NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

Appellate Law Update
2015 District Attorneys Fall Conference
November 17, 2015

WHAT WE DO

- **§ 8-5-2. Duties of attorney general**

- Except as otherwise provided by law, the attorney general shall:
- A. prosecute and defend all causes in the supreme court and court of appeals in which the state is a party or interested;

Criminal Appeals Division of the OAG

- M. Anne Kelly
- Division Director
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- (505) 222-9054

CRIMINAL APPEALS DIVISION

- We currently have one director, 13 staff attorneys, and two staff members
- Claire Welch in Albuquerque – handles state habeas, federal habeas, and much more – (505) 222-9050 and cwelch@nmag.gov
- Rose Leal in Santa Fe – handles all regular appeals and much more – (505) 827-6054 and rleal@nmag.gov

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OAG WEBSITE

- NMAG.GOV
- This presentation and the DA Liaison List will be under the Criminal Appeals tab

NEW MEXICO SUPREME COURT

- Published opinions and unpublished decisions from May of 2015 to November 17, 2015
- Opinions and decisions are usually issued on Mondays and Thursdays
- Available on New Mexico Courts website: www.nmcourts.gov
- Available on New Mexico Compilation Commission website: www.nmcompcomm.us
- The opinion is emailed that day from our office to the prosecutor

NEW MEXICO COURT OF APPEALS

- Published opinions from May of 2015 to November 17, 2015
- Rule 12-405 NMRA permits citations to unpublished opinions (memorandum opinions)
- Memorandum opinions and published opinions are faxed to the prosecutor
- All opinions, published and unpublished, are available on the New Mexico Court of Appeals website – https://coa.nmcourts.gov
- And the New Mexico Compilation Commission – www.nmcompcomm.us

CITATIONS

- No more NM Reporters – stopped at Volume 150
- We now have the New Mexico Appellate Reports but they are never cited
- Vendor-neutral citation form – Rule 23-112 NMRA
- Parallel citation to the New Mexico reports through Volume 150 is mandatory
- Parallel citation to the Pacific Reporter is discretionary
- EXAMPLE: *State v. Gallegos*, 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828

SUPREME COURT CLERK'S OFFICE

- Joey Moya
- Clerk of the New Mexico Supreme Court
- P.O. Box 848
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COURT OF APPEALS CLERK'S OFFICE

- Mark Reynolds
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- P.O. Box 2008
- Santa Fe, NM 87504-2008
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DOCKETING STATEMENTS

- For a State's appeal, trial counsel is responsible for filing the docketing statement
- Rule 12-208 NMRA
- Any extension of time to file a docketing statement is filed with the Court of Appeals, not the district court
- File the docketing statement in the district court *and* the Court of Appeals
- Form letter goes out from our office when a notice of appeal is filed
- Include all relevant facts in the docketing statement

SUPREME COURT OPINIONS and DECISIONS

- *State v. Cabezuela*
- *State v. Anaya* (unpublished decision)
- *State v. Sanchez*
- *State v. Antonio T.*
- *State v. Steven B.*
- *State v. Baca*
- *State v. King*
- *State v. Paananen*
- *State v. DeAngelo M.*
- *State v. Davis*
- *State v. Stanfield* (unpublished decision)
- *State v. Serros*

NEW MEXICO COURT OF APPEALS OPINIONS

- *State v. Cordova*
- *State v. Holt*
- *State v. Wyatt B.*
- *State v. Godkin*
- *State v. Mendoza*
- *State v. Acosta*
- *State v. Herrera*
- *State v. Lefthand*
- *State v. Suskiewich*
- *State v. Hobbs*
- *State v. Ben*
- *State v. Anderson*
- *State v. Hernandez*
- *State v. Astorga*
- *State v. Chavez*
- *State v. Swain*
- *State v. Flores*
- *State v. Bailey*
- *State v. Bernard*
- *State v. Dopslaf*

JURISDICTION AND JURORS

- *State v. Lefthand*
- *State v. Hobbs*

VENUE

- *State v. Adria Lefthand*, 2015 WL 5214617 (N.M. Ct. App. Sept. 3, 2015)
- Defendant and Martinez lived in Taos, had a son who was born in Taos, and a Taos court entered an order re: support, custody, and visitation
- Defendant was indicted for custodial interference in Taos and claimed improper venue because the alleged acts occurred in Santa Fe or Bernalillo county
- Venue was appropriate because the victim suffered the result of the deprivation in Taos – an essential element of the offense
- Venue allows for prosecution "in any county in which a material element of the crime was committed." § 30-1-14

RIGHT TO PUBLIC TRIAL

- *State v. Gregory Hobbs*, 2015 WL 5841175 (Oct. 5, 2015)
- Second-degree murder
- Witness claimed she was in fear from Victim's family – defense counsel stipulated to partial closure of the courtroom and then argued structural error on appeal (!)
- Defendant waived his right to a public trial by defense counsel's stipulation to make his witness more comfortable

JUROR BIAS

- *State v. Gregory Hobbs*, 2015 WL 5841175 (Oct. 5, 2015)
- One of State's witnesses disclosed prior to her testimony that she knew one of the jurors from church
- Defense counsel had no objection as long as relationship wasn't close and personal but still sought motion for new trial on this basis
- Defendant failed to object, failed to inquire further, and failed to show juror was biased
- State attached affidavit from juror that he realized he knew the witness only after conclusion of trial

