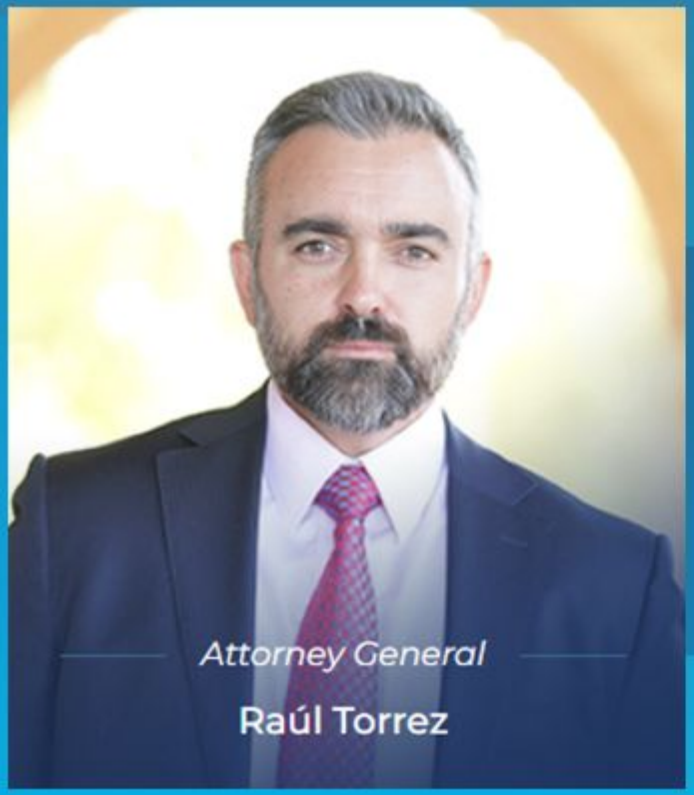
Office of New Mexico **Attorney General**



Appellate Update

2023 NMDAA/AODA *Spring into Summer Conference*

Wednesday, June 7, 2023, 1:30p

Office of New Mexico
Attorney General

2023 NMDAA/AODA
Spring into Summer Conference
Appellate Update Team

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-and-

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Office of New Mexico
Attorney General

OVERVIEW

Overview

Coverage Period:
11/12/22 - 5/31/23

- Recent Developments
- Case Outcomes
- Some limited Q & A opportunity available during presentation: email criminalappealsservice@nmag.gov
- Live Q & A at end (time permitting)
- Contact Info & Resources referenced during presentation will be listed again on the last slide

Recent Developments

- Effective 11/1/2022: Newly revised Pilot Project Procedural Order
  - Applicable to criminal appeals from 2nd, 11th, and 12th Judicial Districts
  - Copy of order available at coa.nmcourts.gov

Recent Developments

- New address for email service to Criminal Appeals Division: criminalappealsservice@nmag.gov (just today it can also be used to send in questions during the presentation)

Recent Developments

How to Help Avoid Some Common Snags on Appeal

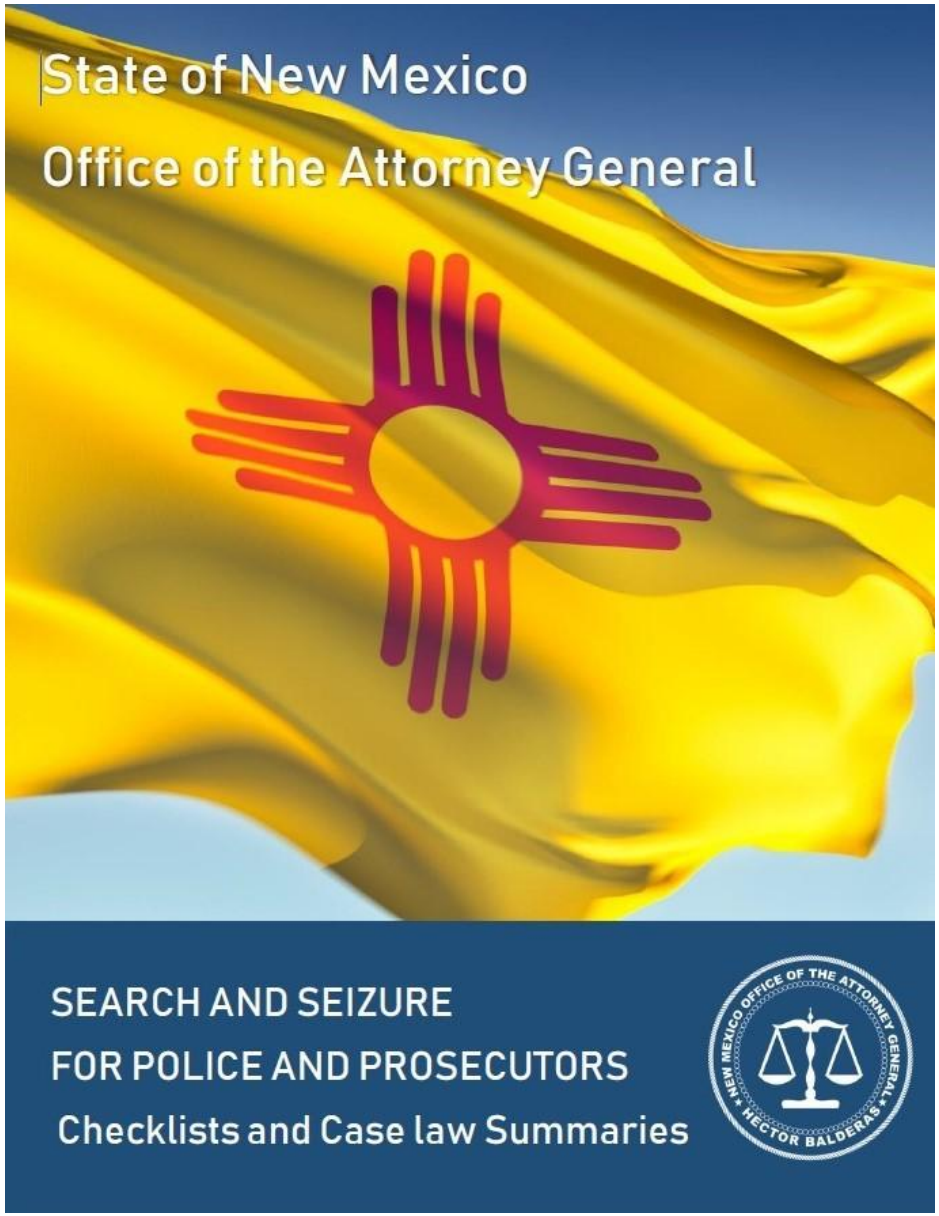
- Help ensure that hard copies of tendered jury instructions become part of the record
- Help ensure that admitted exhibits are formally admitted and become part of the record
- Help ensure that bench conferences are recorded **and audible**

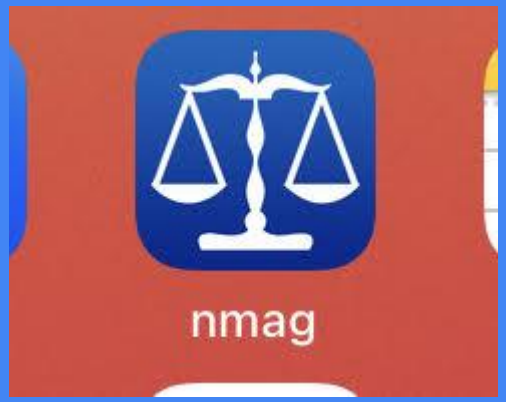
Lawfulness of Seizure/Search

- Reasonable Suspicion
- Seizure under U.S. & N.M. Constitutions

Search & Seizure Manual

www.nmag.gov > Resources > Publications > Search and Seizure Manual





Reasonable Suspicion

Officer had reasonable suspicion that Def. had committed felony aggravated fleeing

State v. Melissa Ortega, 2023-NMCA-032. JK

- **FACTS:** April 11, 2019 (late afternoon): Officer sees vehicle with distinctive purple accessories and runs plate; registered owner wanted for a felony.
- Officer initiates lights/sirens to perform a stop; vehicle takes off at high rate of speed and runs several red lights; and Officer terminates pursuit because he believes driver is endangering motorists/pedestrians. Officer never saw driver.
- May 24, 2019: Officer sees same vehicle with same distinctive accessories and same plate; he learns it's still registered to same person. Certain that it was the same vehicle but not certain it was the same driver as on April 11, he stops the vehicle. Evidence recovered from vehicle leads to charge for felony trafficking consub.
- D files pretrial Mot. Supp. arguing lack of RS for stop. DC denies motion. D takes conditional plea reserving right to appeal suppression ruling.

Officer had reasonable suspicion that Def. had committed felony aggravated fleeing

State v. Melissa Ortega, 2023-NMCA-032. JK

- **ISSUE:** Did stopping officer lack RS for stop because the offense he sought to investigate was a completed misdemeanor or, alternatively, because it was a completed misdemeanor that did not result in an ongoing safety concern?

- **ANALYSIS:** Absent evidence to the contrary, it is constitutionally reasonable in the context of investigatory stops to presume that the driver of a vehicle is the registered owner. *State v. Candelaria*, 2011-NMCA-001, ¶ 15, 149 N.M. 125; *State v. Hicks*, 2013-NMCA-056, ¶ 7.

- Section 30-22-1.1(A-B): Agg. fleeing consists of . . .
  - willfully and carelessly driving . . .
  - in a manner that endangers life of another . . .
  - after being given a visual or audible signal to stop . . .
  - by a uniformed LE officer in an appropriately marked LE vehicle
  - in pursuit in accordance with the provisions of the LE Safe Pursuit Act;
  - its a Fe^4 .

Officer had reasonable suspicion that Def. had committed felony aggravated fleeing

State v. Melissa Ortega, 2023-NMCA-032. JK

- **ANALYSIS (cont.):** *State v. Vest*, 2021-NMSC-020: fleeing police by driving dangerously itself violates the statute; no need to prove others in the vicinity; just need a risk of harm that could have endangered someone in the community.

- **HELD:** Officer had RS that Def. committed felony agg. fleeing on 4/11/19 by fleeing Officer's pursuit at a high rate of speed & running multiple red lights in moderately heavy traffic. DC did not err in denying mot. suppress; affirmed. Cert. denied.

- **NOTE:** What this case is not – Def. had also argued lack of RS because the offense the officer sought to investigate was (1) a completed misdemeanor, or (2) a completed misdemeanor that did not result in an ongoing safety concern. Court did not reach those arguments, but in Crim. Appeals there has been a recent uptick of cases on which defense trial counsel made those arguments. BOLO.

Seizure violated Article II, Section 10 because tip lacked reliable factual basis and circumstances did not support reasonable suspicion

State v. Francisco Javier Granados, 2023-NMSC-003, Dec. (N.M. Feb. 6, 2023) (nonprecedential). CG

- **FACTS:** A CI tip had indicated Granados would be trafficking a large amount of cocaine. Four narcotics agents attempted to stop him at a gas station after observing him interact with a woman (but not seeing anything exchanged between them).
- Granados bolted in his car. An agent saw Granados toss an object out the window. Granados soon stopped and spoke with the agents. The object turned out to be a plastic bag with about 50g cocaine.
- Granados moved to suppress, arguing stop lacked legit basis. D.C. denied motion. Grandos convicted for trafficking Consub, and TampEv. NMCA affirmed, concluding that agents had RS at initial approach.
- **ISSUE:** Did seizure violate Art. II, sec. 10 of N.M. Constitution? (Did tip and surveillance provide sufficient basis for stop?)

Seizure violated Article II, Section 10 because tip lacked reliable factual basis and circumstances did not support reasonable suspicion

State v. Francisco Javier Granados, 2023-NMSC-003, Dec. (N.M. Feb. 6, 2023) (nonprecedential). CG

- **ANALYSIS (Tip):** Two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969) ("*Aguilar-Spinelli* test"). Officer who relies wholly or in part on hearsay provided by an unnamed informant in justifying a seizure must identify:

  (1) basis for the informant's conclusions that the facts were as he claimed they were, so that the court can perform an independent analysis (the ***reliability or basis of knowledge prong***); and

  (2) facts to support conclusion either that the informant is inherently credible, or the informant's information is reliable on that occasion (the ***credibility or veracity prong***)
- Granados argued only that the tip lacked a reliable basis of knowledge, so NMSC's analysis addressed only the first *Aguilar-Spinelli* prong
- Reliable basis was lacking. Agent testified that he received info from a credible informant that Granados was trafficking a large amount of cocaine, but **there was no explanation of how the informant became aware of the info**.

Seizure violated Article II, Section 10 because tip lacked reliable factual basis and circumstances did not support reasonable suspicion

State v. Francisco Javier Granados, 2023-NMSC-003, Dec. (N.M. Feb. 6, 2023) (nonprecedential). CG

- NOTE: Specific, predictive info in the tip can result in the tip being self-verifying and therefore provide the necessary reliable factual basis, but that didn't happen here.
- **HELD (1):** Tip failed first prong of *Aguilar-Spinelli* and did not support RS.
- **HELD (2):** The agents' observations did not otherwise support RS. Granados met with a woman who was driving a vehicle similar to one that belonged to a previous target; agents testified it was "almost like an exchange" but didn't see anything exchanged; agents could not hear what was said.
- Additionally, agents' "unadorned invocation" of their training and experience didn't suffice. **There was no explanation of how their expertise informed their opinion.**
- **HELD (3):** Under totality of circumstances, no RS at time of seizure.
- But at what point was there a seizure?...

Seizure Analysis Under State & Federal Constitutions

Def. not seized under 4th Amend. because he did not submit to agents before abandoning cocaine . . .

State v. Francisco Javier Granados, 2023-NMSC-003, Dec. (N.M. Feb. 6, 2023) (nonprecedential). CG

- **ISSUE:** Because RS was needed by the time a seizure occurred, when was Granados seized?

- **HELD (4):** District court's 4th Amend. analysis correct – Granados had not yielded to the agents' show of authority at the time he jettisoned the cocaine, so he was not seized for 4th Amendment purposes at that time and the cocaine would be considered abandoned.

. . . but seized under Art. II, sec. 10 because agents' show of authority communicated to reasonable person that the person was not free to terminate the encounter

State v. Francisco Javier Granados, 2023-NMSC-003, Dec. (N.M. Feb. 6, 2023) (nonprecedential). CG

- **ANALYSIS:** Under N.M. Constitution a seizure occurs when reasonable person would have believed he/she not free to leave, such as when freedom of movement is restrained, or facts show accosting and restraint. Here, agents attempted to block Granados in with their vehicles, got out, displayed their badges, invoked their authority shouting into his vehicle, and one had his hand on his holstered firearm.
- **HELD (5):** Granados was seized for N.M. Const'l purposes when agents attempted to stop him at the station. Because agents lacked a legitimate basis for the stop at that time, the seizure violated N.M. Const. District court erred in denying motion to suppress.

Other Constitutional Issues

- *Miranda* Public Safety Exception
- Admission of and/or Comment on Evidence of Post-*Miranda* Silence
- Voluntariness of Confession
- Alleged Prosecutorial Misconduct (Closing Argument)
- Confrontation
  - DNA Evidence
  - Testimony re: C.I.-provided info
- Double Jeopardy (Double Description: Nonres. Burg. + B & E)
- Double Jeopardy (Convictions Under Multiple Theories for Same Murder)
- “Due Process” (Appellate Delay)
- Speedy Trial (Pandemic-related Jury Trial Suspension as a Factor)
- Ineffective Assistance of Counsel
- Cruel & Unusual Punishment
- Pretrial Detention

Miranda Public Safety Exception

> *...the public safety exception is triggered when police officers have an objectively reasonable need to protect the police or the public from immediate danger.*

Totality of circumstances did not support *Miranda* public safety exception because there was no objectively reasonable need to protect officers or public from immediate arrest-incident danger; admission of at-issue testimony, although erroneous, not fundamental error.

State v. Michael Dirickson, ___-NMCA-___ (A-1-CA-40149, Apr. 28, 2023). ES

- **FACTS:** Officers intending to arrest Dirickson on a warrant were surveilling his hotel room and could not determine if he was alone. Dirickson exited; the officers arrested him, patted him down, and walked him to their vehicle.
- Without *Miranda* warnings, an officer asked him if there was anything in the room because the officers didn't want to get hurt; Dirickson replied that there was a loaded syringe. Officer then *Mirandized* him and asked if there was anything in the room. Dirickson denied knowledge of the presence of a syringe.
- A sweep of the room revealed a syringe with a substance later identified as meth. Dirickson was convicted for one count of possession consub (meth).
- In the district court Dirickson did not file a pretrial motion to suppress; instead objected only at the time testimony about the at-issue statements came in. District court overruled the objection on the merits rather than due to untimeliness. State argued public safety exception, but no counterargument on that point from Dirickson.

