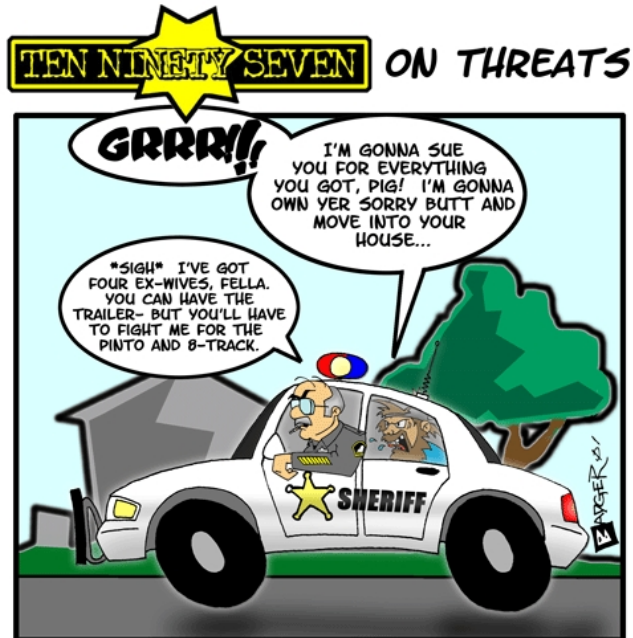


# Win in the Streets, Win in the Courts

*What you need to know about the latest New Mexico case law, statute updates, and lawsuits.*



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Additional legal update resources are available for download from the New Mexico Law Enforcement Academy website: <http://www.dps.nm.org/training>

*Policing in the 21<sup>st</sup> Century Conference*  
*December 11, 2008*

# **LEGAL UPDATE IN NEW MEXICO - 2008**

**Win on the street, Win in Court: What you need to know about the latest New Mexico Case law, Statute Updates and Lawsuits**

## **INTRODUCTION**

We will be covering a number of new cases and trends, including the following:

1. Battery on Peace Officer - it's a felony!
2. Guns & off-duty officers in liquor establishments.
3. Refusal to Obey – some call it contempt of cop.
4. Stopping people, stopping vehicles – new cases.
5. Search warrants – how long do I have to wait before smashing the door in?
6. Open-mike . . . your chance to stump the legal wizard!

We also will discuss a number of cases where officers made mistakes or “crossed the line.” The idea is that we can learn from the mistakes of others.

## **BATTERY ON A PEACE OFFICER**

NMSA 1978, Section 30-22-24. Battery upon peace officer.

Battery upon a peace officer is the unlawful, intentional touching or application of force to the person of a peace officer while he or she is in the lawful discharge of his or her duties, when done in a rude, insolent or angry manner.

Simple battery has the same elements as battery upon a peace officer. The only difference is the penalty: it's a petty misdemeanor. For the same crime, if the victim is a peace officer, the penalty is a fourth degree felony.

Officers who are victims of a battery become upset when seeing the charge of battery upon a peace officer reduced to a simple battery. They are told that their injury “comes with the territory,” and is part of being an officer.

- This is not true. Where does the confusion come from?

## VERBAL ABUSE v. PHYSICAL ABUSE OF OFFICERS

### VERBAL ABUSE

- What do court decisions say about verbal abuse of officers? The say that officers are expected to put up with verbal abuse. An example is the disorderly conduct statute. It prohibits conduct which “tends to disturb the peace.” The courts have held that the statute does not apply to officers. It is not a crime for someone to verbally abuse an officer.

### PHYSICAL ABUSE

The Courts, however, have a different view when it comes to physical abuse or battery upon a peace officer. Consider the following cases and how the courts have ruled:

#### Battery – Peace Officer

Defendant was arrested for DWI and placed in the backseat of a police car. He leaned forward and spit on the officer. Is this sufficient for battery on a peace officer? State v. Jones (2000).

#### Battery – Peace Officer

Farmington police officer entered a residence in response to a domestic violence call. Child committed a battery on the police officer but argued evidence should be suppressed since the officer didn't have a warrant, consent, or exigent circumstances.

Assuming the entry was illegal, should evidence of the battery be admissible? State v. Travison B. (2006).

### Battery – Resisting

Three officers in Lordsburg were approached by Defendant, yelling and shaking his fists. He was placed under arrest but tried to pull his arms away and struggled to loosen their grip. When they tried to put handcuffs on him, he kicked one of the officers. What charge(s)? State v. Ford (2007).

### Battery-Resist (two counts)

A Las Cruces Police Officer saw a vehicle speeding. The officer stopped the vehicle but the defendant took off running. Suddenly, the Defendant turned around and punched the officer twice in the face. Defendant ran away, the officer in hot pursuit.

