NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

Appellate Law Update

2016 District Attorneys Spring Conference

April 27, 2016

WHAT WE DO

- **§ 8-5-2. Duties of attorney general**

- Except as otherwise provided by law, the attorney general shall:
- A. prosecute and defend all causes in the supreme court and court of appeals in which the state is a party or interested;

Criminal Appeals Division of the OAG

- M. Anne Kelly
- Division Director
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CRIMINAL APPEALS DIVISION

- We currently have one director, 15 staff attorneys, and two staff members
- Claire Welch in Albuquerque – handles state habeas, federal habeas, and much more – (505) 222-9050 and cwelch@nmag.gov
- Rose Leal in Santa Fe – handles all regular appeals and much more – (505) 827-6054 and rleal@nmag.gov

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OAG WEBSITE

- NMAG.GOV
- This presentation and the DA Liaison List will be under the Criminal Appeals tab

Rule 12-405 - OPINIONS

- "A petition for writ of certiorari . . . or a Supreme Court order granting the petition *does not affect the precedential value of an opinion of the Court of Appeals*, unless otherwise ordered by the Supreme Court."
- It's good law once it's published by the COA

Electronic Filing

- Not yet. Supreme Court will be first and Court of Appeals a year or so later.
- Questions on specific cases – call our office
- Check the Supreme Court website – nmsupremecourt.nmcourts.gov
- Check the Court of Appeals website – coa.nmcourts.gov

NEW MEXICO SUPREME COURT

- Published opinions and unpublished decisions from November of 2015 to now
- Opinions and decisions are usually issued on Mondays and Thursdays
- Available on New Mexico Courts website: www.nmcourts.gov
- Available on New Mexico Compilation Commission website: www.nmcompcomm.us
- The opinion is emailed that day from our office to the prosecutor

NEW MEXICO COURT OF APPEALS

- Published opinions from November of 2015 to now
- Rule 12-405 NMRA permits citations to unpublished opinions (memorandum opinions)
- Memorandum opinions and published opinions are faxed to the prosecutor
- All opinions, published and unpublished, are available on the New Mexico Court of Appeals website – https://coa.nmcourts.gov
- And the New Mexico Compilation Commission – www.nmcompcomm.us

CITATIONS

- No more NM Reporters – stopped at Volume 150
- We now have the New Mexico Appellate Reports but they are never cited
- Vendor-neutral citation form – Rule 23-112 NMRA
- Parallel citation to the New Mexico reports through Volume 150 is mandatory
- Parallel citation to the Pacific Reporter is discretionary
- EXAMPLE: *State v. Gallegos*, 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828 with the P.3d cite as optional

SUPREME COURT CLERK'S OFFICE

- Joey Moya
- Clerk of the New Mexico Supreme Court
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COURT OF APPEALS CLERK'S OFFICE

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DOCKETING STATEMENTS

- For a State's appeal, trial counsel is responsible for filing the docketing statement
- Rule 12-208 NMRA
- Any extension of time to file a docketing statement is filed with the Court of Appeals, not the district court
- File the docketing statement in the district court *and* the Court of Appeals
- Form letter goes out from our office when a notice of appeal is filed
- Include **all relevant facts** in the docketing statement – COA pre-hearing has expressed concern over defendants' docketing statements with insufficient facts

SUMMARY CALENDAR

- Rule 12-210 NMRA
- Common in the Court of Appeals
- Court files a calendar notice with a proposed disposition – Court only has the docketing statement and the record proper (i.e. the pleadings) to review.
- We will almost always call you if COA proposes to reverse on a defendant’s appeal or affirm on a State’s appeal

SUPREME COURT OPINIONS and DECISIONS

- *State v. Deandre Gonzales* (unpublished decision)
- *State v. Anthony Holt*
- *State v. Daniel Marson Murrell* (unpublished decision)
- *State v. Jeremy Nichols*
- *State v. Paul N. Reynolds* (unpublished decision)
- *State v. Dorall Smith*
- *State v. Danny Surratt*

