

SUPREME COURT, STATE OF COLORADO		DATE FILED: June 18, 2022 9:57 PM FILING ID: 1E4CB0CB654C3 CASE NUMBER: 2022SA207
Colorado State Judicial Building 2 East 14th Avenue Denver, Colorado 80203		
El Paso County District Court Honorable Judge Curtis Case No. 21CR6075		
IN RE: THE PEOPLE OF THE STATE OF COLORADO Respondent-Appellee, v. CALVIN WRIGHT Petitioner-Appellant		♦ COURT USE ONLY ♦
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IN RE: PEOPLE V. CALVIN WRIGHT		

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C. A. R. 28 and C. A. R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit and formatting requirements set forth in C. A. R. 28(g).

It contains 3690 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C. A. R. 28 and C. A. R. 32.

A handwritten signature in black ink, consisting of a stylized initial 'J' followed by a horizontal line.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	4
ISSUE PRESENTED.....	5
THE PARTIES.....	5
TRIBUNAL BELOW.....	5
ENTITY AGAINST WHICH RELIEF IS SOUGHT.....	5
RULINGS COMPLAINED OF AND RELIEF SOUGHT.....	6
NO OTHER ADEQUATE REMEDY IS AVAILABLE.....	6
FACTUAL AND PROCEDURAL BACKGROUND.....	7
ARGUMENTS IN SUPPORT OF RELIEF UNDER C.A.R. 21.....	12
I. THE TRIAL COURT IMPROPERLY DEPRIVED MR. WRIGHT OF THEIR RIGHT TO A PRELIMINARY HEARING BECAUSE THERE WAS NOT A VALID WAIVER.....	12
A. Mr. Wright was entitled to a preliminary hearing.....	12
B. Mr. Wright could not effectively waive their right to a preliminary hearing when they did not know what rights they were giving up	14
C. Because Mr. Wright did not effectively waive their right to a preliminary hearing, it must be reinstated.....	19
CONCLUSION.....	20
INDEX OF SUPPORTING DOCUMENTS.....	21
CONTACT INFORMATION FOR THE PARTIES BELOW.....	22
CERTIFICATE OF SERVICE.....	23

TABLE OF AUTHORITIES

<i>Gerstein v. Pugh</i> , 420 U.S. 103, (1975).....	13
<i>Hunter v. Dist. Court</i> , 543 P.2d 1265, 1267 (Colo. 1975).....	6
<i>Lucero v. District Court</i> , 532 P.2d 955, 957 (1975).....	13
<i>Moore v. People</i> , 318 P.3d 511, 516 (Colo. 2014).....	14
<i>People v. Abbott</i> , 638 P.2d 781, 785 (Colo. 1981).....	13
<i>People v. Al-Yousif</i> , 49 P.3d 1165, 1169, 1172 (Colo. 2002).....	15
<i>People v. Campos-Corona</i> , 343 P.3d 983, 985 (Colo. App. 2013).....	14
<i>People v. Dist. Ct.</i> , 521 P.2d 778 (1974).....	13
<i>People v. Dist. Ct.</i> , 521 P.2d 778, 779 (Colo. 1974).....	17
<i>People v. Dist. Ct.</i> , 522 P.2d 589, 591 (Colo. 1974).....	18
<i>People v. Huckabay</i> , 463 P.3d 283, 284 (Colo. 2020).....	7
<i>People v. Huckabay</i> , 463 P.3d 283, 285 (Colo. 2020).....	6
<i>People v. Macrander</i> , 756 P.2d 356, 362 (Colo. 1988).....	13, 14, 19
<i>People v. Moꝛee</i> , 723 P.2d 117, 121 n.4 (Colo.1986).....	14
<i>People v. Moꝛee</i> , 723 P.2d 117, 122 n.4 (Colo. 1986).....	15
<i>People v. Nicholson</i> , 219 P.3d 1064, 1065 (Colo. 2009).....	19
<i>People v. Nicholson</i> , 219 P.3d 1064, 1067 (Colo. 2009).....	14
<i>People v. Pozo</i> , 746 P.2d 523, 525–26 (Colo.1987)	14
<i>People v. Rowell</i> , 453 P.3d 1156, 1159 (Colo. 2019).....	7
<i>People v. Steen</i> , 318 P.3d 487, 490 (Colo. 2014).....	6
<i>People v. Tafoya</i> , 434 P.3d 1193, 1995 (Colo. 2019).....	6
<i>People v. Thames</i> , 344 P.3d 891, 895 (Colo. 2015).....	15
<i>People v. Walker</i> , 318 P.3d 479, 484 (Colo. 2014).....	16
<i>People v. Williams</i> , 987 P.2d 232, 233 n.1 (Colo. 1999).....	5
§ 16-5-301(1)(a), C.R.S.	7, 11, 12
§ 18-4-203(1), C.R.S.	7, 12
§ 18-4-203(2)(a), C.R.S.	7, 12
§ 18-4-502, C.R.S.	7
§ 18-4-506, C.R.S.	7
Colo. R. Crim. P. 7	17
Colo. R. Crim. P. 7(h)(1)	7
Colo. R. Crim. P. 43.....	16
C. A. R. 21.....	5
2 W. LaFave & J. Israel, <i>Criminal Procedure</i> § 14.2 at 246–47 (1984).....	13

