NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

Appellate Law Update
DISTRICT ATTORNEYS CONFERENCE
April 13, 2017

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
- (505) 717-3505 – office (SF and ABQ)
- (505) 318-7929 – (cell)

CRIMINAL APPEALS DIVISION

- We currently have one director, 14 staff attorneys, and two staff members
- Claire Welch in Albuquerque – handles state habeas, federal habeas, and much more – (505) 717-3573 and cwelch@nmag.gov
- Rose Leal in Santa Fe – handles all regular appeals and much more – (505) 490-4848 and rleal@nmag.gov

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OAG WEBSITE

- NMAG.GOV
- This presentation will be under the Criminal Appeals tab which is under the Criminal Affairs 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

STATUS OF AN APPEAL

- Electronic filing should be forthcoming this year. Supreme Court will be first and then the Court of Appeals.
- Questions on specific cases – call our office
- Check the Supreme Court website – nmsupremecourt.nmcourts.gov
- Check the Court of Appeals website – coa.nmcourts.gov
- **Supreme Court filings are now available on Odyssey**
- Numbers for Supreme Court are S-1-SC-12345

NEW MEXICO SUPREME COURT

- Published opinions and unpublished decisions from November 2016 to now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 2016 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- Rule 12-405 NMRA permits citations to unpublished opinions (memorandum opinions)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- All opinions, published and unpublished, are available on the New Mexico Court of Appeals website – https://coa.nmcourts.gov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 not 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
- P.O. Box 848
- Santa Fe, NM 87504-0848
- (505) 827-4860 (T) / (505) 827-4837 (F)

COURT OF APPEALS CLERK'S OFFICE

- Mark Reynolds
- Clerk of the New Mexico Court of Appeals
- P.O. Box 2008
- Santa Fe, NM 87504-2008
- (505) 827-4925 (T) / (505) 827-4946 (F)

HOW TO TAKE AN APPEAL

- On our website – www.nmag.gov
- Criminal Affairs tab
- Criminal Appeals tab – How to Take an Appeal handbook
- Updated recently
- Any other questions, please call
- 10 days for 39-3-3(B) appeals (suppression of evidence) – MUST include the language that "I certify that this appeal is not taken for purpose of delay, and the evidence is a substantial proof of a fact material in the proceeding."
- 30 days for dismissal of all or part of charging document
- Must have a **written order** from which to appeal
- Defendants can file late notices of appeal – we cannot!

HOW TO TAKE AN APPEAL

- Notice of Appeal is **filed** in district court and **served** in the applicable appellate court – Rule 12-201(A) NMRA
- Almost all State's appeals will be filed in the Court of Appeals with the exception of appeals from a district court order granting a habeas petition or an appeal involving a first-degree murder. But this includes *all* first-degree murder appeals, including interlocutory appeals and 12-204 appeals.

DOCKETING STATEMENTS

- For a State's appeal, **trial counsel is responsible for filing the docketing statement – we do not do them for you**
- 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 Court of Appeals and **serve** on district court – use the district court number as the case is not assigned a COA number yet
- 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

TAKING AN APPEAL

- Habeas cases – if State loses, the State has an automatic direct appeal to the Supreme Court
- File notice of appeal and statement of issues in Supreme Court
- Rule 12-102(A)(3) NMRA
- If habeas petitioner wins, he/she has to petition the Supreme Court for cert

IF YOU FILE APPEAL IN WRONG APPELLATE COURT

- Not fatal – NMSA 1978, Section 34-5-10
- “No matter on appeal in the supreme court or the court of appeals shall be dismissed for the reason that it should have been docketed in the other court, but it shall be transferred by the court in which it is filed to the proper court. Any transfer under this section is a final determination of jurisdiction. Whenever either court determines it has jurisdiction in a case filed in that court and proceeds to decide the matter, that determination of jurisdiction is final. No additional fees or costs shall be charged when a case is transferred to another court under this section.”

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 call you if COA proposes to reverse on a defendant's appeal or affirm on a State's appeal – generally, we need more facts

FILING IN THE APPELLATE COURTS

Use 14-point type – Rule 12-305(C)(1)

SUPREME COURT OPINIONS and DECISIONS

- *State v. Begay* (published)
- *State v. Gonzales*
- *State v. Linares* (published)
- *State v. Lucero* (published)
- *State v. Morris*
- *State v. Ramirez*
- *State v. Suazo* (published)

NEW MEXICO COURT OF APPEALS OPINIONS

- *State v. Bello*
- *State v. Bregar*
- *State v. Brown*
- *State v. Fox*
- *State v. Gallegos-Delgado*
- *State v. Hernandez*
- *State v. Huerta-Castro*
- *State v. Imperial*
- *State v. Jimenez*
- *State v. Lindsey*
- *State v. Lozoya*
- *State v. Lucero*
- *State v. Montoya*
- *State v. Navarro-Calzadillas*
- *State v. Pacheco*
- *State v. Patterson*
- *State v. Percival*
- *State v. Ramos*
- *State v. Seigling*
- *State v. Turner*

ARTICLE II, SECTION 13

- Old provision: "All persons shall, before conviction be bailable by sufficient sureties, except for capital offenses when proof is evident and presumption great."
- New provision: "Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonable protect the safety of any other person or the community."

FIRST DEGREE MURDER

- *State v. Morris*
- *State v. Ramirez*

FIRST DEGREE MURDER

- *State v. Anthony John Morris*, No. 35259 (N.M. S. Ct. Nov. 17, 2016) (unpublished disposition)
- 1991 murder – cold case
- Victim was seen being forced into a truck on Central Ave. and her body was later found on the road on the west side with a gunshot wound in her head
- 2012 DNA match to def's sperm from a swab taken from victim
- Def then called his ex-wife from the jail and made incriminating statements
- Search warrant on truck that was seen the night of the murder revealed the presence of blood
- Def claims this purely circumstantial evidence was not sufficient
- Held: there was sufficient evidence that Def killed the victim; Court reaffirms that it does not evaluate the evidence to see if there is some hypothesis consistent with innocence
- Also sufficient evidence for deliberation – Def admitted to frequenting prostitutes, he abducted the victim against her will, his sperm was found in her mouth, and she was then shot in the head. Shows a "calculated series of acts designed to abduct, rape, and kill" the victim.

