

24-7175

SUPREME COURT OF THE UNITED STATES

KEVIN OGDEN, PETITIONER,

VS.

DAVID COLE, WARDEN, LEA

COUNTY CORRECTIONAL FA

CILITY, STATE OF NEW MEX-

ICO, Et. al. RESPONDENTS.

IN RE PETITION FOR WRIT OF

HABEAS CORPUS

By: Kevin Ogden 44384

Kevin Ogden, Pro Se

Lea County Correctional Facility

6900 W. Millen Drive

Hobbs, New Mexico 88244

RECEIVED
FEB 27 2025

FILED

FEB 27 2025

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

Question One: Did The Supreme Court Of New Mexico Lack Jurisdiction To Rule And Convict The Petitioner Prior To Trial?

Question Two: Did The Supreme Court Of New Mexico Apply The Wrong Legal Standard When It Denied The Petitioner The Well Established Right To Represent Himself On Appeal?

Question Three: Did The District Court Violate The Petitioner's Rights By Not Stating Any Reasons Why The Affirmative and Meritorious Issues Raised By The Petitioner, When It Dismissed His Petition?

Table Of Contents

Table of Authorities i to vi

List of Exhibits vi

Statement of The Case 1, 2

Issue 1: The Supreme Court of New Mexico Lacked
Jurisdiction To Rule And Convict The Petitioner Prior
To Trial 2 to 18

Issue 2: The Supreme Court Of New Mexico Applied
The Wrong Legal Standard When It Denied The Pe-
titioner The Well Established Right To Represent
Himself On Appeal 19 to 22

Issue 3: The District Court Did Not State Any Reasons
Why The Affirmative, Meritorious Issues By The
Petitioner Were Dismissed Which Is A Violation
Of N.M.R.A. 5-802(G) 6, Habeas Corpus Rules 23, 24

Conclusion 25, 26

Relief Requested 27

Appendix 28

Certification 29

Table Of Authorities

page(s)

SUPREME Court Of The United STATES CASES:

Abney v. United States, 431 U.S. 651, at 658 (1977)	7
Anders v. California, 431 U.S. 651 (1977).	20, 23
Ashe v. Swenson, 397 U.S. 436, at 453	4
Bowie v. City of Columbia,	8
Brown v. Ohio, 432 U.S. 161, at 169	5
Calder v. Bell, 3 U.S. (3 Dall.) 386, at 390, 1 L. Ed.	
648 1298	10
Carmell v. Texas, 529 U.S. 513, at 521-22, 525, 534	10
(2000).	10
Carroll v. United States, 354 U.S. 94, at 399,	5, 6
400 (1957).	5, 6
Farretta v. California, 422 U.S. 806.	19
Fong Foo v. United States, 369 U.S. 141	5
Green v. United States, 355 U.S. 184, at 188, 193-94	6, 7, 14
McKaskle v. Wiggins, 465 U.S. 168, at 174 (1984)	21
Pension v. Ohio, 488 U.S. 75 (1988)	20
Pierce v. United States, 314 U.S. 306, at 311 (1941).	11
Rhodes v. Chapman, 452 U.S. 217 (1981).	24
Sanabria v. United States, 437 U.S. 54 (1978).	4
Waller v. Florida, 397 U.S. 387 (1970).	4
Weaver v. Graham, 450 U.S. 24 (1981).	13
Will v. United States, 389 U.S. 90, at 96-97 (1967).	6
Wilson v. Sellers, No. 16-6855, 138 S. Ct. 1188 (2018).	23

<u>Federal Cases:</u>	<u>Page(s)</u>
Allen v. United States, 938 F.2d 664 (6th Cir. 1991)	20
Casano v. Shoop, 1 F.4th 458 (6th Cir. 2021)	22
Davis v. Kramer, 167 F.3d 1148 (9th Cir. 1999)	20
Delgado v. Lewis, 168 F.3d 1148 (9th Cir. 1999)	20
Evans v. Clark, 868 F.2d 267 (8th Cir. 1989)	20
Grabbs v. Singletary, 900 F.Supp. 425 (M.D. Fla. 1995)	20
Hitchcock v. Secretary Dept. of Corrections, Attorney General, State of Florida, United States Court of Appeals No. 07-15857 (11th Cir. 2018)	22a
Lofton v. Whiteley, 905 F.2d 885 (5th Cir. 1990)	21
Lombard v. Lynaugh, 868 F.2d 1475 (5th Cir. 1989)	21
Murray v. Cline, 2010 U.S. Dist. LEXIS 67075, Case No. 08-3696-SAC, Case No. 08-3125-SAC (July 6, 2010)	22b
Myers v. Collins, 8 F.3d 249 (5th Cir. 1999 252)	22a
Myers v. Johnson, 76 F.3d 1330, 1336 (5th Cir. 1996)	21
Robbins v. Smith, 153 F.3d 1062 (9th Cir. 1999)	20
Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987)	21
Stubbs v. Leonardo, 973 F.2d 167, No. 1666, Docket 91-2494 (1992)	22b
United States v. Coleman, 575 F.3d 316, 321 (3d Cir. 2009)	21
United States v. Jackson, 560 F.2d 112, 121, n. 9 (CA2 1977)	5
United States v. Rodriguez, No. 15-50289, 821 F.3d 632 (2016)	22a
United States v. Skuidall, 341 F.3d 921, 927-28 (9th Cir. 2003)	20, 21

