IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

Court of Appeals No. 35,564

COPY

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

MAR 15 2017

STATE OF NEW MEXICO,

Appellant,

vs.

CHRISTOPHER HEYSER,

Appellee.

APPEAL FROM THE THIRD JUDICIAL DISTRICT
COUNTY OF DONA ANA

Third Judicial District No. D-307-CR-2015-630
The Hon. Marci Beyer

ANSWER BRIEF

ORAL ARGUMENT IS REQUESTED

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STATEMENT OF RULE 12-313 PAGE/WORD COUNT COMPLIANCE:

This Brief contains fewer than the 35 pages permitted. Counsel used NeoOffice Writer for iMac with a proportionally spaced Times New Roman typeface. The body of the document consists of 6,322 words total.

STATEMENT OF TRANSCRIPT CITATION FORMAT

References to the recorded transcript are by date and elapsed time from the start of the recording to the end of the section containing the averment (e.g. TR 4/15/16 11:10:00 through 11:10:30).

Nature of the Case:

The State appeals the district court's order granting Defendant-Appellee Christopher Heyser's motion to dismiss for violation of the compulsory joinder Rule 5-203(A)(1) NMRA ("Rule 5-203" or "the Rule"), after the District Attorney conceded at oral argument before the district court on Mr. Heyser's motion to dismiss for failure to join that Rule 5-203 was applicable to the facts underlying the charges against Mr. Heyser.

Appellee's Summary of Relevant Facts:

Following a traffic stop and investigation by Las Cruces police, Mr. Heyser was arrested for aggravated driving under the influence, driving on a suspended or revoked license, and failure to dim headlights. [RP 36-39] Mr. Heyser was transported to the detention center for booking. [RP 29; 57; 58] During a search of Mr. Heyser, detention center personnel found in Mr. Heyser's boot three zip-loc bags containing a substance that appeared to be cocaine. The suspicion was later confirmed. [RP 58]

Mr. Heyser was charged in magistrate court in cause No. M-14-DR-201500400 for the offenses of aggravated DUI (refusal), driving on a suspended or revoked license (DUI related), and failure to dim headlights. [RP 36-39] Mr.

Heyser pleaded guilty to aggravated DUI and driving on a suspended or revoked license. [RP 44-45]

Mr. Heyser was subsequently indicted by a grand jury on one count of felony possession of a controlled substance, initiating this case in district court. [RP 1-4] Mr. Heyser moved to dismiss the charges in this case, arguing that the magistrate court convictions and cocaine possession charges "are a bundle- all based upon the same conduct, series of connected acts, or parts of a single scheme or plan that occurred at the same time." [RP 29-35] Therefore, dismissal of the cocaine charges was mandated under Rule 5-203(A) and the New Mexico Supreme Court's decision in *State v. Gonzales*, 2013-NMSC-016, 301 P.3d 380.

The State conceded in its response to Mr. Heyser's motion to dismiss that the magistrate court convictions and the cocaine possession conviction were "based on a series of acts connected together or constituting part of a single plan of scheme. [RP 48] Nevertheless, the State urged the district court to apply limiting principles/exceptions in construing Rule 5-203(A). [RP 47-55] Specifically, the State urged adoption of limitations on Rule 5-203(A) as allegedly incorporated in model rules and as allegedly accepted by the majority of jurisdictions with compulsory joinder rules. [BIC 5-6]

District Court Hearing

The matter of Mr. Heyser's motion to dismiss was heard at oral argument before the district court on April 15, 2016. [TR 4/15/16] The district court indicated it disagreed with the State's concession, but the State repeated that:

> State: [He] is charged with DUI under the influence of alcohol and drugs and he has cocaine in his shoe. To me, these are connected together. I will concede that in this scenario.
>
> Court: All right. Then I'm going to . . .
>
> State: I know what you have to do but . . .
>
> Court: Then I'm going to grant the motion. I was going to deny it based on a different analysis because I don't think the two are necessarily the same but you know more about the case than I do. Given that the State concedes that they're connected, on the basis of the law, I'm granting the motion to dismiss.

[TR 4/15/16 11:10:00 through 11:10:30 (emphasis added)] Notwithstanding the State's concession in the record, its invitation to the district court to rule as she did, its clear assurance to the district court of its position, and its awareness that dismissal would result, the State has proceeded with this appeal.

ANSWERING ARGUMENT AND AUTHORITY:

ISSUE 1: The State is Bound by Its Concessions in the District Court.

Standard of Review:

This issue requires this Court to rule on an issue of law, and therefore the review is *de novo*. *City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 5, 147 N.M. 693.