Totality of circumstances did not support *Miranda* public safety exception because there was no objectively reasonable need to protect officers or public from immediate arrest-incident danger; admission of at-issue testimony, although erroneous, not fundamental error.

State v. Michael Dirickson, ____-NMCA-____ (A-1-CA-40149, Apr. 28, 2023). ES

- **ANALYSIS:** Dirickson did not preserve the public safety exception question for review, but also argued fundamental error on appeal.
- **ISSUE:** Magical formula for fundamental error analysis:
  - (1) error?;
  - (2) was it fundamental?
- **ANALYSIS:** Public safety exception requires that question is objectively reasonable based on a need to protect either the police or the public from immediate danger. *State v. Widmer*, 2020-NMSC-007, ¶¶ 35, 37. Here, no evidence establishing any such need (D was handcuffed and in custody away from the room; based on circumstances known to officers, no danger and no potential confederates in the room).

Totality of circumstances did not support *Miranda* public safety exception because there was no objectively reasonable need to protect officers or public from immediate arrest-incident danger; admission of at-issue testimony, although erroneous, not fundamental error.

State v. Michael Dirickson, ____-NMCA-____ (A-1-CA-40149, Apr. 28, 2023). ES

- Also, fundamental error requires exceptional circumstances to prevent miscarriage of justice. No such unfairness implicated here (at time the at-issue statement was admitted, the information about his statement had already come in without objection through another witness; D never moved to suppress the fruit of the room sweep; officers found the syringe in plain sight in the hotel room).
- **HELD:** Error in admitting the at-issue statement because totality of circumstances did not support public safety exception. But error was not fundamental, so it did not support reversal.

Post-*Miranda* Silence

No abuse of discretion in denial of mistrial motion predicated on comment on post-*Miranda* silence where Def. did not object at time statement was made, and curative instruction was adequate to remedy any prejudice

State v. Michael Dirickson, ___-NMCA-___ (A-1-CA-40149, Apr. 28, 2023). ES

- **FACTS:** During Defense cross-ex, Deputy made a nonresponsive comment on Def's post-*Miranda* silence. No objection at the time; motion made later after district court brought it to Defense's attention.
- District court denied motion, instead giving a curative instruction.
- **ISSUE:** Did court abuse its discretion in denying the mistrial motion?
- **ANALYSIS:** Prosecutor did not elicit comment; comment was isolated; no timely objection; prosecutor did not later direct attention to it by asking related questions or referring to it in closing. NMCA not persuaded that any prejudice was *not* remedied by curative instruction.
- **HELD:** Denial of mistrial motion not an abuse of discretion.

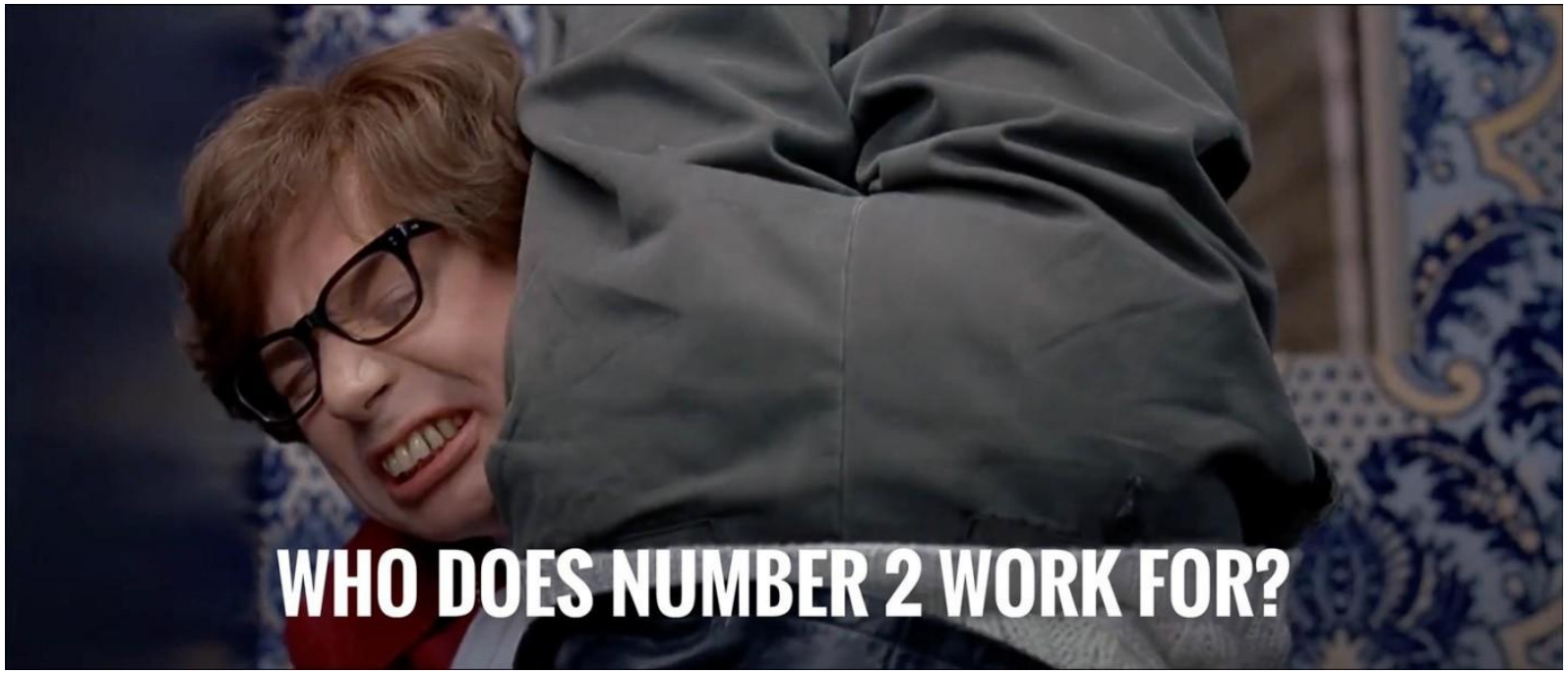
Alleged Prosecutorial Misconduct During Closing

Even assuming prosecutor made erroneous and potentially misleading statements during closing, circumstances did not rise to level of fundamental error.

State v. Michael Dirickson, ___-NMCA-___ (A-1-CA-40149, Apr. 28, 2023). ES

- **FACTS:** On appeal, Def. alleges prosecutorial closing argument misconduct due to alleged (1) reference to evidence outside record; (2) reference to hearsay that had been excluded; and (3) misstatement of law of possession. Def. did not object to any part of the closing argument.
- **ISSUE:** Did alleged uncontested statements lead to fundamental error?
- **ANALYSIS:** In this context, fundamental error requires, in addition to significant unfairness & conscious-shocking doubt about guilt, that the court be convinced that the alleged conduct created a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence.
- Even assuming the erroneous and/or potentially misleading statements as alleged, there was overwhelming evidence of guilt, and the comments dealt with secondary matters of little relevance to the questions before the jury.
- **HELD:** Comments did not result in fundamental error.

Voluntariness of Confession



Court did not err in denying motion to suppress alleging that confession was involuntary

State v. Roger L. Gage, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential). MV

- **FACTS:** Def. and brother entered drug house and executed three people.
- Def. filed motion to suppress post-*Miranda* incriminating statements he made during post-arrest interrogation. He argued that statements were not voluntary or were coerced because: (1) he was incoherent & uncomfortable at the time; and (2) police made implied promises of leniency.
- Motion denied. Def. convicted for murders.
- **ISSUE:** Did court err in denying motion to suppress?
- **ANALYSIS:** (*Miranda* warnings/waiver not at issue).
- For voluntariness question court looks to evidence of confessor's personal characteristics, and those include troubled minds and impairment, but those factors alone are insufficient to render a confession involuntary without accompanying police misconduct or overreaching. Explicit promises of leniency in exchange for Def's admission render confession inadmissible due to involuntariness.

Court did not err in denying motion to suppress alleging that confession was involuntary

State v. Roger L. Gage, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential). MV

- Relevant circumstances in this case include:
  - Def. (33 y.o.)
  - attended special education classes in school; but graduated
  - suffered from depression & drug addiction
  - no evidence that police were aware of and seized upon the above factors to coerce Def.
  - Def. asserted he was uncomfortable from cuffs, hour-long transport, four hours of custody, and no water or restroom access, but at the time did not express any discomfort or ask for food, rest, access to restroom or medical treatment
  - Def. asserted that on that day he used meth & heroin prior to arrest; but never told officer he was under the influence, and based on the evidence he appeared lucid and in control of his faculties
- In totality, above circumstances do not support determination of involuntariness.

Court did not err in denying motion to suppress alleging that confession was involuntary

***State v. Roger L. Gage*, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential). MV**

- As to subclaim that officers coerced admission through four statements that contained implied threats and implied promises of leniency:
  - Statements 1 and 2: officer merely stated he did not want to see Defendant's brother take responsibility for Def's acts
  - Statement 3: officer merely stated he did not want unnecessary charges brought against Def's brother
  - Statement 4 – "so vague, it is impossible to give it a connotation of coercion."
- No suggestion of coercion in these statements.
- **HELD:** Court did not err in denying motion to suppress.

Post-*Miranda* Silence (During DRE Investigation)

12 Steps to a DRE Evaluation

1	**Rule out alcohol.** An OUI drugs charge is a more complex investigation for a police officer; typically, an officer will rule out alcohol as the cause of the impairment and only proceed to a DRE evaluation if the breathalyzer is below .08 and the officer is convinced the motorist is impaired.
2	**Interview with the Arresting Officer.** The DRE officer will discuss the case with the arresting officer. The arresting officer will tell the DRE why he stopped the motorist, what he observed and any physical evidence of drug use, such as pill bottles, drug paraphernalia or admissions of the motorist.
3	**HGN test**. The DRE will conduct a HGN and VGN test. Under Massachusetts drunk driving laws, neither test should be admitted at trial as a police officer is not qualified to exam and individuals eyes to make conclusions regarding impairment.
4	**VGN test, vertical gaze and Nystagmus Test.**
5	**Divided Attention Test.** A DRE will then conduct divided attention test known as field sobriety tests; these are the same tests used in case of OUI alcohol. The tests include the walk and turn test, one leg stand, finger to nose and Rhomberg Balance.
6	**Vital Signs.** The DRE checks the motorist's blood pressure, temperature and pulse.
7	**Dark Room Examination:** the DRE looks at the suspects pupils in three different lights as some drugs cause the eyes to have specific reactions which the DRE evaluates.
8	**Examination for muscle tone.**
9	**Check for injection sites and third pulse.**
10	**Statements and other observations.**
11	**Analysis and opinion of the evaluator.**
12	**Toxicological Examination.**

Introduction of and comment on evidence of post-*Miranda* silence during DRE investigation to show consciousness of guilt was plain error requiring reversal

***City of Las Cruces v. Carbajal*, 2023-NMCA-036. ES**

- **FACTS:** Traffic stop; marijuana smell; poor FST's; arrest for DWI (marijuana).
- Intoxilyzer – .00; DRE officer reads *Miranda* warnings; short exchange about impending DRE exam, Def. refuses to answer questions. Pertinent testimony of State wit's received w/o objection. Def. testifies at trial that she refused and had the right to refuse.
- Closing argument – prosecutor twice, without objection, argued that refusal showed consciousness of guilt.
- Def. convicted; *district court's judgment relies on Def.'s refusal to take the DRE eval as support for the conviction*.
- **ISSUE:** Did court commit reversible error in admitting, allowing closing argument about, and relying on as support for conviction, evidence of Def.'s post-arrest, post-*Miranda* silence?
- **ANALYSIS:** Def. was interrogated while in custody. Evidence of FST refusal generally would be admissible to show consciousness of guilt because the right against self-incrimination does not apply to a refusal to provide physical evidence. But it applies to requests for testimonial or communicative evidence such as what was sought by the DRE-related questioning of the in-custody Def. here.

Introduction of and comment on evidence of post-*Miranda* silence during DRE investigation to show consciousness of guilt was plain error requiring reversal

City of Las Cruces v. Carbajal, 2023-NMCA-036. ES

- Precedent: The admission of evidence of an in-custody Def.'s invocation of the right to remain silent, even if not objected to by the defense, requires reversal as plain error.
- **HELD:** Admission of and reliance on evidence of in-custody Def.'s refusal to provide communicative evidence in response to DRE-related questioning occurred in violation of the right against self-incrimination. Reversal required.
- **NOTE:** Right against self-incrimination does not apply to a refusal to provide physical evidence requested as part of DRE exam.

Confrontation

Admission of DNA evidence did not violate confrontation right

State v. Jerry Gilbert Espinoza, 2023-NMCA-012. VS

- **FACTS:** Espinoza was charged with the sexual abuse of his granddaughter (Victim). Acting on a warrant, investigators collected his DNA for a paternity test relative to Victim's child (Child).
- Espinoza filed a pretrial motion to suppress any testimony regarding paternity testing. Evidence received at the suppression hearing included testimony from DPS lab analyst that:
  - software provided/maintained by FBI called Popstats was used for a statistical analysis to generate a likelihood ratio that Def. was Child's father.
  - per the statistical calculation performed by the Popstats software, it was "260 billion times more likely" that Espinoza was the father than if an untested, unrelated man was the father.
- District court denied motion to suppress. Espinoza convicted for one count each of CSPM in the first degree and incest in the third degree.
- **ISSUE:** Did district court's admission of the at-issue evidence violate the Confrontation Clause because the analyst's testimony about the resulting conclusions was improper "parroting" of the Popstats calculations?

Admission of DNA evidence did not violate confrontation right

State v. Jerry Gilbert Espinoza, 2023-NMCA-012. VS

- **ANALYSIS:** Confrontation Clause claim unpreserved; reviewed for fundamental error.
- Right to confrontation extends to testimonial statements made by a declarant who did not appear at trial unless the declarant was unavailable to testify and the defendant had a prior opportunity for cross-examination.
- The statistical calculations bear only on the mathematical processes that produce the reliability conclusions and therefore are not testimonial.
- Probability conclusions provided by the analyst are testimonial, and the analyst who conducted that testing testified at trial.

- **HELD:** Admission of the at-issue evidence did not violate confrontation right; no fundamental error.

Testimony about info provided by CI did not violate Confrontation Clause; statements weren't testimonial and merely explained context of investigation

State v. Jacob Scott, 2023-NMCA-031. BL

(dramatic re-enactment)

- **FACTS:** While executing an arrest warrant for charges pending against Scott in an unrelated matter, officers found heroin & meth in Scott's underwear.
- One officer testified that he coordinated with a CI to arrange a meeting for the CI to purchase drugs from Scott; the other testified that at the time he arrested Scott, he was advised to pat Scott down for narcotics because Scott was known to have narcotics on him.
- Scott convicted for 2 counts trafficking consub.
- **ISSUE:** Did the testimony violate the Confrontation Clause?

Testimony about info provided by CI did not violate Confrontation Clause; statements weren't testimonial and merely explained context of investigation

State v. Jacob Scott, 2023-NMCA-031. BL

- **ANALYSIS:** For a CC violation of this sort, testimony must be of a specific statement by an out-of-court declarant who is unavailable for cross-exam.
- No actual statement to analyze for testimonial nature here, given that testimony lacked any words allegedly uttered by the CI.
- Whatever of the at-issue testimony could be construed as attributable to the CI, that aspect of it did not assert who the seller or buyer was at any completed or controlled purchase.
- Overall, the info that the CI provided to officers did not explicitly incriminate Scott as having actually committed the crime at issue.
- **HELD:** Admission of at-issue testimony did not violate the Confrontation Clause.

