NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

Appellate Law Update
April 19, 2018
M. Anne Kelly, Division Director
Criminal Appeals Division

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;

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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 and can be cited

STATUS OF AN APPEAL

- Both appellate courts are now accepting **only** electronic filing
- Check Odyssey as both appellate courts are now on-line
- Numbers for Supreme Court are S-1-SC-12345
- Number for Court of Appeals are A-1-CA-12345
- Or call me – (505) 717-3505

NEW MEXICO SUPREME COURT

- 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

NEW MEXICO COURT OF APPEALS

- Rule 12-405 NMRA permits citations to unpublished opinions (memorandum opinions)
- All opinions, published and unpublished, are available on the New Mexico Court of Appeals website – https://coa.nmcourts.gov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
- 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
- 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**
- 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 yet assigned a COA number
- 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

HABEAS APPEALS

- Habeas cases – if State loses, the State has an automatic direct appeal to the Supreme Court
- File notice of appeal in district court and serve on Supreme Court
- File 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 always call the prosecutor if we receive a proposed summary reversal – often we just need more facts

FILING IN THE APPELLATE COURTS

- Use 14-point type – Rule 12-305(C)(1)
- Can only file electronically

NEW MEXICO SUPREME COURT OPINIONS AND DECISIONS from November 2017 to April 2018

- *Ira v. Janecka*
- *State v. Arvizo*
- *State v. Carmona* (unpublished)
- *State v. Chadwick-McNally*
- *State v. Chakerian*
- *State v. Ferry*
- *State v. Filemon V.*
- *State v. Franklin*
- *State v. Galindo*
- *State v. Gardner* (unpublished)
- *State v. Groves*
- *State v. Lucero* (unpublished)
- *State v. Maestas*
- *State v. Martinez*
- *State v. McDowell*
- *State v. Radosevich*
- *State v. Alejandro Ramirez*
- *State v. Luis Ramon Ramirez* (unpublished)
- *State v. Tapia*
- *State v. Torres*
- *State ex rel. Torrez v. Whitaker*

NEW MEXICO COURT OF APPEALS PUBLISHED OPINIONS from November 2017 to April 2018 (and two unpublished opinions)

- *State v. Aslin*
- *State v. Branch*
- *State v. Costello* (unpublished)
- *State v. Gwynne*
- *State v. Hnulik*
- *State v. Lewis*
- *State v. Luna*
- *State v. Miera*
- *State v. Montano*
- *State v. Nehemiah G.*
- *State v. Ortiz*
- *State v. Pareo*
- *State v. Salazar*
- *State v. Sena*
- *State v. Tarango* (unpublished)
- *State v. Vanderdussen*
- *State v. Widmer*

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."

RULE 5-409 – PRETRIAL DETENTION

- Very tight deadlines for hearing, appeal, and disposition of appeal
- Only the district courts – as courts of record – have the authority to enter detention orders unless and until Legislature changes this
- Defendant has the right to be present and represented by counsel, to testify, to present witnesses, to compel attendance of witnesses, to CX witnesses, and to present information by proffer or otherwise. Rule 5-409(F)(3)
- Must show "by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."
- Appellate courts are using an abuse of discretion standard of review and generally affirm
- Court of Appeals has **not** applied the *Duran* presumption of ineffective assistance of counsel for late appeals under this rule
- Court of Appeals will not consider the appeal unless the appellant provides a copy of the hearing
- We handle defendants' appeals; DAs handle State's appeals

"CAPITAL" OFFENSE

- *State v. Muhammad Ameer*, S-1-SC-36395
- Supreme Court nullified the constitutional provision contained in Article II, § 13 that allows for no bond holds on persons charged with "capital offenses"
- The Court held that at the time the constitution was passed, capital meant only death penalty
- The death penalty was repealed in 2009, so this provision is a nullity
- By order of May 8th, the Court remanded the case to district court for a hearing under the new constitutional provision
- No formal opinion yet
- "Capital offense" is still a term used by the Legislature to denote first-degree murder

BAIL - PRETRIAL DETENTION

- *State v. Ferry*
- *State v. Groves*
- *State ex rel. Torrez v. Whitaker*

CONSIDERATION OF OFFENSE ALONE TO PROVE DANGEROUSNESS

- *State v. Ferry*, 2018-NMSC-004, 409 P.3d 918
- State's appeal on the grounds that the court did not sufficiently consider the nature of the offense (first-degree murder) on the belief *State v. Brown*, 2014-NMSC-038, forecloses consideration of the offense
- "We also conclude that it is necessary to make sure that the nature and circumstances of a defendant's conduct in the underlying charged offense(s) may be sufficient, despite other evidence, to sustain the State's burden of proving by clear and convincing evidence that the defendant poses a threat to other or the community." ¶ 6
- The State **also** must prove, by clear and convincing evidence, that no release conditions will suffice. "For example, the State may introduce evidence of a defendant's defiance of restraining orders; dangerous conduct in violation of a court order; intimidation tactics; threatening behavior; stalking of witnesses, victims, or victims' family members; or inability or refusal to abide by conditions of release in other cases. The potential evidence of a person's dangerous inability or refusal to abide by the directive of an authority figure are so variable that it is difficult to catalog all the circumstances that might satisfy the State's burden of proof." ¶ 6
- Court must not "automatically" consider any one factor to be dispositive and must file written findings of the individualized facts justifying detention
- Remanded because of the ambiguity in the written order here; unclear if the court found the nature and circumstances of the underlying crime can never in or of themselves be sufficient for pretrial detention

PRETRIAL DETENTION - WHAT THE COURT MUST FIND

- *State v. Elexus Groves*, 2018-NMSC-006, 410 P.3d 193
- Court is to make three categories of determination: (1) which information carries sufficient indicia of reliability to be worthy of consideration; (2) the extent to which that information would indicate that a def may be likely to pose a threat to safety of others if released and (3) whether any potential pretrial release conditions will reasonably protect the safety of others
- Def's criminal history carried strong indicia of reliability and district court was entitled to consider it in its determination
- Def's past criminal conduct created a strong basis for reasoned inferences of her likely future criminal conduct – three vehicle thefts within a few weeks followed by recklessly dangerous flights from police
- Def "demonstrated a pattern of refusal to comply with directions of the courts and of police" and thus substantial evidence supported finding that no release conditions would protect the community. ¶ 38
- Court's decision was supported by "substantial evidence" and the district court did not act arbitrarily or capriciously in ordering detention

EVIDENCE NEEDED

- *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, 410 P.3d 201
- Writ of superintending control regarding type and quantity of evidence for pretrial detention hearings
- Reiterates *Brown* holding that bail is not meant to allow dangerous/flight risk defs to bail out while poor low-risk defs are held on bonds they can't meet
- Pretrial release decisions should focus on "evidence-based assessments of individuals risks of danger and flight." ¶ 68
- The amendment as passed does not apply to nondangerous defendants who post only a flight risk
- "There is nothing in the text of the rules or their legislative history that would require live witnesses in every case or that otherwise would limit the discretion of the court in relying on information that it may find reliable or helpful." ¶ 80.
- Live witnesses are not required by either the state or federal constitution.
- But courts are to assess which information "in any form carries sufficient indicia of reliability to be worthy of consideration by the court[.]" ¶ 99

PRETRIAL DETENTION TIPS

- Make sure your judge files a written order with individualized facts; an oral ruling will not suffice
- Make sure you address both the def's threat to others or the community *and* that no release conditions will reasonably protect the safety of the community
- The clear threat of future criminal activity, whether or not the def has a *violent* criminal history, can be sufficient. *United States v. Cook*, 880 F.2d 1158, 1161 (10th Cir. 1989) (reversing denial of government's motion to revoke defendant's release pending appeal, taking into account likelihood that he "might engage in criminal activity to the detriment of the community" if released) (citation omitted); *United States v. Daniels*, 772 F.3d 382, 383 (7th Cir. 1985) (evidence that defendant would pose a danger to the community by committing more crimes if allowed release pending trial sustained pretrial detention order).

