NEW MEXICO OFFICE OF THE ATTORNEY GENERAL

APPELLATE LAW UPDATE
DISTRICT ATTORNEYS CONFERENCE
OCTOBER 23, 2019

WHAT WE DO

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

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

Criminal Appeals Division of the OAG

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

CRIMINAL APPEALS DIVISION

- We currently have one director, 15 staff attorneys, and two staff members
- Claire Welch in Albuquerque – handles state habeas, federal habeas, and much more – (505) 717-3573 and cwelch@nmag.gov
- Rose Leal in Santa Fe – handles all regular appeals and much more – (505) 490-4848 and rleal@nmag.gov

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OAG WEBSITE

- NMAG.GOV
- This presentation and the DA Liaison List will be under the Criminal Affairs/Criminal Appeals tab
- Previous appellate update presentations are also on the website

RULE 12-405 - OPINIONS

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

NEW MEXICO SUPREME COURT

- Published opinions and unpublished decisions from April 2019 to now
- Opinions and decisions are usually issued on Mondays and Thursdays
- Available on New Mexico Courts website: www.nmcourts.gov
- Available on New Mexico Compilation Commission website: www.nmcompcomm.us
- The opinion is emailed that day from our office to the prosecutor

NEW MEXICO COURT OF APPEALS

- Published opinions from April 2019 to now
- Rule 12-405 NMRA permits citations to unpublished opinions (memorandum opinions)
- Memorandum opinions and published opinions are faxed to the prosecutor
- All opinions, published and unpublished, are available on the New Mexico Court of Appeals website – https://www.nmcourts.gov/Court-ofAppeals/
- And the New Mexico Compilation Commission – www.nmcompcomm.us

CITATIONS

- No more NM Reporters – stopped at Volume 150
- Vendor-neutral citation form – Rule 23-112 NMRA
- Parallel citation to the New Mexico reports through Volume 150 is mandatory
- Parallel citation to the Pacific Reporter is discretionary
- EXAMPLE: *State v. Gallegos*, 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828 with the P.3d cite as optional

SUPREME COURT CLERK'S OFFICE

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

COURT OF APPEALS CLERK'S OFFICE

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

HOW TO TAKE AN APPEAL

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

DOCKETING STATEMENTS

- For a State's appeal, **trial counsel is responsible for filing the docketing statement – we do not do them for you**
- Rule 12-208 NMRA
- Any extension of time to file a docketing statement is filed with the Court of Appeals, not the district court
- Form letter goes out from our office when a notice of appeal is filed
- Include **all relevant facts** in the docketing statement
- Calendar notice is issued based on the record proper and docketing statement – don't just include the facts that are good for the State
- **New order from the COA – docketing statements will be rejected if they do not follow the rule. The COA is very active in rejecting DSs for failure to summarize all facts material to the issues presented**.
- **Sample docketing statement from COA at https://coa.nmcourts.gov/attorney-information.aspx**
- **DOCKETING STATEMENT IS FILED IN APPELLATE COURT AND SERVED ON THE DISTRICT COURT**

COA PILOT PROJECT

- Court is moving away from summary calendar and has proposed a pilot project which started this month in the 11th Judicial District
- Once the appeal is filed, the district court is to provide the entire record to the Court and parties
- Our Division would file a brief in chief as the first pleading in a State's appeal – no more docketing statements
- Only applicable to cases involving the LOPD
- If you're in the 11th, and planning on filing an appeal, call me!

HABEAS APPEALS

- Habeas cases – if State loses, the State has an automatic direct appeal to the Supreme Court under Rule 12-102(A)(3) NMRA
- File statement of issues in Supreme Court and we take it from there
- If habeas petitioner wins, he/she has to petition the Supreme Court for certiorari

IF YOU FILE APPEAL IN WRONG APPELLATE COURT

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

SUMMARY CALENDAR

- Rule 12-210 NMRA
- Common in the Court of Appeals
- Court files a calendar notice with a proposed disposition – Court only has the docketing statement and the record proper (i.e. the pleadings) to review.
- We will call you if COA proposes to reverse on a defendant's appeal or affirm on a State's appeal – generally, we need more facts
- Please respond to us, especially if the COA proposes to reverse on insufficient evidence. We don't know any additional facts beyond the docketing statement and what might be in the record proper

FILING IN THE APPELLATE COURTS

- All electronic filing – no other filing is accepted
- Everything is on Odyssey
- Supreme Court number format – S-1-SC-12345
- Court of Appeals number format – A-1-CA-12345
- Use 14-point type – Rule 12-305(C)(1) NMRA
- Docketing statements are generally the only document you will have to file in the appellate courts – there is no page limitation
- Other questions – please just call

NEW MEXICO SUPREME COURT OPINIONS and DECISIONS from April 2019 to now

- *Fry v. Lopez and Allen v. LeMaster*
- *State v. Aguilar*
- *State v. Baca*
- *State v. Burrows* (unpublished decision)
- *State v. Comitz*
- *State v. Gutierrez*
- *State v. Ortiz* (unpublished decision)
- *State v. Semino* (unpublished decision)
- *State v. Yancey*

COURT OF APPEALS OPINIONS FROM APRIL 2019 TO NOW

- *State v. Adams*
- *State v. Alvarado*
- *State v. Cain*
- *State v. Chavez*
- *State v. Costillo Jr.*
- *State v. Dorado*
- *State v. Edwards*
- *State v. Figueroa*
- *State v. Ford*
- *State v. Franco*
- *State v. J. Garcia*
- *State v. S. Garcia*
- *State v. Gonzales*
- *State v. Grubb*
- *State v. Jacob F.*
- *State v. Knight*
- *State v. L. Martinez*
- *State v. P. Martinez*
- *State v. Quintin C.*
- *State v. Radler*
- *State v. Stevenson*
- *State v. Willyard*
- *State v. Zachariah G.*

RULE 5-409 – PRETRIAL DETENTION HEARINGS

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

PRETRIAL DETENTION

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

APPELLATE JURISDICTION

- *State v. Adams*
- *State v. Baca*
- *State v. Willyard*

STATE'S RIGHT TO APPEAL – SECTION 39-3-3(B)

- ***State v. Brian Adams***, 2019-NMCA-043, 447 P.3d 1142
- State appealed district court's suppression of blood test in DWI prosecution
- Section 39-3-3(B)(2) "In any criminal proceeding in district court an appeal may be taken by the state to the [S]upreme [C]ourt or [C]ourt of [A]ppeals, as appellate jurisdiction may be vested by law in these courts ... within ten days from a decision or order of a district court suppressing or excluding evidence ..., if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."
- Def claimed the blood test wasn't "substantial proof of a fact material in the proceeding" because the State could proceed without it and rely on officer testimony to prove "impaired to the slightest degree"
- *State v. Gomez*, 2006-NMCA-132, held that the State could not appeal the exclusion of a blood test because it did not go to the "heart of the proof required to establish DWI."
- COA notes that neither of the other panel members in *Gomez* joined this opinion and instead Judge Fry joined Judge Bustamante's special concurrence making that the opinion of the Court. That concurrence held the State could not appeal once jeopardy had attached.
- COA reaffirms that the excluded evidence be "important or significant" and the blood results clearly meet that test.

APPEAL FROM DETERMINATION OF DANGEROUSNESS

- ***State v. Manuel Baca***, 2019-NMSC-014, 448 P.3d 576
- Def was charged with an open count of murder of his father and the district court found by clear and convincing evidence that he was dangerous and not competent
- Def appealed, challenging the sufficiency of the evidence
- Court questioned its jurisdiction and requested supplemental briefing
- N.M. Const. art. VI, § 2, provides that "appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court."
- Court concluded it had jurisdiction because the "potential lifetime deprivation of liberty is equivalent to a life sentence."

