NEW MEXICO OFFICE OF THE ATTORNEY GENERAL

CRIMINAL APPELLATE LAW UPDATE
DISTRICT ATTORNEYS' FALL CONFERENCE
NOVEMBER 18, 2020

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;

- M. Anne Kelly
- Deputy Attorney General for Criminal Affairs
- (505) 717-3505 – office (SF and ABQ)
- (505) 318-7929 – (cell)

CRIMINAL APPEALS DIVISION

- We currently have 15 staff attorneys and two staff members
- John Kloss is the new director of Criminal Appeals
- Maris Veidemanis is the deputy director
- Fran Narro in Albuquerque – handles state habeas, federal habeas, and much more – (505) 717-3573 and fnarro@nmag.gov
- Rose Leal in Santa Fe – handles all regular appeals and much more – (505) 490-4848 and rleal@nmag.gov

STAFF ATTORNEYS

- Jane Bernstein – (505) 717-3509
- jbernstein@nmag.gov
- Meryl Francolini – (505) 717-3591
- mfrancolini@nmag.gov
- Charles Gutierrez – (505) 717-3522
- cjgutierrez@nmag.gov
- Marko Hananel – (505) 490-4890
- mhananel@nmag.gov
- Walter Hart – (505) 717-3523
- whart@nmag.gov
- Ben Lammons – (505) 490-4057
- blammons@nmag.gov

STAFF ATTORNEYS

- Maha Khoury – (505) 490-4844 (about to retire – congratulations, Maha!!)
- mkhoury@nmag.gov
- Mark Lovato – (505) 717-3541
- mlovato@nmag.gov
- Anne Minard – (505) 490-4045
- aminard@nmag.gov
- Van Snow – (505) 717-4843
- vsnow@nmag.gov
- Emily Tyson-Jorgenson – (505) 490-4868
- etyson-jorgenson@nmag.gov
- Maris Veidemanis – (505) 490-4867
- mveidemanis@nmag.gov

STAFF ATTORNEYS

- Victoria Wilson – (505) 717-3574
- vwilson@nmag.gov
- Lauren Wolongevicz – (505) 717-3562
- lwolongevicz@nmag.gov
- John Woykovsky – (505) 717-3576
- jwoykovsky@nmag.gov

NEW MEXICO SUPREME COURT

- N.M. Const. art VI, § 2. NMSC has original jurisdiction over appeals "imposing a sentence of death or life imprisonment[.]"
- *State v. Smallwood*, 2007-NMSC-005, ¶ 10, 141 N.M. 178, held that this jurisdiction extends to interlocutory appeals on cases in which a death or life imprisonment sentence is possible
- Applies equally to appeals from pretrial detention rulings – Rule 12-204

NEW MEXICO SUPREME COURT

- "In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law[.]" N.M. Const., art. VI, § 2
- Section 34-5-14(B) gives the Court cert jurisdiction if the COA opinion is in conflict with a decision from the appellate courts, involves a significant constitutional question, or involves an issue of substantial public interest.
- Section 34-5-14(C) allows for the Court of Appeals to certify a question to the Supreme Court

NEW MEXICO SUPREME COURT

- Comprises five justices who generally sit on every case. The Court does not sit in panels.
- Oral argument will usually be heard if one party requests it. Rule 12-319 NMRA
- Opinions (published) and decisions (unpublished) 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

NEW MEXICO COURT OF APPEALS

- The Court was created by constitutional amendment in 1965. N.M. Const. art. VI, § 28.
- The Court has no original jurisdiction and its appellate jurisdiction is as provided by law. N.M. Const. art. VI, § 29.
- Section 34-5-8 is the governing statute on the Court's jurisdiction and includes "all actions under the Workers' Compensation Act, the New Mexico Occupational Disease Disablement Law, the Subsequent Injury Act and the federal Employers' Liability Act" and "criminal actions, except those in which a judgment of the district court imposes a sentence of death or life imprisonment."

NEW MEXICO COURT OF APPEALS

- Court currently comprises ten judges
- Cases are decided by a panel of three judges, chosen randomly
- A party may file a motion for rehearing – Rule 12-404 – if one believes the Court misapprehend or overlooked a point or fact or law
- However, there is no en banc procedure
- All opinions, published and unpublished, are available on the New Mexico Court of Appeals website – https://www.nmcourts.gov/Court-ofAppeals/
- And the New Mexico Compilation Commission – www.nmcompcomm.us

CRIMINAL APPEALS – BY DEFENDANT

- **Governed by Section 39-3-3**
- A. By the defendant. In any criminal proceeding in district court an appeal may be taken by the defendant to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts:
- (1) within thirty days from the entry of any final judgment;
- (2) within ten days after entry of an order denying relief on a petition to review conditions of release pursuant to the Rules of Criminal Procedure; or
- (3) by filing an application for an order allowing an appeal in the appropriate appellate court within ten days after entry of an interlocutory order or decision in which the district court, in its discretion, makes a finding in the order or decision that the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order or decision may materially advance the ultimate termination of the litigation.

