NEW MEXICO OFFICE OF THE ATTORNEY GENERAL

APPELLATE LAW UPDATE
DISTRICT ATTORNEYS CONFERENCE
NOVEMBER 7, 2018

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, 15 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

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OAG WEBSITE

- NMAG.GOV
- This presentation and the DA Liaison List will be under the Criminal Affairs/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

- **ONLY** electronic filing in both appellate courts.
- Docketing statements or statement of issues are the first document you'll need to file in the appellate courts.
- Everything is on Odyssey.
- Supreme Court number format – S-1-SC-12345
- Court of Appeals number format – A-1-CA-12345
- Questions on specific cases – call our office

NEW MEXICO SUPREME COURT

- Published opinions and unpublished decisions from April 2018 to now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 April of 2018 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- Rule 12-405 NMRA permits citations to unpublished opinions (memorandum opinions)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- All opinions, published and unpublished, are available on the New Mexico Court of Appeals website – https://coa.nmcourts.gov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
- 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/Criminal Appeals tab – How to Take an Appeal handbook
- 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!
- **NOTICE OF APPEAL IS FILED IN DISTRICT COURT AND SERVED ON THE APPELLATE COURT**

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
- Form letter goes out from our office when a notice of appeal is filed
- Include **all relevant facts** in the docketing statement – COA pre-hearing has expressed concern over defendants' docketing statements with insufficient facts
- New order from the COA – docketing statements will be rejected if they do not follow the rule
- Sample docketing statement from COA
- **DOCKETING STATEMENT IS FILED IN APPELLATE COURT AND SERVED ON THE DISTRICT COURT**

TAKING AN APPEAL

- Habeas cases – if State loses, the State has an automatic direct appeal to the Supreme Court
- File statement of issues in Supreme Court
- Rule 12-102(A)(3) NMRA
- 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

FILING IN THE APPELLATE COURTS

USE 14-POINT TYPE – RULE 12-305(C)(1)

NEW MEXICO SUPREME COURT OPINIONS and DECISIONS

- *State v. Ameer*
- *State v. Cales* (unpublished)
- *State v. Hurd* (unpublished)
- *State v. Lewis*
- *State v. Loza*
- *State v. Martinez/Casias*
- *State v. Navarette* (unpublished)
- *State v. Ortiz n/k/a Suarez* (unpublished)
- *State v. Pinon* (unpublished)
- *State v. Rodriguez* (unpublished)
- *State v. Suarez* (unpublished)
- *State v. Tegeda* (unpublished)

NEW MEXICO COURT OF APPEALS OPINIONS

- *State v. Anthony L.*
- *State v. Arias*
- *State v. Ernest Barela*
- *State v. James Barela*
- *State v. Blea*
- *State v. Chacon*
- *State v. Chavez*
- *State v. Cummings*
- *State v. Flores*
- *State v. Jackson*
- *State v. Montano*
- *State v. Roeper*
- *State v. Ruffin*
- *State v. Sanchez*
- *State v. Serna*
- *State v. Stejskal*
- *State v. Verret*
- *State v. Vest*
- *State v. Winn*
- *State v. Yepez*

ARTICLE II, SECTION 13

Old provision

- All persons shall, before conviction, be bailable by sufficient sureties, except for capital offense when proof is evident and presumption great.

New provision

- Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

RULE 5-409 – PRETRIAL DETENTION HEARINGS

- Very tight deadlines for hearing, appeal, and disposition of appeal
- Only the district courts – as courts of record – have the authority to enter detention orders unless and until the legislature changes this
- Def has the right to be present and represented by counsel, to testify, to present witnesses, to compel attendance of witnesses, to CX witnesses, and to present information by proffer or otherwise. Rule 5-409(F)(3)
- Appellate courts are using an abuse of discretion standard and generally affirm
- Court of Appeals has not applied the *Duran* presumption of ineffective assistance of counsel for untimely appeals
- Court of Appeals will not consider the appeal until the appellant provides a recording of the hearing
- We handle defendants' appeals; DAs handle State's appeals

"CAPITAL" OFFENSE

***State v. Muhammad Ameer*, 2018-NMSC-030, ___ P.3d ___**

- The Article II, Section 13 provision relating to "capital offenses" as nonbailable means offenses for which the death penalty is authorized
- Because capital punishment has been statutorily abolished as a punishment for first-degree murder, first-degree was not a "capital offense" for which bail could be categorically denied and the legislature cannot redefine this constitutional term
- "Capital offense" is still a term used by the legislature to denote first-degree murder – NMSA 1978, §§ 30-2-1(A); 31-18-14

PRETRIAL DETENTION

- Make sure your judge files a written order with individualized facts; an oral ruling will not suffice
- Make sure you address both the def's threat to others *and* that no release conditions will reasonably protect the safety of others
- The clear threat of future criminal activity, whether or not the def has a *violent* criminal history, can be sufficient. *United States v. Cook*, 880 F.2d 1158, 1161 (10th Cir. 1989) (reversing denial of government's motion to revoke defendant's release pending appeal, taking into account likelihood that he "might engage in criminal activity to the detriment of the community" if released); *United States v. Daniels*, 772 F.3d 382, 383 (7th Cir. 1985) (evidence that defendant would pose a danger to the community by committing more crimes if allowed release pending trial supported pretrial detention order).