STATUTORY CONSTRUCTION

- *State v. Chavez*
- *State v. Bernard*
- *State v. Lefthand*
- *State v. Archuleta*
- *State v. Anaya*
- *State v. Stephenson*
- *State v. Holt*
- *State v. Tufts*

STATUTORY CONSTRUCTION/ AGGRAVATED FLEEING

- *State v. Peter Chavez*, No. 33,084 (N.M. Ct. App. Oct. 26, 2015) – *cert will be filed*
- Conviction for aggravated fleeing of law enforcement officer – NMSA 1978, § 30-22-1.1 (2003)
- Facts – 10:00 p.m. - officer saw defendant on dirt bike with no lights and no license plate. Followed defendant and ended up in extended police chase.
- Defendant went through a parking lot, dirt path, and the highway. Speeds up to 65 mph and defendant ran three stop signs. At least three police cars in pursuit and five cars had to pull over to avoid the chase.
- Defendant finally went off-road and the officer blew a tire.
- Officers testified there was no "public safety issue" because there wasn't much traffic and no person was actually endangered.

State v. Peter Chavez (cont.)

- A person commits aggravated fleeing by "willfully and carelessly driving [a] vehicle *in a manner that endangers the life or another person* after being given a visual or audible signal to stop."
- Court of Appeals held the statute requires *actual* endangerment and rejected the State's interpretation that endangerment is satisfied by actual danger *or* the potential for danger
- The "simple, evasive maneuvers" taken by the other motorists to avoid the pursuit was insufficient evidence of endangerment. ¶ 16
- CERT WILL BE SOUGHT

STATUTORY CONSTRUCTION/POSSESSION OF A STOLEN VEHICLE

- *State v. Eric Bernard*, 2015-NMCA-089, 355 P.3d 831
- NMSA 1978, § 30-16D-4(A) – possession of a stolen vehicle and receiving or transferring possession of stolen vehicle
- Intent to procure or pass title to a vehicle is not an essential element of possession of a stolen vehicle – the offenses are distinct

STATUTORY CONSTRUCTION/CUSTODIAL INTERFERENCE

- *State v. Adria Lefthand*, 2015 WL 5214617 (Sept. 3, 2015)
- Construction of § 30-4-4(B) – custodial interference to determine the essential elements of the offense for purposes of venue challenge
- The crime is not completed until the intended result is achieved – i.e. when the person who has the right to custody "suffers the malicious and intended" harm - ¶ 13
- Thus, the prohibited result, rather than the proscribed conduct *per se*, is the gravamen of the offense

STATUTORY CONSTRUCTION/BURGLARY

- *State v. Archuleta*, 2015-NMCA-037, 346 P.3d 290, and *State v. Baca*, 2014-NMKCA-087, 331 P.3d 971 –
- Burglary – unauthorized entry *and* intent to commit a theft or felony therein
- Defendant, and at least 25 other such defendants, were charged with burglary where they were under a no trespass order from a commercial business, violated that order by entering the establishment, and stole items
- COA says this is NOT what the statute intended – *Muqqddin,* 2012-NMSC-029, 285 P.3d 622
- This is not the type of "harmful entry" contemplated by the statute and the State can charge trespass and shoplifting - ¶ 14
- CERT WAS QUASHED

BURGLARY/UNAUTHORIZED ENTRY

- *State v. Arthur Anaya*, No. 34,279 dec. (N.M. Sup. Ct. May 4, 2015)
- Doesn't dispute evidence for murders
- But insufficient for agg burglary because he had a lawful right to enter the trailer he owned and therefore no unauthorized entry
- Evidence showed parties had an oral rental agreement and Defendant's conduct confirmed this
- Evidence that the victim was behind on the rent also didn't give Defendant the right to enter at will

STATUTORY CONSTRUCTION/ABANDONMENT OF A CHILD

- *State v. Jennifer Stephenson*, 2015-NMCA-038, 346 P.3d 409, *cert. granted*, 350 P.3d 92
- Toddler was left all night in a locked room – a 112 lb. dresser fell on him, pinning him between the dresser and his bed causing severe trauma to his legs and severe pain
- Conviction for child abandonment as lesser included offense (requested by defense) of negligent child abuse - § 30-6-1(B)
- "Abandonment of a child consists of a parent, guardian, or custodian of a child intentionally leaving or abandoning the child under circumstances whereby the child may or does suffer neglect."
- COA held that the statute requires the parent or guardian to leave with the intent *never to return* and State didn't prove that
- Hopeful the NMSCT will back off that requirement – argued last month. Stay tuned

STATUTORY CONSTRUCTION/BREAKING AND ENTERING

- *State v. Anthony Holt*, 2015-NMCA-073, 352 P.3d 702
- Defendant was working to remove the aluminum window screen from the window and had it halfway removed and his fingers between the window and the screen
- Entry of any part of defendant into the space between the home's outer window screen and the window constituted "entry of a structure" for purposes of B&E
- COA considered *Muqqddin* and held the window screen was protected space under the statute and afforded protection against unauthorized intrusions
- BUT – Judge Kennedy filed a dissent, also citing to *Muqqddin* and the Supreme Court has granted cert
- Again, the dissent makes the argument that the defendant could have been charged with a lesser crime which somehow means B&E doesn't apply

