

APPELLATE LAW UPDATE

May 6, 2015

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STRUCTURE

- Review of New Mexico Supreme Court opinions and decisions
- Review of New Mexico Court of Appeals opinions BUT NOT MEMORANDUM OPINIONS
- From November 15, 2014 to April 27, 2015
- Introductory comments and observations
- Special Requests
- Special Concerns
- It Helps
- Pre-trial, trial, post-trial
- Substantive Crimes
- Pleas
- Ineffective Assistance of Counsel

NEW MEXICO SUPREME COURT

- All opinions and decisions
- November 15, 2014 to April 27, 2015
- Opinions and decisions are issued every Monday and Thursday via email (usually)
- Available on New Mexico Courts website: www.nmcourts.gov and New Mexico Compilation Commission website
- Any disposition is sent that day to the prosecutor via email
- LEXIS, WESTLAW, State Bar Bulletin, and Google Scholar are other sources for opinions

NEW MEXICO SUPREME COURT

- Remember that cases may be pending on certiorari review.
- For example, a case is pending on certiorari review after the writ was granted on September 14, 2012 (*State v. Pasillas*, NMSCT No. 33,725)
- This appellate update includes SOME cases where certiorari was applied for, pending, or granted.

NEW MEXICO COURT OF APPEALS

- Only published opinions issued from November 15, 2014 to April 27, 2015
- Rule 12-405 NMRA permits citations to unpublished opinions (memorandum opinions)
- All opinions, published and unpublished, are reported on New Mexico Court of Appeals website and at New Mexico Compilation Commission

WHY?

- Perfect and protect the record
- Safeguard the rights of the accused
- Reflect a professional and ethical approach to the prosecution
- Avoid reversible error
- Know that the record will be reviewed ad infinitum on direct appeal and in state habeas corpus and federal habeas corpus proceedings
- Allow the criminal appeals division to advocate for a lawful conviction

BE AWARE

- Pretrial Release Ad Hoc Committee, post *State v. Brown*
- Amendments to rules, effective December 31, 2014
- Especially:
 - Rules of Criminal Procedure for the District Courts
 - Rules of Criminal Procedure for the Magistrate Courts
 - Rules of Criminal Procedure for the Metropolitan Courts
 - Rules of Procedure for Municipal Courts
 - Criminal Forms
 - Rules of Appellate Procedure
 - Uniform Jury Instructions – Criminal (especially child abuse)
 - Local Rules for the Second Judicial District Court
 - State Habeas Corpus Rules

KEEP IN MIND AND KNOW TO YOUR INNER CORE

- Prosecutors have a higher standard professionally and ethically that is independent of:
 - What defense counsel does or does not do.
 - What the trial court does or does not do.
- Embrace and practice this standard. PLEASE.
- THE ACTIONS OF THE PROSECUTOR WILL BE SCRUTINIZED FIRST.

APPELLATE COURT CLERKS

- Joey Moya
- Clerk of the New Mexico Supreme Court
- P.O. Box 848
- Santa Fe, NM 87504-0848
- (505) 827-4860 (T) / (505) 827-4837 (F)

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

SPECIAL REQUEST FROM NMCOA

- Email dated April 24, 2015 from Brigitte C. Thomas, Deputy Clerk to Appellate Public Defender and yours truly
- Please file the docketing statement in the district court and the NMCOA.
- Trial counsel is responsible for the docketing statement, not your friends in the criminal appeals division.
- Rule 12-208 NMRA.
- Any extension of time for a docketing statement is filed with the NMCOA, not the district court.
- This information is also included in the letter from the criminal appeals division sent when a notice of appeal is filed.

SPECIAL REQUESTS

- Mere assertions and arguments of counsel are not evidence.
- Remember memorandum opinions and decisions may be cited. Rule 12-405 NMRA.
- Please use the correct citation format and update any citations. Rule 23-112 NMRA.
- Make the record by insisting that bench conferences and in-chambers conferences be held on the record.
- Document all continuances and object to continuances.
- The mantra is “THE STATE IS READY TO PROCEED TO TRIAL TODAY.”

SPECIAL REQUESTS

- Please know how to impeach a witness
- Make the record about how the trial court exercised discretion and tailored the remedy to address the claimed error
- Past recollection recorded and present recollection refreshed or revived are hearsay exceptions
- Handout: Edward J. Imwinkelried, *Evidentiary Foundations*, 453-459 (7th ed.)
- Get the plea offer that was rejected on the record (sealed, if needed):
 - *Lafler v. Cooper*, 132 S. Ct. 1376 (2012)
 - *Missouri v. Frye*, 132 S. Ct. 1399 (2012)

SPECIAL REQUESTS

- Timely and accurate filing of a notice of appeal
- Service to all parties
- Timely and accurate designation of the record on appeal
- Inventory and safeguard all exhibits
- Returning calls and emails as soon as practicable

SPECIAL CONCERNS

- Right to speedy trial especially when D is subjected to a lengthy pretrial confinement
- EMDA . Get the findings on the record.
- Correct judgments and sentences re: enhancements, SVO, sex offender registration, mandatory fees, service of sentences as concurrent or consecutive, award of presentence confinement credit and whether the sentence is imposed pursuant to a conditional plea.
- *State v. Archuleta* and *State v. Baca*, commercial burglary
- *State v. Armijo*, right to appeal and jurisdiction

SPECIAL CONCERNS

- IPRA
- University of New Mexico School of Law Innocence & Justice Project
- Indian country jurisdiction
- Jury instructions
- Denial of any defense sought by D
- Any statements made by D
- Police misconduct
- Child abuse
- Prosecutorial misconduct (from beginning to end)

IT HELPS

- Know the standard of review
- Know the correct statute for date of crime
- Know burden of proof
- Proffer a remedy that is reasonable, based on the circumstances, and supported by law
- Get it down pretrial and before the jury is sworn for evidentiary issues, charging issues, and jurisdiction
- Direct the trial court that D has to raise and argue a separate state constitutional analysis to preserve the issue for appellate review

IT HELPS

- For any *pro se* filing, note filing on the record and explain that no response will be filed by the State and no ruling is necessary from the trial court because D is represented by counsel
- Only when a *Faretta* hearing is held and D is appearing *pro se* or with the appointment of stand-by counsel, all *pro se* filings have no validity
- ASK TO STRIKE ALL PRO SE FILINGS
- The hybrid record with filings by counsel and D creates problems including IAC claims, *Faretta* claims, and other issues
- Address all prongs and get a finding on the record for any analysis that requires different factors to be evaluated, e.g. *Barker v. Wingo*, *Strickland v. Washington*, *Miranda*, *Ochoa*.