FIRST DEGREE MURDER

- *State v. Albert Jose Ramirez*, No. 34576 (N.M. S. Ct. Dec. 1, 2016) (unpublished disposition)
- No issue on sufficiency – def was witnessed shooting the victim in the head
- Issues on competency and IAC (discussed below)
- Evidentiary issues: (1) comment on silence (inadvertent and related to officer's testimony about his role in the case); (2) jury was not prejudiced by seeing def in leg restraints because no record made by def that this occurred; (3) court correctly allowed evidence of def's aggressive prior acts against victim as they were relevant to deliberate intent; (4) harmless error to allow State to CX def on a specific act of violence where he claimed the victim was the first aggressor – the rules allow for reputation or opinion testimony, but not a specific act of violence which only went to show propensity; (5) prosecutor's questions to def on CX about his legal research – "and you've done a significant amount of legal research on how to get the jury to buy [your self-defense claim]?" were "isolated and minor" and did not deprive def of a fair trial

GUILTY PLEAS

- *State v. Turner*

GUILTY PLEAS - IAC

- *State v. Bill Turner*, 2017 WL 1000530, ___ P.3d ___ (N.M. Ct. App. Mar. 14, 2017)
- Def pled guilty to 13 counts of securities fraud
- Plea colloquy indicated def acted knowingly and voluntarily
- Before restitution hearing, def moved to withdraw his plea claiming (1) "unconstitutional bail" (2) unsanitary prison conditions and (3) institutional IAC at LOPD.
- (1) $250K cash only bond – supported by the evidence that def was a flight risk and had the resources to run. "Because the district court did not err, we fail to see how the fact that Defendant was confined pre-trial, on its own, created a coercive condition that warrants withdrawal of the plea." NOTE: new *Brown* decision.
- (2) no mention of this at plea; nothing until 9 months later.
- (3) no evidence of institutional IAC that impacted his plea
- State had a good record - John Sugg testified that the plea was the result of months of negotiation and no reason to think it wasn't voluntary

DISCOVERY/BRADY VIOLATION

- *State v. Huerta-Castro*

DISCOVERY/BRADY VIOLATION

- *State v. Jorge Bernardo Huerta-Castro*, 2017-NMCA-026, 390 P.3d 185
- *Brady* violation equates to charge of prosecutorial misconduct which court reviews for abuse of discretion
- (1) pediatrician's report, reporting no injuries, was not disclosed until just before trial and (2) fact that victims' mother was allowed to remain in the country because of her cooperation with LE wasn't disclosed
- Def must show (1) prosecution suppressed evidence (2) the evidence was favorable to def and (3) the evidence was material - i.e. if disclosed, the result of the proceeding would have been different
- As to discovery of evidence during trial, look to whether the "late tender has impeded the effective use of evidence" to impact the proceeding's fundamental fairness
- Def never sought continuance to interview the pediatrician and did little to effect an interview with her and the information wasn't favorable to def
- More merit to second claim – "serious discovery violation" – evidence of Mother's motive to fabricate claims so she could stay in the country
- The U-Visa was disclosed the second day of trial – Def was able to only CX Mother on it and not present other evidence or question other witnesses
- All three prongs of *Brady* are met but the fairness of the proceeding wasn't called into question

PROSECUTORIAL MISCONDUCT

- *State v. Lozoya*

PROSECUTORIAL MISCONDUCT/CLOSING ARGUMENT

- *State v. Lozoya*, No. 34,651 (N.M. Ct. App. Apr. 5, 2017)
- CDM for helping girl buy alcohol
- In closing, prosecutor said def was a "two-time felon", questioned why a 27 yoa man would be with a 15 yoa girl, asked the jury "don't allow him to do this to our children", and noted he had a condom – no objection made at the time
- Not a violation of a fair trial – criminal history was admitted and wasn't prime focus of the argument
- Prosecutor's implication that def was a sexual predator was "unnecessary and improper" but sufficiently isolated and not egregious

CONTINUANCES

- *State v. Turner*

CONTINUANCE

- *State v. Bill Turner*, 2017 WL 1000530, ___ P.3d ___ (N.M. Ct. App. Mar. 14, 2017)
- Grant or denial is in "sound discretion" of district court
- Court refused to grant def's requests to continue restitution and sentencing hearings – blamed him for atty problems and was biased against him
- But def was given six months to attempt to pay restitution before sentencing but he made no efforts to do so
- Court didn't fail to grant any continuance on restitution – proceeded to sentencing and continued restitution hearing until def was on probation

LR2-400

- *State v. Michael Lucero*
- *State v. Navarro-Calzadillas*
- *State v. Seigling*

LR2-400 – ABUSE OF DISCRETION

- *State v. Michael James Lucero*, No. 34,713 (N.M. Ct. App. Apr. 3, 2017)
- Affirms holding from *State v. Armijo* and *State v. Angulo* that the State has the right to appeal from a dismissal without prejudice
- Finds an abuse of discretion for trial court's dismissal without prejudice
- Defense counsel announced he was ready for trial at a conditions of release hearing – State wasn't ready for trial and trial wasn't scheduled for another year under the court's order