Preservation:

Generally, an appellee has no duty to preserve issues for review and may advance any ground for affirmance on appeal. *State v. Todisco*, 2000-NMCA-064, ¶ 11, 129 N.M. 310. Mr. Heyser has no duty to preserve an issue where he is not claiming that the trial court erred.

The purposes of the preservation requirement applicable to appellants are to (1) allow the trial court an opportunity to correct any errors, thereby avoiding the need for appeal, and (2) create a record from which the appellate court can make informed decisions. *State v. Martinez*, 2008-NMCA-052, ¶ 10, 143 N.M. 773. In order to preserve an issue for appeal, "it must appear that [the] appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Id.*

Argument and Authority:

The State insists that this Court is not bound by the State's concession to the district court of precisely the issue for which the State now seeks reversal–namely –the applicability of Rule 5-203 to the facts below. [BIC 9, *citing State v. Neatherlin*, 2007-NMCA-035, ¶ 21, 141 N.M. 328 (noting and rejecting the State's concession on appeal that the district court had erred in denying a defendant a jury instruction on the lesser included offense which constituted reversible error.)] As will be argued in Section 2 below, the State's position, as a propositional matter, conflicts with the doctrines of preservation of error, invited error, and waiver.

Additionally, Mr. Heyser has parsed the case law in New Mexico governing whether a concession of the magnitude made by the State herein is, in fact, non-binding, and the case law points to a different conclusion than that urged by the State. New Mexico case law precedent suggests that on appeal the appellate court can disregard a concession made in argument to the appellate court; the same cannot necessarily be said of a concession made before the fact-finder, for reasons of preservation, invited error, judicial estoppel, and judicial economy. *See, e.g. State v. Guerra*, 2012-NMSC-027, ¶ 9, 284 P.3d 1076, 1079 (appeal by defendant following conviction; State conceded on appeal that the evidence was insufficient as a matter of law to uphold Defendant's tampering conviction); *State v. Urioste*,

2011-NMCA-121, ¶ 31, 267 P.3d 820, 828 (appeal by defendant following conviction; on appeal, state conceded defendant's argument that the conspiracy to tamper with evidence charges violated defendant's due process rights); *State v. Foster*, 1999-NMSC-007, ¶ 25, 126 N.M. 646 (appeal by defendant following conviction; State conceded for the first time on appeal that Defendant's conviction for second degree murder must be reversed), *abrogated on other grounds by State v. Frazier*, 2007–NMSC–032, ¶¶ 31, 35, 142 N.M. 120); *State v. Maes*, 1983-NMCA-073, ¶ 7, 100 N.M. 78, 80–81 (appeal by defendant following conviction; noting State of New Mexico, through the attorney general, agreed with the defendant's arguments and conceded a lack of evidence; "[t]he public interest in criminal appeals does not permit their disposition by party stipulation."), *abrogated on other grounds by State v. Fuentes*, 119 N.M. 104, 106, 888 P.2d 986, 988 (Ct.App.1994); *State v. Caldwell*, 2008-NMCA-049, ¶ 8, 143 N.M. 792, 796 (appeal by defendant following conviction; the State appeared to concede on appeal that Defendant's conduct was unitary; appellate Court noted it was "not bound by the State's concession"); *State v. Montoya*, 1993-NMCA-097, 116 N.M. 297, 307 (appeal by defendant following conviction; considering a State's concession on appeal that a conviction violated the defendant's double jeopardy rights; noting that the Court was not bound by the State's concession that double

jeopardy had been violated), *holding modified on other grounds by State v. Gomez*, 1997–NMSC–006, 122 N.M. 777; *State v. Muñiz*, 2003–NMSC–021, ¶ 5, 134 N.M. 152 (stating that appellate courts have a duty to affirm the trial court if its decision was correct, despite the state's concession of an issue), *reversed on other grounds by* 2003-NMSC-021, 134 N.M. 152; *State v. Martinez*, 1999–NMSC–018, ¶ 26, 127 N.M. 207 (appellate courts in New Mexico are not bound by the attorney general's concession of an issue in a criminal appeal).