IT HELPS

- For claims of the denial of speedy trial, make the record about the custody of the accused and update the trial court AS OFTEN AS NEEDED about the custody status, the lack of any request by accused to reconsider conditions of bail/bond, etc.
- The NMSCT is very concerned about accused “sitting in jail” for a lengthy period of time irrespective of what the trial court or what defense counsel did or did not do.
- Do not let the record reflect that the State was either unaware or not cognizant of custody status and the length of time in custody.

EVIDENTIARY RULINGS

- State v. Sanchez
- State v. Garnenez
- State v. Martinez
- State v. Montoya
- State v. Strauch
- State v. Hanson
- State v. Winters
- State v. Tapia
- State v. Astorga
- State v. Ferri
- State v. Ferran
- State v. Duran

DOUBLE JEOPARDY

- State v. Silvas
- State v. Marquez
- Dominguez v. State
- State v. Lucero

DWI

- State v. Garnenez
- State v. Chakerian
- State v. Charlie/State v. Norberto

INEFFECTIVE ASSISTANCE OF COUNSEL

- State v. Favela
- State v. Martinez
- State v. Pfauntsch
- State v. Tejeiro

KIDNAPPING

- State v. Marquez
- State v. Tapia

JURY INSTRUCTIONS

- State v. Mark
- State v. Lucero
- State v. Montoya
- State v. Tapia

DEFENSES

- State v. Lucero
- State v. Schaublin

RIGHT OF CONFRONTATION

- State v. Mark
- State v. Garnenez

INDIAN COUNTRY JURISDICTION

- State v. Charlie/State v. Norberto

PRETRIAL

- State v. Astorga

CHILD ABUSE

- State v. Stephenson
- State v. Montoya

CRIMINAL SEXUAL ASSAULT

- State v. Tapia
- State v. Duran

RIGHT TO SPEEDY TRIAL

- State v. Taylor
- State v. Montoya
- State v. Ochoa
- State v. Dorais
- State v. Carroll

FOURTH AMENDMENT

- State v. Tapia
- State v. Martinez
- State v. Sabeerin
- State v. Davis
- State v. Yazzie
- State v. Antonio T.
- State v. Mark
- State v. Sheehan

SENTENCING

- State v. Montoya
- State v. Sanchez

STATUTORY CONSTRUCTION

- State v. Tufts
- State v. Strauch
- State v. Benally
- State v. Murillo
- State v. Archuleta
- State v. Baca
- State v. Holt

PLEAS

- State v. Winters
- State v. Favela
- State v. Pfauntsch
- State v. Tejeiro

JURY

- State v. Garnenez

PRE-TRIAL

Special Prosecutor

Charging

Indian Country Jurisdiction

Statements by Accused

Statutory Construction

Severance

Jury Selection

Right to Speedy Trial

Fourth Amendment

Venue

SPECIAL PROSECUTOR

- *State v. Surratt*, 2015-NMCA-039, cert. granted, No. 35,049 (February 27, 2015)
- Appointment of special prosecutor, Section 36-1-23.1
- Special prosecutor did not have authority to appoint another attorney to act as special prosecutor in her place
- D was a police officer and deputy sheriff
- First prosecutor – conflict of interest
- Appointed special prosecutor
- Special prosecutor unable to prosecute and appointed a new special prosecutor
- Bad appointment found by NMCOA; first prosecutor had the duty to appoint
- Reversed on jurisdiction grounds – second special prosecutor had no authority to prosecute

CHARGING

- *State v. Archuleta*, 2014 WL 5454826 (NMCOA 32,794, October 27, 2014), *cert. granted*, No. 35,005; oral argument held April 29, 2015 (and consolidated with *State v. Baca*, No. 34,769 and No. 34,786)
- Commercial burglary
- Whether defendant could be charged with commercial burglary following his entry into Walgreens when a no-trespass order had been entered?
- Answer: No. Overruling *State v. Tower*, 2002-NMCA-109
- No trespass order was not the type of “harmful entry” required for a commercial burglary charge

INDIAN COUNTRY JURISDICTION

- *State v. Charlie and State v. Norberto*, NMSCT No. 34,487 and 34,488, 2014 WL 7187049, *rev'g* NMCOA No. 32,504 and No. 32,353, 2013 WL 77562634
- Dispositional Order of Reversal, December 18, 2014
- Navajo defendants
- DWI on state land and travel onto the Navajo Reservation
- Stopped on Navajo Reservation by New Mexico State Police
- Defendants transported off the Navajo Reservation to the State Police Headquarters in Farmington

INDIAN COUNTRY JURISDICTION

- *State v. Charlie and State v. Norberto*, NMSCT No. 34,487 and 34,488, *rev'g* NMCOA No. 32,504 and No. 32,353
- Breath and blood alcohol tests administered
- Transported back to the Navajo Detention Center in Shiprock
- Lack of personal jurisdiction for failure to follow Navajo extradition protocols, violation of tribal sovereignty, and inability of the State to prosecute the DWI charge
- Cross-commission permitted the transport and testing
- Navajo Nation Code
- No extradition implicated because Ds were never released into the custody of another jurisdiction

STATEMENTS BY ACCUSED

- *State v. Antonio T.*, 2014 WL 5377530 (No. 33,997 and 33,999, October 23, 2014), motion for rehearing filed and granted and oral argument on motion for rehearing held.
- STILL PENDING
- High school student (17 years old)
- Minor in possession of alcohol
- Statements made to assistant principal in the presence of a deputy sheriff
- Admission that he had consumed alcohol
- Breath alcohol test administered, arrested, *Miranda* rights given, refused to answer any questions posed by deputy sheriff

STATEMENTS BY ACCUSED

- *State v. Antonio T.*, 2014 WL 5377530 (No. 33,997 and 33,999, October 23, 2014), motion for rehearing filed and granted and oral argument on motion for rehearing held.
- State failed to prove that child effectively waived the right to remain silent; the statements were inadmissible in the delinquency proceeding
- Blurring of the status and function of school administrator and law enforcement
- The fact that the statements were elicited by the assistant principal and not the deputy sheriff is not controlling
- Get waiver forms for schools?

STATEMENTS BY ACCUSED

- *State v. Antonio T.*, 2014 WL 5377530 (No. 33,997 and 33,999, October 23, 2014), motion for rehearing filed and granted and oral argument on motion for rehearing held.
- Motion to suppress filed on grounds that the statements made to the assistant principal were elicited without a knowing, intelligent, and voluntary waiver of his right to remain silent
- “Although a school official may insist that a child answer questions for purposes of school disciplinary proceedings, any statements elicited by the official may not be used against the child in a delinquency proceeding unless the child made a knowing, intelligent, and voluntary waiver of the right to remain silent.”

