unless there is explicit constitutional language to the contrary.[10]

This Note explores the preliminary hearing in New Mexico, both substantively and procedurally; considers the rationale of the *Whitehead* court, with an emphasis on the court's state constitutional interpretation; and analyzes the implications from

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1. 124 N.M. 375, 950 P.2d 818 (Ct. App.), *cert. denied*, 124 N.M. 268, 949 P.2d 282 (1997).
2. The New Mexico Constitution refers to preliminary hearings as preliminary examinations. This Note will use the more familiar term "preliminary hearing," widely recognized by practitioners and scholars, to denote a preliminary examination.
3. *See infra* note 47 and accompanying text.
4. *See Whitehead*, 124 N.M. at 376, 950 P.2d at 819.
5. *See id.* at 379, 950 P.2d at 822.
6. *See id.* at 378, 950 P.2d at 821.
7. *See* CHARLES H. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE 301, 337 (1978).
8. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 1.4, at 17 (1997). Originalists believe that the Court should find a right to exist in the Constitution only if it is expressly stated in the text or was clearly intended by its framers. If the Constitution is silent, originalists say it is for the legislature, unconstrained by the courts, to decide the law. *Id.*
9. *See infra* note 47 and accompanying text.
10. *See Whitehead*, 124 N.M. at 378, 950 P.2d at 821.

Whitehead that indicate the Court's reluctance to expand prosecutorial power over a defendant's constitutionally-granted procedural rights.

II. STATEMENT OF THE CASE

Vicente Cayetano Zamarron ("Zamarron"), the defendant and real party in interest, resolved to kill his wife Linda with the intention of obtaining money as the beneficiary of her insurance policy.[11] Unwilling to carry out the murder himself, Zamarron asked two Mexican nationals, Gerardo-Castillo Sanchez and Jose Reyes, to kill his wife. Sometime in late 1994, Zamarron, Castillo-Sanchez, and Reyes agreed that Castillo-Sanchez would carry out the murder. On November 11, 1994, in accordance with the conspiracy, Reyes dropped Castillo-Sanchez off at the empty Zamarron household. Castillo-Sanchez then ransacked the house, and, when Linda arrived, strangled her.

Before Linda's murder, Zamarron had agreed to pay Castillo-Sanchez and Reyes $50,000 to kill her. However, two years after Castillo-Sanchez carried out the murder, Zamarron had not paid either of the other two co-conspirators. Consequently, Reyes became frustrated and contacted the District Attorney in Farmington. He revealed the plot to kill Linda, and the involvement of both Zamarron and Castillo-Sanchez to D.A. Investigators. Reyes agreed to cooperate fully with the investigation, which included a promise to testify.

In February 1996, Zamarron was arrested in San Juan County and charged with first-degree murder, conspiracy to commit murder, conspiracy to commit fraud, and attempted fraud.[12] In cases such as this, where the prosecution proceeds to charge the defendant by criminal information (rather than by a grand jury indictment), the New Mexico Constitution requires a neutral judicial officer, usually a magistrate, to schedule a preliminary hearing for the purpose of determining probable cause.[13] Zamarron, in a departure from what a defendant usually does, waived this right to a hearing.[14]

Zamarron's refusal to be examined at this stage took away what the prosecution perceived as its only opportunity to preserve the testimony of Reyes, the prosecution's main witness.[15] The problem facing the district attorney because of Zamarron's waiver was the possibility that Zamarron might kill Reyes before trial, thus depriving the state of his testimony.[16]

A preliminary hearing is sometimes used as a mechanism to preserve testimony for later use at trial[17]—the transcript of the testimony is admissible at trial in lieu

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11. Unless otherwise noted, all facts in this section are from the Prosecution's Opening Statement, State *ex rel.* Whitehead v. Vescovi-Dial (D. Ct. San Juan County 1996) (No. CV 678-3) (tape log on file with the *New Mexico Law Review*).

12. *See Whitehead*, 124 N.M. at 376, 950 P.2d at 819.

13. *See id.*

14. *See id.*

15. *See* Letter from Sandra Price, Prosecutor, regarding State v. Cayetano Zamarron, *State of New Mexico, Eleventh Judicial District, Division One* to Pamela G. Candelaria, Staff, *New Mexico Law Review* (Oct. 5, 1998) (on file with the *New Mexico Law Review*).