CRIMINAL APPEALS – BY THE STATE

- **Section 39-3-3(B)**
- In any criminal proceeding in district court an appeal may be taken by the state to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts:
- (1) within thirty days from a decision, judgment or order dismissing a complaint, indictment or information as to any one or more counts;
- (2) 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.**

CONSTITUTIONAL RIGHT TO APPEAL

- New Mexico Constitution provides that "an aggrieved party shall have an absolute right to one appeal." N.M. Const., art. VI, § 2
- Convicted defendants have an absolute right to appeal. If their attorney fails to file a notice of appeal – or files it late – the court will presume this as a prima face case of ineffective assistance of counsel and hear the appeal. *State v. Duran*, 1986-NMCA-125, 105 N.M. 231
- Now commonly known as the "*Duran* presumption." However, it does not extend to appeals from pretrial detention decisions; appeals from probation revocations; and to appeals from unconditional guilty pleas

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 unless and until the NMSC changes it

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
- INCORRECT: *State v. Gallegos*, 141 N.M. 185, 189, 152 P.3d 828, 831
- This just applies to New Mexico cases. Check the Bluebook for out of state case citations

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
- 10 days for any suppression of evidence/witnesses that eviscerates your case
- 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 – the State cannot!
- **NOTICE OF APPEAL IS FILED IN DISTRICT COURT AND SERVED ON THE APPELLATE COURT**
- **See Rule 12-202 NMRA for details on filing, service**

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
- Calendar notice is issued based on the record proper and docketing statement – don't just include the facts that are good for your case
- **Docketing statements will be rejected if they do not follow the rule. The COA is very active in rejecting DSs for failure to summarize all facts material to the issues presented**.
- **Sample docketing statement from COA at https://coa.nmcourts.gov/attorney-information.aspx**
- **DOCKETING STATEMENT IS FILED IN APPELLATE COURT AND SERVED ON THE DISTRICT COURT**

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 filed 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
- Please respond to us, especially if the COA proposes to reverse on insufficient evidence. We don't know any additional facts beyond the docketing statement and what might be in the record proper

COA PILOT PROJECT

- Court of Appeals is moving away from summary calendar and has proposed a pilot project which started this in October of 2019
- Once the appeal is filed, the district court is to provide the entire record to the Court and parties
- Our Division would file a brief in chief as the first pleading in a State's appeal – no more docketing statements
- Only applicable to criminal cases involving the LOPD

HABEAS APPEALS

- Habeas cases – if State loses in district court, the State has an automatic direct appeal to the Supreme Court under Rule 12-102(A)(3) NMRA
- If habeas petitioner loses in district court, he/she has to petition the Supreme Court for certiorari

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."

FILING IN THE APPELLATE COURTS

- All electronic filing – no other filing is accepted
- Everything is on Odyssey
- Supreme Court number format – S-1-SC-12345
- Court of Appeals number format – A-1-CA-12345
- Use 14-point type – Rule 12-305(C)(1) NMRA
- Do not include an order with a motion, even if the motion is unopposed – the appellate courts generate their own orders
- Must get the position of the opposing party on a motion or the Court will reject it – Rule 12-309(C)

PUBLISHED COA OPINIONS FROM APRIL 2020 TO NOW

- *State v. Anthony Baca*
- *State v. Cesar B.*
- *State v. Juan Montelongo Esparza*
- *State v. Natisha George*
- *State v. Joseph A. Grubb*
- *State v. David Gutierrez et al*
- *State v. Gregory Hobbs*
- *State v. Kimberly Ann Ledbetter*
- *State v. Frank C. Little*
- *State v. Isaac Marquez*
- *State v. Santiago Martinez*
- *State v. Anthony Pamphile*
- *State v. Daryl Paul*
- *State v. William Ramey*
- *State v. Gerardo Torres and Kendale Hendrix*
- *State v. Carroll J. Tuton*
- *State v. Ronald Widmer*

2020 CRIMINAL OPINIONS and DECISIONS FROM THE NMSC

- *State v. Ismael and Angela Adame*
- *State v. James Edward Barela*
- *State v. Bradley Scott Farrington*
- *State v. Nigel Johnson* (unpublished decision)
- *State v. Mikel A. Martinez*
- *State v. Roy Montano and William Martinez*
- *State v. Ameer Muhammad* (unpublished decision)
- *State v. Jason Nowicki* (unpublished decision)
- *State v. Eder Ortiz-Parra* (unpublished decision)
- *State v. Edwin Ortiz-Parra* (unpublished decision)
- *State v. Jaycob Michael Price*
- *State v. Benny V. Porter*
- *State v. Gabriel Sanchez*
- *State v. Richard Sena*
- *State v. Rick Stallings*
- *State v. Gregory Valenzuela* (unpublished decision)
- *State v. Ronald Widmer*
- *State v. Curtis Worley*

FIRST-DEGREE MURDER

- ***State v. Johnson***
- ***State v. Nowicki***
- ***State v. Eder Ortiz-Parra***
- ***State v. Edwin Ortiz-Parra***
- ***State v. Valenzuela***

FIRST-DEGREE MURDER

- ***State v. Nigel Johnson***, No. S-1-SC-37285 (Jul. 2, 2020) (unpublished decision)
- Def and his cohorts beat to death and robbed a man outside a convenience store
- Convicted of felony murder and conspiracy to commit robbery
- Def said one of his friends stole the money off the already unconscious victim but a witness saw the beating
- Court discusses the testimony of identity and rejects def's argument based on "slight inconsistencies" in the eyewitnesses' descriptions of the clothing
- "An agreement to a crime must necessarily precede the commission of that crime." No unitary conduct of the charges