Federal cases continued:

Page(s)

United States v. Wagner, 158 F.3d 901, 1998 WL 774 000, at 902 (5th Cir. 1998)	229
United States v. Youlq, 24 F.3d 296, 300 (3d Cir. 2001)	21
Wilson v. Walker, 204 F.3d 33, 37 (2nd Cir. 2000)	22

Other State's Cases:

Anders Brief, In re, 581 So.2d, 149 (Fla. 1991)	229
Moore v. Ruth, 556 So.2d 762 (10th Cir. 2008)	22
State v. Jones, 146 Ariz. 278, 705 P.2d 955 (App. 1985)	22
State v. Raseley, 148 Ariz. 458, 715 P.2d 314 (App. 1986)	22
Maupin v. Commonwealth, 542 S.W. 3d 926, 2016-SC-000448-06	10

New Mexico Cases:	Page(s)
B.C. Goldberg and Associates v. Uptown Inc., 103 N.M. 277, 705 P.2d 683	9
Chavez v. Atkinson, 78 N.M. 130, 428 P.2d 485 (1967)	14
Garcia v. State, 148 N.M. 414, 237 P.3d 1716 (2010)	226
Griego v. Grieco, 90 N.M. 174, 501 P.2d 36	9
Miller v. Albuquerque, 88 N.M. 324, 540 P.2d 254, 1975 N.M. App. LEXIS 706 (1st App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975)	14
Reese v. State, 106 N.M. 505, 745 P.2d 1153 (1987)	15
Serrano v. State Department of Alcohol And Control, 827 P.2d 154, 113 N.M. 444, Ct. of Appeals of N.M. No. 11729, Feb. 4, 1992	17
State v. Ahasteen, 1988-NMCA-158, 126 N.M. 238, 968 P. 2d 328, 1998 N.M. App. LEXIS 424 (N.M. 1994)	12
State v. Alderete, 88 N.M. 619, 544 P.2d 1184	10
State v. Armijo, 2016-NMSC-021, 375 P.3d 415, 2016 N.M. LEXIS 142 (N.M. 2016)	12
State v. Baca, 2013-NMCA-060, 303 P.3d 858	8
State v. Boyer, 103 N.M. 655, 712 P.2d 1 (1985)	226
State v. Compton,	16
State ex. rel. State Eng'r v. Crider, 78 N.M. 312, 431 P.2d 45, 1967 N.M. LEXIS 2737 (1967)	14
State v. Fernandez, 1999-NMCA-128, 128 N.M. 111, 990 P.2d 224, 1999 N.M. App. LEXIS 94 (N.M. Ct. App. 1999)	11
State v. Garcia, 1983-NMCA-017, 99 N.M. 466, 659 P.2d 918, 1983 N.M. App. LEXIS 687 (N.M. Ct. App. 1983)	12, 13

State v. Gibson, 828 P.2d 980, 113 N.M. 547, B. Sufficiency of Evidence, paragraph 3.	15
State v. Goodson, 54 N.M. 184, 217 P.2d 262	4
State v. Griego, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192, 2004 N.M. App. LEXIS 81 (N.M. Ct. App. 2004)	12
State v. Heinzen, 2004-NMCA-110, 136 N.M. 245, 97 P.3d 627, 2004 N.M. App. LEXIS 89 (N.M. Ct. App. 2004), aff'd, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040, 2005 N.M. LEXIS 488 (N.M. 2005) sub. nom	11
State v. James, 93 N.M. 605, 603 P.2d 715 (1979)	3
State v. Lobato, 2006-NMCA-051, 139 N.M. 431, 134 P.3d 122, 2006 N.M. App. LEXIS 24 (Ct. App.), cert. denied, 139 N.M. 567, 136 P.3d 568, 2006 N.M. LEXIS 209 (N.M. 2006)	12
State v. Lizzol, 2007-NMSC-024, 141 N.M. 705, 160 P.3d 886	13
State v. Myers, 147 N.M. 574, 2010-NMCA-007, 226 P.2d 845	7, 11
State v. Maese, No. 28, 821, 2005 N.M. LEXIS 70 (N.M. Feb 16, 2005)	11, 12
State v. Nozie, 146 N.M. 142, April 22, 2009	16
State v. Ogden, 880 P.2d 845, para. 25	3
State v. Ogden, 880 P.2d 845, footnote 6 and 7	7
State v. Ogden, 880 P.2d 845	17
State v. Smallwood, 2007-NMSC-005, 141 N.M. 178,	

	page(s)
152 P.3d 821, 2007 N.M. LEXIS 54 (2007)	2
State v. Romero, S.C. N.M., 2014-NMSC-007, 435 P.3d 1231, 2018 N.M. LEXIS 73, No. S-1-SC-36229, Dec. 27, 2018, paragraph 1.	16
State v. Romero, S.C. of N.M., 2017-NMSC-007, 435 P.3d 1271, 2018 N.M. LEXIS 73, No. S-1-SC-36229, Dec. 27 2018, paragraph 1	17
State v. Tabaha, 103 N.M. 791, 714 P.2d 1012	25