APPELLATE JURISDICTION

- *State v. Pinon*
- *State v. Ruffin*
- *State v. Verret*

APPELLATE JURISDICTION - HABEAS

***State v. Sammy Pinon*, No. S-1-SC-36408 (Jun. 21, 2018)**

- Def's conviction was upheld on COA's summary calendar
- Def filed a habeas claiming that this appellate counsel was ineffective for failing to raise certain claims on appeal
- District court, sitting as a habeas court, agreed and afforded remedy of a new appeal
- State did not appeal under Rule 12-102(A)(3)
- COA dismissed the new appeal finding that def had already had his one appeals and district court could not force COA to give him a second appeal
- NMSC granted cert and did not reach the bigger question of what constitutes appellate IAC
- NMSC held that the State failed to appeal the district court order – which is the correct statutory remedy for grant of a habeas – and that therefore the district court order stands and the COA erred in dismissing the second appeal

STATE'S RIGHT TO APPEAL

***State v. Emily Ruffin*, No. A-1-CA-35424 (Oct. 22, 2018)**

- State appealed pretrial ruling that its deputy, the responding officer, could not testify as an expert
- Def claimed the State had no right to appeal under § 39-3-3(B)(2) because the State could still prove its case even without that testimony
- Section 39-3-3(B)(2) provides the State may appeal "within ten days from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property, if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."
- *State v. Mendez*, 2009-NMCA-060, held the State is not limited to an appeal only when the ruling makes it impossible to prove its case. But the evidence must be important and significant as opposed to of minor consequence.
- Here, the evidence went to the disputed issue of causation which was the heart of the case.

HEINSEN RE-FILING – INDEPENDENT REVIEW?

***State v. Austin Verret*, No. A-1-CA-36336 (Oct. 23, 2018)**

- State refiled in district court after magistrate court excluded arresting officer from testifying
- Def claimed district court should conduct independent review of his motion to exclude witness pursuant to *City of Farmington v. Pinon-Garcia*, 2013-NMSC-046, 311 P.3d 446. In *Pinon-Garcia*, the city appealed dismissal of the DWI charge to the district court
- District court disagreed and found that because the case was a refiling, rather than an appeal, its job was to determine whether the motion was meritorious now. District court denied the motion because def had since had the opportunity to interview the officer
- COA reversed and found no "meaningful difference" between appeal versus refiling in terms of seeking judicial review in district court. COA relied on *Pinon-Garcia*'s holding that "[i]f district courts are not permitted to review a lower court's grant or denial of potentially dispositive pretrial motions on appeal, the power of lower courts to grant relief when constitutional safeguards and procedural rules, such as speedy trial, double jeopardy, or discovery rules, are violated would be meaningless."

GRAND JURY

- *State v. Martinez/Casias*

GRAND JURY - EVIDENCE

***State v. Martinez/Casias*, 2018-NMSC-031, 420 P.3d 568**

- Defs were indicted for armed robbery and conspiracy
- DA submitted subpoenas for phone records to the grand jury which were later ruled to be invalid and the district court dismissed the indictment on this basis
- NMSC reversed and reaffirmed the "century of judicial precedents" that limit the role district courts have in reviewing the evidence on which indictments rely
- NMSC held that Rule 5-302A(F), which was drafted in response to *State v. Jones*, 2009-NMSC-002, must be amended to conform with the existing law that district courts generally lack authority to review the admissibility of evidence considered by the grand jury
- "[A]lthough a broad reading . . . could be argued as authorizing the very kind of postindictment evidentiary review that decades of case law have held to be unprincipled in light of the independence of the grand jury, beyond statutory authorization, and unworkable in practice, to do so was not this Court's intention in adopting the rule[.]" Rather, the Court meant to only address whether defense-offered exculpatory evidence met statutory standards to be considered by the grand jury. No such "drastic rewriting" of NM law was intended and such an interpretation has "spawned confusion and needless litigation."

SELF-REPRESENTATION

- *State v. Barela*

RIGHT TO SELF-REPRESENTATION

***State v. Ernest Bryan Barela*, No. A-1-CA-35355 (Aug. 2, 2018)**

- Convicted of res burglary, stalking, larceny and other crimes for an incident with his ex-girlfriend
- Def requested a new attorney three times; each time right before trial. Court granted each request delaying the case over three years
- On the morning of trial, def moved to represent himself but also said he was not ready to proceed to trial
- Court denied the motion based on this case the untimeliness of the motion
- *Faretta v. California,* 422 U.S. 806, 819 (1975); *State v. Garcia*, 2011-NMSC-003, ¶ 24 – def must (1) "clearly and unequivocally" assertion his intention to represent himself (2) make his assertion in a timely manner and (3) "knowingly and intelligently" waive his right to counsel
- Request was untimely and it cannot be used as a "tactic to secure delay." "A court may consider events preceding a motion for self-representation to determine whether the request is made in good faith or merely for delay."
- COA also rejected def's claim that the NM Constitution grants him greater protection was not preserved and Court notes NM has not interpreted this right more expansively than its federal counterpart

CHILDREN'S COURT

- *State v. Anthony L.*

CHILDREN'S COURT – TIME LIMIT FOR ADJUDICATORY HEARING

***State v. Anthony L.*, No. A-1-CA-36241 (Sept. 26, 2018)**

- Child was in detention
- State sought and was granted a continuance for the adjudicatory hearing for the purpose of a CSA assessment and possible out-of-home placement
- Rule 10-243 provides for 30 day time limit for hearing if Child is in detention
- However, "for good cause shown" the court may extend the time for no more than 90 days
- Plain language of the rule is not ambiguous – State alleged good cause for the extension to determine appropriate placement for Child