STATEMENTS BY ACCUSED

- *State v. Mark*, NMSCT No. 34,025 (April 13, 2015)
- Motion to suppress physical evidence obtained after D's voluntary statements to police
 - Made statements to police that helped police recover physical evidence
 - Statements were voluntary
 - Physical evidence admissible
 - Intoxication
 - Totality of the circumstances are reviewed de novo
 - Video recording of reviewed

STATUTORY CONSTRUCTION

- *State v. Holt*, NMCOA 33,090 (April 27, 2015), 2015 WL 1914580
- Breaking and entering charge
- Did D's act of removing a window screen fit within the statute, Section 30-14-8(A)?
- Yes.
- Amazing.
- *But see* dissenting opinion, Judge Kennedy, re: *Muqqddin* analysis
- Tiresome.

STATUTORY CONSTRUCTION

- *State v. Baca*, 2014-NMCA-087, 331 P.3d 971, cert. granted, 2014-NMCERT-8, oral argument held April 29, 2015
- Whether entry into COSTCO without a valid membership card was an unauthorized entry and sufficient to support conviction for commercial burglary?
- No.
- Burglary statute did not contemplate this situation to be an unauthorized entry; following *State v. Muqqddin*, 2012-NMSC-029
- Punish misdemeanor behavior with a felony charge

STATUTORY CONSTRUCTION

- *State v. Archuleta*, 2014 WL 5454826 (NMCOA 32,794, October 27, 2014), *cert. granted*, No. 35,005; oral argument held April 29, 2015 (and consolidated with *State v. Baca*, No. 34,769 and No. 34,786)
- Commercial burglary, NMSA 1978, Section 30-16-3(B)
- Applying *State v. Muqqddin*, 2012-NMSC-029, to limit the scope and applicability of statute
- What is the LEAST SERIOUS CRIME THAT MAY BE CHARGED?
- Trend towards charging two misdemeanors instead of a higher felony count?

STATUTORY CONSTRUCTION

- *State v. Chakerian*, NMCOA No. 32,872, January 14, 2015, 2015 WL 178356, cert. pet. filed, No. 35,121 (February 13, 2015)
- DWI
- D was not afforded his statutory right to obtain an independent blood alcohol test pursuant to Implied Consent Act
- Issue: Whether a D who was provided a telephone book and access to a telephone for a period of 20 to 30 minutes during the early mornings hours was given a reasonable opportunity to arrange for an independent chemical test pursuant to the Implied Consent Act?

STATUTORY CONSTRUCTION

- *State v. Chakerian*, NMCOA No. 32,872, January 14, 2015, 2015 WL 178356, cert. pet. filed, No. 35,121 (February 13, 2015)
- No, D was not afforded his statutory right for an independent test
- Bench trial in metropolitan court
- “Meaningful cooperation” not found
- D was only provided a “mere possibility of being able to arrange for an independent test.”
- Dissenting opinion by Judge Zamora.

STATUTORY CONSTRUCTION

- *State v. Chakerian*, NMCOA No. 32,872, January 14, 2015, 2015 WL 178356, cert. pet. filed, No. 35,121 (February 13, 2015)
- No, D was not afforded his statutory right for an independent test
- Bench trial in metropolitan court
- “Meaningful cooperation” not found
- D was only provided a “mere possibility of being able to arrange for an independent test.”
- Dissenting opinion by Judge Zamora.

STATUTORY CONSTRUCTION

- *State v. Murillo*, NMCOA No. 32,708, January 21, 2015, 2015 WL 270053
- Aggravated battery with a deadly weapon, Section 30-3-5(C)
- Unlawful possession of a switchblade knife, Section 30-7-8
- Right to bear arms
- Statutory construction. Right to bear arms is not violated by the statute making it unlawful to possess switchblade under both the state and federal constitutions.

STATUTORY CONSTRUCTION

- *State v. Benally*, NMCOA No. 31,972, January 29, 2015, 2015 WL 404311 , cert. filed, No. 35,145 (March 2, 2015)
- Forfeiture and “Wiktionary”
- Forfeiture complaints must be filed within 30 days of date that State took possession of property
- Seizure of vehicle containing money triggered the 30 days limit
- Statutory interpretation of Section 31-27-5(A) (2002), Forfeiture Act
- Newly-enacted legislation?

STATUTORY CONSTRUCTION

- *State v. Tufts*, NMCOA 33,419, April 7, 2015, 2015 WL 1554755, cert. petition to be filed, May 27, 2015
- Section 30-37-3.3 (2007) – Statutory construction
- Prohibiting the sending of forbidden “obscene images” to a child under 16 years of age by means of an “electronic communication device”
- D hand-delivered obscene images contained on a memory card to a 15 year old by placing the card in a cell phone and then hand delivering the cell phone to the child
- D nude and masturbating on memory card
- No crime

STATUTORY CONSTRUCTION

- *State v. Strauch*, 2015-NMSC-009, rev'g, 2014-NMCA-020, 317 P.3d 878
- Communications between D and social worker
- Not privileged and subject to disclosure
- Statutory construction of Section 32A-4-3(A)(2005), Abuse and Neglect Act in the New Mexico Children's Code
- Was social worker a mandatory child abuse reporter?
- Yes.
- Statutory history and “broadly inclusive” terms of the Abuse and Neglect Act controlled.

STATUTORY CONSTRUCTION

- *State v. Strauch, 2015-NMSC-009*
- Comprehensive review of statute and evidentiary privileges
- What does “every person” mean?
- “Because this case is not an enforcement proceeding under the act but is instead a proceeding to compel discovery and testimony in our courts, we must now address the matter of evidentiary privileges applicable in judicial proceedings.”
- Rule 11-501 NMRA – Social worker privilege
- Rule 11-504 NMRA – Physician and mental health counselor privilege

RIGHT TO SPEEDY TRIAL

- *State v. Ochoa*, 2014-NMCA-065, 327 P.3d 1102, cert. granted, 2014-NMCERT-6 (June 6, 2014)(and oral argument held on April 13, 2015)
- Delay was presumptively prejudicial so all factors evaluated
- Deference to district court's factual findings and de novo review of violation of constitutional right
- Circumstances of each particular case evaluated
- D's trial was set and reset 8 times
- Negligent and administrative delay weighed against State
- D filed 4 motions to dismiss on speedy trial grounds
- Prejudice suffered because D was incarcerated the entire time
- All factors weighed in favor of D; speedy trial right violated