STATE'S CONSTITUTIONAL RIGHT TO APPEAL

- ***State v. Terrell Willyard*,** No. A-1-CA-36455 (Jun. 17, 2019)
- State appealed from district court's setting aside of jury's DWI verdict, granting of its own motion for new trial, and dismissing the case after concluding that the retrial was not supported by the evidence
- Article VI, Section 2 of the New Mexico Constitution provides that "an aggrieved party shall have an absolute right to one appeal."
- Def claimed the trial was unfair but failed to support his argument
- State has a "strong interest in enforcing a lawful jury verdict" and was therefore an aggrieved party

PRE-INDICTMENT DELAY

- ***State v. Joseph Grubb***, No. A-1-CA-36177 (Oct. 1, 2019)
- Def failed to report after a furlough and the State filed a motion to enforce the sentence in January 2012
- No further action until indictment in October 2014
- To show a denial of due process for pre-indictment delay, def has the burden to show (1) definite (not speculative) prejudice as a result of the delay and (2) the State intentionally caused the delay to gain a tactical advantage
- Def claims State had all the necessary evidence to charge him but withheld charges to keep him in custody and that he lost the ability to serve concurrent sentences
- Prejudice of ability to serve concurrent sentences is "entirely speculative" and Court does not consider the first prong

JURY SELECTION

- *State v. Dorado*

JURY SELECTION – *BATSON V. KENTUCKY*

- ***State v. Javier Dorado***, 2019-NMCA-037, 444 P.3d 1083
- Def claimed the State exercised its preemptory challenges in a racially discriminatory manner contrary to *Batson v. Kentucky*, 476 U.S. 79 (1986)
- State used three preemptory challenges against jurors with Hispanic surnames. Def objected and the court asked the prosecutor for a response.
- (1) demeanor/body language (2) young male from same area as the defendant (3) young female close to defendant's age from same area as defendant
- District court found the majority of the panel was Hispanic, the strikes had not been used improperly, and seven of the seated jurors were Hispanic
- COA stressed its deferential standard of review, relying on the district court's evaluation of the parties' "sincerity" and observations of the challenged jurors
- *Batson* analysis: (1) Def made a prima facie challenge which shifted the burden to the State to offer race-neutral reasons
- (2) Combination of age and residence was facially race-neutral and was not used as a "surrogate for racial stereotypes and socioeconomic status." Under *State v. Begay*, 1998-NMSC-029, body language can also be a facially neutral reason
- (3) Def did not come forward with evidence to show the prosecutor's explanation was baseless

DISCOVERY - SANCTIONS

- ***State v. Mario Ernest Ortiz***, No. S-1-SC-37127 (Aug. 15, 2019) (unpublished decision)
- State failed to get the results of the drug test to defense in a timely manner in a prosecution for trafficking cocaine and the district court excluded the evidence
- COA reversed and held (1) district court failed to hold a hearing to determine the reasons and the prejudice (2) def failed to prove prejudice and (3) the district court failed to consider a lesser sanction
- But, the COA "mechanically applied the [*State v. Harper*, 2011-NMSC-044, factors] without considering our recent clarification of the analysis of those factors in *Le Mier*, 2017-NMSC-017[]."
- State argued there was no prejudice at all to def but Court held "[p]romoting the efficient administration of justice is an important responsibility of our district court which is undermined by a party's failure to comply with discovery rules and orders."
- Prejudice to the court is as important as prejudice to the opposing party. Prosecutor repeatedly failed to come into compliance with the court's orders.
-

PRESERVATION OF ERROR – *BRADY* VIOLATION

- ***State v. Thomas Stevenson***, No. A-1-CA-35962 (Oct. 22, 2019)
- The victim's girlfriend testified favorably for the State to corroborate the theory that def did not act in self-defense
- After her testimony, but before the end of trial, she was arrested with fraud relating to her employment
- Def found out after trial and filed a motion for new trial
- However, def failed to preserve the issue. He filed a motion for new trial but on the theory of newly-discovered evidence. He did not cite to *Brady* or any of its principles
- Court recognizes that "nomenclature" of a motion and legal citations are not determinative of the issue raised
- But, here, there was nothing to alert the court to a *Brady* claim that the prosecutor or the prosecution team knew of the investigation leading to the girlfriend's arrest
- The only assertions were that APD arrested her and an employee of APD was at counsel table during trial
- "[M]erely alleging that possible impeachment information, entirely unconnected to the case at hand, was possessed by a law enforcement officer who also had no connection to the case at hand, does not implicate *Brady* to a sufficient extent to preserve such an argument for appeal."

PRESERVATION OF ERROR – BRADY VIOLATION (cont.)

- Also not fundamental error because no showing of the first prong that the prosecution suppressed evidence
- Def was also able to vigorously attack girlfriend's credibility at trial by citing to her differing accounts to various people – def had plenty of impeachment information to work with

WITNESSES

- *State v. Garcia*

EXPERT WITNESS – VOUCHING FOR VICTIM – PLAIN ERROR DOCTRINE

- ***State v. Sammy Garcia*, No. A-1-CA-35812 (May 23, 2019)**
- Nurse practitioner witness in child sexual abuse case testified at length about victim's account of abuse, repeated many of the victim's statements, and that victim had identified defendant as her assailant
- Witness concluded that "the thing that [victim] said had happened to her had, in fact, happened to her" and that the lack of physical injuries was consistent with her account
- Def counsel made no objection and questioned her on CX about victim's statements
- On redirect, prosecutor asked which of the victim's statements were most "compelling" and the witness recounted the details and opined again that the victim was truthful
- Analyzed for plain error because it is an evidentiary matter which "affects substantial rights" but was not brought to the district court's attention
- State conceded on appeal that the testimony was error but argued that it was not plain error because defendant acquiesced by CXing the witness on it
- Court disagrees and won't "pit" a def's right to CX against his ability to have harmful evidentiary matters reviewed under the plain error doctrine

FOURTH AMENDMENT and ARTICLE II, SECTION 10

- *State v. Edwards*
- *State v. Martinez*

FOURTH AMENDMENT – PREEXISTING ARREST WARRANT AS INTERVENING CAUSE

- ***State v. Dimitrice Edwards***, A-1-CA-37208 (Aug. 22, 2019)
- Police heard shots fired call, officer positioned his vehicle to prevent traffic from leaving the area, and approached the individual vehicles to ask what they had seen or heard
- Occupants in def's vehicle acted suspiciously – officer asked for ID on all occupants and discovered def had outstanding warrant
- COA assumed without deciding that the officer lacked reasonable suspicion for the stop but held the preexisting arrest warrant operated to excuse any preceding mistaken or unlawful police action

FOURTH AMENDMENT – PREEXISTING ARREST WARRANT AS INTERVENING CAUSE (cont.)

