

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO  
February 22, 2022

NO. S-1-SC-39114

LAYLA CORIZ,

Petitioner,

V.

STATE OF NEW MEXICO,

**Respondent.**

## ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari filed under Rule 12-501 NMRA, and the Court having considered the petition and being sufficiently advised, Justice C. Shannon Bacon, Justice David K. Thomson, and Justice Julie J. Vargas concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is DENIED.

## IT IS SO ORDERED.



WITNESS, the Honorable Michael E. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 22nd day of February, 2022.

Jennifer L. Scott, Clerk of Court  
Supreme Court of New Mexico

**I CERTIFY AND ATTEST:**

A true copy was served on all parties or their counsel of record on date filed.

Zelida Abeta

**Clerk of the Supreme Court  
of the State of New Mexico**

By

Zelda Stahl

**Deputy Clerk**

# Appendix B

FILED 1st JUDICIAL DISTRICT COURT

Rio Arriba County

11/8/2021 1:59 PM

KATHLEEN VIGIL CLERK OF THE COURT

Jessica Baca

**STATE OF NEW MEXICO  
COUNTY OF RIO ARRIBA  
FIRST JUDICIAL DISTRICT COURT**

**No. D-117-cr-2016-00020-**

**LAYLA D. CORIZ,  
Petitioner,**

**vs.**

**STATE OF NEW MEXICO, Warden  
Respondent.**

## **PROCEDURAL ORDER ON PETITION FOR WRIT OF HABEAS CORPUS**

This matter having come before the court on petitioner's petition for a writ of habeas corpus or other pleading pursuant to Rule 5-802 NMRA of the Rules of Criminal Procedure for the District Courts, and the Notice of 5-802(H)(1) Pre-Appointment Review filed by the Law Office of the Public Defender. The court having reviewed the record and being otherwise fully advised in the premises, FINDS AND ORDERS THAT:

### **SUMMARY DISMISSAL IS APPROPRIATE:**

[ xx ] This matter is summarily dismissed because as a matter of law petitioner is not entitled to relief based on a review of the files, pleadings, and records which show that:

Petitioner claims that she received ineffective assistance of counsel due to her attorney's failure to file a written motion for mistrial.

This issue was addressed on direct appeal. The *Memorandum Opinion* from the Court of Appeals indicates that the Court informed counsel for both parties that two unsigned notes were received from the jury. The first note stated: "Mr. Coriz [the alleged victim and husband of Petitioner] is very intimidating. We have met him (accidentally) outside of the courtroom. During the proceedings, he glared at each juror. I want to ensure the safety of each juror." *State v. Coriz*, A-1-CA-36713, mem. op. ¶ 6 (unpublished). The second note stated: "Four of the jurors witnessed ... Coriz give [Agent] Whittaker a throat slashing sign while he was on the stand." *Id.*

Petitioner's trial counsel orally moved for a mistrial. The Court ruled that in the absence of cited authority indicating that some jurors' perception that a witness is threatening or intimidating is ground for a mistrial, it was denying Petitioner's motion for a mistrial without prejudice. The Court further stated that Petitioner could renew the motion for a mistrial in writing. *Id.* ¶¶ 7-8.

On direct appeal, Petitioner raised, among other claims, that she received ineffective assistance of counsel due to her attorney's failure to file a written motion for mistrial, despite the Court's invitation to do so. *Id.* ¶ 30.

The Court of Appeals noted that the Court's invitation to file a written motion for mistrial included a provision that the motion include case law showing that a jury's fear that a complaining witness may not be happy with its verdict warrants a mistrial, and concluded that: "In light of the fact that appellate counsel himself cited no relevant authority supporting this very claim, and given our holding that the district court's denial of a defendant's motion for a mistrial was not an abuse of discretion, we cannot say that counsel was ineffective for not filing a motion for mistrial." *Id.* ¶ 34 (citing *State v. Chandler*, 1995-NMCA-033, ¶ 35, 119 N.M. 727).

"[A] defendant may not seek post-conviction relief for issues raised on appeal that were decided on the merits against defendant." *State v. Gomez*, 1991-NMCA-061, ¶ 5, 112 N.M. 313.

The record is frequently insufficient to establish ineffective assistance of counsel on direct appeal. Therefore, such claims are often better addressed in habeas corpus proceedings. See *State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517. However, in this matter, Petitioner has offered no additional information that would indicate that the Court of Appeals decision on this issue would have been different in light of facts outside the record.

The petition is DISMISSED.

IT IS SO ORDERED.

  
KATHLEEN MCGARRY ELLENWOOD  
District Court Judge, Division X 11-6-21  


#### CERTIFICATE OF SERVICE

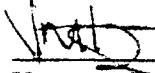
I, the undersigned, hereby certify that copies of this order were e-served on the date of acceptance for e-filing to counsel who registered for e-service as required by the rules and mailed to pro se parties, if any to:

Layla Coriz  
P.O. Box 577  
Chimayo, NM 87522

Amanda Stephenson  
Post-Conviction Habeas Unit

Law Offices of the Public Defender  
505 Marquette Ave., NW Suite 120,  
Albuquerque, NM 87102

First Judicial District Attorney's Office  
Jennifer Padgett Macias, Chief Deputy District Attorney  
Attn: Heather Smallwood, Habeas Corpus Attorney  
P.O. Box 2041  
Santa Fe, NM 87504-2041

  
\_\_\_\_\_  
Venessa Martinez, TCAA

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

August 03, 2021

NO. S-1-SC-38792

**STATE OF NEW MEXICO.**

**Plaintiff-Respondent,**

**LAYLA D. CORIZ, a/k/a  
LAYLA D. KESSLER,**

**Defendant-Petitioner.**

## ORDER

22 WHEREAS, this matter came on for consideration by the Court upon  
23 petition for writ of certiorari and response filed under Rule 12-502 NMRA, and the  
24 Court having considered the foregoing and being sufficiently advised, Justice C.  
25 Shannon Bacon, Justice David K. Thomson and Justice Julie J. Vargas concurring;  
26 Chief Justice Michael E. Vigil recused.

27 NOW, THEREFORE, IT IS ORDERED that the petition for writ of  
28 certiorari is DENIED; and

29 IT IS FURTHER ORDERED that the Court of Appeals may proceed in  
30 *State v. Coriz*, Ct. App. No. A-1-CA-36713 in accordance with the Rules of

1 Appellate Procedure.

2 IT IS SO ORDERED.



WITNESS, the Honorable Michael E. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 3rd day of August, 2021.

Joey D. Moya, Clerk of Court  
Supreme Court of New Mexico

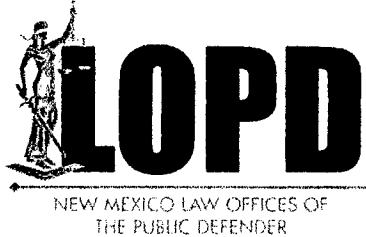
By Michael Vigil \_\_\_\_\_  
Deputy Clerk

I CERTIFY AND ATTEST:

A true copy was served on all parties  
or their counsel of record on date filed.

Michael Vigil  
Clerk of the Supreme Court  
of the State of New Mexico

**Additional material  
from this filing is  
available in the  
Clerk's Office.**



---

**Bennett J. Baur  
Chief Public Defender**

October 12, 2021

Ms. Layla D. Coriz  
PO Box 577  
Chimayo, NM 87522

RE: Habeas Petition D-117-CR-2016-00020

Dear Ms. Coriz:

Enclosed you will find a copy of the Notice of 5-802(H)(1) Pre-Appointment Review that was filed regarding your pro se petition. Our office has not been appointed to represent you. The Judge still needs to make a determination on your petition on whether or not our office will be appointed.

Once the Judge has issued an order you will receive a letter from our office informing you of the Judge's decision. There is nothing more for you to do until instructed by the Court.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthias Swonger'.

Matthias Swonger  
Assistant Public Defender  
Post-Conviction Habeas Unit

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

  
Mark Reynolds

STATE OF NEW MEXICO,

**Plaintiff-Appellee,**

v.