RIGHT TO SPEEDY TRIAL

- *State v. Ochoa*, 2014-NMCA-065, 327 P.3d 1102, cert. granted, 2014-NMCERT-6 (June 6, 2014)(and oral argument held on April 13, 2015)
- 24 month delay between D's arrest and trial violated right to speedy trial
- Criminal sexual contact of a minor
- Barker v. Wingo factors evaluated
 - Length of delay
 - Reasons for delay (deliberate, negligent, valid)
 - D's assertion of right
 - Prejudice to D

RIGHT TO SPEEDY TRIAL

- *State v. Taylor*, 2015-NMCA-012, 343 P.3d 199
- CSP and misdemeanor battery
- Right to speedy trial
- Charges dismissed
- Affirmed
- D was denied the right to a speedy trial following the balancing of the four *Barker v. Wingo* factors
- The length of the delay was excessively long, almost two years had elapsed between arrest and trial
- State was responsible for 463 days of delay based on inexcusable neglect and a “complete lack of diligence”

RIGHT TO SPEEDY TRIAL

- *State v. Montoya*, NMCOA No. 32,525, February 25, 2015, 2015 WL 798100
- Sixth Amendment violation of right to speedy trial
- Trial court granted D's motion to dismiss for 27 month delay for multiple counts of CSPM and related felonies
- *Barker v. Wingo* factors balanced in favor of dismissal and finding that D was denied right to a speedy trial:
 - Length of delay
 - Reasons for delay
 - Assertion of right
 - Prejudice

FOURTH AMENDMENT

- *State v. Sheehan*, 2015-NMCA-021, 344 P.3d 1064, cert. denied, No. 35,100, February 16, 2015
- DWI
- Officer conducted a warrantless vehicle stop for the specific, articulable concern for female passenger's safety
- Stop was lawful to ascertain whether assistance was needed under the public servant doctrine
- But once resolved, any additional police/citizen encounter fell within the scope of the Fourth Amendment

FOURTH AMENDMENT

- *State v. Sheehan*, 2015-NMCA-021, 344 P.3d 1064, cert. denied, No. 35,100, February 16, 2015
- A police officer who is acting as a community caretaker does not violate the Fourth Amendment.
- Community caretaking requires a balancing of the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the individual
- Passenger appeared to be unconscious and in an unnatural position, did not respond to officer's inquiry; vehicle parked on the side of the road
- Emergency aid doctrine applied to warrantless intrusions into the home
- Public servant doctrine involves warrantless searches and seizures of automobiles

FOURTH AMENDMENT

- *State v. Sabeerin*, 2014-NMCA-110, cert. granted, No. 34,886 (October 24, 2014)
- Vehicle identification (VIN) switching operation
- Affidavit for search warrant was insufficient to establish probable cause
- Warrant did not describe with sufficient particularity the things to be seized
- Affidavit must show:
 - Items sought to be seized are evidence of a crime; and
 - Criminal evidence sought is located at the place to be searched

FOURTH AMENDMENT

- *State v. Sabeerin*, 2014-NMCA-110, cert. granted, No. 34,886 (October 24, 2014)
- For issuance of a search warrant, factual basis must be established to show a sufficient nexus between the criminal activity, the things to be seized, and the place to be searched (Who, What, When, Where, Why)
- Probable cause must be based on more than suspicion or possibility
- Absolute factual certainty not required
- Four corners of the search warrant including direct and circumstantial evidence as well as all reasonable inferences
- Dissenting opinion by J. Sutin

FOURTH AMENDMENT

- *State v. Yazzie*, 2014-NMCA-108, cert. granted, No. 34,866 (October 24, 2014)
- Reasonable suspicion for traffic stop
- Insurance status reported as unknown
- Stopping a vehicle to ascertain insurance status was unreasonable
- Tricky case about what officer knew, what a report of “unknown” insurance status means, and if this report is sufficient to justify a traffic stop
- Enjoy the Rumsfeldian analysis!

FOURTH AMENDMENT

- *State v. Davis*, 2014-NMCA-042, cert. granted, 324 P.3d 376 (and submitted, November 14, 2014)
- Possession of a controlled substance (marijuana)
- Aerial surveillance
- Federal and state constitutional analysis
- State constitution prohibits aircraft to fly over a residence to discover evidence of a crime without a warrant

FOURTH AMENDMENT

- *State v. Garnenez*, 2015-NMCA-022, 344 P.3d 1054, cert. denied, No. 35,038, January 23, 2015
- Vehicular homicide
- Blood draw can be supported by an arrest pursuant to the Implied Consent Act or a valid search warrant supported by probable cause

FOURTH AMENDMENT

- *State v. Martinez*, 2015-NMCA-013, 343 P.3d 194
- Attenuation analysis re: illegal search and whether victim's testimony was admissible based on separate and independent ground

FOURTH AMENDMENT

- *State v. (Edward James) Tapia*, NMCOA No. 32,934, February 16, 2015, 2015 WL 674711, cert. pet. filed, No. 35,183 (March 18, 2015)
- Forgery and concealing identity
- Traffic stop
- Issue of first impression: Did the new-crime exception to the exclusionary rule apply?
- No, the discovery of evidence of concealed identity and forgery was not sufficiently removed from the taint of the illegal traffic stop to justify admission of the evidence.

FOURTH AMENDMENT

- *State v. (Edward James) Tapia*, NMCOA No. 32,934, February 16, 2015, 2015 WL 674711, *cert. pet. filed*, No. 35,183 (March 18, 2015)
- D was a backseat passenger in a vehicle that was stopped without reasonable suspicion.
- Police officer asked for identification. D provided a false name and signed the citation with a false name AKA as concealing identity and forgery---the new crimes.
- Purpose of exclusionary rule justified holding that the new crimes could not be prosecuted.
- The exclusionary rule is understood to be a “judicially created doctrine that safeguards rights guaranteed under the Fourth Amendment through its deterrent effect on state misconduct.”

FOURTH AMENDMENT

- *State v. (Edward James) Tapia*, NMCOA No. 32,934, February 16, 2015, 2015 WL 674711, *cert. pet. filed*, No. 35,183 (March 18, 2015)
- Attenuation analysis
- “Although the exclusionary rule ‘prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search,’ it does not apply when the connection between the unconstitutional police action and the evidence becomes ‘so attenuated as to dissipate the taint from the unlawful conduct.’” (Citations omitted).

FOURTH AMENDMENT

- *State v. (Edward James) Tapia*, NMCOA No. 32,934, February 16, 2015, 2015 WL 674711, *cert. pet. filed*, No. 35,183 (March 18, 2015)
- No attenuation found. Denial of D's motion to suppress reversed.
- Three factors for assessing attenuation between the unconstitutional police conduct and the evidence offered by the State:
 - The amount of time that elapsed between the illegality and the acquisition of evidence
 - Any intervening circumstances
 - The purpose and the flagrancy of the police misconduct.