- Relied on *Brown v. Illinois*, 422 U.S. 590 (1975), and the three factors of (1) lapsed time between illegality and acquisition of evidence (2) presence of intervening circumstances and (3) flagrancy of official misconduct
- The valid warrant was an "intervening cause that attenuated [def's] unlawful seizure from evidence obtained after his arrest."
- As two factors one and three, the lapsed time was short but the police misconduct was not flagrantly illegal and was undertaken to investigate criminal activity
- CERT PETITION STILL PENDING

FOURTH AMENDMENT – ILLEGAL SEARCH

- ***State v. Liborio Martinez***, No. A-1-CA-36069 (July 25, 2019)
- Def was stopped for speeding and officer opened the passenger front door seconds into the stop – officer then smelled alcohol and eventually arrested def for DWI
- Officer's concern was that def might drive away because def did not stop right away
- This was a search without a warrant and officer's conduct did not fit into any exceptions to the warrant requirement – exigent circumstances, search incident to arrest, inventory search, consent, hot pursuit, open field, or plain view
- COA recognized there are cases that allow for such an entry but they involve facts indicating a legitimate safety concern which made a protective search justifiable

FIFTH AMENDMENT

- *State v. Alvarado*

FIFTH AMENDMENT ISSUES – DEFENDANT'S STATEMENTS

- ***State v. Gabriel Alvarado***, 2019-NMCA-051, 448 P.3d 621
- State's appeal from suppression of def's written statements
- Def is a certified massage therapist and allegedly digitally penetrated his patient
- He agreed to meet with police, was read his rights, and clearly invoked his right to counsel
- Def asked for a paper and pen and the officer left the room
- Def wrote "I tell them everything; I go to jail; I have to self-destruct and that sucks. But that's my own fault. I'm a product of my decisions. So I can handle the results . . . and must find my way back to God."
- When he left the room, he was asked if he wanted to take his notes and he said no
- The statements were clearly volunteered and made after the police interview ended
- Def was not prompted to make the statements, he knew he was being observed by cameras, and there was no basis to find the officer should have anticipated the statements

EVIDENTIARY RULINGS

- *State v. Burrows* (unpublished decision)
- *State v. Costillo, Jr.*
- *State v. Garcia*
- *State v. Gutierrez*
- *State v. Martinez* (unpublished)
- *State v. Stevenson*

ADMISSION OF TELEPHONE CONVERSATION

- ***State v. Kenneth Allin Burrows***, No. S-1-SC-36475 (Jun. 3, 2019) (unpublished decision)
- Def convicted of first-degree murder – his girlfriend lured the victim outside and def shot him
- Recorded phone conversation between def and his girlfriend was admitted and def objected on hearsay and Confrontation Clause grounds
- Def concedes that his statements are not hearsay but claims his girlfriend's are
- But her portion of the conversation was a "reciprocal and integrated utterance between the two parties." *State v. Castillo-Sanchez*, 1999-NMCA-085, ¶ 23. Absent her portion of the conversation, there is no context for def's statement

EVIDENTIARY RULINGS – COMMENT ON DEFENDANT'S RIGHT TO REMAIN SILENT

- ***State v. Leo Costillo, Jr.***, No. A-1-CA-36032 (Sept. 26, 2019)
- Def was convicted of 21 counts of CSPM, one count of attempt to commit CSPM, and one count of intimidation of a witness
- The six-year-old victim was repeatedly raped by def, her grandmother's husband
- During a non-custodial, pre-arrest interview, the def declined to answer any questions and asked several times to end the interview
- COA reviewed the split of authority on use of pre-arrest, pre-*Miranda* silence and agreed with the courts that held that such silence "once invoked, may not be used as substantive evidence of guilt . . . at trial."
- COA held that the "pervasive" references to def's invocation of his right to remain silent "do[] not withstand constitutional scrutiny." Prosecutor argued def "didn't deny" the charges, played the tape in which def invoked his right, asked the detective if the def said why he might be falsely accused of a crime, and CX-ed the def on why he didn't profess his innocence to the jury
- COA held "the prosecutor's theory of the case suggestively and unabashedly rested on the premise that Defendant's failure to proclaim his innocence in the face of [the victim's] accusations insinuates – if not commands – a conclusion of guilt."
- NO OBJECTIONS were made but COA relied on fundamental error to reverse

SCIENTIFIC FOUNDATION – RADAR TECHNOLOGY – *DAUBERT*

- ***State v. Juan Garcia***, No. A-1-CA-36856 (Oct. 17, 2019)
- Speeding conviction under Section 66-7-301
- Def claims the State failed to present an adequate scientific foundation to establish the reliability of the radar technology
- Two radar readings showed 78 in a 65 mph zone
- Def claimed radar is scientific evidence that requires expert testimony
- NM courts have affirmed courts' discretionary authority to avoid unnecessary reliability proceedings where the type of science has generally been accepted
- For six decades, courts have recognized the general reliability of radar as a device for measuring speed
- Given this, the burden was on the def to show some reason to doubt the reliability and he did not do so
- State also laid an adequate foundation through the officer's testimony on his experience and the operation of the radar

SPOUSAL COMMUNICATION PRIVILEGE ABOLISHED

- ***State v. David Gutierrez II***, No. S-1-SC-36394 (Aug. 30, 2019)
- First-degree murder conviction in which def made incriminating statements to two of his ex-wives. He attempted to invoke the spousal communication privilege to prevent them from testifying against him at trial
- Rule 11-505(B) provides that "[a] person has a privilege to refuse to disclose, or to prevent another from disclosing, a confidential communication by the person to that person's spouse while they were married."
- NMSC has constitutional authority to recognize or limit evidentiary privileges
- Such privileges are "in derogation of the search for truth" and not "lightly created nor expansively construed."
- "[W]hile the efficacy of the privileges protecting the communications between layperson and professionals seems quite sensible and self-evidently efficacious, the efficacy of the spousal communication privilege to protect and foster frank communication between spouses appears, in contrast, quite doubtful."
- Its justifications are little more than "soaring rhetoric and legally irrelevant sentimentality" and its "misogynistic history" is "obvious and odious."
- Its applicability in this case is illustrative – def did not tell his wives because he required a confidante but because he was bragging about it.
- DISSENT: (1) refer to rules committee (2) case could be affirmed without abolishing the privilege and (3) no other state has done this and the privilege protects the marital bond.

SPOUSAL COMMUNICATION APPLIED

- ***State v. David Gutierrez II***, No. S-1-SC-36394 (Aug. 30, 2019)
- Abolishment applies prospectively only
- District court erred in finding def waived the privilege under Rule 11-511 because def also told third parties.
- But the waiver only applies to the actual statement, not the spouse's disclosure of the subject matter of the statement
- Nicole: (1)"not to worry" when she told him the victim had raped her when she was a child (2) after the murder, def told her he "took care of it" and needed help finding the shotgun shell and (3) he threatened her life if she told anyone.
- Third statement is an unprotected threat which was admissible. The other two were harmless error because Nicole also testified about seeing the corpse and helping def find the shotgun shell.
- Evelyn: she heard his parents threaten to "send him away for the rest of his life." When she asked about it, def disclosed the murder. Admissible because def failed to prove by preponderance of the evidence that he and Evelyn were married when this communication was made.

