For the Defense

New Mexico
CRIMINAL DEFENSE LAWYERS ASSOCIATION

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Mission Statement:
The New Mexico Criminal Defense Lawyers Association provides support, education and training for attorneys who represent persons accused of crime. NMCDLA also advocates fair and effective criminal justice in the courts, the legislature and in the community.

Representing Mohamedou Slahi, and how his *Guantanamo Diary* Got Published with the Aid of NMCDLA Lawyers

Nancy Hollander and Theresa Duncan, Albuquerque

The harrowing memoir of Mohamedou Slahi, a 44-year-old Mauritanian computer engineer who has been imprisoned in Guantanamo for the last 14 years, has emerged out of the secret world of rendition into public light with the efforts of NMCDLA members Nancy Hollander and Theresa Duncan. From a local police station, where he was summoned in November 2001, Slahi was flown by the CIA to Jordan, then to Afghanistan and ultimately to Guantanamo Bay. Although ordered released in 2010 by a federal judge, who cited the government's failure after nine years to have sufficient evidence to detain him, Slahi remains in custody, living near the same prison hut where he wrote *Guantanamo Diary*. There he awaits rehearing of his habeas petition after the case was remanded on appeal by the Obama Administration.

Hollander and Duncan became involved in Slahi's case in 2005 when Hollander was contacted by a lawyer in France who had heard from a lawyer in Mauritania that they were seeking representation for a Mauritanian believed to be in Guantanamo. It was subsequently discovered that the Center for Constitutional Rights had appointed a lawyer to represent Slahi. That lawyer, Sylvia Royce, agreed to work with Hollander and Duncan on the case. A few years later Royce withdrew, and in 2009 ACLU attorneys Hina Shamsi and Jonathan Hafetz joined the Slahi defense team, along with Linda Moreno, an attorney who had participated with Hollander and Duncan in the defense of the Holy Land Foundation.

Hollander first visited Slahi with Royce in June 2005. During that visit, Slahi gave Hollander and Royce 90 pages he had written as a way to introduce himself. Over the course of that year he expanded his writings into the book of 466 pages that he sent to his attorneys several pages at a time.

His attorneys knew Slahi wanted to publish his manuscript and began to request that it be "cleared" for release. Everything a prisoner in Guantanamo says or writes is presumed to be classified. In order to share Slahi's writings with anyone without a security clearance, they had to be submitted to a Privilege Review Team (PRT). In his case, the PRT refused to review the book because they said it was too long. The defense team fought about and litigated this for years until it was obvious they would not get anywhere. Finally, Slahi agreed to waive the attorney-client privilege so the manuscript could be reviewed by various unknown intelligence agencies, a process that took at least two years.

Following the review, the manuscript was still not cleared for release. Instead, it had gone from being classified to being protected, a "somewhat made-up" status, in Hollander's words, that meant it could be shared within the legal team but not with the public and the press. The defense advised the government, as they had done when they provided the manuscript, that Slahi did not waive his privilege so that the government lawyers fighting his habeas and the intelligence agencies could read the book. There was another wait of many months while the government sent it back again.

In 2012, the manuscript was returned - unclassified, with redactions. That became the essence of the book, *Guantanamo Diary,* edited by Larry Siems and published in January 2015.

As Siems explains in the introductory essay, Slahi's arrest was not random. One of 11 children of a camel trader, Slahi was a smart kid who memorized the Koran as a teen and at 17 won a scholarship to the University of Duisberg-Essen in Germany, where he studied electrical engineering. As Siems points out, he was more than a student, however. He took two breaks from school to travel to Afghanistan and fight the Soviets. In 1991 he trained at a camp near Khost, Afghanistan, run by al-Qaeda, and there took an al-Qaeda loyalty oath. The next year he participated in a siege against the Soviet-backed government. When the Soviets withdrew from Afghanistan, and, in Slahi's words, "the Mujahiden…started to wage war against themselves," he also withdrew, and returned to school in Germany, where his Mauritanian wife joined him. He also kept in touch with the friends he had made in Afghanistan, some of whom remained affiliated with al-Qaeda.

In a Slate interview with Siems, Colonel Morris Davis, chief prosecutor of Guantanamo cases from 2005 to 2007, said of Slahi: "He reminded me of Forrest Gump, in the sense there were a lot of noteworthy events in the history of al-Quaida [sic] and terrorism, and there was Slahi lurking somewhere in the background…. He was in Germany, Canada, different places that look suspicious, and that caused them to believe he was a big fish, but then when they invested effort to look into it, that's not

where they came out." Prosecutors eventually concluded "there's a lot of smoke but no fire," Davis said, and they declined to charge Slahi. Col. Davis said recently that "there is absolutely no evidence that he had ever engaged in any hostile acts against the United States."

Much of the diary recalls these events, as well as the seemingly endless, often torturous days of Guantanamo prison life that Slahi endured before and while he had counsel fighting for his freedom. Among the most poignant passages are descriptions of his interrogations that Slahi describes with fear, rage and wonder. What had he done? What did they want him to say? As Slahi tells it, "It's not just, 'Yes, I did.' No, it doesn't work that way. You have to make up a story that makes sense to the dumbest dummies. One of the hardest things to do is to tell an untruthful story and maintain it, and that is exactly where I got stuck."

Seeking release from the brutal regimen of physical and psychological torture by his oppressors, he resorted to false confessions that he knew would implicate an innocent person. He came to recognize the evil in his own acts, and wrote of his choices: "I understand that no one is perfect, and everybody does good and bad things. The only question is, how much of each?" As Pankaj Mishra says of Slahi in The Guardian review (February 13, 2015): "He is no gaudy moralist, deriving from the crimes of his enemies the proof of his virtues. Rather he seeks in his own actions and feelings an explanation for his suffering. "

A review in The New Yorker ("Read *Guantanamo Diary*," by Joshua Rothman, February 13, 2015) evokes the tone of the memoir:

"*Guantanamo Diary* turns out to be especially humane. Slahi doesn't just humanize himself; he also humanizes his guards and interrogators. That's not to say he excuses them. Just the opposite: he presents them as complex individuals who know kindness from cruelty and right from wrong."

In 2009, Judge James Robertson, since retired, presided over four days of hearings in the District of Columbia on Slahi's habeas petition, during which the parties introduced thousands of pages of exhibits and Slahi testified live from Guantanamo. In 2010, Judge Robertson granted Slahi's petition and ordered his immediate release from Guantanamo. The ruling was appealed as part of a governmental strategy for habeas cases, in which the Obama Administration persuaded the appeals court to adopt progressively weaker and weaker legal and evidentiary standards for judging whether a prisoner like Slahi was "part of" al-Qaeda. The court of appeals held that Judge Robertson applied the wrong legal standard in granting Slahi's petition and remanded the case for further proceedings. Slahi awaits a rehearing, where Hollander and Duncan hope and expect he will once again be ordered released.

A petition on the ACLU website, www.aclu.org/freeslahi, asks the military to stop fighting Slahi's habeas. NMCDLA members and their colleagues are encouraged to sign on.

In 2009, President Obama began what are called Periodic Review Boards. These are not trials but rather informal hearings whose purpose is to determine whether a prisoner poses a current threat to the security of the United States. The prisoner gets a personal representative who is not a lawyer to assist him, and can also have a lawyer at his own expense, as Slahi will have one of his lawyers with him. He can call witnesses and introduce evidence to show he is not a current threat to the United States. Such a hearing, which could be held as early as this summer, could be another passage to freedom for Mohamedou Slahi.