LR2-400 – WITNESS EXCLUSION

- *State v. Armando Navarro-Calzadillas*, No. 34,667 (N.M. Ct. App. Jan 24, 2017), *cert. granted*, 2017-NMCERT-___ (No. 36,307, Mar. 16, 2017), *but held in abeyance pending decision in State v. LaMier*, S-1-SC-34830
- *LaMier* is a cert case from the def on a witness exclusion/*Harper* issue on a briefs only calendar. Briefing was completed last year.
- First-degree CSPM – State moved to extend PTIs for good cause but court denied the motion and then granted def's motion to exclude witnesses under LR2-400
- Reconciling the rule with Supreme Court precedent – particularly *State v. Harper*, 2011-NMSC-044, which holds that exclusion of a witness is improper absent an intentional refusal to obey a court order, prejudice to the opposing party, and consideration of lesser sanctions. Exclusion is only for an "exceptional" case with clear culpability and tangible prejudice
- LR2-400.1(D)(4) mandates sanctions for discovery violation under the rule
- No conflict between *Harper* and the rule because court still had the lesser sanction of dismissal without prejudice available – district court abused its discretion in not considering this sanction
- Court rejects def's reading of the rule as fundamentally in conflict with *Harper* and "all statewide rules of criminal procedure and existing case law" – COA notes its function as an intermediate court with no authority to "upend" Supreme Court case law
- Cautions prosecutors not to use dismissals without prejudice to procure more time and/or a different judge

LR2-400 – WITNESS AND EVIDENCE EXCLUSION

- *State v. Benjamin Seigling*, No. 34,620 (N.M. Ct. App. Jan. 24, 2017), *cert. granted*, 2017-NMCERT-___ (No. 36,308, Mar. 16, 2017), *but held in abeyance pending decision in State v. LaMier*, S-1-SC-34830
- Decided the same day and same panel as *Navarro-Calzadillas*
- "[E]xisting case law on criminal procedure continue[s] to apply to cases filed in the Second Judicial District Court . . . to the extent [it] do[es] not conflict with the pilot rule." LR2-400(A) (2014)
- Commercial burglary and larceny
- Scheduling order set deadlines but not for PTIs - four officers were subpoenaed for interviews – only one showed. State accepted responsibility for scheduling the interviews rather than have their testimony excluded
- Court suppressed all audio and video evidence and granted motion to exclude witnesses.
- Court notes that, unlike in *Harper*, prejudice is not a prerequisite to the imposition of sanctions under the rule and the local rule controls due to this conflict **but** "nothing in the local rule can be read to eliminate the analytic role of prejudice to a defendant in determining the severity of the sanction imposed on the state."
- No conflict here with *Harper* because lesser sanctions were available. Sanctions are mandatory under the rule but the court still has discretion as to the type of sanction
- Here, no rule deadline was violated so no mandatory sanction was required – although some of the officers failed to appear, there were still three months left.
- As to the audio and visual evidence, the State did violate Rule 5-501(A). LR2-400(D)(1) requires physical copies *and* a speed letter. Sanctions under LR2-400(D)(4) are purely discretionary. Def received discovery four months before trial and two months before the pre-trial motions deadline. Remanded for consideration of an appropriate sanction and prejudice.
- "We do not believe that the local rule was designed to serve as a technical mechanism by which important witnesses in criminal cases are excluded, core evidence suppressed as a matter of first resort, or cases themselves abruptly dismissed with prejudice." ¶ 31.
- CERT WAS GRANTED

LR2-400 – DOCUMENTARY EVIDENCE

- *State v. Miguel Antonio Otero*, No. 34,893 (N.M. Ct. App. Apr. 13, 2016) (non-precedential), *cert. granted*, 2017-NMCERT-___ (No. 35,886, Mar. 2, 2017)
- Short memorandum opinion
- LR2-400 requires State to provide defense copies of documentary evidence irrespective of materiality and dismissal without prejudice as a sanction is not analogous to and therefore not subject to the constraints of *Harper*.

EVIDENTIARY ISSUES

- *State v. Bregar*
- *State v. Hernandez*
- *State v. Imperial*
- *State v. Jimenez*
- *State v. Patterson*

STATEMENT OF DEFENDANT – HOSPITAL BED ADMISSION

- *State v. Darla Bregar*, 2017-NMCA-028, 390 P.3d 212
- Vehicular homicide
- Def gave a ten-minute statement in hospital and then claimed it was involuntary due to her medical condition - injuries including a broken jaw, several fractured ribs, seven broken vertebra, and a blow to the head
- Four witnesses for the State and one for def testified about her injuries and mental state but def did not testify
- (1) Failure to record her statement renders it involuntary – not preserved for appellate review. Moreover, district court found the officer's undisputed testimony credible
- (2) Def witness, a nurse, established that def was susceptible to confusion – again not preserved for review. Moreover, must show coercive police misconduct/overreaching – a def's mental condition alone is not enough
- (3) Officer manipulated def because he knew she was under the influence – other testimony indicated she was sufficiently lucid and alert. And she changed her story denied driving when she learned the passenger had died. Also no evidence that officer knew of her medical condition and exploited it and there is no preservation of any argument that an officer has an affirmative duty to learn of an interviewee's medical condition.

ADMISSIBILITY OF EXPERT OPINION TESTIMONY

- *State v. Darla Bregar*, 2017-NMCA-028, 390 P.3d 212
- Officer testified as expert in accident reconstruction and opined that def was driving
- Officer considered the location of yaw and trip marks on the roadway and where the def and the victim landed
- Officer had investigated 500 crashes including 100 that involved fatalities and testified as expert in accident reconstruction before
- Appellate arguments regarding lack of officer's qualification to testify were not preserved and thus reviewed only for plain error – did any errors raise grave concerns about the validity of the guilty verdict
- occupant kinematics requires scientific expertise this officer did not have – fails to address whether his opinion was otherwise based on a reliable scientific methodology
- But State failed to show officer's opinion was the result of reliable methodology and the court abused its discretion in allowing the testimony
- Discusses inconsistent case law interpretations of plain v. fundamental error but doesn't decide the issue because def can't meet the burden in either case
- The officer did not comment directly on def's credibility and his opinion was not the only evidence of def's guilt and didn't likely affect the jury's verdict

PROSECUTORIAL MISCONDUCT

- *State v. Ramon Hernandez*, 2017-NMCA-020, 388 P.3d 1016
- The Court of Appeals reversed Defendant's convictions for homicide and GBH by vehicle.
- Defendant maintained that the other person in the vehicle (who was deceased at the time of trial) was the driver. In a pretrial ruling, the district court held that a purported confession of Defendant that he was "behind the wheel" was not admissible but the officer testified to it at trial after an open-ended "what happened next" question from the prosecutor.
- The Court held this was error, was not cured by the curative instruction given by the district court, and was not harmless error. However, the Court also held there was no *Breit* prosecutorial misconduct that would bar retrial and that the evidence was sufficient for retrial.