EVIDENTIARY RULINGS – 404(B)

- ***State v. Ray Martinez***, No. A-1-CA-35433 (Oct. 1, 2019) (non-precedential)
- Def was convicted of three counts of first-degree CSPM on six-year-old
- Mom discovered pornography on her computer the day after def babysat Victim.
- State argued it was relevant to explain why mom became suspicious of def, why she questioned Victim about def, and why def wasn't allowed to babysit again
- Evidence that def viewed that pornography was allowed – mother's testimony on it was brief and isolated and provided "context" on why she did not allow def to babysit again

BEST EVIDENCE RULE – TEXT MESSAGES

- ***State v. Thomas Stevenson***, No. A-1-CA-35962 (Oct. 22, 2019)
- State introduced testimony from the victim's nephew about text messages he'd seen on the victim's phone the day of the shooting. Nephew could ID the sender as def and at least one was threatening
- Def objected that the best evidence was the text messages themselves, rather than second-hand testimony
- Detective testified about efforts to obtain the original writings – phone was obtained and analyzed by experts but could not be unlocked due to a swipe passcode
- Thus, the inaccessibility of the messages was functional equivalent of loss or destruction of the messages and the court did not abuse its discretion in admitting the testimony

EVIDENCE OF PRIOR VIOLENT CONDUCT

- ***State v. Thomas Stevenson***, No. A-1-CA-35962 (Oct. 22, 2019)
- Def wanted to introduce evidence of specific violent conduct of the victim in the past in support of his self-defense and defense of others claim
- A def may present evidence of specific prior violent acts by the victim, if the def was aware of those acts at the time to establish his "subjective apprehension" of the victim
- State relied on Rule 11-404(A)(2)(b)(ii) to argue it could then respond by a litany of def's own prior violent acts
- State's reading of 11-404(A)(2)(b)(ii) is not supported – it allows only for reputation or opinion evidence because def's past acts of violence do not prove an essential element of the crime because violence is not an element of murder or self-defense
- No prejudice because def was allowed to introduce some of his evidence and the State was allowed to introduce almost none other than def's prior convictions
- Importantly, def was not deprived of his ability to present his chosen defense.

STATUTORY CONSTRUCTION/SUFFICIENCY OF EVIDENCE

- *State v. Adams*
- *State v. Baca*
- *State v. Chavez*
- *State v. Comitz*
- *State v. Figueroa*
- *State v. Ford*
- *State v. Franco*
- *State v. Garcia*
- *State v. Gonzales*
- *State v. Jacob F.*
- *State v. Knight*
- *State v. Martinez*
- *State v. Quintin C.*
- *State v. Willyard*
- *State v. Zachariah G.*

STATUTORY CONSTRUCTION - DWI

- ***State v. Brian Adams***, 2019-NMCA-043, 447 P.3d 1142
- Def admitted to drinking and taking prescription drugs
- Transported to hospital where licensed EMT – who was a hospital employee – did a blood draw
- Section 66-8-103 provides "[o]nly a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test."
- District court relied on the "categorical holding" of *State v. Alfredo Garcia*, 2016-NMCA-044, that a licensed EMT was not qualified under § 66-8-103
- State agreed being an EMT alone was not enough, but she had additional experience and training to draw blood as a lab technician or technologist
- She was not a licensed phlebotomist but had done hundreds of blood draws for medical lab testing and at the request of law enforcement
- She also testified about the differences between drawing blood for medical lab testing and drawing blood for law enforcement

STATUTORY CONSTRUCTION – DWI (cont.)

- *Garcia* involved a head-on collision where the EMT who was treating the def in the ambulance drew his blood. She did not read the SLD kit instructions or use the needle included in the kit because she did not want to compromise def's care
- But this EMT's additional training and experience – combined with her EMT license – qualified her as lab technician or technologist under the statute
- There is no statutory or regulatory definition of "laboratory technician" in NM but COA relies on other states to find that she qualifies so long as a hospital or physician finds she is qualified to perform blood draws in accordance with approved medical practice
- The title is not determinative – controlling factors are assigned duties, skill, training, and experience.
- "Our decision ensures the safety of defendants and the reliability of blood samples by limiting those authorized to draw blood to qualified individuals who have been approved by the medical community to perform such tasks."

STATUTORY CONSTRUCTION – DWI (cont.)

- Three other unpublished cases relied on *Adams* to reverse exclusion of blood draws and held the EMTs were sufficiently trained and experienced to be considered "laboratory technicians" under Section 66-8-103
- *State v. Corey Talk*, A-1-CA-36378 (May 21, 2019)
- *State v. Dallas Riley*, A-1-CA-36863 (May 21, 2019)
- *State v. Eugene Garcia*, A-1-CA-36839 (May 21, 2019)
- ***BUT*** cert has been granted on all these cases.

SUFFICIENCY OF EVIDENCE – FIRST-DEGREE MURDER

- ***State v. Manuel Baca***, 2019-NMSC-014, 448 P.3d 576
- Def's appeal from dangerousness determination for first-degree murder
- Evidence was clear and convincing on deliberation
- Def claimed he was in a "delusional frenzy" and could not have formed specific intent to kill his father
- But his incriminating statements showed he was aware of his actions; he armed himself with a pickaxe; he was angry with his father; he struck his father with multiple blows indicating a prolonged attack; and he tried to deceive authorities and evade prosecution

STATUTORY CONSTRUCTION – SEX OFFENDER PROBATION

- ***State v. Thomas Chavez*,** No. A-1-CA-35994 (July 29, 2019)
- Def, a convicted sex offender, appealed the order that his supervised probation be continued for an additional 2 ½ years following his initial five-year probationary term
- Def argued the statute – NMSA 1978, § 31-20-5.2(B) – is void for vagueness and/or the State failed to meet its burden to prove to a reasonable certainty that he should remain on probation
- The standard of "reasonable certainty" is typically used in the context of probation violations and has been previously held to mean evidence "that a reasonable and impartial mind would be inclined to conclude that the defendant has violated the terms of his probation."
- The phrase "should remain on probation" is also understandable and guided by the factors in Section 31-20-5.2(A) which govern the court's initial determination on the terms and conditions of sex offender probation
- Court did not abuse its discretion in continuing this def's probation where there was evidence of two violations involving his GPS

STATUTORY CONSTRUCTION – SHOOTING FROM A DWELLING

- ***State v. Jason Comitz***, 2019-NMSC-011, 443 P.3d 1130
- Def was convicted of felony murder with the predicate felony of shooting at a dwelling – def shot at a group of people in front of their house after an argument
- Def relied on *State v. Marquez*, 2016-NMSC-025, in which the Court held the predicate felony has to have an "independent felonious purpose" from the murder
- Court did not directly decide the applicability of *Marquez* and instead held that the predicate felony was not proven because the evidence was only that def shot at people who happened to be in front of a dwelling
- Def's target was the people in front of the house; not the house itself

STATUTORY CONSTRUCTION – CSPM II

- ***State v. Marcos Figueroa*,** No. A-1-CA-36391 (Aug. 12, 2019)
- COA reversed def's convictions for two counts of CSPM on his young son and stepson
- Def performed oral sex on the boys when they were asleep – they were too ashamed and intimidated to initially report
- Jury was instructed that def used his "position of authority"
- COA held this was fundamental error because, since 2007, the statute no longer contains a reference to "position of authority" and instead relies on force or coercion. COA held def was therefore convicted of a non-existent crime
- State argued that "force or coercion" was satisfied because the instruction required the jury to find def used his authority to "coerce" the victims and because the victims were asleep which is by definition "force or coercion"
- COA still believed it was fundamentally unfair to convict def on a crime that did not exist
- However, retrial was not barred because there was sufficient evidence to convict under the erroneous instructions
- CERT PETITION PENDING

STATUTORY CONSTRUCTION – POSSESSION OF BURGLARY TOOLS

- ***State v. Andrew Christian Ford***, No. A-1-CA-36450 (Sep. 5, 2019)
- COA upheld conviction for receiving or transferring a motor vehicle but reversed conviction for poss of burglary tools
- When vehicle was recovered, there was a screwdriver in the center console and the ignition had been "punched"
- COA held that because burglary is completed upon unlawful entry, the burglary tools "must be used, or intended to be used, to facilitate entry."
- Distinguished *State v. Hernandez*, 1993-NMCA-132, in which the def opened an unlocked vehicle and tried to start the ignition with a screwdriver
- COA held in that case that there was evidence of def's intent – prior to entry – to use the screwdriver
- Here, there was no evidence that def possessed the screwdriver prior to entry of the car or that he had any intent to use it to make an unauthorized entry into the car