STATE'S RIGHT TO APPEAL

- *State v. Nehemiah G.*

STATE'S RIGHT TO APPEAL - IMPOSITION OF JUVENILE INSTEAD OF ADULT SENTENCE

- *State v. Nehemiah G.*, A-1-CA-35528 (N.M. Ct. App. Mar. 9, 2018)
- State appealed judge's determination that State did not prove that Nehemiah was not amenable to treatment
- First question; can the State appeal this determination?
- No dispute that it was a final order
- Court held the State's statutory right to appeal was found in Section 39-3-7 which provides for an appeal in a "special statutory proceeding" and Children's Code proceedings are included
- Second question; is the State an aggrieved party?
- COA is currently reading that requirement to mean the State is aggrieved only if it alleges a disposition "contrary to law."
- State argued the court acted contrary to law because it did not make the findings required by Section 32A-2-20(C) (although then COA reviewed merits for abuse of discretion)
- COA did not discuss whether State had constitutional right to appeal

DISCOVERY

- *State v. Branch*
- *State v. Lewis*

DISCOVERY – MENTAL HEALTH RECORDS

- *State v. Lawrence Branch*, No. A-1-CA-33064 (Jan. 23, 2018)
- Def sought disclosure of his son's (the victim's) military discharge paperwork – State asserted the victim's service as a Marine "could not possibly provide a justification for Defendant shooting him in the leg." ¶ 37
- Def claimed the records might show the victim's propensity for violence and possible PTSD
- District court correctly found that specific instances of a victim's prior violent conduct is not admissible as propensity evidence for a self-defense claim
- Defendant also never requested an in camera review of the sensitive records and cannot show that the records contained relevant information

DISCOVERY – STATE'S OBLIGATIONS

- *State v. Damon Lewis*, 2018-NMCA-019, 413 P.3d 484
- State's appeal from district court sanction of dismissal with prejudice for failure to timely turn over recordings of witness interviews
- State conceded that it "definitely violated" its obligations under LR2-400.1(D) to timely provide the recordings and sanctions are therefore mandatory
- However, district court failed to explain the manner in which it considered culpability, prejudice, and lesser sanctions under *State v. Harper*, 2011-NMSC-044
- COA reversed and remanded for further consideration in light of these factors

PLEA AGREEMENTS

- *State v. Tarango*

PLEA AGREEMENT - IMMIGRATION CONSEQUENCES

- *State v. Daniel Tarango*, A-1-CA-35443 (N.M. Ct. App. Feb. 12, 2018) (non-precedential)
- Defendant pleaded guilty to possession in 1997 and court found plea was voluntary and knowing.
- Defense counsel said that as far as he knew, def was a legal immigrant
- Defendant was deported before sentencing but then came back to get his family and told the court at sentencing that he wanted to return to Mexico with his family
- 17 years later, he moved to withdraw his plea claiming that his attorney did not tell him that the plea would affect his immigration status, his ability to apply for permanent residence, or that he would be deported
- *State v. Paredez*, 2004-NMSC-036, ¶ 19, obligates defense counsel "to determine the immigration status of their clients" "including whether deportation would be virtually certain."
- Def submitted a general affidavit from his defense counsel saying he did not recall the specifics of the case
- Here, age of the case worked against def because there was no evidence that counsel did not discuss it with him and def signed the plea agreement saying he had been advised
- COA also deferred to the district court when it did not believe def's testimony that he would have gone to trial in light of his statements at the sentencing
- Reiterated that self-serving statements of a def alone are not enough to prove first prong of IAC

GRAND JURY

- *State v. Pareo*

GRAND JURY TARGET'S RIGHT TO TESTIFY

- *State v. Darcie and Calvin Pareo*, A-1-CA-35857 (N.M. Ct. App. Apr. 2, 2018)
- Targets showed up to testify and prosecutor twice informed the grand jury they were there
- Grand jury declined to hear from them and returned a true bill
- Held: targets had right to testify before grand jury; that right was violated; and no prejudice need be shown
- Section 31-6-11-(C)(3) provides a target must be notified of his "right to testify" before the grand jury; Rule 5-302(A)(1)(d) requires a prosecutor to notify the target in writing of his right to testify
- Although these are notice provisions, they "create a right to testify, because it would make no sense for the Legislature to require the prosecutor to notify the target of the 'right to testify' if the Legislature did not also intend for such a right to exist." ¶ 6.
- Prosecutor failed in not telling the grand jury the targets had a right to testify and this failure to "provide correct and complete advice" resulted in deprivation of the right to testify. ¶ 8
- Grand jury could not decide simply not to hear the targets. ¶ 12
- No prejudice nor bad faith need be shown because right to testify is "structural." ¶ 15

FIRST DEGREE MURDER

- *State v. Carmona*
- *State v. Gardner*
- *State v. Lucero*

DIVIDING LINE BETWEEN FIRST AND SECOND DEGREE MURDER

- *State v. Enrique Carmona*, No. S-1-SC-36031 (N.M. S. Ct. Jan. 25, 2018) (unpublished decision)
- Def and victim were drinking and a fight broke out with a number of people. Victim turned to face def and def pulled a gun. Def looked at victim for five seconds, "thought about it", and shot him in the head. He then shot at the victim's brother
- Claimed self-defense and said victim was about to hit him with a bottle
- When a def is alleged to have formed the deliberate intent to kill within a short period of time, the State must provide other evidence of deliberate intent
- Only evidence of deliberation was the shooting itself
- Def did not retrieve or load the weapon and did not have a prior history with the victim
- NMSC vacated the first-degree murder and remand for entry of judgment on second-degree murder because of "ample evidence" of an intentional killing

FIRST-DEGREE MURDER – CIRCUMSTANTIAL EVIDENCE

- *State v. Manuel Gardner*, No. S-1-SC-35981 (N.M. S. Ct. Mar. 8, 2018) (unpublished decision)
- First-degree murder and armed robbery for fatally shooting owner of a jewelry store
- Evidence was circumstantial but district court correctly declined to give instructions on it
- UJI 14-5001 and 5002 are not to be given; the reasonable doubt instruction is sufficient
- NM law does not recognize a difference between direct and circumstantial evidence
- Evidence was sufficient based on testimony from witnesses near the scene, inmate informers, a surveillance video, and def's history with the store
- No *Brady* violation for failure to disclose records that one of the inmate informers perjured himself in placing him at the same facility
- No error because defense counsel "effectively tarnished" his credibility as a witness and it was cumulative with the other inmate informer – therefore, no materiality under *Brady* even if it was suppressed by the prosecution and was favorable to def

FIRST DEGREE MURDER - FELONY MURDER

- *State v. Steven Lee Lucero*, S-1-SC-36128 (Feb. 19, 2018) (unpublished decision)
- Def and co-defs lured victim to vacant house, stabbed him, stole his truck, returned to find him still alive, delivered a fatal stab wound, and stole his wallet and $15
- Sufficient evidence for felony murder and conspiracy to commit felony murder
- Robbery element of separating something of value from the person or his immediate control was satisfied where def incapacitated the victim before taking his property
- Def claimed that killing did not occur during the commission of the predicate felony of armed robbery because he had already stolen the truck when he returned to deliver the fatal blow
- Court disagreed and held it was a "continuous transaction" and "closely connected in time, place and causal relation" where defendant stabbed the victim to take his truck and then returned and took the victim's wallet and killed him. ¶ 23

STATUTORY CONSTRUCTION

- *State v. Radosevich*
- *State v. Salazar*

TAMPERING WITH EVIDENCE

- *State v. John Radosevich*, S-1-SC-35864 (Apr. 12, 2018)
- Section 30-22-5 – graduated penalties depending on degree of underlying crime
- 4th degree felony if crime for which tampering is committed is a 3rd or 4th degree felony; petty misdemeanor if crime is a misd or petty misd; but a 4th degree felony if the crime is indeterminate
- COA remanded for entry of a felony tampering but, under the circumstances of this case, jury was not required to find whether the underlying offense was a felony or a misdemeanor
- Tension between *State v. Jackson*, 2010-NMSC-032, and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that any fact that increases a penalty for a crime is an element that must be submitted to the jury and proved b/r/d
- Statute "cannot be constitutionally applied to impose greater punishment for commission of tampering where the underlying crime is indeterminate than the punishment prescribed under Section 30-22-5(B)(3) where the underlying crime is a misdemeanor or petty misdemeanor."
- (1) Court "insulates" the indeterminate portion of the statute from invalidity by limiting its penalties to the lowest level of punishment of a petty misdemeanor.
- (2) Highest crime for tampering with evidence of a probation violation is the highest crime for which the def is on probation, rather than an indeterminate crime, overruling *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452. In *Jackson*, def falsified his urine test for probation but Court upheld his tampering conviction as for an indeterminate crime.