STATUTORY CONSTRUCTION/CRIMINAL SEXUAL COMMUNCATION WITH A CHILD

- *State v. Robert Tufts*, 2015-NMCA-075, 355 P.3d 32, *cert. granted*, June 19, 2015
- Def created images of his penis and a video of himself masturbating, saved them to a secure digital (SD) card, put the SD card in a cell phone, and gave the cell phone to a 15-year old girl telling her there was a "surprise" on the phone for her
- Convicted under § 30-37-3.3 – criminal sexual communication with a child – "knowingly and intentionally communicating directly with a specific child under 16 years of age by sending the child obscene images of the person's intimate parts by means of an electronic communication device when the perpetrator is at least four years older than the child."
- But no – the verb "to send" requires a third-party carrier which was not present here
- Currently on cert review – the COA's interpretation ignores the varied ways people can convey digital images and thereby frustrates the legislative purpose in protecting children

FIRST DEGREE MURDER AND KIDNAPPING

- *State v. Anaya*
- *State v. King*
- *State v. Stanfield*
- *State v. Herrera*

FIRST DEGREE MURDER/PEREMPTORY EXCUSAL OF JUDGE/AMENDED INFORMATION

- *State v. Arthur Anaya*, No. 34,279, dec. (N.M. Sup. Ct. May 4, 2015) (non-precedential)
- 2 counts of first-degree murder – shot his tenant and her daughter's boyfriend in the face
- Rule 5-106(D)(1) allows 10 days past arraignment or waiver thereof to excuse the trial judge – all Defendant's motions to excuse Judge Pfeffer were untimely
- The amended criminal information and second arraignment did not revive this time limit because it only supplemented, and did not change, the original charges

FIRST DEGREE MURDER

- *State v. Donovan King*, 2015-NMSC-030, 357 P.3d 949
- During interrogation in murder case, Defendant offered to reveal the location of the weapon if the detective would "drop" the charge of tampering. Detective said he didn't have the authority but called a prosecutor and then told Defendant "the district attorney is willing to talk dismissal." Defendant led detective to the weapon.
- Court said the prosecutor's involvement made this discussion a plea agreement. ¶¶ 14-15
- Because Defendant relied on the promise of dismissal, he was entitled to *specific performance* of the unfulfilled promise and the Court vacated the tampering conviction. ¶¶ 17-19

FIRST DEGREE MURDER

- *State v. King* other holdings
- Charging Defendant as a principal gave notice he could be convicted as an accessory - ¶¶ 20-21
- Defendant's self-serving statements made to an officer could not be introduced by Defendant through the officer as they were hearsay not covered by any exception - ¶¶ 22-32
- Exception for then-existing mental state cannot be used to admit a statement about *why* the declarant had that state of mind - ¶ 27

FIRST DEGREE MURDER/COMPETENCY

- *State v. Danny Stanfield*, No. 34,817 (N.M. Sup. Ct. Nov. 9, 2015)
- Victims were on Johnson's property putting away their tools when confronted by Defendant, who was a tenant of the property. Defendant yelled at them, drove back to his trailer, and returned with a gun. He shot one victim eight times and the other four times.
- Found to be dangerous and incompetent to stand trial
- Three years later, still dangerous and not making substantial progress toward competency – court held a hearing and determined by clear and convincing evidence that Defendant took the victims' lives with deliberation intention and was sentenced to NMDOH, under Section 31-9-1.5(D), for two consecutive life terms plus nine years (for a third attempted murder)
- Claims insufficient evidence of deliberate intent to kill
- Use of a single-action revolver which required him to aim and pull the trigger each time he shot
- When asked if he had shot them – "You're damn right I did."

KIDNAPPING

- *State v. Carlos and Daniel Herrera*, 2015 WL 5174133 (N.M. Ct. App. Sept. 3, 2015)
- Victims kept at apartment for over an hour – made to strip, threatened with weapons, punched, and robbed
- "Such a prolonged period of restraint is simply not incident to or inherent aggravated assault under any of the tests described in *Trujillo* [2012-NMCA-112, 289 P.3d 238]" - ¶ 10
- Defendants not entitled to a jury instruction based on *Trujillo* (and failed to include the proposed instruction even on appeal)

CHILD ABUSE

- *State v. Cabezuela*

CHILD ABUSE/SUFFICIENCY OF EVIDENCE

- *State v. Adriana Cabezuela*, 2015-NMSC-016, 350 P.3D 1145
- Remand on retrial – conviction for intentional child abuse resulting in death affirmed
- 8-month old baby Mariana
- Defendant mother made several contradictory statements about the baby's injuries – she fell, she was bitten by another child, Defendant lost control and bit her, Defendant shook her, Defendant threw her on the bed and she hit the wall
- The baby had bruising over her head and face, bleeding around her brain and inside her eyes, and bruising on her torso and extremities, and died from a traumatic brain injury
- Defendant argued on appeal that there was insufficient evidence of intentional abuse because the baby fell off a van and Def was only negligent in not getting her medical care earlier
- Court will not substitute its judgment for that of the jury and jury had ample evidence of intentional child abuse

CHILD ABUSE/JURY INSTRUCTIONS

- *State v. Adriana Cabezuela*, 2015-NMSC-016, 350 P.3d 1145
- First time around, case was reversed due to jury instruction to consider Defendant's acts or "failure to act" in the elements instruction
- In *Cabezuela I* [2011-NMSC-041, 150 N.M. 654], the Supreme Court held this was error as "failure to act" was more in line with negligent child abuse and the jury wasn't instructed on negligent child abuse
- On remand, State again tried her only on intentional child abuse and did not pursue a failure to act theory (although Defendant did)
- However, it's OK to have this language in the *definitional* instruction for "intentional" – UJI 14-610
- Not fundamental error – "our concern that a culpable act must be identified, however, should not preclude the jury from considering *all conduct*, including actions and failures to act, surrounding the culpable act itself, as evidence of the accused's subjective intent." ¶ 39
- New instructions don't include this "intentional" definition and provide that UJI 14-141, general criminal intent, is to be given