Calvin Wright petitions this court, pursuant to C. A. R. 21, to issue an order to show cause and to grant appropriate relief as requested below.

ISSUE PRESENTED

- I. Whether the trial court deprived Calvin Wright of their right to a preliminary hearing because there was not a valid waiver, and because the trial court failed to comply with Rule 43.

THE PARTIES

The petitioner in this original proceeding is Calvin Wright, the defendant in the district court. The proposed respondents are the People of the State of Colorado (the prosecution) and the El Paso County District Court (the trial court). *See People v. Williams*, 987 P.2d 232, 233 n.1 (Colo. 1999) (acknowledging that, although any relief under C. A. R. 21 would issue against the tribunal below, the prosecution is the “real party in interest”).

TRIBUNAL BELOW

The tribunal that issued the order that is the subject of this original proceeding is the El Paso County District Court. The contested order was issued in case no. 21CR6075.

ENTITY AGAINST WHICH RELIEF IS SOUGHT

The relief requested in this case would issue against the El Paso County District Court.

RULINGS COMPLAINED OF AND RELIEF SOUGHT

The ruling complained of is the district court's finding that Mr. Wright waived their right to a preliminary hearing. Specifically, the district court first made such a finding on December 27, 2021, and then in a written order on February 4, 2022 denying Mr. Wright's motion for reinstatement of their preliminary hearing.

The relief Mr. Wright seeks is a preliminary hearing.

NO OTHER ADEQUATE REMEDY IS AVAILABLE

Relief under C.A.R. 21 is an extraordinary remedy, but it is appropriate in cases that raise issues of first impression and that are of significant public importance. *People v. Steen*, 318 P.3d 487, 490 (Colo. 2014). Relief is also appropriate "where the normal appellate process would prove inadequate." *Id.*

Where the error alleged involves the right to a preliminary hearing, any appellate remedy that a defendant might have would be inadequate because his right to a preliminary hearing would be moot after trial. *People v. Huckabay*, 463 P.3d 283, 285 (Colo. 2020) (citing *People v. Tafuya*, 434 P.3d 1193, 1995 (Colo. 2019); see also *Hunter v. Dist. Court*, 543 P.2d 1265, 1267 (Colo. 1975) (a preliminary hearing is a *pretrial* screening device) (emphasis added).

Additionally, the validity of a waiver of a preliminary hearing is an issue of significant public importance. First, a preliminary hearing is a judicial

determination of whether there is probable cause sufficient *to subject the defendant to trial*. See *Huckabay*, 463 P.3d at 284. Second, the denial of a preliminary hearing deprives the accused of a statutory right and may require them to improperly remain in custody until trial. See *Rowell*, 453 P.3d at 1159.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Wright is charged with second degree burglary, a class 3 felony, §§ 18-4-203(1), (2)(a), C.R.S. (count 1); first degree criminal trespass, a class 5 felony, § 18-4-502, C.R.S. (count 2); and second degree criminal tampering, a class 2 misdemeanor, § 18-4-506, C.R.S. (count 3). All counts are alleged as acts of domestic violence. Mr. Wright was entitled to a preliminary hearing on count 1, the class 3 felony second degree burglary. See §§ 18-4-203(1), (2)(a), C.R.S.; Colo. R. Crim. P. 7(h)(1); § 16-5-301(1)(a), C.R.S. Mr. Wright was before the Court for the filing of the information on November 1, 2021, and promptly requested a preliminary hearing at that time. *Id.* Mr. Wright's preliminary hearing was scheduled for December 27, 2021.