STATUTORY CONSTRUCTION - SYNTHETIC CANNABINOIDS

- *State v. Paul Salazar*, A-1-CA-34909 (N.M. Ct. App. Feb. 28, 2018)
- Chemicals 5F-PB22 and PB-22 found in deodorant sticks
- Def argued they were not listed as controlled substances in the Controlled Substances Act – NMSA 1978, § 30-31-6(C)(19)(a)-(k) and State thus failed to prove they were synthetic cannabinoids as prohibited by law
- The CSA designates "synthetic cannabinoids" as Schedule I controlled substances, "including" 11 listed substances in (a) – (k)
- Statute is not limited to these 11 – "including" means it is not an exclusive list. Court quotes to the Legislative Council Service's Legislative Drafting Manual
- Forensic chemist testified that the 5F-PB22 and PB-22 were completely synthetic but mimicked the effects of cannabis and evidence was sufficient on that point

SUFFICIENCY OF THE EVIDENCE

- *State v. Arvizo*
- *State v. Branch*
- *State v. Ramirez*
- *State v. Salazar*

SUFFICIENCY OF THE EVIDENCE – CSCM

- *State v. Oscar Arvizo*, No. S-1-SC-36000 (N.M. S. Ct. Mar. 9, 2018)
- Issue was whether child victim's opposition to CSCM by a relative, after the conduct occurred, negates the element of coercion
- Def woke up the victim, touched her, and expressed his intent to digitally penetrate her
- Victim pushed him off and COA held this meant the State did not prove that def used his position of authority to coerce the victim to submit
- "A person in a position of authority does not have to use threats or physical force to coerce a child to submit to sexual contact." ¶ 21
- Here, there was evidence that the def exercised undue influence over the victim because he was a relative and close family friend and the victim felt pressure not to report
- The Court held the COA's emphasis on the victim's resistance to the exclusion of other evidence was misplaced; the focus should be on the actions of the perpetrator, not the victim

SUFFICIENCY OF THE EVIDENCE – AGGRAVATED ASSAULT

- *State v. Lawrence Branch*, No. A-1-CA-33064 (N.M. Ct. App. Jan. 23, 2018)
- On remand following Supreme Court's writ quash to reconsider in light of *State v. Baroz*, 2017-NMSC-030, which upheld the firearm enhancements in a double jeopardy claim
- Def shot and injured his adult son and was also convicted of aggravated assault of his wife, who was standing next to their son when def fired the shots
- Def argued there was no evidence he had the specific intent to put someone in fear of an immediate battery
- But law in NM is that only general criminal intent is required for agg assault; only need conscious wrongdoing and victim's fear must be reasonable

SUFFICIENT EVIDENCE FOR ACCESSORY TO MURDER

- *State v. Luis Ramon Ramirez*, No. S-1-SC-35566 (N.M. S. Ct. Jan. 4, 2018) (unpublished decision)
- Co-def and brother of Alejandro Ramirez; Alejandro did the shooting
- Def parked in a manner to block the victim's car; spoke to Alejandro for a minute before the shooting; handed an object Alejandro right before the shooting; and then drove Alejandro away from the crime scene. Sufficient to find he also had the deliberate intent to murder the victim
- There was also sufficient evidence for conspiracy as there was clearly an agreement between the two
- Def also claimed he could not be convicted for the three counts of child abuse because no proof he knew the children were in the van
- But def was right by the van and all three children testified they turned around and looked at Alejandro and def while they were talking just a few feet away
- Similar analysis for aggravated assault of the victim's wife; sufficient evidence to infer def knew there was a person in the passenger seat

SUFFICIENCY OF EVIDENCE - TRAFFICKING and DISTRIBUTION

- *State v. Paul Salazar*, A-1-CA-34909 (N.M. Ct. App. Feb. 28, 2018)
- State's theory was that def directed Ms. Ramirez to drop off deodorant sticks containing synthetic cannabinoids for an inmate but that State's case failed because Ms. Ramirez was not called as a witness
- Officers found phone calls between the inmate and def around the time of the drop-off and discussing his cousin dropping off hygiene products
- Deputy testified he had listened to over 1000 phone jail calls and knew code words used to describe bringing contraband into the jail
- Sufficient direct and circumstantial evidence

DWI

- *State v. Chakerian*
- *State v. Costello*
- *State v. Ortiz*

DWI – RIGHT TO BE ADVISED OF INDEPENDENT TEST

- *State v. Chakerian*, No. S-1-SC-35121 (N.M. S. Ct. Feb. 22, 2018)
- Construction of § 66-8-109(B): "The person tested shall be advised by the law enforcement officer of the person's right to be given an opportunity to arrange for a physician, licensed professional or practical nurse or laboratory technician or technologist who is employed by a hospital or physician of his own choosing to perform a chemical test in addition to any test performed at the direction of the law enforcement officer." Part of the implied consent advisement.
- Defendant told the officer he wanted an independent test. Officer gave him access to a telephone, a phone directory, and a pen for 20-30 minutes. Defendant didn't do anything other then write down some numbers and said it was already too late.
- COA reversed the district court and held that § 66-8-109(B) imposes an affirmative duty on law enforcement to "meaningfully cooperate" with a desire to arrange for an independent test and that this was not enough.

DWI – RIGHT TO BE ADVISED OF INDEPENDENT TEST

- Section 66-8-109(B) does not require LE to cooperate with an arrestee to obtain an additional chemical test
- Only two obligations in the statute (1) advise of the right to an opportunity to arrange for it and (2) if the arrestee exercises the right, the LE agency pays for it
- Here, the defendant was given this "reasonable" opportunity. The officer did not obstruct him and under the "totality of the circumstances" his actions were sufficient. ¶ 22.
- "At a minimum, the arrestee must be provided with the means to contact a person of the arrestee's choosing in order to arrange for a chemical test." ¶ 22.
- Court did not reach second issue of whether Section 66-8-109(B) can be interpreted to allow for sanctions.

DWI - CONFRONTATION CLAUSE

- *State v. Chelsea Costello*, No. A-1-CA-35091 (Feb. 19, 2018) (non-precedential), *cert. denied*, No. S-1-SC-36940 (Apr. 13, 2018)
- State's appeal from dismissal due to fact that phlebotomist who drew the def's blood wasn't present for trial
- COA relied on *State v. Dedman*, 2004-NMSC-037 and *State v. Nez*, 2010-NMCA-092, to hold that the officer's testimony regarding his observations of the blood draw was sufficient foundation to admit the BAC
- Compliance with Section 66-8-103 is a foundational issue and the blood draw procedures and qualifications of the phlebotomist did not implicate the Confrontation Clause – not testimonial and therefore *Melendez-Diaz* and *Bullcoming* do not apply. Confrontation Clause only applies to facts regarding a def's guilt or innocence and not to ensure the reliability of every piece of evidence

DWI - DURESS DEFENSE

- *State v. Crystal Ortiz*, 2018-NMCA-018, 412 P.3d 1132
- Def testified she was in a relationship with the victim who had raped her three years earlier
- They were out drinking and victim became sexually aggressive; he had def's car keys and wouldn't let her leave. Def got to her car but the victim got in with her; def accidentally hit him after he jumped out
- COA reversed def's convictions for GBH by vehicle and aggravated battery for court's failure to give requested duress instruction; sufficient evidence to show def was in fear of being raped by victim again. State was improperly relieved of its burden to disprove that def didn't act under this reasonable fear
- However, def was not entitled to the modified instruction on strict liability crimes as discussed in *State v. Rios*, 1999-NMCA-069
- In a strict liability crime, "the elements of immediacy and reasonableness must be construed narrowly so that the high level of protection afforded by a statute [implicating] strict liability is not vitiated." *State v. Baca*, 1992-NMSC-055, ¶ 16
- Subjective immediacy elements was satisfied by def's testimony that victim immediately jumped in the car before she could lock the doors
- But def failed to prove she had no reasonable legal alternative to driving away in an intoxicated state; she could have called the police, gone to a neighbor's house, asked the roommate for assistance.
- Judge Sutin concurrence raises some analytical anomalies in duress jurisprudence