CHILD ABUSE/SENTENCING

- *State v. Adriana Cabezuela*, 2015-NMSC-016, 350 P.3d 1145
- Conviction of child abuse resulting in death
- Defendant was entitled to present mitigation evidence to reduce her life sentence by 1/3 or 10 years – NMSA 1978, § 31-18-15(A)(1)
- Parties were incorrect in assuming that the sentence was a minimum mandatory sentence of 30 years
- First-degree child abuse resulting in death is a noncapital felony
- Only capital felonies carry the mandatory sentence of life imprisonment
- Remanded to determine if mitigation was appropriate

DOUBLE JEOPARDY

- *State v. Baca*
- *State v. Ben*
- *State v. Bernard*

DOUBLE JEOPARDY/LOWER COURTS

- *State v. Abraham Baca*, 2015-NMSC-021, 352 P.3d 1151, *cert. denied*, ___ S.Ct. ___, 2015 WL 4641887 (Oct. 5, 2015)
- NMSP officer charged with DWI
- Issues of double jeopardy – what is an acquittal vs. a dismissal for procedural error?
- Case was dismissed in magistrate court for procedural error – no record
- Two conflicting magistrate court dismissals – district court heard testimony and the NMSCT gave deference to its findings
- NMSCT looked beyond how defense counsel and the magistrate court "characterized" their motions/rulings and considered the "substance rather than the labels." ¶ 42
- "A defendant 'deliberately choosing to seek termination of the proceeding against him' before a determination of his guilt or innocence is voluntarily rejecting the Fifth Amendment protection against being twice placed in jeopardy for the same offense." ¶ 41
- Good language of the protections of the Double Jeopardy Clause.

DOUBLE JEOPARDY/IMPLIED ACQUITTAL

- *State v. Ferlin Ben*, No. 33,921 (N.M. Ct. App. Oct. 5, 2015), 2015 WL 5841019
- Defendant blew a .08 and performed poorly on FSTs – charged in magistrate court with per se DWI and impairment to the slightest degree
- Magistrate court convicted him of per se DWI and didn't address the other provision
- Both theories were presented on de novo review in district court and jury convicted him on impairment but acquitted on per se DWI
- No double jeopardy violation – different situation from an implied acquittal where jury convicts on a lesser offense but is silent on the greater
- This is an alternative means of committing a crime – "jeopardy attaches to the offense as a whole rather than the particular form in which it is tried." ¶ 13
- EXCEPTION: a collateral estoppel theory where a conviction necessarily involves a factual finding inconsistent with guilt on the other theory

DOUBLE JEOPARDY/UNIT OF PROSECUTION

- *State v. Eric Bernard*, 2015-NMCA-089, 355 P.3d 831
- Four counts of possession of a stolen vehicle – four separate vehicles stolen from one victim
- Didn't extend the single-larceny doctrine to a unit of prosecution analysis – jury wasn't required to find Defendant actually *took* the vehicles - ¶ 21
- Statute is ambiguous on unit of prosecution (that word "any" again) so look to indicia of distinctness
- However, "we read *Olsson* to preclude the use of *Herron* factors in possession cases due to the 'impracticability' of its application in determining the proper unit of prosecution . . . [but this does not] require[] a wholesale departure from an indicia of distinctness if the facts of a unit of prosecution case render such analysis practicable." ¶ 25
- Here, there was not sufficient evidence to show Defendant possessed each vehicle at a separate location and time - ¶ 27
- So, the Court looked at provisions of the Motor Vehicle Code to conclude that the Legislature sought to protect the public from trafficking in stolen vehicles and therefore intended to allow separate charges for each stolen vehicle - ¶ 30

FOURTH AMENDMENT/ARTICLE II, § 10

- *State v. Swain*
- *State v. Dopslaf*
- *State v. Hernandez*
- *State v. Cordova*
- *State v. Paananen*
- *State v. Davis*
- *State v. Sanchez*

FOURTH AMENDMENT/*BETANCOURT* ROADBLOCKS

- *State v. Lamont Swain*, 2015 WL 6594311 (N.M. Ct. App. Oct. 28, 2015)
- Useful for any *Betancourt* roadblock case – reaffirms that no one factor is dispositive
- The only disputed factor was advance publicity – testimony that officer sent the notice to a radio station that not only didn't receive this notification but didn't receive any of the other ones sent by the police
- Police only contacted the radio station and not newspapers or any other source
- Court didn't decide if those efforts were sufficient because "advance publicity, while beneficial from a deterrence perspective, is not dispositive with respect to the" Fourth Amendment analysis.
- NOTE: it was helpful that the roadblock was clearly marked for motorists

FOURTH AMENDMENT/REASONABLE SUSPICION

- *State v. Zachary Dopslaf*, 2015-NMCA-098, 356 P.3d 559
- Whether an officer had reasonable suspicion based upon his reasonable mistake of law about the U-turn law
- COA follows *Heien v. U.S.*, 135 S.Ct. 530 (2014), in which SCOTUS held an officer's reasonable mistake of law could support a finding of reasonable suspicion for a lawful traffic stop
- No separate argument was made under Article II, § 10
- Point isn't whether the defendant actually committed the traffic violation but whether the officer's belief that he did is objectively reasonable

