NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

Appellate Procedure Summary

April 13, 2017

WHAT WE DO

- NMSA 1978, § 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

- Anne Kelly – (505) 717-3505. akelly@nmag.gov
- 14 staff attorneys and two administrative assistants
- This Power Point will be on our website – nmag.gov under the Criminal Appeals tab which is under the Criminal Affairs tab

APPEALS

- We handle all appeals from all 13 judicial districts in New Mexico
- The District Attorneys do not handle their own appeals – we do them all
- We do not institute the appeals. Appeals are filed by the convicted defendant or the DA's office, in limited circumstances.
- We advise DAs about the merits of a State's appeal, but the decision remains with the DA
- As prosecutors, however, we have the ethical obligation to concede error.

WHAT IS AN APPEAL?

- An appeal is a resort to a superior/higher (*i.e.* appellate) court to review the decision of an inferior/lower (*i.e*. trial court). There may be more than one level of appeal.
- For example, a DWI conviction may be appealed from a magistrate court to the district court and then to the New Mexico Court of Appeals and eventually to the New Mexico Supreme Court.
- Any case with a charge of first degree murder **must** be appealed to the NMSC. Rule 12-102(A)(1).

NEW MEXICO APPELLATE COURTS

- New Mexico Court of Appeals – hears most of the appeals
- New Mexico Supreme Court – has original jurisdiction over first degree murder cases and has certiorari jurisdictions over opinions fsrom the Court of Appeals. Thus, if either party asks the Court to review an opinion, it can do so. Completely discretionary.

CONSTITUTIONAL RIGHT TO AN APPEAL

- **New Mexico Constitution**

  Art. 6, § 2

Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal.

DEFENDANT'S STATUTORY RIGHT TO APPEAL

- **NMSA 1978, Section 39-3-3**
- A. By the defendant. In any criminal proceeding in district court an appeal may be taken by the defendant to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts:
- (1) within thirty days from the entry of any final judgment;
- (2) within ten days after entry of an order denying relief on a petition to review conditions of release pursuant to the Rules of Criminal Procedure; or
- (3) by filing an application for an order allowing an appeal in the appropriate appellate court within ten days after entry of an interlocutory order or decision in which the district court, in its discretion, makes a finding in the order or decision that the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order or decision may materially advance the ultimate termination of the litigation.

STATE'S STATUTORY RIGHT TO APPEAL

- NMSA 1978, § 39-3-3
- B. By the state. In any criminal proceeding in district court an appeal may be taken by the state to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts:
- (1) within thirty days from a decision, judgment or order dismissing a complaint, indictment or information as to any one or more counts;
- (2) within ten days from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property, if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

DEFENDANT'S RIGHT TO APPEAL

- A defendant can appeal from a verdict of guilty, whether by a jury or judge.
- Generally, a guilty or no contest plea – an on-the-record admission of guilt in open court – waives the right to appeal

STATE PROHIBTED FROM TAKING APPEAL

- C. No appeal shall be taken by the state when the double jeopardy clause of the United States constitution or the constitution of the state of New Mexico prohibits further prosecution.

DOUBLE JEOPARDY

- This means the state cannot appeal from an acquittal or conviction, even if there was error.
- An acquittal is not reviewable

TIME DEADLINES

- NMSA § 39-3-3(A) For most issues, Defendant and State have **thirty days** to appeal.
- Defendant: (1) within thirty days from the entry of any final judgment;
- State: (1) within thirty days from a decision, judgment or order dismissing a complaint, indictment or information as to any one or more counts;
- (2) Ten days from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property.

THE RULES OF APPELLATE PROCEDURE DICTATE DEADLINES FOR FILING AN APPEAL

- **RULE 12-201. APPEAL AS OF RIGHT; WHEN TAKEN**
- **A. Filing notice.** A notice of appeal shall be filed:
- (1) within ten (10) days after the decision or order appealed from is filed in the district court clerk's office; **if** the appeal is from an order **suppressing or excluding evidence** or requiring the return of seized property, and
- (2) for all other appeals, within thirty (30) days after the judgment or order appealed from is filed in the district court clerk's office.