The Defendant stopped again. He turned, facing the officer in an aggressive manner. This time the officer was ready, wacked him with a baton, and he was arrested. We have resisting. Do we also have battery on peace officer? State v. Lopez (2008).

### News item: FBI ranks NM second in attacks against cops

New Mexico was number two in the country for attacks on police officers in 2006. Louisiana was number one. The Taos News, December 6-12, 2007.

**Lesson learned:** When the charge of battery upon peace officer is repeatedly reduced to simple battery, attacks on officers increase.

**Lesson learned:** Officers have to put up with verbal abuse but not physical abuse. Verbal abuse, yes; physical abuse, no.

**Lesson learned:** It must be a “meaningful challenge” to authority. Be careful about treating every physical contact as a felony.

## DISORDERLY CONDUCT

Verbal abuse only applies to civilians. Let's make sure we know what it is.

Disorderly conduct consists of engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which "tends to disturb the peace." NMSA 1978, Section 30-20-1.

### Disorderly Conduct

Officer in Hobbs saw driver go through a red light. He was apprehended several minutes later in his backyard. Defendant yelled at the officer, "This is not a f----- crack house. Get out of my f----- yard." Workers installing a swimming pool in defendant's backyard seemed amused by what was going on.

No disorderly conduct against the officer – he's an officer. Nor was there disorderly conduct against the workers. It must be conduct which "tends to disturb the peace." Workers were amused, not disturbed. State v. Hawkins (1999).

### News item: Las Cruces Must Pay \$255k to person arrested

A \$255,000 settlement has been reached for a Las Cruces man arrested after he used a word (sounds like "witch") when another driver took his parking space at Target.

He was looking for a parking space when he spotted a vehicle pulling out of a parking space. Before he could pull into the space, an unidentified woman whipped into the space and parked. A police officer on duty and in the parking lot overheard him use the profanity. Criminal charge of disorderly conduct was dismissed. Albuquerque Journal – North, October 5, 2008.

**Lesson learned:** It must be conduct which "tends to disturb the peace."

## **FIREARMS IN LICENSED LIQUOR ESTABLISHMENTS**

Only certain categories of people can carry a firearm into a licensed liquor establishment. In 2007 two new categories were added. NMSA 1978, Section 30-7-3:

1) A person with a valid concealed handgun license provided that the licensed establishment does not sell alcoholic beverages for consumption on the premises.

- The reason for this is that many people are confused by the meaning of “licensed liquor establishment.” They think it means a saloon or bar which serves drinks.
- Also, a store may sell food in one part of the store and alcohol in another. The person walking in the food part of the store would be guilty of unlawfully carrying of a firearm in a licensed liquor establishment.

2) A certified law enforcement following the policies of his or her agency. This refers to off-duty officers. Why were they added?

- It was felt that if a person with a concealed carry permit could walk into a licensed liquor establishment (where alcohol is consumed off the premises), then so should an off-duty police officer.

**Lesson learned:** Check your policy before going into a licensed liquor establishment when off-duty.

## **REFUSAL TO OBEY OR RESISTING**

NMSA 1978, Section 30-22-1:

Resisting or abusing any . . . peace officer in the lawful discharge of his or her duties.

Note: The state statute does not use the word “obey.” Some local ordinances include the word “obey” which gives an officer more discretion to cite or make an arrest.

Some lawyers and new media call it “Contempt of Cop”

Most state statutes are clear and easy to follow: murder, burglary, robbery, etc. But Refusal to Obey or Resisting can be a gray area. What is a lawful order? When misused, lawyers and the news media call this “contempt of cop.”

We’re going to discuss a few cases where the statute may have been misused. There’s a reason we need to know about these cases. If one officer makes a mistake, that’s unfortunate. But if other officers are never made aware of that mistake, and they in turn commit that mistake, that’s even more unfortunate.

News item: APD Fires Officer in Cameraman Attack

A cameraman was standing on a street corner in Albuquerque. An APD officer asked him to leave. The cameraman asked for his name and badge number. The officer pushed the cameraman (this is all on camera) and, using a local ordinance, arrested him for refusal to obey.

The Metro Judge dismissed the charge. He noted that people have a right to be on a public street corner and that the order given to leave was not a lawful order. Albuquerque Journal, July 2, 2008.

- APD drafted a new policy which requires that officers contact a supervisor or public information officer – not arrest – if they believe a reporter or photographer is disobeying a lawful order. Albuquerque Journal, September 14, 2008.

**Lesson learned:** The media has a right to be where the public has access, such as a public street.

**Lesson learned:** Need to make sure an order is lawful if charging refusal to obey or resisting.

News item: Officer Punished in Seat-Belt Arrest

Under New Mexico law, a motorist doesn't have to wear a seat belt if he or she has a doctor's note. NMSA 1978, Section 66-7-372. An APD officer cited a 79-year-old man for not wearing his seat belt despite having a doctor's note. When the 79-year-old man allegedly threw a pen at the officer, he was arrested for battery. Albuquerque Journal, August 30, 2008.