FIRST DEGREE MURDER

- *State v. Cales*
- *State v. Hurd*
- *State v. Navarette*
- *State v. Ortiz n/k/a Suarez*
- *State v. Rodriguez*
- *State v. Suarez*
- *State v. Tegeda III*

FIRST DEGREE MURDER

***State v. Ivan Cales*, No. S-1-SC-36164 (Jul. 16, 2018) (unpublished decision)**

- Sufficient evidence supported deliberation in a circumstantial case
- Def believed the victim was a "skinwalker" or Native American witch; claimed she had put a spell on him and that he would feel justify in killing someone who cursed him; victim was killed by single gunshot to forehead and def bragged his gun could fire through someone's head; def lied about owning the gun; def went into hiding after murder
- Testimony from inmate who said def believed the victim was a witch was properly admitted; it was not offered to establish def's character to kill witches but rather was evidence that he had a specific reason to kill this particular victim

FIRST DEGREE MURDER

***State v. Jordan Hurd*, No. S-1-SC-36153 (Jul. 26, 2018)**

- Def killed father and daughter in their home and the survivor wife testified and identified def as the shooter both in and out of court
- Def claims "gruesome" photos of the scene were erroneously admitted and inflamed the passions of the jury but the photos were relevant to show the relative position of the shooter and the victims. No abuse of discretion and court did the 403 balancing before admission
- Not error to fail to give UJI 14-5014 – "failure to call witness" instruction – because Use Note says it shall not be given because it is a comment on the evidence

FIRST DEGREE MURDER

***State v. Arnoldo Navarette*, No. S-1-SC-35528 (Jul. 19, 2018) (unpublished decision)**

- Premeditated first degree murder from 1993; def fled to Mexico and was extradited in 2009
- (1) evidence that def pulled a gun on one of victim's brothers two months earlier was probative of def's motive and the existence of a feud between the families and did not simply prove def's propensity to use guns
- (2) sufficient evidence def was the shooter even though def asserted another man was the shooter
- (3) def objected to lesser included on second degree murder but requested VM as a lesser on second. Not error to not give it because there was no evidence that the victim provoked def and all the evidence of provocation came from def's testimony – it would be "incongruous" to allow for that testimony to support the instruction when def insisted he did not kill at all. Jury would have to "fragment" his testimony "to such a degree as to distort it."
- (4) def waived his right to remain silent as shown by the video
- (5) denial of motion to change venue was proper – def offered no evidence to support it and simply asserted that the parties had "extensive and overwhelming contacts" in the community. No evidence of actual prejudice where court conducted voir dire
- (6) IAC for failure to question potential jurors about media exposure – the contrary is true because the court questioned the jurors on the issue. Also claimed counsel had a per se conflict because he was the DA at the time of the crime and his office unsuccessfully prosecuted def's co-defendant. Court notes that the record "strongly suggests" there was no actual conflict. The State moved to DQ him under Rule 16-111(A)(2) but defense counsel "flatly denied" having anything to do with the case and the State offered nothing to the contrary. Def also signed a written waiver of the conflict.

FIRST DEGREE MURDER

***State v. Carlos Ortiz n/k/a Jesus Suarez*, No. S-1-SC-36061 (Aug. 13, 2018)**

- Armed home invasion and murder
- Sufficient evidence for felony murder; def only challenges identity. But victim's girlfriend identified him at trial, the murder weapon was found in his yard, he left his cell phone at the scene, and there was surveillance video – albeit "grainy" – of him entering the home
- No IAC for failure to join def's two murder cases – "Permitting a jury to hear both eyewitnesses respectively describe Defendant as the person they saw commit two separate murders just hours apart, buttressed by ballistics testimony that the pistol found on the ground near Defendant when he was arrested was the same weapon used in both murders, would have strengthened the identifications of Defendant as the shooter in both cases."

FIRST DEGREE MURDER

***State v. Michael Rodriguez*, No. S-1-SC-36459 (Sept. 20, 2018) (unpublished decision)**

- Jail calls were admissible against claim that they were too prejudicial because but it is "commonly understood that a person suspected of murder may be held in pre-trial custody"
- Calls were highly probative of intent – def discussed the knives used, said they would have a "hard time matching it", told his father that "fuck yeah" he remembers what he did, and "that's the story" when his father asked wasn't he too high to remember
- Photographs of def's tattoos were properly admitted as they showed defensive wounds on his body and there was nothing "inherently shocking" about the tattoos themselves
- Court denied motions for mistrial on comments made by potential jurors – those jurors were excused and nothing indicated the impaneled jurors were biased
- Sufficient evidence of deliberate intent due to the nature of the killing in which def used two knives and both struggled and stabbed the victim and def's actions after the killing and his jailhouse phone calls in which he said he remembered everything

FIRST DEGREE MURDER

State v. Jesus Suarez, No. S-1-SC-36080 (Aug. 13, 2018) (unpublished decision)

- Def killed victim in his home
- For first time on appeal, def claimed his statements were in violation of the 5th Amendment because made after he invoked his right to counsel. Def invoked his right to counsel but continued to volunteer statements; asked the police questions; and reacted to the police answers.
- These were volunteered communications under *Edwards v. Arizona*, 451 U.S. 477 (1981) – def initiated and furthered the conversation
- No IAC for failure to join this case with def's other murder case in which he murdered a different victim in a different incident on the same day
- Rather, there is a "strong argument" that joinder would have been prejudicial to him – photos and evidence from each scene would not have been cross-admissible in separate trials
- "It is difficult to imagine a competent attorney making a deliberate choice to put the evidence of these two separate homicide prosecutions before the same jury, particularly in light of Defendant's central defense theory in both cases . . . that he was not properly identified as the perpetrator."