FIRST-DEGREE MURDER

- ***State v. Jason Nowicki*,** No. S-1-SC-37388 (Apr. 20, 2020) (unpublished decision)
- Def and his buddies parked outside the victim's apartment and def shot him multiple times when victim approached
- Conviction of felony murder with predicate of shooting at a dwelling and willful and deliberate murder
- FM and predicate felony vacated under *State v. Comitz*, 2019-NMSC-011, which held shooting at dwelling is not supported by simply shooting at a person who happens to be in front of a dwelling
- Here, def didn't shoot the building but waited for victim and shot at him
- Expert testimony that bullets recovered at the scene were shot from def's gun was upheld as admissible
- Rejected def's argument that the science is "invalid and unreliable" – such techniques are "widely accepted" and court properly denied request for a *Daubert* hearing

FIRST-DEGREE MURDER

- ***State v. Eder Ortiz-Parra***, No. S-1-SC-37109 (May 28, 2020) (unpublished decision)
- Convicted of two counts of murder and tried jointly with brother Edwin and cousin Rafael
- Eder, Edwin, Rafael, and two other men went to a house and shot the victims
- Def claimed the eyewitnesses should not believed and his identity as one of the shooters was in question
- But standard of review does not allow the reviewing court to reweigh the evidence and it must construe the evidence in the light most favorable to the jury's verdict
- Court also rejected claim that trial should have been severed from that of Rafael's
- Defense were not inconsistent – contrary to his claim, both defs attacked the credibility of one of the eyewitnesses

FIRST-DEGREE MURDER

- ***State v. Edwin Edsel Ortiz-Parra***, No. S-1-SC-37093 (May 28, 2020) (unpublished decision)
- Claim that use of the defs' nicknames – especially brother Eder's of "El Chapo" was unfairly prejudicial
- Witnesses testified these were nicknames since childhood and they were used simply to tell the story from the witnesses' perspective and to explain the detective's process
- Also claimed failure to sever from Rafael was error due to conflicting defenses – same holding as in Eder's case
- Other evidentiary issues were dealt with summarily – foundation for video from a city traffic light camera; sufficiency of evidence for kidnapping; firearm enhancement

FIRST-DEGREE MURDER – "OVERKILL"

- ***State v. Gregory Valenzuela***, No. S-1-SC-37415 (Nov. 16, 2020)
- Def brutally and repeatedly stabbed a good friend for seemingly no reason – friend gave his son a hug and kiss on the forehead – although meth was involved
- Def asked the Court to reassess its conclusion in previous cases that overkill evidence may support a jury's finding of deliberate intent to kill.
- The Court rejected def's arguments, concluding that the number of wounds he inflicted was one of several pieces of evidence upon which the jury may have rested its finding that he killed deliberately, and that evidence beyond the evidence of overkill supported the jury's verdict.
- He took and burned evidence from the scene; said he'd do it again after initially lying to the police

FIFTH AMENDMENT - MIRANDA

- ***State v. Muhammad***
- ***State v. Widmer***

WAIVER OF MIRANDA

- ***State v. Ameer Muhammad***, No. S-1-SC-37364 (Oct. 19, 2020) (unpublished decision)
- Def stabbed the victim to death in a parking lot and then stole his wallet – convicted of felony murder and armed robbery
- Moved to suppress his statements claiming he didn't knowingly and intelligently waive *Miranda* rights
- Def made some statements that indicated he was delusional and had been diagnosed with schizophrenia
- District court found the statement was made voluntarily but did not make findings if the waiver was knowing and intelligent – def claimed on appeal his mental illness obviated this
- Held: Def's mental illness did not affect his ability to understand and waive his rights. A waiver may be knowing and intelligent and need not be "rational or wise."

MIRANDA – PUBLIC SAFETY EXCEPTION

- ***State v. Ronald Widmer*,** 2020-NMSC-007, 461 P.3d 881
- Def stopped for possible stolen vehicle and found to have outstanding warrants. Officers placed def in handcuffs and donned protective gloves in preparation for a search incident to arrest.
- Officer asked def, "Is there anything on your person I should know about?" and def responded, "I have meth."
- District court denied suppression and held the question was asked for officer safety
- The COA reversed and the NMSC granted cert
- Majority held (1) def was subjected to custodial interrogation and *Miranda* was therefore required but (2) def's statement was admissible as an exception to *Miranda* under *New York v. Quarles*, 467 U.S. 649 (1984), because the question was designed to protect the officers' safety

MIRANDA – PUBLIC SAFETY EXCEPTION (cont.)

- Justice Nakamura dissented on the majority's conclusion that the officer's question constituted interrogation
- First, *Quarles* creates an exception to *Miranda* itself. If a question is designed for officer safety, it is not interrogation designed to elicit an incriminating response
- The majority found both that the question was interrogation because it elicited a response that led to def's conviction but also that it was for public safety. Can't be both.
- Like routine questions of name, address, age etc., public safety questions are not interrogation
- Second, the majority – and the COA – failed to defer to the district court's factual findings. That court found that the question – and the officers' actions in putting on protective gloves – resolved the question in favor of public safety.

