2021 NMDAA/AODA
Fall Conference
November 10, 2021

Appellate Update

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OVERVIEW

Overview

Coverage Period:
after 5/18/21 & before 11/10/21

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

Overview

Coverage Period:
after 5/18/21 & before 11/10/21

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

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CASE OUTCOMES

CASE OUTCOMES

5 Main Issue Categories

- Lawfulness of Seizure/Search
- Other Constitutional Issues
- Elements, Instructions, & Sufficiency
- Evidentiary Issues
- Misc.

Where's the action?

slido

In the last 12 months of case outcomes (precedential NMCA cases & all NMSC cases), the most action has been in which of the following issue categories?

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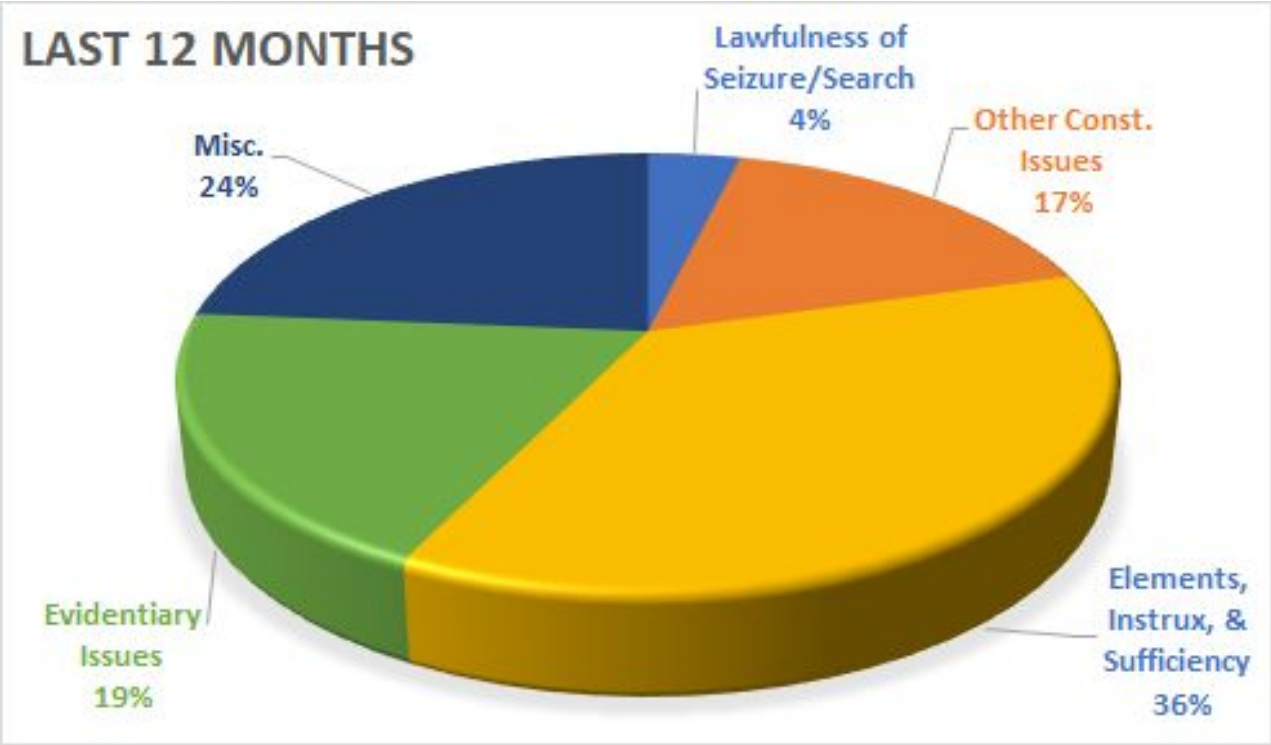
Where's the action?

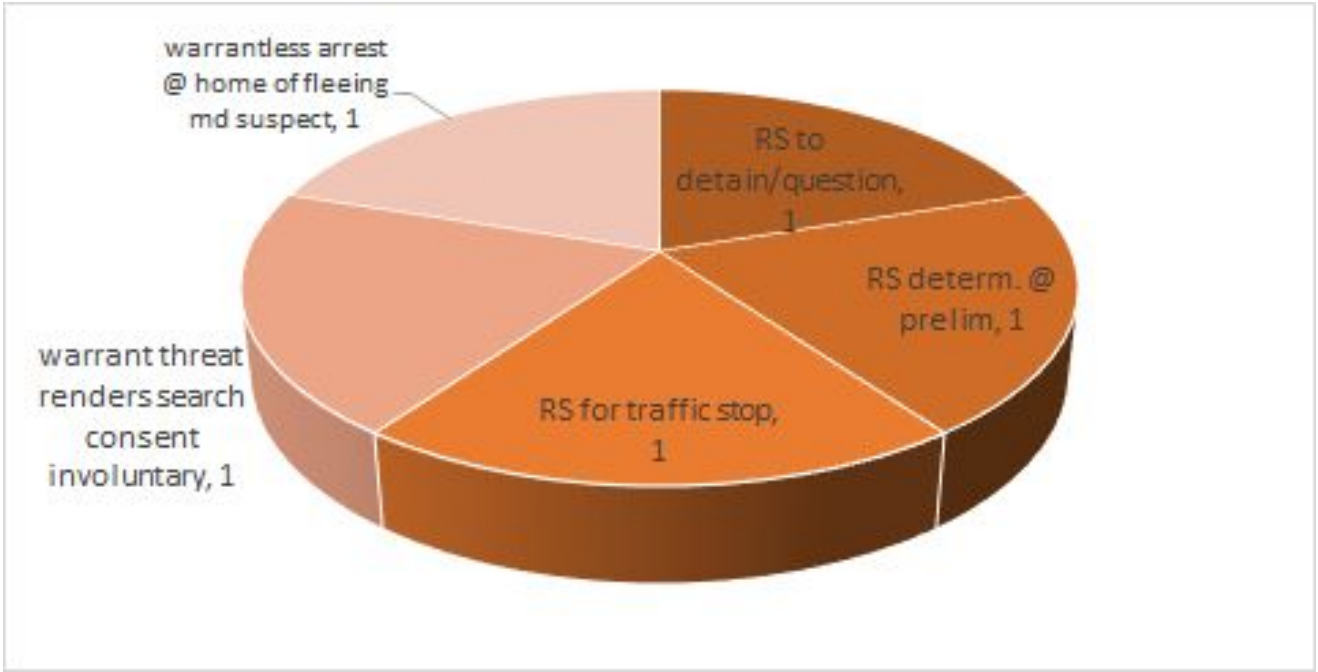
	Nov. 2020 - May 2021	May 2021- Nov. 2021	LAST 12 MONTHS
Lawfulness of Seizure/Search	2	3	5
Other Const. Issues	14	8	22
Elements/ Instructions/Suff.	**27**	**21**	**48**
Evidentiary Issues	10	15	25
Misc.	19	12	31
TOTAL	72	59	131

Where's the Action?



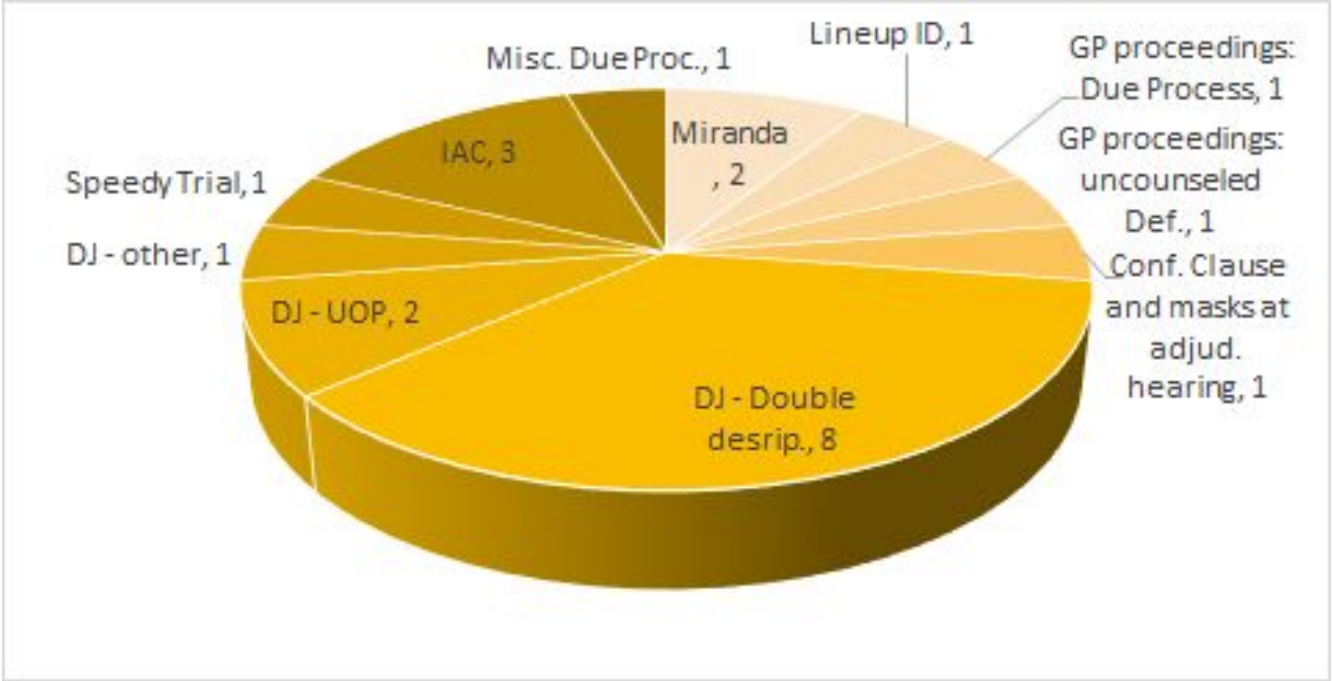
Where's the action? (last 12 months)

Lawfulness of Seizure/Search



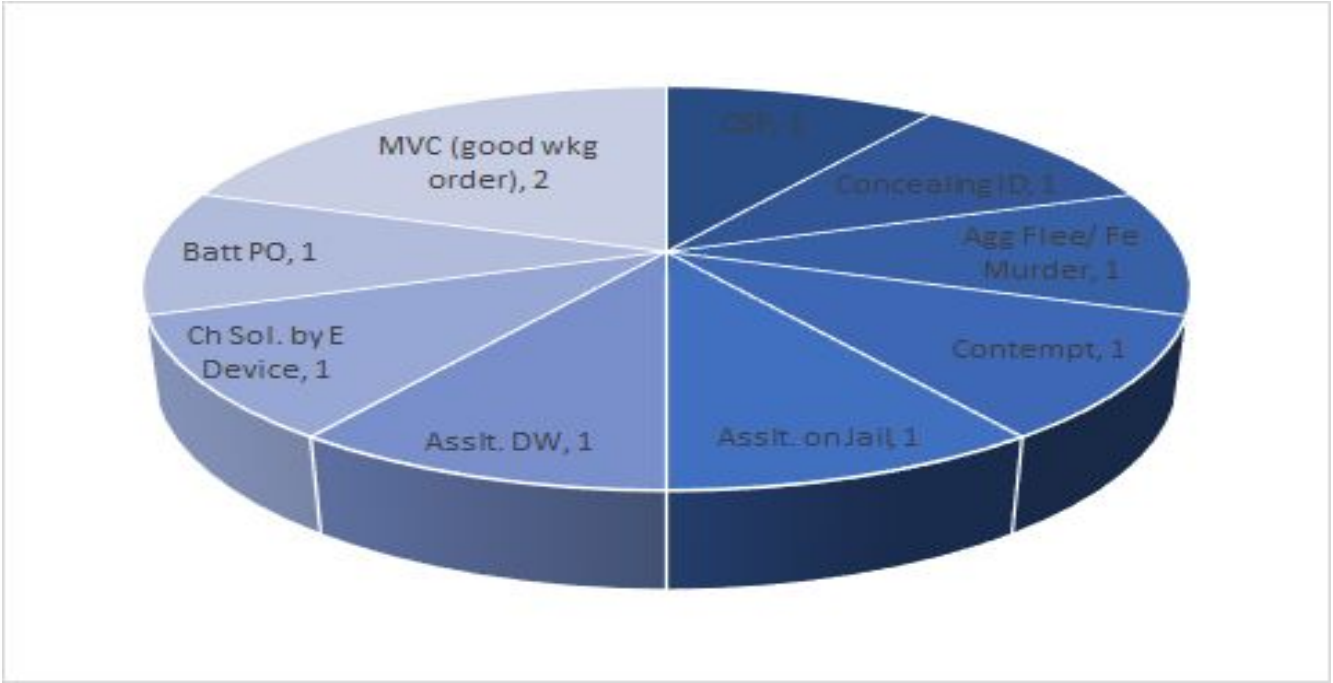
Where's the action? (last 12 months)

Other Constitutional Issues



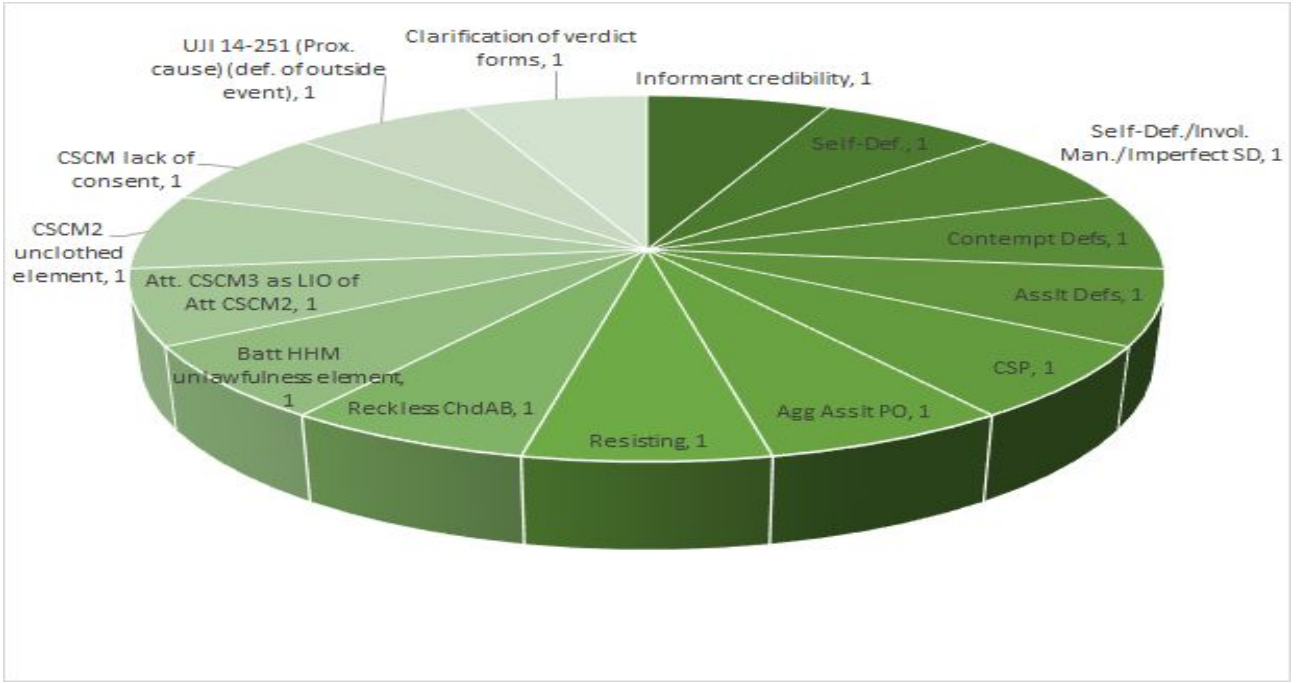
Where's the action? (last 12 months)