DISCOVERY

- *State v. Christine Imperial*, No. 34,277 (N.M. Ct. App. Feb. 14, 2017)
- Forgery and ID theft at Wal-Mart
- Claim of late disclosure of witness – fraud investigator – who prepared a spreadsheet showing def's transactions
- This witness was new because the previous investigator was unavailable – previous investigator was on State's witness list for years and def never sought to interview him
- Court held the two were "functionally equivalent for purposes of determining the evidentiary significance of the discovery materials." ¶ 17
- No prejudice to def's trial preparation and def had opportunity to interview new witness
- Plus, the spreadsheets were edited to redact irrelevant information – no prejudice

ADMISSION OF EVIDENCE - HEARSAY

- *State v. Christine Imperial*, No. 34,277 (N.M. Ct. App. Feb. 14, 2017)
- Rule 11-803(b)(6) – business records exception
- Instantaneously recorded data related to retail transactions fell within the exception
- Millions of transactions were then compiled into a spreadsheet regarding this def's transactions

ADMISSION OF EVIDENCE – AUTHENTICATION

- *State v. Christine Imperial*, No. 34,277 (N.M. Ct. App. Feb. 14, 2017)
- Admission of Wal-Mart surveillance videos showing def conducting the transactions
- Def challenged foundation of date and time
- "Basic computer operations relied on in the ordinary course of business are admitted without an elaborate showing of accuracy." ¶ 32
- No specific claim that the contents weren't accurate and Court declined to require a higher standard of admissibility because of the "theoretical" possibility of manipulation

ADMISSION OF EVIDENCE

- *State v. Noe Jimenez*, No. 34,375 (N.M. Ct. App. Feb. 14, 2017)
- Trial court did not err in allowing limited testimony regarding def's civil lawsuit against the city – def testified he was asking for $80M in damages
- Relevant to his bias and State's theory that def thought he would get a "big paycheck" if he wasn't convicted
- Court holds it was relevant to attack def's credibility

CLOSING ARGUMENT - PROSECUTORIAL MISCONDUCT

- *State v. Noe Jimenez*, No. 34,375 (N.M. Ct. App. Feb. 14, 2017)
- Not prosecutorial misconduct to argue def's lawsuit against the city in closing argument
- But the argument was based on facts elicited during CX of def after def's objection was overruled
- The comments were not outside the admitted evidence

EVIDENTIARY ISSUES – CROSS-EXAMINATION

- *State v. Anthony Patterson*, No. 33,961 (N.M. Ct. App. Feb. 27, 2017)
- Two counts of trafficking by distribution of oxycodone
- COA held that trial court committed reversible error by limiting CX of undercover agent
- Dist ct sustained State's objection to questioning regarding agent's testimony under oath in another proceeding
- Should have been allowed under 11-608(B)(1) which permits CX about a specific incident or act that is probative of truthfulness and the agent was critical to State's case

FOURTH AMENDMENT

- *State v. Aaron Ramos*

FOURTH AMENDMENT – CONSENT

- *State v. Aaron Ramos*, No. 34,410 (N.M. Ct. App. Feb. 2, 2017)
- Officers entered def's apartment at request of domestic violence victim who needed to retrieve her belongings
- Victim did not have actual common authority – she had been staying there only 2-4 days and did not have a key.
- District court relied on her apparent authority which is not recognized by Article II, § 10 and did not find she had actual authority

FOURTH AMENDMENT – PROTECTIVE SWEEP

- *State v. Aaron Ramos*, No. 34,410 (N.M. Ct. App. Feb. 2, 2017)
- Entry into def's apartment was not justified by protective sweep
- A quick and limited search, incident to arrest, conducted to protect safety of police officers and others
- Not present here because def had left the scene and wasn't arrested. Officers also didn't articulate safety reasons for sweep
- State relied on FVPA which requires officers to take reasonable steps to protect the victim - Court did not find this to be a valid exception to the warrant requirement. Officers may accompany her to the residence but do not have carte blanche to enter without a warrant
- No evidence that an emergency necessitated the warrantless entry

CONFRONTATION CLAUSE

- *State v. Imperial*
- *State v. Jimenez*

CONFRONTATION CLAUSE

- *State v. Christine Imperial*, No. 34,277 (N.M. Ct. App. Feb. 14, 2017)
- Claim that Wal-Mart surveillance videos were testimonial – i.e. primary purpose is to "establish or prove past events potentially relevant to later criminal prosecution." ¶ 38
- Business records are generally not testimonial
- Court relies on articles discussing the purpose of such cameras – workplace productivity; safety; deter theft or fraud
- No evidence that these cameras were primarily to create a record for trial

CONFRONTATION CLAUSE

- *State v. Noe Jimenez*, No. 34,375 (N.M. Ct. App. Feb. 14, 2017)
- Defendant was involved in a SWAT situation at a club – ammo and guns were seized from his car pursuant to a search warrant
- Defendant claimed his confrontation rights were violated by not being able to confront the officers who searched his car and the officer who arrested him
- But the evidence technician who collected and handled the evidence did testify and def was able to CX her
- Def's real complaint is that the State didn't call all the officers involved so he could ask about the possibility of tampering – chain of custody doesn't require this

SUFFICIENCY OF EVIDENCE

- *State v. Bregar*
- *State v. Fox*
- *State v. Gonzales*

SUFFICIENCY OF EVIDENCE – CORPUS DELICTI

- *State v. Darla Bregar*, 2017-NMCA-028, 390 P.3d 212
- A conviction cannot be based solely on the extra-judicial admissions of an accused
- Corpus delicti requires the existence of a harm oar injury and that the harm or injury was caused by a criminal act
- NM follows the "modified trustworthiness rule" – CD can be established when prosecution demonstrates the trustworthiness of the confession and some independent evidence of a criminal act
- State produced independent circumstantial evidence to show def was the driver

