IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Appellee,

vs.

Ct. App. No. 33, 041

LUIS MADRIGAL,

Defendant/Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
DONA ANA COUNTY, NEW MEXICO
THE HONORABLE FERNANDO R. MACIAS

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TRANSCRIPT OF PROCEEDINGS

The pertinent proceedings in this case consist of a pre-trial hearing on September 4, 2012 and a jury trial on October 3, 2012. Counsel cites to the CD recording as **[CD DATE, TIME]** and to the transcript as **[Tr.___]**. References to the record proper are cited as **[RP ___]**

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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

As Luis Madrigal was leaving his friend's apartment driving his friend's car, police officers pulled him over. The officers admitted they had no traffic related reason for stopping the car—rather they pulled Mr. Madrigal over to investigate drug activity. Despite this fact, his attorney failed to file a motion to suppress the cocaine found during the stop and subsequent search. The traffic stop was never challenged.

Furthermore, a default judgment forfeiting Mr. Madrigal's money seized during the same search was entered *years* before a jury trial was held in front of a different judge. It does not appear from the record that the State made any effort to give Mr. Madrigal or his attorneys an opportunity to defend against the forfeiture. In any case, the entry of the default judgment prior to the criminal conviction violated the Forfeiture Act. Moreover, since the criminal proceedings were successive to the forfeiture, Mr. Madrigal respectfully requests that this Court vacate his conviction as his right to be free from double jeopardy was violated.

B. Facts and Procedural History

On June 30, 2009, officers pulled over Luis Madrigal and Pablo Chipres to investigate drug trafficking. Both consented to searches of themselves and to Mr. Chipres' car. Mr. Chipres also allowed officers to search his apartment. Police

found a large amount of cocaine under the seat where Mr. Chipres was sitting, a smaller amount of cocaine and money in Mr. Madrigal's pocket, and paraphernalia in the apartment. **[RP 35H-I]**

On July 16, 2009, the State filed a grand jury indictment against Mr. Madrigal, charging him with trafficking (by possession with intent to distribute), conspiracy to commit trafficking, and possession of drug paraphernalia. **[RP 13]** On July 30, 2009, the State filed a Controlled Substances Forfeiture Complaint for the $1,514 seized from Mr. Madrigal's pocket during the traffic stop. **[RP 26]** The forfeiture complaint does not contain a statement that it was served on Mr. Madrigal's attorney or the Public Defender's office. A summons for the forfeiture complaint was issued the same day to Mr. Madrigal and was served at an apartment in El Paso, Texas, despite the fact that Mr. Madrigal was in state custody at the time. **[RP 31]** On August 14, 2009, the return on the summons was filed with the officer attesting that personal service was completed on Mr. Madrigal on August 4, 2009. **[RP 34-35]** The address listed on the summons is the apartment in El Paso, Texas; Mr. Madrigal could not possibly have been personally served at that address. Mr. Madrigal was not at the forfeiture hearing on November 9, 2009, so Judge Bridgforth granted the State's request and entered a default judgment on the forfeiture complaint. **[RP 51]** An amended default judgment was subsequently entered on February 2, 2010. **[RP 71]**

After conflicts with a number of attorneys, Mr. Madrigal finally went to trial on October 3, 2012. **[RP 141]** At trial, the State called Agent Luis Rios with the Las Cruces Dona Ana County Metro Narcotics Unit. He testified that on June 9, 2009, he pulled over Mr. Madrigal and Pablo Chipres. The reason he pulled him over was to investigate drug trafficking after officers had conducted surveillance. He testified that Mr. Madrigal was driving the car and gave his consent to search. Agent Rios found five and a half grams of cocaine and money in the front pocket of Mr. Madrigal's pants. **[Tr. 128-130, 136-140, 145]** After the drug dog alerted to the front passenger seat of the car, the agents found cocaine on the floorboard of the car. **[Tr. 141, 145]**

Officer Arnulfo Flores works with the City of Las Cruces Police Department. He was also involved in the traffic stop. He said both Mr. Madrigal and Mr. Chipres gave consent to search. **[Tr. 173, 177]** Officer Flores testified that Mr. Madrigal admitted that he was delivering cocaine and that the "stash house" was in Santa Teresa, N.M. He took the officers to the house. **[Tr. 182-184]** The fact that Mr. Madrigal had made a statement apparently took defense counsel by surprise and he told the court he did not see that in the discovery. **[Tr. 179]** Officer Flores admitted that he wrote down in his report that one person refused to sign consent, although they did get consent from both men. He also admitted that he did not record the admission Mr. Madrigal made to him. **[Tr. 189, 191]**

Dona Ana County Sheriff's Officer Ernesto DiMatteo testified that he had suspicions that there were narcotics being trafficked out of the apartment on South Locust in Las Cruces and that one of the people involved was Mr. Madrigal. **[Tr. 213, 216]** On June 30, 2009, he saw a gold van and a black Saturn parked at the apartment. Once the Saturn left, he asked the other agents to help him with a traffic stop. **[Tr. 217]** Officer DiMatteo testified that he directed Agent Rios "not to conduct a pretextual stop" but rather "to immediately identify himself with the suspicion of possible trafficking and attempt to obtain consent." **[Tr. 218]**

