2022 NMDAA/AODA
Spring Conference
May 12, 2022

Appellate Update

Office of the New Mexico Attorney General

John Kloss,
Assistant Attorney General
Director, Criminal Appeals Division

Charles J. Gutierrez,
Assistant Attorney General

Zach Jones,
Assistant Attorney General,
Senior Criminal Counsel

Emily Tyson-Jorgenson,
Assistant Attorney General

Van Snow,
Assistant Attorney General

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OVERVIEW

Overview

Coverage Period:
11/10/21 - 5/10/22

- Recent developments
- Case outcomes
  - All NMSC outcomes, with or without precedential value
  - NMCA outcomes of precedential value (except where noted)

Overview

Coverage Period:
11/10/21 - 5/10/22

- Q & A: at end (time permitting)
- Contact Info & Resources: also at end
- Slido stuff throughout

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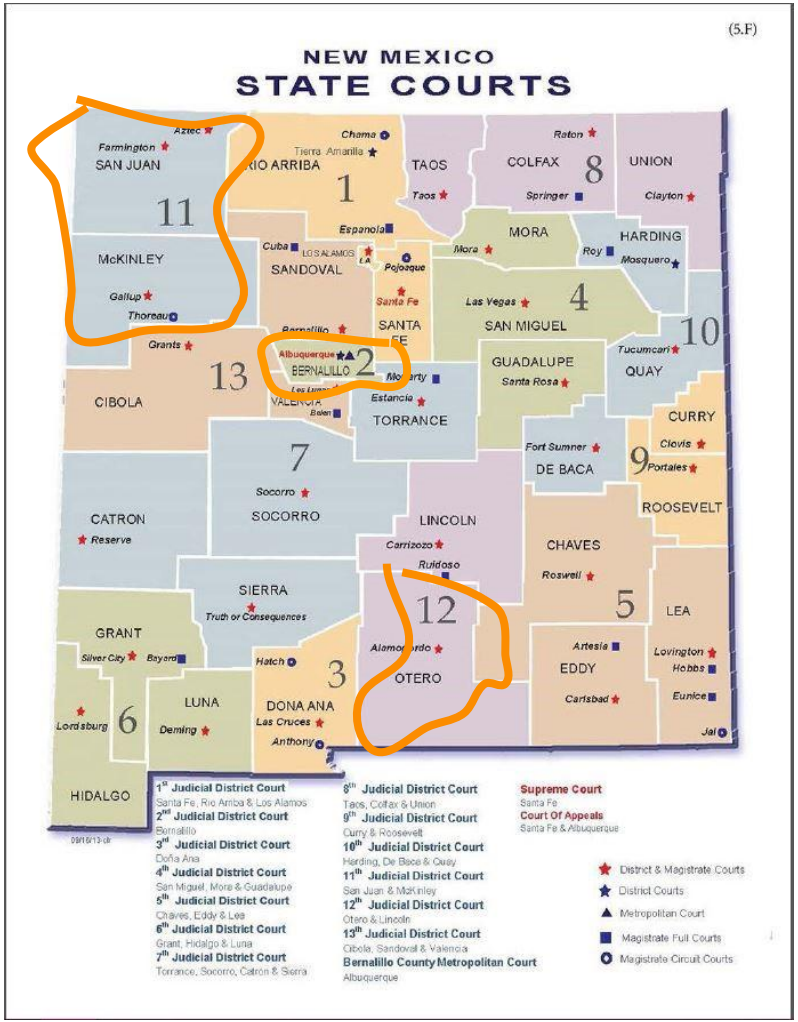
RECENT DEVELOPMENTS

Recent Developments

- Pilot Project now implemented in 2nd, 11th, and 12th Districts
- Citation Rule Revision



PILOT PROJECT

- NMCA is moving away from summary calendar; Project started Oct. 2019
- Special appellate rules now govern in the 2nd, 11th, & 12th districts
- Applicable to criminal cases where LOPD was last trial counsel in district court and is counsel on appeal
- Once NOA filed, district court provides entire record to NMCA & the parties
- In such cases, no docketing statements
- In a State's appeal, C.A. Division handles the brief in chief; we'll reach out if more info is needed; please reach out to us if there is important info we should know.

Nonprecedential (unpublished) appellate opinions

~~*Heard v. Depp*, No. 38,500, dec. at 42 (N.M. Sup. Ct. May 12, 2021 (non-precedential).~~

Heard v. Depp, S-1-SC-38,500, dec. ¶ 79 (N.M. May 12, 2021) (nonprecedential).

Precedential opinion not yet assigned a citation:

~~*Depp v. Heard*, 2022-NMSC-___, ¶ 88 (No. 39,000, May 12, 2022).~~

Depp v. Heard, ___-NMSC-___, ¶ 88 (S-1-SC-39000, May 12, 2022).

REVISED CITATION RULE (23-112)

- Revised version of Rule 23-112 NMRA (citation rule) took effect this year
- Applicable to pleadings/papers filed in the courts of this state on/after 3/31/2022
- Reflects new appellate courts number formatting (e.g., S-1-SC-37997 or A-1-CA-38455, rather than "No. 37,997" or "No. 38,455")
- "N.M. Sup. Ct" now just "N.M."
- **"(non-precedential)" is now "(nonprecedential)"[!]**
- Etc. – *see* Rule 23-112

CASE OUTCOMES

CASE OUTCOMES

5 Main Issue Categories

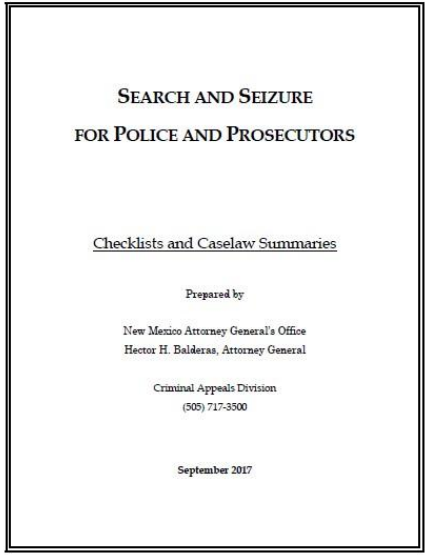
- Lawfulness of Seizure/Search
- Other Constitutional Issues
- Elements, Instructions, & Sufficiency
- Evidentiary Issues
- ~~Misc.~~ “Special Topics”

Lawfulness of Seizure/Search

Search & Seizure Manual

New Mexico Attorney General's Office Search & Seizure Manual for Prosecutors

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



SEARCH AND SEIZURE

FOR POLICE AND PROSECUTORS

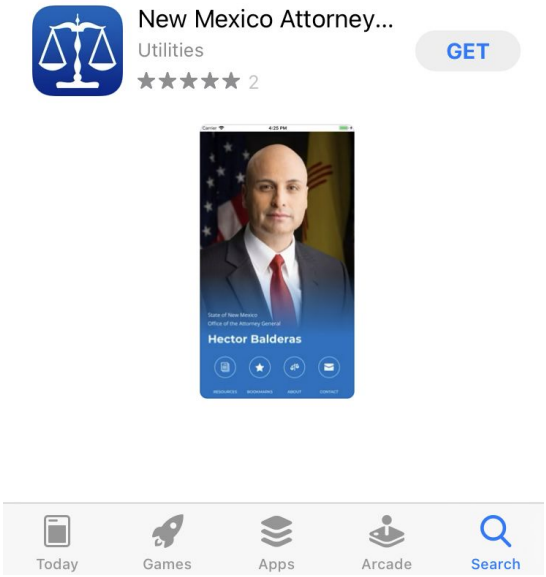
Checklists and Caselaw Summaries

Prepared by

New Mexico Attorney General's Office
Hector H. Balderas, Attorney General

Criminal Appeals Division
(505) 717-3500

September 2017



Lawfulness of Seizure/Search

- Reasonable Suspicion
- Inventory Searches
- Section 30-3-6 warrantless arrest for, e.g., battery; reasonableness under N.M. Constitution
- Section 66-8-124 unauthorized “arrest” of driver; unreasonableness under N.M. Constitution
- Search Warrants (probable cause)

Reasonable Suspicion

RS motion did not have sufficient particularity as to need for witness at trial; court erred in dismissing based on unavailability of witness

State v. Davis Hebenstreit, __-NMCA-__ (A-1-CA-38654, Apr. 12, 2022). [MF]

- State appealed from metro court order dm'g the complaint. **QP:** Did district court err in dismissing based on unavailability of checkpoint Sgt., where Def's motion to suppress challenged RS but did not challenge constitutionality of checkpoint?
- **FACTS:** After stop and investigation at DWI checkpoint, police arrested Hebenstreit for agg. DWI (refusal).
- Hebenstreit filed motion to suppress arguing that deputy who contacted him at checkpoint lacked RS to detain him.

FILED IN THIS OFFICE
TIME 10
OCT 04 2019
CLERK-METROPOLITAN COURT
BY

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE METROPOLITAN COURT

Judge Weals

STATE OF NEW MEXICO,
Plaintiff,

vs.

T-4-DW-2019-993

TODD HEBENSTREIT,
Defendant.

MOTION TO SUPPRESS BASED UPON
LACK OF REASONABLE SUSPICION TO DETAIN
Request for Half Hour Hearing:

Comes Now, defendant, by and through counsel, Joseph Sullivan, and requests this court dismiss this case based upon lack of reasonable suspicion to detain the defendant.

STATEMENT OF THE FACTS

1. The defendant was detained by law enforcement, unlawfully.
2. Mr. Hebenstreit is not alleged to have committed any violation of law prior to being detained by law enforcement.

STATEMENT OF THE LAW

All evidence obtained following this unlawful stop is fruit of a 4th Amendment violation and a violation under Article II Section 10 of the New Mexico Constitution.

"When an officer stops an automobile to investigate a possible crime, we analyze the reasonableness of the stop and ensuing investigatory detention in accordance with the two-part test in *Terry v. Ohio*, 392 U.S. 1 (1968)." *See State v. Duran*, 2005-NMSC-034, ¶ 23, 138 N.M. 414, 120 P.3d 836.

"We ask whether the stop was justified at its inception and whether the officer's actions during the stop were reasonably related to circumstances that justified the stop. *Id.* In order for the stop to be justified at its inception, "[t]he officer, looking at the totality of the circumstances, must be able to form a reasonable suspicion that the individual in question is engaged in or is about to be engaged in criminal activity." *State v. Contreras*, 2003-NMCA-129, ¶ 5, 134 N.M. 503, 79 P.3d 1111.

"A reasonable suspicion is a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law." *Jason L.*, 2000-NMSC-018, ¶ 20.

Under Fourth Amendment standards, a police officer making a lawful stop "may conduct an investigation reasonably related to the circumstances that gave rise to the officer's reasons for the stop." *State v. Williamson*, 2000-NMCA-068, ¶ 8, 129 N.M. 387, 9 P.3d 70. The officer may expand this investigation if the officer has reasonable and articulable suspicion that other criminal activity has been or may be afoot.... The officer's investigation, of course, is limited to a reasonable inquiry that is designed to satisfy the officer's reasonable suspicions. Moreover, the officer's investigation of any reasonable suspicion must proceed diligently. *Id.* (internal quotation marks and citations omitted). Following a valid stop and reasonably related investigation, further detention requires reasonable suspicion of criminal activity. *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 20, 130 N.M. 386, 25 P.3d 225; *State v. Lowe*, 2004-NMCA-054, ¶ 12, 135 N.M. 520, 90 P.3d 539.

ARGUMENT

In this case, Deputy Gallegos did not have reasonable suspicion to detain the defendant initially, nor to detain beyond the scope of the initial traffic stop.

Respectfully submitted,

This will certify that a copy hereof was placed in the District Attorney's incoming basket in the office of the Clerk of the Metropolitan Court on 10-4-19

Counsel for the Defendant

By:
Joseph Sullivan, Attorney at Law
315 Central NW Suite 207
Albuquerque, NM 87102
(505) 620-3895 FAX (505) 212-0622

RS motion did not have sufficient particularity as to need for witness at trial; court erred in dismissing based on unavailability of witness

State v. Davis Hebenstreit, __-NMCA-__ (A-1-CA-38654, Apr. 12, 2022).

- At trial setting, Deputy present but checkpoint Sgt. not.. Judge reviews Rule 7-304, concludes that motion to suppress had enough specificity to trigger need for Sgt.'s testimony, and therefore DM's.
- State appeals; argues that Metro court erroneously DM'd b/c motion did not attack constitutionality of checkpoint with adequate particularity under Rule 7-304, and checkpoint Sgt.'s testimony was therefore unnecessary at trial. **COA analysis:**
- Motions "shall state with particularity the grounds therefor." Rule 7-304.

RS motion did not have sufficient particularity as to need for witness at trial; court erred in dismissing based on unavailability of witness

State v. Davis Hebenstreit, __-NMCA-__ (A-1-CA-38654, Apr. 12, 2022).

- Def's have the burden to raise issue as to illegality of search/seizure, then burden shifts to State to justify a warrantless search or seizure. *State v. Ponce*, 2004-NMCA-137, ¶ 7, 136 N.M. 614.
- Legality of checkpoint stop and legality of investigative detention arising from that stop are distinct issues such that raising one does not necessarily implicate the other.
- **HELD:** Motion was insufficiently particular to alert Metro court or State that the alleged grounds for suppression related to the checkpoint's illegality.

RS motion did not have sufficient particularity as to need for witness at trial; court erred in dismissing based on unavailability of witness

State v. Davis Hebenstreit, __-NMCA-__ (A-1-CA-38654, Apr. 12, 2022).

- Burden to show legality of checkpoint therefore didn't shift to State.
- B/c legality of checkpoint was not at issue, checkpoint Sgt.'s limited testimony as to the checkpoint's legality would not have been necessary at trial.
- Metro court therefore erred in Dm'g the case based on Sgt.'s unavailability to testify at trial.
- Memorandum Opinion –> State filed Motion to "Publish" (i.e., make it precedential) –> NMCA granted –> reissued as precedential opinion.

Def's proximity to scene of recent crime, along with surrounding circumstances, provided reasonable suspicion for investigatory stop

State v. Donald Wing, __-NMCA-__ (A-1-CA-38763, Dec. 20, 2021), *cert. denied* (S-1-SC-39182, Feb. 15, 2022). [WH]

- Wing appealed from consub conviction. **QP:** Did district court err in denying motion to suppress in which Wing argued that police lacked RS for investigatory stop that culminated in arrest and discovery of consub evidence?
- **FACTS:** Officer patrolling at night spotted truck with multiple people dumping trash in lot known for suspicious activity.
- Officer turned around back toward the location; truck gone; officer sees only Wing walking a bicycle.