BUT TIME DEADLINES ARE FLEXIBLE
Rule 12-201: Tolling Motions

- **D. Post-trial or post-judgment motions extending the time for appeal.**
- (1) If any party timely files a motion under Section 39-1-1 NMSA 1978, Rule 1-050(B) NMRA, Rule 1-052(D) NMRA, or Rule 1-059 NMRA, or files a motion under Rule 1-060(B) NMRA that is filed not later than thirty (30) days after the filing of the judgment, the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from the filing of an order expressly disposing of the last such remaining motion.

LATE FILING OF APPEAL

- Almost always fatal for the State
- A late filing of appeal for a defendant is accepted – presumed ineffective assistance of counsel. Court will not hold counsel's mistake against defendant

DOCKETING THE APPEAL

- Rule 12-208(B): Defendant/Appellant must file docketing statement in COA or Statement of the issues in the NMSC within 30 days after filing Notice of Appeal.

- Rule 12-309(D): May file a motion seeking an extension of time to file the docketing statement upon a "showing of good cause"

- Rule 12-209: Upon receipt of a copy of the docketing statement or statement of issues, the district court clerk shall send the "record proper" to the appellate court not later than fourteen (14) days from the date the docketing statement or statement of issues is received by the district court.

CALENDAR ASSIGNMENT

RULE 12-210(A): Based on the docketing statement or statement of issues and the record proper, the appellate court assigns the case to one of three calendars:

1) General Calendar: Rule 12-210(B)

2) Legal Calendar: Rule 12-210(C)

3) Summary Calendar: Rule 12-210(D)

GENERAL CALENDAR
RULE 12-210(B)

Rule 12-210(B): Full Briefing:

BIC: Appellant has 45 days to file a brief-in-chief AFTER service of notice by appellate court that all transcripts of proceedings have been filed in the appellate court.

Answer Brief: Appellee has 45 days to respond after service of the BIC on the appellee.

Reply Brief: Defendant **may** serve and file a reply within 20 days after service of the AB.

Oral Argument: If requested and granted, and sometimes requested by the Court.

TRANSCRIPT OF PROCEEDINGS: RULE 12-211

A transcript of proceeding is the printed or audio record of the proceedings and pleadings of a case, required by the appellate court for a review of the history of the case.

Rule 12-211(B): If audio recorded, district court shall send the proceedings to the appellate court within 15 days of receipt to the calendar notice.

Rule 12-211(C) If Not audio recorded, the appellant has 15 days to designate what parts of the proceedings he intends to include in the transcript. Must make satisfactory arrangements to pay the court reporter, and file certificate of satisfactory arrangements with the district court clerk. Court reporter has 60 days to file the transcripts w/ district court.

The COA will send a notice of filing once it receives the transcripts. This starts the briefing schedule.

LEGAL CALENDAR
RULE 12-210(C)

No transcript of proceedings filed.

BIC: Appellant has 30 days to serve and file a brief-in-chief from date of calendar notice.

Answer Brief: Appellee has 30 days to respond.

Reply Brief: Appellant may serve and file a reply within 20 days.

Oral argument: If requested and granted.

Rarely used

SUMMARY CALENDAR
RULE 12-210 (D)

No transcript of proceedings filed.

Appellate court issues a notice of the proposed disposition. (the resolution or outcome of the case).

Appellant has 20 days to serve and file a memorandum in support of or in opposition to the court's proposed disposition and give reasons why the case should or should not remain on the summary calendar.

NO oral argument allowed concerning the proposed disposition.

Case may be reassigned to the General Calendar and the Court will issue another calendar notice.

Often used.

ORAL ARGUMENT

- Either party may request oral argument in the Court of Appeals or the Supreme Court, or the court may request it.
- Supreme Court holds more arguments on criminal cases than does the Court of Appeals
- An oral argument allows the parties to clarify the facts and/or the issues and allows the court to ask questions.
- Generally, each side has 30 minutes to present the argument. Rule 12-214 NMRA.
- Anyone may attend the oral argument, but only the attorneys representing the defendant and the State may speak. The victims cannot speak directly to the Court.

COURT OF APPEALS ENTERS DECISION

The COA may affirm the decision of the lower/trial court, modify it, reverse it, or remand the case for a new trial in the lower court pursuant to its order.