FIRST DEGREE MURDER

***State v. Albert Tegeda III*, No. S-1-SC-35942 (Jul. 19, 2018) (unpublished decision)**

- Def initially said he knew nothing and the interview was terminated
- 30 minutes later, def said he wanted to talk to police, was again reminded of his rights, and confessed
- First statement was voluntary and no evidence of official coercion
- Second statement was also voluntary and threats to bring charges against def's grandmother or blandishments to "come clean" were not so coercive to overcome his will
- Def also claims IAC for failure to object to pathologist testimony because she was not the doctor who performed the autopsy relying on *State v. Navarette*, 2013-NMSC-003 which held it was a violation of the Confrontation Clause. But here the doctor had sufficient personal knowledge to testify and was not merely relaying on hearsay testimonial evidence
- Jury was instructed on self-defense but reasonably rejected it due to evidence that victim was shot 4-5 times which was contrary to def's claim that the gun went off when they struggled

DEFENSES

- *State v. Yepez*

DEFENSES - THE "WARRIOR GENE" DEFENSE

***State v. Anthony Blas Yepez*, 2018-NMCA-062, ___ P.3d ___, *cert. granted*, No. S-1-SC-37217 and No. S-1-SC-37216 (Sept. 28, 2018)**

- Def charged with first degree murder but convicted of second
- Claims the court improperly excluded expert witness testimony regarding his inability to form specific intent due to the MAOA gene
- COA found the district court abused its discretion in excluding it and the doctor's conclusion that def is "predisposed to acts of impulsive violence and is substantially more likely to engage in acts of impulsive violence than the ordinary person" would have been relevant to def's specific intent
- COA found it was harmless error because he was only convicted of second
- Judge Kiehne specially concurred to affirm the convictions but found that the majority's holding was unnecessary to the case and is therefore dicta
- Both cert petitions granted; whether the Court erred in finding it harmless error and whether the Court erred in reaching the issue

STATUTORY CONSTRUCTION

- *State v. Arias*
- *State v. James Barela*
- *State v. Blea*
- *State v. Chavez*
- *State v. Jackson*
- *State v. Roeper*
- *State v. Sanchez*
- *State v. Vest*
- *State v. Winn*

STATUTORY CONSTRUCTION – SYNTHETIC CANNABINOIDS

***State v. Jim Arias*, 2018-NMCA-057, 427 P.3d 129**

- Section 30-31-23(B)
- Def claimed State failed prove the substance was a synthetic cannabinoid as that term is used in the Controlled Substances Act
- No testimony regarding the chemical composition of the substance – officer just knew it was not marijuana. Witnesses testified that his behavior was consistent with being under the influence of "spice"
- Case has lengthy discussion of the term "synthetic cannabinoids"
- Added to CSA in 2011 but not expressly defined
- Section 30-31-6(C)(19)(a)-(k) lists eleven chemical compounds but this is not an exclusive or exhaustive list – the Board of Pharmacy added dozens more to the NMAC and included a functional definition
- State must prove the substance is (1) one of the enumerated ones in the statute or NMAC (2) falls into one of the classes of chemical listed in the NMAC *or* (3) has a high potential for abuse, no accepted medical use, and demonstrates binding activity to the cannabinoid receptor or analogs or homologs with binding activity
- Thus, the substances are "inherently complex and not uniformly identifiable." State must introduce scientific evidence to prove the identity

STATUTORY CONSTRUCTION – FELONY BATTERY ON HM ENHANCEMENT

***State v. James Edward Barela*, No. A-1-CA-35790 (Sept. 26, 2018), *cert. granted*, S-1-SC-37301 (Nov. 5, 2018)**

- Convicted of felony battery on HM under Section 30-3-17(A) and sentenced as habitual offender
- Claim of double enhancement - § 30-3-17(A) provides for a fourth degree felony for three such offenses
- Defendant relies on *State v. Anaya*, 1997-NMSC-010, in which the NMSC held felony DWI was not subject to habitual offender enhancement
- But DV is different – (1) felony battery against HM and habitual offender statutes are both in Criminal Code along with habitual offender enhancement, not MV code (2) DWI statute says "jail" not "prison"
- Therefore, Legislature meant to treat a "serial domestic batterer . . . as a typical fourth-degree felon."
- Judge Vargas dissented

STATUTORY CONSTRUCTION – DNA IDENTIFICATION ACT

***State v. Joseph Blea*, 2018-NMSC-052, 425 P.3d 385, *cert. denied*, No. S-1-SC-37150**

- Convicted of first-degree CSP and kidnapping of four victims for crimes committed in 1980s and 1990s – victims were unable to ID their attacker
- Crimes went unsolved until 2010 when def's DNA from a DV arrest was found to match DNA from the crime scenes
- State and federal facial constitutional challenge to Katie's Law which requires certain arrestees to provide a DNA sample to be placed in CODIS
- *Maryland v. King*, 569 U.S. 435 (2013) upheld the similar Maryland law against a Fourth Amendment challenge – a buccal swab is a search for Fourth A purposes but a minimal intrusion. And it furthers the govt interest in correctly identifying the person arrested and the use of DNA for identification purposes "represents an important advance in the techniques used by law enforcement to serve legitimate police concerns[.]" Analogous to fingerprint technology which has long been held "a natural part of the administrative steps incident to arrest." DNA is just "another metric of identification used to connect [an] arrestee with his or her public persona[.]"
- Def relies on Scalia's dissent that the primary purpose of CODIS is to investigate crimes and the Fourth A forbids searching a person for evidence of a crime where there is no basis to believe the person is guilty of the crime
- But COA declined to depart from *King* and cleaved to its holding that the State has a right to identify felony arrestees and the "minimally invasive means for securing the DNA sample" weighs in favor of its reasonableness