He said that Mr. Chipres told him that Mr. Madrigal was just driving the car and that Mr. Madrigal stayed with him at the residence. Mr. Chipres gave consent to search the residence and he had the key. Mr. Madrigal said that he did not live at the Locust address but that he lived in El Paso. Officers did not follow up on this location. **[Tr. 224, 240]** Mr. Madrigal gave consent for officers to search the van and no drugs were found in the van. **[Tr. 226, 240]**

Officers searched the Locust apartment and found plastic baggies, a coffee grinder, a small digital scale, heat sealed wrap, an unknown white powder, screwdriver, scissors, a metal press, a jack, and a plate. Officer DiMatteo testified that these items were used to press and weigh cocaine and the powder on the grinder field tested positive for cocaine. **[Tr. 227-229]** He also took into evidence inositol powder, which is used as a cutting agent. **[Tr. 230]** He explained that this

is used in drug trafficking because the common user is not going to cut his product. Officer DiMatteo testified that the street value of the cocaine found was $120,000. He also testified that there was very little furniture or food in the apartment. **[Tr. 232-234]**

On cross-examination, Officer DiMatteo testified that Mr. Chipres claimed ownership of the car and gave permission to search. He explained that the information Mr. Madrigal gave regarding the additional stash house was not recorded for Mr. Madrigal's safety. **[Tr. 235-239]**

After the court instructed the jury on both trafficking and the lesser-included offense of possession of cocaine, the jury convicted Mr. Madrigal of trafficking, conspiracy to commit trafficking, and possession of paraphernalia. **[RP 148-50, 169A-C]** Mr. Madrigal admitted to a prior federal trafficking conviction, and one prior federal re-entry felony for habitual enhancement purposes, and the trial court ran his sentences concurrent for a total sentence of 18 years. **[RP 191-195]**

ARGUMENT

II. MR. MADRIGAL'S TRIAL AND CONVICTION AFTER THE DISTRICT COURT FORFEITED HIS PROPERTY IN WHAT WAS ESSENTIALLY A SEPARATE PROCEEDING RESULTED IN DOUBLE JEOPARDY.

Article II, Section 15 of the New Mexico Constitution protects Mr. Madrigal from multiple punishments for the same act. Mr. Madrigal may raise a double jeopardy claim for the first time on appeal. **NMSA 1978, § 30-1-10** ("The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment.") Mr. Madrigal asserts that his double jeopardy rights were violated when the State first received a default judgment forfeiting his property and then *years* later obtained a criminal conviction after a jury trial in front of a different judge. As a constitutional question of law, this Court reviews a double jeopardy challenge *de novo*. ***State v. Swick***, 2012–NMSC–018, ¶ 10, 279 P.3d 747.

In ***State v. Nunez***, 2000-NMSC-013, ¶ 52, 129 N.M. 63, 2 P.3d 264, our Supreme Court held that "[f]orfeiture inflicts a pecuniary penalty as punishment for the crime and seeks to deter any recurrence of the crime." Forfeiture is, thus, "punitive." ***Id***. ¶ 53. The Court further held "that jeopardy does attach upon the entry of a default judgment in a forfeiture proceeding under the Controlled Substances Act." 2000-NMSC-013, ¶ 103.

To pursue both while safeguarding important constitutional rights, ***Nunez*** required that "all forfeiture complaints and criminal charges for violations of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding. The single proceeding will eliminate the potential for double-jeopardy violations." ***Nunez***, 2000-NMSC-013, ¶ 104 (citation omitted).

Pragmatically, the ***Nunez*** Court further held,

> Most notably, the indigent defendant will have available the assistance of counsel in the forfeiture proceeding because both the property and the criminal actions will *take place in a single trial.* Of course, the State is not restricted from bringing only a criminal action or only a forfeiture action. However, if it elects to bring both a forfeiture complaint and a criminal proceeding growing out of the same facts, the action may be brought only in a single, bifurcated proceeding.

2000-NMSC-013, ¶ 104 (emphasis added.) Finally, ***Nunez*** explained that its "holding is unaffected by whether jeopardy attached first in the criminal proceeding or in the civil forfeiture action." 2000-NMSC-013, ¶ 117.

In response to ***Nunez***, the Legislature amended the Forfeiture Act, passing NMSA 1978, Section 31-27-6 (effective July 1, 2002). Section C mandates: "[t]he forfeiture proceeding shall be brought in the same proceeding as the criminal matter and presented to the same trier of fact[.]" Notably, the statute provides that: "The court shall enter a judgment of forfeiture and the property shall be forfeited to the state if the state proves by clear and convincing evidence that: the criminal prosecution of the owner has resulted in a conviction[.]" **NMSA 1978, § 31-27-6**

(E)(2). Thus, the Legislature provided structure to ***Nunez***'s allowance of a bifurcated proceeding by requiring the criminal prosecution be completed first. In this case, a default judgment was entered against Mr. Madrigal and his property was forfeited *years before* the district court held a trial in his criminal case, and thus without the statutorily required proof of a conviction.