Rule 12-404: Appellant may file a motion for rehearing within 15 days, unless the time is extended by order.

OR

Rule 12-502: Defendant/Appellant may file a petition for a writ of certiorari seeking review of the COA's decision. The cert petition shall be filed within 30 days after final action by the COA. A response to the petition may be filed within 15 days of service of the petition.

SUPREME COURT GRANTS PETITION

Rule 15-502(G): Respondent may file a response to the petition within 15 days of service of the petition **OR** 15 days of the granting of the petition.

Supreme Court will set a briefing and oral argument schedule. Deadlines for BIC, Answer Brief and Reply Brief are similar to COA.

SUPREME COURT ENTERS DECISION

After a full briefing and sometimes oral argument, the NMSC will issue its decision or Opinion.

Rule 12-402 Supreme Court will issue a mandate after 15 days has expired, if no motion for rehearing is filed. Rule 12-404: Non-prevailing party may file a motion for rehearing within 15 days after court enters its decision.

If Supreme Court grants the motion, opposing party has 15 days to file a responsive brief.

NO TIME FRAME FOR SUPREME COURT TO ISSUE DECISION

- There is no rule that dictates how long the COA or the NMSC can take to issue a decision/opinion and then its mandate.
- The decision of the NMSC is generally the final decision, although a defendant may file a writ of habeas corpus even after he is imprisoned.

WHAT IS A MANDATE?

Rule 12-402: Supreme Court and Court of Appeals issue mandates. A mandate is an order issued upon the decision of an appeal or writ of error, directing an inferior court to take action on the case.

Rule 12-402: Supreme Court will not issue mandate until 15 days after entry of the disposition of the proceedings.

POST CONVICTION PROCEEDINGS

WRIT OF HABEAS CORPUS

- A defendant who believes that his or her conviction was unconstitutional may pursue a constitutional procedural device that has become known as the "Great Writ"—the **writ of habeas corpus**.
- State habeas corpus involves a constitutional challenge to the petitioner's conviction or the conditions of confinement. Rule 5-802(B)(6)(a) and (b)

WRIT OF HABEAS CORPUS

- Most challenges to the conviction involve ineffective assistance of counsel. (Sixth Amendment: right to counsel)
- Before a defendant can file a habeas corpus he/she must exhaust his/her appellate remedies. This is part of the reason that most defendants always file an appeal.
- No statute of limitations for any state habeas.
- The petition must show that the court ordering the detention or imprisonment made a legal or factual error.
- Habeas corpus petitions are usually filed by persons serving prison sentences.

WRIT OF HABEAS CORPUS

- Relief is available only for constitutional violations. Whether a constitutional violation has occurred will depend upon the evidence in the case and the overall instructions given to the jury.
- Habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice.
- Most writs of habeas corpus are denied.

WRIT OF HABEAS CORPUS

- Most are dealt with summarily by the district court
- But the court may hold an evidentiary hearing - best to inform the victims if this happens
- Most federal habeas corpus petitions are also dealt with summarily but the federal district court has discretion to hold a hearing

POST-CONVICTION DNA TESTING

- Section 31-1A-2
- Innocence and Justice Project at UNM has a grant
- The standard to seek new testing is low but no case in NM has yet overturned a conviction, or granted a new trial, on this basis
- Cases may be 20-30 years old – special considerations for victims and families of victims

PRE-TRIAL CONDITIONS OF RELEASE/BOND

- *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276 – district court must consider factors other than the nature of the offense in setting a reasonable bond
- "Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."
- Defendants are appealing high bonds and they will probably be overturned

PRETRIAL RELEASE

BOND

- Rule 5-401 hearing – victims can appear and speak to the court. Important to let the court know more about the case than simply the charge. Any evidence about contact with the victims, threats, intimidation etc. is crucial
- If defendant is released on bail, one of the conditions of release should be no contact with the victim – release can be revoked if the conditions are violated

REVOCATION OF BOND

- BUT – the victim's word is not enough to revoke bond!
- *State v. Segura*, 2014-NMCA-037, 321 P.3d 140 – defendant was out on bond while awaiting trial on charge of aggravated battery on household member
- State alleged defendant was harassing the victim and the victim told the victim advocate that defendant was abusing drugs – court ordered a urinalysis test and revoked his bond without a hearing
- Reversed – defendant had a procedural due process right to have a hearing and confront the evidence against him

Article II, Section 13

- New constitutional amendment allows for pretrial detention without bond if the State requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."
- Live witnesses do not necessarily need to be called; State may be able to prove this by proffer of the criminal complaint and/or criminal history.