FOURTH AMENDMENT – ARTICLE II, SECTION 10

- ***State v. Adame***
- ***State v. Martinez***
- ***State v. Price***
- ***State v. Ramey***
- ***State v. Sanchez***
- ***State v. Tuton***
- ***State v. Widmer***

FOURTH AMENDMENT – REASONABLE EXPECTATION OF PRIVACY

- ***State v. Ismael and Angela Adame***, S-1-SC-36839 (Jun. 18, 2020)
- Issue: whether defendants had a reasonable expectation of privacy in their bank records under Article II, Section 10 of the New Mexico Constitution
- Defs filed pretrial motion to suppress their financial records obtained by a federal subpoena
- Held: the NM constitution does not provide greater protection to bank records than does the federal constitution
- Relied on the third-party doctrine; when a person voluntarily shares information with another, he has no legitimate expectation of privacy in that information
- *United States v. Miller*, 425 U.S. 435 (1976), is the federal precedent
- Court distinguished *State v. Granville*, 2006-NMCA-098, in which the COA held there is a reasonable expectation of privacy in garbage
- Court discussed – but not did adopt – the criticisms that have been leveled at *Miller*

FOURTH AMENDMENT – REASONABLE SUSPICION (cont.)

- ***State v. Mikel Martinez***, 2020-NMSC-005, 457 P.3d 254
- Officer observed two possible drug deals at Allsups within minutes of each other and stopped the suspects
- The reasonable suspicion was informed by (1) officer's training and experience (2) his observations and (3) the fact that it was a high crime area
- COA's conclusion to the contrary ignored the deference to the officer's training and "discount[ed] the gloss the district court gave the facts here."
- "Police officers must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent."
- "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct."
- High crime area justification is appropriate where officer can articulate the particular type of prevalent crime rather than just a generic assertion

SUFFICIENCY OF AFFIDAVIT FOR CELL PHONE SEARCH

- ***State v. Jaycob Michael Price***, 2020-NMSC-014, 470 P.3d 265
- Victim was found shot dead in parking lot 30 minutes after leaving a relative's apartment where he asked for $
- No physical evidence at the scene but def's number was called during that 30 minutes
- Police got a search warrant for (1) the basic subscriber information (2) the cell-site location information (CSLI), and (3) a list of calls and text messages to and from Defendant's cell phone
- District court held the search warrant affidavit did not establish probable cause for the latter two areas of information
- Held: "[T]he totality of the circumstances described in the Affidavit establishes reasonable grounds for the judge issuing the search warrant to find probable cause that the unknown person talking to Victim was in the vicinity of the parking lot when the conversations took place before Victim was shot. The CSLI included evidence of that person's location during the relevant time frame."

CONSENSUAL ENCOUNTER

- ***State v. William Ramey***, 2020-NMSC-041, 473 P.3d 13
- Silver City PD practice of stopping individuals walking at night and asking for names and DOB to get "database of people" in case a crime is later committed
- Def was walking at 12:18 a.m. and was stopped simply for that reason
- Officer was then informed that def had outstanding warrant and found meth in search incident to arrest
- Held: requesting his ID was a seizure – def wouldn't have believed he was free to leave despite State's argument that the brief and informal encounter was "cordial, friendly and not remotely confrontational"
- But def's isolation, lateness of the hour, officer's conduct in passing him and doing two U-turns, and then questioning where he lived militated against that

ATTENUATION

- ***State v. William Ramey*****,** 2020-NMCA-041, 473 P.3d 13
- State argued that even if a seizure, the evidence from the arrest was admissible under the attenuation doctrine
- The doctrine considers (1) lapsed time between illegality and acquisition of evidence (2) presence of intervening circumstances and (3) purpose and flagrancy of official misconduct
- In *State v. Edwards*, 2019-NMCA-070, the COA held that a valid arrest warrant acted to excuse any preceding official misconduct
- COA considers this under the second factor but finds the other two factors weigh against attenuation
- Time was only six minutes and the conduct was an arbitrary fishing expedition
- "[A]dmission of the evidence . . . would embolden police to engage in unreasonable searches and seizures[.]"

SEIZURE OF CELL PHONE UNDER A WARRANT

- ***State v. Gabriel Sanchez***, 2020 WL 4251784 (Jul. 23, 2020)
- Interlocutory appeal in a first degree murder case in which district court suppressed evidence of the def's cell phone because the extraction of its contents violated Rule 5-211(C) which requires a warrant to be executed within ten days of issuance
- The phone was seized but police were unable to bypass the lock code and it was returned to the evidence vault
- 11 months later, the police got a second warrant after learning the technology to get the data out
- Held: the extraction was lawful because the phone was seized within ten days of the warrant's issuance. The court considered the "practical realties" of searching electronic devices which can be delayed for many months due to the need for specialized software to deal with encryption etc.
- The Court cited to several state and federal cases which held the same
- Contrary rule would require LE to obtain a new warrant every 10 days while holding the device

REASONABLE SUSPICION

- ***State v. Carroll J. Tuton***, 2020-NMCA-042, 472 P.3d 1214
- Def was stopped for failure to use his turn signal. Def was very nervous and produced his driver's license but not his other documents. Officer asked him to step out of the car and asked him where he was coming from. Def said he was coming from a friend's house whom the officers knew to be a convicted drug trafficker. Officer then asked for consent to search the vehicle and def's wallet where meth was found
- Def claims the officer unreasonably extended the traffic stop and impermissibly deviated from its original justification
- Held: not a violation under the Fourth Amendment which allows further investigation so long as the traffic stop is not unreasonably prolonged.
- But it did violate Article II, Section 10 which forbids fishing expeditions during traffic stops and mandates that all questions be reasonably related to the initial reason for the stop unless supported by independent reasonable suspicion