STATUTORY CONSTRUCTION – "FOLLOWING TOO CLOSELY"

***State v. Jose Chavez*, 2018-NMCA-056, 427 P.3d 126**

- Def was stopped for violation of Section 66-7-318 (1978) – officer testified she saw no "sky" between the two vehicles leading her to believe def was less than a car length away
- Def claimed the statute was unconstitutionally vague because it gives officers too much discretion and motorist insufficient guidance
- A statute is unconstitutionally vague if it (1) fails to provide persons of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited and (2) fails to create minimum guidelines for those tasked with enforcing and convicting under it – def has the burden to prove it unconstitutional beyond a reasonable doubt
- Statute relies on a "reasonable and prudent" standard – "overwhelming weight of precedent" has upheld this language against constitutional challenges

STATUTORY CONSTRUCTION – HUMAN TRAFFICKING

***State v. Sharoski Jackson*, A-1-CA-34873 (Sept. 12, 2018)**

- Def convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, CDM, and conspiracy
- Def argued that human trafficking requires *knowledge* that the victim was under 18
- Plain language of the statute provides that "knowingly" modifies only the act of "recruiting, soliciting, enticing, transporting, or obtaining"
- This also furthers the "statewide policy that minors are entitled to special protection."
- Court also relied on *State v. Lozoya*, 2017-NMCA-052, which held that CDM does not require proof that the offending adult knew the age of the child.

STATUTORY CONSTRUCTION - TRUANCY

***State v. Jeanne Roeper*, No. A-1-CA-34496 (Sept. 4, 2018)**

- Conviction for failure to enforce compulsory school attendance – Sections 22-12-1 to 10
- Evidence was insufficient because State did not prove Section 22-12-7(C) which requires the juvenile probation office to conduct an investigation into whether def's child was a "neglected child or a child in a family in need of services."
- COA held that the JPO's testimony about his review of the child's school file was not sufficient. "School officials are in just as good a position to conduct such a review as the juvenile probation office." Legislature must have been more and COA suggests interviews with family members, teachers, etc.
- Difficult facts – mom took care of three children and one grandchild one of which had severe physical ailments, her husband died, she suffered from depression, and had a mental breakdown

STATUTORY CONSTRUCTION – ESCAPE FROM COMMUNITY CUSTODY RELEASE PROGRAM ENHANCEMENT

***State v. Juan Trinidad Sanchez*, No.A-1-CA-35904 (Oct. 4, 2018)**

- Section 30-22-8.1 (1999) provides that when a person is committed to CCP for a felony, the conviction is a felony
- Def argued that the court double-used his underlying conviction for felony possession; once to enhance to a felony under § 30-22-8.1 and again to enhance as a habitual offender
- Court held that case law differentiates between statutes that require a prior felony *conviction*, either as a basis for enhancement or factual element, and those that only speak of a felony *charge*
- § 30-22-8.1 speaks in terms of a "charge" rather than a conviction and persons can be placed on CCP before conviction
- Escape from CCP therefore requires different facts than habitual offender enhancement – def's status as a felon is not an element of his conviction under § 30-22-8.1
- Statutes also have different purposes – habitual offender serves to deter criminal conduct and escape from CCP serves to create incentives to comply

STATUTORY CONSTRUCTION – AGGRAVATED FLEEING

***State v. Sean Vest*, 2018-NMCA-060, ___ P.3d ___, *cert. granted*, No. S-1-SC-37210 (Sept. 24, 2018)**

- Officer chased the def at 70 mph and def ran over a sidewalk and crashed into a residential area
- COA construes statutory language of "willfully and carelessly driving a vehicle *in a manner that endangers the life of another person* requires *actual* as opposed to potential endangerment
- COA reasons that this requirement is what differentiates the heightened culpability from evading under Section 30-22-1
- COA also finds that dictionary definitions of endanger do not indicate a potential or future condition
- Record is "devoid" of evidence to prove actual endangerment where def had no passenger and no evidence of encounters with other motorists

STATUTORY CONSTRUCTION - SORNA

***State v. Melvin Winn*, A-1-CA-34929 (Oct. 17, 2018)**

- Def was convicted of failure to register as a sex offender for a CO conviction for misdemeanor assault
- If the elements are the same, then the inquiry is over. But if not then "an offense is 'equivalent' to a New Mexico offense, for purposes of SORNA, if the defendant's actual conduct that gave rise to the out-of-state conviction would have constituted one of the twelve enumerated offenses requiring registration pursuant to SORNA." *State v. Hall*, 2013-NMSC-001, ¶ 1
- COA found the CO crime elements were not the same as NM offenses. As to actual conduct, the State relied upon an unsigned and unfiled PSR was not sufficient.

