

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: **March 5, 2018**

4 **NO. A-1-CA-34272**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **RONALD WIDMER,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

11 **Stan Whitaker, District Judge**

12 Hector H. Balderas, Attorney General

13 Santa Fe, NM

14 John Kloss, Assistant Attorney General

15 Albuquerque, NM

16 for Appellee

17 Bennett J. Baur, Chief Public Defender

18 C. David Henderson, Appellate Defender

19 Santa Fe, NM

20 for Appellant

1 **OPINION**

2 **VIGIL, Judge.**

3 {1} The district court denied Defendant Ronald Widmer’s motion to suppress on
4 grounds that inculpatory statements he made without the benefit of *Miranda* warnings
5 were admissible under the police officer safety exception to *Miranda*. We disagree
6 and reverse.

7 **BACKGROUND**

8 {2} Defendant was found guilty by a jury on one count of possession of a
9 controlled substance (methamphetamine), contrary to NMSA 1978, Section 30-31-23
10 (2011). Defendant’s conviction stemmed from the detention and search of his person
11 that occurred during an Albuquerque, New Mexico Police Department (APD)
12 investigation into whether a moped in Defendant’s possession was stolen.

13 {3} Defendant filed a pre-trial motion to suppress statements he made, together
14 with any drugs and paraphernalia seized from his person by the APD officers.
15 Because Defendant’s motion was untimely, the district court decided to address the
16 merits of Defendant’s motion during the trial, and together with any related
17 constitutional issues as they arose while the evidence at trial was being presented.

18 {4} APD Officers Frank Baca and “Speedy” Apodaca, as well as APD forensic
19 scientist Manuel Gomez testified. In addition, Defendant provided limited testimony

1 outside of the presence of the jury. APD dispatch received an anonymous tip
2 reporting two individuals in a Walgreens parking lot were trying to start a moped that
3 appeared to have been tampered with, and Officers Baca and Apodaca were
4 dispatched to investigate. Upon arriving at the Walgreens at around 11:00 p.m.,
5 Officer Apodaca testified that he approached Defendant and his companion, Lydia
6 Alvarez, who were standing around a moped meeting the tip's description, and asked
7 what was going on and what were they doing. Defendant and Ms. Alvarez, according
8 to Officer Apodaca, cooperated with the officers and explained that their moped was
9 having mechanical issues due to a low battery. Although Defendant told the officers
10 that he owned the moped, Officer Apodaca said they continued to investigate because
11 there was damage to the moped's ignition, which indicated that it may have been
12 stolen.

13 {s} Officer Apodaca located a VIN number on the moped and ran that information
14 through the National Criminal Information Center (NCIC)—a database through which
15 police run checks on potential stolen vehicles, firearm inquiries, and warrant checks.
16 At the same time, Officer Baca collected and ran the personal information of
17 Defendant and Ms. Alvarez through NCIC and learned that Defendant had a possible
18 active felony arrest warrant.

1 {6} As soon as the officers learned of the possible arrest warrant, within only
2 minutes of arriving at Walgreens, and before receiving confirmation from dispatch
3 that the arrest warrant was in fact active, Officer Apodaca detained Defendant, placed
4 him in handcuffs, and directed him to sit near the sidewalk.

5 {7} While Defendant was being handcuffed, Officer Apodaca searched Defendant's
6 person. During the search and without reading Defendant his *Miranda* rights, Officer
7 Apodaca asked Defendant "Is there anything else on you that I should know
8 about?"—which both officers testified is a routine question asked of individuals
9 being patted down to ensure police safety. In response to Officer Apodaca's question,
10 Officer Baca testified over defense counsel's objection (which was overruled) that
11 Defendant admitted to having some methamphetamine in a red pill container hanging
12 from his belt loop. As a result, Officer Apodaca seized a pill container which
13 contained a white powdery substance from Defendant's belt loop. Shortly thereafter,
14 APD dispatch confirmed that the arrest warrant for Defendant was outstanding and
15 Defendant was placed in Officer Apodaca's squad car and removed from the scene.

16 {8} The district court gave two explanations for its ruling admitting Defendant's
17 statement into evidence. The district court ruled that Defendant's questioning was
18 permissible as incident to a lawful arrest under the police safety exception to
19 *Miranda*. In a subsequent statement, the district court further explained that it refused

1 to “get into the artfulness or lack of artfulness” of Officer Apodaca’s question to
2 Defendant.

3 The jury was instructed that:

4 Evidence has been admitted concerning a statement allegedly made
5 by [D]efendant. Before you consider such statement for any purpose,
6 you must determine that the statement was given voluntarily. In
7 determining whether a statement was voluntarily given, you should
8 consider if it was freely made and not induced by promise or threat.

9 {9} Officer Apodaca further testified that during the investigation at Walgreens he
10 and Officer Baca also spoke with Ms. Alvarez. As a result of this interaction, Officer
11 Apodaca testified that he seized a small baggie containing a white powdery substance
12 from Ms. Alvarez, which Officer Baca had noticed was underneath Ms. Alvarez’s leg
13 where she sat on the sidewalk. Believing that all of the white powder seized from
14 Defendant and Ms. Alvarez was methamphetamine, Officer Apodaca combined the
15 contents of the pill container from Defendant’s belt with the contents in the baggie
16 seized from Ms. Alvarez into one bag before tagging it into evidence.

