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It's all about the NEW RULES prosecutors are facing:
from changes to criminal procedure, to time limits in the Second Judicial District, to updates in Children's Court, to one that died in the Legislature.

Prosecutors Section

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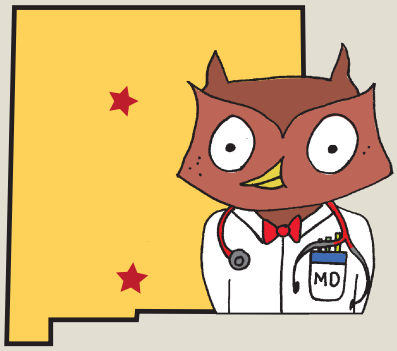

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Local Rule Targets INMATE REDUCTION, *but at What Cost?*

By John Sugg

In recent years the Metropolitan Detention Center in Bernalillo County became a cautionary tale for the heavy cost of jail overcrowding. Designed to house roughly 2,200 inmates, MDC saw its average daily population soar past 2,600 during the peak years of 2008-2012—and those numbers would have been even higher if not for the fact Bernalillo County was paying millions of dollars every year to send hundreds of inmates to contracted facilities throughout New Mexico and Texas.[1]

Today, though, fewer than 1,600 inmates reside at MDC at any given time, and Bernalillo County no longer exports any inmates to off-site jails. While the rapid reduction of overcrowding at MDC can be attributed to several initiatives and policies designed to reduce Bernalillo County's inmate population, none of those fixes affects the practice of law quite like Local Rule 2-400.

Indeed, the state's largest judicial district is still adjusting to the drastic changes brought on by the New Mexico Supreme Court's implementation of Local Rule 2-400 ("the Rule") in the Second Judicial District Court. The Rule, which seeks to alleviate Bernalillo County's jail overcrowding,[2] imposes strict deadlines that trigger dismissals for reasons that have nothing to do with the merits of the cases. The Rule applies to all cases pending or filed on or after Feb. 2, 2015.[3]

> The Second Judicial District once again finds itself in the position where trial courts must dismiss pending charges with prejudice if and when the state is unable to meet the Rule's accelerated trial deadlines.

Nuts and Bolts: How the Rule Works

Under the Rule, cases are assigned to one of three "tracks" based on (1) the complexity of the case, (2) the number of witnesses, (3) the time needed to address evidentiary issues and (4) "other" unnamed factors the district court finds appropriate.

There is a presumption that each case will be assigned to Track 1 and therefore be required to go to trial within 180 days from the arraignment date. Track 2 cases are required to go to trial within 270 days of arraignment and Track 3 cases are required

Local Rule 2-400: Not the Norm

	Presumptive deadline for commencing trial	Remedy if trial deadline is violated	Deadline for responding to motions	Remedy for discovery violations	Plea deadlines
Second Judicial District	Track 1: 6 months Track 2: 9 months Track 3: 12 months	Dismissal with prejudice	10 days	Dismissal with or without prejudice, suppression of evidence, contempt	10 days before trial
All other N.M. judicial districts	Simple: 12 months Intermediate: 15 months Complex: 18 months	Dismissal only if court determines speedy trial right violated under four-prong *Barker* test	15 days	Dismissal or suppression only if defendant proves prejudice, contempt	None

Sources: *State v. Garza*, 2009-NMSC-038; *State v. Harper*, 2010-NMCA-055; Rule 5-120(E) NMRA; Local Rule 2-400 NMRA.

to go to trial within 365 days. For a case to be assigned to Track 3, which is reserved for the most complex cases, the district court must enter written findings outlining the factors it considered to justify that assignment.

These trial deadlines can be extended for up to 30 days at a time upon a showing by one of the parties that good cause exists. If the trial judge grants the extension, the judge is required to enter written findings; if the trial judge rejects the request for extension, the case must either be tried within the previously ordered time limit or be dismissed with prejudice.

The Rule also imposes strict arraignment, discovery, plea and motion deadlines intended to streamline cases.[4] It shortens the deadline for responding to motions to 10 days, and the failure to submit a written response within the specified timeframe is deemed to be an admission of the facts stated in the motion.