LAWFULNESS OF ARREST – RELIANCE ON OUTSTANDING WARRANT

- ***State v. Ronald Widmer***, No. A-1-CA-34272 (Sep. 15, 2020)
- On remand back to COA after NMSC decided the admissibility of def's statements
- Def also claims unlawful arrest because he was arrested *before* the reported warrants from dispatch were confirmed as valid
- Officer testified their policy was not to make an arrest until warrant is secondarily confirmed but officer's failure to file this policy is not the stuff of a constitutional violation
- Conversely, adherence to an internal policy will not obviate a constitutional violation
- Seizure of meth was product of a lawful search incident to arrest

STATUTORY CONSTRUCTION/SUFFICIENCY OF EVIDENCE/JURY INSTRUCTIONS

- ***State v. Baca***
- ***State v. Barela***
- ***State v. Cesar B.***
- ***State v. Esparza***
- ***State v. George***
- ***State v. Gutierrez***
- ***State v. Hobbs***
- ***State v. Ledbetter***
- ***State v. Montano***

AGGRVATED ASSAULT

- ***State v. Anthony Baca***, No. A-1-CA-37411 (Aug. 18, 2020)
- Def ran from cop and shot him. Def took off running and officer was not able to clearly see him or his weapon. Officer took cover until backup arrived. Def was convicted of agg battery and agg assault
- Held: insufficient evidence of agg assault because no evidence that officer feared an immediate battery after being shot
- Otherwise, "any scenario wherein a battery with a deadly weapon occurs would necessarily transform into a subsequent assault, so long as the victim testifies he was afraid the shooter would return and attack again."

BATTERY AGAINST A HOUSEHOLD MEMBER - ENHANCEMENT

- ***State v. James Edward Barela,*** No. S-1-SC-37301 (Nov. 16, 2020)
- Def was convicted of battering his girlfriend and had two prior convictions – under Section 30-3-17(A) he was sentenced to a felony
- His sentence was also enhanced under Section 31-18-17 as an habitual offender for a separate prior felony conviction
- Claimed this was impermissible under *State v. Anaya*, 1997-NMSC-010, which held the Habitual Offender Act (HOA) does not apply to the self-enhancing DWI sentencing scheme
- HOA specifically excepts DWI felonies from its application but not felony BOHM
- BOHM is different from DWI – it's a violent offense and the statute doesn't have the same internal sentencing scheme as DWI

STATEMENT OF CHILD UNDER 13

- ***State v. Cesar B.***, No. A-1-CA-38448 (Aug. 12, 2020)
- Child had knife at school and made admissions to the asst. principal
- Decided even though moot – capable of repetition yet evading review
- Section 32A-2-14(F) establishes a rebuttable presumption that statements made by 13-14 year-olds to a "person in authority" are inadmissible
- Issue is whether asst principal is "person in authority" or if it only means law enforcement
- Held: the term is not defined within the Children's Code, but an asst principal is included in the broad term – remanded for district court to determine if the presumption was rebutted
- COA specifically does not hold that parents, relatives, household members, or employers are necessarily included and does not limit the school's use of the statements for internal discipline

LEAVING THE SCENE OF AN ACCIDENT

- ***State v. Juan Montelongo Esparza*,** No. A-1-CA-37917 (Aug. 27, 2020)
- Def hit another driver who later died from his injuries
- Def left the scene before the first responders arrived but was acquitted of vehicular homicide
- Convicted of Section 66-7-201(D) – leaving the scene of an accident
- No UJI for the crime
- Def claimed the given instruction was fundamentally flawed because it didn't tell the jury he only had a duty to stay until he fulfilled the requirements of 66-7-203 – COA agrees this is an essential element of the crime
- Error for fundamental because there was evidence that def gave some aid and he was acquitted of 66-7-203

SENTENCING – RESTITUTION – SECTION 31-17-1

- ***State v. Natisha George***, 2020-NMCA-039, 472 P.3d 1235
- Def was convicted of one count of forgery and ordered to pay $2100 as restitution to the sheriff's department for the cost to extradite her from New York
- COA noted its conflicting opinions on whether the State can be a victim but reconciles them to reaffirm the rule that restitution requires a "causal connection between the criminal activities of a def and the damages which the victim suffers."
- Def didn't leave the state to avoid prosecution – she just relocated to live with her father
- Also not allowable under Section 31-20-6 which permits the court to set a condition reasonably related to the def's rehabilitation
- Also no allowable under Section 31-12-6 which allows for costs to be adjudged against the def. General costs of maintaining the system of courts is not allowed and nothing to show these costs don't fall under that broad definition

THE GOVERNMENTAL CONDUCT ACT

- ***State v. David Gutierrez et al.***, 2020-NMCA-045, 472 P.3d 1260
- Four defendants charged under Section 10-16-3 – "ethical principles of public service; certain official acts prohibited; penalty" – district courts dismissed the charges on various grounds
- First, the Section does allow for criminal prosecution – "any person who knowingly and willfully violates the provision of this subsection is guilty of a fourth degree felony"
- Second, Subsection A which states the legislator, public officer or employee "shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests" was not unconstitutionally vague
- However, Subsections B and C were. B did not describe the prohibited conduct sufficiently and C did not specify the class of persons covered
- Cert on all issues was just granted and case is in briefing

