NEW MEXICO OFFICE OF THE ATTORNEY GENERAL

APPELLATE LAW UPDATE
DISTRICT ATTORNEYS CONFERENCE
APRIL 15, 2020

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
- Fran Narro in Albuquerque – handles state habeas, federal habeas, and much more – (505) 717-3573 and fnarro@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

NEW MEXICO SUPREME COURT

- Published opinions and unpublished decisions from November 2019 to now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 2019 to now
- Rule 12-405 NMRA permits citations to unpublished opinions (memorandum opinions)
- Memorandum opinions and published opinions are faxed or emailed 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- All opinions, published and unpublished, are available on the New Mexico Court of Appeals website – https://www.nmcourts.gov/Court-ofAppeals/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
- INCORRECT: *State v. Gallegos*, 141 N.M. 185, 189, 152 P.3d 828, 831

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
- Calendar notice is issued based on the record proper and docketing statement – don't just include the facts that are good for the State
- **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 at https://coa.nmcourts.gov/attorney-information.aspx**
- **DOCKETING STATEMENT IS FILED IN APPELLATE COURT AND SERVED ON THE DISTRICT COURT**

COA PILOT PROJECT

- Court is moving away from summary calendar and has proposed a pilot project which started this month in the 11th Judicial District
- Once the appeal is filed, the district court is to provide the entire record to the Court and parties
- Our Division would file a brief in chief as the first pleading in a State's appeal – no more docketing statements
- Only applicable to cases involving the LOPD
- If you're in the 11th, and planning on filing an appeal, call me!

HABEAS APPEALS

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

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 filed 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

- All electronic filing – no other filing is accepted
- Everything is on Odyssey
- Supreme Court number format – S-1-SC-12345
- Court of Appeals number format – A-1-CA-12345
- Use 14-point type – Rule 12-305(C)(1) NMRA
- Do not include an order with a motion – the appellate courts generate their own orders
- Docketing statements are generally the only document you will have to file in the appellate courts and there is no page limitation
- Other questions – please just call

NEW MEXICO SUPREME COURT OPINIONS and DECISIONS from November 2019 to now

- *State v. William Alexander* (unpublished decision)
- *State v. Jeffrey Aslin*
- *State v. Joe David Chavez, Sr.* (unpublished decision)
- *State v. Jesse Lawrence Lente*
- *State v. Mikel A. Martinez*
- *State v. John Eric Ochoa* (unpublished decision)
- *State v. Matthew Sloan*
- *State v. Terrick L. Thompkins* (unpublished decision)
- *State v. Roberto Vargas* (unpublished decision)
- *State v. Crystal Vigil* (unpublished decision)
- *State v. Terry White* (unpublished decision)
- *State v. Ronald Widmer*
- *State v. William York* (unpublished decision)

COURT OF APPEALS OPINIONS FROM NOVEMBER 2019 TO NOW

- *State v. Alexander Alirez* (unpublished)
- State v. Joseph *Apodaca*
- *State v. Brandon Dyke*
- *State v. Warren Brand Franklin*
- *State v. Ysidro Robert Garcia*
- *State v. John R. Gonzales*
- *State v. Nathaniel Hertzog*
- *State v. Joshua Jackson*
- *State v. Sarita Jones*
- *State v. William Kalinowski*
- *State v. Arthur Martinez*
- *State v. Miguel Otero*
- *State v. David Rael*
- *State v. Cloycevann Salazar*
- *State v. Juventino Serrato*
- *State v. Lafayette Stone* (unpublished)

JURISDICTION

- *State v. Salazar*

JURISDICTION – INDIAN COUNTRY

- ***State v. Cloycevann Salazar***, No. A-1-CA-36206 (Jan. 15, 2020)
- Def was charged with probation violation for crimes committed on the Mescalero Apache reservation
- Generally, a state "does not have jurisdiction over crimes committed by an Indian in Indian country." *State v. Frank*, 2002-NMSC-026.
- Dispute was whether def was an Indian. State argued he was not enrolled in the tribe and therefore did not qualify. District court agreed.
- Held: reversed. Federal and other state courts have held that lack of enrollment is not dispositive. Tribal enrollment alone is sufficient proof that a person is an Indian but one may still be an Indian if not enrolled.
- Remanded for factual finding on other factors because the record below was undeveloped

DEFENSES

- *State v. Apodaca*
- *State v. Jones*
- *State v. Thompkins*
- *State v. Vargas*

DEFENSES – MISTAKE OF FACT

- ***State v. Joseph Apodaca***, No. A-1-CA-36469 (Apr. 1, 2020)
- First degree CSP conviction for brutal rape of woman which left her with severe injuries that required multiple surgeries
- Def claimed consent and tendered a mistake of fact instruction
- The district court denied it because (1) the theory of force and coercion required the jury to find the act was unlawful and done without consent and (2) the theory that the victim was unable to consent (due to incapacitation) required the jury to find that defendant knew or should have known of her condition
- COA disagreed and found the instruction should have been given as to the first theory – although finding it was redundant as to the second – i.e. def was under the mistaken impression that the victim consented
- Also found it should have been given on the tampering charge because if def didn't think there had been a rape as he cleaned the blood from his truck, his conduct was innocent
- Dissent didn't address the legal issue that the instruction should never be given but did find that it shouldn't be in these circumstances because even if given, the mistake of fact has to be **honest and reasonable**
- **CERT WILL BE SOUGHT**

DEFENSE OF ANOTHER

- ***State v. Sarita Jones***, No. A-1-CA-37558 (Feb. 4, 2020)
- Officers dispatched to domestic dispute and asked def and her two sons to step outside. One son went back inside and both officers pointed their tasers at him. Mom def testified she thought they were guns and clawed and grabbed at the officer's wrist
- Def's conviction for battery on a peace officer was reversed and remanded for new trial
- Held: defense of another against use of excessive force by a police officer is a viable defense and the requested instruction should have been given
- State argued that the elements under *State v. Ellis*, 2008-NMSC-032, were not satisfied to warrant the instruction. *Ellis* outlined the standard to apply in self-defense cases against police officer and held that if "some evidence of excessive force" is presented then a self-defense instruction is required
- *Ellis* applies to defense of another and reasonable minds could differ as to whether the officers used excessive force against the def's son
- Relied on multiple cases from other jurisdictions which also recognize the defense

DEFENSES - INSANITY

- ***State v. Terrick L. Thompkins***, No. S-1-SC-37220 (Apr. 6, 2020) (unpublished decision)
- Shot a "t" in the door, came in and shot his ex-wife and her boyfriend
- Claimed the district court erred in not directing a verdict in his favor on insanity
- Court discusses the evidence at length with the competing experts – he suffered from various mental disorders including PTSD and a traumatic brain injury but he also clearly had a motive for the killing due to losing custody of his children the day before and called 911 and confessed
- "Because the evidence [of insanity] . . . was clearly disputed, the determination of Defendant's sanity was a question for the jury to decide."