New Mexico Rules Annotated:

5-802	1, 2, 23, 24
Art. 7, 5-704	3

New Mexico Statutes Annotated:

N.M.S.A. 39-9-3	13, 14, 15, 17
N.M.S.A. 27-7-1 to 29-7-13 The Law Enforcement Training Act, Article 7	17

List of Exhibits

Exhibit A, Case History 1992-1995, State v. Oden	2
Exhibit 1: Supreme Court of New Mexico Denial of The Right To Represent Self On Appeal.	19
Exhibit 2: Motion To Withdraw, 2 pages	20
Exhibit 3: Order By The District Court, Denial, 1 page	24

Jurisdiction

28 U.S.C. § 2241

Supreme Court of The United States Rules:
Rule 20, Extraordinary Writ

Statement of The Case

The Petitioner was arrested on July 9, 1992 for murder in Farmington, N.M.

The Petitioner was indicted on August 20, 1992. The indictment did not state the person killed was an employee of the city or of the police department.

The arraignment was on October 26, 1992 for first degree murder and three counts of possession of firearms by a felon.

The assistant district attorney, who is not a lawyer, filed the Notice of Aggravating Circumstances on February 17, 1993 which was for the purpose of the State wanting to kill the defendant (City of Farmington, N.M.). The Notice was a late filing.

The Petitioner was convicted during the trial in Gallup, N.M. and received a 30 year life sentence and 6 years consecutive, for a total of 36 years.

The district judge and also the State

Supreme Court both denied the Petitioner the right to represent himself on appeal. The frivolous appeal by the assigned lawyer was dismissed in a few short paragraphs.

The Petitioner filed a very lengthy habeas petition in district court. The judge dismissed it in one short paragraph without adjudicating any of the affirmative and meritorious issues, and without comment.

Issue 1. The Supreme Court of New Mexico Lacked Jurisdiction To Rule And Convict The Petitioner Prior To Trial

(See Exhibit

A) The Notice Of Aggravating circumstances was filed seven months after the charge, six months after the indictment, and 110 days after the arraignment. The State has 90 days after arraignment to file aggravating circumstances, See State v. Smallwood, 2007-NMSC-005, 141 N.M. 178, 152 P.3d 821, 2007 N.M. LEXIS 54 (2007). In this case the State filed the aggravating circumstances 98 days after the arraignment which was ruled

illegal and the case was reversed. The court stated:

5-704 Death Penalty: Sentencing

A. Notice of Intent. "In any case where the State seeks the death penalty, the State shall file a notice of intent to seek the death penalty within 90 days after arraignment. The notice shall specify the elements of the statutory aggravating circumstances upon which the State will rely..." Rules of Criminal Procedure For The District Courts, Article 7, 5-704.

The district judge in Mr. Ogden's case ruled prior to trial that the Community Service Officer (CSO) was not a peace officer. The State appealed. This was a major violation of the due process of law.

The State alleged that the district court did not have jurisdiction to rule, See State v. Ogden, 880 P.2d 845, paragraph 25. The Supreme Court of N.M. ruled against the State stating the district court did have jurisdiction. The obvious being that the State can not appeal prior to trial unless there is a lack of jurisdiction, so the district court's ruling was binding, See State v. James, 93 N.M. 605, 603 P.2d 715 (1979),

- page 3 -

See also, State v. Goodson, 54 N.M. 184, 217 P.2d 262. In Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 434 (1970) the court held that a person who has been tried in Municipal court may not be charged with "the identical offense" in State court, 397 U.S. at 395. The court recognized the problem of the lower court's not having jurisdiction. In his concurring opinion in Ashe v. Swenson, 397 U.S. 436, at 453, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), Mr. Justice Brennan stated that one "exception would be if no single court had jurisdiction of all of the alleged crimes," at 453, N.7. The Supreme Court of N.M. agrees that the district court had jurisdiction, therefore, the Supreme Court of N.M. did not have jurisdiction prior to trial to rule de novo.

Few, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define crimes or offenses, See Sanabria v. United States, 437 U.S. 54 (1978):

"Double jeopardy is not such a fragile guarantee that its limitations can be avoided by simple expedient of dividing a single crime into a series of temporal or spacial units or into discreet basis of liability not defined as such by the legislature, U.S.C.A. Const. Am. 5.

- page 4 -

"Once the defendant is acquitted, no matter how 'egregiously erroneous' the legal rulings leading to the judgment of acquittal might be, there is no exception to the constitutional rule forbidding successive trials for the same offense, Fong Foo v. United States, 369 U.S. 141."

"The double jeopardy clause is not such a fragile guarantee that... its limitations can be avoided by the simple expedient of dividing a single crime into a series of temporal or spacial units, See Brown v. Ohio, 432 U.S. 161, at 169. See also United States v. Jackson, 560 F.2d 112, at 121, N.9 (CA2 1977) (Government may not, under Double Jeopardy Clause, 'fragment what is in fact a single crime into its components'). The legislature does not and has never defined 'discreet liability', therefore, it can not prosecute by fragmenting."

"To hold that a Defendant waives his double jeopardy protection whenever a trial court error in his favor on midtrial motion leads to an acquittal would undercut the adversary assumption on which our criminal justice rests, See Jeffers v. United States, 432 U.S. 159-160 (1977)."