Double Jeopardy

Nonresidential burglary and b & e convictions violated double jeopardy because underlying conduct was unitary and, under State's theory, b & e elements were subsumed within the burglary elements

State v. Franklin Begaye, ____-NMSC-____ (S-1-SC-38797). WH

- **FACTS:** The owner of RAM Signs called the police to report a break-in of the business after he heard a loud bang and then found the front window of the business smashed.
- Officers responded and watched the surveillance video. It depicted an individual smashing then falling through the front window. Officers found Defendant in the area and fitting the description of the individual depicted in the surveillance video and arrested Defendant.
- A jury convicted Defendant of (1) non-residential burglary and (2) breaking and entering. The district court and the COA rejected Defendant's double jeopardy challenge to both convictions.
- **ISSUE:** Whether Defendant's convictions for non-residential burglary and breaking and entering violate double jeopardy.

Nonresidential burglary and b & e charges violated double jeopardy because underlying conduct was unitary and, under State's theory, b & e elements were subsumed within the burglary elements

***State v. Franklin Begaye*, ____-NMSC-____ (S-1-SC-38797). WH**

- **HELD:** Under the State's theories in this case, both convictions violate double jeopardy
- **ANALYSIS:** Framework: In a double-description case, the court must determine
  - whether the defendant's conduct underlying both convictions was the same, or unitary, and if so,
  - whether the Legislature intended to allow for multiple punishments for unitary conduct
- This case only implicated the second prong - Legislative intent. The parties agreed that Defendant's conduct was unitary.
- The NMSC first discussed the two "divergent approaches" exist within our caselaw to discern whether the Legislature intended to authorize separate punishments under two statutes: (1) strict-elements *Blockburger* test and (2) the modified-*Blockburger* test.

Nonresidential burglary and b & e charges violated double jeopardy because underlying conduct was unitary and, under State's theory, b & e elements were subsumed within the burglary elements

***State v. Franklin Begaye*, ___-NMSC-___ (S-1-SC-38797). WH**

- (1) Strict-elements *Blockburger* - the court compares the elements of each offense mechanically to determine legislative intent
- (2) Modified-*Blockburger* test - applies to statutes that are vague and unspecific or written in the alternative. Under this approach, the court must compare the elements by ascertaining the State's legal theory for each offense. The NMSC determined that a court determines the legal theory by
    - Reviewing the statutory language, charging documents, and jury instructions used at trial
    - If it cannot be ascertained by those sources, the court will also review testimony, opening arguments, and closing arguments to establish whether the **same evidence** supported a defendant's convictions under both statutes
- The "same evidence" approach, although the NMSC stated it was consistent with past cases, shifts the second prong into a conduct based comparison, not an element based comparison. It is hard to distinguish between the first and second prong of the test.

Nonresidential burglary and b & e charges violated double jeopardy because underlying conduct was unitary and, under State's theory, b & e elements were subsumed within the burglary elements

***State v. Franklin Begaye*, ___-NMSC-___ (S-1-SC-38797). WH**

- Application: (1) Looking first to the statutory language , charging documents, and jury instructions, the NMSC determined that the State's legal theory was not apparent. The breaking and entering instruction did not reveal the State's theory as to the structure entered or how Defendant entered. The burglary instruction did not establish theory on how the intent to commit a theft or felony therein was satisfied.
- (2) So, the NMSC looked to whether, and concluded that, the same evidence supported both convictions. It focused its analysis on the entry - Defendant committed both crimes by smashing the front window and entering.
- It explained that the distinct specific intent necessary for burglary (to commit theft or felony) and that breaking and entering required proof of a physical breaking was immaterial where the same evidence proved both offenses.
- The State has moved for rehearing.

For three murders, three convictions for first-degree willful and deliberate murder and three convictions for felony murder violated double jeopardy protections.

State v. Roger L. Gage, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential).
MV

- **FACTS:** Defendant and his brother entered a home where drugs are sold. They shot each of the three occupants, took a laptop and safe from a bedroom, then again shot each of the three occupants. The jury convicted Defendant of 3 counts of 1st murder, returning a general verdict and special verdict forms finding Defendant guilty of 2 alternative theories - willful and deliberate and felony murder - for each victim. Judgment was entered for 6 counts of 1st degree murder for the killings of 3 victims.
- **ISSUE:** Whether 6 convictions for for 1st degree murder for killing 3 victims violates double jeopardy

For three murders, three convictions for first-degree willful and deliberate murder and three convictions for felony murder violated double jeopardy protections.

State v. Roger L. Gage, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential).
MV

- **HELD:** The Court accepted the State's concession and determined that 6 convictions violated double jeopardy. It vacated 3 convictions, one for each victim, on the principle "it is a double jeopardy violation to impose more than one homicide conviction for one death."
- No effect on sentence - the district court had sentenced Defendant to 3 consecutive life sentences, one per victim. It already ran each alternative theory per victim concurrently. So vacating a theory per victim had no effect on the sentence.

“Due Process”

"Appellate delay" did not violate Def's due process rights; no error in attributing delay to Def. and, in any event, Def. failed to establish prejudice

State v. Janice Lucero, 2023-NMCA-035. JK

- **FACTS:** Defendant entered into a conditional guilty plea for first-offense DUI in metro court. She appealed her conviction to the district court sitting in its appellate capacity. 4 years passed between her filing the notice of appeal and the district court's decision on appeal.
- At the time Defendant appealed, original appeals from metro court were to the district court. Defendant filed a notice of appeal in both the district court and COA, which the district court found caused the 4-year delay.
- **ISSUE:** Whether the 4-year delay between the notice of appeal and decision on appeal in district court violated Defendant's due process.

"Appellate delay" did not violate Def's due process rights; no error in attributing delay to Def. and, in any event, Def. failed to establish prejudice

State v. Janice Lucero, 2023-NMCA-035. JK

- **HELD:** No due process violation because the district court's findings that defense counsel caused the delay and that Defendant suffered no prejudice are supported by substantial evidence
- **ANALYSIS:** The COA applied the framework it established in *State v. Garcia*, 2019-NMCA-056. To be "sufficiently egregious," appellate delay first requires prejudice to the defendant. If there is prejudice, the court will determine if the State's responsibility and nature and severity of prejudice require dismissal.
- The COA determined that Defendant sustained no prejudice and relied on the arguments of counsel, not evidence, below. The district court's finding that defense counsel caused the delay was supported by substantial evidence where the delay was caused by counsel filing an improper notice of appeal in the COA in addition to the proper notice of appeal filed in district court.

Speedy Trial

Amidst suspension of jury trials due to COVID-19 pandemic, speedy trial rights not violated where delay and assertion of right factors weighed slightly in Def.'s favor, but Def. failed to demonstrate that the asserted prejudice resulted from pretrial incarceration or delay

State v. Dennis R. Pate, ___-NMCA-___ (A-1-CA-39508, Apr. 19, 2023). VS

- **FACTS:** A jury convicted Defendant of felon in possession and possession of a controlled substance. The time period between the arrest and the jury verdict was 16.5 months.
- During this 16.5-month period, between 3/17/20 and 6/15/20, our Supreme Court suspended jury trials due to the COVID-19 pandemic
- **ISSUE:** Whether the 16.5-delay violated Defendant's speedy trial right. The broader issue was "the impact of our Supreme Court's suspension of criminal jury trials during the COVID-19 pandemic on a criminal defendant's constitutional right to a speedy trial."
- **HELD:** Defendant's speedy trial right was not violated
- As to the broader issue, the COA "decline[d] to broadly assign responsibility to any party for delay that occurred during the period in which criminal jury trials were suspended."

Amidst suspension of jury trials due to COVID-19 pandemic, speedy trial rights not violated where delay and assertion of right factors weighed slightly in Def.'s favor, but Def. failed to demonstrate that the asserted prejudice resulted from pretrial incarceration or delay

State v. Dennis R. Pate, ___-NMCA-___ (A-1-CA-39508, Apr. 19, 2023). VS

- **ANALYSIS:** The COA applied the four-factor *Barker* test, which requires the reviewing court to weigh and balance (1) length of the delay, (2) cause of the delay, (3) assertion of the right, and (4) prejudice. The length of the delay is both a trigger to examine the remaining factors as well as the first factor.
- Length of Delay: The case was simple, so the 16.5-month delay triggered a full *Barker* analysis. But only 4.5 months beyond 12 month triggering mechanism for simple case so factor is weighed slightly against State.
- Cause of Delay: This factor weighed slightly against the State because it caused 7 months of delay versus 6 months caused by Defendant. Within this factor:
- Declined to categorically assign COVID-19 delay to either party. It adopted a flexible approach, requiring a reviewing court to consider the particular circumstances.

Amidst suspension of jury trials due to COVID-19 pandemic, speedy trial rights not violated where delay and assertion of right factors weighed slightly in Def.'s favor, but Def. failed to demonstrate that the asserted prejudice resulted from pretrial incarceration or delay

***State v. Dennis R. Pate*, ___-NMCA-___ (A-1-CA-39508, Apr. 19, 2023). VS**

- During COVID-19 suspension, 2.5 months period where defense counsel unilaterally moved for continuance due to a vacation weighed against Defendant. Not "extraordinary" nor was the State or court indifferent to unacceptable delay. However, weighed 1 month against the State for "inaction" for not moving to set trial during the suspension for "exceptional circumstances" where the case was past 12 months and Defendant moved twice for trial.
- Assertion of the Right: Defendant filed 3 pro se speedy trial motions and his attorney moved to dismiss. Normally, these assertions would have been entitled to greater weight but this factor only weighed slightly for Defendant because they were concentrated in 3 month period, not spread out over 16.5 months.
- Prejudice: Defendant did not show any particularized prejudice. He relied on 4 months of incarceration below, but he abandoned that as a basis on appeal. On appeal, he made hindsight assertions regarding anxiety, financial consequences, and a health issue when incarcerated. Court determined that assertion not supported by evidence/tied to any delay.
- Balancing: Because no factors weigh heavily in Defendant's favor and no showing of prejudice, no speedy trial violation.

Ineffective Assistance of Counsel

IAC claim failed because, although failure to PTI Sgt. established prima facie case that counsel's performance fell below that of a reasonably competent attorney, prejudice not shown because nothing in the record established that outcome of case would have been different had PTI occurred

State v. Dennis R. Pate, ____-NMCA-____ (A-1-CA-39508, Apr. 19, 2023). VS

- **FACTS:** A jury convicted Defendant of felon in possession and possession of a controlled substance. The charges arose out of the execution of a search warrant. Defendant's trial strategy was to challenge the State's ability to prove Defendant's connection to the residence.
- Defendant's counsel learned for the first time during opening statements that the State's adequately disclosed witness, Sergeant Riddle, was going to testify that he lived near the residence and saw Defendant "coming and going from the residence on multiple occasions."
- **ISSUE:** Whether defense counsel's failure to conduct a pretrial interview constitutes ineffective assistance of counsel or established a prima facie case of ineffective assistance necessitating a remand for an evidentiary hearing.

IAC claim failed because, although failure to PTI Sgt. established prima facie case that counsel's performance fell below that of a reasonably competent attorney, prejudice not shown because nothing in the record established that outcome of case would have been different had PTI occurred

State v. Dennis R. Pate, ____-NMCA-____ (A-1-CA-39508, Apr. 19, 2023). VS

- **HELD:** Defendant did not establish a prima facie case of ineffective assistance because the record does not show prejudice.
- **ANALYSIS:** To establish an ineffective assistance of counsel claim, Defendant must show (1) counsel's performance fell below that of a reasonably competent attorney, (2) no rational strategy or tactic explains counsel's actions, and (3) counsel's deficiency prejudiced the defense.
- Counsel's performance was unreasonable: The search warrant affidavit disclosed Sergeant Riddle's surveillance of the residence and in light of defense strategy, counsel had an obligation to investigate. An investigation would have uncovered the evidence connecting Defendant to residence.
- BUT, the record does not show prejudice: Defendant claimed that had counsel discovered the evidence connecting him to the residence, he would have pleaded. However, the record does not support a conclusion that Defendant did not plea because of counsel's advice. Defendant's issue is better left for habeas proceedings.

Cruel & Unusual Punishment

Three life sentences for three murders did not violate constitutional prohibition against cruel and unusual punishment

State v. Roger L. Gage, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential).
MV

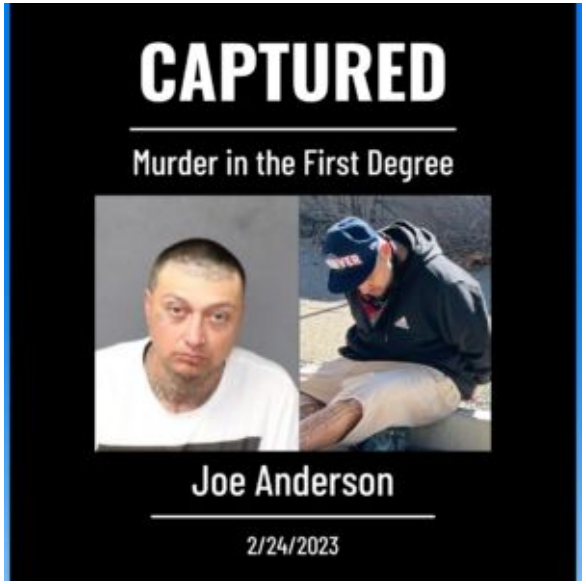
- **FACTS:** Defendant and his brother entered a home where drugs are sold. They shot each of the three occupants, took a laptop and safe from a bedroom, then again shot each of the three occupants. The jury convicted Defendant of 3 counts of 1st murder, returning a general verdict and special verdict forms finding Defendant guilty of 2 alternative theories - willful and deliberate and felony murder - for each victim. The district court imposed 3 consecutive life sentences, one per victim.
- **ISSUE:** Defendant argued that his 3 consecutive life sentences constitute cruel and unusual punishment because his brother shot and killed 2 of the victims.

Three life sentences for three murders did not violate constitutional prohibition against cruel and unusual punishment

State v. Roger L. Gage, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential). MV

- **HELD:** 3 life sentences does not constitute cruel and unusual punishment.
- **ANALYSIS:** Defendant's argument was deemed "not developed" and "rightly so."
- Under New Mexico law, "a person who is an accessory to a crime is equally culpable as the principal."

Pretrial Detention



District court erred in denying motion for pretrial detention; dangerousness was not disputed, and State met its burden to prove by clear & convincing evidence that no release conditions could reasonably protect any individual or the community

State v. Joe Anderson, ____-NMSC-____ (S-1-SC-39744, May 22, 2023). CG

- **FACTS:** The State charged Defendant with first-degree murder. The State presented reliable evidence that he hunted down, shot, and killed the victim in the middle of the street over a simple property dispute (motorcycle). Defendant and his accomplice took the property as the victim lay dying. Defendant later returned to the scene and chatted with law enforcement to establish an alibi.
- Defendant has an extensive, 19-year criminal history, including a voluntary manslaughter conviction using a firearm. He also has concurrent felony charges for possession of fentanyl, possession of meth, receiving a stolen vehicle, and possession of a firearm by a felon.
- The State presented direct evidence that Defendant did not comply with pretrial services in his concurrent case. It also presented evidence that Defendant had previously violated probation and violated conditions of release.
- The State also presented evidence that Defendant's PSA flagged Defendant as a risk for committing new violent crimes, his GF (a witness) owned a firearm, pretrial services does not conduct home visits, and Defendant does not have a known address

District court erred in denying motion for pretrial detention; dangerousness was not disputed, and State met its burden to prove by clear & convincing evidence that no release conditions could reasonably protect any individual or the community

State v. Joe Anderson, ___-NMSC-___ (S-1-SC-39744, May 22, 2023). CG

- The district court denied the State's expedited motion for pretrial detention. It applied the three general considerations from *Groves*, 2018-NMSC-006, and *Torrez*, 2018-NMSC-005, which require a court to consider the evidentiary reliability, the defendant's dangerousness, and whether release conditions can reasonably protect the community.
- It found that Defendant was dangerous and that the State's evidence was reliable.
- However, it found "that any danger Defendant may pose on the community can be mitigated because of Defendant's performance on probation in the past [in two cases] as well as his performance on pretrial services in the" concurrent felony case, in which it determined that there have been no allegations of violations."

District court erred in denying motion for pretrial detention; dangerousness was not disputed, and State met its burden to prove by clear & convincing evidence that no release conditions could reasonably protect any individual or the community

State v. Joe Anderson, ____-NMSC-____ (S-1-SC-39744, May 22, 2023). CG

- **ISSUE:** The State appealed, arguing that the district court abused its discretion in denying its expedited motion for pretrial detention
- **HELD:** The district court abused its discretion in denying the State's motion because the evidence amply satisfied the State's burden that no release conditions would reasonably protect the public, and the district court did not properly weigh the Rule 5-409(F)(6) NMRA factors.
- **ANALYSIS:** First and foremost, the NMSC clarified the required analysis a district court must conduct in ruling on a motion for preventative detention.
- The NMSC clarified that a district court should no longer just apply three general considerations (reliability, dangerousness, and whether release conditions can reasonably protect the public), and instead, must comply with the requirements of Rule 5-409(F)(6) NMRA.