**LAYLA D. CORIZ a/k/a  
LAYLA D. KESSLER,**

**No. A-1-CA-36713  
Rio Arriba County  
D-117-CR-2016-00020**

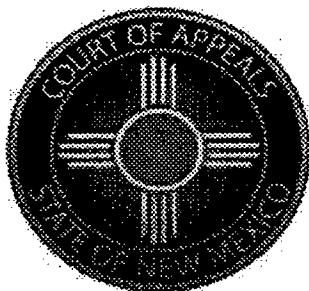
**Defendant-Appellant.**

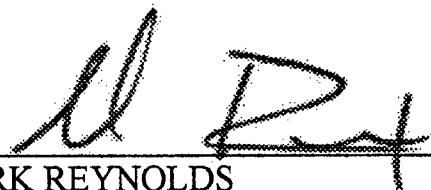
**MANDATE TO DISTRICT COURT CLERK**

Applicable items are indicated by an "X" below.

1.  Attached is a true and correct copy of the original decision/order entered in the above-entitled cause.
2.  This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision/order.
3.  Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision attached hereto.
4.  Cost Bill is assessed as follows:

By direction of and in the name of the Chief Judge of the Court of Appeals, this 20th day of October, 2021.



  
\_\_\_\_\_  
MARK REYNOLDS  
Chief Clerk of the Court of Appeals

**cc: Counsel w/out attachments**

STATE OF NEW MEXICO  
COUNTY OF RIO ARRIBA  
FIRST JUDICIAL DISTRICT COURT

D-117-CR-2016-00020

ENDORSED  
First Judicial District Court

SEP 16 2021

Santa Fe, Rio Arriba &  
Los Alamos Counties  
PO Box 2268  
Santa Fe, NM 87504-2268

LAYLA D. CORIZ,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent,

**AFFIDAVIT OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of the Petition for Writ of Habeas Corpus was served to parties entitled notice pursuant to 5-802(F) by First Class Mail this 16<sup>th</sup> day of September, 2021.

Addressed as follows:

First Judicial District Attorney's Office  
Jennifer Padgett Macias, Chief Deputy District Attorney  
Attn: Heather Smallwood, Habeas Corpus Attorney  
Post Office Box 2041  
Santa Fe, New Mexico 87504-2041

Post-Conviction Habeas Division  
Office of the Public Defender  
Attention: Amanda Stephenson  
505 Marquette NW, Ste. 120  
Albuquerque, New Mexico 87102



KATHLEEN VIGIL  
CLERK OF THE DISTRICT COURT

By: *Sheinca (Chavez) Vigil*  
Deputy Clerk

9-701. Petition for writ of habeas corpus.  
[For use with District Court Criminal Rule 5-802 NMRA]

STATE OF NEW MEXICO  
COUNTY OF Santa Fe  
IN THE DISTRICT COURT

Layla D. Coriz  
(Full name of prisoner)

Petitioner,

v. State of NM,

(Name of warden, jailor  
or other person having  
power to release the petitioner)

Respondent.

SANTA FE COUNTY  
FILED IN THE CLERK'S OFFICE  
C.F. DISTRICT COURT

August 31, 2021 SW  
Deemed filed August 29, 2021

For Official Use Only  
No. D-117-CR-2016-00020  
(To be supplied by the  
clerk of the court)

Assigned Judge:  
KATHLEEN MCGARRY ELLENWOOD

*Instructions — Read Carefully*

Make sure that all information provided in this form is true and correct. If more space is required, attach additional pages as needed. Make sure that all necessary documents are attached, or explain why the documents are not being included. If you are currently incarcerated, you may file the petition without payment of the filing fee. If you are not incarcerated and are seeking free process, complete Form 9-403.

Finally, you must complete the certificate of service and mail or otherwise serve copies of this petition on the respondent and the district attorney in the county in which the petition is filed. You must file the original petition and one copy with the Clerk of the District Court. You should keep a copy for your own records.

**PETITION FOR WRIT OF HABEAS CORPUS<sup>1</sup>**

1. Layla D. Coriz (name of person in custody) is imprisoned or otherwise restrained at State of NM (name of facility and county of detention) by \_\_\_\_\_ (name and title of person having custody).

2. This petition (SELECT ONLY ONE. If you wish to raise both types of claims, you must file two separate petitions and submit each petition in the location required by Rule 5-802(E)):

seeks to vacate, set aside or correct an illegal sentence or order of confinement (i.e., ineffective assistance of counsel, illegal search and seizure, involuntary confession, interpretation of the sentence by the institution or other matters relating to the trial or sentence the confined person received).

*NOTE: If the petition seeks to vacate, set aside or correct the sentence or order of confinement, correct the Corrections Department's interpretation*

*or application of the sentence or order of confinement, or challenge the conviction, it shall be filed in the county of the court in which the matter was adjudicated, or, if the matter has not been adjudicated, it must be filed in the county of the court that ordered the contested confinement. See Rule 5-802(E)(1) NMRA.)*

[ ] challenges confinement or conditions of confinement or matters other than the sentence or order of confinement. (This applies only to matters arising after the confined person arrived at the institution, i.e., county jail confinement, mental hospital confinement, detention facility confinement, good time credit, misconduct report, prison due process violation or parole.) *NOTE: If the petition challenges conditions of confinement or matters other than challenges to the sentence or order of confinement (those set forth in the first option), it shall be filed in the county where the petitioner is confined or restrained. See Rule 5-802(E)(2) NMRA.*

3. State concisely the facts upon which the confined person bases the claim:

*Did not file in writing for a mistrial.*

4. State concisely the grounds and law, or other legal authorities on which the confined person bases the claim:

*My lawyer did not file in writing for a mistrial.*

5. Have the grounds being raised in this petition been raised previously in your direct appeal? If so, explain the result. If not, explain why not:

*yes*

6. Have the grounds raised in this petition been raised previously in another petition for a writ of habeas corpus? If so, explain the result. If not explain why not:

*No, Filed an appeal and the issue was raised in the appeal.*

7. Briefly describe the relief requested:

*Overtake the conviction.*

8. State the nature of the court proceeding resulting in the confinement (i.e., criminal prosecution, civil commitment, etc.), including:

(a) case name:

Hayla Coriz

(b) docket number:

D-107-CR-2016-00020

(c) name of judge:

Jennifer Attrep

(d) name and location of the court in which the proceeding was held:

Santa Fe District Court

9. State the date of the final judgment, order or decree for confinement:

Prison jail and 5 years  
probation

10. Attach a copy of the judgment, order or decree. If not, describe your sentence.

I served 19 months confinement

I'm still on probation 4 years 2 months as of nu

11. Was the conviction the result of:

Guilty plea

No Contest plea (nolo contendere)

Finding of guilty by judge or jury

12. Was the confined person represented by an attorney during the proceedings resulting in the confinement?

Yes

No

13. If you answered "yes" to (12), list the name and address of each attorney who represented the confined person:

Rod Thompson

300 Paseo de Peralta Suite 306 Santa Fe NM  
87501

14. Did you appeal your conviction?

Yes (Go to 15)

No (Go to 16)

15. If you answered "yes" to (14), list:

(a) The name of each court to which an appeal was taken:

Court of Appeals NM Rio Arriba County Court

Court of Appeals NM State Supreme Court

(b) The case name and docket number for each appeal:

Ct. Appeals No. A-1-CA-36713 Hayla D. Coriz

NM State Supreme Court No. S-1SC-38292

(c) The date each appeal was filed and decided: (Attach a copy of each opinion or order)

NM State Court of Appeals filed 11-3-19

and decided 2-17-20

NM Supreme Court filed in April 2021

Decided 8-3-21

19. Do you seek the appointment of counsel to represent you?<sup>2</sup>

Yes  
 No

#### VERIFICATION

STATE OF NEW MEXICO  
COUNTY OF Santa Fe

I, the undersigned, state that I am the petitioner in this action. I have read the foregoing petition and know and understand its contents, and the information contained herein is true and correct to the best of my knowledge, information and belief. I affirm under penalty of perjury under the laws of the State of New Mexico that on 08/29, 2021 (date), I deposited this petition in the internal mail system of the institution in which I am confined, properly addressed with any necessary postage prepaid, for forwarding to the district court at the following address:

District Court (name of court)  
Santa Fe (city), New Mexico, \_\_\_\_\_ (zip code).

Jay Lee Co  
(Signature) PO Box 53

(Address) Chimayó NM

PNM No., if applicable

87537

#### USE NOTE

1. After this petition is reviewed by the Court, the Court will enter the order granting or denying the writ or ordering a response before further action. The order shall be prepared by the Court.