SUFFICIENCY OF EVIDENCE - MANSLAUGHTER

- *State v. Chip Fox*, 2017-NMCA-029, 390 P.3d 230
- Def stabbed his friend during an argument – jury was instructed on provocation and self-defense
- Def claims it was unreasonable for jury to reject self-defense
- COA disagrees – critical difference between self-defense and voluntary manslaughter is not the provocation but the reasonableness of the def's conduct in killing
- Evidence was sufficient to find that the victim's actions of repeatedly at def constituted sufficient provocation but that a reasonable person would not have stabbed the victim where the victim was unarmed

SUFFICIENCY OF EVIDENCE – CRIMINAL SOLICITATION TO COMMIT TAMPERING WITH EVIDENCE

- *State v. Chip Fox*, 2017-NMCA-029, 390 P.3d 230
- Section 30-28-3(A) requires the person to "intend that another person engage in conduct constituting a felony"
- Does not matter if the object of the solicitation is carried out; the crime is complete when the solicitation is made
- Def claims that the tampering could only relate to his exhortations to his girlfriend to get rid of his backpack full of inhalants – possession of inhalant is a misdemeanor and criminal solicitation requires a felony
- Def also claims that because the crime to which the tampering was related is undetermined, he can't be convicted of criminal solicitation for an "indeterminate" crime
- COA rejects reliance on *State v. Jackson*, 2010-NMSC-032, in which the Court held that the "indeterminate" portion of tampering applied to def's providing a false urine sample while on probation
- Tampering with evidence can be a stand-alone crime not tied to a separate crime – *State v. Radosevich*, 2016-NMCA-060 (cert pending)

SUFFICIEINCY OF EVIDENCE – DWI (DRUGS)

- *State v. Deseree Gonzales*, No. 35296 (N.M. S. Ct. Feb. 28, 2017) (unpublished disposition)
- Def drove 95 mph after a "rave", drifted across lanes, smelled of marijuana, admitted she had smoked marijuana, and said "I know, I know" when told she should not drive in that condition
- Court of Appeals held there was insufficient evidence she was impaired by marijauana and held that scientific evidence is needed in drug impairment cases
- Supreme Court reversed
- "Although DRE evidence is helpful to a fact finder, its use is not required in every case."

STATUTORY CONSTRUCTION

- *State v. Begay*
- *State v. Jimenez*
- *State v. Lindsey*
- *State v. Lozoya*
- *State v. Merhege*
- *State v. Montoya*
- *State v. Suazo*

STATUTORY CONSTRUCTION – Section 31-20-8

- *State v. Trevor Begay*, 2017-NMSC-009, 390 P.3d 168
- Def absconded from mag court probation and bench warrant was issued
- Def claimed bench warrant didn't toll his probation term because the tolling provision applies only to district court - § 31-21-15(C) and COA so held
- § 31-21-15(C) was fixed by legislation in March 2016 but Supreme Court found issue was still of public importance due to number of affected orders from the lower courts
- Under §§ 31-20-8 and 31-20-9, a court is deprived of jurisdiction once the probationary period has expired
- The Supreme Court interpreted § 31-20-8 to allow the trial court to revoke probation when, at the time of the expiration of the term, the probationer had allegedly violated and was subject to a bench warrant. Otherwise, the statute's application is "absurd" and would encourage probationers to simply abscond
- Thus, Court diverges from the plain language of the statue and held it cannot be read to include those situations where the probationer causes, by evasion of the court's authority, the revocation order to be entered after the probationary term has ended

STATUTORY CONSTRUCTION – RESISTING, EVADING OR OBSTRUCTING

- *State v. Noe Jimenez*, No. 34,375 (N.M. Ct. App. Feb. 14, 2017)
- Def charged with the *evading* portion of resisting, evading, or obstructing an officer – Section 30-22-1(B) – rather than "resisting or abusing" – Section 30-22-1(D)
- Prosecutor is free to charge this crime under multiple subsections if it is not clear which theory the evidence will support but State limited itself to proving evasion
- State did not prove defendant "fled, attempted to evade, or evaded" the officer – evidence was telephonic contact with the officer and refusal to obey his orders
- Employs the well-known rule of statutory construction *noscitur a sociis* – the word is known by the company it keeps
- Court considers statute as a whole and holds that Subsection B requires actual flight to constitute evasion – temporally, will usually happen before "resisting"
- Resisting is a direct engagement with an officer or refusal to comply with an order – refusal to do something is "resisting" and not "evading"

STATUTORY CONSTRUCTION – HABITUAL OFFENDER

- *State v. Zachary Lindsey*, No. 34,184 (N.M. Ct. App. Mar. 20, 2017)
- Section 31-18-17(A) allowing the district court to not impose a mandatory one-year habitual for a non-violent offense if the court finds "substantial and compelling reasons" to depart from that sentence
- Here, State argued there were no such reasons – doing well on probation is the expected outcome rather than a special circumstance and defendant's impending fatherhood was also not a good reason – Legislature used the term for a reason
- COA said "substantial" is "innately inexact" and that "compelling" is also a subjective term
- COA concluded that both terms are subjective and reaffirmed that it should "steer well away from excessive supervision" of district court discretionary decision

STATUTORY CONSTRUCTION - CDM

- *State v. Brandon Lozoya*, No. 34,651 (N.M. Ct. App. Apr. 5, 2017)
- Def helped Child, whom he had never met before, shoplift alcohol
- Def claimed that instructing that he "allowed Child to shoplift" was legally insufficient because civil law requires a duty to protect another from harm that was absent here
- Court rejects this theory – they were sufficiently acquainted and working together
- Def also claimed there was no proof he knew Child was a minor – COA disagrees
- Purpose of statute is to protect children and courts reject narrow interpretations that limit this purpose

STATUTORY CONSTRUCTION – CRIMINAL TRESPASS

- *State v. Trevor Merhege*, No. 34775 (N.M. Sup. Ct. Mar. 30, 2017)
- Criminal trespass – Section 30-14-1(B)
- COA held that the language "notice of no consent to enter shall be deemed sufficient notice to the public and evidence to the courts, by the posting of the property at all vehicular access entry ways" meant that no posting meant insufficient evidence
- Supreme Court reversed – sufficient circumstantial evidence showed defendant the knowledge requirement
- Owner had a 3' fence; defendant jumped over it at 3:40 a.m. to evade a pursuer.
- General public not presumptively granted permission to enter onto unposted lands.