District court erred in denying motion for pretrial detention; dangerousness was not disputed, and State met its burden to prove by clear & convincing evidence that no release conditions could reasonably protect any individual or the community

State v. Joe Anderson, ____-NMSC-____ (S-1-SC-39744, May 22, 2023). CG

- Rule 5-409(F)(6) NMRA requires the district court to consider a non-exhaustive list of factors, and any additional relevant fact in determining the nature and seriousness of the danger to any person or the community that would be posed by a defendant's release. The non-exhaustive factors are:
  - nature and circumstances of the offense charged
  - weight of the evidence
  - history and characteristics of the defendant
  - any fact indicating whether the defendant will commit a new crime
  - whether the defendant has been previously detained
  - available results of a PSA
- The Court must issue written findings and the factors are relevant to both dangerousness and whether any conditions can protect the community. The Court must take a holistic, commonsense approach.

District court erred in denying motion for pretrial detention; dangerousness was not disputed, and State met its burden to prove by clear & convincing evidence that no release conditions could reasonably protect any individual or the community

***State v. Joe Anderson*, ___-NMSC-___ (S-1-SC-39744, May 22, 2023). CG**

- Applying these factors, the court concluded that under the totality of the circumstances, Defendant has an extensive and undeniable history of violence, noncompliance, and continual law and rule breaking.
- Therefore, Defendant "has earned a place in that carefully limited exception, not as punishment for his past acts but to protect others from his predictable future dangerousness."
- Within this analysis, the NMSC rejected the district court's finding that Defendant had twice successfully completed probation and was on conditions of release with no allegations of non-compliance in the concurrent case. The record showed direct evidence of non-compliance in the concurrent case and the record showed violations of probation (as well as violations of conditions of release in another prosecution).

Instructions & Sufficiency

- INSTRUCTIONS
  - Reckless Driving w/GBH
  - Denied Alibi Instruction
  - Securities Fraud; Sale of Unreg. Security; Sale of Security by Unlicensed Agent
- SUFFICIENCY
  - Accomplice Liability (Securities-related Offenses)
  - Securities Fraud; Fraud
  - Conspiracy to Commit Fraud
  - Larceny; Restitution
  - Reckless Driving w/GBH
  - DWI (Marijuana)

Instructions: Reckless Driving w/GBH

District court did not err in refusing to instruct jury that speeding is insufficient to constitute reckless driving

State v. Shawn D. Doyal, 2023-NMCA-015. LB

- **FACTS:** Defendant drove his truck through Cloudcroft at night. Once he passed through town, he drove through a highway that is curvy, mountainous, has a 35 mph speed limit, is a safety corridor, contains signage describing dangerous conditions, including an upcoming fishhook-shaped curve and notifying truckers to use a lower gear. Defendant accelerated to 66 mph, lost control of his truck when driving through the curve, and struck a vehicle with two occupants on the driver's side. The driver suffered great bodily harm.
- The jury convicted Defendant of great bodily harm by reckless driving.
- The district court instructed the jury that to find Defendant operated his vehicle in a reckless manner, it must find he "drove with willful disregard of the safety of others and a speed likely to endanger any person." UJI 14-241 NMRA.
- **ISSUE:** Whether the jury should have been instructed that "speeding alone is insufficient to constitute reckless driving."

District court did not err in refusing to instruct jury that speeding is insufficient to constitute reckless driving

State v. Shawn D. Doyal, 2023-NMCA-015. LB

- **HELD:** The jury instruction did not contain error.
- **ANALYSIS:** There was no dispute by the State that "speeding alone is insufficient to constitute recklessness." *State v. Munoz*, 2014-NMCA-101.
- BUT, UJI 14-241 already requires the jury to find BOTH a "willful disregard of the safety of others" AND "at a speed . . . likely to endanger any person."
- Therefore, the UJI already communicates to the jury that speeding alone is insufficient to constitute reckless driving. The COA relied on *State v. Simpson*, 1993-NMSC-073, 116 N.M. 768, which is on-point.

. . . or in refusing to provide jury a modified version of UJI 14-241 that changed the state of mind element

State v. Shawn D. Doyal, 2023-NMCA-015. LB

- **NEXT ISSUE:** Whether the district court erred when it did not add the following language to UJI 14-241:

  "Defendant knew or should have known his conduct created a substantial and foreseeable risk, he disregarded that risk and he was wholly indifferent to the consequences of the conduct and to the welfare and safety of others.

  Ordinary negligence or careless driving is not a willful disregard of the safety of others."

- Defendant argued that his proposed additions more accurately reflect the state of mind requirement that requires more than careless driving and are necessary to communicate the element of "conscious wrongdoing" as required by caselaw.

. . . or in refusing to provide jury a modified version of UJI 14-241 that changed the state of mind element

State v. Shawn D. Doyal, 2023-NMCA-015. LB

- **HELD:** UJI 14-241 and UJI 14-141 (general intent) accurately reflect the state of mind requirement for great bodily harm by reckless driving
- **ANALYSIS:** The language used in UJI 14-241, that the defendant "drove with willful disregard of the safety of others," requires more than civil negligence. It connotes that the defendant acted "with conscious disregard of the safety of others."
- The instructions also required conscious wrongdoing, which is the "purposeful doing of an act that the law declares to be a crime." The jury was instructed on general intent, that the jury must find the defendant "acted intentionally when he committed the crime." Same thing.

Instructions: Denied Alibi Instruction

District court did not err in denying defense-requested alibi instruction

***State v. Jason Stalter*, ____-NMCA-____ (A-1-CA-39984, Mar. 21, 2023). MV**

- **FACTS:** A jury convicted Defendant of larceny and burglary following a burglary that occurred at Lowe's on 10:40 pm. Defendant was an overnight manager at Lowe's and had keys and a code to disable the alarm but had been fired two days prior the burglary. The State proved its case primarily by having the jury compare video footage of the burglary compared to known workplace footage of Defendant.
- Defendant presented alibi evidence - both he and a friend testified that he was in Utah the day of the burglary and would not have had time to get back. He also presented receipts and bank and phone records to establish a timeline.
- Defendant requested UJI 14-5150 NMRA, which states that

  Evidence has been presented concerning whether or not the defendant was present at the time and palace of the commission of the offense charges. If after a consideration of all evidence, you have reasonable doubt that the defendant was present at the time the crime was committed, you must find him not guilty.

District court did not err in denying defense-requested alibi instruction

***State v. Jason Stalter*, ___-NMCA-___ (A-1-CA-39984, Mar. 21, 2023). MV**

- The district court denied the instruction because the Use Note for UJI 14-5150 states that "No instruction on this subject shall be given."
- The committee commentary explains that "alibi is not a technical or legal defense but is used to cast doubt on the proof of elements of the crime" and "no instruction should be given since it merely comments on the evidence"
- **ISSUE:** Defendant argued on appeal that the district court erred by not instructing the jury using UJI 14-5150, arguing "juror confusion."

District court did not err in denying defense-requested alibi instruction

***State v. Jason Stalter*, ____-NMCA-____ (A-1-CA-39984, Mar. 21, 2023). MV**

- **HELD:** The district court did not mis-instruct the jury.
- **ANALYSIS:** Use notes are binding on district courts.
- Further, the COA "may only amend, modify, or abolish" a uniform jury instruction reviewed and not ruled upon by the NMSC. UJI 14-5150 has been reviewed by the NMSC and the Court "sustained and reaffirmed" the use note at issue. The COA was therefore precluded from reviewing the use note and Defendant's argument, as a result.
- The COA expressed its reservation about the use note at issue here and discussed divergent approaches taken by other jurisdictions on providing alibi instructions. Notes shift in landscape toward allowing instruction to "ensure that juries understood the burdens of proof."
- Defendant has a pending petition for certiorari on the issue. BUT for now, an alibi instruction is not permissible under New Mexico law.

Instructions: Securities Fraud; Sale of Unreg. Security; Sale of Security by Unlicensed Agent

Because only general criminal intent must be proven, district court did not err in denying request for instructions that would have required proof of a higher level of intent for securities offenses

State v. Joel Hixon, ____-NMCA-____ (A-1-CA-39640, Apr. 4, 2023). ETJ

- **FACTS:** Defendant met Schult, who owned a company called American Radio Empire (ARE), which he claimed intended to purchase local radio stations and put their programming on internet. Defendant invested in ARE, and he was to earn "finder's" or "consultant" fees if he found additional investors.
- The State presented evidence that Defendant induced Orphey, Worley, Smith, and the Millers to invest in ARE by representing that the investment would be used to take ARE public. Defendant received fees for finding these investors.
- ARE was, actually, in effect, a "Ponzi scheme." The majority of its debts and investors were paid off from new investors. Only 4.3 percent of the money invested in ARE was used for multimedia-related expenses.
- In addition to other offenses, a jury convicted Defendant of three securities offenses under NM uniform securities act (NMUSA): (1) securities fraud, (2) sale of unregistered security, and (3) sale of security by unlicensed agent.

Because only general criminal intent must be proven, district court did not err in denying request for instructions that would have required proof of a higher level of intent

***State v. Joel Hixon*, ___-NMCA-___ (A-1-CA-39640, Apr. 4, 2023). ETJ**

- The district court instructed the jury using the UJIs for each offense. In accordance with the UJIs, the district court instructed the jury on general criminal intent - that the State must prove that "Defendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime, even though he may not know that his act is unlawful."
- The district court refused Defendant's proffered instructions that would have required a higher level of intent.
- **ISSUE:** Whether the securities offenses under the NMUSA requires more than general criminal intent.
- At the outset, the COA noted that caselaw contradicts Defendant's position that these offense require more than general intent. *See State v. Ramirez*, 2009-NMCA-132 (securities fraud does not require specific intent to defraud); *State v. Shafer*, 1985-NMCA-018 (rejecting good faith defense).

Because only general criminal intent must be proven, district court did not err in denying request for instructions that would have required proof of a higher level of intent

***State v. Joel Hixon*, ___-NMCA-___ (A-1-CA-39640, Apr. 4, 2023). ETJ**

- **HELD:** The securities offenses are general intent crimes.
- **ANALYSIS:** The COA examined the language of the NMUSA in reaching its conclusion.
- The NMUSA creates criminal offenses whenever "[a] person willfully . . . violates" any provision, rule, or order pursuant to the NMUSA. It declares certain acts unlawful, including:
  - Security fraud - in connection with the offer, sale, or purchase of a security
    - use a device, scheme, or artifice to defraud;
    - misrepresent a material fact;
    - engage in act, practice or course of business that operates to defraud
  - Sale of unregistered security - offering a security for sale that is not federally covered, exempt by NM law, or registered under NM law
  - Sale of security by unlicensed agent - transact business as an agent unless registered as an agent under NM law

Because only general criminal intent must be proven, district court did not err in denying request for instructions that would have required proof of a higher level of intent

State v. Joel Hixon, ____-NMCA-____ (A-1-CA-39640, Apr. 4, 2023). ETJ

- The NMUSA defines "willfully" as "purposely or intentionally committing the act or making the omission and does not require an intent to violate the law or knowledge that the act or omission is unlawful."
- Based on this definition, the securities offenses are general intent crimes. A general intent crime in New Mexico "requires only a conscious wrongdoing, or the purposeful doing of an act that the law declares to be a crime." The definitions are functionally identical.

. . . and securities fraud UJI used at trial correctly instructed jury on all essential elements under Section 58-13C-501; an affirmative duty to disclose is not among those elements

***State v. Joel Hixon*, ____-NMCA-____ (A-1-CA-39640, Apr. 4, 2023). ETJ**

- **NEXT ISSUE:** Whether the district court committed fundamental error by not instructing the jury on an additional element - an affirmative fiduciary duty to disclose - for securities fraud when the charge is premised on an omission
- Instruction: The district court instructed the jury that to convict Defendant of securities fraud, it had to find that Defendant
  - used a plan of scheme to deceive or cheat others
  - made an untrue statement of fact significant to investment decision of a reasonable person
  - omitted a fact that would have been misleading to investment decision of a reasonable person

. . . and securities fraud UJI used at trial correctly instructed jury on all essential elements under Section 58-13C-501; an affirmative duty to disclose is not among those elements

State v. Joel Hixon, ____-NMCA-____ (A-1-CA-39640, Apr. 4, 2023). ETJ

- **HELD:** No fundamental error because there was no error. An affirmative fiduciary duty to disclose is not an element of the offense.
- **ANALYSIS:** Defendant's argument relied upon what he deemed "persuasive" federal authority.
- BUT, Defendant's argument is contrary to the language of the New Mexico statute.
- Section 58-13C-501 requires the State to establish one of three alternatives, and does not require an affirmative duty to disclose. The COA disposed of the argument on the principle that "we will not read into a statute any words that are not there."

. . . and absence of jury instruction on definitions of "effect" or "agent" did not result in fundamental error

State v. Joel Hixon, ____-NMCA-____ (A-1-CA-39640, Apr. 4, 2023). ETJ

- **NEXT ISSUE:** Whether the district court committed error by not instructing the jury on definitions of "agent" and "effect" for sale of a security by an unlicensed agent.
- Instruction: The district court instructed the jury that to convict Defendant of sale of a security by an unlicensed agent, it had to find that Defendant
  - was required to be registered as an agent with the state of NM
  - was not registered as an agent with the state of NM

. . . and absence of jury instruction on definitions of "effect" or "agent" did not result in fundamental error

State v. Joel Hixon, ___-NMCA-___ (A-1-CA-39640, Apr. 4, 2023). ETJ

- **HELD:** Definitions of "agent" or "effect" were not required
- **ANALYSIS:** No reasonable jury would have been confused or misdirected in this case
- Under the NMUSA, a person who represents an issuer in the sale of a security is exempt from registration as an agent only if they were not compensated. The State's evidence at trial showed that Defendant was compensated, regardless of how he described the fee (finder, agent, consultant, or commission)

Sufficiency: Securities Fraud

Sufficient evidence supports Defendant's conviction for securities fraud

***State v. Joel Hixon*, ____-NMCA-____ (A-1-CA-39640, Apr. 4, 2023). ETJ**

- **FACTS:** Defendant met Schult, who owned a company called American Radio Empire (ARE), which he claimed intended to purchase local radio stations and put their programming on internet. Defendant invested in ARE, and he was to earn "finder's" or "consultant" fees if he found additional investors.
- The State presented evidence that Defendant induced Orphey, Worley, Smith, and the Millers to invest in ARE by representing that the investment would be used to take ARE public. Defendant received fees for finding these investors.
- ARE was, actually, in effect, a "Ponzi scheme." The majority of its debts and investors were paid off from new investors. Only 4.3 percent of the money invested in ARE was used for multimedia-related expenses.
-

Sufficient evidence supports Defendant's conviction for securities fraud

***State v. Joel Hixon*, ___-NMCA-___ (A-1-CA-39640, Apr. 4, 2023). ETJ**

- **ISSUE:** Defendant was convicted of securities fraud for his fraudulent inducement of the Millers. Defendant argued that the State insufficiently proved his requisite intent for securities fraud
- **HELD:** The State's circumstantial evidence was sufficient to support that Defendant committed securities fraud with the requisite criminal intent
- **ANALYSIS:** The State presented evidence of three misrepresentations - Defendant (1) omitted that he knew he would be compensated by investments, (2) misrepresented his own personal investment to the Millers, and (3) misrepresented the minimum amount required to invest to the Millers.
- This evidence of the misrepresentations combined with the fees he obtained supports inference of Defendant's criminal intent.