16. *See id.*

17. *See generally* Kenneth Graham & Leon Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A. L. REV. 916, 920 (1971) (parts IV & V) ("The preliminary

of live testimony, but only if the witness is unavailable to testify at trial.[18] A defendant is advised to waive the right to a hearing in the event that an essential prosecution witness, who may testify at the preliminary hearing, may be unavailable to testify at trial.[19] This is what the prosecution suspected Zamarron was undertaking to do. Specifically, the prosecution suspected that the defense did not want to have Reyes' testimony preserved in the event he later could not be found (either because Zamarron had him killed or because he was no longer in the United States).[20] If Reyes did not testify at Zamarron's preliminary hearing, a possibility existed that the state would not have testimony from Reyes to use at trial against Zamarron.[21] The prosecution had the option of filing a motion for a pre-trial deposition for the purpose of preserving Reyes' testimony, but in the prosecution's experience, their fear that Reyes might be killed "was not grounds for getting a deposition ordered."[22] Consequently, Reyes' direct testimony implicating Zamarron was never preserved because neither a preliminary hearing nor a pre-trial deposition on the charges was conducted.[23]

On April 17, 1996, Magistrate Vescovi-Dial[24] bound Zamarron over for trial before the district court of San Juan County without conducting a preliminary hearing.[25] The state filed a petition in district court for a writ of mandamus directing the magistrate to hold a preliminary hearing, notwithstanding the defendant's waiver.[26] The district court granted the writ and ordered the magistrate to hold a preliminary hearing.[27] Zamarron then appealed the writ to the New Mexico Court of Appeals.[28] The appellate court unanimously reversed the district court and quashed the writ.[29] That court held that the State had no right to demand a preliminary hearing over a defendant's waiver, stating in part, "the Constitution creates no clear, mandatory duty to afford the state a preliminary examination in the face of [the] [d]efendant's waiver."[30]

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hearing as a discovery tool is a mechanism by which the defense and prosecution can . . . preserve that information for possible use at the subsequent trial.").

18. *See* N.M. R. EVID. 11-804(A) & 11-804(B)(1).

19. *See* ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 137 (Vol. 1 1988).

20. *See* letter from Sandra Price, *supra* note 15.

21. *See id.* There was testimony from Reyes from a preliminary hearing and trial of the co-defendant, Castillo-Sanchez. However, neither the testimony from the hearing nor the testimony from the trial could be used, except for impeachment purposes, because the testimony at the co-defendant's hearing and trial was not subject to cross-examination by Zamarron. *See id.*

22. *See* Petition for Alternative Writ of Prohibition or Alternative Writ of Mandamus or Alternative Writ of Superintending Control, at 9, State *ex rel.* Whitehead v. Vescovi-Dial (D. Ct. San Juan County 1996) (No. CV 678-3); *see also* N.M. R. CRIM. P. 5-503(B) (authorizing pre-trial depositions in criminal cases only upon motion and for good cause, as determined by a district court judge).

23. *See* letter from Sandra Price, *supra* note 15.

24. The Honorable Carla Vescovi-Dial, Magistrate for San Juan County, Division I.

25. *See Whitehead*, 124 N.M at 376, 950 P.2d at 819.

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.* at 380, 950 P.2d at 823. The Court of Appeals can review appeals from writs of mandamus pursuant to N.M. STAT. ANN. § 44-2-14 (1978), which provides: "[I]n all cases of proceedings by mandamus in any district court of this state, the final judgment of the court thereon shall be reviewable by appeal or writ of error in the same manner as now provided by law in other civil cases."

30. *Whitehead*, 124 N.M. at 379, 950 P.2d at 822.