DEFENSES – DIMINISHED CAPACITY FOR NEGLIGENT CHILD ABUSE

- ***State v. Terrick Thompkins*,** No. S-1-SC-37220 (Apr. 6, 2020) (unpublished decision)
- Also convicted of child abuse for terrorizing the children inside the house
- Court correctly denied his requested diminished capacity instruction on these charges – UJI 14-5111 – because negligent child abuse only requires recklessness and does not have a specific intent

DEFENSES – VOLUNTARY INTOXCIATION

- ***State v. Roberto Vargas***, No. S-1-SC-36773 (Mar. 2, 2020)
- Depraved mind murder and other crimes
- On appeal, def claimed court should have given a voluntary intoxication instruction because there was evidence he was very drunk at the time of shooting
- Reviewed only for fundamental error because he never requested the instruction
- Could be available for some of the crimes, including DMM – *see State v. Brown*, 1996-NMSC-073, ¶ 16
- Court holds that it's unnecessary to decide if the evidence was enough to give the instruction because "he never claimed the defense of diminished capacity and the lack of a sua sponte intoxication instruction by the district court was not fundamental error."
- Habeas claim?

DEFENDANT'S RIGHT TO BE PRESENT – RULE 5-612(B)(2) NMRA

- ***State v. Matthew Sloan***, 2019-NMSC-019, 453 P.3d 401
- Felony murder conviction. Def and his companions (Duck and Hoss) stormed into victim's house and def shot victim in the head
- Defense counsel orally waived def's presence for pretrial hearing on qualification of expert witness
- Def has a due process right to be present for a "critical" stage of the proceeding - one at which "the defendant's presence at the proceeding would [contribute] to defendant's opportunity to defend himself against the charges" and a "fair and just hearing would be thwarted by his absence."
- Rule 5-612 "incorporates" this constitutional right – subsection D says presence not required for "a conference or hearing [only] upon a question of law."
- Hearing on expert witness was not critical stage because it dealt only with the expert's qualifications and was a preliminary gatekeeping question – not facts relative to guilt or innocence
- Disapproves broad rule that def has right to be present whenever testimony is taken
- **NOTE: even if defense counsel explicitly waives client's presence, court might decide under fundamental error so establish on the record that it's not a critical stage**

FOURTH AMENDMENT and ARTICLE II, SECTION 10

- *State v. Franklin*
- *State v. Martinez*
- *State v. Widmer*

DWI – *BIRCHFIELD*

- ***State v. Warren Brand Franklin***, 2020-NMCA-016, ___ P.3d ___
- Def was in a crash and taken to the hospital. Officer read his Implied Consent and parties dispute whether or not officer told him that he could be charged with a crime if he failed to take a blood test
- Blood test was given – by authorized nurse or technician – and result was .08
- Def moved to suppress claiming this violated *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160 (2016), which held a blood draw is not a valid search incident to arrest and motorists cannot be said to have impliedly consented to such a search "on pain of committing a criminal offense."
- District court took no evidence and denied the motion with no factual findings

DWI – *BIRCHFIELD* (cont.)

- ***State v. Warren Brand Franklin***, 2020-NMCA-016, ___ P.3d ___
- Def claims the blood draw must be suppressed under *Birchfield* because his consent was involuntary as it was premised on an inaccurate threat of heightened criminal penalties
- State argued no *Birchfield* error because def consented without threat of criminal penalties and because there were exigent circumstances
- Law in NM is that warrantless blood draws are not permitted unless (1) valid consent or (2) probable cause with exigent circumstances
- "We thus hold that when a defendant raises *Birchfield*, asserting [his] consent to a blood test was involuntary due to a partially inaccurate advisory, the district court must assess the voluntariness of the consent in light of the totality of the circumstances, including the improper implied consent advisory." ¶ 16
- Remanded to district court to consider (1) whether the criminal penalty portion of IC was read to def and if so, (2) whether def's consent was voluntary and/or (3) whether was there was probable cause with exigent circumstances

FOURTH AMENDMENT – REASONABLE SUSPICION

- ***State v. Mikel Martinez*,** 2020-NMSC-005, 457 P.3d 254
- On cert from COA's opinion finding no reasonable suspicion for stop even though the district court did
- Officer was doing surveillance at an Allsups known for to him as a drug trafficking area
- Def and another man drove to the gas pump and a third man got into the back of their car, interacted with them for a minute or two, and then left. Officer believed this was a possible drug transaction
- Def then drove to the side of the Allsups. A few minutes later, an SUV drove up and a woman got out and entered def's car for a few minutes. Officer believed this was also a possible drug transaction
- Stop eventually led to discovery of methamphetamine

FOURTH AMENDMENT – REASONABLE SUSPICION (cont.)

- ***State v. Mikel Martinez***, 2020-NMSC-005, 457 P.3d 254
- Defs argued the stop was based only on an "inarticulable hunch" but district court disagreed and relied on the officer's training and experience that indicated drug transactions
- The reasonable suspicion was informed by (1) officer's training and experience (2) his observations and (3) the fact that it was a high crime area
- "Reasonable suspicion engages probabilities" and "probability in turn is best assessed when one has encountered variations on a given scenario many times before."
- COA's conclusion to the contrary ignored the deference to the officer's training and "discount[ed] the gloss the district court gave the facts here."
- "Police officers must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent."
- "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct."
- High crime area justification is appropriate where officer can articulate the particular type of prevalent crime rather than just a generic assertion

MIRANDA – PUBLIC SAFETY EXCEPTION

- ***State v. Ronald Widmer*,** No. S-1-SC-36966 (Mar. 19, 2020)
- Def stopped for possible stolen vehicle and found to have outstanding warrants. Officers placed def in handcuffs and donned protective gloves in preparation for a search incident to arrest.
- Officer asked def, "Is there anything on your person I should know about?" and def responded, "I have meth."
- District court denied suppression and held the question was asked for officer safety
- The COA reversed and the NMSC granted cert
- Majority held (1) def was subjected to custodial interrogation and *Miranda* was therefore required but (2) def's statement was admissible as an exception to *Miranda* under *New York v. Quarles*, 467 U.S. 649 (1984), because the question was designed to protect the officers' safety
- "If questions designed to protect public safety were never interrogation, there would be no reason for *Quarles* to create an exception to the requirements of *Miranda*." ¶ 10

MIRANDA – PUBLIC SAFETY EXCEPTION (cont.)

- ***State v. Ronald Widmer*,** No. S-1-SC-36966 (Mar. 19, 2020)
- Justice Nakamura dissented on the majority's conclusion that the officer's question constituted interrogation
- First, *Quarles* creates an exception to *Miranda* itself. If a question is designed for officer safety, it is not interrogation designed to elicit an incriminating response
- She points out that the majority found both that the question was interrogation because it elicited a response that led to def's conviction but also that it was for public safety. Can't be both.
- *Quarles* doesn't deal with suppression but eliminates the *Miranda* requirement
- Like routine questions of name, address, age etc., public safety questions are not interrogation
- Second, the majority – and the COA – failed to defer to the district court's factual findings. That court heard the officers and found that the question – and their actions in putting on protective gloves – resolved the question in favor of public safety.

