IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-36379

STATE OF NEW MEXICO, ex rel.,
RAUL TORREZ, Second Judicial District Attorney,

Petitioner,

v.

HON. STAN WHITAKER,

Respondent,

and

PAUL SALAS, and
MAURALALON HARPER,

Real Parties in Interest.

PARTIAL TRANSCRIPT

BE IT REMEMBERED that this matter came on for Oral Argument before THE NEW MEXICO SUPREME COURT on April 12, 2017.

A P P E A R A N C E S

For the Petitioner: Kevin Holmes, Esq.

For the Respondent: Jerry Todd Wertheim, Esq.

TRANSCRIBED BY: MARGIE LUERAS

CHIEF JUSTICE DANIELS: We scheduled these cases together for argument today because they involve many of the same kinds of issues under some new provisions of our law as a result of the adoption by the voters of the new provisions of Article II, Section 13 of the Constitution. One of the cases also involved an issue under an older provision of the Constitution, but most of the questions really arise from the new constitutional provision.

And it's understandable that it's going to take a while for people to sort of work out and settle down on application of these issues.

Luckily, New Mexico didn't reinvent the wheel when it adopted the new provisions of the constitutional amendment. This dates back several decades to the adoption in 1970 or 1971 of the District of Columbia crime bill when the federal government passed a statute that at that time was applicable only to the District of Columbia that provided for the first time in American jurisprudence a provision of law that made an exception to the previously generally recognized right to bail that was virtually absolute except in very narrow categories of offenses.

And that provision really was the genesis for what happened later in the federal courts generally. In New Jersey, two years before our state adopted its constitutional amendment, when the New Jersey voters, with the backing of the New Jersey Supreme Court, legislature, governor's office, and a broad array of interest, adopted the same sort of standard as D.C. had done back in 1970 to provide that even though there was a generally recognized right to be released pretrial when one is presumed to be innocent, there will be exceptions. In the D.C. crime bill, there were two exceptions: Whether one was a flight risk or whether one was a danger if released. It required a showing of clear and convincing evidence, the same standard that our voters later adopted, the same standard we have here. So there's been a body of case law that's been developed over the years.

The D.C. courts, the D.C. prosecutors' offices have been applying that language, that standard -- clear and convincing evidence of dangerousness, in addition to their flight risk provision -- day by day, routinely, for decades now. And there's no reason to be apprehensive about it. It's worked both in reducing the population in jail

of people who are there simply because of poverty and providing a sure method of keeping dangerous people in jail, which money cannot guarantee in the same way an outright denial of release will do.

Congress, after it saw the success in the District of Columbia, adopted a statute containing similar provisions for the federal courts around the country. And there's an even greater body of case law that's come out of the federal courts as to what clear and convincing evidence is, as to how one proves it, as to what happens at detention hearings, and so on.

Some of those cases have been cited by parties here in their briefs before us. Other of the cases are summarized in the opinion issued by an appellate court in New Jersey just six weeks ago in State v. Amed Ingram. For those of you who are involved in the criminal justice system, you ought to take a look at it. It's in Westlaw. The citation is 2017 WL 785807, filed and issued March 1st of 2017.

The issue in that case was very similar to the issues that you-all have brought before this Court today. Defense was arguing, and that case was appealing a denial of release, a detention order,

where the state relied on documentary evidence and didn't bring a live witness. And the defense was arguing that it was a violation of due process law ever to hold someone based on an evidentiary presentation that didn't contain at least a live witness.

The New Jersey appellate court reviewed the facts of that case and reviewed the great body of case law, which is remarkably consistent among the circuits around our country, that there's no one-size-fits-all rule. These are decisions made in individual cases involving individual human beings and broadly-varying circumstances that to attempt to put it into a computer formula, to say that a judge always must have live witnesses or never can have live witnesses, is inconsistent with the very thought of case-by-case adjudication to determine whether the evidence really does show by clear and convincing evidence that the person is dangerous.

New Mexico is not plowing new ground here. When our voters adopted the constitutional amendment, it was largely based on the New Jersey amendment, which was largely based on the federal statutes. One of the reasons that we're here today is because there is a petition for writ of

superintending control that's been filed here, in addition to an appeal, of a detention order.

And in that petition for writ of superintending control, we've been asked to provide some guidance, and so that's why we're talking a little bit now. That's why we intend to write formal opinions in these cases to supplement this guidance so that people who weren't sitting in this courtroom can have the benefit of the guidance. And we can provide that guidance in the way we best do, which is through meticulously-prepared written opinions that stand as precedent.