Eclipsing Established 'Speedy Trial' Analysis

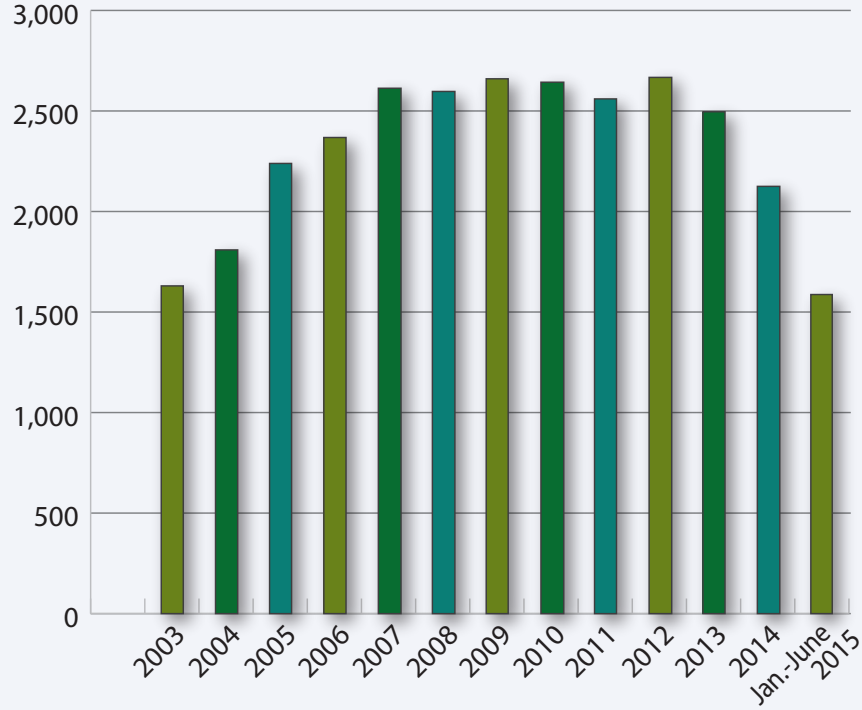
Six years ago, the New Mexico Supreme Court made significant changes to the state's speedy trial analysis in *State v. Garza*, which increased the time limit that triggers the four-pronged analysis used by the district courts to determine whether a defendant's right to a speedy trial has been violated. The time limit—known as "presumptively prejudicial" delay—sets a deadline for "simple" cases at one year, 15 months for cases of "intermediate complexity" and 18 months for "complex" cases.[5]

The Rule, then, essentially chops six months off the time limits for each category of case.[6]

In this context, the Rule enlarges the substantive speedy trial rights of defendants whose cases are pending in the Second Judicial District by endowing these defendants with substantively greater guarantees than the speedy trial rights

continued on page 12

Bernalillo County Metropolitan Detention Center Average Daily Population by Year*



	Average daily population in MDC
2003	1,630
2004	1,809
2005	2,239
2006	2,368
2007	2,613
2008	2,597
2009	2,660
2010	2,643
2011	2,560
2012	2,667
2013	2,496
2014	2,125
Jan.-June 2015	1,587

**Does not include those in receiving-discharge-transfer, in the hospital, on furlough or in community custody. Does not include those housed out of county, which began in June 2013 in an effort to meet MDC's operational capacity. In October 2013, 707 inmates were housed out of county. During FY14, the county spent more than $7.8 million to house inmates in out-of-county facilities. The program was discontinued in December 2014.*
Source: Bernalillo County

Prosecution of Sexual Exploitation of Children by Possession post-*State v. Olsson*

Does One Download = One Image?

By Clara Moran

Law enforcement and prosecutors have seen an increase in cases involving the possession of images of child sexual abuse in part because of the numerous file-sharing websites spanning the globe, where strangers can share and exchange such images without even communicating with one another. In rare cases, such exchanges involve just a single image, yet in most cases copious images are exchanged.[1]

This article details the current state of the law involving prosecution of child exploitation by possession in New Mexico when the defendant allegedly possesses multiple images. Under NMSA 1978, Section 30-6A-3(A),

> it is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age.

A conviction under this statute is a fourth-degree felony, with a basic sentence of 18 months.

Prior to the April 2014 Supreme Court decision in *State v. Olsson*[2], there was very little judicial interpretation of Section 30-6A-3(A). Prosecutions under this section were based on the number of images of child sexual exploitation a person possessed: If a person was arrested for possession of five images, he was facing five fourth-degree felony charges. The decision in *Olsson,* which addressed two consolidated cases (*State v. Olsson* and *State v. Ballard*), dramatically changed this dynamic.

Declaring an ambiguity, the Court also found nothing in the legislative history that provided any guidance, and concluded that the rule of lenity should apply.