"The Criminal Appeals Act should be strictly construed against the Government's right to appeal, Carroll v. United States, 354 U.S. 94, at 399,

400 (1957); also Will v. United States, 389 U.S. 90, at 96-97 (1967)."

The Supreme Court of the U.S. ruled in 1958 that the State may not appeal, See Green v. United States, 355 U.S. 184, at 188 stating:

"The underlying idea, one that is deeply ingrained in the Anglo-American system of justice and jurisprudence, is that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even innocent he may be found guilty' This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to a trial by jury, it is 'fundamental to the American scheme of justice.'"

"As this Court held in Green v. United States, at 193-194, 'conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy' " It is analogous to the Petitioner's case. First, the jury

-page 6-

should have voted on whether or not a CSO is a peace officer pursuant to N.M. law. Second, the Supreme Court alleges the Petitioner loses all rights by the State appealing; State v. Ogden, 880 P.2d 845, foot note 6 and 7. It is not true, as stated in Green v. United States, supra.

The Supreme Court of The U.S. has consistently held the States may not appeal a pre-trial issue and that finality is necessary to allow the State to appeal, See Abney v. United States, 431 U.S. 651, at 658. In N.M. the jury must vote on whether the victim is a peace officer during the trial phase and the trial had not occurred, therefore, it is not appealable by the State.

The district judge ruled the CSO was not a peace officer. The indictment did not state the victim was an officer of any kind or form. The indictment did not state the victim was an employee of the city of Farmington or the police department. Thus, the obvious ex post facto, retroactive ruling was illegal by the Supreme Court of N.M. This has been ruled illegal by the Supreme Court of The U.S. and the Court of Appeals of N.M., See State v. Myers, 147 N.M. 574, 2010 NMCA-007, 226 P.2d 845 where the court

- page 7 -

states:

"...retroactively applying judicial precedent to defendant's conduct would violate due process because it would constitute an unforeseeable judicial enlargement of the statute, which would operate as an ex post facto law." "If a State legislature is forbidden from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." See Bowie v. City of Columbia, 378 U.S. 347 (1964)" The Supreme Court of N.M. lacked jurisdiction prior to trial to pass a retroactive law.

There are many, many cases which state that pretrial appeals are illegal. The Supreme Court of N.M. conducted a de novo pretrial appeal in Mr. Ogden's case. In State v. Baca, 2013-NMCA-060, 303 P.3d 858, a pretrial appeal was ruled illegal as was a de novo ruling pretrial illegal. This case states that a directed verdict was based on the evidence and therefore final and not appealable, double jeopardy. The prosecutor may not appeal. It is analagous to petitioner's case. The State had it's chance and the witnesses testified the CSO was not a peace officer.

A decision is not appealable until after the trial. In Griego v. Grieco, 90 N.M. 174, 561 P. 2d 36 which is a civil case in N.M. a summary judgement on the merits is appealable. However, in the same case a pretrial appeal of a discovery is not appealable, which is similar to the discovery and pretrial ruling in the Petitioner's case where the CSO was determined not to be a peace officer. In this case, a plaintiff appealed a final decision, which in turn would allow the defendant to argue his discovery issue, which was otherwise not appealable prior to trial. It is similar to the Petitioner's case because if the prosecutor wanted to argue without any merit he could wait until the defendant filed an appeal after trial, See State v. Tabaha, page 25 of this petition.

In N.M. a "motion to suppress" is one of the rare instances allowing a pretrial appeal, See B.C. Goldberg and Associates v. Uptown Inc., 103 N.M. 277, 705 P. 2d 683. In this case an order striking a counterclaim was not appealable prior to trial because it is not final. It is similar to the Petitioner's case in that the prosecutor claimed seven months after the indictment, without any evidence supporting his position, that a CSO was a police officer. The Supreme Court of N.M. ruled in this

- page 9 -

case they had no jurisdiction prior to trial.

A motion to suppress is the rare instance where a pretrial appeal may be filed by the State, See State v. Alderete, 88 N.M. 619, 544 P.2d 1184. This case was about suppression of drugs which is material evidence, physical. The fact that a CSO is not a peace officer is not physical and material evidence.

Ex post facto laws, as was done against the Petitioner, are illegal, See Calder v. Bell, 3 U.S. (3 Dall) 386, 390, 1 L.Ed. 648 1298; also Carmell v. Texas, 529 U.S. 513, 521-22, 525, 534, 120 S.Ct. 1620, 146 L.Ed. 2d 577 (2000).

The fact that the Petitioner was acquitted of the police officer issue speaks volumes because it proves there was not any probable cause for an arrest. At the time of the incident the CSO was ordered not to contact Kevin Ogden or any suspect and the CSO was not a police officer. An acquittal is not appealable, See Maupin v. Commonwealth, 542 S.W.3d 926, 2016-SC-006448-06.

The Supreme Court of The U.S. has ruled
- page 10 -

similar to State v. Myers that judicial expansion and enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definitiveness, See Pierce v. United States, 314 U.S. 306, at 311. The Supreme Court of the U.S. ruled that judicial enlargement is an illegal retrospective ruling in this case.