And we essentially are adopting the overwhelming body of case law on the issue of what is clear and convincing evidence of dangerousness in a detention hearing and how it may be proved, that there is no automatic rule, that even though the state is free to proffer documentary evidence, accusatory pleadings, so long as they contain indicia of reliability and sufficient facts for a judge to make some kind of reasoned determination, as judges do in bail hearings all the time or in assessing a search warrant or these other kinds of things -- I'm not saying the decision in the issues here will be identical to the decision in those

other cases, but there are all kinds of proceedings where judges make decisions without necessarily having a live witness, although they may have them in some cases. There's essentially a two-step process that is conducted by the federal courts and we expect to be adopted under our rules.

Now, we have these rules published already for comment before we promulgate final versions. And if anyone has any input on the rules that we've already published for comment, we repeat our earlier request that you send them in.

One of the things this case has confirmed is that we probably ought to reaffirm in those rules once again what we have elsewhere in our rules, that before any decision is made for any prolonged detention of a criminal defendant, there has to be a determination there's probable cause to believe the defendant committed the offense. And I believe the rules that we first published for comment did explicitly repeat that.

The federal cases all reaffirm that in detention hearings, that if there has not been a determination of probable cause, such as in a grand jury indictment or at a preliminary hearing, the judge has to assess probable cause in the ways

judges assess probable cause: Look at the affidavits, look at the other evidence presented, is there probable cause to believe this defendant committed that offense. That's not spelled out in the constitutional language, the new amendment, but it's been part of the U.S. Constitution for decades as the Gerstein case acknowledged. So that would remain. The probable cause determination has to be made. Of course, if there's a grand jury indictment that's already been returned, the judge doesn't have to go through a new determination; it's already been established by the grand jury indictment or by a preliminary hearing finding of probable cause along with a bind-over to a district court.

A lot of these cases, though, are going to come up before the case gets to the grand jury or the preliminary hearing, and sometimes that's when the need for a detention determination is most urgent, right at the outset -- you know, you have someone shooting up a crowded theater with an AK-47 and then let them get out on a jailhouse bond for the week or so before a detention hearing can take place or before the grand jury can return an indictment.

So if there has not been a probable cause

determination made by the time of the detention hearing, the judge has to do that because that's our minimum of holding someone, and that still will have to be done.

It's the second step that has to be conducted here that is the main focus of what you-all are concerned about, and that is a separate determination of whether or not there is clear and convincing evidence that the defendant would be dangerous to another person or the community if released on whatever conditions are available for the court to release the person on.

That determination can be made on a lot of the same evidence that the judge makes the probable cause determination on. It's not bound by the rules of evidence. There is no presumption that witnesses are required or presumption that in a particular case, they won't be required.

Prosecutors should make the judgments in their case that this would be helpful: I think this case is important enough to call for detention, I think it would be helpful to bring my investigator, assistant investigator, or third assistant investigator or somebody who can come in and answer the questions of the judge because there may be

questions about some of this.

Judges should not be hyper-technical about it and impose any arbitrary rule that "I won't consider detention unless there is a live witness there for cross-examination," make the determination from all the documents that are presented.

We're not going to make judgments today on the two cases that caused the writ to be filed. That was not a bail appeal. That was a writ of superintending control that was sought to provide some kind of guidance here. And we're going to provide as much guidance as we can, but we're not going to determine those cases. That's going to be in the hands of the district court, at least, unless and until there's an appeal from that ruling because a writ of superintending control is not a substitute for appeal, and it's a procedure that under our case law should be used sparingly for matters of great public importance.

We've deemed this to be important enough to entertain the writ, and we are going to issue a writ because one of the grounds for issuance of a writ of superintending control, as we said just last year in the case of Kerr v. Parsons at 2016-NMSC-028, "The Supreme Court may exercise the

power of superintending control where it is deemed to be in the public interest to settle the question involved at the earliest moment."

And this is that kind of question because it obviously concerns people with all kinds of perspectives and roles in the system.

As may have been obvious from the questions that various members of the Court asked, this Court is unclear in the two cases that were wrapped up in the writ as to whether Judge Whitaker was saying, "I have a general rule that you have to have witnesses and you have to show me this is exceptional in order to get away from that," or whether the judge was saying, "In this case, I have reasons why you need a witness because there's something here that concerns me."

So we're going to remand both the Salas and the Harper cases. We're going to issue the writ, remand both of those matters to the district court. And there's no reason to change judges in this case; we'll remand it to Judge Whitaker for hearings in both cases.

Applying what we've said here today, to the extent that it helps provide guidance for either side, to the district attorney as to whether you may

choose to bring a witness in the case, to Judge Whitaker, so that you understand the law in this state will be the law that's been outlined in the federal cases and Ingram case out of New Jersey which speaks at much greater length on these issues here and make a determination.