2. Petitioners who are incarcerated at the time of filing the petition need not file a motion for free process and may file the petition without payment of the applicable filing fee. See Rule 5-802(D)(2) NMRA.

[Adopted, effective August 1, 1989; as amended by Supreme Court Order No. 09-8300-008, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-025, effective for all cases pending or filed on or after December 31, 2017.]

*Mark R.*  
Mark R.

**THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellant,**

**vs.**

**Ct. Appeals No. A-1-CA-36713  
District Ct. D-117-CR-2016-00020  
(Rio Arriba County)**

**LAYLA D. CORIZ,**

**Defendant-Appellee.**

---

**LAYLA D. CORIZ'CONFORMING BRIEF IN CHIEF**

---

**Criminal Appeal from the District Court  
Rio Arriba County  
The Honorable Jennifer Attrep Presiding**

**Submitted By:**

**John A. McCall  
Law Works L.L.C.  
Attorney for Layla Coriz  
500 Oak St. NE Suite 108  
Albuquerque, NM 87106  
(505) 256-1998**

## CITATIONS TO THE RECORD

The record in this case consists of the Record Proper, Four Compact Discs including one Sealed Disk with recordings of the Proceedings. When citing these sources, this brief follows the conventions of NMRA 2019, Rule 23-112 and its appendix.

The one-volume Record Proper filed on May 19, 2016 is cited by the abbreviation "RP" followed by a page number. For example, the citation (RP 131) refers to page 131 of the Record Proper.

The ten volumes of the Transcripts of Proceedings filed by the Supreme Court on August 5, 2016, are cited in the form of [Vol: page number: line number]. For example, the citation [4:178:18-19 cross exam] refers to Volume 4 of the Transcripts of Proceedings, page 178, line numbers 18 through 19, and it is the Cross Exam Testimony of the witness. The Four Compact Discs in this matter are referenced by cite form as [CD#:Date of hearing:time-stamp]. For example CD 4 with a hearing date of 3/2/17 at 8:15 a.m. would be cited [CD4:3/2/17:8:15]

The Exhibits in this case are cited under the abbreviation "Ex." or as Exhibit followed by the exhibit's number and the type of Exhibit. For example, the citation [Ex. 78 CD 24:00] refers to Exhibit number 78, the type of Exhibit is a CD, and 24:00 is the elapsed time from the beginning of the recording.

## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES .....</b>	<b>iv-vi</b>
<b>I. SUMMARY OF PROCEEDINGS.....</b>	<b>1</b>
<b>A. COURSE OF PROCEEDINGS.....</b>	<b>1</b>
<b>B. STATEMENT OF FACTS.....</b>	<b>4</b>
<b>JUROR CONCERNS AND THE JURY VERDICT.....</b>	<b>9</b>
<b>II. ARGUMENT .....</b>	<b>14</b>
<b>A. INTRODUCTION.....</b>	<b>14</b>
<b>B. ISSUE ONE - Whether the Trial Court erred in Failing to Grant the Defendant's Motion For Mistrial... .....</b>	<b>15</b>
1. <i>Standard of Review</i> .....	15
2. <i>Probable and Inherent Prejudice</i> .....	16
<b>C. ISSUE TWO – Fundamental Error Occurred When Trial Court Did Not Conduct Proper Inquiry Into Jury Tampering and Bias .....</b>	<b>21</b>
1. <i>Standard of Review</i> .....	21
2. <i>Argument</i> .....	22
<b>D. ISSUE THREE – Prosecutorial Misconduct Constituted Fundamental Error.....</b>	<b>27</b>
1. <i>Standard of Review</i> .....	27
2. <i>Argument</i> .....	28

<b>E. ISSUE FOUR – It was Ineffective Assistance of Counsel Research and Write A Motion for Mistrial, Request the State’s Video of Misconduct and Move for Voir Dire of the Jury Regarding the Juror Notes.....</b>	<b>30</b>
1. <i>Standard of Review</i> .....	20
2. <i>Argument</i> .....	31
<b>F. PRAYER FOR RELIEF.....</b>	<b>35</b>
<b>CERTIFICATE OF SERVICE.....</b>	<b>35</b>

**THE RECORD IN THIS CASE CONTAINS ONE VOLUME OF THE RECORD PROPER AND FOUR COMPACT DISC**

Citations to the recorded hearings are in date format with the time stamp from the recording. (i.e. 3/21/13: 9:23)

Citations to the Record Proper state RP and the page number [RP 23]

## TABLE OF AUTHORITIES

### FEDERAL AUTHORITY

#### United States Constitution

N/A

#### US Supreme Court

<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	27
<i>Parker v. Gladden</i> , 385 U.S. 363 (1966) .....	16
<i>Remmer v. United States</i> , 347 U.S. 227, (1954) .....	16,18,27,32,34
<i>Strickland v. Washington</i> , 466 U.S. 668, (1984).....	30

#### Federal Cases

<i>Kellen v. Dowling</i> 2017 U.S. Dist. Lexis 191454 *; 2017 WL 5586958.....	32
<i>Stouffer v. Trammell</i> , 738 F.3d 1205 (10th Cir. 2013).....	32,34
<i>United States v. Vitale</i> , 459 F.3d 190 (2nd Cir. 2006).....	27

### **NEW MEXICO AUTHORITY**

#### New Mexico Constitution

N/A

#### New Mexico Cases

<i>Campos v. Bravo</i> , 2007-NMSC-021 .....	31
<i>Duran v. Lovato</i> , 1982-NMCA-182 .....	27
<i>Goodloe v. Bookout</i> , 1999-NMCA-061 .....	21

<i>Kilgore v. Fuji Heavy Indus. LTD</i> , 2010-NMSC-040.....	18
<i>State v. Aguilar</i> , 117 N.M. 501, 873 P.2d 247 (1994) .....	22
<i>State v. Arrendondo</i> , 2012-NMSC-013.....	30
<i>State v. Astorga</i> , 2015-NMSC-007.....	30
<i>State v. Baca</i> , 1997-NMSC-45.....	22
<i>State v. Barber</i> , 2004-NMSC-019, .....	31
<i>State v. Cortez</i> , 2007-NMCA-54.....	29
<i>State v. Cunningham</i> , 2000-NMSC-9 .....	22
<i>State v. Gallegos</i> , 2009-NMSC-017.....	16,22,24,31
<i>State v. Gardner</i> , 2003-NMCA-107.....	21
<i>State v. Gutierrez</i> , 1967-NMCA-024 .....	16
<i>State v. Hatch</i> , 2008-NMSC-24 .....	27
<i>State v. Luna</i> , 1996 NMCA 71 .....	29
<i>State v. Mann</i> , 2002-NMSC-001 .....	15,18,19
<i>State v. Paredez</i> , 2004-NMSC-036 .....	30
<i>State v. Perea</i> , 1981-NMCA-033 .....	20
<i>State v. Sandoval I</i> , 2011-NMSC-022.....	27
<i>State v. Silva</i> , 2008-NMSC-051 .....	28
<i>State v. Torres</i> , 2018-NMSC-013.....	22,30
<i>State v. Vanderdussen</i> , 2018-NMCA-41.....	20,26

**Cases From Other States**

N/A

**New Mexico Rules and Statutes**

NMRA 2019, Rule 12-216(B)(2) ..... 22,31

**Secondary Authority**

N/A

## **I. SUMMARY OF PROCEEDINGS**

### **A. COURSE OF PROCEEDINGS**

#### **1. Pretrial Proceedings**

Defendant Coriz was charged by Criminal Information on January 19, 2016 on Attempt to Commit Murder as charged in Count 1 of the Criminal Information; Or in the alternative, Aggravated Battery Against a Household Member; Criminal Damage to Property of a Household Member as charged in Count 2 of the Criminal Information; and Unlawful Taking of a Motor Vehicle as charged in Count 3 of the Criminal Information. [RP 1-2]. A first appearance hearing was held on January 22, 2016 and Defendant was ordered held on a \$100,000 cash only bond. [RP 4-12]. The Trial Scheduling Order was entered on January 22, 2016 setting trial for July 18, 2016 in Tierra Amarilla [RP 13-14] On January 27, 2016 the Court issued a Bench Warrant for Defendant because she was mistakenly released under a different case number. [RP 15-16] D. Paul Branch entered an appearance for Defendant as her Public Defender and requested Speedy Trial, Discovery and a waiver of the Insanity Defense on January 29, 2016. [RP 19-23]. Roderick Thompson entered an appearance on February 3, 2016 on behalf of the Defendant and Requested Discovery again and Entered a Plea of Not Guilty on behalf of the Defendant. [RP 26-28]. Defendant was placed on electronic monitoring and a bond of \$50,000 cash or surety on February 4, 2016 and the Preliminary hearing was

rescheduled in the case. [RP 30-36]. Defendant was transported to the hearing on February 25, 2016 in custody. [RP 37] The District Court bound over charges of Aggravated Battery on February 29, 2016 and Dismissed the charge of Attempted Murder; the State also stipulated to dismiss Count II, Criminal Damage to Property. [RP 38-39]. Defendant's bond was reduced to \$10,000 cash or surety with third party custody to Robert Espino on March 14, 2016 [RP 50, 52]. Defendant was arraigned on March 14, 2016 and entered a plea of not guilty. [RP 53].

