NEW MEXICO OFFICE OF THE ATTORNEY GENERAL

APPELLATE LAW UPDATE
DISTRICT ATTORNEYS CONFERENCE
APRIL 25, 2019

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, 16 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 and the DA Liaison List will be under the Criminal Affairs/Criminal Appeals tab
- Previous appellate update presentations are also on the website

RULE 12-405 - OPINIONS

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

ELECTRONIC FILING

- **ONLY** electronic filing in both appellate courts.
- Docketing statements or statement of issues are the first document you'll need to file in the appellate courts.
- Everything is on Odyssey.
- Supreme Court number format – S-1-SC-12345
- Court of Appeals number format – A-1-CA-12345
- Questions on specific cases you can't find the answer to – call our office

NEW MEXICO SUPREME COURT

- Published opinions and unpublished decisions from November 2018 to now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 2018 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- Rule 12-405 NMRA permits citations to unpublished opinions (memorandum opinions)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- All opinions, published and unpublished, are available on the New Mexico Court of Appeals website – https://www.nmcourts.gov/Court-ofAppeals/
- 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/Criminal Appeals tab – How to Take an Appeal handbook
- 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!
- **NOTICE OF APPEAL IS FILED IN DISTRICT COURT AND SERVED ON THE APPELLATE COURT**

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
- 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
- New order from the COA – docketing statements will be rejected if they do not follow the rule. The COA is very active in rejecting DSs for failure to summarize all facts material to the issues presented.
- Sample docketing statement from COA
- **DOCKETING STATEMENT IS FILED IN APPELLATE COURT AND SERVED ON THE DISTRICT COURT**

HABEAS APPEALS

- Habeas cases – if State loses, the State has an automatic direct appeal to the 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 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
- Please respond to us – especially if the COA proposes to reverse on insufficient evidence. We don't know any additional facts beyond the docketing statement and what might be in the record proper

FILING IN THE APPELLATE COURTS

USE 14-POINT TYPE – RULE 12-305(C)(1)

NEW MEXICO SUPREME COURT OPINIONS and DECISIONS from November 2018 to now

- *State v. Candelaria*
- *Lukens v. Franco*
- *State v. Fuschini* (unpublished)
- *State v. Gallegos* (unpublished)
- *State v. Lewis*
- *State v. Ordonez* (unpublished)
- *State v. Ortiz* (unpublished)
- *State v. Romero*
- *State v. Yazzie*

NEW MEXICO COURT OF APPEALS OPINIONS from November 2018 to now

- *State v. Begay*
- *State v. Benally*
- *State v. Candelaria*
- *State v. Casaus* (unpublished)
- *State v. Catt*
- *State v. Deans*
- *State v. Hildreth, Jr.*
- *State v. E Maes* (unpublished)
- *State v. Salazar*
- *State v. Simpson*
- *State v. Smith*
- *State v. Telles*
- *State v. Wright*

ARTICLE II, SECTION 13

Old provision

- All persons shall, before conviction, be bailable by sufficient sureties, except for capital offense 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 reasonably protect the safety of any other person or the community.

RULE 5-409 – PRETRIAL DETENTION HEARINGS

- 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 the legislature changes this
- Def 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)
- Appellate courts are using an abuse of discretion standard and generally affirm
- Court of Appeals has not applied the *Duran* presumption of ineffective assistance of counsel for untimely appeals
- Court of Appeals will not consider the appeal until the appellant provides a recording of the hearing
- We handle defendants' appeals; DAs handle State's appeals

"CAPITAL" OFFENSE

***State v. Muhammad Ameer*, 2018-NMSC-030, ___ P.3d ___**

- The Article II, Section 13 provision relating to "capital offenses" as nonbailable means offenses for which the death penalty is authorized
- Because capital punishment has been statutorily abolished as a punishment for first-degree murder, first-degree was not a "capital offense" for which bail could be categorically denied and the legislature cannot redefine this constitutional term
- "Capital offense" is still a term used by the legislature to denote first-degree murder – NMSA 1978, §§ 30-2-1(A); 31-18-14

PRETRIAL DETENTION

- 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 *and* that no release conditions will reasonably protect the safety of others
- 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); *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 supported pretrial detention order).

JURY SELECTION AND VENUE

- *State v. Gallegos*
- *State v. Romero*
- *State v. Telles*

JURY SELECTION

- ***State v. Trinidad Gallegos*, S-1-SC-36110 (Mar. 21, 2019) (unpublished decision)**
- Defense counsel questioned the venire about the presumption of innocence and whether jurors would need to hear from both sides – several members raised their hands
- Defense counsel then read the jury instruction on presumption of innocence and the State's burden of proof and three jurors who still raised their hands were excused for cause
- On appeal, defendant claimed the jurors who initially indicated they wanted to hear from the defense should have also been excused for cause
- *Fuson v. State*, 1987-NMSC-034. Prejudice is presumed when a party must use all its preemptory challenges on jurors who should have been excused for cause
- Nothing to show the jurors here should have been excused for cause. "By not raising their hands, [the potential jurors] indicated that their views would not impair their ability to perform their duties[.]"