FOURTH AMENDMENT/REASONABLE SUSPICION

- *State v. Oscar Hernandez*, 2015 WL 6080899 (N.M. Ct. App. Oct. 13, 2015)
- Undercover investigation culminated in stop of SUV in which Defendant was a passenger
- Defendant moved to suppress, claiming no reasonable suspicion, due to agents' fractured investigation
- "We are no made aware of any authority to support the notion that an investigatory stop requires law enforcement officers to know of prior suspicious or criminal activity or to know that the owner of the subject vehicle was 'in fact' involved in criminal activity. Again, reasonable suspicion 'does not deal with hard certainties, but with probabilities.'" ¶ 17
- "[A] pattern of behavior interpreted by the untrained observer as innocent may justify a valid investigatory stop when viewed collectively by experienced drug enforcement agents." ¶ 17

FOURTH AMENDMENT/EMERGENCY ASSISTANCE DOCTRINE

- *State v. Juan Cordova*, 2015 WL 3645078 (N.M. Ct. App. June 11, 2015)
- Entry into Defendant's home after a horrific car accident with fatalities
- COA held officers had insufficient evidence to reasonably believe Defendant was in need of immediate aid – deputies only knew that Defendant's truck had been involved in the accident and that three people had been seen leaving the truck
- COA required evidence of injury – blood trail leading to the house, something definitive to show defendant was injured, etc.
- ON CERT

FOURTH AMENDMENT/WARRANTLESS ARRESTS

- *State v. Ernest Paananen*, 2015-NMSC-031, 357 P.3d 958
- Defendant caught shoplifting by store security and detained until officers arrived
- Upon arrival, the officers immediately handcuffed Defendant and searched his possessions - NMSA 1978, Section 30–16–23 (1965) ("Any law enforcement officer may arrest *without warrant* any person [the officer] has probable cause for believing has committed the crime of shoplifting....")
- COA held the search was unlawful because the arrest, although supported by PC, was not supported by exigent circumstances
- Fourth Amendment was not violated – allows for warrantless arrest based on PC alone
- Decided under Article II, § 10 with emphasis on time and reasonableness
- Other options were to let Defendant go, then get an arrest warrant and track him down or to detain him at the store while getting a warrant

- "We reiterate our holding in *Campos* [1994-NMSC-012, 117 N.M. 155] that the overarching 'inquiry in reviewing warrantless arrests [is] whether it was reasonable for the officer not to procure an arrest warrant,' and that a warrantless arrest supported by probable cause is reasonable if 'some exigency existed that precluded the officer from securing a warrant.' . . . Accordingly, when the police have ample time to obtain a warrant before making an arrest, as was the case in *Campos,* our New Mexico Constitution compels them to do so. . . . However, where as here sufficient exigent circumstances make it not reasonably practicable to get a warrant, one is not required." ¶ 27

FOURTH AMENDMENT/ AERIAL SURVEILLANCE

- *State v. Norman Davis*, 2015 WL 6125580 (N.M. Sup. Ct. Oct. 19, 2015)
- 2006 – helicopter flights over Carson Estates due to tips of marijuana growing
- Majority decided case under the 4th Amendment
- "But, exhibiting a reasonable expectation of privacy from ground level surveillance may not always be enough to protect from public or official observation from the air under the Fourth Amendment." ¶ 28
- "Based on the evidence, therefore, we conclude that the official conduct in this case went beyond a brief flyover to gather information. The prolonged hovering close enough to the ground to cause interference with Davis' property transformed this surveillance from a lawful observation of an area left open to public view to an unconstitutional intrusion into Davis' expectation of privacy." ¶ 52
- Justice Chavez special concurrence – case should be decided under Article II, § 10 – "an individual's subjective expectation of privacy in his or her home from ground-level surveillance is coextensive with his or her subjective expectation of privacy from aerial surveillance." ¶ 63

FOURTH AMENDMENT/BORDER PATROL

- *State v. Aide Zamora Sanchez*, 2015-NMSC-018, 350 P.3d 1169
- International border crossing
- *State v. Cardenas-Alvarez*, 2001-NMSC-017, 130 N.M. 386 - NM Constitution applies to evidence seized by federal agents at border patrol checkpoints within the State
- "We hold that Article II, Section 10 does not afford greater protection at an international border checkpoint because unlike motorists who are stopped at interior border checkpoints, all motorists stopped at international fixed checkpoints are known to be international travelers who are not entitled to the heightened protection enjoyed by domestic travelers." ¶ 2

SPEEDY TRIAL

- *State v. Flores*
- *State v. Serros*
- *State v. Suskiewich*

SPEEDY TRIAL/A LOSS

- *State v. Robert Flores*, 2015-NMCA-081, 355 P.3d 81
- Reckless child abuse resulting in death – infant left in laundry basket while dad left
- Complex case but COA held the 62-month delay was "extraordinary" – found prejudice was *presumed* because of the long delay and the assertion of the right
- District court found no speedy trial violation and it was barely argued by Defendant in the briefs
- So, even if the defense barely touches it, make sure you cover all the bases and always argue prejudice should not be presumed
- Supreme Court denied cert