STATUTORY CONSTRUCTION – SEXUAL EXPLOITATION OF CHILDREN

- ***State v. Manuel Franco***, No. A-1-CA-35470 (June 13, 2019)
- Eight counts of sexual exploitation of children by distribution – def used a peer-to-peer sharing network to access child pornography
- Def admitted possession but said he was "sharing" rather than distributing the images and this passive "sharing" is not sufficient to show intentional distribution
- Well settled in this and other jurisdictions that peer-to-peer file sharing constitutes distribution
- Def relied on *State v. Granillo*, 2016-NMCA-094, to argue that the State must prove a conscious objective to endanger a child
- COA disagreed – unlike child abuse with its "tiered mens rea" – this statute only requires general criminal intent to do an act and not an intent to do a further act or achieve a further consequence
- Under *State v. Sena*, 2018-NMCA-037, however, the eight counts were reduced to a single conviction under the unit of prosecution analysis

KIDNAPPING – "INCIDENTAL RESTRAINT"

- ***State v. Sammy Garcia***, No. A-1-CA-35812 (May 23, 2019)
- Kidnapping and CSPM – def claimed the restraint was only "incidental" to the rape
- *State v. Trujillo*, 2012-NMCA-112, held "the Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime."
- Court looks to "whether the restraint or movement increases the culpability of the defendant over and above his culpability for the other crime."
- The victim encountered def in an outdoor shed and tried to leave. Def stopped her, suggested that they "make babies", and shut the shed door before sexually assaulting her
- Def's act of shutting the door decreased his risk of detection and prevented the victim's escape. Although the time period was short, def's actions completed the kidnapping before the sexual assault took place

STATUTORY CONSTRUCTION – RACING ON HIGHWAYS

- ***State v. David Gonzales***, 2019-NMCA-036, 444 P.3d 1064
- Def "rev[] up [his] engine and start[] peeling out." His tires squealed, creating blue smoke and then "lunged forward so fast that it left a gap."
- Def was convicted of racing on highways – NMSA 1978, § 66-8-115 – on the theory that he was driving in an "exhibition of speed or acceleration."
- Def claims there must be two elements (1) a competition or agreement with another driver and (2) a display of driving skill or prowess to an audience – i.e. a drag race
- But the statute is written in the disjunctive and a drag race is just one of the alternatives. Moreover, a "test or exhibition" does not require an agreement or competition
- Dictionary definition of "exhibition" does not require an audience – only to "show or display outwardly."
- Court cautions it does not intend to "draw the boundaries of criminality of 'exhibition of speed or acceleration'" and does not suggest that every tire squeal or peeling out is sufficient

STATUTORY CONSTRUCTION – FINDING OF MENTAL RETARDATION

- ***State v. Jacob F.,*** 2019-NMCA-042, 446 P.3d 1237
- Defendant was arrested for agg battery for attacking his mother with garden shears
- Section 31-9-1.6(E) provides that IQ of 70 or below on a "reliably administered IQ test" is presumptive evidence of mental retardation
- Issue is whether tests were "reliably administered"
- State argued the term means the test results themselves are reliable and def's psychosis prevented the doctors from obtaining accurate results – term makes no sense otherwise
- Def argued "reliably administered" term was narrow and meant only that the testing administration was properly done
- COA agrees with def's "straightforward" interpretation
- Both doctors testified as to what "reliably administered" meant and neither doctor questioned or challenged the methods employed
- The two tests were also internally consistent – 67 and 68 IQ – and this was sufficient to establish the presumption of mental retardation

STATUTORY CONSTRUCTION – SEXUAL EXPLOITATION OF CHILDREN

- ***State v. Donald G. Knight*,** No. A-1-CA-36160 (Jun. 28, 2019)
- Def was convicted of four counts of possession and 10 counts of manufacture
- Under *Olsson/Ballard*, the Court vacated three of the possession counts but otherwise affirmed
- Same argument as in *Franco* – possession and manufacture require specific intent to endanger a child
- Unlike child abuse, the sexual exploitation statutes "do not include an intent to do a further act or achieve a further consequence. Rather, they too only describe a particular act."

STATUTORY CONSTRUCTION - SPEEDING

- ***State v. Patrick Martinez***, 2019-NMCA-049, 448 P.3d 602
- Creative defense of the year!
- Def appealed his speeding conviction on the grounds that speeding statutes are ambiguous and should be construed to allow motorists to accelerate in advance of an increased speedy limit sign once that sign is visible
- COA considered the statutes and portions of the NMDOT manual that discuss the placing of speed signs
- COA also found that the State Transportation Commissions, the National Committee on Uniform Traffic Control Devices, the Federal Highway Administration, and the U.S. Secretary of Transportation "all agree that the speed limit is effective at the point where the sign is located."
- Def's interpretation would "disrupt uniformity", "render speed limits and their boundaries subjective, and produce an "unworkable and absurd result."

STATUTORY CONSTRUCTION – WILLFUL INTERFERENCE WITH EDUCATIONAL PROCESS

- ***State v. Quintin C.*,** No. A-1-CA-37230 (Aug. 8, 2019)
- NMSA 1978, § 30-20-13(D) criminalizes willful interference with the education process by threatening to commit any act that would "disrupt the lawful mission, processes, procedures or functions of a school." Petty misdemeanor
- 14-year-old told another student he had a "kill list." Principal was told and searched camera and laptop and found nothing. Investigation took four hours and interfered with principal's normal duties
- COA held insufficient evidence because the statute requires specific intent – i.e. intent to disrupt school functions, not simply general criminal intent to do the act
- To the extent the statute punishes "true threats" – that are not protected speech – it does not run afoul of the First Amendment and the mens rea of "willfully" distinguishes it from simple assault
- Remanded for retrial because the evidence was otherwise sufficient

SUFFICIENCY OF EVIDENCE/DWI

- ***State v. Terrell Willyard*, No. A-1-CA-36455 (Jun. 17, 2019)**
- District court set aside the DWI jury verdict and State appealed
- Def collided with a telephone pole and walked away from the scene
- Police found him a few blocks away, no more than 20 minutes later
- There was a witness to the collision, the collision was indicative of impairment, officers testified def had signs of intoxication 20 minutes after the crash, no evidence def became intoxicated after walking away from the crash, and def's departure from the scene and hiding behind a pole were evidence of consciousness of guilt

STATUTORY CONSTRUCTION – "USE" OF A DEADLY WEAPON

- ***State v. Zachariah G.***, No. A-1-CA-37584 (Oct. 1, 2019)
- Child brought BB gun to school but never removed it from his waistband
- Principal conducted limited search and recovered a CO cartridge which he knew could be used with the BB gun
- Child asked what would happen if he "shot up the school", if the principal was "afraid to die", and how he would feel if a 12-year-old shot him – questions made principal "feel very unsecure"
- Police arrived and removed the BB gun which looked like a 9 mm pistol
- Child is charged with aggravated assault against a school employee and unlawful carrying of a deadly weapon
- Child claims he did not "use" a deadly weapon because never pointed, displayed, or brandished the weapon

STATUTORY CONSTRUCTION – "USE" OF A DEADLY WEAPON

- Evidence was sufficient to allow reasonable jury to conclude that Child "used" the weapon because it was instrumental to the assault (i.e. placing the principal in reasonable apprehension of imminent bodily harm) and facilitated the aggravated part by rendering the Child's questions to the principal even more menacing
- Dissent on this issue – "use" should be defined as "tak[ing] some action with the [weapon] in further of the commission of the" assault. Child did not "use" the BB gun and it was merely incidental to – rather than facilitative of – the assault