17 {10} Mr. Gomez, who was qualified as an expert in forensic science and analysis of
18 controlled substances, testified that a single sample of the contents of the bag
19 containing the mixed white powders seized from Defendant and Ms. Alvarez was
20 tested for controlled substances. This sample tested positive for methamphetamine.

21 {11} The jury returned a general verdict of guilty, and Defendant appeals.

1 **DISCUSSION**

2 **I. Standard of Review**

3 {12} Appellate review of a motion to suppress under *Miranda* presents a mixed
4 question of law and fact. *State v. Olivas*, 2011-NMCA-030, ¶ 8, 149 N.M. 498, 252
5 P.3d 722. We defer to the district court’s findings of fact, if they are supported by
6 substantial evidence, and apply de novo review to the application of the law to those
7 facts. *State v. Nieto*, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442. “Whether
8 a defendant was subject to a custodial interrogation and whether a defendant’s
9 statements are voluntarily given are legal determinations that we review de novo.”
10 *Olivas*, 2011-NMCA-030, ¶ 8; *see Nieto*, 2000-NMSC-031, ¶ 19 (utilizing de novo
11 review to determine whether a defendant was subject to custodial interrogation); *State*
12 *v. Cooper*, 1997-NMSC-058, ¶¶ 25-28, 124 N.M. 277, 949 P.2d 660 (applying de
13 novo review to determine if a confession was voluntary). Likewise, we review a
14 district court’s conclusion of law that the police officer safety exception to *Miranda*
15 applies under a de novo standard of review. *See United States v. Newton*, 369 F.3d
16 659, 669 (2d Cir. 2004) (applying a de novo standard of review to the district court’s
17 legal conclusion regarding the applicability of the public safety exception to
18 *Miranda*); *United States v. Lackey*, 334 F.3d 1224, 1226 (10th Cir. 2003) (“Whether

1 [the] facts support an exception to the *Miranda* requirement is a question of law.”).

2 **II. Analysis**

3 {13} On appeal, Defendant argues that Officer Apodaca’s question to Defendant: “Is
4 there anything on your person that I should know about?”—which prompted
5 Defendant to state that he had some methamphetamine—was custodial interrogation
6 in violation of his rights under the Fifth Amendment and *Miranda v. Arizona*, 384
7 U.S. 436 (1966). Defendant also contends Officer Apodaca’s question does not
8 qualify under the police officer safety exception to *Miranda*. We agree with both
9 contentions.

10 **A. Custodial Interrogation Under Miranda**

11 {14} The Fifth Amendment to the United States Constitution provides that “[n]o
12 person shall be compelled in any criminal case to be a witness against himself.” U.S.
13 Const. amend V. Based on this protection, the United States Supreme Court
14 established in *Miranda* that the government may not use statements, whether
15 exculpatory or inculpatory, stemming from “custodial interrogation” of a suspect,
16 unless effective procedural safeguards have been followed to secure the suspect’s
17 privilege against self-incrimination. 384 U.S. at 444 (holding that prior to
18 investigatory questioning, a suspect “must be warned that he has [the] right to remain
19 silent, that any statement he does make may be used as evidence against him, and that

1 he has a right to the presence of an attorney”). *Miranda* warnings are required when
2 a suspect has been: (1) placed in custody, and then (2) subject to interrogation. *Id.*;
3 *State v. Vasquez*, 2010-NMCA-041, ¶ 26, 148 N.M. 202, 232 P.3d 438. When a
4 defendant is subject to custodial interrogation without *Miranda* warnings, any
5 responses made to police during the course of the custodial interrogation are
6 presumed compelled and must be excluded from evidence. *Oregon v. Elstad*, 470 U.S.
7 298, 317 (1985).

8 {15} Therefore, we must determine if Officer Apodaca’s question to Defendant
9 concerning whether he had anything on him that Officer Apodaca should know about
10 constituted “custodial interrogation.” We consider the questions of whether
11 Defendant was placed in custody and then subject to interrogation in turn.

12 {16} To determine whether a suspect was placed in custody for purposes of
13 *Miranda*, appellate courts engage in an objective inquiry under which the ultimate
14 issue is whether a suspect was either formally placed under arrest or subject to
15 restraint from freedom of movement to the degree normally associated with a formal
16 arrest. *See State v. Wilson*, 2007-NMCA-111, ¶ 14, 142 N.M. 737, 169 P.3d 1184; *see*
17 *also State v. Munoz*, 1998-NMSC-048, ¶ 41, 126 N.M. 535, 972 P.2d 847;
18 *Yarborough v. Alvarado*, 541 U.S. 652, 653 (2004). Because the inquiry into *Miranda*
19 custody is an objective one, the subjective beliefs of the suspect and police officer

1 concerning whether the suspect was in custody are immaterial. *See Wilson*, 2007-
2 NMCA-111, ¶ 41. As a result, “[t]he only relevant inquiry is how a reasonable man
3 in the suspect’s position would have understood his situation.” *Yarborough*, 541 U.S.
4 at 653 (internal quotation marks and citation omitted); *see Wilson*, 2007-NMCA-111,
5 ¶ 35 (holding that a suspect was in *Miranda* custody when the police handcuffed and
6 placed him in a police vehicle); *see also New York v. Quarles*, 467 U.S. 649, 655-56
7 (1984) (holding that a suspect was in *Miranda* custody when he was handcuffed and
8 surrounded by police officers, even though he had not yet been told he was under
9 arrest); *United States v. Smith*, 3 F.3d 1088, 1097-98 (7th Cir. 1993) (holding that a
10 suspect was in *Miranda* custody when the suspect was frisked, placed in handcuffs,
11 and told to sit in a specific place).