VENUE

- ***State v. Andrew Romero*, 2019-NMSC-007, 435 P.3d 1231**
- Murder of Rio Rancho police officer – "robust" and "negative" media coverage in Sandoval county
- Def wanted trial moved to Rio Arriba, Taos, or McKinley county
- Court moved it to Valencia county on the grounds of "public excitement" – Section 38-3-3(B)(3) (2003)
- 800 prospective jurors summoned and 300 filled out a special questionnaire – final venire of 150 people and jury was selected
- Def renewed motion after jury selection – denied
- Reviewed for abuse of discretion
- Voir dire revealed no actual prejudice and court took "great care" to empanel a fair jury and gave "great latitude" to attorneys in questioning
- Court need not review the initial decision to move to Valencia County
- Court did express skepticism in argument to def's claim that media saturation was the same in Valencia County due to its geographical closeness to Albuquerque – def seemed to be arguing a fair jury can never be seated in a major media outlet

RIGHT TO PUBLIC TRIAL

- ***State v. Leonard Telles*, A-1-CA-34617 (Mar. 20, 2019)**
- Second-degree murder conviction – beat victim to death with a baseball bat
- After trial, it was discovered the courtroom had been inadvertently closed to members of the public – including three members of defendant's family – for 10-15 minutes during closing argument
- Defendant claimed constitutional error and district court denied the motion for a new trial finding the closure was brief and inadvertent
- Right to speedy and public trial – U.S. Const. amend. VI; N.M. Const. art. II, § 14 – is not absolute but courtroom closure is allowed only when there is "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *State v. Turrietta*, 2013-NMSC-036, § 17
- No overriding interest because court did not order the closure
- COA followed federal law on closures that can be characterized as "trivial" or "de minimis"
- No authority for defendant's position that any wrongful courtroom closure is a constitutional violation

DISCOVERY

- *State v. Candelaria*
- *State v. Gallegos*
- *State v. Salazar*

LATE DISCLOSED EVIDENCE

***State v. Karl Candelaria and Nora Chee*, A-1-CA-35193 and A-1-CA-35225 (Apr. 1, 2019)**

- State's witness found a relevant letter and turned it over to the State which in turn gave it to defense counsel the next day
- State did not breach a duty because it disclosed the letter as soon as it was received
- Court did not abuse its discretion in admitting the letter and denying def's request for a continuance
- It was cumulative of other evidence that Chee had no authority to write the checks
- Def was aware of the evidence, had interviewed the witness, and was allowed a few extra minutes to talk to the witness again before his testimony

DISCOVERY

- ***State v. Trinidad Gallegos*, No. S-1-SC-36110 (Mar. 21, 2019) (unpublished decision)**
- The State's main witness had entered into a use immunity agreement but this fact was not disclosed until the witness was on the stand at trial
- "Trial courts possess broad discretionary authority to decide what sanction to impose when a discovery order is violated." *State v. LeMier*, 2017-NMSC-017, ¶ 22
- Trial court allowed defense counsel to question the witness outside the jury's presence
- Witness said he did not remember the details of the agreement made with the State months earlier but would have remembered if he'd been asked earlier
- Court did not exclude his testimony but fined the State $275 ($25 for every month it failed to disclose)
- Not an abuse of discretion – no unilateral withholding of the agreement, no bad faith, and witness was available to defense in PTI

DISCOVERY

- ***State v. Johnny Salazar*, A-1-CA-35562 (Nov. 18, 2018)**
- Agg DWI charge – officer pursued def who evaded a checkpoint
- State lost its only copy of the officer's dashcam video and had already provided a copy to defense counsel
- Defense counsel refused to return a copy and the court granted the State's motion to compel
- Def claimed this created a conflict of interest with her client and sought to withdraw. Court denied that motion, too.
- Reviewed for an abuse of discretion

DISCOVERY (cont.)

- District court relied on Rule 16-304(A) NMRA which directs that a "lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material[.]"
- COA turned to rules of discovery because unclear what "unlawful" means in this context
- Rule 5-502 governing disclosure by the defense does not address this issue
- But Rule 5-101(B) requires rules to be "construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."
- And the rules are meant to "provide for reciprocal discovery rights and are intended to provide ample opportunity for investigation of facts." *State v. Stills*, 1998-NMSC-009, ¶ 52
- Providing the video does not implicate any of def's rights or privileges – State's evidence

CONFLICT OF INTEREST

- ***State v. Johnny Salazar*, A-1-CA-35562 (Nov. 18, 2018)**
- Reviewed de novo
- Def claims turning over the evidence meant weakening her client's case
- But a lawyer's duty to the client "are often, and properly, circumscribed by the lawyer's duties to the court and the administration of justice."
- "Compliance with these obligations [to the court], particularly in the absence of error by the court, generally gives rise to no conflict."

DEFENDANT'S STATEMENTS - *MIRANDA*

- *State v. Ordonez*
- *State v. Smith*

MIRANDA

- ***State v. Jeremiah Ordonez*, S-1-SC-36123 (Apr. 11, 2019) (unpublished decision)**
- State's appeal from suppression of def's statement in first-degree murder case
- Def was at MDC on an unrelated charge and wrote a letter to a church confessing to a murder
- Def confessed to police after being advised of his *Miranda* rights
- Def then moved to suppress claiming he did not understand his rights and presented an expert witness who said he suffered from mental illness
- No question that def was advised of his rights but district court found he did not understand the statements could be used against him in court
- Police admitted on the stand that def expressed confusion
- Def's statement "Yeah, I don't want to waiver" was "clearly equivocal" and "contributes meaningfully" to Court's conclusion that the *Miranda* warning was ineffective
- Not clear if he meant he did not want to "waver" from his decision to waive his rights or that he did not want to waive his rights
- Court combs the record to find evidence to support the district court's finding on this – Court cites not to the def's statement but to defense counsel's questioning of the officers during the motion

DEFENDANT'S RIGHT TO TESTIFY

- ***State v. Juhree Smith*, A-1-CA-34796 (Feb. 18, 2019)**
- Aggravated DWI
- Defense counsel told the court he did not anticipate calling any witnesses
- After the State rested, counsel conferred with his client for less than a minute and then called her to the stand
- The court was concerned and questioned defendant about her right not to testify. Defense counsel did not object and after a short recess, defendant decided not to testify
- Defendant claims this was a violation of her right to testify and compromised the attorney-client relationship
- No NM case on the issue but other jurisdictions find that it can be risky because the defendant may perceive the judge disapproves of the decision and it could affect defense strategy
- Nevertheless, the court has the discretion to question a defendant on the record about her decision to ensure any waiver is knowing and voluntary
- Court did not abuse its discretion here – it was not "gratuitous" questioning and was prompted by the "hurried" fashion in which the def's decision was made
- Def also claims judge misstated the law by telling her it was a decision to make with her attorney – no evidence defense counsel did not properly advise her it was her decision alone