FOURTH AMENDMENT – ARTICLE II, § 10

- *State v. Martinez*
- *State v. Tapia*
- *State v. Widmer*

FOURTH AMENDMENT – REASONABLE SUSPICION

- *State v. Jennifer Martinez*, 2018-NMSC-007, 410 P.3d 186
- Reiterates that reviewing court is to defer to district court findings if supported by substantial evidence. State took cert claiming the COA found the officer was not credible and the dash-cam video was too ambiguous to support a finding of reasonable suspicion
- Officer testified def went past the stop sign at the intersection before coming to a complete stop
- On appeal, def claimed the appellate court was in as good a position as the district court to make findings on the video and urged the Court to view it and decide for itself
- Court agrees, but finds that the district court's finding included officer testimony as well and the reviewing court must not reweigh individual factors in isolation
- District court found the officer may have exaggerated – because the video showed the violation was not as blatant as testified by the officer – but did not find him not credible
- Declines def's invitation to disregard the officer's testimony because the facts here were not indisputably established and the video did not squarely contradict the officer

FOURTH AMENDMENT – EXCLUSIONARY RULE

- *State v. Edward Tapia*, 2018-NMSC-017, 414 P.3d 332
- Def was the passenger in a car stopped for speeding and because the license plate was obscured. Officer saw def was not wearing a seat belt and asked for his ID and issued him a citation. Def signed a false name to the citation.
- After his identity was discovered, def was arrested for concealing identity and forgery
- District court held the stop was unlawful and suppressed the evidence of the seat belt violation but did not suppress evidence of the concealing ID and forgery because those crimes had not yet occurred and an unlawful stop does not justify commission of new crimes
- COA reversed and held that the new crimes did not automatically purge the taint of the unlawful police conduct
- NMSC reversed and held that evidence of non-violent crimes committed in the presence of a police officer after an unconstitutional traffic stop need not be suppressed as a matter of federal or state constitutional law
- The Court applied three attenuation factors from *Brown v. Illinois*, 422 U.S. 590 (1975): (1) the lapsed time was admittedly short; (2) def's misrepresentation of his identity was an intervening circumstance; (3) the police conduct was not flagrant or for an illegal purpose; the officer reacted appropriately based upon the circumstances and her conduct after the stop was lawful
- Article II, Section 10 requires the same result. The federal attenuation analysis has been used in Article II, Section 10 cases involving confessions and consent to search and "comports with our preference to assess the reasonableness of law enforcement by considering the totality of the circumstances of each case." ¶ 47. Non-violent crimes, such as this one, can still cause real harm

FOURTH AMENDMENT - SEARCH INCIDENT TO ARREST

- *State v. Ronald Widmer*, No. A-1-CA-34272 (N.M. Ct. App. Mar. 5, 2018)
- Police dispatched to Walgreens where def was tampering with a moped. Police determined he had an active felony arrest warrant and handcuffed him
- Officer conducted search of his person and asked if he had anything on him the police should know about; def admitted he had methamphetamine in his belt
- COA reversed the district court denial of the motion to suppress finding that the question was custodial interrogation and def's *Miranda* rights were violated
- COA also said the police safety exception did not apply because police expressed no concern for their safety
- DISSENT: Judge Hanisee found the majority ignored the "uniform[], plain[], and consistent[]" precedent that allows for a search contemporaneous with arrest. "Stated more simply, a legal arrest commands the constitutionality of a search incident thereto." ¶ 42
- "More regrettably, [the majority] unnecessarily reduces the day-to-day safety of law enforcement officers by disallowing one simple, safety-geared inquiry of defendants that are possibly armed, possibly in possession of hazardous paraphernalia associated with drug use, or that otherwise may pose some unknown yet avoidable threat to officers." ¶ 46
- CERT PETITION HAS BEEN FILED

FIFTH AMENDMENT - *MIRANDA*

- *State v. Galindo*

ADMISSIBILITY OF DEF'S STATEMENT

- *State v. Juan Galindo*, No. S-1-SC-35382 (N.M. S. Ct. Mar. 5, 2018)
- Def waived in *Miranda* rights but claimed his statements were still involuntary due to his "extreme mental stress" caused by the death of the baby
- No evidence of police overreaching or coercion and NMSC rejected def's claim that Article II, § 15 should be interpreted to foreclose admission of incriminating statements even in the absence of police coercion
- Court continues to adhere to *Colorado v. Connelly*, 479 U.S. 157 (1986)
- Def's rule would require courts to "divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision" and defendant's case "demonstrates that such a burdensome requirement would be unnecessary." ¶ 35

PROSECUTORIAL MISCONDUCT

- *State v. Salazar*
- *State v. Sena*

PROSECUTORIAL MISCONDUCT - CLOSING ARGUMENT

- *State v. Paul Salazar*, A-1-CA-34909 (N.M. Ct. App. Feb. 28, 2018)
- In closing, the prosecutor talked about Ms. Ramirez not testifying and said “she doesn’t want to show up” and “she still has to face these people”
- Def didn’t object but argued fundamental error for the “insinuation” that Ms. Ramirez was afraid of def
- Fair argument that evidence was sufficient to convict without Ramirez’s testimony

PROSECUTORIAL MISCONDUCT – COMMENT ON DEFENDANT'S DEMEANOR

- *State v. Richard Sena*, No. A-1-CA-34674 (N.M. Ct. App. Feb. 14, 2018)
- In closing argument, the prosecutor encouraged the jury to infer guilt from defendant's demeanor and failure to look at the victim
- As matter of first impression, prosecutor's comment regarding non-testifying defendant's demeanor during trial is improper "as it is neither probative of innocence of guilt, nor is it evidence that an appellate court can properly review." ¶ 12
- But the comments were not reversible error because under *State v. Sosa*, 2009-NMSC-056, they did not invade a "distinct constitutional protection" (and presumption of innocence is not constitutionally mandated) and they were relatively brief
- Moreover, the State presented "significant evidence" of def's guilt including the victim's graphic testimony, the def's footprints at the home where he was found, and def's admissions of guilt

EVIDENTIARY ISSUES

- *State v. Galindo*
- *State v. Gywnne*
- *State v. Hnulik*
- *State v. Maestas*
- *State v. McDowell*
- *State v. Ramirez*

ADMISSION OF PHOTOGRAPHS

- *State v. Juan Galindo*, No. S-1-SC-35382 (N.M. S. Ct. Mar. 5, 2018)
- Admission of photos of the baby's body were properly admitted
- Although "graphic, heartbreaking and difficult to view" they also "convey[ed] the nature and extent of Baby's injuries in a manner that words cannot" and were relevant to dispute def's claim that he was only trying to "revive" her. ¶ 39

RULE 11-404(B) – PRIOR BAD ACTS EVIDENCE

- *State v. Jason Gwynne*, A-1-CA-34082 (N.M. Ct. App. Feb. 14, 2018), *cert. denied*, S-1-SC-36926 (Apr. 10, 2018)
- Def's daughter testified about witnessing sexual activity between her father and her friend and def was convicted for manufacturing and possession of CP of such acts
- State claimed it was relevant to establish identity and the opportunity to film a sexual act
- But State did not sufficiently prove either exception; no distinct or unique pattern that would be easily attributable to def
- Harmless error because no reasonable probability this testimony would have affected the verdict
- The friend testified that the videos showed her and def and videos showed def's unique scar

RULE 11-404(B) – PRIOR BAD ACTS EVIDENCE

- *State v. Dallas Hnulik*, No. A-1-CA-35323 (N.M. Ct. App. Feb. 21, 2018)
- Admission of def's domestic violence arrests in Lubbock and Artesia were admissible
- Def argued it was more prejudicial than probative because it did not result in charges
- State offered it to prove motive to kill; def stated "I'm not going to jail over this shit" and showed he had a motive to kill the victim to keep her from testifying
- Also relevant to rebut def's claim that they had a loving relationship – "Defendant placed his own intent at issue by claiming that the gun fired by accident." ¶ 30
- Also not unfairly prejudicial; even defense counsel voir dired the jury on their feelings about domestic violence and there was extensive evidence of def's abuse of the victim