NEW MEXICO COURT OF APPEALS OPINIONS

- *State v. Chris Baxendale*
- *State v. Trevor Begay*
- *State v. Requildo Cardenas*
- *State v. Jess Carpenter*
- *State v. Mario Carmona*
- *State v. Leroy Erwin*
- *State v. Luis Alfredo Garcia*
- *State v. Tarrah Hobbs*
- *State v. Johnny Maxwell*
- *State v. Arthur Mestas*
- *State v. Caesar Ortiz-Castillo*
- *State v. Armando Perez*
- *State v. John Radosevich*
- *State v. Gilbert Sena*
- *State v. Michael Vargas, Sr.*

DISTRICT ATTORNEYS – STATUTORY CONSTRUCTION

- *State v. Danny Surratt*, 2016-NMSC-004, 363 P.3d 1204
- CSPM – defendant was law enforcement in Lea County so the DA Hicks conflicted the case and appointed DA Martwick
- Before the second trial, DA Martwick determined a conflict and appointed DA Chandler as special prosecutor – defendant was again convicted
- Defendant claimed DA Martwick's appointment of DA Chandler was "without legal effect" and divested the district court of jurisdiction and Court of Appeals agreed
- Supreme Court reversed – Section 36-1-23.1 (1984) is the only statute that authorizes the appointment of another District Attorney
- NM is "unique" in granting the DA the sole authority and discretion to appoint a special prosecutor without leave from the court or permission from the AG - ¶ 21
- DA Martwick had all the powers and duties of DA Hicks by her appointment – "It would be absurd to construe the legislative mandate . . . [to] limit the authority of that special prosecutor solely in this one area of responsibility over a case." ¶ 26.
- Defendant's claims of "unlimited discretion" and "irresponsible appointments" were given short shrift – case involved three elected DAs subject to oath of office and obligated to the public. ¶¶ 27-28

WITNESS COMPETENCY

- *State v. Perez*

COMPETENCY OF VICTIM TO TESTIFY

- *State v. Armando Perez*, 2016-NMCA-033, 367 P.3d 909
- District court found the eight-year-old victim of ten counts of CSP incompetent to testify
  - Child wrote a note saying "the voices" told her to blame it on defendant
  - Expert found she was incompetent to testify based on her "vagueness", "vapid speech", "poor decision making" – not fabricating but just "very vague" and signs of a thinking disorder/PTSD/mental illness

COMPETENCY

- BUT – she had the ability to tell the difference between truth and a lie knew there were consequences for lying
- She was capable of “telling the truth at a basic level, which satisfies the standard for witness competence.”
- *State v. Hueglin*, 2000-NMCA-106, 130 N.M. 54 – victim was competent even though she had Down Syndrome and an IQ of 36 – had the ability to tell the truth

FIRST DEGREE MURDER

- *State v. Gonzales*
- *State v. Murrell*
- *State v. Smith*

FIRST DEGREE MURDER

- *State v. Deandre Gonzales*, No. 35291, dec. (N.M. Sup. Ct. Feb. 11, 2016) (non-precedential)
- Sufficient evidence on deliberate intent – defendant argued the short time frame was inconsistent with deliberation
- BUT evidence of a motive and def had a weapon when he arrived at the scene
- PLUS jury could infer "express purpose" to get the gun and use it to kill victim who had just bested him in a fight
- AND then he fled the scene and denied ever having the gun – jury could infer "cover-up of guilt"
- Girlfriend, now wife, who gave him the gun – her appeal is pending

FIRST DEGREE MURDER

- *State v. Daniel Marson Murrell*, No. 34954 dec. (N.M. Sup. Ct. Mar. 24, 2016) (non-precedential)
- Felony murder – two armed and violent robberies of two elderly victims within two days and subsequent used the victims' credit cards
- The second victim, who had other health problems, died a few days later
- **Sufficient evidence** – co-def testified and plenty of physical evidence
- **Causation** – for felony murder, the predicate felony must be the factual and proximate cause of death
- Need not be the *only* cause but must be a *significant* cause – evidence was sufficient that his death was caused by pain and stress inflicted during the robbery