DOUBLE JEOPARDY

- *State v. Cummings*
- *State v. Lewis*
- *State v. Loza*

DOUBLE JEOPARDY

State v. El Rico Cummings, 2018-NMCA-055, 425 P.3d 745

- Claim of double jeopardy for convictions of felon in possession of a firearm and receiving stolen property because both crimes are based on the same firearm
- Generally, courts follow the *Swafford* test (1) whether the conduct is unitary and (2) if so, whether the Legislature intended to punish the crimes separately
- State conceded conduct was unitary – single gun found in def's locked safe
- Each crime contains an element the other does not; FIP requires def to be a felon and receiving a stolen firearm requires that the firearm be stolen
- Def argued for modified *Blockburger* test based on the State's legal theory and facts of the case – i.e. that both crimes required the element of possession of this particular stolen gun
- Def compared to *Gutierrez*, 2011-NMSC-024, in which armed robbery and unlawful taking of a MV were the same because for both crimes the object stolen was the car
- Here, both charges require the existence of an object but the stolen characteristic of the gun was an element only of the receiving charge and was irrelevant to FIP
- However, this presumption is not conclusive to determine legislative intent but the intent of the statutes is different; deter recidivism for FIP and protecting the public for receiving a stolen gun

JURY DEADLOCK

***State v. Kelson Lewis*, No. S-1-SC-36428 (Nov. 1, 2018)**

- Jury instructed on CSCM with battery as a lesser included
- Jury sent two notes asking if they should move onto lesser offense if they cannot reach unanimous decision on CSCM and district court declared mistrial after foreperson clarified they could not reach a verdict on Count I
- Def appealed the mistrial order claiming the district court failed to poll the jury and retrial on CSCM was a violation of double jeopardy
- (1) There was a clear record of deadlock on CSCM
- "Importantly, the judge must confirm that the jury did not unanimously agree that the defendant was not guilty of one or more of the included offenses because the constitutional protection against double jeopardy precludes the State from prosecuting the defendant for such offense(s) since the jury's unanimous agreement on a verdict of not guilty constitutes an acquittal." *State v. Phillips*, 2017-NMSC-019, ¶ 1
- Rule 5-611(D) sets out the procedure to do this – court is to poll the jury on the offenses in descending order to determine at what level the jury has disagreed. "If upon a poll of the jury it is determined that the jury has unanimously voted not guilty as to any degree of an offense, a verdict of not guilty shall be entered for that degree and for each greater degree of the offense."

JURY DEADLOCK cont.

- Court rejected def's argument that failure to strictly comply with Rule 5-611(D) was an abuse of discretion – the court established a clear record and the contrary holding would "exalt form over substance."
- Court notes that the Rule 5-611(D) says the court "shall" poll the jury but clarifies that its precedent only requires that a clear record is made
- (2) Court notes that UJIs 14-6002 and 14-6012 – and its case law - are ambiguous and inconsistent regarding whether a jury may proceed to consideration of a lesser offense if deadlocked on the greater
- The instructions both "simply state that the jury must proceed to consideration of the lesser offense if it has 'reasonable doubt" of the defendant's guilt of the greater offense"
- Courts in other states with similar instructions are split as to whether this means the jury has to unanimously find the def not guilty before proceeding to the lesser or the jury is supposed to proceed to the lesser if unable to agree on the greater

JURY DEADLOCK – "MODIFIED ACQUIT FIRST APPROACH"

- Here, the district court gave the instructions the "reasonable interpretation" that the jury should not consider the lesser battery offense if deadlocked on CSCM and should proceed to consider lesser offense only if acquitted on greater
- Discusses case law from other jurisdictions and the varied approaches
- Court adopts the "modified acquit first approach" of Alaska and California
- Jury has discretion to choose the manner and order in which it deliberates on the offenses *but* it must return a unanimous verdict of not guilty on the greater offense before the court may accept a verdict on the lesser offense
- Promotes the policy of not interfering with jury deliberations and does not deprive the State of final resolution on the greater charge
- Referred to the Criminal Uniform Jury Instructions Committee

DOUBLE JEOPARDY - RACKETEERING

***State v. Matias Loza*, 2018-NMSC-034, 426 P.3d 34**

- Def was convicted of racketeering and State sought to then prosecute him for first-degree murder which was one of the predicate offenses for the racketeering
- Def appealed before trial claiming double jeopardy
- Double jeopardy was not violated by these successive prosecutions under the NM Const
- Federal law is clear that this is allowed and NM has always followed federal law on this issue and the NM statute is modeled on RICO
- It would be "contrary to common sense and would undermine the purpose of racketeering legislation to force the State to choose between prosecuting the predicate offense or pursuing a racketeering case."
- A def can be prosecuted for a predicate offense before a racketeering case materializes. Nothing in the legislation forces the State to choose and foreclose a possible racketeering prosecution
- Court did not address the joinder issue because the def did not address it

FOURTH AMENDMENT/ARTICLE II, SECTION 10

- *State v. Chacon*
- *State v. Cummings*

FOURTH AMENDMENT/ARTICLE II, SECTION 10 – SECOND STRIP SEARCH

***State v. Eugene Chacon*, No. A-1-CA-34545 (Aug. 6, 2018)**

- Def was initially strip searched upon admission – clearly allowed and not challenged
- Def was involved in suspicious behavior the next day with other inmates and the officers received an anonymous tip about drugs
- Def was then subjected to a second strip search and drugs were found in him
- The COA noted that the institutional need for such searches is diminished once an inmate is admitted. However, as a matter of first impression, the COA held the "middle ground" of reasonable suspicion – with probable cause on one end and complete discretion on the other – is the appropriate standard for such a search
- Here, the information received by the officers was sufficient to justify the second search