USE OF COMPUTER IMAGES

- *State v. Jason Gwynne*, A-1-CA-34082 (N.M. Ct. App. Feb. 14, 2018), *cert. denied*, S-1-SC-36926 (Apr. 10, 2018)
- Detective testified about the videos and adjusted the brightness and contrast to show screenshots to the jury of def's abdominal scar and compare them to photographs of def
- But this in-court adjustment to the laptop display was not the same as computer generated evidence
- Nothing was actually altered or modified

TESTIMONY REGARDING IDENTITY

- *State v. Jason Gwynne*, A-1-CA-34082 (N.M. Ct. App. Feb. 14, 2018), *cert. denied*, S-1-SC-36926 (Apr. 10, 2018)
- Def also argues that the detective's testimony as to the identity of the male in the videos was improper lay opinion because the jury could watch for themselves
- *State v. Sweat*, 2017-NMCA-069, decided this contrary to def's argument. In that case, the detective was allowed to testify about a surveillance video and his opinion that it showed defendant.
- As in *Sweat*, the video quality here was "dark and grainy" and the detective's testimony was admissible under Rule 11-701 because it was helpful to determine a fact in issue

HEARSAY EXCEPTIONS - STATE OF MIND

- *State v. Dallas Hnulik*, A-1-CA-35323 (N.M. Ct. App. Feb. 21, 2018)
- Def's second-degree murder conviction for shooting his girlfriend upheld. Def claimed it was accidental but State's theory was that it was intentional to prevent her from testifying in a domestic violence case
- To prove it was not an accident, victim's friends and family testified about statements she made to them about her desire to leave the area and break up with def. Also admitted testimony of a 2009 domestic violence incident
- Court held that two of the hearsay statements were relevant to negate the accident defense and showed the victim's state of mind and future intent – it was properly admitted under the state of mind exception (Rule 11-803(3)) because it "preced[ed] and inform[ed] the conduct" at issue even though it went to show def's motive. ¶ 14
- "We are not alone in holding that a victim's statements of intent to break up with or divorce a partner or spouse are property admitted to show the existence of a motive to commit violence on the part of the partner or spouse." ¶ 20
- Cannot just be imputation of a def's state of mind out of no more than deceased person's feelings about the def, but "[w]hen a victim's projected conduct permits an inference that [the] defendant may have been motivated by the conduct to act in the manner alleged by the prosecution, the statement satisfies the threshold for relevance." ¶ 20 (internal quote omitted)
- However, admission of hearsay statement that victim and def had been fighting was inadmissible because the state-of-mind exception does not allow for a statement that explains the declarant's state of mind. Also not an excited utterance because no evidence on spontaneity. Harmless error because of "ample" evidence that def was abusive to victim

FORFEITURE BY WRONGDOING DOCTRINE

- *State v. Joshua Maestas*, 2018-NMSC-010, 412 P.3d 79
- While def was in jail on DV incident, the victim contributed money to his phone account and the two exchanged 588 calls over a two-month period
- Victim then signed a notarized affidavit of non-prosecution denying that def hurt her and claimed she made her earlier statement under pressure from police
- State filed a motion requesting that the victim be declared unavailable and her former statements be admissible under the doctrine of forfeiture by wrongdoing. Jail calls revealed def repeatedly called her and instructed her to lie for him
- But district court found no explicit threats with the intent to keep the victim from testifying and therefore State did not prove that def caused the victim's unavailability to testify. The COA affirmed
- NMSC held the wrongdoing need not "take the form of overt threat of harm; various forms of coercion, persuasion, and control may satisfy the requirement." ¶ 2
- The proponent of the exception may rely on inference that the wrongdoer intended to cause, and did cause, the witness's unavailability
- Here, it was sufficient considering the history of the abusive relationship, the threatening phone calls, and the repeated demands that the victim lie for him.
- Dissent in part and concurrence in part: Justice Chavez agrees with the legal analysis but found the State did not establish its burden and failed to specify which of the 588 calls supported the doctrine

COMMENT ON INVOCATION OF RIGHT TO COUNSEL

- *State v. John "Jack" McDowell*, 2018-NMSC-008, 411 P.3d 337
- Reversal of first-degree murder conviction
- Court found the prosecutor commented on def's right to silence, even under fundamental error analysis because Court found the error was not preserved. Lengthy fact-specific discussion on preservation
- In questioning the detective, the prosecutor twice elicited that def had invoked his right to counsel after arrest and that the detective could not question him further
- Fundamental error because no overwhelming evidence of def's guilt, even though the questions were brief

EYEWITNESS TESTIMONY

- *State v. Alejandro Ramirez*, 2018-NMSC-003, 409 P.3d 902
- Defendant shot victim, who was sitting in his car with his wife and three children, nine times
- Five eyewitnesses testified that def was the gunman although he was not known to them
- Court summarizes testimony of all five eyewitnesses and held the "jury was free to accept or reject the eyewitness accounts." ¶ 13
- Def also claimed that the in-court and out-of-court IDs should be suppressed and argued that no witness participated in a show-up, line-up, or photo array ID
- But a nonexistent out-of-court ID procedure could not taint in-court ID and any weakness in the ID was a matter for cross-examination
- Further claim that media coverage tainted the IDs. But the source of any improper taint matters only when law enforcement is the source; here, the police abandoned a planned lineup when they found out the media had already published photos of def and def's own expert testified this was proper police procedure
- Def also claimed witnesses knew where the def sits in the courtroom and he was the only Hispanic male at counsel table. Again, no suggestion of improper LE influence
- "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing a jury to assess its creditworthiness." ¶ 35, quoting *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012)

JUVENILE CASES

- *Ira v. Janecka*
- *State v. Filemon V.*
- *State v. Nehemiah G.*

ADULT SENTENCING FOR YO

- *Joel Ira v. James Janecka*, No. S-1-SC-35657 (N.M. S. Ct. Mar. 9, 2018)
- Convicted of multiple counts of CSPM against his young stepsister; sentenced to 91 ½ years when he was 16
- COA affirmed his sentence in 2002 against claims of cruel and unusual punishment
- He claimed on habeas that recent SCOTUS case law invalidated his sentence
- NMSC held (1) juveniles' developmental maturity makes them less culpable then adults and crimes are more likely to be a product of "transient rashness" than "irretrievable depravity" (2) juveniles have greater potential to reform which makes it essential for them to have a meaningful opportunity to obtain release and (3) no penological theory justifies a life sentence without parole for a juvenile convicted of a non-homicide crime
- Ira's term-of-years sentence is constitutional because it does not deprive him of a meaningful opportunity to obtain release; he will be parole-eligible at approximately 62 years old
- DISSENT: Justice Nakamura found that the categorical rule in *Graham v. Florida*, 560 U.S. 48 (2010), that the Eighth Amendment prohibits imposition of a life sentence without parole on a juvenile who did not commit homicide does not apply because "there is a meaningful distinction between juveniles sentenced to life without parole for a commission of a single offense and juvenile sentenced to multiple consecutive sentences for a series of offenses committed over a period of time." ¶ 44. Split of authority on this issue.