FOURTH AMENDMENT

- *State v. Martinez*, NMCOA No. 32,516, January 6, 2015, 2015 WL 93531, cert. pet. filed, No. 35,116 (February 25, 2015)
- DWI
- Police officer did not have reasonable suspicion to stop vehicle for failing to stop at stop sign
- “This case presents a new wrinkle on reasonable suspicion. The arresting officer testified that Defendant ran a stop sign and came to a stop in the middle of the intersection, blocking his lane of travel. However, the dashboard camera demonstrated this was not the case.”
- On review, the video evidence was “ambiguous.” Finding of reasonable suspicion was wrong.

FOURTH AMENDMENT

- For any traffic stop, a pleasant reminder:
 - Know *State v. Hubble*, 2009-NMSC-014, 146 N.M. 70, 205 P.3d 579
 - Know *State v. Anaya*, 2008-NMCA-020, 143 N.M. 431, 176 P.3d 1163
- Consider any and all factors to support a reasonable suspicion or probable cause finding
- Know the exceptions to the warrant requirement
- Understand and respond to any separate New Mexico constitutional analysis
- Make the record about the sequence of events and why the officer did what he or she did
- Not every encounter is a Fourth Amendment search and seizure issue

VENUE

- *State v. Astorga*, 2015-NMSC-007, 343 P.3d 1245
- Change of venue
- Abuse of discretion standard
- Record helped show no reversible error
- “The district court’s decision to grant the renewed motion for a change of venue—after the highly publicized guilt phase of trial—does not lead us to a different result. Rather, we view the district court’s grant of the renewed motion as indicative of its ability to maintain a fair and open mind throughout the complicated and length proceedings of this case.”

TRIAL

- Evidentiary Rulings
- Right of Confrontation
- Defenses
- Jury Instructions
- Motion for Mistrial
- Judicial Misconduct
- Prosecutorial Misconduct

EVIDENTIARY RULINGS

- *State v. Ferran*, NMSCT No. 33,845, March 5, 2015, 2015 WL 927075
- First degree murder (2)
- Gunshot wounds and blazing car
- Admission of out-of-court statements by State's witnesses
 - Present sense impression
- Denial of confrontation by limitation on D's ability to cross-examine a State's witness; hearsay
- Qualification and testimony of expert re: fire investigation

EVIDENTIARY RULINGS

- *State v. Duran*, 2015-NMCA-015, 343 P.3d 207
- First degree criminal sexual penetration of a minor
- Reversed and remanded
- Trial court erred in allowing forensic interviewer to testify as a lay witness
- Testimony was that the majority of children she interviewed at child advocacy center delayed disclosure of sexual abuse
- Statements about behavior of children alleging sexual assault was not a proper subject for lay testimony
- Error was not harmless

EVIDENTIARY RULINGS

- *State v. Sanchez*, NMCOA No. 32,664, April 13, 2015, 2015 WL 1668494
- Second degree murder and tampering with evidence
- Allowing the State to question a witness regarding a prior act of D that led to an unrelated assault
- Chronology of events was critical:
 - During cross-examination of a State's witness, D asked witness if he recalled testifying at preliminary hearing that D was "a very nice guy, that he's very quiet and that he never really talked, that he was just a nice guy."
 - State wished to introduce evidence during rebuttal to rebut claim of D's peaceful nature
 - Rule 11-404(A) applied

EVIDENTIARY RULINGS

- *State v. Sanchez*, NMCOA No. 32,664, April 13, 2015, 2015 WL 1668494
- Trial court held that Rule 11-404(A) permitted the admission of evidence of D's character evidence
- State allowed to question witness regarding her awareness of one prior event in order to rebut the character trait placed at issue by D
- Not all three prior incidents were used to rebut
- Good example of a record, argument, and remedy fashioned by trial court
- Remedy also included a limiting instruction
- Rebuttal character evidence was admissible
- No reversible error

EVIDENTIARY RULINGS

- *State v. Garnenez*, 2015-NMCA-022, 344 P.3d 1054, cert. denied, No. 35,038, January 23, 2015
- Adequate foundation for admission of BAC and retrograde extrapolation

EVIDENTIARY RULINGS

- *State v. Martinez*, 2015-NMCA-013, 343 P.3d 194
- Thank goodness for federal prosecution
- Criminal sexual exploitation of a child; child pornography, the works
- Suppression because warrantless entry of home was unlawful
- Could the trial court consider a new argument against suppression of the victim's testimony?
- State argued that victim could testify independently; unlawful search did not preclude victim's testimony

EVIDENTIARY RULINGS

- *State v. Martinez*, 2015-NMCA-013, 343 P.3d 194
- Motion to reconsider filed by State
- Attenuation
- State had opportunity to present relevant evidence at the hearing on the motion to reconsider
- State needed to show willingness of victim to testify
- State failed to make a record
- Affirmed denial of State's motion to reconsider

EVIDENTIARY RULINGS

- *State v. Hanson*, NMCOA 33,057, March 9, 2015, 2015 WL 1022033
- Prosecution for violation of no-contact provision of a protective order
- Evidence used was the handwritten transcript of text messages
- Reversed.
- Admission of the handwritten transcripts was barred by the best evidence rule.
- Rule 11-1002 NMRA and Rule 11-1004 NMRA.

EVIDENTIARY RULINGS

- *State v. Hanson*, NMCOA No. 33,057, March 9, 2015, 2015 WL 1022033
- Best evidence rule: An original writing is required in order to prove its content unless a statute or rule provides otherwise.
- Rule 11-1002 NMRA.
- State did not offer evidence about the original texts.
- Error in admission was not harmless.
- State's case relied on the content of the inadmissible transcript to show D violated the protective order.

EVIDENTIARY RULINGS

- *State v. Winters*, NMCOA No. 32,669, February 18, 2015, 2015 WL 691351
- Larceny and criminal damage to property
- Admission of lay witness expert testimony re: shoe prints
- Evidence was inadmissible because no foundation made
- Rule 11-701 NMRA
- Testimony about similarity between shoe prints found at the scene of the theft and shoe prints found outside D's residence was improper lay witness opinion testimony

EVIDENTIARY RULINGS

- *State v. (Augustine) Tapia*, NMCOA No. 32,277, February 17, 2015, 2015 WL 674693, cert. denied, No. 35,182 (April 20, 2015)
- D challenged admission of the physician assistant's testimony about her physical findings and consistency with child abuse
 - Not qualified as an expert witness by court
 - Issue not preserved by D
 - Not fundamental or reversible error

EVIDENTIARY RULINGS

- *State v. Astorga*, 2015-NMSC-007, 343 P.3d 1245
- Trial court properly denied D the ability to call witness to impeach the testimony of another witness
- Rule 11-801 NMRA and Rule 11-613(B) NMRA – different aspects of the admission of a prior inconsistent statement
- Harmless error analysis

EVIDENTIARY RULINGS

- *State v. Astorga*, 2015-NMSC-007, 343 P.3d 1245
- State sought to introduce evidence about outstanding warrant
- Improper questioning about D's involvement in another murder
- Prior statement implied D was involved in another murder
- Fundamental error analysis
- “We acknowledge that the State's decision to impeach Defendant with that particular statement was very near the line that had been drawn by the district court.”