The State can not appeal, See State v. Vasquez, 2012-NMCA-107, 288 P.3d 520, 2012 N.M. App. LEXIS 85 (N.M. Ct. App. 2012), cert. quashed No. 33796, 2014 N.M. LEXIS 113 (N.M. April 4, 2014), rev'd, 2014 2014-N.M.S.C.-010, 326 P.3d 497, 2014 N.M. LEXIS 107 (N.M. 2014). The State can only appeal a motion to suppress or excluding evidence.

Only a motion to suppress can be appealed by the State, See State v. Fernandez, 1999-NMCA-128, 128 N.M. 111, 990 P.2d 224, 1999 N.M. App. LEXIS 94 (N.M. Ct. App. 1999)

The State can not appeal a magistrate order, See State v. Heinsen, 2004-NMCA-110, 136 N.M. 245, 97 P.3d 627, 2004 N.M. App. LEXIS 89 (N.M. Ct. App. 2004), aff'd, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040, 2005 N.M. LEXIS 488 (N.M. 2005) 546. NOM. State v.
-page 11-

Maese, No 28,821, 2005 N.M. LEXIS 70 (N.M. Feb 16, 2005)

The pretrial appeal is for the defendant, See State v. Armijo, 2016-NMSC-021, 375 P.3d 915, 2016 N.M. LEXIS 142 (N.M. 2016)

A nonfinal order is not appealable, See State v. Griego, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192, 2004 N.M. App. LEXIS 81 (N.M. Ct. App. 2004).

A final order is required for a pretrial appeal, See State v. Ahasteen, 1998-NMCA-158, 126 N.M. 238, 968 P.2d 328, 1998 N.M. App. LEXIS 424 (N.M. 1994)

A mistrial can not be appealed because it is not a final order, State v. Lobato, 2006-NMCA-051, 139 N.M. 431, 134 P.3d 122, 2006 N.M. App. LEXIS 24 (Ct. App.), cert. denied, 139 N.M. 567, 136 P.3d 568, 2006 N.M. LEXIS 209 (N.M. 2006).

Nonfinal orders can not be appealed, See State v. Webb, 1990-NMCA-077, 111 N.M. 78, 80 P.2d. 660, 1990 N.M. LEXIS 120 (N.M. Ct. App. 1990)

Nonfinal order can not be appealed, See State

V. Garcia, 1983-NMCA-017, 99 N.M. 466, 659 P.2d 918, 1983 N.M. App. LEXIS 687 (N.M. Ct. App. 1983).

The State can not appeal, See State v. Lizzo,
2007-NMSC-024, 141 N.M. 705, 160 P.3d 886.

Retrospective law illegal, See Weaver v. Graham,
450 U.S. 24 (1981).

The Supreme Court of N.M. quoted N.M.S.A. 39-3-3 Appeal By Defendant when it ruled against the Petitioner. It is fraud on the court. The correct quote is N.M.S.A. 39-3-3,

B... By the State

(1) within 30 days from a decision, judgement or order dismissing a complaint, indictment or information as to any one or more courts;

(2) within 10 days from a decision or order of district courts suppressing or excluding evidence ... Is not for the purpose of delay ...

(c.) No appeal may be taken by the State when the double jeopardy clause of the U.S. Constitution or the Constitution of The State of N.M. prohibits further prosecution.

Here above, number (1) did not occur, the first part of (2) did not occur and the last part (delay)

did occur. It was for the purpose of delay by the State. (c) is violated as double jeopardy occurred.

Disposing of the merits of the case is necessary for an appeal, See Miller v. Albuquerque, 88 N.M. 324, 540 P.2d 254, 1975 N.M. App. LEXIS 706 (1st App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

The State would have to wait until after the trial to appeal, See Chavez v. Atkinson, 78 N.M. 130, 428 P.2d 485, 1967 N.M. App. LEXIS 148 (1st App. 1967); See also State ex. rel. State Eng'r v. Crider, 78 N.M. 312, 431 P.2d 45, 1967 N.M. LEXIS 2737 (1967), and if the defendant appeals first.

There are many legal principles that apply to not allowing the State to appeal including: stare decisis, res judicata, collateral estoppel, retroactive, ex post facto, etc. It is well established that the State may not appeal, See Green v. United States, 355 U.S. 184 (1957).

The Supreme Court of N.M. gave a partial quote of the statute on appeals, and for pretrial appeals. The correct quote is N.M.S.A. 39-9-3:

A. By defendant:

"In any criminal prosecution in district
- page 14 -

court an appeal may be taken by the defendant to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts.

(1) within 30 days from the entry of any final judgement.

(3) ...interlocutory order or decision in which the district in its discretion, makes a finding ... that ... involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from such an order or decision may materially advance the ultimate termination of the litigation.

The first point of error is that it was not a final decision by the district court. The jury must vote on whether or not the victim is a police officer (peace), See State v. Gibson, 828 P. 2d 980, 113 N.M. 547, B. Sufficiency of Evidence, paragraph 3.

The defendant's knowledge of the identity of the police (peace) officer is a necessary element in crimes against a peace (police) officer, See Reese v. State, 106 N.M. 505, 745 P. 2d 1153 (1987). The Supreme Court of N.M. held that: "To deny the defendant the right to have the jury informed

- page 15 -

or apprised of a necessary element of the crime for which he was charged violates his constitutional right to Due Process of Law."