JURY DELIBERATIONS, INSTRUCTIONS, and VERDICTS

- *State v. Alexander*
- *State v. Martinez*
- *State v. Sloan*
- *State v. Stone*

JURY DELIBERATIONS

- ***State v. William Alexander*,** No. S-1-SC-37058 (Feb. 13, 2020)
- Jury returned verdicts on first-degree willful and deliberate but did not fill out the verdicts forms for the alterative felony murder
- Court asked jury if it had fully carried out its deliberations and whether additional deliberations would be "fruitful"
- The foreperson agreed and they came back with guilty verdicts on felony murder and the predicate kidnapping
- NMSC frames it as a double jeopardy question but applies *State v. Phillips*, 2017-NMSC-019, which deals with jury deliberations
- No *Phillips* problem here where the jury was not hung and there was no ambiguity in their verdicts – they were polled after final return of verdicts
- Fine to convict on alternative theories and district court vacated the felony murder to avoid any double jeopardy issue

JURY VERDICT IRREGULARITY

- ***State v. Arthur Martinez***, 2020-NMCA-010, 456 P.3d 1112
- Trial in magistrate court on two counts. Jury foreperson announced guilt on both which jury poll confirmed
- After jury was discharged, court noticed they signed both guilty and not guilty forms on both charges
- Apparently the court held another hearing that the foreperson attended and entered the guilty verdicts finding the NG verdicts were signed in error
- Def claimed double jeopardy violation in district court appeal but district court denied his motion to dismiss
- COA agrees the NG forms were clerical error – they are not "ambiguous" but flatly contradict the guilty verdicts
- Rule 6-704(B) authorizes mag court to correct clerical mistakes at any time
- Ample evidence that the guilty verdicts reflected the jury's true intent
- No double jeopardy because def was not actually acquitted

JURY INSTRUCTIONS – LESSER INCLUDED OFFENSE

- ***State v. Matthew Sloan*,** 2019-NMSC-019, 453 P.3d 401
- Drug deal gone bad – def stormed into victim's house and shot victim in the head
- Claims he was entitled to a voluntary manslaughter instruction as a lesser included offense
- Theory was that he was under duress from his accomplice Hoss – Hoss was the source of provocation that caused him to kill the victim
- Def is entitled to an instruction on a theory of the case when evidence supports the theory
- But, law is clear that the victim must be the source of the provocation to support voluntary manslaughter

JURY INSTRUCTIONS – DEADLY WEAPON

- ***State v. Layfayette Stone***, No. A-1-CA-36417 (Nov. 8, 2019)
- Def was dragging a suitcase in WalMart filled with stolen items and swung at the security guard causing a shallow scratch to the guard
- Def was seized later that day and found with a pocket knife
- Charged and convicted of shoplifting and agg battery with a deadly weapon
- Def claimed fundamental error on appeal for failure to instruct the jury to find that the knife was a deadly weapon
- COA agreed and found a pocket knife is not a per se deadly weapon under Section 30-1-12(B) and therefore must be found to be so by the jury. *State v. Traeger*, 2001-NMSC-022

EVIDENTIARY RULINGS

- *State v. Carson*
- *State v. Chavez*
- *State v. Franklin*
- *State v. Gonzales*
- *State v. Kalinowski*
- *State v. Ochoa*
- *State v. York*

404(B) EVIDENCE

- ***State v. Wallace Carson***, 2020-NMCA-015, ___ P.3d ___
- Human trafficking convictions
- Rule 11-404(B) evidence regarding def's uncharged bad acts in TX was properly admitted – evidence of his sexual and physical abuse of the victims
- Must be relevant to an issue and not mere propensity evidence to commit the charged crimes
- Relevant to the def's intent to use force, fraud, coercion to subject the victims to prostitution
- Showed his M.O. and common plan or scheme to recruit victims
- Def placed his intent at issue by claiming one of the women was the culprit
- District court also gave appropriate limiting instruction
- Not unduly prejudicial under Rule 11-403 and highly probative of his intent

EVIDENTIARY RULINGS – 404(b) EVIDENCE

- ***State v. Joe David Chavez, Sr.***, No. S-1-SC-37067 (Jan. 16, 2020)
- Def was member of the AZ Boys – a drug trafficking organization (DTO)
- State introduced evidence of the DTO to prove the motive for the murder
- Victim was the def's daughter's boyfriend but was killed at def's behest because he was creating a risk of exposure for the DTO
- State established this through testimony of witnesses who also testified about his role in the DTO
- Not error because the "evidence established there was a motive to conspire to kill Victim" which was so intertwined with evidence of the DTO's existence that it could not be reasonably excised by the trial court
- Really good factual record laid by the State

EVIDENTIARY RULINGS – UNAVAILABILTY FOR HEARSAY EXCEPTION

- ***State v. Joe David Chavez, Sr.***, No. S-1-SC-37067 (Jan. 16, 2020)
- Inmate housed with Matias Loza – who did the actual killing of the victim – testified about what Loza told him about the murder
- Came in as a statement against interest under Rule 11-804(B)(3) which requires Loza to be unavailable
- His atty asserted his Fifth Amendment privilege on his behalf based upon a letter in the file that Loza had written his prior attorney that he didn't want to testify
- Some discussion about current attorney's reliance on former attorney's file but Court determined this was sufficient especially considering that Loza's murder trial was still pending

FOUNDATION FOR ADMISSION OF BLOOD TEST IN DWI

- ***State v. Warren Brand Franklin***, 2020-NMCA-016, ___ P.3d ___
- Case was remanded on *Birchfield* issue
- Def also claimed the results of the blood draw were inadmissible because the actual drawer – a nurse/technician at the hospital – didn't testify
- No requirement that the person testify. In *State v. Nez*, 2010-NMCA-092, the Court held that the officer who witnessed the blood draw with an SLD-approved kit by an authorized individual was sufficient
- Same here. The officer was present at the hospital, provided hospital staff with the SLD kit, ensured the person who drew the blood was authorized, and took care of getting the vials to SLD
- Def also claimed a Confrontation Clause violation – unclear argument and def fails to identify any out-of-court testimonial statement

EVIDENTIARY RULINGS – Rule 11-410

- ***State v. John R. Gonzales***, No. A-1-CA-36059 (Dec. 23, 2019)
- Convictions for DWI, careless driving, and open container
- Def testified that he bought whiskey on the way home and then sat in his car listening to music when police stopped him
- During CX, def said he had done nothing wrong and if he had he would have "accepted a guilty plea like in the past."
- Prosecutor asked, "Isn't it true that this morning you wanted to plea this case out?"
- Def didn't answer, court told jury to disregard, and denied mistrial
- The evidence was inadmissible under Rule 11-410
- Curative admissibility also does not apply – "under the doctrine of curative admissibility, a party may introduce inadmissible evidence to counteract the prejudice created by their opponent's earlier introduction of similarly inadmissible evidence."
- Unclear if def's statement was inadmissible – the rule generally protects only statements used against a def
- Either way, Rule 11-410 barred the prosecutor's question. Unlike 404(B) cases – in which the State was allowed to invoke the doctrine – Rule 11-410 is a "cloak of privilege" with no exceptions
- Also not harmless error because it introduced new facts and used def's testimony to equate his plea negotiation with an admission of guilt