In ***State v. Esparza***, 2003-NMCA-075, 113 N.M. 772, 70 P.3d 762, the Court of Appeals applied ***Nunez*** to three consolidated cases. In one case, ***State v. Esparza***, the State had properly charged both the criminal drug charges and the complaint for forfeiture in the criminal information. 2003-NMCA-075, ¶ 3. In another of the consolidated cases, ***State v. Booth***, the State filed a motion to forfeit the defendant's truck only three days after the indictment was filed. 2003-NMCA-075, ¶ 6.

The ***Esparza*** Court analyzed the Supreme Court's mandate in ***Nunez*** that all penalties must be sought in a "single, bifurcated proceeding." 2000-NMSC-013, ¶ 104. This Court held that "once proceedings have been properly initiated, a decision by a district court to dispose of either the forfeiture claim or the criminal charges prior to restitution of the entire case will not foreclose the imposition of the remaining penalty." 2003-NMCA-075, ¶ 20. Apparently ignoring the Supreme Court's express language to the contrary, ***Esparza*** further held that "***Nunez*** does

not require a single trial, but rather a single proceeding." 2003-NMCA-075, ¶ 22; *see* ***Nunez***, 2000-NMSC-013, ¶ 104.

Tellingly, the ***Esparza*** Court recognized that "the mere act of assignment of a docket number is insufficient, of itself, to demonstrate that the penalties were sought in a single, bifurcated proceeding." 2003-NMCA-075, ¶ 27. The Court instead found "the initiation of all proceeding in the same case prior to the entry of default judgment, and the fact that the proceedings were overseen by the same district judge," in that case supported its determination that the double jeopardy clause was not violated by subjecting the defendant to multiple proceedings. ***Id.*** ¶ 27.

A. Mr. Madrigal's subsequent trial and conviction violate double jeopardy and require that this Court vacate his convictions.

Mr. Madrigal's case differs from ***Esparza*** in key facts, as the proceedings were not overseen by the same district judge, nor were the criminal charges and forfeiture complaint pled together, or even close in time. However, should this Court disagree and find ***Esparza*** applicable to Mr. Madrgial's case, he asserts that ***Esparza*** was wrongly decided and does not follow the Supreme Court's mandate in ***Nunez***, nor does it properly consider the requirements of the forfeiture statute's 2002 amendments. Mr. Madrigal respectfully requests that this Court reconsider its decision in ***Esparza***. He maintains that his criminal prosecution should have been

barred by double jeopardy after forfeiture proceedings were fully complete in what amounted to a completely separate proceeding before any resolution of his criminal charges. Under ***Nunez***, his conviction resulting from a successive prosecution must be vacated.

Although the forfeiture complaint and the criminal charges were filed under the same case number, they proceeded as two completely different and independent proceedings, in violation of the Supreme Court's instruction in ***Nunez*** and as a result, violated Mr. Madrigal's right to be free from double jeopardy. *See* ***Esparza***, 2003-NMCA-075, ¶ 27 (noting that a single case number does not necessarily indicate a single proceeding). Jeopardy attached when the district court entered the default judgment against Mr. Madrigal, forfeiting his property. ***Nunez***, 2000-NMSC-013, ¶ 103. Because the trial was not conducted during the same proceeding, in front of the same finder of fact, the subsequent criminal conviction violated Mr. Madrigal's right to be free from double jeopardy. *See* ***id.*** ¶ 104.

B. The forfeiture proceeded absent notice to Mr. Madrigal and contrary to the statutory requirements; therefore the default judgment should be vacated.

In this case, the district court entered an order forfeiting Mr. Madrigal's property by default judgment. **[RP 51, 71]** Although Mr. Madrigal was represented by contract public defenders throughout the proceedings, it does not appear from the record that they were ever made aware of the forfeiture proceedings as the

complaint does not indicate a certificate of service to his attorneys of record. **[RP 26]** Moreover, Mr. Madrigal himself never received notice of the proceedings. The State apparently completed service of process at Mr. Madrigal's apartment in El Paso on August 4, 2009 **[RP 34-35]**, despite the fact that Mr. Madrigal was in its custody. **[RP 193]** (In the Judgment and Sentence, the court gives Mr. Madrigal pre-sentence confinement credit from date of arrest on July 1, 2009 through sentencing on May 22, 2013.); *cf.* ***Esparza***, 2003-NMCA-075, ¶ 33 ("it is clear that the State in each of these consolidated cases endeavored, in good faith, to comply with the requirements of a single proceeding."). Of course, "the state is presumed to know a defendant's whereabouts when he is in its custody." ***State v. Tartaglia***, 1990-NMCA-045, ¶ 4, 109 N.M. 801, 791 P.2d 76. Because Mr. Madrigal had no notice of the forfeiture proceeding, a default judgment against him for non-appearance was inappropriate and violated his right to due process. ***Cordova v. State, Taxation and Revenue, Property Tax Div.***, 2005-NMCA-009, ¶ 22, 136 N.M. 713, 104 P.3d 1104 ("To satisfy due process, notice must be given in a manner reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (Quotation marks and citation omitted.)