PLEA AGREEMENTS

- ***State v. Millard Doyle Yancey***, No. S-1-SC-36669 (Oct. 7, 2019)
- Reversed the COA's opinion that the defendant must state "I am guilty" on the record for there to be an enforceable plea agreement
- Def pled guilty to various crimes in three separate plea agreements and appealed claiming that he did not fully understand the possible sentence
- Rule 5-303 only requires an "affirmative showing on the record that a plea was voluntary and intelligent." NMSA 1978, § 30-1-11 also does not require an express acknowledgement of guilt
- Federal authorities are clear that there is no required "talismanic incantation" of words and the knowing and voluntary nature of a plea is assessed by the totality of the circumstances. State courts have come to the same conclusion.
- Yancey signed that he "agreed to plead guilty" and signed the acknowledgement of the rights he was giving up; he told the court he understood and consented to the plea agreement's terms, he responded that the pleas were voluntary, and he did not object when court accepted the "guilty pleas."
- CAVEAT: Always best practice to have a defendant expressly plead guilty – not because it is required but because it is the best evidence that the "defendant does certainly mean to travel the road he or she has started down."
- Court did not address the COA's conclusion that the error was "jurisdictional" and did not decide whether it was appropriate for the COA to raise and decide the issue sua sponte.

PLEA AGREEMENTS

- Please always detail the factual basis and the dates of the offenses to which the def is pleading – do not stipulate or refer to another case
- Double check the dates of the charges to which def is pleading and make sure the sentence and parole periods match, especially for sex offenders
- Make sure the 5-20 or 5-life parole period for sex offenders is explicit in the agreement
- Any ambiguity in the plea agreement will inure to the def's benefit because the court construes its terms according to what the def reasonably believed. *State v. Miller*, 2013-NMSC-048

MOTIONS FOR NEW TRIAL

- *State v. Aguilar*
- *State v. Willyard*

MOTION FOR NEW TRIAL

- ***State v. Lloyd Aguilar***, No. S-1-SC-35922 (Oct. 7, 2019)
- After deliberation in a murder trial, the jury submitted verdict forms to the judge. The judge noted an apparent conflict in those forms and returned them to the jury, directing the jury to read the instructions again and clarify its verdict.
- This was done without knowledge or participation of the parties
- The day after the revised verdict was received and the jury discharged, the judge disclosed his ex parte contact with the jury and ordered a new trial
- Rule 5-614(A) allows for a new trial "in the interests of justice" and a court's decision is reviewed only for abuse of discretion
- This is a broad discretion and "a much stronger showing is required to overturn an order granting the new trial than denying a new trial."
- The State argued that under Rule 5-610(D) the contact was only "ministerial" but the Court held the contact was related to the case and prejudice to def is presumed

MOTIONS FOR NEW TRIAL

- ***State v. Terrell Willyard*,** No. A-1-CA-36455 (Jun. 17, 2019)
- District court erred in granting a new trial
- Inquiry under Rule 5-614(A) is different from a sufficiency of the evidence determination. Court must find the "evidence so heavily preponderates against the verdict that there evidently has been a miscarriage of justice."
- District court has two opportunities to rule on the sufficiency of the evidence during trial – after State has submitted its evidence (Rule 5-607(E)) and after the defense rests (Rule 5-607(K))
- But "[n]o provision in our rules of criminal procedure allows a district court to consider the sufficiency of the evidence after the jury returned its verdict."
- District court must enter judgment in accordance with the jury verdict and def may then appeal

DOUBLE JEOPARDY

- *State v. Aguilar*
- *State v. Burrows* (unpublished decision)
- *State v. Cain*
- *State v. Comitz*
- *State v. Costillo, Jr.*
- *State v. Garcia*
- *State v. Gonzales*
- *State v. Knight*
- *State v. Zachariah G.*

DOUBLE JEOPARDY

- **State v. Lloyd Aguilar**, No. S-1-SC-35922 (Oct. 7, 2019)
- Jury returned conflicting verdicts and then returned final ones after ex parte communication with judge
- Def claims that it would be double jeopardy to retry him on murder and double jeopardy where jury returned conflicting verdicts of acquittal
- Rule 5-611(A) requires that a verdict "shall be returned by the jury to the judge in open court"
- Def's argument "presupposes" that the preliminary verdict forms were the "verdict" for purposes of rule 5-611
- They were only an "initial vote" and cannot support the double jeopardy claim
- "The final set of jury verdicts were the true verdict of the jury[.]"

DOUBLE JEOPARDY – RETRIAL BARRED UNDER *BREIT*

- ***State v. Kenneth Allin Burrows***, No. S-1-SC-36475 (Jun. 3, 2019) (unpublished decision)
- Def's girlfriend lured the victim outside to fix her car and def came out of the bushes and shot him – convicted of first-degree murder
- First trial ended in mistrial and def claimed *Breit* barred retrial due to prosecutorial misconduct
- In pretrial order, court said the State could not mention "subsequent violence and/or alleged criminal behaviors by anyone accompanying [defendant] to the [victim's] residence" before the murder
- Girlfriend testified on direct that she and def "got arrested"; detective mentioned speaking to def "at county jail"; and the detective mentioned an incident where a door was kicked in
- The trial court granted a mistrial based on the "cumulative" effect of this testimony
- But no *Breit* violation because the prosecutor was not the "source of the comments" and *Breit* does not extend to "unsolicited statements by witnesses."

DOUBLE JEOPARDY – SORNA and UNIT OF PROSECUTION

- ***State v. Paul Cain*,** No. A-1-CA-35234 (Jun. 25, 2019)
- Convicted of two counts of failing to register as a sex offender
- Def violated two requirements of SORNA – failed to register every 90 days and failed to register within 10 days of changing his address
- COA vacated one conviction on double jeopardy grounds finding that SORNA specifies the unit of prosecution
- Section 29-11A-4(P) states "the willful failure to comply with any registration or verification requirement set forth in this section shall be deemed part of a continuing transaction or occurrence."
- The use of "any" indicates the Legislature "contemplated that more than one violation may occur within any given period of non-compliance . . . and expressly states that those violations are treated as part of a single, ongoing transactions or occurrence."

DOUBLE JEOPARDY – DOUBLE DESCRIPTION

- ***State v. Jason Comitz***, 2019-NMSC-011, 443 P.3d 1130
- (1) Court vacated the first-degree murder conviction and second-degree murder conviction stands
- (2) Def was convicted of two counts of aggravated battery on two victims under different theories – deadly weapon and resulting GBH. Only one conviction can stand for each victim.
- (3) Def was convicted of four conspiracies and the Court vacated three of them under *State v. Gallegos*, 2011-NMSC-027. The location and time of the alleged conspiracies was the same and the circumstantial evidence showed the agreement was made on the ride to the victims' home that preceded the gunfire.
- (4) Def was convicted of agg assault and agg battery. No double jeopardy violation because these acts were distinct. The initial assault (pointing of guns at victims) was interrupted by the sound of a siren followed by the "distinct act of aggression" of firing the guns