III. HISTORICAL AND CONTEXTUAL BACKGROUND

A. *The Hearing's Substantive Assiduousness to the Custodial Nature of the Constitution*

The preliminary hearing in New Mexico is a "critical stage" adversarial hearing conducted to determine whether there is probable cause to believe the defendant committed the crime charged.[31] The characterization of a hearing as a "critical stage" necessitates that counsel be made available at the time of the hearing.[32] A hearing rises to a "critical stage" level when the nature of the hearing is such that "potential substantial prejudice to defendant's rights inheres in the particular confrontation"[33] and the requirement of counsel may help avoid that prejudice.[34] In other words, if in all likelihood a defendant's rights may be compromised without the presence of counsel, counsel may be required at that particular hearing. The United States Supreme Court cited four reasons in *Coleman v. Alabama*[35] why an attorney is constitutionally required by the Sixth Amendment to prevent any "potential substantial prejudice"[36] of the defendant's rights at any criminal proceeding designated as a "critical stage" proceeding.[37] First, an attorney's skill in examining and cross-examining witnesses has the potential to expose weaknesses in the prosecution's case that may lead the magistrate not to bind over[38] the accused for trial.[39] Second, an attorney's skill in interrogating prosecution witnesses may yield an impeachment tool for later use in cross-examining those witnesses at trial, or, may preserve testimony of a favorable defense witness who may not appear at trial.[40] Third, an attorney's skill in discovering the prosecution's case may assist in preparing a competent defense at trial.[41] Finally, an attorney's skill may, in some circumstances, influence an early bail release.[42] Given that it is conceivable, based on these factors, that a defendant's rights may be compromised at the preliminary hearing stage, the hearing in New Mexico is properly characterized as a "critical

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31. *See id.* at 376, 950 P.2d at 819.

32. *See* State v. Hogervorst, 90 N.M. 580, 584, 566 P.2d 828, 832 (Ct. App. 1977) ("[T]he right to counsel exists after judicial proceedings have been initiated against the accused, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.")

33. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

34. *See id.*

35. *Id.*

36. *Id.*

37. *See id.* at 7 (citing United States v. Wade, 388 U.S. 218, 226 (1967)) ("It is central to that [constitutional] principle [of a right to counsel] that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, *where counsel's absence might derogate from the accused's right to a fair trial.*") (emphasis added); Powell v. Alabama, 287 U.S. 45, 69 (1932) (a person accused of a crime "requires the guiding hand of counsel at every step of the proceedings against him.")).

38. "Bind over" is a term of art that describes an act of a lower court in transferring a case to a higher court or grand jury after a finding of probable cause to believe the defendant committed the crime. *See* BLACK'S LAW DICTIONARY 169 (6th ed. 1990).

39. *See Coleman*, 399 U.S. at 9.

40. *See id.*

41. *See id.*

42. *See id.*

stage" proceeding, at which time the charges against the accused may be dropped, and the prosecution must desist from pursuing a case lacking probable cause.[43]

B. *Expansion of Preliminary Hearing: Collateral Uses Reach Beyond Original Intent*

The New Mexico Constitution grants a preliminary hearing to a defendant charged by criminal information.[44] Despite the Fifth Amendment's prohibition that "[n]o person shall be held to answer for a [felony] unless on a presentment or indictment of a Grand Jury,"[45] instituting a criminal prosecution by information does not contravene the Due Process Clause of the Fourteenth Amendment since the Fifth Amendment requirement to proceed by indictment was not made applicable to the states.[46] New Mexico Constitution Article II, Section 14 provides that

> No person shall be held to answer for a capital, felonious or infamous crime unless on presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies, . . . No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such a preliminary examination.[47]

What is clear from this provision is that the right to a preliminary hearing only applies in felony cases, and then only upon the filing of a criminal information.[48] Moreover, a defendant may waive his or her right to a hearing at any time before or during the hearing. Also, if the prosecutor so chooses, he or she may always

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43. Alan Dershowitz, a professor at Harvard Law School, maintains that:

> the U.S. legal system is such that all sides in a [criminal proceeding] want to hide at least some of the truth. . . . The defendant wants to hide the truth, because he is generally guilty. The defense attorney's job is to make sure that the jury does not arrive at the truth.

Ted Gest & Alvin P. Sanoff, *U.S. Legal System: All Sides Want to Hide the Truth: A Conversation with Alan M. Dershowitz*, U.S. NEWS & WORLD REP., Aug. 9, 1982, at 93. Overall, Dershowitz lamented that "truth suffers enormously in [this] adversary system of justice." But it is the best system we can get, because "letting [an accused] person go into court without a defense attorney and making him represent himself is horrible to contemplate." *Id.*

44. An information is a formal written accusation filed by the district attorney or other public officer against a person for some criminal offense, without an indictment. It is "in the nature of an indictment [but] differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath." *See* BLACK'S LAW DICTIONARY 779 (6th ed. 1990). It functions to inform the accused of the charge or charges against him so that he may prepare for trial, and also to prevent being tried again for the same offense. *See id.*

45. U.S. CONST. amend. V.

46. *See* Hurtado v. California, 110 U.S. 516 (1884). In *Hurtado*, the Court held that states are not mandated to charge a defendant by a grand jury, despite Fifth Amendment language to the contrary. Due process, the Court noted, is concerned with the substance of "those fundamental principles of liberty and justice which lie at the base of all our civil political institutions," not with the ways in which those principles are attained. *See id.* at 535.

> Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witness produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, . . . and in every circumstance of its administration . . . it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments.

Id. at 538.

47. N.M. CONST. art. II, § 14.

48. *See* State v. Vasquez, 80 N.M. 586, 458 P.2d 838 (Ct. App. 1969).

proceed by grand jury indictment instead of by an information, thus obviating the requirement of a hearing.[49]

Traditionally, a preliminary hearing served to screen out cases lacking probable cause.[50] This determination remains the primary function of a preliminary hearing, a function which prevents a defendant from being prosecuted maliciously on false or frivolous grounds; protects a defendant from being accused of a crime in open and public court unless probable cause exists; "avoid[s] . . . for [a] defendant . . . the expense of a public trial"; "[and] save[s a] defendant from the humiliation and anxiety involved in public prosecution."[51]

This "original intent" of the preliminary hearing—to screen out meritless cases—has expanded to comprise several collateral functions, including discovery, impeachment, and testimony preservation.[52] The vast majority of jurisdictions that allow for preliminary hearings now recognize these functions.[53]

1. Discovery

The preliminary hearing may offer both sides an occasion to carry on limited discovery of the opposite side's case.[54] The accused is not required to put on any evidence at this stage. However, he or she may cross-examine prosecutorial witnesses and elicit information that may not have come out on direct examination.[55] In addition to dispensing with the evidence requirement (for the defendant only), Rule 5-501 of the New Mexico Rules of Criminal Procedure obligates the prosecution to make a number of pretrial disclosures to the accused, including any statement made by witnesses the prosecution intends to call.[56] This rule seems to limit the need for discovery at the preliminary hearing inasmuch as the defense will eventually, prior to trial, discover who, what, and how the prosecution's witnesses plan to testify.[57] However, it is far more effective for impeachment purposes that a witness testifies at the hearing under oath.[58]

2. Impeachment

"[T]he skilled interrogation of witnesses [at the preliminary hearing] by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the [prosecution's] witnesses at trial."[59] The testimony given by witnesses at this early stage is more likely to be damaging or contradictory because,

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49. *See* State v. Peavler, 87 N.M. 443, 535 P.2d 650 (Ct. App. 1975), *rev'd on other grounds*, 88 N.M. 125, 537 P.2d 1387 (1975).

50. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 926 (9th ed. 1999).

51. *See* Thies v. State, 189 N.W. 539, 541 (Wis. 1922).

52. *See* Graham & Letwin, *supra* note 17, at 916; Kenneth Graham & Leon Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A. L. REV. 635, 641 (parts I-III) (1971).

53. *See* Graham & Letwin, *supra* note 17, at 916.

54. *See id.*

55. *See* KAMISAR, *supra* note 50, at 928.

56. *See* N.M. R. CRIM. P. 5-501.

57. *See* State v. Sparks, 85 N.M. 429, 430, 512 P.2d 1265, 1266 (Ct. App. 1973).

58. *See* KAMISAR, *supra* note 50, at 929.

59. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

presumably, the prosecution has had inadequate time to prepare them to testify.[60] Because impeaching a witness is important for discrediting that witness at trial,[61] a defense attorney cross-examining a biased, mistaken, confused or inconsistent witness at a hearing may put a wrench in the prosecution's case by locking the witness into potentially damaging testimony under oath.[62]

3. Testimony preservation

The preliminary hearing may also become an indispensable method of preserving testimony for use at trial. Under New Mexico's "former testimony" exception to the hearsay rule, the transcript of preliminary hearing testimony may be admitted as substantive evidence at trial in the event the witness becomes unavailable.[63] A witness is deemed unavailable to testify under the following circumstances: (1) the witness asserts a valid privilege and is exempted by the court from testifying concerning the subject matter of the out-of-court statement; (2) the witness simply refuses to testify; (3) the witness testifies to a lack of memory concerning the out-of-court statement; or (4) the witness is absent from trial due to death or then existing physical or mental infirmity.[64]