CHILD ABUSE

- *State v. Casaus*

CHILD ABUSE – MEDICAL NEGLECT

- ***State v. Stephen Casaus*, A-1-CA-35349 (Nov. 21, 2018) (unpublished disposition)**
- Nine-year-old boy beaten to death by his mother
- Def father was convicted with child abuse resulting in death for medical neglect
- Evidence showed he was aware of the child's grievous injury – which resulted in a slow bleed - but did nothing for hours
- Evidence showed he instead tried to conceal the crime and shot up heroin
- COA read *State v. Nichols*, 2016-NMSC-001, to require specific medical testimony as to what treatment the child could have received and what difference it would have made
- ER doctor and forensic pathologist both testified but Court still found that causation was lacking
- CERT WAS DENIED

DWI

- *State v. Smith*

DWI – RIGHT TO INDEPENDENT TEST

- ***State v. Juhree Smith*, A-1-CA-34796 (Feb. 18, 2019)**
- Aggravated DWI – breath test of .18 and .19
- Defendant claims her motion to suppress should have been granted for failure to arrange for an independent blood test under Section 66-8-109(B)
- When first pulled over, she said she wanted a blood test. She was told of the consequences of refusing a breath test and decided to take the breath test
- She did not renew her request for a blood test after the breath test
- Def's request for an independent test was "made as part of her refusal to take the officer-designated breath test."
- Therefore, she did not ask for an independent test *in addition* to the breath test but *instead* of the breath test
- Defendant never affirmatively asked for an independent test and officer's obligation to provide her the means to do so never materialized

STATUTORY CONSTRUCTION

- *State v. Candelaria*

STATUTORY CONSTRUCTION – FORGERY

***State v. Karl Candelaria and Nora Chee*, A-1-CA-35193 and A-1-CA-35225 (Apr. 1, 2019)**

- Chee issued quick pay checks to herself and Candelaria from a business at which she worked – she had no authority to issue the checks
- Section 30-16-10-(A)(1) – "Forgery consists of falsely . . . making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injury or defraud[.]"
- Forgery "requires a lie" but the lie must be about the document itself
- NM recognizes distinction between a document which is not genuine (forgery) and a genuine document the contents of which are false (not forgery)
- Defs claimed the checks were not "lies in and of themselves" because the checks and signature stamp were genuine
- However, the key distinction is that the signature stamp belonged to the company's CFO and not to Chee
- "In sum, whether a defendant signs another's name by hand, or uses a signature stamp, his or her actions tell a lie about the document itself – that it has been made with the approval of the apparent signer, and is therefore genuine – and does not merely tell a lie about a fact or facts stated in the document." ¶ 12

SUFFICIENT EVIDENCE

- *State v. Benally*
- *State v. Candelaria*
- *State v. Romero*
- *State v. Telles*

SUFFICIENT EVIDENCE – CONSTRUCTIVE POSSESSION

- ***State v. Milo Benally*, A-1-CA-36122 (Mar. 6, 2019)**
- Inmate def had two weapons in his area with three bunks – a shaving razor with a playing card as a handle and a mop handle shaved down to a sharp point. Shavings from the mop handle were found in the nearby shower area
- Def expressed anger toward another inmate and said he wanted to "cut that guy's head off."
- Convicted of two counts of possession of a deadly weapon by a prisoner – NMSA 1978, § 30-22-16
- Jury could reasonably infer defendant had knowledge of and control over both weapons
- Defendant's statements of "what if that thing was mine"; animus against other inmate; and appreciation that prison staff found them when they did before he "lost it" and "something . . . went down"
- Weapons were also in the bottom bunk which had other items with defendant's name on them and were within an arm's reach of the occupant of that bunk

SUFFICIENT EVIDENCE – DEPRAVED MIND MURDER

- ***State v. David Candelaria*, 2019-NMSC-004, 434 P.3d 297**
- Argument between two groups in separate vehicles – def shot into the car and killed an eight-year-old girl
- All factors for depraved mind murder were met – more than one person was endangered, def's act was "intentional" and "extremely reckless", def had subjective knowledge that his act was greatly dangerous to the lives of others, and the act showed an intensified malice or evil intent
- Def received self-defense and defense of others instructions but the jury rejected his defense
- Also was sufficient evidence of agg assault against the others in the car

SUFFICIENT EVIDENCE – AGGRAVATED FLEEING

- ***State v. Andrew Romero*, 2019-NMSC-007, 435 P.3d 1231**
- Def claimed insufficient evidence because Officer Benner was not "in pursuit" when def fled the scene and endangered the lives of others
- "In pursuit" is not an element in the UJI
- Under these facts, def's flight was part of a continuing course of conduct. Upon Officer Benner's first approach, def told his girlfriend to "drive, bitch" and then shoved her out of the moving vehicle. The officer then approached again and def shot him.

SUFFICIENT EVIDENCE – FIRST-DEGREE MURDER

- ***State v. Andrew Romero*, 2019-NMSC-007, 435 P.3d 1231**
- Def claims insufficient evidence of deliberation and that it was only a rash impulse
- But GF testified def shoved her out of the moving car because he didn't "want [her] to be involved in anything that was going to happen."
- She also testified he said he wasn't going back to prison and it's him or the cops
- Def also repositioned the gun after the initial traffic stop to make it more accessible
- Def paused in his shots and fired "four controlled shots" that all struck the officer rather than emptying the entire magazine
- Def knew he had just committed an armed robbery and waited until the officer approached again to shoot him

SUFFICIENT EVIDENCE - KIDNAPPING

- ***State v. Leonard Telles*, A-1-CA-34617 (Mar. 20, 2019)**
- Victim's moribund body was rolled up in a carpet and moved to a back bedroom
- Argued in the alternative – held to service by preventing victim from assisting himself or calling police or to inflict physical injury
- Assuming *arguendo* that this was not held to service because only incidental to the homicide, the kidnapping statute allows the second alternative and defendant made no argument to the contrary