POST-CONVICTION DNA TESTING – SECTION 31-1A-2

- ***State v. Gregory Marvin Hobbs***, No. A-1-CA-37477 (Jun. 16, 2020)
- Def was granted a new trial under this statute which allows for post-conviction DNA testing
- Although the standard to get the testing is relatively low, the standard to obtain relief is that the new DNA evidence is "exculpatory"
- COA held this means it reasonably tends to negate guilt when it is (1) material (2) not merely cumulative and (3) not merely impeaching or contradictory and (4) raises reasonable probability that petitioner would not have pled guilty or been found guilty if the DNA testing had been performed prior to conviction
- Remanded for the district court to apply the new standard
- State's cert petition was granted and case is pending – argument is that exculpatory in this context means more and should directly negate guilt and establish innocence
- Companion case – *State v. Jacob Duran* – is also pending

SUFFICIENCY OF EVIDENCE – BURGLARY, LARCENY, CRIMINAL DAMAGE TO PROPERTY

- ***State v. Kimberly Ann Ledbetter***, 2020-NMCA-046, 472 P.3d 1287
- Residential property was unoccupied and unmonitored from June to October
- Handyman then discovered it had been "demolished" with missing appliances and structural damage
- Def's DNA was found on cigarette butts and three soda cans inside and she was convicted of the above crimes
- Held: insufficient evidence of burglary because although State could prove unauthorized entry, there was no evidence that she had intent to commit a theft or felony therein when she entered. The other crimes suffered the same fate- no evidence she took the items or damaged the house. The items were never found or connected to her.

AGGRAVATED FLEEING – STATUTORY CONSTRUCTION

- ***State v. Roy Montano and William Martinez***, 2020-NMSC-009, 468 P.3d 838
- What suffices for a "uniformed law enforcement officer" and "appropriately marked law enforcement vehicle" under Section 30-22-1.1()A which outlaws aggravated fleeing from an officer
- "Uniform" is construed with its common meaning of clothing and accessories of a distinctive design. Here, the deputy's attire of dress shirt, tie, badge, dress slacks, and dress shoes was not sufficient to identify him as an LE officer.
- As for the vehicle, the unmarked vehicle in this case was not sufficient even though it had red and blue LED lights in the grill, a siren, and a police antenna. Statute requires insignia of some kind to indicate its identity
- Justice Nakamura dissented, nothing that these requirements are not stand-alone elements of the offense and are only factors bearing on the def's knowledge that he is evading law enforcement. Under the majority's opinion, a person who admittedly knows he is evading an officer could escape liability.

EVIDENTIARY ISSUES

- ***State v. Farrington***
- ***State v. Little***
- ***State v. Marquez***
- ***State v. Martinez***
- ***State v. Pamphile***

FORFEITURE BY WRONGDOING EXCEPTION TO HEARSAY

- ***State v. Bradley Farrington***, No. S-1-SC-37355 (Oct. 19, 2020)
- Def convicted of killing his estranged wife by strangling her in the bathtub
- Def was former Silver City police officer and had history of domestic violence and controlling behavior toward the victim
- At the time of the murder, they were embroiled in a contentious divorce and child custody battle
- Def would tell victim it was useless for her to report him because of his status as an LE officer which rendered her "reluctant, if not downright terrified, to report abuse[.]"
- District court allowed seven State's witnesses to testify about these threats and behavior

FORFEITURE BY WRONDOING – cont.

- Exception is to the Confrontation Clause that one cannot complain about the inability to confront a witness whose absence was caused by the def's unlawful conduct
- Also evolved into a hearsay exception – Rule 11-804(B)(5)
- No constitutional analysis needed because def conceded the statements were non-testimonial
- *Giles v. California*, 554 U.S. 353 (2008) – have to show the def acted with the intent to cause the unavailability
- *Maestas*, 2018-NMSC-010 – needn't be overt threat of harm – multiple jail calls to DV victim sufficed – also needn't be solely motivated by desire to procure unavailability
- Rule based forfeiture is same analysis as common law-based exception to confrontation – prior cases all dealt with only the confrontation analysis
- Def's many instances of abuse support an inference of his intent – he acted to isolate her and prevent her from seeking outside help

REFRESHING A WITNESS'S RECOLLECTION

- ***State v. Frank Little***, 2020-NMCA-040, 473 P.3d 1
- Lengthy discussion about refreshing a victim/witness's recollection with a police report
- Victim testified she was 13 when def first penetrated her but earlier statement to police was that she was under 13 – improper procedure used to refresh her recollection because she never indicated that her memory needed refreshing
- Found to be reversible error because victim's "erroneously refreshed testimony" on her age was the only evidence she had been 12
- However, case can be retried because there was sufficient evidence that she was under 13, because she so testified on redirect
- Also found a Confrontation Clause error in court's refusal to allow defense counsel re-cross after victim's testimony on redirect – not sure why the Court reached this constitutional issue when they already reversed on other grounds