SPEEDY TRIAL/A LOSS/AN "EXTREME" CASE

- *State v. Mark Serros*, No. 34,637 (N.M. Sup. Ct. Nov. 12, 2015)
- Charged with CSPM, bribery of a witness, and CDM – immediately placed in protective custody for his own safety
- Bond was $150K cash or surety and Defendant couldn't make it
- District court dismissed the case on speedy trial – Defendant had 3 attorneys and a competency eval
- BUT Defendant was held "for over four years and three months in conditions that amounted to solitary confinement. These circumstances necessarily color our entire analysis." ¶ 21
- First factor – "To weigh a delay of over four years against Defendant – even slightly – is simply unjust, keeping in mind that the right at stake is Defendant's right to a speedy trial." ¶ 27
- Second factor – district court found State *was not* at fault and delay was caused by first two defense attorneys
  - Adopts *State v. Stock*, 2006-NMCA-140, in which COA held speedy trial violation for 3 ½ years delay where defendant was harassed and assaulted in jail
  - Defendant did not cause or acquiesce in the continuances/extensions – Defendant so testified at the speedy trial hearing – "We are mindful that the actions of defense counsel ordinarily are attributable to the defendant. . . But when the evidence found by the district court shows that both defense counsel were acting contrary to Defendant's wishes when they agreed to the State's requests to delay the trial, we will not weigh their actions against Defendant." ¶ 46
  - Defendant's motions to replace his attorneys was not unreasonable – can't make Defendant choose between effective assistance and speedy trial - ¶¶ 48-63. Notes the State did not provide "any evidence to the contrary" about consultations between Def and his attorney (!)
  - No intentional delay by State but it *enabled* poor performance by defense counsel - ¶¶ 69, 72

SPEEDY TRIAL cont.

- *Serros*
- Court also disapproved the policy to "restrict" interviews with victim's of sexual abuse – i.e. prosecutor tries to negotiate case *before* making child go through trauma of an interview. This can wreak havoc on the right to a speedy trial - ¶ 72
- So, only negligent delay but weighs heavily because of its "extraordinary length" - ¶ 73
- State faulted again for not calling the two prior defense attorneys at the speedy trial hearing (!) and not contradicting Defendant's self-serving statements - ¶ 74
- Third factor – Defendant himself didn't agree to extensions and "State offered no evidence to the contrary." ¶ 79
- Fourth factor – no need to show particularized prejudice because first three factors weigh heavily for Defendant – but it was protective custody due to his sexual orientation and nature of the charges – "We will not presume to second-guess Defendant's preference to be granted freedom from the confines of his cell." ¶ 91

SPEEDY TRIAL/A WIN

- *State v. Suskiewich*, 2015 WL 5702695 (N.M. Ct. App. Sept. 28, 2015)
- Second-degree murder with 24-month delay
- State's motion to reconsider trial court's suppression of evidence, and appeal from that denial, didn't weigh heavily against the State because the issue of law wasn't one that had been decided in NM courts
- Unlike in *Flores*, Defendant was tasked with showing prejudice and did not do so

SPEEDY TRIAL THOUGHTS?

- *Serros* – limited to its facts??
- Driven by the length and quality of the defendant's incarceration - "for over four years and three months in conditions that amounted to solitary confinement. These circumstances necessarily color our entire analysis." ¶ 21
- Be sure to always request a trial setting – especially is there is a new judge
- Always state on the record that the State is ready for trial
- Beware of concurring with defense continuances – ask for a speedy trial waiver on the record – show some reluctance to delay the case
- Be aware of defendant's confinement

EVIDENTIARY RULINGS

- *State v. Bailey*
- *State v. Acosta*
- *State v. Mendoza*
- *State v. Cabezuela*

EVIDENTIARY RULINGS/RULE 404(B)

- *State v. Jason Bailey*, 2015-NMCA-102, 357 P.3d 423, *cert. granted*, Sept. 25, 2015
- CSCM – evidence of uncharged conduct from another jurisdiction was admissible to establish intent - Defendant claimed (1) normal parenting (2) victim's misperception due to prior abuse by another and (3) no sexual intent on his part – the court allowed questioning on the issue because the Def opened the door during his CX of the victim
- COA found it showed propensity but was allowable because also relevant to intent
- "Hearing and evaluating evidence of terrible events and acts without allowing emotion to gain the upper hand over reason is, naturally, challenging. Yet, we sometimes ask this task of jurors." ¶ 24
- BUT – Judge Garcia dissented, partly on procedural grounds because the district court changed its ruling on the admissibility mid-trial and prejudiced the Defendant.
- Cert has been granted

EVIDENTIARY RULING/404(B)

- *State v. Acosta*, 2015 WL 5158533 (N.M. Ct. App. Sept. 2, 2015)
- No abuse of discretion to order new trial for State's failure to give notice of use of 404(B) evidence
- No ruling on its admissibility – just the notice requirement
- Evidence was of three controlled buys prior to the search warrant which linked Defendant to the apartment, the co-defendant, and the drugs found in the apartment
- BUT, the State litigated the ability of the officers to testify about what the CI told them and was allowed to do so – COA still held State failed to give notice

EVDIENTIARY RULING/*Chouinard*

- *State v. Mendoza*, No. 33,506 (N.M. Ct. App. Aug. 31, 2015)
- Child solicitation by electronic device
- Yahoo email account used between undercover officer and Defendant – they were all printed and disclosed to Defendant
- Defendant claims some of the emails were destroyed and not disclosed
- Prosecution did not breach a duty
- Electronic versions of the emails were not material and therefore their destruction was not prejudicial