DEFENSES

- *State v. David Candelaria*

DEFENSES - DUTY TO RETREAT

- ***State v. David Candelaria*, 2019-NMSC-004, 434 P.3d 297**
- Depraved mind murder conviction
- Def received self-defense and defense of others instructions
- Claimed fundamental error for not giving no-retreat instruction – UJI 14-5190. "A person who is threatened with an attack need not retreat . . . and may stand his ground and defend himself."
- *State v. Anderson*, 2016-NMCA-017, COA held the instruction was necessary to jury's self-defense determination as it informed whether the def acted reasonably
- But no evidentiary basis for the instruction in this case – def in *Anderson* argued that he had no duty to retreat. Def made no such claim here and there was a great deal of evidence to reject the self-defense theory

DOUBLE JEOPARDY

- *State v. Benally*
- *State v. Candelaria*
- *State v. Fuschini*
- *State v. Hildreth Jr.*
- *State v. Telles*

DOUBLE JEOPARDY – UNIT OF PROSECUTION

- ***State v. Milo Benally*, A-1-CA-36122 (Mar. 6, 2019)**
- Inmate def had two weapons in his three-bunk area – a shaving razor with a playing card as a handle and a mop handle shaved down to a sharp point. Shavings from the mop handle were found in the nearby shower area
- Def expressed anger toward another inmate and said he wanted to "cut that guy's head off."
- Convicted of two counts of possession of a deadly weapon by a prisoner – NMSA 1978, § 30-22-16
- Unit of prosecution analysis – look at statutory language and if it is unclear, determine whether the acts are separated by sufficient indicia of distinctness
- Possession cases are looked at two ways – physical conduct of the defendant *or* the individual items possessed

DOUBLE JEOPARDY – UNIT OF PROSECUTION (cont.)

- ***State v. Milo Benally*, A-1-CA-36122 (Mar. 6, 2019)**
- *State v. Olsson*, 2014-NMSC-012 – possession of multiple images of child pornography was one act; *State v. Tidey*, 2018-NMCA-014 – possession of two items of drug paraphernalia was one act; *State v. Bernard*, 2015-NMCA-089 – possession of four stolen vehicles constituted four separate acts.
- All three cases found the statue ambiguous as to unit of prosecution and Court likewise finds Section 30-22-16 ambiguous
- No sufficient indicia of distinctness
- No evidence of separation of time relying on lack of evidence that defendant made either weapon
- Not enough evidence of separation of space even though they were in separate hiding places
- Relies on fact that they were simultaneously found
- Weapons are "more similar than different."
- No "result" of the possession – i.e. no victims or harm
- Discounts the State's argument of policy considerations underlying the statute as a "misunderstanding" of the unit of prosecution analysis
- CERT PETITION HAS BEEN FILED

DOUBLE JEOPARDY – UNIT OF PROSECUTION

- ***State v. Karl Candelaria and Nora Chee*, A-1-CA-35193 and A-1-CA-35225 (Apr. 1, 2019)**
- Two fraud convictions
- Time periods for the two convictions were overlapping
- Indictment and jury instructions do not specify the exact conduct on which these charges are based
- State argued at trial that the difference was the way the two checks were deposited but did not "make clear" what this difference was
- Unit of prosecution case – two step process. Analyze the statute's language and if the unit of prosecution is not clear, determine whether the acts are separated by sufficient "indicia of distinctness."
- Unit of prosecution for fraud is not clearly defined
- And jury could have relied upon the same evidence for both convictions
- Court looked to State's closing argument and determined the factual basis for the two counts was not differentiated

DOUBLE JEOPARDY – JURY INSTRUCTIONS

- ***State v. Annette Fuschini*, S-1-SC-36489 (unpublished decision)**
- Def was convicted of involuntary manslaughter and aggravated DWI for driving over and killing her fiancé when she was drunk
- State charged her with deliberate murder and she was convicted of the lesser offense, as requested by the defense. Neither party requested a vehicular homicide instruction.
- Agg DWI only requires that the def "cause bodily injury" but the given instruction changed the UJI to "contradict" the legislative intent and require the jury to find def "caused the death of the victim"
- Therefore, because both crimes required the jury to find def "caused the death" of the victim, double jeopardy was violated
- However, the Court rejected the new appellate claim that his IM conviction should be vacated because vehicular homicide preempts IM. Any error was invited because def requested the IM stepdown.

DOUBLE JEOPARDY – BAR OF RETRIAL UNDER *State v. Breit*

- ***State v. Henry Hildreth, Jr.*, A-1-CA-36833 (Feb. 27, 2019)**
- Defense counsel refused to participate in the trial
- Defendant also argued retrial was barred and sought to extend *Breit* to the judge
- *Breit* bars retrial under DJ principles when the "improper official conduct is so unfairly prejudicial" that it cannot be cured short of a mistrial, the official knows his conduct is improper and prejudicial, and the official either intends to provoke a mistrial or acts in willful disregard
- *Breit* was a departure from federal law on the issue and has only been used in situations of prosecutorial misconduct
- Defendant claims the judge was dismissive of his counsel and acted in willful disregard of the resulting reversal
- Court does not decide if *Breit* can be extended to the judge, but finds that the judge acted impartially and "attempted to mitigate" counsel's inaction in the eyes of the jury
- Cert petition was filed on this issue and is pending

DOUBLE JEOPARDY – DOUBLE DESCRIPTION

- ***State v. Leonard Telles*, A-1-CA-34617 (Mar. 20, 2019)**
- Claimed DJ violation for convictions for attempted tampering with evidence and kidnapping
- Defendant wrapped victim in a carpet and moved him to a back bedroom
- Double description claim – single act results in multiple charges under different statutes
- *Blockburger* test – consider the elements of the statutes and determine whether each one "requires proof of a fact which the other one does not."
- If neither statutes subsumes the other, presume Legislature intended separate punishment
- Here, the statutes require separate proof. Tampering focuses on intent to hide evidence to avoid prosecution and kidnapping focuses on intent to confine a person
- Presumption of separate punishment is not overcome by legislative intent – statutes address separate social evils