- What would you have done in this case?

**Lesson learned:** Know the New Mexico seat belt law.

News item: He's 80, She's 69 – and They're Under Arrest

APD officer called to dog being inside vehicle on hot summer day. Owners argued with officer. Male owner approached officer and "got into the officer's face" and asked for her name and badge number. Officer said she stepped back because of fear of immediate battery. He was arrested for refusal to obey for not staying in his vehicle.

Male owner had a heart attack and was taken to a hospital. While there, Police told wife (an amputee) her husband couldn't leave their custody. She took him into the waiting room to find a seat. When she did this, she was arrested for refusal to obey. Albuquerque Journal, August 31, 2008.

News item: Brother, Sister Face Charges after traffic stop escalates

Their vehicle was pulled over for not having headlights on. The officer asked the passenger, Deborah Baca, to put her cigarette out. She went to take one last drag of the cigarette. The officer said (according to them), "Don't you dare."

The officer (in the report) said he told them cigarettes can sometimes be used as weapons. Note: in New Mexico a person can have weapons in their vehicle, including firearms. NMSA 1978, Section 30-7-2.

She put out the cigarette. She and her brother began yelling at the officer.

The situation escalated and she went to jail and her brother spent the weekend in the hospital.

- By all accounts, the main thing that escalated this incident was a cigarette. She was charged with refusal to obey. Albuquerque Journal, October 29, 2008.
- How would you have handled this situation?

News Item: You're Under Arrest for Contempt of Cop.

In 2007, Metro judges dismissed 70 percent of the refusing to obey charges in 517 arrests. Albuquerque Journal, June 29, 2008.

News Item: Chief Reins in 'Contempt of Cop' Arrests

Albuquerque Police announced a new policy instructing officers not to charge someone with "refusing to obey" unless that person is already being arrested for another crime or is physically keeping the officer from carrying out duties.

It also instructs officers not to arrest someone because of something the person said with the exception of "fighting" words that threaten the officer. Albuquerque Journal, November 25, 2008.

**RECOMMENDATION:**

Review reports in your agency where refusal to obey or obstruction of justice is charged. We need to make sure that we – through lack of training – are not abusing this.

**STOPPING PEOPLE, STOPPING VEHICLES**

### Detaining a person

- Need reasonable suspicion to detain a person.

### News item: State Settles Suit over Search of Navajo Team

Nine Navajo high school basketball players sued State Police officers for unlawful detention and race profiling. They will share a \$95,000 settlement. The lawsuit was filed by the ACLU.

Albuquerque Journal, November 25, 2008.

### News item: Woman, City Settle False Arrest Suit

She got her license at MVD and wrote a check for \$208 at Wal-Mart. The clerk noted her driver's license was missing a hologram and called police. An Albuquerque Police officer cuffed her and put her in the loss prevention room for 45 minutes. When the investigation revealed the license was OK, she was released and told it would be written up as an incident.

A federal jury found in her favor and the City of Albuquerque will pay \$100,000. The Judge said "a generalized suspicion that a person is attempting to use a fraudulent check or driver's license . . . is not enough to justify the immediate intrusive use of handcuffs." Albuquerque Journal, June 26, 2006.

**Lesson learned:** We don't handcuff everyone we detain.

Be prepared to articulate – give reasons – why a person who was detained was handcuffed.

### Stop & Frisk

- The legal standard to stop& frisk someone is the belief that the person is armed and dangerous.
- Stop & Frisk is to look for weapons. It is not to look for drugs.

- If drugs are found during a stop & frisk, however, they will be admissible.

## **VEHICLE STOPS**

This is an area where lawyers seek to challenge law enforcement before trial. If evidence is suppressed in a motion hearing, the case is over. We will now look at the law and vehicle stops from the following angles

- Vehicle stop – using pretext to stop vehicle.
- Vehicle stop – questions of driver.
- Vehicle stop - requesting ID of passengers.
- Vehicle stop – what is needed to detain.
- Vehicle stop- seizing evidence in plain view.

### **VEHICLE STOP - USING PRETEXT TO STOP VEHICLE**

News item: Court Holds Feds to N.M. Evidence Law

Federal agents must follow state law if they want to use evidence in a state court prosecution. The case stemmed from a stop of a vehicle 60 miles north of the border. The agent said he had a “hunch” that something was “suspicious.” Albuquerque Journal, May 4, 2001.

**Lesson learned:** Need reasonable suspicion to stop a vehicle.

- Vehicle stop must be based upon reasonable suspicion. A vehicle cannot be stopped for a pretext (seatbelt violation) in order to look for drugs. State v. Ochoa (2008).