FIRST DEGREE MURDER

- *State v. Dorall Smith*, 2016-NMSC-007, 367 P.3d 420
- Sufficient evidence for deliberate intention in brutal stabbing of def's ex-girlfriend
- Motive to kill due to past relationship; nature of the attack (90 stab wounds in a prolonged attack); threatening confrontation day before; subsequent actions of disposing of clothes and weapon
- And JOINDER was proper – slashing of victim's tires was crucial to show deliberation and part of the same series of events – evidence would have been cross-admissible

STATUTORY CONSTRUCTION

- *State v. Begay*
- *State v. Erwin*
- *State v. Garcia*
- *State v. Hobbs*
- *State v. Holt*
- *State v. Maxwell*
- *State v. Mestas*

STATUTORY CONSTRUCTION/PROBATION

- *State v. Trevor Begay*, 2016 WL 166624 (N.M. Ct. App. Jan. 13, 2016)
- Return of probation violator - § 31-21-15 tolling provision is limited to convictions from district court
- Therefore, if you were convicted in magistrate court, violated probation, and couldn’t be found until your sentence expired, there was no tolling and you were home free
- Fixed by legislation signed March 2, 2016 – defines probationer as a person convicted in any district, magistrate, metro, or municipal court

STATUTORY CONSTRUCTION/"POSITION OF AUTHORITY"

- *State v. Leroy Erwin*, 2016-NMCA-032, 367 P.3d 905, *cert. denied* (Mar. 8, 2016)
- CSCM when perpetrator is a household member – boyfriend of victim's mother who lived in the home
- Section 30-9-10(E) defines person of authority as "that position occupied by a parent, relative, household member, teacher, employer ***or*** other person who, by reason that position, is able to exercise undue influence over a child"
- Last phrase "able to exercise undue influence" does not modify all the foregoing people and is a "catch-all"
- Court held this definition presumes a household member is able to exercise undue influence so additional proof of use or possession of a position of authority is not needed

STATUTORY CONSTRUCTION/DWI

- *State v. Luis Alfredo Garcia*, 2016 WL 324783 (N.M. Ct. App. Jan. 25, 2016)
- EMT did blood draw on def – suppressed under § 66-8-103 because not an authorized person
- “licensed professional or practical nurse” refers only to two types of nurses; a licensed professional nurse or a licensed practical nurse. No separate category of a “licensed professional”
- BUT purpose of the provision is to insure the safety and protection of a person subjected to a blood draw and the reliability of the sample.
- Given this, is suppression the right remedy, even assuming a statutory violation?

STATUTORY CONSTRUCTION/BREAKING AND ENTERING – WHAT IS AN ENTRY?

- *State v. Anthony Holt*, 2016-NMSC-011, ___ P.3d ___
- Partial removal of window screen – placed his fingers behind the screen and inside outer boundary of home
- Def says space between screen and window is not interior space and thus not an "entry"
- COA found it to be protected space – Supreme Court found this problematic because it "suggests that the space between the screen and the window is a separate and independent dimension of space . . ." ¶ 14
- Supreme Court looked to burglary statute, and its interpretation of the same in *Muqqddin*, and found the privacy interest protected is "enclosed, private, prohibited spaces" such that a reasonable person expects protection from unauthorized intrusions - ¶¶ 16-17

STATUTORY CONSTRUCTION/DWI/SLD REGULATIONS

- *State v. Tarrah Hobbs*, 2016-NMCA-022, 366 P.3d 304, *cert. denied*, No. 35708 (Feb. 15, 2016)
- Def claimed breath test was inadmissible because no evidence that the gas canister was SLD approved
- SLD regs treat “breath alcohol instrument” differently from “equipment” – regs on instruments are “extensive and explicit.” ¶ 21
- SLD does not require that each operator must confirm that the tank and its contents are SLD approved before administering the breath test. *State v. Martinez*, 2007-NMSC-025 - State need not show strict compliance with all SLD regs but only those that are “accuracy-ensuring.” Certification of instruments is such a foundational prerequisite for admission of breath test
- No threshold showing is needed on gas tanks