STATEMENT OF JUVENILE

- *State v. Filemon V.*, 2018-NMSC-011, 412 P.3d 1089
- State's interlocutory appeal from suppression of juvenile's statements
- Four statements: (1) Filemon walked into probation office for routine visit with his parents and announced he had "just shot Chugie and Eric" and said he was there to turn himself in for murder; (2) his probation officer, who was aware of the shooting, told Filemon and his mother to go to his office to discuss it and Filemon gave an unwarned statement to his PO while they waited for police (3) police, who knew Filemon was a suspect in the murder, transported Filemon to the police station and Filemon gave a third unwarned statement and (4) Filemon gave a similar statement to a detective who read him his *Miranda* warnings
- First and third statements were not at issue; first one was spontaneous and State conceded the third one was inadmissible because Filemon was in police custody at that point and not provided his *Miranda* warnings

STATEMENT OF JUVENILE

- *State v. Filemon V.*, 2018-NMSC-011, 412 P.3d 1089
- Second statement is admissible under Fifth Amendment because not a custodial interrogation and SCOTUS has held probation officers are not required to provide *Miranda* warnings to probationers who are not in custody
- But Section 32A-2-14 is designed to provide children with greater statutory protection than constitutionally mandated and prohibits admission of the unwarned statement in the probation office. A child need not be subject to custodial interrogation for the statute to apply; need only been subject to an investigatory detention. *State v. Javier M.*, 2001-NMSC-030, ¶ 38. Only have to show the child is (1) suspected of a delinquent act (2) questioned and (3) not free to leave. Even though Filemon was not in custody, the PO was holding him there until police arrived.
- Section 32A-2-14 is not limited to police questioning. "The presence of a police officer is relevant, but not dispositive, to determining whether a child is in investigatory detention." ¶ 33
- Distinguishes *State v. Taylor E.*, 2016-NMCA-100, in which the COA held a child's unwarned statements to his PO were admissible in probation revocation proceeding. But those statements were elicited during a routine meeting and not used to prosecute a new offense.

STATEMENT OF JUVENILE

- *State v. Filemon V.*, 2018-NMSC-011, 412 P.3d 1089
- Fourth statement was inadmissible under *Missouri v. Seibert*, 542 U.S. 600 (2004)
- The "midstream" *Miranda* warning was insufficient to inform Filemon of his rights
- Undisputed he was subject to a custodial interrogation at the police department
- State argued that the post-*Miranda* statement was admissible under *Oregon v. Elstad*, 470 U.S. 298 (1985), because his pre- and post-*Miranda* statements were voluntary
- NMSC disagreed and held *Seibert* limited *Elstad* to its facts and held the relevant question is whether the *Miranda* warnings given after the first statement are effective
- Here, they were not because the second statement was taken directly after the unwarned statement with no break and the detective was present for both statements. As in *Seibert*, they were essentially continuous and the detective even said he was just "finishing up" the first interview

SENTENCING OF A YO - AMENABILITY DETERMINATION

- *State v. Nehemiah* G., A-1-CA-35528 (N.M. Ct. App. Mar. 9, 2018)
- State's appeal from determination that State did not prove that Nehemiah was not amenable to treatment under Section 32A-2-20(C)
- Nehemiah shot and killed his entire family; both parents and three young siblings; pled guilty to two counts of second degree murder and three counts of child abuse resulting in death
- COA found two errors by district court
- One, court did not consider four of the statutory factors regarding the seriousness of the offenses
- District court apparently thought it could not consider the nature of the crime and could only focus on Nehemiah
- Second, the court disregarded the unanimous testimony that Nehemiah would not be rehabilitated before age of 21
- Although a court may disregard expert testimony, it must have some "rational basis" for doing so and it is not free to "arbitrarily disregard" it. ¶ 57

PROBATION VIOLATION

- *State v. Aslin*

PROBATION VIOLATION

- *State v. Jeffrey Aslin*, A-1-CA-35471 (Feb. 28, 2108)
- Def was on TVP which provided for progressive discipline, including jail time, for "technical violations" of probation
- Def received two sanctions in the program and then was arrested and charged with a new crime
- Police testified regarding new charges and PO testified about def's failure to enter a treatment program
- Court found violation for failure to enter treatment and found it was not a technical violation
- Def claimed (1) it was not a "willful" violation and (2) that he should have been sentenced only for a technical violation
- (1) burden of proving a willful violation is always on the State but burden shifts to def to show it was not willful once State presents a prima facie case. Here, def did not rebut inference of willfulness and State presented evidence that PO made multiple requests for him to pursue treatment
- (2) under the administrative order at the time, pursuant to Rule 5-805(C), this was a technical violation only and could only result in a 14-day jail sanction PO to do so

SUFFICIENCY OF THE EVIDENCE

- *State v. Galindo*
- *State v. Ramirez*

SUFFICIENCY OF THE EVIDENCE – CHILD ABUSE

- *State v. Juan Galindo*, No. S-1-SC-35382 (N.M. S. Ct. Mar. 5, 2018)
- "Horrific" case of child abuse on a 28-day old infant
- Convicted of child abuse for emotional harm to the baby's 13-year-old sibling who was in the house while def was trying to "revive" the baby by biting her; rubbing ice, perfume, and rubbing alcohol on her; and being generally "frantic" and frenzied
- The child testified she felt "shocked" and "dead inside" and the Court said it would not turn a "blind eye" to the horrors she experienced (although warned expert testimony is usually the safest bet)
- Also found clear evidence of child abuse resulting in death despite def's testimony that he only meant to revive her; the injuries told a different story
- Upheld conviction for aggravated CSPM which required a showing that def's act was greatly dangerous to the lives of others and indicated a depraved mind without regard to human life. Severe injuries to vagina and anus, consistent with insertion of blunt object

SUFFICIENCY OF THE EVIDENCE

- *State v. Alejandro Ramirez*, 2018-NMSC-003, 409 P.3d 902
- Sufficient evidence for murder, child abuse by endangerment, tampering with evidence (gun discarded near where def was arrested), and agg assault
- Agg assault was against victim's wife who was in the passenger seat
- Def claims he didn't point the gun at her but Court held this was a "formalistic and conceptually flawed understanding" of the crime. ¶ 21
- "A shooting conducted in very close quarters endangers anyone in proximity to the intended target." ¶ 22
- Crime is one of general criminal intent; needn't prove that def had specific intent to assault the victim but only general criminal intent that caused the victim to believe she was in danger of receiving an immediate battery. ¶ 23
- Same as in *Branch*

STATUTORY CONSTRUCTION

- *State v. Roy Montano*

STATUTORY CONSTRUCTION – "UNIFORMED" FOR PURPOSES OF AGGRAVATED FLEEING STATUTE

- *State v. Roy Montano*, 2018 WL 1577491 (A-1-CA-35275, Mar. 29, 2018)
- Aggravated fleeing - § 30-22-1.1(A)
- Def claimed offer was not "a uniformed law enforcement officer" as required by the statute
- Wearing dress shirt and tie with badge displayed on breast pocket of the shirt; also had handcuffs and firearm
- This was not a "distinctive design or fashion" that identified him as a LE officer and was actually meant to "allow him to blend in with the general public." ¶ 13
- Badge, firearm, and handcuffs are not clothing
- COA harmonizes this holding with the other NM statutes that address police uniforms and distinguish between a uniform and a badge; e.g. § 29-2-13 requires each commissioned officer to be issued a uniform *and* an appropriate badge
- Distinguishes *State v. Archuleta*, 1994-NMCA-072, and *State v. Maes*, 2011-NMCA-064, in which defs were stopped for traffic violations and the issue was not whether a badge is enough for a uniform but whether an officer must be in *full* uniform as opposed to a BDU and marked windbreaker in those cases
- *Archuleta* developed alternative test; (1) sufficient indicia to lead reasonable person to believe the person is an officer *or* (2) evidence that the person actually knew the person was an officer
- Court held neither test is met here; not enough to believe he was an LE officer and nothing to indicate def actually knew he was
- Might be better policy not to have the uniformed requirement but Court can't read it out of the statute
- DISSENT: precedent directs an objective test ignored by the majority – previously held that indicia of law enforcement stitched or printed on a garment is enough so why isn't a badge pinned on a garment enough.