EVIDENTIARY ISSUES – EXPERT WITNESSES

- ***State v. William Kalinowski***, No. A-1-CA-36403 (Dec. 19, 2019)
- Def wanted fellow contractor as expert witness to testify about the recession and its effect on contractors generally
- District court excluded it because the expert (1) built in Albuquerque, not Santa Fe and (2) didn't know about def's particular circumstances
- COA deferred to the district court's broad discretion that this would not be helpful to the jury because there was no showing that the contractor's experience was similar to def's
- Also rejected def's claim that his right to present a defense was denied – the claimed testimony had no clear exculpatory value and was not admissible under the rules of evidence

EVIDENTIARY ISSUES – 404(B) EVIDENCE

- ***State v. William Kalinowski***, No. A-1-CA-36403 (Dec. 19, 2019)
- State introduced testimony from other witnesses who testified as to other uncharged incidents of def's alleged misappropriation of funds in other projects in Las Campanas
- This was admissible to show def's intent where his defense was that he lacked fraudulent intent when he used the funds for something other than their intended purpose
- Not unfairly prejudicial under Rule 11-403 – nothing shocking in hearing that others had experienced similar financial losses to the victims at issue

EVIDENTIARY RULINGS – EXPERT WITNESSES

- ***State v. John Eric Ochoa***, No. S-1-SC-37092 (Jan. 16, 2020) (unpublished decision)
- Two counts of CSCM
- Defense tendered forensic psychologist expert to critique the CornerHouse safehouse interview technique of the children
- PhD in clinical and forensic psychology and had conducted over 400 interviews of children who were allegedly sexually abused
- However, he did not use the CornerHouse technique, did not offer testimony on it, and was not trained in it.
- District court found he could not offer testimony on it
- NMSC agreed, stressing the discretion of the district court
- Def argued any question on his qualifications should go to the weight of his testimony and not its admissibility
- "To the extent defendant's argument suggests that the district court lacks authority to exclude unqualified expert testimony because the jury can weigh any deficiencies, such a suggestion is at odds with applicable precedent." ¶ 17

EVIDENTIARY RULINGS – EXPERT WITNESSES

- ***State v. John Eric Ochoa***, No. S-1-SC-37092 (Jan. 16, 2020)
- Second issue was admissibility of State's expert witness – a police detective – who was trained as a CornerHouse forensic interviewer with children and had conducted one of the children's interviews
- State wanted her to testify that it is not unusual for a child to not fully disclose
- Court agreed with district court that she was qualified to offer "non-scientific expert testimony" based on her training and experience
- District court "must evaluate a non-scientific expert's personal knowledge and experience to determine if the expert's conclusions on a given subject may be trusted." *State v. Torrez*, 2009-NMSC-029
- *Daubert*/*Alberico* only applies to scientific knowledge and not to all expert testimony
- Court also held that the COA incorrectly treated her testimony as lay testimony whereas it was expert in that it is not the type of information generally known by the general public.
- *But see State v. Ruffin* on crash scene investigation and *State v. Vargas* re: expert testimony from an officer on stun guns.

PRESERVATION OF ERROR

- ***State v. William York***, No. S-1-SC-36782 (Feb. 20, 2020) (unpublished decision)
- First-degree murder conviction for drug deal gone bad – victim stole from co-def and def shot him in the bathroom
- Def claimed Confrontation Clause violation the question asked by police "why would they tell me you were the trigger man" was a statement by an out-of-court declarant that accused def of murder
- Despite ample opportunity, def didn't specifically object to that question so only reviewed for fundamental error
- Based conclusion of no fundamental error partly on fact that district court was so thorough in considering the transcripts and allowing the parties to make objections
- This demonstrated no fundamental error in the trial and there was overwhelming evidence of his guilt

STATUTORY CONSTRUCTION/SUFFICIENCY OF EVIDENCE

- *State v. Alexander*
- *State v. Aslin*
- *State v. Carton*
- *State v. Hertzog*
- *State v. Kalinowski*
- *State v. Rael*
- *State v. Thompkins*
- *State v. Vargas*
- *State v. Vigil*
- *State v. White*

SUFFICIENCY OF EVIDENCE – KIDNAPPING (ACCOMPLICE LIABILITY

- ***State v. William Alexander*,** No. S-1-SC-37058 (Feb. 13, 2020) (unpublished decision)
- Def's accomplices took the victim to a house where she was beaten and questioned by one of the accomplices
- Def dealt the fatal blow to the victim with a hammer
- But Def claimed he didn't know about the plan in advance and wasn't physically present at the beginning
- No matter – clear evidence of accomplice liability. One of the accomplices told another to lock victim in the closet and wait for def to arrive; def said "I'm here to take care of your problem when he arrived"; and encouraged another accomplice to beat the victim via text message

STATUTORY CONSTRUCTION – TECHNICAL PROBATION VIOLATION

- ***State v. Jeffery Aslin*,** 2020-NMSC-004, 457 P.3d 249
- Rule 5-805(C) provides that judicial districts can promulgate local rules to establish a program of technical violations for probationers
- Last sentence: "For purposes of this rule, a "technical violation" means any violation that does not involve new criminal charges"
- COA read this to mean that any violation that does not involve new criminal charges is a technical violation
- NMSC disagreed and found that the purpose of the rule – to give judicial districts discretion – meant that the sentence only means to disallow new criminal charges to be technical violations
- This reading is also consistent with the "rehabilitative purposes and goals of probation."
- Notes the various differing local rules from around the State

HUMAN TRAFFICKING

- ***State v. Wallace Carson***, 2020-NMCA-015, ___ P.3d ___
- Def called himself "DGP" – "Da Greatest Pimp"
- Recruited young women for "escort services" but then forced them to have sex for money, beat them, and got them hooked on heroin
- Def claimed the State must prove not only that he knowingly committed the crime but that "knowingly" also modifies the age requirement and that he had to know his victim was under 18
- Nope. *State v. Jackson*, 2018-NMCA-066, held that the plain language of the statute – as well as the general policy to protect minors – did not require that specific knowledge

STATUTORY CONSTRUCTION – LEAVING THE SCENE OF AN ACCIDENT

- ***State v. Nathaniel Hertzog***, No. A-1-CA-37331 (Mar. 11, 2020)
- Def was driving in his truck with his girlfriend. They had a fight and she jumped up while he was driving at 40 mph. Although he said he thought he saw her sitting on the sidewalk with people around her, she actually was killed when the truck rear tire ran over her head
- Def was convicted of leaving the scene of an accident contrary to Section 66-7-201
- Def claims statutory term "involved in an accident" means only a motor vehicle collision with some other object; not this situation of someone jumping out of his vehicle
- 66-7-201(A) does not say "motor vehicle accident"; statute's history and purpose is to prohibit drivers from evading criminal and civil liability; to ensure people receive aid, and to deter drivers from thwarting investigations; and other jurisdictions also interpret the term broadly
- Sufficient evidence because def had to know there was an accident and he admitted he knew she jumped out of the truck

SUFFICIENCY OF EVIDENCE - EMBEZZLEMENT

- ***State v. William Kalinowski*,** No. A-1-CA-36403 (Dec. 19, 2019)
- Def was convicted of six counts of embezzlement and three counts of fraud
- On two counts of embezzlement, def was paid large deposits by two separate clients for the purpose of building homes
- Def failed to complete the homes, liens were filed, and the clients had to shell out hundreds of thousands to finish construction
- On appeal, sua sponte, the COA found embezzlement would not lie for these actions because other states have "almost universally found that contractors cannot be convicted of embezzlement of down payment funds upon failure to complete a project because the deposit money is legally the property of the contractor at the time it is paid."
- DISSENT: Section 60-13-23(F) imposes a fiduciary duty on NM contractors regarding client's payments. *In re Romero*, 535 F.2d 618 (10th Cir. 1976), concludes that the section "clearly imposes a fiduciary duty upon contractors who have been advanced money pursuant to construction contracts."