Def's proximity to scene of recent crime, along with surrounding circumstances, provided reasonable suspicion for investigatory stop

State v. Donald Wing, __-NMCA-__ (A-1-CA-38763, Dec. 20, 2021), *cert. denied* (S-1-SC-39182, Feb. 15, 2022).

- Without activating lights or telling Wing to stop, officer approached Wing & asked about activity in lot. Wing immediately admitted to dumping trash there.
- Officer obtained identifiers from Wing, learned Wing had outstanding warrant, and arrested him. Search incident to arrest yielded meth & drug paraphernalia.
- Wing moved to suppress, arguing (1) he was seized when officer began to question him; and (2) seizure was unconstitutional due to lack of reasonable suspicion.

Def's proximity to scene of recent crime, along with surrounding circumstances, provided reasonable suspicion for investigatory stop

State v. Donald Wing, __-NMCA-__ (A-1-CA-38763, Dec. 20, 2021), *cert. denied* (S-1-SC-39182, Feb. 15, 2022).

- Dist. court: DENIED. No seizure; alternatively, RS supported stop.
- Conditional GP. On appeal, Wing claimed no RS that he was involved in dumping offense. **COA's analysis:**
- In context of circumstances known to officer, Wing's physical and temporal proximity to the scene of a recent crime (illegal dumping) was significant.
- The lot was known for criminal activity (the illegal dumping).

Def's proximity to scene of recent crime, along with surrounding circumstances, provided reasonable suspicion for investigatory stop

State v. Donald Wing, __-NMCA-__ (A-1-CA-38763, Dec. 20, 2021), *cert. denied* (S-1-SC-39182, Feb. 15, 2022).

- It was cold (January) and dark (1:15 am) – ("[i]t was unusual for anyone to be out given the time of day and the conditions").
- Wing was the only person in the area.
- **HELD:** Def's proximity to scene of recent crime, along with surrounding circumstances, provided RS for investigatory stop; because RS supported stop, district court did not err in denying motion to suppress.
- Cert. denied

Inventory Searches

Under 4th Amendment, circumstances did not satisfy criteria for constitutionally reasonable inventory search of arrested Defendant's vehicle

State v. Andrew Ontiveros, __-NMCA-__ (A-1-CA-37870, Dec. 20, 2021), *cert. granted* (S-1-SC-39186, Mar. 29, 2022). [BL]

- Ontiveros appealed his convictions for consub possession and driving on a revoked license. **QP:** Did district court err in denying motion to suppress in which Ontiveros argued that the inventory search of his vehicle violated federal & state constitutions?
- **FACTS:** When officer initiated traffic stop for cracked windshield and broken taillight, Ontiveros pulled over at a trailer park.
- Officer learned Ontiveros' DL was revoked. Ontiveros stated that Grandma is registered owner of vehicle, and that trailer next to vehicle is Grandma's home. Officer verified that registered owner of car was Grandma, but not whether trailer was Grandma's home.


Aquatic Center
1124 Fairgrounds Rd,
Farmington, NM 87401
Alexander Trailer Court
Home Sweet Home
Vine Ave
Fairgrounds Rd
Fairgrounds Rd


Google

Under 4th Amendment, circumstances did not satisfy criteria for constitutionally reasonable inventory search of arrested Defendant's vehicle

State v. Andrew Ontiveros, __-NMCA-__ (A-1-CA-37870, Dec. 20, 2021), *cert. granted* (S-1-SC-39186, Mar. 29, 2022).

- Officer arrested Ontiveros for driving revoked. Ontiveros (& his passenger) asked if car could be left there, or if Grandma could be contacted. Officer replied car would be towed per policy.
- Inventory search revealed, among other things, meth that formed basis of consub charge.
- Ontiveros filed motion to suppress evidence from inventory search.
- Per suppression hearing evidence (including copy of agency's policy):

Under 4th Amendment, circumstances did not satisfy criteria for constitutionally reasonable inventory search of arrested Defendant's vehicle

State v. Andrew Ontiveros, __-NMCA-__ (A-1-CA-37870, Dec. 20, 2021), *cert. granted* (S-1-SC-39186, Mar. 29, 2022).

- (1) car was towed per agency policy; (2) policy instructs officers to tow only when reasonably necessary; (3) officer was not required to tow but it was his standard practice every time he arrests a driver, and although he knew car was at owner's home, he believed tow was necessary to protect the vehicle.
- District court found that vehicle was in parking space belonging to Grandma's trailer, but denied motion to suppress because car and contents were items of value that could be stolen and subject law enforcement to liability.

Under 4th Amendment, circumstances did not satisfy criteria for constitutionally reasonable inventory search of arrested Defendant's vehicle

State v. Andrew Ontiveros, __-NMCA-__ (A-1-CA-37870, Dec. 20, 2021), *cert. granted* (S-1-SC-39186, Mar. 29, 2022).

- Conditional GP. On appeal, Ontiveros argued inventory search unreasonable under federal & state constitutions. **COA's analysis:**
- Warrantless searches are presumptively unreasonable & State has burden of proving that exception to warrant requirement applies.
- *State v. Davis*, 2018-NMSC-001: inventory search valid under 4th Amend. requires:
  - (1) Police have custody or control over object of search;
  - (2) Search conducted in conformity with established police regs;
  - (3) Search is reasonable

Under 4th Amendment, circumstances did not satisfy criteria for constitutionally reasonable inventory search of arrested Defendant's vehicle

State v. Andrew Ontiveros, __-NMCA-__ (A-1-CA-37870, Dec. 20, 2021), *cert. granted* (S-1-SC-39186, Mar. 29, 2022).

- *Prong 1*: A central question is whether object made unsecure by arrest. *Under these facts object not made unsecure by arrest b/c car was in parking spot of Grandma's trailer*.
- *Prong 2*: *Search not conducted per policy* – Dept. policy says officer may tow when "reasonably necessary" but also may consider alternative methods of releasing vehicle to owner. But officer stated that it was always his policy to tow upon arrest of driver.

But see State v. Byrom, 2018-NMCA-016, ¶¶ 29-30, 37.

Cert. granted.

Under 4th Amendment, circumstances did not satisfy criteria for constitutionally reasonable inventory search of arrested Defendant's vehicle

State v. Andrew Ontiveros, __-NMCA-__ (A-1-CA-37870, Dec. 20, 2021), *cert. granted* (S-1-SC-39186, Mar. 29, 2022).

- *Prong 3*: *Inventory search unreasonable* – "[W]e are unconvinced that an individual holds a colorable claim against law enforcement for secured property that was lost or stolen from the place it would remain whether or not the individual was arrested."
- **HELD:** State did not carry its burden to demonstrate validity of search. District court erred in denying motion to suppress. Consub and driving revoked convictions reversed.

Although Fourth Amendment permitted warrantless search of locked gun safe as part of inventory search of vehicle Defendant had with him at time of arrest, N.M. Const. Art. II, § 10 did not.

State v. Leo Jim, __-NMCA-__ (A-1-CA-36024, Jan. 31, 2022). [LW]

- Jim appealed from consub conviction. **QP:** Did district court err in denying motion to suppress Jim based in part on a claim that warrantless search of locked gun safe during course of automobile inventory search violated N.M. Const. art. II, § 10?
- **FACTS:** Police went to shopping center parking lot responding to report that Jim was driving around for hours & didn't leave at request of security.
- Officer arrested Jim for trespassing, decided to impound Jim's truck, used Jim's keys to open locked door of truck, & began to inventory contents.

Although Fourth Amendment permitted warrantless search of locked gun safe as part of inventory search of vehicle Defendant had with him at time of arrest, N.M. Const. Art. II, § 10 did not.

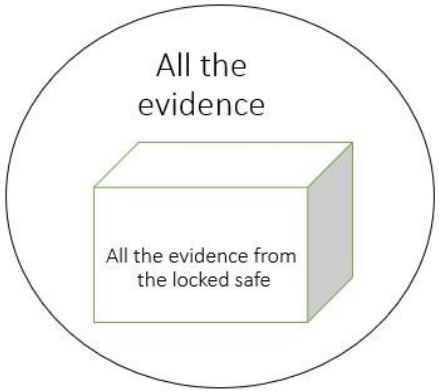
State v. Leo Jim, __-NMCA-__ (A-1-CA-36024, Jan. 31, 2022).

- Officer found drug paraphernalia under driver's side door mat, then found locked gun safe under rear seat & removed it for safekeeping pending owner pickup.
- Officer found safe key on Jim's key ring and used it to unlock safe. Inside safe: handgun & heroin.
- State charged Jim w/CT, poss. consub (heroin) & paraphernalia. Jim filed motion to suppress all evidence illegally obtained as fruit of warrantless search/seizure in violation of federal/state constitutions.

Although Fourth Amendment permitted warrantless search of locked gun safe as part of inventory search of vehicle Defendant had with him at time of arrest, N.M. Const. Art. II, § 10 did not.

State v. Leo Jim, __-NMCA-__ (A-1-CA-36024, Jan. 31, 2022).

- District court denied motion. Conditional GP. Issue on appeal: Whether warrantless search of locked gun safe during automobile inventory search violated N.M. Const. art. II, § 10. **COA analysis:**
- Generally, where police follow standard procedures, Fourth Amendment does not prohibit opening of locked container during inventory search of auto. Search of locked gun safe in this case OK under 4th Amendment because it was conducted pursuant to standardized police policy, and there was no claim of bad faith or pretext.



Although Fourth Amendment permitted warrantless search of locked gun safe as part of inventory search of vehicle Defendant had with him at time of arrest, N.M. Const. Art. II, § 10 did not.

State v. Leo Jim, __-NMCA-__ (A-1-CA-36024, Jan. 31, 2022).

- Court explains that under Art. II, § 10, reasonableness of inventory search is determined by balancing the need for the search in a particular case against the intrusion upon an individual's privacy interest.
- Search of locked gun safe had little, if any, utility for inventory purposes and it infringed a substantial privacy interest. **HELD:** Search was unreasonable under Art. II, § 10, and district court therefore erred in denying motion to suppress; all evidence obtained as a result of the search must be suppressed.

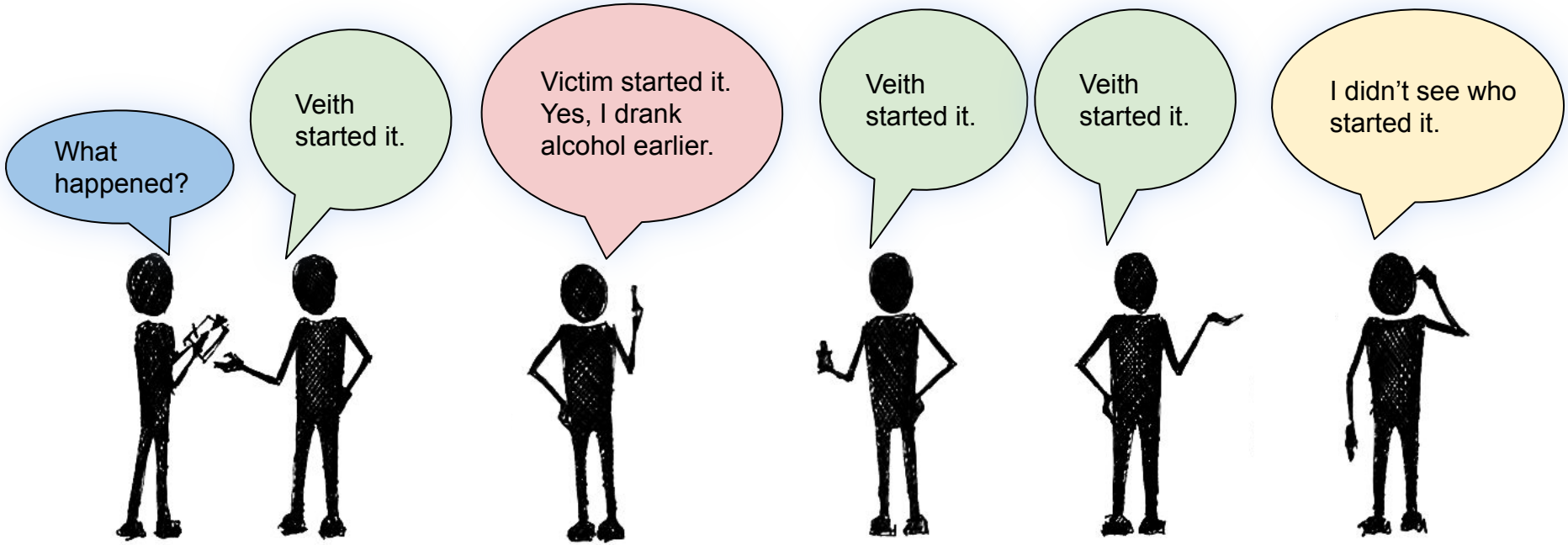
Section 30-3-6 warrantless arrest for, *e.g.*, battery; reasonableness under N.M. Constitution

Section 30-3-6 permitted warrantless arrest for battery, which was reasonable under N.M. Const. because officer developed probable cause at scene

State v. April Veith, __-NMCA-__ (A-1-CA-39059, Feb. 3, 2022). [JK]

- State appealed from district court order remanding to magistrate court for imposition of mag. court's order of dismissal. **QP:** Did district err in upholding the magistrate court's dismissal based on conclusions that: (1) Section 30-3-6 did not authorize the warrantless arrest of Veith for battery; and (2) the warrantless arrest was unreasonable under the N.M. Constitution?
- **FACTS:** Dispatch sent deputy to school parking lot to investigate report that Veith had attacked someone there. Upon arrival, Deputy saw multiple people attempting to keep Veith and Victim apart.

The On-Scene Investigation



Section 30-3-6 permitted warrantless arrest for battery, which was reasonable under N.M. Const. because officer developed probable cause at scene

State v. April Veith, __-NMCA-__ (A-1-CA-39059, Feb. 3, 2022).

- Deputy arrested Veith without warrant; charged batt. in mag. ct.
- Veith moved to dismiss under the misdemeanor arrest rule, arguing that the arrest was unlawful because it was for a misdemeanor that occurred outside the presence of the officer. Magistrate court agreed/dismissed. State appealed to district court – similar outcome.