FOURTH AMENDMENT and ARTICLE II, SECTION 10

- *State v. Salazar*
- *State v. Simpson*
- *State v. Wright*
- *State v. Yazzie*

FOURTH AMENDMENT – REASONABLE SUSPICION

- ***State v. Johnny Salazar*, A-1-CA-35562 (Nov. 20, 2018)**
- Def paused, made a U-turn before a marked checkpoint, and drove "rapidly" away
- Officer suspected he was trying to avoid the checkpoint and pursued him. Lost sight of the car but then saw it parked with def standing outside. Def conceded that he was trying to evade the checkpoint.
- *State v. Anaya*, 2009-NMSC-043, ¶¶ 11-18, has "specific guidance" on when reasonable suspicion can be supported by evasive driving behavior near a checkpoint
- The pause on the roadway, the U-turn, the acceleration from the checkpoint, the visibility of the checkpoint, and the officer's testimony regarding normal traffic patterns in the area support district court's finding of reasonable suspicion
- Def relied on fact that officer lost sight of car during pursuit and "guessed" as to its route of travel – but traffic was light and "potential universe of suspects was small" in light of the short length of time in which the officer lost sight
- COA also notes that if the brief loss of contact was enough to eliminate RS, this would "condone a constitutional test not only inconsistent with our prior precedent but also dismissive of the significant risk that fleeing drunk drivers pose to the public."
- Good record – detailed testimony from the officer

FOURTH AMENDMENT – REASONABLE SUSPICION

- ***State v. Jennifer Simpson*, A-1-CA-35414 (Jan. 22, 2019)**
- Def parked her car at 11:20 p.m. on park property. An officer approached her on foot and she started to drive away. The officer tapped on the window of the moving vehicle and she rolled the window down. The officer immediately smelled alcohol and def was eventually arrested for DWI.
- COA held the encounter was consensual and def was not seized by the tap on the window
- Applied the "free-to-leave" test from *State v. Garcia*, 2009-NMSC-046.
- Look to circumstances surrounding the contact and whether they were at a level of "accosting and restraint that a reasonable person would have believed he or she was not free to leave."
- Tap on the window was not a "show of police authority" that conveyed a message that def was not free to leave – no lights; no siren; no commands
- The "communicative effect" of the tap is to gain the occupant's attention and would generally "be perceived as nonoffensive contact if it occurred between two ordinary citizens."
- Fact that vehicle was moving does not change the analysis – officer did not conduct a traffic stop

FOURTH AMENDMENT – AUTHORITY OF RESERVE DEPUTY

- ***State v. Somer D. Wright*, A-1-CA-35497 (Feb. 14, 2019)**
- State's appeal from district court's suppression of all evidence from vehicle stop in DWI prosecution
- Reserve deputy saw def speeding and driving erratically. Def pulled into her driveway, struck another parked car, and then backed up and nearly hit the deputy's car
- Deputy identified himself to def and could smell alcohol – she admitted consuming four beers
- Deputy told the def "hang tight" and commissioned officer arrived in five minutes
- The stop was a statutory violation under Section 66-8-124(A) which requires an arrest by a commissioned, salaried PO

FOURTH AMENDMENT – AUTHORITY OF RESERVE DEPUTY(cont.)

- ***State v. Somer D. Wright*, A-1-CA-35497 (Feb. 14, 2019)**
- But was the statutory violation a *constitutional* violation?
- No – it was reasonable under the N.M. Const. Def was not pulled over, deputy spoke to her briefly, deputy did not ask her to exit her car, and he did not demand her paperwork
- The need to temporarily detain her "far outweighed" the minimal intrusion considering the def's actions and the need to identify drunk drivers
- Judge Vargas dissented finding that exigent circumstances did not allow for the warrantless arrest. She also noted there was some evidence that the deputy had done this before and expressed concern about deterring violations of statutory authority
- CERT GRANTED

FOURTH AMENDMENT – EMERGENCY ASSISTANCE DOCTRINE

- ***State v. Nathaniel Yazzie*, 2019-NMSC-008, 437 P.3d 182**
- Officer entered the residence without a warrant
- District court considered officer's testimony and his lapel video
- Officer was dispatched to do welfare check from neighbor that heard a "thumping"
- He knocked seven times and announced his presence. No response for 8-10 minutes but he heard an infant crying and a young child calling for his mother to wake up. The doorknob also rattled as if someone was trying to open the door
- The officer concluded that someone inside was hurt and that the children were unattended. He opened the unlocked door and saw def and a woman lying on the floor with two children and an infant in the same room. Officer performed a 30-second sweep to ensure his safety and see if anyone else needed assistance.
- Def was arrested and charged with negligent child abuse

FOURTH AMENDMENT – EMERGENCY ASSISTANCE DOCTRINE (cont.)

- ***State v. Nathaniel Yazzie*, 2019-NMSC-008, 437 P.3d 182**
- District court upheld the sweep but COA reversed
- Under the Fourth Amendment, police (1) must have reasonable grounds to believe there is an emergency and an immediate need for assistance to protect life or property and (2) there must be a reasonable basis, approximating PC, to associate the emergency with the place to be searched.
- *Brigham City v. Stuart*, 547 U.S. 398 (2006), held that the officer's subjective motivation is irrelevant and deleted the second requirement that the "search must not be primarily motivated by intent to arrest or seize evidence."
- First requirement was met. "Knowing that the very young children were unattended, Officer Temples had few reasonable alternatives but to open the door and check on the occupants."

ARTICLE II, SECTION 10 – EMERGENCY ASSISTANCE DOCTRINE (cont.)