12 {17} Defendant was in custody for purposes of *Miranda* at the time of the
13 questioning that led to his admission to possessing methamphetamine. Almost
14 immediately upon arriving at Walgreens and learning of a possible active arrest
15 warrant for Defendant, Officer Apodaca detained Defendant and placed him in
16 handcuffs. Officer Apodaca proceeded to frisk Defendant and directed him to sit
17 down on the sidewalk. Although Officer Baca testified at trial that APD officers are
18 not permitted to formally place a suspect under arrest until potential warrants have
19 been confirmed by dispatch, Officer Apodaca testified that at the time Defendant was

1 placed in handcuffs “he was arrested for the warrant.” However, whether Defendant’s
2 detention constituted an investigatory stop, a de facto arrest, or formal arrest is
3 immaterial because a suspect need not be under formal arrest to be in “custody” under
4 *Miranda*. Rather *Miranda* custody only requires restraint from movement to the
5 degree normally associated with an arrest, as the courts in *Wilson*, *Quarles*, and *Smith*
6 concluded. In those cases, the courts determined suspects were in *Miranda* custody
7 when they were handcuffed, frisked, questioned, and ordered to sit in a particular
8 area—even if not explicitly told they were under arrest—because the suspects’
9 movement was restrained to the degree normally associated with an arrest. Here,
10 Defendant’s freedom of movement was similarly restrained when he was handcuffed,
11 frisked, questioned, and ordered to sit on the sidewalk by Officer Apodaca. The
12 circumstances indicate that a reasonable person in Defendant’s position would have
13 understood himself to be in custody.

14 {18} Having determined that Defendant was placed in “custody” by Officer Apodaca
15 for purposes of *Miranda*, we turn to whether Officer Apodaca’s questioning of
16 Defendant constituted “interrogation,” under *Miranda*.

17 {19} “Interrogation” under *Miranda* certainly encompasses express questions from
18 police to obtain an incriminating response. But, it is not limited to such express
19 questions. “Interrogation” also includes “any words or actions,” according to the

1 United States Supreme Court, “that the police should know are reasonably likely to
2 elicit an incriminating response[.]” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980),
3 (quoted in *State v. Ybarra*, 1990-NMSC-109, ¶ 11, 111 N.M. 234, 804 P.2d 1053).
4 In this regard, because *Miranda* is designed to provide a suspect in custody with
5 additional protection against “coercive police practices, without regard to objective
6 proof of the underlying intent of the police[.]” the focus is primarily on the suspect’s
7 perception. *Rhode Island*, 446 U.S. at 301. “A practice that the police should know
8 is reasonably likely to evoke an incriminating response from a suspect thus amounts
9 to interrogation” regardless of the police officer’s actual intent. *Id.*

10 {20} *State v. Spotted Elk*, 34 P.3d 906 (Wash. Ct. App. 2001) is illustrative. In
11 *Spotted Elk*, a police officer saw a person he knew to be a drug user, and after
12 confirming his suspicion that she had outstanding arrest warrants, arrested her. *Id.* at
13 908. Because he knew the defendant was a drug user, the officer was concerned that
14 she might have weapons, needles, or drugs on her person, and he asked, before
15 handcuffing and searching her incident to arrest, “Do you have anything on your
16 person I need to be concerned about?” *Id.* Usually, but not this time, the officer’s
17 practice was to immediately explain, “[w]eapons, needles or anything that can poke
18 me, stick me, of any kind?” *Id.* In response to the officer’s question, the defendant
19 removed a plastic container from her shirt pocket and told the officer that it was

1 heroin which belonged to a friend. *Id.* The Washington Court of Appeals concluded
2 that given the broad nature of the officer’s question (which lacked his usual
3 explanation that he was looking for weapons, needles, or items that could poke or
4 stick him), “he should have known his query was reasonably likely to elicit an
5 incriminating response.” *Id.* at 909. The court therefore concluded that the defendant
6 was subjected to an interrogation under *Miranda*. *Spotted Elk*, 34 P.3d at 909.

7 {21} We find *Spotted Elk* persuasive and adopt its reasoning. Here, Defendant was
8 confronted by two armed police officers, handcuffed, searched, and then ordered to
9 sit on the sidewalk. After Defendant was handcuffed and while Officer Apodaca was
10 in the process of searching Defendant, Officer Apodaca asked Defendant “Is there
11 anything on you that I should know about?” This was a broad, unlimited question
12 with no explanation that Officer Apodaca was asking only about items which could
13 jeopardize his safety. From Defendant’s perception, the “question” was tantamount
14 to a demand by Officer Apodaca that Defendant disclose to him whether anything
15 illegal was on Defendant’s person. *See State v. Hermosillo*, 2014-NMCA-102, ¶ 11,
16 336 P.3d 446 (“In determining whether a person is being interrogated, we consider
17 whether the officer’s questioning is reasonably likely to elicit an incriminating
18 response or has that effect.”). An armed police officer who has just handcuffed a
19 person and is in the process of searching that person who asks whether there is

1 anything on his person the officer “should” know about, should know that the police
2 officer’s question is likely to elicit an incriminating response. We therefore conclude
3 that Defendant was subjected to interrogation under *Miranda*.