LEWD AND LASCIVIOUS EXCEPTION

- ***State v. Isaac Marquez***, No. A-1-CA-37055 (Sep. 1, 2020)
- Def convicted of first-degree CSPM for digital penetration of his ex-wife's granddaughter
- Victim was 25 when she testified and evidence came in through her and the grandmother that def also made her touch his penis and walked around with his robe open
- District court allowed it under the "lewd and lascivious exception" to Rule 11-404(B)
- Held: exception is not viable in NM since *State v. Kerby*, 2005-NMCA-106 (*Kerby I*). Although the NMSC overruled *Kerby I* on other grounds, the holding that this exception is "indefensible" was untouched
- *Kerby* was different because the def put his intent at issue

VEHICULAR HOMICIDE – ADMISSION OF BLOOD TEST

- ***State v. Santiago Martinez***, 2020-NMCA-043, 472 P.3d 1241
- Vehicular homicide and GBH
- Def's blood was taken at the hospital – no alcohol but evidence of drugs in his blood and in the car
- Held: blood test results were admissible even though nurse used a different needle from the one in the kit – nothing in SLD regs specifies the type of needle that must be used

ADMISSION OF BLOOD TEST TAKEN AFTER THREE HOURS

- ***State v. Santiago Martinez***, 2020-NMCA-043, 472 P.3d 1241
- Blood was taken four hours after driving but was still admissible despite SLD reg that blood samples should be collected within three hours of driving
- Held: SLD reg does not mandate per se exclusion of all chemical tests outside the three hour window – Section 66-8-110(E) allows for it and the fact-finder can give it the appropriate weight
- In addition, there is no statutory presumption re: drugs and the State must always establish that the presence of drugs in a def's system at the time of testing is probative of impairment at the time of driving

VEHICULAR HOMICIDE – ADMISSION OF EXPERT TESTIMONY

- ***State v. Martinez* (cont.)**
- Long discussion on expert testimony from Protiti Sarker from SLD who opined that def was impaired to the extent he could not drive safely – based partly on the fact there was an accident
- Def didn't object to the **methodology** of her opinion and COA said it couldn't decide it in a "vacuum" even though the expert opinion was "shaky"
- A *Daubert* hearing would have been helpful but def did not pursue one

BEST EVIDENCE RULE

- ***State v. Anthony Pamphile*,** No. A-1-CA-37226 (Aug. 27, 2020)
- After several instances of breaking into his ex-girlfriend's house, def shattered a window and set fire to the house causing $100K in damage
- Long discussion about the admission of def's jail calls
- The detective testified from his report as to the content of those calls
- "Rare case[]" in which best evidence rule applies
- But not reversible error because parties didn't dispute the accuracy of what was admitted – reversal would "exalt form over substance."
- And no ineffective assistance of counsel for failure to play full calls because they were prejudicial to def in that he mentioned a parole violation

DEFENSES

- ***State v. Muhammad***
- ***State v. Ortiz***

SELF-DEFENSE

- ***State v. Muhammad Ameer***, No. S-1-SC-37364 (Oct. 19, 2020)
- Def stabbed victim in parking lot – victim was unarmed and had defensive wounds
- Some conflicting eyewitness testimony as to whether there was a fight before the stabbing
- District court denied the self-defense instruction
- Held: the evidence showed an altercation but at most victim struck def before the stabbing. A simple battery does not warrant deadly force

DEFENSE OF DURESS

- ***State v. Crystal Ortiz*,** 2020-NMSC-008, 468 P.3d 833
- Def, while intoxicated, drove her SUV into her ex-boyfriend thereby injuring him
- She asserted a duress defense claiming that the victim was threatening her but claimed she hit him accidentally
- Held: a duress instruction requires a prima facie showing that the def was in fear of immediate and great bodily harm to herself or another and a reasonable person in her position would have acted the same way
- Acting under duress is compelled choice to break the law – the actor knows the act is wrong but can be exculpated because she cannot fairly be held accountable for it
- Therefore, the instruction is not available if the def denies any intention to perpetrate the crime
- Here, it would be "nonsensical" to ask the jury to determine whether a reasonable person in her position would have accidentally struck the victim

DOUBLE JEOPARDY

- ***State v. Torres and Hendrix***
- ***State v. Paul***
- ***State v. Porter***
- ***State v. Sena***

UNIT OF PROSECUTION

- ***State v. Gerardo Torres and Kendale Hendrix***, No. A-1-CA-37642 & 38099 (Aug. 13, 2020)
- Unit of prosecution for larceny of livestock
- Taking multiple head of cattle at same time and place is a single transaction and is only one larceny
- Court relied on the "single-larceny" doctrine
- Cert has been granted – will pursue issue of viability of single-larceny doctrine in double jeopardy jurisprudence

DOUBLE JEOPARDY – MANIFEST NECESSITY FOR MISTRIAL

- ***State v. Darryl Paul***, No. A-1-CA-36748 (May 28, 2020)
- Mistrial declared for jury deadlock with vehicular homicide and lesser included DWI
- 90 days later, def filed motion to dismiss claiming retrial would be double jeopardy because the court had failed to determine on what count the jury deadlocked
- No manifest necessity for that reason – lengthy discussion of *State v. Lewis*, 2019-NMSC-001, and finding the deadlock was not clear here
- However, def consented to the mistrial and COA affirms under right for any reason rationale. Def didn't object to discharge of the jury and can't be heard now that the jury is gone and no further deliberations can be held.
- "We find it difficult to believe that defense counsel would have agreed that the proceedings were 'at a hung jury state' and 'at a mistrial' if he earnestly believed that the jury had acquitted" of the greater charge