The State filed its Witness list with 31 witnesses on June 29, 2016 [RP 100-102]. The State also filed request for Alibi, Disclosure and Entry of Appearance on June 29, 2016 [RP 103-109] and the Defense filed It's Witness List on July 7, 2016. [RP 110]. The Jury Panel was Vacated on July 22, 2016 at request of the Defense [RP 114] and an Amended Trial Scheduling Order was entered on July 29, 2016 setting trial for November 7, 2016. [RP 116]. The Parties agreed to change venue from Rio Arriba County after issues related to jurors discussing facts of the case outside the presence of the Court came up and the members of the Jury Panel would not admit as to who had those discussions; the Motion also noted that various members of the Panel had read of the case in the Rio Grande Sun, the primary newspaper in Espanola, New Mexico. [RP 117-118]. The Court entered an Order Changing Venue on August 16, 2016 [RP 120]. The Parties Amended their

Motion and Order changing venue due to the mistaken assignment of Judge Marlow to the case. [RP 123-126] and trial was set for March 31, 2017 [RP 127].

On October 13, 2016, the Alleged Victim submitted a letter to Judge Attrep which was filed in the record asking that the prosecution of Ms. Coriz, his wife, be stopped and noting that he and Ms. Coriz had provided multiple statements regarding what happened in the case at bar. [RP 139-40].

The trial began on February 27, 2017 [RP 155] and the Court entered the Juror's trial questions in the record. [RP 180-87]. The Parties also entered written Stipulations for the Jury Trial [RP 173-75]. The Court designated Juror Notes during deliberation [RP 204] and Court's Exhibits 8-10 indicating jurors were intimidated by Mr. Coriz and saw him giving a "throat gesture" to witness Jesse Whitaker during trial were entered into the record [RP 205-207]. The Jury found Ms. Coriz guilty of Aggravated Battery on March 2, 2017 [RP 208]. Defendant was sent to the Department of Corrections for a Sixty Day Evaluation [RP 210] and was Sentenced on August 24, 2017; the Judgment and Partially Suspended Sentence requiring her to serve 18 months incarceration for Third Degree Aggravated Battery (with 575 days of Pre-Sentence Confinement time) and she was Ordered to report to Probation for Five years. [RP 228-230].

Defendant filed a Notice of Appeal on August 28, 2017 and was granted free process on appeal on October 5, 2017 [RP 238-240]. Defendant's Docketing

Statement was filed on October 11, 2017 [RP 241-251] and the First Amended Docketing Statement was filed on December 1, 2017. This Court proposed to Summarily Affirm on April 9, 2018 and the Memorandum in Opposition was filed by Defendant on July 26, 2018. The Court entered the case on the General Calendar on March 19, 2019 and this Brief is Due on November 1, 2019 pursuant to an Order of this Court.

## **B. STATEMENT OF FACTS**

### **1. Introduction**

Layla Coriz (Defendant) was charged with Count One, Attempted Murder in the First Degree (Willful and Deliberate); and Count Two, Aggravated Arson (By Setting a Fire). On November 17, 2015, agents from the New Mexico State Police including Special Agent Jesse Whittaker, arrested Layla Coriz for the attempted murder of her husband, James Coriz, and for arson occurring at the Rio Arriba County home that they shared.

#### **a. Preliminary Hearing**

On February 25, 2016, the Honorable Jennifer Attrep, First Judicial District Court, held a preliminary examination. The Court ruled that the arson charge be dismissed and that the attempted murder charge be reduced to aggravated battery on a household member with a deadly weapon and bound that count over for trial. [RP 38-39].

### **b. First Trial Vacated Due to Tainted Jury Panel**

This case was first set for trial on July 18, 2016. [RP 13-14]. During the *Voir Dire* on July 18, 2016, it was determined jurors had been discussing the case with each other and it also appeared the jurors might not be forthcoming as to who on the panel was discussing the case facts. (CD1-7/18/16:11:16-43) [RP 115]. Many of the jurors knew the AV and Defendant and many were family or long-time friends with them. The Court investigated the issue and determined to dismiss the entire panel after questioning them about improper discussions of the facts of the case. *Id.* This laid the ground for more intensive warnings about discussing the case to the subsequent jury panel and for the stipulated Motion to move the jury trial to Santa Fe County.

### **c. Jury Trial**

None of the jurors in Santa Fe indicated knowledge of the Defendant or the AV except one person who knew a James Coriz from a non-profit activity.

#### **Relevant Testimony at Trial**

##### **(a) James Coriz Testimony for the State's Case**

Mr. Coriz first testified on the second day of testimony, February 28, 2017. (CD2-2/28/17:9:00). His testimony was that his wife did not intentionally start the fire that burned him and that the fire occurred when a container of chainsaw mix, oil and gas, spilled and got on him. (CD2-2/28/17:9:12). Specifically, he stated that he

was close to his bed and the container spilled and Mrs. Coriz flicked a lighter to see what was going on and they were both caught on fire. (CD2 2/28/19:9:11-917). The State attempted to impeach Mr. Coriz, however, in the prior statements he made he indicated he was angry at his wife and on a large number of medications that caused him to be seriously impaired. He also stated he had significant head injuries causing long term memory issues. (CD2-2/28/17:10:07, 10:09, Cross at 10:53, 10:56, 10:58) He also admitted he had an ax and was breaking the windows in Defendant's car when the incident happened. (CD2-2/28/17:1056).

**(b) Mark Coriz and Martina Garcia**

These two witnesses testified that Mr. Coriz made statements asserting he had been burned by the Defendant the night of the fire, however they also noted that he was in a state of shock and severely injured. (CD2-2/27/17:3:2:30 and 2:49)

**(c) Officer Chavez's Testimony**

State Police Officer Chavez testified as an expert witness that he believed the accelerant used to start the fire was gasoline. He testified that he believed Mr. Coriz had the accelerant squeezed on him from a container with a 1 inch opening or tossed or thrown. He refused to acknowledge a theory where the liquid could have splashed onto the AV.

**(d) Fire Marshall's Office Investigator – Sam Anaya**

Officer Anaya testified as an expert and described the fire debris field as spread out. He testified that the bed was not burnt, however, 9 items including Mr. Coriz's clothing all had accelerant on them and had burned. (CD2-2/28/17). He also testified that he believed that the fire was caused by liquid from the container with fuel mix in it being thrown or splashed on the Alleged Victim (CD2-2/28/17), however, he noted that the fumes from the gasoline could catch the air on fire above the gas itself.

**(e) Case Agent – NMSP – Whittaker**

Officer Whitaker was the primary case agent for the investigation of the charges against Mrs. Coriz. He testified that he was called to the scene on November 17, 2017 and did a walk through. (CD2-2/28/17:2:32).

Officer Whitaker interviewed James Coriz and Layla Coriz, and made a tape recording of the interviews. His interview with Layla Coriz was over an hour and a half long and was played for the jury. (CD2-2/28/17:2:53-4:58). She stated Mr. Coriz would pick up an ax or shovel or hammer and go for her head and so she wanted out of there as fast as she could get out. (CD2-2/28/17:347). When she wrecked her car, she said she called police. She thought Mr. Coriz would hide once she told him she called police. She argued with Agent Whitaker regarding the spilling of the chainsaw fuel. (CD2-2/28/17:3:50) Mrs. Coriz stated she and Mr. Coriz were drinking and using cocaine earlier in the day. (CD2-2/28/17:3:58). Case

Agent Whittaker interviewed Mr. Coriz at the hospital and on December 19, 2015 and Mrs. Coriz a few days after the incident on November 17, 2015. His one and a half hour long interview with Defendant was played to the jury during his testimony along with his arrest of her for Attempted Murder and Aggravated Arson. (CD2-2/28/2017:2:52-458). Defense Counsel moved for a mistrial as to the arrest information. (CD3-3/1/17:814). Agent Whittaker testified as to how he oversaw the crime scene investigation and identified a lighter collected during the process (CD2-2/28/17:2:42) Exhibit 15. Agent Whittaker discussed how the AV's story could change after he took the statement. He also admitted on cross-examination that the alleged victim's injuries to her feet did not change his opinion about what happened. (CD3-3/1/17:8:52).