4 {22} Because Defendant was subjected to custodial interrogation under *Miranda*,
5 Defendant was entitled to being advised of his constitutional rights. It is undisputed
6 that Defendant was *Mirandized* after the inculpatory statements were elicited from
7 him by Officer Apodaca. As a result, unless the circumstances of Officer Apodaca’s
8 questioning of Defendant warrant application of an exception to *Miranda*, the district
9 court erred in admitting Defendant’s statement to Officer Apodaca that he had some
10 methamphetamine. We proceed by considering the state’s argument and district
11 court’s ruling that an exception to *Miranda* applies in this case.

12 **B. The Police Officer Safety Exception to *Miranda***

13 {23} In *Quarles*, the United States Supreme Court established a “narrow exception
14 to the *Miranda* rule[,]” which allows arresting officers to ask a defendant “questions
15 necessary to secure their own safety or the safety of the public.” *Quarles*, 467 U.S.
16 at 658-59 (1984). In *Quarles*, a woman reported that she had been raped at gunpoint
17 and provided a description of her attacker. *Id.* at 651-52. When the officers entered
18 a nearby supermarket and saw a man fitting the description provided by the woman,
19 he fled. *Id.* at 652. Following a short pursuit, the officers caught him, frisked him, and

1 discovered that he was wearing an empty shoulder holster. *Id.* After handcuffing the
2 suspect and before advising him of his *Miranda* rights, the officers asked the suspect
3 where the gun was. *Quarles*, 467 U.S. at 652. He nodded towards some empty cartons
4 and answered, “the gun is over there.” *Id.* (internal quotation marks omitted). The
5 Court reversed suppression of the defendant’s statement and the firearm, holding that
6 under circumstances where a question is “reasonably prompted by a concern for the
7 public safety” or the safety of the arresting officers, *Miranda* warnings are not
8 required. *Quarles*, 467 U.S. at 656, 658. The Court cautioned that under this “narrow
9 exception,” each case “will be circumscribed by the exigency which justifies it.” *Id.*
10 at 658.

11 {24} In *State v. Trangucci*, 1990-NMCA-009, ¶¶ 6-13, 110 N.M. 385, 796 P.2d 606,
12 this Court applied *Quarles*. In *Trangucci*, the defendant forced himself into the
13 victim’s apartment, and after the victim refused the defendant’s repeated demands for
14 money, the defendant shot the victim in the face and ran. 1990-NMCA-009, ¶ 3. The
15 police learned early the next morning that the defendant was at a certain motel and
16 went there to arrest him. *Id.* ¶ 4. After entering the room with their weapons drawn,
17 the officers observed a man lying on one of the beds with his back towards the door,
18 and then found the defendant hiding underneath a dresser table with his hands hidden
19 under his chest. *Id.* ¶ 5. After lifting the dresser and while lifting the defendant to his

1 feet, one of the officers conducted a quick pat down of the defendant’s front area and
2 asked, “Where is the gun?” *Id.* Defendant, who was not yet handcuffed, immediately
3 answered that the officer was not going to find the gun because he had ditched it. *Id.*
4 Defendant was then given his *Miranda* warnings. *Trangucci*, 1990-NMCA-009, ¶ 5.
5 On appeal, the defendant argued that the district court erred in denying his motion to
6 suppress his statement regarding the gun. *Id.* ¶ 6. This Court observed that “[t]he
7 standard for application of the public safety exception to *Miranda* warnings” under
8 *Quarles* is “a reasonable determination of an objective, immediate threat to the safety
9 of the public [or the police].” *Trangucci*, 1990-NMCA-009, ¶ 10. Because substantial
10 evidence supported the district court’s finding “that the situation had not stabilized
11 or been secured for everybody’s safety” when the defendant was questioned, this
12 Court held that the district court properly denied the defendant’s motion to suppress
13 under the police and/or public safety exception to *Miranda*. *Trangucci*, 1990-NMCA-
14 009, ¶ 13.

15 {25} *Quarles* and *Trangucci* teach that a narrow exception to *Miranda* exists when
16 there is an objective, immediate threat to police officer safety and police ask
17 questions that are necessary to secure their own safety. In each case the exception
18 “will be circumscribed by the exigency which justifies it.” *Quarles*, 467 U.S. at 658.

1 Previously decided cases, similar to the one before us here, give us additional
2 guidance.

3 {26} In *Spotted Elk*, discussed above, after concluding that the police officer’s
4 question, “Do you have anything on your person I need to be concerned about?” was
5 custodial interrogation under *Miranda*, the Washington Court of Appeals proceeded
6 to consider whether the police officer safety exception applied. *Spotted Elk*, 34 P.3d
7 at 908, 910. The court concluded it did not for two reasons: (1) “the officer’s broad
8 and apparently unqualified question was not related solely to his own safety”; and (2)
9 “no sense of urgency attended the arrest.” *Id.* at 910.