STATUTORY CONSTRUCTION – "PERSONHOOD"

- *State v. Joseph Montoya*, No. 35,006 (N.M. Ct. App. Dec. 29, 2016)
- Can you be convicted of robbery when the victim is already dead?
- Under the facts of this case, yes. Def and others robbed and killed the victim. Def returned a few hours later and emptied the victim's pockets and set the victim and his residence on fire
- Def argued the victim didn't have immediate control of the stolen money because he was dead and he was essentially no longer a "person"
- However, there is precedent that to the contrary if the killing and taking of property is part of the same transaction – i.e. if the robbery is made possible by the antecedent assault. Although you can't rob a person who is already dead when you come to the scene, "one can certainly rob a living person by killing that person and then taking his or her property."

STATUTORY CONSTRUCTION - SECOND-DEGREE MURDER

- *State v. Marcos Suazo*, 2017-NMSC-011, 390 P.3d 674 – COA certified the case to the S. Ct.
- Def pointed his gun at a friend; friend grabbed gun and put the barrel in his mouth; def pulled the trigger thereby killing friend and seriously injuring another friend standing right behind
- Evidence that def didn't know the gun was loaded
- Prosecutor succeeded in having the UJI changed from "knew his acts created a strong probability of death or GBH" to "knew *or should have known*"
- Supreme Court held this was error – (1) not in accord with plain language of the statute; (2) rejects argument that a prior cases' dicta that second-degree murder requires "an objective knowledge of the risk" is controlling; that was dicta to draw a distinction between subjective knowledge needed for depraved mind murder and second-degree; (3) consistent with holdings that an accidental or negligent killing can't satisfy second-degree murder; (4) "should have known" is ordinary negligence and thus a less culpable mental state than that for involuntary manslaughter (criminal negligence)
- Also rejected argument that conviction for agg batt was sufficient because it was the same act and required a finding that def "intended to injure [victim] or another" because mens rea was crucial – can't say if def knew the gun was loaded or if he should have known – latter finding can't support second-degree and this misdirected the jury. Jury was also led to believe that this mens rea was sufficient for agg batt
- Justice Nakamura dissented finding that the agg batt conviction, and its mens rea, cured the error – the jury necessarily rejected def's theory that he didn't know the gun was loaded. Def couldn't intentionally shoot one victim and accidentally shoot the other.

STATUTORY CONSTRUCTION - DWI

- *State v. Luis Alfredo Garcia*, 2016-NMCA-044, 370 P.3d 791, *cert. granted*, No. 35,771
- 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?
- TO BE ARGUED ON MAY 10

CHILD ABUSE

- *State v. Jadrian Lucero*

CHILD ABUSE - INTENTIONAL

- *State v. Jadrian Lucero*, 2017-NMSC-008, 389 P.3d 1039
- Death of 47-day old baby due to "devastating brain injuries" caused by blunt force trauma
- Def convicted of one count of intentional child abuse resulting in death of child
- Def told police he could have accidentally done something and it was probably his fault
- Instructions were for intentional child abuse only; def claimed fundamental error on appeal because instructions didn't say he had further intent to abuse or harm so jury could have convicted him of any intentional act that eventually led to the baby's death
- Court agrees such convictions must be based on proof of an intentional act rather than merely accidental, or reckless, conduct
- But instructions (the UJIs at the time) didn't do this – had to find def either caused baby to be placed in situation that endangered her life or that he caused baby to be tortured, cruelly confined, or cruelly punished and that he acted intentionally in either case
- Jury wouldn't have been confused – State's only theory was that def intentionally hit baby causing immediate and severe injuries and the defense was that he wasn't the abuser
- Court contrasts this with *Consaul* in which the State "changed its theory during trial"

DOUBLE JEOPARDY

- *State v. Bello*
- *State v. Huerta-Castro*
- *State v. Lozoya*

DOUBLE JEOPARDY

- *State v. Armis Bello*, No. 34,165 (N.M. Ct. App. Mar. 2, 2017)
- Convicted of trafficking cocaine by distribution and trafficking cocaine by possession with intent to distribute
- Undercover buy – officer first bought a rock from def through an intermediary and then immediately bought another rock from def directly
- Unit of prosecution analysis – same conduct results in multiple convictions. Did Legislature intend punishment for course of conduct or each discrete act?
- Here, two separate transfer that while close in time, were not contemporaneous

DOUBLE JEOPARDY/DUPLICATIVE CHARGES

- *State v. Jorge Bernardo Huerta-Castro*, 2017-NMCA-026, 390 P.3d 185
- 12 counts of CSPM – two children (6 and 8 yoa) but otherwise duplicate charges. Def lived in the house with the victims
- COA found DJ and DP violation and dismissed 10 of the charges and remanded for one count on each victim
- Charged time period was sufficiently short and specific - only two months
- But State must show "factually distinct basis" and can't rely on "cookie-cutter allegations" – def claimed he could have been at work depending on the day or the time
- District court erred in holding that denial of bill of particulars could be cured by judging the evidence at trial – doesn't address def's right to know the nature of the charges against him – must be judged by the sufficiency of facts in the charging document – rejects "post-facto" analysis
- Lack of specificity was fatal – *State v. Dominguez*, 2008-NMCA-029; *See also State v. Vargas*, 2016-NMCA-038, 368 P.3d 1232
- Conflict between *Dominguez* and *Baldonado*?