Sufficiency: Fraud

. . . and sufficient evidence supported fraud conviction

***State v. Joel Hixon*, ___-NMCA-___ (A-1-CA-39640, Apr. 4, 2023). ETJ**

- **NEXT ISSUE:** Whether the State presented sufficient evidence to support Defendant's fraud conviction
- Instruction: To prove fraud, the State had to prove that
  - Defendant made a promise he had no intention of keeping or misrepresented a fact to the Millers, intending to deceive the Millers, and
  - because of the promise or misrepresentation and the MIllers' reliance on it, Defendant obtained over $20,000
- **HELD:** The State's evidence was sufficient as to both elements

… and sufficient evidence supported fraud conviction

***State v. Joel Hixon*, ___-NMCA-___ (A-1-CA-39640, Apr. 4, 2023). ETJ**

- **ANALYSIS:** (1) The State's evidence was sufficient to support finding that Defendant made a misrepresentation to the Millers with intent to deceive based on:
    - Defendant misrepresented three things - his own personal investment, the minimum investment required, and omitted that he would be paid upon the Millers' investment. Any of those three misrepresentations combined with his immediate payment upon Millers' investment established intent to deceive Millers.
- (2) The State's evidence was also sufficient to establish that by misrepresentation, Defendant obtained $20,000 from the Millers.
    - The evidence showed that the Millers invested $25000, and Defendant received half of that. Fraud is only concerned with misappropriation. It is immaterial that Defendant personally benefited only $12500.
    - Millers testified that the misrepresentations induced their conduct

Sufficiency: Conspiracy to Commit Fraud

. . . and sufficient evidence supported conspiracy to commit fraud conviction

State v. Joel Hixon, ____-NMCA-____ (A-1-CA-39640, Apr. 4, 2023). ETJ

- **ISSUE:** Whether the State presented sufficient evidence to support Defendant's conspiracy to commit fraud conviction
- Instruction: To prove conspiracy,, the State had to prove that
  - Defendant and the other person entered into an agreement and intended to commit fraud
- **HELD:** The State's evidence was sufficient

. . . and sufficient evidence supported conspiracy to commit fraud conviction

***State v. Joel Hixon*, ___-NMCA-___ (A-1-CA-39640, Apr. 4, 2023). ETJ**

- **ANALYSIS:** The State presented evidence of reported dealings between Defendant and Schult where Defendant knew that he would be paid from investments.
- The State also presented evidence that Defendant induced the Millers into investing through misrepresentations and that Defendant and Schult did not use the investment money for the stated purpose that induced the investment.
- That circumstantial evidence was sufficient to support the finding that Defendant and Schult entered into an agreement with the intent to defraud the Millers

Sufficiency: Larceny; Restitution

Sufficient evidence supported larceny conviction and amount of restitution order, notwithstanding absence of documentary evidence as to the amount

State v. Jason Stalter, ____-NMCA-____ (A-1-CA-39984, Mar. 21, 2023). MV

- **FACTS:** A jury convicted Defendant of larceny over $20,000 following a burglary that occurred at Lowe's on 10:40 pm. Defendant was an overnight manager at Lowe's and had keys and a code to disable the alarm but had been fired two days prior the burglary. A Lowe's employee testified that the amount stolen was $36,000 and an officer testified that it was $33,040.85.
- **ISSUE:** Defendant argued that the evidence was insufficient to establish the requirement for larceny that Defendant took cash "over $20,000" and to support the restitution award of "$33,040.83"

Sufficient evidence supported larceny conviction and amount of restitution order, notwithstanding absence of documentary evidence as to the amount

***State v. Jason Stalter*, ___-NMCA-___ (A-1-CA-39984, Mar. 21, 2023). MV**

- **HELD:** A rational jury could have concluded that Defendant took "over $20,000" from Lowe's and to support the restitution award.
- **ANALYSIS:** The Court rejected Defendant's contention that the disparity in amounts was fatal. The testified amounts both exceeded the requirement for larceny and the amount of the restitution award.
- Defendant presented no authority to establish that an amount taken must be established by documentary evidence.

. . . and because of sufficiency as to the restitution amount, lack of presentence report to establish restitution amount did not result in fundamental error

State v. Jason Stalter, ____-NMCA-____ (A-1-CA-39984, Mar. 21, 2023). MV

- **FACTS:** A jury convicted Defendant of larceny over $20,000 following a burglary that occurred at Lowe's. A Lowe's employee testified that the amount stolen was $36,000 and an officer testified that it was $33,040.85. The restitution award at sentencing was $33,040.83.
- **ISSUE:** Defendant argued that the restitution award of $33,040.83 was fundamental error because it did not match the trial evidence and was imposed without a presentence investigation into the amount.

. . . and because of sufficiency as to the restitution amount, lack of presentence report to establish restitution amount did not result in fundamental error

State v. Jason Stalter, ____-NMCA-____ (A-1-CA-39984, Mar. 21, 2023). MV

- **HELD:** No fundamental error occurred.
- **ANALYSIS:** The amount was two cents less than the lowest amount testified to at trial. The award was sufficiently supported by the testimony, a presentence report was not necessary, and the amount imposed was not fundamental error

Sufficiency: Reckless Driving w/GBH

Sufficient evidence, beyond evidence of speeding, was presented for jury to find that Defendant drove in a reckless manner

State v. Shawn D. Doyal, 2023-NMCA-015. LB

- **FACTS:** Defendant drove his truck through Cloudcroft at night. Once he passed through town, he drove through a highway that is curvy, mountainous, has a 35 mph speed limit, is a safety corridor, contains signage describing dangerous conditions, including an upcoming fishhook-shaped curve, and notifying truckers to use a lower gear. Defendant accelerated to 66 mph, lost control of his truck when driving through the curve, and struck a vehicle with two occupants on the driver's side. The driver suffered great bodily harm.
- **ISSUE:** Defendant argued that the evidence was insufficient to support the finding that he acted in a reckless manner, claiming "his only transgression was to drive too fast."

Sufficient evidence, beyond evidence of speeding, was presented for jury to find that Defendant drove in a reckless manner

***State v. Shawn D. Doyal*, 2023-NMCA-015. LB**

- **HELD:** The circumstances, particularly the circumstances leading up to the collision, were sufficient to establish recklessness.
- **ANALYSIS:** Speeding alone is insufficient to constitute reckless driving and is just "one factor."
- New Mexico caselaw supports a totality of circumstances approach, in which the jury considers all factors bearing on recklessness, including "a driver's actions leading up to the collision."
- Defendant encounter numerous signs warning of danger and was unfamiliar with the road. It was dark. The road was only two lanes with no passing lane, and contained a mountain on one side with a guardrail to prevent vehicles from going over a drop off. He accelerated from 35 to 66 mph in a 1.5 mile stretch.

Sufficiency: DWI (Marijuana)

Evidence of strong smell of marijuana and poor performance on FST's provided sufficient evidence to sustain DWI conviction

City of Las Cruces v. Carbajal, 2023-NMCA-036. ES

- **FACTS:** A municipal police officer pulled over Defendant for driving with a broken taillight. The officer did not observe any further driving infraction. The first time the officer approached Defendant's car, he smelled a strong odor of perfume. The second time he approached the vehicle, he smelled marijuana. Defendant admitted to smoking the previous day. Defendant performed poorly on FSTs.
- A judge convicted Defendant of DUI (marijuana) following a bench trial in municipal court.
- The COA reversed Defendant's conviction due to an impermissible comment on Defendant's right to silence.
- **ISSUE:** Whether Defendant's conviction was supported by substantial evidence so as to permit retrial.

Evidence of strong smell of marijuana and poor performance on FST's provided sufficient evidence to sustain DWI conviction

City of Las Cruces v. Carbajal, 2023-NMCA-036. ES

- **HELD:** Substantial evidence supports Defendant's conviction.
- **ANALYSIS:**
- The COA rejected Defendant's contention (or implication) that "a conviction under this ordinance requires direct evidence of erratic driving to convict." The factfinder was entitled to infer the degree to which Defendant was impaired from listening to officer's testimony and observing her performance on the FSTs from video evidence.
- The testimony that the officer smelled perfume and marijuana, combined with testimony that perfume is often used to mask marijuana, suggested recent use.

Evidentiary Issues

- Rule 11-504 (Privilege for Confidential Physician-Patient Communication)
- Rule 11-609 (Admission of Prior Batt. P.O. Conviction)
- Rule 11-613 (Exclusion of Prior Inconsistent Statement by Omission)
- Limitation of Cross-ex under §30-9-16(A) (“Rape Shield Statute”)
- Rule 11-701 (Lay Opinion Identifying Subject in Video)
- Rule 11-702 (Admission of Expert Testimony)
  - DNA Evidence
  - Abuse: Family Dynamics and Manifestations of Impacts
- 11-801 to -804 (Exclusion of Prelim. Hearing Transcript)
- 7.33.2.15 NMAC (requirement that operator make good faith attempt to collect/analyze at least two breath samples)

Rule 11-504 (Privilege for Confidential Physician-Patient Communication)

Trial court erred in concluding that confidential communication is not protected by the Rule 11-504 privilege if a reasonable person should have known that a third party could overhear the communication, because court adopted an objective test based on what a hypothetical reasonable person should have known.

State v. Janice Lucero, 2023-NMCA-035. JK

- **FACTS:** Deputy responds to single-car crash and finds D in her overturned vehicle, visibly intoxicated, and smelling of alcohol.
- EMTs arrive and begin treating D in the back of an ambulance. Deputy immediately enters the ambulance through the side door, placing him behind D and a few feet away.
- EMT questions D about how many drinks she consumed, D says "three Crown and Cokes." Deputy hears this but doesn't speak until two minutes later when he asks D if she's been drinking. D starts crying, refuses to answer the question, and pretends to fall asleep.
- D, charged with DWI, moves to suppress her statements to the EMT under Rule 11-504's physician-patient privilege as confidential statements for purposes of diagnosis or treatment. She testifies she thought she was alone with the EMT.
- Trial court denies the motion: 11-504's confidentiality requirement was not met because it was unreasonable for D to believe the conversation was private when she knew there were officers on scene, the ambulance doors were open, and the deputy was only a few feet from her.

Trial court erred in concluding that confidential communication is not protected by the Rule 11-504 privilege if a reasonable person should have known that a third party could overhear the communication, because court adopted an objective test based on what a hypothetical reasonable person should have known.

State v. Janice Lucero, 2023-NMCA-035. JK

- **ISSUE:** Does a communication between a physician and a patient which is overheard by a third party remain "confidential" under Rule 11-504?
- **ANALYSIS:** Communication is protected by Rule 11-504 if: **(1)** the patient intends the communication be undisclosed to third parties; and **(2)** nondisclosure of the communication furthers the interests the privilege is intended to protect.
- At the first prong, the trial court erred by applying an objective standard asking whether the patient *should have known* a third party could overhear. This approach conflicts with Rule 11-504, which focuses on the *particular patient's* subjective intent–did the patient have an actual expectation that the communication would remain confidential?
- The intent must be manifested through words or conduct consistent with an expectation that the communication will not be disclosed, and the agreement to a private medical exam is sufficient.

Trial court erred in concluding that confidential communication is not protected by the Rule 11-504 privilege if a reasonable person should have known that a third party could overhear the communication, because court adopted an objective test based on what a hypothetical reasonable person should have known.

State v. Janice Lucero, 2023-NMCA-035. JK

- **HELD**: The trial court should have determined whether Defendant actually intended that her conversation with the EMT remain confidential, not whether she should have known that the deputy could overhear the conversation. The court then should have determined whether Defendant acquiesced in or consented to the disclosure, which would amount to an exception to Rule 11-504, based on whether she actually knew the Deputy was in the ambulance.

  Reversed and remanded to allow the trial court to make the necessary findings and apply the correct subjective legal standard.

Rule 11-609 (Admission of Prior Batt. P.O. Conviction)

District court abused its discretion in admitting evidence of Def's prior conviction for battery upon a peace officer; error not harmless

State v. Albert Fernandez, 2023-NMSC-005. JK

- **FACTS**: D charged with battery on a P.O. for headbutting and kicking an officer while being arrested. Before trial, district court grants D's motion to suppress evidence of his 2017 conviction for same offense.
- At trial, D testifies and denies striking the officer. State requests permission to impeach D with the prior conviction, arguing defense opened the door. District court allows the impeachment. Jury finds D guilty.
- **ISSUE**: Did the district court abuse its discretion by admitting evidence of D's prior conviction under Rule 11-609 or Rule 11-404?
- **ANALYSIS**: Rule 11-609 permits admission of prior felony convictions to impeach a defendant's character for truthfulness only if the probative value of the evidence outweighs its prejudicial effect. Six-factor balancing test from *Lucero*, 1982-NMCA-102 determines whether conviction should be admitted.

District court abused its discretion in admitting evidence of Def's prior conviction for battery upon a peace officer; error not harmless

State v. Albert Fernandez, 2023-NMSC-005. JK

— **Nature of the crime**: The impeachment value of a batt P.O. conviction is minimal compared to its "inflammatory impact" because it sheds little light on D's character for truthfulness (it's not a crime of dishonesty).

+ Date of prior conviction: D's prior conviction was in 2017, a year before trial in this case, suggesting the conviction had *some* probative value.

— **Similarity of the crimes:** Admitting a prior conviction for an identical crime is "particularly prejudicial" because the jury likely views it as propensity evidence.

— **Correlation with Rule 11-404 policies:** Again, the jury likely used the evidence as propensity evidence, which violates the policies underlying Rule 11-404.

— **Importance of D's testimony:** D's testimony was critical to defense theory because lapel videos didn't show whether a battery occurred or not. D also elected to testify believing the prior conviction had been suppressed.

— **Centrality of credibility to the issue:** Because it was a "he said, he said" case, credibility was central to the jury's decision.

District court abused its discretion in admitting evidence of Def's prior conviction for battery upon a peace officer; error not harmless

State v. Albert Fernandez, 2023-NMSC-005. JK

- **HELD:** Balancing the *Lucero* factors, admission of D's prior conviction as Rule 11-609 impeachment evidence was an abuse of discretion. It also violated Rule 11-404 because the jury likely used the conviction as character/propensity evidence.

  Admission of the evidence was not harmless error because there is a reasonable probability that, given the circumstances of this case, the evidence contributed to D's conviction.

  Reversed and remanded for a new trial.

Rule 11-613 (Exclusion of Prior Inconsistent Stmt. by Omission)

Prior inconsistent statement by omission was relevant admissible impeachment evidence

***State v. Phillip B. Salazar*, 2023-NMCA-026. MV**

- **FACTS**: V is attacked by D, her ex-boyfriend, when he breaks into her apartment the day after their breakup.
  - V initially reports to police that D tackled and hit her, but doesn't report that he also sexually assaulted her until the following day when she returns to the police station to request that more serious charges be filed.
  - During a SANE exam, V also doesn't disclose that she and D were in a consensual sexual relationship up until the day before the attack–a fact that isn't disclosed until some months later.
- At D's trial for kidnapping and CSP, V admits to having consensual sex with D the day before the attack. Defense attempts to cross-x V about the failure to timely disclose the consensual sexual relationship, arguing the omission = a prior inconsistent statement. District court forbids the questioning as violative of New Mexico's rape shield statute.
- D testifies that he hit V but denies restraining or sexually assaulting her. Jury finds D guilty of kidnapping and not guilty of CSP.

Prior inconsistent statement by omission was relevant admissible impeachment evidence

***State v. Phillip B. Salazar*, 2023-NMCA-026. MV**

- **ISSUE:** Should V's prior inconsistent statement by omission have been admitted as impeachment evidence?
- **ANALYSIS:** Rule 11-613 permits admission of a witness's prior inconsistent statement for impeachment.
    - A prior inconsistent statement may take the form of an omission under *State v. Archer*, 1927-NMSC-002, if the omission occurs at a time when it would be "natural" to make an important disclosure.
- V's months-long failure to disclose the ongoing sexual relationship with D was inconsistent w/ her admission at trial to the relationship (as recently as the day before the attack), and is the type of information that one would expect V to disclose when reporting the attack.
- **HELD:** The excluded evidence was a prior inconsistent statement by omission that was relevant to V's credibility and should have been admitted.

. . . and district court abused its discretion by preventing Defendant from impeaching complaining witness with prior omission inconsistent with her testimony; error was not harmless

State v. Phillip B. Salazar, 2023-NMCA-026. MV

- **ISSUE:** Was the district court's refusal to allow the defense to impeach V with her prior omission harmless error?
- **ANALYSIS:** Defendant was prejudiced by the district court's ruling because V's credibility was crucial to the State's case– it was "the lens through which the jury evaluated" the evidence, therefore the excluded omission had significant probative value. There was also reason to believe the jury already doubted V's credibility because it acquitted D of CSP.
- **HELD:** Because D was prejudiced by the district court's ruling, the error was not harmless. Reversed and remanded for a new trial on the remaining charge of kidnapping.