It appears, then, that the State may not subvert the standard of review, disregard preservation requirements generally imposed upon an appellant, and obtain a second bite at the apple before the district court, after the State has made a strategic decision in litigation that, in retrospect, appears to have been unwise. Certainly a criminal defendant is not typically offered the opportunity to withdraw a concession or stipulation, even of the defendant's constitutional rights; criminal defendants are routinely bound by strategic decisions made by defense counsel. *See, e.g., State v. Astorga*, 2016-NMCA-015, ¶ 14, 365 P.3d 53, 57 (noting defendant was bound by defense counsel's tactical decision to use a deposition at trial), *cert. denied*, 2015-NMCERT-012; *see also State v. Boeglin*, 1987-NMSC-002, ¶ 19, 105 N.M. 247 (defendant is bound by his decision, contrary to the advice of counsel, to gamble on a verdict of acquittal, and the district court did not

commit reversible error by instructing the jury as defendant desired). In *State v. Clark*, 108 N.M. 288, 297, 772 P.2d 322, 331 (1989), our Supreme Court held that, absent fundamental error, even in a death penalty case issues must be properly preserved.

In *Boeglin*, 1987-NMSC-002, ¶ 15, our Supreme Court noted:

> This Court prefers not to compel defendants to avail themselves of rights they believe may not be advantageous and long has held that defendants' rights, even fundamental constitutional rights, may be waived. *See State v. Garcia*, 46 N.M. at 305, 128 P.2d at 460; *cf. State v. Ball*, 104 N.M. 176, 718 P.2d 686, 693 (1986) (right to appeal); *Baird v. State*, 90 N.M. 667, 669, 568 P.2d 193, 195 (1977) (right to appeal defects in grand jury proceedings); *Neller v. State*, 79 N.M. 528, 532, 445 P.2d 949, 953 (1968) (right to counsel); *State v. Henry*, 101 N.M. at 280, 681 P.2d at 65 (right to testify on own behalf).

Boeglin continued:

> The courts of many other jurisdictions permit defendants to make strategic choices [and] refuse to hear the complaints of defendants who have gambled and lost, failing to preserve error properly. *See, e.g., Shepard v. Foltz*, 771 F.2d 962 (6th Cir.1985) (dicta); *Look v. Amaral*, 725 F.2d 4 (1st Cir.1984); *Crowe v. State*, 435 So.2d 1371 (Ala.Crim.App.1983); *Collins v. State*, 271 Ark. 825, 611 S.W.2d 182, cert. denied, 452 U.S. 973, 101 S.Ct. 3127, 69 L.Ed.2d 984 (1981); *Harris v. State*, 438 So.2d 787 (Fla.1983), *cert. denied*, 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984); *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986) (dicta); *People v. Lewis*, 97 Ill.App.3d 982, 53 Ill.Dec. 353, 423 N.E.2d 1157 (1981); *State v. Sands*, 123 N.H. 570, 467 A.2d 202 (1983) (dicta); *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied*, 471 U.S. 1036, 105 S.Ct. 2056, 85 L.Ed.2d 329 (1985); *Jahnke v. State*, 692 P.2d 911 (Wyo.1984).

Boeglin, supra. Indeed, were the positions reversed, if Mr. Heyser were claiming on direct appeal of conviction that a defense counsel's concession should be disregarded, the State would doubtless argue that such strategic missteps before the district court, perceived in hindsight, cannot and should not be corrected on direct appeal to this Court.

The record in this case clearly demonstrates that the State knowingly, intelligently, and voluntarily waived its right to argue that Rule 5-203 did not preclude a prosecution of the cocaine possession charges apart from the DUI offenses. The State was even nudged by the district court's indication that she was disinclined to grant the motion, but ultimately would defer to the assistant district attorney's presentation because he was presumably familiar with his case. [TR 4/15/16 11:10:00 – 11:10:30]

Mr. Heyser's motion to dismiss gave the State the opportunity to present its case in briefing and at oral argument, and gave the district court an opportunity to make an informed ruling on the State's opposition to the motion, if any. In briefing and at oral argument, the State conceded the applicability of Rule 5-203 to the facts. [RP 48; TR 4/15/16] The district court reluctantly dismissed the case based in large part on the State's concession at oral argument. [TR 4/15/16 11:10:00 –

11:10:30] The State should not now be heard to argue that its concession was ineffectual or non-binding.

ISSUE 2: The State waived any objection to the district court's dismissal when it invited any error by the district court and conceded the issue it now raises on appeal; the State is judicially estopped from claiming error on appeal.

Standard of Review:

To the extent the State now implicitly insists that *de novo* review of the application of Rule 5-203 [BIC 6-7] excuses the State's concession of the argument it presents on appeal, the State confuses the concepts of waiver and *de novo* review. *Matter of Kroner*, 953 F.2d 317, 319 (7th Cir.1992). As the United States Court of Appeals for the Seventh Circuit aptly explained:

> The [preservation] doctrine merely determines which arguments are properly preserved for consideration on appeal[,] while the *de novo* standard of review refers to the appellate court's fresh look at the way the trial court applied the law to the facts of the case. The law is clear, an issue not preserved for appeal is simply not reviewable regardless of the standard of review.