DOUBLE JEOPARDY

- *State v. Brandon Lozoya*, No. 34,651 (N.M. Ct. App. Apr. 5, 2017)
- CDM and shoplifting
- Def, 27, drove with Child, 15, to buy alcohol – acted as Child's lookout in the store while she stole booze
- Def said he didn't know she was shoplifting and he didn't know she was a minor
- Conduct was unitary and a DJ violation
- Reaffirms that lesser conviction, shoplifting, is the one to be vacated when DJ is violated

EVIDENTIARY RULINGS

- *State v. Lozoya*
- *State v. Suazo*

EVIDENTIARY RULINGS

- *State v. Brandon Lozoya*, No. 34,651 (N.M. Ct. App. Apr. 5, 2017)
- Def was impeached, in CDM prosecution, with prior robbery conviction
- Def claims prejudice – almost 10 years old, not a crime of dishonesty and showed only propensity
- Allowed by Rule 11-609(A)(1)(b) as def took the stand and his credibility was a central issue, even though there was some similarity between the shoplifting charge and the robbery
- And robbery is a crime of dishonesty

EVIDENTIARY RULINGS - HEARSAY

- *State v. Marcos Suazo*, 2017-NMSC-011, 390 P.3d 674
- Def sought to introduce hearsay statements made by him, while he was upset and crying, an hour after the shooting to the effect that he killed his best friend and didn't know the gun was loaded – clearly hearsay as offered for the proof of the matter asserted
- State's objections sustained and upheld by S. Ct.
- Not sufficiently spontaneous to be excited utterance – def drove away, took his batteries out of his phone, told his girlfriend he was going away, made several stops, and hid the shotgun
- Also not present sense impression due to the time lapse and intervening actions

JURY INSTRUCTIONS

- *State v. Jimenez*
- *State v. Percival*

JURY INSTRUCTIONS

- *State v. Noe Jimenez*, No. 34,375 (N.M. Ct. App. Feb. 14, 2017)
- Felon in possession of a firearm
- Claim of fundamental error for failure to include optional language from 14-130 – UJI on constructive possession
- "A person's presence in the vicinity of the object or his knowledge of the existence or location of the object is not, by itself, possession."
- Definitional instructions are not always essential – *State v. Barber*, 2004-NMSC-019, 135 N.M. 621
- Not error because the State did not rely only on proximity to prove possession and had evidence of actual possession
- The concept of the omitted language was already covered by the given instruction

JURY INSTRUCTIONS - DURESS

- *State v. Raquel Percival*, No. 34,385 (N.M. Ct. App. Feb. 6, 2017)
- Agg DWI and careless driving
- Claim of incomplete instruction on duress defense – she was at a house and felt unsafe with a man there
- Jury was given 14-5130 – feared immediate GBH to self or another unless crime was committed and reasonable person would have done the same
- Unlike other defenses, the Use Note to this UJI wasn't amended to require that the absence of duress be included as an essential element of the charged offense
- Duress excuses intentional conduct while other defense negate an essential element of the offense
- Including absence of duress would not negate any of the essential elements of the crimes – careless driving requires general criminal intent and DWI does not require criminal intent
- "Intuitively, jurors need not consider a duress defense" if they find the State didn't prove the elements – only if they find the def is guilty of the elements, would they then turn to consider duress

JURY INSTRUCTIONS – INCORRECT ORAL CHARGE

- *State v. Raquel Percival*, No. 34,385 (N.M. Ct. App. Feb. 6, 2017)
- In reading 14-5130 to the jury, the court mistakenly said the burden was on the State to prove def acted under such reasonable fear rather than the burden was on the State to prove she *did not* act under such reasonable fear
- However, no error because written instructions were correct and jurors are presumed to follow the written ones
- *State v. Ortiz-Castillo*, 2016-NMCA-045, ¶ 12 – "the purpose of written jury instructions relates directly to the [limited] ability of jurors to remember oral instructions once they have retired to the jury room."

SPEEDY TRIAL

- *State v. Walter Brown*

SPEEDY TRIAL – EFFECT OF PRETRIAL INCARCERATION

- *State v. Walter Brown*, No. 34,388 (N.M. Ct. App. Mar. 2, 2017)
- 42-month delay in 2nd degree murder – 24 months past presumptively prejudicial threshold of 18 months for complex case
- Length of delay weighs heavily in def's favor
- Reason for the delay weights slightly to moderately in def's favor – 5 months weigh in State's favor, 18 in def's, and 19 months are neutral.
- Assertion of the right – court finds it isn't "critical" to the "final outcome" and weighs it in def's favor because he made 12 assertions in pleadings
- Prejudice – COA considers the incarceration which was later found to be in violation of Rule 5-401 in the first *Brown* decision, to be "unlawful" and therefore weighed heavily against the State – the "unlawful and arbitrary" bail "heightened the prejudice factor" and is weighed more heavily in def's favor
- We have filed a cert petition

SPEEDY TRIAL

- Request trial settings in writing – new judge
- Careful of what you say on the record
- Request rulings on pending motions
- Do not always acquiesce to defense requests for continuance - *Serros*
- Beef up the record for appellate review by showing the State's readiness for trial
- Hardest cases are ones with long periods with no activity and no State pleadings

POST-CONVICTION CONSIDERATIONS

- *State v. Lucero*

COMMUNICATION WITH JURORS

- *State v. Jadrian Lucero*, 2017-NMSC-008, 389 P.3d 1039
- Intentional child abuse resulting in death
- Def moved for new trial based on email sent by juror to court after conviction claiming that def was found guilty based upon a negligence theory – i.e. that def failed to care for his daughter but didn't murder her
- Def claims denial to his right to a unanimous jury
- (1) instructions specified only an intentional act, and did not reference recklessness, negligence, or failure to act (2) the court offered to poll the jury and def declined and (3) court couldn't authenticate the email
- And Rule 11-606(B) prohibits receiving testimony or evidence from a juror re: validity of a verdict with three narrow exception none of which apply here
- Rejects def's claim that an erroneous jury instruction constituted the "extraneous prejudicial information" exception

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Gallegos-Delgado*
- *State v. Montoya*
- *State v. Ramirez*
- *State v. Turner*

