# NEW MEXICO
# OFFICE OF THE ATTORNEY GENERAL

Appellate Law Update
DISTRICT ATTORNEYS CONFERENCE
November 16, 2016

# WHAT WE DO

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

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

# Criminal Appeals Division of the OAG

- M. Anne Kelly
- Division Director
- (505) 717-3505 – office (SF and ABQ)
- (505) 318-7929 – (cell)

# CRIMINAL APPEALS DIVISION

- We currently have one director, 12 staff attorneys, and two staff members
- Claire Welch in Albuquerque – handles state habeas, federal habeas, and much more – (505) 717-3573 and cwelch@nmag.gov
- Rose Leal in Santa Fe – handles all regular appeals and much more – (505) 490-4848 and rleal@nmag.gov

# STAFF ATTORNEYS – NEW PHONE NUMBERS

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# OAG WEBSITE

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

# Rule 12-405 - OPINIONS

- "A petition for writ of certiorari . . . or a Supreme Court order granting the petition *does not affect the precedential value of an opinion of the Court of Appeals*, unless otherwise ordered by the Supreme Court."
- It's good law once it's published by the COA

# Electronic Filing

- Not yet. Supreme Court will be first (February of 2017?) and Court of Appeals a year or so later.
- Questions on specific cases – call our office
- Check the Supreme Court website – supremecourt.nmcourts.gov
- Check the Court of Appeals website – coa.nmcourts.gov
- **Nothing that is filed only in the appellate courts is on Odyssey**

# NEW MEXICO SUPREME COURT

- Published opinions and unpublished decisions from May 2016 to now
- Opinions and decisions are usually issued on Mondays and Thursdays
- Available on New Mexico Courts website: www.nmcourts.gov
- Available on New Mexico Compilation Commission website: www.nmcompcomm.us
- The opinion is emailed that day from our office to the prosecutor

# NEW MEXICO COURT OF APPEALS

- Published opinions from May of 2016 to now
- Rule 12-405 NMRA permits citations to unpublished opinions (memorandum opinions)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- All opinions, published and unpublished, are available on the New Mexico Court of Appeals website – https://coa.nmcourts.gov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 with the P.3d cite as optional

# SUPREME COURT CLERK'S OFFICE

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

# COURT OF APPEALS CLERK'S OFFICE

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

# HOW TO TAKE AN APPEAL

- On our website – www.nmag.gov
- Criminal Affairs tab
- Criminal Appeals tab – How to Take an Appeal handbook
- Updated this year
- Any other questions, please call
- 10 days for 39-3-3(B) appeals (suppression of evidence) – MUST include the language that "I certify that this appeal is not taken for purpose of delay, and the evidence is a substantial proof of a fact material in the proceeding."
- 30 days for dismissal of all or part of charging document
- Must have a **written order** from which to appeal
- Defendants can file late notices of appeal – we cannot!

# DOCKETING STATEMENTS

- For a State's appeal, **trial counsel is responsible for filing the docketing statement – we do not do them for you**
- Rule 12-208 NMRA
- Any extension of time to file a docketing statement is filed with the Court of Appeals, not the district court
- File the docketing statement in the Court of Appeals and serve on district court – that is how the district court knows to prepare the record proper (all the pleadings) for the appellate court
- Form letter goes out from our office when a notice of appeal is filed to remind you of this
- Include **all relevant facts** in the docketing statement – COA pre-hearing has expressed concern over defendants' docketing statements with insufficient facts
- Extensions are disfavored – more so than with other pleadings

# APPEALS ON HABEAS

- Habeas cases – if State loses in district court, the State has an automatic direct appeal to the Supreme Court
- Rule 12-1-2(A)(3) NMRA
- File notice of appeal and statement of issues in Supreme Court
- If habeas petitioner wins, he/she has to petition the Supreme Court for cert

# IF YOU FILE APPEAL IN WRONG APPELLATE COURT

- Not fatal – NMSA 1978, Section 34-5-10
- “No matter on appeal in the supreme court or the court of appeals shall be dismissed for the reason that it should have been docketed in the other court, but it shall be transferred by the court in which it is filed to the proper court. Any transfer under this section is a final determination of jurisdiction. Whenever either court determines it has jurisdiction in a case filed in that court and proceeds to decide the matter, that determination of jurisdiction is final. No additional fees or costs shall be charged when a case is transferred to another court under this section.”

# SUMMARY CALENDAR

- Rule 12-210 NMRA
- Common in the Court of Appeals
- Court files a calendar notice with a proposed disposition – Court only has the docketing statement and the record proper (i.e. the pleadings) to review.
- We will call you if COA proposes to reverse on a defendant's appeal or affirm on a State's appeal – generally, we need more facts

# SUPREME COURT OPINIONS and DECISIONS (May to November 2016)

- *State v. Armijo*
- *State v. Arredondo-Soto*
- *State v. Bailey*
- *State v. Earley*
- *State v. Garcia*
- *State v. Hopkins*
- *State v. Jones*
- *State v. Lovett*
- *State v. Madonda*
- *State v. Marquez*
- *State v. Rodriguez*
- *State v. Samora*
- *State v. Serrano*
- *State v. Sloan*
- *State v. Stephenson*
- *State v. Thomas*
- *State v. Torres*
- *State v. Trammell*
- *State v. Tufts*
- *State v. Yazzie*

# NEW MEXICO COURT OF APPEALS PUBLISHED OPINIONS (May to November 2016)

- *State v. Aragon*
- *State v. Branch*
- *State v. Castro*
- *State v. Davis*
- *State v. Deignan*
- *State v. Duttle*
- *State v. Estrada*
- *State v. Franco*
- *State v. Gallegos*
- *State v. Goodman*
- *State v. Granillo*
- *State v. Gray*
- *State v. Gutierrez*
- *State v. Hall*
- *State v. Howl*
- *State v. Loza*
- *State v. Maxwell*
- *State v. Monafo*
- *State v. A. Montoya*
- *State v. R. Montoya*
- *State v. Moore*
- *State v. Morgan*
- *State v. Naegle*
- *State v. Ortiz*
- *State v. Pacheco*
- *State v. Pitner*
- *State v. Ramirez*
- *State v. Simpson*
- *State v. Taylor E.*
- *State v. Vargas*

# DISTRICT ATTORNEY DUTIES/GRAND JURY/APPELLATE JURISDICTION/CHARGING

- *State v. Aragon*
- *State v. Armijo*
- *State v. Deignan*
- *State v. Gutierrez*
- *State v. Jones*