- ***State v. Nathaniel Yazzie*, 2019-NMSC-008, 437 P.3d 182**
- Second requirement was also met. The officer's search was 30 seconds and limited to the exigencies that justified the initial entry.
- N.M. Const. art. II, § 10 retains the subjective requirement regarding the officer's motivation because it offers "broader protection against baseless, warrantless intrusions[.]"
- This third requirement was also met. Officer testified about his concern for the children and his fear that the mother was ill due to her failure to respond.

STANDARD OF REVIEW

- ***State v. Nathaniel Yazzie*, 2019-NMSC-008, 437 P.3d 182**
- District court considered officer's testimony as well as his lapel video and upheld protective sweep of residence
- On cert review, the NMSC held that "an appellate court must presume that the district court credited an officer's testimony, even if that testimony is not perfectly aligned with video evidence."
- "When video evidence conflicts with other evidence, an appellate court must defer to the district court's factual findings if supported by evidence in the record."
- COA "improperly rested its decision on an independent review of the lapel video and did not credit [the officer's] testimony regarding the circumstances that led to his entry."
- COA did not defer to district court's factual findings and used its own impressions from the video

EVIDENTIARY RULINGS

- *State v. Gallegos*
- *State v. Romero*

HEARSAY – HARMLESS ERROR

- ***State v. Trinidad Gallegos*, No. S-1-SC-36110 (Mar. 21, 2019) (unpublished decision)**
- First-degree murder
- Officer testified – in anticipation of a witness confirming the same – that he received an anonymous tip that defendant had placed the murder weapon in his truck
- State argued it was not offered for the proof of the matter asserted but to explain why the police sought a second warrant for the truck
- No weapon was recovered from the truck and the witness denied at trial that defendant told him that he put it there
- Def claimed inadmissible hearsay – it appeared he "craftily hid the murder weapon yet retrieved it before law enforcement could find it."
- Court agreed – defendant had not questioned police motives during the investigation or attacked the validity of the search warrant
- However, it was harmless error. No "reasonable probability" that it affected the verdict because it was not "highly emphasized" at trial, the police said no gun was found in the truck, and the tip wasn't mentioned at all in closing
- Strong evidence – witness heard a gunshot and defendant returned with a gun in his hands and instructed the witness to return to ABQ without the victim

CONFRONTATION CLAUSE

- ***State v. Trinidad Gallegos*, No. S-1-SC-36110 (Mar. 21, 2019) (unpublished decision)**
- First-degree murder
- Def did not raise the Confrontation Clause issue at trial so reviewed only for fundamental error
- The anonymous tip was testimonial hearsay for purposes of the Confrontation Clause – it was imparted for the "primary purpose" of assisting law enforcement in prosecution of defendant
- But def's conviction does not "shock the conscience" or "undermine judicial integrity if left unchecked."
- There was substantial evidence independent of the anonymous tip including eyewitness testimony of the events immediately before and after the killing
- Importantly, the State did not rely on the anonymous tip when arguing defendant's guilt to the jury

404(B) EVIDENCE

- ***State v. Andrew Romero*, 2019-NMSC-007, 435 P.3d 1231**
- Def's girlfriend testified that she and def had committed at least seven armed roberries to support their drug habit
- Testimony about earlier robberies was admissible to "give context" to girlfriend's plea deal and relationship with def and to rebut impeachment by def – district court limited details on the robberies
- "It is not the job of this Court to speculate on every conceivable purpose a portion of testimony may have[.]"

404(B) EVIDENCE

- ***State v. Andrew Romero*, 2019-NMSC-007, 435 P.3d 1231**
- GF also testified about two armed robberies that day – one before the murder and one after
- Admitted to show motive or identity
- Evidence showing def was wearing the same clothes and using the same gun
- "Consciousness of his guilt [of the first robbery] gave Defendant a motive to kill Officer Benner." GF testified he always said he wouldn't go back to prison and "it was either going to be him or the cops."
- Def was arrested following the second armed robbery and had the key to the vehicle that fled the scene after the officer's murder

SEVERANCE

- ***State v. Andrew Romero*, 2019-NMSC-007, 435 P.3d 1231**
- Def also argued it was error not to sever the charge of conspiracy to commit armed robbery from the murder and conspiracy to commit armed robbery
- But the robberies – as well as providing evidence of identity and motive – were admissible as "background evidence to show the context of other admissible evidence."
- The evidence was cross-admissible and probative to prove the murder

AUTHENTICATION

- ***State v. Andrew Romero*, 2019-NMSC-007, 435 P.3d 1231**
- Def made inculpatory jail calls discussing the murder
- Claims they were not authenticated under Rule 11-901(A) – inmates switch PINs with each other and there were 13 other inmates named Andrew
- But it was his PIN, he identified himself as Andrew, he asked about "Crystal" who is def's cousin, he discussed his move to MDC, and mentioned shooting his GF in the foot
- RR detective also identified the voice as def after listening to three other phone calls

INEFFECTIVE ASSISTANCE OF COUNSEL

- *Lukens v. Franco*
- *State v. Gallegos*
- *State v. Hildreth Jr.*

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

- ***David R. Lukens, Jr., v. German Franco*, 2019-NMSC-002, 433 P.3d 288**
- Petitioner was convicted of child abuse resulting in GBH and claimed his appellate attorney was ineffective for failing to fully brief issues on direct appeal
- COA did not directly address some issues due to counsel's failure to adequately brief them and admonished counsel for the brief's shortcomings
- Counsel filed an untimely petition for cert which NMSC denied
- District court denied the habeas petition finding petitioner failed to show prejudice – i.e. that the results would have been different

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL (cont.)

- ***David R. Lukens, Jr., v. German Franco*, 2019-NMSC-002, 433 P.3d 288**
- Defs are entitled to effective assistance of appellate counsel
- NMSC held it would not presume prejudice where petitioner did receive his constitutional right to one appeal – prejudice should be presumed only when a defendant is completely deprived of a merits review
- Here, the COA considered the merits of the arguments made and the appeal was not "a total or even a substantial failure."
- "Deficient briefing does not necessarily equate to ineffectiveness."