Furthermore, the district court failed to comply with the forfeiture statute in two significant ways. First, the forfeiture was ordered without proof that Mr.

Madrigal had been convicted. **NMSA 1978, § 31-27-6(E)(2)** ("The court shall enter a judgment of forfeiture and the property shall be forfeited to the state if the state proves by clear and convincing evidence that: the criminal prosecution of the owner has resulted in a conviction[.]"). In fact, the criminal charges were still pending at the point when the default judgment was entered. Second, the forfeiture proceedings and the criminal case were not presented to the same trier of fact as required by the statute. **NMSA 1978, § 31-27-6(C)** ("The forfeiture proceeding shall be brought in the same proceeding as the criminal matter and presented to the same trier of fact[.]"). The forfeiture order resulted from a default judgment signed by Judge Bridgforth, **[RP 51, 71]**, whereas the criminal conviction was the result of a jury trial held in front of Judge Macias. In this way, this case differs significantly from ***Esparza***. Mr. Madrigal's proceedings were not overseen by the same judge and jeopardy had long attached with the entry of the default judgment years prior to the criminal trial.

Mr. Madrigal asserts that the procedure used by the State and the district court in this case resulted in violations of both the statute and the double jeopardy clause of the state constitution. As such, he respectfully requests that this Court vacate his criminal convictions. Additionally, or in the alternative, Mr. Madrigal respectfully requests that this Court vacate the default judgment entered on the forfeiture complaint against him, as it did not comply with the statute and neither

Mr. Madrigal nor his attorney apparently received notice of the hearing. *See* ***Albin v. Bakas***, 2007-NMCA-076, ¶ 31, 141 N.M. 742, 160 P.3d 923 (holding that the officers violated the forfeiture act and therefore reversing the summary judgment.); ***Cordova***, 2005-NMCA-009, ¶ 22.

III. MR. MADRIGAL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO FILE A MOTION TO SUPPRESS CHALLENGING THE TRAFFIC STOP CONDUCTED WITHOUT REASONABLE SUSPICION, FAILED TO FILE A MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS, AND FAILED TO CHALLENGE WHETHER HIS STATEMENT WAS GIVEN VOLUNTARILY.

A. Standard of Review

"The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversarial process." ***Kimmelman v. Morrisson***, 477 U.S. 365, 374 (1980); *see* ***Strickland v. Washington***, 466 U.S. 668 (1984). The standard for ineffective assistance of counsel is whether defense counsel exercised the skill, judgment, and diligence of a reasonably competent attorney. ***State v. Dean***, 1986-NMCA-093, ¶ 10, 105 N.M. 5, 727 P.2d 944. An appellate court will not find ineffective assistance of counsel unless the record on appeal establishes a *prima facie* case. ***State v. Wilson***, 1993-NMCA-074, ¶ 30, 117 N.M. 11, 868 P.2d 656. A *prima facie* case is not made

when some plausible, rational strategy or tactic can explain counsel's conduct. ***Id.*** (citing ***State v. Swavola***, 1992-NMCA-089, ¶ 3, 114 N.M. 472, 840 P.2d 1238.))

A defendant also must show that counsel's incompetence caused him prejudice. ***State v. Gonzales***, 1992-NMSC-003, ¶ 32, 113 N.M. 221, 824 P.2d 1023. Prejudice is established by a showing that without the acts and omissions of counsel, which are found to fall below constitutional standards, there is a reasonable probability that the result would have been different. ***Strickland v. Washington***, 466 U.S. at 694 (1984).

B. Failure to File a Motion to Suppress

In order to satisfy the reasonableness prong of the ineffective assistance of counsel test in the context of counsel's failure to move to suppress evidence, this Court considers two questions. *See* ***Patterson v. LeMaster***, 2001–NMSC–013, ¶ 19, 130 N.M. 179, 21 P.3d 1032. First, it considers "whether the record supports the motion[.]" ***State v. Martinez***, 1996–NMCA–109, ¶ 33, 122 N.M. 476, 927 P.2d 31. Second, "whether a reasonably competent attorney could have decided that a motion to suppress was unwarranted." ***Id***. (internal quotation marks and citation omitted).

Mr. Madrigal asserts that his attorney was ineffective for failing to file a motion to suppress challenging the traffic stop. Officers pulled Mr. Madrigal over after conducting surveillance at an apartment. The officer who wrote the

"Statement of Facts in Support of Criminal Complaint" said that he had completed a controlled buy with Mr. Madrigal sometime earlier, within the last 24 hours. **[RP 35H-I]** The Statement or the testimony of the officers at trial provided no traffic related reason for the stop, though any such assertion would arguably be pretextual under ***State v. Ochoa***, 2009-NMCA-002, ¶ 25, 146 N.M. 32, 206 P.3d 143 ("A pretextual traffic stop is a detention supportable by reasonable suspicion or probable cause to believe that a traffic offense has occurred, but is executed as a pretense to pursue a "hunch," a different more serious investigative agenda for which there is no reasonable suspicion or probable cause."). In fact, Officer DiMatteo said he instructed his agents not to conduct a pretextual stop, but rather to stop the car to investigate drug trafficking.