### **VEHICLE STOP - QUESTIONS OF DRIVER**

A number of cases in recent years focus on what kind of questions an officer asks a citizen. A key issue is whether the questions are related to the reasons for the stop.

#### Vehicle stop - scope

A state police officer stopped a car on the Deming-Hatch bypass for improper display of a temporary tag. He noticed several things: a cell phone, a two-ton car jack, an overnight bag, and the odor of gasoline. Driver was very nervous. Driver and passenger had conflicting stories of where they had been and where they were going. Officer asked if there were drugs in the car. Consent was given and numerous bags of marijuana were recovered. Were these questions appropriate? State v. Duran (2005).

#### Vehicle stop – expand

A Ruidoso Downs police officer stopped a vehicle involved in a possible forgery. A passenger in the front seat was a suspect. Drugs were found on the passenger.

The officer asked the driver if “there was anything in the vehicle that I needed to know about” and Driver said no. Officer asked if he could search the vehicle. Consent was given and drugs found. State v. Funderburg (2008).

- Were these additional questions (about drugs) appropriate?

**Lessen Learned:** Officers need to articulate why a driver is being questioned about drugs in a vehicle.

### **VEHICLE STOP - REQUESTING ID OF PASSENGER**

There have been several cases about requesting ID of passengers (to check for warrants) in recent years. What do you think happened in the following cases?

#### Vehicle stop – Passenger

Shortly after midnight, in Chaves County, an officer stopped a vehicle for a faulty license plate light. Asking for ID from the driver was proper but what about the passenger? There was no suspicion that the passenger was involved in criminal activity (or armed or dangerous) but officer asked him for ID. After doing a warrants check, he learned that the passenger had a warrant. Upon arrest, and while doing a pat down, the officer found meth and drug paraphernalia. Good case or not? State v. Affsprung (2004).

### Individualized Suspicion

It was late at night when a Ruidoso police officer saw a car go into a parking lot of a closed business. There were four occupants, including Patterson who was sitting in the front passenger seat. There had been several burglaries in the neighborhood. The officer asked for ID of all occupants to see “who he was dealing with.” As Patterson was getting out of the car, he was observed hiding drugs. State v. Patterson (2006).

In San Juan County an officer observed a car pull into a parking lot about 150 yards before a DWI roadblock. There were three occupants in the car, including Swanson who was in the front passenger seat. Each person was asked for ID and patted down. On Swanson the officer found drugs. State v. Swanson (2006).  
What’s going to happen in these cases?

### Conceal ID – Obstructing

Roswell police officer was advised to look into situation where two males were parked in a car in front of a house late at night. Driver gave his ID. Passenger gave his name but refused to produce ID. Another officer came by and said passenger lived nearby. Can officer charge passenger with obstructing an officer? City of Roswell v. Hudson (2007).

### Vehicle Stop – Passenger ID

Albuquerque Police Officer made a routine traffic stop but the driver became frustrated when asked for registration and insurance. The passenger, sitting in the front seat, stated it was his vehicle. The officer asked the owner-passenger for ID, did a computer check, and found he had a warrant. An inventory search resulted in the seizure of cocaine. State v. Rubio (2006)

- Was it appropriate to do a warrant check on the passenger-owner?

**Lesson learned:** What is the rule on asking passengers for ID?

Vehicle stop - Detention

News item: Activist, FBI settle lawsuit

His name was on the FBI terrorist watch list. Stopped for speeding near Pojoaque, he was put in a police car and held for an hour while police conferred with the FBI. He argued he was held without probable cause or reasonable suspicion that he had committed a crime or was a terrorist. A Chicano activist, he was cleared in the 1980's of mailing pipe bombs. He is an attorney living in Colorado.

Defendants included the FBI, a state police officer and a Pojoaque Pueblo police officer. Albuquerque Journal- North, July 6, 2007.

News Item: Attorney to get \$106,500 from settlement

The defendants have agreed to pay \$106,500 to a Colorado attorney who was illegally detained in New Mexico, Colorado and Illinois because his name appeared on an FBI terrorist-watch list. Albuquerque Journal – North, July 31, 2008.

**Lesson learned:** What is the legal standard to detain someone?

**VEHICLE STOP - SEIZING EVIDENCE IN PLAIN VIEW**

If an officer sees contraband in a house, probable cause and exigent circumstances are required to enter the house. What if the officer sees contraband in a vehicle? Does the same standard apply?

Farmington police officers stopped Defendant for a traffic violation. One officer noticed a plastic baggie in the gap between the two front seats and immediately recognized it contained meth. The officer reached in and seized the baggie.

This case went to the Supreme Court. Will the item seized be admissible? State v. Bomboy (2008).

**Lesson learned:** What should an officer do if he or she sees contraband in a vehicle?

What should an officer do if he or she wants to search the rest of the vehicle?