STATUTORY CONSTRUCTION – SEXUAL EXPLOITATION OF CHILDREN

- ***State v. David Rael***, No. A-1-CA-37066 (Apr. 7, 2020)
- Def convicted of possession, distribution, and manufacture at bench trial
- COA does not include the full titles of the material – e.g. "gayblackman" is actually "gayblackmanfucking13yearoldboy"
- All three crimes require "intentional" conduct which the COA held means general criminal intent in *State v. Knight*, 2019-NMCA-060; and *State v. Franco*, 2019-NMCA-057.
- Possession and distribution also require the def know or should have known the medium depicts a prohibited sexual act and one of the participants is under 18
- This "know or should have known" language is not contained in the manufacture subsection and the COA concludes it must be read into it because otherwise manufacture has no scienter element
- State failed to prove for all crimes that def knew or should have known the files contained SECM at the time he possessed, distributed, or manufactured (by copying the videos)
- CERT WILL BE SOUGHT

STATUTORY CONSTRUCTION – SEXUAL EXPLOITATION OF CHILDREN

- ***State v. Manuel Franco***, 2019-NMCA-057, 450 P.3d 439
- Eight counts of sexual exploitation of children by distribution – def used a peer-to-peer sharing network to access child pornography
- Def admitted possession but said he was "sharing" rather than distributing the images and this passive "sharing" is not sufficient to show intentional distribution
- Well settled in this and other jurisdictions that peer-to-peer file sharing constitutes distribution
- Def relied on *State v. Granillo*, 2016-NMCA-094, to argue that the State must prove a conscious objective to endanger a child
- COA disagreed – unlike child abuse with its "tiered mens rea" – this statute only requires general criminal intent to do an act and not an intent to do a further act or achieve a further consequence
- Under *State v. Sena*, 2018-NMCA-037, however, the eight counts were reduced to a single conviction under the unit of prosecution analysis

STATUTORY CONSTRUCTION – SEXUAL EXPLOITATION OF CHILDREN

- ***State v. Donald G. Knight*,** 2019-NMCA-060, 450 P.3d 462
- Def was convicted of four counts of possession and 10 counts of manufacture
- Under *Olsson/Ballard*, the Court vacated three of the possession counts but otherwise affirmed
- Same argument as in *Franco* – possession and manufacture require specific intent to endanger a child
- Unlike child abuse, the sexual exploitation statutes "do not include an intent to do a further act or achieve a further consequence. Rather, they too only describe a particular act."

SUFFICIENCY OF EVIDENCE – NEGLIGENT CHILD ABUSE

- ***State v. Terrick Thompkins***, No. S-1-SC-37220 (Apr. 6, 2020) (unpublished decision)
- One child never came out of his room – heard the noise and thought he'd get in trouble if he left
- Court likened this case to *State v. Ramirez*, 2018-NMSC-003, in which it upheld all three child abuse convictions when the def fired into a car in which three children were sitting, killing their father
- Def was dressed in full tactical gear, armed with several guns and ammo, shot up the front door, and 32 spent cartridge casings were recovered

SUFFICIENCY OF EVIDENCE – TAMPERING WITH EVIDENCE

- ***State v. Roberto Vargas***, No. S-1-SC-36773 (Mar. 2, 2020)
- Depraved mind murder case – DMM wasn't briefed so wasn't considered
- Reversed tampering with evidence. Guns were used but never recovered.
- "It is settled law that '[t]he State cannot convict Defendant of tampering with evidence simply because evidence that must have once existed cannot now be found.'" quoting *State v. Guerra*, 2012-NMSC-027, ¶ 16

SUFFICIENCY OF EVIDENCE – SHOOTING AT A DWELLING

- ***State v. Roberto Vargas***, No. S-1-SC-36773 (Mar. 2, 2020)
- Defendant shot at people – killing one – who were in front of a dwelling
- In *State v. Comitz*, 2019-NMSC-011, the Court held that the evidence must support that the house itself is the target of the gunfire. Shooting at people who happen to be in front of a house is not sufficient.
- Distinguished from cases in which defs fired at or into a house, specifically targeting the dwelling and/or people inside
- But here, no evidence the house was a target
- This holding obviated the double jeopardy claim that this was double punishment with the murder

SUFFICIENCY OF EVIDENCE – CONSPIRACY TO COMMIT DEPRAVED MIND MURDER

- ***State v. Roberto Vargas***, No. S-1-SC-36773 (Mar. 2, 2020)
- There is no such crime because co-conspirators "cannot agree to accomplish a required specific result unintentionally." *State v. Baca*, 1997-NMSC-059, ¶ 52
- DMM is a "killing resulting from highly reckless behavior" rather than a specific intent to kill
- State argued for direct remand for entry of lesser included offense of conspiracy to commit second-degree murder
- No, because the jury did not necessarily find intent to kill as defined by second-degree murder

SUFFICIENCY OF EVIDENCE – FIRST-DEGREE WILLFUL AND DELIBERATE MURDER

- ***State v. Crystal Vigil*,** No. S-1-SC-37110 (Mar. 12, 2020) (unpublished decision)
- Sufficiency of the evidence to show deliberation
- Discusses *State v. Garcia*, 1992-NMSC-048, and *State v. Tafoya*, 2012-NMSC-030, in which the Court reversed the first-degree murder convictions finding the evidence supported only a "rash and impulsive killing"
- Like those cases, this was a fight in which the def then suddenly killed the victim
- Here, seven facts supported deliberation other than just time
- (1) def retrieved the gun from a bag in her bra; (2) she fought another person to get at victim; (3) she shook off that person and shot victim; (4) she and victim had a "conflict-ridden" history; (5) she called victim a bitch as he lay on the ground after being shot; (6) she told someone else to clean up and left; and (7) she gave inconsistent stories to police.