FILED
11th JUDICIAL DISTRICT COURT
San Juan County
5/4/2020 4:54 PM
WELDON J. NEFF
CLERK OF THE COURT
Christy Hager

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,
Plaintiff,

v. No. **D-1116-LR-2020-00021**

APRIL VEITH,
Defendant.

ORDER AND REMAND TO MAGISTRATE COURT

THIS MATTER having come before the Court on May 1, 2020, and the Court having been fully apprised of the premises, finds the following:

1. Personal freedom is the highest liberty protected by the United States and New Mexico Constitutions.
2. The case cited by the State, *State v. Paananen*, 2015-NMSC-31, is not applicable and no exigent circumstances existed that would excuse the officer's failure to obtain a warrant.
3. NMSA, Section 30-3-6 provides a legislated exception to the Misdemeanor Arrest Rule, and does not apply under the facts of this matter.
4. It is uncontroverted that this incident did not take place in the presence of Deputy Jacob DePrez, the arresting deputy, and there is no applicable exception to the Misdemeanor Arrest Rule, therefore this arrest was illegal.

NOW THEREFORE, IT IS HEREBY ORDERED that this matter is hereby remanded to Magistrate Court for imposition of the Magistrate Court's original order.

DISTRICT JUDGE

Respectfully submitted and approved by:

/s/ Arlon L. Stoker
Arlon L. Stoker
Attorney for Defendant

Submitted and approved as to form by:

/s/ Gertrude Lee
Gertrude Lee
Assistant District Attorney

ELEVENTH JUDICIAL DISTRICT COURT
SAN JUAN COUNTY
STATE OF NEW MEXICO

FILED
11th JUDICIAL DISTRICT COURT
San Juan County
5/26/2020 8:34 AM
WELDON J. NEFF
CLERK OF THE COURT
Christy Hager

STATE OF NEW MEXICO,
Plaintiff-Appellant,

v. **No. D-1116-LR-2020-00021-4**

APRIL VEITH,
Defendant-Appellee,

NOTICE OF APPEAL

The State of New Mexico, plaintiff-appellant, appeals to the New Mexico Court of Appeals from the Order Granting Defendant's Motion to Dismiss or in the Alternative to Suppress Evidence filed on April 07, 2020, in this case.

I certify that this appeal is not taken for the purpose of delay, and the evidence is a substantial proof of a fact material in the proceeding.

Respectfully submitted,

ROBERT (RICK) P. TEDROW
District Attorney
Eleventh Judicial District
335 S. Miller Ave.
Farmington, New Mexico 87401
(505) 599-9810

GERTRUDE LEE
Assistant District Attorney

(GL) (oa)
DA / Defense: Arlon Stoker

Section 30-3-6

§ 30-3-6. Reasonable detention; assault, battery, public affray or criminal damage to property

Currentness

A. As used in this section:

(1) “licensed premises” means all public and private rooms, facilities and areas in which alcoholic beverages are sold or served in the customary operating procedures of establishments licensed to sell or serve alcoholic liquors;

(2) “proprietor” means the owner of the licensed premises or his manager or his designated representative; and

(3) “operator” means the owner or the manager of any establishment or premises open to the public.

B. Any law enforcement officer may arrest without warrant any persons he has probable cause for believing have committed the crime of assault or battery as defined in Sections 30-3-1 through 30-3-5 NMSA 1978 or public affray or criminal damage to property. Any proprietor or operator who causes such an arrest shall not be criminally or civilly liable if he has actual knowledge, communicated truthfully and in good faith to the law enforcement officer, that the persons so arrested have committed the crime of assault or battery as defined in Sections 30-3-1 through 30-3-5 NMSA 1978 or public affray or criminal damage to property.

Section 30-3-6 permitted warrantless arrest for battery, which was reasonable under N.M. Const. because officer developed probable cause at scene

State v. April Veith, __-NMCA-__ (A-1-CA-39059, Feb. 3, 2022).

- **COA Analysis (30-3-6):**
- Plain language of § 30-3-6 provides that so long as an arresting officer has probable cause that a battery or one of the other crimes listed has occurred, the officer has authority to perform a warrantless arrest. It does not limit arrests based on location of the alleged crime.
- Facts sufficiently established probable cause Veith committed battery.
- 30-3-6 provided Deputy statutory authority to arrest without warrant.

Section 30-3-6 permitted warrantless arrest for battery, which was reasonable under N.M. Const. because officer developed probable cause at scene

State v. April Veith, __-NMCA-__ (A-1-CA-39059, Feb. 3, 2022).

- **COA Analysis (Reasonableness under N.M. Const. Art. II, § 10):**
- Under *State v. Paananen*, 2015-NMSC-031, a warrantless arrest supported by probable cause is reasonable if some exigency existed that precluded the officer from securing a warrant. An on-scene arrest will usually supply the requisite exigency.
- Facts in this case satisfied the formula articulated in *Paananen*; arrest was reasonable under N.M. Const.
- Reversed/remanded for further proceedings.

- Section 66-8-124 unauthorized “arrest” of driver; unreasonableness under N.M. Constitution

Arrest of driver by individual lacking arrest authority under Section 66-8-124(A) resulted in unreasonable seizure under N.M. Constitution

State v. Somer D. Wright, 2022-NMSC-009, 503 P.3d 1161 (S-1-SC-37589, Jan. 10, 2022). **CG**

- **Facts:** A volunteer reserve deputy (RD) observed D driving erratically (weaving back and forth in between lane and crossing the white edge line) and speeding (85 mph in a 55 MPH zone) around midnight on a rural highway in Torrance County. The RD was driving a marked patrol vehicle and in a uniform displaying a badge of office, but he was not a commissioned officer. The RD contacted a commissioned deputy, who instructed the RD to follow D.

Arrest of driver by individual lacking arrest authority under Section 66-8-124(A) resulted in unreasonable seizure under N.M. Constitution

State v. Somer D. Wright, 2022-NMSC-009, 503 P.3d 1161 (S-1-SC-37589, Jan. 10, 2022). **CG**

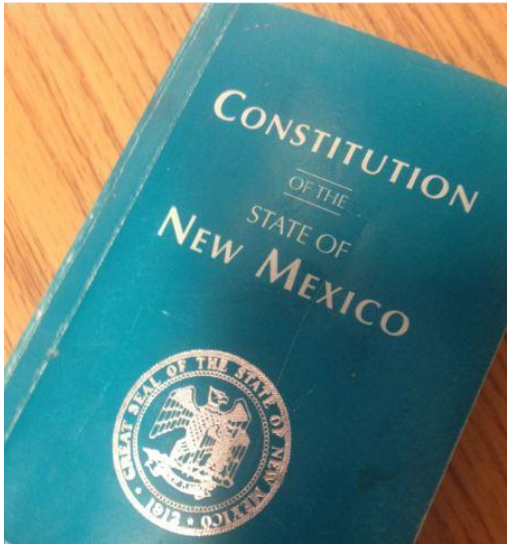
- The RD followed D to her residence. D pulled into her driveway and hit a parked car. The RD parked parallel to the street and behind D, who then backed up and almost hit his patrol car. The RD turned on his spotlight, approached D, identified himself as a reserve deputy, and asked if D had anything to drink, to which D responded that she had four green beers. The RD told her her to “hang tight” and returned to his patrol vehicle. The commissioned deputy arrived 4-5 minutes later.

Arrest of driver by individual lacking arrest authority under Section 66-8-124(A) resulted in unreasonable seizure under N.M. Constitution

State v. Somer D. Wright, 2022-NMSC-009, 503 P.3d 1161 (S-1-SC-37589, Jan. 10, 2022). **CG**

- **Issue:** Whether RD's seizure of D violated Article II, Section of the New Mexico Constitution. The district court found the detention was constitutionally unreasonable, and the COA reversed in a split opinion
- **Conceded in the district court that** (1) RD detained D, (2) RD's detention of D constitutes an unlawful "arrest" that violated NMSA 1978, § 66-8-124 (2007), which requires that any arrest for a violation of the MVC or other law relating to motor vehicles be effectuated by a "commissioned, salaried peace officer." **On appeal, D did not contend that** the unlawful arrest violated the Fourth Amendment

Arrest of driver by individual lacking arrest authority under Section 66-8-124(A) resulted in unreasonable seizure under N.M. Constitution



State v. Somer D. Wright, 2022-NMSC-009, 503 P.3d 1161 (S-1-SC-37589, Jan. 10, 2022). **CG**

- **Holding:** "the failure to observe the requirements of Section 66-8-124(A) resulted in an illegal arrest . . . and violated Article II, Section 10 of the New Mexico Constitution."
- **Analysis:** The Court applied a balancing-of-interests test in evaluating the arrest under the NM Constitution, which "balances on the one hand, the degree to which the arrest intrudes on an individual's privacy and, on the other, the degree to which the arrest is needed for the promotion of legitimate governmental interests."

Arrest of driver by individual lacking arrest authority under Section 66-8-124(A) resulted in unreasonable seizure under N.M. Constitution

State v. Somer D. Wright, 2022-NMSC-009, 503 P.3d 1161 (S-1-SC-37589, Jan. 10, 2022). **CG**

- **Intrusion on privacy –** The statute reflects a legislative determination that the intrusion by anyone other than a commissioned officer outweighs any governmental interest. The RD here also used a spotlight on D's property and prevented her from entering her home. **Governmental interest -** The district court's factual findings did not support State's claim that arrest furthered its interest in deterring drunk driving or in maintaining a safe roadway. At the time of arrest, D no longer posed threat to the motoring public. **Balancing –** The intrusion on D's privacy outweighs the government interests

Other Constitutional Issues

Other Constitutional Issues

- Search Warrants
- Speedy Trial
- Miranda
- Double jeopardy (Unitary conduct)
- Double Jeopardy (Sentencing)
- Double Jeopardy (As Bar to Retrial)
- Ineffective Assistance
- Eyewitness Identification and Due Process

Search Warrants

District court properly concluded that probable cause supported search warrant, and therefore properly denied motion to suppress evidence recovered during execution of warrant

State v. Gregory A. Wood, 2022-NMCA-009, 504 P.3d 579 (No. A-1-CA-38469, Dec. 6, 2021) **LW**

- **Facts:** On 12/18/14, LE responded to an alarm at an auto shop. The first officer observed a man with white or blonde hair wearing a black jacket jump over a fence. A second officer observed a person matching that description in an adjacent parking lot, enter a Camaro, and flee. LE discovered it was registered to D's father. LE then received a tip that D drove the vehicle to an address later determined to be his home. Based on these facts, a court issued a warrant for D's home.

District court properly concluded that probable cause supported search warrant, and therefore properly denied motion to suppress evidence recovered during execution of warrant

State v. Gregory A. Wood, 2022-NMCA-009, 504 P.3d 579 (No. A-1-CA-38469, Dec. 6, 2021) **LW**

- D argued on appeal that his description did not match the description in the affidavit because his hair is gray (not white or blonde) and he was not wearing a black jacket.
- **Held:** The affidavit was supported by PC. The similarity of the description and the fleeing vehicle being registered to D's father, as stated in the affidavit, presented sufficient facts upon which to conclude that there was a reasonable probability that evidence of a crime would be found. Further, the affidavit stated that the officer confirmed through a booking photo that the individual he observed was D.

District court erred in concluding that warrant was not supported by probable cause, and therefore erred in denying motion to suppress evidence discovered during execution of warrant

State v. James Henz, ___-NMCA-___, ___ P.3d ___ (No. A-1-CA-38830, Mar. 23, 2022), *cert. pending* **CG**

- **Facts:** LE obtained a warrant for D's residence. The LE affiant stated that in February 22 and 24, 2014, Tumblr sent two tips to NCMEC concerning a user involved in incidents of child pornography. Tumblr stated that a user named "allsoyummmy" posted six images "that contained explicit images of children in sexual acts or positions." On July 7, 2014, Google reported that a user "uploaded child pornography images." Both tips traced back to D/D's residence after an investigation by the affiant.

District court erred in concluding that warrant was not supported by probable cause, and therefore erred in denying motion to suppress evidence discovered during execution of warrant

State v. James Henz, ___-NMCA-___, ___ P.3d ___ (No. A-1-CA-38830, Mar. 23, 2022), *cert. pending* **CG**

- The DC granted D's motion to dismiss, determining that the affidavit did not establish probable cause. It reasoned that the tips were "conclusory assertions" that "failed to provide the necessary descriptive detail to allow the issuing court to judge independently whether the images described would be prohibited under New Mexico law."

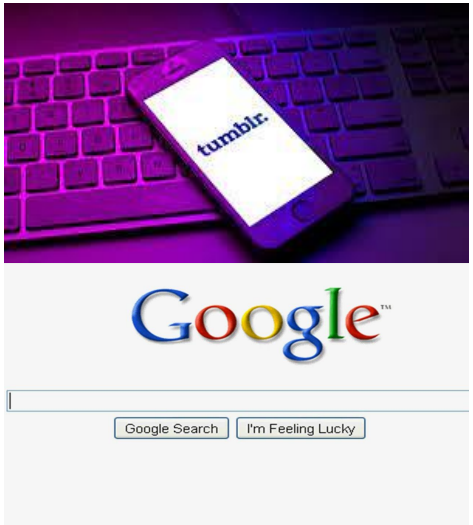
District court erred in concluding that warrant was not supported by probable cause, and therefore erred in denying motion to suppress evidence discovered during execution of warrant

State v. James Henz, ___-NMCA-___, ___ P.3d ___ (No. A-1-CA-38830, Mar. 23, 2022), *cert. pending* **CG**

- **Held:** The search warrant was supported by probable cause
- **Background:** Tumblr and Google, as electronic communication service providers, are compelled by federal law to report apparent violations of child pornography laws to NCMEC. Non-compliance results in monetary fines. NCMEC is required to report the tips it receives to federal authorities and is authorized to report to state authorities.

District court erred in concluding that warrant was not supported by probable cause, and therefore erred in denying motion to suppress evidence discovered during execution of warrant

State v. James Henz, ___-NMCA-___, ___ P.3d ___ (No. A-1-CA-38830, Mar. 23, 2022), *cert. pending* **CG**



- **Analysis:** First, the COA determined that Tumblr and Google are credible hearsay sources who gathered the information supporting their reports in a reliable fashion. The COA adopted view of other jurisdictions who have determined that providers are credible sources akin to citizen-informants who gather information contained in reports reliably through first-hand knowledge.