Kroner, 953 F.2d at 319. Stated differently, "[t]he fact that [a cause] is subject to *de novo* review does not mean that the rule [of preservation] applies with any less force than it does in other cases." *In re Marriage of Westendorf*, 165 Or.App. 175, 178, 996 P.2d 523, 525 (2000); *see also Fischer v. Fischer*, 348 S.W.3d 582, 590 (Ky. 2011) (holding that *de novo* review does not excuse a party's failure to

preserve the argument raised on appeal); *State v. Garrett*, No. 200-OhioCA-115, June 1, 2001 (Ohio App.2001) (unpublished) (appellate courts may review an issue *de novo*, but any error that the trial court committed when it ruled on a question must be preserved for appellate review."). Consequently, regardless of whether appellate review is for an abuse of discretion, substantial evidence, or *de novo*, a party seeking to have a district court's decision overturned must have properly made, briefed and preserved the argument upon which it seeks relief on appeal.

Here, the State did not argue below that Rule 5-203 should be construed as the State now insists. Quite the contrary, the State concedes on appeal that it conceded the issue before the district court. Therefore, arguments that Rule 5-203 was improperly applied to the instant case were waived by the State's failure to preserve, and are not properly before this Court for review. This Court should affirm the district court's dismissal based on the State's lack of preservation.

Preservation:

Generally, an appellee has no duty to preserve issues for review and may advance any ground for affirmance on appeal. *Todisco*, 2000-NMCA-064, ¶ 11. As appellee, Mr. Heyser has no duty to preserve an issue; he is not claiming that the trial court erred.

Further, it is established law that New Mexico appellate courts will affirm a district court's decision if it is right for any reason, so long as the circumstances do not make it unfair to the appellant to affirm. *State v. Gallegos*, 2007–NMSC–007, ¶ 26, 141 N.M. 185, 152 P.3d 828; *see State v. Vargas*, 2008–NMSC–019, ¶ 8, 143 N.M. 692, 181 P.3d 684 ("Under the 'right for any reason' doctrine, 'we may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below); *Cordova v. World Fin. Corp. of NM*, 2009-NMSC-021, 146 N.M. 256, 262, 208 P.3d 901, 907 (same).

Argument and Authority:

A. The State Invited Any Error By the District Court.

Allowing a party "to invite error and to subsequently complain about that very error would subvert the orderly and equitable administration of justice." *State v. Collins*, 2007–NMCA–106, ¶ 27, 142 N.M. 419; *Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, L.L.C.*, 2012-NMSC-004, ¶ 34, 274 P.3d 97. In briefing to the district court, in oral argument before the district court, and in the face of the district court's clear reluctance to grant the motion to dismiss, the State repeatedly insisted that the facts brought the case within the ambit of Rule 5-203. Because the State itself conceded the applicability and consequence of Rule 5-203,

this Court should not consider the State's claim of error on appeal. *See State v. Urioste*, 2011–NMCA–121, ¶ 44, 267 P.3d 820 (stating that the "invited error provides no grounds for appeal"). This Court has asserted before that to allow a criminal defendant to invite error and then complain about that very error would "subvert the orderly and equitable administration of justice." *State v. Martinez*, 2008-NMCA-052, ¶ 14, 143 N.M. 773. The doctrine should apply with no less vigor to the State than to a criminal defendant. *See State v. Gonzales*, 2011–NMCA–007, ¶ 19, 149 N.M. 226 (stating that "this Court has no duty to review an argument that is not adequately developed").

The State agreed that Rule 5-203 applied to the instant case, despite being given the opportunity by the district court to reconsider that concession. In *State v. Foxen*, 2001–NMCA–061, ¶ 12, 130 N.M. 670, this Court held that they would "not withhold review for fundamental error" where defense counsel submitted faulty jury instructions as a result of oversight or neglect, "particularly in light of the well-established principle that adequate instruction on self-defense is the duty of the courts where it finds support in the evidence." In *State v. Ortega*, 2014–NMSC–017, ¶ 33, 327 P.3d 1076, the Supreme Court distinguished *Foxen* by pointing out that *Foxen* was about oversight and neglect, while the defendant in *Ortega* invited the erroneous jury instruction by objecting to a proposed

modification and by objecting to reinstruct the jury after the jury expressed confusion. *See Ortega*, 2014–NMSC–017, ¶¶ 34–35, 327 P.3d 1076.