In *Ohio v. Roberts*,[65] the United States Supreme Court held that evidence given at a preliminary hearing was constitutionally admissible where the prosecution demonstrated that former testimony bore a sufficient indicia of reliability, and the witness was unavailable for purposes of defendant's trial.[66] Therefore, a prosecutor need not make an independent inquiry into reliability because "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception," such as the former testimony exception.[67] It satisfies the reliability concern by excluding unfairly prejudicial evidence through several protective measures.[68] First, a witness must be under oath at the deposition or hearing.[69] Second, the defendant must be able to cross-examine the witness.[70] Third, the deposition or hearing must usually be before a judicial tribunal or court

60. *See* AMSTERDAM, *supra* note 19, at § 139.

61. *See id.*

62. Witnesses may be impeached through the presentation of (1) contrary evidence; (2) evidence showing the witness' actual lack of knowledge or perceptive capacity; (3) evidence of bad character (evidence of prior conviction or poor reputation for truthfulness); or (4) prior inconsistent acts or statements. *See* N.M. R. EVID. 11-608, 11-609, & 11-613. However, if either side cross-examines the witness too vigorously it may give the witness an opportunity to reconsider the testimony and allow him or her time to prepare for rehabilitation at trial. *See* KAMISAR, *supra* note 50, at 929. The witness may rehabilitate himself at trial by claiming that he was confused at the hearing; that the examination and cross-examination at trial has caused him to review things; and that he now has everything clear in his mind. *See id.*

63. *See* N.M. R. EVID. 11-804(B)(1).

64. *See* N.M. R. EVID. 11-804(A). However, "[the person who made the out-of-court statement] is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability or absence is due to the procurement or wrongdoing of the [attorney] for the purpose of preventing the witness from attending or testifying." *Id.*

65. 448 U.S. 56 (1979).

66. *See id.*

67. *See id.* at 66.

68. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 182-183 (1987).

69. *See, e.g.*, California v. Green, 399 U.S. 149 (1970).

70. *See, e.g., id.*

reporter.[71] Fourth, the deposition or hearing must be made on the official record about matters substantially similar to those at trial.[72]

For prosecutors to present former testimony to a jury, they must overcome the limitations imposed by the Confrontation Clause.[73] However, as previously indicated, former testimony is a "firmly rooted" exception, so Confrontation Clause concerns erode because the defendant will have the opportunity to cross-examine the witness at the preliminary hearing. That is all that is constitutionally necessary. As long as the defendant, "had an opportunity and similar motive to develop the testimony [of the adverse witness] by direct, cross, or redirect examination"[74] (regardless of the extent to which the defendant exercised that right) at the preliminary hearing, the "commands of the Confrontation Clause" are satisfied.[75]

In the absence of a preliminary hearing, prosecutors in some jurisdictions[76] may be able to preserve testimony using pre-trial criminal depositions. Criminal depositions are permitted in New Mexico under Rule 5-503 of the New Mexico Rules of Criminal Procedure.[77] These depositions may be used as evidence if the witness is unavailable (under the former testimony exception),[78] if "the witness gives testimony at the trial or hearing inconsistent with the witness' deposition"[79] (for impeachment purposes), or if the deposition is otherwise admissible under the Rules of Evidence.[80] These depositions are only ordered, however, where the circumstances permitting their use are exceptional.[81] Ultimately, a judge practicing discretionary authority under Rule 5-503 will decide to grant or deny a motion for pre-trial depositions.[82]

IV. RATIONALE OF THE *WHITEHEAD* COURT

The *Whitehead* court rejected a broad interpretation of Article II, Section 14,[83] and instead interpreted the provision in accordance with originalism/

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71. *See, e.g., id.*

72. *See, e.g., id.*

73. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

74. N.M. R. EVID. 11-804(B)(1).

75. *See, e.g.*, California v. Green, 399 U.S. 149, 153 (1970). In *United States v. Salerno*, 505 U.S. 317 (1992), the Court held that former testimony, in the context of a grand jury proceeding, may not be introduced under Federal Rule 804(b)(1) without a showing of a "similar motive" to develop testimony.