FOURTH AMENDMENT/ARTICLE II, SECTION 10 - SEARCH OF LOCKED SAFE

***State v. El Rico Cummings*, 2018-NMCA-055, 425 P.3d 745**

- Police served valid search warrant at def's residence pursuant to a shooting investigation which authorized search and seizure of firearms, ammo, weapons or tools, cell phones, narcotics, and documents
- While searching the house, police found a locked safe which was large enough to hold a firearm. Def did not give permission to search it and did not have a key for it
- Police took it back to the police dept and opened it without getting a second warrant
- Search was reasonable under Article II, Section 10. Although the warrant did not specify a safe, the safe was a container that could have contained a firearm or other items described in the warrant and it did not exceed the scope of the warrant. Short discussion

MIRANDA ISSUES

- *State v. Serna*

MIRANDA

***State v. Ernest Serna*, No. A-1-CA-35290 (Sept. 13, 2018)**

- Def pled to second-degree murder and reserved the right to appeal adequacy of the *Miranda* warnings
- Def was given short version of *Miranda* and made incriminating statements
- Although warnings need not be given verbatim, they do have to convey the right to presence of counsel *before* questioning. Here, the warning only told def of right to counsel *during* questioning
- Def was thus given a "misleading temporal limitation" on his full right to counsel
- Court declined to decide if def validly waived his *Miranda* rights because the rights given were inadequate

EVIDENTIARY RULINGS

- *State v. Barela*
- *State v. Flores*
- *State v. Jackson*
- *State v. Ruffin*

EVIDENTIARY RULINGS – PRIOR INCONSISTENT STATEMENTS

***State v. James Edward Barela*, No. A-1-CA-35790 (Sept. 26, 2018)**

- District court excluded letters written by the DV victim as prior inconsistent statements under Rule 11-613(B)
- But court allowed def to use the content of the letters to impeach victim but did not allow them to be introduced as exhibits
- On CX the victim testified at length about the letters and her reasons for writing them and all inconsistencies were revealed
- Admission of the letters themselves would have been cumulative and court did not abuse its discretion

EVIDENTIARY ISSUES – ADMISSION OF PLEA AGREEMENT

***State v. Melissa Rae Flores*, No. A-1-CA-35500 (Sept. 17, 2018)**

- COA reversed conviction for receiving or transferring stolen MV because a co-def's indictment and plea was entered into evidence
- COA found agreement was solely used to prove the elements of the crime which is impermissible because (1) it encourages guilt by association and (2) State can't "borrow" proof from another case to prove guilt.
- COA rejected State's argument that it was relevant to prove def's knowledge that the vehicle was stolen and the conspiracy to steal it
- Not harmless error because prosecutor was the source of the error and it was critical evidence to prove def's knowledge

EVIDENTIARY ISSUES – TEXT MESSAGES AUTHENTICATION

***State v. Sharoski Bernard Jackson*, No. A-1-CA-34873**

- Court admitted text messages between def and co-conspirator – State presented evidence
- State also presented evidence tying the two numbers to a backpage.com ad featuring the victim
- State presented sufficient evidence, by a preponderance of the evidence, to show the messages came from the two phones – def's argument to the contrary goes to the weight, not admissibility
- Texts were non-hearsay under Rule 11-801(D)(2)(a) for def (statement by an opposing party is not hearsay) and Rule 11-801(D)(2)(e) for co-conspirator (statements of co-conspirator made in furtherance of the conspiracy
- Others that appeared to be from clients were not offered for the truth of the matter asserted – i.e. that the price of the services – but to provide context and show def was motivated by $ to set up a commercial sexual transaction

EXPERT V. LAY TESTIMONY

***State v. Emily Ruffin*, No. A-1-CA-35424 (Oct. 22, 2018)**

- Vehicular homicide – State appealed from pretrial ruling that deputy could not testify as an expert
- Deputy had experience and training and had investigated over 5000 crashes
- Held: *Alberico/Daubert* did not apply to his testimony regarding his observations at the scene including the damage to the vehicles and the yaw and gouge marks which indicated the victim vehicle rolled over. On remand, the court still has to determine if the testimony is reliable.
- BUT, testimony as to *why* the vehicle rolled over is scientific testimony subject to *Alberico/Daubert* because it required application of physics principles.

MOTION FOR NEW TRIAL

***State v. Sharoski Bernard Jackson*, No. A-1-CA-34873 (Sept. 12, 2018)**

- Def moved for new trial claiming the victim lied on the stand as shown by the newly discovered evidence of a post-trial phone conversation between victim and def's sister
- Def's sister asked her why she lied at trial and she said "They told me that if I didn't say anything that I would have to stay in jail."
- Only goes to impeachment and victim was thoroughly CXed at trial
- Moreover, courts "treat attacks on the veracity of trial testimony with extreme caution" and this phone call is "far from the conclusive evidence necessary to demonstrate its usefulness as more than impeachment evidence."