### **RECENT TRENDS IN SEARCH WARRANT CASES**

It is well established that officers have to knock and announce when serving a search warrant. There is no set time limit for how long officers have to wait for a person to answer the door. The following court cases give us some guidance.

#### **Search Warrant – Knock**

It's 0615 on a Saturday morning and Bernalillo County deputies are ready to execute a search warrant. Standing outside a motel room, they knock on the door and announce their presence. Ten seconds go by, no response. Out comes the battering ram. They enter and find a meth lab. Defendant is standing just inside the door. Is ten seconds enough time? State v. Johnson (2006).

#### **Search Warrant – Knock and Announce**

It's mid-afternoon in Lincoln County and a mobile home gets an unexpected visitor from local police officers. Serving a

search warrant, they knock, announce, and wait just three seconds before entering. Looking for drugs, they were concerned that the occupants had firearms to include “fully automatic Mini-14’s and sawed off shotguns.” This was included in the search warrant. Both drugs and firearms were recovered.

Three seconds? Will the evidence seized be admissible?  
State v. Lopez (2005).

### Search Warrant – Reasonable

In Luna County, New Mexico, agents executed a search warrant for a camping trailer (eight by twenty-one feet) on Defendant’s property. The time was 0715 hours. A CI told them Defendant was a heavy meth dealer who kept a gun in his trailer or on his person.

The knocked and announced their presence for ten to twenty seconds. They heard movement within the trailer but could not hear movement towards the door or a verbal response. Forcible entry was made and officers found a workable meth lab. State v. Hand (2008).

- Did officers wait a reasonable time to determine if consent to enter had been denied?

**Lesson learned:** There is no set limit as to how long to wait for a person to answer the door for a search warrant.

### Arrest Warrant – knock

This involves a bench warrant, not a search warrant, but the issues are similar. Armed with a bench warrant, Las Cruces police officers waited just outside Defendant’s apartment door. A male voice was heard inside. One officer was getting ready to knock when the Defendant opened the door. The officer said, “hey bro’, how ya doing?” Surprised, the Defendant exclaimed, “Oh s---!” and tried to shut the door. Although they announced their presence, they entered without knocking. Good entry? State v. Vargas (2008).

News item: Evidence Banned in Murder Case

Detectives got a search warrant for a suspect in a double homicide in Albuquerque. They found a bullet casing linking him to the double homicide but it cannot be used. Why? Because the warrant was for a daytime search but the raid happened at night. T Albuquerque Journal, October 2, 2007.

**Lesson learned:** Without nighttime authorization, when do officers have to serve a warrant?

News item: District Judge suppresses evidence

District Judge Sam Sanchez ruled that State Police officers “just walked right in” when they served a search warrant.

The Chief Public Defender added: “The tape speaks for itself . . . that State Police agents leading the search never knocked or announced their presence before entering the home.” Judge Sanchez noted there were no exigent circumstances. The Taos News, November 9-15, 2007.

**Lesson learned:** Unless exigent circumstances occur when serving a search warrant, officers have to knock- and- announce prior to entry.

Fax machines and search warrants

The Supreme Court has approved officers using fax machines to get search warrants approved by Judges.

**DRUG LAWS IN NEW MEXICO**

New Mexico has a high drug abuse rate. The legislature has tried to be innovative in coming up with new ways to reduce drug abuse. For example, drug addicts used to share needles which led to an increase in AIDS. A needle exchange program was authorized. Other laws dealing with drugs include:

Medical Marijuana

A few people in New Mexico can legally smoke marijuana. Refer to newsletter. Law enforcement in Eddy County was unaware of this and arrested a person who had the right to have marijuana. ACLU filed a lawsuit against Eddy County.

Overdose prevention NMSA 1978, Section 30-31-27.1

- A person who, in good faith, seeks medical assistance for someone experiencing a drug-related overdose shall not be charged or prosecuted for possession if the evidence was gained as a result of the seeking of medical attention.
- A person who experiences a drug-related overdose and is in need of medical assistance shall not be charged or prosecuted for possession if the evidence was gained as a result of the overdose and the need for medical assistance.
- New Mexico has the highest overdose rate in the country. It is also the first state in the country to pass this kind of law. The idea is to encourage people to protect themselves or others from a drug-related death or trauma. It may also deter people from leaving victims outside of hospitals or other places where they may be discovered too late.  
NMSA 1978, Chapter 2A and Chapter 2B.

**VOLUNTARY CONFESSION & MIRANDA**

**VOLUNTARY CONFESSION**

Struck by a fatal disease, a man told his girlfriend and others that he was being punished for improperly touching their two year old daughter. The daughter recently had been having nightmares and was withdrawing from strangers. The confession was voluntarily. Do we have enough evidence for prosecution?