10 {27} In *State v. Crook*, 785 S.E.2d 771 (N.C. Ct. App. 2016), a police officer was
11 at a motel investigating whether the defendant and another suspect were in possession
12 of a stolen vehicle, and received confirmation that the suspect had an outstanding
13 warrant for his arrest. *Id.* at 773-74. After a backup officer arrived, the officers went
14 to the room to arrest the suspect, where a wrestling match ensued when the defendant
15 interfered with the suspect’s arrest. *Id.* at 774. A police officer handcuffed the
16 defendant, ordered him to sit on the ground, and during his pat-down of the defendant
17 found scales in the defendant’s pocket. *Id.* After retrieving the scales, the officer
18 asked him whether “he [had] anything else on him” and the defendant answered, “I
19 have weed in the room.” *Id.* The court rejected the state’s argument that the public

1 safety exception to *Miranda* applied because there was no threat to the public safety
2 which outweighed the need to protect the defendant’s right against self-incrimination.
3 *Crook*, 785 S.E.2d at 777-78. Specifically, the court noted, the defendant posed no
4 threat to the police or public safety because he was not suspected of carrying a gun
5 or weapon and was handcuffed, sitting on the ground when he was questioned. *Id.* at
6 778. The court therefore held that the defendant’s motion to suppress his statement,
7 “I have weed in the room[,]” should have been granted. *Id.* at 781.

8 {28} In *United States v. Castaneda*, 196 F.Supp.3d 1065 (D. Ariz. 2016), police
9 officers approached the defendant because he violated a traffic law while riding his
10 bicycle and because he appeared to be trying to elude the officers. *Id.* at 1068. After
11 it was discovered that the defendant had an outstanding misdemeanor warrant for
12 failure to appear on a shoplifting charge, the defendant was handcuffed and arrested.
13 *Id.* The officers also decided to retrieve the defendant’s bicycle, which was ninety feet
14 away and next to a storage shed. *Id.* One of the officers asked the defendant “if there
15 was anything on the bicycle that he needed to know about.” *Id.* One of the officers
16 then heard the defendant say something about a joint and while taking the defendant
17 to the patrol car, one of the other officers heard the defendant mumble that “he found
18 something in the alley,” that he thought it was a “rifle or something,” and that it had
19 “wood and screws.” *Id.* The officers then found a sawed-off shotgun in a backpack

1 attached to the handlebars of the bicycle. *Id.* at 1068-69. The defendant was indicted
2 for being a felon in possession of a firearm in violation of federal law. *Id.* at 1069.
3 The court rejected the government’s argument that the defendant’s statements at the
4 scene of his arrest were not subject to suppression under the police officer safety
5 exception to *Miranda*. *Castaneda*, 196 F.Supp.3d at 1072-74. First, the court noted
6 that there were no facts about the defendant, his conduct, or his arrest that gave rise
7 to a potential threat or “a pressing need to ensure police and/or public safety.” *Id.* at
8 1072-73. In addition, the court concluded that the nature of the question itself was
9 “vague and investigative” because asking if there is “anything” the officer needs to
10 know about “invites” a response “to list specific items of evidence or other
11 incriminating information just as much as it addresses officer or public safety[.]” *Id.*
12 at 1073. Such a question, the court held, “as opposed to a question strictly intended
13 to resolve an officer’s objectively reasonable immediate safety concerns cannot be
14 excused by the *Quarles* exception.” *Id.* at 1074.

15 {29} We hold that under the facts of this case, Defendant’s response to Officer
16 Apodaca’s question, “Is there anything else on you that I should know about” must
17 be suppressed. This was a custodial interrogation without *Miranda* warnings, and the
18 “narrow exception” recognized in *Quarles* does not apply. The officers expressed no
19 concern of any kind that anything at the scene or Defendant’s conduct posed a danger

1 to their safety. In fact, Defendant was cooperative and handcuffed before the pat
2 down. If Officer Apodaca was concerned that Defendant might have something on
3 his person which would endanger Officer Apodaca while he conducted Defendant's
4 pat down, he did not say so. In addition, there is nothing in the record to show the
5 reason for such a concern, if such a concern potentially existed. Similar to *Castaneda*,
6 the broad, undifferentiated question, "Is there anything else on you I need to know
7 about?" was not focused on protecting officer safety. 196 F.Supp.3d at 1073-74. As
8 we have already observed, the question not only invited Defendant to disclose
9 whether he had contraband of any kind on his person, dangerous or not, the officer
10 expected Defendant to cooperate and answer the question. By continuing to cooperate
11 with the officer, Defendant's only options were to give an answer that was dishonest
12 or to incriminate himself. We require Defendant to do neither under these
13 circumstances.