At trial, Olsson was charged with possession of 152 images of child pornography, which were found in three binders and on a computer. Olsson argued that each of the counts should merge into one count, as his crime was a unitary act of possession. The trial court disagreed, concluding that under that rationale the statute "would become meaningless and an offender would be free to acquire unlimited child pornography without additional counts being charged." The trial court certified the unit of prosecution question to the Court of Appeals, which remanded for further factual development. On remand, Olsson pled guilty to six counts of possession of child pornography but reserved the unit of prosecution question for appeal.

Ballard was initially charged with 51 counts of possession of child pornography, but the charges were culled to 25 counts, of which Ballard was convicted. On appeal, the Court of Appeals "reduced the twenty-five convictions to five because each of [Ballard's] five separate downloads was in the nature of a single bundling of images for possession purposes."

Ultimately, both cases were appealed to the New Mexico Supreme Court for determination of the unit of prosecution under Section 30-6A-3(A). The Supreme Court first looked at the language of the statute and found no clear indication as to what the unit of prosecution was under subsection A. Declaring an ambiguity, the Court also found nothing in the legislative history that provided any guidance, and concluded that the rule of lenity should apply.

"The rule of lenity [provides] that criminal statutes should be interpreted in the defendant's favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute." Having found an insurmountable ambiguity, the Court concluded that Olsson and Ballard could only be charged with one count of possession of child pornography. In its ruling, the Court noted:

> The statutory language is insurmountably ambiguous and

The Legislature responded by introducing two bills during the 2015 Legislative session to address the Court's concerns.

> we do not discern any distinctness in the acts charged. Since Section 30-6A-3(A) was enacted in 1984 and amended in 2001, significant and rapid technological developments have occurred. Digital storage has become widely available and can store massive amounts of data. We respectfully recommend that the Legislature revise Section 30-6A-3(A) to reflect modern advances in technology and clarify the intended unit of prosecution.

In his dissenting opinion, Justice Edward L. Chávez concluded that the unit of prosecution for possession of child pornography is based on the number of different child victims participating in distinct sexual acts, or the same child or children participating in distinct prohibited sexual acts. Stating that "[t]he consequences of the unit of prosecution that I have hypothesized is that a defendant who possesses a medium containing multiple images of different children engaged in distinct prohibited sexual acts, or the same child or children participating in distinct prohibited sexual acts, is subject to multiple convictions, which might result in an extraordinarily lengthy sentence. This consequence advances what we have interpreted to be the purpose of this legislation, which is to continue to deter the continued victimization of a child who is the subject of child pornography."

The Legislature responded by introducing two bills during the 2015 Legislative session to address the Court's concerns.[3] HB 251 and HB 440 specified that the legislative intent behind Section 30-6A-3(A) is that a person should be charged with one count for each image possessed. Opponents of the legislation were concerned that persons in possession of thousands of images could receive a prison sentence greater than the individual who actually committed the abuse.

In response to these concerns, testimony was presented to House committees that the proposed bills would not make charging decisions mandatory and that prosecutors are best situated to determine, on a case-by-case basis, what charges are supported by evidence. In response to this type of testimony, the House Judiciary Committee amended the legislation to substitute "may" rather than "shall" regarding the prosecution of individual images within subsection H of HB 251 and 440.[4] The exercise of prosecutorial discretion was an important aspect of the proposed legislation, as it allowed prosecutors to make informed decisions about a matter they ultimately must prove beyond a reasonable doubt.

The bills were combined into one, and the House unanimously passed it.[5] Yet, there was simply not enough time to get the proposed legislation to the Senate for its consideration, and it was not acted upon by that body. Consequently, as it stands today, a person in possession of multiple images of child exploitation may be charged with only a single count with a maximum sentence of 18 months. Whether that should be the law remains in the province of the Legislature. It seems unfair to punish a person who possesses one image of child sexual exploitation in the same manner as a person who possesses thousands of images. Hopefully, this anomaly will be rectified in the next Legislative session for the benefit of all of New Mexico. ■

Endnotes

[1] *See generally*, Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 Rich. J.L. & Tech. 8, 6-7 (2010);
United States v. Shaffer, 472 F.3d 1219, 1221-1222 (10th Cir. 2007) (discussing the file sharing application Kazaa, through which the defendant downloaded 100 movies and 20 photos of child pornography).

[2] 2014-NMSC-012, 324 P.3d 1230. The Supreme Court's decision addressed two consolidated cases: *State v. Olsson* and *State v. Ballard*.