State v. Weisser (2007)

**Lesson learned:** A confession alone is not enough.

An organization called Project Innocence, using DNA, has managed to get over 200 people released from prison. In 2007 John Grisham had a bestseller (*An Innocent Man*) about a person on death row in Oklahoma when DNA indicated he had given a false confession.

News item - Albuquerque Journal, June 28, 2008

In Albuquerque, a mentally retarded young man falsely confessed to the brutal rape and murder of a young girl. She was eleven-years-old. Other than the confession, and the fact that he had been seen with her, most of the evidence suggested someone else did it. He spent thirty two months in jail when a DNA match pointed to another person. He was released from jail in 2008.

- He was mentally retarded. A law professor, reviewing the transcript, said “This was like leading a child, the person was so suggestible,” . . . “he was . . . easily led . . . into accepting responsibility because he was eager to please.”

People in Albuquerque were upset. The following editorial comments reflected what many in the community felt:

Albuquerque Journal Editorial Page, July 2, 2008

- “It’s sickening such an injustice was done to 22-year-old Robert Gonzales. It’s terrifying that he could have been wrongly convicted. It’s maddening that the man now faced with the crime almost got away.”
- “This case cries out for review of how police interrogate suspects, especially the young and mentally retarded.”

**Lesson learned:** Be careful of the false confession.

**MIRANDA**

There is a surprising amount of confusion about Miranda. One reason is that people get the legal standards of the Fourth Amendment and the Fifth Amendment mixed up. The legal standards follow:

Fourth Amendment	-	Not free to leave
Fifth Amendment	-	Custodial interrogation

### What does custodial interrogation mean?

To appreciate when to advise someone of their Miranda rights, we need to know what a custodial interrogation is. We can do this by trying to answer two questions while reviewing the following cases: (1) What does it mean to be “in custody” for purposes of Miranda, and (2) was there an interrogation?

### Miranda - Police Car

Defendant killed victim in a remote area of a military installation. Nearly a year later FBI agents went to defendant’s residence. Defendant agreed to be questioned away from the residence. They drove to an empty parking lot a few minutes’ driving time away. Defendant was interrogated for one hour and forty minutes in the back seat of a police car.

Prior to entering the car, one agent told defendant he didn’t have to go with them, did not have to talk with them, was free to leave at any time, and that they would bring him back to his residence after the interview. No Miranda rights were given. Defendant confessed to murder. He was taken back home. State v Munoz (1999).

- Is the confession admissible?
- Was Defendant’s freedom of movement restrained to a “degree associated with formal arrest?”
- Was the Defendant “in custody?”

### Miranda - Police Station

A man and female were killed by gunfire in a cabin near Torreon, New Mexico. The female's two very young sons were left in a cabin and eventually died of dehydration and starvation. The four bodies were found approximately four months later.

An Albuquerque Police Department detective interviewed defendant. The office was small, the door closed, defendant's back was to the wall of the office, and the detective was situated between Defendant and the doorway. No Miranda warnings were given. Defendant gave a statement and implicated himself in the murders. He was found guilty of four counts of first degree murder.

No Miranda warnings? A murder confession at the police station? Another point: Defendant was asked and agreed to accompany police officers to the station, was free to leave or terminate the interview, and was provided transportation to and from the station. State v. Nieto (2000).

- Was Defendant's freedom of movement restrained to a "degree associated with formal arrest?"
- Are these statements admissible?

### Miranda - Handcuffs

An officer in San Juan County was advised of a possible drunk driver leaving a casino. Upon contact with the defendant, he observed signs of intoxication. The defendant got out of his vehicle, began resisting, and was handcuffed. In the back seat of the patrol car he gave incriminating answers to a number of questions. Miranda rights were not given. State v. Wilson (2007).

- Was Defendant's freedom of movement restrained to a "degree associated with a formal arrest?"
- Was the Defendant "in custody?"

### Miranda - Vehicular Homicide

A snowy evening in Colfax (Raton) County, the highway slick and covered with ice. Defendant's vehicle was involved in a head-on collision with another vehicle. As the officer was talking to a witness, the Defendant interfered, trying to convince the witness that it was the driver of the other vehicle (now deceased) who had crossed the finish line.

A second officer told Defendant he would be arrested for obstruction if he continued. This officer then put Defendant in the backseat of a patrol car and, with the doors closed and locked, left him there. The first officer returned and questioned Defendant about the accident. No Miranda rights were given. Incriminating statements were made. State v. Snell (2007).

- Was Defendant's freedom of movement restrained to a "degree associated with a formal arrest?"

**Lesson learned:** There are many cases trying to define what "custody" as in "custodial interrogation" means. Can you define it?