Limitation of Cross-ex under § 30-9-16(A) ("Rape Shield Statute")

. . . and district court abused its discretion in limiting cross-examination under rape shield statute (Section 30-9-16(A))

State v. Phillip B. Salazar, 2023-NMCA-026. MV

- **ISSUE:** Did the district court abuse its discretion by relying on the rape shield statute to limit defense's questioning about V's failure to timely disclose the ongoing, consensual sexual relationship with D?
- **ANALYSIS:** The parties agree on appeal that NM's rape shield statute, Section 30-9-16(A), did not support limiting D's cross-examination.
- The statute prevents the admission of evidence of a victim's past sexual conduct unless the evidence is material to the case and its inflammatory or prejudicial nature does not outweigh its probative value.
- The statute was not implicated here because defense sought to question V about her "lack of candor" with police about the nature of her relationship with D, not about her sexual history. Defense sought to impeach V's credibility, not establish her propensity for consensual sex as would be prohibited by the rape shield statute.
- **HELD:** The district court abused its discretion by limiting cross-examintion of V under the rape shield statute.

Rule 11-701 (Opinion Identifying Subject in Video)

District court did not abuse its discretion in admitting opinion testimony identifying Defendant as subject appearing in video

***State v. Jason Stalter*, ____-NMCA-____ (A-1-CA-39984, Mar. 21, 2023). MV**

- **FACTS:** D was a manager at Lowe's with keys to the store and knowledge of alarm codes. Two days after he's fired, store surveillance cameras capture a person wearing all black use a key to enter the store at night, disable the alarm system, unlock a code-protected safe, and steal a large amount of cash.
- At D's trial for larceny, the jury is shown the break-in footage as well as footage of D from his time working in the store.
- A Lowe's security officer testifies that in her opinion, D is indeed the person in the break-in footage.
- Defense objects to the W's opinion, arguing it goes beyond lay testimony and into the realm of expert testimony. District court disagrees.
- **ISSUE:** Did the district court abuse its discretion by admitting the W's opinion that D was the person depicted in the break-in footage?

District court did not abuse its discretion in admitting opinion testimony identifying Defendant as subject appearing in video

***State v. Jason Stalter*, ____-NMCA-____ (A-1-CA-39984, Mar. 21, 2023). MV**

- **ANALYSIS:** Lay opinion is admissible under 11-701 if it's: **(1)** based on the W's perception, **(2)** helpful to the factfinder in understanding a fact in issue, and **(3)** not based on specialized knowledge.
- On appeal, D argues W's opinion wasn't helpful because the jury could have easily formed their own conclusion about the thief's identify from watching the surveillance footage.
- D relies on a recent opinion, *Chavez*, 2022-NMCA-007, where the COA rejected police officer testimony that "formed conclusions for jurors that they were competent to reach on their own."
- Under *Chavez*, the "helpfulness" of opinion testimony re: identification of a person in a video is based on whether the W is "more likely than the jury to make an accurate identification." There are 5 factors relevant to this inquiry . . .

District court did not abuse its discretion in admitting opinion testimony identifying Defendant as subject appearing in video

***State v. Jason Stalter*, ____-NMCA-____ (A-1-CA-39984, Mar. 21, 2023). MV**

(1) the witness's level of familiarity w/ the D

(2) the W's familiarity w/ the D's appearance at the time of the recording

(3) whether the D disguised his appearance during the offense

(4) whether the D altered his appearance prior to trial

(5) the degree of clarity of the surveillance footage & the quality and completeness of the subject's depiction in the recording

- Any one factor is enough to find a W is more likely than the jury to make an accurate ID. Here, two factors are satisfied:
  - The W worked w/ D almost daily for two years, establishing familiarity
  - The thief was dressed in disguise, making it more likely that W could correctly ID him based on familiarity.
- **HELD:** Because the W's lay opinion was helpful to the jury under Rule 11-701, the district court did not abuse its discretion by admitting it.

Rule 11-702 (Admission of Expert Testimony)

DNA Evidence

District court did not abuse its discretion in admitting DNA evidence indicating: (1) a 260-billion-to-one likelihood ratio, and (2) a 99.99% probability that Defendant was Child's father

State v. Jerry Gilbert Espinoza, 2023-NMCA-012. VS

- **FACTS:** D was charged with the sexual abuse of his granddaughter (V). Acting on a warrant, investigators collected his DNA for a paternity test relative to V's child. At trial, the State's DNA expert testifies:

  > Software provided/maintained by FBI called Popstats was used for a statistical analysis to generate a likelihood ratio that Def. was Child's father: "260 billion times more likely" that D was the father than an untested, unrelated man, and the probability of paternity was 99.99% (the "Probability Conclusions").

- **ISSUE:** Did the district court err by admitting the Probability Conclusions?

- **ANALYSIS:** Expert testimony is admissible under 11-702 if: **(1)** the expert is qualified, **(2)** the testimony will assist the jury, and **(3)** the testimony concerns scientific, technical, or other specialized knowledge w/ a reliable basis.

District court did not abuse its discretion in admitting DNA evidence indicating: (1) a 260-billion-to-one likelihood ratio, and (2) a 99.99% probability that Defendant was Child's father

***State v. Jerry Gilbert Espinoza*, 2023-NMCA-012. VS**

- D argues the 3rd requirement wasn't satisfied–the DNA evidence was unreliable because:
  - Popstats software produced the Probability Conclusions and the DNA expert didn't testify to how those calculations were performed,
  - The DNA lab was not accredited for paternity testing,
  - The DNA expert simply plugged numbers into Popstats without understanding the statistical calculations and "parroted" the software's conclusions, and
  - The district court shifted the burden to the defense to undermine the foundational evidence for Popstats.
- **First**, the Court finds Popstats' statistical calculations are merely foundational evidence supporting introduction of the actual evidence of the Probability Conclusions. The DNA expert's testimony regarding the "underlying process" of Popstats' statistical calculations was sufficient foundation for the Probability Conclusions because evidence was admitted showing that the FBI upgraded and validated the Popstats software a year before trial, which required a successful "performance evaluation" of the program.

District court did not abuse its discretion in admitting DNA evidence indicating: (1) a 260-billion-to-one likelihood ratio, and (2) a 99.99% probability that Defendant was Child's father

State v. Jerry Gilbert Espinoza, 2023-NMCA-012. VS

- **Second**, the Court rejects D's accreditation argument: D pointed to no authority for the idea that accreditation or satisfying other standards is *required* for paternal DNA results to be admissible.
- **Third**, the Court rejects D's "parroting" argument: whether the DNA expert understood the precise specifics underlying the calculations performed by Popstats isn't determinative because the expert was able to testify about the purpose Popstats, which calculations it performed, the meaning of the results, and her own work/results, and did not relay hearsay of another person.

  Fourth, the Court rejects D's burden-shifting argument: once the State meets the foundational requirements, burden shifts to D to "critically challenge" the evidence. The district court didn't shift the burden here, D just wasn't able to successfully challenge the State's foundational evidence.
- **HELD**: The district court did not abuse its discretion by admitting the DNA evidence.

Rule 11-702 (Admission of Expert Testimony)

Abuse: Family Dynamics and Manifestations of Impacts

District court did not abuse its discretion in qualifying expert in dynamics of child sexual abuse within the family and in the observed behavioral manifestations of sexual abuse on children and adolescents

State v. Jerry Gilbert Espinoza, 2023-NMCA-012. VS

- **FACTS:** The State calls a second expert W at trial–a behavioral expert/forensic interviewer–to testify about **(1)** observed behavioral manifestations of the impacts of sexual abuse on children/adolescents, and **(2)** family dynamics in abusive homes.
- D argues the testimony should be limited because the W is only qualified to testify about forensic interviewing, not about disclosure of sexual assault, grooming, or promiscuity resulting from sexual abuse.
- The district court admits W as an expert in the areas identified by the State based on her qualifications and experience.
- **ISSUE:** Did the district court abuse its discretion by qualifying the W as an expert in family dynamics and behavioral manifestations of sexual abuse?

District court did not abuse its discretion in qualifying expert in dynamics of child sexual abuse within the family and in the observed behavioral manifestations of sexual abuse on children and adolescents

State v. Jerry Gilbert Espinoza, 2023-NMCA-012. VS

- **ANALYSIS:** An expert is qualified to testify under Rule 11-702 by "knowledge, skill, experience, training, or education."
- W was highly qualified by education, training, and experience which met the requirements of Rule 11-702:
  - Previously worked as a liason w/ CYFD and made referrals to interviewees and their families for services after sexual abuse allegations,
  - Associate's degree in childhood development,
  - Nearly completed a Bachelor's degree in family-studies,
  - 1,000 hours of particularized training in child sexual abuse and incest, including signs and symptoms abused children display
  - Involved in 1,600 cases involving child abuse throughout her career, the majority ocuring within the family unit.
- **HELD:** The district court did not abuse its discretion by qualifying the W as an expert in family dynamics of sexual abuse and behavioral manifestiation of sexual abuse in children.

. . . and no fundamental error resulted from expert's alleged bolstering of Victim's testimony

State v. Jerry Gilbert Espinoza, 2023-NMCA-012. VS

- **FACTS:** The expert W testified in part that had she been the one to interview V, she would have made referrals for a SANE exam, rape kit, and counseling. D argues for the first time on appeal that this improperly bolstered the V's testimony alleging sexual abuse.
- **ISSUE:** Did the expert W inappropriately bolster V's testimony, resulting in fundamental error?
- **ANALYSIS:** The W did not comment directly on the Vs credibility, name the perpetrator of the alleged abuse, or testify that the V's behaviors/symptoms were in fact caused by sexual abuse. Her testimony "did not require an inference that [W] believed V," because she testified that making referrals for SANE exams and other resources is merely part of her job.
- **HELD:** Admission of the testimony did not amount to fundamental error.

Rule 11-801 to -804 (Exclusion of Prelim. Hearing Transcript)

District court did not abuse its discretion in excluding transcript of preliminary hearing testimony

***State v. Jason Stalter*, ____-NMCA-____ (A-1-CA-39984, Mar. 21, 2023). MV**

- **FACTS:** The Lowe's larceny D raises an alibi defense, claiming he can't be the person in the surveillance video because he was visiting two friends–W1 and W2–in Utah at the time.
- W1 testifies at D's preliminary hearing, but by the time of trial, defense can't get in contact with him.
- District court initially rules the prelim transcript is admissible at trial under Rule 11-804 because W1 is now unavailable. The court relies on D's claims that he's unable to secure the W's presence by process or "other reasonable means."
- At trial however, W2–who is married W1–testifies he's had contact with the supposedly "unavailable" W1 in recent weeks. The district court reverses course and finds D has not established the W1's unavailability for purposes of Rule 11-804, and the prelim transcript can't come in.
- **ISSUE:** Did the district court abuse its discretion by excluding W1's preliminary hearing testimony at trial after finding the W was not "unavailable"?

District court did not abuse its discretion in excluding transcript of preliminary hearing testimony

***State v. Jason Stalter*, ____-NMCA-____ (A-1-CA-39984, Mar. 21, 2023). MV**

- **ANALYSIS:** Rule 11-804 provides that hearsay in the form of prior testimony is admissible if the declarant is unavailable at trial. Unavailability = the proponent of the testimony has been unable to secure the declarant's presence by process or other reasonable means.
- The Court finds D did not make "**reasonable efforts**" to secure W1's presence at trial. Although his investigator had difficulty serving W1 and W1 "did not want to come to trial," D did not check other potential addresses, talk to W1's neighbors, or even ask W2 where W1 could be found. Absent reasonable efforts to locate W1, he could not be considered unavailable under Rule 11-804.
- **HELD:** The district court did not abuse its discretion by excluding the alibi W's preliminary hearing testimony.

7.33.2.15 NMAC (Good Faith Attempt to Collect/Analyze at Least Two Breath Samples)

District court erred in admitting breath test results because foundation was insufficient to show that breath test operator made good faith attempt to collect and analyze two samples; but error was harmless

***State v. Leona Louise Garcia Pacheco*, ___-NMCA-___ (A-1-CA-39633, May 30, 2023). LC**

- **FACTS:** Arrested for DWI, D is asked to take a breath test. She agrees and provides a breath sample which shows a BAC over .16 (it was .22). D tries a second sample but claims she can't blow hard enough due to a respiratory issue, so the second sample is insufficient/doesn't register any numerical value.
- At trial for Agg. DWI, D argues the single breath sample is inadmissible because the Scientific Laboratory Division (SLD) requires two breath samples for accuracy purposes, as set forth in *Ybarra*, 2010-NMCA-063. The metropolitan court admits the single breath sample, but ultimately dismisses the Agg. DWI charge and convicts D of lesser-included simple DWI (impaired to the slightest degree).
- **ISSUE:** Did the metro court abuse its discretion by finding the State laid a sufficient foundation for admission of the single breath sample? If so, was the error harmless?

District court erred in admitting breath test results because foundation was insufficient to show that breath test operator made good faith attempt to collect and analyze two samples; but error was harmless

***State v. Leona Louise Garcia Pacheco*, ___-NMCA-___ (A-1-CA-39633, May 30, 2023). LC**

- **ANALYSIS:** Breath test results are admissible if the State lays sufficient foundation by showing compliance with SLD's accuracy-ensuring regulations. D continues to rely on *Ybarra* on appeal.
- When *Ybarra* was decided, the 2001 version of NMAC 7.33.2.12 read: "two breath samples ***shall*** be collected and analyzed" unless a D declines or is physically incapable of second sample.
- In 2010, regulation was amended and replaced with NMAC 7.33.2.15, which reads: an officer "should make a ***good faith attempt*** to collect and analyze at least two breath samples." Court notes "the collection/analysis of two samples is no longer mandatory," and all that is required is a good faith attempt.
- "Thus, if the [officer] is unable to analyze two samples, but made a good faith attempt to do so, the operator complied with the Current Regulation."

District court erred in admitting breath test results because foundation was insufficient to show that breath test operator made good faith attempt to collect and analyze two samples; but error was harmless

***State v. Leona Louise Garcia Pacheco*, ___-NMCA-___ (A-1-CA-39633, May 30, 2023). LC**

- Nevertheless, the Court finds the officer did not make a good faith attempt to collect *and analyze* two samples because both the 2001 and current regulation require that an officer collect a *third* sample if the difference between the first two samples is .02 or more.
- The State argues that because the non-readable second sample–which contained no numerical value–was not .02 apart from the first sample, the officer did not need to attempt a third sample.
- The Court presumes without analysis or explanation that an insufficient sample with no numerical value is .02 different from a readable sample, and the officer was obligated to collect a third. His failure to do so "undermined the good faith attempt to analyze two samples" and violated the current regulation. The breath test did not meet foundational requirements and should not have been admitted.

District court erred in admitting breath test results because foundation was insufficient to show that breath test operator made good faith attempt to collect and analyze two samples; but error was harmless

***State v. Leona Louise Garcia Pacheco*, ____-NMCA-____ (A-1-CA-39633, May 30, 2023). LC**

- However, because the metropolitan court dismissed the Aggravated DWI charge and relied on the single breath sample only as evidence of alcohol in D's system–rather than as a statutory element of aggravated DWI–the Court finds the erroneously admitted breath test did not affect the verdict.
- **HELD:** There was insufficient foundation for admission of the breath test, but the error was harmless.

NOTE: Our office is in the process of filing a motion for rehearing in this case in an effort to clarify the requirements under the current version of NMAC 7.33.2.15

Special Topics

- Whether Special Seating Due to COVID-19 Caused Jury Intimidation or Improperly Limited Access to Counsel
- Whether Exclusion of Evidence as a Discovery Sanction Was Required
- Whether Changed Theory of Case Violated of Right to Reasonable Notice
- Whether Plea Agreement w/Appellate Waiver Precludes Challenge to Amenability Determ.
- The Proper Parole Period for CES
- Jurisdictional Authority to Correct an Illegal Sent. Under Rule 5-801
- Contempt Limits and Terminology
- Tolling & Refiled Complaints Under Rule 7-506
- Pleas
  - Rule 5-303 Substantial Compliance
  - Appellate Preclusion of DJ Analysis
- Statute of Limitations
- Mistrial Motion When Proper Notice
- Motion to Recuse When Conflict with Attorney

COVID-19 Special Seating: Jury Intimidation or Improperly Limited Access to Counsel

District court did not deprive Defendant of impartial jury or otherwise err in the manner in which it seated jury due to COVID-19 considerations

State v. Shawn D. Doyal, 2023-NMCA-015, *cert. denied*. LB

- **FACTS:** Doyal's trial was during the COVID-19 pandemic, in a small courtroom. Witnesses, victims, and spectators sat among the jurors, with everyone sitting six feet apart and wearing masks due to social distancing guidelines in effect.
- **ISSUE:** Whether the district court erred in how it seated everyone due to COVID-19 considerations; specifically, whether witnesses sitting among the jury caused jury intimidation and influence.
- **ANALYSIS:** First, the Court determined that Doyal failed to make a timely objection that would have given the district court the opportunity to correct any error, instead raising the issue in a post-trial motion.
- Because Doyal did not preserve his claim, the Court reviewed the issue only for fundamental error.