During agent Whittaker's testimony, the Court excused Mr. Coriz as a State's witness and he was told he was free to go. (CD2-02/28/17:3:33). It was not clear in the record if he stayed and Defense Counsel did state that he wanted Mr. Coriz for the Defendant's case the next day. Mr. Coriz's mother was admonished by the Court and it was noted that she was making noises hostile to the Defendant's statements on a recorded interview (Exhibit 17) with Whittaker and had threateningly confronted the Defendant in the hallway outside the Courtroom. (CD2-02/28/17:3:08:45).

**(f) Defendant's Case –**

**(g) James Coriz Testimony in Defendant's case**

James Coriz was called to testify for the Defense on the last day of testimony. He testified that he had made statements accusing the Defendant that were false when he was angry and medicated. (CD3-3/1/17:10:37). Mr. Coriz said that he was not sure how the fuel got on him but he knew the container fell. (CD3-3/1/17:10:53). During his testimony his mother, a noted opponent of Defendant, was asserted to be making noises again. (CD3-3/1/17:10:58). Mr. Coriz continued to say that he was angry when he told Agent Whittaker that Mrs. Coriz lit him on fire. (CD3-3/1/17:11:11)

**(h) Defendant Layla Coriz' testimony**

Mrs. Coriz testified that she accidentally kicked the fuel container in this case and, after Mr. Coriz broke her car windows with an ax she went into the house where the electric was turned off and she lit a lighter when the container was spilled to see what had happened and a large flame erupted. She then ran from the house to her friends home. (CD3-3/1/17:11:26-11:43). Mrs. Coriz stated that during her long interview with Agent Whittaker she was not feeling well, but she stood by her description of the ignition as accidental. (CD3-3/1/17:1147-11:52).

**JUROR CONCERNS AND THE JURY VERDICT**

This section is inclusive of several procedural issues in the case, however, the procedural and factual circumstances of what occurred a trial are merged here for unitary and easy access to the key issues raised on appeal.

The trial began on February 27, 2017 [RP 155]. The trial court took great care to instruct the jurors before and after selection not to discuss the case with anyone. One example of these instructions included instruction from the trial court that the jury not let anyone discuss the case in their presence and if anyone did they were instructed to immediately let a member of the judge's staff know that. (CD-2-2/27/17:10:51:55). This instruction and others like it were repeated on multiple occasions to the jurors.

On March 2, 2017, the last day of trial, the jury found the Defendant guilty of the single charge of aggravated battery on a household member. Before the verdict was announced several things happened. First, at 11:24 the judge noted the jury had a verdict and the judge called the case. The court then asked counsel to approach. (CD4-3/2/17:11:24:45). The Court stated: "A juror upon returning of the verdict stated some discomfort and concern for her safety, that certain parties might not be happy, and expressed concern for her safety upon return of the verdict, that certain parties might not be happy with the verdict, so I have arranged for deputies to escort the jury out of the court house once the verdict is returned." (CD4-3/2/17:11:25).

At 11:26, the Court also called counsel back to the bench. The Judge stated: "Okay, I'm going to read these notes onto the record, these notes were received by the jury, they're not signed, okay, I'm going to read these so that your client knows what is going on. (CD4-3/2/17:11:26). The Court then read the two notes in the record to counsel. The first note explained that the jurors had met with Mr. Coriz by accident outside the Court (presumably the day he testified and was given permission to leave the courtroom) and he was intimidating to them, he had glared at each juror, the author of the note wanted to ensure the safety of all jurors. Court's Exhibit 9. The Second Note indicated that four of the jurors observed James Coriz "give Jesse Whittaker [sic] a throat slashing sign while he was on the witness stand." Court's Exhibit 10.

Upon the Court's reading of the second note regarding the throat slashing sign, the Defendant's attorney exclaimed: "I did not know about that." Ms. Anastasia Martin, for the State, appears to state during this conversation that "the State was aware of it, Jesse Whitaker informed us about it" (CD4-3/2/17:11:26:50). Mr. Thompson then stated he wanted to move for a mistrial. The Court then read the notes out loud in the Court so the Defendant could hear what they said.

Mr. Thompson moved for a mistrial and asked if the note was produced before or after the verdict. The judge stated she heard the jury had a verdict half an hour before the proceedings taking place. (CD4-3/2/17:11:29). The Judge stated she had

just been handed the notes. However, Mr. Thompson's question as to whether the notes had been written before or after the verdict had been rendered was not answered. (CD4-3/2/17:11:29). Mr. Thompson asserted that there was no way that four jurors could have seen the throat slashing gesture toward Agent Whitaker and after having concerns expressed for their safety as well (independent of that incident); that there was no way they could not have been affected in their verdict.

*Id.*

Ms. Martin responded to Mr. Thompson's assertion stating that Agent Whitaker had informed the State the day before (March 1, 2017), that Mr. Coriz had made the gesture toward him while he was on the stand. (CD4-3/2/17:11:30). Ms. Martin argued that the instructions required the jurors to observe witnesses when testifying. Mr. Thompson noted that when jurors are in fear for their physical safety from Mr. Coriz, he was sure that would affect their ability to come to a fair conclusion because of the fear for their physical safety due to the threats and intimidation blatantly exhibited by Mr. Coriz. (CD4-3/2/17:11:24:31) The Court indicated that without caselaw that indicated that a witness who testifies is perceived as threatening or intimidating to the jury or to some of the jury, the court would, without prejudice to the return of the verdict, asked for caselaw on the issue. The Court indicated specifically that it was not aware of any case law suggesting that "simply because the jury is afraid that a complaining victim may not be happy with

their verdict that that would be the basis for a mistrial, and so I'm denying it." "So, It's without prejudice after the verdict if you see fit to do so you may do that in writing." (CD4-3/2/17:11:32).

The court made sure to have the jury escorted out of the building from a different floor as Mr. Coriz was on the third floor where the courtroom was located, and the Court asked a deputy to watch Mr. Coriz. (CD4-3/2/17:11:34) (Mr. Coriz was later criminally charged for this incident).

The Court read the verdict of guilty at 11:38:50 and the foreman confirmed the verdict, (CD4-3/2/17:11:39). The court polled the jurors by number from 1-12 and all affirmed the verdict. The trial court informed the jurors that they could contact the court or law enforcement if they felt threatened and informed the jurors they would be escorted out of the building.

The State argued a Motion for revocation of the Defendant's conditions of release and the Court ordered that she be taken into custody. (CD4-3/2/17:11:46). The Court also ordered a 60 day diagnostic report through the Department of Corrections. (CD4-3/2/17:11:47). The Defense asked the Court to re-consider the remand order, and the Court denied it due to the requirement that Defendant be in custody for the 60 day eval. (CD4-3/2/17:11:49). The Court also noted it would file the juror notes so Defense counsel could obtain them in case a "Motion for New Trial" was going to be filed. (CD4-3/2/17:11:50).

Both Defense and Prosecution were again called into the court at 12:14 and provided with copies of the notes from the jury and were instructed that the jury information was in the record and part of the court docket along with the court notes that jurors had been intimidated. (CD-4-3/2/17:12:14). The Court indicated that it did not know whether jurors being uncomfortable would be a basis for sealing the record. The State responded that there was a stringent test for sealing documents and a hearing would quickly be needed in order to seal the document. (CD-4-3/2/17:12:15).

The State noted that there was a video of the incident with Agent Whittaker and the victim, Mr. Coriz, and indicated that the State had possession of, and had reviewed the Court video of the incident. (CD-4-3/2/17:12:17) No further information was entered into the record as to how the State came into possession of the Courtroom video of the alleged incident and the State did not discuss sharing the video with counsel for the Defendant or otherwise indicate the status of the video.