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL (cont.)

- ***David R. Lukens, Jr., v. German Franco*, 2019-NMSC-002, 433 P.3d 288**
- NMSC then considers if petitioner showed *actual* prejudice
- Petitioner argues that but for counsel's errors, the conviction would have been reversed on appeal
- First, Petitioner claims that the use of "should have known" in the UJI for child abuse was erroneous under *State v. Consaul*
- No prejudice – the jury instruction was proper at the time. *Consaul* was decided a year later and the jury instruction wasn't changed until five years after petitioner's case was final
- Second, Petitioner claims that counsel failed to argue sufficiency of the evidence
- Petitioner argued that the child suffered from fragile bones which caused the fractures
- But Petitioner admitted squeezing the child too hard and getting mad at him
- Moreover, appellate counsel has discretion on which arguments to press on appeal and the sufficiency claim was weak

INEFFECTIVE ASSISTANCE OF COUNSEL

- ***State v. Trinidad Gallegos*, No. S-1-SC-36110 (Mar. 21, 2019) (unpublished decision)**
- IAC for (1) failure to object to the anonymous tip on Confrontation Claus grounds and (2) failure to subpoena an expert witness to rebut testimony regarding the location of the def's cell phone
- (1) No prejudice because Court had already concluded that the inclusion of the anonymous tip evidence did not make a difference in the verdict
- (2) Record disclosed that defense counsel apparently consulted with an expert and it was unclear why that expert was not called at trial.
- But could be several reasons why defense counsel did not call the expert and the substance of the expert's proposed testimony is completely unknown
- Moreover, the cell phone evidence was not the "crux" of the State's case

INEFFECTIVE ASSISTANCE OF COUNSEL – REFUSAL TO PARTICPATE

- ***State v. Henry Hildreth Jr.*, A-1-CA-36833 (Feb. 27, 2019)**
- Court denied defense counsel's request for continuance and counsel told the court "I will not be ready, your honor. I will not participate in the trial."
- Counsel remained "steadfast" in his decision and did not participate in jury selection, give a substantive opening statement, CX any witnesses, call any witnesses, move for DV, or give a closing argument
- State conceded IAC and Court agreed
- Counsel's conduct "rose to the level of a constructive denial of counsel sufficient to create a presumption of prejudice."
- Counsel's refusal to provide his client with a defense resulted in an "unseemly and unusual" situation. Counsel was not "empowered with decisional autonomy regarding when trials commence and when they do not commence."
- Court also said courts are not "helpless" and could have (1) ordered new counsel (2) imposed a sanction (3) invoked contempt powers
- But forcing a criminal defendant to trial with an non-participating attorney "hinders" rather than promotes judicial economy "while all but ensuring" a violation of def's constitutional rights

SPEEDY TRIAL

- *State v. Candelaria*
- *State v. Deans*

SPEEDY TRIAL – Motion Untimely Filed

***State v. Karl Candelaria and Nora Chee*, A-1-CA-35193 and A-1-CA-35225 (Apr. 1, 2019)**

- District court summarily denied speedy trial motions on the grounds that they were filed after the pretrial motion deadline
- Court was bound by LR2-400 (now LR2-308)
- Court issued a scheduling order which provided that the court "shall impose sanctions" if a party fails to comply with the set deadlines
- Defs filed their motions to dismiss two months after the pretrial motion deadline and neither acknowledged the delay nor established good cause for it
- Court had authority – both inherent and under LR2-400 – to deny the motion without reaching the merits
- Defs rely on *State v. Taylor*, 2015-NMCA-012, in which the Court said the right to a speedy trial is "fundamental" and is not waived even if not asserted
- "*Taylor* does not stand for the proposition that the right to assert a speedy trial violation is somehow immune from the district court's authority to set pretrial motions deadlines" and held only that a defendant who earlier stipulated to a continuance was not foreclosed from later asserting the right to a speedy trial
- Other cases have held that a motion asserting a fundamental/constitutional rights are subject to p retrial motion deadlines

SPEEDY TRIAL

- ***State v. Laverle Deans*, 2019-NMCA-015, 435 P.3d 1280**
- Def was charged with multiple counts of possession of CP in 2012. In 2014, *Olsson* was decided and def successfully moved to have 20 counts merged into one
- Defendant pled guilty to one count and appealed denial of motion to dismiss for speedy trial violation
- 30-month delay and def was incarcerated for 28 months
- COA found case was of intermediate complexity and passage of time inured to def's benefit because of the change in the law – no particularized prejudice
- COA also held that the exception from *State v. Serros*, 2016-NMSC-008, in which the Court accepted the def's testimony that he did not accede to the delays requested by his attorney, is very limited
- *Serros* is only applicable where the "prejudice is palpable." Here, the general rule that delays caused by defense counsel are attributable to the def would apply

SPEEDY TRIAL

- Request trial settings in writing – new judge
- Request rulings on pending motions
- Do not always acquiesce to defense requests for continuance or be wary of multiple 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

JURY DEADLOCK

***State v. Kelson Lewis*, 2019-NMSC-001, 433 P.3d 476**

- Jury instructed on CSCM with battery as a lesser included
- Jury sent two notes asking if they should move onto lesser offense if they cannot reach unanimous decision on CSCM and district court declared mistrial after foreperson clarified they could not reach a verdict on Count I
- Def appealed the mistrial order claiming the district court failed to poll the jury and retrial on CSCM was a violation of double jeopardy
- (1) There was a clear record of deadlock on CSCM
- "Importantly, the judge must confirm that the jury did not unanimously agree that the defendant was not guilty of one or more of the included offenses because the constitutional protection against double jeopardy precludes the State from prosecuting the defendant for such offense(s) since the jury's unanimous agreement on a verdict of not guilty constitutes an acquittal." *State v. Phillips*, 2017-NMSC-019, ¶ 1
- Rule 5-611(D) sets out the procedure to do this – court is to poll the jury on the offenses in descending order to determine at what level the jury has disagreed. "If upon a poll of the jury it is determined that the jury has unanimously voted not guilty as to any degree of an offense, a verdict of not guilty shall be entered for that degree and for each greater degree of the offense."