EVIDENTIARY RULINGS

- *State v. Ferri*, NMSCT No. 34,229, February 9, 2015, 2015 WL 560798
- Decision
- First degree murders (3)
- Las Cruces bad business dealings
- Evidentiary rulings
 - If preserved, abuse of discretion
 - If not preserved, plain or fundamental error

EVIDENTIARY RULINGS

State v. Ferri, NMSCT No. 34,229, February 9, 2015

- Whether district court erred in admitting a stipulation containing the phrase “guilty plea proceeding”

All evidentiary rulings reviewed on the entire record and harmless error analysis as part of review.

EVIDENTIARY RULINGS

- *State v. Ferri*, NMSCT No. 34,229, February 9, 2015
- Evidentiary issues:
 - Whether the district court erred in admitting evidence of D's demeanor toward the victims, Rule 11-401 NMRA, Rule 11-402 NMRA, Rule 11-403 NMRA and Rule 11-404(B) NMRA
 - Opinion testimony by lay witness
 - Whether district court erred in admitting evidence that D lied during a bankruptcy proceeding where the victims were creditors
 - Whether district court erred in admitting evidence of D's proper at issue in a civil lawsuit involving victims
 - Whether district court erred in admitting a prison telephone call between D and his mother

EVIDENTIARY RULINGS

- *State v. Duran*, 2015-NMCA-015, 343 P.3d 207
- Delayed disclosure testimony is a subject for expert testimony, not lay testimony
- Trial court "confused" the requirements of Rule 11-701 NMRA and Rule 11-702 NMRA
- Testimony was based on statistics, not personal observations

RIGHT OF CONFRONTATION

- *State v. Mark*, NMSCT No. 34,025, April 13, 2015
- Decision
- First degree murder and tampering with evidence
- Confrontation
 - Forensic pathologist who did not perform the autopsy provided his own independent and expert opinion about the cause and manner of death
 - No confrontation clause issue or violation
 - Witness relied on raw data, autopsy photographs and arrived at an independent opinion

RIGHT TO CONFRONTATION

- *State v. Garnenez*, 2015-NMCA-022, 344 P.3d 1054, cert. denied, No. 35,038, January 23, 2015
- Confrontation clause did not require live testimony concerning the blood draw

RIGHT OF CONFRONTATION

- *State v. Dorais*, 2014 WL 2367938 (NMCOA No. 32,235, May 21, 2014), cert. granted, No. 34,777 (June 2, 2014)
- 2014 WL 2367938
- Confrontation clause violated by admission of certified statement of analyst
- Following *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), although *Bullcoming* was issued after conviction

DEFENSES

- *State v. Schaublin*, 2015-NMCA-024, 344 P.3d 1074, cert. denied.
- Child solicitation by electronic communication device, Section 30-37-3.2
- Affirmed
- Undercover police officer posing as a 15 year old did not induce D to commit crime
- Subjective entrapment defense not available
- Sufficient evidence to show that D was predisposed to commit crime
- Entrapment law reviewed

DEFENSES

- *State v. Lucero*, NMCOA No. 32,864, December 17, 2014, 2014 WL 7202629
- Denial of self-defense jury instruction was reversible error
- Voluntary manslaughter
- Aggravated battery
- Sufficient evidence presented for entitlement to self-defense instruction
- Conduct was unitary for double jeopardy; convictions violated prohibition against double jeopardy
- Reversed and remanded

JURY INSTRUCTIONS

- *State v. Marquez*, NMSCT No. 33,548, March 23, 2015, rev'g, NMCOA No. 30,565 (March 7, 2012), 2012 WL 1252956
- Jury instructions:
 - First degree murder – deliberate
 - First degree murder – felony murder
 - Were the jury instructions re: intent proper?

Jury was properly instructed on the elements of each theory of first degree murder based on the uniform jury instructions.

Assumption made, absent any facts in the record showing confusion, that the jury understood and followed the instructions.

JURY INSTRUCTIONS

- *State v. (Augustine) Tapia*, NMCOA No. 32,277, February 17, 2015, 2015 WL 674693, cert. denied, No. 35,182 (April 20, 2015)
- Concurring and dissenting opinion by Judge Garcia
- CSPM and kidnapping
- Sufficiency of the evidence
- Jury instructions
- Failure to preserve issue re: witness testimony about findings were consistent with sexual abuse
- Fundamental error analysis

JURY INSTRUCTIONS

- *State v. Montoya*, 2015-NMSC-010, 345 P.3d 1056
- Child abuse
- Jury instructions were sufficient to accurately instruct the jury

JURY INSTRUCTIONS

- *State v. Lucero*, NMCOA No. 32,864, December 17, 2014, 2014 WL 7202629
- D requested a self-defense jury instruction, UJI 14-5181 NMRA
- Refused
- An instruction for self-defense must be justified by evidence for all three elements of self defense:
 - D was put in fear by an apparent danger of immediate death or great bodily harm;
 - The killing resulted from that fear; and
 - D acted reasonably when he killed.

JURY INSTRUCTIONS

- *State v. Murillo*, NMCOA No. 32,708, January 21, 2015, 2015 WL 270053
- Jury instruction was accurate and no additional instruction required for the jury to find the knife was a deadly weapon only if it could have caused death or great bodily harm
- A lovely constitutional analysis opinion and an invitation for a compelling law review article involving:
 - Right to bear arms
 - Substantive due process
 - Procedural due process
 - Equal protection

MOTION FOR MISTRIAL

- *State v. Garnenez*, 2015-NMCA-022, 344 P.3d 1054, cert. denied, No. 35,038, January 23, 2015
- Denial of D's request for a mistrial did not reflect an abuse of discretion
 - Juror prejudice
 - Emotional courtroom outburst; member of the audience began crying during testimony about one of the victim's injuries. Individual escorted out of the courtroom.