14 {30} We emphasize that our holding does not prohibit a police officer from asking
15 a focused question that is necessary to ensure the safety of the officer when there is
16 an objective, immediate threat to the safety of the officer. However, this is not such
17 a case. We therefore determine that the district court erred in admitting Defendant's
18 statement that he had some methamphetamine in a red pill container hanging from his
19 belt loop, together with the methamphetamine discovered as a result of Defendant's

1 statement. *See State v. Greene*, 1977-NMSC-111, ¶¶ 31-32, 91 N.M. 207, 572 P.2d
2 935 (agreeing that “courts must be willing to bar the physical fruits of inadmissible
3 statements and confessions, as well as the confessions themselves” under the “fruit
4 of the poisonous tree” doctrine (internal quotation marks and citation omitted)).

5 **C. Harmless Error**

6 {31} Perhaps anticipating our conclusion, the State argues that even if *Miranda* was
7 violated, admitting Defendant’s statement into evidence was harmless error. We
8 disagree.

9 {32} At issue here is the violation of Defendant’s constitutional rights under
10 *Miranda*. *See Wilson*, 2007-NMCA-111, ¶¶ 35-36 (stating that federal constitutional
11 rights arise from a *Miranda* violation). An appellate court may not conclude that a
12 constitutional error is harmless unless the state carries its burden of demonstrating
13 that the error is harmless beyond a reasonable doubt. *State v. Tollardo*, 2012-NMSC-
14 008, ¶ 25, 275 P.3d 110. That is to say, the State must demonstrate that there is “no
15 reasonable possibility” that the constitutional error affected the verdict. *State v. Barr*,
16 2009-NMSC-024, ¶ 53, 146 N.M. 301, 210 P.3d 198 (emphasis omitted), *overruled*
17 *on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37.

18 {33} With the denial of Defendant’s motion to suppress, the defense strategy relied
19 on other lapel videos recorded by the officers to challenge the State’s claim that the

1 white powdery substance presented at trial was not seized from Defendant. Defense
2 counsel argued that the methamphetamine presented at trial had actually been seized
3 from Defendant's companion, Ms. Alvarez. In support of the defense, Defendant's
4 attorney wanted to admit edited clips from Officer Apodaca's lapel cam video.
5 However, because defense counsel had not yet edited the videos, and to avoid a delay
6 in the trial to allow counsel to redact the videos, the district court ruled that to support
7 the defense, defense counsel would be required to admit the full videos from Officer
8 Apodaca and Baca's lapel cams, including the audio. On one of the videos, after the
9 methamphetamine was seized from Defendant, one of the officers asked Ms. Alvarez
10 if she had any methamphetamine, to which she responded, "What are you talking
11 about?" As the officer was answering, "[t]he meth that's on [Defendant,]" Defendant
12 told Ms. Alvarez, "[t]he meth that's on me baby."

13 {34} The State makes two arguments of harmless error on appeal that it did not make
14 to the district court. First, relying on *State v. Fekete*, 1995-NMSC-049, ¶¶ 45-46, 120
15 N.M. 290, 901 P.2d 708, the State contends that Defendant's statement to Ms.
16 Alvarez, "[t]he meth that's on me baby[,]" was admissible as a volunteered statement,
17 even assuming there was a prior *Miranda* violation. Second, the State argues that
18 there was no error because the methamphetamine on Defendant would have been
19 lawfully seized anyway incident to his lawful arrest under the arrest warrant. *See State*

1 v. *Paul T.*, 1999-NMSC-037, ¶ 11, 128 N.M. 360, 993 P.2d 74 (“Under the Fourth
2 Amendment, the police may lawfully conduct a full, warrantless search of the
3 arrestee’s person without his or her permission.”). The State’s waiver arguments are
4 not persuasive.

5 {35} *Fekete* is of no assistance to the State. In *Fekete*, the defendant had shot and
6 killed a man on the street, and went back to his motel room for the night. 1995-
7 NMSC-049, ¶¶ 8-9. Three statements made by the defendant were considered on
8 appeal. Based on their investigation, police officers went to the defendant’s motel the
9 next day and asked if he would come to the police station and be questioned. *Id.* ¶ 11.
10 The defendant responded that he had shot a man the night before and asked if they
11 wanted the gun, pointed out where it was, and handed the officers extra ammunition
12 he was carrying. *Id.* On the way to the police station, the defendant repeated twice
13 again that he had shot a man the night before. *Id.* At the police station, the defendant
14 signed a written waiver of his *Miranda* rights and gave a full confession. *Id.* Our
15 Supreme Court held the defendant’s first statements at the motel room were not the
16 product of a custodial interrogation and were properly admitted into evidence. *Id.*
17 ¶ 42. Our Supreme Court then assumed that the defendant was in custody on the way
18 to the police station, and concluded that all of his statements, except one, were
19 spontaneous and not in response to any questions by the police. And, the one question

1 asked was, “[W]hich one[?]” in response to the defendant’s question about whether
2 the man had lived. *Id.* ¶ 45. As to this question, our Supreme Court concluded, the
3 error, if any, was harmless, because the defendant only repeated his earlier statements
4 at the motel. *Id.* ¶ 46. Finally, our Supreme Court held that because the defendant
5 made a valid voluntary, knowing, and intelligent waiver of his *Miranda* rights before
6 giving the full confession at the police station, any error in admitting defendant’s two
7 prior statements was harmless. *Id.* ¶¶ 46, 49-51. In contrast to *Fekete*, Defendant’s
8 statement to Ms. Alvarez was simply the product of his prior *un-Mirandized*
9 confession to Officer Apodaca that he had methamphetamine on his person. This
10 statement and the powder taken from Defendant were subject to suppression under
11 the fruit of the poisonous tree doctrine. *See Greene*, 1977-NMSC-111, ¶¶ 31-32. We
12 do not further consider *Fekete*.