Here, the State invited any error when counsel for the Stated participated in briefing on Mr. Heyser's motion to dismiss, and continued to concede the main premise even after the district court indicated she was inclined to deny the motion. The State's attorney repeatedly affirmed that Rule 5-203 applied to this matter – in briefing and before the district court. Accordingly, having invited any error in the dismissal of the charges in accordance with Mr. Heyser's motion, the State cannot now appeal and invite this Court to disregard the State's concession to remedy what the State now argues was a strategic mistake.

B. The State Waived the Argument it Makes Now on Appeal.

The record in this case clearly demonstrates that the State knowingly, intelligently, and voluntarily waived its right to proceed with the cocaine charges against Mr. Heyser in district court, where it had previously prosecuted and obtained a conviction of Mr. Heyser on the related DUI charges in magistrate court. The State repeatedly conceded that Rule 5-203 was applicable, even in the face of the district court's explaining its reluctance to grant the motion. Both the district court and the State knew the consequences of violation of Rule 5-203 was that the second prosecution arising out of the same transaction or set of facts could

not proceed. *State v. Gonzales*, 2013-NMSC-016, ¶¶ 30-32, 301 P.3d 380 (holding a bar against a subsequent prosecution on charges that should have been joined under Rule 5–203(A) is the only effective remedy to enforce the mandatory nature of the rule). This Court may presume that the attorney for the State realized and understood the difference of opinion and conceded to dismissal despite this knowledge. *See State v. Tipton*, 78 N.M. 600, 602, 435 P.2d 430, 432 (1967) (finding presumption that defendant represented by counsel was fully informed when he entered guilty plea). There was an "intentional relinquishment or abandonment of a known right or privilege" here, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), sufficient to constitute a waiver of the State's position now on appeal.

Although the existence of waiver is generally a question of fact for the district court to determine, *see State v. Bishop*, 108 N.M. 105, 109, 766 P.2d 1339, 1343 (Ct.App.1988), in this case, the State's waiver arguments are found in the Record Proper and continued into oral argument, in the face of the district court's statement that she was disinclined to grant the motion to dismiss. [RP 48; TR 4/15/16 11:10:00 – 11:10:30]. When "the evidence as to waiver is a written instrument, its construction and interpretation may be decided as a question of law." *Id.* Because a determination of the waiver issue herein does not depend on facts not presented below, but rests on the interpretation of the State's written

instruments and its documented representations to the district court, this Court may find that the State waived the arguments it now makes for the first time on appeal.

C. The State is Judicially Estopped from Changing Its Position on Appeal.

Under New Mexico's our "right-for-any-reason" doctrine, this Court may affirm the district court on the basis of judicial estoppel. *Keith v. ManorCare, Inc.*, 2009-NMCA-119, ¶ 35, 147 N.M. 209. "Judicial estoppel is a doctrine that prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position." *Rodriguez v. La Mesilla Constr. Co.*, 1997–NMCA–062, ¶ 20, 123 N.M. 489, *and see Reed v. State*, 14 S.W.3d 438 (Tex. App. Houston 14th Dist. 2000) (holding government was judicially estopped to assert that no bona fide doubt as to the defendant's competency to stand trial existed when it had previously agreed with the defense to have the defendant examined for his competency); *People v. Lawlor*, 683 N.E.2d 214 (2d Dist. 1997) (doctrine of judicial estoppel prevented the state from asserting on appeal that the seizure order was a search warrant). The purpose of the rule is to stop a party from "playing fast and loose with the court during the course of litigation." *Citizens Bank v. C & H Constr. & Paving Co.*, 89 N.M. 360, 366, 552 P.2d 796, 802 (Ct.App.1976).

Three elements must be met for judicial estoppel to apply. First, the party against whom the doctrine is to be used must have successfully assumed a position during the course of litigation. *Rodriguez*, 1997–NMCA–062, ¶ 20. Second, that first position must be "necessarily inconsistent" with the position the party takes later in the proceedings. *Johnson v. Aztec Well Servicing Co.*, 117 N.M. 697, 701, 875 P.2d 1128, 1132 (Ct.App.1994). Finally, while not an absolute requirement, judicial estoppel will be "especially" applicable when the party's change of position "prejudices a party who had acquiesced in the former position." *Rodriguez*, 1997–NMCA–062, ¶ 20.