JUDICIAL MISCONDUCT

- *State v. Ferran*, NMSCT No. 33,845, March 5, 2015

PROSECUTORIAL MISCONDUCT

- *State v. Ferran*, NMSCT No. 33,845, March 5, 2015

POST-TRIAL

- Sentencing
- Probation Revocation
- Double Jeopardy

SENTENCING

- *State v. Sanchez*, NMCOA No. 32,664, April 13, 2015
- 2015 WL 1668494
- Tampering with evidence
- D testified that he threw the knife used for the stabbing out the window of his car
- Weapon never found
- Third degree felony conviction for tampering with evidence was supported by substantial evidence

SENTENCING

- *State v. Montoya*, 2015-NMSC-010
- Child abuse
- Mitigation is possible

PROBATION REVOCATION

- *State v. Dinapoli*, NMCOA No. 33,044 (April 27, 2015)
- Revocation based on violation of the sex offender supervision behavioral contract
- D was not to possess “any sexually oriented or sexually stimulating material”
- D was in possession of three R-rated movies
- Sufficient evidence presented to support violation
- No need for court to review the movies in their entirety in order to assess the nature of the movies as a whole
- Notice to D was sufficient

DOUBLE JEOPARDY

- *State v. Silvas*, 2015-NMSC-006, 343 P.3d 616, rev'g, 2013-NMCA-093
- Trafficking and conspiracy convictions for one act
- Double jeopardy or Wharton's Rule?
- Double jeopardy precludes convictions and punishments for trafficking and conspiracy arising from single act
- Single sale of drugs
- NMCOA overturned conviction for conspiracy based on Wharton's Rule
- But the NMSCT reversed on double jeopardy analysis
- "... we expressly discourage any future expansion of Wharton's Rule beyond its original contours."

DOUBLE JEOPARDY

- *Dominguez v. State*, NMSCT No. 34,295 (April 16, 2015)
- 2015 WL 1737234
- State habeas proceeding, Rule 5-802 NMRA and Rule 12-501 NMRA
- Double jeopardy analysis
- Case that overruled holding in a prior habeas corpus proceeding announced a new procedural rule
- No retroactive effect
- New double jeopardy rule did not apply retroactively
- Plus stare decisis precluded overruling case

DOUBLE JEOPARDY

- *Dominguez v. State*, NMSCT No. 34,295 (April 16, 2015), 2015 WL 1737234
- *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, held that double jeopardy bars a D from being punished for both voluntary manslaughter and shooting at or from a motor vehicle where both convictions are based on the same shooting of the same victim, overruling *State v. Dominguez*.
- *State v. Dominguez*, 2005-NMSC-001. D lost on the same arguments re: double jeopardy and double punishment.
- Sought habeas relief and the application of *Montoya*.
- *Montoya* announced a new procedural rule that cannot be applied retroactively under *Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381.

TIME FOR A DEFINITION

- “Irony”: “incongruity between the actual result of a sequence of events and the normal or expected result.”

SUBSTANTIVE CRIMES

- Child Abuse
- Criminal Sexual Assault
- Kidnapping
- First Degree Murder

CHILD ABUSE

- *State v. Montoya*, 2015-NMSC-010
- Intentional child abuse resulting in death
- Jury instructions were sufficient to accurately instruct the jury on the law
- Reckless child abuse resulting in the death of a child under 12 was a lesser included offense of child abuse resulting in the death of a child
- Abrogating *State v. Schoonmaker* and *State v. Davis*
- Admission of expert forensic pathologist's testimony was not plain error

CHILD ABUSE

- *State v. Montoya*, 2015-NMSC-010
- Evidence was sufficient to support conviction
- But trial court improperly failed to consider motivating circumstances when sentencing D
- “This case presents another example of the ongoing confusion created by our child abuse jury instructions.”
- Reckless child abuse MAY, IN SOME CASES, BE A LESSER INCLUDED OFFENSE OF INTENTION CHILD ABUSE.
- “We emphasize that the overriding concern in this case, as it was in *Cabezuela*, is that the jury’s verdict must be clear about the crime of which the defendant is convicted.”

CHILD ABUSE

- *State v. Stephenson*, 2015-NMCA-038, cert. granted, No. 35,035 (January 26, 2015)
- Criminal child abandonment
- D locked child inside bedroom while D remained outside apartment
- Child suffered severe injuries when pinned by a 112 pound dresser and his cries were not heard for an extended period of time
- Insufficient evidence to show D left child without an intent to return to support the essential element of “leaving or abandoning” element of the crime

CHILD ABUSE

- *State v. Stephenson*, 2015-NMCA-038, cert. granted, No. 35,035 (January 26, 2015)
- Conviction reversed because crime of child abandonment was not supported by the evidence
- Dismissal of conviction and vacation of sentence
- Mens rea
- Actus reus
- Who knows?
- Merely an accident?

CRIMINAL SEXUAL ASSAULT

- *State v. Tapia*, NMCOA No. 32,277, February 17, 2015, 2015 WL 674693, cert. denied, No. 35,182 (April 20, 2015)
- Evidence sufficient for CSCM convictions
- Evidence sufficient for CSPM convictions
 - Digital vaginal penetration
 - Anal penetration
 - Sexual intercourse

FIRST DEGREE MURDER

- *State v. Astorga*, 2015-NMSC-007, 343 P.3d 1245
- First degree murder of Deputy McGrane in March 2006 on willful and deliberate intent theory
- Tampering with evidence
- Felon in possession of a firearm
- Affirmed
- Many issues and a worthwhile read for all prosecutors about evidentiary rulings, standards of review, and making the record

FIRST DEGREE MURDER

- *State v. Astorga*, 2015-NMSC-007, 343 P.3d 1245
- Evidence was sufficient to show deliberation and not an impulsive killing
- A deliberate intention is rarely subject to proof by direct evidence and often must be inferred from the circumstances
- Discusses and distinguishes *State v. Garcia*, 1992-NMSC-048, 114 N.M. 269

FIRST DEGREE MURDER

- *State v. Ferri*, NMSCT No. 34,229, February 9, 2015
- Other issues raised on appeal:
 - Denial of D's challenge for cause of one juror
 - Cumulative error
 - Enhancement of aggravated burglary charge with firearm enhancement when the use of a firearm was an element of aggravated burglary; vacation of firearm enhancement was necessary on double jeopardy grounds
 - Sufficiency of the evidence
 - First degree murder
 - Aggravated burglary
 - Unlawful taking of a motor vehicle
 - Tampering with evidence

FIRST DEGREE MURDER

- *State v. Ferran*, NMSCT No. 33,845, March 5, 2015
- Sufficiency of the evidence
- Cumulative error

FIRST DEGREE MURDER

- *State v. Mark*, NMSCT No. 34,025, April 13, 2015
- Cumulative error
- Sufficiency of the evidence
 - First degree murder / accomplice liability
 - Tampering with evidence