The Supreme Court of N.M. has ruled that the defendant must know the victim was a peace officer, See State v. Nozle, 146 N.M. 142, April 22, 2009. This case puts to rest any questions on whether the defendant must know the victim is a peace officer. State v. Compton is overruled by this case in which Compton received the death penalty and then it was commuted to life by the Governor. Compton made the exact same claim. He died in prison.

The defendant must know the victim is a peace (police) officer, See State v. Romero, S.C. N.M., 2014-NMSC-007, 435 P.3d 1231, 2018 N.M. LEXIS 73, NO. S-1-SC-36229, Dec. 27, 2018, paragraph 1. The Chief of Police of Farmington testified the CSO was not a peace officer and was not authorized to do the close patrol or contact suspects or contact Kevin Ogden specifically.

The knowledge of the victim's identity is an essential element of attempted murder of a

-page 16-

law enforcement officer, See Thompson v. State, 695 So.2d 691, at 692 (Fl. 1997).

The defendant must know the victim is a peace(police) officer, See State v. Romero, S.C. of N.M., 2017-NMSC-007, 435 P.3d 1271, 2018 N.M. LEXIS 73, No. S-1-SC-362229, Dec. 27, 2018, paragraph 1.

Peace officer means police officer, N.M.S.A. 1993 Sect. 29-7-1 to 13 The Law Enforcement Training Act defines peace officer, See Serrano v. State Department of Alcohol And Beverage Control, 827 P.2d 154, 113 N.M. 444, Ct. of Appeals of N.M. No. 11729, Feb. 4, 1992. Any employee of a law enforcement agency, either appointed or not appointed must be certified, commissioned by the State. It is blatant fraud on the Supreme Court of N.M. because in State v. Ogden pretrial they omitted the above statute. The ISO does not have even one qualification to be a peace officer in a long list.

The second error in the Supreme Court of N.M. State v. Ogden pretrial opinion concerning Section 39-3-3 is in (3). There was not a difference of opinion due to the above statute and paragraph
-page 17-

are controlling law. The question has already been contemplated by the legislature.

The third error is not obvious. ... "an immediate appeal from such an order or decision may materially advance the ultimate termination of the litigation." The appeal can only be for the defendant because if the defendant wins on appeal the litigation is terminated. If the State wins the litigation is not terminated. The Section A does say appeal by the defendant.

The district judge's decision was not final because it should have gone to the jury. The Supreme Court of New Mexico erred. The district court erred, the appeal pretrial should not have been granted or certified.

The appeal by the defendant pretrial has been misinterpreted by the Supreme Court of N.M. for over a half of a century, and allowing the State to appeal which is a major violation of due process, equal protection, right to a trial by jury in this case, access to the courts, etc.,

Issue 2: The Supreme Court of New Mexico Applied The Wrong Standard When It Denied The Petitioner The Well Established Right To Represent Himself On Appeal.

The Supreme Court of N.M. applied Faretta v. California, 422 U.S. 806 and some similar N.M. cases when it denied the Petitioner the well established right to represent himself on appeal, See Exhibit 1. That was the wrong legal standard.

The court ruled that Mr. Ogden did not knowingly and voluntarily waive his right to counsel. It is not true. On page 4, Exhibit 1, second paragraph the court states that he is a college graduate and has an excellent law library at Southern N.M. Correctional Facility where he is living currently. There is not anything more to prove. The waiver was knowing and voluntary.

The wrong standard was used by the Supreme Court of N.M. The correct standard is what the issues are and if there is any merit to the Petitioner's issues. As a direct result of the wrong standard being used, the appellate lawyer filed a frivolous appeal. The Petitioner requested 41 or more major trial errors, none of them were used.

-page 19-

The correct legal standard is the merits of the case on appeal and the appellate lawyer must file an Anders Brief when requesting to withdraw, See Anders v. California, 431 U.S. 651 (1977). The Motion To Withdraw is Exhibit 2.

An Anders Brief is required on the issue of defendant's knowledge and skill to represent himself, See United States v. Skuidall, 341 F.3d 921, at 927-928 (9th Cir. 2003).

An Anders Brief is required when requesting to withdraw, See Delgado v. Lewis, 168 F.3d 1148 (9th Cir. 1999); See also Davis v. Kramer, 167 F.3d 494 (9th Cir. 1999); and Grabbs v. Singletary, 900 F.Supp. 425 (M.D. Fla. 1995); also Allen v. United States, 938 F.2d 664 (6th Cir. 1991).

An Anders Brief is required, See Robbins v. Smith, 153 F.3d 1062 (9th Cir. 1999).

Anything in the record that would support the appeal must be in the Anders Brief, 868 F.2d 267 (8th Cir. 1989), Evans v. Clark.

Anders Brief required, See Pension v. Ohio, 488 U.S. 75 (1988).

Anders Brief required when withdrawing, See United States v. Youla, 241 F.3d 296, at 300 (3d Cir. 2001).

Anders Brief required when withdrawing, See United States v. Coleman, 575 F.3d 316, at 321 (3d Cir. 2009).