Undersigned counsel tested positive for COVID-19 on December 22, 2021, and was ordered by the Colorado Department of Public Health & Environment to quarantine until December 31, 2021. Counsel contacted the division prosecutors to advise them that counsel would be attending court on

December 27 virtually and, as such, all cases set for preliminary hearing that were not already waivers would be continued. *See* Appendix G.

On December 27, 2021, counsel appeared in court by audio-visual WebEx and Mr. Wright appeared in person. Counsel requested to continue the preliminary hearing, notifying the Court that counsel had not yet met with Mr. Wright¹ nor advised them of their plea offer. Appendix A, p. 3: l. 15-23. The prosecution had no objection. Appendix A, p. 3: l. 24-25; p. 4: l. 1-4.

Following this record, Mr. Wright spoke up and announced, “Well, I’d like to just go to trial.” Appendix A, p. 4: l. 7. Counsel responded in open court to Mr. Wright over audiovisual WebEx and advised Mr. Wright that counsel would advise them of all of their options and provide them all of the information they needed to make that decision. Appendix A, p. 4: l. 8-14. At this point, the Court *sue sponte* interjected and ask Mr. Wright directly, “So, do you want to skip your preliminary hearing?” Appendix A, p. 4: l. 17. Mr. Wright responded, “Yes, ma’am.” Appendix A, p. 4: l. 18. The Court continued, “And just set your case for trial today?” Appendix A, p. 4: l. 19. Mr. Wright responded, “Yes, ma’am.” Appendix A, p. 4: l. 25. The Court thereafter

¹ As counsel had not communicated with Mr. Wright, it was unbeknownst to Mr. Wright that a condition of the plea offer was to waive preliminary hearing. *See* Appendix B. It was also unbeknownst to Mr. Wright that an accused

made a finding that Mr. Wright waived their right to a preliminary hearing. Contemporaneously, counsel objected. Appendix A, p. 5: l. 4-11.

Specifically, counsel: (1) asked for the Court to provide an opportunity for counsel to meet with Mr. Wright prior to accepting a waiver, (2) argued that the Court should not accept a represented defendant's *pro se* request, (3) argued that Mr. Wright needed to be advised about their options and the consequences of their options, and (4) raised the issue of possible competency concerns based on the incongruent decision making. Appendix A, p. 5: l. 4-11. The Court responded that Mr. Wright had a right to enter not guilty pleas, Appendix A, p. 5: l. 12-14, to which counsel argued that pleading not guilty does not then forgo the right to a preliminary hearing, Appendix A, p. 6: l. 2-9. The Court then *sua sponte* asked Mr. Wright directly, "Is that correct, Mr. Wright, is that you do not want a preliminary hearing?" Appendix A, p. 6: l. 11-12. Mr. Wright responded, "Yes, ma'am." Appendix A, p. 6: l. 13. The Court thereafter found that Mr. Wright made a "knowing, intelligent, and voluntary" waiver of preliminary hearing, accepted Mr. Wright's plea of not guilty, and set their case for jury trial. Appendix A, p. 6: l. 14-18.

normally proceeds to preliminary hearing if they elect to plead not guilty and set their case for trial.

Counsel again contemporaneously objected. Appendix A, p. 6: l. 20-25. Specifically, counsel asserted that Mr. Wright was being denied effective assistance of counsel, that Mr. Wright did not know what a preliminary hearing was, and that Mr. Wright was therefore not capable of making an “informed, knowing, or voluntary” decision about preliminary hearing when Mr. Wright had not been advised about what rights they were giving up. Appendix A, p. 6: l. 20-25. The Court interrupted counsel and stated, “Mr. Wright says he does. I understand your concerns, Ms. Lalonde, but I think I’ve told him that this is against the advice of counsel. Implied in that is that I think this is a bad idea for him to do. You understand that sir?” Appendix A, p. 7: l. 5-8. Mr. Wright responded, “Yes.” Appendix A, p. 7: l. 9.

The Court then acknowledged that there was an emotionally charged exchange in the court room² that occurred prior to the Court making its ruling in Mr. Wright’s case on an unrelated matter. Appendix A, p. 7: l. 15-17. The Court then asked Mr. Wright directly if they wanted to reconsider their request, to which they responded “No.” Appendix A, p. 7: l. 23-24. The Court advised that it did not think “think it was a good idea,” and Mr. Wright responded “No.” Appendix A, p. 7: l. 23-25; p. 8, l. 1 (emphasis added). In response to Mr.

² The Court had just engaged in a heated exchange with someone on another, unrelated case prior to calling Mr. Wright’s case on the record.