# CHARGING/JOINDER

- *State v. Daniel G. Aragon*, 2016 WL 3849469, No. 34,653 (N.M. Ct. App. July 12, 2016)
- Compulsory joinder statute did not require joinder of DWI charge and speeding charge
- State proceeded with and resolved traffic citation in magistrate court and later, after determining that the DWI should not be filed as a felony, filed a misdemeanor DWI in magistrate court
- Offenses were not of the same or similar character, nor were the offenses based on the same conduct under Rule 5-203(A)
- "The purpose of a compulsory joinder statute, viewed as a whole, is twofold: (1) to protect a defendant from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode; and (2) to ensure finality without unduly burdening the judicial process by repetitious litigation." *Gonzales*, 2013-NMSC-016, ¶ 26
- Nothing in this case violates these principles
- Judge Sutin cites to recent NM Law Review article which analyzes *Gonzales* and its "good points" about the rule's current lack of limitations and need for case-by-case analysis

# APPELLATE JURISDICTION

- *State v. Edward Armijo*, 2016-NMSC-065, 377 P.3d 471
- Challenge to COA's appellate jurisdiction from district court decision from on-record metro court appeal
- Detailed history of NM's judicial system which allows for this – Section 39-3-3 was not amended with the creation and evolution of metro court
- Court recognizes the "anomaly" that allows for up to three levels of review for a misdemeanor and only one for a capital crime
- But Court is interested in getting this changed – through constitutional amendments followed by legislative fix
- Affects only on-record appeals from metro court to district court

# GRAND JURY/REVIEW OF INDICTMENT

- *State v. Chad Deignan*, 2016-NMCA-065, 377 P.3d 471
- Prosecutor asked detective leading questions summarizing the detective's testimony
- Def moved to dismiss claiming insufficient evidence and prosecutor failed to properly instruct the jury
- Sufficiency of the evidence is not subject to review "absent a showing of bad faith on the part of the prosecuting attorney" – Section 31-6-11(A) (2003)
- "[T]he purpose of [Section 31-6-11(A)] is to restrict sufficiency of the evidence review . . . to circumstances where an indictment results from intentional misconduct on the part of the prosecutor, not simply negligence or even recklessness." ¶ 6
- "Reading the phrase 'bad faith' . . . to imply an objective assessment of a prosecutor's conduct would render the statute's distinction between indictments based on insufficient evidence and prosecutorial bad faith superfluous because no reasonable prosecutor would seek an indictment based on insufficient evidence." ¶ 6
- Rejected arguments that it was structural error that doesn't require showing of prejudice – prosecutor did not compromise the grand jury's independent evaluation of the testimony
- BUT some counts dismissed for failure to correctly instruct the grand jury
- *State v. Casias/Martinez* – pending in the Supreme Court re: limits of district court review of indictments

# STATE'S RIGHT TO APPEAL

- *State v. Mayra Gutierrez*, 2016-NMCA-077, 380 P.3d 872
- Def pled to possession of marijuana – her immigration status was discussed at the plea and sentencing hearings and def said she was advised she could be deported
- She was detained by ICE 19 months later and sought to withdraw her plea which was granted
- COA, in lengthy discussion, held State had the right to appeal grant of def's motion to withdraw the plea – new Rule 5-803 (not in effect at the time of this case) clarifies that State has right to appeal if post-sentence relief is granted
- Rule 5-803 doesn't require def to be in custody (that would be governed by Rule 5-802 habeas rule)

# DISTRICT ATTORNEYS

- *State v. Randall Jones*, No. 34953 (N.M. Sup. Ct. Jun. 9, 2016) (unpublished disposition)
- Def moved to DQ the DA's office due to claim from co-def that the prosecutor, while a defense attorney, had met with him in jail and co-def revealed confidential info to him with an eye to hiring him
- Initial burden of persuasion is on def
- State made good factual record to dispute this – records from the jail; testimony from the prosecutor

# FIRST DEGREE MURDER

- *State v. Arredondo-Soto*
- *State v. Earley*
- *State v. Hopkins*
- *State v. Lovett*
- *State v. Rodriguez*
- *State v. Serrano*
- *State v. Thomas*
- *State v. Torres*

# FIRST-DEGREE MURDER

- *State v. Arredondo-Soto*, No. 35,112 (N.M. S. Ct. June 2, 2016) (unpublished disposition)
- Murder of mother and infant – only challenged conviction on mother's murder
- No witnesses or motive but 26 stab wounds, evidence of a struggle, attempt to cover crime by setting house on fire, and flight sufficient to show deliberate intent to kill

# FIRST-DEGREE MURDER

- *State v. Robert Earley*, 2016 WL 2958068, No. 35,356 (N.M. S. Ct. May 19, 2016) (unpublished disposition)
- Def killed his girlfriend and then called 911 to report her missing – suff evidence of deliberate intent
- Statements were admissible; not error to deny continuance; crime scene and autopsy photos were properly admitted; and expert testimony on def's alcohol metabolism was properly limited to hypothetical person

# FIRST-DEGREE MURDER

- *State v. Telyith Kadeem Fontayne Hopkins*, 2016 WL 3128776, No. 35,052 (N.M. S. Ct. May 26, 2016) (unpublished disposition)
- 21-year-old def pled guilty to two murders and was sentenced to consecutive life sentences
- 1) Sentence was not cruel and unusual punishment – Def didn't challenge his competency determination or the validity of his guilty plea.
- "Defendant's prior incompetence and current mental illness are not the equivalent of mental retardation and therefore do not entitle him to a modification of his sentence." ¶ 20
- 2) Court rejects argument to extend *Roper v. Simmons*, 543 U.S. 551 (2005), which held it was violation of 8th Amendment to execute defs under 18. Here, def was 21 and not sentenced to death
- 3) Sentence is proportional to crimes
- 4) Felony murder is constitutional when applied to mentally ill – def had the applicable mens rea

# FIRST DEGREE MURDER

- *State v. Paul Lovett*, 2016 WL 3213174, No. 34,815 (N.M. S. Ct. Jun. 2, 2016) (unpublished disposition)
- Initially reversed for impermissible joinder with another victim – brutal killing of Circle K cashier
- 1) Prosecutor mistakenly referred to second victim – not abuse of discretion to deny mistrial motion as it was isolated error and jury panel had been questioned about knowledge of previous trial
- 2) Prospective jurors saw def with uniformed detention officers – no error as they weren't chosen for the jury
- 3) Sufficient evidence of identity and deliberate intent

# FIRST DEGREE MURDER

- *State v. Rigoberto Rodriguez*, 2016 WL 4579254 (Sept. 1, 2016) (unpublished disposition)
- Double murder in Albuquerque affirmed
- The Court upheld testimony and evidence that charted cell phone calls between the defendants and victims to prove the circumstantial case in the absence of DNA evidence or eyewitnesses.