13 {36} Significantly, the State overlooks the fact that Defendant’s purported
14 “voluntary” statement was admitted into evidence only because the district court
15 denied Defendant’s motion to suppress. Defendant was left with relying on lapel cam
16 videos which would otherwise have been suppressed to support his defense that the
17 methamphetamine came from Ms. Alvarez. Moreover, the district court mandated that
18 the entire videos be given to the jury. Under these circumstances, there was no
19 waiver. *See State v. Zamarripa*, 2009-NMSC-001, ¶ 50, 145 N.M. 402, 199 P.3d 846

1 (“An objection is not waived where, after it is overruled, the objecting party agrees
2 to the introduction of statements similarly objectionable and relies on them to make
3 its case.”). *See Saynor v. Sholer*, 1967-NMSC-063, ¶ 6, 77 N.M. 579, 425 P.2d 743
4 (“The court having already overruled the proper [hearsay] objection . . . counsel was
5 placed in the rather unenviable position of having to make the best of a bad situation
6 [by relying on hearsay]. This was not a waiver[.]” (internal quotation marks and
7 citations omitted)).

8 {37} The State’s inevitable discovery argument also fails. As set forth above, the
9 suspected methamphetamine seized from Defendant was combined with suspected
10 methamphetamine seized from Ms. Alvarez into one bag at the scene by Officer
11 Apodaca. It is therefore unknown what, specifically, was tested positive for
12 methamphetamine by Mr. Gomez. Because of its erroneous suppression ruling, the
13 district court never developed a record for this Court to review regarding the
14 inevitable discovery doctrine or the officer’s contamination of the seized evidence.
15 We apply the right for any reason doctrine only if doing so “is not unfair to the
16 appellant.” *State v. Gallegos*, 2007-NMSC-007, ¶ 26, 141 N.M. 185, 152 P.3d 828;
17 *Beggs v. City of Portales*, 2013-NMCA-068, ¶ 32, 305 P.3d 75 (“It is within this
18 Court’s discretion to affirm the district court under the ‘right for any reason’ doctrine,
19 but we will not exercise such discretion if it would result in unfairness to the

1 appellant.”). Under the circumstances, it is unfair to apply the doctrine here, and we
2 decline to do so.

3 {38} Finally, in our determination of whether the error in admitting Defendant’s
4 statement into evidence was harmless beyond a reasonable doubt, we note that no
5 better evidence was available to the State besides Defendant’s statement—his
6 confession—that Defendant had methamphetamine on his person, and knew it was
7 methamphetamine. Our Supreme Court has recognized that the impact of a confession
8 is virtually impossible for a jury to ignore:

9 Confessions have profound impact on the jury, so much so that we may
10 justifiably doubt its ability to put them out of mind even if told to do so.
11 A full confession in which the defendant discloses the motive for and
12 means of the crime may tempt the jury to rely upon that evidence alone
13 in reaching its decision. The risk that the confession is unreliable,
14 coupled with the profound impact that the confession has upon the jury,
15 requires a reviewing court to exercise extreme caution before
16 determining that the admission of the confession at trial was harmless.

17 *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 34, 136 N.M. 309, 98 P.3d 699
18 (alterations and omissions omitted) (quoting *Arizona v. Fulminante*, 499 U.S. 279,
19 296 (1991)). See *United States v. Leon-Delfis*, 203 F.3d 103, 112 (1st Cir. 2000)
20 (“Confessions are by nature highly probative and likely to be at the center of the
21 jury’s attention.”).

1 {39} We reject the State’s arguments of harmless error and we are otherwise unable
2 to conclude beyond a reasonable doubt that the admission of Defendant’s statement
3 into evidence, in violation of *Miranda*, was harmless.

4 **CONCLUSION**

5 {40} We reverse Defendant’s conviction and remand to the district court for a new
6 trial. In light of our holding, we do not address Defendant’s remaining arguments.

7 {41} **IT IS SO ORDERED.**

8

9

MICHAEL E. VIGIL, Judge

10 **I CONCUR:**

11

TIMOTHY L. GARCIA, Judge Pro Tempore

13 **J. MILES HANISEE, Judge (dissenting)**

1 **HANISEE, Judge (dissenting).**

2
3 {42} When a defendant is legally arrested—as is the case when an NCIC search
4 undertaken by law enforcement officers reveals the existence of an outstanding felony
5 arrest warrant—our precedent uniformly, plainly and consistently permits a
6 contemporaneous search incident to arrest. It matters not that supplemental
7 confirmation of the warrant’s accuracy by APD dispatch was ongoing when
8 Defendant was handcuffed, searched, and seated upon a curb during the remainder
9 of the officers’ on-scene investigation. Stated more simply, a legal arrest commands
10 the constitutionality of a search incident thereto. As such, the methamphetamine
11 found in the pill container, attached to Defendant’s belt, is admissible against him at
12 trial. Also, I would hold Defendant’s constitutional rights not to have been violated
13 when he was asked, without being first notified of his right to remain silent, whether
14 he possessed anything on his person that officers “should know about” because such
15 an inquiry is justified by the limited *Miranda*-excepted need to secure officer safety.
16 Therefore, Defendant’s ensuing statement notifying officers of the presence of the
17 methamphetamine on his person is also admissible against him. I respectfully dissent.