Wright's *no*, the Court repeated "I don't think it's a good idea. I don't think it's a good idea for you to do this. You might lose a beneficial offer that's been extended to you." Appendix A, p.8: l. 2-4. Mr. Wright responded, "It's okay." Appendix A, p. 8: l. 5. The Court stated "the prosecution might revoke plea agreements," to which Mr. Wright responded, "Cool." Appendix A, p. 8: l. 6-7. The Court then scheduled Mr. Wright's jury trial and excused the parties to the case.

On January 6, 2022, Mr. Wright, through counsel, filed a motion for reinstatement of preliminary hearing citing section 16-5-301(1)(a), Rule 7(h)(1), effective assistance of counsel, and the federal and Colorado constitutional rights to due process and equal protection. *See* Appendix C. Mr. Wright, through counsel, filed this motion immediately after their first in-person advisement with counsel, once they were made aware of what their rights were by counsel. In this motion, Mr. Wright argued: (1) Mr. Wright did not make a knowing, voluntary, and intelligent waiver of preliminary hearing; (2) the Court, in accepting Mr. Wright's unadvised waiver of preliminary hearing, denied Mr. Wright the right to effective assistance of counsel, and (3) the Court improperly denied counsel's request to confidentially confer Mr. Wright prior to accepting a waiver of preliminary hearing. Appendix C, p. 2-3.

The prosecution filed a response to Mr. Wright's motion on February 1, 2022. *See* Appendix D. The prosecutor who wrote the Response first acknowledged that they were not present at this hearing and instead were relying on minute orders, *see* Appendix E, and notes from the deputy district attorneys who were present. Appendix D, ¶ 2. The argument from the prosecution was when an accused waives the preliminary hearing, then they cannot ask for their hearing back. Appendix D, ¶ 5-7. On February 4, 2022, the Court denied Mr. Wright's motion for reinstatement of their preliminary hearing "for the reasons set forth in the People's Response." Appendix F.

ARGUMENTS IN SUPPORT OF RELIEF UNDER C.A.R. 21

I. THE TRIAL COURT IMPROPERLY DEPRIVED MR. WRIGHT OF THEIR RIGHT TO A PRELIMINARY HEARING BECAUSE THERE WAS NOT A VALID WAIVER

A. Mr. Wright was entitled to a preliminary hearing.

Mr. Wright was entitled to a preliminary hearing on count 1, second degree burglary, since it is a class 3 felony. *See* §§ 18-4-203(1), (2)(a), C.R.S.; Colo. R. Crim. P. 7(h)(1); § 16-5-301(1)(a), C.R.S. Mr. Wright was before the Court for the filing of the information on November 1, 2021, and they promptly requested a preliminary hearing that day. *Id.* The Court scheduled Mr. Wright for a preliminary hearing on December 27, 2021.

In addition to being codified in Colorado statute and rule, the right to a preliminary has a constitutional foundation. *See People v. Abbott*, 638 P.2d 781, 785 (Colo. 1981) (“The right to demand a preliminary hearing where the defendant is accused by information or felony complaint is not only granted by statute, but has a constitutional foundation.”); *Lucero v. District Court*, 532 P.2d 955, 957 (Colo. 1975) (“Lucero, in requesting and obtaining a preliminary hearing, was exercising a right that was not only guaranteed him by statute and our rule, but also one that has a constitutional foundation.”). As this Court has explained:

The practical effect of a defendant's waiver of his right to a preliminary hearing is that he is deemed to have admitted that probable cause exists, *People v. District Court*, 521 P.2d 778 (Colo. 1974), and thus his liberty may be restrained prior to trial either through incarceration or through conditions on his bail. For that reason, the waiver of the right to a preliminary hearing directly implicates constitutional interests. *Gerstein v. Pugh*, 420 U.S. 103, (1975.); *Lucero v. District Court*, 532 P.2d 955, 957 (Colo. 1975) (right to preliminary hearing “has a constitutional foundation”). *See* 2 W. LaFave & J. Israel, *Criminal Procedure* § 14.2 at 246–47 (1984) (discussing constitutional right to determination of probable cause).

People v. Macrander, 756 P.2d 356, 362 (Colo. 1988).

B. Mr. Wright could not effectively waive their right to a preliminary hearing when they did not know what rights they were giving up.