KIDNAPPING

- *State v. Marquez*, NMSCT No. 33,548, March 23, 2015, *rev'g*, NMCOA No. 30,565 (March 7, 2012)
- Kidnapping and criminal sexual contact of a minor
- A kidnapping conviction cannot be supported by restraint or movement that is merely incidental to another defined crime
- No jury instructions about finding that the two charged offenses were separate
- On appeal, argument that kidnapping was not supported by sufficient evidence and violation of double jeopardy

KIDNAPPING

- *State v. Marquez*, NMSCT No. 33,548, March 23, 2015, *rev'g*, NMCOA No. 30,565 (March 7, 2012)
- Restraining the victim while committing CSC does not support a separate crime and conviction of kidnapping
- Following *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238, *cert. quashed*, No. 33,837, 2015-NMCERT-003.
- Other cases re: kidnapping
 - *State v. Dominguez*, 2014-NMCA-064, 327 P.3d 1092
 - *State v. Tapia*, 2015-NMCA-__, __ P.3d __ (No. 32,277, Feb. 17, 2015)
 - *State v. Crain*, 1997-NMCA-101, 124 N.M. 84

KIDNAPPING

- *State v. Marquez*, NMSCT No. 33,548, March 23, 2015, *rev'g*, NMCOA No. 30,565 (March 7, 2012)
- “Because the evidence of unlawful restraint here is indistinguishable from the evidence of force Defendant applied while committing CSCM, there is no independent evidentiary basis to support Defendant's separate kidnapping conviction for the restraint that took place when Defendant stopped the car by the side of the road to perpetrate the sexual assault.”
- Kidnapping by deception theory explored and rejected.
- Kidnapping conviction reversed.

KIDNAPPING

- *State v. Tapia*, NMCOA No. 32,277, February 17, 2015, 2015 WL 674693, cert. denied, No. 35,182 (April 20, 2015)
- Evidence insufficient to support kidnapping convictions because the State “failed to establish conduct beyond actions that were contemporaneous with and incidental to the sexual assaults.”

PLEAS

PLEA

- *State v. Winters*, NMCOA No. 32,699, February 18, 2015, 2015 WL 691351
- Conditional plea requirements: Is the issue preserved and reserved for appellate review and is it specific?
- Rule 5-304(A)(2) NMRA
- A valid conditional plea requires:
 - Preserving the issue/error through a pretrial motion;
 - Obtaining consent by the prosecution; and
 - Obtaining approval by the court.

PLEA

- *State v. Trammel*, 2014-NMCA-107, cert. granted, No. 34,826 (October 24, 2014)
- Withdrawal of plea sought following counsel's' failure to advise D regarding SORNA registration
- Ineffective assistance of counsel
- Affirms *State v. Edwards*, 2007-NMCA-043, 141 N.M. 491, imposes a duty on counsel to advise D of SORNA registration
- Retroactivity analysis applied and permitted D to withdraw plea

PLEA

- *State v. Favela*, 2015-NMSC-005, 343 P.3d 178, *aff'g*, 2013-NMCA-102, 311 P.3d 1213
- Motion to withdraw plea on claim of ineffective assistance of counsel AGAIN
- Defense counsel's failure to explain to D prior to plea hearing that he would certainly be deported as a result of the plea and conviction constituted deficient performance, and satisfied the first prong of *Strickland*
- Judicial warning made during the plea colloquy about immigration consequences was insufficient to cure defense counsel's deficient performance
- And same warning did not cure the prejudice resulting from counsel's failure to advise
- But the type of evidence of prejudice required for the second prong of *Strickland* shall be determined on a case-by-case basis

PLEA

- *State v. Pfauntsch*, NMSCT No. 34,476, February 9, 2015, 2015 WL 561896, rev'g, NMCOA No. 31,675 (November 26, 2013), 2013 WL 6662544
- Motion to publish denied
- Claim that the plea was invalid because D was not advised by counsel of the immigration and naturalization consequences
- D was a naturalized United States citizen
- D admitted that he was a United States citizen during the plea colloquy and that he had been advised
- NMCOA ignored record and decided D was a German national and United States permanent resident and suffered IAC

PLEA

- *State v. Pfauntsch*, NMSCT No. 34,476, February 9, 2015, *rev'g*, NMCOA No. 31,675 (November 26, 2013)
- NMSCT took judicial notice that D was a United States citizen, possessed a United States passport
- Overview of naturalization process
- NMCOA engaged in a “false premise” that D was not a United States citizen
- News flash: A United States citizen cannot be deported and cannot suffer any denaturalization consequences by entry of a plea
- “Accordingly, an ineffective assistance of counsel claim for failure to advise of immigration or naturalization consequences is not available when Defendant's status is a United States citizen.”

PLEA

- *State v. Tejeiro*, 2015-NMCA-029, cert. pet. filed and pending, No. 35,110 (April 13, 2015)
- Motion to withdraw guilty plea
- D was a Cuban immigrant
- Defense counsel rendered deficient performance regarding pre-trial advice on immigration consequences of guilty plea
- Deficient performance, of course, prejudiced D
- Trial court applied incorrect standard for analyzing prejudice prong
- Plea was not knowing and voluntary

INEFFECTIVE ASSISTANCE OF COUNSEL

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Astorga*, 2015-NMSC-007, 343 P.3d 1245
- Claim made that defense counsel “failure to litigate” the dispatch call was reversible error because the call was evidence of “actual innocence” and failure to litigate violated the Sixth Amendment right to effective assistance of counsel
- Gary Mitchell
- Confusion about dispatcher code and sequence of events
- Not fundamental error
- Not ineffective assistance of counsel on direct appeal

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Vigil*, 2014-NMCA-096, cert. granted, 2014-NMCERT-9
- *Duran* conclusive presumption of IAC applied when counsel failed to timely file a notice of appeal
- *Duran* is “firmly rooted in this State’s jurisprudence”
- Ongoing dispute about whether a conclusive presumption applies when *Strickland v. Washington* requires a two-part analysis and limits the application of any conclusive presumption

WANT AD

- Criminal Appeals Division of the Office of the Attorney General (OAG)
- As of April 24, 2015, five open positions for staff attorneys
- Please send any letter of interest, resume, three references, and official law school transcript to:
Valerie Gallegos
HR Administrator
Office of the Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508

FINAL WORDS

- Congratulations and best wishes to Attorney General Hector Balderas.
- My gratitude to the hard working and dedicated attorneys of the Criminal Appeals Division. Every day and despite the obstacles.
- And even more thanks to Claire Welch and Rose Leal for everything, seen and unseen.
- And, last, my heartfelt appreciation to you for your service as prosecutors for the people of the State of New Mexico.

CIAO