Of course, the trial court would still have to consider whether the officer had reasonable suspicion to stop Mr. Madrigal to investigate drug activity or if any other reason justified the seizure. *See* ***State v. Gonzales***, 2011-NMSC-012, ¶¶ 3, 14, 150 N.M. 74, 257 P.3d 894 (holding that on motion to suppress based on defendant's claim that traffic stop for window tint violation was pretext for narcotics investigation, trial court was required to consider whether police officers had independent reasonable suspicion to believe that defendant was engaged in methamphetamine trafficking.); ***State v. Peterson***, 2014-NMCA-008, ¶ 7, 315 P.3d 354 (holding "***Ochoa***'s exception to the reasonable suspicion exception does not

apply to the case at hand because the officers did not need reasonable suspicion to stop Defendant when they had a valid outstanding arrest warrant."). The officers had neither reasonable suspicion to conduct a traffic stop to investigate drug crimes nor any other legitimate basis for the stop.

In ***State v. Alderete***, 2011-NMCA-055, 149 N.M. 799, 255 P.3d 377, officers stopped the defendant for changing lanes without a turn signal, but really wanted to investigate drug activity. The police in ***Alderete*** had far more facts than those present here that provided the officers with reasonable suspicion to stop the defendant's vehicle. For example, the detectives who were observing the subject house had "specific factual information regarding the residents' possible involvement in drug trafficking and therefore had reasonable suspicion to conduct an investigatory stop of Defendant's vehicle to confirm or dispel their suspicions." 2011-NMCA-055, ¶ 18. Explaining why the detectives had reasonable suspicion, the Court pointed to the fact that "the detectives had a tip from a reliable, confidential informant, which included specific, predictive information that a large amount of marijuana was going to be delivered to the house under surveillance." ***Id***. Furthermore, the "information was corroborated by the delivery of three large boxes and the subsequent call from the informant indicating that marijuana was currently being stored in the house." ***Id.*** (citing ***State v. Flores***, 1996–NMCA–059, ¶ 9, 122 N.M. 84, 920 P.2d 1038 (explaining that informant's tip, which included

specific predictive information, was confirmed by police observation and provided reasonable suspicion for an investigative stop)). The police had also obtained a search warrant for the "stash house." ***Id.***

The detectives then saw the man later identified as the defendant's husband leaving the house with one of the three boxes. The officers stopped him and discovered forty-nine packages of marijuana in that box. About ten minutes later, detectives saw the vehicle the defendant was driving leave the garage and drive away. The Court reasoned that "given the closeness in time of the two departures from the house, the detectives could reasonably infer that Defendant was taking one or more of the remaining two boxes to a secondary location when her vehicle left the house shortly after her husband's vehicle left." ***Id.*** ¶ 19. Therefore, "specific and articulable facts supported the detectives' suspicion that Defendant was engaged in illegal activity, and that suspicion was not an unsupported intuition or a baseless hunch." ***Id.*** ¶ 20. The Court ultimately held "that the unrelated motive for stopping Defendant's vehicle—the investigation of drug activity—was supported by reasonable suspicion." ***Id.***

Again, the detectives in ***Alderete*** had many more facts in which to support a reasonable suspicion that the defendant in that case was engaged in illegal drug activity than the detectives in this case. The officers in this case lacked reasonable

suspicion to conduct an investigatory detention of Mr. Madrigal and all evidence obtained as a result should have been suppressed.

"Both the United State Constitution and the New Mexico Constitution protect a citizen against unreasonable searches and seizures." ***State v. Funderburg***, 2008-NMSC-026, ¶ 12, 144 N.M. 37, 183 P.3d 922. Under both constitutional provisions, the temporary detention of a person during a traffic stop constitutes a seizure that must comport with constitutional requirements of reasonableness. *See* ***State v. Candelaria***, 2011–NMCA–001, ¶ 9, 149 N.M. 125, 245 P.3d 69 . "Before a police officer makes a traffic stop, he must have a reasonable suspicion of illegal activity." ***State v. Anaya***, 2008-NMCA-020, ¶ 6, 143 N.M. 431, 176 P.3d 1163. This court analyzes the reasonableness of a stop in accordance with the two-part test set forth in ***Terry v. Ohio***, 392 U.S. 1, 19-20 (1968): (1) whether the stop was justified at its inception and (2) whether the officer's action was "reasonably related in scope to the circumstances which justified the interference." ***Funderburg***, 2008-NMSC-026, ¶ 13.

Mr. Madrigal asserts that the officers did not have reasonable suspicion for the traffic stop. Reasonable suspicion is defined as "a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law." ***State v. Neal,*** 2007–NMSC–043, ¶ 21, 142 N.M.

176, 164 P.3d 57 (emphasis omitted) (internal quotation marks and citation omitted).