This Court has historically held that a defendant's waiver of any fundamental right must be knowingly, voluntarily, and intelligently made *See, e.g., People v. Campos-Corona*, 343 P.3d 983, 985 (Colo. App. 2013) (quoting *People v. Pozo*, 746 P.2d 523, 525–26 (Colo.1987) (“A guilty plea effects ‘a waiver of fundamental rights and, therefore, must be knowingly, intelligently and voluntarily made to be valid.’”)); *Moore v. People*, 318 P.3d 511, 516 (Colo. 2014) (“In *People v. Mozee*, 723 P.2d 117, 121 n.4 (Colo.1986), we noted that we had used the word ‘intentionally’ in the *Curtis* opinion but did not mean to establish any particular distinction between the constitutional standard for waiver of a defendant's right to testify and waiver of other fundamental rights, which, in our jurisprudence, must generally be knowingly, voluntarily and *intelligently* made.”)

In the context of a waiver of preliminary hearing, courts also describe the waiver in terms of voluntariness and effectiveness. *See Macrander*, 756 P.2d at 362 (“Because Macrander's waiver was induced by a promise the prosecution later chose not to honor, it was *involuntary* and thus ineffective.”) (emphasis added); *People v. Nicholson*, 219 P.3d 1064, 1067 (Colo. 2009) (“[A]

district court would have the power to restore a defendant's preliminary hearing if the waiver was *involuntary* and thus ineffective.”) (emphasis added).

While an accused need not understand every consequence of a decision to waive, *People v. Al-Yousif*, 49 P.3d 1165, 1169, 1172 (Colo. 2002), a waiver is only knowing and intelligent “when made with *awareness* of the nature of the right being abandoned and the consequences of the decision to abandon it.” *People v. Thames*, 344 P.3d 891, 895 (Colo. 2015) (emphasis added); *see also People v. Mozee*, 723 P.2d 117, 122 n.4 (Colo. 1986)(“A waiver is ordinarily an intentional relinquishment or abandonment of a *known* right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case . . .”) (emphasis added)(internal citation omitted) A valid waiver must be “knowingly” made, that is, the person waiving the particular right must “*know*” *of the existence of the right and any other information legally relevant to the making of an informed decision* either to exercise or relinquish that right. *Mozee*, 723 P.2d at 122 n.4. Second, the waiver must be made “intentionally” and “intelligently,” that is, the person waiving that right must be *fully aware of what they are doing* and must make a conscious, informed choice to relinquish the known right. *Id.* And, third, that conscious choice must be made

“voluntarily,” that is, not coerced by the state either physically or psychologically. *Id.*; *People v. Walker*, 318 P.3d 479, 484 (Colo. 2014).

Put simply, Mr. Wright could not effectively waive their right to a preliminary hearing when they did not know what right they were relinquishing. When the Court waived Mr. Wright’s preliminary hearing, Mr. Wright had never (1) met counsel; (2) been advised of their right to a preliminary hearing nor the consequences of waiving or proceeding to preliminary hearing; (3) been advised of their plea offer; (4) been advised of their right to a trial and all the rights associated with that election; (5) reviewed discovery; or (6) been advised about the charges, elements, penalties, nor possible defenses.

Nor did the Court provide an opportunity for any of this to occur. Rule 43 provides, in pertinent part, “If defense counsel does not appear in the same location as the defendant, a separate confidential communication line, such as a phone line, shall be provided to allow for private and confidential communication between the defendant and counsel.” Colo. R. Crim. P. 43. On December 27, 2021, counsel explicitly requested that the Court provided an opportunity for counsel to confer with Mr. Wright prior to accepting a waiver of preliminary hearing. *See* Appendix A, p. 5: l. 4-11 (“... I don’t want the Court to accept Mr. Wright’s *pro se* request when he is represented by the Public Defender. He needs to be advised about his options and the consequences of

his options... I would be asking that the Court give me an opportunity to connect with him.”) Rather than permitting counsel to speak with Mr. Wright via a confidential line, the Court spoke to Mr. Wright directly and told them it didn’t think it was a good idea,” that they “might lose a beneficial offer,” and “the prosecution might revoke plea agreements” prior to the Court ultimately waiving Mr. Wright’s preliminary hearing over counsel’s objection. Appendix A, p. 7-8.

Mr. Wright’s lack of understanding of what they were giving up is apparent from the record. First, Mr. Wright’s desire about wanting to get things moving (“Well, I’d like to just go to trial,” “We need to get it rolling.” Appendix A, p. 4-5) cuts against a valid waiver. If Mr. Wright were successful at preliminary hearing, the class 3 felony would have been dismissed. *See Colo. R. Crim. P. 7* (“If, from the evidence, it appears to the district court that no probable cause exists to believe that any or all of the offenses charged were committed by the defendant, the court shall dismiss those counts from the information and, if the court dismisses all counts, discharge the defendant.”)