# FIRST DEGREE MURDER

- *State v. Santana Serrano*, 2016 WL 6078551, No. 35,277 (N.M. Sup. Ct. Oct. 17, 2016) (unpublished disposition)
- Co-def hands def is gun before fistfight – retrieves it from her when fight isn't going well and shoots victim
- All caught on cell phone video
- Use of the Closing Video was not prosecutorial misconduct or fundamental error
- State played a six second loop of one of the videos in closing, with the Def's statement "It's right here" superimposed on the image
- Under *State v. Sosa*, 2009-NMSC-056, this is allowable argument based on the evidence
- "It's right here" isn't a testimonial statement for purposes of Confrontation Clause

# FIRST DEGREE MURDER

- *State v. Truett Thomas*, 2016-NMSC-024, 376 P.3d 184
- First-degree murder convicted reversed on Confrontation Clause issue
- Victim's body found behind trash can where she had been dragged
- DNA match to Def but no witnesses
- Sufficient evidence of identity – def's DNA on victim's body and murder weapon (paver stone)
- Sufficient evidence of deliberate intent – evidence of a prolonged struggle and large number of wounds
- BUT insufficient evidence of kidnapping – restraint happened during commission of one continuous attack that ended in murder

# FIRST DEGREE MURDER

- *State v. Alexias Torres*, 2016 WL 4164541, No. 34,984 (N.M. Sup. Ct. Aug. 4, 2016)
- Def drove with others to Burger King and her passenger shot the victim from the car
- Sufficient evidence of accomplice liability – plot to kill the victim and def was the getaway driver
- Evidence after the shooting was also indicative of deliberate intent – leaving the scene, hiding the evidence, deceiving the investigators
- Evidence in the form of a videotape of the victim, suffering and bleeding on the ground, was not error but Court cautions against such a graphic account in light of the Victims Rights Act

# FELONY MURDER

- *State v. Marquez*

# FELONY MURDER

- *State v. Eric Marquez*, 2016-NMCA-025, 376 P.3d 815
- Felony murder predicated on shooting from a motor vehicle
- **CAN'T DO IT under collateral-felony rule**
- Look to "felonious purpose" – if the crime's objective is to injure or kill, can't be independent of murder committed during course of that crime
- Need an independent felonious purpose
- So, burglary and CSP are ok but shooting from MV is simply an "elevated form of agg battery.
- Justice Chavez specially concurred – drive-by shootings "provide a clear example of the type of gravity and depravity required for a depraved mind murder conviction." ¶ 54
- Justice Nakamura dissented – The merger doctrine simply means the predicate felony cannot be a lesser included offense of second-degree under *Blockburger* strict elements test – no analytical difference between a felony that is independent of the homicide and one that is not a lesser included of second-degree murder. Shooting from an MV is not a lesser included of second.
- Both Chavez and Nakamura urge the Legislature to enumerate the crimes that may serve as predicate felonies for FM

# CHILD ABUSE

- *State v. Granillo*
- *State v. Stephenson*

# CHILD ABUSE/ENDANGERMENT

- *State v. Veronica Granillo*, 2016 WL 4447515, No. 33,637 (N.M. Ct. App. Aug. 22, 2016)
- DWI with child in the car charged as intentional child abuse by endangerment
- Relied on Model Penal Code to determine that the applicable *mens rea* is that a person acts intentionally if it is the person's "conscious object to engage in conduct of that nature or to cause such a result." ¶ 16
- Social harm proscribed by the Legis is a result, not conduct
- Therefore, have to have the conscious objective to achieve the result of endangering the child
- CERT PETITION FILED – UJI only required general criminal intent; NM case law generally classifies child abuse as general intent crime.

# CHILD ABUSE/ABANDONEMENT

- *State v. Jennifer Stephenson*, 2016 WL 5385848, No. 35,035 (N.M. Sup. Ct. Sept. 26, 2016)
- The defendant mother left her two-year-old son trapped between his bed and dresser for 8-12 hours. He suffered grievous injuries to his legs which required complicated surgery.
- Charged as negligently permitting child abuse with abandonment as a step-down
- Section 30–6–1(B) defines "abandonment" as a "parent, guardian or custodian of a child intentionally leaving or abandoning the child under circumstances whereby the child may or does suffer neglect."
- The Court of Appeals held that "abandonment" means only a leaving with an intent never to return – Supreme Court disagreed with this holding
- The Supreme Court found it means intentionally leaving a child in circumstances in which he suffers neglect but held there was insufficient evidence that at the moment defendant put the child to bed, the child's well-being was threatened.
- "Indeed, to uphold Defendant's conviction could potentially criminalize parents' actions every single time they tuck their children into bed and harm befalls their children at night through some unfortunate accident, which we refuse to do." ¶ 28
- Justice Nakamura, joined by Justice Maes, filed a dissent stressing the "hard and jagged" facts of this case which proved more than an unforeseen accident. Expert testimony established the child would have been in pain for hours and defendant must have heard something.

# STATUTORY CONSTRUCTION

- *State v. Branch*
- *State v. Duttle*
- *State v. Garcia*
- *State v. Ortiz*
- *State v. Tufts*

# STATUTORY CONSTRUCTION/DWI

- *State v. Luis Alfredo Garcia*, 2016-NMCA-044, ___ P.3d ___, *cert. granted*, No. 35,771
- EMT did blood draw on def – suppressed under § 66-8-103 because not an authorized person
- "licensed professional or practical nurse" refers only to two types of nurses; a licensed professional nurse or a licensed practical nurse. No separate category of a "licensed professional"
- BUT purpose of the provision is to insure the safety and protection of a person subjected to a blood draw and the reliability of the sample.
- Given this, is suppression the right remedy, even assuming a statutory violation?

# STATUTORY CONSTRUCTION/ASSAULT

- *State v. Lawrence Branch*, 2016-NMCA-071, ___ P.3d ___, *cert. granted*, July 28, 2106
- Def shot and injured his son and convicted of agg batt with deadly weapon
- His wife was standing right next to the son – convicted of agg assault with a deadly weapon on theory that she reasonably believed she was about to be battered
- NM assault is not specific intent crime – enough that def did an unlawful act that caused the victim to reasonably believe she was in danger of receiving an immediate battery. Need not show that defendant intended to assault.

# STATUTORY CONSTRUCTION/CRUELTY TO ANIMALS

- *State v. Sharon Duttle*, 2016 WL 2756604, No. 33,514 (N.M. Ct. App. May 11, 2016)
- Dogfighting – vindication for Moe, Patches, Mamba, Kangadoo
- Court rejected vagueness arguments on cruelty to animals and extreme cruelty to animals and found sufficient evidence for all counts

# STATUTORY CONSTRUCTION

- *State v. Omar Ortiz*, 2016 WL 5121978, No. 34,017 (N.M. Ct. App. Sept. 19, 2016)
- Section 30-22-27(A)(2) – "depriving a peace officer of the use of a firearm or weapon when the officer is acting within the scope of his duties"
- Def argued that State has to show officer was intending to use the weapon at the time def was trying to take it
- But "'use' is not an active verb; it is a function of the firearm's mere presence, not much different than the words 'access to.'" ¶ 26.
- Needn't show an actual immediate need for the weapon

# STATUTORY CONSTRUCTION/CHILD SOLICITATION

- *State v. Robert George Tufts*, 2016-NMSC-020, ___ P.3d ___
- Section 30-37-3.3 (2007) – criminal sexual communication with a child
- Def took obscene video of himself, saved it on an SD memory card, put the card in a cell phone, and gave the phone to child
- COA held this wasn't "sending" and the statute required a third-party carrier – S. Ct. reversed
- Plain meaning of "send" includes giving the phone to the child and the statute was narrowed to apply to *specific* child
- Child and def are now married and expecting