"Police may make an investigatory stop in circumstances that do not rise to the level of probable cause for an arrest if the officers have a reasonable suspicion that the law has been or is being violated." ***State v. Sanchez***, 2005–NMCA–081, ¶ 11, 137 N.M. 759, 114 P.3d 1075. In order to justify a stop based on reasonable suspicion, the State "must provide specific and articulable facts that, together with the rational inferences from those facts, reasonably warrant the intrusion." ***Id.*** Officers are entitled to draw upon their experience and training and make inferences and deductions about the information available to them, but reasonable suspicion cannot be based on unsupported intuition or inarticulate hunches. *See* ***Flores***, 1996–NMCA–059, ¶ 8. In determining whether reasonable suspicion exists, the Court's concern is whether the facts and inferences known to the officer "warrant a person of reasonable caution in believing that criminal activity was possibly afoot." ***State v. Prince***, 2004–NMCA–127, ¶ 10, 136 N.M. 521, 101 P.3d 332 (internal quotation marks omitted).

The officer did not have reasonable suspicion to believe that criminal activity was afoot. The previous controlled buy does not provide justification for a traffic stop sometime, possibly up to 24 hours, later. *See* ***United States v. Hensley***, 469 U.S. 221, 228–29 (1985) (discussing the propriety of an investigative stop

after a crime has been completed and noting that exigent circumstances, such as were the case in ***Terry***, are more persuasive when the police step in *before* a crime is committed or completed). The officer had been conducting surveillance on the South Locust apartment, but it is unclear what information was known to him at the time Mr. Madrigal and his friend left. Simply being present at a house suspected of drug crimes is not enough. *See* ***Neal***, 2007–NMSC–043, ¶ 30 (holding that defendant's mere association with a person "who was under surveillance in an ongoing drug investigation, was insufficient to create reasonable suspicion[.]"); ***State v. Graves***, 1994-NMCA-151, ¶ 17, 119 N.M. 89, 888 P.2d 971 (holding that mere presence at a residence subject to a search warrant was insufficient to establish reasonable suspicion to detain a non-resident.) The officers admitted that they did not have any traffic related reason for the stop. The stop was done to investigate drug trafficking. The officers should have obtained a warrant to search the house, instead of circumventing the warrant requirement by conducting a traffic stop to "attempt to obtain consent." **[Tr. 218]**

Trial counsel should have filed a motion to suppress the evidence challenging the traffic stop that directly lead to the discovery of drugs in Mr. Madrigal's pocket, 112 grams of cocaine in Mr. Chipres' car, and the subsequent search of the apartment that lead to the discovery of the drug paraphernalia. All searches were the fruit of an illegal seizure. Any consent given by Mr. Madrigal

had been tainted by the prior illegal traffic stop. *See* ***Neal***, 2007–NMSC–043, ¶ 33 ("For evidence to be admissible, consent must be both voluntary and purged of all taint from a prior illegality."). Because it is likely that a motion to suppress would have been successful, Mr. Madrigal suffered prejudice by the failure of his counsel to challenge the traffic stop as conducted absent reasonable suspicion.

C. Failure to File Motion to Dismiss on Speedy Trial Grounds

Defense counsel provided ineffective assistance of counsel when he failed to file a motion to dismiss on speedy trial grounds. The trial judge, while recognizing that he did not know all the facts, noted that this seemed like a simple case. **[C.D. 9/4/2012, 1:34:58]** The delay in this simple case was an unreasonable thirty-nine months. The trial judge was rightfully concerned about the amount of time Mr. Madrigal would continue to "languish" in custody **[C.D. 9/4/2012, 1:38:36]** and a Motion to Dismiss likely would have been successful, as demonstrated below.

This Court applies a four-part balancing test for evaluating speedy trial claims. *See* ***State v. Garza***, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 387. These four factors are the length of delay, the reasons for delay, the defendant's assertion of his right, and the prejudice to the defendant. ***Id***. "In considering each of these factors, we defer to the [district] court's factual findings but review de novo the question of whether [the d]efendant's constitutional right was violated."

State v. O'Neal, 2009-NMCA-020, ¶ 14, 145 N.M. 604, 203 P.3d 135 (filed 2008) (internal quotation marks and citation omitted).

Mr. Madrigal was arrested on June 30, 2009, and did not go to trial until October 3, 2013. Therefore the length of the delay is three years, three months, and three days. *See* ***State v. Maddox***, 2008-NMSC-062, ¶ 10, 145 N.M. 242, 195 P.3d 1254 (indicating that the right to a speedy trial attaches "when the defendant becomes an accused, that is, by a filing of a formal indictment or information or arrest and holding to answer" (internal quotation marks and citation omitted)).

This Court examines the complexity of the case in order to determine whether a delay triggers the presumption of prejudice. ***Garza***, 2009-NMSC-038, ¶ 23. As the district court noted, this case is a simple case. However, regardless of whether this case is simple, of intermediate complexity, or complex, the thirty-nine month delay triggered the presumption of prejudice, requiring an analysis of the speedy trial factors. *See* ***id***. ¶¶ 47-48, 50 (changing the lengths of time that will be considered presumptively prejudicial).