Second, Mr. Wright’s desire for a trial indicated they wanted to fight or dispute the charges – a preliminary hearing would have afforded them an opportunity to do just that. Instead, waiving preliminary hearing did the very opposite. *See People ex rel. Farina v. Dist. Ct.*, 521 P.2d 778, 779 (Colo. 1974)

(“The preliminary hearing was created as a screening device of afford the defendant an opportunity to challenge the sufficiency of the prosecution’s evidence to establish probable cause before an impartial judge. If, however, the defendant elects to waive the preliminary hearing and to proceed to trial, the waiver operates as an admission by the defendant that sufficient evidence does exist to establish probable cause that the defendant committed the crimes charged.”). In particular, Mr. Wright was clearly unaware that prosecutors in the Fourth Judicial District revoke plea negotiations when an accused proceeds to preliminary hearing or pleads not guilty. Being set on going trial, Mr. Wright gained no benefit by waiving their preliminary hearing, which would also have been a valuable opportunity to cross examine witnesses who would testify against them at trial.

Mr. Wright’s lack of understanding became further apparent when he later had an opportunity to meet with counsel. An accused who requests a preliminary hearing and then affirmatively waives it is presumed to have admitted that probable cause exists to believe that they have committed the crime charged. *Farina*, 522 P.2d at 591. However, Mr. Wright expressed to counsel that they believed they were waiving an “advisement” rather than a dispositive gatekeeping hearing when the Court asked them if they wanted to waive their preliminary hearing. Appendix C, ¶ 12. When counsel and Mr.

Wright had their first opportunity to confer on the evening of December 27, 2021, Mr. Wright expressed immediate regret about their unknowing unintelligent, and involuntary waiver. By January 6, 2022, when they were fully advised by counsel under Rule 5 and 11 and provided a copy of discovery, Mr. Wright indicated strong defenses to the charges (in particular, that they own and reside in the home that is the subject of the felony burglary) and filed a motion for reinstatement of preliminary hearing that day. *See* Appendix C. Accordingly, Mr. Wright's waiver was unknowing, unintelligent, and involuntary waiver without the benefit of effective assistance of counsel.

C. Because Mr. Wright did not effectively waive their right to a preliminary hearing, it must be reinstated.

Although the prosecution argued in its Response, Appendix D, that the Court cannot restore a successive request for preliminary hearing, Colorado law permits a preliminary hearing to be restored where the waiver was ineffective. *Nichelson*, 219 P.3d at 1065 (“We hold that the district court has the authority to restore a defendant’s preliminary hearing where the district court finds that the waiver is ineffective.”); *Macrander*, 756 P.2d at 362 (“Because Macrander’s waiver was induced by a promise the prosecution later chose not to honor, it was involuntary and thus ineffective. As a consequence, the trial court had the power to reinstate the defendant’s right to a preliminary hearing if it so

desired.”) Because there was no valid waiver of preliminary hearing, the district court should have reinstated Mr. Wright’s preliminary hearing.

CONCLUSION

Because there was no valid waiver, Mr. Wright requests this Court issue a rule to show cause why his right to a preliminary hearing should not be reinstated.

INDEX OF SUPPORTING DOCUMENTS

Appendix A: Transcript of Preliminary Hearing Waiver from December 27, 2021.

Appendix B: Email from prosecution from December 5, 2021, revoking plea offer if Mr. Wright proceeded to go to preliminary hearing.

Appendix C: Defense Motion for Reinstatement of Preliminary Hearing filed January 6, 2022.

Appendix D: Prosecution's Response filed February 1, 2022.

Appendix E: December 27, 2021, minute order.

Appendix F: Court Order dated February 4, 2022, denying Mr. Wright's Motion for Reinstatement of Preliminary Hearing.

Appendix G: Email sent to prosecutors on December 23, 2021, advising all preliminary hearings that were not waivers would nonetheless be continued.

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CERTIFICATE OF SERVICE

I certify that, on June 18, 2022, a copy of In Re: People v. Calvin Wright was served through E-Filing on the El Paso County District Attorney and El Paso County District Court.

A handwritten signature in black ink, consisting of a stylized 'J' followed by a horizontal line and a small dot.