76. For example, the Federal Rules permit depositions in criminal cases only upon "exceptional circumstances." Under the Federal Rules, both the government and defendants are authorized to take depositions. *See* FED. R. CRIM. P. 15(a). The "exceptional circumstances" limitation provides a court discretion when determining a party's pre-trial motion to depose a witness, and unless a movant has established both that the witness' testimony is material and the witness is unavailable to testify at trial, a judge will usually deny the motion. *See* U.S. v. Ismaili, 828 F.2d 153, 159 (3rd Cir. 1987). More specifically, the Third Circuit found that the lower court did not abuse its discretion by denying a motion to depose, reasoning that the movant had not established "both the materiality of the testimony and the unavailability of the witness." *Id.*

77. *See* N.M. R. CRIM. P. 5-503.

78. *See id.* § 5-503(N).

79. *Id.*

80. *See id.*

81. *See* McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

82. *See* N.M. R. CRIM. P. 5-503(B).

83. N.M. CONST. art. II, § 14.

interpretavism,[84] concluding that the right to a preliminary hearing is unique to a defendant[85] as evidenced by the unambiguous language of Article II, Section 14.[86] It examined the role of the preliminary hearing[87] and it found the hearing's primary purpose to be a mechanism which "provide[s] an independent evaluation of whether the state has met its burden of demonstrating probable cause."[88]

The court rejected the prosecution's argument that a hearing was indispensable in preserving the testimony of key witnesses.[89] Although the court agreed that the "preservation of testimony is a legitimate use of the preliminary [hearing],"[90] it reasoned that, in light of Rule 5-503 of the New Mexico Rules of Criminal Procedure, the prosecution had available to it adequate means of preserving testimony for later use.[91] "The state offers no convincing rationale why its legitimate need to preserve testimony cannot be satisfied by this same time-tested technique."[92] The prosecution failed to file any motions for pre-trial depositions, and failed to explain why depositions could not have served the same purpose as the hearing for preservation purposes.[93] After taking into account what it perceived as a lack of justification for demanding a hearing the court dismissed the prosecution's argument. It then began examining the text of the New Mexico Constitution.[94]

The New Mexico Constitution provides a preliminary hearing for an accused held on an information for a capital, felonious, or infamous crime.[95] The Court observed that in the New Mexico Constitution, such a right is guaranteed only to the accused and does not refer to a comparable right in the state.[96] Article II, Section 14 "grants the accused an express, enforceable right to a preliminary examination as a condition to being 'so held on information,'" but is silent concerning the state.[97]

The court emphasized the location of the preliminary hearing clause within the Bill of Rights section of Article II, Section 14.[98] The clause, the court noted, has developed into a basic guarantee of individual liberty against the power of the state, such as the right to life, liberty, and property, the right of habeas corpus, and the freedom of speech, press, and religion, and can be invoked only by the accused as he or she sees fit.[99]

The court thought it reasonable to look at other jurisdictions to determine how other states handle claims of a prosecutor's right to invoke a preliminary hearing over a defendant's waiver.[100] It found that, in all cases observed, most jurisdictions

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84. *See* CHEMERINSKY, *supra* note 8, and accompanying text.
85. *See Whitehead*, 124 N.M. at 377, 950 P.2d at 820.
86. *See id.* at 379, 950 P.2d at 822.
87. *See id.* at 376, 950 P.2d at 819.
88. *See id.* (citations omitted).
89. *See id.* at 379.
90. *Id.* at 377 (citations omitted).
91. *See id.*
92. *Id.*
93. *See id.*
94. *See id.*
95. *See supra* note 47 and accompanying text.
96. *See Whitehead*, 124 N.M. at 375, 950 P.2d at 818.
97. *See id.*
98. *See id.* at 377, 950 P.2d at 820.
99. *See id.*
100. *See id.* at 377, 950 P.2d at 820.

over a defendant's waiver.[100] It found that, in all cases observed, most jurisdictions specifically provided for the right either in their constitutions or in statutes.[101] The Court rejected the majority approach taken by an Oklahoma court.[102] Although the language in the Oklahoma Constitution[103] is similarly silent, that Court inferred a right in the state merely because its Constitution did not prohibit it. The *Whitehead* court was more persuaded by the dissenting opinion,[104] which described the hearing as a device created to protect the accused from prosecutorial abuse, not to aid the prosecution in its investigation.[105]

In the end, the *Whitehead* court relied on the plain language of the New Mexico Constitution. It determined that, in New Mexico, the criminally accused is the only person entitled to accept or waive the right to a preliminary hearing.[106]