# DOUBLE JEOPARDY

- *State v. Branch*
- *State v. Franco*
- *State v. Montoya*
- *State v. Pacheco*
- *State v. Ramirez*
- *State v. Sena*

# DOUBLE JEOPARDY/AGG ASSAULT AND AGG BATTERY

- *State v. Branch*, 2016-NMCA-071, ___P.3d ___, *cert. granted*, July 28, 2016
- Conduct was unitary – firing of single shot
- Conceded that negligent use of a firearm was subsumed into agg battery
- *Blockburger* - Distinct elements for assault and battery – battery requires specific intent to injure and assault requires reasonable belief that battery is imminent
- Second prong – intent and subject of statutes. Assault and battery protect against different harms

# DOUBLE JEOPARDY/FIREARM ENHANCEMENTS

- *State v. Branch,* 2016-NMCA-071, ___ P.3d ___, *cert. granted*, July 28, 2016
- Sentences for assault and battery with a deadly weapon were enhanced
- State wasn't required to prove any additional facts, under its **theory of the case**, to have the sentence enhanced. Elements instruction included that defendant used a firearm
- Under this analysis, can you ever have a firearm enhancement?
- ON CERT – focusing on legislative intent to punish with an additional year – DJ (multiple punishment) inquiry is supposed to be concerned with the "polestar" of legislative intent

# DOUBLE JEOPARDY/SECOND DEGREE FELONY RESULTING IN DEATH

- *State v. Christopher Franco*, 2016-NMCA-074, ___ P.3d. ___, *cert. denied*, Aug. 1, 2016
- Convicted of shooting from a MV resulting in death and sentenced to 15 years
- Claimed DJ violation – death was used to elevate crime from 4th to 2nd felony within the statute and used again to enhance sentence for 2nd degree felony (9 years) to 2nd degree resulting in death (15 years)
- Section 31-18-15(A)(4) is the basic sentence for all second degree felonies resulting in death and not a sentencing enhancement

# DOUBLE JEOPARDY/DOUBLE DESCRIPTION

- *State v. Rhiannon Montoya*, 2016 WL 4194125, No. 34,143 (N.M. Ct. App. Aug. 8, 2016)
- Agg burglary and tampering with evidence
- Conduct was distinct – washing the blood off the murder weapon was distinct from entering the home with same weapon
- Burglary was completed at unauthorized entry with requisite intent armed with weapon
- The weapon was not tampered with until after the aggravated burglary was completed

# DOUBLE JEOPARDY/*BACA* ISSUE

- *State v. Pacheco*, No. 34,759 (N.M. Ct. App. Nov. 3, 2016)
- Def raised MTD on *Foulenfont* grounds after State gave opening statement – court granted the motion finding State couldn't prove its case
- *Baca*, 2015-NMSC-021 – distinguishing between termination of trial based on finding state's evidence insufficient (an acquittal) and procedural dismissal unrelated to evidence of def's guilt
- Judge's characterization of his order doesn't control – State hadn't yet presented any evidence and court relied only on defense counsel's statements
- Thus, DJ didn't attach as it was a procedural dismissal and State can appeal

# DOUBLE JEOPARDY

- *State v. James Joseph Ramirez*, 2016-NMCA-072, ___ P.3d ___, *cert. denied*, July 20, 2016
- Home invasion – def, armed with a gun, held the 15 yoa victim hostage while going room to room looking for someone
- Kidnapping and child endangerment – the restraint wasn't incidental to the CE – "prolonged search" thru the house
- Agg burglary and CE – the burglary was completed at moment of entry so no unitary conduct
- Agg assault and CE – unitary conduct but statutes aren't subsumed into each other. Also, legislative intent to protect children is important social policy that doesn't overlap with social policy relevant to agg assault

# DOUBLE JEOPARDY/CHILD ENDANGERMENT

- *State v. Gilbert Sena*, 2016 WL 1063166 (N.M. Ct. App. Mar. 15, 2016)
- Unit of prosecution for ten counts of distribution through P2P file sharing
- Nope – only one count under *Olsson/Ballard*
- "Passive conduct" of def – misunderstanding of P2P?
- What about *Leeson*?
- Careful with conditional pleas on stipulated facts. Very limiting on appeal. Def is trying to argue on appeal that what he did wasn't distribution at all.
- CERT GRANTED AND PENDING

# FOURTH AMENDMENT

- *State v. Davis*
- *State v. Goodman*
- *State v. Monafo*
- *State v. Ortiz*
- *State v. Simpson*
- *State v. Yazzie*

# FOURTH AMENDMENT/INVENTORY SEARCH

- *State v. Wesley Davis*, 2016-NMCA-073, ___ P.3d ___
- Def arrested for driving on revoked license
- Deputy patted Def down, asked if there was anything in Def's backpack "he needed to be aware about" and Def told him he had marijuana
- Justified as inventory search – SO had guideline that all belongings must be inventoried at time of arrest
- Three requirements: (1) police have custody or control of the object; (2) search is carried out pursuant to police regs; and (3) search is reasonable.
- Fails on first requirement because Def didn't have the backpack on his person when he was arrested – Def put it on top of his car after he walked into his carport. Thus, the "necessity to safeguard Defendant's property and protect law enforcement from liability was absent." ¶ 11.
- No nexus between arrest and seizure and police guidelines weren't followed because backpack wasn't on Def's person at time of arrest
- And not reasonable because no interests of inventory search were at stake
- CERT GRANTED AND PENDING

# REASONABLE SUSPICION

- *State v. Terence Goodman*, 2016 WL 5864596, No. 34,282 (N.M. Ct. App. Oct. 6, 2016)
- Driver delayed 5-15 seconds before proceeding from red light turning green – stopped for violating city ordinance prohibiting obstruction of traffic
- COA held no RS because officer made unreasonable mistake of law
- Officer had no RS that def obstructed "free use of the public way" contrary to the ordinance – officer wasn't obstructed but only delayed in moving
- REMEMBER: *Heien v. North Carolina*, 135 S. Ct. 530 (2014), held a reasonable mistake of law can support RS. Followed by COA in *State v. Dopslaf*, 2015-NMCA-098, 356 P.3d 559.