EVIDENTIARY RULING/CONFRONTATION CLAUSE

- *State v. Adriana Cabezuela*, 2015-NMSC-016, 350 P.3d 1145
- First claim: the testifying pathologist's, Dr. Aurelius, testimony violated Defendant's constitutional right to confront the witnesses against her because the pathologist testified in part based on work done by another doctor under the testifying doctor's supervision
- But both doctors examined the injuries and organs together, both decided which tests to perform, and they compiled their opinion in the autopsy report together
- Dr. Aurelius made "independent, personal observations" and did not simply "parrot" the conclusions of the doctor who didn't testify. ¶ 28.
- Second claim: Dr. Aurelius based her opinion that a bite mark on the baby was made by an adult on the expert opinion of a forensic odontologist who did not testify
- This was a Confrontation Clause problem but harmless error – lots of other facts about injuries and Defendant admitted to biting the baby ¶ 31

DEFENSES

- *State v. Anaya*
- *State v. Stanfield*
- *State v. Anderson*
- *State v. Mendoza*

SELF-DEFENSE

- *State v. Arthur Anaya*, No. 34,279 dec. (N.M. Sup. Ct. May 4, 2015)
- Self-defense instruction properly denied
- Defendant went back to his trailer, got his gun, forcefully entered the trailer, and resumed an argument
- Both victims were unarmed
- No evidence of a threat of GBH or death

SELF-DEFENSE

- *State v. Stanfield*, No. 34,817 (N.M. Sup. Ct. Nov. 9, 2015
- Defendant instigated the confrontation and can't justify actions by self-defense – one victim was unarmed and the second victim reached for his gun only after Defendant shot the first victim – the third victim was running away
- No evidence that he acted out of fear for his personal safety – any perceived threat was to the property, not his person – cannot use deadly force to prevent a trespass

SELF-DEFENSE/"STAND YOUR GROUND"

- *State v. Joe Anderson*, 2015 WL 5920872 (N.M. Ct. App. Oct. 7, 2015)
- Second-degree murder – fight at a party. Defendant armed himself and shot the victim on the couch
- Asked for and received UJI 14-5190 – need not retreat - along with self-defense instructions
- Instruction apparently wasn't given but Defendant didn't say anything about it
- Court found it was fundamental error and essential to his defense of self-defense because it went to the reasonableness of his actions
- I filed a cert petition last week

ENTRAPMENT

- *State v. Mendoza*, 2015 WL 5118099 (N.M. Ct. App. Aug. 31, 2015)
- Child solicitation by electronic device – NMSA 1978, § 30-37-3.2
- Subjective entrapment: relevant facts were not uncontradicted so district properly denied motion to dismiss and let jury decide
- Objective entrapment: LE practice of posting an ad in an adults-only section of a website and using an age-regressed photo of an adult is not objective entrapment – no indicia of unconscionable conduct similar to getting a defendant addicted to drugs and then playing on his addiction – officer told Defendant right away that he was a 15-year-old – similar to posing undercover as a drug dealer
- And Section 30-37-3.2 expressly provides that the fact that the intended victim is LE is not a defense

STATEMENTS OF JUVENILES

- *State v. Wyatt B.*
- *State v. DeAngelo M.*
- *State v. Antonio T.*

STATEMENTS OF JUVENILES

- *State v. Wyatt B.*, 2015 WL 4873341 (N.M. Ct. App. Aug. 13, 2015)
- DWI stop – Child's waiver of statutory right to remain silent was knowing, voluntary, and intelligent
- Deputy asked Child only two questions after he found out his age and before he informed him of his right to remain silent
- Child was 16 in a public parking lot with other people around
- Child's intoxication did not invalidate his waiver

STATEMENTS OF JUVENILES

- *State v. DeAngelo M.*, 2015 WL 6023323 (N.M. Sup. Ct. Oct. 15, 2015)
- 13-year-old gave incriminating statements during custodial interrogation
- § 32A-2-14 provides a "rebuttable presumption that any confessions, statements or admission made by a child thirteen to fourteen years old to a person in a position of authority are inadmissible."
- Court established three principles to rebut this presumption:
  - Standard of proof is clear and convincing evidence - ¶ 14
  - State must show that at time of statement, "the child had the maturity to understand his or her constitutional and statutory rights and the force of will to assert those rights." ¶ 17
  - Expert testimony is not required to rebut the presumption. ¶ 18
- Have the investigator advise the child of the child's rights, and then have the child explain in his or her own words what each one means. ¶ 19. More is required than one-word answers and signed consent form. *Id*.

STATEMENTS OF JUVENILES

- *State v. Antonio T.*, 2015-NMSC-019, 352 P.3d 1172
- Child was questioned by asst. principal in presence of deputy sheriff. Child admitted he had consumed alcohol at school, and at the principal's request, the deputy gave him a breath test. Then, the deputy advised him of his right to remain silent.
- HELD: the deputy's "mere presence" made it an investigatory detention and triggered § 32A-2-14(C) and the deputy had to advise him of his right to remain silent before any questioning - ¶ 11
- If the principal had questioned Child alone, that would have been fine but the deputy created a "coercive and adversarial environment" outside the usual school/teacher interaction - ¶ 25
- Principal could insist the a child answer for purposes of school discipline, but a statement elicited in the presence of LE cannot be used in a delinquency proceeding minus a waiver

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Hobbs*
- *State v. Anaya*
- *State v. Bernard*