SUFFICIENCY OF EVIDENCE – FIRST-DEGREE WILLFUL AND DELIBERATE MURDER

- ***State v. Terry White***, No. S-1-SC-37249 (Dec. 23, 2019)
- Def murdered his wife's ex-husband over custody fight
- Def told his cellmate the details and a neighbor's surveillance video corroborated his story – snuck in victim's garage and then beat him, strangled him, and finally cut his throat
- Def's DNA found under victim's fingernail; def attempted suicide after a warrant was issued for his arrest; motive of upcoming custody court date

DOUBLE JEOPARDY

- *State v. Alexander*
- *State v. Alirez*
- *State v. Carson*
- *State v. Jackson*
- *State v. Lente*
- *State v. Serrato*
- *State v. York*

DOUBLE JEOPARDY – KIDNAPPING AND MURDER

- ***State v. William Alexander*,** No. S-1-SC-37058 (Feb. 13, 2020)
- Jury returned verdicts on two alternative theories of murder – willful and deliberate and felony
- Court vacated felony murder and def claimed kidnapping had to be vacated under *State v. Frazier*, 2007-NMSC-032
- *Frazier* held that felony murder always subsumes the predicate felony
- BUT felony murder was vacated and therefore the *Frazier* problem is obviated
- Elements of kidnapping and willful and deliberate murder are different and kidnapping may be completed when victim is restrained even through the restraint continues through to the murder

DOUBLE JEOPARDY – RELINQUISHMENT OF ANIMALS

- ***State v. Alexander Alirez***, No. A-1-CA-37387 (Mar. 31, 2020) (non-precedential)
- Issue whether requirement in Section 30-18-1.2(E) that a person charged with cruelty to animals either post a security with the animal shelter for the animals' care or lose them through involuntary relinquishment is punitive forfeiture under double jeopardy principles
- Several dogs were seized from def and put in the shelter. Def was charged with extreme cruelty to animals
- Def failed to indemnify the shelter and the dogs were deemed relinquished and abandoned
- District court dismissed the criminal charges on double jeopardy grounds
- HELD: the seizure is not punitive and has a remedial purpose. "Although a civil penalty may cause a degree of punishment for the defendant, such a subjective effect cannot overrule the legislature's primarily remedial purpose."

HUMAN TRAFFICKING

- ***State v. Wallace Carson***, 2020-NMCA-015, ___ P.3d ___
- Convicted of two counts on the same victim – unit of prosecution analysis
- First, did the Legislature define the unit of prosecution? Second, if it is ambiguous (which is usually is) then look to whether acts are separated by sufficient indicia of distinctness
- Section 30-52-1 does not specify the unit of prosecution so go to second step
- COA applies *Herron v. State*, 1991-NMSC-012, six factor test which has been applied in other contexts such as attempted robbery, fraud, and CDM
- Acts occurred between 1/24/13 and 2/7/13 during their first trip to ABQ and then again between 2/17/13 and 2/22/13 during second trip to ABQ – short trip to TX between these charges
- Def's intent and course of action was unchanged and temporal proximity was close
- "There was no notable deviation in the nature of Defendant's 'escorting' business nor did any meaningfully distinct activity take place that bears the capacity to separate the collective human trafficking activities in Albuquerque."
- But COA emphasizes that there may be occasions where multiple counts against one victim would be appropriate and rejects def's "categorical proclamation" of one count per victim

DOUBLE JEOPARDY - JOINDER

- ***State v. Joshua Jackson***, No. A-1-CA-36400 (Feb. 26, 2020)
- Def was charged with two cases – filed at the same time – for domestic violence against his girlfriend on April 4 and April 10
- The State did not join the cases and def was convicted in two separate trials
- Claims violation of the joinder rule on appeal – Rule 5-203 which requires the State to join charges that are of the "same or similar character"
- *State v. Gonzales*, 2013-NMSC-016, held joinder is mandatory and bars a subsequent prosecution on charges that should have been joined
- Issue here is whether joinder can be waived by def
- COA held yes where def failed to object until after conviction at the second trial
- Relied on a Colorado case which held "where . . . Defendant does not raise the issue of joinder until well after the conclusion of the second trial, neither of the public policy reasons for the compulsory joinder rule would be served [by dismissal] – the harm, if any, has occurred."
- NOTE: joinder is not the same as double jeopardy. DJ protects against successive prosecutions for the same offense but does not require the State to join all charges of a same of similar character in a single proceeding.

DOUBLE JEOPARDY – UNIT OF PROSECUTION

- ***State v. Joshua Jackson***, No. A-1-CA-36400 (Feb. 26, 2020)
- Def claims his two convictions for kidnapping in the separate trials violated double jeopardy because there was only one continues kidnapping from April 4 to April 10
- Although in *State v. Dombos*, 2008-NMCA-035, the Court said the unit of prosecution in kidnapping is clear in that it begins when the victim is initially confined and ends when released, the Court also must determine if the confinement was continuous or separated by sufficient indicia of distinctness
- Although the victim's testimony was somewhat inconsistent in the two trials, there was sufficient evidence of distinctness in that she testified def called her on April 10 to come over – indicates that he terminated his intent to restrain her on April 4 by his departure

DOUBLE JEOPARDY – DOUBLE DESCRIPTION

- ***State v. Joshua Jackson***, No. A-1-CA-36400 (Feb. 26, 2020)
- Kidnapping and two counts of CSP
- Def relied on *State v. Simmons*, 2018-NMCA-015, to argue that the jury instructions didn't specify which acts formed the basis of the kidnapping and therefore must presume the jury premised the kidnapping conviction on the same force used for CSP
- But here the jury was instructed that "the restraint or confinement [for kidnapping] was not . . . merely incidental to the commission [of CSP]"
- In addition, the State argued in closing that the kidnaping was completed when def dragged the victim into the bathroom by the hair and then committed sexual acts of violence on her
- Sufficient indicia of distinctness between the crimes

DOUBLE JEOPARDY – DOUBLE DESCRIPTION

- ***State v. Joshua Jackson*,** No. A-1-CA-36400 (Feb. 26, 2020)
- Def convicted of CSC and agg battery on a household member (ABHM) for the same unitary act of cutting her vagina with a knife
- Under *Blockburger*, both statutes contain an element the other does not. CSC requires application of force to a specified intimate part of another and ABHM requires that the victim be a household member
- Crimes also protect different interests – CSC protects against intrusion into intimate parts of another while ABHM protects against use of force against a specific group of people
- Finally, crimes are not usually committed together

DOUBLE JEOPARDY FOR "RESIDENT CHILD MOLESTER" CASES

- ***State v. Jesse Lawrence Lente***, 2019-NMSC-020, 453 P.3d 416
- Habeas case in which district court found the convictions were "cookie cutter", not distinguishable, and subjected def to double jeopardy
- Resident child molester – term taken from a CA case – are defs who "have regular access to and control over children whom they sexually abuse in secrecy for long periods of time."
- As such, their victims can only provide generalized accounts of the frequent sexual abuse
- Def was charged with 38 counts alleging various types of CSPM and CSCM and was convicted of 26 – one type of sex act charged in six-month intervals
- NOTICE: Def waived opportunity to object to indictment on notice/due process grounds. Even if he hadn't, testimony at the habeas hearing revealed that counsel reviewed the charges with him, told him the evidence against him was strong, urged him to take a plea, and believed each count to be a separate event. Victim's mother also witnessed the final act and def fled and def presented a successful alibi defense to some of the counts.
- The State's charging in six-month intervals for ongoing abuse was appropriate line-drawling

DOUBLE JEOPARDY FOR "RESIDENT CHILD MOLESTER" CASES (cont.)