### CONSENT TO SEARCH

#### Consent – Knock and Talk

A popular procedure for narcotics agents is called "knock and talk." Agents from the Pecos Valley Drug Task Force (Eddy County) arrested a person for trafficking cocaine. The person said Defendant was his source of cocaine. Agents went to Defendant's home. In plain clothes, badges on chains around their necks, guns at their sides, they asked Defendant for consent to search his house. Defendant agreed and they found cocaine and a scale.

Defendant argued in court that the consent to search his house was invalid because he had not been advised of his right to refuse consent. State v. Flores (2008).

- Will the contraband be admissible?

**Lesson learned:** When requesting consent, do we need to advise a person they have the right to refuse?

News item: Man get \$580,000 in Hobbs case

A federal court jury found two Hobbs police officers conducted an illegal search when they obtained a blood sample from Jimmie Marshall without his permission and without a warrant following a traffic stop.

Officers maintained that Jimmie Marshall agreed to provide a blood sample for drug testing but refused to give written authorization. Marshall on the witness stand adamantly said he never agreed, orally or in writing, to give a blood sample. He now lives in Ruidoso. Albuquerque Journal, August 24, 2004.

**Lesson learned:**

- If a person refuses to give blood, we need to get a search warrant.
- We can only get a search warrant for blood in felony cases.

Consent of person incapable of refusal not withdrawn

Any person who is dead, unconscious or otherwise in a condition rendering him or her incapable of refusal, shall be deemed to have given consent to a breath or blood test.

NMSA 1978, Section 66-8-108.

## **RECENT TREND IN SEARCH & SEIZURE CASES**

Contraband – Voluntary

Defendant was arrested for DWI and taken to the Dona Ana County Detention Center. He was given a form which asked if he had drugs or weapons on him. If yes, he would be charged with possession only. If not, he could be charged with contraband into jail, a felony offense. State v. Cole (2007).

He denied having drugs but a search revealed drugs.

- Is this form enough for us to charge bringing contraband into jail?

#### Forfeiture – Money

Tucumcari police stopped vehicle for speeding and found \$104,999. The officer seized the money pending proof of ownership.

NMSA 1978, Section 30-31-34 (f) provides for forfeiture of “narcotics paraphernalia or **money** which is a fruit or instrumentality of a crime.” Court of Appeals held money must be returned since there was no evidence it came from drugs. State v. \$104, 999 (2000).

#### News Item: Cops ‘Chasing Assets’?

Law enforcement agencies now turn to federal court of for most of their forfeiture cases. State law, unlike federal law, requires a conviction before seizure and money seized does not go to the arresting agency. Albuquerque Journal, November 16, 2008.

#### News item: Driver: Give Me Back my \$11,000

Bernalillo County Sheriff’s deputy stopped a man for a traffic violation. He found a small amount of marijuana and \$11,000 in cash. The deputy seized the cash.

He later showed the news media copies of two checks he received just prior to the traffic stop that totaled \$15,000. Albuquerque Journal, August 21, 2008.

### Telephone Consent

While in the booking area of the Hobbs City Jail, Defendant made a telephone call which implicated him in criminal activity. Does an inmate have an expectation of privacy in a jail? Do we have to advise an inmate that telephone calls are being monitored? State v. Templeton (2007).

**Lesson learned:** What kind of sign would you recommend be put in the booking area?

### Expectation of Privacy

Officers sometimes ask the following question: Should there be a policy regarding people in a law enforcement agency recording one another?

The following policy has been adopted by the NM Department of Public Safety. If your agency doesn't have a policy, you may wish to use it. (Use of Recording Equipment, paragraph 10):

- **Under no circumstances, except those instances involving criminal investigations of Department personnel, will a conversation between DPS employees be recorded without all parties to the conversation being aware of the fact that the conversation is being recorded.**

## **SEARCH & SEIZURE - METH**

### Meth – Exigent Circumstances

Standing on a porch of a residence, Albuquerque police officers noticed the chemical odor of a possible meth lab. Defendants refused consent to enter. Concerned, the officers called for a sergeant who arrived within half an hour. While waiting, neither defendant was restrained. One defendant entered the residence to use the restroom.

The officers went in and found a meth lab. Will the evidence seized be admissible? State v. Trudelle (2007)

### Search & Seizure – Exigent

An Estancia, New Mexico police sergeant smelled the odor of ammonia. He knew it's used to make meth and traced the odor to Defendant's garage. As he was looking through a crack in the garage door, he was hit in the face with ammonia vapors which burned his eyes and lungs.

Defendant's mobile trailer home was thirty to forty feet away. Defendant, who had just walked out of the trailer, was detained. Officers entered his trailer and found evidence of meth production. Admissible? State v. Moore (2008).

**Lesson learned:** Need exigent circumstances to enter a residence (even a meth lab) without a warrant.

### **RECENT TRENDS IN DEADLY WEAPONS CASES**

The definition of deadly weapon includes a number of deadly weapons, starting with firearms. At the end of the definition is this: "or any other weapons with which dangerous wounds can be inflicted." NMSA 1978, Section 30-1-12 (B).