District court erred in concluding that warrant was not supported by probable cause, and therefore erred in denying motion to suppress evidence discovered during execution of warrant

State v. James Henz, ___-NMCA-___, ___ P.3d ___ (No. A-1-CA-38830, Mar. 23, 2022), *cert. pending* **CG**

- Second, the affidavit provided reasonable grounds for the issuing court to conclude a search of D's home would uncover evidence of child pornography. The COA examined and adopted the approach of the 8th, 9th, and 10th circuits regarding the level of detail. It concluded that the description "sexual acts" in conjunction with "children" in the Tumblr tip was sufficient in detail to describe child pornography under either the New Mexico or federal standard. Analogized to 9th circuit case holding that description "a young female having sexual intercourse with an adult male" was sufficient in detail

District court erred in concluding that warrant was not supported by probable cause, and therefore erred in denying motion to suppress evidence discovered during execution of warrant

State v. James Henz, ___-NMCA-___, ___ P.3d ___ (No. A-1-CA-38830, Mar. 23, 2022), *cert. pending* **CG**

- **Takeaways:** Issuing court need not view the images. Nor is it fatal for the affiant to not include the images with the affidavit.
- This case could have been avoided if the affiant, who testified at the hearing that he received the images from NCMEC and corroborated unlawfulness, stated in the affidavit that he viewed the images and corroborated that they contained child pornography as prescribed by NM law.

Speedy Trial

slido

Currently, in your district, assuming a prosecution proceeds at an average pace, how many months would you expect to pass from arrest/indictment to conviction at trial in a case of intermediate complexity?

ⓘ Start presenting to display the poll results on this slide.

Circumstances did not result in speedy trial violation where 29 months passed between arrest and sentencing; no impermissible delay in sentencing.

State v. Gregory A. Wood, 2022-NMCA-009, 504 P.3d 579 (No. A-1-CA-38469, Dec. 6, 2021) **LW**

- **Facts:** D was charged with nonresidential burglary, resisting, evading, or obstructing an officer, failure to yield, possession of marijuana, possession of a controlled substance, possession of a drug paraphernalia. There was 29 months of delay between his arrest and trial. The jury convicted D on all charges except the nonresidential burglary.

Circumstances did not result in speedy trial violation where 29 months passed between arrest and sentencing; no impermissible delay in sentencing.

State v. Gregory A. Wood, 2022-NMCA-009, 504 P.3d 579 (No. A-1-CA-38469, Dec. 6, 2021) **LW**

- **Holding:** D's speedy trial right was not violated
- **Analysis:** The parties agreed that the case was of intermediate complexity, and the COA determined that the length of delay weighed heavily in D's favor. However, the reasons for the delay did not weigh heavily in D's favor because he caused 11 months of delay compared to 12 months by the State. D did not establish particularized prejudice – he claimed he was unable to locate an alibi witness but that witness pertained exclusively to nonresidential burglary charges for which he was acquitted.

Circumstances did not result in speedy trial violation where 29 months passed between arrest and sentencing; no impermissible delay in sentencing.

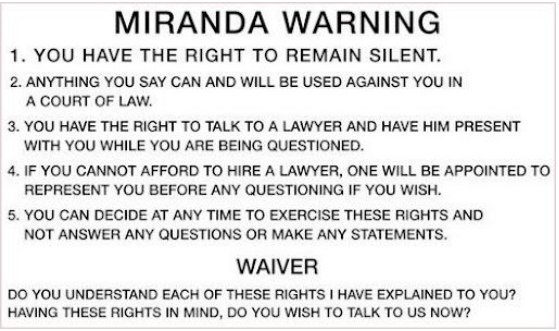
State v. Gregory A. Wood, 2022-NMCA-009, 504 P.3d 579 (No. A-1-CA-38469, Dec. 6, 2021) **LW**

- D also raised a speedy sentencing argument. The COA rejected that argument on the lack of prejudice. D argued he was unable to challenge enhancement of sentence but that was not supported by record as caused by the timing of the hearing.
- **Note:** NM courts continue to assume without deciding that a defendant has the right to speedy sentencing. SCOTUS has determined the right to a speedy trial ends at conviction. *See Betterman v. Montana*, 578 U.S. 437, 443 (2016).

Miranda

District court did not err in granting motion to suppress statements un-Mirandized defendant made to police where substantial evidence supported conclusion that defendant was in custody at time of interrogation

State v. Francis Fair, Disp. Order of Affirmance, No. S-1-SC-38750 (N.M. Mar. 21, 2022) (nonprecedential) **LW**



- **Facts:** This case was an interlocutory State's appeal from an order of suppression in a 1st degree murder prosecution. D was interviewed after returning to scene of shooting. He was told he was not under arrest and that he could leave at any time. The interview lasted 47 minutes in a mobile police van, and D was not arrested until 3 weeks later. However, D was told he was being detained, handcuffed, and LE took D's clothes, processed him at a police station, and took photographs.

District court did not err in granting motion to suppress statements un-Mirandized defendant made to police where substantial evidence supported conclusion that defendant was in custody at time of interrogation

State v. Francis Fair, Disp. Order of Affirmance, No. S-1-SC-38750 (N.M. Mar. 21, 2022) (nonprecedential) **LW**

- **Issue:** The State argued that D was not "in custody" for *Miranda* purposes.
- **Holding:** D was in custody. A reasonable person would not believe they were free to leave, and his freedom of movement was restrained to a degree associated with a formal arrest

Double Jeopardy (Unitary Conduct)

Based on evidence and State's case theory, convictions for armed robbery and agg. battery (DW) upon Victim A resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- **Facts:** D and Howell committed an armed robbery of a bistro.
- Prior to effectuating the armed robbery, D committed several prefatory acts that were crimes. First, D pistol whipped the owner, Katherine Budak, when she attempted to close the door. Second, D pointed a firearm at the face of an employee, Joanne Gunn, after she went to the kitchen after hearing Budak's screams and after D pistol whipped Budak. Third, D confined all employees on the floor of the bistro at gunpoint.

Based on evidence and State's case theory, convictions for armed robbery and agg. battery (DW) upon Victim A resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- Relevant to the double jeopardy issues on appeal, a jury convicted D of the following offenses with the following named victims: armed robbery (Budak and Gunn), aggravated battery (Budak), aggravated assault (Gunn), and false imprisonment (Gunn). D argued on appeal that the armed robbery conviction subsumed the other three convictions and violated his double jeopardy rights.

Based on evidence and State's case theory, convictions for armed robbery and agg. battery (DW) upon Victim A resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- **Test:** NM Courts apply a two-part double jeopardy test to multiple convictions under separate statutes: (1) First, the court must determine whether the defendant's conduct was unitary, or the same, and (2) if so, whether the Legislature authorized multiple punishments for unitary conduct under the statutes. This prong look at a comparison of elements (*Blockburger*/modified-*Blockburger* test).
- *Foster* presumption: In conducting a double jeopardy analysis, in examining both elements, a court must presume that the jury relied on alternative(s) that may violate double jeopardy.

Based on evidence and State's case theory, convictions for armed robbery and agg. battery (DW) upon Victim A resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- The armed robbery instruction allowed the jury to convict D based on finding use of force OR threat of force against Budak OR Gunn. The State's theory at trial did not rely on any one particular act of force or use of force, nor did it focus on a particular victim.
- Therefore, in conducting the double jeopardy analysis in this case, the Court presumed that the jury relied on the armed robbery alternative(s) (Gunn/Budak) (use of force/threat of force) that offended double jeopardy with each corresponding crime

Based on evidence and State's case theory, convictions for armed robbery and agg. battery (DW) upon Victim A resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- **Held:** Defendant's convictions for armed robbery and aggravated battery with a deadly weapon (Budak) violate D's double jeopardy rights

Based on evidence and State's case theory, convictions for armed robbery and agg. battery (DW) upon Victim A resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- First, D's conduct forming the basis of armed robbery and aggravated battery (Budak) was unitary.
- The Court applied the *Foster* presumption and assumed the jury convicted D for armed robbery based on a use of force against Budak. Further, the Court presumed the jury relied on the same use of force against Budak to support armed robbery and aggravated battery (pistol whipping).

Based on evidence and State's case theory, convictions for armed robbery and agg. battery (DW) upon Victim A resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- Second, the Legislature did not intend to allow for multiple punishments. The Court purportedly applied modified-*Blockburger*. It concluded that "[g]iven that the jury was instructed that it could rely on the same conduct to satisfy the force elements of both armed robbery and aggravated battery with a deadly weapon, we hold that D's conviction for aggravated battery with a deadly weapon, as the lesser offense, must be vacated."

Based on evidence and State's case theory, convictions for armed robbery and agg. battery (DW) upon Victim A resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- Note: This analysis again does not focus on elements, it focuses on conduct. Aggravated battery required an intent to injure and armed robbery requires an intent to deprive the victim of property. The Court disregarded the distinct elements.

Based on evidence and jury instructions framed in the alternative, convictions for armed robbery and agg. assault (DW) upon Victim B resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- **Held:** Defendant's convictions for armed robbery and aggravated assault with a deadly weapon (Gunn) violate D's double jeopardy rights

Based on evidence and jury instructions framed in the alternative, convictions for armed robbery and agg. assault (DW) upon Victim B resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- First, D's conduct forming the basis of armed robbery and aggravated assault (Gunn) was unitary.
- The Court applied the *Foster* presumption and assumed the jury convicted D for armed robbery based on the use of force (Court probably meant threat of force) against Gunn alternatives. The Court further presumed the conduct within the instructed alternatives, in other words, the same threat of force against Gunn, was the premise of both offenses even though there were multiple threats against. This appears to contradict *Sena*, 2020-NMSC-018.

Based on evidence and jury instructions framed in the alternative, convictions for armed robbery and agg. assault (DW) upon Victim B resulted in double jeopardy violation from unitary conduct because elements of both offenses were simultaneously satisfied

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- Second, the Legislature did not intend to allow for multiple punishments. The Court applied modified-*Blockburger*. It concluded that D's "actions needed to effectuate aggravated assault with a deadly weapon, as charged in this case, did require anything more of Defendant than the actions necessary to effectuate armed robbery."
- Note: This analysis again does not focus on elements, it focuses on conduct.

Based on circumstances and State's closing argument, convictions for armed robbery and false imprisonment resulted in double jeopardy violation from unitary conduct

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- **Held:** Defendant's convictions for armed robbery and false imprisonment (Gunn) violate D's double jeopardy rights

Based on circumstances and State's closing argument, convictions for armed robbery and false imprisonment resulted in double jeopardy violation from unitary conduct

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- First, D's conduct forming the basis of armed robbery and false imprisonment (Gunn) was unitary. Here, the Court's analysis relied on the State's closing, which expressly argued that use of force or threat of force element for armed robbery satisfies the restraint or confinement element for false imprisonment.

Based on circumstances and State's closing argument, convictions for armed robbery and false imprisonment resulted in double jeopardy violation from unitary conduct

State v. Kevin Barlow Reed, __-NMCA-__, ___ P.3d ___ (No. A-1-CA-37734, Dec. 22, 2021). **CG**

- Second, the Legislature intended multiple punishments because "to complete false imprisonment here, nothing more was required of D than was required for his commission of armed robbery" except the false imprisonment requires proof of knowledge that D had no authority to restrain. The Court considered this distinct knowledge element "immaterial" because the knowledge element could be inferred from the same facts. (I am unclear on the reasoning)

Double Jeopardy (Unit of Prosecution)

Section 30-31-23 defines the unit of prosecution as each controlled substance a defendant possesses, and district court therefore erred in dismissing on double jeopardy grounds second of two separate counts that were based on defendant's simultaneous possession of two distinct controlled substances

State v. Felicia Garcia, __-NMCA-__ (No. A-1-CA-38525, March 10, 2022).

VS

- **Facts:** D was a passenger in a vehicle subject to a traffic stop. LE determined that D had an outstanding warrant and placed her under arrest. During the search incident to the arrest, LE found heroin and methamphetamine. The State charged D with two counts of possession of a controlled substance, one for each substance.
- The DC dismissed one count on double jeopardy ground, reasoning that D's acts of possession were not sufficiently distinct to support two charges. The State appealed, arguing that Section 30-21-23 defines the unit of prosecution as each controlled substance possessed.

Section 30-31-23 defines the unit of prosecution as each controlled substance a defendant possesses, and district court therefore erred in dismissing on double jeopardy grounds second of two separate counts that were based on defendant's simultaneous possession of two distinct controlled substances

State v. Felicia Garcia, __-NMCA-__ (No. A-1-CA-38525, March 10, 2022).

VS

- **Holding:** If the State can prove a defendant simultaneously possessed distinct controlled substances, that defendant can be charged and convicted for each distinct controlled substance in his or her possession.

Section 30-31-23 defines the unit of prosecution as each controlled substance a defendant possesses, and district court therefore erred in dismissing on double jeopardy grounds second of two separate counts that were based on defendant's simultaneous possession of two distinct controlled substances

State v. Felicia Garcia, __-NMCA-__ (No. A-1-CA-38525, March 10, 2022).

VS

- **Analysis:** The plain language of Section 30-21-23 defines the unit of prosecution as per controlled substance. It is worded in the singular - "[i]t is unlawful for a person intentionally to possess a controlled substance." Controlled substance is likewise defined as "a drug or substance . . ." Because the plain language was dispositive, the Court declined to consider "policy concerns" raised by D

Double Jeopardy (As a Bar to Retrial)

slido

What kind of misconduct can bar a retrial in New Mexico?

ⓘ Start presenting to display the poll results on this slide.

Where trial court's conduct forced trial at which defense counsel's conduct denied Defendant effective assistance of counsel and jury convicted, and Court of Appeals reversed for ineffective assistance of counsel, conduct of trial court was "official misconduct" under State v. Breit and resulted in bar to retrial under double jeopardy clause of New Mexico Constitution.

State v. Henry Hildreth, Jr., __-NMSC-__ (No. S-1-SC-37558, Feb. 9, 2022).

ETJ

- **Facts:** The State produced discovery (CD with witness statements) five days before trial. Defense counsel, Seeger, moved to continue the trial on ground that he needed to review discovery to provide effective counsel. DC denied the motion without argument at pretrial conference. At trial, Seeger refused to participate in voir dire, challenge any jurors, examine witnesses, participate in selection of jury instructions, or proffer argument. Instead he made three motions for a mistrial based on his ineffective assistance, which the DC denied.

Where trial court's conduct forced trial at which defense counsel's conduct denied Defendant effective assistance of counsel and jury convicted, and Court of Appeals reversed for ineffective assistance of counsel, conduct of trial court was "official misconduct" under State v. Breit and resulted in bar to retrial under double jeopardy clause of New Mexico Constitution.