DOUBLE JEOPARDY

- ***State v. Benny Porter***, 2020 WL 4455860 (Aug. 3, 2020)
- Def was convicted of aggravated assault with a deadly weapon and shooting from a motor vehicle for a single gunshot at a single victim
- Held: the two convictions violated double jeopardy.
- Courts do not apply a mechanical *Blockburger* test, also known as the strict elements test, and instead apply a modified *Blockburger* test, which compares the elements of the offenses, looking at the State's legal theory of how the statutes were violated
- Here, the conduct was unitary and the State's theory for both crimes was based on the same act

DOUBLE JEOPARDY AND PROSECUTORIAL MISCONDUCT

- ***State v. Richard Sena***, 2020-NMSC-011, 470 P.3d 227
- Brutal rape and kidnapping of elderly woman in her home
- COA vacated the agg burglary conviction as a violation of double jeopardy with the rape conviction
- Held: the prosecutor committed misconduct during closing argument by pointing out to the jury that the def would not look at the victim while she was testifying. Court found this was a comment on def's right to remain silent because he did not testify. Essentially asking the jury to adverse conclusion from def's silence. All convictions reversed and remanded for new trial.
- Held: the convictions for aggravated burglary and CSP did not violate double jeopardy. The Court of Appeals erroneously found the conduct was unitary. However, any presumption that the jury relied on the same acts for each crime was rebutted by evidence that each crime was committed before the other crime

COMMENT ON SILENCE/INVOCATION OF RIGHTS/FAILURE TO TESTIFY

- DON'T DO IT
- Difficult to win these cases – appellate courts are unsympathetic to after-the-fact justifications
- Avoid any spontaneous/heat of the moment comment on def's silence
- Only possible use is if def waived his rights and gave a statement
- But if he invoked his right to silence/attorney – stay away from that

MISCELLANEOUS

- ***State v. Grubb***
- ***State v. Stallings***
- ***State v. Worley***

JOINDER - VENUE

- ***State v. Joseph A. Grubb***, No. A-1-CA-37836 (Apr. 21, 2020)
- Def indicted in both Lea and Otero counties. State introduced some of the info from the Lea county charge as 404(B) evidence in the Otero county trial
- Def filed motion to dismiss in Lea county claiming violation of the mandatory joinder rule – Rule 5-203(A) – which requires joinder of offenses of "same or similar character" or those "based on the same conduct"
- Held: joinder rule doesn't address venue but venue statute – which provides that all crimes will be committed in county where they were committed – contravenes the def's argument
- Footnote 5 – possible conflict with DA duties if charges are committed in different counties within the district

SELF-REPRESENTATION

- ***State v. Rick Stallings***, 2020 WL 5495651 (Aug. 27. 2020)
- First-degree murder case in which def fired two attorneys and then asked for a third attorney or to proceed pro se
- The district court did not appoint a third attorney and allowed def to proceed pro se
- On appeal, def claimed he did not clearly invoke his right to self-representation
- Held: although def's assertion of his right to proceed pro se was conditional, it was not unclear. Defendant did not have a right to select among appointed counsel and "thus he decisively asserted his right to self-representation by firing his attorney."
- "While the right to counsel and the right to self-representation and both constitutionally guaranteed, they cannot be upheld together; a defendant must choose between them."
- The waiver of counsel was also knowing and intelligent in that the court conducted a fully inquiry with def on it

HABEAS CORPUS – STANDARD OF REVIEW

- ***State v. Curtis Worley*,** 2020 WL 5495688 (Aug. 27, 2020)
- 1982 rape and murder case. Def claimed newly discovered evidence on habeas in the form of recanting witnesses, potential *Brady* evidence, and new DNA evidence. Also claimed actual innocence
- District court granted the petition with no factual findings on a sprawling record which led to a debate on the correct standard of review
- Majority held that a decision that is ordinarily discretionary but "premised on a misapprehension of the law" may be considered under an abuse of discretion standard and ultimately did something closer to a de novo review
- Justice Nakamura special concurrence noted the majority's approach on this was "unclear" and agreed with the defendant that the court should consider whether substantial evidence supports the lower court's decision. Thus, the Court was to "scour an extensive evidentiary record" to make that determination.
- Held: Habeas relief is reversed.

PERFECTING THE RECORD

- Criminal case will not end with direct appeal – proceedings in state and federal habeas corpus can linger for 20+ years – e.g. *Worley*
- 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
- Reiterate the content of the exhibit if you refer to it – e.g. "State's Exhibit 25, which is the murder weapon."
- Make sure exhibits are all together and with the court. Do not let the court return the exhibits to the parties – they are part of the record

JURY INSTRUCTIONS

- Crucial to a successful appeal
- Even if rushed, please review the language, especially of the elements instructions.

PROSECUTORS AS THE VANGUARD OF PROFESSIONALISM

- Held to a higher standard at all stages: investigation; charging; trial; sentencing; appeal
- Your choices, words, and actions are scrutinized at every level
- We embrace this standard and continue to seek to obtain and uphold lawful convictions on behalf of the citizens of the State of New Mexico
- THANK YOU FOR ALL YOU DO