April 27, 2017 Advisory Letter – Opinion Request – Retroactive Application of Criminal Statute

The Honorable Mimi Stewart
New Mexico State Senator
313 Moon Street, NE
Albuquerque, NM 87123

Re: Opinion Request – Retroactive Application of Criminal Statute

Dear Senator Stewart:

You requested our advice regarding the effect of the backlog of untested sexual assault evidence kits ("SAEK") on the viability of criminal sexual assault prosecutions. More specifically, you asked:

(1) Does NMSA 1978, Section 30-1-9.2 (2003), which tolls the statute of limitations for prosecuting criminal sexual penetration in certain circumstances, apply retroactively, and if so, are there any conditions limiting that retroactivity, such as whether the statute of limitations had run at the time Section 30-1-9.2 was enacted?

(2) May a criminal offender be considered "concealing himself" under NMSA 1978, Section 30-1-9(A) until identified by DNA in a SAEK where a victim has a SAEK collected, the victim does not know the offender, the offender has not been identified and the SAEK DNA has not been matched to an individual suspect?

Based on our examination of the relevant New Mexico statutes, case law authorities, and on the information available to us at this time, we conclude:

(1) Section 30-1-9.2 tolls the statute of limitations for commencing a prosecution for criminal sexual penetration under NMSA 1978, Section 30-9-11, regardless of when the alleged crime was committed, unless the applicable limitations period expired on or before Section 30-1-9.2's effective date of July 1, 2003.

(2) It is unlikely that the facts you posit would be sufficient, by themselves, to support a finding that an offender "concealed himself" for purposes of the tolling provisions of Section 30-1-9(A). A New Mexico court likely would require evidence that an offender took deliberate, affirmative steps to conceal or hide himself or herself after the crime was committed.

As a preliminary matter, there are several rules of statutory construction that guide our analysis. In New Mexico, the legislature directs that "[t]he text of a statute or rule is the primary, essential source of its meaning." NMSA 1978, § 12–2A–19 (1997). When presented with a question of statutory construction, New Mexico courts begin their analysis "by examining the language utilized by the Legislature, as the text of the statute is the primary indicator of legislative intent." Bank of N.Y. v. Romero, 2014–NMSC–007,

¶ 40, 320 P.3d 1. “Under the rules of statutory construction, when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.” Id. (internal quotation marks and citation omitted); see also NMSA 1978, § 12–2A–2 (1997) (“Unless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar and common usage.”). In the event “legislative guidance is absent, New Mexico courts have resorted to judicially created presumptions in order to determine how a statute should be applied.” *Grygorwicz v. Trujillo,* 2006–NMCA–089, ¶ 10, 140 P.3d 550.

1. Retroactive Application of NMSA 1978, Section 30-1-9.2

Section 30-1-9.2(A) provides:

> When DNA evidence is available and a suspect has not been identified, the applicable time period for commencing a prosecution pursuant to Section 30-1-8 NMSA 1978 shall not commence to run for an alleged violation of Section 30-9-11 NMSA 1978 until a DNA profile is matched with a suspect.

NMSA 1978, Section 30-1-8 (2009), referenced in Section 30-1-9.2(A), limits the time for commencing prosecution after the commission of a crime. Generally, the periods allowed for prosecution range from one year for a petty misdemeanor to six years for a second degree felony. *Id.* § 30-1-8(A)-(D). There is no limitations period for a capital felony of first degree violent felony. *Id.* § 30-1-8(I). NMSA 1978, Section 30-9-11 (2009), also referenced in Section 30-1-9.2(A), defines the offense of criminal sexual penetration.

Section 30-1-9.2 is a tolling statute. A tolling statute is “a law that interrupts the running of a statute of limitations in certain situations, as when the defendant cannot be served with process in the forum jurisdiction.” Black's Law Dictionary (10th ed. 2014) (definition of “tolling statute”). Generally, a statute is applied prospectively unless the legislature has made clear its intention to apply it retroactively. *State v. Perea,* 2001–NMSC–026, ¶ 4, 31 P.3d 1006; *see also* NMSA 1978, § 12–2A–8 (1997) (“A statute or rule operates prospectively only unless the statute or rule expressly provides otherwise or its context requires that it operate retrospectively.”). Although the presumption of prospective application appears straightforward, confusion often arises as to what retroactivity means. Gadsden Fed'n of Teachers v. Bd. of Educ., 1996–NMCA–069, ¶ 14, 920 P.2d 1052. New Mexico courts consider a statute or regulation retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions. Howell v. Heim, 1994-NMSC-103, ¶ 17, 882 P.2d 541.

In *State v. Morales*, 2010-NMSC-026, 236 P.3d 24, the New Mexico Supreme Court addressed whether a 1997 amendment to Section 30-1-8 abolishing the statute of limitations for capital felony offenses and first degree violent felony offenses applied to offenses committed prior to the amendment’s effective date of July 1, 1997. The

limitations period for such crimes before the amendment was 15 years. The Court held that the 1997 amendment applied to criminal conduct that was not time-barred before July 1, 1997. *Id*. at ¶ 20. According to the Court, extending an unexpired limitation period does not impair vested rights acquired under prior law, require new obligations, impose new duties, or affix new disabilities to past transactions. *Id*. at ¶ 1.

The *Morales* Court acknowledged the presumption that the legislature intended the 1997 amendment to operate prospectively, absent clear legislative intent to the contrary. *Id.* ¶¶ 7–8, 13. However, the Court reasoned that because capital felonies and first degree violent felonies committed after July 1, 1982 were not time barred as of the effective date of the 1997 amendment, the legislature intended the 1997 amendment to apply to those crimes. *Id*. at ¶ 1. The Court stated further that "the language and history of the 1997 amendment plainly manifest the legislature's intent to ensure that the most serious crimes, i.e., capital felonies and first-degree violent felonies, do not escape prosecution based on a mere lapse of time between the commission of the offence and the commencement of the prosecution." *Id*. ¶ 14.