IAC – IMMIGRATION CONSEQUENCES

- *State v. Manuel Gallegos-Delgado*, No. 34,321 (N.M. Ct. App. Dec. 7, 2016)
- Def pled guilty to a drug charge and was permanently deported
- Claim of IAC – his attorney consulted an immigration attorney and told him he may be deported but not that he would be forever barred reentry.
- District court denied motion to withdraw his plea and COA reversed
- *State v. Paredez*, 2004-NMSC-036, established that failure to advise on immigration consequences on a guilty plea is deficient performance
- *State v. Carlos*, 2006-NMCA-141 – attys must "conduct an individualized analysis of the apparent immigration consequences" for their client
- Not clear here if atty told def that deportation was a certainty – def's plea wasn't voluntary and intelligent
- Prejudice requires "reasonable probability" that def would not have taken the plea. Must show decision not to plead would have been "rational" under the circumstances. May consider def's pre-conviction statements and actions, strength of State's case, evidence of def's connections to the U.S., and def's post-conviction behavior.
- Evidence of def's contact of an immigration atty show pre-conviction efforts to avoid deportation; def got married based on that advice
- State's case was strong but consequences for def were harsh
- Def had wife and young child in U.S. and lived here since 1998
- Def also moved quickly to seek relief from the judgment

IAC – FAILURE TO REQUEST JURY INSTRUCTION

- *State v. Montoya*, No. 35,006 (N.M. Ct. App. Dec. 29, 2016)
- Claimed IAC for failure to request larceny as lesser included of robbery
- Could have been a tactical decision to defeat the second robbery conviction completely
- No prejudice because no reasonable possibility the outcome would have been different – no discussion on this prong, just the conclusion

IAC - generally

- *State v. Albert Jose Ramirez*, No. 34576 (N.M. S. Ct. Dec. 1, 2016) (unpublished disposition)
- Def was a difficult client – refused to answer questions on direct examination, tried to fire his atty in front of the jury, and had an outburst
- The district court repeatedly said that counsel was providing excellent representation and did not hold an evidentiary hearing on IAC
- Supreme Court finds the record is insufficient on IAC and recommends habeas as a remedy

IAC – GUILTY PLEA

- *State v. Bill Turner*, 2017 WL 1000530, ___ P.3d ___ (N.M. Ct. App. Mar. 14, 2017)
- Def pled guilty to 13 counts of securities fraud
- Plea colloquy indicated def acted knowingly and voluntarily
- Def atty claimed IAC on all her cases – the new district PD argued against it
- Before restitution hearing, def moved to withdraw his plea claiming that he contracted MRSA due to his highly unhygienic inmate and he was therefore coerced into the plea to avoid this inmate
- John Sugg testified that the plea was the result of months of negotiation and no reason to think it wasn't voluntary
- Prejudice in plea context is that it "affected the outcome of the plea."
- No evidence to show IAC in the plea – speculative claims on first prong
- No prejudice – "improbable" that def, who was facing a life sentence and was facing a strong case, would have gone to trial when he got a plea under which he could potentially serve no time – any contrary assertion is "self-serving statement"

COMPETENCY

- *State v. Linares*
- *State v. Ramirez*

COMPETENCY

- *State v. Desiree Linares*, 2017 WL 931476 (N.M. Sup. Ct. Mar. 9. 2017)
- Juvenile murdered her foster mother
- Dr. Cave found her incompetent to stand trial due to mental retardation and def was civilly committed
- Issue was the State's need to have an independent evaluation as the report was internally inconsistent – said she was mentally retarded yet competent to enter a plea – court granted it but held that Dr. Cave could sit in on the evaluation so her concerns could be immediately addressed
- The State's expert said rules of professional conduct precluded this but court insisted due to age of the case
- State refused and court quashed its order for the eval
- Supreme Court held this wasn't an abuse of discretion because the court wanted to move the case along
- Incompetency finding wasn't abuse of discretion – mental retardation alone doesn't equate to incompetency and the court did consider both

COMPETENCY

- *State v. Albert Jose Ramirez*, No. 34576 (N.M. S. Ct. Dec. 1, 2016) (unpublished disposition)
- Def shot his mother's boyfriend in the head and pled guilty
- Def was found competent and was found guilty by a jury of first-degree murder
- Claim was raised both before and during trial – implicates Rule 5-602(B)(2)(a) and (2)(b)
- Before trial: def asked for a fifth eval a week before trial and court denied the request
- Standard is whether def has shown there is a reasonable doubt as to competency – not shown here where def only said he suffered from a mental illness and not that he could not aid his counsel. Also not enough just to say his prior eval was eight months ago
- During trial: raised by defense counsel saying that def "didn't understand" and "didn't know how to behave"- he was crying, interrupting, and making statements contrary to his interest – court denied the request
- Rule 5-602(B)(2)(b) requires that the jury be instructed on the issue if it's raised during trial; however, the reasonable doubt standard is "implied" in this rule. Court adequately addressed the concerns and no instruction was requested by def.

MISCELLANEOUS ISSUES

MANDATORY SEX OFFENDER PAROLE PERIOD

- A sex offender defendant is sentenced and district court later amends J&S to include the correct parole period of 5-20 years
- Call me if you have this issue
- We have had some success in upholding this despite *State v. Torres*, 2012-NMCA-026, 272 P.3d 689, which held that trial court lacked jurisdiction to consider the State's motion to correct an illegal sentence.

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
- Please state what is happening – can't see gestures

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
- New UJIs for assault crimes – I will get them up on our website

DNA FEE – MANDATORY COLLECTION

- NMSA 1978, § 29-16-11 (1997)
- "Each time that a covered offender is convicted, the court **shall** assess a DNA fee of $100 in addition to any other fee, restitution or fine. The corrections department shall collect the DNA fee from the covered offender for deposit in the fund."
- NMSA 1978, § 29-16-3(C) – "covered offender" means any person convicted of a felony offense as an adult; any person convicted as an adult pursuant to youthful offender or serious youthful offender proceedings; or any person required to register under SORNA.

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*