State v. Henry Hildreth, Jr., __-NMSC-__ (No. S-1-SC-37558, Feb. 9, 2022).

ETJ

- The COA reversed D's convictions for ineffective assistance of counsel. However, the COA rejected D's argument that retrial was barred by double jeopardy pursuant to *State v. Breit*, 1996-NMSC-067, 122 N.M. 655.

Where trial court's conduct forced trial at which defense counsel's conduct denied Defendant effective assistance of counsel and jury convicted, and Court of Appeals reversed for ineffective assistance of counsel, conduct of trial court was "official misconduct" under State v. Breit and resulted in bar to retrial under double jeopardy clause of New Mexico Constitution.

State v. Henry Hildreth, Jr., __-NMSC-__ (No. S-1-SC-37558, Feb. 9, 2022).

ETJ

- Under *Breit*, retrial is barred when (1) improper official conduct is so unfairly prejudicial to defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, (2) the official knows that the conduct is improper and prejudicial (objective standard – presumed knowledge if of the nature every legal profession is charged with knowing), and (3) the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.

Where trial court's conduct forced trial at which defense counsel's conduct denied Defendant effective assistance of counsel and jury convicted, and Court of Appeals reversed for ineffective assistance of counsel, conduct of trial court was "official misconduct" under State v. Breit and resulted in bar to retrial under double jeopardy clause of New Mexico Constitution.

State v. Henry Hildreth, Jr., __-NMSC-__ (No. S-1-SC-37558, Feb. 9, 2022).

ETJ

- **Issue:** The NMSC granted certiorari on the issue of whether *Breit* applies to judicial conduct, and, if so, whether the DC's conduct in this case bars retrial.
- **Holding 1:** The NMSC held that *Breit* applies to judicial conduct "based on the language of *Breit* itself and the history behind its adoption." Specifically, *Breit* used the language "official conduct" and did not limit application to prosecutorial misconduct on its face. Moreover, the standard adopted by *Breit* was based on federal case law that broadly applied to governmental actions

Where trial court's conduct forced trial at which defense counsel's conduct denied Defendant effective assistance of counsel and jury convicted, and Court of Appeals reversed for ineffective assistance of counsel, conduct of trial court was "official misconduct" under State v. Breit and resulted in bar to retrial under double jeopardy clause of New Mexico Constitution.

State v. Henry Hildreth, Jr., __-NMSC-__ (No. S-1-SC-37558, Feb. 9, 2022).

ETJ

- **Holding 2:** The NMSC held that re-trial was barred pursuant to *Breit* based on the DC's conduct: (1) DC had an affirmative obligation to grant second mistrial motion, made at the point where Seeger had refused to participate in voir dire and Seeger informed DC that State misled court by calling witnesses who had statements on the CD; (2) DC presumed to have knowledge its conduct was improper and prejudicial because law clearly requires that effective assistance encompass meaningful adversarial testing and more than presence; (3) DC acted in willful disregard because record demonstrates conscious and purposeful decision to proceed despite likelihood of reversal

Ineffective Assistance of Counsel

No IAC in not requesting a lesser-included offense instruction and corresponding verdict form for second-degree murder as a lesser-included offense to depraved-mind murder, as charged in the alternative to Count 1

State v. Esias Frank Madrid, S-1-SC-37567 (N.M. Dec. 13, 2021) (nonprecedential). **JK**

- **FACTS:** Defendant was convicted of depraved-mind first-degree murder for the killing of Jaydon Chavez-Silver, who was struck by a bullet fired into a house where he was attending a party.

- **ISSUE:** Defendant alleged a "cascade" of prejudicial errors by his attorney. For this first one, he claimed his counsel erred by not requesting a jury instruction and verdict form for second-degree murder as a lesser-included offense for depraved-mind first-degree murder, as charged in the alternative to Count 1.

No IAC in not requesting a lesser-included offense instruction and corresponding verdict form for second-degree murder as a lesser-included offense to depraved-mind murder, as charged in the alternative to Count 1

State v. Esias Frank Madrid, S-1-SC-37567 (N.M. Dec. 13, 2021) (nonprecedential). **JK**

- **HOLDING:** The instructions directed the jury to "consider these instructions as a whole" and not to disregard "one instruction or parts of an instruction." The other instructions were willful and deliberate first-degree murder, second-degree murder, and depraved-mind first-degree murder. Because the jury was instructed on the relevant lesser-included charge, his counsel did not commit error by not requesting an additional jury instruction.

No IAC in not proffering a jury instruction or offering expert testimony regarding Defendant's juvenile status

State v. Esias Frank Madrid, S-1-SC-37567 (N.M. Dec. 13, 2021) (nonprecedential). **JK**

- **ISSUE:** Next, Defendant claimed that his counsel erred by not proffering a jury instruction on juvenile "subjective knowledge" or expert testimony to rebut the depraved-mind mens rea. Specifically, he argued that the science of juvenile brain development required expert testimony.

- **HOLDING:** No error because: (1) Defendant did not request an instruction on this issue and no evidence was presented regarding his lack of subjective knowledge; (2) Defendant's theory of the case was one of actual innocence - *i.e.* that he was "not present at the scene of the crime and that he was merely a 'patsy' indicted by uncredible witness"; so (3) under Defendant's theory of the case, the expert testimony and jury instruction were not required.

No IAC in not requesting a jury instruction on testifying codefendants

State v. Esias Frank Madrid, S-1-SC-37567 (N.M. Dec. 13, 2021) (nonprecedential). **JK**

- **ISSUE:** The third claimed error of counsel was that he did not request a jury instruction on the testimony of accomplices. Defendant claimed that the case relied on convincing the jury that the co-defendant was telling the truth when he claimed Defendant fired the fatal bullet.

- **HOLDING:** UJI 14-5020 NMRA (Credibility of Witnesses) is sufficient to alert the jury of its responsibility to evaluate witness testimony. The jury was given this instruction, so no additional instruction was necessary.

No IAC from alleged failure to adequately prepare for, or present argument at, sentencing

State v. Esias Frank Madrid, S-1-SC-37567 (N.M. Dec. 13, 2021) (nonprecedential). **JK**

- **ISSUE:** The fourth and final claimed error of counsel was that he did not "adequately prepare for and present at sentencing." Specifically, Defendant argued that counsel presented no mitigating information, expert testimony, or meaningful argument for a sentence less than life imprisonment.

- **HOLDING:** The record did not support these allegations. Indeed counsel made multiple arguments, including that the State had not met its burden, lack of motive, flaws in the evidence, and the fact that two other suspects were in custody for a full year prior to Defendant's name even being mentioned. While there was no expert testimony, Defendant did not present any authority that this is error under existing law.

No IAC from lack of motion to sever from other charges Defendant's charge for felon in possession of a firearm

State v. Kevin Barlow Reed, __-NMCA-__ (No. A-1-CA-37734, Dec. 22, 2021), *cert. denied* (S-1-SC-39187). **CG**

- **FACTS:** Defendant convicted of one count each of armed robbery, conspiracy to commit armed robbery, false imprisonment, possession of a firearm by a felon, aggravated battery with a deadly weapon, and two courts of aggravated assault with a deadly weapon.

- **ISSUE:** Defendant claimed that his counsel was ineffective because he did not move to sever the felon in possession charge from his other charges.

No IAC from lack of motion to sever from other charges Defendant's charge for felon in possession of a firearm

State v. Kevin Barlow Reed, __-NMCA-__ (No. A-1-CA-37734, Dec. 22, 2021), *cert. denied* (S-1-SC-39187). **CG**

- **HELD:** Record before the Court of Appeals was insufficient to determine whether the absence of a motion to sever was a "potentially serious failure on the part of trial counsel" or a trial tactic or strategy. Because the Court was unable to make this determination, it did not consider the issue further and informed Defendant that a habeas petition could be filed on this issue.

No IAC from failure to cross-examine witness on witness' criminal history

State v. Kevin Barlow Reed, __-NMCA-__ (No. A-1-CA-37734, Dec. 22, 2021), *cert. denied* (S-1-SC-39187). **CG**

- **FACTS:** Defendant claimed that Mr. Howell, his co-conspirator, had a criminal history. He testified on direct examination, however, that he had no criminal history prior to the robbery.

- **ISSUE:** Defendant claimed his counsel was ineffective because he did not cross-examine Mr. Howell about his criminal history after the robbery. Specifically, he argued that his counsel "should have done more to attack Mr. Howell's credibility."

No IAC from failure to cross-examine witness on witness' criminal history

State v. Kevin Barlow Reed, __-NMCA-__ (No. A-1-CA-37734, Dec. 22, 2021), *cert. denied* (S-1-SC-39187). **CG**

- **HELD:** Counsel conducted an extensive cross-examination of Mr. Howell and inquired into the truthfulness of his trial testimony, answers to law enforcement, and the terms of his plea as related to testimony against Defendant. Because this examination was extensive, the Court could not conclude that trial counsel's performance was deficient. The Court also noted that Defendant's argument was "premised largely on speculation" because the district court could have disallowed the admission of this evidence and, even if it did not, the impact on the jury is also speculative.

Eyewitness Identification and Due Process

Because Defendant did not argue in district court the New Mexico Constitution should provide greater due process protections than its federal counterpart, lack of preservation precluded same claim on appeal and justified affirmance of Court of Appeals decision affirming district court's denial of motion to suppress

State v. Richard Martinez, Disp. Order of Affirmance, No. S-1-SC-38106 (N.M. Mar. 21, 2022) (nonprecedential) **ETJ**

- **FACTS:** Defendant was convicted of residential burglary. The eyewitness, who observed him and his co-Defendant, for a long period of time, at a close distance, and with an unobstructed view, identified him for the first time at the preliminary hearing at the request of the prosecutor. The Court of Appeals found that this identification, even if unduly suggestive, contained sufficient indicia of reliability under *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 23-25, to justify the district court's admission of the evidence.

Because Defendant did not argue in district court the New Mexico Constitution should provide greater due process protections than its federal counterpart, lack of preservation precluded same claim on appeal and justified affirmance of Court of Appeals decision affirming district court's denial of motion to suppress

State v. Richard Martinez, Disp. Order of Affirmance, No. S-1-SC-38106 (N.M. Mar. 21, 2022) (nonprecedential) **ETJ**

- **ISSUE:** After the Court of Appeals opinion and the filing of the petition for certiorari, the Supreme Court issued its opinion in *State v. Martinez*, 2021-NMSC-002, 86, which stated that, under Article II, Section 18 of the New Mexico Constitution: "if a witness makes an identification of a defendant as a result of a police identification procedure that is unnecessarily suggestive and conducive to misidentification, the identification and any subsequent identification by the same witness must be suppressed." Defendant asked the Supreme Court to extend this holding to in-court identifications elicited by a prosecutor.

Because Defendant did not argue in district court the New Mexico Constitution should provide greater due process protections than its federal counterpart, lack of preservation precluded same claim on appeal and justified affirmance of Court of Appeals decision affirming district court's denial of motion to suppress

State v. Richard Martinez, Disp. Order of Affirmance, No. S-1-SC-38106 (N.M. Mar. 21, 2022) (nonprecedential) **ETJ**

- **ORDER:** The Supreme Court found: (1) federal due process protections do not apply to eyewitness identifications elicited in court by prosecutors; and (2) to preserve an issue for appeal where a party is seeking greater protection under the New Mexico Constitution, the district court must be alerted to the constitutional provision at issue and an argument must be made for why this provision "should be interpreted more expansively than its federal counterpart." Here, Defendant did not cite any constitutional provisions below or make any such argument about greater due process protections under the New Mexico constitution, so his claim was not preserved for review.

Suggestiveness of State's in-court identification procedures, resulted in erroneous admission of unreliable identifications that violated due process protections and, although not challenged at trial, created grave doubts about the validity of the verdict and therefore required reversal as plain error

State v. Antonio M., __-NMCA-__ (No. A-1-CA-39709, Mar. 17, 2022). **MF**

- **FACTS:** During the adjudicatory hearing, where all participants were wearing masks because of the COVID-19 pandemic, the prosecutor asked the witnesses to identify Antonio as follows:
  "Your Honor, I would like to ask [Witness 1] if he can Identify [Antonio]. Could I please ask [Antonio] to remove his mask just long enough for her to see if she identifies him or not?....So please look at this young man. Can you tell if this is [Antonio] or not?"
  "Your Honor, I would like to ask [Witness 2] if she could identify [Antonio]. Could I please ask [Antonio] to remove his mask just long enough for her to see if she identifies him our not? … So please look at this young man. Can you tell if this is [Antonio] or not?"
  "Your Honor, I would like to ask [Witness 3] could identify [Antonio]. I would like to ask if [Antonio] could briefly remove his mask to see if she can identify him…Please look at this young man here and tell us if this is [Antonio]?"

Suggestiveness of State's in-court identification procedures, resulted in erroneous admission of unreliable identifications that violated due process protections and, although not challenged at trial, created grave doubts about the validity of the verdict and therefore required reversal as plain error

State v. Antonio M., __-NMCA-__ (No. A-1-CA-39709, Mar. 17, 2022). **MF**

- **ISSUE:** Antonio argued that these identifications were unnecessarily suggestive and violated his due process rights under the US and NM constitutions. He also urged this Court to extend *State v. Martinez*, 2021-NMSC-002, to in-court identification procedures.

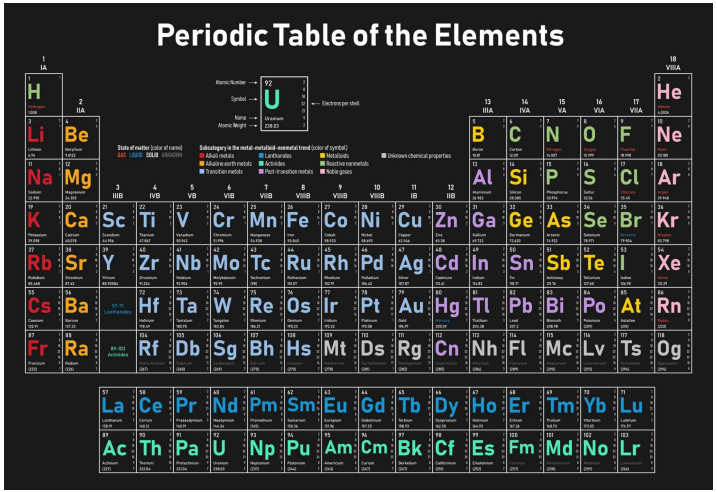
Suggestiveness of State's in-court identification procedures, resulted in erroneous admission of unreliable identifications that violated due process protections and, although not challenged at trial, created grave doubts about the validity of the verdict and therefore required reversal as plain error

State v. Antonio M., __-NMCA-__ (No. A-1-CA-39709, Mar. 17, 2022). **MF**

- **HOLDING:** Because the issue was not preserved below, the Court of Appeals reviewed for plain error. Using the analysis set forth in *State v. Ramirez*, 2018-NMSC-003, the Court determined that the in-court identifications were unreliable and tainted by the State's suggestiveness when eliciting the identifications. Specifically, the State used Antonio's name while asking the witness to identify him, directed the witnesses to look at him, and singled him out by asking him to remove his mask. The Court also found that this admission "created an injustice that created grave doubts concerning the validity of the verdict" because identity was a central issue in the case. Finally, the Court declined to extend *Martinez* because the identifications violated the federal constitution so further analysis was not necessary.