V. ANALYSIS AND IMPLICATIONS

The fact that a defendant would waive his or her right to a preliminary hearing might strike a seasoned attorney or legal scholar as odd indeed. Even more anomalous is a demand by the prosecution to hold one. This kind of demand suggests a somewhat curious approach by the state to expand power beyond the reproach of what many consider the paradigmatic model of a person in need of Constitutional protection—the criminally accused. The reason delineated by the prosecution for its demand was a perceived need to preserve testimony of key witnesses.[107] However, this "need" appears to be nothing more than a pretext, if viewed in light of Rule 5-503(B) of the New Mexico Rules of Criminal Procedure.[108] The rule states, in essence, that, in the event a defendant does waive the preliminary hearing, either party has at its disposal an alternative pre-trial method of discovery—pre-trial criminal depositions.[109] Therefore, this tendentious effort by the prosecution to pursue a hearing over a defendant's waiver may be a misuse, albeit slight, of prosecutorial power.

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100. *See id.* at 377, 950 P.2d at 820.

101. *See id.* The court pointed to states that, unlike New Mexico, have either "constitutional or statutory provisions empowering the prosecution to proceed with an examination after waived by the accused." *See id.*; *see also, e.g.*, CAL. PENAL CODE § 860 (West 1985) ("[N]othing contained herein shall prevent the district attorney . . . from requiring an examination be held."); 725 ILL. COMP. STAT. ANN. 5/109-3(b) (West 1992) ("If defendant waives preliminary examination the judge shall hold him to answer and may, or *on the demand of the prosecuting attorney* shall, cause the witnesses for the State to be examined.") (emphasis added).

102. *See* Arnold v. District Court of Pottawatomie County, 462 P.2d 335 (Okla. Ct. App. 1969).

103. *See* OKLA. CONST. art. II, § 17.

104. *See Arnold*, 462 P.2d at 335 (Nix, J., dissenting).

105. *See id.* at 336.

106. *See Whitehead*, 124 N.M. at 379, 950 P.2d at 822.

107. *See* Petition for Alternative Writ of Mandamus or Alternative Writ of Superintending Control, State *ex rel.* Whitehead v. Vescovi-Dial (D. Ct. San Juan County 1996) (No. CV 678-3).

108. Under the New Mexico Rules of Criminal Procedure, Rule 5-503(B), pre-trial criminal depositions of an evidentiary nature may be ordered "[u]pon motion, and notice to opposing counsel, at any time after the filing of the indictment or information." The district court judge may order a deposition of any person, except the defendant, upon a showing that (1) "the person's testimony may be material and relevant to the offense charged;" (2) "it is necessary to take the person's deposition to prevent injustice;" (3) "the taking of a statement is inadequate to preserve the testimony in question;" and (4) "the person may be unable to attend trial or a hearing." N.M. R. CRIM. P. 5-503(B).

109. *See id.*

The court noted that, in some circumstances, the preservation of testimony is irrelevant to the real purpose of the hearing.[110] Furthermore, the court, at least implicitly, intimated that the hearing was created to protect the accused from prosecutorial abuse, not to aid the prosecution in its investigation.[111] The location of a right to a preliminary hearing offers support for the court's view. By placing the right to a hearing within the Bill of Rights section, the framers arguably fashioned it as an explicit limitation on the state.[112] Because of its location, courts are bound, not to interpret the right as a matter of mere criminal procedure, but as a right equal to those other rights granted in the New Mexico Constitution.[113]

These "rights," which presumably belong to the criminally accused, have been surrendered to the state, at least in a couple of instances. For example, in New Mexico, prosecutors can override a defendant's waiver of a trial by jury,[114] a right which is constitutionally granted.[115] In effect, a prosecutor can compel a defendant to acquiesce to a jury trial rather than a bench trial despite the defendant's refusal.[116] Some defendants may have legitimate reasons for preferring judges to juries.[117] For example, defendants involved in complex fraud or securities cases may prefer an experienced judge to lay jurors simply because the latter may lack knowledge in this technically complicated area of law.[118]