- ***State v. Jesse Lawrence Lente***, 2019-NMSC-020, 453 P.3d 416
- MULTIPLICITY: each instance clearly "constituted a different offense" and there is no argument that it was "one unitary act." Not like *Herron v. State* which was one assaultive episode.
- Source root of the cases reversing such convictions is *Russell v. U.S.*, 369 U.S. 749 (1962) – concern was with specificity of charges so that defs could rely on them for any future prosecution
- Here, jury's findings can be correlated to specific counts
- SUFFICIENCY OF THE EVIDENCE: Court discusses reasons why such victims cannot furnish details: young age, frequency of abuse, desire to forget; and limited vocabulary

DOUBLE JEOPARDY FOR "RESIDENT CHILD MOLESTER" CASES (cont.)

- ***State v. Jesse Lawrence Lente***
- Details of the particular charge are not elements of the offense but the evidence must satisfy three requirements
- (1) the child must describe the acts with sufficient particularity to establish that they did occur and permit a jury to differentiate between the various types of sex acts (2) child must describe the number of acts with sufficient certainty to support the counts; and (3) child must describe the general time period
- Evidence here was sufficient because the child knew the time period, described the different sex acts, and knew the general frequency
- Victim's inability to recall specific details was created by the def and he cannot complain about a "product of his own making."

DOUBLE JEOPARDY – "COOKIE CUTTER" CHARGES

- ***State v. Leo Costillo, Jr.*****,** A-1-CA-36302 (Sept. 26, 2019)
- Young victim testified that the first incident of CSPM was in August 2008 and the rest all happened the same way – once a week from August to October 2008 and then twice a month from October 2008 to summer 2009
- COA held this testimony established only a "course of conduct" and that there was no evidence to distinguish the individual offenses.
- Relied on *State v. Dominguez*, 2008-NMCA-029, ¶ 10, for proposition that "we have never held that the [s]tate may move forward with a prosecution of supposedly distinct offenses based on no distinguishing facts or circumstances at all, simply because the victim is a child."
- State argued it presented the most concise testimony it could and there was no way to present more detail
- State filed cert – On 1/31/20, NMSC remanded to COA to reconsider in light of *Lente*

DOUBLE JEOPARDY – ENTICEMENT OF A CHILD and KIDNAPPING

- ***State v. Juventino Serrato*,** No. A-1-CA-36381 (Feb. 17, 2020)
- Def whistled outside 10-year-old victim's bedroom at 11 pm; when she opened the window to look out, he grabbed her hand, pulled her out, and covered her mouth
- Took her to his house, barred the door with a box spring, and asked her to have sex with him. She refused and tried to leave and he said he had to live with him. He then committed CSCM on her and she was able to escape when her mother started calling
- Unitary conduct so COA looks to legislative intent
- Even though each statute has an element the other does not, the COA uses a modified *Blockburger* analysis to determine State's theory of the case instead of the statutes in the abstract
- State's closing argument relied on def's statement to victim that he "wanted to show her something" for both enticement of a child and kidnapping. Kidnapping was premised on deception with intent to commit a sexual offense
- Therefore, the offenses "overlap" and child enticement is vacated as a violation of double jeopardy
- DISSENT: Modified *Blockburger* "is not to determine whether the State based its theory for the two charges on the same conduct . . . but to identify the appropriate provision for comparison under the traditional *Blockburger* test." Still have to look at the elements of each offense. Kidnapping by deception requires def intended to hold victim against her will and enticement requires the victim was under 16 years old. Statutes also address different social evils.
- CERT PETITION HAS BEEN FILED

DOUBLE JEOPARDY – FIRST-DEGREE KIDNAPPING AND CSCM

- ***State v. Juventino Serrato***, No. A-1-CA-36381 (Feb. 17, 2020)
- Majority also finds double jeopardy violation because the CSCM was used to elevate kidnapping from second to first-degree felony. First-degree kidnapping requires finding that the def committed a sexual offense
- COA finds that the conduct was unitary because the first-degree kidnapping wasn't complete until the CSCM was committed - commission of a sexual offense is a required element of the crime of first-degree kidnapping
- Applies modified *Blockburger* to legislative intent inquiry because kidnapping has multiple alternatives
- The State's theory relied only on the CSCM as the sexual offense and therefore double jeopardy was violated
- DISSENT: NM precedent has allowed separate convictions for kidnapping and the sexual offense. Also would result in anomalous result of a def who kidnaps a victim and inflicts even slight physical injury or doesn't release victim in a safe place receives the same punishment as one who kidnaps and violently rapes his victim. Emphasis should be on conduct used to accomplish the kidnapping; not the conduct used to elevate it to the first-degree felony. Here, it is distinct. Def pulled her out of her window and committed kidnapping by deception. Then, after he brought her to his bedroom, he committed CSCM.

DOUBLE JEOPARDY

- ***State v. William York***, No. S-1-SC-36782 (Feb. 20, 2020)
- Def and his two accomplices took the victim – who had stolen drugs from one of them – to a house where def shot him as he went to the bathroom. Evidence indicated an agreement with the co-def drug dealer to kill the victim
- Sentenced to 15 years for conspiracy to commit first-degree murder as a second-degree felony resulting in death – *see* §31-18-15(A)(4)
- Claimed double jeopardy for this sentence on top of the life sentence for the murder – punished twice for one killing
- (1) not unitary conduct because conspiracy and actual killing are two different criminal acts; (2) conspiracy sentence wasn't "enhanced" due to death of victim but was the "appropriate basic sentence" for a second-degree felony resulting in death, as intended by the Legislature

SIXTH AMENDMENT – RIGHT TO COUNSEL; INEFFECTIVE ASSISTANCE; POST-CONVICTION LITIGATION

- *State v. Dyke*
- *State v. Jackson*
- *State v. Otero*
- *State v. Sloan*

RIGHT TO COUNSEL - CONFLICT

- ***State v. Brandon Dyke***, 2020-NMCA-013, 456 P.3d 1125
- Def pled to multiple counts of CSPM but his plea was vacated on habeas because judge erroneously told him he was facing three years minimum instead of 18 – remanded for trial on original charges
- Todd Holmes represented him on the habeas and then moved to withdraw from the new trial because he had represented the mother of the victim in her criminal case
- But then Holmes filed an EOA even though the PD had been appointed
- State immediately moved to DQ Holmes citing an actual conflict
- Held: (1) State had duty to raise the issue to avoid any unfair advantage and to preserve any conviction (2) court clearly acted within its discretion; Holmes admitted a possible conflict, didn't attempt to get a waiver from def or the mother; and mother was to be a witness for the State in def's trial