The State and the court have an obligation to move the case as well, and there were no hearings at all in this case during 2011. *See* ***State v. Spearman***, 2012–NMSC–023, ¶ 25, 283 P.3d 272 (holding negligent or administrative delay is weighed against the prosecution because "the ultimate responsibility for such

circumstances ... rest[s] with the government rather than with the defendant[.]") (internal quotation marks and citation omitted). Although some of the delay was caused by the fact that Mr. Madrigal fired a number of his attorneys, the thirty-nine month delay is presumptively prejudicial and defense counsel should have filed a motion to dismiss. The trial judge all but told him outright to do so. **[C.D. 9/4/2012, 1:33:53]**—(asking defense counsel if any motions would be filed.) Mr. Madrigal acknowledges that in one motion his previous attorney waived his right to speedy trial and the six-month rule; however, a later motion merely waived his speedy trial rights for the time involved in the continuance. **[RP 76, 130]** Therefore, Mr. Madrigal asserts that these "waivers" were not waivers, but rather an acknowledgment that the time would count against the defense for speedy trial purposes. Regardless, even counting that time against the defense, Mr. Madrigal's thirty-nine months spent in custody is presumptively prejudicial and a motion to dismiss should have been filed. Because it is likely that a motion to dismiss would have been successful, Mr. Madrigal suffered prejudice by this failure of his counsel.

D. Failure to Challenge Statement

Defense counsel further provided ineffective assistance of counsel when he failed to challenge the Statement given by Mr. Madrigal to Agent Flores. Agent Flores did not testify that he properly read Mr. Madrigal his *Miranda* rights and

obtained a knowing, intelligent, and voluntary waiver. Of course, when seeking to admit at trial a defendant's statement made in response to custodial interrogation, the State bears "a heavy burden" of proving that the defendant made an intelligent, knowing, and voluntary waiver of his rights. ***Miranda v. Arizona***, 384 U.S. 436, 475 (1966). Furthermore, "[t]here is a presumption against the waiver of constitutional rights." ***State v. Zamarripa***, 2009-NMSC-001, ¶ 38, 145 N.M. 402, 199 P.3d 846. Had defense counsel challenged the Statement, even if the Court had ruled against him on the motion, Mr. Madrigal would have been entitled to **UJI 14-5040 NMRA** which requires the jury to "determine that the statement was given voluntarily."

However, defense counsel was surprised by the fact that Mr. Madrigal had made a statement, demonstrating that he had not adequately investigated the case. **[Tr. 170]**; *see* ***Kimmelman v. Morrison***, 477 U.S. 365 (1986); ***State v. Barnett,*** 1998-NMCA-105, ¶ 30, 125 N.M. 739, 965 P.2d 323 ("failure to make adequate pretrial investigation and preparation may also be ground for finding ineffective assistance of counsel"); *see also* ***King v. State***, 810 P. 2d 119, 123 (Wyo. 1991) (Prejudice presumed in drug case because "[s]trategic justification cannot be extended to the failure to investigate," where counsel failed to secure or interview two eyewitnesses to the alleged drug transaction.) This resulted in prejudice because a determination of voluntariness, either by the judge or by the jury was

never made in this case. As defense counsel brought out on cross-examination, this purported statement was not recorded by Agent Flores or written in his report. **[Tr. 190-191]** A jury's consideration of this evidence should have been informed by UJI 14-5040. Defense counsel's failure to challenge the statement took away the voluntariness consideration from both the judge and the jury. This resulted in prejudice given the facts of this case.

E. Habeas As An Alternative

However, this Court should note that where an ineffective assistance of counsel claim relies on facts not contained in the record, a defendant may be afforded relief, where appropriate, in a habeas corpus proceeding. Undersigned counsel requests that if this Court does not find that appellant's claim on this point warrants reversible error, that it note in any decision that this issue may be raised, if there appears to be a factual basis, in a collateral post-conviction proceeding. *See* ***State v. Telles***, 1999-NMCA-013, ¶ 25, 126 N.M. 593, 973 P.2d 845 (in reviewing ineffective assistance of counsel claim, court cannot evaluate matters outside of record); ***State v. Baca***, 1997-NMSC-059, ¶ 25, 124 N.M. 333, 950 P.2d 776 (noting that record on appeal providing basis for remand to trial court for evidentiary hearing on ineffective assistance of counsel is rare; ordinarily, such claims are heard on petition for writ of habeas corpus); ***State v. Martinez***, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31 (expressing "preference for habeas

corpus proceedings over remand when the record on appeal does not establish a prima facie case of ineffective assistance of counsel").

IV. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN MR. MADRIGAL'S CONVICTIONS.

The State must present evidence at trial sufficient to meet its burden of proving each element of the offense charged, beyond a reasonable doubt, under the Due Process Clause of the state and federal constitutions. *See* ***Jackson v. Virginia***, 443 U.S. 307 (1979); ***State v. Garcia***, 1992-NMSC-048,114 N.M. 269, 837 P.2d 862 ; **U.S. Const. amends. V, VI, XIV**; **N.M. Const. art. II, §§ 14, 18**. In reviewing the sufficiency of the evidence to support a conviction, this Court first "must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." ***State v. Sutphin***, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314.

