COLORADO COURT OF APPEALS **2015COA15**

Court of Appeals No. 12CA0703
Arapahoe County District Court No. 10CR141
Honorable Elizabeth A. Weishaupl, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Ismael Casillas,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE FURMAN
Navarro, J., concurs
Webb, J., dissents

Announced February 26, 2015

Cynthia H. Coffman, Attorney General, Rebecca L. Williams, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Audrey Bianco, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 This case asks us to determine whether a cheek swab taken from a juvenile on a deferred adjudication by a juvenile probation officer, in violation of section 19-2-925.6(1), C.R.S. 2014 (juvenile DNA collection statute), must be suppressed in a later adult criminal case. We conclude that it should not be suppressed.

¶ 2 A juvenile court placed Ismael Casillas on a deferred adjudication. The terms of the deferred adjudication required him to be under the supervision of the juvenile probation department with standard terms and conditions. Casillas' juvenile probation officer later swabbed Casillas' cheek for a DNA sample. This DNA sample led to Casillas — now an adult — being first linked to a carjacking and, ultimately, being convicted of criminal mischief, which he now appeals.

¶ 3 Casillas contends that evidence of his DNA should be suppressed because its collection violated the juvenile DNA collection statute and the Fourth Amendment. We agree with Casillas that the cheek swab violated the juvenile DNA collection statute and the Fourth Amendment but disagree that evidence of his DNA should be suppressed. We therefore affirm his judgment of conviction.

I. The Cheek Swab

¶ 4 As part of a juvenile court plea deal, Casillas stipulated to a one-year deferred adjudication and sentence for drug possession. The stipulation required him to be under the supervision of the juvenile probation department with standard terms and conditions.

¶ 5 Shortly after beginning his supervision, Casillas' juvenile probation officer called Casillas in, saying that he needed to swab Casillas for DNA. Accompanied by his mother, Casillas submitted to a cheek swab where the probation officer took some cotton swabs that looked like gigantic Q-tips and swabbed the inside of his cheek to obtain a DNA sample.

¶ 6 The juvenile DNA collection statute states that "adjudicated offenders shall submit to and pay for collection and a chemical testing of the offender's biological substance sample to determine the genetic markers thereof." § 19-2-925.6(1). But this requirement "shall not apply to an offender granted a deferred adjudication, unless otherwise required to submit to a sample pursuant to this section or unless the deferred adjudication is revoked and a sentence is imposed." § 19-2-925.6(1)(e).

¶ 7 Casillas successfully completed the terms and conditions of his deferred adjudication, and the juvenile court dismissed the case and terminated jurisdiction.

¶ 8 Casillas' DNA sample was ultimately uploaded to the Combined DNA Index System database (CODIS).

II. The Present Criminal Mischief Case

¶ 9 About a year after Casillas' juvenile case was dismissed, Casillas and two other men approached a victim and, at gunpoint, ordered him to give them the keys to his car. Casillas threatened the victim with a gun to get him to turn over the keys. The police later recovered the abandoned stolen car and impounded it. Inside the car, police found small traces of blood, which they submitted to a laboratory for testing. Testing revealed that the blood matched Casillas' DNA sample in CODIS. Based on this match, Casillas became a suspect in the carjacking.

¶ 10 During the investigation, a CODIS administrator learned that Casillas had not been eligible for DNA testing during his deferred adjudication.

¶ 11 A detective also discovered that Casillas' DNA sample in CODIS was a "nonqualifying offense submission." Even so, the

detective used the match to include Casillas in a photo lineup. He showed the lineup to the victim who identified Casillas as one of the carjackers.

¶ 12 Before his criminal trial, Casillas moved to suppress the DNA sample that identified him. He claimed that the juvenile probation officer violated the juvenile DNA collection statute by taking a cheek swab from him even though the statute did not authorize the officer to collect a DNA sample. Casillas also claimed that the cheek swab violated the reasonable search requirement under the state and federal constitutions.

¶ 13 At the suppression hearing, the trial court heard evidence that the CODIS administrator had sent an e-mail about Casillas' cheek swab to a probation analyst in the State Court Administrator's Office, saying, "It looks like I have another CODIS hit to an offender with a deferred sentence." The analyst confirmed that Casillas had been under a deferred adjudication and was, therefore, "not eligible for DNA testing on his case." The prosecution admitted that the cheek swab "was taken without authorization."

¶ 14 But, the trial court denied Casillas' motion to suppress the DNA sample. It found that, to the extent there was a violation of

the juvenile DNA collection statute, suppression was not the appropriate remedy because "[t]here was no evidence supporting a finding of a willful or recurring violation of the statute presented at [the] hearing." The court also found that there was no constitutional violation in collecting Casillas' DNA because, as "a person who has pled guilty to a crime, [Casillas] does not stand in the shoes of a person alleged to have committed a crime who maintains the presumption of innocence, but somewhere between that person and a person convicted of a felony" and there are "significant government interests in maintaining such a [DNA] database."

¶ 15 A jury ultimately convicted Casillas of criminal mischief in connection with the carjacking.

¶ 16 On appeal, Casillas raises similar challenges to the trial court's denial of his motion to suppress the DNA sample as he did before the trial court.

¶ 17 Review of a suppression order presents mixed questions of fact and law. *People v. Martin*, 222 P.3d 331, 334 (Colo. 2010). We defer to the trial court's factual findings if they are supported by the record, but review its legal conclusions de novo. *Id.*

III. The Juvenile DNA Collection Statute

¶ 18 We conclude Casillas' cheek swab violated the juvenile DNA collection statute. We reach this conclusion because (1) it was undisputed that the juvenile court had granted Casillas a deferred adjudication; (2) Casillas was not required to submit a DNA sample by another section of the juvenile DNA collection statute; and (3) Casillas had successfully completed his deferred adjudication. Thus, the juvenile DNA collection statute did not authorize the collection and testing of Casillas' DNA sample.

¶ 19 But, that does not end our analysis. A statutory violation does not ordinarily trigger suppression of evidence because suppression "is designed to effectuate guarantees against deprivation of *constitutional* rights." *People v. McKinstry*, 843 P.2d 18, 20 (Colo. 1993) (internal quotation marks omitted) (emphasis in original); *People v. Shinaut*, 940 P.2d 380, 383 (Colo. 1997). Thus, our supreme court has recognized that evidence obtained through "willful and recurrent" statutory violations may be suppressed. *See, e.g.*, *People v. Wolf*, 635 P.2d 213, 218 (Colo. 1981); *see also People v. Shreck*, 107 P.3d 1048, 1054 (Colo. App. 2004).

¶ 20 Premised on evidence introduced at the suppression hearing, Casillas contends that his DNA was obtained through "willful and recurrent" statutory violations as follows.

- His probation officer willfully violated the juvenile DNA collection statute by calling him in and saying that they needed to swab him for DNA. But, without more, this request does not show the probation officer even knew he was not authorized to collect Casillas' DNA.
- The CODIS administrator willfully violated the juvenile DNA collection statute based on the e-mail showing that there had been "another CODIS hit to an offender with a deferred sentence." But, this e-mail does not show that she knew prior to the testing of the DNA that she was not authorized to do so.
- A Colorado Bureau of Investigation training manual that had no protocol to prevent the inclusion of ineligible DNA in the database indicated that the collecting was willful and recurrent. But, the protocol for preventing the DNA of nonqualifying individuals from being entered into CODIS could exist in the training of police officers and

other persons tasked with taking DNA samples, and the absence of a particular protocol in one manual does not establish the absence of other protocols in other manuals to prevent this type of collection.

- The police detective willfully violated the juvenile DNA collection statute because he knew Casillas' DNA was improperly submitted in CODIS before he included Casillas in a photo lineup. Although it is troubling that the detective used Casillas' DNA sample in his investigation, the juvenile DNA collection statute only applies to collecting, testing, and identifying DNA. § 19-2-925.6; *see also Maryland v. King*, 569 U.S. ___, 133 S. Ct. 1958, 1967-68 (2013) (describing CODIS).

¶ 21 Thus, because Casillas has not established that any violation of the juvenile DNA collection statute was "willful and recurrent," we conclude the trial court did not err by denying his motion to suppress based on a statutory violation. *Wolf*, 635 P.2d at 218.

IV. The Fourth Amendment

¶ 22 We also conclude that the cheek swab was an unreasonable search. Casillas does not contend that the state constitution

should be applied any differently in this context than the federal constitution. Thus, we resolve this issue solely on the basis of the Fourth Amendment of the federal constitution. *See Shreck*, 107 P.3d at 1052 (citing *People v. Mershon*, 874 P.2d 1025, 1030 n.2 (Colo. 1994)).

¶ 23 The Fourth Amendment secures the "right of the people to be secure in their persons, houses, papers and effects" against unreasonable searches. U.S. Const. amend IV. A cheek swab to obtain DNA samples is a search, *King*, 569 U.S. at __, 133 S. Ct. at 1968-69, and a search without a warrant supported by probable cause is presumptively unreasonable unless it falls into one of the established exceptions to the warrant requirement, *Shreck*, 107 P.3d at 1052.

¶ 24 The operation of a probation system presents "'special needs' beyond normal law enforcement that may justify departures from the usual warrant . . . requirements." *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987). Under this exception, "a warrant, probable cause, or even individualized suspicion of wrongdoing need not be shown where . . . the search . . . is found to be 'reasonable' after balancing the government's special need against the individual's

asserted privacy interests." *People v. Rossman*, 140 P.3d 172, 174 (Colo. App. 2006) (citing *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001)).

¶ 25 The division in *People v. Samuels*, 228 P.3d 229, 236 (Colo. App. 2009), held the warrantless search of a probationer by his probation officer was reasonable because "probationers, merely by virtue of their probationary status, have a significantly diminished reasonable expectation of privacy." In balancing the government's special need against the individual's asserted privacy interests the division recognized the probationer's significantly diminished privacy interests based on the following:

- "probationers are closely supervised";
- "[p]robation officers directly supervise probationers";
- "probation officers are 'peace officers' under Colorado law and therefore are authorized to enforce all state laws while acting within the scope of their authority"; and
- "the sentencing court may impose a host of conditions on probationers curtailing their liberty" including "'intensive supervised probation' (ISP), a status reserved for those

> offenders deemed to present the greatest risk to the community."

Id. at 236.

¶ 26 And, courts have determined that the government's special needs in collecting DNA samples from individuals on probation include:

- exonerating the innocent, *Rossman*, 140 P.3d at 175; *Shreck*, 107 P.3d at 1053;
- solving past and future crimes, *Rossman*, 140 P.3d at 175;
- deterring recidivism, *id.*; and
- reintegrating probationers back into the community, *Samuels*, 228 P.3d at 237.

¶ 27 The People contend that the juvenile probation officer's cheek swab was reasonable because the government's "special need" in maintaining the DNA database to exonerate the innocent, solve past and future crimes, and deter recidivism outweighs Casillas' reduced privacy interest. We disagree because a juvenile on a deferred adjudication has a greater expectation of privacy with respect to DNA collection than does a juvenile on probation. We reach this conclusion for several reasons.

¶ 28 First, the juvenile DNA collection statute explicitly excludes juveniles granted a deferred adjudication from the general requirement that juvenile offenders "submit to and pay for collection and a chemical testing of the offender's biological substance sample to determine the genetic markers thereof." § 19-2-925.6(1); *see also* § 19-2-925.6(1)(e). Thus, Casillas had no reason to expect that by pleading guilty and receiving a deferred adjudication he would be required to submit to a DNA test.

¶ 29 Second, there is no evidence that the juvenile court required, as a condition of the deferred adjudication, that Casillas submit to a DNA test. *See* § 19-2-709(2), C.R.S. 2014 ("Any juvenile granted a deferral of adjudication . . . may be placed under the supervision of a probation department. The court may impose any conditions of supervision that it deems appropriate . . . .").

¶ 30 Third, the standard terms and conditions of juvenile probation, which do not include submitting to a DNA test, would not have alerted Casillas to the possibility of being required by his juvenile probation officer to submit to a cheek swab. *See* § 19-2-925(2), C.R.S. 2014 (defining standard terms and conditions of probation).

¶ 31 Fourth, there is no evidence that Casillas' juvenile probation officer had reasonable suspicion to believe that Casillas violated any terms of his juvenile probation while on the deferred adjudication. *Cf. Samuels*, 228 P.3d at 238 (special needs exception justified probation officer's search of defendant's room when officer had reasonable suspicion that defendant violated conditions of probation).

¶ 32 But, the People maintain that Casillas "does not stand in the shoes of someone who is alleged to have committed a crime but maintains the presumption of innocence, but has a reduced expectation of privacy as a probationer." We disagree. Casillas was not convicted of a crime, because a deferred adjudication is not a final conviction. *See C.B. v. People*, 122 P.3d 1065, 1067 (Colo. App. 2005) ("[U]nlike an adjudication of juvenile delinquency, a deferred adjudication provides that the juvenile's plea shall be withdrawn and the case shall be dismissed with prejudice upon compliance with the terms of the deferred adjudication.").

¶ 33 And, as noted, there was no statute, regulation, or term of Casillas' juvenile probation that would have made him aware that he could be required to submit a DNA sample. *See, e.g.*, *King*, 569

U.S. at __, 133 S. Ct. at 1967 (statute authorized the DNA collection authorized from individuals who committed certain crimes); *Rossman*, 140 P.3d at 173-74 (same); *see also People v. McCullough*, 6 P.3d 774, 778 (2000) (statute authorized parole officers to search parolees' "person, residence, or vehicle" (internal quotation marks omitted)).

¶ 34 The People's reliance on *Shreck* for the proposition that the special needs exception justified taking Casillas' DNA sample is misplaced. The People correctly point out that in *Shreck*, Department of Corrections (DOC) officers drew a sample of the defendant's blood for analysis, even though the collection of the blood sample fell outside the scope of the DNA collection statute. 107 P.3d at 1052. But, Casillas was under the supervision of the juvenile probation department, not the DOC, while on a deferred adjudication. And, because he was on a deferred adjudication, the juvenile DNA collection statute specifically excluded the collection of his DNA. He thus had a greater expectation of privacy with respect to DNA collection than do inmates. *Cf. Rossman*, 140 P.3d at 176 ("[W]e agree with defendant that probationers generally have a greater expectation of privacy than do inmates or parolees.").

¶ 35 Nonetheless, the fact that Casillas' juvenile probation officer violated the Fourth Amendment by swabbing Casillas' cheek does not necessarily mean that suppression of the DNA evidence is an appropriate remedy. *See Herring v. United States*, 555 U.S. 135, 137 (2009).

¶ 36 The suppression of evidence is a "judicially created remedy designed to safeguard the Fourth Amendment rights generally through its deterrent effect." *United States v. Calandra*, 414 U.S. 338, 348 (1974); *see also United States v. Leon*, 468 U.S. 897, 906 (1984). Suppression's "prime purpose is to deter future unlawful *police conduct* and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Calandra*, 414 U.S. at 347 (emphasis added); *People v. Altman*, 960 P.2d 1164, 1168 (Colo. 1998) ("[T]he exclusionary rule is intended to deter improper police conduct . . . .").

¶ 37 Suppression of evidence deters unlawful police conduct "by removing the incentive to disregard [the Fourth Amendment]," *Elkins v. United States*, 364 U.S. 206, 217 (1960), and the extent to which suppression is justified "varies with the culpability of the law enforcement conduct," *Herring*, 555 U.S. at 143. Suppression has

no deterrent value when an actor has "no stake in the outcome of particular criminal prosecutions." *Leon*, 468 U.S. at 917; *see also People v. Gall*, 30 P.3d 145, 150 (Colo. 2001) ("Because neutral judicial officers have no stake in the outcome of particular criminal proceedings, the threat of exclusion cannot be expected to significantly modify their behavior.").

¶ 38 We conclude that the suppression of the DNA evidence obtained from the juvenile probation officer's cheek swab would have no deterrent value. At the time, Casillas was neither suspected of violating a term or condition of his deferred adjudication nor suspected of committing a crime. Thus, the juvenile probation officer who performed the cheek swab was performing nothing more than a supervisory function under the direction of the juvenile court.

¶ 39 Section 19-2-926, C.R.S. 2014, defines the supervisory authority of juvenile probation officers as follows:

- making "investigations and keep[ing] written records thereof as the court may direct";

- providing "a written statement of the terms and conditions of [the juvenile's] probation" and "explain[ing] fully such terms and conditions";
- keeping "informed as to the condition and conduct of each juvenile" and "report[ing] thereon to the court as it may direct";
- using "suitable methods, . . . to aid each juvenile under his or her supervision" and "perform such other duties in connection with the care and custody of juveniles as the court may direct";
- keeping "complete records of all work done, as well as complete accounts of all money collected from those under supervision"; and
- informing the court of a juvenile's change in residence.

See also § 16-2.5-138, C.R.S. 2014 (juvenile probation officers are "peace officers . . . limited pursuant to section[] 19-2-926").

¶ 40 Juvenile probation officers performing a supervisory function for the juvenile court have no stake in the outcome of criminal prosecutions and thus the threat of exclusion "cannot be expected

significantly to deter them." *Leon*, 468 U.S. at 917; *see Calandra*, 414 U.S. at 347; *Altman*, 960 P.2d at 1168.

V. Conclusion

¶ 41 Although we conclude that the cheek swab violated the juvenile DNA collection statute and the Fourth Amendment, we affirm the trial court's denial of Casillas' motion to suppress the DNA sample. *See Negron v. Golder*, 111 P.3d 538, 542 (Colo. App. 2004) (appellate court may affirm the trial court's determination on other grounds). Accordingly, we affirm Casillas' judgment of conviction.

JUDGE NAVARRO concurs.

JUDGE WEBB dissents.

JUDGE WEBB, dissenting.

¶ 42 The facts that show the Fourth Amendment violation by defendant's juvenile probation officer are undisputed, as are the controlling legal principles. Because I agree with the majority's thoughtful application of those principles to recognize such a constitutional violation, I will not separately address the statutory violation. But the majority's refusal to remand for suppression based on the constitutional violation disregards the statutory powers of a juvenile probation officer. For this reason, and with respect, I dissent.

I. Juvenile Probation Officers Have Broad Law Enforcement Powers

¶ 43 The majority relies on section 19-2-296, C.R.S. 2014, to conclude that the juvenile probation officer was "performing nothing more than a supervisory function under the direction of the juvenile court." True, juvenile probation officers are court appointees. § 19-2-204(1)-(2), C.R.S. 2014; *see State v. Fuessenich*, 717 A.2d 801, 807 (Conn. App. Ct. 1998) ("Probation officers act under the auspices of the judicial branch in requiring the defendant to submit to conditions of probation."). Yet, in Colorado, juvenile probation officers possess the following statutory powers:

- Under section 19-2-502 (3), C.R.S. 2014, "A juvenile probation officer may take a juvenile into temporary custody."
- Under section 19-2-503, C.R.S. 2014, a court may issue an arrest warrant on the report of a juvenile probation officer, and "[t]he warrant may be executed by any juvenile probation officer."
- Under sections 19-2-926(4) and 16-2.5-101(2), C.R.S. 2014, juvenile probation officers have the authority, "at a minimum . . . to enforce all laws of the state."
- Under section 16-2.5-101(3), C.R.S. 2014, they can carry firearms, "while engaged in the performance of their duties," which presumably could be used, if necessary, to discharge those duties.

These powers show that "notwithstanding the probation department's ties to the court, the probation officers and employees' significant responsibilities to enforce the law and assist law enforcement distinguish them from ordinary court employees." *People v. Ferguson*, 134 Cal. Rptr. 2d 705, 711-12 (Cal. Ct. App. 2003).

¶ 44 The majority's suggestion that a juvenile probation officer merely performs a supervisory function for the juvenile court is not supported by the statutes cited. The majority correctly points out that section 16-2.5-138, C.R.S. 2014, concerning judicial probation officers, cross references the description of their duties in sections 19-2-926 and 19-2-1003, C.R.S. 2014. But section 19-2-926(4) cross references back to section 16-2.5-101. This circularity precludes any limitation on their possessing "the powers of peace officers," as provided in section 16-2.5-101(2).

¶ 45 Even more problematic is the cross reference to section 19-2-1003, which addresses juvenile *parole* officers, not juvenile *probation* officers. Juvenile parole officers are considered employees of a law enforcement agency for purposes of section 16-10-103(1)(k), C.R.S. 2014, and Crim. P. 24(b)(1)(XII). *People v. Sommerfeld*, 214 P.3d 570, 573 (Colo. App. 2009).

II. Juvenile Probation Officers Have a Stake in Law Enforcement Activities

¶ 46 Suppressing evidence based on the exclusionary rule safeguards Fourth Amendment rights "through its deterrent effect." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Deterrence

applies unless the actor has "no stake in the outcome of particular criminal prosecutions." *United States v. Leon*, 468 U.S. 897, 917 (1984). If so, "no significant deterrent effect" results from "excluding evidence based upon the mistakes of those uninvolved in or attenuated from law enforcement." *United States v. McCane*, 573 F.3d 1037, 1044 (10th Cir. 2009).

¶ 47 To be sure, because a judicial officer such as the magistrate who issued the search warrant in *People v. Gall*, 30 P.3d 145 (Colo. 2001), has "no stake in the outcome of particular criminal proceedings, the threat of exclusion cannot be expected to significantly modify their behavior." *Id.* at 150. Yet unlike a magistrate, a juvenile probation officer provides information for arrest warrants, executes arrest warrants, takes suspects into temporary custody, and otherwise "enforce[s] all laws of the state." Such actions are not attenuated from law enforcement. After all, a juvenile probation officer who has supplied information about a probationer to obtain an arrest warrant, and then served the warrant, has a stake in the validity of the arrest. *See Ferguson*, 134 Cal. Rptr. 2d at 712 ("[P]robation officers will sometimes 'act like police officers and seek to uncover evidence of illegal activity' and

'are undoubtedly aware that any unconstitutionally seized evidence that could lead to an indictment could be suppressed in a criminal trial.'" (quoting *People v. Willis*, 46 P.3d 898, 910 (Cal. 2002))). And such a stake could tempt the officer to obtain information supporting the warrant in violation of the probationer's constitutional rights.

¶ 48 In Colorado, the exclusionary rule does not apply to revocation proceedings. *See* § 16–11–206(3), C.R.S. 2014 ("Any evidence having probative value shall be received regardless of its admissibility under the exclusionary rules of evidence if the defendant is accorded a fair opportunity to rebut hearsay evidence."); *see generally Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364 (1998) ("[E]xclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights.").

¶ 49 But where, as here, the prosecution seeks to introduce evidence obtained by a probation officer contrary to the Fourth Amendment in an unrelated criminal proceeding, failure to apply the exclusionary rule "would greatly increase the temptation to use the . . . probation officer's . . . broad authority to circumvent the

Fourth Amendment." *Ferguson*, 134 Cal. Rptr. 2d at 712 (internal quotation marks omitted); *see United States v. Payne*, 181 F.3d 781, 788 (6th Cir. 1999) ("Exempting evidence illegally obtained by a parole officer from the exclusionary rule would greatly increase the temptation to use the parole officer's broad authority to circumvent the Fourth Amendment. We therefore hold that evidence obtained by a parole officer in violation of the Fourth Amendment must be suppressed in a subsequent criminal proceeding.").

III. Suppression Would Deter Future Constitutional Violations

¶ 50 Finally, I disagree with the majority's reliance on lack of evidence that Casillas' probation officer performed the cheek swab for a law enforcement purpose, such as if Casillas had been suspected of committing a crime.

¶ 51 To begin, the reason why the probation officer took the swab, contrary to statute and the constitution, is unexplained. For the exclusionary rule to apply, a defendant must show, by a preponderance of the evidence, a constitutional violation, and a causal nexus between the violation and the evidence sought to be excluded. *United States v. Torres-Castro*, 470 F.3d 992, 999 (10th Cir. 2006). Both were shown here.

¶ 52 Once the defendant makes this showing, if the prosecutor still desires to proffer the challenged evidence, the burden shifts to the prosecution to establish that some exception to the exclusionary rule applies. *Id.* at 999. Here, the prosecution could have done so by invoking the statutory good faith exception under section 16–3–308, C.R.S. 2014, but did not. Thus, uncertainty in the record weighs for — not against — suppression.

¶ 53 In any event, deterrence operates prospectively, not retrospectively. *See People v. Guthrie*, 2012 CO 59, ¶ 13 (Exclusionary rule intended to "deter similar violations in the future."); *see also United States v. Perez*, 393 F.3d 457, 460 (4th Cir. 2004) ("The 'prime purpose' of the judicially created exclusionary rule is 'to deter future unlawful police conduct . . . .'" (quoting *Calandra*, 414 U.S. at 347)). Looking ahead, the inquiry must be whether persons having the same powers as the actor would be deterred from violating the constitution in their exercise of those powers. *See People v. Salinas*, 182 Cal. Rptr. 683, 690-91 (Cal. Ct. App. 1982) ("[T]he controlling question in determining whether the exclusionary rule should be invoked is . . . whether the particular governmental employees and other similarly situated

would be deterred from engaging in illegal searches and seizures."). Looking behind at whether the constitutional violation arose from abuse of law enforcement powers does not advance this inquiry.

IV. Conclusion

¶ 54 For these reasons, I would hold that the motion to suppress should have been granted.