INEFFECTIVE ASSISTANCE OF COUNSEL

- ***State v. Joshua Jackson***, No. A-1-CA-36400 (Feb. 26, 2020)
- Counsel didn't watch def's police interview before trial which led to admission of inadmissible 404(B) evidence regarding the other case and his battery on victim
- "Although we cannot conceive of a reasonable trial tactic for counsel's failure to watch the video of Defendant's interview before trial, Defendant cannot demonstrate ... prejudice[.]"
- Jury wouldn't have had a reasonable doubt regarding def's guilt given the victim's testimony
- Mere assertion of prejudice does not demonstrate prejudice. *State v. Torres*, 2005-NMCA-070, ¶ 18
- Also claims interview showed def was intoxicated – argument not developed because only have defense counsel's argument and even if def was intoxicated, that alone does not render his statement involuntary

INEFFECTIVE ASSISTANCE OF COUNSEL

- ***State v. Joshua Jackson***, No A-1-CA-36400 (Feb. 26, 2020)
- Def claims counsel was ineffective for failing to raise joinder issue
- Cites to the Colorado case which notes that an attorney might find it "strategically preferable" to keep cases separate to prevent juries from hearing of facts pertaining to both incidents
- Possible here where the facts were of "disturbingly violent conduct by Defendant"
- Also, counsel sought to keep out evidence of the April 10 incident at the second trial, "suggesting this was his intention."
- Thus, could be a reasonable trial tactic

POST-CONVICTION MOTION TO WITHDRAW PLEA

- ***State v. Miguel Otero*,** No. A-1-CA-37742 (Feb. 25, 2020)
- 2001 – def pled to armed robbery
- 2018 – four years after completion of his sentence, he filed a coram nobis motion under Rule 1-060 or Rule 5-803 to withdraw his plea because he was never advised that his Second Amendment rights would be affected (he was arrested by the feds for felon in possession)
- Court discussed but did not decide the correct procedure – State argued the coram nobis was untimely because not brought within "reasonable time" and no explanation for years of delay under Rule 5-803
- Def claimed Rule 1-060 applied because the judgment was void and therefore no time limit to motion
- 2007 – Rule 5-303(F)(6) included requirement that def be advised of loss of Second Amendment rights
- Def relies on *State v. Paredez*, 2014-NMSC-023, which held a def must be advised of immigration consequences, and *State v. Ramirez*, 2014-NMSC-023, which held *Paredez* applies retroactively to 1990 when the requirement to advise of immigration consequences was first made a requirement in NM
- Court discusses retroactivity – and the general rule that a new rule does not apply in post-conviction proceedings – and comes to the same conclusion as *Ramirez*
- His plea was entered six years before 2007 so no relief

INEFFECTIVE ASSISTANCE OF COUNSEL

- ***State v. Matthew Sloan***, 2019-NMSC-019, 453 P.3d 401
- Atty waived his client's presence at three pretrial hearings
- Even though NMSC decided the presence issue on fundamental error (¶ 14), the Court then found that counsel *can* validly waive the right (¶ 37)
- Def claimed he didn't authorize his atty to waive his presence so more appropriate for habeas – but the Court already found no error so not sure why it didn't hold def couldn't show prejudice
- Def also claims other errors in failing to challenge certain evidence, failure to move to suppress his statement, and failure to pursue an intoxication defense due to his meth addiction.
- But defense counsel could have decided hiring an expert on "novel and unprecedented" theory of addiction defense was inconsistent with voluntary intoxication defense

MOTION FOR NEW TRIAL

- *State v. Garcia*

MOTION FOR NEW TRIAL

- ***State v. Ysidro Robert Garcia***, No. A-1-CA-36295 (Nov. 25, 2019), *cert. denied* (Apr. 10, 2020)
- Def convicted of receiving or transferring a stolen vehicle
- During trial, the arresting officer said the def asked to speak to an attorney
- Defense counsel moved for a mistrial which was denied by judge who gave a curative instruction
- Judge left the bench and case was reassigned for sentencing
- Day after judge reassignment, def moved to "reconsider" the denial of his mistrial motion and new judge granted it
- REVERSED. Def's motion was essentially a motion for a new trial under Rule 5-614 and was therefore untimely – court looks to purpose of the motion rather than title
- "To permit the unlimited renewal or reconsideration of fully decided motions [for new trial] would needlessly tie up judicial resources and seriously delay the final disposition of cases. Doing so would undermine both the language and purpose of the [r]ules." ¶ 13 (quoting a fed case)

SENTENCING

- *State v. Apodaca*
- *State v. Dyke*

SENTENCING – AGGRAVATING CIRCUMSTANCES

- ***State v. Joseph Apodaca*,** No. A-1-CA-36469 (Apr. 1, 2020)
- First-degree CSP reversed on jury instruction grounds
- Jury found seven aggravating factors b/r/d although the court did not impose an aggravated sentence
- Def claims the Criminal Sentencing Act requires bifurcation of the two determinations
- Section 31-18-15.1(E) provides "presentation of evidence or statements regarding an alleged aggravating circumstance shall be made as soon as practicable following the determination of guilt or innocence."
- Bifurcation is permissive under the statute
- Also not constitutionally required
- *State v. Chadwick-McNally*, 2018-NMSC-018, held that the Capital Felony Sentencing Act does not require bifurcation as either a statutory or constitutional requirement

SENTENCING – CLAIM OF VINDICTIVE SENTENCE

- ***State v. Brandon Dyke***, 2020-NMCA-013, 456 P.3d 1125
- Def claimed court vindictively sentenced him after trial – sentenced to 36 years at the plea but 69 years after trial
- Court cited a lot of case law that a greater sentence at trial conviction after a plea is rejected isn't enough to show the court acted to punish a def for exercising a constitutional right
- During trial, "the judge may gather a fuller appreciation of the nature and extent of the crimes charged" and gain "insights into [the def's] moral character and suitability for rehabilitation."
- The court did express remorse for its mistake on habeas which led to the victim having to testify ten years later but this was not enough to show vindictiveness – court gave lengthy and reasoned explanation for the sentence including the facts of the case and the age of the victim

SPEEDY TRIAL

- Request trial settings in writing – especially if new judge is assigned
- Request rulings on pending motions
- Do not necessarily acquiesce to defense requests for continuance and be wary of multiple requests for continuance – *State v. Serros*, 2016-NMSC-016, 366 P.3d 1121
- 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
- Be extra cautious if defendant is detained pretrial

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
- Make sure the 5-20 or 5-life parole period for sex offenders is explicit in the agreement and included in the J&S
- 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

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

REDACTION OF VICTIMS' NAMES

- Filed a motion for rehearing in *State v. Wallace Carson* to redact the adult victim's name
- The minor victim was identified only by initials but the adult victim was named and thereafter referred to her nickname
- But the sordid facts or what def did to her and what her forced her to do to others could follow her in any internet search
- Found some excellent case law from the Crime Victims Law Institute to argue the victim's constitutional, statutory, and common-law right to privacy in this context
- Motion was granted

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."
- 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
- *State v. Kelson Lewis*, 2019-NMSC-001, 433 P.3d 276, on how to handle a deadlocked jury when you have lesser included offenses. PLEASE READ THIS CASE

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 – from charging decisions to closing argument