18 {43} First, we have held that outstanding arrest warrants permit arrests. *See State v.*
19 *Grijalva*, 1973-NMCA-061, ¶ 12, 85 N.M. 127, 509 P.2d 894 (holding that
20 possession of an arrest warrant is not essential to the legality of an arrest based

1 thereon when the validity of the arrest warrant is not challenged). Despite the
2 Majority’s characterization of the warrant at issue to be a “possible active felony
3 arrest warrant[,]” Majority Op. ¶ 5, our appellate courts have never held—nor should
4 either hold—that arrest upon an NCIC-reported felony arrest warrant may only follow
5 some secondary confirmation that the warrant is accurate or remains active. While
6 ensuring the accuracy of known arrest warrants is laudable, it is not a constitutional
7 mandate. I would make plain today that the initial discovery of an outstanding felony
8 arrest warrant by use of a nationally-relied-upon database permitted Defendant’s
9 arrest.

10 {44} Next, searches incident to arrests are as entrenched as any exception to the
11 otherwise applicable warrant requirement that serves generally, but not always, as the
12 constitutional prequel to police looking for things in private places such as pill boxes
13 attached to belt loops. *State v. Paananen*, 2015-NMSC-031, ¶ 29, 357 P.3d 958 (“One
14 of the most firmly established exceptions to the warrant requirement is the right on
15 the part of the government, always recognized under English and American law, to
16 search the person of the accused when legally arrested.” (internal quotation marks and
17 citation omitted)); *State v. Weidner*, 2007-NMCA-063, ¶ 23, 141 N.M. 582, 158 P.3d
18 1025 (stating that the search incident to arrest exception requires the state to prove
19 “that the search occurs as a contemporaneous incident to the lawful arrest of the

1 defendant and is confined to the area within the defendant’s immediate control”
2 (internal quotation marks and citation omitted)). Coupled with Defendant’s legal
3 arrest, the accompanying search of his person and pockets corrects the Majority’s
4 conclusion that the methamphetamine Defendant possessed cannot be used against
5 him at trial.

6 {45} The more constitutionally intriguing issue, one I suggest our Supreme Court
7 take up, is the propriety of the un-*Mirandized* question asked of Defendant just before
8 the constitutionally compliant search incident to his arrest. While the Majority’s
9 disallowance of the wording employed by the arresting officer finds some support in
10 other jurisdictions, *see* Majority Op. ¶¶ 20, 27-28, I would hold differently. *Quarles*
11 held that “the need for answers to questions in a situation posing a threat to the public
12 safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s
13 privilege against self-incrimination.” 467 U.S. at 657. In appropriate circumstances,
14 *Quarles* has been interpreted to allow questions such as that asked here. *See United*
15 *States v. Newsome*, 475 F.3d 1221, 1225 (11th Cir. 2007) (finding no problem with
16 the officer’s broadly phrased question, “Is there anything or anyone in the room that
17 I should know about?” (internal quotation marks omitted)); *United States v. Luker*,
18 395 F.3d 830, 832 (8th Cir. 2005) (upholding the propriety of an officer’s question
19 regarding the presence of anything in a defendant’s vehicle “that shouldn’t be there

1 or that [officers] should know about”); *United States v. Gorrell*, 360 F. Supp.2d 48,
2 53 (D.D.C. 2004) (upholding constitutionality of officer question, asked when placing
3 the defendant under arrest, regarding whether there was anything “she should know
4 about[?]”). It is my view that here, given that officers had received a report and
5 confirmed the possibility that Defendant and a person with him were engaged in
6 criminal activity, and had learned from NCIC of the existing felony arrest warrant for
7 Defendant, that the question asked of Defendant was constitutionally proper. I also
8 note the question was asked in conjunction with the searching officer donning gloves
9 as one precaution against the possibility of sharp objects such as needles. It seems to
10 me that the instant circumstance fits neatly within the exception to the *Miranda*
11 requirement drawn by *Quarles* and applied by the cases interpreting it. As such,
12 Defendant’s responsive statement, like the methamphetamine found in the search
13 itself, is admissible against him at trial.

14 {46} The Majority’s holding fails to reiterate the well-established constitutional
15 propriety of the straightforward search incident to arrest that resulted in the seizure
16 of methamphetamine from Defendant. More regrettably, it unnecessarily reduces the
17 day-to-day safety of law enforcement officers by disallowing one simple, safety-
18 geared inquiry of defendants that are possibly armed, possibly in possession of
19 hazardous paraphernalia associated with drug use, or that otherwise may pose some

1 unknown yet avoidable threat to officers. I view *Quarles* to permit officers to seek
2 such limited assurance without first providing *Miranda* warnings. I would affirm the
3 district court's denial of Defendant's motion to suppress.

4
5

J. MILES HANISEE, Judge