STATUTORY CONSTRUCTION/IMPLIED CONSENT/INDEPENDENT TEST

- *State v. Johnny Maxwell*, 2016 WL 933091 (N.M. Ct. App. Mar. 10, 2016)
- Does the Implied Consent Act provision that an officer is to advise the suspect of his right **"to be given an opportunity to arrange for"** an independent test – § 66-8-109(B) – require the officer to transport the subject to the hospital. Def had already been given the opportunity to "arrange for" the test and that's all the statute requires – officer needn't fulfill the arrangements
- BUT *State v. Chakerian*, 2015-NMCA-052, 348 P.3d 1027, *cert. granted*, 2015-NMCERT-005 (No. 35,121, May 11, 2015) – giving suspect access to phone and phone book was not sufficient because statute demands a "meaningful opportunity" to arrange for a test. Issue of remedy - suppression is not the correct result even assuming violation of § 66-8-109(B)

STAUTORY CONSTRUCTION/BURGLARY

- *State v. Arthur J. Mestas*, 2016 WL 556322 (N.M. Ct. App. Feb. 11, 2016)
- Def and unknown accomplice entered motel and got clerk to leave. Accomplice got his arms and torso into the clerk's locked area and stole cash out of the drawer.
- Def argued his entry was not "unauthorized" because the lobby was public and that the clerk's office was not a "structure"
- *State v. Office of Public Defender ex rel. Muqqddin*, 2012-NMSC-029, 285 P.3d 622, "called into question forty years" of COA precedent on burglary to make sure it didn't become an "automatic enhancement for any crime committed in any type of structure of vehicle, as opposed to a punishment for a harmful entry."
- Entry was into the clerk's office which enjoyed protection from unauthorized intrusions
- Also rejected argument that *Muqqddin* precludes conviction for entry into a part of a larger protected structure – the clerk's office was an enclosure that put the public on notice
- Starting to equate burglary with "invasion of privacy"

CHILD ABUSE

- *State v. Nichols*

CHILD ABUSE/NEGLIGENTLY PERMITTING

- *State v. Jeremy Nichols*, 2016-NMSC-001, 363 P.3d 1187
- Reversed for insufficient evidence on the one count of negligently permitting endangerment by medical neglect
- Six months old at time of death – home with defendant and appeared normal at midday
- Unconscious later that afternoon and died an hour later
- Cause of death – loss of blood associated with blunt abdominal trauma and a lacerated liver
- State had more than one theory, most of which the jury acquitted on, including that defendant caused the injuries

CHILD ABUSE cont.

Holdings:

- Causing and permitting endangerment by medical neglect define identical criminal acts which led to conflicting verdicts – theory of medical neglect by definition is passive and permitting endangerment by medical neglect "makes no sense." ¶ 35
- No evidence that medical neglect caused the baby's death – needed medical evidence that baby would have lived if care was obtained earlier

BOTTOM LINE

- Court is unsympathetic to differing theories of child abuse
- But, of course, very difficult to know exactly what happened
- Court speaks of “hopeless confusion” of jury verdicts and “confusing array” of jury instructions

DOUBLE JEOPARDY

- *State v. Radosevich*
- *State v. Sena*
- *State v. Vargas*

DOUBLE JEOPARDY/JOINDER

- *State v. Radosevich*, 2016 WL 825125 (N.M. Ct. App. Mar. 1, 2016)
- Agg assault with deadly weapon rev'd for jury instruction error – court dv'd the charged offense of assault with intent to commit murder and instructed on agg assault
- Agg assault is not "subsumed" within assault with intent to commit murder because no deadly weapon in second charge
- State cannot retry on the uncharged agg assault due to violation of compulsory joinder
- "Risky" "all or nothing" trial strategy – *Gonzales II*, 2013-NMSC-016 – BUT jury was instructed on the charge unlike in *Gonzales II*.

DOUBLE JEOPARDY/CHILD ENDANGERMENT

- *State v. Gilbert Sena*, 2016 WL 1063166 (N.M. Ct. App. Mar. 15, 2016)
- Unit of prosecution for ten counts of distribution through P2P file sharing
- Nope – only one count under *Olsson/Ballard*
- "Passive conduct" of def – misunderstanding of P2P?
- What about *Leeson*?
- Careful with conditional pleas on stipulated facts. Very limiting on appeal. Def tried to argue on appeal that what he did wasn't distribution at all.