James Coriz was charged the same day, March 2, 2017 with Bribery of a Witness in case D-101-CR-2017-00332. Appellant asks the Court to take judicial notice of that case in this matter.

## **II. ARGUMENT**

### **A. INTRODUCTION**

#### **1. Issues on Appeal**

The Court addressed the following issues raised by Defendant in her Docketing Statement and Memorandum in Opposition to Summary Affirmance. Defendant-Appellant Coriz raises four issues in this appeal. First, Defendant-Appellant Coriz claims that the trial court abused its discretion by denying trial counsel's motion for a mistrial based on information regarding the juror notes expressing fear for juror safety. Second, Defendant-Appellant Coriz claims that a fundamental error occurred when the trial court failed to make a *sua sponte* inquiry into jury tampering. The additional issues are whether the State committed prosecutorial misconduct by failing to alert the Court or the Defense to Mr. Coriz's actions during the case agent's testimony and whether the failure to turn over a video of the incident to the Defense or the Judge was in furtherance of such prosecutorial misconduct. Finally, trial counsel raised the issue of whether ineffective assistance of counsel resulted from his failure to request *voir dire* of the jurors or to file a written motion for new trial or for mistrial subject to the Court's allowance for such notwithstanding the verdict.

**B. ISSUE I. Whether the Trial Court erred in Failing to Grant the Defendant's Motion For Mistrial**

**1. Standard of Review**

"This Court will only overturn a district court's denial of a motion for new trial based on jury tampering or bias unless the district court abused its discretion." *State v. Mann*, 2002-NMSC-001, ¶17, 131 N.M. 459, 39 P.3d 124.

To establish an abuse of discretion, it must appear that the district court "acted in an obviously erroneous, arbitrary or unwarranted manner." *State v. Gallegos*, 2009-NMSC-017, ¶ 21, 146 N.M. 88, 206 P.3d 993.

## **2. Probable and Inherent Prejudice**

Unauthorized communications to the jury in state courts must be judged by the federal requirements of due process. *Parker v. Gladden*, . If the situation here involves probable prejudice or inherent prejudice under these standards, there must be a new trial. Probable or inherent prejudice exists in the communication of a throat slashing gesture to a police officer accompanied by glaring at the jurors.

In *State v. Gutierrez*, 1967-NMCA-024, ¶¶ 15-17, 78 N.M. 529, 531, 433 P.2d 508, 510, this Court held that New Mexico is bound to federal law on Due Process with respect to this issue, adopting the holding in *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

In *Remmer* the US Supreme Court interpreted and enforced the Due Process Clause stating:

"In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."

*Remmer* at 229.

Thus, under standards of due process, any unauthorized communication is presumptively prejudicial. Further, the burden is not upon the defendant to establish the existence of prejudice. In this case, a key additional fact is that the out of court communication and the in-court intimidation not seen by Defense Counsel or the Judge, did occur during the course of the trial and well before the deliberations of the jury. The trial court, recalling the prior incidents with the jury that had to be vacated in *Tierra Amarilla*, had repeatedly instructed the jury that if anyone had any contact with a party, or a witness, other than a hello or good morning, that they were to report such contact to the Court's staff immediately. *See* (CD2-2/27-28/17:6:45) This was not done in this case.

More recent jurisprudence in from the Supreme Court has further explained this protection of the sacrosanct process of jury deliberation. "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of the known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Kilgore*

*v. Fuji Heavy Indus. LTD*, 2010-NMSC-040, 148 N.M. 561 *citing Remmer v. United States*, 347 U.S. 227 (1954).

Jury tampering occurs when a person purposefully initiates contact with a juror in an attempt to influence the juror. *Kilgore*, 2009-NMCA-078, ¶ 12; *see also Mann*, 2002-NMSC-001, ¶ 21 which defines jury tampering as "private communications between third persons and jurors."

The first instance of jury tampering occurred during NMSP main case agent Jessie Whitaker's testimony. During his testimony, four of the jurors witnessed Mr. Coriz allegedly "make a throat-slashing gesture against his own neck with his finger towards him." [RP 207] The jury saw and took the gesture as violent.

The second instance occurred outside of the courtroom. The juror note stated that some jurors accidentally encountered Mr. Coriz outside of the courtroom. Additionally, the note implies a certain degree of fear of Mr. Coriz because he was "intimidating." [RP 206]. The State's argument that this situation only reflected on Mr. Coriz's credibility as a witness misdirected the trial court. Defense counsel noted that the issue was not witness credibility but juror intimidation out of court and in court. The trial court's ruling focused on the witness issue only, and did not address the juror intimidation issue (however, the court had assigned sheriffs to escort jurors). The trial court noted: "simply because the jury is afraid that a complaining victim may not be happy with their verdict that that would be the

basis for a mistrial, and so I'm denying it." (CD4-3/2/17:11:32)

The jurors were affected, how they were affected is unknown, however, the Defendant-Appellant does not bear the burden of dissuading the presumption of prejudice in a situation as occurred at bar. The trial court, the State and the Defense all were on notice that a jury issue is resolvable only by *voir dire* of the jury in response to their notes.

The jury, whose notes to the trial court evidence an outside influence unquestionably bothered their minds while they considered whether to acquit or convict the Defendant-Appellant, were not required to do more than notify the Court, however, they had also delayed notification of these issues in defiance of the Court's instruction to inform the court staff of any inappropriate contacts. (CD2-2/27/17:06:45). They did so, however, it was at the most inopportune time.

Mr. Coriz' presence and alleged actions intimidated the jurors in such a way that it "unfairly affected the jury's deliberative process and resulted in an unfair jury." *Mann*, 2002-NMSC-001, ¶ 20. Mr. Coriz' tampering in this case was deliberate and, other than the throat-slashing gesture, directed at them personally, no evidence was presented that Defendant-Appellant requested Mr. Coriz to take the steps he did.

If even one juror was biased against Mrs. Coriz due to her husband's actions, the conviction must fail because "a lone biased juror undermines the impartiality of

an entire jury." *State v. Vanderdussen*, 2018-NMCA-41, 16,420 P.3D 609.

In this case, the presumption of prejudice was triggered by Mr. Coriz' contact with the jury outside the courtroom *and* outside the view of the Judge. Fortunately, his actions were caught on video camera by the Court. Unfortunately, the court and the Defense were never shown the video during these discussions as the parties milled about the video equipment they were using to show slides and play interviews.

In *State v. Perea*, 1981-NMCA-033, 95 N.M. 777, the court found that the jury was contaminated when a juror brought into the jury room a newspaper with an article about the Defendant's guilt. Bailiff discussed the article with the jury which resulted in a juror writing a note asking the court deny mistrial based on the newspaper incident. This Court found the circumstances "so corruptive of the sanitation within which a fair trial is supposed to proceed" that even "the protestations of the State and the assurances of the jurors that "each and every one of the jury panel was 'totally free' from any contamination" was insufficient to sustain the conviction as valid and free from error. *Id.* ¶ 6.

As noted, it is clear that the outside influences visited on the jury by Mr. Coriz were individually threatening. [RP 206-7]. Whether the jurors voted to convict based on their feelings about his behavior is impossible to discern on the current record, however, the possibility of prejudice is clearly demonstrated by the

same record. The trial court asked for case law and briefing on the issue, however, this was fundamental error at best. The danger was easily addressed by the tool available to the court, individual voir dire of each juror to determine whether the juror was aware of any threats or contact and, if so, whether the threats would or were having an impact on that juror's impartiality. This process is the surefire prophylactic available to the court in such a situation and failure to exercise the process was error. Without that process Defendant-Appellant's presumption establishes that the jury's deliberative process was unfairly affected and that the trial court abused its discretion in denying Defendant-Appellant's motion for a mistrial based on the improper behavior aimed at influencing the jurors and witnessed by the jurors during testimony.

**C. ISSUE TWO: FUNDAMENTAL ERROR OCCURRED WHEN TRIAL COURT DID NOT CONDUCT PROPER INQUIRY INTO JURY TAMPERING AND BIAS**

**Fundamental Error Occurred Because the Trial Court Did Not Inquire into Possible Jury Tampering and Bias**

**1. Standard of Review**

When a court learns of possible juror misconduct or tampering during trial, "it should conduct an inquiry to determine whether the fairness of the trial has been threatened and then take appropriate measures." *State v. Gardner*, 2003-NMCA-107, ¶ 13, 134 N.M. 294, 76 P.3d 47 citing *Goodloe v. Bookout*, 1999-NMCA-061, ¶ 23, 127 N.M. 327, 980 P.2d 652.