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Gregory Hobbs*, 2015 WL 5841175 (Oct. 5, 2015)
- Counsel failed to retain an expert (Nelson Welch) on bullet trajectories which would have corroborated his self-defense claim
- Defense counsel discovered Welch's expertise after trial
- Even assuming incompetence, Defendant can't show prejudice as he relies mainly on speculation and conjecture

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Arthur Anaya*, No. 34,279 dec. (N.M. Sup. Ct. May 4, 2015) (non-precedential)
- IAC as alternative argument to untimely excusal of Judge Pfeffer in first-degree murder case
- "Defense counsel may have sound reasons not to excuse Judge Pfeffer at the beginning of the district court proceedings [and] [o]nly an evidentiary hearing on habeas can supply the necessary information." ¶ 17

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Eric Bernard*, 2015-NMCA-089, 355 P.3d 831
- Claim that counsel was ineffective for failing to object to the jury instructions that did not incorporate the missing element of "intent to procure or pass title" and to argue DV motion on the same ground – COA decided against this on the merits, so no IAC
- Other general allegations which involve matters of trial strategy that will not be second-guessed
- Claims are also largely "unsupported and purely speculative" and can be pursued on habeas - ¶ 35

MOTION FOR NEW TRIAL

- *State v. Hobbs*
- *State v. Acosta*

MOTION FOR NEW TRIAL/JUROR BIAS

- *State v. Gregory Hobbs*, 2015 WL 5841175 (Oct. 5, 2015)
- Juror failed to disclose he knew one of the witnesses – but Defendant did not follow up and State attached affidavit from juror saying he realized the connection only after conclusion of trial

MOTION FOR NEW TRIAL/NEWLY DISCOVERED EVIDENCE

- *State v. Gregory Hobbs*, 2015 WL 5851175 (Oct. 5, 2015)
- Alternative (and contradictory) to IAC argument on Welch's trajectory expertise – Defendant claimed he learned of it only after trial but can't have it "both ways" – either counsel knew about it and failed to use it or counsel didn't know about it
- "We conclude that counsel's realization that a trajectory expert may have bolstered Defendant's theory of self-defense does not constitute newly discovered evidence." ¶ 31

MOTION FOR NEW TRIAL/STATE'S RIGHT TO APPEAL

- *State v. Juan Carlos Acosta*, 2015 WL 5158533 (Sept. 2, 2015)
- *State v. Chavez*, 1982-NMSC-108, ¶ 6, 98 N.M. 682 – State may appeal an order granting a new trial because of the "strong interest in enforcing a lawful jury verdict."
- *State v. Griffin*, 1994-NMSC-061, ¶ 9, 117 N.M. 745 – but State may only appeal where the order is based on an "erroneous conclusion that prejudicial legal error occurred during the trial or that newly-discovered evidence warrants a new trial."
- Here, the court's sua sponte ruling was that the State introduced evidence of prior uncharged controlled buys made in weeks before execution of the search warrant and State didn't provide notice of this 404(B) evidence – didn't rule the evidence was inadmissible; just that there was no notice
- This constitutes "prejudicial legal error" because hinged on interpretation and application of notice requirement of evidentiary rule
- Held: district court did not abuse its discretion in granting a new trial

FUNDAMENTAL ERROR

- *State v. Michael Paul Astorga*, 2015 WL 6165141 (N.M. Ct. App. Oct. 20, 2015)
- Second-degree murder
- Claim of fundamental error where Defendant was not present for (1) deposition of decedent's sister taken in her hospital room and (2) the excusal of some jurors prior to voir dire – no objection from Defendant on any of this
- "Fundamental error comprises a case-specific calculation." ¶ 4
- No authority that either a pretrial deposition or "culling" of the jury is a critical stage of the proceedings requiring Defendant's presence
- Must compromise the underlying integrity of the judicial system regardless of guilt of accused

COMPETENCY/DUE PROCESS

- *State v. Johnny Gutierrez*, 2015-NMCA-082, 355 P.3d 93
- District court summarily reversed first district court's determination and found defendant competent to stand trial for murder
- Court found Defendant's right to procedural due process was violated – no notice or opportunity to be heard on the competency issue and the hearing was supposed to be limited to determination of mental retardation
- Court also found violation of substantive due process – can't try an incompetent defendant and finding of mental retardation isn't the same as competency
- BUT - there were hours of jailhouse recordings that the judge heard in which Defendant was talking about working the system – but our cert petition was denied

INDIAN COUNTRY JURISDICTION

- *State v. Steven B.* consolidated with *State v. Begaye*, 2015-NMSC-020, 352 P.3d 1181
- Parcel Three of Fort Wingate is *not* a dependent Indian community under 18 U.S.C. § 1151(b) (2012) and therefore state court jurisdiction is appropriate
- Overrules *State v. Dick*, 1999-NMCA-062, 127 N.M. 382, and resolves the contradictory rulings between *Dick* and *United States v. M.C.*, 311 F.Supp.2d 1281 (D.N.M. 2004)

Prosecutors as Vanguards of Professionalism

- We have a higher standard professionally and ethically that is independent of what defense counsel does or does not do or what the court does or does not do
- The appellate courts scrutinize the actions, or inactions, of the prosecutor and the prosecutorial team – *Serros*

Perfecting the Record

- Crucial for a successful appeal – easier for us to advocate for a lawful conviction when the record is complete
- Case will not end with direct appeal – proceedings in state and federal habeas corpus can linger for 20+ years