Anders Brief required when withdrawing, See Lombard v. Lynaugh, 868 F.2d 1475 (5th Cir. 1989).

Anders Brief required when withdrawing, See Lofton v. Whitley, 905 F.2d 885 (5th Cir. 1990).

Inadequate Anders Brief, See Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987).

Anders Brief required when withdrawing, See United States v. Skurdal, 341 F.3d 921 (9th Cir. 2003).

The Petitioner has an absolute right to represent himself on appeal and file pro se motions on appeal, See Myers v. Johnson, 76 F.3d 1330, at 1336 (5th Cir. 1996).

Denial of right to proceed pro se requires reversal, See McKaskle v. Wiggins, 465 U.S. 168, at 174 (1984).

The Supreme Court of N.M. placed the burden of stating the law on the Petitioner. That is the wrong legal standard. It is the duty of the court to inform the defendant of the dangers and disadvantages of self representation, it is not the defendant's responsibility to inform the court, See State v. Jones, 146 Ariz. 278, 705 P.2d 955, (App. 1985); also State v. Raseley, 148 Ariz. 458, 715 P.2d 314 (App. 1986)

Denial of self representation is not subject to harmless error analysis and requires automatic reversal, See Wilson v. Walker, 204 F.3d 33, at 37 (2nd Cir. 2000).

A pro se prisoner's meritorious claims may not be ignored because of inartful drafting, See Moore v. Ruth, 556 So.2d 762 (10th Cir. 2008).

The State ignored the defendant's waiver of counsel motion is grounds for not deferring to state court decision under the AEDPA, See Casano v. Shoop, 1 F.4th 458 (6th Cir. 2021). Death sentence reversed.

Since the appellate lawyer did, in fact, file a frivolous appeal, he should have chosen to file an Ander's Brief instead of filing a

- page 22 -

frivolous appeal.

The Supreme Court of New Mexico used the wrong standard when it denied the petitioner, Mr. Ogden, his well established right to represent himself on appeal by using *Faretta v. California* as the standard. This case does not apply to appeals and is used only for the trial, See *United States v. Rodriguez*, No. 15-30239, 821 F.3d 632 (2016), fn3 (5th Cir.)

The merits of the case is the correct standard and a defendant can file a pro se brief when the lawyer files an Anders Brief, See *Anders Briefs*, *In re*, 581 So.2d 149 (Fla. 1991)

A pro se brief should have been allowed on the issues the defendant wanted to raise, See *Hitchcock v. Secretary Dept. Of. Corr.*, Attorney General, State of Florida, No. 07-15857, United States Court of Appeals, 11th Cir., Jan. 7, 2018.

A defendant has a right to represent himself on appeal, See *United States v. Wagner*, 138 F.3d 981, 1998 WL 774000, at 902 (5th Cir. 1998); also *Myers v. Collins*, 8 F.3d 249 (5th Cir. 1994 252).

Under N.M. law all parties assume that defendants have a right to appear pro se on appeal, See State v. Boyer, 103 N.M. 655, 712 P.2d 1 (1985), 103 N.M. 658.

The defendant has a right to file a pro se brief on appeal, See Stubbs v. Leonardo, 973 F.2d 167, No. 1666, Docket 91-2494 (1992).

In a beating of a homosexual the defendant chose to represent himself on appeal, See Murray v. Cline, 2010 U.S. Dist. LEXIS 67075, Case No. 08-3096-SAC, Case No. 08-3125-SAC (July 6, 2010).

The defendant has a right to represent himself on appeal, See Garcia v. State, 148 N.M. 414, 2010-NMSC-023, 237 P.3d 716, Docket No. 31,328 (2010); 148 N.M. 420. This was an ineffective assistance of counsel case.

Issue 3: The District Court Did Not State Any Reasons Why The Affirmative, Meritorious Issues By The Petitioner Were Dismissed Which Is A Violation Of N.M.R.A 5-802 Habeas Corpus Rules, (G) 6

The Petitioner requests to file an original habeas petition due to the merits of the case were not adjudicated in a court of law, in this case it was the district court, See N.M.R.A. 5-802(G) 6.

The problem that pro se litigants face was first identified in a Supreme Court of The U.S. case which states the State courts must state the reasons ^{of a dismissal} on the merits of the case, otherwise the petitioner can not determine what issues to raise on appeal or the next stage, See Anders v. California, 38 U.S. 738 (1968). The State court must state the reasons the merits of the case were dismissed. In the Petitioner Ogden's case, the appeal by the assigned lawyer was frivolous.

A death penalty was reversed in Wilson v Sellers, S.C. of The U.S. No. 16-6855, 138 S. Ct. 1188 (2018) where the court states that the merits of the State court decision is the most important part of the case.

The courts are starting to realize they must state the reasons why each issue is dismissed, See Daft v. Hill, 222 P.3d 714.

The problem has been identified in earlier rulings. A judge must state the reasons of dismissal, See Rhodes v. Chapman, 452 U.S. 217 (1981): "A judge must base his opinion on objective factors. When a judge states no reason either for or against a motion, it is impossible to determine or affirm objective factors."

Rulings in law must be factual and not conclusory, See Frazier v. Dubois, 922 F.2d 560, at 562 N.1 (10th Cir. 1990).