STATUTORY CONSTRUCTION – "MARKED VEHICLE" FOR PURPOSES OF AGGRAVATED FLEEING STATUTE

- *State v. Roy Montano*, 2018 WL 1577491 (A-1-CA-35275, Mar. 29, 2018)
- Def also claimed officer was not in "an appropriately marked law enforcement vehicle" as required by the statute
- Unmarked Ford Expedition but with government license plate, wigwag headlights, red and blue flashing lights on front grill, flashing brake lights, and siren
- These are "marks" and statute does not explicitly require insignia, decals, or lettering
- But "marked" is ambiguous given the common understanding of a "marked" police vehicle
- Thus, Court looks to legislative intent which is that the motorist knows he is fleeing a LE officer and determines that as long as the vehicle "has sufficient equipment to trigger the motorist's obligation under section 66-7-332" to stop, it is appropriately marked

DOUBLE JEOPARDY

- *State v. Branch*
- *State v. Gwynne*
- *State v. Luna*
- *State v. Alejandro Ramirez*
- *State v. Luis Ramon Ramirez*
- *State v. Sena*
- *State v. Torres*
- *State v. Vanderdussen*

DOUBLE JEOPARDY – AGGRAVATED BATTERY AND AGGRAVATED ASSAULT

- *State v. Lawrence Branch*, No. A-1-CA-33064 (N.M. Ct. App. Jan. 23, 2018)
- Undisputed that conduct was unitary; firing of a single shot
- (1) DJ not violated for convictions for aggravated battery of son and aggravated assault of wife; one offense is not subsumed in the other and there were two victims
- (2) Under *State v. Baroz*, 2017-NMSC-030, the firearm enhancements did not violate DJ even though the use of a firearm is an element of the underlying crime; the legislative intent to authorize the enhanced punishment when a firearm is used is clear
- (3) State conceded that negligent use of a firearm must be vacated because subsumed with the agg battery conviction

DOUBLE JEOPARDY – POSSESSION AND MANUFACTURE OF CP

- *State v. Jason Gwynne*, A-1-CA-34082 (N.M. Ct. App. Feb. 14, 2018), *cert. denied*, S-1-SC-36926 (Apr. 10, 2018)
- Def was living with his 16-year-old stepdaughter and her same aged runaway friend; stepdaughter saw them having sex and called police
- Police found three videos on def's phone of such acts and def was charged with two counts of manufacturing CP and one count of possession
- Double description analysis – two-part test from *Swafford v. State*, 1991-NMSC-043.
- COA only considers the first part and held the conduct was not clearly unitary because all three charges had different charging dates. The two videos were created on different dates and this alone was sufficient to support separate crimes
- The possession was also a separate act because it was separated by time from the manufacturing (date charged on possession was the date the phone was seized from def) and a second copy of each video had been saved on the phone
- Rejected def's argument that he took no additional steps to posses the material because his phone stored it automatically. Rather, def continued to possess the videos after he manufactured them.

DOUBLE JEOPARDY – CONTRIBUTING TO THE DELINQUENCY OF A MINOR

- *State v. Gavino Luna*, A-1-CA-34709 (N.M. Ct. App. Jan. 23, 2018)
- Def showed pornographic movies to child; showed his penis to child; touched child's penis with his hand and mouth
- Convicted of CSCM, CDM for showing the movies and touching the child, and unlawful exhibition of motion pictures to a minor
- Claim of DJ because conduct underlying CDM is identical to the basis for the other two charges
- CDM is "a quintessentially generic [and] multipurpose" statute which requires analysis under modified *Blockburger* analysis; i.e. look at the State's theory instead of strict elements. ¶ 14
- "If application of either approach to the *Blockburger* test 'establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes – punishment cannot be had for both.'" If not, there is a presumption of multiple punishment which can be overcome by other indicia of legislative intent. ¶ 11
- The jury instruction required the jury to find the def forced the child in engage in a sexual act and watch pornographic movies as the underlying acts for CDM
- CDM violates DJ and must be vacated

DOUBLE JEOPARDY - CHILD ENDANGERMENT

- *State v. Alejandro Ramirez*, 2018-NMSC-003, 409 P.3d 902
- Defendant shot the victim nine times while he was sitting in his car with his wife and three children
- Convicted of three counts of child abuse by endangerment, among other charges
- (1) the child abuse and agg assault charges do not merge into the murder; second prong of *Swafford* is not met because the three statutes "are quite different and address distinct social evils." ¶ 43
- (2) the three child abuse charges did not violate DJ. Court notes that *State v. Castaneda*, 2008-NMCA-126, skipped the first step in a unit of prosecution analysis; i.e. a review of the plain language of the statute.
- The statute speaks in terms of "a child" as opposed to "children" or "any child."
- Finally, policy considerations indicate that a single violent act against multiple victims is a greater societal harm and requires a greater need for deterrence.
- Here, nine shots were fired and all three children testified as to their fear

DOUBLE JEOPARDY – CONSPIRACY AND ACCESSORY

- *State v. Luis Ramon Ramirez*, No. S-1-SC-35566 (N.M. S. Ct. Jan. 4, 2018)
- Double jeopardy for conspiracy and accessory on first-degree murder
- Def was the getaway driver for his brother
- Well established precedent that aiding and abetting an offense and conspiracy are separate offenses
- Def contends that the conduct giving rise to both was "identical" but Court disagrees
- Evidence supporting his role as an accessory "extended well beyond the evidence of the agreement to murder Victim, which was complete at or before the moment when Defendant handed Alejandro the gun." ¶ 35

DOUBLE JEOPARDY - DOUBLE DESCRIPTION

- *State v. Richard Sena*, No. A-1-CA-34674 (N.M. Ct. App. Feb. 14, 2018)
- DJ claim for agg burglary and CSP/CSC
- Agg burglary was charged in the alternative including that def committed a battery on victim
- Court held that in cases of a general verdict, when it is unknown which alternative the jury relied upon, the court must presume it relied upon the alternative that would violate DJ
- Court finds the battery of lying on top of victim (even though there was a separate battery of covering her mouth with his hand) was relied upon by the jury and this conduct is unitary with the CSP/CSC
- Court then moves to modified *Blockburger* analysis to find that because the aggravated burglary statute is "broad" and the State did not define its theory, that conviction is "subsumed by the CSP/CSC convictions." ¶ 45
- Vacates the agg burglary conviction – not because it is the shortest sentence – but because it "remedies the double jeopardy violations." ¶ 48
- CERT PETITION HAS BEEN FILED

DOUBLE JEOPARDY - MURDER

- *State v. Noe Torres*, 2018-NMSC-013, 413 P.3d 467
- Convicted of murder, attempted murder, shooting at a dwelling, conspiracy to commit murder, and conspiracy to shoot at a dwelling. Fired nine shots through a bedroom window, killing the 10-year-old brother of the intended victim
- (1) first-degree murder and shooting at a dwelling violated DJ; conduct was unitary and the statutes are directed at punishing the same social evil. Vacates shooting a dwelling conviction
- (2) multiple conspiracy convictions violated DJ when there was only evidence of one "overarching" criminal conspiracy with multiple objectives
- (3) first-degree murder and attempted first-degree murder related to different victims and did not violate DJ. Under a unit of prosecution analysis, only the first factor need be considered because the murder statute specifies the unit of prosecution as dependent on the number of victims

MISTRIAL - MANIFEST NECESSITY

- *State v. Steven Vanderdussen*, A-1-CA-36304 (N.M. Ct. App. Apr. 5, 2018)
- Juror was discharged for stating she could not be impartial after deliberations had begun
- Magistrate court with no record; district court had to make de novo determination on manifest necessity. COA rejected State's claim that def failed to present a sufficient record
- DJ does not prohibit retrial, even over defense objection, if the mistrial is justified by manifest necessity
- Prosecutor bears the burden of showing (1) extraordinary circumstances sufficient to override def's DJ interests and (2) court must consider less drastic measures
- First requirement was clearly met; must have six impartial jurors. Juror's late-disclosed bias raises "grave concerns" that the deliberation process was tainted
- Def disputes second requirement and claims the court could have replaced the juror with an alternate even though deliberations had begun because magistrate court does not have Rule 5-605(C) which mandates discharge of alternates before the jury retires to deliberate. But in absence of mag court rule, it was not error for court to rely on district court rule
- But, here, the alternates were discharged with no instructions to continue to be bound by their oath
- *State v. Sanchez*, 2000-NMSC-021, the NMSC held that post-submission substitution creates a presumption of prejudice
- The proposed alternative carried the likelihood of reversal and was thus not reasonable

JURY INSTRUCTIONS

- *State v. Luna*
- *State v. Sena*

JURY INSTRUCTIONS

- *State v. Gavino Luna*, A-1-CA-34709 (N.M. Ct. App. Jan. 23, 2018)
- Jury instruction for unlawful exhibition of motor pictures was fundamental error because it did not instruct on the essential element – or adequately define – that the motion picture is harmful to minors
- Partly a problem of proof; only testimony on what it showed was the child's vague descriptions and officer's testimony that it was "pornographic"
- Court found a "distinct possibility" that jury convicted without finding all the elements or using the wrong legal standard