Rule 12-216(B)(2) states that “fundamental error is an exception to the general rule requiring preservation of error.” *Gallegos*, 2009-NMSC-017, ¶ 18 citing *State v. Cunningham*, 2000-NMSC-9, ¶ 10, 128 N.M. 711, 998 P.2d 176.

“Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand.” *Gallegos*, 2009-NMSC-017, ¶ 27 citing *State v. Baca*, 1997-NMSC-45, ¶ 41, 124 N.M. 55, 946 P.2d 1066 (citing *State v. Aguilar*, 117 N.M. 501, 507, 873 P.2d 247, 253 (1994)). There are two situations in which the shocks the conscience standard is applicable, one when the Defendant’s innocence is in question, which is a fair proposition in this case given the nature of fire and gas fumes igniting, and two when the violation of Due Process clearly eliminated the possibility of a fair trial. That is a clearly the situation in this case. *State v. Torres*, 2018-NMSC-013, ¶ 62

## **2. Argument**

Defendant-Appellant contends that the trial court should have *sua sponte* conducted *voir dire* and declared a mistrial upon receiving information in the juror notes and confirming that jurors felt threatened and their impartiality was compromised.

Before the jury returned to announce its verdict, trial court brought to trial counsel and the State’s attention that the Court had received information

regarding juror notes, however, the record does not precisely identify the chronology of these notes:

- CD-4-3/2/17:11:24 Judge Attrep noted the jury had a verdict and she called the case. The court then asked counsel to approach.
- CD-4-3/2/17:11:24:45 The Court stated: "A juror upon returning of the verdict stated some discomfort and concern for her safety . . . upon return of the verdict, that certain parties might not be happy with the verdict, so I have arranged for deputies to escort the jury out of the court house once the verdict is returned." CD-4-3/2/17:11:25.
- CD-4-3/2/17:11:26 The Court also called counsel back to the bench. Judge Attrep stated: "Okay, I'm going to read these notes onto the record, these notes were received by the jury, they're not signed, okay, I'm going to read these so that your client knows what is going on."
- CD-4-3/2/17:11:26 The Court then read the two notes in the record to counsel. Upon reading the second note regarding the throat slashing sign, the Defendant's attorney exclaimed: "I did not know about that."
- CD-4-3/2/17:11:26:50 Ms. Anastasia Martin, for the State, appears to state during this conversation that "the State was aware of it, Jesse Whitaker informed us about it" Mr. Thompson then stated he wanted to move for a mistrial. The Court then read the notes out loud in the Courtroom so the Defendant could hear what they said.
- CD-4-3/2/17:11:29 Mr. Thompson moved for a mistrial and asked if the note was produced before or after the verdict. Judge Attrep stated she heard the jury had a verdict half an hour before the proceedings taking place. She also stated she had just been handed the notes, however, she did not answer Mr. Thompson's question as to whether the notes had been written before or after the verdict had been rendered. Mr. Thompson asserted that there was no way that four jurors could have seen the throat slashing gesture toward Agent Whitaker and having expressed concerns for their safety as well; that there was no way they could not have been affected in their verdict.
- CD-4-3/2/17:11:30 Ms. Martin responded to Mr. Thompson's assertion stating that Agent Whitaker had informed the State the day before

(February 28, 2017), that Mr. Coriz had made the gesture toward him while he was on the stand. Ms. Martin argued that the instructions required the jurors to observe witnesses when testifying.

- CD-4-3/2/17:11:30-11:31 Mr. Thompson noted that when jurors are in fear for their physical safety from Mr. Coriz, he was sure that would affect their ability to come to a fair conclusion because of the fear for their physical safety due to Mr. Coriz.
- CD 4-3/2/17:11:32 The Court stated that without caselaw that indicated that a witness who testifies is perceived as threatening or intimidating to the jury or to some of the jury, the court noted that was without prejudice to the return of the verdict and asked for caselaw on the issue. The Court indicated specifically that it was not aware of any case law suggesting that “simply because the jury is afraid that a complaining victim may not be happy with their verdict that that would be the basis for a mistrial, and so I’m denying it.” “So, It’s without prejudice after the verdict if you see fit to do so you may do that in writing.”
- CD 4-3/2/17:11:34 The court made sure to have the jury escorted out of the building from a different floor as Mr. Coriz was on the third floor where the courtroom was and the Court asked a deputy to watch Mr. Coriz.
- CD 4-3/2/17:11:38:50 The Court read the verdict of guilty
- CD 4-3/2/17:11:39 the foreman confirmed the verdict. The court polled the jurors by number from 1-12 and all affirmed the verdict. The court then informed the jurors that they could contact the court or law enforcement if they felt threatened and informed the jurors they would be escorted out of the building.

Trial courts “have discretion and variety of remedies to address allegations of juror bias, including individual *voir dire*, curative instructions, and if necessary dismissal of the affected juror.” *Gallegos*, 2009-NMSC-017, ¶ 28-29. In *Gallegos*, the appellate court found no fundamental error because the trial court correctly

took the necessary steps to determine the existence of bias or prejudice by conducting a *voir dire* of the entire jury and then by offering a curative instruction.

The juror note revelations prompted trial counsel to move for a mistrial. The trial court denied the motion on the basis that Mr. Coriz' gesture did not affect the decision of the jury without conducting proper inquiry as to the allegations of juror intimidation. However, the trial court took the incident seriously enough to have the sheriffs guard Mr. Coriz and escort jurors secretly form the building.

In this case the initial demonstration of a highly prejudicial series of events was made on the record with no question as to whether these events occurred. The Court's ruling did not address the fact that the jury expressed fear of Mr. Coriz that might have impacted their deliberations. It did not matter whether he was a witness or not, he intimidated the jury by the throat slashing gesture and the meeting of the jurors in the hallway. The trial court had previously dismissed the jury in Tierra Amarilla due the possibility that panel members were not being honest about discussing the case with each other while sitting outside the courtroom during *voir dire*. The Court's failure to investigate this matter was simply an abuse of discretion given the very likely possibility that the jury was influenced by the fear expressed in the notes.

The trial court was on notice as to the severity of this situation and would be required to conduct the necessary *voir dire* of the jury. The Court would be

required to do so when alerted to such possible violation of the instruction to the jury that they not allow anyone to contact them regarding the case pending their deliberations. If the jury made contact with Mr. Coriz and failed to notify the Court at the time of that contact, which had to be prior to the uninterrupted deliberations on the morning of March 2, 2017, the jurors had violated the instructions and had failed to inform the Court. The jurors were clearly in violation of their oath and therefore, the Court was obligated to *voir dire* the jury on that issue alone, as it had done with the venire panel in Tierra Amarilla.

The next step required was not taken. The State did not rebut the presumption of prejudice and the Court did not inquire of the jury as to the impact of these events. Without, further evidence in the record, prior case law is clear that such a conviction cannot stand and another trial is required to ensure the improper efforts to influence the jury did not result in an erroneous jury verdict based on bias or prejudice to the Defendant. *Vanderdussen*, 2018-NMCA-41, ¶ 16. The Due Process provided for in both the State and Federal Constitutions was in the hands of the sworn attorneys in the room and the judge. No doubt this was an emotional and extensive one count trial that had more meanderings than the Rio Chama itself, however, this did not relieve the attorneys and the court of the duty to protect the Defendant's constitutional rights right up through the time of receiving the verdict.

Fundamental error clearly existed in this case and the proper remedy is "an evidentiary hearing in which the parties have an opportunity to find out whether Mr. Coriz' alleged actions affected the jury's deliberations and thereby its verdict." *Kilgore*, 2010-NMSC-040, ¶ 28 citing *Olano*, 507 U.S. at 739; see *Smith*, 455 U.S. at 214; *Remmer*, 347 U.S. at 229-30; *United States v. Vitale*, 459 F.3d 190, 197-200 (2d Cir. 2006); *Doe*, 101 N.M. at 366-67, 683 P.2d at 48-49; *Duran v. Lovato*, 1982-NMCA-182, 99 N.M. 242, 248, 656 P.2d 905, 911 (Ct. App. 1982).