President's Message

Barbara Mandel, Assistant Federal Public Defender, Las Cruces

It is such a great pleasure to be President of this organization. We are an incredibly vibrant, smart, active group of people. Over the last year and a half, I have learned how much our members contribute and what you all do for the group and for our collective clients. Even if you only attend our CLEs, you are contributing to our bottom line as well as enriching yourself, and the knowledge you gain at each CLE helps you represent your clients more effectively every day. But, yes, there is something for everyone to do, if he or she wants to be more involved.

During this legislative session, we have had members advocate for and against bills at the committee meetings, analyze bills, and make phone calls to their legislators. Anything our members can do in this regard helps. As of this writing, not one piece of legislation that would hurt our clients has made it out of committee. There have been some major disappointments as well – where we have not been able to move helpful legislation forward, but this has been a difficult year politically. There is always next year and the year after that. Remember, it took twelve years, with the help of the Coalition to Repeal the Death Penalty, for New Mexico to abolish the death penalty. Legislative work is so important, and I was thrilled to learn that thirty of you attended the Legislative Drive-In we held in January. I also want to take the opportunity now to send a shout-out to our new Legislative Coordinator, Rikki-Lee Chavez. She is working so hard and doing a fabulous job for us. Thank you, Rikki!

Some of you help organize our wonderful CLEs, reviewing the topics our members have requested, grouping them, and recruiting faculty to present on those topics. Some of you teach at the CLEs; others help at the registration desks. In May we will be co-sponsoring our first CLE in another state, in beautiful Durango, Colorado, focusing on Criminal Justice Issues in and around Indian Country. We hope that many of you will attend, and we especially welcome our members in Gallup and the Four Corners area. Before that seminar, we will have our third annual Trial Practice, as well as our second Federal Practice CLE, both in Albuquerque. Please remember that we have scholarships available for CLEs, and I again thank our members who sponsor these scholarships. So, for those of you who may wish to contribute more, but don't have the time to actively participate, you might consider sponsoring a scholarship - another way to help out fellow members. Additionally, if you can't make it to a CLE, you can purchase self-

study items on our website, as well as manuals and books helpful to your practice.

We also reach out into the legal community, outside of the criminal defense community. We sit on Supreme Court rules committees, and we were very involved with the recent rules changes in Bernalillo County. If you see an area in your community where NMCDLA could get involved, do not hesitate to contact Cathy, me, or our incoming president, Matt Coyte. As NMCDLA becomes more involved in local communities, the more respected our opinions become. In the last few years, we have greatly increased our availability to the media, reporters call our members for clarification and assistance, and we've been submitting op-ed pieces and letters to the editor.

We have the best writers in the state in our organization. They write those letters and those op-ed pieces, and they write articles for the newsletter you're now reading. They post motions and briefs into the Members Only Library. They write Amicus Briefs on state-wide issues important to our clients.

As a member, you have access to the library, as well as to our listserve, where folks ask for help and information is shared. We've been increasing our presence on social media; using Twitter and Facebook. Friend us on Facebook, and, I promise, you will be happy with the postings and may even want to post something yourself from time to time! Take a look at our website; you can even help us there by sending us names of experts who might want to advertise with us.

So even though you – our members – are some of the busiest attorneys, investigators, and paralegals in the state, you also take the time to help your organization, an organization which then helps you! Every one of you has a tough job. Whether you are a public defender or are in private practice; whether you take contract cases from the state or are on the federal CJA panel, NMCDLA has your back - reinforced by our Strike Force, if and when your professionalism is under attack.

I wish all of you a safe and fun St. Patrick's Day, a Happy Easter, and a Happy Passover, and please, if you want to pitch in, just call (505) 992-0050, and Cathy will be happy to help find something for you to do that will unquestionably enhance our organization and our mission.

Barbara G. Mandel

Volunteer Program to Help Federal Prisoners Apply for Clemency

Will you volunteer to represent a federal prisoner who has been incarcerated for a very long time and faces a long future sentence to apply for clemency? There is a short window of opportunity under the Obama Administration.

Clemency Project 2014 – a working group composed of lawyers and advocates including the Federal Defenders, the American Civil Liberties Union, Families Against Mandatory Minimums, the

American Bar Association, and the National Association of Criminal Defense Lawyers, as well as individuals active within those organizations – was launched in January 2015 after Deputy Attorney General James Cole asked the legal profession to provide pro bono (free) assistance to federal prisoners who would likely have received a shorter sentence if they had been sentenced today. Clemency Project 2014 members collaborate to recruit and train attorneys on how to screen for prisoners who meet the criteria listed below and assist prisoners who meet the criteria to find lawyers to represent them.

Clemency Project 2014 reviews requests from prisoners to determine if a prisoner has served ten years and does not have an obviously disqualifying feature (such as a crime of violence). Prisoners who appear to qualify are assigned a lawyer, who then writes to the prisoner for permission to review documents in his or her case to determine if the other criteria are met. If the criteria are met, the prisoner is assigned a lawyer to help fill out and file a clemency petition. That might be the same lawyer who wrote to the prisoner for permission to review his or her documents or it might be a new one. In either event, the lawyer is writing to confirm that the prisoner wants free counsel to help write and submit a petition for commutation.

According to the criteria released by the Justice Department, prisoners must be:
- serving a federal sentence;
- serving a sentence that, if imposed today, would be substantially shorter;
- have a non-violent history with no significant ties to organized crime, gangs or cartels;
- have served at least ten years;
- have no significant prior convictions; and
- have demonstrated good conduct in prison.

Volunteering for Clemency Project 2014 will help assist the thousands of prisoners who have asked for pro bono help. Volunteers will:
- conduct research and work with individual prisoners to help determine whether a prisoner meets the Clemency Criteria, and if so,
- represent the prisoners and draft a clemency petition for these prisoners that will be submitted to the Office of the Pardon Attorney.

Clemency Project 2014 will assist volunteers by providing:
- comprehensive on-line training;
- a complete set of resource materials that complement the training;
- a panel of expert Resource Counsel to answer technical, procedural and substantive questions;
- a Screening Committee that will review attorney recommendations on individual cases.

If you are a member of the bar in good standing and agree not to charge the client, and would like to volunteer, please send an email expressing your interest to volunteer@clemencyproject2014.org.

ARE YOU NMCDLA BOARD-READY?

If you have been involved in NMCDLA and are interested in being nominated for the Board of Directors, please submit a Letter of Interest before April 3 to info@nmcdla.org. All letters will be reviewed by the Nominations Committee.

Thanks to our 2015 Benefactors and Sustainers!

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Roundhouse Roundup

Rikki-Lee Chavez, NMCDLA Legislative Coordinator

The 60-day session enters its final week on March 16th. At this point, no criminal- law related bills, good or bad, have passed both chambers. At this point, only a handful of bills have passed both chambers.

Two bills that currently threaten to make their way to their second chamber are House Bill 142 and House Bill 125. House Bill 142 is sponsored by Representative Egolf, and is commonly referred to as the revenge porn bill. House Bill 125 is sponsored by Representative Kelly Farjado, and is commonly referred to as the sexting bill. These bills made it through their first Senate committees after passing the House. It is possible that they could be scheduled for a Senate Judiciary hearing this week and see the Senate floor before the end of the session; however, I am working to bring issues with both bills to the attention of committee members.