The question here regarding the retroactive application of Section 30-1-9.2 is similar to the issue faced in *Morales*, i.e., the extension of a statute of limitations by later-enacted legislation. Although the language of Section 30-1-9.2 does not indicate whether the legislature intended the statute to apply to crimes committed before its effective date, we believe, based on *Morales*, that the legislative intended Section 30-1-9.2 to apply to crimes for which the applicable limitations period had not yet expired. That intent is reflected in the express language of the law that enacted Section 30-1-9.2, which provides:

> APPLICABILITY.—The provisions of this act are applicable to an alleged violation of Section 30–9–11 NMSA 1978 for which the applicable time period for commencing a prosecution, as provided in Section 30–1–8 NMSA 1978, has not expired as of July 1, 2003.

2003 New Mexico Laws, ch. 257, § 2. *See also id.* § 3 (providing that the effective date of Section 30-1-9.2 is July 1, 2003).[1]

So long as the applicable statute of limitations for a crime committed under Section 30-9-11 has not expired as of July 1, 2003, Section 30-1-9.2 effectively extends the limitations period for the offense "until a DNA profile is matched with a suspect." Conversely, if the applicable statute of limitations expired prior to July 1, 2003, then Section 30-1-9.2 would not apply.

2. <u>Tolling Time for Prosecution under NMSA 1978, Section 30-1-9</u>

NMSA 1978, Section 30-1-9(A) provides:

> If after any crime has been committed the defendant shall **conceal himself**, or shall flee from or go out of the state, the prosecution for such crime may be

> commenced within the time prescribed in Section [30-1-8], after the defendant ceases to conceal himself or returns to the state. (Emphasis added.)

You ask whether a defendant is considered to have "concealed himself" for purposes of Section 30-1-9(A) where a victim has a SAEK collected, the victim does not know the offender, the offender has not been identified and the SAEK DNA has not been matched to an individual suspect.

As an initial matter, we note that in the circumstances you describe, the victim has had a SAEK collected and there has been no DNA match with a suspect. Generally, those facts would toll the statute of limitations under Section 30-1-9.2, discussed above, until the DNA profile was matched with a suspect. Because the limitations period would already be tolled, there would be no need to rely on the separate tolling provisions of Section 30-1-9(A).

Assuming, however, that Section 30-1-9(A) were applied in the circumstances you describe, we believe it is unlikely that the offender could be considered to have "concealed himself" absent evidence that the offender took affirmative steps to hide his identity after the crime was committed. In Section 30-1-9(A), the word "conceal" is used as a verb. When used as a verb, "conceal" is defined as "an affirmative act intended or known to be likely to keep another from learning of a fact of which he would otherwise have learned. Such affirmative action is always equivalent to a misrepresentation and has any effect that a misrepresentation would have." Black's Law Dictionary (10th ed. 2014) (definition of "concealment").

New Mexico courts applying Section 30-1-9(A) have not specifically analyzed the meaning of "conceal himself" as used in the provision. *See, e.g., State v. Cawley,* 1990-NMSC-088, ¶ 7, 799 P.2d 574 (Section 30-1-9(A) was intended "to foreclose the barring of a prosecution due to the voluntary absence from the state by a criminal offender"); *State v. Martinez*, 1978-NMCA-095, ¶ 16, 587 P.2d 438, 441 (Ct. App.) (generally stating that the tolling provisions of a predecessor to Section 30-1-9 applied when a prosecution could not proceed "because of procedural problems …, such as a defendant's flight or concealment…"), *cert. quashed,* 586 P.2d 1089 (N.M. 1978).

However, decisions of New Mexico and other states' courts in analogous situations indicate that affirmative or voluntary action is required to support the finding that a person has concealed himself or herself. *See Clark v. LeBlanc*, 1979 NMSC-034, 593 P.2d 1075 (finding an exception to personal service requirement where defendant was aware that civil action might be instituted against him and deliberately concealed himself to avoid service of process). *See also Moore v. Luther*, 291 F.Supp.2d 1194, 1200 (D. Kan. 2005) ("conceal" for purposes of Kansas statute tolling the limitations period when a cause of action arises against a person who has "concealed himself or herself" means "some action by the defendant, i.e., he used an assumed name, changed his occupation, or acted in a manner which tended to prevent the community in which he lives from knowing who he is or from where he came") (citations omitted); *McGee v. Hardina*, 140 P.3d 165, 168 (Colo. Ct. App. 2005) (defendant did not conceal herself for

purposes of tolling statute of limitations where there was no evidence she took "deliberate action to withdraw herself from the public eye"); *Johnson v. Miller*, 655 P.2d 475, 478 (Kan. Ct. App. 1982) ("[t]he mere inability of a plaintiff to locate a defendant where there has been no attempt by a defendant to conceal himself is not sufficient to establish concealment within the meaning of the tolling statute").

The determination of when an applicable limitations period is triggered is a factual one. The plain language of Section 30-1-9(A) and the relevant case law authorities suggest that a court will look to the actions of an offender after the crime was committed. In so doing, the court necessarily will have to undertake a fact-specific analysis of whether the offender's actions before, during, and after the offense constituted an affirmative attempt conceal the offender or the offender's identity and are sufficient to trigger the tolling provisions of Section 30-1-9(A).

Your request was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion is a public document. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may make copies of this letter available to the general public.

Sincerely,

Dylan K. Lange
Assistant Attorney General

[1] Section 1 of 2003 New Mexico Laws, ch. 257 was codified as NMSA 1978, § 30-1-9.2.