#### **D: ISSUE THREE: PROSECUTORIAL MISCONDUCT CONSTITUTED FUNDAMENTAL ERROR**

**Fundamental Error Occurred When the State Failed to Disclose to Trial Court and Trial Counsel Its Knowledge of the Throat-Slapping Gesture Before Deliberations**

##### **1. Standard of Review**

A trial court's ruling on prosecutorial misconduct is reviewed for abuse of discretion because the trial court is in the best position to evaluate the significance of any alleged prosecutorial errors. *State v. Hatch*, 2008 NMSC 24, ¶ 47. In this case the issue was not brought to the trial court's attention as prosecutorial misconduct and therefore, the Court likely would review the issue for fundamental error. If the Court reviews the issue for fundamental error "the jury verdict will not be reversed unless necessary to prevent a miscarriage of justice." *State v. Sandoval I*, 2011-NMSC-022, ¶ 13 (internal quotation marks and citation omitted). The court will reverse a conviction under the fundamental error doctrine only "if the defendant's

guilt is so questionable that upholding a conviction would shock the conscience, or where, notwithstanding the apparent culpability of the defendant, substantial justice has not been served." *State v. Silva*, 2008-NMSC-051, ¶ 13, 144 N.M. 815, 192 P.3d 1192 (internal quotation marks and citation omitted).

## 2. Argument

Defendant-Appellant argues that the prosecution committed misconduct by failing to disclose the throat slashing incident to the jury during Agent Whittaker's testimony. Agent Whittaker's testimony was the gravamen of the Defendant's credibility. He testified and an hour and a half video of his interview with Defendant arguing over the method by which the AV, Mr. Coriz, was doused with chain saw fuel mix. This argument went on through Mrs. Coriz' testimony. Throughout it all, her assertion that she did not douse Mr. Coriz intentionally was tested versus the State's version of events. She explained that the situation was confusing and the conflict between her and Mr. Coriz was such that she knew the flammable material ignited violently within the room causing her to run away. It was during this most crucial evidence that the throat slashing sign to Agent Whittaker was made by Mr. Coriz, however, the Defense and the Court do not know when this occurred and how it was done or how much involvement the four jurors who saw it might have had in contact with the AV when he did it. The State does know this information. The state had this information prior to the rendering of the verdict. The State did not admit

that it had a video of the event until after the jury had been dismissed and rushed out of the courthouse secretly with an armed escort. The withholding of this information prior to verdict, as in any analysis of withholding of exculpatory information prior to trial, completely denigrated the Due Process Rights of the Defendant and denigrated the authority of the Court, from whose security services the video had to have been obtained from.

Prosecutors have a duty to refrain from improper methods to produce a wrongful conviction. The State's failure to turn over information and evidence of the misconduct of its own witness was fatal to the conviction and was essential to defending the Defendant against the harmful effects of jury tampering. In an analogous situation the State was found to have committed prosecutorial misconduct prior to trial. "It appears to us that the prosecution in this case had a duty to bring to Defendant's and the district court's attention that it had information that arguably came within the court's discovery order and the Brady rule. It appears that the State breached that duty. It also appears that if the prosecution was not going to disclose any of the information, it had a duty to assert the Rule 11-510(A) privilege. It appears that the State breached that duty as well. *See State v. Luna*, 1996 NMCA 71, pp 9-14, 122 N.M. 143, 921 P.2d 950 (indicating that the State should assert its privilege in a timely manner to allow the defendant to seek in-camera review of allegedly privileged documents). *State v. Cortez*, 2007 NMCA 54 P28. "When guilt is so

doubtful that it would shock the judicial conscience to allow the conviction to stand," and "goes to the foundation or basis of a defendant's rights or ... take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *State v. Torres*, 2018-NMSC-013, ¶ 62.

**E: ISSUE FOUR: IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL RESEARCH AND WRITE A MOTION FOR MISTRIAL, REQUEST THE STATE'S VIDEO OF MISCONDUCT AND MOVE FOR VOIR DIRE OF THE JURY REGARDING THE JUROR NOTES**

**1. Standard of review**

In *State v. Astorga*, 2015-NMSC-007 the Supreme Court puts forward a test for establishment of Ineffective Assistance of Counsel on direct appeal as: "To establish ineffective assistance of counsel, a defendant must show: (1) 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.'" *State v. Paredez*, 2004-NMSC-036, ¶ 13, 136 N.M. 533, 101 P.3d 799 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "On direct appeal, the record is frequently inadequate to either evaluate counsel's performance or to determine prejudice. *State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517 ("The record is frequently insufficient to establish whether an action taken by defense counsel was reasonable or if it caused prejudice."). As a result, our appellate courts prefer an ineffective assistance of counsel claim to be brought in a habeas corpus proceeding, "so that the defendant may actually develop the record with respect to defense counsel's actions." *Id.* However, if the defendant

and intimidating members of the jury and witness Whittaker. At [CD3-3/2/2017, 11:26:09] the Court first informs Trial Counsel that the jurors sent the judge two notes from the jury complaining of James Coriz. In the first note, an unspecified number of jurors complain that they met James Coriz outside of court (allegedly accidentally) and that during the proceedings he “glared at each juror” and that the jurors were concerned for the safety of jury members. In the second note, four jurors complain that James Coriz made a throat slashing motion towards Agent Whittaker who was testifying. At [CD3-3/2/2017:11:29:00] Trial counsel makes a motion for a mistrial citing that the fears of the jurors must have influenced their decision-making prejudicing Defendant Coriz.

It was Ineffective Assistance of Counsel for Trial Counsel to have not moved the court for an evidentiary hearing to *voir dire* the jurors about their interactions with James Ruiz before the verdict was rendered and definitely before they were released from their jury service in this case. “A Remmer hearing is . . . used to investigate [‘]credible evidence of jury tampering[‘]” *Stouffer v. Trammell*, 738 F.3d 1205, 1213 (10th Cir. 2013). (Quoting from *Kellen v. Dowling* 2017 U.S. Dist. Lexis 191454 \*; 2017 WL 5586958). The case at bar contained credible evidence of jury tampering that confronted Attorney Thompson prior to the rendering of the verdict.

In the first note given to the Judge by the jurors, it is clear that the jurors penning that note had had some form of contact with James Coriz as the fearful jurors stated “we have met him, accidentally, outside of the courtroom [CD3-3/2/2017:11:27:56].” According to a reading of *Remmer* at 229, this contact “is deemed presumptively prejudicial” in that it was not made “in pursuance of the known rules of the court.” Following *Remmer* further, the burden was, in fact, on the State to prove that the juror contact was not “presumptively prejudicial” after “notice to and hearing of the defendant.” Trial Counsel ineffectively never held the State to this burden of proof of no prejudice by failing to seek a brief recess to obtain and argue *Remmer* and by failing to move the trial court for an evidentiary hearing to at least *voir dire* the juror members reporting with regards to the suspicions he raised regarding prejudice in his Motion for Mistrial.

While Trial Counsel did move for a mistrial verbally based on the two notes from the jury to the judge, he also failed to accede to the Court’s invitation for a written motion with no prejudice to the jury verdict. At minimum, a brief check into caselaw would reveal *Remmer*’s place in New Mexico jurisprudence and likely would have pre-empted the need for a written motion. It is not much of a stretch to believe that the Jurors may have imputed the bad acts of James Coriz onto Defendant Layla Coriz. Though in fundamental error, this possibility was

~~acknowledged~~ it had the video and had known of the issue for days prior to Mr. ~~Thompson~~ and the Court. Defense Counsel's lack of any action in this regard was ~~in~~applicable, given the Motion for Mistrial based on the asserted impact of the throat slashing incident on the four jurors who saw it and on other jurors they possibly chose to discuss the incident with.

#### **D. PRAYER FOR RELIEF**

For the foregoing reasons Defendant asks this Honorable Court to Reverse her conviction for Aggravated Battery on a Household Member and to remand this case for dismissal or further proceedings consistent with the Court's Opinion.

Respectfully submitted,

Law Works LLC

/s/John McCall  
John McCall  
Attorney for Defendant-Appellant  
500 Oak St. NE, Suite 108  
Albuquerque NM 87106  
(505) 256-1998  
Mccall.jo@gmail.com

I hereby certify that the foregoing motion was sent on November 4, 2019 by Electronic Filing to Anne Kelly Director of Criminal Appeals, New Mexico Attorney General's Office.

/s/John McCall  
John McCall, Attorney for Defendant-Appellant