DOUBLE JEOPARDY – BAR OF RETRIAL UNDER *State v. Breit*

- ***State v. Leo Costillo, Jr.*, A-1-CA-36302 (Sept. 26, 2019)**
- Case in which COA found fundamental error for comment on def's pre-arrest, pre-*Miranda* silence
- Def also argued retrial was barred under *State v. Breit*, 1996-NMSC-067
- *Breit* bars retrial under DJ principles when the "improper official conduct is so unfairly prejudicial" that it cannot be cured short of a mistrial, the official knows his conduct is improper and prejudicial, and the official either intends to provoke a mistrial or acts in willful disregard
- *Breit* was a departure from federal law and has only been used in situations of the "most severe prosecutorial transgressions."
- Not applicable here because prosecutor's conduct did not "contravene then-established binding precedent."
- Nothing to indicate prosecutor intended to provoke a mistrial and defense counsel never once objected

DOUBLE JEOPARDY – "COOKIE CUTTER" CHARGES

- ***State v. Leo Costillo, Jr.*, A-1-CA-36302 (Sept. 26, 2019)**
- Young victim testified that the first incident of CSPM was in August 2008 and the rest all happened the same way – once a week from August to October 2008 and then twice a month from October 2008 to summer 2009
- No evidence to distinguish the individual offenses.
- Relied on *State v. Dominguez*, 2008-NMCA-029, ¶ 10, for proposition that "we have never held that the [s]tate may move forward with a prosecution of supposedly distinct offenses based on no distinguishing facts or circumstances at all, simply because the victim is a child."
- Asked COA to reconsider *Dominguez* but COA declined
- State argued it presented the most concise testimony it could and there was no way to present more detail
- Still, COA is concerned about due process and notice to def

DOUBLE JEOPARDY – MULTIPLE CONSPIRACY CONVICTIONS

- ***State v. Sammy Garcia*,** No. A-1-CA-35812 (May 23, 2019)
- Convicted of four counts of conspiracy including conspiracy to commit CSPM
- Def claims DJ for all but one count
- *State v. Gallegos*, 2011-NMSC-027 – Legislature created "rebuttable presumption that multiple crimes are the object of only one, overarching conspiratorial agreement subject to one, severe punishment."
- Conspiracy to commit intimidation of witness - Def's son called victim later that night to reiterate his father's threat – "likely the result of the then-recent prior agreement"
- Conspiracy to commit kidnapping and CSPM – def continued restraining the victim so his son could assault her too. Not enough to show separate agreement for kidnapping
- As to bribery of a witness, the State argued it did not further the sexual attack. But the Court held the actions were "aimed at furthering a single goal or purpose" to sexually assault the victim. Agreeing to silence her was part of that overarching agreement.

DOUBLE JEOPARDY – AGGRAVATED FLEEING AND CARELESS DRIVING

- ***State v. David Gonzales***, 2019-NMCA-036, 444 P.3d 1064
- Aggravated fleeing and careless driving convictions – the drag race case
- After he peeled out, def fled from the officer and eventually crashed
- State argued the conduct was non-unitary. The officer was ordered to stop the dangerous chase and the def kept driving until he crashed
- But, "[i]n the context of a defendant's continuous flight from law enforcement, this Court has rejected the principle that the technical completion of one offense is sufficient to find non-unitary conduct."
- Relied on *State v. Padilla*, 2006-NMCA-107, where def fled in a vehicle and then on foot and the court found it was one crime because "it is artificial to parse conduct when a suspect flees from the police in one way and then immediately continues to flee in another way."
- Here, the incident lasted only minutes and spanned less than one mile
- As to legislative intent – second *Swafford* prong – both statues define criminal conduct broadly and the Court therefore applies modified *Blockburger* because there are so many ways a person can drive to violate both statutes
- Indictment and jury instructions provided no detail, so Court looked to State's closing argument which relied on the same conduct for both convictions

DOUBLE JEOPARDY – SEXUAL EXPLOITATION OF CHILDREN BY MANUFACTURE

- ***State v. Knight*,** No. A-1-CA-36160 (Jun. 28, 2019)
- Conviction of 10 counts of manufacture did not violate double jeopardy
- Def tried to distinguish *State v. Leeson*, 2011-NMCA-068, by arguing that it only applies to the "original production of an exploitative image"
- But "manufacture" means "the production, processing, copying by any means, printing, packaging or repackaging" of any offending image
- *Leeson* held the statutory language was clear and "[a] violation of the statute occurs where a criminal defendant intentionally produces or copies a photograph, electronic image, or video that constitutes child pornography."
- *Leeson* applies here. The unit of prosecution "is each copy of an electronic video file, no matter whether each such file is copied individually or where multiple files are copied in a batch."

DOUBLE JEOPARDY – MULTIPLE PUNISHMENTS

- ***State v. Zachariah G.*** No. A-1-CA-37584 (Oct. 1, 2019)
- Child who brought BB gun to school and threatened the principal
- Claim of DJ for convictions of both agg assault against a school employee and unlawful carrying of a deadly weapon
- "Double jeopardy prohibits multiple punishments in the double-description context only where the conduct is 'unitary' and where the Legislature did not intend to create separately punishable offense."
- Two separate non-unitary acts – bringing the gun to school and threatening the principal with it. The assault was not committed until after the first crime was completed.
- The acts were also "of distinct quality and nature, affected different victims, and were motivated by different objectives."

UJIs

- ***State v. Joseph Grubb***, No. A-1-CA-36177 (Oct. 1, 2019)
- Def was convicted of crime of escape from jail (NMSA 1978, § 30-22-8) but jury was instructed with the UJI on escape from inmate-release program (UJI 14-2228 and NMSA 1978, § 33-2-46)
- The State used 14-2228 because it was "factually closer" to the circumstances of the case and court gave modified version of 14-2228. Def was released from lawful custody for a furlough and failed to return. Def didn't object to the given instruction.
- COA found fundamental error (1) significant probability that jury convicted def based on deficient understanding of the law on escape (2) State did not charge escape from inmate-release program and did not present it as a lesser included charge of escape and (3) def was convicted based on the elements of a crime for which he was not charged

INEFFECTIVE ASSISTANCE OF COUNSEL

- *State v. Hildreth Jr.*
- *State v. Semino*

INEFFECTIVE ASSISTANCE OF COUNSEL – REFUSAL TO PARTICPATE

- ***State v. Henry Hildreth Jr.*, 2019-NMCA-047, 448 P.3d 585, *cert. granted*, No. S-1-SC-37558**
- Court denied defense counsel's request for continuance and counsel told the court "I will not be ready, your honor. I will not participate in the trial."
- Counsel remained "steadfast" in his decision and did not participate in jury selection, give a substantive opening statement, CX any witnesses, call any witnesses, move for DV, or give a closing argument
- State conceded IAC and Court agreed
- Counsel's refusal to provide his client with a defense resulted in an "unseemly and unusual" situation. Counsel was not "empowered with decisional autonomy regarding when trials commence and when they do not commence."
- Court also said courts are not "helpless" and could have (1) ordered new counsel (2) imposed a sanction (3) invoked contempt powers
- But forcing a criminal defendant to trial with an non-participating attorney "hinders" rather than promotes judicial economy "while all but ensuring" a violation of def's constitutional rights
- **CERT granted on whether *Breit* extends to judicial misconduct**

INEFFECTIVE ASSISTANCE OF COUNSEL

- ***State v. Raymond Semino***, No. S-1-SC-36275 (Jun. 3, 2019) (unpublished decision)
- Court reversed the district court's grant of def's habeas petition
- District court found def counsel (1) failed to investigate and raise def's competency and (2) failed to investigate available DNA evidence
- (1) Def's testimony alone at the habeas hearing was not enough to show he was incompetent at trial – "Whatever might be required to establish incompetence in post-conviction proceedings, it cannot be less than what would have been necessary to raise a reasonable doubt about Petitioner's competency in the underlying proceedings."
- Def offered no "reliable extrinsic" evidence to prove he was incompetent at trial. "Indeed, it is difficult to imagine a situation in which an expert opinion would be more critical" where the habeas court's "vantage point is further removed and limited by the passage of time."