Elements, Instructions, & Sufficiency

Elements



- Section 60-7B-1 (giving alcoholic beverages to minors) and “knowledge” element
- Probable Cause and Preliminary Hearings

Section 60-7B-1 (giving alcoholic beverages to minors) and “knowledge” element

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It is a felony if the person “knows or has reason to know” that he or she is “violating the provisions” of the “selling or giving alcoholic beverages to minors” section of the Liquor Control Act. What does the knowledge element go to?

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In Section 60-7B-1, which makes it a felony to give alcoholic beverage to a minor if one "knows or has reason to know" that one is violating the provisions of this section," the knowledge element relates to awareness that the victim was a minor, not that one's conduct is prohibited; therefore, knowledge element as described in jury instruction did not result in fundamental error

State v. Dominique Muller __-NMCA-__ (No. A-1-CA-36501, Feb. 9, 2022), *cert. denied* (S-1-SC-39263) **BL**

- **FACTS:** Defendant had sex with 15-year-old M.V. on multiple occasions. One of the times, he gave her hard liquor before committing the criminal sexual penetration. In relation to this specific incident, he was convicted of second-degree criminal sexual penetration, perpetrated during the commission of the felony of giving alcohol to a minor.

In Section 60-7B-1, which makes it a felony to give alcoholic beverage to a minor if one "knows or has reason to know" that one is violating the provisions of this section," the knowledge element relates to awareness that the victim was a minor, not that one's conduct is prohibited; therefore, knowledge element as described in jury instruction did not result in fundamental error

State v. Dominique Muller __-NMCA-__ (No. A-1-CA-36501, Feb. 9, 2022), *cert. denied* (S-1-SC-39263) **BL**

- **ISSUE:** The statute contains language that this conduct is a felony if the person "knows or has reason to know" that he or she is "violating the provisions" of the "selling or giving alcoholic beverages to minors" section of the Liquor Control Act. The district court interpreted this language to direct that Defendant must know or have reason to know that the person is a minor. On appeal, however, Defendant argued that this knowledge requirement was actually knowledge of violating the statute itself.

In Section 60-7B-1, which makes it a felony to give alcoholic beverage to a minor if one "knows or has reason to know" that one is violating the provisions of this section," the knowledge element relates to awareness that the victim was a minor, not that one's conduct is prohibited; therefore, knowledge element as described in jury instruction did not result in fundamental error

State v. Dominique Muller __-NMCA-__ (No. A-1-CA-36501, Feb. 9, 2022), *cert. denied* (S-1-SC-39263) **BL**

- **HOLDING:** Of these two plausible interpretations, Defendant's abrogates the "deeply rooted common law principle that ignorance of the law is no defense," so the most rational interpretation is that "knows or has reason to know" applies to the recipient's status as a minor.

Probable Cause and Preliminary Hearings

District court erred in deciding that there was not probable cause to bind Defendant over for trial on second-degree murder

State v. Clayton Thomas Benedict, ___-NMCA-___ (No. A-1-CA-38523, Jan. 31, 2022), *cert. granted* (S-1-SC-39240, April 20, 2022). **BL**

- **FACTS:** Defendant was an Uber driver who picked up intoxicated passengers on St. Patrick's Day of 2019. When one of the passengers vomited in his backseat, Defendant stopped alongside I-25 and kicked them out. There was an argument over the clean-up fee, which culminated in Defendant fatally shooting James Porter.

- **ISSUE:** The district court found no probable cause to bind Defendant over for trial on second-degree murder but did find probable cause for voluntary manslaughter.

District court erred in deciding that there was not probable cause to bind Defendant over for trial on second-degree murder

State v. Clayton Thomas Benedict, ___-NMCA-___ (No. A-1-CA-38523, Jan. 31, 2022), *cert. granted* (S-1-SC-39240, April 20, 2022). **BL**

- **HOLDING:** The Court of Appeals looked at the undisputed facts of the case to answer two components that need to be established at a preliminary hearing: (1) a crime has been committed; and (2) probable cause exists to believe the person charged committed it. Below, Defendant claimed "sufficient provocation" existed and, therefore, the charge of second-degree murder was foreclosed. Looking at the elements of second-degree murder, and the facts that included Defendant pointing a gun at the unarmed Porter "early in the encounter," pulling his gun and pointing it at Porter for slamming his door, and multiple other actions involving pointing a gun at an unarmed Porter. The Court found that the undisputed evidence "supports a *reasonable belief* that an ordinary person of average disposition in Defendant's position would not have been provoked to the point of utilizing lethal force, but would instead have taken available opportunities to attain a position of safety from an unarmed man in no immediate position to pose a threat to Defendant's safety." The Court also found it could be reasonable that Porter acted in response to Defendant introducing a gun so early in their encounter, so this response could not be utilized as sufficient provocation. Finally, the Court reiterated that the standard was not whether or not the proof provided at the preliminary hearing was sufficient for a criminal conviction, but rather if it supported a reasonable belief that Defendant committed the crime charged.

Jury Instructions

- Criminal Trespass: UJI 14-1402
- Breaking and Entering: UJI 14-1410
- Second-degree murder & depraved mind-murder
- *Brown* instructions

Criminal Trespass - UJI 14-1402

State v. Presciliano Ancira, __-NMCA-__, __ P.3d __ (A-1-CA-38173, Mar. 23, 2022)

- Facts of the case:
  - Meth
  - Tries to break in the back door of one house
  - Hops the wall into the neighboring yard
- Criminal trespass into the second yard

Criminal Trespass - UJI 14-1402

State v. Presciliano Ancira, __-NMCA-__, __ P.3d __ (A-1-CA-38173, Mar. 23, 2022)

- UJI 14-1402 "the defendant knew *or should have known* that permission to enter…had been denied."

- Compare with NMSA 1978, § 30-14-1(B):
  - trespass = "knowingly entering or remaining upon the unposted lands *knowing* that such consent to enter or remain is denied or withdrawn"

- *State v. Merhege*, 2017-NMSC-016, ¶ 10 n.2, 394 P.3d 955

- CoA: UJI 14-1402 is wrong
  - Technically UJI 14-1402 is still there -- be very careful!

Breaking & Entering: UJI 14-410

State v. Presciliano Ancira, __-NMCA-__, __ P.3d __ (A-1-CA-38173, Mar. 23, 2022)

- UJI 14-1410:
  - "The defendant entered _____ (*identify lands, vehicle or structure*) without permission"
  - No element about whether the defendant knew that he did not have permission

- NMSA 1978, § 30-14-8: no scienter requirement either

- BUT: *State v. Contreras*, 2007-NMCA-119, ¶ 17, 142 N.M. 518
  - Implied scienter: knowledge as to lack of permission

slido

How many theories of first-degree murder are there in NM?

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Second-degree murder as a lesser included offense of depraved mind murder

State v. Esias Frank Madrid, S-1-SC-37567, dec. (N.M. Dec. 13, 2021) (nonprecedential)

- Count 1: murder, Count 2: shooting at a dwelling, Count 3: shooting from a motor vehicle, Count 4: conspiracy to commit all of the above
- Jury only returns guilty on depraved-mind 1st deg murder for Count 1. Thought that following counts were all "subsequent to second degree." Because they "found in the first-degree" we stopped
- Guilty as to Count 1, mistrial on Counts 2-4.

Second-degree murder as a lesser included offense of depraved mind murder

State v. Esias Frank Madrid, S-1-SC-37567, dec. (N.M. Dec. 13, 2021) (nonprecedential)

- Claims that jury should have been expressly instructed that second-degree was a lesser-included of depraved mind murder in addition to willful and deliberate.
- Was instructed that that second-degree was lesser-included as to W&D, move on to consider 2nd degree if acquit on 1st degree
- Jury confused, but it was clear that jurors understood that they would consider 2nd degree after 1st, and then remaining counts.
- Not fundamental error.

Juvenile Status In Depraved Mind Murder

State v. Esias Frank Madrid, S-1-SC-37567, dec. (N.M. Dec. 13, 2021) (nonprecedential)

- Depraved mind murder requires:
  - *State v. Reed*, 2005-NMSC-031, ¶ 23, 138 N.M. 365.
    - "subjective knowledge" that his act was greatly dangerous to the lives of others.
      - "wicked or malignant heart" , "utter disregard for human life"

- *State v. Brown*, 1996-NMSC-073, 122 N.M. 724: "take into consideration the evidence of his intoxication and its effect on the requisite mental state of subjective knowledge."

Juvenile Status In Depraved Mind Murder

State v. Esias Frank Madrid, S-1-SC-37567, dec. (N.M. Dec. 13, 2021) (nonprecedential)

- Fundamental error: on appeal, claims that he should have received a *Brown* instruction based on his status as a juvenile
- *Brown* doesn't require instruction every time subjective knowledge could be at issue - evidence and theory of the case
- Sufficient evidence

Mens Rea for Accomplice Depraved Mind Murder

State v. Esias Frank Madrid, S-1-SC-37567, dec. (N.M. Dec. 13, 2021) (nonprecedential)

- Claim: jury could convict if it found that D intended for another to commit depraved mind murder without finding that D had mens rea for depraved mind murder
- Nope. UJIs correct statement of law - not facially confusing
- UJI 14-2822 incorporates mens rea for underlying crime
- Just give the applicable UJIs

Sufficiency

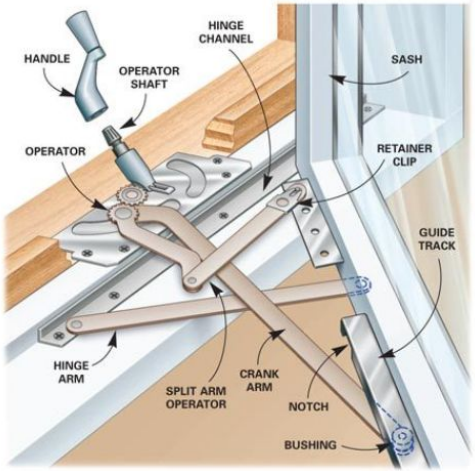
- Double jeopardy
- Breaking and entering
- Proving up prior DWI violations

Double Jeopardy and Sufficient Evidence

State v. Antonio M., __-NMCA-__, __ P.3d __ (A-1-CA-39709, Mar. 17, 2022)

- In-court identification was improperly suggestive: reverse
- But: can still retry if the state provided sufficient evidence
- Claim: absent the improper identification evidence (and unsuccessfully-challenged hearsay) can't link D to the crime, -> insufficient
- Nope. Can consider the improperly-admitted evidence

Sufficiency: Breaking & Entering



State v. Presciliano Ancira, __-NMCA-__, __ P.3d __ (A-1-CA-38173, Mar. 23, 2022)

- D's story, claims on appeal

- Sufficient evidence
  - D asleep in the tub
  - V always locks windows, doors
  - Window was wide open, crank broken, screen inside
  - Footprints outside
  - Only bathroom was ransacked

Enhancing DWI - Proving Priors

State v. Roger Warford, __-NMCA-__, __ P.3d __ (A-1-CA-36798, April 14, 2022)

- To enhance a DWI conviction using priors, State has to prove up those priors
- State bears burden of establishing prima facie case, burden then shifts to D to show conviction was invalid. But State retains overall burden of persuasion
- 1991 court abstract with notation reading “P.D. Raina Owen, 620 Roma NW” where you would expect counsel to be listed.
    - Who is that? Nobody knows.

Enhancing DWI - Proving Priors

State v. Roger Warford, __-NMCA-__, __ P.3d __ (No. A-1-CA-36798, April 14, 2022)

- Claim: State failed to show that he received assistance of counsel before entering his plea
- State met its “not onerous” prima facie burden - arrested, demanded attorney, pled, the notation was where you would expect a lawyer to be listed
- D only offered speculation

Evidentiary Issues

- Section 66-8-103 - who can draw blood?
- 11-404(B) - prior bad acts
- 11-801 - hearsay

Blood Draws: “Laboratory technician”

State v. Brian Adams, __-NMSC-__, __ P.3d __ (S-1-SC-37722, Dec. 16, 2021)

- Section 66-8-103: “only a physician, licenced professional or practical nurse or laboratory technician or technologist employed by a hospital or a physician” may draw blood for DWI blood test
- Emergency Department Tech and licenced EMT working for hospital drew blood. Did not work in laboratory
- Claim: not a physician, not a nurse, not a lab tech. So blood draw is inadmissible

Blood Draws: “Laboratory technician”

State v. Brian Adams, __-NMSC-__, __ P.3d __ (S-1-SC-37722, Dec. 16, 2021)

- “laboratory technician” not defined, ambiguous on its face

- legislative intent
  - protect patients
  - ensure reliable samples
  - purpose of DWI statute: deter DWI and make highways safe

- To count as laboratory tech, must:
  - be employed by a hospital or physician to perform blood draws,
  - be trained to perform blood draws, and
  - have on-the-job experience doing blood draws

Job Descriptions

- Implements MD orders under supervision of an RN as allowed under this purpose description. The following list of skills and procedures is included:
  - Splint application
  - Wound irrigation and preparation for suturing
  - 12 lead EKGs
  - Foley catheter insertion
  - Venipuncture only for the purpose of obtaining blood samples

- Performs Legal Blood Alcohol blood draws at the request of Law Enforcement personnel.

Blood Draws: “Employed by a Hospital”

State v. Roger Warford, __-NMCA-__, __ P.3d __ (A-1-CA-36798, April 14, 2022)

- Certified phlebotomist working for TriCore
  - TriCore was contracted by hospital to perform its blood tests
- Claim: not “employed” by the hospital or a physician - employed by TriCore

Blood Draws: “Employed by a Hospital”

State v. Roger Warford, __-NMCA-__, __ P.3d __ (A-1-CA-36798, April 14, 2022)

- Regs defined “laboratory technician” to include certified phlebotomists
- Had sufficient training and experience
  - phlebotomy course, certified, trained on the job, did 50 tests / day, demonstrated familiarity with proper process and procedures
- “Employed by a hospital”?
  - employ not defined, ambiguous on its face -- to use, or to have an employee/employer relationship?

Blood Draws: “Employed by a Hospital”

State v. Roger Warford, __-NMCA-__, __ P.3d __ (A-1-CA-36798, April 14, 2022)

- Interpret in light of statute
  - protect patient, ensure accuracy
- qualified, and read *Adams* as broadening universe of qualifying technicians
- She was trusted to perform blood draws for the hospital

404(B) - Prior Bad Acts

State v. Dominique Muller __-NMCA-__, __ P.3d __ (A-1-CA-36501, Feb. 9, 2022)

- 404(B) - other acts inadmissible to prove character and propensity
- 2nd and 4th degree CSPM - Mom's boyfriend and daughter
- Testimony
  - V's classmate testified that D looked at V in a gross way
  - V's mother also testified about gross looks, including one time he looked at V dancing in a "lustful" way
  - V's testimony that they had sex near a dog park
    - Uncharged because it was out of the jurisdiction

404(B) - Prior Bad Acts

State v. Dominique Muller __-NMCA-__, __ P.3d __ (A-1-CA-36501, Feb. 9, 2022)

- Did not object at trial
- Not plain error
  - No argument as to prejudice
  - Failed to consider evidence as a whole
- But what if there had been a timely objection?
- Consider purpose, be careful

801 - Hearsay

State v. Antonio M., __-NMCA-__, __ P.3d __ (A-1-CA-39709, Mar. 17, 2022)

- E.M. was another juvenile, testified that:
  - he and another friend, Y.C., drove Child and accomplices to Frenger Park “because they were going to do a drug trade.”
  - that a co-defendant said something about them “hitting a lick”

Urban Dictionary Says…

801 - Hearsay

State v. Antonio M., __-NMCA-__, __ P.3d __ (A-1-CA-39709, Mar. 17, 2022)

- Definition of hearsay
- Drove to park for drug deal
  - Out-of-court statement? Yes
  - Truth of the matter asserted? No.
    - State wasn't prosecuting for drug deal
- Plan to commit robbery
  - Unpreserved

slido

How would you get in statement from other juvenile about "hitting a lick'?

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~~Miscellaneous~~

Special Topics

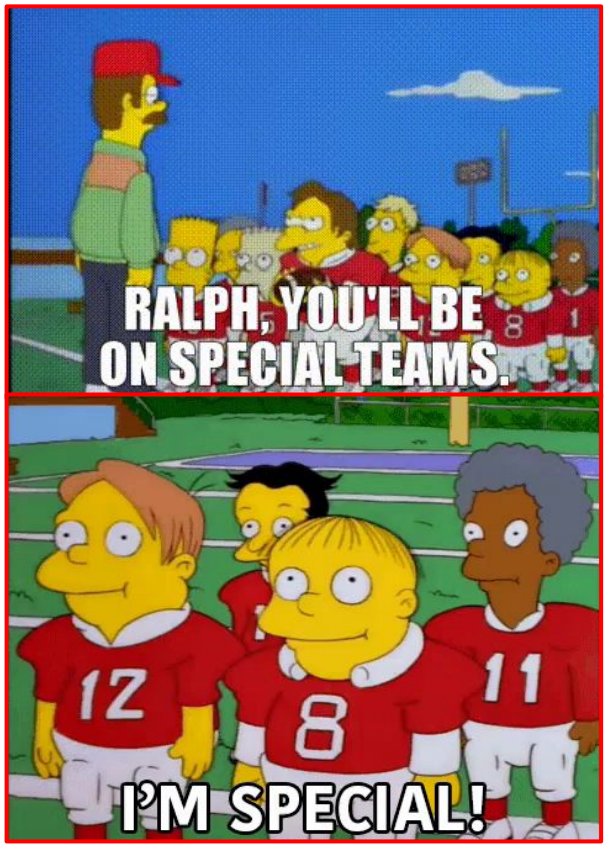
ZACH'S APPELLATE STATS

- a few docketing statements
- mostly able to access Odyssey
- owns a 2007 Bluebook

- 0 appellate briefs
- 0 NMCA arguments
- 0 NMSC arguments

~~Miscellaneous~~

Special Topics



- Timeliness of juvenile adjudicatory hearing
- Jurisdiction
- Rule 5-204(a)→ amendment of charge
- Sentencing / probation / etc.
- SOL
- Appeal procedure→ mag. to district court
- Rule 5-803→ post-sentence relief
- Interlocutory appeal
- “Expectation of finality”
- Restitution

Restitution

Hot off the presses!

Antonio Quintero, ___-NMCA-___ (No. A-1-CA-38754, May 4, 2022)

- ***Facts→***
  - 2010→ Molests 10 y/o girl *(V1)*
  - 2013→ Molests 8 y/o girl *(V2)*
  - 2019 plea→ Convicted in both cases; V restitution ordered
  - 2019 restitution hearing→
    - $609.78→ *V1* - educational expenses
    - $3,420→ *V2* - hospitalization for mental-health care

- ***D's argument→***
  - Shouldn't pay for mental anguish (generally) & costs unconnected to crimes (specifically)

Antonio Quintero, ___-NMSC-___ (No. A-1-CA-38754, May 4, 2022)

- ***Holding→ NMCA disagrees w/ D***

Compensation for <u>$ loss caused</u> by mental anguish

VERSUS

Compensation for <u>mere emotional suffering</u>

- D's crimes don't have to be <u>sole reason</u> for $ damages
  - just a <u>reasonably foreseeable, contributing</u> reason

- ***Cert. not yet requested***

“Expectation of finality”

Hot off the presses!

State v. Joey Deal, ___-NMSC-___ (No. S-1-SC-38568, May 2, 2022)

- ***Facts→***
  - **1998 - 2001**→ D raped daughter
  - **1999**→ EMDA amended, increased # of SVOs
  - **2002**→ Convicted 79 cts - CSP, CSC, incest
    - **60 yrs DOC @ SVO time = *51 yrs***
  - **D kept on w/ appellate review**→ b/c crimes occurred during date range encompassing time before EMDA changed, should serve 60-yr sentence @ 50% GT, like all crimes occurred before 1999. This was well taken.
  - **2020**→ re-sentenced to **104 yrs DOC @ 50% GT = *52 yrs***

State v. Joey Deal, ___-NMSC-___ (No. S-1-SC-38568, May 2, 2022)

- ***D's argument*** → *[habeas petition]*
  - DJ violated. Expectation of finality in 2002 sentence.

- ***Holding*** → ***D wins***
  - Increase from **60 yrs** (SVO time, **51 yrs real time**) to **104 yrs** (non-SVO time, **52 yrs real time**) after D served **17 yrs** violated "expectation of finality" in 60 yr, non-SVO sentence
  - **Effect** → Serve only **30 yrs**

Timeliness of child's adjudicatory hearing

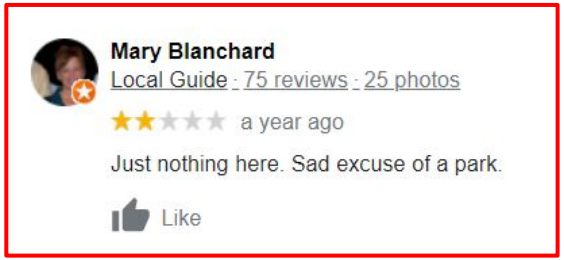
State v. Antonio M., __-NMCA-__ (No. A-1-CA-39709, Mar. 17, 2022)

- ***Facts*→ Aug. 2020 - D & 2 other kids kill guy after drug deal**
  - D's AH not held w/in time limits of Rule 10-243
    - AH if kid IC→ w/in 30 days
    - Extensions over 120 days (30+90)→ "exceptional circumstances"
  - 1st 3 extensions→ requested by State b/c evidentiary issues
  - Next 2 extensions→ *sua sponte*; COVID-19 hit, NMSC vacated everything
  - D found G following an AH of felony murder, etc.
    - Adjudged delinquent, sentenced accordingly
- ***D's arguments*→**
  - Extensions over 90 days unsupported by "exceptional circumstances"

Frenger Park in Las Cruces

State v. Antonio M., __-NMCA-__ (No. A-1-CA-39709, Mar. 17, 2022)

- ***Holding→ NMCA disagrees w/ D***
  - Delays in D's AH were "*unfortunate, but unavoidable*"
  - Delays can't be attributed to error by State or district court
- ***Takeaway→*** COVID-related delays not being held against State
- But … rev'd & remanded for AH on other grounds *(in-court ID)*
  - State filed **cert. petition**→ Apr. 2022



Mary Blanchard has seen worse

Jurisdiction

Related Cases

D-504-CR-2014-00190 (Same Party)
D-504-LR-2015-00011 (Same Party)
D-504-LR-2015-00012 (Same Party)
D-504-LR-2015-00031 (Same Party)
D-504-LR-2016-00014 (Same Party)
D-504-LR-2016-00027 (Same Party)
D-504-LR-2016-00028 (Same Party)
D-504-LR-2017-00031 (Same Party)
D-504-LR-2017-00042 (Same Party)
D-504-CR-2017-00568 (Same Party)
D-504-CR-2017-00569 (Same Party)
D-504-CR-2018-00160 (Same Party)
D-504-CR-2018-00180 (Same Party)
A-1-CA-37346 (Same Party)
D-504-LR-2018-00034 (Same Party)
D-504-LR-2018-00035 (Same Party)
A-1-CA-37481 (Same Party)
A-1-CA-37482 (Same Party)
A-1-CA-37777 (Same Party)
A-1-CA-37924 (Same Party)
D-504-LR-2019-00031 (Same Party)
A-1-CA-38229 (Same Party)
S-1-SC-37922 (Same Party)
A-1-CA-38468 (Same Party)
D-504-LR-2019-00061 (Same Party)
D-504-LR-2020-00010 (Same Party)
D-504-LR-2020-00011 (Same Party)
D-504-LR-2020-00017 (Same Party)
A-1-CA-38821 (Same Party)
S-1-SC-38345 (Same Party)
A-1-CA-39011 (Same Party)
A-1-CA-39042 (Same Party)
A-1-CA-39076 (Same Party)
A-1-CA-39308 (Same Party)
D-504-CV-2020-00807 (Same Party)
S-1-SC-38596 (Same Party)
S-1-SC-38656 (Same Party)
D-504-LR-2021-00022 (Same Party)
D-504-LR-2021-00030 (Same Party)
D-504-LR-2021-00031 (Same Party)
D-504-LR-2021-00032 (Same Party)
D-504-LR-2021-00033 (Same Party)
D-504-LR-2021-00034 (Same Party)
S-1-SC-39022 (Same Party)
S-1-SC-39080 (Same Party)
D-504-LR-2021-00041 (Same Party)
S-1-SC-39145 (Same Party)

State v. Frank Lucero, __-NMCA-__ (No. A-1-CA-38468, Jan. 6, 2022)

- ***Facts→ D facing M traffic offenses in Roswell***
  - Prior to mag-court trial, D requested jury panel. Court did it, charged $40 for copying. D refused to pay, didn't get copies.
  - Convicted in mag. court
  - Appealed to d.ct. for trial *de novo*
  - Tried in d.ct.; again convicted on all counts

- ***D's argument→***
  - Mag. court lacked SMJ b/c of jury panel infirmity
    - *"tried by an anonymous jury"*

State v. Frank Lucero, __-NMCA-__ (No. A-1-CA-38468, Jan. 6, 2022)

A sad, sad day.

- ***Holding→ NMCA disagrees w/ D***
  - ***General rules→***
    - ✅ Can attack SMJ anytime, even 1st time on appeal
    - ✅ Constitutional / statutory violations usually don't affect SMJ
  - ***Bottom line→ b/c traffic offenses = Ms, mag. court had SMJ***
    - No constitutional provision / statute granting mag. court jurisdiction was violated, ignored, exceeded
- D petitioned for **cert**.→ denied Mar. 2022

Amendment of Charge Under Rule 5-204(A)

State v. Presciliano C. Ancira, ___-NMCA-___ (No. A-1-CA-38173, Mar. 23, 2022)

Dramatic reenactments

- *Facts→*
  - Alamogordo→ D smoked meth, got paranoid, broke into home through dog door. Resident saw D, kicked D, D fled.
  - D charged w/ trespass of 1000 Dewey St.
  - Close of State's case→ Amended trespass to 1002 Dewey St.
    - Rule 5-204(A)→ "court may at any time prior to a verdict cause the … information to be amended in respect to any such defect, error, omission or repugnancy if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced"
- *D's argument→*
  - Amendment of trespass = new charge in violation of 5-204(A)

State v. Presciliano C. Ancira, ___-NMCA-___ (No. A-1-CA-38173, Mar. 23, 2022)

- ***Holding→ NMCA agrees w/ D; trespass conviction rev'd***
  - **Contrast**→ "amendment ***to an*** information" **vs.** "amend***ed*** information"
  - D @ both addresses during crime spree
  - D's trial strategy was to concede trespass to avoid residential burglary
  - D's counsel didn't PTI owner of updated address
- No **cert.** petition filed

Sentencing / Probation / etc.