A highlight for this session occurred on Thursday, March 5th. After excellent public comment by NMCDLA members Tova Indritz, Angelica Hall, Ben Baur, and Kim Chavez-Cook, the House Safety and Civil Affairs Committee voted to table House Bill 453. House Bill 453 sought to change New Mexico's three-strikes law by striking the great bodily harm requirement and adding additional felonies to the list of serious violent offenses. This was a great win for NMCDLA, and a true showing of the impact our representation in numbers has on the legislature.

NMCDLA member Matt Coyte partnered with ACLU member Steve Allen to bring forth House Bill 376. The bill, sponsored by Representative Moe Maestas, seeks to eliminate the misuse and overuse of solitary confinement in New Mexico. After an interesting hearing in the House Safety and Civil Affairs Committee, the bill received a Do Pass to House Judiciary. Unfortunately, the bill did not pass the House Judiciary Committee, and will not progress this legislative session. However, the bill brought a lot of publicity to the issue, and if nothing else, laid the ground work for positive reform with regard to solitary confinement.

Senator Lisa Torraco is sponsoring two bills, Senate Bill 358 and Senate Bill 363. Senate Bill 358 seeks to enact the Expectant and Postpartum Prisoners Act, which would provide for the release of women who are expecting a child or lactating. Senate Bill 358 is brought forth from discussion during the interim in the Criminal Justice Reform Subcommittee. This bill seeks to enact the Halfway House and Transitional Residential Facility Act, which would require the corrections department to operate or contract to operate a minimum of one halfway house or transitional residential facility for

men and one for women in each probation and parole region. At this time, Senate Bill 358 has passed the Senate.

Senate Bill 441, sponsored by Senator Richard Martinez, seeks to provide further immunity for those who call to report alcohol or drug overdose, or those who are experiencing alcohol or drug overdose. The bill received a Do Pass from the Senate Public Affairs Committee and will be heard in the Senate Judiciary Committee next. Senator Martinez also is sponsoring Senate Bill 315, which seeks to prohibit state and local law enforcement from enforcing federal immigration laws. Both bills are currently awaiting a Senate Judiciary hearing.

Senate Bill 16, sponsored by Senator Cisco McSorley, passed the Senate last week and awaits its first House committee hearing. The bill seeks to reform eyewitness ID procedures in New Mexico. Previous versions of the bill have passed both chambers in the past, but were vetoed by the Governor. The bill passed its first House committee, and is now awaiting a House Judiciary Committee hearing.

Senate Bill 365, sponsored by Senator Michael Sanchez, seeks to introduce expungement to New Mexico. The bill would allow those arrested without conviction or victims of identity theft to petition the court for an order expunging criminal records from public databases. The bill also seeks to allow persons convicted of certain misdemeanors to petition the court for record expungement after 5-10 years of no additional criminal activity. The bill passed the Senate Public Affairs Committee and the Senate Judiciary Committee, and is now on the Senate Floor Calendar. Previous versions of the bill have passed both chambers in the past, but were vetoed by the Governor.

House Bill 560, sponsored by Representative Zach Cook, Forfeiture Procedures and Reporting, seeks to offer additional protections and procedures to those whose property has been seized by law enforcement. This bill is currently on the House Floor calendar.

Senator Joseph Cervantes sponsored Senate Bill 383 to decriminalize the possession of small amounts of marijuana. This bill passed the Senate by one vote, and heads to the House side for further debate and discussion. NMCDLA worked with the LOPD and DPS on this bill.

These are just a few of the bills that NMCDLA keeps track of and seeks to educate legislators about how they affect the criminal law field. To date, we are tracking over 120 bills. This immense task could not be undertaken without the help of the NMCDLA legislative committee and our collaboration with the Public Defender Department. Those who have analyzed bills throughout the session have greatly assisted in the preparation of talking points that are presented to committee members. These analyses have also

helped to reach out to individual legislators and discuss possible amendments or recommend that the bill be reviewed during the interim.

Please look at the attached bill report. It is a comprehensive list of bills that we have been tracking and testifying on.

Thank you to all those who attended the legislative CLE in January. I hope you found the information and the experience helpful. The NMCDLA presence at the Roundhouse has been acknowledged several times by legislators, both in the media, and in committee. I appreciate all the support that I have received as a freshman lawyer and lobbyist.

Bad Cop, No Donut

Marc H. Robert, Assistant Federal Public Defender

This version of "Bad Cop" should be called "Ignorant Cop, No Problem." That's what the U.S. Supreme Court said in *United States v. Heien*, 135 S.Ct. 530 (2014). You've probably heard about this one by now. Officer Profile (an obvious pseudonym) was sleeping - er, observing traffic - in his patrol car when he saw our hero driving by. The officer thought that our hero looked "very stiff and nervous" as he clipped along on the interstate and began to follow. Profile saw that only one of our hero's brake lights was working and pulled him over. He issued a warning ticket and then: "Do you mind answering a few questions?" Our (idiot) hero gave consent for a search of the car and the officer found some cocaine in a sandwich bag. Turns out, however, that North Carolina law only requires one working brake light. A suppression motion was filed, and the district court denied the motion. The North Carolina court of appeals reversed, holding that the initial stop was not valid because our hero was perfectly legal with one working brake light. The North Carolina Supreme Court then reversed, holding that the patrolman's misunderstanding of the law was perfectly reasonable. "When an officer acts reasonably under the circumstances, he is not violating the Fourth Amendment." Our hero took his case to the Supreme Court, the font of all reasonableness.

SCOTUS affirmed, with only Justice Sotomayor dissenting. "[R]easonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion." Chief Justice Roberts reached back into the late 1700s and mid-1800s for support for this notion. The Court cited *DeFillippo*, a case in which officers arrested a man for violating a law which was *later* found to be unconstitutional and in which the Court found no constitutional violation, in support of its decision. Ultimately, the Court held that if the officer's suspicion that our hero's conduct violated the law was reasonable, "there is no violation of the Fourth Amendment in the first place."

Wait - won't that cause the officers out there to pay less attention to those nagging, picayune points of law in the small print? Not to worry, says our Chief Justice; their

"decision does not discourage officers from learning the law." Oh, okay then. And money isn't a corrupting influence in politics.

Justices Kagan, joined by Justice Ginsburg, concurred separately to emphasize that only "objectively reasonable" mistakes of law will be given a pass under this decision, and that "the inquiry into whether an officer's mistake of law counts as objectively reasonable is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity". Oddly, Justice Kagan writes that "the government cannot defend an officer's mistaken legal interpretation on the ground that the officer was unaware of or untrained in the law." Wasn't officer Profile unaware of this law?

Justice Sotomayor alone believes that deciding whether a search is reasonable requires "evaluating an officer's understanding of the facts against the *actual state of the law*." She points out that most of the cases (at least after 1850 or so) address reasonableness in the context of the facts, leaving the law as a fixed point on an unsteady sea. She notes with regret the departure from this precedent that *Heien* represents. So right, your honor, so right.

This decision undermines some uncharacteristically good law in the Tenth Circuit. In *United States v. Harmon*, 742 F.3d 451 (10th Cir. 2014), *United States v. Nicholson*, 721 F.3d 1236 (10th Cir. 2013) and *United States v. Games-Perez*, 695 F.3d 1104 (10th Cir. 2012), our circuit recognizes that while reasonable mistakes of fact can save a dodgy search, mistakes of law cannot. Gone, now, gone like flatulence in the wind, in the words of Warden Norton. Wait for the aftershocks of this one.