INEFFECTIVE ASSISTANCE OF COUNSEL (cont.)

- (2) Counsel's decision to forego DNA investigation and rely on a consent defense in a CSP case was not "wholly unreasoned" and would not be second-guessed on review
- "When faced with two viable yet conflicting defenses, it is not ineffective assistance of counsel to choose one over the other."
- Def's DNA was found on a swab taken from the victim's fingernails and the absence of semen on other items did not prove sexual intercourse did not occur
- At most, the DNA evidence could have given def a "second viable defense" but would not have proven his innocence

SPEEDY TRIAL/APPEALS

- *State v. Garcia*
- *State v. Radler*

DELAYED APPEAL

- ***State v. Sammy Garcia*,** No. A-1-CA-35812 (May 23, 2019)
- Def filed a notice of appeal and docketing statement but no opening brief was ever filed
- COA therefore dismissed the case in 2006
- Def revived the case in 2014 with a habeas petition and requested to file a new notice of appeal
- Issue: does inordinate appellate delay violate due process?
- Speedy trial analysis does not apply in this context – flexible due process analysis focusing on fairness and prejudice is more appropriate
- No prejudice here because def was able to present meritorious arguments on appeal that resulted in reversal
- Same result under N.M. Constitution
- COA did not address prejudice to the State in retrying a case 10 years later with a child victim

SPEEDY TRIAL

- ***State v. Jason Radler***, 2019-NMCA-052, 448 P.3d 613
- Def claimed speedy trial violation eight months after the charge was originally filed in magistrate court and five months after the charge was dismissed and filed in district court
- Def claimed the 182-day mag court limit was violated and prejudiced him – district court dismissed the case on speedy trial grounds
- The six-month rule was eliminated for district court. Rule 5-604 allows a def to move for a speedy trial violation but does not specify that a def must wait until the presumptive speedy trial delay has occurred and district court here did not err in considering the motion
- Here, delay was only 80 days past the 182-day rule and only eight months total. Presumptive delay under *State v. Garza* is 12 months. The length of delay factor therefore weighs against def.
- Reason for delay weighed slightly against State and assertion of the right weighed only slightly for def
- No prejudice. Def claimed he lost job opportunities but courts have recognized a distinction between the 'weighty prejudice" of losing an existing job and the "lesser prejudice arising from the loss of a job offer."

SPEEDY TRIAL

- Request trial settings in writing – new judge
- Request rulings on pending motions
- Do not always acquiesce to defense requests for continuance and be wary of multiple requests for continuance - *Serros*
- Beef up the record for appellate review by showing the State's readiness for trial
- Hardest cases are ones with long periods with no activity and no State pleadings

EXTRANEOUS INFORMATION TO THE JURY

- ***State v. Thomas Stevenson***, No. A-1-CA-35962 (Oct. 22, 2019)
- Three months after the trial was concluded, the foreman sent the court an email asking about why the parties were not charged with felon in possession or enhancement because a silencer was used
- District court denied def's motion to bring the foreman in for an evidentiary hearing
- Rule 11-606(B) forbids jurors from testifying about any part of the deliberation process subject to three exceptions (1) extraneous prejducial information was brought to the jury (2) an outside influence was improperly brought to bear on a juror or (3) a mistake was made in entering the verdict form.
- Def has the initial burden to offer competent evidence that material extraneous to the trial actually reached the jury
- The email alone is not sufficient evidence. There was no evidence of a silencer – the jury was likely confused by the term "firearm enhancement" – and the jury knew def had felony convictions.

SENTENCING

- *Fry v. Lopez/Allen v. LeMaster*
- *State v. Tafoya*

DEATH PENALTY SENTENCING

- ***Robert Fry v. James Lopez and Timothy Allen v. Tim LeMaster***, 2019-NMSC-013, 447 P.3d 1086
- 2009 repeal of the death penalty applied only prospectively, leaving Fry and Allen on death row
- Court had previously held that these death sentences were not comparatively disproportionate
- But majority held, in a 3-2 decision, held that these sentences are disproportionate under Section 31-20A-4(C)(4) and that the repeal of the death penalty was an "intervening change in fact" that allowed reconsideration
- J. Nakamura filed a dissent taking issue with the majority's subjective conclusion about the comparative heinousness of Fry's and Allen's crimes with other murders and the majority's conclusion about the "aberrant" jury verdict of death – these crimes involved vulnerable female victims and were heinous
- She also noted that SCOTUS law does not require "form symmetry" in capital sentencing

CORRECTION OF SENTENCE

- ***State v. Lawrence Tafoya***, No. A-1-CA-34599 (July 23, 2019) (non-precedential)
- Def convicted of first-degree child abuse and court sentenced him to 12 years (due to mitigating evidence)
- 36 days later, the State filed a motion to clarify the sentence because it lacked the requisite finding that the conviction was a serious violent offense (SVO)
- Court found it was an SVO and amended the original J&S
- COA reversed finding that the original sentence was "illegal" as opposed to "illegally imposed" and the district court was without jurisdiction to correct it
- The Rules of Criminal Procedure do not give the State authority to file motions to correct illegal sentences – Rule 5-802(A) allows such motions only by defs
- Dissent: original sentence was legal but imposed in an illegal manner and the State filed a timely motion to correct it
- CERT PETITION IS STILL PENDING

SEX OFFENDER PAROLE PERIOD

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

SEX OFFENDER PAROLE PERIOD

- Defendant is sentenced and district court later amends J&S to include the correct parole period of 5-20 years
- We've had success in upholding this despite *State v. Torres*, 2012-NMCA-026, 272 P.3d 689, which held that trial court lacked jurisdiction to consider State's motion to correct an illegal sentence

CHARGING CRIMES AS CHILD ABUSE

- Recent case in which 17-year-old and 18-year-old attacked and stabbed a 16-year-old victim
- Both were convicted of child abuse among other charges
- COA has requested supplemental briefing on questions regarding duty of care, if a minor can be charged with child abuse, and generally if the child abuse statute covers this situation
- Be wary – may not be child abuse just because the victim is under 18

FOULENFONT HEARINGS

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

PERFECTING THE RECORD

- Crucial for a successful appeal – easier for us to advocate for a lawful conviction when the record is complete
- Case will not end with direct appeal – proceedings in state and federal habeas corpus can linger for 20+ years
- Please make sure bench conferences and jury instruction conferences are recorded – reconstructing the record after the fact is difficult, if not impossible
- **Double and triple check jury instructions**
- Please state what is happening – can't see gestures
- Reiterate the content of the exhibit if you refer to it – e.g. "State's Exhibit 25, which is the murder weapon."
- Make sure exhibits are all together and with the court. Do not let the court return the exhibits to the parties – they are part of the record

JURY INSTRUCTIONS

- Crucial to a successful appeal
- Fertile ground for reversal
- Even if rushed, please review the language, especially of the elements instructions. An inadvertent typo can have disastrous consequences
- *State v. Kelson Lewis*, 2019-NMSC-001, 433 P.3d 276, on how to handle a deadlocked jury when you have lesser included offenses. PLEASE READ THIS CASE AND/OR REFER TO MARKO HANANEL'S PRESENTATION.

Prosecutors as Vanguards of Professionalism

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