[3] HB 251 and 440, 52nd Leg., Reg. Sess. (N.M. 2015) available at http://www.nmlegis.gov/Sessions/15%20Regular/bills/house/HB0251.pdf and http://www.nmlegis.gov/Sessions/15%20Regular/bills/house/HB0251.pdf.

[4] http://www.nmlegis.gov/Sessions/15%20Regular/bills/house/HB0440JC1.pdf.

[5] http://www.nmlegis.gov/Sessions/15%20regular/votes/HB0440HVOTE.pdf.

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Passage of HB 560 Turns Criminal Forfeitures into

—RISKY BUSINESS—

By Devin Chapman

Prior to 2000, New Mexico mirrored the federal position, iterated in the then-recent *U.S. v. Ursery* (518 US 267, 1996) decision, that civil actions for the forfeiture of the proceeds and instrumentalities of crime separate and distinct from criminal prosecutions of the offenders themselves does not violate the Double Jeopardy clause of the Fifth Amendment. The U.S. Supreme Court effectively held that taking ill-gotten goods earned through criminal activity, goods the perpetrator possessed solely from criminal activity, did not constitute punishment for the activity itself.

In *State v. Nuñez* (2000 NMSC 13), however, the New Mexico Supreme Court broke with this line of reasoning. Effectively calling the distinction between a criminal action against a criminal and a civil action against the proceeds of that activity a legal fiction, the Court held that asset forfeitures at the state level implicate the double jeopardy protections of Article II, §15 of the New Mexico Constitution. Our highest court went on to spell out a number of requirements that must be satisfied before the state could both forfeit property and seek criminal sanctions against the same defendant for the same offenses. Soon thereafter, the Legislature adopted, codified and expanded the protections established in *Nuñez* with the 2002 Forfeiture Act (currently NMSA §31-27-1 et seq.).

Following *Nuñez* and the enactment of the Act, the only way for the state to both punish criminal activity and take the items of value earned or used in the commission of those crimes was through a single, bifurcated court action. The state would first have to prove the commission of the crime beyond a reasonable doubt and, only upon a conviction, would then have to prove that the property it sought to forfeit was reasonably connected to the charged offenses. The Act also imposed a number of other protections to prevent the improper forfeiture of assets.

> **HB 560** includes fixes that eliminate complications, but the changes so thoroughly shift the landscape that many state and local agencies have stated they will no longer take part in forfeitures.

Under the Act, the state had to prove that the value of the property forfeited did not outweigh the value/cost of the criminal activity; the state could not forfeit a $40,000 pick-up truck used for the one-time delivery of a $20 "crack" rock. More importantly, state claims against seized property were subject to innocent owners or secured interests of subject property; a bank holding the loan of the truck would not lose the value of its interest if the property was forfeited, as only the now-convicted offender's equity could be forfeited. To make sure that all innocent owners and interest holders had the opportunity to contest the forfeiture of their rightful shares, the Act required personal notice be served on any potentially interested party known to the state, and to repeatedly publish notice of the forfeiture action to notify interested parties unknown to the state.

Later decisions (*State v. Esparza* (2003 NMCA 075) and *Albin v. Bakas* (2007 NMCA 076)) gave further structure and clarification to the process. Though judicial opinions cannot anticipate every possible situation, *Nuñez*, its progeny and the Act created a relatively clear process through which the state could pursue forfeitures while giving defendants and innocent owners a means to contest those same actions.

Admittedly, the Act was not always properly observed, and some lessons were learned the hard way. In 2011, a $3 million verdict was entered against the Bernalillo County Sheriff's Office for its failure to comply with the requirements of the Act (*Apodaca v. Bernalillo County*, D-0202-CV-2006-10246). The state police currently are negotiating the settlement of a class-action suit arising from claimed violations of the Act (*Hicks v. State*, D-0101-CV-2009-02294). These cases all have reinforced the original *Nuñez* line: the only way the state could acceptably both punish a wrongdoer and deprive him or her of the proceeds of that wrongdoing was to do so in a single, bifurcated action. Doing either the forfeiture or the prosecution independently implicated the

double jeopardy clause and barred the state from bringing the other action at a later date in a different proceeding.

With limited economic growth and ever-shrinking budgets, many agencies became reliant on the monies raised from forfeitures to provide needed equipment and training. However, the Act also included instructions regarding the disposition of forfeited proceeds. Seizing agencies were able to recoup any direct expenses related to the storage and maintenance of seized property, but the Act mandated that all of the remaining proceeds remit to the governmental body overseeing the seizing agency. It was left to those locally elected bodies to determine, with some limitations, how much, if any, of the proceeds might be returned to the seizing agency.

Though far from perfect, and in need of some alterations and further clarifications, the Act provided a workable process through which an agency could seek the forfeiture of property while observing constitutional mandates. While the *Apodaca* and *Hicks* cases initially scared many agencies away from pursuing forfeitures altogether, an increasing number were attempting to take away ill-gotten proceeds while maintaining strict adherence to the Act. *Nuñez* and the Act largely eliminated the types of abuses described in some media stories. As such, many were surprised by passage in this year's Legislature of HB 560, which effectively results in an all-new Forfeiture Act, one that many worry will result in the elimination of asset forfeitures by any non-federal law enforcement agency in the state.

HB 560 includes fixes that eliminate complications, but the changes described below so thoroughly shift the landscape that many state and local agencies have stated they will no longer take part in forfeitures.

§31-27-2 – Eliminates the possibility of any purely civil forfeiture, requiring the state to bring a criminal case in conjunction with any effort to take ill-gotten goods away from a suspected criminal. While this provision clearly precludes situations resembling those sensationalized in the media, it really only codifies the practical, and already-observed, effect of *Nuñez* and the 2002 Act.

§31-27-7(D) and **§31-27-7.1(C)** – The state can no longer forfeit property of a willfully ignorant owner who turns a blind eye to the use of said property in criminal activity. The state now must show that the owner had actual knowledge of the activity, not just that he or she should have known what was going on.

§31-27-4.1(E) – This provision allows the petition of the trial court for the return of seized property to pay for defense counsel if the "property is the only reasonable means for a defendant to pay for legal representation in a related criminal or forfeiture proceeding." This incentivizes the decision to have no legitimate income source, instead relying solely on income from illegal activities. The drug dealer with a legitimate job may still be able to pay for an attorney with untainted assets, while the dealer that does nothing but deal can claim that because the money taken by law enforcement is his or her only way to pay for counsel of choice, the money should be given back. And at the end of all litigation, if the state got both a conviction and a forfeiture judgment, there may not be any remaining assets against which to levy a forfeiture judgment.

§31-27-8 – All real and personal property seized for the purposes of forfeiture must be protected and maintained by the seizing agency, just as under the 2002 Act. With seized vehicles, this has always meant storing and maintaining them, arguably in an indoor facility. For seized real estate, this means typical maintenance and repairs. Whatever property is seized for forfeiture has to be maintained in the condition in which it was seized until the forfeiture is resolved, otherwise the seizing agency faces potential liability for damages if the forfeiture is not successful. The 2002 Act allowed for the reimbursement of storage and maintenance expenses before the proceeds were returned to the governing bodies. Under the new Act, the agencies must still bear all the costs, but are no longer granted any recompense.

§31-27-4.1(B, C and D) – Allows anyone, including previously unknown or unforeseen parties, to claim an interest in seized property until 60 days before the commencement of trial. This gives the state no more than 20 calendar days

continued on page 13

Can't Tell the Rules Without a Scorecard

Children's Court Rules Updated

By Ken Fladager

With the start of the new year came significant changes to the New Mexico Children's Court Rules. Some changes involve only delinquency proceedings while others apply only to youthful offender proceedings; some affect both. These changes apply to all cases filed on or after Dec. 31, 2014, and are explored in this article.

In General

Article 1 of the Children's Court Rules (General Provisions, applicable to all proceedings) underwent the fewest revisions, though some of the changes are significant. Prior to the rule amendments, the Rules of Criminal Procedure for the District Courts governed all proceedings in Children's Court upon the filing of a notice of intent alleging that a child is a "youthful offender" as defined in the Children's Code. The Rules of Criminal Procedure for the Magistrate Courts governed all youthful offender proceedings before the magistrate courts. Rule 10-101 NMRA now brings *all* youthful offender matters exclusively under the Children's Court Rules. Naturally, that has required substantial changes to Article 2 of the Children's Court Rules (Delinquency Proceedings), to address matters that previously had been handled in the district and magistrate court rules. However, procedural rules for "serious youthful offenders" have remained unchanged.

Filing and Time Limits

Rule 10-104 NMRA was changed to clarify methods of filing and service, but also added a new paragraph (Rule 10-104(G)) governing filing and service of documents by an inmate confined to an institution. The use of this rule will arise most frequently in abuse and neglect cases, but also may affect delinquency matters where a youthful offender has received an adult sentence that includes incarceration. Rule 10-107 was completely rewritten to more closely resemble federal rules of procedure regarding the calculation of time. The changes lay out the rules more specifically for computing time in increments.

One of the biggest changes is to time limits for adjudicatory hearings and trials. The basic time limits for delinquency cases have not changed: They still are 30 days for children in detention (Rule 10-243(A) NMRA) and 120 days for children out of detention (Rule 10-243(B)). However, the New Mexico Supreme Court is no longer granting rule extensions. Under the revised Rule 10-243, the children's court now has 90 days of discretionary extension authority instead of the previous 60 days. *See* Rule 10-243(D) NMRA. No

Changes to New Mexico Children's Court Rules

Withdrawn	Unchanged	Changed	Changed, Youthful Offender	New, Youthful Offender
10-227	10-222 10-245	10-104 10-107 10-243 10-251	10-101 10-213 10-226 10-241 10-242	10-225.1 10-243.1 10-245.1 10-247 10-251.1 10-253 10-432 10-433

extensions beyond the additional 90 days are authorized except upon a showing of "exceptional circumstances." *Id.* Those exceptional circumstances may not include any reason cited for a previous extension. *Id.* Consequently, prosecutors who in the past might have been willing to agree to a continuance for a child's failure to appear will have to seriously consider requesting a bench warrant to protect time limits.

Time limits for youthful offender cases also have changed under the new Rule 10-243.1 NMRA. The basic time limits are still six months (Rule 10-243.1(A)(2), with one extension of an additional six months available (Rule 10-243.1(B)(1)). A second six-month extension is available under Rule 10-243.1(B)(2), but the court must consider five listed factors before granting the extension including case complexity, reason for delay and prejudice. As with delinquency cases, no extensions beyond the additional one year are authorized except upon a showing of "exceptional circumstances." Again, those exceptional circumstances may not be for any reason used for a previous extension. *See* Rule 10-243.1(B)(3) NMRA.

Pre-Adjudication

The procedures for the initiation of youthful offender proceedings under Rule 10-213 NMRA also have expanded. The 15-day time limit for a probable cause determination has been shortened to 10 days, which may be extended for not more than an additional 30 days. *See* Rule 10-213(B) NMRA. In addition, the rule now goes into detail about procedures when there is no probable cause finding for any of the countless youthful offender offenses. *See* Rule 10-213(C) NMRA.

Two new forms have been approved for use in youthful offender cases. Form 10-432 provides for the waiver of arraignment and denial of charges. Form 10-433 provides for the waiver of preliminary examination and grand jury.

The right to bail when a notice of intent to seek adult sanctions has been filed is now covered in the new version of Rule 10-225.1 NMRA. It provides that the respondent child shall have a right to bail as provided under Rule 5-401. If a child wants to raise the defense of insanity in a youthful offender case, those procedures have been added to Rule 10-241. Likewise, provisions for raising competency to stand trial have been added to Rule 10-242. The raising of competence stays all proceedings, including grand jury. *See* Rule 10-242(A) NMRA.

The old Rule 10-227—regarding responses to a petition, inquiry of the child, voluntariness and factual basis—has been withdrawn. Those provisions have been transferred to the rewritten Rule 10-226 NMRA, which now contains provisions for acceptance of pleas, conditional pleas and new provisions for youthful offender pleas. Youthful offender pleas shall neither purport to impose an adult sentence nor relieve the court of its duty to hold an amenability hearing. The rule also requires the court to advise a youthful offender of the additional consequences of receiving an adult sentence, such as firearm restrictions, sex offender registration and use as a prior conviction.

Jury trial in delinquency proceedings remains unchanged; jury trial in youthful offender proceedings is now addressed in the new Rule 10-245.1 NMRA, which directs that a youthful offender trial proceed in accordance with Rules 5-605 through 5-614. The committee commentary includes the recommendation that the court submit special interrogatories to the jury for assistance in the court's determination of whether to impose an adult sentence or a juvenile disposition.

Post-Adjudication

Procedures for the amenability hearing in youthful offender cases are now covered in the new Rule 10-247 NMRA. It is separate from either an adjudicatory hearing or a subsequent dispositional or sentencing hearing, and must start no later than 30 days after a trial's end or entry of a plea, *see* Rule 10-247(B). Amenability hearings are now governed by the rules of evidence. *See* Rule 10-247(D) NMRA. The standard of proof for the state is clear and convincing evidence. Prior to the hearing, the Children, Youth and Family Department is required to prepare a report on the child's cooperation. If the court determines that the child is to receive an adult sentence, the adult probation and parole division is required to submit a pre-sentence report before a sentencing hearing.

Judgment and sentencing of youthful offenders is addressed in the new Rule 10-251.1 NMRA and covers both the imposition of juvenile and adult sanctions. In the case of an adult sentence, the sentencing hearing must begin within 90 days of the court's entry of findings on amenability. The judgment and sentence must then be entered within 30 days of the conclusion of the hearing.

Finally, the right to appeal post-adjudication, for both delinquency and youthful offender cases, in now covered in the new Rule 10-253, which provides for the tolling of time limits for the taking of an appeal if the child is not advised of those rights at the time of disposition or sentence. ■

Ken Fladager *has been a Children's Court prosecutor in the Second Judicial District for 16 years. Including his time as a defense attorney, he has practiced in Children's Court for more than 20 years.*

Local Rule Targets Inmate Reduction *continued from page 5*

John Sugg *works as a solo practitioner primarily handling domestic relations, personal injury and criminal defense cases in Ruidoso. Previously, he worked as a deputy district attorney in the Lincoln County office of the 12th Judicial District Attorney's office, and as a prosecutor in the Second Judicial District Attorney's office from 2007 to 2013.*

> The Rule strips trial courts of the ability to make merit-based determinations or exercise discretion in apportioning sanctions

otherwise afforded to criminal defendants in New Mexico. As a result, the Rule conflicts with the statutory language of NMSA § 38-1-1, which specifies that the Supreme Court shall "promot[e] the speedy determination of litigation upon its *merits*," but "shall not abridge, *enlarge* or modify the substantive rights of any litigants."[7]

Moreover, while violation of the "presumptively prejudicial" time limit under *Garza* merely serves as a triggering mechanism for application of the four-pronged *Barker* test, violation of the Rule's time limits results in dismissal—without any evaluation of whether a defendant's speedy trial rights have been violated.

The Rule Moves Away From Determining Cases on the Merits

In New Mexico, when a party fails to comply with a court order or deadline set by the Rules of Criminal Procedure for the District Court, extreme sanctions (such as exclusions of witnesses, suppression of evidence and dismissal of cases) are "to be used only in exceptional circumstances."[8] Before extreme sanctions can be invoked, a party must demonstrate that it suffered tangible prejudice as a result of the other party's failure to comply with the rules or order.

Under the Rule, however, opposing parties in the Second Judicial District are not required to assert prejudice—let alone prove that there has been "an adverse impact upon the defense's ability to prepare and present its case" before an extreme sanction is handed down by the court.[9] As a result, the Rule strips trial courts of the ability to make merit-based determinations or exercise discretion in apportioning sanctions.

Moreover, the Rule marks a return to precisely the type of arbitrary trial deadlines that the Supreme Court itself abandoned five years ago when it withdrew Rule 5-604—the so-called "six-month rule"—in a unanimous decision.[10] So even though the Supreme Court wiped away the statewide six-month rule only a half-decade ago, the Second Judicial District once again finds itself in the position where trial courts must dismiss pending charges with prejudice if and when the state is unable to meet the Rule's accelerated trial deadlines.

Balancing Costs, Benefits

Any reasonable attorney would agree that the jail overcrowding at MDC required action, and the recent reductions in inmate population are clearly reducing Bernalillo County's expenditures at the jail. Yet no consensus exists as to whether the Rule is a wise course of action within the greater context of New Mexico's criminal justice system. Scores of cases are being dismissed for failing to comply with the Rule. And in every instance thereof, the dismissal constitutes a very real consequence of New Mexico's choice to avert the justice of a jury trial in favor of other public policy interests. ■

Endnotes

[1] Dan McKay, *Jail population plunges*, Albuquerque J., March 15, 2015 at http://www.abqjournal.com/555688/news/bernalillo-county-jail-population-has-plunged.html.

[2] Mike Gallagher, *New rule aims to unclog courts, cut jail population*, Albuquerque J., November 13, 2014 at http://www.abqjournal.com/495530/news/new-rule-aims-to-unclog-courts.html ("'The rule is designed to address the … overcrowding at the jail in Bernalillo County,' said Arthur Pepin, director of the Administrative Office of the Courts in Santa Fe.").

[3] Supreme Court Order No. 14-8300-025.

[4] E.g., a plea agreement is to be submitted to the court no later than 10 days before trial; pre-trial motions must be filed not less than 35 days before trial in Track 1 and Track 2 cases, and not less than 45 days before trial in Track 3 cases.

[5] *State v. Garza*, 146 N.M. 499, 212 P.3d 387, 2009-NMSC-038. See also *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182.

[6] *Compare* LR-2-400 (deadline of six months for simple cases, nine months for intermediate cases and one year for complex cases) with *State v. Garza*, 2009-NMSC-038, ¶ 48, 146 N.M. 499, 212 P.3d 387.

[7] § 38-1-1, NMSA 1978 (Emphasis added)

[8] *State v. Bartlett*, 1990-NMCA-024, ¶ 5, 109 N.M. 679, 789 P.2d 627; *see also State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25.

[9] *Harper* at ¶ 19.

[10] *State v. Savedra*, 2010-NMSC-025, ¶ 9, 148 N.M. 301, 236 P.3d 20 ("[T]he six-month rule has become an unnecessary and sometimes counterproductive method for protecting a defendant's right to a speedy trial.").

Passage of HB 560 Turns Criminal Forfeitures into Risky Business *continued from page 9*

to fully investigate and respond to such a claim, and gives the court no more than an additional 10 days to fully adjudicate these newly revealed issues. The standard return requested on subpoenas for documents to establish the claimed rights alone would take nearly the entire time.

§31-27-4.1(F) – The court appears to have discretion to *sua sponte* order the return of seized property to a defendant to obtain legal counsel, and this section provides only an optional requirement for an accounting of where that money goes, but also explains what standards apply to such an accounting.

§31-27-6(K) – At any time after a forfeiture judgment, any party claiming interest in forfeited property may petition the court to determine whether the forfeiture was unconstitutionally excessive, even though the value of the property in relation to the offense committed already would have been expressly considered as part of the forfeiture hearing under §31-37-36(G).

§31-27-6(N) – "Fair market value" no longer means fair market value. Courts may now rely on the value of the property to the defendant from whom it was taken, including the "hardship that the defendant will suffer if the forfeiture is realized," as well as the hardship potentially suffered by anyone else if the property is forfeited. (Walter White may not be able to keep the profits for himself, but Skyler, Flynn and Holly could keep everything.)

§31-27-7(B) – Mandates that every law enforcement agency in the state transport at its own expense all forfeited property to the state treasurer, who at present has no facilities or procedures for processing such items. The treasurer must then convene auctions to dispose of the property, with no indication of how to fund or conduct such efforts. All proceeds then revert to the state general fund.

§31-27-7(C) – Requires agencies to turn over forfeiture proceeds received from "any other jurisdiction" to the general fund. This includes any monies received through asset sharing with federal law enforcement and investigatory agencies. Federal asset sharing rules expressly mandate that such proceeds go directly to the participating agency and forbid redirection to any governing body's general fund. Thus, due to HB 560's enactment, the Asset Forfeiture and Money Laundering Section (AFMLS) of the Department of Justice ordered that all federal asset sharing in New Mexico cease on July 1, 2015.

§31-27-8(D) – Agencies are no longer permitted to retain previously forfeited vehicles for use in undercover activities, as any forfeited property must be turned over immediately to the state treasurer.

§11 of HB 560 – Creates an obligation for every state or federal agency to report annually every seizure (not just completed forfeitures), to include the individual and total value of all currency seizures, and the numbers, descriptions and fair market value of any seized property. These reports are to be published on the agency's website and must be submitted to both the Department of Public Safety and the local district attorney's office. This applies regardless of whether the agency conducted any seizures.

In short, HB 560 has created many loopholes and new expenses that may prompt law enforcement agencies to forgo forfeiture actions. And the changes in HB 560 related to the federal asset sharing program also may mean that agencies may no longer be able to afford participation in many joint taskforce operations. ■

Devin Chapman *is a deputy district attorney with the Second Judicial District Attorney's office, overseeing property and narcotics prosecutions. Beginning with a stint in the Attorney General's office, he has trained prosecutors and law enforcement across the state how to conduct forfeiture proceedings in compliance with New Mexico law.*

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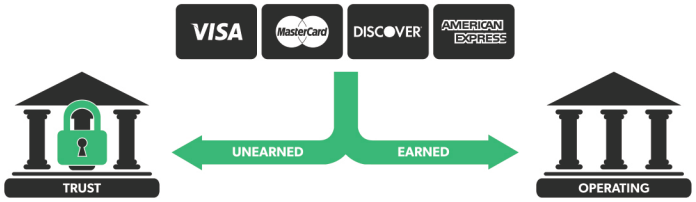

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