District court did not deprive Defendant of impartial jury or otherwise err in the manner in which it seated jury due to COVID-19 considerations

State v. Shawn D. Doyal, 2023-NMCA-015, *cert. denied*. LB

- The Court considered the fact that everyone had to sit in the gallery only due to social distancing needs, and that everyone was facing forward, socially distanced, and wearing masks, which concealed their facial expressions.
- The Court also noted that there was no evidence that anyone improperly communicated with the jurors or that any juror expressed concern to the bailiff who was present with the jury during trial.
- **HELD:** The Court of Appeals held that the district court did not err in the manner in which it seated victims, witnesses, spectators, and the jury due to COVID-19 considerations, and rejected Doyal's argument that the seating arrangement deprived him of a fair trial by an impartial jury. The Supreme Court denied Cert.

No error in district court's denial of new trial on basis of ineffective assistance of counsel claim predicated on argument that COVID-19 restrictions precluded adequate communication with counsel

State v. Gregg Steele, ___-NMCA-___ (A-1-CA-39869, Mar. 20, 2023). LB

- **FACTS:** Due to NMSC Order regarding recommencing Jury Trials during the COVID-19 pandemic, 20-8500-020 (N.M. May, 28, 2020), *all* individuals were required to maintain a minimum distance of six feet between one another, including between Steele and his attorney.
- **ISSUE:** Whether Steele's right to effective assistance of counsel was violated and he was entitled to a new trial due to his counsel's compliance with and the district court's enforcement of the seating restrictions.
- A secondary issue was whether the district court erroneously found that the order incorporated a determination that the ability to maintain attorney-client communications before and during proceedings is not a prerequisite for effective assistance of counsel.
- **ANALYSIS:** The Court clarified that this case is about the *effect* of the Order; it declined to entertain any inquiry challenging the *propriety* or *legality* of the Order, which should instead be directed to our Supreme Court.

No error in district court's denial of new trial on basis of ineffective assistance of counsel claim predicated on argument that COVID-19 restrictions precluded adequate communication with counsel

***State v. Gregg Steele*, ___-NMCA-___ (A-1-CA-39869, Mar. 20, 2023). LB**

- The Court agreed that the district court was mistaken in characterizing the Order as concluding that trial communication between a defendant and their attorney is not necessary to effective representation.
- However, the Court noted that the alleged deficiencies arose solely from trial counsel's compliance with the order and that the record nonetheless demonstrated that Steele *was* able to communicate with counsel, albeit in a manner constrained by method and proximity—i.e., meeting virtually pretrial, exchanging confidential written communications during trial, and meeting outside during breaks from the trial.
- Although the Court expressed concern that the limited communication may have impeded counsel's ability to freely communicate with Steele, it determined that such limitations did not *singularly* render counsel deficient or establish a prima facie showing of ineffective assistance of counsel.
- **HELD:** Steele failed to establish the requisite prejudice necessary to a prima facie case of ineffective assistance of counsel, and the district court did not abuse its discretion in denying a new trial on the same basis.

Denied Motion to Exclude as Discovery Sanction

Abuse of Discretion Standard

District court did not err in denying motion to exclude as a discovery sanction evidence of law enforcement's coordination with CI

State v. Jacob Scott, 2023-NMCA-031, *cert. denied*. BL

- **FACTS:** You may remember this case (the picture may help refresh your memory) in which officers, executing an arrest warrant during a traffic stop for charges against Scott in an unrelated matter, found approx. 20 grams of heroin and 7 grams of meth in Scott's underwear.
- Relevant to this discussion, the officers testified that coordination with a CI led to Scott's arrest.

District court did not err in denying motion to exclude as a discovery sanction evidence of law enforcement's coordination with CI

State v. Jacob Scott, 2023-NMCA-031, *cert. denied*. BL

- **ISSUE HERE:** Whether the district court should have excluded the testimony from the officers regarding the CI as a discovery sanction because the testimony curtailed his ability to present his planned defense.
- **ANALYSIS:** The Court noted that defense counsel was made aware of one of the officer's testimony to the grand jury regarding the CI.
- **HELD:** The Court therefore held that Defendant had reasonable notice that the State may present evidence and pursue a theory at trial based on such information, and that there was no error in the district court's refusal to exclude testimony as a discovery sanction. The Supreme Court denied cert.

Claim that Changing Theory of Case Violates Right to Reasonable Notice

District court did not err in rejecting claim that State violated right to reasonable notice by changing theory of case on morning trial was to begin

State v. Jacob Scott, 2023-NMCA-031, *cert. denied*. BL

- **FACTS:** Same facts (same photo, you're welcome).
- **ISSUE HERE (related):** Whether Scott was deprived of reasonable notice regarding the State's theory of the case.
- **ANALYSIS:** The Court again noted that Scott knew of the CI's involvement from the grand jury proceedings and, therefore, had notice that the State might elect to pursue a theory of prosecution that incorporated that aspect of its investigation.
- **HELD:** The Court therefore held that the district court did not err in concluding that Scott had reasonable notice of the State's theory of the case.

Challenge to Amenability Determination Post-plea w/Appellate Waiver

A challenge to an amenability determination presents a challenge to jurisdiction of district court to impose an adult sentence that may be raised on appeal, notwithstanding the entry of a valid guilty plea and appellate waiver

State v. Christopher T. Rodriguez, 2023-NMSC-004. JW

- **FACTS:** Rodriguez **pled guilty** to eight burglary-related charges and to the unauthorized use of the card of another. The plea agreement provided that **some** of the **charges made him a youthful offender**, **requiring an amenability hearing** to determine whether Rodriguez would receive a juvenile or adult sentence.
- The plea agreement included a "**waiver of defenses and appeal**" provision. It provided that Rodriguez specifically waived his right to appeal as long as the court imposed a sentence according to the terms of the agreement.
- The district court determined **Rodriguez was not amenable** to treatment as a juvenile and imposed a sentence that was within the parameters specified in the plea agreement.
- The Court of Appeals dismissed Rodriguez's appeal on the grounds that Rodriguez had waived his right to appeal the outcome of his amenability hearing based on the plea agreement

A challenge to an amenability determination presents a challenge to jurisdiction of district court to impose an adult sentence that may be raised on appeal, notwithstanding the entry of a valid guilty plea and appellate waiver

State v. Christopher T. Rodriguez, 2023-NMSC-004. JW

- **ISSUE:** Whether a challenge to an amenability determination is a jurisdictional defect that may be raised on appeal, notwithstanding the entry of a valid guilty plea that includes an appellate waiver.
- **ANALYSIS:** The Supreme Court first discussed the Legislature's tailoring of the Delinquency Act to promote rehabilitation and treatment of children and noted that there is a **statutorily created right to an amenability determination**.
- The Court also reiterated the holding in *State v. Jones*, 2010-NMSC-012, 148 N.M. 1, that a juvenile cannot waive the right to an amenability determination.
- The Court reasoned that **it therefore follows that a juvenile cannot waive the right to appeal the *outcome* of such a determination**.

A challenge to an amenability determination presents a challenge to jurisdiction of district court to impose an adult sentence that may be raised on appeal, notwithstanding the entry of a valid guilty plea and appellate waiver

State v. Christopher T. Rodriguez, 2023-NMSC-004. JW

- **HELD:** Rodriguez was entitled to challenge the amenability determination.

- *NOTE: The rule is not to be applied retroactively—it only applies to this case, other pending cases in which a verdict has not yet been reached, and cases on direct review in which the issue was raised and preserved below.*
- *The Court remanded to the Court of Appeals to consider the merits of Rodriguez's challenges to the amenability determination.*

Proper Parole Period for CES

Child Solicitation by Electronic Communication Device (CES)

For CES, 5-20-year indeterminate period of sex-offender parole applies rather than standard parole term applicable to other criminal offenders

State v. Anthony C. Sena, 2023-NMSC-007. CG

- **FACTS:** Sena was charged with child solicitation by electronic communication device (CES) for using a **website** to **lure an undercover officer** posing as a young teenage girl to a house to engage in a sexual encounter. Sena entered a conditional plea for CES and the district court sentenced Sena to three years incarceration.
- Because **CES is included in the current sex offender parole statute**, the court imposed a **5-to-20-year indeterminate period of sex offender parole** and not the standard 2-year parole term applicable to other criminal offenders.
- Sena appealed, contending that the two bills addressing the monitoring and parole of convicted sex offenders passed within days of each other and signed into law on the same day, were irreconcilable and, as such, the preexisting standard parole term should apply.

For CES, 5-20-year indeterminate period of sex-offender parole applies rather than standard parole term applicable to other criminal offenders

State v. Anthony C. Sena, 2023-NMSC-007. CG

- The majority opinion of the Court of Appeals agreed and reversed the district court's application of the extended parole term. Judge Yohalem dissented.
- **ISSUE:** Whether the two bills were irreconcilable when one (SB 735) added the crime of CES and identified the extended parole requirement for the crime, but the other (SB 528) failed to include CES when it restated the list of crimes covered by the sex offender parole statute.
- **ANALYSIS:** The Supreme Court reiterated that its role is to **read statutes harmoniously** when possible and that the proper test to apply when reconciling legislation and discerning legislative intent is that of *State v. Smith*, 2004-NMSC-032, 136 N.M. 372, which requires our courts to construe amendments to the same statutory section enacted in a single legislative session to **give effect to each, if at all possible.**

For CES, 5-20-year indeterminate period of sex-offender parole applies rather than standard parole term applicable to other criminal offenders

State v. Anthony C. Sena, 2023-NMSC-007. CG

- **The Bills had different purposes**: the Court explained that SB 735 made CES—and thus Sena's acts—illegal and subject to the extended parole requirement, whereas SB 528 focused on goals unrelated to the specific charge of CES.
- The Court further explained that the fact that the two bills both addressed parole requirements for sex offenders does not demonstrate conflicting legislative intent because each bill's purpose is distinct.
- **HELD:** The Court held that the bills can and should be read harmoniously, and that the Court of Appeals should have given effect to both enactments. The Supreme Court thus reversed the Court of Appeals and affirmed the district court's imposition of the extended parole term.

Rule 5-801 and Jurisdictional Authority to Correct an Illegal Sent.

Historical changes leading to Rule 5-801 (2009) did not remove district court's common law jurisdictional authority to correct illegal sentences

State v. Derrick Romero, 2023-NMSC-008. VS

- **FACTS:** Romero pleaded guilty to second-degree CSP.
- In the first J&S, the district court erred in ordering that Romero serve only two years of parole, resulting in an unlawfully short period of mandatory parole. Thirteen days later, the district court entered a second amended J&S, updating Romero's parole period to five-to-twenty years, seeking to correct the sentencing error.
- Both parole periods were illegal sentences, however, because Section 31-21-10.I(A)(2) (2007) required a sex offender convicted of second-degree CSP to serve an "indeterminate period of supervised parole for . . . not less than five years and up to the natural life of the sex offender."
- Romero challenged the revised parole period in an Amended Petition for Writ of Habeas Corpus.

Historical changes leading to Rule 5-801 (2009) did not remove district court's common law jurisdictional authority to correct illegal sentences

State v. Derrick Romero, 2023-NMSC-008. VS

- The district court relied on *State v. Torres*, 2012-NMCA-026, ¶ 37, which acknowledged that Rule 5-801(A) NMRA (2009), a *former* rule applicable to the district courts both in *Torres* and here, "abrogated the common law principle that a district court retained inherent jurisdiction to correct illegal sentences." Based on *Torres*, the **district court here determined that it had had no jurisdiction to correct the illegal parole sentence and granted Romero's habeas petition**, vacating the second amended J&S and reinstating the original two-year parole period.
- **ISSUE:** Whether the Court should remand for imposition of the correct statutory parole period, reverse the district court because Section 39-1-1 provided a separate statutory basis from Rule 5-801 for the second amended J&S, or overrule *Torres* to hold that district courts retain their common law authority to correct illegal sentences. The Court also addressed whether any of those outcomes would create a basis for Romero to withdraw his plea.

Historical changes leading to Rule 5-801 (2009) did not remove district court's common law jurisdictional authority to correct illegal sentences

State v. Derrick Romero, 2023-NMSC-008. VS

- **ANALYSIS:** The Court determined that historical changes leading to former Rule 5-801 (2009) did not remove a district court's common law jurisdictional authority to correct an illegal sentence.
- **HELD: The Court overruled *Torres* and held that district courts retain jurisdiction to correct an illegal sentence**. The Court thus reversed the district court's grant of the writ of habeas corpus and remanded for imposition of the statutorily required parole sentence.
- *NOTE: The Court further directed the Criminal Procedure Rules Committee to clarify the length of time in which a district court retains jurisdiction to correct an illegal sentence.*
- Finally, under *Boykin v. Alabama*, 395 U.S. 238 (1969), and Rule 5-303 NMRA, the Court held that **Romero is entitled to an opportunity for plea withdrawal**.

Contempt

$1,000 limit to contempt fines no longer applies; ~~civil contempt~~ → remedial contempt; ~~criminal contempt~~ → punitive contempt

In re Victor R. Marshall (Marshall II), 2023-NMSC-009.

- **FACTS: Marshall's law license was suspended** (*Marshall I*). The Disciplinary Counsel alleged that Marshall failed to abide by the Court's order and Rule 17-212 NMRA, prompting a Show Cause Hearing.
- Marshall did not contest those allegations in either his briefing or at the hearing. His behavior at the hearing also violated the standards of conduct before the Court.
- The Court thus **held Marshall in contempt** both for the allegations and for his behavior. One of the obligations imposed on Marshall was to **pay a $2,000 fine** to the State Bar of New Mexico Client Protection Fund.
- **ISSUE:** Whether the fine exceeded the prior $1000 limit to contempt fines. The Court also issued a precedential opinion to update the terminology for contempt.

$1,000 limit to contempt fines no longer applies; ~~civil contempt~~ → remedial contempt; ~~criminal contempt~~ → punitive contempt

In re Victor R. Marshall (Marshall II), 2023-NMSC-009.

- **ANALYSIS:** Note that there is a good explanation of the types and purposes of contempt in this opinion. Marshall faced both civil and criminal contempt sanctions as a result of both indirect and direct contemptuous conduct at the hearing.
- Civil contempt is for when the punishment is remedial (and is now called *remedial contempt*), and criminal contempt is for when the sentence is punitive; to vindicate the authority of the court (and is now called *punitive contempt*). Criminal contempt defendants are entitled to the due process protections of the criminal law.
- **HELD:** The Court concluded that the $1,000 limit to fines imposed for contempt no longer applies because thirty years had passed since that limit was established, $1,000 was now equivalent to over $6,738, and the $2,000 fine was not very substantial or burdensome. No express limit was determined.

Tolling & Refiled Complaints Under Rule 7-506

Tolling provision under Rule 7-506 applies whether dismissal is by court or by prosecution; time to bring Defendant to trial therefore did not expire

State v. Tito Lopez, ___-NMSC-___ (S-1-SC-38802, Mar. 30, 2023). WH

- **FACTS:** On January 19, 2018, Lopez was arraigned in metro court on charges including aggravated DWI and reckless driving.
- As applied to this case, Rule 7-506(B) required Lopez's trial to commence within **182 days** of arraignment, which **would have run on July 20**, 2018, assuming no extensions of time under Rule 7-506(C) and no tolling under Rule 7-506.1(D).
- The case was initially set for **trial** on April 30, 2018, but was **continued** to June 4, 2018, because Lopez had not received a police lapel video. Then the arresting officer did not appear on June 4, the State could not explain his absence and requested a continuance. Lopez moved to dismiss. The **metro court dismissed** the case **without prejudice** because the State was not prepared for trial.