Here, while the district attorney was not the proponent of the motion to dismiss, the district attorney successfully took the position that Rule 5-203 applied to the instant case and required dismissal. *Id.* Why the assistant district attorney may have conceded the premise is not a part of the record, as the State never filed a motion to set aside the dismissal or moved for rehearing in the district court. As suggested by the district court at oral argument, the district attorney knew the case and may have been privy to facts that were not brought to light, but were nevertheless dispositive, such that dismissal was appropriate. The district attorney may have considered the case to be unimportant in light of the conviction already obtained in magistrate court, and therefore believed the case was not worth

pursuing, but was reluctant to dismiss with prejudice due to political or other factors obtaining in the district attorney's office.

In any event, despite being given the opportunity to rethink and reconsider his position at oral argument, and even despite being informed of the district court's reluctance to grant the motion, the district attorney successfully conceded that Rule 5-203 barred the instant prosecution. The case was duly dismissed, without objection from the district attorney, and without any subsequent motion to reconsider or to clarify. The State successfully took the position that Rule 5-203 barred the instant prosecution of Mr. Heyser, thus satisfying the first prong of the "judicial estoppel" analysis.

Second, the State's position on appeal is necessarily and absolutely inconsistent with its position below. *Johnson*, 117 N.M. at 701, 875 P.2d at 1132. Below, the State repeatedly conceded the applicability of Rule 5-203, and further conceded that dismissal was the sole remedy. [TR 4/15/16 11:10:00 – 11:10:30] Now on appeal, the State insists that its previous concession was in error, invites the Court of Appeals to disregard the concession and the State's failure to preserve error, and asks for reversal of the dismissal, alleging error in precisely the actions urged by the district attorney upon the district court.

The preservation prong of the analysis is not dispositive (*Rodriguez*, 1997–NMCA–062, ¶ 20), but the delay in prosecution at this point would prejudice Mr. Heyser by requiring him to mount a defense with stale evidence and with fewer resources to accomplish that defense. In considering the speedy trial analysis, in *State v. Spearman*, 2012-NMSC-023, ¶ 34, 283 P.3d 272, 279, the Supreme Court adopted the reasoning of the Supreme Court in *Barker v. Wingo*, which identified interests that the right to a speedy trial protects, *inter alia*: ". . . to minimize anxiety and concern of the accused; and . . . to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. 514, 530-32 (1972). For purposes of this analysis, District Court should analyze prejudice within this framework. *Spearman,* 2012-NMSC-023, ¶ 34. To the extent that the passage of time has caused Mr. Heyser anxiety or concern, or may result in an impairment to his defense due to lost evidence or the fading memories of witnesses, Mr. Heyser will be prejudiced.

For the foregoing reasons, and in line with the analysis set forth above, the State is judicially estopped from changing its position on appeal and arguing, contrary to its previous position, that Rule 5-203 does not bar prosecution of Mr. Heyser on the charges herein.

ISSUE 3: Any Prosecution of Mr. Heiser for Possession of Cocaine Would Violate His Due Process and Double Jeopardy Rights; It is Unnecessary to Limit or Excuse Application of Rule 5-203 NMRA.

Standard of Review:

A double jeopardy challenge is a constitutional question of law reviewed *de novo*. *State v. Swick*, 2012–NMSC–018, ¶ 10, 279 P.3d 747; *see also State v. Gonzales*, 2013-NMSC-016, ¶ 26, 301 P.3d 380 (compulsory joinder and double jeopardy are closely related—two sides of the same coin).

Preservation:

Generally, an appellee has no duty to preserve issues for review and may advance any ground for affirmance on appeal. *Todisco*, 2000-NMCA-064, ¶ 11. As the appellee, Mr. Heyser had no duty to preserve an issue; he is not claiming that the trial court erred.

Argument and Authority:

As set forth above, the State waived any argument that Rule 5-203 does not apply to this case. Rule 5-203(A) NMRA provides:

> Joinder of Offenses. Two or more offenses shall be joined in one complaint, indictment or information with each offense stated in a separate count, if the offenses, whether felonies or misdemeanors or both:

> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

The compulsory joinder rule provides a check upon the otherwise unlimited power of the State to pursue successive prosecutions. The parameters of Rule 5-203 have been addressed by our Supreme Court in *State v. Gonzales*, 2013-NMSC-016, 301 P.3d 380 (holding application of the compulsory joinder rule should come as no surprise to the State). There is no need to apply additional limitations to excuse joinder, and doing so in this case would encourage the State to ignore the provisions of the rule, knowing that enforcement at the district court level is likely to be reversed on appeal.