# ATTENUATION

- *State v. John Monafo*, 2016-NMCA-092, ___ P.3d ___
- Def's van stopped illegally and released
- At the same time, owner of the van showed up and said he didn't give def permission to have it
- Def had been released on the first stop and police stopped him again as he was leaving
- Attenuation looks to (1) temporal proximity of illegality and consent (2) presence of intervening circs and (3) flagrancy of official misconduct
- Met under 4th A – time was short but arrival of van owner was "fortuitous and unanticipated" and unrelated to the original stop and there was no police misconduct. ¶ 15
- Met under Art. II, § 10 – doesn't address def's claim that third factor should be disregarded our state constitution – even under the first two factors, attenuation is demonstrated. "Here, where there was a complete end to the first stop and a clear beginning to the subsequent stop, attenuation . . . is complete." ¶ 20

# FOURTH AMENDMENT/REASONABLE SUSPICION

- *State v. Omar Ortiz*, 2016 WL 5121978, No. 34,017 (N.M. Ct. App. Sept. 19, 2016)
- Convicted of concealing ID – validity of that conviction depended on officer acting in legal performance of his duty
- Officer observed defendant repeatedly jumping the fence of a private property after responding to a report of suspicious activity in the area had reasonable suspicion to conduct an investigatory stop of defendant
- It was 6:00 a.m. and officer could infer that the business was not open.

# FOURTH AMENDMENT/REASONABLE SUSPICION

- *State v. Tommy Simpson*, 2016-NMCA-070, ___ P.3d ___, *cert. denied*, Aug. 8, 2016
- Call from citizen that def was seen drunk in a restaurant and then got into his car – he moved the car to another parking space almost hitting other cars
- Officer observed parked car that matched the description – could see woman in passenger seat and def in back seat but dark tinted windows
- Officer opened the door to continue investigation
- Court held this was reasonable – good language on DWI investigations

# REASONABLE SUSPICION – "UNKNOWN INSURANCE STATUS"

- *State v. Joann Yazzie*, 2016-NMSC-026, 376 P.3d 858
- Officer stopped the vehicle based on MVD report that insurance status was "unknown"
- State presented evidence from MVD that 90% of these "unknowns" are in fact uninsured
- This was sufficient for RS, even without evidence that this officer knew about the 90% probability
- Court will not require the State to call witnesses in all such cases to establish the significance of the "unknown" status
- "Reasonable suspicion engages probabilities." ¶ 33.

# DWI

- *State v. Hall*
- *State v. Montoya*
- *State v. Vargas*

# DWI/CHECKPOINT

- *State v. Chris Hall*, 2016-NMCA-080, 380 P.3d 884
- Checkpoint was constitutional under *City of Las Cruces v. Betancourt*, 1987-NMCA-039
- Def challenged three of the factors
- Safety - photos were introduced and there was sufficient signage
- Location - chosen based on arrest stats from past checkpoints – lack of any arrests during most recent checkpoint demonstrated successful deterrent effect. No evidence of discrimination against a protected group in choosing the location
- Advance publicity - some question as to whether media outlets received the police faxes but other factors were sufficiently shown to satisfy *Betancourt*

# DWI/BREATH RESULTS

- *State v. Chris Hall*, 2016-NMCA-080, 380 P.3d 884
- Def had documentation from SLD that it had no information re: the proficiency tests on the Intoxilyzer that was used for that year
- The annual proficiency tests are a "mandatory accuracy-ensuring requirement" under current SLD regs. ¶ 29
- Remanded to determine if officer's testimony about the certification sticker on the machine was sufficient
- Def blew a .10/.10 so evidence was sufficient for per se DWI despite def's attack on the machine

# DWI/UNCERTAINTY COMPUTATION

- *State v. Andrea Montoya and Michael Yap*, 2016-NMCA-079, ___ P.3d ___, *cert. denied*, July 29, 2016
- Argued breath tests were unreliable because no uncertainty computation was applied to the results
- Court had no reason to believe that legislature did not include consideration of measurement uncertainty in selecting 0.08 as the legal limit, and test was approved by Scientific Laboratory Division of the Department of Health (SLD).

# DWI

- *State v. Laressa Vargas*, 2016 WL 6299385, No. 33,718 (N.M. Ct. App. Oct. 25, 2016)
- Defendant exhibited signs of impairment but blew only a .04/.05 on a breath test. The officer then asked her to take a blood test which she refused. She was convicted of agg DWI based on that refusal.
- COA found sufficient evidence of impairment to the slightest degree but reversed the aggravation pursuant to *Birchfield v. North Dakota*, ___ U.S. ___, 136 S,Ct, 2160 (2016), which held blood test is a Fourth Amendment search and refusal cannot be criminalized.
- Cert is contemplated on the issue of preservation.
- In *Birchfield*, SCOTUS used qualifying language: (1) the reasonableness of blood tests "must be judged in light of the availability of the less invasive alternative of a breath test" and (2) the Court based its holding in part on the absence of any argument that some other exception to the warrant requirement could have justified the warrantless draw of Birchfield's blood.
- State didn't get chance to argue, or factually develop, either of these points under the facts of this case.
-

# EVIDENTIARY RULINGS

- *State v. Arredondo-Soto*
- *State v. Bailey*
- *State v. Branch*
- *State v. Jones*
- *State v. Loza*
- *State v. Madondo*
- *State v. Maxwell*
- *State v. Samora*
- *State v. Thomas*

# EVIDENTIARY RULINGS/PHOTOGRAPHS OF SCENE

- *State v. Arrendondo-Soto*, No. 35, 112 (N.M. Sup. Ct. Jun. 2, 2016) (unpublished disposition)
- "It is not the State's responsibility to sanitize defendant's crime." ¶ 29
- Upheld the admissibility of bloody handprints on the wall made by the infant victim
- Upheld, under fundamental error analysis, other photos from the child's autopsy – relevant to show the nature of the crime and the timeline

# EVIDENTIARY RULINGS/RULE 404(B)

- *State v. Jason Bailey*, 2016-NMSC-___, 2016 WL 5944997 (N.M. Sup. Ct. Oct. 13, 2016)
- 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
- Supreme Court affirmed its admission on cert
- "Given New Mexico's inclusionary view of Rule 11–404(B)(2), and particularly where a defendant refutes allegations of sexual contact with a minor victim by claiming that the sexual contact was parental or medical, we conclude that evidence of other acts directed to that victim that bear on a defendant's specific, unlawful intent to commit the charged offense are admissible under Rule 11–404(B)(2)."
- OK under Rule 403 too – partly because it was "uniquely similar to one of the charged incidents in that on two occasions some type of ointment was used when Defendant made contact with Victim's genitals."