State v. Juliana Montano, ___-NMCA-___ (No. A-1-CA-38616, Feb. 10, 2022)

Patricia Urban

- ***Background→***
  - **Pre-2016**→ VH (DWI or reckless) = **F3** w/ death / **6 yrs** / **OSVO**
  - **Post-2016**→ VH DWI amended = **F2** w/ death ↑ / **15** yrs ↑ / **OSVO ?**
    - **Didn't** amend EMDA to make it **SVO / OSVO**
- ***Facts→***
  - **Dec. 2017**→ D black-out drunk, crashes on I-40 @ Rt. 66 Casino
  - Pled G to VH by DWI
  - Ct. found F2 VH DWI = OSVO
    - Legislative oversight that produced **absurd result→**
      - F3 = OSVO **but** F2 ≠ OSVO ???
- ***D's argument→***
  - F2 VH DWI ≠ OSVO
  - Entitled to be sentenced as non-SVO

Julianna Montano

State v. Juliana Montano, ___-NMCA-___ (No. A-1-CA-38616, Feb. 10, 2022)

- ***Holding→ NMCA agrees w/ D!***
  - **F2 VH DWI ≠ OSVO**
  - NMCA gave EMDA its **plain meaning**
  - Disparity→ **legislative inaction/choice**, not **mistake/oversight**

- **State petitioned for cert.** Mar. 2022. D ordered to respond, which they did.
  - No decision from NMSC whether to accept

State v. Gregory A. Wood, ___-NMCA-___ (No. A-1-CA-38469, Dec. 6, 2021)

- ***Facts→***
  - D got 22 days PSC for this case
  - D sought more PSC for unrelated 2013 case

Gregory Alan "SCHLEGIEH" Wood

Alias: GREOGORY, ALAN; WOOD, GREGORY ALLAN; WOOD, GREGORY ALLEN; SCHLEGIEH, GREGORY WOOD

- ***D's argument→*** Gimme more PSC

- ***Holding→ NMCA emphatically disagrees w/ D. No more PSC.***
  - Confinement ***doesn't have to relate exclusively*** to charge to which D seeks PSC
    - … but confinement ***must relate in some way***
  - No evidence D's confinement in unrelated 2013 case related to 2015 charges

- No **cert.** petition filed

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Which country is considered the birthplace of the potato?

ⓘ Start presenting to display the poll results on this slide.

State v. Felicia J. Peru, ___-NMCA-___ (No. A-1-CA-39149, Dec. 14, 2021)

- ***Facts→***
  - May 2020→ D had PV after NMSC enacted COVID measures
    - Virtual hearings unless "emergency"
  - D asked to appear in person for PV
  - Court said no, held PV virtually

- ***D's argument→***
  - If D wants in-person hearing, should've gotten it!
    - *[Didn't argue NMSC's COVID order erroneous or unconstitutional]*

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Audience Q&A Session

ⓘ Start presenting to display the audience questions on this slide.

State v. Felicia J. Peru, ___-NMCA-___ (No. A-1-CA-39149, Dec. 14, 2021)

- ***Holding→ NMCA disagrees***
  - No "**emergency need**" to appear in person ⊕
  - **No error w/ court's compliance w/ NMSC's COVID order**

- ***Takeaway→*** Adherence to NMSC PHOs will likely be upheld on appeal

- D petitioned for **cert.**→ denied Mar. 2022

Farmington resident Donald Wing

State v. Donald Wing, __-NMCA-__ (No. A-1-CA-38763, Dec. 20, 2021)

- ***Facts→***
  - ***June 2019 plea***
  - ***Sept. 2019 sentencing→***
    - Only State, D's counsel, & treatment court invited to speak
    - D neither spoke, nor was he asked to speak

- ***D's argument→***
  - Denied right to allocution at sentencing
  - Entitled to resentencing

Susan B. Anthony

John Brown

State v. Donald Wing, __-NMCA-__ (No. A-1-CA-38763, Dec. 20, 2021)

- ***Allocution***→ Formal opportunity to address court to express remorse, explain personal circumstances that might be considered in sentencing

> The silencing of defendants serves to disproportionately quiet the voices of the poor and people of color within the court system. The obstacles preventing poor and minority litigants from "having their say" in court have been thoroughly recognized.[16] The specific silencing of defendants within the criminal system is one of the starkest examples of this reality.[17]
>
> Allocution matters because it is one place in the criminal process where every convicted defendant has the chance to speak.

- ***Holding→ NMCA agrees w/ D!***
  - Denial of allocution renders sentence unauthorized by statute
  - **Remedy**→ Reversal & resentencing w/o inquiry into harm caused
  - Even when statements can have little/no impact to sentence

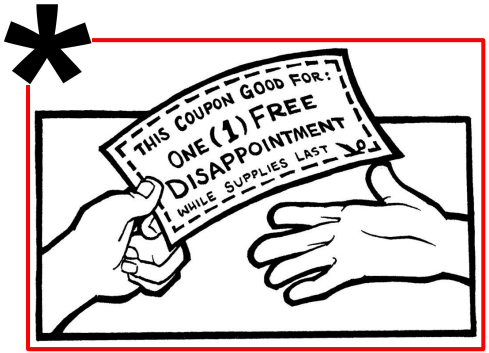
- Feb. 2022→ **Cert.** denied *(D requested cert. to review suppression issue)*

State v. Lucio Godinez, Jr., __-NMCA-__ (No. A-1-CA-38063, Dec. 1, 2021)

Winner -- Worst human being in 2021

- ***Facts*→**
  - **2011**→ Conv. of F2 CSCM (7 y/o V)
  - **2013**→ Released from DOC
  - **2018**→ PV b/c D CSP'd his autistic daughter (22 y/o, functions as 1st grader)
  - **PVH**→ Testimony from PO, V's mom, SANE, Safehouse interviewer, NMSP officer
    - **V didn't testify**→ condition likely to regress if she had to
  - **State's evidence**→
    - W testimony re V's statements
    - V's altered demeanor after incident
    - *Physical evidence*→ bloody underwear w/ male DNA, bruising to thighs
  - **Court**→ PV by committing new crime. FO DOC, ~11 years.
- ***D's argument*→**
  - PVH violated due process; unable to confront V re new crimes

State v. Lucio Godinez, Jr., __-NMCA-__ (No. A-1-CA-38063, Dec. 1, 2021)



- ***Holding→ NMCA agrees w/ D!***
  - *Confrontation essential* … unless corroborating evidence compellingly establishes crime occurred & D committed it
  - NMCA open to "*creative solutions*" short of traditional cross-ex that may satisfy due process in PVHs (like video-recorded depositions)
    - *… but didn't go into great detail …*
- ***Takeaway→*** New crime = Sole basis of PV?
  - Likely need to prove new crime at PVH w/ live-W testimony
- **State's cert. petition granted** 🤞

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What is (statistically) the happiest state in the USA?

ⓘ Start presenting to display the poll results on this slide.

Statute of Limitations

Jaydon Chavez-Silver

State v. Esias Frank Madrid, No. S-1-SC-37567 (Dec. 13, 2021) (nonprecedential)

- ***Facts→***
  - **June 2015**→ D does drive-by shooting, killing Jaydon Chavez-Silver
  - **2017**→ G @ trial of depraved-mind F1 murder
    - … But no verdict as to Cts. 2, 3, or 4 (F2s) b/c jurors wrongly thought G on Ct. 1 meant they didn't need to
    - Mistrial on 2, 3, & 4
- ***D's argument***→ Bar retrial of these counts on DJ grounds

State v. Esias Frank Madrid, No. S-1-SC-37567 (Dec. 13, 2021) (nonprecedential)

- ***Holding→ NMSC sided w/ D … but not for reason D argued***
  - 6-year SOL on F2s had run; issue = moot
    - *"underlying events…took place on June 26, 2015, and thus potential reprosecution on Counts 2, 3, and 4 expired on June 26, 2021"*

*

  - **BUT** prosecution for 2, 3, & 4 initiated during 6-year SOL period. Ct. declared mistrial on 2, 3, & 4, found requisite "manifest necessity."
  - **Suggests prosecutions must conclude w/in SOL period, not just be initiated w/in SOL period**

🙏 **Unpublished**

Procedure on Appeal from Magistrate Court to District Court

State v. Frank Lucero, __-NMCA-__ (No. A-1-CA-38468, Jan. 6, 2022)

- ***Facts→***
  - *Pro se* D convicted of traffic offenses in mag. court
  - Appealed to d.ct. for trial *de novo*
  - Tried in d.ct., again convicted on all counts

- ***D's argument→***
  - D ct. should've remanded case to mag. court for new trial b/c mag. court erred on pretrial motions

State v. Frank Lucero, __-NMCA-__ (No. A-1-CA-38468, Jan. 6, 2022)

- ***Holding→ NMCA disagrees w/ D***
  - D's requested relief ≠ a thing
  - D's relief→ trial *de novo* in d.ct., which D got
- D's **cert. petition** denied Mar. 2022

Rule 5-803 - Post-Sentence Relief

State v. Gregory A. Wood, ___-NMCA-___ (No. A-1-CA-38469, Dec. 6, 2021)

Nov. 2010→ Convicted of **auto burg.** for siphoning gas

2012→ *Muqqddin* redefined scope of burglary in NM

Dec. 2014→ Arrested for PCS (meth) & breaking into storage sheds

Jan. 2016→ 5-803 petition challenging **2010 auto burg** conviction in light of *Muqqddin*. **Denied**.

2017→ Convicted of PCS (meth). HOE using **2010 auto burg** conviction.

D's argument→ *Muqqddin* should apply **retroactively** to bar use of **2010 burg. conviction** to enhance 2017 conviction as HOE

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Audience Q&A Session

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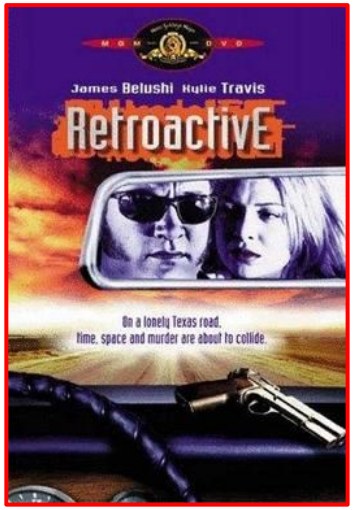

Retroactive

133

DVD

Blu-ray

$16.85 $29.95 -44%

prime FREE Delivery Sat, Apr 30

Only 18 left in stock (more on the way).

More Buying Choices

$12.15 (19 used & new offers)

VHS Tape

$3.48

Get it Fri, May 6 - Wed, May 11

$3.99 shipping

Only 1 left in stock - order soon.

More Buying Choices

$1.49 (10 used & new offers)

State v. Gregory A. Wood, ___-NMCA-___ (No. A-1-CA-38469, Dec. 6, 2021)

- ***Holding*→ *NMCA agreed w/ D***
  - *Muqqddin*→ applies *retroactively*
  - D's 2010 felony ≠ felony post-*Muqqddin*
    - Thus, D's HOE sentence for 2017 convictions = erroneous

- ***Takeaway*→** if D has a usable prior F for burglary, know supporting facts to make sure it's valid post-*Muqqddin*

- ***No cert. petition filed***

State v. Dana McGarrh, ___-NMCA-___ (No. A-1-CA-39044, Apr. 26, 2022)

- ***Facts→***
  - **1989→ M DWI** in Farmington Muni Court
  - **1992→ M DWI** in Farmington Muni Court
  - **2001→ M DWI** in Aztec Muni Court
  - **2003→ F DWI** in 11th District Court
  - **2006→** D completes 2003 sentence
  - **2020→** 5-803 petition in d.ct. to set aside all 4 DWIs

- ***D's argument→***
  - G pleas not K&V entered
  - Respective judges didn't explain things to him

State v. Dana McGarrh, ___-NMCA-___ (No. A-1-CA-39044, Apr. 26, 2022)

- ***Holding→ D loses!***

1 ✅ District ct. = jurisdiction to consider 5-803 petition for M DWIs, even though convictions occured in muni courts

2 ❌ 5-803 petitions→ must be filed "w/in a reasonable time" after completion of sentence, unless good cause for delay
  - 15 years = unreasonable; no good cause for delay

3 ❌ No evidence G pleas weren't knowing & voluntary
  - ❌ 2006→ Plea = valid
  - ? 2001→ Little record of plea
  - 1992→ No record of plea
  - 1989→ No record of plea

- ***No cert. petition*** filed yet

Interlocutory appeal

State v. Brian Adams, __-NMCA-__ (No. A-1-CA-36506, May 21, 2019), *aff'd*, __-NMSC-__ (No. S-1-SC-37722, Dec. 16, 2021)

- ***Facts***→ Farmington D commits DWI
  - **D's blood**→ + for MJ, benzos, synthetic opioids
  - **D.Ct.**→ suppresses + blood results
  - **State**→ application for interloc. pursuant to § 39-3-3(B)(2):
    - ✓ w/in 10 days from suppression of evidence
    - ✓ appeal not taken for purpose of delay
    - ✗ evidence = *"substantial proof of a fact material in the proceeding"*

- ***D's argument→ State could <u>still</u> prove its case w/o + blood results!***
  - State can't appeal b/c other evidence supports DWI
  - Ws could still testify as to→
    - observations of D
    - D's FSTs
    - D's admissions to drinking & taking prescription drugs

State v. Brian Adams, __-NMCA-__ (No. A-1-CA-36506, May 21, 2019), *aff'd*, __-NMSC-__ (No. S-1-SC-37722, Dec. 16, 2021)

Bryan Adams
2 of the most romantic wedding songs (Brides.com)
#52 - "(Everything I Do) I Do It for You"
#72 - "Heaven"

- ***Holding→ NMCA disagrees w/D!***
  - D's + blood results = *"important or significant"*
    - Material for State's theory that D *incapable of safely driving*
      - D didn't admit to consuming all those drugs
      - D admitted consuming some drugs, but earlier in the day; results necessary to show level of impairment
  - Exclusion of evidence doesn't have to make it impossible for State to prosecute under any theory

- **NMSC upheld decision on appeal** *(didn't even address this issue)*

Q&A; CONTACT INFO; RESOURCES

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What issue would you like to see our appellate courts address?

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OAG Criminal Appeals Division

Director: John Kloss (505) 717-3592; cell (505) 280-8573
jkloss@nmag.gov
Deputy Director: Maris Veidemanis (505) 490-4867
mveidemanis@nmag.gov

STAFF ATTORNEYS
Jane Bernstein – (505) 717-3509 – jbernstein@nmag.gov
Emily Bowen – (505) 717-3562 – ebowen@nmag.gov
Leland Churan – (505) 717-3574 – lchuran@nmag.gov
Meryl Francolini – (505) 717-3591 – mfrancolini@nmag.gov
Charles Gutierrez – (505) 717-3522 – cjgutierrez@nmag.gov
Walter Hart – (505) 717-3523 – whart@nmag.gov
Ben Lammons – (505) 490-4057 – blammons@nmag.gov
Mark Lovato – (505) 717-3541 – mlovato@nmag.gov
Erica Schiff – (505) 717-3576 – eschiff@nmag.gov
Van Snow – (505) 490-4843 – vsnow@nmag.gov
Emily Tyson-Jorgenson – (505) 490-4868 –
etyson-jorgenson@nmag.gov

ADMIN/SUPPORT
Fran Narro in Albuquerque – state/fed habeas & more
(505) 717-3573 fnarro@nmag.gov
Rose Leal (Santa Fe) – all regular appeals & more
(505) 490-4848 rleal@nmag.gov

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