Remember the Yusef Salaam case,[119] the black youth who raped a jogger in New York's Central Park. Many blacks feared that Yusef would not get a fair trial if the jury were made up of a majority of whites.[120] Their fear was reminiscent of the fear blacks sustained as a result of the racial lynching and hatred exacted upon them in the mid-twentieth century South. Despite Dr. King's efforts, many "minorities charged with racially explosive crimes" continue to face prejudicial and biased all-white juries, a problem that may be ameliorated to some degree if a defendant has the option of a bench trial.[121] Likewise, a defendant who is accused of an opprobri-

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110. *See id.* at 376, 378, 950 P.2d at 819, 821 (suggesting in its parenthetical accompanying *State v. Masters*, 99 N.M. 58, 653 P.2d 889 (Ct. App. 1982) that "the *only* issue at a preliminary hearing is whether probable cause exists to believe [the] defendant committed the crime") (emphasis added).

111. *See supra* text accompanying notes 104 & 105.

112. *See Whitehead*, 124 N.M. 377, 950 P.2d 821.

113. *See* N.M. CONST. art. II. Like its Federal counterpart, the New Mexico Constitution includes in the Bill of Rights a plethora of protections for the criminally accused. Article II, Section 10 protects people from unreasonable searches and seizures, and requires the state to show probable cause before any search warrants are issued. Article II, Section 13 limits the amount of bail or fines that can be set, and prohibits the infliction of cruel and unusual punishments. Article II, Section 14 contains the preliminary hearing clause together with the right to counsel, the right to confrontation, and the right to a speedy and impartial trial by jury. Article II, Section 15 protects the accused from self-incrimination and double jeopardy. Article II, Section 18 mandates the government, in most cases, to provide due process whenever it attempts to deprive a citizen of life, liberty, or property.

114. *See* N.M. R. CRIM. P. 5-605(A).

115. *See* N.M. CONST. art II, § 14.

116. *See* Committee Commentary, N.M. R. CRIM. P. 5-605. "Under Paragraph A of this rule, all trials in the district court, except for petty misdemeanors, are by jury unless the defendant waives the jury. The state may refuse to consent to a waiver by the defendant and thereby require the matter to be tried by a jury." *Id.*

117. *See* William C. Smith, *Enpowering Prosecutors: Movement to Allow Equal Rights to Jury Trial Has Judges Fearing Overload*, ABA J., Mar. 1999, at 28.

118. *See id.*

119. *See* Samuel Maull, *Jurors in Jogger Attack Trial Disclose Reasons For Verdicts*, AKRON BEACON J., Aug. 20, 1990, at E1.

120. *See id.*

121. *See* Smith, *supra* note 116.

ous crime such as child sexual abuse may find a judge a more "fair and dispassionate arbiter and fact-finder" than a potentially biased jury.[122] Allowing prosecutors an equal right to a jury trial is a method of prosecutorial misuse of power, in that prosecutors can take advantage of the "bias and a prejudicial atmosphere [a jury trial may present] against the defendant."[123]

The *Whitehead* decision may, in an appropriate case, force the Supreme Court to rethink the state's right to hold a jury trial in the face of a defendant's waiver. In *Whitehead*, when measured against a defendant's right to waive a preliminary hearing, the court found unpersuasive reasons proffered by the state to let it override a defendant's exercise of discretion. The Supreme Court may hold that the same is true for a defendant's right to waive a trial by jury—that this right outweighs any state motive to conduct one.

VI. CONCLUSION

Whitehead holds that state prosecutors cannot compel a preliminary hearing over a defendant's waiver. In doing so, the Court has not taken away an important discovery tool for the prosecution because it can preserve testimony by deposing witnesses pursuant to Rule 5-503 of the New Mexico Rules of Criminal Procedure. The Court in *Whitehead* correctly decided that the right to submit to, or waive, a preliminary hearing is in the sole discretion of the defendant.

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122. *See id.*

123. *See id.* In New Mexico, prosecutors may also participate in a defendant's decision to enter a conditional plea. Rule 5-304(A)(2) of the New Mexico Rules of Criminal Procedure only permits a defendant to enter a conditional plea upon the state's approval. *See* N.M. R. CRIM. P. 5-304(A)(2). A defendant may enter a conditional plea of guilty, no contest or guilty but mentally ill but only with the consent of the state (and approval of the court). *See id.* To be sure, the state's consent is unnecessary for the proper adjudication of criminal justice. The defendant should be free to enter a conditional plea without anyone's consent because, ultimately, it is his or her life that is imperiled, not the prosecution's.