Not that the Tenth offers a lot of shelter from the Fourth Amendment storms in any event. In *United States v. Valdez-Perea*, 2015 WL 399970, the circuit blessed a search and seizure by the ubiquitous agent Perry. His recording of his encounter with our heroine failed to record her response to his request for consent to search. Not to worry - the agent was there to assure one and all that consent had been mimed by our silent heroine.

That's fine, you're saying, but what about a state case? How about *State v. Sabeerin*., 2014-NMCA-110, in which the court of appeals found that the application for a search warrant lacked probable cause, reversing a denial of suppression in the Second Judicial District. The application was based on unsourced hearsay suggesting that our hero did business at the place searched, on a suggestion that there were "several suspicious vehicles" at the location, and was too broad in its search parameters. The application sought "all evidence which may lead investigators to the offender(s) and possible witnesses in this case". The Court of Appeals thought not. Judge Sutin dissented, however, and the Supreme Court granted cert. Stay tuned.

Tenth Circuit Spotlight

Mitigating a Sentence Beyond Incarceration

By Shari Allison, Research and Writing Specialist, New Mexico Federal Public Defender's Office

Understandably, federal sentencing practice generally focuses on the term of imprisonment, if any. After all, "how much time" is often the client's main concern. The conditions restricting the client's liberty post-incarceration are usually not an issue until the client is subject to revocation and possible re-incarceration for a violation. Recent appellate decisions are powerful ammunition for clarifying and minimizing post-incarceration restrictions at the original sentencing.[1]

The district court's discretion to impose supervised release conditions is limited by statutory and constitutional considerations. Conditions must comply with the requirements of 18 U.S.C. § 3583(d). Certain conditions are mandatory. Any other condition must be reasonably related to the sentencing factors set forth in 18 U.S.C. § 3553(a)(1), (2)(2)(B), (a)(2)(C), and (a)(2)(D); involve no greater deprivation of liberty than necessary to meet those purposes; and be consistent with Sentencing Commission policy statements. *See* § 3583(d). In short, the conditions imposed must be individualized to the particular defendant and supported by appropriate findings.

Any discretionary condition has the potential to infringe unnecessarily on a defendant's rights. Special conditions prohibiting association with certain groups of persons potentially infringe the defendant's constitutional rights to association, especially familial association. The sentencing court must make specific findings in support of any special condition. For example, in *United States v. Burns*, 775 F.3d 1221 (10th Cir. 2014), the defendant challenged a special condition that required the probation officer's approval before the defendant could have contact with any minor, including his youngest daughter. The Court held the defendant had established plain error because the district court restricted his contact with a family member without making the constitutionally required findings and, had the findings been made, the restriction probably wouldn't have been imposed.

The mere fact that a defendant has been convicted of a certain type of offense (such as possession of child pornography or any sex offense) is insufficient justification for imposing broad restrictions on association. In *Burns*, the defendant had pled guilty to possessing child pornography. The Court pointed out there was no evidence that the defendant had abused children, had a positive relationship with four of his five children, and thus "there was little to support a restriction on [defendant's] contact with [his

[1]This short article can only touch on a few of the issues relating to supervised release conditions. A sample sentencing memo containing additional arguments and citations is included in the NMCDLA members-only library.

daughter]."

Any condition that potentially interferes with a defendant's ability to work should also be scrutinized. Many conditions have this potential, including restrictions on association, search conditions, and travel restrictions. In *United States v. Dunn*, 2015 WL 525698 (10th Cir. 2015), the defendant (convicted of possessing child pornography) challenged the numerous onerous restrictions placed on his ability to use and access computers and the internet, and the fact those restrictions were going to last for 25 years. The Court found that the district court's action, "especially when the restriction will, for all intents and purposes, materially impact the defendant's ability to obtain work," was plain error.

Although not a Tenth Circuit opinion, *United States v. Thompson*, 777 F.3d 368 (7th Cir. 2015), is a must-read decision. The Court points out problems with many of the conditions that are routinely imposed, including:

- The requirement that the defendant support his or her dependents and meet other family responsibilities may be inappropriate and "assumes arbitrarily and maybe inaccurately" that the defendant will be able to find a job.
- A requirement that the defendant "refrain from excessive use of alcohol" is vague where the term is not defined.
- A prohibition on associating with other felons unless granted permission to do so is also vague and potentially imposes strict liability.

These cases emphasize that discretionary conditions must be tailored to the individual. A condition requiring the defendant to seek employment has very different implications for a defendant who is 25 and will be 30 when released than for a defendant who is 50 and will be 65 when released. The Probation Office might find it easier to treat all defendants the same, but the law requires otherwise.

Selected Tenth Circuit Decisions

December 2014 - March 2015

Compiled by the Research and Writing Specialists of the New Mexico Federal Public Defender Office

Visit the Tenth Circuit Blog, http://circuit10.blogspot.com/ for more updates (including unpublished decisions) and announcements.

U.S. v. Dunn, 2015 WL 525698 (10th Cir. 2015) (published) - The defendant's convictions for receipt and possession of the same illicit material violated the Double Jeopardy Clause. The sentencing court had failed to make the proper findings to support imposition of special conditions of supervised release that restricted the defendant's use and access to computers and the internet. Finally, the panel set aside

the district court's restitution order because it violated the restitution analysis and rules in *Paroline v. United States*, 134 S.Ct 1710 (2014).

U.S. v. Rentz, 2015 WL 430918 (10th Cir. 2015) (en banc) (published) - After Rentz fired a single gunshot that wounded one victim and killed another, he was charged with two crimes of violence—assault and murder—and two counts of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). The district court granted the defendant's motion to dismiss the second § 924(c) count. The government appealed. The majority of the *en banc* court affirmed that when a case involves only one use, carry or possession of a firearm, the government may "seek and obtain no more than one § 924(c)(1)(A) conviction."

U.S. v. Vann, 776 F.3d 746 (10th Cir. 2015) - The Tenth Circuit affirmed defendant's conviction for possession with intent to distribute PCP. First, the judge's "streamlined" ruling denying defendant's *Batson* challenge was sufficient. The government justified its excusal of the only black venire member for the trial of a black man on the grounds the juror didn't completely fill out his questionnaire, was not educated enough, was unemployed, and seemed dazed and disengaged during voir dire. Before hearing from the defense, the court found these "were nonracial reasons that made sense." The defense contended the juror was attentive, not dazed. The court rejected the challenge without addressing the demeanor issue. After trial the defense renewed its challenge, pointing out the excused juror had two years of college and there was a non-black person who became a juror who was also unemployed and didn't fill out everything on the questionnaire. The defense argued the court had not made a *Batson* third-step discrimination finding. The district court ruled its "made sense" finding was implicitly the requisite finding. It did not make a finding on the demeanor or comparative-juror analysis except to say the latter didn't make a difference. Importantly, the Tenth Circuit thought the defense should have laid out all its *Batson* case by the end of jury selection. At that time the defense had only challenged one of the four reasons the government gave for its excusal. The Court also held, in conflict with other circuits, that circuit precedent does not require an explicit discrimination finding.