# EVIDENTIARY RULINGS/DISCOVERY/LOST EVIDENCE

- *State v. Branch*, 2016-NMCA-071, ___ P.3d ___, *cert. granted*, July 28, 2016
- Def sought to get the victim's military and mental health records – but evidence of specific instances of victim's prior violent conduct can't be used as propensity of a violent disposition
- Court notes the records could have led to admissible evidence on reputation or opinion evidence but Def never requested *in camera* review or otherwise showed his request to be anything other than a fishing expedition
- Also upheld court's suppression of general PTSD testimony where def never related it to this case
- Finally, def didn't show prejudice or materiality from lost photos from the scene – nothing about the blood spatter would have made an appreciable difference

# EVIDENTIARY RULINGS/PRELIMINARY TESTIMONY

- *State v. Jones*, 2016 WL 3344944, No. 34953 (N.M. S. Ct. Jun. 9, 2016) (unpublished disposition)
- Co-def refused to testify, pursuant to 5th A, in murder trial and State used his preliminary testimony
- Co-def was unavailable and def had prior opportunity for CX – admissible under rules of evidence and Confrontation Clause
- As long as defs have similar motivations to CX at preliminary hearings, this is a sufficient opportunity for confrontation – change of tactics for trial don't change this

# EVIDENTIARY RULINGS/404(b)

- *State v. Matias Loza*, 2016-NMCA-088, ___ P.3d ___, *cert. denied*, Sept. 12, 2016
- Def was associated with the AZ Boys criminal enterprise out of Alamogordo.
- COA upheld his racketeering and conspiracy to commit racketeering convictions. Rule 11-404(B)'s proscription against admission of other bad acts evidence does not apply to racketeering which requires proof of other acts to support the charge. Section 30-42-3(A)
- NOTE: a related appeal is pending in the Supreme Court where Loza has claimed he cannot be subsequently prosecuted on the predicate crimes, including first-degree murder.

# EVIDENTIARY RULINGS/MIRANDA/FIFTH AMENDMENT

- *State v. Muziwokuthula Madonda*, 2016-NMSC-___, 375 P.3d 424
- Def requested lawyer but officers continued the discussion
- Court rejected State's argument that substantial evidence didn't support the district court's conclusion that the officers didn't stop the interview or that they asked questions likely to elicit incriminating information
- Officers did not scrupulously honor the invocation of rights and did not properly terminate their interrogation

# EVIDENTIARY RULINGS/404(b)

- *State v. Steven and Michael Maxwell*, 2016-NMCA-082, ___ P.3d ___, *cert. denied*, Sept. 7, 2016
- State witness testified about prior failed business dealing with Michael
- Not 404(b) because it showed an element of the fraud crime and wouldn't have misled the jury

# EVIDENTIARY RULINGS/404(b)

- *State v. Anthony Samora*, 2016 WL 44189536, No. 34,733 (N.M. Sup. Ct. Aug. 8, 2016)
- Claim that admission of evidence that def wore a GPS monitoring device and that victim found his picture, name, and address on a website was error
- District court didn't allow witnesses to say what def's crime was or that the website was the sex offender registry
- First, State didn't have to stipulate to def being there with victim – State is not bound to present its case "through abstract stipulations"
- Second, inference that def was a sex offender isn't 404(b) because it was relevant to victim's ID of def – ie. that his attacker was wearing a GPS and to prove that def was at the location where victim claimed the attack took place
- Sole purpose wasn't to prove criminal propensity

# EVIDENTIARY RULINGS/CONFRONTATION CLAUSE

- *State v. Truett Thomas*, 2016-NMSC-024, 376 P.3d 184
- First-degree murder – CODIS hit on def but DNA analyst was out of state
- Prosecutor suggested SKYPE and defense counsel said OK – later changed his mind after it was too late for State to get the witness there
- Supreme Court held no waiver and addressed the issue
- *Maryland v. Craig*, 497 U.S. 836 (1990) – child victim allowed to testify on one-way closed circuit TV – right to confront is "not absolute" and may give way "to further an important public policy"
- *Crawford* didn't overrule *Craig* but may call its holding into question – but face-to-face aspect of confrontation wasn't at issue in *Crawford*
- "We doubt [SCOTUS] would find any virtual testimony [to be] an adequate substitute for face-to-face confrontation without at least the showing of necessity that *Craig* requires." ¶ 27
- No findings on important public policy and inconvenience to witness isn't enough
- State argued SKYPE doesn't violate CC – but still have to meet *Crawford* requirements of unavailability and State didn't show "legal unavailability of the witness." ¶ 32  Court thus doesn't decide if SKYPE is sufficient under *Crawford*

# SUFFICIENCY OF THE EVIDENCE

- *State v. Garcia*
- *State v. Maxwell*
- *State v. Montoya*
- *State v. Ortiz*
- *State v. Pitner*

# SUFFICIENCY OF EVIDENCE/FRAUD

- *State v. Patricia Garcia*, 2016 WL 4487786, No. 35,451 (N.M. Sup. Ct. Aug. 25, 2016)
- The defendant bilked the vulnerable and elderly victim out of $50,000, and told him she was not married (which she was).
- The COA reversed the fraud conviction finding insufficient evidence that the victim relied upon defendant's misrepresentations.
- The Supreme Court held the evidence supported a finding that the victim relied upon defendant's representations of being his "loving partner" which led him to give her access to his bank accounts.
- COA misapplied the sufficiency of the evidence standard in its holding that the evidence was equally consistent with hypothesis of innocence.
- COA relied on statement from *State v. Garcia*, 2005-NMSC-017, ¶ 12, but overlooked rest of the holding that "it is unproductive to try to formulate a standard of appellate review in terms of a hypothesis of innocence, because inevitably it appears to intrude upon the role of the jury."
- Reaffirms two-step process in sufficiency of evidence inquiries – draw every reasonable inference in favor of verdict *and then* evaluate to see if it supports the verdict b/r/d

# SUFFICIENCY OF EVIDENCE/FRAUD

- *State v. Steven and Michael Maxwell*, 2016-NMCA-082, ___ P.3d ___, *cert. denied*, Sept. 7, 2016
- Multiple fraud and securities convictions upheld against double jeopardy and evidentiary issues although several of Michael's convictions were reversed for insufficient evidence

# SUFFICIENCY OF THE EVIDENCE/SECOND-DEGREE MURDER

- *State v. Rhiannon Montoya*, 2016 WL 4194125, No. 34,143 (N.M. Ct. App. Aug. 8, 2016)
- Acquitted of first-degree murder but convicted of second
- Def's uncle was killed by two of her friends – 48 stab wounds and multiple hits on head with baseball bat
- Both "friends" testified that Def offered them money to kill the victim
- After the murder, def told them to go back and make it look like a robbery so they went and stole items
- The uncorroborated testimony of her co-defendants was sufficient evidence

# SUFFICIENCY OF THE EVIDENCE/CONCEALING ID AND ATTEMPT TO DISARM PO

- *State v. Omar Ortiz*, 2016 WL 5121978, No. 34,017 (N.M. Ct. App. Sept. 19, 2016)
- Def, while in patrol car, grabbed barrel of the officer's shotgun through the open partition with his handcuffed hands
- Def testified that he was high on meth and grabbed the gun in an effort not to be taken to the hospital – wasn't trying to use the shotgun and not aware it was a shotgun
- Evidence was sufficient to show he tried to pull it thru the partition and fact-finder could infer he intentionally grabbed it intending to deprive the officer of its use

# SUFFICIENCY OF THE EVIDENCE/CSCM

- *State v. Kevin Pitner*, 2016 WL 4710202, No. 33,807 (Sept. 8, 2016)
- 9-year-old victim testified that def unzipped her footie PJs and used his fingers to rub the skin below her underwear and "a little above [her] privates."
- In closing, State argued he touched her groin area which isn't defined in the statute
- COA found the common meaning of groin would cover this

# FOULENFONT HEARINGS

- Generally, be cautious of these.  Is it really a legal issue or is it a factual issue?
- Most of these issues probably should be resolved by a jury – not a judge

# FOULENFONT

- *State v. John Pacheco*, No. 34,579 (N.M. Ct. App. Nov. 3, 2016)
- State's appeal from dismissal of fraud charge
- Rule 5-601(B) – "any defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion."
- Def filed a motion claiming that, as a matter of law, he did not obtain property by fraud and victim didn't rely on false rep – renewed it after State's opening statement
- District court granted the motion based on facts from a related civil proceeding
- COA recognizes the confusion – "framing the issue as a sufficiency of the evidence problem or a pure question of law does not change the analysis meaningfully either way." ¶ 9
- Here, not capable of determination without a trial – victim would testify about his reliance

# JURY INSTRUCTIONS

- Crucial to a successful appeal
- Even if rushed, please review the language, especially of the elements instructions. An inadvertent typo, or omission of an element, can have disastrous consequences.

# JURY INSTRUCTIONS

- *State v. Montoya*
- *State v. Samora*
- *State v. Sloan*

# DEFINITION OF REASONABLE DOUBT

- *State v. Rhiannon Montoya*, 2016 WL 4194125, No. 34,143 (N.M. Ct. App. Aug. 8, 2016)
- Def convicted of second-degree murder
- In closing, defense counsel argued reasonable doubt saying "Imagine, you go to a doctor. . ." and it's hard to "quantify" and "is different for every person" and "people who are smarter than me [have tried] to put it into words, so I will hopefully try to explain what it means."
- After objections, court told counsel to "leave the jury instruction as it is" and disagreed with counsel's claim that he was entitled to argument
- District court upheld – no abuse of discretion and def wasn't prevented from making his argument
- SCOTUS has held a definition of RD needn't be given, but if it is, it must be carefully worded because an erroneous instruction is prejudicial error
- UJI 14-5060 is NM's instruction and is to be "unadorned by any added, illustrative language." *State v. Garcia*, 2005-NMSC-017, ¶ 10

# JURY INSTRUCTIONS

- *State v. Anthony Samora*, 2016 WL 4189536, No. 34,733 (N.M. Sup. Ct. Aug. 8, 2016)
- CSP felony on 16-year-old victim
- Fundamental error to omit "without consent" from the jury instructions
- Whether the victim consented was "legally relevant" to the CSP charge because he was 16 years old and could legally consent
- Fundamental error because there was evidence of consent – no evidence to support victim's testimony of force; def did not deny having sex; victim's changing account
- But sufficient evidence so case can be retried

# JURY INSTRUCTIONS/FELONY MURDER

- *State v. Matthew Sloan*, No. 34,858 (N.M. Sup. Ct. Jun. 23, 2016) (unpublished disposition)
- Felony murder conviction reversed because jury instructions didn't include elements of the predicate offense of attempted armed robbery
- Burglary conviction reversed because the intoxication instruction was not given, as it was for agg burglary
- Error conceded by State as the essential elements of the crimes were not given
- IAC not addressed by the Court

# INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Gutierrez*
- *State v. Howl*
- *State v. Morgan*
- *State v. Trammell*

# INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Mayra Gutierrez*, 2016-NMCA-077, 380 P.3d 872
- Def pled to possession of marijuana – her immigration status was discussed at the plea and sentencing hearings and def said she was advised she could be deported
- She was detained by ICE 19 months later and sought to withdraw his plea which was granted
- *Paredez*, 2004-NMSC-036, requires a "definite prediction" on immigration consequences
- COA deferred to district court which credited def's account that she thought deportation was only a possibility, not a virtual certainty
- Defense counsel, in affidavit, said he couldn't specifically remember
- Prejudice established because record showed resolution of her citizenship status was material to the plea agreement
- Not enough to say client "could" or "might" be deported

# INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. David Howl*, 2016-NMCA-084, 381 P.3d 684, *cert. denied*, Sep. 12, 2016
- Unusual situation where COA found prima facie case of IAC sufficient to remand for evidentiary hearing rather than pursue in habeas
- Defense counsel failed to move to suppress evidence Court found a prima facie case of IAC where defense counsel did not move to suppress the fruits of the search
- Def was removed from the car and the officer asked the passenger to find the insurance documents. The passenger opened the console and a meth pipe was there.
- Officer had no right to search closed container without a warrant – not in plain view; passenger had no authority to consent to search.
- Def went to trial and defense counsel argued pipe wouldn't have been found if passenger hadn't opened the console

# INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Thomas Morgan*, 2016-NMCA-089, ___ P.3d ___
- 2014 conviction by plea of child solicitation by electronic device
- HB 570 amended SORNA on 4/3/13 to include def's crime for all convictions occurring on or after 7/1/13 – def's crime occurred in 2011
- Def continued his June 2013 trial date thereby "closing the window" on which he could have avoided SORNA registration
- Demanding def's atty be aware of this would "require a particularly high level of attentiveness and diligence" – 6th A doesn't guarantee perfect representation. ¶ 22
- Def didn't show that his case was continued based upon his atty's failure – atty may have known about his amnesty.
- Def didn't show that he would not have pled during that time period – he got the benefit of a one-year prison term

# INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Lucas Trammell*, 2016 WL 4146850, No. 34826 (N.M. Sup. Ct. Aug. 4, 2016)
- Def stole a truck, unaware that there was a 12-year-old child in it. Returned the vehicle and child unharmed
- Def pled to false imprisonment of a minor, among other charges, which required SORNA registration – atty failed to realize this
- Def filed motion to withdraw plea six years later
- COA found *Edwards*, 2007-NMCA-043, was not a new rule of law and applied retroactively – S. Ct agreed and found the first prong, deficient performance, of IAC. Advisement of a plea agreement's SORNA implications "is, and long has been, a prerequisite to effective assistance of counsel." ¶ 21.
- But no prejudice because def only said he would have tried to negotiate a different plea agreement. And def did receive benefits in the form of numerous dropped charges. His "self-serving" testimony isn't sufficient to show that he would have gone to trial instead.
- Plus, def was aware of the SORNA requirement two years before he challenged it and then only because he violated his plea agreement

# SPEEDY TRIAL

- *State v. Castro*
- *State v. Estrada*
- *State v. Gallegos*
- *State v. Moore*
- *State v. Samora*
- *State v. Thomas*

# SPEEDY TRIAL

- *State v. Jesus Castro*, 2016-NMCA-085, 381 P.3d 694, *cert. granted*, Sept. 23, 2016
- Two trials – no assertion of ST until second attorney got the case after conviction. Def filed 11-page affidavit detailing ST prejudice
- District court denied the motion but COA remands for an evidentiary hearing on first atty's IAC and then on speedy trial
- COA finds it a "unique appellate circumstance where Def's assertion of a constitutional right to a speedy trial is interrelated and potentially dependent upon his constitutional claim of ineffective assistance of counsel."
- Judge Hanisee disagreed – the majority "clouds our already-complex speedy trial analysis and undermines the preference that IAC proceedings be decided in collateral proceedings."
- ON CERT

# SPEEDY TRIAL

- *State v. Michael A. Estrada*, 2016-NMCA-066, 377 P.3d 476
- Almost 30-month delay in forgery case in case of intermediate complexity
- Defers to district court that most of the delay was caused by def (but State's motion to join with co-def and court's failure to timely rule on it weighed in def's favor) – 12 months to State but 16 months to def
- Def filed pro se motion to dismiss his attorney – evidence contradicted his claims that attorney wasn't preparing for trial or communicating with him and showed that his "speedy trial complaints" were really "an effort to derail the case on the eve of trial" rather than "genuine desire for finality." ¶ 68
- Reiterates that def has the burden to identify and prove prejudice

# SPEEDY TRIAL

- *State v. Mark Gallegos*, 2016-NMCA-076, ___ P.3d ___, *cert. denied*, Aug. 18, 2016
- Shoplifting conviction with 32 month delay
- But only 14 months were attributable to the State and that delay was negligent/administrative which did not weigh heavily against the State.
- Def claimed prejudice but didn't prove impairment to his defense – burden is on him to do so

# SPEEDY TRIAL

- *State v. Judd Moore*, 2016-NMCA-067, 378 P.3d 552
- 46-month delay in complex case weighed heavily against State
- 8-month delay between filing in magistrate court and district court – weighs against State because no State responses on discovery or indication that State moved case forward
- More delay caused by State's late disclosure of evidence and year-long delay in co-defs' acceptance into pre-prosecution program
- And def proved prejudice with detailed affidavit – ostracized by family; lost employment; lost home.

# SPEEDY TRIAL

- *State v. Samora*, 2016 WL 4189536, No. 34,733 (Aug. 8, 2016)
- 5 year delay in CSP case
- First period weighs slightly against State – working on a plea deal
- Second period weighs against def – motion for judicial recusal denied and found to be for purpose of delaying trial – sought an extraordinary writ which was denied
- Third period – State's appeal re: suppression of a statement def made to his counselor was legitimate even though denied
- No meaningful assertion of the right and he acquiesced in delays. Concern whether def acquiesced in delay due to DA policy of not allowing plea after PTI with victim but def never explicitly stated so and court is left to "speculate" whether def felt "truly compelled" to stipulate to the continuances
- No particularized prejudice – he was incarcerated but would have been incarcerated due to new charges brought against him
- No speedy trial violation

# SPEEDY TRIAL

- *State v. Truett Thomas*, 2-16-NMSC-024, 376 P.3d 184
- First-degree murder and kidnapping
- 26-months of pretrial custody
- District court found it was a complex case due to the DNA and Supreme Court deferred to this finding
- Delay wasn't much over the presumptive limit and was mostly administrative due to vacancy on bench and unavailability of forensic analyst for PTI
- Assertion weighed slightly in def's favor – no "focused assertion" until two years had passed
- No particularized prejudice other than normal anxiety

# SPEEDY TRIAL

- Request trial settings in writing – new judge
- Request rulings on pending motions
- Do not always acquiesce to defense requests for continuance – *Serros*
- "We acknowledge that there are times when defense counsel may prefer delay in the best interests of his client. *When the client expressly concurs*, that delay will continue to be attributed to the accused. But it is the State that is ultimately tasked with bringing the accused to trial in a timely manner." *Serros*, ¶ 96
- Get def's signature on request for continuance??
- Beef up the record for appellate review by showing the State's readiness for trial
- Hardest cases are ones with long periods with no activity and no State pleadings

# MISCELLANEOUS ISSUES

- *State v. Gray*
- *State v. Naegle*
- *State v. Taylor E.*
- *State v. Thomas*

# GBH BY VEHICLE

- *State v. Kenneth Gray*, 2016 WL 4151899, No. 33,940 (Aug. 4, 2016)
- Section 66-8-101(C) does not apply to the defendant where the resulting GBH is to def and not others – "a human being" doesn't include the perpetrator
- Therefore, def pled guilty to a crime that does not exist and def is permitted to withdraw his plea
- IAC wasn't decided but in the background – def admitted to four prior DWIs but atty apparently didn't tell him his sentence could be enhanced based on those admissions
- CERT DENIED

# BAIL BOND FORFEITURE

- *State v. Michael Naegle and Mickey's Bail Bonds and Sherron Little and Universal Fire and Casualty Co.*, 2016 WL 6426686, No. 34,451 (N.M. Ct. App. Oct. 28, 2016)
- COA affirmed the district court's forfeiture of a $5000 bond on a DWI case. The bond company failed to show good cause to set aside the forfeiture, and in particular, did not show that Defendant's presence in Arkansas was good cause for Defendant's failure to appear. The Court remanded to the magistrate court to consider in the first instance whether the appellants could seek remitter on the forfeiture.

# CHILDREN'S COURT

- *State v. Taylor E.*, 2016 WL 4529599, No. 34,261 (N.M. Ct. App. Aug. 29, 2016)
- Child filed motion to suppress incriminating statements made to his JPO, saying there was no corroborating evidence of his "spice" use and JPO failed to give *Miranda*/32A-2-14(D) warnings
- Federal *Miranda* law doesn't bar admission in a PVR (but might in an independent criminal proceeding) – *Minnesota v. Murphy*, 465 U.S. 420 (1984) establishes probationer is generally not "in custody" during PO interview
- The Delinquency Act preserves the distinction between delinquency proceedings and PVR – and LE and POs. Don't want probationer/JPO relationship to be adversarial.
- Distinguishes *Antonio T.* – Section 32A-2-14(C) wasn't triggered because school official did investigation, but because LE was present which created a "coercive and adversarial environment"
- Lengthy discussion on the Act – a good primer if you do Children's Court

# SOCIAL MEDIA

- *State v. Truett Thomas*, 2016-NMSC-024, 376 P.3d 184
- District judge posted on FB page for his election campaign – "I am on the third day of presiding over my 'first' first-degree murder trial as a judge."
- After the guilty verdict - "Justice was served. Thank you for your prayers."
- No "bright-line ban prohibiting use of judicial media" but lengthy caution from the Court on the appearance of impropriety

# SEX OFFENDER PAROLE PERIOD

- Defendant is sentenced as sex offender and district court later amends J&S to include the correct parole period of 5-20 years
- We've had success in upholding this despite *State v. Torres* by arguing that it is an illegal sentence if this parole period is not imposed

# PERFECTING THE RECORD

- Crucial for a successful appeal – easier for us to advocate for a lawful conviction when the record is complete
- Case will not end with direct appeal – proceedings in state and federal habeas corpus can linger for 20+ years
- Please make sure bench conferences and jury instruction conferences are recorded – reconstructing the record after the fact is difficult, if not impossible
- Please state what is happening – can't see gestures

# 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*