Statutory Elements



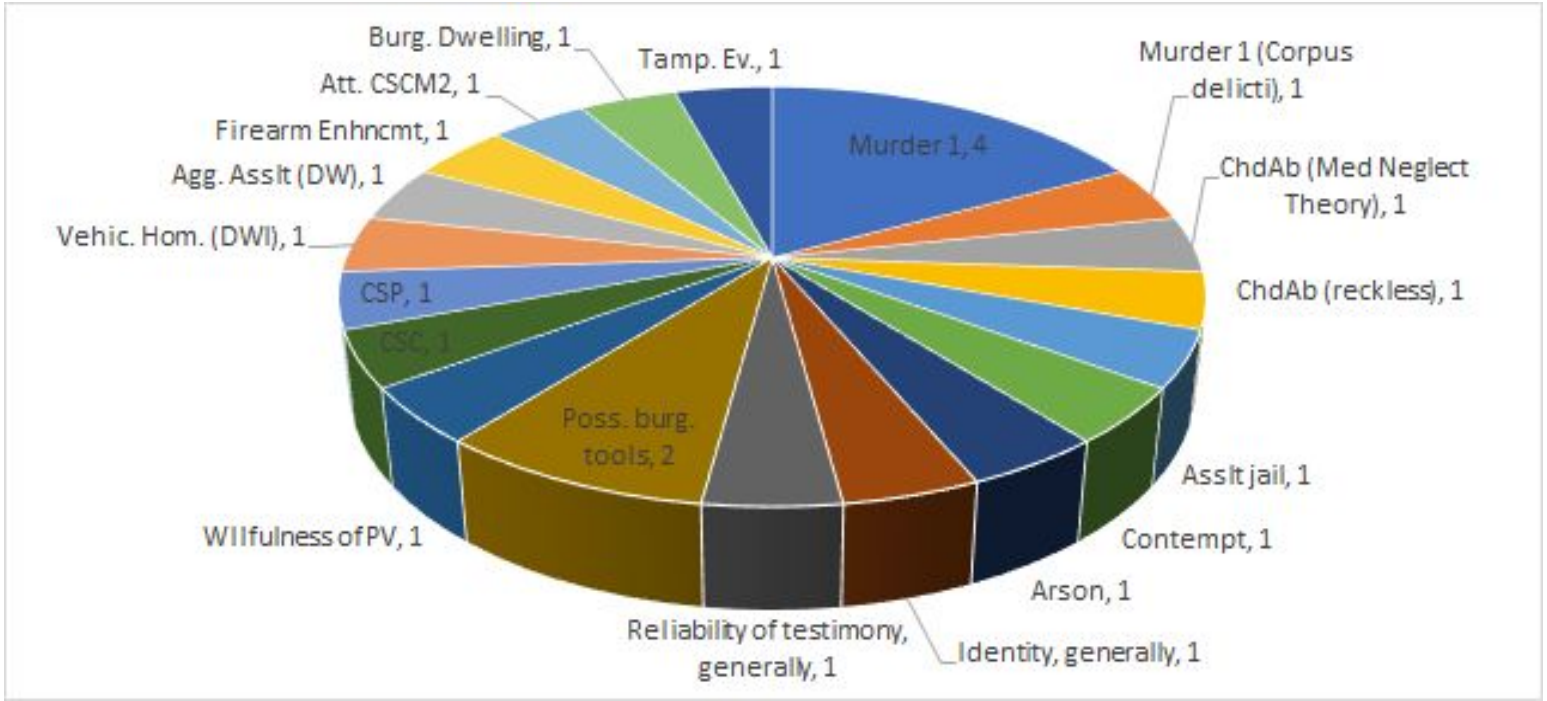
Where's the action? (last 12 months)

Instructions



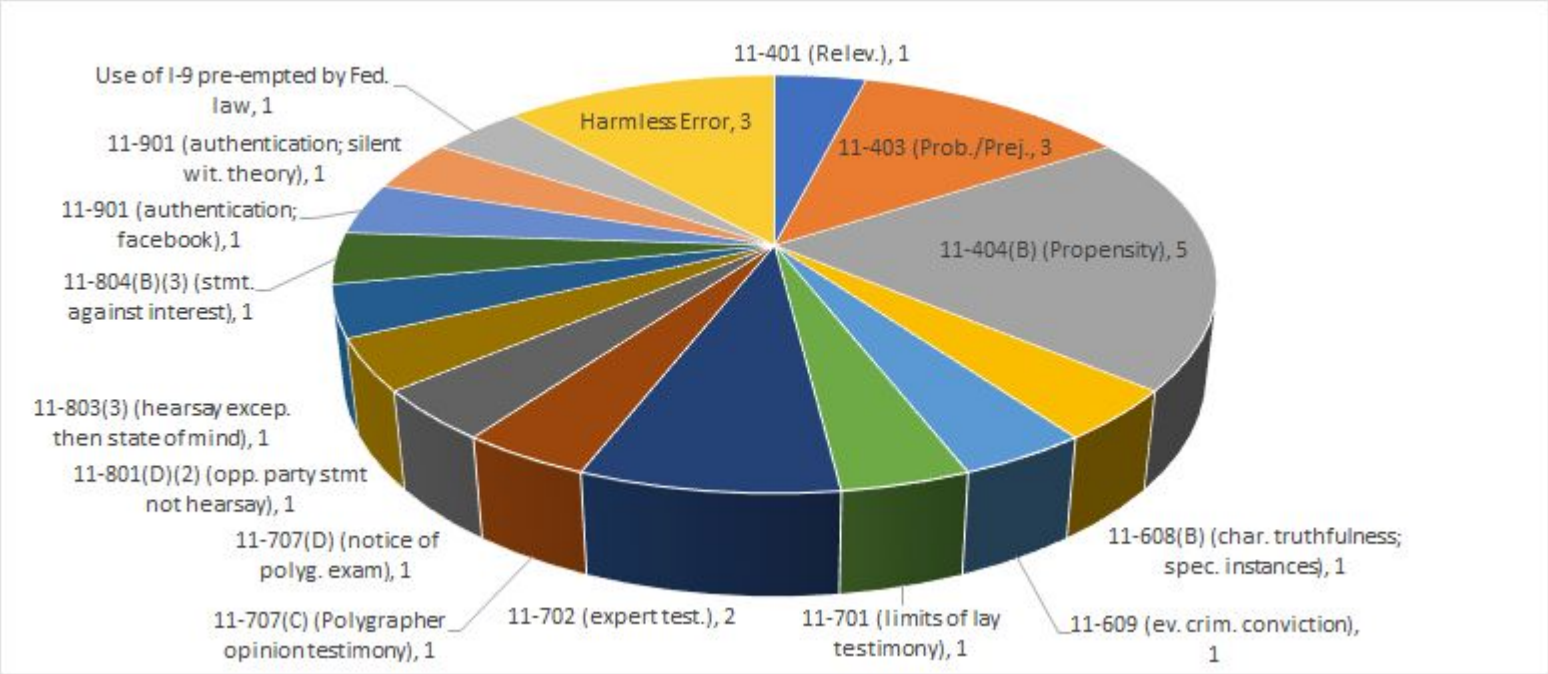
Where's the action? (last 12 months)

Sufficiency



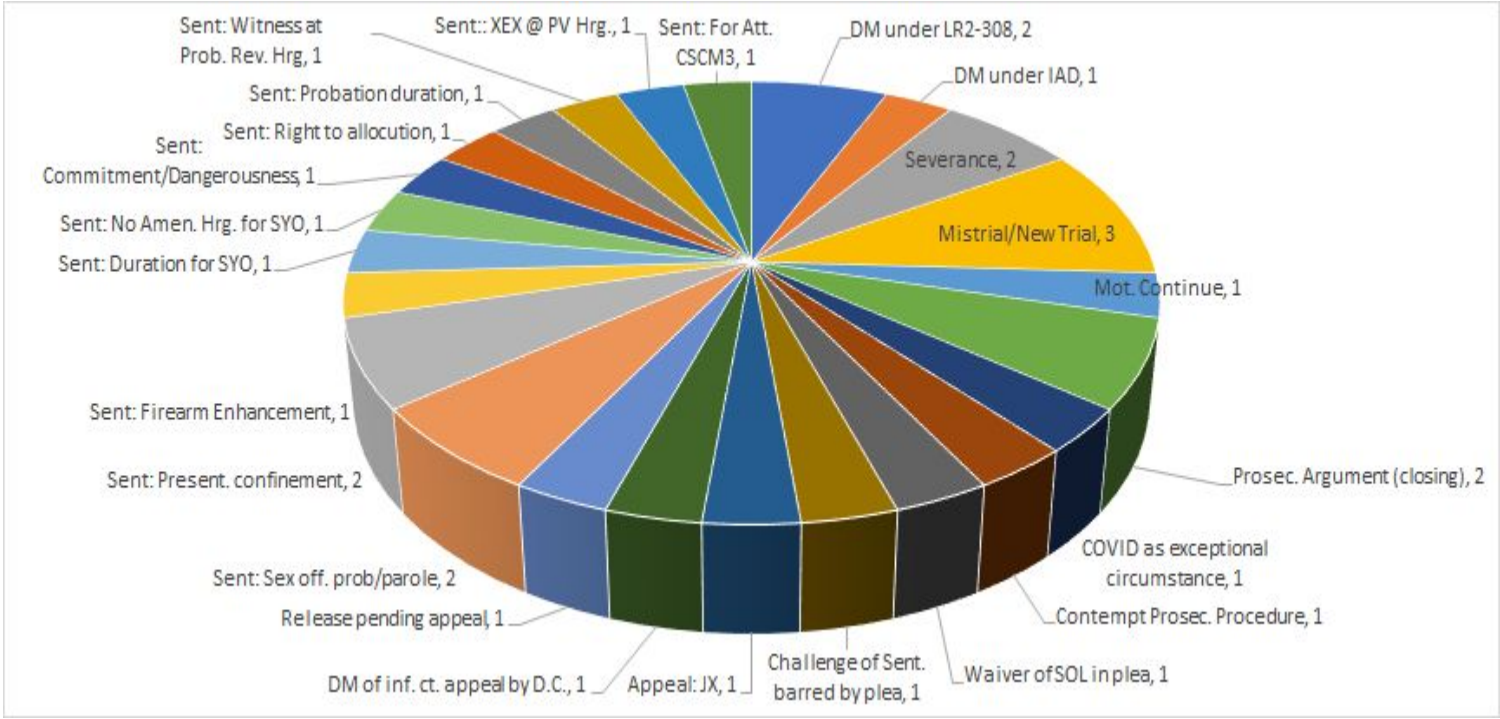
Where's the Action? (Last 12 Months)

Evidentiary Issues



Where's the action? (last 12 months)

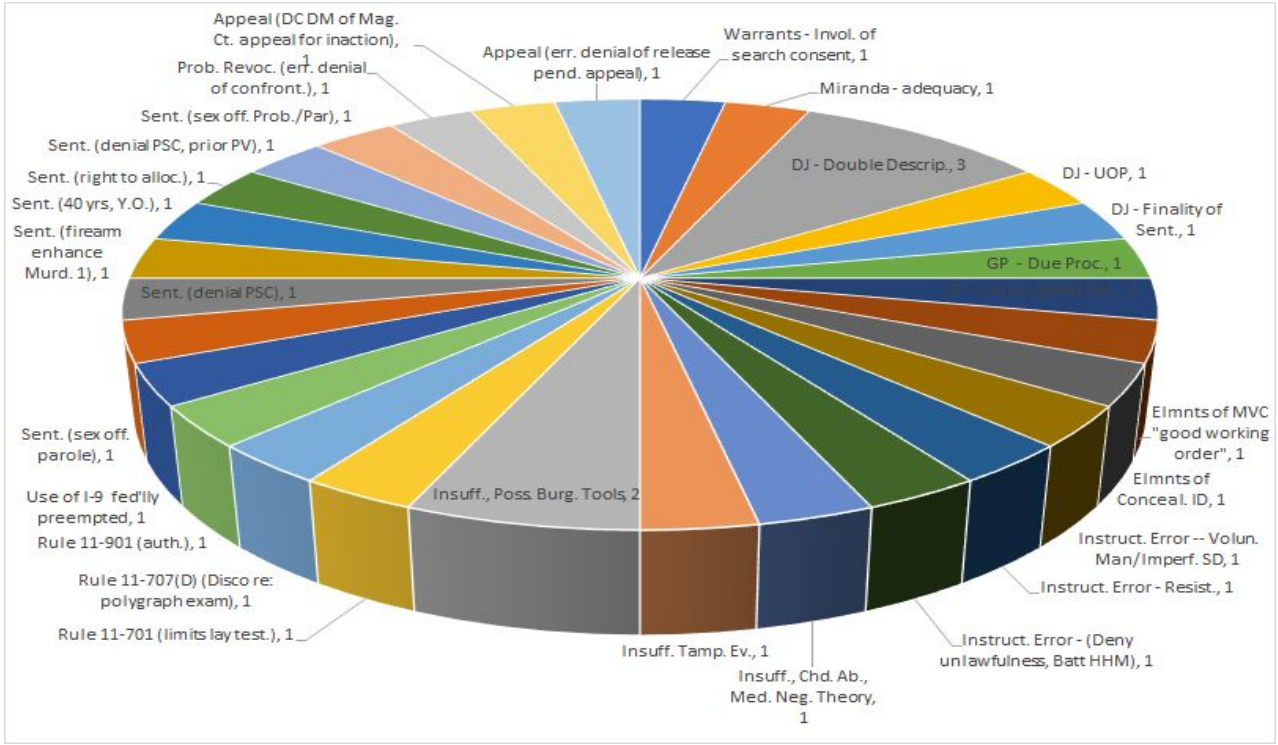
Misc.



Where's the action?

Where's the Action? (Last 12 Months)

(State-adverse Reversals Only)

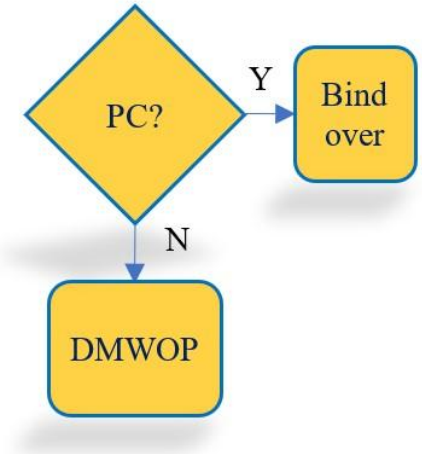


Lawfulness of Seizure/Search

Lawfulness of Seizure/Search

- Reasonable Suspicion
- Warrants
- Search & Seizure Manual

Reasonable Suspicion



District court's authority at preliminary hearing does not encompass authority to determine whether evidence was illegally obtained

State v. Ricky Ayon, __-NMCA-__ (No. A-1-CA-38812, July 27, 2021).

- State appealed from order DM w/prejudice. Dist. Ct. entered it as a result of determining at a preliminary hearing that the officer who arrested Defendant Ayon did not have RS to detain him.
- **QP:** At preliminary hearing, does district court have authority to determine whether evidence was illegally obtained?
- **FACTS:** The State charged Ayon by information with possession consub; at preliminary hearing, arresting officer and sole testifying witness Officer Limon explained that he:

District court's authority at preliminary hearing does not encompass authority to determine whether evidence was illegally obtained

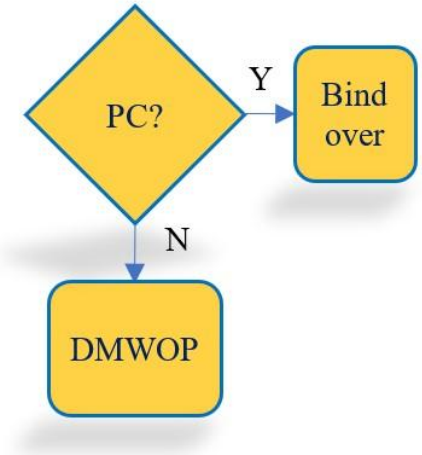
State v. Ricky Ayon, __-NMCA-__ (No. A-1-CA-38812, July 27, 2021).

1. was familiar with Ayon from previous interactions;
2. searched Ayon's history 1 week pre-arrest and found an active arrest warrant;
3. saw Ayon, called him over, then arrested/handcuffed him;
4. then confirmed the outstanding warrant;
5. searched Ayon incident to arrest & recovered heroin.

- Ayon argued no RS to detain because officer did not confirm warrant until after arrest and, as a result, PC should not be found to bind case over for trial. The district court found no RS supported the stop, and dismissed with prejudice.

District court's authority at preliminary hearing does not encompass authority to determine whether evidence was illegally obtained

State v. Ricky Ayon, __-NMCA-__ (No. A-1-CA-38812, July 27, 2021).



- State maintained dist. court exceeded its authority by considering at the prelim. hearing whether evidence was illegally obtained and that, even if court did have that authority, Ayon's detention was legal, & evidence presented at the prelim. was sufficient to establish PC.
- **HELD:** in light of what Rule 5-302's plain language says is to occur at a prelim., the district court's authority at a prelim. hearing does not encompass authority to determine whether evidence was illegally obtained. District court dismissal order reversed. (NMCA concluded that this obviated the need for it to address the RS question).

Although police hadn't yet executed warrant they had to search Def.'s home for narcotics, totality of circumstances provided RS for traffic stop

State v. Shannon Dwayne Jackson __-NMCA-__ (No. A-1-CA-38218, Aug. 19, 2021).

- Jackson appealed from drug-related, resisting, and tampering convictions. **QP:** Did district court err in denying motion to suppress Jackson based on a claim that evidence recovered during traffic stop was outside the scope of a warrant police had for Jackson's residence?
- **FACTS:** Police arrived at Jackson's residence to execute warrant to search for narcotics. Due to safety concerns, they waited for Jackson to leave his home. Jackson exited & got into passenger side of vehicle with a driver. Police followed. Vehicle stopped at another house known to be involved in narcotics. Jackson went in for about five minutes then returned to the vehicle, and it drove off.

Although police hadn't yet executed warrant they had to search Def.'s home for narcotics, totality of circumstances provided RS for traffic stop

State v. Shannon Dwayne Jackson __-NMCA-__ (No. A-1-CA-38218, Aug. 19, 2021).

- Police stopped vehicle, approached, & saw Jackson with $$$ in lap.
- Jackson exited as requested; officer saw a large baggie with smaller baggies in Jackson's pocket and attempted to restrain him.
- Jackson resisted; struggle ensued, & Jackson pulled large baggie from shorts pocket and threw it to driver. Police subdued Jackson.
- Search incident to arrest yielded zip-lock bags with > $2K in cash. The bag Jackson threw had 63 smaller baggies of crack cocaine.

Although police hadn't yet executed warrant they had to search Def.'s home for narcotics, totality of circumstances provided RS for traffic stop

State v. Shannon Dwayne Jackson __-NMCA-__ (No. A-1-CA-38218, Aug. 19, 2021).

- The officers went to Jackson's home and there found a pistol, several small zip-lock baggies & digital scales, and a brown bag with small zip-lock baggies inside.
- Jackson moved to suppress the evidence, claiming that evidence initially recovered from stop was outside the scope of the warrant to search his residence. Per district court, RS supported stop because of the warrant & observations officers made while surveilling Jackson & his home. Motion denied. Jackson convicted.
- On appeal, Jackson challenged, among other things, the suppression ruling.

Although police hadn't yet executed warrant they had to search Def.'s home for narcotics, totality of circumstances provided RS for traffic stop

State v. Shannon Dwayne Jackson __-NMCA-__ (No. A-1-CA-38218, Aug. 19, 2021).

- **ANALYSIS:** Search warrant affidavit included credible, reliable claims of drug activity at Jackson's residence (including that Jackson concealed cocaine on his person). During surveillance, police observed Jackson go to another house known to be involved in drug activity, go inside, and return to the car less than 5 minutes later.
- **HELD:** Under totality of circumstances, specific, articulable facts supported officers' suspicion that Jackson was engaged in illegal activity. District court properly concluded that RS supported stop.

Warrants

In light of post-briefing decision in *Lange v. California*, ___ U.S. ___, 141 S. Ct. 2011 (2021), matter remanded to reconsider suppression ruling

State v. Ronald Scott, No. A-1-CA-38113 (N.M. Ct. App. Sep. 30, 2021) (non-precedential)

- Defendant Scott appealed the district court's denial of his suppression motion, following entry of a conditional plea to drug and vehicle offenses.
- **QP:** Did DC err in basing suppression ruling on the ground that exigent circumstances justified officers' warrantless "entry" into Scott's home to conduct a warrantless arrest for a misdemeanor because the officers did not have time to obtain a warrant prior to arriving at the scene?

In light of post-briefing decision in *Lange v. California*, ___ U.S. ___, 141 S. Ct. 2011 (2021), matter remanded to reconsider suppression ruling

State v. Ronald Scott, No. A-1-CA-38113 (N.M. Ct. App. Sep. 30, 2021) (non-precedential)

Maggie = Scott; Homer = Police

- **FACTS:** Police began following Scott after noticing that his vehicle appeared to have no registration tag. Scott evaded. Police engaged emergency equipment. Scott stopped his vehicle in front of his house, jumping a curb, and continued walking toward his front door despite commands from the officers to stop and return to his vehicle.
- The officers pursued and, while Scott was on his porch, placed their hands on him to stop him. Scott opened the door and grabbed the doorframe, but the officers wrested him back onto the porch, with their hands and arms only (and not their feet) "entering" the doorway in the process.

In light of post-briefing decision in *Lange v. California*, ___ U.S. ___, 141 S. Ct. 2011 (2021), matter remanded to reconsider suppression ruling

State v. Ronald Scott, No. A-1-CA-38113 (N.M. Ct. App. Sep. 30, 2021) (non-precedential)

- Scott argued below & on appeal that the officers' entry into his home without exigent circumstances to conduct a warrantless misdemeanor arrest was unconstitutional. DC denied the motion on the ground that exigent circumstances existed because the officers did not have time to obtain a warrant prior to arriving at the scene.
- Following briefing and submission to panel in NMCA, SCOTUS issued *Lange*, which held that, under 4th Amend. of U.S. Const., the pursuit of a fleeing misdemeanor suspect does not categorically qualify as an exigent circumstance that could justify a warrantless entry into the home.

In light of post-briefing decision in *Lange v. California*, ___ U.S. ___, 141 S. Ct. 2011 (2021), matter remanded to reconsider suppression ruling

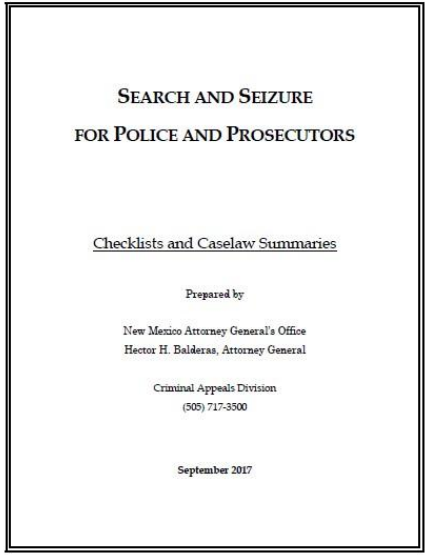
State v. Ronald Scott, No. A-1-CA-38113 (N.M. Ct. App. Sep. 30, 2021) (non-precedential)

- Per NMCA:
  - In denying Scott's motion "the district court appears to have applied a categorical rule—i.e., that officers may always pursue a misdemeanant into his home to effectuate an arrest that began in public on the grounds of 'exigent circumstances.'"
  - "It does not appear that the district court considered whether exigent circumstances, of the type described in *Lange* (i.e., circumstances giving rise to a law enforcement emergency), were present in this case."
  - In the interests of justice and judicial economy, matter remanded for the district court to redetermine suppression ruling in light of *Lange*.

Search & Seizure Manual

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

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



SEARCH AND SEIZURE

FOR POLICE AND PROSECUTORS

Checklists and Caselaw Summaries

Prepared by

New Mexico Attorney General's Office
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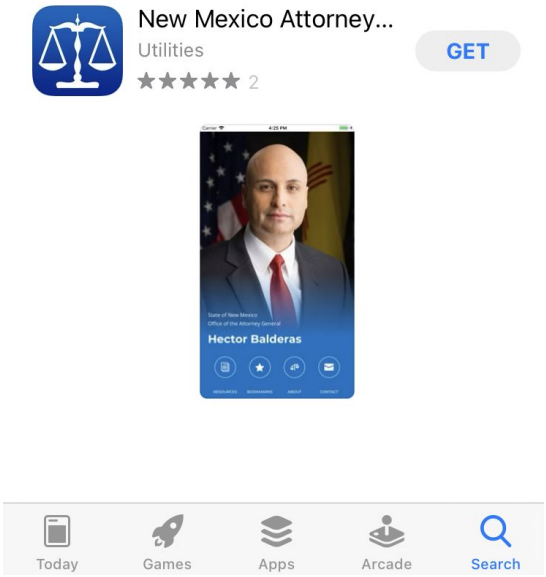
(505) 717-3500

September 2017



Other Constitutional Issues

Other Constitutional Issues

- Miranda
- Double Jeopardy
- Double Jeopardy (Sentencing)

Miranda

Miranda warning given by police was inadequate because it did not inform Defendant of right to consult with attorney prior to questioning

State v. Harold Atencio, __-NMCA-__ (No. A-1-CA-38286, June 22, 2021).

- **FACTS:** Defendant was convicted of multiple sex crimes against C.Y. The abuse occurred when Defendant lived next door to C.Y.'s family. C.Y. later disclosed the abuse. LE asked Defendant to speak with them at a police station in reference to a burglary Defendant recently reported. LE then transitioned the interview to C.Y.'s disclosures.
- **ISSUES:** Defendant argued that the DC erred by not suppressing his statement for a *Miranda* violation

Miranda warning given by police was inadequate because it did not inform Defendant of right to consult with attorney prior to questioning

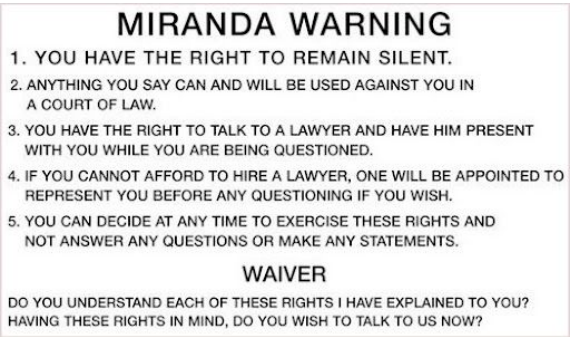
State v. Harold Atencio, __-NMCA-__ (No. A-1-CA-38286, June 22, 2021).

- **HELD:** Defendant was in "custody" for purposes of Miranda.
- Although Defendant came to station voluntarily, he was tricked. Defendant was not handcuffed, only one officer was present in plain clothes (but armed), and the door was not locked. But, Defendant was not told he could terminate interview at any time, he was precluded from leaving the room (escorted to restroom), and he was patted down for weapons.

Miranda warning given by police was inadequate because it did not inform Defendant of right to consult with attorney prior to questioning

State v. Harold Atencio, __-NMCA-__ (No. A-1-CA-38286, June 22, 2021).

- **HELD:** Defendant's Miranda warnings were inadequate. Defendant failed to preserve the issue because he only challenged the validity of his waiver. Nonetheless fundamental error occurred where Defendant was advised "You have a right to a lawyer; and if cannot afford a lawyer, one will be provided to you."
- The Court reasoned that the warnings did not clearly convey to Defendant that he had a right to counsel prior to, and during, his interview.



Trial court did not err in granting motion to suppress Defendant's statements because State did not demonstrate statements were knowing, intelligent, and voluntary

State v. Victor Ortiz, No. S-1-SC-37673 (N.M. Sup. Ct. July 15, 2021) (non-precedential) WH

- **FACTS:** Defendant was charged with an open count of murder for the stabbing death of a taxi driver. He sat through a five-hour custodial interview. A LE staff psychiatrist attended the interview to ensure Defendant understood. The Court found that Defendant focused on bizarre topics not obviously relevant to the homicide, exhibited erratic behavior, and became increasingly agitated and angry.
- The DC determined that, based on those findings regarding his mental condition, Defendant had no awareness of his rights and no awareness of the consequences he faced by abandoning these rights.

Trial court did not err in granting motion to suppress Defendant's statements because State did not demonstrate statements were knowing, intelligent, and voluntary

State v. Victor Ortiz, No. S-1-SC-37673 (N.M. Sup. Ct. July 15, 2021) (non-precedential) WH

- **HELD:** The Court rejected State arguments that the following DC findings were unsupported: (1) Defendant exhibited religious behavior and beliefs that were bizarre or striking (2) that Defendant had very recently sought treatment for PTSD (3) Defendant was hearing voices the night of the events in question and interview. The Court determined that the DC made no such findings as characterized.

Trial court did not err in granting motion to suppress Defendant's statements because State did not demonstrate statements were knowing, intelligent, and voluntary

State v. Victor Ortiz, No. S-1-SC-37673 (N.M. Sup. Ct. July 15, 2021) (non-precedential) WH

- The Court also rejected the State's challenge to the finding that Defendant was fixated on bizarre topics not relevant to the questions, reasoning a reasonable factfinder could determine topics were odd or out of the ordinary based on a dictionary definition.
- This was a case about the standard of review.

Double Jeopardy

FACTS

State v. Clive Phillips, __-NMCA-__ (No. A-1-CA-37455, July 7, 2021)

- **FACTS:** Defendant lived with Allie (ex-gf and mother of his child), Adrian, and Sean. One night, Defendant was staying at a friend's house while the others remained home. Around 3:49 a.m., Sean informed Defendant that Adrian and Allie appeared to be in a bedroom having sex. Defendant rushed home, grabbed a baseball bat, and found Allie and Adrian in bed together. He beat both Allie and Adrian with the bat then the room.

FACTS

State v. Clive Phillips, __-NMCA-__ (No. A-1-CA-37455, July 7, 2021)

- Allie locked the door. Defendant meanwhile retrieved a handgun. He shot and kicked open the door. Inside, he shot Adrian twice in the chest but Adrian remained alive.
- Allie called the police. Defendant's gun was empty. While Allie was on the phone with 911, Defendant retrieved a rifle and then killed Adrian by shooting him under the chin.
- Defendant then shot Allie in the leg with the rifle. Defendant then picked up the phone and told the 911 dispatcher he just killed his best friend. After ending the call, Defendant punched and strangled Allie until LE arrived.

How many convictions for aggravated battery with a deadly weapon against Adrian do these facts support?

State v. Clive Phillips, __-NMCA-__ (No. A-1-CA-37455, July 7, 2021)

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How many counts of aggravated battery with a deadly weapon against Adrian are supported by these facts?

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Where Defendant killed one of two victims, two convictions for agg. batt. (DW) against Victim 1 (decedent) did not violate double jeopardy because acts underlying convictions were separated by sufficient indicia of distinctness

State v. Clive Phillips, __-NMCA-__ (No. A-1-CA-37455, July 7, 2021)

- Defendant was ultimately convicted of two counts of aggravated battery (deadly weapon) (Adrian), four counts of aggravated BHHM, and pled guilty to voluntary manslaughter (after remand).
- **HELD:** Defendant's two convictions for aggravated battery (deadly weapon) did not violate because there was a sufficient indicia of distinctness supporting the offenses.

Where Defendant killed one of two victims, two convictions for agg. batt. (DW) against Victim 1 (decedent) did not violate double jeopardy because acts underlying convictions were separated by sufficient indicia of distinctness

State v. Clive Phillips, __-NMCA-__ (No. A-1-CA-37455, July 7, 2021)

- **Reasoning:** One conviction was premised on beating Adrian with the bat and the other was premised on shooting him with the handgun.
- Both occurred around the same time, at the same location, and involved the same victim. BUT, the sequencing and intervening events supported two crimes. After the first battery, Defendant left the room and retrieved the handgun. Allie locked him out and he had to shoot and kick it open. Additionally, Defendant's intent changed. He told LE that he did not intend to kill anyone when he was using the bat.

Where Defendant killed one of two victims he attacked, one of two convictions for agg. batt. (DW) against Victim 1 (decedent) resulted in double jeopardy violation relative to voluntary manslaughter of Victim 1 because conduct underlying the offenses was presumed to be unitary and aggravated battery is subsumed within voluntary manslaughter

State v. Clive Phillips, __-NMCA-__ (No. A-1-CA-37455, July 7, 2021)

- **HELD:** Defendant's voluntary manslaughter conviction and an aggravated battery (deadly weapon) (handgun) conviction violate double jeopardy.
- **REASONING:** The Court first had to determine whether Defendant's conduct supporting voluntary manslaughter was unitary, or the same, as aggravated battery (deadly weapon) (handgun).

Where Defendant killed one of two victims he attacked, one of two convictions for agg. batt. (DW) against Victim 1 (decedent) resulted in double jeopardy violation relative to voluntary manslaughter of Victim 1 because conduct underlying the offenses was presumed to be unitary and aggravated battery is subsumed within voluntary manslaughter

State v. Clive Phillips, __-NMCA-__ (No. A-1-CA-37455, July 7, 2021)

- The State argued that the manslaughter was distinct because it was premised on the fatal rifle shot. But the Court determined it could not rule out that a reasonable jury could have relied, partially, on the handgun shots for manslaughter. The medical testimony at trial was not dispositive.
- The Court relied on *Franco*, 2005-NMSC-013, and determined that it must presume unitary (or the same) conduct where faced with competing reasonable views.

Where Defendant killed one of two victims he attacked, one of two convictions for agg. batt. (DW) against Victim 1 (decedent) resulted in double jeopardy violation relative to voluntary manslaughter of Victim 1 because conduct underlying the offenses was presumed to be unitary and aggravated battery is subsumed within voluntary manslaughter

State v. Clive Phillips, __-NMCA-__ (No. A-1-CA-37455, July 7, 2021)

- As to the second prong, the Court applied precedent establishing that voluntary manslaughter and aggravated battery on unitary conduct violated double jeopardy. *Lucero*, 2015-NMCA-040.
- Note: Other Court of Appeals cases have recently reached the opposite conclusion regarding unitary conduct presumptions. In *Frankie Vigil*, 2021-NMCA-024, the Court held that where the verdict and jury instructions are unclear, the Court is not required to presume the jury relied on the same conduct.

Where Defendant killed one of two victims he attacked, one of four convictions for agg. batt. (DW) against Victim 2 (survivor) resulted in double jeopardy violation because only three of the convictions were separated by sufficient indicia of distinctness

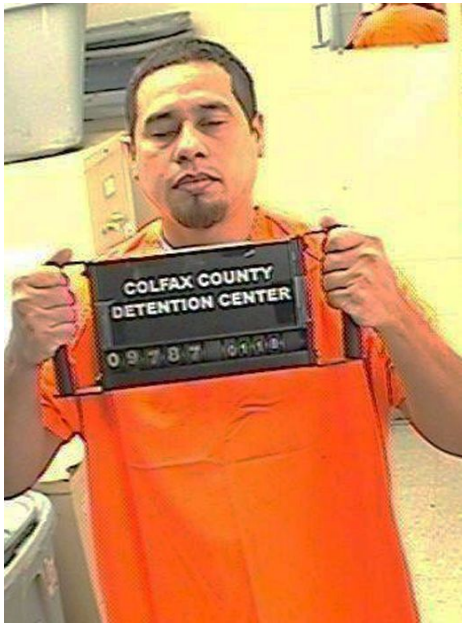
State v. Clive Phillips, __-NMCA-__ (No. A-1-CA-37455, July 7, 2021)

- Defendant lastly challenged his four convictions for aggravated BHHM. The State supported the charges with the following facts: Defendant (1) struck Allie with the baseball bat (2) shot Allie in the leg (3) strangled Allie and (4) punched Allie. The issue at hand was whether the four convictions were supported by a sufficient indicia of distinctness.

Where Defendant killed one of two victims he attacked, one of four convictions for agg. batt. (DW) against Victim 2 (survivor) resulted in double jeopardy violation because only three of the convictions were separated by sufficient indicia of distinctness

State v. Clive Phillips, __-NMCA-__ (No. A-1-CA-37455, July 7, 2021)

- The Court determined that there was an intervening event (retrieving the handgun from his room and getting locked out) between Defendant striking Allie with the baseball bat and shooting her in leg. There was also an intervening event between shooting Allie and strangling/punching her (Defendant took the phone and talked to the 911 dispatcher).
- However, there was no distinctness between strangling and punching Allie. **HELD**: Therefore the facts only supported three, not four, aggravated BHHM convictions.



Murder conviction and conviction for aggravated burglary violated double jeopardy because multiple acts of battery upon victim were not distinct from the murder and therefore could not constitute the battery necessary for the aggravated burglary

State v. Alejandro Azamar-Nolasco, No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- **FACTS:** Victim's mother found victim deceased on her back in the bathtub with her mouth open full of standing water with her head positioned under the faucet. Victim had bruising and abrasions around her chin, neck, shoulders, and lower abdomen. There were blood smears and a large clump of hair on bathtub. Victim's cause of death was strangulation/drowning. Defendant was convicted of aggravated burglary and first-degree murder

Murder conviction and conviction for aggravated burglary violated double jeopardy because multiple acts of battery upon victim were not distinct from the murder and therefore could not constitute the battery necessary for the aggravated burglary

State v. Alejandro Azamar-Nolasco, No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- Defendant argued that his aggravated burglary and murder convictions violate double jeopardy because the act of killing victim was used twice to prove both an essential element of murder and the aggravating element for aggravated burglary
- **HELD**: Defendant's conviction for murder conviction and aggravated burglary violate double jeopardy.

Murder conviction and conviction for aggravated burglary violated double jeopardy because multiple acts of battery upon victim were not distinct from the murder and therefore could not constitute the battery necessary for the aggravated burglary

State v. Alejandro Azamar-Nolasco, No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- The conduct was unitary. Multiple acts of battery occurred based on evidence, but the acts could not be separated from the murder. Victim's multiple injuries were consistent with a prolonged death by strangling and drowning. Only evidence of a singular goal and mental state (to kill victim) with no intervening events or time in between. In short, no distinct battery from the murder.

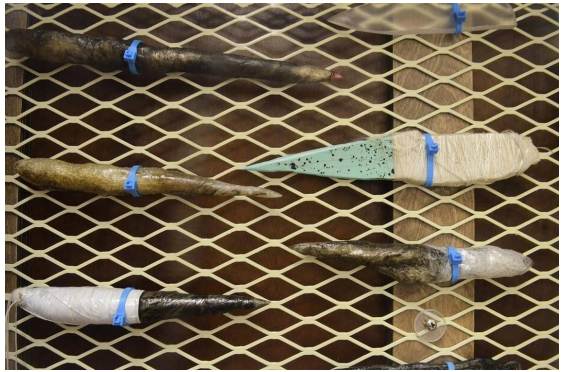
Murder conviction and conviction for aggravated burglary violated double jeopardy because multiple acts of battery upon victim were not distinct from the murder and therefore could not constitute the battery necessary for the aggravated burglary

State v. Alejandro Azamar-Nolasco, No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- The Legislature did not intent to authorize multiple punishments for first-degree murder and aggravated burglary when premised on unitary conduct. The Court applied modified-*Blockburger* (comparison of elements under State's theories).
- The Court relied on the jury instructions and State's closing argument to determine that, under the State's theory, the murder was subsumed because it was the aggravating element for burglary. The State expressly relied on the murder to prove the battery.

Do the facts support two convictions possession of a deadly weapon by a prisoner?

State v. Milo Benally, __-NMSC-__ (No. S-1-SC-37613, May 20, 2021)



- **FACTS:** COs conducted a "shakedown" and found two makeshift weapons in Defendant's bunk: (1) A shaving razor with a playing card folded around it to form a handle, found in the support bar of the bunk above his bed; and (2) a sharpened piece of the end of a plastic mop handle, found inside his mattress. Defendant was convicted of two counts of possession of a deadly weapon or explosive by a prisoner.
- **ISSUE:** Defendant raised a unit-of-prosecution double jeopardy claim, arguing that the proper unit of prosecution is per course of conduct, not per weapon.

Did two convictions for two counts of possession of a deadly weapon by a prisoner?

State v. Milo Benally, __-NMSC-__ (No. S-1-SC-37613, May 20, 2021)

slido

How many convictions for possession of a deadly weapon by a prisoner are permissible?

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

Convictions for two counts of possession of a deadly weapon by a prisoner resulted in double jeopardy violation

State v. Milo Benally, __-NMSC-__ (No. S-1-SC-37613, May 20, 2021)

- **Two- Step Framework:** (1) The court must analyze the statute to determine if the Legislature defined the unit of prosecution using canons of statutory construction: (a) plain meaning/wording (b) structure (c) history (d) purpose (e) quantum of punishment. If still an insurmountable ambiguity, then lenity applies, which requires presumption of one count absent proof that acts were in some sense distinct from the others.

Convictions for two counts of possession of a deadly weapon by a prisoner resulted in double jeopardy violation

State v. Milo Benally, __-NMSC-__ (No. S-1-SC-37613, May 20, 2021)

- **Two- Step Framework:** (2) The court must consider whether defendant's acts are separated by a sufficient indicia of distinctness. The inquiry is still guided by legislative intent and elements of offense in addition to facts of case. Considers as non-mechanical "guiding principles" (1) time between criminal acts (2) location of the victim during each act (3) existence of any intervening events (4) sequence in commission of the acts (5) defendant's intent (6) number of victims.

Convictions for two counts of possession of a deadly weapon by a prisoner resulted in double jeopardy violation

State v. Milo Benally, __-NMSC-__ (No. S-1-SC-37613, May 20, 2021)

- **HELD:** Only one conviction was proper. **Reasoning:** Statute was ambiguous considering all canons of construction because each canon lent itself to "equally valid ways of thinking." Determined no indicia of distinctness because no evidence Defendant acquired weapons at distinct times, weapons were "more similar than different," were "within arm's length of each other," no evidence of actualized threat

Double Jeopardy (Sentencing)

Resentencing of Defendant to increased prison term resulted in double jeopardy violation because Defendant had a reasonable expectation that the original sentence would not be increased upon remand to custody to serve originally-imposed sentence,

State v. Lee Waldo Garcia, __-NMCA-__ (No. A-1-CA-37486, Oct. 14, 2021)

- **Facts:** A jury convicted Defendant of vehicular homicide and aggravated DWI. DC initially sentenced Defendant to 10-years incarceration then re-sentenced Defendant twice, ultimately imposing a 15-year sentence: **(1)** Oral sentence of 17.5 years (18 month for Agg. DWI and 16 years for VH) with 7.5 years suspended – 10 years actual incarceration. Defendant moved to reconsider sentence and the DC vacated agg. DWI on DJ grounds, **(2)** Re-sentenced for 16 years with 6 years suspended – 10 years actual incarceration. DC also designated VH a SVO. **(3)** Re-sentenced Defendant a second time to 15 years with no suspension and removed SVO designation.

Resentencing of Defendant to increased prison term resulted in double jeopardy violation because Defendant had a reasonable expectation that the original sentence would not be increased upon remand to custody to serve originally-imposed sentence,

State v. Lee Waldo Garcia, __-NMCA-__ (No. A-1-CA-37486, Oct. 14, 2021)

- **GENERAL RULE:** The DJ clause protects a criminal defendant's reasonable expectation of finality in a sentence. Therefore a court cannot increase a valid sentence once a defendant begins serving that sentence. This principle protects against increase in actual term of incarceration.
- **HELD:** Defendant was remanded to jail and began serving his sentence before the subsequent resentencing(s) and therefore had a reasonable expectation of finality.

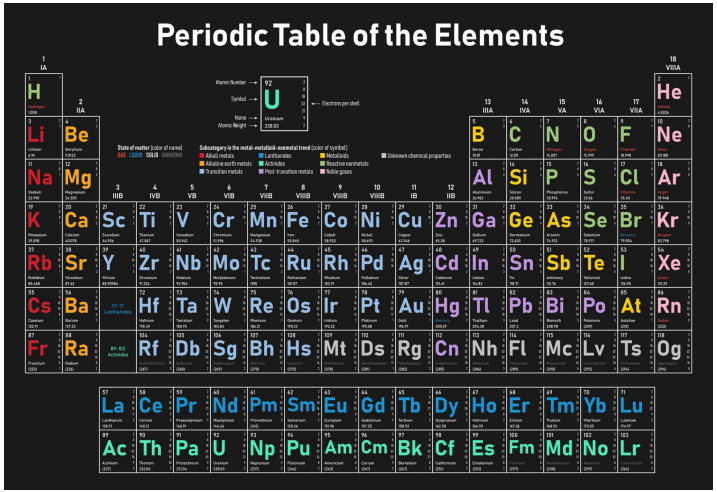
Resentencing of Defendant to increased prison term resulted in double jeopardy violation because Defendant had a reasonable expectation that the original sentence would not be increased upon remand to custody to serve originally-imposed sentence,

State v. Lee Waldo Garcia, __-NMCA-__ (No. A-1-CA-37486, Oct. 14, 2021)

- **REJECTED ARGUMENTS:** (1) It was inconsequential that there was no written J&S prior to re-sentencing. Rule applies to oral sentences (2) Defendant did not belie his reasonable expectation of finality by filing a motion for "reconsideration" of his sentence. There is no mechanism for court to increase a valid sentence so he could not expect enlargement. (3) Defendant's expectation of finality was not lessened because he had yet to serve any time in prison and was still incarcerated at a local jail – rule applies where the defendant serves any time in a NMCD or government facility.

Elements, Instructions, & Sufficiency

Elements



- Applicability of Section 30-37-4 (notice that acts underlying charges harmful to minors)
- Section 30-22-1.1 (Agg. fleeing)
- Section 30-3-4 (Batt. P.O.)
- Section 66-3-901 (Good working order of equipment)
- “Use” of DW in Assault (DW)

Applicability of Section 30-37-4

Requirement under Section 30-37-4, of notice that acts underlying charges were harmful to minors, does not apply to charge of child solicitation by electronic device under Section 30-37-3.2

State v. Nathaniel Julg, __-NMCA-__ (No. S-1-SC--39220, July 27, 2021).

- **FACTS:** Defendant was charged with child solicitation by electronic communication device, Section 30-37-3.2, for attempting to meet with an undercover officer posing as a 14-year-old girl for oral sex.
- Defendant argued that proof of satisfaction of the "notice" requirement in Section 30-37-4 is an essential element of the offense.

Requirement under Section 30-37-4, of notice that acts underlying charges were harmful to minors, does not apply to charge of child solicitation by electronic device under Section 30-37-3.2

State v. Nathaniel Julg, __-NMCA-__ (No. S-1-SC--39220, July 27, 2021).

- **Section 30-37-4** provides that "No prosecution based under this act shall be commenced unless the district attorney of the county in which the offense occurs shall have previously determined that **the matter or performance is harmful to minors** and the **defendant shall have received actual or constructive notice** of such determination."
- Defendant argued that the DA of San Juan County has not made a determination or provided notice that his acts are harmful to minors. Both notice requirement and child electronic solicitation are contained in Sexually Oriented Material Harmful to Minors Act.

Requirement under Section 30-37-4, of notice that acts underlying charges were harmful to minors, does not apply to charge of child solicitation by electronic device under Section 30-37-3.2

State v. Nathaniel Julg, __-NMCA-__ (No. S-1-SC--39220, July 27, 2021).

- **HELD:** Section 30-37-4 does not apply to prosecutions for child solicitation by electronic communication device. **REASONING:** Section 30-7-4 refers to "matter(s)" and "performance(s)." It only applies to "matter[s]" described in Section 30-37-2 and "performance[s]" described in Section 30-37-3 of the act, which regulate depictions of media content deemed harmful to minors. Section 30-37-3.2 was passed subsequent to the notice requirement, explicitly defines the prohibited conduct, and does not use the phrase "harmful to minors"

Section 30-22-1.1 (Agg. Fleeing)

In aggravated fleeing statute, Section 30-22-1.1, requirement that a defendant drive “in manner that endangers the life of another” requires only that a defendant created a risk of harm not that another person was literally put in danger

State v. Sean Vest, __-NMCA-__ (No. S-1-SC-37210, May 27, 2021)

- **FACTS:** Officers apprehended Defendant after he led them on a high-speed vehicle chase through rain slicked streets in the early morning hours. Based on the chase, a jury convicted Defendant of aggravated fleeing.
- **ISSUE:** Whether the requirement in the aggravated fleeing statute, that a defendant drive “in a manner that endangers the life of another” means that another person was actually put in danger by defendant’s conduct or whether dangerous driving that places a community at risk of harm is sufficient

In aggravated fleeing statute, Section 30-22-1.1, requirement that a defendant drive “in manner that endangers the life of another” requires only that a defendant created a risk of harm not that another person was literally put in danger

State v. Sean Vest, __-NMCA-__ (No. S-1-SC-37210, May 27, 2021)

- **HELD:** The Court determined the statute only requires that a defendant willfully and carelessly drove so dangerously that the defendant created a risk of harm, a risk that could have endangered someone in the community. No showing of actual endangerment was necessary.

In aggravated fleeing statute, Section 30-22-1.1, requirement that a defendant drive “in manner that endangers the life of another” requires only that a defendant created a risk of harm not that another person was literally put in danger

State v. Sean Vest, __-NMCA-__ (No. S-1-SC-37210, May 27, 2021)

- **REASONING:** The Court relied on the plain meaning of the language of the statute, determining that the language focuses on the defendant’s conduct. The Court also reasoned that interpreting the statute to require a risk of harm to the community as opposed to actual endangerment furthers the legislative purpose (which is to protect communities from harm posed by high risk chases)

Section 30-3-4 (battery upon a peace officer)

A public service officer performing duties under the Detoxication Reform Act, Sections 43-2-1.1 to -2-23, is not a peace officer upon whom battery is prohibited under Section 30-3-4

State v. Denson Becenti, __-NMCA-__ (No. A-1-CA-39165, Aug. 24, 2021)

- **FACTS:** A public service officer (PSO) under the detoxification reform act found Defendant asleep in his vehicle near an interstate exit. Defendant committed a battery as the PSO escorted him to protective custody. The State charged Defendant with felony battery on a peace officer, but the DC reduced the charge to a petty misdemeanor simple battery.
- **ISSUE:** Whether a PSO is a "peace officer" for purpose of felony battery on a peace officer. **HELD:** A PSO is not a peace officer.

A public service officer performing duties under the Detoxication Reform Act, Sections 43-2-1.1 to -2-23, is not a peace officer upon whom battery is prohibited under Section 30-3-4

State v. Denson Becenti, __-NMCA-__ (No. A-1-CA-39165, Aug. 24, 2021)

- **Statutory Definitions:** PSO is "a civilian employee within a police department who is authorized by the police department to transport intoxicated or incapacitated persons to a treatment facility of detention center." A peace officer is defined as "any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes."
- The State argued that a PSO is a public officer with duties to maintain public order.

A public service officer performing duties under the Detoxication Reform Act, Sections 43-2-1.1 to -2-23, is not a peace officer upon whom battery is prohibited under Section 30-3-4

State v. Denson Becenti, __-NMCA-__ (No. A-1-CA-39165, Aug. 24, 2021)

- The detoxication reform act states that "[i]t is the policy of this state that intoxicated and incapacitated persons may not be subject to criminal prosecution, but rather should be afforded protection."
- In light of that purpose, the Court was unpersuaded that a PSO's duties serve a central purpose of maintaining public order. Further, they do not have duties traditionally associated with LE, which are "preserving the public peace, preventing and quelling public disturbances, and enforcing state laws, including but not limited to the power to make arrests for violation of state laws."

Section 66-3-901 (Veh. without Equip. or in unsafe condition)

Tail lamps do not violate the "good working order" requirement of Section 66-3-901 when they comply with the specific statutory requirements set out in Sections 66-3-801 to -888.

State v. John Farish, __-NMSC-__ (No. S-1-SC-36638, Sep. 13, 2021)

- **FACTS:** Defendant was stopped on the basis that his tail light was defective. The LE officer testified that Defendant's right tail lamp was "working properly" but the large upper bulb was not illuminated. Defendant was convicted of operating a vehicle with defective equipment and DUI in metro court. Defendant argued that no RS supported the stop, rendering it and the evidence therefrom invalid.
- The issue addressed on certiorari was whether a tail lamp with multiple bulbs violates Section 66-3-901 when one bulb is not illuminated but the tail lamp otherwise complies with the specific requirements for tail lamps in the MVC (found in Section 66-3-805).

Tail lamps do not violate the “good working order” requirement of Section 66-3-901 when they comply with the specific statutory requirements set out in Sections 66-3-801 to -888.

State v. John Farish, __-NMSC-__ (No. S-1-SC-36638, Sep. 13, 2021)

- **HELD:** Tail lamps do not violate Section 66-3-901 when they comply with specific statutory equipment requirements for tail lamps in Section 66-3-805.

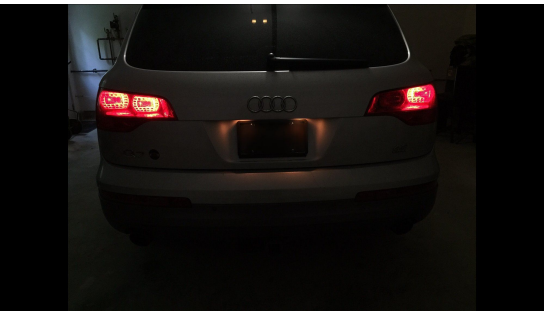
Tail lamps do not violate the “good working order” requirement of Section 66-3-901 when they comply with the specific statutory requirements set out in Sections 66-3-801 to -888.

State v. John Farish, __-NMSC-__ (No. S-1-SC-36638, Sep. 13, 2021)

- Section 66-3-901 provides that “No person shall drive [any] vehicle … unless the equipment … is in good working order and adjustment as required in the Motor Vehicle Code and the vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person[.]”
- Section 66-3-805 provides “number, location, color, and visibility” requirements for tail lamps and a violation is deemed a penalty assessment misdemeanor.
- Basically the issue distilled to whether Section 66-3-901 provides a cause of action for tail lamps not being in “good working order” where Section 66-3-805 is not violated.

Tail lamps do not violate the "good working order" requirement of Section 66-3-901 when they comply with the specific statutory requirements set out in Sections 66-3-801 to -888.

State v. John Farish, __-NMSC-__ (No. S-1-SC-36638, Sep. 13, 2021)



- As a predicate, the Court defined "good working order" for purposes of Section 66-3-901 as suitable or functioning for the intended use (as opposed to free from flaws or defects).
- Under the general/specific rule and this definition, Section 66-3-901 does not provide an independent basis for a criminal violation separate from the requirements of Section 66-3-805. Section 66-3-805 provides the applicable intended use and function for tail lamps, and, therefore inform whether they are in good working order. The statutes "are an identity in elements."

Where a specific statute in the Motor Vehicle Code does not prescribe requirements defining equipment's intended use or function, then the public safety purpose of Section 66-3-901 still requires that the equipment be in good working order to the extent that the equipment satisfactorily functions for its intended use and in a manner that is not unsafe and does not render the vehicle unsafe

State v. John Farish, __-NMSC-__ (No. S-1-SC-36638, Sep. 13, 2021)

- In the case of tail lamps, at issue in this case, there was a specific statute in the MVC defining requirements for tail lamps. The Court did not write out Section 66-3-901 as a basis for criminal liability completely, only where there is a more specific statute setting the intended use and function for a specific piece of equipment contained in the MVC.

Where a specific statute in the Motor Vehicle Code does not prescribe requirements defining equipment's intended use or function, then the public safety purpose of Section 66-3-901 still requires that the equipment be in good working order to the extent that the equipment satisfactorily functions for its intended use and in a manner that is not unsafe and does not render the vehicle unsafe

State v. John Farish, __-NMSC-__ (No. S-1-SC-36638, Sep. 13, 2021)

- "Notwithstanding our conclusion here, it is possible that equipment may still violate Section 66-3-901 when the [MVC] does not set out specific requirements for equipment." In that case, "Section 66-3-901 still requires that the equipment to be in good working order to the extent that the equipment satisfactorily functions for its intended use and in a manner that is not unsafe and does not render the vehicle unsafe."

Section 30-3-2 (agg. Assault with deadly weapon)

A defendant uses a deadly weapon to commit assault where a defendant makes facilitative use of the deadly weapon; sufficient evidence established the facilitative use of a deadly weapon for assault with a deadly weapon

State v. Zachariah G., __-NMSC-__ (No. S-1-SC-37790, Oct. 18, 2021)

- **FACTS:** Principal learned that 12-year-old Child had a weapon on campus and took Child to office. Child was fumbling in the front of his waistband, was found to have a CO2 cartridge for a BB gun in the contents of his pockets, and there was an abnormal bulge in his waistband, which Child stated was his “dick” when directed to hand over the item. The principal called LE.
- While waiting for law enforcement to arrive, Child asked principal three questions: (1) What would happen if somebody shot up the school? (2) are you afraid to die? (3) How would you feel if a 12-year-old shot you? LE found a BB gun.

A defendant uses a deadly weapon to commit assault where a defendant makes facilitative use of the deadly weapon; sufficient evidence established the facilitative use of a deadly weapon for assault with a deadly weapon

State v. Zachariah G., __-NMSC-__ (No. S-1-SC-37790, Oct. 18, 2021)

- **ISSUE:** Whether Child "used" a deadly weapon to assault Principal (or in statutory terms committed the assault "with" a deadly weapon).

A defendant uses a deadly weapon to commit assault where a defendant makes facilitative use of the deadly weapon; sufficient evidence established the facilitative use of a deadly weapon for assault with a deadly weapon

State v. Zachariah G., __-NMSC-__ (No. S-1-SC-37790, Oct. 18, 2021)

- **HELD:** The statute requires "facilitative use" of the weapon during an assault – as distinct from incidental exposure or mere possession – which may be found where (1) a deadly weapon is present at some point during the encounter, (2) the victim knows or, based on the defendant's words or actions, has reason to know that the defendant has a deadly weapon, and (3) the presence of the weapon is intentionally used to facilitate the commission of the assault.

A defendant uses a deadly weapon to commit assault where a defendant makes facilitative use of the deadly weapon; sufficient evidence established the facilitative use of a deadly weapon for assault with a deadly weapon

State v. Zachariah G., __-NMSC-__ (No. S-1-SC-37790, Oct. 18, 2021)

- **APPLICATION:** Child used a deadly weapon.
- The Court reasoned that a deadly weapon (BB gun) was present. The principal had reason to know the BB gun was present from Child's words, actions and threats. He found a CO2 cartridge and recognized it as a component of a BB gun. Child's questions evince that he intentionally used the presence of the BB gun to facilitate the assault.

Instructions

- Voluntary Manslaughter & Imperfect Self-Defense
- Attempted 3rd-degree CSCM as LIO
- 2nd-degree CSCM
- CSCM & lack of consent
- Batt (HHM) & unlawfulness
- Court clarification of inconsistent verdicts
- Self-defense
- UJI 14-251 (defining proximate cause)

Voluntary Manslaughter & Imperfect Self-Defense

District court erred in denying Defendant's requested instruction on voluntary manslaughter (imperfect self-defense)

State v. Matthew Chavez, __-NMCA-__ (No. A-1-CA-37888, Oct. 1, 2021).

- **FACTS:** Defendant tried to rob the victim at gunpoint at an ATM, but the victim drew his own gun, pursued him back to his car, held him at gunpoint, and tried to order him out of the car. Defendant then shot and killed the victim.
- Conflicting testimony about whether the victim shot at all or if Defendant or victim fired the first shot.
- **ISSUE:** District Court granted self-defense and defense of another jury instructions but denied request for "imperfect self-defense" instruction for voluntary manslaughter.

District court erred in denying Defendant's requested instruction on voluntary manslaughter (imperfect self-defense)

State v. Matthew Chavez, __-NMCA-__ (No. A-1-CA-37888, Oct. 1, 2021).

- **HELD:** The Court of Appeals reversed, finding that Defendant should have received instruction on voluntary manslaughter because evidence could have supported sufficient provocation, which was a question for the jury. Although the law does not allow a person who intentionally instigates an assault to claim self-defense, there was some question as to whether the victim's response to the assault was reasonable.

. . . and aforementioned instructional error required reversal of tampering with evidence and conspiracy charges that were predicated on the conviction for second degree murder that was reversed due to the instructional error

State v. Matthew Chavez, __-NMCA-__ (No. A-1-CA-37888, Oct. 1, 2021).

- **FACTS:** Defendant parked his car in an alley after the incident and returned later, with another person, to set it on fire. He was convicted of conspiracy and tampering with evidence.

- **HELD:** Degree of tampering and conspiracy convictions were predicated on murder conviction (second degree felony) so instructions were incomplete because voluntary manslaughter was not an option. Therefore, these convictions were reversed and retrial ordered - double jeopardy did not bar retrial because evidence was sufficient to prove offense based on instruction given.

Attempted 3rd-degree CSCM as LIO

District court did not err in denying Defendant's requested jury instruction to include attempt to commit third-degree CSCM (under 13) as a lesser-included offense of attempt to commit second-degree CSCM (under 13)

State v. Gerald Notah, __-NMCA-__ (No. A-1-CA-38623, Aug. 26, 2021)

- **FACTS:** Step-grandfather entered victim's room while she was sleeping, lifted blanket off her, pulled down pajama pants and underwear, pulled down his own pants, and rubbed her arm. Then went to other side of bed, and continued to masturbate while rubbing upper ribs over shirt - she pretended to wake up and Defendant left.

- **ISSUE:** Defendant requested instruction on attempt to commit third-degree CSCM - claiming that victim was "clothed" and that this was a lesser included offense.

District court did not err in denying Defendant's requested jury instruction to include attempt to commit third-degree CSCM (under 13) as a lesser-included offense of attempt to commit second-degree CSCM (under 13)

State v. Gerald Notah, __-NMCA-__ (No. A-1-CA-38623, Aug. 26, 2021)

- **HELD:** No error in denying jury instruction because: (1) Third-degree CSCM is not a lesser offense of second-degree CSCM; and (2) no rational juror could have acquitted of the greater offense and convicted on the lesser because there was no evidence that he undressed her and then attempted to touch only clothed intimate parts.

2nd-degree CSCM

Fundamental error did not result from alleged failure to properly state the "unclothed" element in instruction describing elements of second-degree CSCM (under 13)

State v. Gerald Notah, __-NMCA-__ (No. A-1-CA-38623, Aug. 26, 2021)

- **FACTS:** Jury instruction described attempted contact with "the unclothed mons veneris and/or the undeveloped breast area."
- **ISSUE:** For the first time on appeal, Defendant claimed that "unclothed" modified only "mons veneris" and not "undeveloped breast area."
- **HELD:** No fundamental error because: (1) instruction was consistent with UJI; (2) when read to the jury, the word "the" was omitted; and (3) if the instruction was in error, the error was technical.

CSCM & Lack of Consent

Absence of instruction on lack of consent from instructions given to jury that convicted for criminal sexual contact of a minor not fundamental error because lack of consent is not an element of that offense

State v. Leighton Begaye, __-NMCA-__ (No. A-1-CA-39333, Oct. 21, 2021).

- **FACTS:** Defendant was convicted of one count of CSCM for forcibly touching the breast of a sixteen-year old female.
- **ISSUE:** Defendant argued that fundamental error occurred because the jury was not instructed on lack of consent.
- **HELD:** Lack of consent is not an element of CSCM, so no fundamental error.

Batt (HHM) & Unlawfulness

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Is unlawfulness an essential element of battery against a household member?

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

Reversible error to refuse to instruct on essential element of unlawfulness in trial for Batt (HHM) because there was some evidence that justified or excused Defendant's conduct

State v. Charles Smith, __-NMSC-__ (No. S-1-SC-38093, June 30, 2021).

- **FACTS:** Defendant and Victim got into an argument while out at a bar. Victim took Defendant's car home. When Defendant arrived at the house, Victim blocked the door to prevent him from entering, pushed him away from the door, and would not return his keys. Defendant grabbed his keys from Victim, pushed her to the ground, and hit her in the arm with his car as he left the house.

- **ISSUE:** Defendant requested unlawfulness instruction and the metropolitan court denied his request because he had not established a recognized defense. District court affirmed.

Reversible error to refuse to instruct on essential element of unlawfulness in trial for Batt (HHM) because there was some evidence that justified or excused Defendant's conduct

State v. Charles Smith, __-NMSC-__ (No. S-1-SC-38093, June 30, 2021).

- **HELD:** Unlawfulness instruction required unless: (1) jury instructions have language that is obviously synonymous with unlawfulness; or (2) there is no evidence of lawful behavior. Because the relevant statute identified unlawfulness as an essential element, there was a duty to instruct on this element.

Court Clarification of Insufficient Verdicts

Trial court did not improperly coerce jury or abuse its discretion when it sought to clarify the jury's inconsistent verdicts and denied Defendant's motion for mistrial

State v. Davon Lymon, __-NMSC-__ (No. S-1-SC-37729, May 27, 2021).

- **FACTS:** Defendant was convicted of first-degree murder, tampering with evidence, forgery, receiving or transferring a stolen vehicle, and resisting, evading, or obstructing an officer.

- **ISSUE:** Jury's preliminary verdict found Defendant "not guilty" of first-degree murder but had not filled out a verdict form for any lesser-included offense or made any mention of disagreement. Court sent all forms back to the jury with a question that asked: "What is your verdict as to Count 1?" The jury then signed both the "not guilty" and "guilty" forms for first-degree murder. The jury then said that the guilty verdict was the proper form. Defendant moved for a mistrial, which the court denied. The court then sent back new verdict forms with a note stating: "You have signed both verdict forms as to Count 1. The Court has provided new verdict forms as to Count 1. Please indicate your verdict on these new forms as to Count 1." The jury then returned a guilty verdict for first-degree murder. When polled, the jurors all agreed this was their intended verdict.

Trial court did not improperly coerce jury or abuse its discretion when it sought to clarify the jury's inconsistent verdicts and denied Defendant's motion for mistrial

State v. Davon Lymon, __-NMSC-__ (No. S-1-SC-37729, May 27, 2021).

- **HELD:** No coercion by the district court when it clarified the inconsistent verdict and denied the mistrial.

Self-Defense

Trial court properly refused self-defense instruction because reasonable minds could not find that the officer used excessive force in encounter that resulted in Defendant shooting officer

State v. Davon Lymon, __-NMSC-__ (No. S-1-SC-37729, May 27, 2021).

- **ISSUE:** Defendant claimed that he was improperly denied the self-defense instruction because the officer drew his weapon at the beginning of the encounter.

- **HELD:** No error in refusing instruction because officer deescalated force by holstering weapon so reasonable minds could not find excessive force as viewed from a reasonable officer's perspective.

UJI 14-251 (defining proximate cause)

Lack of definition of “outside event” in UJI 14-251 (defining proximate cause) was not fundamental error

State v. Lee Waldo Garcia, __-NMCA-__ (No. A-1-CA-37486, Oct. 14, 2021).

- **FACTS:** Defendant was driving drunk and crashed into Victim as he was crossing the street. Victim died two weeks later when removed from life support.

- **ISSUE:** Defendant claimed that the phrase “outside event” as used in the UJI defining proximate cause was ambiguous and should have been defined for the jury.

- **HELD:** The instruction encompasses both factual and proximate causation and adequately conveys necessary causation concepts, specifically that it requires the jury to decide if an “act of the defendant was a significant cause of the death … without which the death out not have occurred” and if the death was a foreseeable result of the action.

Sufficiency

- 1st-degree Murder (willful & deliberate)
- Homicide by Vehicle (DWI)
- Agg. Assault (DW); firearm enhancement
- CSC/CSP
- Attempted 2nd-degree CSCM
- Burglary of a Dwelling
- Tampering with Evidence
- JNOV

1st-degree Murder (Willful & Deliberate)

Sufficiency: 1st-degree Murder (willful & delib.)

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- **FACTS:** Defendant met his friend at the office to pick up some equipment. Defendant was acting strangely and asked to use the restroom. While in the restroom, Victim arrived and said that Defendant had called him over. As they were waiting, Defendant overheard talking to himself, then he joined the others. His friend heard a "pop" and saw Victim bleeding and grabbing his chest. As Victim was dying, Defendant approached him and said: "Look at him … Look what's coming from him." He also pointed the gun at his friend when she tried to call for help and, later, pointed a gun at her back. When officers arrived, Defendant denied that there was someone inside "bleeding out" and then later said there was a "dead guy" inside but he didn't kill him.

Sufficiency: 1st-degree Murder (willful & delib.)

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- **HELD:** There was evidence Defendnat was the killer because police saw him walk out of the scene with the murder weapon and his friend testified he was the shooter. Evidence of deliberate intent based on his sufficient time to deliberate, comments and demeanor while watching Victim die, his assault on his friend to stop her calling for help, that he likely brought the murder weapon with him, and he tried to mislead officers.

Homicide by Vehicle (DWI)

Sufficiency: Homicide by vehicle while under the influence of intoxicating liquor

State v. Lee Waldo Garcia, __-NMCA-__ (No. A-1-CA-37486, Oct. 14, 2021).

- **FACTS:** Defendant drove drunk and crashed his truck into Victim as Victim was crossing the street in a motorized wheelchair. After multiple weeks in the hospital, Victim was removed from life support and he died.

- **ISSUE:** Defendant argued that the evidence did not show Victim died from his act, uninterrupted by an outside event, and only showed great bodily harm. Specifically, he argued that Victim was negligent when he crossed the street and that his family's decision to remove him from life support relieved Defendant of liability for the death.

- **HELD:** Sufficient evidence based on witness testimony of another driver who said she screamed and honked her horn to try and warn of the danger, that the jury could have reasonably concluded that Defendant could have avoided the collision if sober, and that medical experts all testified that blunt force trauma from the accident is what caused Victim's death.

Agg Assault (DW); Firearm Enhancement

Sufficiency: Aggravated assault (DW) and corresponding firearm enhancement

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- **ISSUE:** Defendant argued that evidence was insufficient that he assaulted his friend with the gun.

- **HELD:** Friend's testimony that Defendant pointed the gun at her twice was sufficient for the assault charge and firearm enhancement.

CSC/CSP

Sufficiency: Criminal sexual contact and penetration

State v. Harold Atencio, __-NMSC-__ (No. A-1-CA-38286, June 22, 2021).

- **FACTS:** Defendant was convicted of one count of CSPM and 21 counts of CSCM. The police identified him as a suspect and invited him to come to the police department to discuss a previous case. After being orally advised of his *Miranda* rights, Defendant admitted to the charges in this case.

- **ISSUE:** Defendant claimed that there was insufficient evidence to support his convictions.

- **HELD:** Supreme Court found that *Miranda* warnings were insufficient and ordered new trial. New trial was allowed, however, because there was sufficient evidence based on: (1) testimony of Child/Victim; (2) testimony of Victim's parents that Defendant lived next door during the period of abuse; and (3) Defendant's own statements.

Attempted 2nd-degree CSCM

Sufficiency: Attempt to commit second-degree criminal sexual contact of a minor (under 13)

State v. Gerald Notah, __-NMCA-__ (No. A-1-CA-38623, Aug. 26, 2021).

- **ISSUE:** Defendant claimed insufficient evidence that he intended to touch Victim on an unclothed intimate part.
- **HELD:** Defendant's conduct - partially undressing Victim, masturbating next to her, touching her, and lying down next to her while masturbating and touching her, allowed jury to reasonably conclude that he intended to touch her unclosed intimate parts.

Burglary of a Dwelling

Sufficiency: Burglary of a dwelling

State v. Albert Dell Shelby, __-NMCA-__ (No. A-1-CA-38225, Sep. 9, 2021).

- **FACTS:** Defendant was convicted of burglary of a dwelling.
- **ISSUE:** Defendant claimed that house was under construction and did not have electricity or running water, and was not "customarily used" as "living quarters" as required by UJI 14-1631 NMRA (defining "dwelling house").
- **HELD:** The evidence showed the house was a structure with an enclosed, finished exterior, used intermittently for habitation in a regular way, and the purpose of the house was for habitation. This evidence, on balance, was sufficient to support conviction for burglary of a dwelling house.

Tampering With Evidence

Sufficiency: Tampering with evidence

State v. Daryl Rodriguez, __-NMSC-__ (No. S-1-SC-38080, Nov. 1, 2021) (dispositional order).

- Supreme Court dispositional order reversing the Court of Appeals and reinstating Defendant's conviction for tampering with evidence. The Court found that there was sufficient evidence of "'an overt act with respect to the evidence in question' from which the jury could infer Defendant's specific intent to tamper with evidence when it presented testimony that after shooting the victim, Defendant threw the gun before fleeing the scene." The Court also stated that "our case law needs no further explanation or definition of the term 'hid' under the circumstances of this case."

(In)sufficiency: Tampering with evidence

State v. Shannon Dwayne Jackson, __-NMCA-__ (No. A-1-CA-38218, Aug. 19, 2021).

- **FACTS:** When speaking to Defendant, who was the passenger in a car, officers saw that his pocket contained a large baggie with smaller baggies inside. When they tried to restrain him, he resisted, pulled the large baggie out, and threw it to the driver.

- **ISSUE:** Defendant claimed insufficient evidence of tampering with evidence because his act of "throwing baggies of crack cocaine in plain view of multiple police officers" does not satisfy any of the prohibited acts in NMSA 1978, Section 30-22-5.

- **HELD:** The State conceded that the evidence was insufficient and the Court of Appeals agreed because it occurred in view of the officers, so there was no destruction, alteration, or concealment.

JNOV

Sufficiency and JNOV

State v. Julian Martinez, __-NMSC-__ (No. S-1-SC-37938, Nov. 1, 2021).

- **FACTS:** Defendant was convicted by a jury of CSP and battery against a household member. The district court accepted the verdicts. Two days later, the court vacated the convictions, concluding that the State failed to establish that Defendant was the person who committed the crimes.

- **ISSUE:** Can a district court review the sufficiency of the evidence *after* the jury returns its verdict?

- **HELD:** Yes. While district courts cannot take motions for directed verdict under advisement, it retains the ability to determine sufficiency of the evidence so long as it retains jurisdiction over the case. The State, however, may appeal this determination. The Supreme Court also referred this matter to the Rules of Criminal Procedure for State Court Committee to draft rules regarding the procedure for postverdict judgments of acquittal.

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What should a prosecutor do if the district court vacates a jury conviction based on insufficient evidence?

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Evidentiary Issues

Evidentiary Issues

- Relevance and Prejudice: Rules 11-401, -403, and -404
- Witnesses: Rules 11-608 and -609
- Opinions & Experts: Rules 11-701, -702, and -707
- Hearsay: Rules 11-801 and -803
- Authentication: Rule 11-901
- Harmless Error

Relevance and Prejudice:

Rules 11-401, -403, and 404

Rules 11-401 and -403: Did district court abuse its discretion in admitting video of Defendant in interrogation room?

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- W arrives office before D does. D is acting weird, goes to use bathroom. V arrives, says that D invited him over. In bathroom, weird noises - grunting, angry, one-way convo in strange voice. D comes out and keeps acting weird: “scary,” hiding face, grunting. D suddenly shoots V.
- Trial court admits pre-interrogation video showing D acting weird. Cuts off at the beginning of the interview because he invoked his right to remain silent.

Did district court abuse its discretion in admitting video of Defendant in interrogation room?

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- D argument - 401: irrelevant, 403: relevance substantially outweighed by risk of unfair prejudice, cumulative
- Highly relevant: W testified he was acting weird, shows that she described accurately, goes to mental state which is relevant for 1st degree murder
- Not substantially outweighed: would have to be shocking or appeal to emotion, not needlessly cumulative. No abuse of discretion

Rule 11-404(B): Did district court abuse its discretion in admitting evidence of Defendant feigning injury during prior encounter with police?

State v. Davon Lymon, 2021-NMSC-021, 488 P.3d 610.

- Lymon was driving a motorcycle and Officer Webster stopped him. Webster drew his weapon and stepped on Lymon's foot to control him. Webster then holstered his weapon and tried to handcuff Lymon. Lymon complained of shoulder pain and leaned away. Nearly a minute after Webster holstered his weapon, Lymon opened fire, killing Webster.

- Prior incident: traffic stop, officer ordered to put hands behind back, feigned asthma attack and then ran off

Did district court abuse its discretion in admitting evidence of Defendant feigning medical injury during prior encounter with police?

State v. Davon Lymon, 2021-NMSC-021, 488 P.3d 610.

- Court initially excluded the prior incident. Then Lymon claimed self-defense. State argued that prior incident was admissible under 404(B) to show that he was acting according to a plan to escape, and not in self-defense.
- No abuse of discretion - relevant to self-defense claim (not just character or propensity) and not outweighed by prejudicial value
- Note the implicit 403-like balancing under 404(B)

Witnesses: Rules 11-608 and -609

Rule 11-608(B) (and 11-403 and -404(B)): did district court abuse its discretion in denying Defendant opportunity to cross-examine witness about falsely claiming she was kidnapped when she was 13 y.o.?

State v. Davon Lymon, 2021-NMSC-021, 488 P.3d 610.

- Witness was on motorcycle during traffic stop and murder
- When she was 13, falsely claimed that she had been kidnapped. D: should be able to impeach under 608(B), which allows questioning about specific conduct if probative of character for truthfulness
- Court barred D from cross examining about this under 404(B) - it would just be propensity - and 403 - more prejudicial than probative.

Did district court abuse its discretion in denying Defendant opportunity to cross-examine witness about falsely claiming she was kidnapped when she was 13 y.o.?

State v. Davon Lymon, 2021-NMSC-021, 488 P.3d 610.

- 608 Factors:
  - witness testimony crucial or unimportant?
  - Is the prior act relevant to truthfulness?
  - How long ago did the prior act occur?
  - Will hearing about the prior act be time-consuming or distracting to the jury?
  - Will the prior incident unfairly humiliate the witness or unduly prejudice the proponent?

Did district court abuse its discretion in denying Defendant opportunity to cross-examine witness about falsely claiming she was kidnapped when she was 13 y.o.?

State v. Davon Lymon, 2021-NMSC-021, 488 P.3d 610.

- No abuse of discretion.
  - Probative value was minimal; unclear if she told the story to police or just to a friend
  - Happened eight years ago
  - Would have been distracting because it raised a whole set of side issues: witness claimed that it was just a joke played on a friend.
  - D was able to cross about other instances of lying and refusing to cooperate

Rule 11-609: Did district court abuse its discretion in admitting evidence of prior fraud conviction?

State v. Davon Lymon, 2021-NMSC-021, 488 P.3d 610.

- D charged with, among other things, forgery. He chose to testify. He had 18 year-old fraud and forgery convictions
- Rule 609(B): can use a felony conviction that happened more than 10 year ago if its probative value substantially outweighs its prejudicial effect and proponent gives notice.

Rule 11-609: Did district court abuse its discretion in admitting evidence of prior fraud conviction?

State v. Davon Lymon, 2021-NMSC-021, 488 P.3d 610.

- District court permitted State to impeach with fraud, but not forgery.
- Both were pretty relevant: crimes involving dishonesty, and he put his credibility at issue. But mention of prior forgery conviction would be too prejudicial for current forgery charge
- No abuse of discretion.

Opinions & Experts: Rules 11-701, -702, and -707

Rules 11-701(B) and -702: Did the district court abuse its discretion in admitting testimony that a video showed the defendant holding gun?

State v. Matthew Chavez, 2021-NMCA-__ (No. A-1-CA-37888, Oct. 1, 2021).

- D attempts to rob V, V pulls a gun and blocks D in his car, D pulls gun and shoots V. Recurring issue: did D have a gun when he attempted to rob V? Important for voluntary manslaughter and reasonableness of V's response.

- Detective (who wasn't an eyewitness) walked through surveillance video with the jury. Opined that D had a gun when he attempted to rob V: "training and experience" led her to believe that dark object in D's hand could only have been a gun

Did the district court abuse its discretion in admitting testimony that a video showed the defendant holding gun?

State v. Matthew Chavez, 2021-NMCA-__ (No. A-1-CA-37888, Oct. 1, 2021).

- CoA: abuse of discretion to allow the officer to opine about whether video showed D carrying a gun.
- Opinion testimony - both lay and expert - is only admissible if it will help the jury to determine a fact at issue. Opinion testimony about what a video shows is helpful only if the witness is more likely than the jury to identify something through, ex. special training

Did the district court abuse its discretion in admitting testimony that a video showed the defendant holding gun?

State v. Matthew Chavez, 2021-NMCA-__ (No. A-1-CA-37888, Oct. 1, 2021).

- No showing that the officer had special knowledge about whether that dark object was a gun. Contrast, e.x. when an officer could identify the type of gun based on training or experience.
- Jurors were just as well-positioned to determine what the dark object was

QUIZ TIME

State v. Jose Cabral, 2021-NMCA-__ (No. A-1-CA-36757, July 20, 2021)

NM's polygraph rule: 11-707 NMRA

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Rule 11-707 lets you introduce...

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Rule 11-707(D): Did district court abuse its discretion in excluding testimony of Defendant's polygraph expert for failure to provide prosecutor with a transcription and translation of exam before trial?

State v. Jose Cabral, 2021-NMCA-__ (No. A-1-CA-36757, July 20, 2021)

- Can have a polygraph examiner testify about a subject's truthfulness on a polygraph test. But there are a bunch of conditions that you need to fulfil.

- Have to give notice of intent to use it, including: "a copy of the audio or video recording of the entire examination, including the pretest interview, and, if conducted, the post-test interview;" 30 days before trial

Did district court abuse its discretion in excluding testimony of Defendant's polygraph expert for failure to provide prosecutor with a transcription and translation of exam before trial?

State v. Jose Cabral, 2021-NMCA-__ (No. A-1-CA-36757, July 20, 2021)

- Here: exam conducted in Spanish. Prosecution wanted to play portions of the exam during cross of the examiner, but couldn't get a translation for the jury.
- District court barred defense from admitting it because defense did not have it transcribed and translated, violating "spirit" of rule
- Reversible error. No requirement to transcribe and translate - could be extremely expensive. Important to case.

Hearsay: Rules 11-801 and -803

Rules 11-801(D)(2) and -803(3): Did the district court abuse its discretion in admitting an out-of-court statement?

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- Murder case: W arrives at office, then D. V arrives, and tells W that D invited him over.
- At trial, W testified that V told her that D invited him over.
- 801 - Definition of hearsay: out-of-court statement offered to prove the truth of the matter asserted

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Who was (or were) the declarant(s)?

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Did the district court abuse its discretion in admitting an out-of-court statement?

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- Two levels of hearsay: 1) D said to Victim “come over,” 2) Victim reporting that statement to W
- Rule 805: each statement has to be admissible

Did the district court abuse its discretion in admitting an out-of-court statement?

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- D said to V “come over”.
    - Who is the declarant?
    - Out of court statement?
    - Truth of matter asserted?
    - Exception or definitionally not hearsay?

- Assumed it was OOC and ATMA, but it is definitionally not hearsay
- Statement by a party offered against him - 801(D)(2)

Did the district court abuse its discretion in admitting an out-of-court statement?

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- Victim reporting that statement to W
    - Who is the declarant?
    - Out of court statement?
    - Truth of matter asserted?
    - Exception or definitionally not hearsay?

- Not admissible! Hearsay without exception.

- State: what about 803(3) - statement of declarant's then-existing state of mind?

Did the district court abuse its discretion in admitting an out-of-court statement?

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- No - can't use 803(3) to get in explanation of *why* declarant had a mental state. Can only use it to get in evidence of the mental state itself.

- Contrast:
  - "I'm so scared"
  - "I'm so scared because he hit me before"

- Error! But hold that thought!

Authentication: Rule 11-901

Rule 11-901(A): Did the district court abuse its discretion by admitting surveillance video?

State v. Alejandro Azamar-Nolasco, No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- Video from home surveillance showing man dressed in black entering the victim's house at time of murder.
    - No other W could say it was fair and accurate representation of what it depicts. Nobody saw the scene from that perspective at that time.
- How do you get the video in?

Did the district court abuse its discretion by admitting surveillance video?

State v. Alejandro Azamar-Nolasco, No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- 11-901(A) - to authenticate, need to show that evidence is what it purports to be. Pretty low bar.

- Two theories for admitting photographic or video evidence: pictorial and silent witness.

    - Pictorial: W testifies that it is a fair and accurate representation of what it represents.

    - Silent witness: (generally automated) camera can serve as witness itself. Generally, show that the video was created by a reliable process and has not been tampered with

Did the district court abuse its discretion by admitting surveillance video?

State v. Alejandro Azamar-Nolasco, No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- Satisfied 901(A):
  - V's daughter testified about the camera system generally - creates videos automatically triggered by movement. System uploads them, and she could view, but not edit. Had tested it.
  - Investigator: sent a preservation request to the company. Could view files, but not edit. Depicted the victim wearing the same clothing that she was found in.
- Note: be prepared to talk about things like computer-generated timestamps

Harmless Error

Was admission of evidence that gun was found in residence, even if abuse of discretion under 403, harmless error?

Shannon Dwayne Jackson, 2021-NMCA-__ (No. A-1-CA-38218, Aug. 19, 2021)

- D was arrested outside his home with 63 baggies of crack and $2,230 in cash.
- Later search of his home yielded a .38 handgun, a digital scale, and empty baggies

Was admission of evidence that gun was found in residence, even if abuse of discretion under 403, harmless error?

Shannon Dwayne Jackson, 2021-NMCA-__ (No. A-1-CA-38218, Aug. 19, 2021)

- D's argument: admitting the gun violated Rule 403.
  - The gun wasn't relevant to whether he was trafficking or just possessing, substantially outweighed by risk of unfair prejudice.
  - State used the gun to create the impression D was dangerous -> drug dealer

- CoA: Even if error, was harmless in light of all of the evidence

Was admitting out-of-court statements in a murder case harmless error?

State v. Steve L. Kramer, No. S-1-SC-37807 (N.M. Sup. Ct. Sep. 9, 2021) (non-precedential)

- Error to admit V said D said to come over. Could have been evidence of premeditation.
- But nobody really talked about it. IMPORTANT: state didn't, e.g., use it in closing.
- Viewed in context, lots of other evidence. Not reasonably probable that hearsay contributed to conviction. Note: "contributed" is actually a fairly low bar
- Think carefully about using iffy evidence in closing

Miscellaneous

Simpsons Wiki

Miscellaneous, Etc. is a shop in the Springfield Mall.

It sells various eccentric, largely tacky items like an electric nostril groomer, night-vision goggles, suede briefcase cases, a jacket with pictures of celebrities on it, and an electronic belt with impressive but generally useless functions like turn signals, a whistle, a saw, and a lie detector.

Misc.

- Dismissal under LR2-308
- Dismissal under IAD
- Severance
- Mistrial / New Trial
- Prosecutorial Comment (during closing argument)
- Sentencing / Probation / Etc.

Dismissal under LR2-308

WHEREAS, the Commission submitted a recommendation to this Court to approve a case management order that would adopt a new procedural rule that sets strict deadlines and implements procedural safeguards designed to avoid delay while ensuring the fair and speedy disposition of pending and future criminal cases in the Second Judicial District Court; and

NMSC Order No. 14-8300-025 (Nov. 6, 2014)

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- **What do you think of LR2-308? Effective in fairly speeding up case resolutions?**

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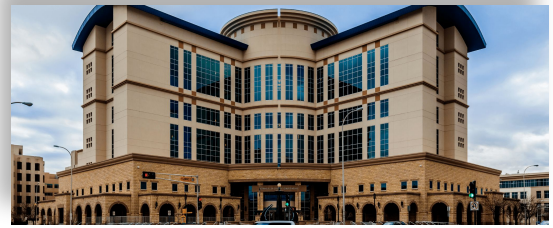
State v. Matthew Robert Stevens

__-NMCA-__ (No. A-1-CA-38179, Aug. 24, 2021)

- **Facts→** D prosecuted in 2nd JDC for violent crimes
  - 2nd has ***strict*** **local rule** for commencing trial:
    - **210 days→** Track 1 (D's case)
    - 300 days→ Track 2
    - 365 days→ Track 3
  - Ct. mistakenly set trial outside 210-day window; no one speaks
  - **Day 213→** D asks Ct. to dismiss as sanction
  - Ct. grants D's request on morning of trial→
    - LR2-308 time limits expired w/o extension
    - **Ct. had no jurisdiction; req'd by rule to dismiss w/ prejudice**
  - State appealed



2nd Judicial District Court

aka

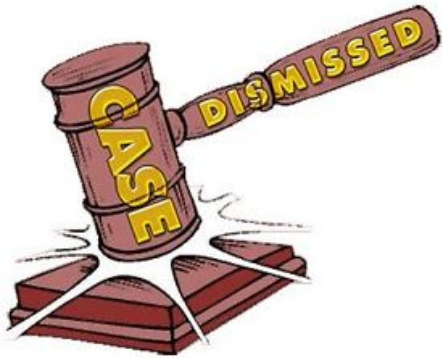
The Thunderdome

State v. Matthew Robert Stevens
__-NMCA-__ (No. A-1-CA-38179, Aug. 24, 2021)

- **Holding→ State wins!** *(kind of)*
    - **Rule ≠ jurisdictional**
        - Ct. doesn't lose jurisdiction to try Track 1 case on day 211
    - **Dismissal w/ prejudice not req'd when trial deadline passes**
        - Ct. can fashion appropriate sanction
- **The "*kind of*" part→** Remanded for appropriate sanction
    - *State says it's Ct.'s fault; no sanction appropriate*
- D's cert petition to NMSC pending

State v. Jessica McWhorter & Christian Castaneda
__-NMCA-__ (No. A-1-CA-38952 & -38967, Sep. 30, 2021)

- **Facts→** *Consolidated opinion, 2 similar cases*
  - LR2-308(B)(1)→ When D IC, arraignment held w/in **7 days after filing of bind-over order**

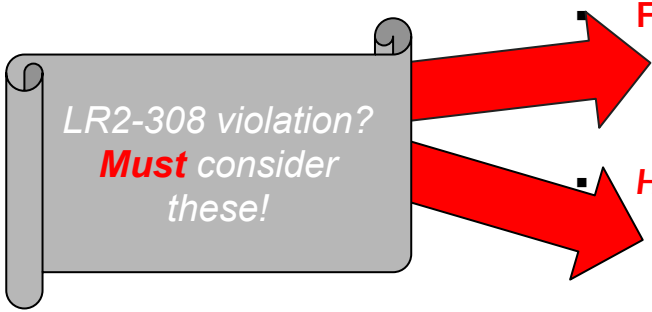


    - **WcWhorter→**
      - 2/26/20→ Waived PH; BO filed in Metro
      - 3/2/20→ BO filed in 2nd JDC
      - 3/10/20→ Arraignment in 2nd JDC
    - **Castaneda→**
      - 2/26/20→ BO filed in Metro
      - 3/2/20→ BO filed in 2nd JDC
      - 3/10/20→ Arraignment in 2nd JDC
  - Ds @ arraignment→ dismiss w/o prejudice b/c **more than 7 days passed since BOs filed in Metro**
    - Ct. agrees; State appeals

State v. Jessica McWhorter & Christian Castaneda
__-NMCA-__ (No. A-1-CA-38952 & -38967, Sep. 30, 2021)

- **Holding→ State wins!** *(kind of)*
  - State **violated rule**, but…
    [7 days triggered by filing BO in Metro, not DC]
  - **… Ct. abused discretion dismissing charges w/o prejudice as sanction**

  - If State violates LR2-308, Ct. req'd to consider in fashioning sanction:
    - **Factors listed in LR2-308(H)(6):**
      - *No dismissal*→ D danger to community; or
      - *No dismissal*→ FTC caused by extraordinary circumstances beyond parties' control
    - ***Harper / Le Mier* factors:**
      - State's culpability;
      - Prejudice to D; &
      - Availability of lesser sanctions



  - **Ct. dismissing case→** Must include **findings of fact** re consideration of these factors

State v. Jessica McWhorter & Christian Castaneda
__-NMCA-__ (No. A-1-CA-38952 & -38967, Sep. 30, 2021)

- **Remanded** to 2nd JDC for appropriate sanctions
- Ds' petitions for cert to NMSC **pending**

"Over the years, damage to the flooring has occurred from women's high heel marks."

Interstate Agreement on Detainers (IAD)

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Do New Mexico & Oklahoma share a border?

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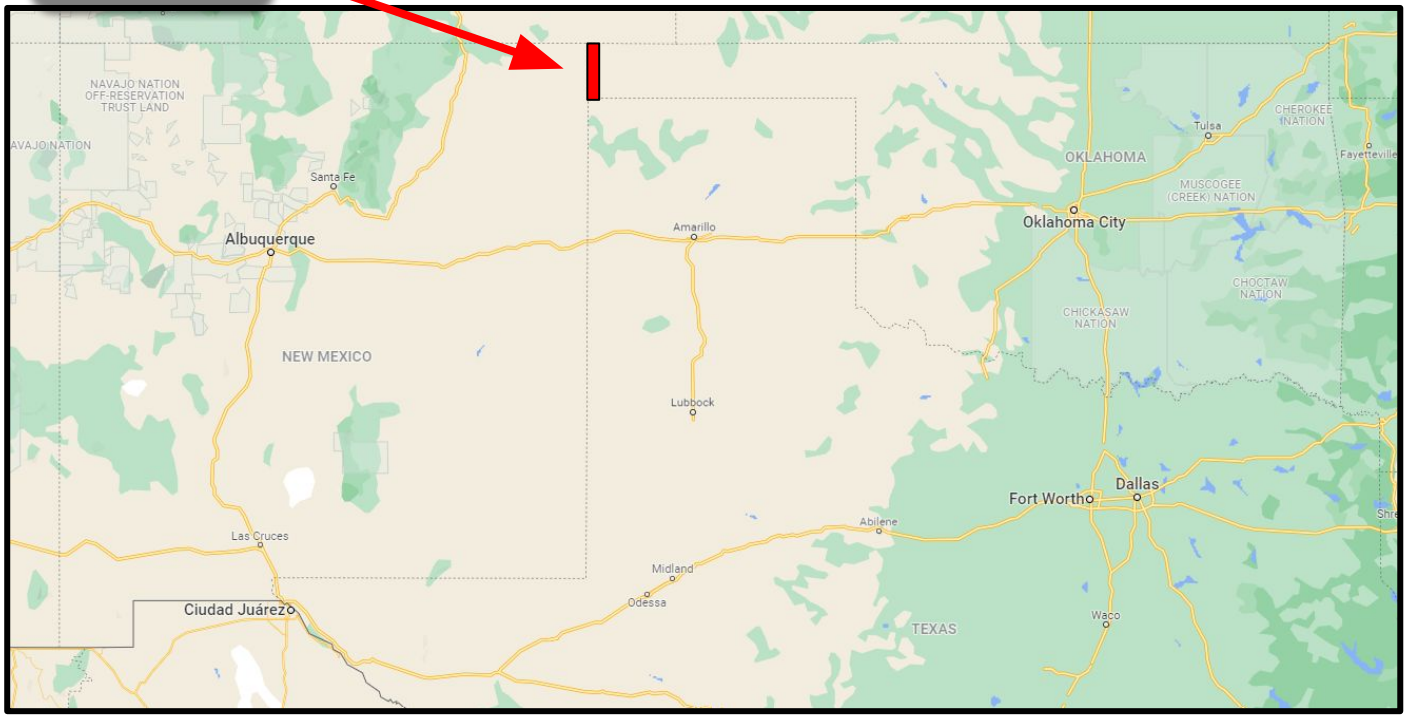
34 miles


NAVAJO NATION OFF-RESERVATION TRUST LAND
Santa Fe
Albuquerque
Amarillo
NEW MEXICO
Lubbock
Las Cruces
Ciudad Juárez
Midland
Odessa
Abilene
Fort Wortho
Dallas
Waco
TEXAS
Tulsa
OKLAHOMA
Oklahoma City
CHEROKEE NATION
MUSCOGEE (CREEK) NATION
CHOCTAW NATION
CHICKASAW NATION

State v. Matthew Chavez

__-NMCA-__ (No. A-1-CA-37888, Oct. 1, 2021)

- **IAD's speedy trial provision→**
  - *"if a prisoner demands disposition he must be brought to trial* ***w/in 180 days of the delivery of the demand unless there is a continuance*** *or tolling as determined by the court having jurisdiction of the matter. If he is not, his charges are to be dismissed with prejudice."*
  - IAD permits **reasonable continuances** if based on **good cause**
    - Good cause→ Ct. considers **totality of circumstances**

State v. Matthew Chavez

__-NMCA-__ (No. A-1-CA-37888, Oct. 1, 2021)

- **Facts→**
  - D killed Tyler Lackey trying to rob Lackey @ ATM
  - D fled to OK; arrested for robbing Hastings & JCPenney w/ GF
  - Sentenced to 3 years in OK, extradited back to NM
- **Appellate facts→**
  - **6/22/17→** State filed agreement on detainers form (triggering)
  - **12/2017→** 180-day IAD deadline for trial
    - ***BUT*→** Before deadline, State asked Ct. to find **good cause** justified **extending deadlines**. Granted.
  - **9/2018→** Trial held 9 months after deadline
  - D→ Dismiss b/c trial outside 180 days & no good cause for continuance