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Ernest Barela*
- *State v. Montano*

INEFFECTIVE ASSISTANCE OF COUNSEL

***State v. Ernest Bryan Barela*, No. A-1-CA-35355 (Aug. 2, 2018)**

- Def failed to show that the COA's order sanctioning counsel for not filing an acceptable docketing statement "impacted the outcome of his trial"
- Def failed to show that counsel's failure to file a motion for self-representation has any basis in the record – nothing to indicate attorney knew of Def's intention and nothing to show the outcome of the trial would have been different "especially in light of the jury's acquittal of three of the five charges."
- Def failed to show counsel was ineffective in his communication with him – def conceded the attorney was aware of the facts of his case and he cannot rest his claim solely on the attorney's entry as substitute counsel
- Def failed to show attorney failed to call certain witnesses – only a general claim with no specifics

INEFFECTIVE ASSISTANCE OF COUNSEL

***State v. Roman F. Montano, Sr.* No. A-1-CA-35602 (Oct. 11, 2018)**

- On his attorney's advice, Def pleaded guilty to CSPM and CSCM with the intention of then moving to withdraw with new counsel
- COA rejected two claims of IAC – there was no claim of police overreaching to justify a motion to suppress his confession (even though def claimed he was intoxicated) and there was no basis to find counsel did an ineffective investigation. No details on what witnesses should have been called
- However, counsel did tell def that his semen and DNA were found on his couch and that not was accurate
- COA found this was deficient performance
- However, no prejudice because (1) counsel also testified that the victim's credible testimony and def's confession were more damning (2) def's claim that the DNA evidence was crucial to his decision was belated and undermined his testimony at the hearing (3) the State's evidence was very strong and (4) def took his attorney's "unorthodox" advice to enter the plea and then try to withdraw with new counsel. NOTE: the COA did not reach the issue whether this advice was ineffective because it was not raised.

INEFFECTIVE ASSISTANCE OF COUNSEL - EVIDENCE

- In *Montano*, the COA rejected def's argument that prejudice should be presumed from expert testimony regarding systemic problems with the LOPD contract system relying on *Kerr v. Parsons*, 2016-NMSC-028, which held that deficient performance will not be presumed from the flat-fee public defender contract system
- *Lytle v. Jordan*, 2001-NMSC-016, ¶ 49, held it is "superfluous for expert witnesses to advise a court, whether it is the district court or an appellate court, about the proper application of existing law to the established historical facts and about the ultimate issue of trial counsel's effectiveness." Object if the defendant wants to call an expert witness to opine on IAC

SPEEDY TRIAL

- *State v. Barela*

SPEEDY TRIAL

***State v. James Edward Barela*, No. A-1-CA-35790 (Sept. 26, 2018)**

- District court's denial of motion to dismiss for speedy trial affirmed
- Intermediate complexity and 21-month time period; six months over presumptive time limit of 15 months
- 9 months of neutral delay; 9 months against the State; 2 ½ months against def
- Def also acquiesced in the delay somewhat
- No particularized prejudice; def only claimed inability to "work or live his daily life"

SPEEDY TRIAL

- Request trial settings in writing – new judge
- Request rulings on pending motions
- Do not always acquiesce to defense requests for continuance - *Serros*
- 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

SENTENCING

- *State v. Stejskal*

SENTENCING

***State v. Wilbur Stejskal*, 2018-NMCA-045, 421 P.3d 856**

- Def pled no contest to two crimes and the written J&S sentenced him to concurrent terms for total of nine years
- Two years later, the district judge amended it to provide for consecutive terms resulting in 10 year sentence
- Def claimed this was in violation of Rule 5-801 and *State v. Torres*, 2012-NMCA-026, and the court lacked jurisdiction to increase his sentence
- State argued this was not a "modification" of his sentence but the correction of a clerical mistake under Rule 5-113(B)
- The P&D specified an agreement that the sentences would run consecutively for a total of 10 years and the record below is clear the parties and court intended that sentence
- "Clerical" mistake means an "error made in copying or writing" and this correction is in accordance with the parties' intentions and the court's oral imposition of sentence
- COA also held no reasonable expectation of finality in sentence saying it does not mean a clerical error cannot be corrected – very brief discussion on this

SEX OFFENDER PAROLE PERIOD

- Section 31-21-10.1(A)(2) was amended effective 7/1/07 to increase the parole period for certain sex offenders from 5-20 to 5-natural life
- Otherwise, the parole period is 5-20 for sex offenders
- Make sure the applicable parole period is a term in the P&D agreement and the J&S
- "We have held that the law, at the time of the commission of the offense, is controlling." *State v. Allen*, 1971-NMSC-026, ¶ 6, 82 N.M. 373

SEX OFFENDER PAROLE PERIOD

- Defendant is sentenced 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*, 2012-NMCA-026, 272 P.3d 689, which held that trial court lacked jurisdiction to consider State's motion to correct an illegal sentence

FOULENFONT HEARINGS

- Generally, be cautious of these. Is it really a legal issue or is it a factual issue? Argue *Foulenfont* does not apply before you argue the merits
- Most of these issues probably should be resolved by a jury – not a judge
- "Questions of fact, however, are the unique purview of the jury and, as such, should be decided by the jury alone." *State v. LaPietra*, 2010-NMCA-009, ¶7, 147 N.M. 569.

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
- Double and triple check jury instructions
- Please state what is happening – can't see gestures
- Defendant must actually plead guilty on the record at a plea hearing – *State v. Yancey*, 2017-NMCA-090, 406 P.3d 1050, *cert. granted*, No. S-1-SC-36669 (Nov. 13, 2017)

JURY INSTRUCTIONS

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

PLEA AGREEMENTS

- Please always detail the factual basis and the dates of the offenses to which the def is pleading – do not stipulate or refer to another case
- Double check the dates of the charges to which def is pleading and make sure the sentence and parole periods match, especially for sex offenders
- Any ambiguity in the plea agreement will inure to the def's benefit because the court construes its terms according to what the def reasonably believed. *State v. Miller*, 2013-NMSC-048

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*