Second, the Tenth Circuit held that Special Agent Small's testimony that PCP wholesalers do not typically package PCP for buyers [thus indicating the defendant, who was a buyer, must have packaged the PCP] was based on reliable data primarily because the agent was familiar with drug dealers in general and the district court vetted Small through a pretrial *Daubert* hearing and at trial, providing an opportunity for counsel to present their cases why Small should or should not testify. The Tenth Circuit treated an argument under the "Santa Muerte" case, *U.S. v. Medina-Copete*, 757 F.3d 1092 (10th Cir. 2014), with little sympathy holding that excluding expert officer testimony in general, "is the exception, not the rule."

Third, the Tenth Circuit essentially held that it will never reverse a conviction due to prosecutors misstating facts in closing as long as there is an instruction that what attorneys say is not evidence.

Fourth, Mr. Vann knowingly waived his right to counsel at sentencing because three months before the court allowed him to go *pro se*, the court warned him about the dangers of going *pro se* at trial. When he was given those warnings Mr. Vann chose to keep his counsel. A contemporaneous thorough inquiry is sufficient but not necessary for a knowing counsel waiver.

U.S. v. Gilmore, 776 F.3d 765 (10th Cir. 2015) - The community caretaking function allows officers to seize an intoxicated person if they have probable cause to believe the person is a danger to himself or others. There was such probable cause here under the totality of the circumstances because Mr. Gilmore might have frozen to death where he was found drunk and incoherent in eight-degree weather at a stock show.

U.S. v. Wray, __ F.3d __, 2015 WL 328589 (10th Cir. 2015) - A Colorado conviction for sexual assault with a ten-year age difference (Colo.Rev.Stat. §18-3-402(1)(e)) is not a crime of violence for purposes of U.S.S.G. §2K2.1(a)(2) and §4B1.2 because it is not a forcible sex offense and it does not fall within the residual clause.

U.S. v. Alabi, 2015 WL 307068 (10th Cir. 2015) (unpublished) - The district court did not err in denying the defendant's motion to suppress based on Equal Protection grounds because the defendant failed to make a showing of discriminatory effect. The Tenth Circuit set out the requirements for proving an Equal Protection violation. Notably, it criticized the district judge for conducting his own out-of-court experiment, in which he purportedly established the inability of passing motorists to make eye contact with law enforcement officers parked alongside I-40.

Tokoph v. U.S., 774 F.3d 1300 (10th Cir. 2014) - A federal court does not have inherent equitable authority to grant expungement of a valid conviction.

U.S. v. Ferdman, 2015 WL 619629 (10th Cir. 2015) (published) - A defense victory in which the Court makes numerous helpful statements limiting restitution. Mr. Ferdman pleaded guilty to acquiring phones from Sprint by impersonating corporate account representatives after getting the corporations' account information. Sprint, the government and ultimately the judge believed restitution should be the retail, unsubsidized price of 86 cell phones, not just the cost of the phones to Sprint, plus Sprint's shipping and investigative costs. The 10th Circuit held there was an insufficient evidentiary basis for that conclusion because restitution may only equal the actual loss to the victim. A two-page, unverified letter, like a bill, concerning the retail price and other costs, was insufficient proof of such loss. The 10th Circuit said, "[T]he likelihood that certain facts exist to confirm the estimates, no matter how probable, does not relieve the government of its burden to establish their actuality." There must be actual evidence of how each employee's time was spent pursuing the investigation. It also stated that loss under the Guidelines is not the same as actual loss for restitution. Restitution should not include consequential or incidental damages because it is not a substitute for civil lawsuits. The 10th Circuit observed that *Paroline v. U.S.*, 134 S. Ct. 1710 (2014), called into question circuit precedent that restitution is remedial, not punitive.

State Court Caselaw Update: New Mexico Court of Appeals

Richard Pugh, District Defender, Law Office of the Public Defender, Albuquerque

State v. Thaddeus Carroll - This appeal discusses proper notice of hearings to be given to the defendant and Metropolitan Court Rule 7-506. On October 8, 2008, the State re-filed the dismissed complaint against the defendant. The metropolitan court set the trial for October 14, 2008, the last possible date to commence a trial under Rule 7–506. The metropolitan court sent both the notice of the re-filing and the new trial setting to the defendant by mail. These mailings were sent on October 8, 2008, six days prior to the trial date. Although the defendant's attorney was present at the trial, the defendant did not attend the proceeding. Again the State was not ready to proceed because the complaining officer did not appear. In consequence of the defendant's absence, the metropolitan court issued a bench warrant.

At the trial setting on February 4, 2009, defendant argued that the case should be dismissed pursuant to Rule 7–506. Defendant pointed out that ten days' notice is required for service of a summons, with three additional days for service by mail. The

metropolitan court stated that Rule 7–205 NMRA—"the ten-day stuff"—did not apply to trials.

The bench warrant for the defendant was issued by the metropolitan court pursuant to Rule 7–207(A) NMRA, which provides that a metropolitan court judge may issue a bench warrant when a person fails to appear at the time and place specified by the court. By the statutory term used for the grant of authority—"may"—the choice to issue a bench warrant is an exercise of discretion on the part of the issuing judge. As such, the Court of Appeals reviewed the matter for an abuse of discretion.

Defendant contended that the metropolitan court abused its discretion when it issued a bench warrant on October 14, 2008 for failure to appear when defendant was sent notice by mail only six days before the proceeding. The State contended that the amount of notice is not relevant. The State argued that, by the plain language of Rule 7–207(A), the metropolitan court can issue a warrant if a person fails to appear at the time and place ordered by the court.

The Court of Appeals agreed with Defendant that the notice provided of his trial date—six days by mail—was not sufficient. An order to appear that, by design, defies compliance cannot be the basis of a legitimate warrant. This is especially true when, as here, the warrant for failure to appear is used as a lever to re-start the countdown to begin a trial under a rule intended to guarantee a defendant's right to a speedy trial. Conviction reversed.

***State v. Jesse Duran* -** This appeal addresses the use of testimony about delayed disclosures in child abuse cases being cloaked as having some type of scientific value and further cloaked as a lay opinion. Over the defendant's detailed objections both in and out of the presence of the jury, the prosecutor asked the witness, "Can you put a percentage on how many children delay in disclosing?" She stated that she could not give a percentage, but "in the majority of children that I've interviewed at the S.A.F.E. House, there is a delay in disclosure. When the issue was raised once again prior to closing arguments, the district court stated, "I think it's fairly well-known and considered of people in the field that ... delayed reporting is common in these types of cases.... I don't find it in any way to be a stretch or outside, you know, learned treatises and other facts." In its closing argument, the State told the jury that it was "to determine whether or not it believed Victim" and that if it "believed that she was telling the truth ..., then the State has proven its case."

Defendant contends that the frequency of delayed reporting of sexual abuse by children is not a proper subject for lay testimony and can only be admitted through expert testimony. Defendant characterizes the witness' testimony as "generalities in a specialized area in the abstract." The State argued the testimony was properly admitted under Rule 11–701 because it was based on personal observations, not any specialized knowledge.

The Court of Appeals concluded that the district court erred in allowing this testimony from a lay witness. The Court of Appeals reached this conclusion because the statement was based on "specialized knowledge" within the purview of experts under Rule 11–702 and infers that the victim's delayed disclosure was consistent with most of the children interviewed.

Next, the Court of Appeals discussed whether or not the error was harmless. The Court of Appeals found that the "role" of the delayed disclosure testimony was to support the victim's credibility, which, as the State recognized in its closing argument, was the central factual issue that the jury was to determine at trial—whether the victim "was telling the truth." The Court of Appeals concluded that there is a reasonable probability that the testimony on delayed disclosure affected the verdict and that since the improperly admitted evidence goes to the primary issue of credibility in a sexual abuse case, it is more likely to be prejudicial. Remanded for new trial.