The State's argument that Rule 5-203 is "overbroad," and its affects as to the State should be "ameliorated" is without merit. [BIC 23] In *Gonzales*, 2013-NMSC-016, ¶ 25, our Supreme Court held that Rule 5-203 is mandatory; it "is not a discretionary or permissive rule; it demands that the State join certain charges." *Id., citing State v. Gallegos*, 2007–NMSC–007, ¶ 10, 141 N.M. 185; *accord State v. Paiz*, 2011–NMSC–008, ¶ 10, 149 N.M. 412.

This case involved several different alleged offenses, all of which were based upon the same conduct or series of acts. Mr. Heyser was stopped, and

subsequently arrested and charged, on suspicion of driving while intoxicated – an offense involving the misuse of drugs or alcohol while operating a motor vehicle. The cocaine in Mr. Heyser's boot was discovered purely and solely as a result of the DUI stop; the two crimes of DUI and cocaine possession shared a temporal origin, in that they arose within a short period of uninterrupted time and in a limited locale, and they shared a common means or motive (possession and abuse of substances in circumstances that violated the law). *See Hamer v. State*, 771 N.E.2d 109, 111 (Ind. Ct. App. 2002) (noting "[u]nquestionably, Hamer's possession of cocaine charge arose out of the same conduct as his reckless possession of paraphernalia and public intoxication charges.").

In *Honeycutt v. State*, 974 N.E.2d 525 (Ind. Ct. App. 2012), the defendant was arrested and a few days later pleaded guilty to misdemeanor counts of possession of marijuana and a traffic infraction; he was sentenced for these crimes. *Id.* At 527. When the results of a blood draw came back positive for marijuana a few days later, the prosecution added two more charges under the same cause number: Class A misdemeanor operating while intoxicated and Class C misdemeanor operating a vehicle with a Schedule I or II controlled substance in his body. *Id.* The *Honeycutt* defendant filed a motion to dismiss these charges on grounds that they were barred by Indiana's Successive Prosecution Statute because

all four charges were connected by a single scheme or plan and therefore should have been charged together. *Id.* The trial court denied his motion, and Honeycutt was found guilty of the additional charges. *Id.*

The Indiana appellate court found the trial court had abused its discretion in denying Honeycutt's motion to dismiss, and reversed the trial court, noting: "[w]here the State chooses to bring multiple prosecutions for a series of acts constituting parts of a single criminal transaction, it does so at its own peril." *Id.* At 529, *citing Williams v. State*, 762 N.E.2d 1216, 1219 (Ind. 2002). As in the instant case, the State in *Honeycutt* conceded that all four charges were connected by a scheme or plan. *Id.* At 529. The State argued that was irrelevant because the State did not have probable cause to bring the operating charges against Honeycutt at the same time it charged him with possession of marijuana and the traffic infraction. Id. The *Honeycutt* court found there was probable cause to charge that defendant with the operating offenses at the same time he was charged with possession. *Id.*

Contrary to the State's argument [BIC 24-28], this is not a case in which the a "jurisdictional exception" would be good policy, and such an exception would conflict with the laws that already give the State an advantage at choosing the forum in which to proceed. At any time prior to trial, the State may dismiss a case without prejudice by filing a *nolle prosequi*. Rule 6–506A(A) NMRA. Because the

district court has concurrent original jurisdiction over misdemeanor cases, *see* N.M. Const., Art. VI, § 13, and the defendant has no right to have a case heard in magistrate court, the State has broad discretion to reinstate charges in the district court by filing an indictment or information, even after obtaining a plea in magistrate court but before sentencing. Rule 6-506(A)(1); *State v. Heinsen*, 2005-NMSC-035, ¶ 23, 138 N.M. 441.

The charge the State sought to bring below, possession of a controlled substance, was not unknown or unknowable at the time the State proceeded in magistrate court on the DUI charges. The State emphasizes that two different assistant district attorneys prosecuted the charges – one in magistrate court and one in district court. [BIC 4-5; see also PR 48] This is not relevant, much less dispositive. The charges against Mr. Heyser arose out of the same chargeable incident, the same police department investigated, and the charges against Mr. Heyser were brought by the same district attorney's office. This Court should reject the State's position that two district attorneys from the same office regarding the same defendant should not be charged with knowledge of the case being developed by their own office.