JURY INSTRUCTIONS – INCIDENTAL MOVEMENT FOR KIDNAPPING

- *State v. Richard Sena*, A-1-CA-34674 (N.M. Ct. App. Feb. 14, 2018)
- Def broke into 73-year-old victim's house, woke her up with a knife, stole her purse, made her take off her clothes, masturbated while she used the bathroom, and then raped her anally and vaginally in her bedroom
- Def left her bedroom after about an hour and victim tried to get up from bed but def, who was then in her living room, warned her not to
- Eventually, she tried again and found her was gone
- Jury was not given the incidental restraint instruction for kidnapping, pursuant to *State v. Trujillo*, 2012-NMCA-112, ¶ 39, which held "the Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime." *See* UJI 14-403 NMRA (2015)
- COA held this was fundamental error – up to the jury to determine if the restraints were "slight, inconsequential, or incidental to the commission of the sexual offense." ¶ 25
- CERT PETITION HAS BEEN FILED

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Miera*

INEFFECTIVE ASSISTANCE OF COUNSEL – PRIMA FACIE CASE

- *State v. Dennis Samuel Miera*, 2018-NMCA-020, 413 P.3d 491
- COA reversed convictions for CSCM, CSPM, and bribery of a witness finding def was denied a fair trial due to errors made by defense counsel
- Defense counsel allowed the State to impeach the defendant with a psychological evaluation that was created and given to the State as part of failed plea negotiations. The report contained an admission by def that he continued to have overnight visits with the victim, contrary to his trial testimony, and other admissions by def
- Rule 11-410(A)(5) prohibits admission of such statements
- Defense counsel was given the opportunity to object but said he had no authority to argue for its exclusion
- Prima facie case of IAC
- However, use of the report was not plain error because it was not admitted as an exhibit or provided to the jury and def had the opportunity to explain his answers
- But, cumulative error – with other instances of errors by defense counsel – required reversal

SPEEDY TRIAL

- *State v. Salazar*

SPEEDY TRIAL

- *State v. Paul Salazar*, A-1-CA-34909 (N.M. Ct. App. Feb. 28, 2018), *cert. denied*, Apr. 13, 2018
- 19 month delay on delivery of meth and other chemicals to an inmate
- Intermediate complexity – four months past the 15-month presumptive limit and requires analysis of the other factors
- Seven of the months weigh against defendant and were caused by requested continuances
- The five assertions were "frequent" but "lacked force" because "mitigated" by multiple requests for more time once State announced it was ready for trial. ¶ 26
- No showing of prejudice although he was incarcerated. He received 629 days of credit for time served and made no showing of undue anxiety or concern

TIPS?

- “Your honor, the State is ready for trial.”
- If no movement in case, or if new judge is assigned, file a request for trial setting
- No remarks on the record that case fell between the cracks, was forgotten, etc.
- BEWARE if the defendant is incarcerated on the charge. New rule requires an expedited trial and not clear what that means yet

SENTENCING

- *State v. Chadwick-McNally*
- *State v. Franklin*
- *State v. Gwynne*

LWOP (LIFE WITHOUT PAROLE) SENTENCING

- *State v. Chadwick-McNally*, No. S-1-SC-36127 (N.M. S. Ct. Feb. 22, 2018)
- Def's interlocutory appeal – before conviction – to consider LWOP statutes
- Def charged with first-degree murder with two aggravating circumstances under § 31-20A-5
- Legislature abolished the death penalty in 2009 and established a new maximum LWOP penalty
- LWOP defendant is not entitled to death penalty procedures of bifurcated guilt and sentencing proceedings, *Ogden* hearing to determine the validity of the aggravating circumstance, or consideration of mitigating circumstances
- (1) Rule 5-704 does not apply as by its terms it only has application to death penalty cases
- (2) Def is not entitled to "comparable procedures"
- (3) Section 31-20A-A is "unequivocal" on sentencing and an LWOP sentence is mandatory if the jury finds guilt and an aggravating circumstance
- (4) Passes 8th Amendment muster under *Harmelin v. Michigan*, 501 U.S. 957 (1991)

FIRST-DEGREE MURDER – MITIGATING EVIDENCE

- *State v. Corey Franklin*, 2018-NMSC-015, 413 P.3d 861
- Defendant pled guilty to one count of first-degree murder with the possibility of parole after 30 years
- Section 31-18-14 provides: "[w]hen a defendant has been convicted of a capital felony, the defendant shall be sentenced to life imprisonment or life imprisonment without the possibility of release or parole."
- Def claimed this was a violation of equal protection and "effectively diminishe[d his] due process rights with respect to the parole process."
- Although not preserved, the Court addressed the issue in light of the Legislature's abolition of the death penalty and the "uncertainty attaching to different statutory treatment of homicides that the Legislature continues to refer to as 'capital felon[ies] but which are not longer punishable by death." ¶ 10
- Equal protection analysis has two parts: (1) determine whether first-degree murderers are similarly situated to lesser offenders and (2) if they are, determine the appropriate level of scrutiny and if the Legislature was justified in denying capital offenders the opportunity to present mitigating evidence
- Court held the two classes are not similarly situated; first-degree murderers are convicted of the most heinous crimes. Court also notes other states which have upheld sentencing schemes which do not guarantee a right to present mitigating evidence to first-degree murderers
- Court did not explicitly reach the second factor but nevertheless notes the Legislature's lawful authority to treat first-degree murderers differently

EQUAL PROTECTION

- *State v. Jason Gwynne*, A-1-CA-34082 (N.M. Ct. App. Feb. 14, 2018), *cert. denied*, S-1-SC-36926 (Apr. 10, 2018)
- Def claims no rational basis for punishing under sexual exploitation of children for filming 16-year-old girl where she legally consented
- Claims that the act of sex itself is not criminal because age of consent is 16, but yet was unlawful to film it because statute protects children under 18
- A person who records consensual sex between two adults is not similarly situated to a person who records consensual sex between an adult and a minor
- Def's challenge is more properly directed to the Legislature

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
- 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.

MISCELLANEOUS

- *State v. Torres*

SHACKLING OF DEFENDANT

- *State v. Noe Torres*, 2018-NMSC-013, 415 P.3d 467
- Defendant claimed he was denied a fair trial because he was chained to the table but did not object or request a hearing on the necessity of the shackles
- Not fundamental error because nothing to indicate the shackles could be seen by the jury
- Court also held that defendant was not denied a fair trial by the court's refusal to permit him to join his attorney at sidebars
- No NM or SCOTUS case establishes a right to join counsel at a sidebar. "While 'a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure,' *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987), it is the defendant's burden to show the critical nature of his absence[.]" ¶ 68

FOULENFONT HEARINGS

- Generally, be cautious of these. Is it really a legal issue or is it a factual issue? Argue *Foulenfont* does not apply before you argue the merits
- Most of these issues probably should be resolved by a jury – not a judge
- *State v. LaPietra*, 2010-NMCA-009, ¶ 7, 147 N.M. 569 – "Questions of fact, however, are the unique purview of the jury and, as such, should be decided by the jury alone."

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
- Double or triple check jury instructions
- Please state what is happening – can't see gestures
- Defendant must actually plead guilty on the record at a plea hearing – *State v. Yancey*, 2017-NMCA-090, 406 P.3d 1050, *cert. granted*, No. S-1-SC-36669 (Nov. 13, 2017)

PLEA AGREEMENTS

- Please always detail the factual basis and the dates of the offenses to which the def is pleading – don't stipulate to it or refer to another case before the same judge
- Double check the dates of the charges to which defendant is pleading and make sure the sentence and parole periods match esp. for sex offenders
- Any ambiguity in the agreement will inure to the defendant's benefit because the court construes its terms according to what the def reasonably believed – *State v. Miller*, 2013-NMSC-048

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 closely scrutinize the actions, or inactions, of the prosecutor and the prosecutorial team – *Joshua Maestas*