The Petitioner's 200 page petition was dismissed without comment in one short paragraph, See Exhibit 3. N.M.R. A-5-802-(G)(6) states that judges must state the reasons why each issue is dismissed.

The Petitioner requests of this court that an original habeas petition can be filed.

Conclusion

The district court and Supreme Court of New Mexico lacked jurisdiction to certify and grant a pretrial appeal. There was not a controlling question of law to be decided. It has already been contemplated by the legislature. The CSD does not have one qualification in a long list in The Law Enforcement Training Act to be a peace officer.

There was not a difference of opinion for the same exact reason.

The appeal pretrial was for the purpose of delay and to inflict double jeopardy.

The litigation was not terminated. The appeal is for the defendant and should not have been allowed.

It was not a final order due to the jury must vote on the elements of the crime. It was not appealable prior to trial. The Supreme Court cites State v. Tabaha as controlling law. It is fraud. The defendant in State v. Tabaha was acquitted of the peace officer issue. It was on appeal, after the trial the court ruled jailers were peace officers. It did not apply to the defendant's trial. See State v. Ogden, footnote 11.

The fake aggravating circumstances were used extensively during the trial phase. The facts that the CSO is not a peace officer and disobeyed orders and went on the close patrol as a rogue employee and due to the district judge ruled at the time of the crime the CSO was not a peace officer indicates strongly that, in fact, there was not any probable cause for an arrest.

The Supreme Court of N.M. writes a lot about there was probable cause for an aggravating circumstance. It is fraud, once again. The court was not at the pretrial hearings and reviewed the case de novo. Probable cause for an arrest is similar to the aggravating circumstance. Both of them are in the negative. The CSO at the time of arrest was not a peace officer and was not in the performance of her duties.

Reasons For Granting The Writ

Issue 1.

State v. Ogden, 880 P.2d 845 conflicts with Ashe v. Swenson, 397 U.S. 436; Sangbaria v. United States, 437 U.S. 54; Brown v. Ohio, 432 U.S. 161; Green v. United States, 355 U.S. 184; Abney v. United States, 431 U.S. 651; Bowie v. City of Columbia, 378 U.S. 347; Pierce v. United States, 314 U.S. 306

Issue 2.

State v. Ogden, Exhibit 1, Post-trial, preappeal conflicts with Anders v. California, 431 U.S. 651; United States v. Skuidall, 341 F. 3d 921; Myers v. Johnson, 76 F.3d 1330; United States v. Rodriguez, * 821 F.3d 632; United States v. Wagner, 158 F. 3d 961; Myers v. Collins, 8 F.3d 249; Stubbs v. Leonardo, 973 F. 2d 167. * Faretta does not apply

Issue 3.

State v. Ogden, Exhibit 3, Order conflicts with Anders v. California, 38 U.S. 738; Wilson v. Sellers, 138 S.Ct. 1188; Datt v. Hill, 222 P.3d 714; Rhodes v. Chapman, 452 U.S. 217; Frazier v. Dubois, 922 F.

2d 560.

State v. Ogden conflicts with the 6th and 14th Amendments right to self representation on appeal.

Rule 20

This petition will aid in the court's appellate jurisdiction because if more defendant's knew that they could represent themselves on appeal, they would do so, and the truth of cases would be revealed from the defendant's version of the events.

The Tenth Circuit does not allow successive petitions, therefore, it would be futile to attempt it. Futility to pursue State court remedies allows a federal petition to be filed, See Gacho v. Butler, 792 F.3d 732 (7th Cir. 2015). The Petitioner, Mr. Ogden, filed a State habeas petition and certiorari petition, but there were not any reasons given for the denials. Where the State's review process is ineffective to protect the defendant's rights, exhaustion is waived, See Jackson v. Rackworth, 112 F.3d 818 (7th Cir. 1997).

The exceptional circumstances are that the State should not be allowed to appeal, and in this case it was frivolous, this court needs to clarify the law so it is exceptional and in aid of the court's jurisdiction freeing the courts of many appeals by the State.

It is also exceptional circumstances because of the State's ineffective process, a frivolous appeal by the assigned lawyer was filed. Also, the State does not convict on the elements of the crime in New Mexico which is also an ineffective process that would allow review by the higher court.

A Retroactive ruling against a weak defendant is a miscarriage of justice in this case.

For Issue 2, the State Supreme Court applied the wrong legal standard using *Faretta v. California*, which applies to trials only and not to appeals. The State practices unprofessional law in New Mexico.

New Mexico incarcerates the most prisoners per capita than any other State.

X

The State of New Mexico, in fact, has the worst legal system in the United States. This is a public interest petition this court needs to rule on.

For Issue 3 it is also a public interest case because the AEDPA is allowing countless petitions to be dismissed without adjudicating the issues, which is illegal and has already been ruled on, but it is not used by the courts, See Anders v. California.

Relief Requested

Since there was not any probable cause for an arrest the case should be dismissed entirely. In the alternative, a lesser offense than second degree murder such as manslaughter would be an option.

The State did not provide a transcript of the trial. The pretrial hearings were tape recorded, I assume. Those should be in San Juan County, I assume.

At the very least, since the State can not appeal, especially in this case, the case should be reversed or reduced.