DOUBLE JEOPARDY/DUPLICATIVE CHARGES

- *State v. Vargas*, 2016 WL 166610 (N.M. Ct. App. Jan. 12, 2016)
- 24 identical counts of child abuse by torture – stun gun
- *Baldonado*, 1998-NMCA-040, ¶ 20 ("profound tension" between def's right to notice and State's interest in protecting vulnerable victims)
- Charging period was sufficiently short and definite but lack of specificity was fatal – *State v. Dominguez*, 2008-NMCA-029
- Conflict between *Dominguez* and *Baldonado*?

FOURTH AMENDMENT/

- *State v. Cordova*

FOURTH AMENDMENT/EMERGENCY ASSISTANCE DOCTRINE

- *State v. Juan Cordova*, 2015 WL 3645078 (N.M. Ct. App. June 11, 2015)
- Entry into Defendant’s home after a horrific car accident with fatalities
- COA held officers had insufficient evidence to reasonably believe Defendant was in need of immediate aid – deputies only knew that Defendant's truck had been involved in the accident and that three people had been seen leaving the truck
- COA required evidence of injury – blood trail leading to the house, something definitive to show defendant was injured, etc.
- CERT QUASHED

EVIDENTIARY RULINGS

- *State v. Smith*
- *State v. Carmona*
- *State v. Bailey*
- *State v. Vargas*

EVIDENTIARY RULINGS/CONFRONTATION CLAUSE

- *State v. Dorall Smith*, 2016-NMSC-007, 367 P.3d 420
- Def claimed that admission of the testimony of the supervising pathologist and the autopsy photos violated his right to confront the witnesses against him
- The testifying doctor supervised the autopsy and signed the report – her testimony was thus a "product of her own independent participation in the autopsy." ¶ 42
- The autopsy photos are not testimonial statements for purposes of Confrontation Clause – not an oral or written assertion

EVIDENTIARY RULINGS/CONFRONTATION CLAUSE

- *State v. Mario Carmona*, 2016 WL 1078163 (N.M. Ct. App. Mar. 17, 2016)
- SANE witness who swabbed the victim for DNA and collected all the evidence from her died before trial
- The State's expert witness compared the evidence collected by the SANE with def's DNA profile but def claimed Confrontation Clause violation
- State put on lots of evidence about policies and procedures on SANE examinations but district court still suppressed

EVIDENTIARY RULINGS/CONFRONTATION CLAUSE

- Court of Appeals affirmed – primary purpose of collection was to assist prosecution of an individual identified at the time of collection
- Discussion of *Melendez-Diaz*; *Bullcoming*; *Williams*.
- *Williams* is closest – State didn't call Cellmark lab which developed a male DNA profile on swabs taken from the victim that was later found to match def. State did call the analysts who found semen on the victim's swabs; who developed the def's DNA profile; and who matched the Cellmark profile to def's profile
- OK because Cellmark report was only used to establish that it matched another DNA profile – not to be considered for the truth therein

EVIDENTIARY RULINGS/CONFRONTATION CLAUSE

- And, it wasn't admitted for the "primary purpose" of targeting defendant because he was not yet a suspect
- But, here, basis of expert's opinion that Def's DNA was on the victim was the SANE's statements that the swabs came from the victim. Thus, they were admitted for truth of matter asserted – i.e. that the swabs were from the victim. That was the crucial link to the make the expert's testimony relevant
- Context of SANE exam "leaves no doubt" that its primary purpose was to establish the fact that Def's DNA was on her body for use in a future criminal proceeding – victim had already identified Def

EVIDENTIARY RULINGS/LATE DISCLOSURE OF DISCOVERY

- *State v. Dorall Smith*, 2016-NMSC-007, 367 P.3d 420
- State's expert had to recalculate the DNA results from four samples with different statistical ratios – done the day of trial
- Only real difference was the change of DNA being mistaken match to def was one in millions rather than one in billions – i.e. more conservative results that favored def
- Def argued he needed his own expert based on this development – court continued the trial based on this, but defense expert was not called and State's expert was fully cross-examined

EVIDENTIARY RULINGS/LATE DISCLOSURE cont.

- Claimed violation of Rules 5-501 and 5-505
- However, court chose not to exclude all DNA evidence and instead granted a continuance so def could consult its own expert
- Court assumes, without deciding, that State breached its duty under Rule 5-505
- But no showing of prejudice to the defense and no abuse of discretion

EVIDENTIARY RULINGS/RULE 404(B)

- *State v. Jason Bailey*, 2015-NMCA-102, 357 P.3d 423, *cert. granted*, Sept. 25, 2015
- CSCM – evidence of uncharged conduct from another jurisdiction was admissible to establish intent - Defendant claimed (1) normal parenting (2) victim's misperception due to prior abuse by another and (3) no sexual intent on his part – the court allowed questioning on the issue because the Def opened the door during his CX of the victim
- COA found it showed propensity but was allowable because also relevant to intent
- "Hearing and evaluating evidence of terrible events and acts without allowing emotion to gain the upper hand over reason is, naturally, challenging. Yet, we sometimes ask this task of jurors." ¶ 24
- BUT – Judge Garcia dissented, partly on procedural grounds because the district court changed its ruling on the admissibility mid-trial and prejudiced the Defendant.
- CASE PENDING ON CERT

EVIDENTIARY RULINGS/EXPERT TESTIMONY

- *State v. Vargas*, 2016 WL 166610 (N.M. Ct. App. Jan. 12, 2016)
- Stun gun injuries – detective testified as to his experience with stun gun and the types of injuries
- Error to admit it as lay witness opinion testimony – (1) his experience with stun guns was from law enforcement rather than "life experience" and (2) he "crossed the line" by opining that the marks on the victim were caused by a stun gun. More than commentary on his observations
- Not harmless error – formed the basis for the number of charges

DEFENSES

- *State v. Deandre Gonzales*
- *State v. Baxendale*
- *State v. Cardenas*

SELF-DEFENSE

- *State v. Deandre Gonzales*, No. 35,291 dec. (N.M. Sup. Ct. Feb. 11, 2016)
- Self-defense instruction properly denied
- There was evidence that some witnesses believed there was a second shot – but no physical evidence of this
- Court has “hesitated” to find a self-defense instruction appropriate when it would “license any participant in a physical combat . . . thinking himself to be the loser, to slay his opponent with whatever weapon he could lay his hands on.” ¶ 28
- Plus, evidence showed def provoked the fight and the threat was eliminated before the shooting. ¶ 29

SELF-DEFENSE/DEFENSE OF PROPERTY

- *State v. Chris Baxendale*, 2016 WL 852772 (N.M. Ct. App. Mar. 2, 2016)
- Agg assault with a deadly weapon against neighbor and girlfriend
- Defendant barricaded himself in his house, told his girlfriend "have fun getting in" and then shot through the door when she and the neighbor tried to break the new padlock *he had just put on* after midnight on New Year's Eve
- Def testified he thought someone was trying to break in and shot high to scare them
- Court refused to give requested instructions on self-defense and defense of property but COA reversed
- Even though Def argued at trial and on appeal that he didn't use deadly force and didn't request the deadly force instruction, the COA said it should have been given
- So, even though Def didn't brief the issue, the Court would consider it because otherwise the conviction for agg assault "was essentially a foregone conclusion" - ¶ 19
- But defense of habitation allows use of lethal force only when it's necessary to prevent the commission of a "violent felony" in his home

SELF DEFENSE/DEFENSE OF PROPERTY

- *State v. Requildo Cardenas*, 2016 WL 430477 (N.M. Ct. App. Feb. 16, 2016)
- Def shot and killed the victim through his front door, not knowing at the time it was his friend, and claimed he should have been given defense of habitation and involuntary manslaughter instructions
- State argued no evidence of pending violent felony but Court said evidence of the *victim's* intent wasn't relevant and State "shifted emphasis"
- So, it's only whether there is evidence "that could give rise" to defendant's belief that a violent felony was imminent - ¶ 12
- Evidence that def was roused from sleep and that victim was attempting to force entry was enough to warrant the instruction

JURY INSTRUCTIONS

- *State v. Jess Carpenter*
- *State v. Ortiz-Castillo*
- *State v. Radosevich*

JURY INSTRUCTIONS

- *State v. Jess Carpenter*, 2016 WL 1586505 (N.M. Ct. App. Apr. 18, 2016)
- Involuntary manslaughter instruction included the element that “def committed an unlawful act not amounting to a felony”
- Def claimed insufficient evidence because no proof on that (unnecessary) element
- Nope – “faulty premise” because element wasn’t essential
- *Musacchio v. United States*, ___ U.S. ___, 136 S. Ct. 709 (2016) is directly on point.

JURY INSTRUCTIONS/SPANISH-SPEAKING JUROR

- *State v. Ortiz-Castillo*, 2016 WL 462065 (N.M. Ct. App. Feb. 3, 2016)
- Claim of constitutional violation for failure to prove Spanish translations of written jury instructions to the juror – N.M. Const. art. VII, § 3
- Criminal defs have the right to assert rights of jurors to be free from discriminatory exclusion all the way through deliberations
- Supreme Court guidelines for Non-English speaking jurors (Order No. 00-8500) say courts are "encouraged" to draft such instructions but alternatively the court interpreter may provide oral translation
- Purpose of jury instructions is to help jurors remember what the court reads to them – interpreters here could do the same

JURY INSTRUCTIONS

- *State v. Radosevich*, 2016 WL 825125 (N.M. Ct. App. Mar. 1, 2016)
- Def threatened to shoot victim and his dogs and then came out with a knife
- Fundamental error in agg assault instruction because jury not separately instructed that the "knife" could cause death or GBH – 3 ½" kitchen knife
- Plus, court *sua sponte* changed the charge from assault with intent to commit murder to agg assault with a deadly weapon – Def didn't defend against a charge with "deadly weapon" as an essential element

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Murrell*
- *State v. Reynolds*

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Daniel Marson Murrell*, No. 34954, dec. (N.M. Sup. Ct. Mar. 24, 2016)
- Felony murder – two robbery victims
- Claim of IAC for failure to move to sever because evidence on two victims was not cross-admissible
- BUT counsel's decision could have been tactical – surviving victim's testimony regarding the height of attacker was closer to co-defendant's height and could be used to undermine the co-def's credibility about who committed the deadly attacks
- Moreover, the evidence was probably cross-admissible – particulars of the two robberies were very similar and based on the same witnesses' testimony
- No IAC if the record supports a plausible, rational strategy or tactic to explain counsel's conduct

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Reynolds*, 2016 WL 1190398 (N.M. Sup. Ct. Mar. 24, 2016) (non-precedential)
- Pled NC to first-degree murder – claims IAC in failure to investigate and advise on potential defenses
- Stabbed to death a woman who had befriended him in order to steal her husband's muscle car
- Doctor found him competent but wrote, in an email, that "he may have lacked specific intent"
- But only def testified and relied on the email – no idea if doctor spoke with attys or if attys did further investigation
- Plus, doctor's opinion was not conclusive – "may"
- Def failed in his burden of proof to overcome strong presumption of competence – no evidentiary basis to make the conclusion of IAC
- State habeas??

FOULENFONT HEARINGS

- Generally, be cautious of these. Is it really a legal issue or is it a factual issue?
- Most of these issues probably should be resolved by a jury – not a judge

PERFECTING THE RECORD

- Crucial for a successful appeal – easier for us to advocate for a lawful conviction when the record is complete
- Case will not end with direct appeal – proceedings in state and federal habeas corpus can linger for 20+ years
- Please make sure bench conferences and jury instruction conferences are recorded – reconstructing the record after the fact is difficult, if not impossible

JURY INSTRUCTIONS

- Crucial to a successful appeal
- Even if rushed, please review the language, especially of the elements instructions. An inadvertent typo can have disastrous consequences
- Real world example – CSPM with clear evidence of mental anguish as the personal injury. But the instructions never mentioned mental anguish and the jury never found it.

Prosecutors as Vanguards of Professionalism

- We have a higher standard professionally and ethically that is independent of what defense counsel does or does not do or what the court does or does not do
- The appellate courts scrutinize the actions, or inactions, of the prosecutor and the prosecutorial team – *Serros*