State v. Jeremy Lucero - This case addressed whether the court erred in not allowing the defendant a self-defense instruction. The defendant testified he and the victim exchanged words, and the victim struck the defendant in the head with his machete. Defendant further testified that after being struck, he "saw a star" and "kind of blacked out." He remembered pushing the victim back and the machete dropping. Defendant could not recall if there was a struggle for the machete. The next thing he remembered was that the victim stood up and retrieved a gun from under his pillow and pointed it at the defendant's face. As the victim had gone for the gun, the defendant picked up the machete from the floor. Defendant testified that when the victim pointed the gun at him, he was angry, confused, scared, and afraid for his life. Defendant did not remember swinging the machete, but testified that he remembered seeing a laceration on the victim's neck and blood everywhere, both the victim's and his own.

An instruction on self-defense must be justified by evidence on all three elements of self-defense: "(1) the defendant was put in fear by an apparent danger of immediate death or great bodily harm, (2) the killing resulted from that fear, and (3) the defendant acted reasonably when he or she killed." *State v. Rudolfo*, 2008–NMSC–036, ¶ 17, 144 N.M. 305, 187 P.3d 170. When such evidence is presented, the defendant has an "*unqualified* right" to the instruction. *State v. Ellis*, 2008–NMSC–032, ¶ 15, 144 N.M. 253, 186 P.3d 245 The first two elements, the apparent danger and the defendant's fear, are assessed subjectively, focusing "on the perception of the defendant at the time of the incident." *Rudolfo*, 2008–NMSC–036, ¶ 17, 144 N.M. 305, 187 P.3d 170 The reasonableness of the defendant's response in the face of the apparent danger and fear is assessed objectively.

The State argued that the defendant's testimony that he was in danger and was in fear for his life lacks credibility. The State contends that the evidence of the victim's physical limitations and the condition of his room calls into question the defendant's testimony that the victim retrieved a gun and pointed it at him. The State also insists that at some point the victim was injured on the floor, no longer posing a threat to the defendant, so the defendant could not have been in actual fear.

The Court of Appeals found that the admitted evidence was conflicting and did not conclusively establish the sequence of events or what position the victim was in when he sustained each of his injuries. The evidence was sufficient to raise an issue of fact with respect to the elements of a self-defense claim and the Court of Appeals concluded that the district court erred in refusing to instruct the jury accordingly. Remand for new trial.

State v. Alex Tejeiro - This case involves the denial of a motion to withdraw a plea due to improper advice as to immigration consequences. The Court of Appeals gives additional guidance to the district court judges regarding the prejudice prong of ineffective assistance of counsel. Defendant, a Cuban immigrant, pleaded guilty to a single count of drug trafficking in November 2003. He subsequently learned that his plea had possible immigration consequences and filed a motion to set aside his guilty

plea on the grounds that his attorney had been ineffective in failing to inform him of that fact.

The U. S. Supreme Court has established a two-prong inquiry for determining whether a defendant received ineffective assistance of counsel: (1) the trial counsel's performance fell below the objective standard of reasonability, and (2) counsel's incompetence prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see State v. Hester,* 1999–NMSC–020, ¶ 9, 127 N.M. 218, 979 P.2d 729. When an attorney fails to advise his client of the specific immigration consequences of his case, it satisfies the *Strickland* standard "if the defendant suffers prejudice by the attorney's omission." *Paredez,* 2004–NMSC–036, ¶ 19, 136 N.M. 533, 101 P.3d 799. In order to demonstrate such prejudice, a defendant must show that the outcome of the plea process was affected by his counsel's deficient performance. Our recent jurisprudence adopts "a broad approach to how a defendant can demonstrate prejudice." *Favela,* 2013–NMCA–102, ¶ 20, 311 P.3d 1213.

In this case the district court agreed that conditions in Cuba are "particularly horrific." The record indicates that the district court considered the actual probability of the defendant's deportation to Cuba, noting, "They don't deport people back to Cuba from the United States technically." The State expressed a similar opinion, that "the United States and Cuba do not have an agreement to return convicted felons back to Cuba under any circumstances."

The Court of Appeals stated the test for consideration of the prejudice prong--- First, we consider the harshness of deportation and attribute proper weight to that harshness as an element of any immigrant's decision-making process. *Paredez,* 2004–NMSC–036, ¶ 18, 136 N.M. 533, 101 P.3d 799. Second, we evaluate the defendant's testimony itself, which is corroborated in the record at the time of the defendant's plea, with references both oblique and direct to the defendant's concern about his immigration status and his attachment to this country.

The Court of Appeals found that the totality of the factors presented firmly establishes a reasonable probability that the defendant would have rejected the plea offer if his attorney had competently advised him. Finally, the Court of Appeals concluded that under these circumstances the defendant's plea was not made knowingly and voluntarily, and that it was, therefore, error to accept it.

The Court of Appeals also addressed the district court's heavy, almost exclusive reliance on the strength of the State's case and the benefits of the plea as improper because it contradicts the standard set forth in *Favela.* 2013–NMCA–102, ¶ 21, 311 P.3d 1213. Noting the likelihood that Defendant would obtain a similar sentence to the one he received under the plea agreement if he went to trial, the district court here improperly asked, "Would the result reasonably have been different than it is today?" rather than whether there was a "reasonable probability" that the defendant would have rejected the plea with competent advice. Defendant was not obligated to show that he might have obtained a "different result" at trial than he obtained with his plea; he was

only required to show that rejecting the plea was a rational, reasonably likely course of action in light of his circumstances. *Favela*, 2013–NMCA–102, ¶ 20, 311 P.3d 1213. Denial of motion to withdrawal plea is reversed.

State v. Jackie Winters- In this case the Court of Appeals addresses the use of lay opinion testimony as it relates to shoe prints. Deputy took photos of different sets of shoe prints at the scene that he believed were potentially associated with suspects of the crime. He believed they were associated with the suspects because he eliminated shoe prints he believed matched other employees and law enforcement officials at the crime scene and because the shoe prints were in close proximity to the truck. Deputy then drove to the defendant's residence to secure the area pending the issuance of a search warrant. While at the residence, the deputy observed shoe prints outside the residence that he believed were similar to the shoe prints he photographed at the crime scene.

In this case, the defendant objects to Deputy Daugherty's opinion that shoe prints photographed at the scene were substantially similar to shoe prints outside the defendant's residence. At trial, Deputy Daugherty testified that he observed shoe prints at the scene and at the defendant's residence and, based on his observations, the shoe prints were "substantially the same." No other foundation for the admission of this opinion was given. The State later moved to admit photographs of three different shoe prints taken by Deputy Daugherty at the scene.

The Court of Appeals found the foundation laid for Deputy Daugherty's opinion regarding the similarities between the shoe prints was insufficient. The deputy did not testify to the observations he made regarding the similarities in the prints or any other peculiarities. He merely testified that he observed shoe prints in both places and that they were "substantially the same." Indeed, not only did the deputy fail to state the observations that supported his opinion, his testimony failed to specify which of the three shoe prints—photographs of which were later published to the jury—he believed matched shoe prints later observed outside the defendant's residence. This is problematic because it does not establish that his opinion was "rationally based on his perceptions" or "helpful to clearly understanding his testimony." Rule 11701(A), (B). Accordingly, his testimony failed to lay a foundation under Rule 11–701 and was impermissible lay witness opinion testimony. Conviction reversed.