APPEAL BOND

- Granted *after* conviction in limited circumstances - not for violent or capital offenses.
- Requires a hearing – victim can appear. Rule 5-402(C) NMRA. Court has to find that defendant is not likely to flee *and* does not pose a danger to the safety of any other person or the community if released. Again, any testimony that defendant has contacted/threatened victim would be key
- Section 31-11-1(c) also requires that the defendant also show by clear and convincing evidence that he is likely to prevail on appeal

RAPE SHIELD LAW/VICTIM'S PRIOR SEXUAL HISTORY

- Section 30-9-16(A) and Rule 11-412(A) – generally, a victim's past sexual conduct is not admissible unless it is material and relevant and its inflammatory or prejudicial nature does not outweigh its probative value
- But our courts have found that if application of the rule precludes the defendant from presenting a full and fair defense, "the statute and rule must yield."

RAPE SHIELD

- *State v. Montoya*, 2014-NMSC-032, 333 P.3d 935 – defendant's girlfriend was the victim and the only witness against him for the crime of kidnapping with intent to commit a sexual offense. He was 17 and she was 15.
- Defendant wanted to cross-examine her about their sexual relationship to demonstrate a pattern of conduct and "understanding" to refute the accusation that he intended to have sex with her against her will
- Court came down on the side of the defendant and his right to a fair trial because defendant claimed he didn't have the bad intent and only wanted to have consensual sex
- Couldn't present a full and fair defense without asking her about their history of "make-up sex"

RAPE SHIELD

- *State v. Stephen F.*, 2008-NMSC-037, 144 N.M. 360
- 15 year-old defendant and 16 year-old victim. Defendant claimed the sex was consensual; the victim said she was forced into oral, vaginal, and anal sex.
- Court held that defendant should have been able to cross-examine the victim about a prior incident in which she was punished by her strict parents for engaging in consensual sex – i.e. explore her motive to lie

RAPE SHIELD

- Courts are sensitive to any suggestion that the defendant cannot fully present his defense
- “Consent” cases
- Educate the victim as to the possibility that prior sexual conduct – whether with the defendant or someone else if it gives a motive to lie – might come in

COMPETENCY OF VICTIM TO TESTIFY

- *State v. Armando Perez*, No. 31,678 (N.M. Ct. App. Jan. 20, 2016)
- District court found the 8-year-old victim of ten counts of CSP incompetent to testify
  - Child wrote a note saying "the voices" told her to blame it on defendant
  - Expert found she was incompetent to testify based on her "vagueness", "vapid speech", "poor decision making" – not fabricating but just "very vague" and signs of a thinking disorder/PTSD/mental illness

COMPETENCY

- BUT – she had the ability to tell the difference between truth and a lie knew there were consequences for lying
- She was capable of "telling the truth at a basic level, which satisfies the standard for witness competence."
- *State v. Hueglin*, 2000-NMCA-106, 130 N.M. 54 – victim was competent even though she had Down Syndrome and an IQ of 36 – had the ability to tell the truth

THE RELUCTANT VICTIM – A CAUTIONARY TALE

- *State v. Gutierrez*, 2014-NMSC-031, 333 P.3d 247
- On the eve of trial, the victim was interviewed at her high school by the prosecutor and the investigator – she had recanted and State wasn't sure she was going to honor her subpoena
- She failed to appear at trial and later claimed the State scared her off
- Supreme Court held there was no necessity for a mistrial and that a retrial was barred due to prosecutorial misconduct
- The investigator intimidated her by asking what would happen to her baby if she "got in trouble" due to perjury
- The investigator did more than simply warn her of the possibility of perjury by "rais[ing] the specter of collateral consequences, such as losing custody of [her] child."