If there is a deficiency in the showing that's made in the writ materials, to articulate that for the record, for counsel, for all concerned, and for a reviewing court, in the event there's an appeal, our proposed bail rules, detention rules that we have put in the public arena for comment, provide changes in our rules of appellate procedure that specifically recognize a right to appeal by the state based on our case law and the constitutional right of every aggrieved party to a right to appeal.

And in light of the importance of this issue for both the defendants and for the public represented by the district attorney, we are proposing to provide an avenue of appeal by the state as well as by the defendant. So any rulings in those cases can be appealed in the matter of due course, either under the current constitutional right of an aggrieved party to an appeal or we have those rules in effect by specific rule numbers

provided in those rules.

The other case before us today, the Groves case, is an appeal. And it is an appeal as of right. It is an appeal that we don't have the discretion to decide or not to decide. We don't have to write precedential opinions in those. The law gives us the right to dispose of them by summary order or by precedential opinion. We're going to write a precedential opinion in the case, but we will announce our ruling on it.

In that case, in the Groves case, there were two grounds for Judge Loveless's order detaining the defendant. We address one issue in this case and find the other one moot. There were two alternative grounds that were the basis of Judge Loveless's detention order. One was the same provision of clear and convincing evidence of dangerousness that was added to the Constitution in November, and we have unanimously determined that the judge did not abuse his discretion in making the decision that case; that based on the documentary materials provided to the judge, it was not a palpable abuse of discretion for the judge to determine that this defendant, given her conduct in the case and supplemented by conduct in prior cases,

that this defendant would constitute a danger to the community and to other people if released. And so we affirm the detention order in Groves and dispose of the appeal that way.

The other issue as to whether there was an alternative ground of detention under the capital offense language, under the old constitutional language from the founding of New Mexico, is a moot issue. But it's an issue that really ought to be developed. Interestingly, we have another bail appeal that's been filed this week, Muhammad Ameer, Number 36,395, for those of you who want to follow this issue, that presents purely and simply the same issues that have been presented by counsel in the Groves case on the old constitutional language. And we are going to ask for briefing on the question of what is a capital offense under Article II, Section 13 under the constitutional language. We know the statutes define certain offenses still as a capital offense, but we're asking for briefing on what the Constitution, which can't be changed by statute, meant as a capital offense, as well as the standard of proof in those cases where the capital offense exception applies, which is the issue that was attempted to be brought before us in the Groves

case. So we are going to address that and provide guidance on that as well.

We are not making a decision from the bench as to whether the detention motion should or should not be granted in either of the cases that we're remanding for hearings. We don't think we have a record sufficient for that here, this is not an appeal, and ultimately it's the decision of the district court, reviewable for abuse of discretion by appellate courts on that issue, and we'll let the normal course of the rule of law follow in that case.

I think that adequately summarized where we are on this. We will amplify by written opinion later. I could speak more, but I don't think it would add much guidance, and I might take a chance of saying something that not all five of us agree on. I think we all five have agreed as to all the things that I've said here, and we will let the formal opinion writing process take care of the precise details to come.

Do any counsel have any questions?

UNIDENTIFIED SPEAKER: No, Your Honor.

UNIDENTIFIED SPEAKER: None from Judge Whitaker, Your Honor.

UNIDENTIFIED SPEAKER: No, sir.

CHIEF JUSTICE DANIELS: All right.

UNIDENTIFIED SPEAKER: None [inaudible].

CHIEF JUSTICE DANIELS: All right. And thank you all. We know this is a matter --

JUSTICE CHÁVEZ: More counsel back there.

UNIDENTIFIED SPEAKER: [Inaudible] on behalf of Ms. Groves, Your Honor.

CHIEF JUSTICE DANIELS: All right. Thank you. All right. Thank you. I didn't mean to leave you out. I was watching to see if you were listening while I was describing our ruling on your case.

We know this is an important issue for everybody involved in the criminal justice system and an important issue for the people of New Mexico, and we appreciate the good faith of all the people in the process who are working to deal with these issues. I am quite confident, as I'm sure my colleagues are confident, that the lawyers and judges in New Mexico are every bit as smart as those up in New Jersey and the ones who do cases across the street from our courthouse down in Albuquerque and that we're going to get through this. It's going to take a while to learn new ways of doing

things here in New Mexico. For a long, long time, we've depended on the myth that how much money a person pays will determine how much the community is protected, and that has been a myth that has been proven over and over again to be a danger to the public. And we've seen over and over cases of people being held in jail not for being dangerous but for being without money. And the constitutional amendment was intended to address both those problems. And if we work on it together, I'm confident that we can emerge better off, just as the citizens of this people hoped when they passed that constitutional amendment.

Thank you-all very much. We're adjourned.

(End of recording.)