JURY DEADLOCK cont.

- Court rejected def's argument that failure to strictly comply with Rule 5-611(D) was an abuse of discretion – the court established a clear record and the contrary holding would "exalt form over substance."
- Court notes that the Rule 5-611(D) says the court "shall" poll the jury but clarifies that its precedent only requires that a clear record is made
- (2) Court notes that UJIs 14-6002 and 14-6012 – and its case law - are ambiguous and inconsistent regarding whether a jury may proceed to consideration of a lesser offense if deadlocked on the greater
- The instructions both "simply state that the jury must proceed to consideration of the lesser offense if it has 'reasonable doubt" of the defendant's guilt of the greater offense"
- Courts in other states with similar instructions are split as to whether this means the jury has to unanimously find the def not guilty before proceeding to the lesser or the jury is supposed to proceed to the lesser if unable to agree on the greater

JURY DEADLOCK – "MODIFIED ACQUIT FIRST APPROACH"

- Here, the district court gave the instructions the "reasonable interpretation" that the jury should not consider the lesser battery offense if deadlocked on CSCM and should proceed to consider lesser offense only if acquitted on greater
- Court adopts the "modified acquit first approach" of Alaska and California
- Jury has discretion to choose the manner and order in which it deliberates on the offenses *but* it must return a unanimous verdict of not guilty on the greater offense before the court may accept a verdict on the lesser offense
- Promotes the policy of not interfering with jury deliberations and does not deprive the State of final resolution on the greater charge
- Referred to the Criminal Uniform Jury Instructions Committee
- CONSIDER USING CALIFORNIA JURY INSTRUCTION CITED IN OPINION

SENTENCING AND MOTIONS FOR NEW TRIAL

- *State v. Ortiz*
- *State v. Quintana*

MOTION FOR NEW TRIAL

- ***State v. Nicholas Ortiz*, S-1-SC-36788 (Mar. 4, 2019) (unpublished decision)**
- Def convicted of three counts of felony murder and other charges
- More than six months later, but before sentencing, def filed motion for new trial claiming error for failure to instruct on provocation
- Briefed on the merits but NMSC simply found the motion was untimely and district court lacked jurisdiction to rule on it
- Rule 5-614(C) allows ten days for a motion for new trial on any grounds other than discovery of new evidence
- *State v. Lucero*, 2001-NMSC-024, held that failure to comply deprives a district court of jurisdiction to rule on the motion
- Did not decide if it is an "absolute jurisdictional requirement" or a "mandatory precondition to the exercise of jurisdiction."

SENTENCING

- ***State v. Ricky Quintana*, A-1-CA-36368 (Feb. 5, 2019)**
- Def charged with open count of murder and parties stipulated he was incompetent to stand trial and dangerous
- Clear and convincing evidence of second-degree murder with aggravating circumstances – 15 year commitment plus 3
- Aggravation was based on "extreme viciousness and brutality" of the murder
- Def claims aggravation is not allowed under the NM Mental Illness and Competency Code (NMMIC) – Section 31-9.1.5(D)(1), (2) allows for detention in a secured and locked facility for the "period of time equal to the maximum sentence to which the defendant would have been subject had the defendant been convicted in a criminal proceeding[.]"
- Court disagrees with def's argument that this means only the basic sentence provided for in Section 31-81-15
- *State v. Chorney*, 2001-NMCA-050, held that habitual offender enhancement cannot be imposed under the NMMIC because it is more punitive than treatment-related and is not related to a "specific marker of dangerousness."
- Here, the method of committing the crime is directly relevant to def's dangerousness
- "The 'maximum sentence' . . . addresses the possible dangerousness of an incompetent defendant and provides the outer limits for commitment for the purpose of protecting society." *Chorney*, ¶ 12

SEX OFFENDER PAROLE PERIOD

- Section 31-21-10.1(A)(2) was amended effective 7/1/07 to increase the parole period for certain sex offenders from 5-20 to 5-natural life
- Otherwise, the parole period is 5-20 for sex offenders
- Make sure the applicable parole period is a term in the P&D agreement and the J&S
- "We have held that the law, at the time of the commission of the offense, is controlling." *State v. Allen*, 1971-NMSC-026, ¶ 6, 82 N.M. 373

SEX OFFENDER PAROLE PERIOD

- Defendant is sentenced and district court later amends J&S to include the correct parole period of 5-20 years
- We've had success in upholding this despite *State v. Torres*, 2012-NMCA-026, 272 P.3d 689, which held that trial court lacked jurisdiction to consider 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? Argue *Foulenfont* does not apply before you argue the merits
- Most of these issues probably should be resolved by a jury – not a judge
- "Questions of fact, however, are the unique purview of the jury and, as such, should be decided by the jury alone." *State v. LaPietra*, 2010-NMCA-009, ¶7, 147 N.M. 569.

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 and triple check jury instructions**
- Please state what is happening – can't see gestures
- Reiterate the content of the exhibit if you refer to it – e.g. "State's Exhibit 25, which is the murder weapon."
- 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)
- Make sure exhibits are all together and with the court. Do not let the court return the exhibits to the parties – they are part of the record

JURY INSTRUCTIONS

- Crucial to a successful appeal
- Fertile ground for reversal
- Even if rushed, please review the language, especially of the elements instructions. An inadvertent typo can have disastrous consequences

PLEA AGREEMENTS

- Please always detail the factual basis and the dates of the offenses to which the def is pleading – do not stipulate or refer to another case
- Double check the dates of the charges to which def is pleading and make sure the sentence and parole periods match, especially for sex offenders
- Any ambiguity in the plea agreement will inure to the def'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 scrutinize the actions, or inactions, of the prosecutor and the prosecutorial team – *Serros*