Tolling provision under Rule 7-506 applies whether dismissal is by court or by prosecution; time to bring Defendant to trial therefore did not expire

State v. Tito Lopez, ____-NMSC-____ (S-1-SC-38802, Mar. 30, 2023). WH

1. **Ten days later**, on June 14, the State filed a notice of refiling of the dismissed complaint; metro court set trial for July 18, but sua sponte rescheduled the next day, **setting trial for July 24**.
2. One day before the scheduled trial date, **Lopez filed a motion to dismiss** with prejudice for failure to prosecute under Rule 7-506(B), arguing the State's deadline to try Lopez was July 20.
3. At the July 24 trial setting, Lopez argued that the tolling provision applies only to voluntary dismissals, not to court-ordered dismissals as a sanction against the State. Lopez argued that that would absurdly result in the State benefiting from its own mistake.
4. The metro court agreed with the State and concluded that the 182-day rule was tolled for ten days under Rule 7-506.1(D). Accordingly, it ruled that the extended deadline to bring Lopez to trial was July 30, 2018. Lopez then entered a conditional plea, reserving the right to challenge the tolling issue on appeal.

Tolling provision under Rule 7-506 applies whether dismissal is by court or by prosecution; time to bring Defendant to trial therefore did not expire

State v. Tito Lopez, ____-NMSC-____ (S-1-SC-38802, Mar. 30, 2023). WH

- The district court affirmed the metro court and the Court of Appeals agreed.
- **ISSUE:** Whether the tolling provision contained in Rule 7-506.1(D) NMRA applies to cases that are dismissed without prejudice, regardless of whether they're dismissed by the court or voluntarily dismissed by the prosecution.
- **ANALYSIS:** Rule 7-506.1(D) states, "[i]f a citation or complaint is dismissed without prejudice and the charges are later refiled," "[t]he time between dismissal and refiling shall not be counted as part of the unexpired time for trial under Rule 7-506." Rule 7-506.1(D). **This tolling provision applies with equal force to cases dismissed by the court and those voluntarily dismissed by the prosecution.**
- **HELD:** The Court held that, with the benefit of the tolling provision here, the time for the State to bring Lopez to trial did not expire before Lopez entered into his conditional plea agreement. The Court therefore affirmed Lopez's conviction.

Pleas
(Under Rule 5-303)

District court did not abuse its discretion in denying motion to withdraw plea; substantially complied with its plea-related obligations under Rule 5-303

State v. Benny Arthur Valenzuela, ____-NMCA-____ (A-1-CA-39199, Mar. 7, 2023). ES

- **FACTS:** In February 2019, **Valenzuela entered into a global plea agreement** in which he agreed to plead no contest to six of the ten counts on which he was indicted: four counts of CSCM, one count of aggravated indecent exposure, and one count of contributing to the delinquency of a minor (CDM).
- The plea dismissed the remaining counts in the indictment as well as charges in four other pending cases, and the State agreed it would not pursue two additional charges for which Valenzuela had not yet been indicted.
- **A few months later**, on May 2019, **Valenzuela moved to withdraw his no contest plea**, arguing, in part, that the two counts of CSCM for each victim listed in the indictment were indistinguishable, and that there had been no indication that there was a "factual basis" supporting four counts of CSCM rather than two.
- The court denied the motion, citing his counsel's stipulation to the factual basis for the charges at the plea hearing.

District court did not abuse its discretion in denying motion to withdraw plea; substantially complied with its plea-related obligations under Rule 5-303

State v. Benny Arthur Valenzuela, ____-NMCA-____ (A-1-CA-39199, Mar. 7, 2023). ES

- **ISSUE:** Whether the district court erred in denying Valenzuela's motion because the plea was not voluntarily and knowingly entered into based on the district court's failure to (1) determine that he understood the nature of the CSCM, aggravated indecent exposure, and CDM charges to which he pleaded, per Rule 5-303(F), and (2) ensure that he understood the possible sentence range for these charges.
- **ANALYSIS:** *The Court analyzed the first issue for reversal error. The Court determined that the remainder may have been raised as fundamental error, Valenzuela failed to develop the issue, and there was on fundamental error.*
- The Court determined that **Valenzuela failed to demonstrate prejudice, and based on the totality of the circumstances, Valenzuela acquired a sufficient understanding of CSCM** from discussions with his counsel and the indictment, the relatively straightforward elements, and the plea agreement that Valenzuela & his counsel signed, indicating that they had discussed the case.

District court did not abuse its discretion in denying motion to withdraw plea; substantially complied with its plea-related obligations under Rule 5-303

State v. Benny Arthur Valenzuela, ____-NMCA-____ (A-1-CA-39199, Mar. 7, 2023). ES

- The Court noted that Valenzuela's prior counsel also informed the district court that she reviewed the indictment with Valenzuela and that he understood the charges.
- **HELD:** The Court held that **the district court substantially complied** with Rule 5-303 and affirmed the district court's denial of Valenzuela's motion to withdraw his plea.
- *NOTE: The Court also reiterated that a court is not required to inquire into whether there is a factual basis for a no contest plea ad held that, in this case, the district court did inquire into the factual basis and defense counsel stipulated to a factual basis for each charge.*
- Judge Yohalem dissented because she did not agree that there was substantial compliance with Rule 5-303(F)(1).

Pleas (Appellate Preclusion of Double Jeopardy Analysis)

Def.'s plea, which included stipulation to factual basis to the charges, and the lack of any other facts in record indicating he was impermissibly charged w/multiple counts of CSCM, precluded analysis of double jeopardy claim on appeal

State v. Benny Arthur Valenzuela, ____-NMCA-____ (A-1-CA-39199, Mar. 7, 2023). ES

- **FACTS:** Same as above.
- **ISSUE HERE:** Whether the district court erred by failing to inquire into whether a **double jeopardy** violation existed, during the hearing on his motion to withdraw the plea.
- **HELD:** The Court held that Valenzuela failed to demonstrate reversible error. Because defense counsel *stipulated to a factual basis to the charges* at the plea hearing and Valenzuela did not place any facts in the record in his motion to withdraw his plea or during the hearing on the motion that would indicate he was impermissibly charged with multiple counts of CSCM, *the record was insufficient* to analyze the double jeopardy claim on appeal.

Statute of Limitations

Section 30-1-9 did not exclude the period between the timely-filed – but dismissed – complaint and the refiled charges, and no nonstatutory tolling otherwise extended the time for the State to pursue charges

State v. Demesia Padilla, ____-NMCA-____ (A-1-CA-40038, Mar. 31, 2023). WH

- **FACTS:** On June 28, 2018, the State charged **Former NM Tax & Rev Secretary** Padilla in the First Judicial District Court on one count each of **embezzlement and computer access with intent to defraud or embezzle**.
- Padilla filed an **objection to venue** on November 29, 2018, **and a related motion to dismiss 5 months later** on April 25, 2019.
- On June 11, 2019, the First Judicial District Court granted the motion to dismiss both counts without prejudice for improper venue.
- Under two months later, on August 1, 2019, a grand jury indicted Padilla in the present case (the Indictment), on the same charges in the Thirteenth Judicial District Court.
- The criminal conduct alleged for both second degree felony counts occurred "between December 19, 2011 and January 22, 2013." Under Section 30-1-8(A) (2009, amended 2022), **the six-year limitation period expired on January 23, 2019, *while the original case was still pending* and before Padilla filed her motion to dismiss**.

Section 30-1-9 did not exclude the period between the timely-filed – but dismissed – complaint and the refiled charges, and no nonstatutory tolling otherwise extended the time for the State to pursue charges

State v. Demesia Padilla, ____-NMCA-____ (A-1-CA-40038, Mar. 31, 2023). WH

- **Padilla moved to dismiss both charges because the statute of limitation had expired**. The State responded in relevant part that under *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, Section 30-1-9 is not the exclusive mechanism for tolling criminal statutes of limitation.
- The **district court** agreed with the State's interpretation of *Martinez* and **denied Padilla's motion** *but included in the order language for interlocutory appeal. The Court of Appeals denied Padilla's application for interlocutory appeal*, and Padilla was tried and found guilty on both charges.
- **ISSUE:** Whether (1) under the circumstances of the present case, Section 30-1-9 did not toll the statute of limitation; and (2) the Legislature intended for Section 30-1-9 to govern the tolling of criminal statutes of limitation. The Court framed the issue as **whether a limitation period like that contained in Section 30-1-8(A) can be tolled**.

Section 30-1-9 did not exclude the period between the timely-filed – but dismissed – complaint and the refiled charges, and no nonstatutory tolling otherwise extended the time for the State to pursue charges

State v. Demesia Padilla, ____-NMCA-____ (A-1-CA-40038, Mar. 31, 2023). WH

- **ANALYSIS: For Section 30-1-9 to apply**, the circumstances that ended the first prosecution have to involve either (1) an indictment, information, or complaint that was quashed for a defect; or (2) a prosecution that is dismissed for variance between the evidence and the indictment, information, or complaint. In either event, the time is excluded from the limitation period only if the *subsequent* complaint is brought within five years of the commission of the charged crime.
- **The Court concluded that Padilla's case involved such circumstances**, ***but*** the statute did not toll the limitation period because the indictment was not brought within five years. **The Court also concluded** that the conditions on tolling imposed in the statute demonstrate **the Legislature's intent to limit the opportunities for the tolling** of the limitation period—i.e., that non-statutory tolling does not apply when the statutory conditions are present.

Section 30-1-9 did not exclude the period between the timely-filed – but dismissed – complaint and the refiled charges, and no nonstatutory tolling otherwise extended the time for the State to pursue charges

State v. Demesia Padilla, ____-NMCA-____ (A-1-CA-40038, Mar. 31, 2023). WH

- **HELD: In Short**, the Court held that (1) in the present case, **Section 30-1-9 did not toll the period between the timely filed (but dismissed) complaint and the refiled charges**—i.e., the statute did not exclude the time when the case was pending in the first venue; **and** (2) **no non-statutory tolling otherwise extended the time for the State to pursue charges in the present case**. The Court therefore vacated Padilla's convictions and remanded for dismissal of the time-barred charges.
- **Judge Duffy dissented**, opining that *Martinez* can be read to have adopted non-statutory tolling that coexists with Section 30-1-9, and noting that the statute has no effect when the limitations period is five years or greater—i.e., that it does not apply to any felony-level offense.
- The State has filed a petition for writ of certiorari; Padilla has filed a response.

Denial of Mistrial Motion

No abuse of discretion in denial of mistrial motion; info disclosed pretrial was adequate to provide notice that Sgt.'s testimony could undercut the Defense

State v. Dennis R. Pate, ____-NMCA-____ (A-1-CA-39508, Apr. 19, 2023). VS

- **FACTS:** Clovis law enforcement executed a search warrant and discovered **drugs and a firearm** in a residence. **Mail with the name "Dennis Ray Pate"** was also recovered from the **residence mailbox**, which **bore the name "Pate."**
- Following arrest, Pate was indicted and held in custody. Trial was continued seven times before a jury found Pate guilty of both charges of felon in possession of a firearm and possession of a controlled substance (methamphetamine).
- **The State mentioned Sergeant Riddle's surveillance during opening statement**, but Pate did not first request a mistrial until after the topic came up again during cross-examination of Sgt. Riddle.
- The district court denied the motion, explaining that the State had disclosed the warrant affidavit, which revealed Sergeant Riddle's surveillance of the residence, and that Sergeant Riddle would testify at trial. **The district court concluded that this information put Pate on notice that Sergeant Riddle would testify about observing Pate coming and going from the residence** and that had Pate conducted a pretrial interview, the full scope of Sergeant Riddle's testimony would have been revealed.

No abuse of discretion in denial of mistrial motion; info disclosed pretrial was adequate to provide notice that Sgt.'s testimony could undercut the Defense

State v. Dennis R. Pate, ____-NMCA-____ (A-1-CA-39508, Apr. 19, 2023). VS

- **ISSUE:** Whether the district court erred in denying a mistrial based on Pate's argument at trial that the State had not disclosed that **Sergeant Riddle**, the law enforcement officer who executed the search warrant, **lived in close proximity to the residence** where the warrant was executed and had seen Pate coming and going from that residence.
- **ANALYSIS:** The Court noted that a party generally must make a mistrial motion at the earliest possible opportunity, but Pate did not.
- **HELD:** The Court held **the information disclosed pretrial was adequate to put Pate on notice** that Sergeant Riddle's testimony could undercut the defense and that, **as such, the district court did not abuse its discretion** in denying the motion for a mistrial.

Denial of Motion to Recuse

In the absence of evidence of bias that adversely affected interests of Defendant, defense attorney's intent to testify in judge's pending disciplinary proceeding was insufficient to require recusal, and court did not abuse its discretion in denying joint motion to recuse

State v. Roger L. Gage, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential).

MV

- **FACTS:** You've heard these facts! This is the one where Gage and his brother entered a drug house and executed the three occupants.
- This one is about judicial bias.
- District Judge Lidyard presided over the case. Prior to assuming the bench, Judge Lidyard served as an ADA and, in one case, prosecuted a person represented by Gage's attorney in this case.
- In that case, the DA's office filed a complaint against ADA Lidyard, alleging that he failed to disclose exculpatory evidence to defense counsel. Defense counsel was to serve as a witness against ADA Lidyard in the disciplinary proceeding, but before the proceedings began, Judge Lidyard assumed the bench and was presiding over Gage's case. The record is silent as to whether the disciplinary proceeding occurred before Gage's trial.

In the absence of evidence of bias that adversely affected interests of Defendant, defense attorney's intent to testify in judge's pending disciplinary proceeding was insufficient to require recusal, and court did not abuse its discretion in denying joint motion to recuse

State v. Roger L. Gage, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential).

MV

- Gage entered into a proposed plea agreement, which Judge Lidyard rejected, concluding that a trial would better serve the interests of justice. Gage and the State sought reconsideration, which Judge Lidyard denied.
- Gage and the State then attempted to recuse Judge Lidyard. Because the period for recusal as a matter of right had expired, defense counsel asked Judge Lidyard to voluntarily recuse himself. The judge declined, concluding that there was no reason to question his ability to fairly and impartially preside.
- Defense counsel again voiced his concern about Judge Lidyard's impartiality due to defense counsel's role as a witness against the judge, but the judge continued to maintain that there was nothing about the circumstances that would cause him to retaliate against Gage or generate within him any bias or prejudice against Gage.

In the absence of evidence of bias that adversely affected interests of Defendant, defense attorney's intent to testify in judge's pending disciplinary proceeding was insufficient to require recusal, and court did not abuse its discretion in denying joint motion to recuse

State v. Roger L. Gage, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential).

MV

- Gage and the State sought reconsideration of recusal, pointing to the appearance of impropriety, but the judge denied this motion as well.
- Gage was convicted of three counts of first degree murder (both willful and deliberate and felony murder for each) and one count each of aggravated burglary, conspiracy to commit murder, and tampering with evidence.
- **ISSUE:** Whether the district court abused its discretion in refusing to recuse itself.
- **ANALYSIS: Recusal is within the discretion of the trial judge; disqualification exists when the judge's impartiality might reasonably be questioned. An attorney's involvement in a complaint against a judge does not automatically necessitate recusal**.

In the absence of evidence of bias that adversely affected interests of Defendant, defense attorney's intent to testify in judge's pending disciplinary proceeding was insufficient to require recusal, and court did not abuse its discretion in denying joint motion to recuse

State v. Roger L. Gage, S-1-SC-39142, dec. (N.M. May 22, 2023) (nonprecedential).

MV

- Rule 21-216 NMRA mandates that a judge not retaliate against anyone who has filed a complaint against the judge. Even bias or prejudice toward an attorney is insufficient to disqualify a judge unless it rises to the level of adversely affecting the interests of the client.
- **HELD: Absent evidence of bias that adversely affected Gage's interests—which Gage did not present—the mere fact of defense counsel's intention to testify against the judge was insufficient to require recusal**.
- **The parties' consensus on the motion to recuse did not require the judge's disqualification**. The parties' joint involvement in the judge's pending disciplinary proceedings made any allegations of bias unpersuasive.
- Adverse rulings against a party, without more, did not support a conclusion that the district court is biased, requiring recusal.

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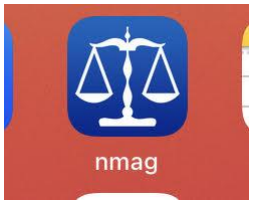
Other Resources

NMAG Website Resources (nmag.gov)
Criminal Affairs → Criminal Appeals
- How to Take an Appeal Handbook
- DA Liaison List

Resources → Publications
- Search & Seizure Manual

NMAG App



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