6/22/17
IAD form filed

12/20/17 ***- IAD Deadline***

9/18 ***- Trial held***

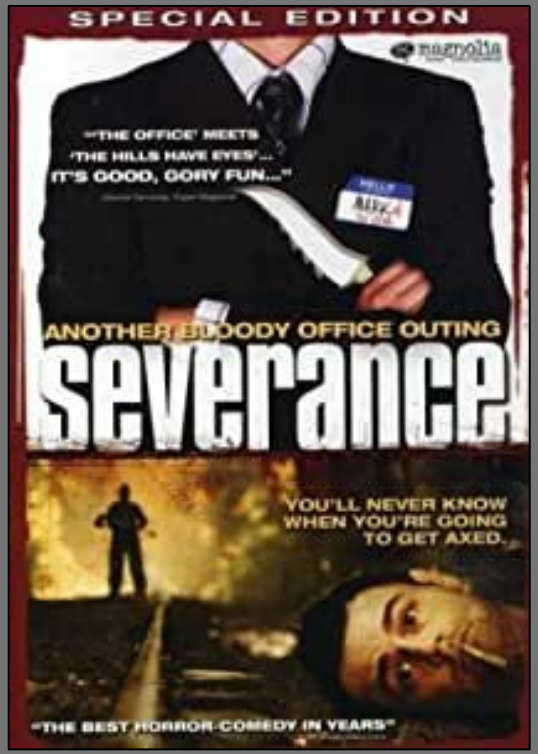
State v. Matthew Chavez

__-NMCA-__ (No. A-1-CA-37888, Oct. 1, 2021)

Tyler Lackey

- **Holding→ Good cause for IAD extension!**
  - Complex case
    - Changes of D's counsel resulted in delayed PTIs
  - Large volume of discovery
    - Over 100 Ws, expert
  - D never filed initial demand for speedy IAD disposition
- Remanded for limited briefing on IAD issue
  - Trial Ct. already responded w/ reasons for "good cause"
- State's petition for cert filed w/ NMSC

Severance



R 2006, Horror/Comedy, 1h 35m

66%
TOMATOMETER
91 Reviews

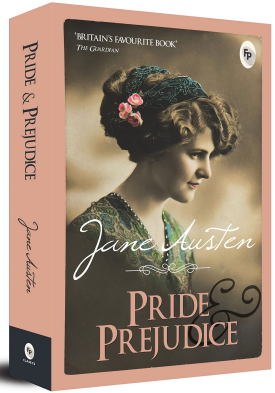
61%
AUDIENCE SCORE
100,000+ Ratings

Mandy Vanlandingham

State v. Alejandro Azamar-Nolasco

No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- **Facts→**
  - Raton resident Azamar-Nolasco stalked & killed Mandy Vanlandingham after 2-year romantic relationship ended
  - Convicted of agg. stalking, agg. burglary, & F1 willful & deliberate murder. D appealed.
- **Appeal→**
  - Ct. should've severed **agg. stalking** from **murder**



State v. Alejandro Azamar-Nolasco

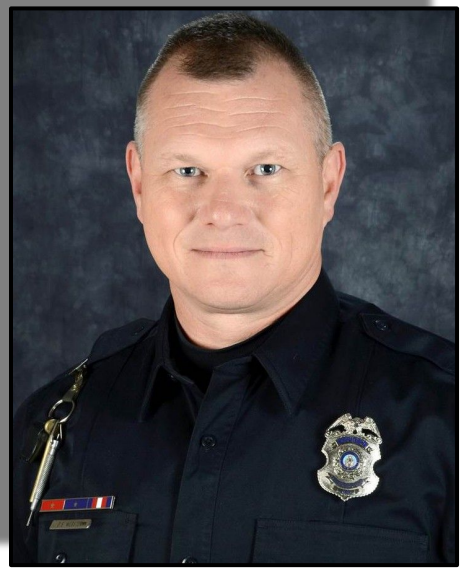
No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- **Appellate standard→**
  - Severance not disturbed unless joinder resulted in **actual prejudice**
  - **D's burden** to show
- **Holding→ no actual prejudice to D from joinder**
  - Prosecution didn't intertwine offenses & Vs in argument
  - D never challenged sufficiency of evidence as to any count
  - Crimes factually dissimilar
  - Not a long and complex trial→ 3 days, 19 Ws, 1 expert; "manageable"
- Evidence was **cross-admissible→**
  - D's harassment admissible under Rule 11-404(B)
- Remanded for resentencing *(vacating agg. burglary on DJ grounds)*

Mistrial / New trial

State v. Davon Lymon

__-NMSC-__ (No. S-1-SC-37729, May 27, 2021)



Dan Webster

- **Facts→**
  - Lymon killed APD Dan Webster during traffic stop in 2015
  - D's motorcycle passenger, Savannah Garcia, testified while IC

- **Appellate facts→**
  - During trial, alt. juror discussed live stream w/ husband at home, talking about Garcia's clothing *(civilian or jail clothes?)*
  - Alt. juror said other jurors were on their phones during breaks; doesn't know what they were doing

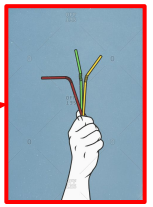
  - **D. Ct.→** No extraneous info reached jury. Denied D's motion for a new trial / add'l evidentiary hearing.
    - Jurors already knew Garcia was IC
    - Alt. juror didn't share info w/ other jurors
    - Alt. juror didn't participate in deliberations

State v. Davon Lymon

__-NMSC-__ (No. S-1-SC-37729, May 27, 2021)

- **Holding→**

  - No reasonable probability of **prejudice** to D
  - **No abuse of discretion in refusing mistrial / another evidentiary hearing** in which more jurors called in
    - Info duplicative of what alt. juror already knew
    - Garcia's clothing wasn't material to case
    - Extraneous info didn't reach deliberating jurors
    - Info about jurors on their phones searching for extraneous info = **speculative**



State v. Shannon Dwayne Jackson

__-NMCA-__ (No. A-1-CA-38218, Aug. 19, 2021)

- **Facts→**

  - Discovered mid-trial *(during cross of officer)* State **failed to disclose police report** documenting D's arrest
  - State obtained report, provided it same day
  - D→ Gimme a **mistrial**
  - **No mistrial**→ Ct. "**admonished**" State for failing to produce report
    - **No prejudice**→ Nothing in report was exculpatory. Report consistent w/ officer's trial testimony.
    - Allowed D to **recall** officers for further cross-ex

State v. Shannon Dwayne Jackson
__-NMCA-__ (No. A-1-CA-38218, Aug. 19, 2021)

Clovis alumnus Hank Baskett III
UNM 45 - Mizz 35
Sept. 10, 2005

- **Holding→**
  - **No abuse of discretion** in refusing mistrial, choosing instead to admonish State & allow W recall
  - D→ **no argument** as to why Ct.'s remedy **insufficient under the circumstances**
    - No prejudice to D
    - Report was cumulative

Prosecutorial comments during closing arguments

State v. Alejandro Azamar-Nolasco

No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- **Facts→**
  - Raton resident stalked & killed Mandy Vanlandingham after 2-year romantic relationship

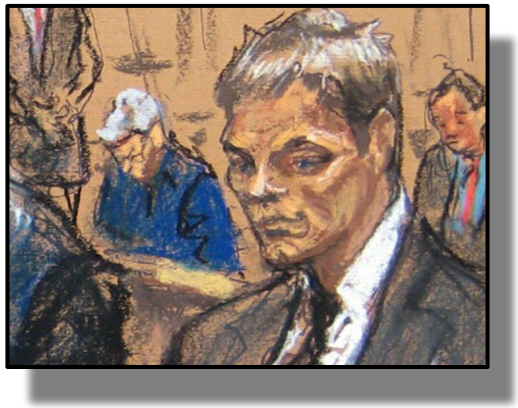
- **Appellate facts→**
  - State's case→ Played D's interview w/ D invoking right to counsel
  - D's closing→ Bolstered D's credibility by emphasizing D willingly spoke to police though not req'd to do so
  - State's rebuttal→
  - D didn't object

> [Defense counsel] said [Defendant] didn't have to go talk to police. That's right he didn't and when did he stop? As soon as the police said we put you at the house of [Victim]. Guess who stopped talking then, right? And everything that he said ever since doesn't line up with what everyone else has said—everyone he called to the stand to corroborate his story—doesn't match up. So I won't talk when I'm cornered, but when I'm not, and I get to talk, and I allow my attorney to correct my story, I'll say something. Okay. Good. Go ahead. And he did.

State v. Alejandro Azamar-Nolasco

No. S-1-SC-37760 (N.M. Sup. Ct. June 24, 2021) (non-precedential)

- **D's appellate argument→**
  - State improperly commented on D's right to counsel & remain silent
- **Holding→**
  - No objection→ reviewed for "**fundamental error**"
  - **D invited mistake** he now alleges was fundamental error
    - Before State commented on D's silence, D's counsel buttressed D's credibility w/ **willingness to talk to police & testify @ trial**
    - Based on willingness to talk, D asked jury to infer D was not guilty



Mystery man

slido

Who is that mystery man?

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

Probation & PSC

State v. Justin French

__-NMCA-__ (No. A-1-CA-37792, July 27, 2021)

- **Facts→**
  - D picked up **new case** while **on probation**
  - Before new case→ MTR b/c D FTA'd; State tacked new charges on as 2nd reason for PV
  - When Ct. arraigned D, it released him ROR on new case but continued NBHs on PV cases
  - D remained IC from arrest to sentencing on PV
  - **Ct. awarded 90 days PSC→ from arrest to arraignment & from conviction to sentencing**

- **D appealed→** wanted PSC for entire period he was locked up for PVs pending trial

State v. Justin French

__-NMCA-__ (No. A-1-CA-37792, July 27, 2021)

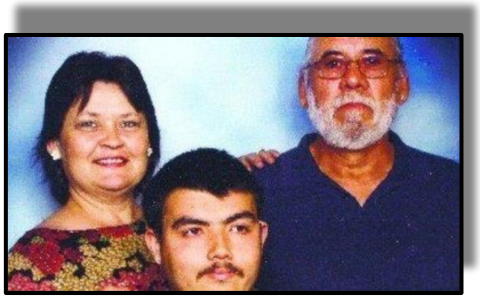
- **Holding→**
  - **NMCA agreed→ D given 293 more days PSC!**
  - **Issue→** *D's confinement related to D's conviction?* (3-factor test)
    - New case that led to PV had sufficient connection to confinement to warrant PSC in new case

- **Takeaway→** When D already on probation is held IC following arrest for new crime ***and*** State's PV revocation is based (at least in part) upon new crime, D will be entitled to PSC against new crime, even if not being held on new crime

Youthful offenders

State v. Nicholas Ortiz

__-NMSC-__, (No. S-1-SC-38151, May 27, 2021)



Lloyd, Dixie, & Steven Ortiz
(no relation to D)

- **Facts→**
  - 16-y/o D killed 3 people w/ pickaxe during burglary attempt
  - Convicted of F1 felony murder x 3; sentenced to 25 years DOC
  - D wanted amenability hearing before sentencing. Ct. denied his request.
    - D→ not having one b/c of "serious youthful offender" status violated protection against C&U punishment

- **Appellate facts→**
  - 3 categories of juvenile offenders:
    - **Delinquent offenders→** sentenced under Delinquency Act, given amenability hearing
    - **Youthful offenders→** sentenced under Delinquency Act, given amenability hearing
    - **Serious youthful offender convicted of F1 murder→** sentenced under Criminal Sentencing Act, no amenability hearing

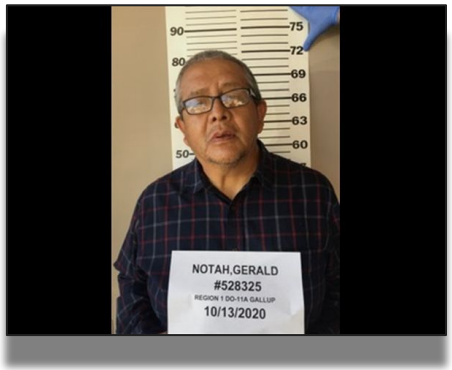
Ortiz

State v. Nicholas Ortiz

__-NMSC-__, (No. S-1-SC-38151, May 27, 2021)

- **Holding→**
  - SYOs like D **don't have to be afforded an amenability hearing**. Can be sentenced as adults w/o amenability determination.
    - **Constitutionally permissible** to exclude SYOs convicted of F1 murder from receiving amenability hearing while providing it to other categories of juvenile offenders
  - **Legislative policy→ Most kids shouldn't face adult consequences** due to their potential for rehabilitation & lesser culpability … **except if you commit F1 murder**. Do that and you're punished like an adult. That choice withstands judicial scrutiny.

Sentencing



State v. Gerald Notah

__-NMCA-__ (No. A-1-CA-38623, Aug. 26, 2021)

- **Facts→**
  - D molested wife's 7 y/o granddaughter
  - Convicted→ **attempt to commit** F2 CSCM under 13
  - Sentenced→ **sex-offender P&P**
- **Appellate facts→**
  - D & State agreed D's status as "sex offender" for P&P purposes was error
  - While CSCM triggers sentence to SO probation/parole, ***attempt* to commit CSCM doesn't**
    - **Takeaway→** Legislature needs to make **inchoate varieties of sex offenses also "sex offenses"** for P&P purposes

State v. Gerald Notah

__-NMCA-__ (No. A-1-CA-38623, Aug. 26, 2021)

- State also argued D's **sentence illegal** b/c Ct. imposed incorrect basic sentence
  - D→ State can't challenge this!

- **Bonus holding→**
  - Illegal sentence→ **"any party may challenge an illegal sentence for the first time on appeal"**
    - **Wrong**→ garden-variety F3 (3 years)
    - **Right**→ F3 for sexual offense against a child (6 years)

- Remanded for resentencing
- D's cert petition to NMSC pending

Probation violations

State v. Christopher Wheeler

No. S-1-SC-37709, N.M. Sup. Ct. June 10, 2021) (non-precedential)

- **Facts→**
  - D on probation
  - D shoplifted & assaulted JCPenney employee
  - **PVH→** State called D's PO & responding police, **but not JCPenney employee** who could've testified to new crimes
  - **PV judge→** D violated probation by violating State law. Unsat. discharge from probation (but didn't revoke CD).
- **Appellate facts→**
  - **NMCA→** Affirmed Ct.'s decision by memo decision. D granted cert.
  - **D→** Due-process rights violated by lack of confrontation @ PVH!

State v. Christopher Wheeler

No. S-1-SC-37709, N.M. Sup. Ct. June 10, 2021) (non-precedential)

- **Holding→** Testimony by **W w/ personal knowledge** usually req'd when allegation is D **committed new crime**
  - *Here→ Revocation order vacated*

- **Takeaway→** PVs based on new crime? **Prove up new crime w/ testimony from knowledgeable Ws**

D's subsequent criminal history

A-1-CA-37528	State v. C Wheeler	08/08/2018	Criminal Closed	
S-1-SC-37709	State v. Wheeler	06/04/2019	Rule 12-502 Certiorari Proceeding - Criminal Closed	
T-4-DV-2021-000108	Wheeler, Christopher 09/29/1989	01/12/2021 Bernalillo Metropolitan Valdez, Victor E.	Domestic Violence Final Closed	Battery (household member)
T-4-DV-2021-001028	Wheeler, Christopher 09/29/1989	03/31/2021 Bernalillo Metropolitan Valdez, Victor E.	Domestic Violence Final Closed	Battery (household member)
W T-4-CR-2021-003858	Wheeler, Christopher 09/29/1989	08/31/2021 Bernalillo Metropolitan Maldonado Malott, Brittany	Criminal In Warrant	Criminal Damage to Property (Under $1000)
M-49-FR-2021-01093	Wheeler, Christopher Arthur 09/29/1989	10/05/2021 Segura, David A.	Felony Pending	Receiving or Transferring Stolen Motor Vehicles (1st Offense)
M-49-VM-2021-00357	Wheeler, Christopher Arthur 09/29/1989	10/12/2021 Segura, David A.	Domestic Violence Misdemeanor Pending	Battery (household member)

Q&A; CONTACT INFO; RESOURCES

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

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

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NMAG website resources (nmag.gov)

Criminal Affairs > Criminal Appeals
- How to Take an Appeal Handbook
- DA Liaison List

Resources > Publications
- Search & Seizure Manual

NMAG App