Some argue that means almost anything could be a deadly weapon, even a ball point pen! Actually, it is for the courts to decide what a deadly weapon is.

### Deadly Weapon – Bite

Defendant, who had hepatitis C, bit a victim and said, "I hope you die, I hope you die." She was taken to the emergency room where she was treated for two bite marks where the skin had been broken. Misdemeanor aggravated battery? Felony battery? Attempted murder? What charge? State v. Neatherlin (2007).

### Robbery – Deadly Weapon

Defendant, in Dona Ana County, pointed a BB gun at a woman's stomach and demanded money. She quickly complied. Robbery or armed robbery? Is a BB gun a firearm? Is a BB gun a deadly weapon? State v. Fernandez (2007).

### TOWING POLICY

- Follow department policy when towing a vehicle.

### ETHICS

Demanding or receiving bribe by public officer or public employee. This is a third degree felony (three years).  
NMSA 1978, Section 30-24-2

### Sometimes the right side of the law is on the wrong side

#### FACTS: Ex-Deputy Loses Conviction Appeal

Santa Fe – The state Court of Appeals upheld a former Dona Ana County sheriff's deputy conviction for asking women to expose their breasts in exchange for not ticketing them. Carlos Solano of Sana Teresa pled guilty to two counts of bribery and was sentenced to six years in prison (there were two women involved).  
Albuquerque Journal, November 3, 2005.

#### FACTS: Ex-police officer guilty of tampering with records

Las Cruces, N.M. A former Las Cruces police officer who tore up a woman's traffic citation in exchange for a kiss and a phone number has been convicted of tampering with public records. Anthony Coble told the woman who ran a stop sign that he wanted "what every man wants" in exchange for tearing up the citation. There was a hung jury on the bribery charge but prosecutor Susan Riedel said he would be retried on that charge.

Channel 13 – Albuquerque, N.M., January 23, 2006.

**FACTS: Ex-Deputy Accepts Plea Deal**

Las Vegas, N.M. A Mora County sheriff's deputy was dispatched to a domestic violence situation. The female asked, "What can be done to make this go away?" The deputy pointed to his penis. She performed oral sex and he left.

As part of a plea agreement, the criminal sexual penetration charge was dismissed. He pled to one count of accepting a bribe by a witness, a fourth degree felony (18 months). Mora County paid \$104, 000 to the female. The deputy was given eighteen months probation. Albuquerque Journal North, May 6, 2008.

- An opportunity was very quickly presented to the deputy. What factors led him to make the decision he did?
- What is bribery? Actually, it's extremely rare that you will be offered cash to influence you.

**Lesson learned:** Sometimes bribery cases begin like this, "How can I make this go away?"

**Lesson learned:** Training on ethics isn't simply telling officers to "be honest." It should include giving examples of officers in New Mexico who learned the hard way.

**TO PAY OR NOT TO PAY**

The policy of many departments

- Many departments believe it's easier to pay out money when sued. One justification is that it's easier to settle than to go to court.

- However, many officers resent this policy. They feel that their department is not backing them up and that money is being paid out even though they didn't do anything wrong.
- Another justification for settling a case is that a department spokesperson can release a statement that under the agreement they're not accepting liability for what happened.

News item Police-shooting case settled

The state paid \$235,000 to the family of a Chimayo man shot by a state police officer. State police admitted no liability in the shooting as part of the settlement.

But the plaintiff's attorney, Robert Rothstein, had the last word when he said "the large amount involved in the settlement indicated an admission of wrongdoing." Albuquerque Journal – North, November 17, 2006.

**Lesson learned:** An agency may deny liability in a settlement.  
Attorneys – and the public - see it differently.

- When a department becomes known for its inclination to settle, what does that encourage lawyers to do?

The policy of the City of Albuquerque (Albuquerque Police)

- The City of Albuquerque used to have a policy for settling lawsuits. Millions were paid out in lawsuits. Some years ago they adopted a "no settlement" policy. City attorneys are told that, with rare exceptions, they will go to trial.
- In the great majority of lawsuits, Albuquerque has prevailed.
- Officers, for a number of reasons, support the policy.

- When a case is lost – when an officer has made a mistake and has to go to trial - the case gets a lot of publicity. Other officers learn from this.

**THE KEY TO REDUCING LIABILITY: TRAINING**

If an office loses a case in court, that should be shared with other officers.

If a new case comes down from the Supreme Court or Court of Appeals, that should be shared with all officers.

Before enacting the “no settlement” policy, APD had extensive legal training for all officers

**CONCLUSION**

Legal training, such as we covered here, can help win in the courts, win on the streets.