Breathaliars and Other Fraud Machines

Rod Frechette, Albuquerque, Founding Member- National College for DUI Defense

Electro Chemical Fuel devices are the black heart and corrupt soul of almost all PBTs and Interlocs. The fuel cell is a porous disk (a bit smaller than a U.S. quarter coin) coated with a thin layer of platinum black on both faces and saturated with an electrolyte. When alcohol hits the fuel cell, a chemical reaction happens which oxidizes the alcohol. The alcohol is converted to

acetic acid which releases electrons. The electrons are counted and converted into a number displayed as the alcohol level. Therefore, the more alcohol, the higher the score. The following is a checklist of things to be aware of if you really need to challenge a pre-arrest portable screening test or positive interlock blow of .025 or higher. As most of my D.O.T. Instructor training is on the Intoximeter AS/RBT-4, it is the main reference for most of the following discussion on devices.

The Intoximeter AS/RBT-4 has a usable temperature range of 48 – 104 degrees Fahrenheit. Most devices are about this range, but check the manufacturer specifics. If the temperature is too hot or too cold it may be difficult to impossible to obtain any reading, let alone an accurate one. Sitting in an officer's car all day and night subjects it to a whole range of temperature and sunlight which may impact its validity.

Breathing pattern and volume can have immense impacts on scores. A proper volume of breath for the AS/RBT-4 is a minimum of about 1,200ccs followed by a drop off of flow or pressure. Unlike the larger, more complicated evidential breath machines, these fuel cells only need a tiny sample to analyze. 1 cc is average size of sample. It is the size of about 1/5 of a teaspoon. The smaller the sample size the larger the multiplier algorithm in the software. This means that a tiny error or misread is amplified by more than a factor of 10,000 times! I have a DVD of me taking ½ teaspoon of 80 proof rum and blowing .85, i.e., dead twice over! A swig of beer can make you score in the aggravated range.

Most of these devices are not specific to ethanol (the kind of poison we like to drink) alcohol and often read many of the other alcohols that may occur in a human breath. Certainly, blowing acetone, isopropyl or propanol straight into the fuel cell may "fry" the cell or cause the machine not to read it. Many folks fuel there vehicles with ethanol gasoline and some folks are exposed to chemicals with methanol and or a host of other thinners, resins, paints and glues that have molecules that can be converted and oxidized as ethanol. Cigarette smoke and mouthwash can also wreak havoc on fuel cells causing damage, misreads or errors. I love watching cop DVDs where they have my client blow near one or more cars, engines running and exhaust going.

As discussed in "Intoxiliars and Other Fraud Machines," (*For the Defense, Winter 2014),* there is no mouth alcohol detector or slope detector in almost all fuel cell devices. Again, this is an algorithm in the software, not a piece of equipment. If there is at least a 20-minute deprivation period, most folks will not have mouth alcohol. Burping, belching, regurgitation and some extreme dental fixtures/devices can certainly cause mouth alcohol to read after 20 minutes, but rarely for a half hour. No mouth alcohol detector means that mouth alcohol will register as a legitimate score with no warning. This means the 20-minute rule is critical to folks using interlocs. Sugars from coffee and soda, starch and yeast with breads, carbohydrates with French fries, candies and most

things we eat can and do convert briefly into alcohol in our mouth as extremely tiny amounts that can be misread as higher levels of alcohol. I blew a .05 with a hamburger roll and a .03 with an orange. Perfumes, colognes and hand sanitizers also frequently score on these devices.

Suffice to say there are even more potential problems with fuel cell devices. Another avenue to attack the government's junk science revolves around the quality assurance issues with these devices – to be explored in a future column.

Call for Book Donations to PNM Library

Melissa Hill, Albuquerque

Image via Shutterstock: Edited: JR/TO

The Level VI Library at the Penitentiary of New Mexico has no budget to purchase books and depends entirely on donations. The books are checked out by inmates for reading pleasure and educational purposes. In addition, the prison has a "Fathers as Readers" program that allows inmates to read children's books to their children using a tape recorder. The tapes are sent to the children, as a way to maintain critical contact while the parent is confined in prison.

You can get your donated books and magazines to the prison several ways. You can directly contact PNM Librarian, Courtney Montoya, at Courtney.Montoya@state.nm.us, and arrange to drop off the books at the prison. If you are in Albuquerque, Ms. Montoya might even be able to pick up your donations. If you are in Santa Fe, you can drop off your donations at the office of the New Mexico Criminal Defense Lawyers Association at

210 E. Marcy Street, info@nmcdla.org, phone: (505) 992-0050. If you are in Albuquerque, NMCDLA member Jacquelyn Robins will accept drop-offs at her office: 812 Marquette Ave NW, Albuquerque, phone (505) 242-5359. She will get the books to Bill Stanton for delivery to the prison. If you are near Corrales, contact Melissa Hill at mhcorrals@me.com to arrange for a drop-off.

The PNM librarians have provided a "wish list" of publications most in demand:

1. **Subscriptions to newspapers** (The Albuquerque Journal, Santa Fe New Mexican and possibly USA Today or The Washington Post);
2. **Subscriptions or gently used, up-to-date magazines**: Men's Health; Men's Journal; GQ; Rolling Stone; People; Us; and car and news magazines of any sort. These are popular among the inmates, and if you have any other suggestions or possibilities, the library will be glad to accept them (barring Cosmopolitan or anything racier than that).
3. **Books by popular fantasy writers**, especially George R.R. Martin, Christopher Paolini, Robert Jordan and Terry Goodkind. Other oft-requested authors include James Patterson, Dean Koontz, Stephen King, Laurell K. Hamilton, Jeffery Deaver and Mario Puzo. (The library has lots of these books, but some need to be replaced.)
4. **"Classic" Westerns**, including those of Louis L'Amour, Ralph Compton, Jake Logan and others are in high demand, but age and use are taking a heavy toll.
5. **Non-fiction books** including books on art and drawing; calligraphy; Eastern religions (except Buddhism, in which the library is "drowning"); Meso-American history; illustrated natural science books; and the history of the ancient Middle and Near East.
6. **Exercise books**. Many of the men enjoy exercising, but their movements are highly restricted. They appreciate books on subjects like yoga that provide instruction on ways to strengthen and stretch without equipment.
7. **Books on paranormal topics**, especially ghosts, aliens and similar topics.
8. **Children's Books** for the "Fathers as Readers" program.

Do not feel you have to limit yourself to this list. Any books – both paperbacks and hardbacks - that you donate will be greatly appreciated by the librarians and those in prison.

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Thanks to our creative and persistent members,
the NMCDLA's Amicus committee has plenty of work
for members interested in helping to write amicus
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Reel to Real:
Lawyer Movies That Could Haunt or Help You

John Samore, Samore Law, Albuquerque

Legal proceedings have long been the source of dramatic tension in film, television, and theater. These art forms profoundly shape public perceptions of our profession and our clients. In turn, they are carried by jurors into deliberation, and even affect the legislators who determine public financing of indigent defense. It behooves us to be aware of popular cultural influences in our efforts to protect the rights and salvage the lives of our clients. ***Reel to Real*** will examine some "lawyer movies" that have influenced impressions of defense attorneys and the justice system at work. With references to a famous scene or character, images that have become bigger than life through popular culture, we can gain helpful insight into, and persuasion with, jury panels and official decision-makers. Movies are also a vivid way to illustrate, in mentoring younger colleagues.