This Court must then determine "whether the evidence viewed in this manner, could justify a finding by any rational trier of fact that *each element* of the crime charged has been *established* beyond a reasonable doubt." ***State v. Sanders***, 1994-NMSC-043, ¶ 11, 117 N.M. 452, 872 P.2d 870 (emphasis added). In making this determination, this Court must not rely on improper inference, surmise, or a cynical speculation to fill the gaps in the State's proof. *See* ***State v. Mariano R.***, 1997–NMCA–018, 123 N.M. 121, 934 P.2d 315. When, however, "the evidence

must be buttressed by surmise and conjecture, rather than logical inference in order to support a conviction," this Court, as protector of the accused's civil liberties, cannot allow the conviction to stand. ***State v. Vigil***, 1975-NMSC-013, ¶ 12, 87 N.M. 345, 533 P.2d 578 (citing ***State v. Romero***, 1960-NMSC-047, ¶ 9, 67 N.M. 82, 352 P.2d 781).

In order to sustain a conviction for trafficking (by possession with intent to distribute) the State was required to prove beyond a reasonable doubt, in pertinent part:

1. The defendant had cocaine in his possession;

2. The defendant knew it was cocaine or believed it to be some drug or other substance the possession of which is regulated or prohibited by law;

3. The defendant intended to transfer it to another.

[RP 148]. The jury was also instructed on constructive possession. **[RP 151]**. However, Mr. Madrigal was not charged as an accessory and the jury was not instructed on accomplice liability. The facts at trial proved that the car where the larger amount of cocaine was found belonged to Mr. Chipres, not Mr. Madrigal. Further, it was found under the seat where Mr. Chipres was sitting. Of course, simply being in a location with cocaine is not sufficient to sustain a conviction for trafficking. **UJI 14-130 NMRA** ("A person's presence in the vicinity of the object or his knowledge of the existence or the location of the object is not, by itself,

possession.") At the *most*, Mr. Madrigal should have been convicted only of possession for the smaller amount of cocaine found in his pocket.

The same is true for the items found in the apartment, where Mr. Chipres lived, but Mr. Madrigal did not. Therefore Mr. Madrigal also challenges his conviction for possession of paraphernalia. According to the officer's testimony, Mr. Chipres was the owner of the car, Mr. Chipres gave consent to search the apartment and Mr. Chipres opened the apartment for the police. The only evidence that tied Mr. Madrigal to the apartment was the hearsay statement testified to by the officer that Mr. Chipres told him Mr. Madrigal stayed at the apartment as well. *Cf.* ***State v. Consaul***, 2014-NMSC-30, ¶ 86, ___ P.3d ___ (No. 33,483, Aug. 21, 2014) ("These levels of hearsay do not provide sufficient evidence to support a conviction . . .")

This does not demonstrate Mr. Madrigal's control over the car or the apartment and therefore he could not be in constructive possession of the contraband found within. *See* ***State v. Maes***, 2007–NMCA–089, ¶ 14, 142 N.M. 276, 164 P.3d 975 (observing that in light of the evidence showing that the defendant did not have exclusive access to the house where the methamphetamine was seized, "the [prosecution] could not rely solely on [the d]efendant's access to the house to support an inference that [she] was in constructive possession of the methamphetamine" found therein); ***State v. Becerra***, 1991-NMCA- 090, ¶ 13, 112

N.M. 604, 817 P.2d 1246 ("Constructive possession requires evidence of knowledge and control[.]")

Finally, Mr. Madrigal also challenges his conviction for conspiracy to commit trafficking. In order to sustain this conviction, the State was required to prove beyond a reasonable doubt, in pertinent part that:

> 1. The defendant and another person by words or acts agreed together to commit trafficking a controlled substance by possession with intent to distribute[.]

[RP 152] Mr. Chipres did not testify in this case. There is no evidence establishing any agreement between Mr. Chipres and Mr. Madrigal. Agent Flores testified that Mr. Madrigal told him that he had been delivering cocaine and then took him to the location of a stash house. **[Tr. 182-184]** This does not establish an agreement. The State failed to prove this charge. *But see* ***State v. Johnston***, 1982-NMCA-083, ¶ 13, 98 N.M. 92, 645 P.2d 448 (observing that conspiracy is rarely susceptible of direct proof and that circumstantial evidence is sufficient to support a conspiracy conviction).

The State failed to present sufficient evidence to sustain any of the convictions. Mr. Madrigal respectfully requests that this Court vacate his convictions.

V. CONCLUSION

For the reasons stated above, Luis Madrigal, Defendant-Appellant, respectfully requests that this Court vacate his convictions and the default judgment.

Respectfully submitted,

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I hereby certify that a copy of this pleading was served by hand delivery to the Attorney General's Box in the Court of Appeals this the 24th day of September, 2014.

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