Joinder "is designed to protect a defendant's double-jeopardy interests where the [state] initially declines to prosecute him for the present offense, electing to

proceed on different charges stemming from the same criminal episode." *Gonzales*, 2013-NMSC-016, ¶ 26, *citing Commonwealth v. Laird*, 988 A.2d 618, 628 (Pa. 2010). By raising double jeopardy concerns, then, Mr. Heyser necessarily implicated this Court's joinder rule. The Supreme Court in *Gonzales, supra*, agreed with the following statement of the Supreme Court of Pennsylvania,

> The purpose of [a] compulsory joinder statute, viewed as a whole, is twofold: (1) to protect a defendant from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode; and (2) to ensure finality without unduly burdening the judicial process by repetitious litigation.

Gonzales, 2013-NMSC-016, ¶ 26, *citing Commonwealth v. Fithian*, 599 Pa. 180, 961 A.2d 66, 75–76 (2008).

Finally, there is no good grounds to apply a bureaucratic or administrative exception to excuse the State's failure to comply with Rule 5-203. [BIC 28] For purposes of Rule 5-203, where a prosecution stems from actions allegedly taken in one judicial district, assistant district attorneys in a judicial district must be presumed to know all of the charges that are or could be brought against a criminal defendant one district attorney's office. *Smith v. Sec'y of New Mexico Dept. of Corr.*, 50 F.3d 801, 825 (10th Cir. 1995) (Torrance County's knowledge from a criminal investigation could be imputed to Bernalillo County's district attorney's office investigation because the Bernalillo County district attorney's office had

actual knowledge of Torrance County's investigation, and because both entities were "two arms of the State."); *see also Corr v. District Court*, 661 P.2d 668, 672-73 (Colo.1983) (The knowledge and actions of deputy district attorneys are imputed to the district attorney); *Jeffrey v. Dist. Court In & For Eighth Judicial Dist.*, 626 P.2d 631, 639 (Colo. 1981) (Deputy district attorneys have all the powers of the district attorney and matters within the knowledge of those deputies are imputed to the district attorney); *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (assistant U.S. attorney responsible to know of promises given informant by another assistant U.S. attorney); *Nicely v. State*, 699 S.E.2d 774, 778 (Ga. 2010) (The actual knowledge of a solicitor-general or a member of his office, who initiated a case by filing an accusation, was imputed to another attorney and member of the solicitor's office who accepted the defendant's plea); *see also Smith, supra*, 50 F.3d at 824 (holding, "[for] purposes of *Brady*, "[k]nowledge by police or investigators is ... imputed to the prosecution.""). By the time Mr. Heyser pleaded guilty in magistrate court, the State had either actual or constructive knowledge of the presence of cocaine in the vehicle when he was stopped and should not be excused from acting on the charging implications of that knowledge with all justiciable dispatch.

The State had the opportunity and the duty to join all of the offenses brought to light by the traffic stop in the magistrate court, or by filing a *nolle prosequi* in magistrate court, and then obtaining a district court indictment on all of the charges arising out of Mr. Heyser's alleged conduct in illegally operating the motor vehicle in question. The State elected to proceed in magistrate court on the DUI charges, obtained a plea (apparently without first ascertaining the content of its own files regarding Mr. Heyser) and then improperly attempted to obtain a second, felony conviction arising out of the stop and possession in the subsequent indictment dismissed below. As argued *supra*, the State was forced to concede that this was improper and violated the mandatory provisions of Rule 5-203. For all of the procedural and substantive legal reasons stated herein, the district court's decision dismissing the charges against Mr. Heyser should be affirmed.

Statement in Favor of Oral Argument:

This case involves constitutional and procedural considerations that are not made clear by existing New Mexico law. The Court of Appeals may find that oral argument is of assistance in making a decision on the merits of either the procedural or substantive grounds argued herein.

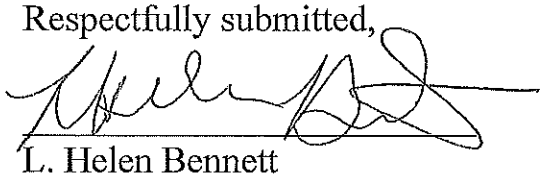
CONCLUSION:

Appellee Christopher Heyser asks that this Court issue a decision:

1. Affirming the district court's order dismissing the charges against Mr. Heyser; and

2. Granting such other and further relief as the Court deems proper.

Respectfully submitted,



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I certify that a true copy of the foregoing was mailed via first class mail, postage prepaid, this 15th day of March 2017 as follows:

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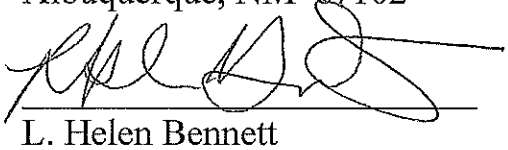

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