"Better Ask Saul" is a prime, local example. The new hit AMC series has already received rave reviews and may be destined for a long run with wide viewership. Set in Albuquerque, the star is a hustler-attorney and, as we laugh or shake our heads at his shenanigans, we also cannot help but wince. When we represent our client, will we be seen as cut from the Jimmy McGill cloth? How do we actually see ourselves, individually and as a group?

Measure the damage when the long-running series "Law and Order" starts every show by telling its loyal audience that "the criminal justice system is made up of three" elements: the police, the prosecutors, and the victims. Could any other element of justice possibly be missing here? How does such nonsense increase our challenges? (As a wiser colleague than I once said, "Most jurors don't even realize we are bound by the same Code of Ethics as prosecutors.") Ignore these realities at your peril -- and at your client's peril.

Do you see yourself an Atticus Finch ("To Kill a Mockingbird"), ethical and honorable, even in defeat? Better check that classic 1962 award-winning film more closely, because Atticus presents (in the climactic trial) one of the more pathetic defenses ever found in fact or fiction (those facial injuries are as likely to have occurred from a backhand blow) and exposes his own coward's morality. When the villain who spit in his face (misdemeanor) is stabbed to death by Boo Radley, Finch quickly accedes to the convenient disposition suggested by the equally weak Sheriff, "Bob Uhl fell on his knife -- let the dead bury the dead." Is this the depth to which we aspire?

Maybe you, like Tom Cruise's Lt. Kaffee, think that if he just keeps shouting at the imperturbable, esteemed officer, "I want the truth!" (in lieu of genuine cross-examination), his seasoned witness will suddenly fold completely, give up his career,

and admit (paraphrasing here), "Yeah, I guess you got me; I been lyin." Well, that's all he did in the execrable "For a Few Good Men," but it ain't gonna happen in any of our real lives. (Aaron Sorkin, what were you smoking when you wrote this crap?)

Maybe a better model is Joe Pesci's streetwise "My Cousin Vinnie," who, for all his shady qualifications and inexperience, puts together a substantive defense on the merits that disproves the prosecution's murder case and carries the day for two innocent men. In the twenty-two years since that surprising gem, few movies have captured what we are supposed to do in a courtroom: follow the rulings (whatever they may be), maintain focus, and find the ethical response. In an entertaining way, it also portrays a misleading admission, how discovery works, judicial discretion, and incisive cross-examination. Might this movie be a good frame of reference for your panel?

Remember that the "old movie channel" TCM already has one-third of its audience under thirty-five years of age. Few of our jurors will be of the caliber found in "Twelve Angry Men." While over fifty years old, this famous TV-photoplay-then-movie (better-yet, the more recent, Russian-made "Twelve") is still popular with local playhouses and has been seen by many prospective panelists. Use it to educate.

From the perspective of jury dynamics, how do we prevail on men and women who do not know each other or the accused to really care – about the facts, about their duty, about justice? Why does the little guy or gal so often win in fiction to the adulation of the audience in the movie theater, but sitting in the jury box their cheers change to jeers - they cannot wait to lock another one away for "Da Guvmint?" Can becoming conversant with movies help us reach them before it is too late?

Trials usually aren't that exciting. Many of our panelists grew up thinking Paul Newman could still win that medical malpractice case ("The Verdict") even after the judge threw out his only expert witness. (Paul's good looks must have won over that jury, although we are never told what the appellate court inevitably did with that judgment.) Many also expect lawyers to continually scream and interrupt each other as they do in "Witness for the Prosecution," "Judgment at Nuremberg," "For a Few Good Men," and so many others of more recent vintage. How do we prepare jurors for the possibility – the inevitability, even – of being bored, while fulfilling their civic duty to listen to the evidence? Better, how do we hone our examinations and arguments so they are compelling and effective?

Popular film will not be the *sine qua non* of effective jury selection, but it is one of the topics that usually makes panel members more comfortable, thus helping you establish rapport and elicit more candid answers. (It is especially helpful if you have a judge who permits rare supplemental juror questionnaires or individual voir dire.) Remind jurors that the issues before them won't be decided in less than two hours - a real trial has no trailer, no review, no plot summaries. They are going to have the responsibility to decide who is the hero, or if there even are heroes and villains.

Begin in your voir dire to weave your client and his accusers into a memorable construct

that may have helpful artistic references. It can be as simple as asking for hands as to who saw a movie which has poignant similarities. Where will their initial sympathies lie? Are you the big-city boy before a small-town jury (or vice versa)? What movie cops became so zealous (or corrupt) that they tried to convict the innocent ("Les Miserables," et al.), and what other cops have been honorable enough to admit their mistake? What expert just forgot an important part of the puzzle, which led to a mistaken opinion (and an acquittal in "My Cousin Vinnie")? What prosecutor hid the evidence, and which one did the right thing?

Trial drama has long been the wellspring of emotion and corruption, deception and redemption, triumph and tragedy. We can and must be aware of the vivid images from popular culture that color jurors' thinking before they walk into the courtroom, and be able to incorporate those images - translate them into real life - for the betterment of our career and the fate of our clients.

Next time, we shall look at law-related documentaries and how they can help us be better lawyers.

THANK YOU TO CONTRIBUTORS TO NMCDLA'S CARLOS VIGIL CLE SCHOLARSHIP FUND IN 2015

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New Mexico Criminal Defense Lawyers Association

Spring CLE Schedule: Two Upcoming Seminars

FEDERAL PRACTICE CLE

April 10, 2015
Greater Albuquerque Association of Realtors
1635 University Blvd. NE, ALBUQUERQUE, NM
6.0 General Credits

Topics will include:

Misdemeanors & Felonies in Federal Court—*Ian King*
Bureau of Prisons—*Jeff Carson*
Sentencing Investigations—*Vickie Piontkowski & Kari Converse*
Petitions to Reduce Sentences Under the New Drug Guidelines—*Stephen McCue*
Highway Stops, Hemisphere, & the NSA—*Aric Elsenheimer & Sylvia Baiz*
Statutory Enhancements—*Marc Robert*

Visit www.nmcdla.org to register today

CRIMINAL JUSTICE ISSUES IN & AROUND INDIAN COUNTRY

Co-coordinated by NMCDLA & the Colorado Criminal Defense Bar

May 1, 2015
The Strater Hotel
699 Main Ave, DURANGO, CO
4.5 General, 1.0 Ethics/Professionalism

Make your hotel – and restaurant - reservations ASAP as Fort Lewis College graduation is the same weekend. Room reservations for April 30 and May 1 discounted for $137/night plus tax including breakfast. Call 800-247-4431 and request the Defense Bar Seminar block.

Sponsored by:

Topics will include:

Federal Jurisdictional Issues & Major Crimes Act—*John Carlson & Tova Indritz*
State & Reservation Jurisdictional Issues—*Justin Bogan, Richard Wade, & Monte Mills*
Representing Pro Bono Clients in Tribal Court Practically & Ethically—*Kathy Bowman*
Perspectives on Native American Culture to Help Your Clients in Tribal Court—*Justin Jones*
Civil Issues Related to Criminal Charges on Native Land—*Louise Grant*

Visit www.nmcdla.org to register today

Thanks to our Indian Law CLE in Durango Seminar Sponsor: