

LIBERAL BEHIND THE LABEL?: A COMPARATIVE HIGH  
COURT CASE STUDY OF THE NEW MEXICO SUPREME  
COURT FROM 1997–2002

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I. INTRODUCTION

How does one begin to uncover the individual judicial ideologies often masked in the opinions and decisions of a court? Identifying the underlying political and philosophical positions of the members of a state high court is essential to understanding that state's fundamental law and public policies. The means of obtaining insight into a court's "inner sanctum" is often only possible through a divided opinion, where the dissenter's strongly held personal views are individually expressed.<sup>2</sup>

Since divided opinions are revealing as to an individual's own perspectives, the focus of this high court study is centered on using these opinions to expose the sentiments of each Justice on the New Mexico Supreme Court. In turn, this will attempt to define the contemporary character of New Mexico's highest tribunal. In particular, this high court study addresses all of the divided constitutional decisions on New Mexico state constitutional issues set forth by the Supreme Court from 1997–2002.<sup>3</sup> As used here, constitutional issues are broadly viewed as including all those questions of criminal justice, civil rights, liberty interests, and

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<sup>2</sup> C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* xii (1948); see also Vincent Martin Bonventre & Kelly M. Galligan, *Court of Appeals Update, 2000 & 2001: Conservative Voting, Narrow Rulings*, 65 ALB. L. REV. 1085, 1086 (2002) (recognizing Herman Pritchett's analysis of divided decisions as the induction to the scholarly analysis of such opinions).

<sup>3</sup> The cases analyzed in this high court study specifically range from May 5, 1997 to August 19, 2002.

public law.<sup>4</sup> This high court study does not focus on the legal result of the cases discussed. Rather, the focus is on the issue that divided the court.<sup>5</sup> In each case, the justices have been categorized as being either pro-prosecution or pro-defendant in criminal cases and either pro-individual or pro-governmental/corporate interests in civil cases. In the context of criminal cases, the justices have either protected individual liberty interests or compromised such interests in favor of achieving a just and orderly society.<sup>6</sup> Similarly, in civil cases, the justices have either advanced individual liberty interests or suppressed those interests in order to maintain the power of the government or large private interests. It is clear that the

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<sup>4</sup> The universe of cases utilized in this high court study is as follows: *State v. Roybal*, 54 P.3d 61 (N.M. 2002); *State v. Frank*, 52 P.3d 404 (N.M. 2002); *State v. Urioste*, 52 P.3d 964 (N.M. 2002); *Cooper v. Chevron*, 49 P.3d 61 (N.M. 2002); *State v. Carbajal*, 48 P.3d 64 (N.M. 2002); *Tercero v. Roman Catholic Diocese*, 48 P.3d 50 (N.M. 2002); *State v. Padilla*, 46 P.3d 1247 (N.M. 2002); *Martinez v. Reid*, 46 P.3d 1237 (N.M. 2002); *State v. Gaitan*, 42 P.3d 1207 (N.M. 2002); *State v. Trujillo*, 42 P.3d 814 (N.M. 2002); *State v. Toney*, 40 P.3d 1002 (N.M. 2002); *State v. Benally*, 34 P.3d 1134 (N.M. 2001); *N.M. Dep't of Health v. Compton*, 34 P.3d 593 (N.M. 2001); *State v. Javier M.*, 33 P.3d 1 (N.M. 2001); *State v. Martinez-Rodriguez*, 33 P.3d 267 (N.M. 2001); *State v. Traeger*, 29 P.3d 518 (N.M. 2001); *State v. Santillanes*, 27 P.3d 456 (N.M. 2001); *State v. Cardenas-Alvarez*, 25 P.3d 225 (N.M. 2001); *Sonntag v. Shaw*, 22 P.3d 1188 (N.M. 2001); *Patterson v. LeMaster*, 21 P.3d 1032 (N.M. 2001); *Garcia-Montoya v. State Treasurer's Office*, 16 P.3d 1084 (N.M. 2001); *State v. Johnson*, 15 P.3d 1233 (N.M. 2000); *Gonzales v. N.M. Dep't of Health*, 11 P.3d 550 (N.M. 2000); *State v. Jacobs*, 10 P.3d 127 (N.M. 2000); *Phoenix Indem. Ins. Co. v. Pulis*, 9 P.3d 639 (N.M. 2000); *State v. Guilez*, 4 P.3d 1231 (N.M. 2000); *State v. Jason L.*, 2 P.3d 856 (N.M. 2000); *State v. Cunningham*, 998 P.2d 176 (N.M. 2000); *In re Commission's Investigations of the Rates for Gas Serv. of PNM's Gas Servs. v. N.M. Pub. Util. Comm'n*, 998 P.2d 1198 (N.M. 2000); *State v. Antillon*, 2 P.3d 315 (N.M. 1999); *State v. Nunez*, 2 P.3d 264 (N.M. 1999); *State v. Lopez*, 993 P.2d 727 (N.M. 1999); *State v. Allen*, 994 P.2d 728 (N.M. 1999); *ACLU v. City of Albuquerque*, 992 P.2d 866 (N.M. 1999); *Handmaker v. Henney*, 992 P.2d 879 (N.M. 1999); *State v. Paul T.*, 993 P.2d 74 (N.M. 1999); *State v. Clark*, 990 P.2d 793 (N.M. 1999); *Torres v. El Paso Elec. Co.*, 987 P.2d 386 (N.M. 1999); *Alberts v. Schultz*, 975 P.2d 1279 (N.M. 1999); *Coates v. Wal-Mart Stores, Inc.*, 976 P.2d 999 (N.M. 1999); *State v. Torres*, 971 P.2d 1267 (N.M. 1998); *State ex rel. Haragan v. Harris*, 968 P.2d 1173 (N.M. 1998); *Case Credit Corp. v. Portales Nat'l Bank*, 966 P.2d 1172 (N.M. 1998); *State v. Reed*, 964 P.2d 113 (N.M. 1998); *State v. Arellano*, 965 P.2d 293 (N.M. 1998); *Gonzales v. New Mexico Bd. of Chiropractic Exam'rs*, 962 P.2d 1253 (N.M. 1998); *S. Union Gas Co. v. N.M. Pub. Util. Comm'n*, 947 P.2d 133 (N.M. 1997); *State v. Ashley*, 946 P.2d 205 (N.M. 1997); *Reed v. State ex rel. Ortiz*, 947 P.2d 86 (N.M. 1997); *State v. Carrasco*, 946 P.2d 1075 (N.M. 1997); *State v. McGruder*, 940 P.2d 150 (N.M. 1997).

<sup>5</sup> In examining these cases, the divided opinion examined was often a concurrence, which agreed with the overall consensus of the court but which reached the result by a different means. This high court study looks at the issue that caused the judicial schism and analyzes which opinion provided the greatest protection to individual rights, and correspondingly, which justice derogated such rights in order to allow governmental powers to prevail.

<sup>6</sup> See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) (outlining two models of criminal justice in the United States). Packer illuminated the differences between the "Due Process Model," which limits the power of the government and which places an individual's dignity and autonomy ahead of crime control, and the "Crime Control Model," which promotes ordered society and an efficient judicial system at the expense of individual liberties. See *id.* at 9-11, 13-16.

2003]

New Mexico

945

concurrence or dissent that favors the prosecution or defense—in the criminal context—is necessarily siding with either the government or the individual respectively. But, in civil matters, favoring the plaintiff does not necessarily mean justice in favor of the party seeking to promote individual interests. For example, the plaintiff in a civil case could be a large corporation or political agency seeking damages from an individual party. Therefore, it is important to note that the pro-individual category defined in this high court study means that justice favoring an individual interest has allotted more rights or liberties upon a private person's autonomy, while justice with a pro-government stance is concerned more with society as a whole and is willing to derogate individual freedoms to further society's interests.

## II. THE COURT

The New Mexico Supreme Court is comprised of five justices elected for eight-year terms.<sup>7</sup> The Court is currently occupied exclusively by justices who are wholly affiliated with the Democratic Party. Such unanimity would implicate overall consonance on pivotal issues, yet the positions of these Justices have at times been multifarious.<sup>8</sup> Interestingly though, as would be anticipated, the Justices have delivered unanimous decisions on liberal issues that have invoked disagreement when resolved in other, more diverse jurisdictions.<sup>9</sup>

The New Mexico Supreme Court decided fifty-one appeals in

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<sup>7</sup> Members of the New Mexico Supreme Court from 1997–2002 are: Chief Justice Patricio Serna, Justice Joseph Baca, Justice Gene Franchini, Justice Pamela Minzner, and Justice Petra Jimenez Maes. The Chief Justice position on the New Mexico Supreme Court rotates every two years. From 1997–98, Justice Franchini served as Chief Justice; from 1999–2000 Justice Minzner served in that capacity; and from 2001–2002 Justice Serna served as Chief Justice. In January of 2003, Justice Maes succeeded Justice Serna as Chief Justice, becoming the first Hispanic woman ever to serve as Chief Justice of a states high court. *See infra* note 101 and accompanying text. The research conducted for this high court study was during Justice Serna's tenure as Chief Justice. Therefore, to avoid confusion, he will be referred to as the Chief Justice.

<sup>8</sup> Over seventy dissents were asserted by New Mexico Supreme Court Justices within the past five years, and over fifty of those divided opinions dealt with issues in public law.

<sup>9</sup> *See, e.g.*, *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998) (ruling that a regulation limiting state medical assistance for abortion to cases of life endangerment, rape, or incest is unconstitutional under the Equal Rights Amendment of the New Mexico Constitution and ordering the state to pay for all medically necessary abortions). *But cf.*, *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 462 (8th Cir. 1999) (proclaiming that states exercise a certain degree of discretion in relation to public funding, and therefore, it is constitutional for a state to fund family planning services while opting to refuse funding for abortion services).

which the justices were divided on an issue of public law between 1997–2002. Of these decisions, thirty-four of them were criminal matters, and eighteen were based on civil causes of action.<sup>10</sup>

### A. *Criminal Cases*

Of the thirty-four divided criminal cases during the five-year period between 1997–2002, the New Mexico Supreme Court decided in favor of the prosecution in 59% of the cases and held in favor of the individual defendant in 41% of the cases.<sup>11</sup> Strong voting patterns are apparent when looking at the statistical data derived from these decisions.

Chief Justice Serna and Justice Baca have been voting partners for the past five years, as they have voted together 78% of the time in the criminal cases.<sup>12</sup> Both Serna and Baca have overwhelmingly decided in favor of the prosecution despite defenses asserting individual rights violations. Though neither of these justices have a perfectly consistent voting record for the prosecution, Chief Justice Serna sided with the prosecution in 82% of the divided criminal cases.<sup>13</sup> Justice Baca's opinions were even more invariable, as he

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<sup>10</sup> Note that one of the cases, *ACLU v. City of Albuquerque*, 992 P.2d 866 (N.M. 1999), was included in both the criminal and civil analysis because it dealt with challenging the unconstitutionality of a criminal statute, but it was brought by petitioners who were not themselves convicted under the statute. Thus, the total number of cases analyzed is fifty-one and not fifty-two; see also tbls.1, 2 for a listing of the individual criminal and civil cases, respectively.

<sup>11</sup> See tbl.1. The following twenty cases were held in favor of the prosecution: *State v. Roybal*, 54 P.3d 61 (N.M. 2002); *State v. Urioste*, 52 P.3d 964 (N.M. 2002); *State v. Frank*, 52 P.3d 404 (N.M. 2002); *State v. Gaitan*, 42 P.3d 1207 (N.M. 2002); *State v. Trujillo*, 42 P.3d 814 (N.M. 2002); *State v. Toney*, 40 P.3d 1002 (N.M. 2002); *State v. Javier M.*, 33 P.3d 1 (N.M. 2001); *State v. Martinez-Rodriguez*, 33 P.3d 267 (N.M. 2001); *State v. Traeger*, 29 P.3d 518 (N.M. 2001); *State v. Santillanes*, 27 P.3d 456 (N.M. 2001); *State v. Johnson*, 15 P.3d 1233 (N.M. 2001); *State v. Guilez*, 4 P.3d 1231 (N.M. 2000); *State v. Cunningham*, 998 P.2d 176 (N.M. 2000); *State v. Lopez*, 993 P.2d 727 (N.M. 1999); *State v. Allen*, 994 P.2d 728 (N.M. 1999); *ACLU v. City of Albuquerque*, 992 P.2d 866 (N.M. 1999); *State v. Clark*, 990 P.2d 793 (N.M. 1999); *State v. Torres*, 971 P.2d 1267 (N.M. 1998); *State v. Arellano*, 965 P.2d 293 (N.M. 1998); *State v. McGruder*, 940 P.2d 150 (N.M. 1997).

The following fourteen cases were held in favor of the defense: *State v. Carbajal*, 48 P.3d 64 (N.M. 2002); *State v. Padilla*, 46 P.3d 1247 (N.M. 2002); *Martinez v. Reid*, 46 P.3d 1237 (N.M. 2002); *State v. Benally*, 34 P.3d 1134 (N.M. 2001); *State v. Cardenas-Alvarez*, 25 P.3d 225 (N.M. 2001); *Patterson v. LeMaster*, 21 P.3d 1032 (N.M. 2001); *State v. Jacobs*, 10 P.3d 127 (N.M. 2000); *State v. Jason L.*, 2 P.3d 856 (N.M. 2000); *State v. Antillon*, 2 P.3d 315 (N.M. 1999); *State v. Nunez*, 2 P.3d 264 (N.M. 1999); *State v. Paul T.*, 993 P.2d 74 (N.M. 1999); *State v. Reed*, 964 P.2d 113 (N.M. 1998); *State v. Ashley*, 946 P.2d 205 (N.M. 1997); *State v. Carrasco*, 946 P.2d 1075 (N.M. 1997).

<sup>12</sup> See tbl.3; see also tbl.1, which provides comparative voting statistics of New Mexico Supreme Court Justices in criminal cases between 1997–2002.

<sup>13</sup> See tbl.1 (illustrating that Justices Serna and Baca tended to vote pro-prosecution).

2003]

New Mexico

947

was pro-prosecution in thirty-two out of the thirty-four—or 97%—of the criminal cases.<sup>14</sup> Thus, compared to the other justices on the Court, Justices Serna and Baca constitute the pro-prosecution end of the Court’s spectrum in criminal cases.

While Justice Baca was pro-prosecution 97% of the time, Justice Franchini only voted in favor of the prosecution in 18% of the cases during this five-year span.<sup>15</sup> Justice Franchini was the most protective of the rights of the accused, as he voted to overturn convictions in 82% of the cases.<sup>16</sup>

Although Justice Franchini was the Court’s most rights-protective justice, Justice Minzner follows his lead at a close second. Justice Minzner agrees most often with Justice Franchini, with whom she has voted with 62% of the time.<sup>17</sup> Justice Minzner sought to protect individual liberty interests in 68% of cases, and Justice Minzner only voted in favor of the prosecution 32% of the time.<sup>18</sup>

Because Chief Justice Serna and Justice Baca are pro-prosecution justices, while Justices Franchini and Minzner are the rights-protective justices, the public law issues in the criminal context of this court have most often been resolved by Justice Maes. Justice Maes is the court’s moderate, but in criminal cases, she is slightly more pro-prosecution. Justice Maes favored the prosecution in 67% of criminal cases in which she participated.<sup>19</sup>

In the context of criminal cases, the two poles of the Court are comprised by Justice Baca at the pro-prosecution end, and Justice Franchini as the defender of individual liberties at the opposite end.<sup>20</sup> Although Justice Maes often proves to be the deciding vote, she aligns herself most often with Justice Serna, and votes least often with Justice Franchini.<sup>21</sup>

### *B. Civil Cases*

Of the eighteen divided civil cases during the five-year period between 1997–2002, the New Mexico Supreme Court was split

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<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See* tbl.3 (detailing the percentage of times a particular justice voted with another justice in the criminal cases during the five-year span between 1997–2002).

<sup>18</sup> *See* tbl.1.

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See* tbl.3 (highlighting how Justice Maes voted with Justice Serna 70% of the time and only voted 44% of the time with Justice Franchini in criminal cases).

equally, deciding in favor of the government in 50% of the cases, and holding in favor of the individuals in the other 50% of the cases.<sup>22</sup> The court's voting allegiances in civil cases are somewhat different than their allegiances in the aforementioned criminal cases. While Justice Baca only decided in favor of the defendant 3% of the time in criminal cases, he sided with the individual 28% of the time in the civil context.<sup>23</sup> Justice Serna also increased his protection of individual interests in the context of civil cases to 39%—compared with 18% in criminal cases.<sup>24</sup> Justice Minzner remained true to her pro-individual stance in civil cases, but she lost her voting companion from the criminal decisions. Justice Franchini, voted in favor of the defendant in criminal cases 82% of the time, while he only favored the individual interest in civil cases 33% of the time.<sup>25</sup> Justice Maes—the moderate of the court—also made a complete switch between her criminal and civil allegiances. In the criminal cases, Justice Maes only favored the defendant 33% of the time, while she favored the individual interest 69% of the time in civil cases.<sup>26</sup>

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<sup>22</sup> See tbl.2. The following nine cases were held in favor of the government: *Tercero v. Roman Catholic Diocese*, 48 P.3d 50 (N.M. 2002); *Martinez v. Reid*, 46 P.3d 1237 (N.M. 2002); *N.M. Dep't of Health v. Compton*, 34 P.3d 593 (N.M. 2001); *Garcia-Montoya v. State Treasurer's Office*, 16 P.3d 1084 (N.M. 2001); *Gonzales v. New Mexico Dep't of Health*, 11 P.3d 550 (N.M. 2000); *ACLU v. City of Albuquerque*, 992 P.2d 866 (N.M. 1999); *Alberts v. Schultz*, 975 P.2d 1279 (N.M. 1999); *Gonzales v. New Mexico Bd. of Chiropractic Exam'rs*, 962 P.2d 1253 (N.M. 1998); *Southern Union Gas Co. v. New Mexico Pub. Utility Comm'n*, 947 P.2d 133 (N.M. 1997).

The following nine cases were held in favor of the individual: *Cooper v. Chevron*, 49 P.3d 61 (N.M. 2002); *Sonntag v. Shaw*, 22 P.3d 1188 (N.M. 2001); *Phoenix Indem. Ins. Co. v. Pulis*, 9 P.3d 639 (N.M. 2000); *In re Commission's Investigations of the Rates for Gas Serv. of PNM's Gas Servs. v. New Mexico Pub. Utility Comm'n*, 998 P.2d 1198 (N.M. 2000); *Handmaker v. Henney*, 992 P.2d 879 (N.M. 1999); *Torres v. El Paso Elec. Co.*, 987 P.2d 386 (N.M. 1999); *Coates v. Wal-Mart Stores, Inc.*, 976 P.2d 999 (N.M. 1999); *State ex rel. Haragan v. Harris*, 968 P.2d 1173 (N.M. 1998); *Reed v. State ex rel. Ortiz*, 947 P.2d 86 (N.M. 1997).

<sup>23</sup> Compare tbl.1 (providing the justices voting records for criminal cases) with tbl.2 (providing the justices voting records for civil cases).

<sup>24</sup> Compare tbl.1 with tbl.2 (highlighting Justice Serna's voting record in both criminal and civil cases).

<sup>25</sup> See tbl.2 (noting the difference in Justice Franchini's voting pattern in criminal versus civil cases).

<sup>26</sup> Compare tbl.1 with tbl.2 (comparing Justice Maes's voting record in criminal and civil cases).

2003]

New Mexico

949

## III. THE JUSTICES

## A. Chief Justice Patricio M. Serna

Chief Justice Serna was elected to the New Mexico Supreme Court in 1996 and became Chief Justice in 2001. Though a self-proclaimed democrat, Chief Justice Serna is the second most pro-prosecution member of the court. In 82% of the divided criminal opinions between 1997–2002, Justice Serna either upheld convictions or vehemently dissented when the defense prevailed.<sup>27</sup> For example, in both *State v. Antillon*<sup>28</sup> and *State v. Nunez*,<sup>29</sup> the court recognized a double jeopardy violation when the state sought to prosecute criminal charges after the defendant forfeited property in connection with drug charges, because the defendant's property deprivation was seen as a second punishment.<sup>30</sup> Justice Serna robustly contested this issue in his dissents, in which he claimed that the defendants should not be able to assert a Fifth Amendment violation when they are deprived of property and are later convicted for such conduct.<sup>31</sup>

Although Chief Justice Serna is generally pro-law enforcement in the context of criminal cases, there have been occasions when he has reversed convictions or remanded the case for further determination of the facts instead of simply following his usual pattern of voting in favor of the prosecution.<sup>32</sup> However, in all of these instances, Chief Justice Serna's pro-defense stance is not the most protective view maintained in these decisions. For example, in *State v. Padilla*,<sup>33</sup> Chief Justice Serna participated in the majority opinion, which held that a defendant can waive the right to be present at jury selection, but that it must be done voluntarily, knowingly, and intelligently.<sup>34</sup> Here, the majority decided that the

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<sup>27</sup> See tbl.1.

<sup>28</sup> 2 P.3d 315 (N.M. 1999).

<sup>29</sup> 2 P.3d 264 (N.M. 1999).

<sup>30</sup> See *Antillon*, 2 P.3d at 318–19; *Nunez*, 2 P.3d at 293.

<sup>31</sup> See *Antillon*, 2 P.3d at 319 (Serna, J., dissenting) (asserting that “a default judgment does not constitute punishment because the property is ownerless or abandoned”); see also *Nunez*, 2 P.3d at 297 (Serna, J., dissenting).

<sup>32</sup> See, e.g., *State v. Jason L.*, 2 P.3d 856, 864 (N.M. 2000) (granting a motion to suppress evidence obtained in violation of the Fourth Amendment); *State v. Paul T.*, 993 P.2d 74, 83–84 (N.M. 1999) (remanding the case to determine if the defendant consented to a search and to review the validity of the search under the Fourth Amendment).

<sup>33</sup> 46 P.3d 1247 (N.M. 2002).

<sup>34</sup> See *id.* at 1255 (holding that the defendant did not knowingly and voluntarily waive his

defendant did not waive this right because he was not aware of the consequences of his actions.<sup>35</sup> Chief Justice Serna's decision to participate in the majority opinion did not place him at either extreme of the pro-prosecution/pro-defense paradigm, as Justice Minzner's concurrence provided more protection for the defendant—claiming that the right to be present at jury selection could not be waived.<sup>36</sup> Yet Serna did not fall into the other extreme either because Justice Baca's dissent asserts that the defendant is not only able to waive the right to be present at *voir dire*, but that the defendant here actually waived this right knowingly and intelligently by not appearing at the time the selection was scheduled to take place.<sup>37</sup>

In *State v. Jason L.*,<sup>38</sup> Chief Justice Serna again voted in favor of the defendant's interests without abandoning his typical pro-prosecution stance.<sup>39</sup> Serna, in his separate concurrence, asserted that the scope of the majority opinion—finding there had been a Fourth Amendment violation—should be limited to cases in which there is a fact specific determination of such a violation.<sup>40</sup> Here, Chief Justice Serna sought to narrow the scope of the decision, which favored individual rights at the expense of a conviction.

The civil cases that Chief Justice Serna has participated in are consistent with his pro-prosecution position in criminal cases.<sup>41</sup> Chief Justice Serna held in favor of the governmental/corporate interest 61% of the time, [while only taking a pro-individual stance in 39% percent of the civil cases].<sup>42</sup> Even where Chief Justice Serna found in favor of the individual, he has often qualified his decision in such cases. For example, in *Sonntag v. Shaw*,<sup>43</sup> Chief Justice Serna wrote a separate concurrence in an effort to limit future

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right to be present at jury selection for his trial).

<sup>35</sup> See *id.* at 1254.

<sup>36</sup> See *id.* at 1256 (Minzner, J., special concurrence) (emphasizing the fundamental right of the accused to participate in the public process of his trial).

<sup>37</sup> See *id.* at 1257 (Baca, J., concurring in part and dissenting in part) (suggesting that the defendant's more appropriate remedy would be a habeas corpus proceeding).

<sup>38</sup> 2 P.3d 856 (N.M. 2000).

<sup>39</sup> See *id.* at 864 (suppressing evidence of a concealed weapon found on a minor because deference was given to the lower court's factual determination that a proper Fourth Amendment search and seizure violation occurred).

<sup>40</sup> See *id.* at 865 (Serna, J., concurring).

<sup>41</sup> Compare tbl.1 with tbl.2 (illustrating the total number of times each justice voted in favor of the prosecution or individual defendant in criminal cases in relation to the percentage of times each justice voted in favor of the government or individual interest in civil cases, respectively).

<sup>42</sup> See tbl.2.

<sup>43</sup> 22 P.3d 1188 (N.M. 2001).

2003]

New Mexico

951

interpretation of dicta contained in the majority opinion.<sup>44</sup> One of the main issues Chief Justice Serna disagreed with was the majority's assertion—in dicta—that corporation owners can be held personally liable for their corporation's discriminatory acts. Chief Justice Serna's main concern was with limiting this affirmation so as to ensure that it would not be extended to include shareholders of a corporation.<sup>45</sup> Chief Justice Serna ultimately favored the aggrieved individual in this case, but under the pro-government/corporate interest and pro-individual paradigm, he was more protective of the corporate interest because it was the affluent corporate owners that he sought to protect against the possibility of future expansive interpretations of the majority's dicta.

Of the cases in which Chief Justice Serna favored the individual over the governmental/corporate interest, the opinion that is most uncharacteristic of the court's second most pro-government justice is *Torres v. El Paso Electric Company*.<sup>46</sup> In *Torres*, Chief Justice Serna authored the opinion that held in favor of the individual in a personal injury case against his employer.<sup>47</sup> In this case, the directed verdicts in favor of defendant utility company were vacated to allow plaintiff's negligence and punitive damage claims to be decided by a jury in a new trial.<sup>48</sup> Thus, this case is representative of an instance when Chief Justice Serna will find circumstances in which he believes that a powerful interest should be vulnerable to liability for its injurious actions towards an individual.

### B. Justice Joseph F. Baca

Justice Baca is by far the most pro-prosecution member of the New Mexico Supreme Court. His record for upholding convictions is almost flawless.<sup>49</sup> The only case in which Justice Baca decided in favor of the accused from 1997–2002 was in *State v. Carbajal*,<sup>50</sup> in which he concurred in the majority opinion written by Justice

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<sup>44</sup> *Id.* at 1200 (Serna, C.J., concurring).

<sup>45</sup> *See id.* (disagreeing with the majority opinion which Chief Justice Serna noted, "opens the door to shareholder liability").

<sup>46</sup> 987 P.2d 386 (N.M. 1999).

<sup>47</sup> *Id.* at 389.

<sup>48</sup> *See id.* (rejecting the affirmative defense of independent intervening cause for cases involving multiple acts of negligence).

<sup>49</sup> *See* tbl.1 (illustrating that Justice Baca only decided in favor of the defendant once out of thirty-three criminal cases in which he participated in between 1997–2002, which calculates to favoring the prosecution 97% of the time).

<sup>50</sup> 48 P.3d 64 (N.M. 2002).

Minzner.<sup>51</sup> Justice Baca's participation in the majority opinion in *Carbajal* proves to be an inexplicable discrepancy—the prosecution clearly established the defendant's fraudulent intent, and even Justice Maes, the dissenting judge, believed that the conviction should be upheld, which normally signals a win for the prosecution.<sup>52</sup>

Justice Baca's pro-prosecutorial sentiment is readily visible from his apparent unwillingness to compromise with the majority, even when the court is otherwise unanimous on the issue. In five separate criminal cases, Justice Baca believed convictions should have been upheld despite the fact that every other member of the court held that the defendants had been deprived of their constitutional rights.<sup>53</sup> In *State v. Reed*,<sup>54</sup> Justice Baca defended his position as the court's hard-liner when he was the sole dissenter who believed that a jury had enough evidence to conclude that the defendant knew he had cocaine on him when there was only a trace amount of the contraband found on a cellophane cigarette wrapper in the defendant's possession.<sup>55</sup>

Similarly, in *State v. Ashley*,<sup>56</sup> Justice Baca again served as the lone dissenter, believing that a bigamy conviction should be upheld despite the majority's finding of prosecutorial misconduct.<sup>57</sup> The majority in *Ashley* concluded that the prosecution unfairly prejudiced the defendant by asking a law enforcement officer, during his testimony, if he thought the defendant committed bigamy, and by introducing evidence of past offenses of the same crime committed by the defendant.<sup>58</sup> However, in his dissent, Justice Baca believed that proof of defendant's guilt was such that its probative value substantially outweighed the prejudicial

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<sup>51</sup> See *id.* at 69 (dismissing a forgery charge against the defendant because the altered traveler's check had no legal effect, and thus, it did not violate the New Mexico forgery statute).

<sup>52</sup> *Id.* (Maes J., dissenting). Justice Maes is the usual swing vote on the New Mexico Supreme Court. Thus, when Justice Maes sides with the prosecution, the typical outcome is an affirmation of the conviction. See *infra* notes 101–102 and accompanying text.

<sup>53</sup> See, e.g., *State v. Padilla*, 46 P.3d 1247, 1257 (N.M. 2002) (Baca, J., concurring in part and dissenting in part); *State v. Paul T.*, 993 P.2d 74, 84 (N.M. 1999) (Baca, J., dissenting); *State v. Reed*, 964 P.2d 113, 116 (N.M. 1998) (Baca, J., dissenting); *State v. Ashley*, 946 P.2d 205, 210 (N.M. 1997) (Baca, J., dissenting); *State v. Carrasco*, 946 P.2d 1075, 1086 (N.M. 1997) (Baca, J., concurring in part and dissenting in part).

<sup>54</sup> 964 P.2d 113 (N.M. 1998).

<sup>55</sup> See *id.* at 116 (arguing that the court should have followed precedent allowing for conviction based upon possession of a trace amount of illegal drugs).

<sup>56</sup> 946 P.2d 205 (N.M. 1997).

<sup>57</sup> See *id.* at 210 (Baca, J., dissenting).

<sup>58</sup> See *id.* at 208–09.

2003]

New Mexico

953

evidence offered by the prosecution.<sup>59</sup>

Justice Baca's voting record in civil cases is not quite as one-sided as his criminal opinions, yet he still heavily sides with the governmental/corporate interests rather than individual interests. Justice Baca decided in favor of the governmental/corporate interest 72% of the time and was only pro-individual 28% of the time.<sup>60</sup> It is important to examine the five cases in which Justice Baca sided with the individual, to determine why he departed from his usual pro-corporate position. One example which Justice Baca voted for the individuals was in *Haragan v. Harris*.<sup>61</sup> However, the individual plaintiffs in this case were government officials attempting to increase their salaries.<sup>62</sup> Justice Baca, concurring with Justice Serna's dissent, believed that the individuals were entitled to a mid-term raise.<sup>63</sup> Nevertheless, Justices Minzner and Franchini had the support of Justice McKinnon III—who authored the majority opinion—and concluded that the individual officials were not entitled to a salary increase.<sup>64</sup> Justice Baca's more relaxed pro-government position in civil cases often depends upon who the individuals are. For instance, a large corporation seeking damages from the government would more likely sway Justice Baca to protect the *individual* interests at issue than would a single aggrieved plaintiff.<sup>65</sup>

### C. Justice Pamela B. Minzner

In January 1999, Justice Minzner became the first woman elected by her colleagues to the position of Chief Justice of the New Mexico

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<sup>59</sup> See *id.* at 210 (Baca, J., dissenting) (questioning the majority's finding of prosecutorial misconduct and commenting that "[t]he alleged prosecutorial misconduct, even when viewed cumulatively, is not enough to outweigh the evidence of guilt").

<sup>60</sup> See tbl.2.

<sup>61</sup> 968 P.2d 1173 (N.M. 1998).

<sup>62</sup> *Id.* at 1174.

<sup>63</sup> *Id.* at 1181–82 (Serna, J., dissenting).

<sup>64</sup> *Id.* at 1174, 1177. Justice Dan A. McKinnon III served on the New Mexico Supreme Court prior to Justice Maes' term as Justice. For the purposes of this study, Justice McKinnon III has not been analyzed because only a small number of the decisions from 1997 include any divided decision in which he participated. However, it is important to realize that Justice McKinnon III was, like Justices Minzner and Franchini, a liberal who often favored, in both criminal and civil cases, individual interests over governmental interests.

<sup>65</sup> See, e.g., *S. Union Gas Co. v. N.M. Pub. Util. Comm'n*, 947 P.2d 133 (N.M. 1997) (authoring the majority opinion that found the Public Utility Commission lacking proper jurisdiction over a private gas company, thus allowing the gas company to increase its rates even after the Public Utility Commission denied their rate increase application).

Supreme Court,<sup>66</sup> a position that she held until January 2001. On the Court's spectrum, Justice Minzner is typically more protective of individual rights than her colleagues.<sup>67</sup> Her pro-individual stance became apparent through her dissenting opinions, in which she often exceeded the court's already liberal tendencies. Justice Minzner, in balancing liberty and order, will tend to protect individual liberties at the expense of order. For example, in *State v. Urioste*,<sup>68</sup> Justice Minzner proclaimed that the Court should strictly uphold the exclusionary rule when evidence was obtained via an unreasonable search in violation of the Fourth Amendment.<sup>69</sup> Minzner was willing to exclude reliable evidence necessary for the conviction because an individual's rights were violated in the process of obtaining such evidence.

Although Justice Minzner typically supports the rights of the accused, there are instances in which she has departed from this position. Most of the cases in which Minzner has upheld a conviction—even when there has been a claim that the defendant's constitutional rights were violated—dealt with utterly depraved actions by the defendant. For example, in *State v. Lopez*,<sup>70</sup> Justice Minzner authored the majority opinion that affirmed the defendant's conviction even when he proclaimed the existence of a serious evidentiary mistake.<sup>71</sup> In this case, the defendant was convicted of first-degree murder for inflicting fifty-four stab wounds and for later crushing the victim's skull with a large rock.<sup>72</sup> It is likely that Justice Minzner found the criminality in this case so devastating that she was not willing to go to the utmost extreme to protect such an individual.

Similarly, in *State v. Allen*,<sup>73</sup> Justice Minzner wrote the majority opinion upholding a death sentence in a case that dealt with the

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<sup>66</sup> See Deborah Baker, *Maes Becomes Nation's First Hispanic Female Chief Justice*, ALBUQUERQUE JOURNAL, Jan. 8, 2003, at <http://www.abqjournal.com/news/apmaes01-08-03.htm> (last visited Feb. 12, 2003).

<sup>67</sup> See tbls. 1–2.

<sup>68</sup> 52 P.3d 964 (N.M. 2002).

<sup>69</sup> See *id.* at 971 (Minzner, J., dissenting) (manifesting her belief that when a defendant's Fourth Amendment Rights are violated, and evidence is obtained as a result of the unconstitutional search, that evidence cannot be used to incriminate the defendant).

<sup>70</sup> 993 P.2d 727 (N.M. 1999).

<sup>71</sup> See *id.* at 729 (appealing the conviction of first-degree murder, false imprisonment, and tampering with evidence on the grounds that a statement was improperly admitted as hearsay and on the grounds a request for a limiting instruction was denied).

<sup>72</sup> See *id.* (describing the manner in which the defendant murdered his victim).

<sup>73</sup> 994 P.2d 728 (N.M. 1999).

2003]

New Mexico

955

brutal rape and murder of a seventeen-year-old girl.<sup>74</sup> Again, the brutality of the crime committed is likely the factor that persuaded Justice Minzner to choose not to protect the rights of the accused in this case. In particular, the defendant in *Allen* argued that victim impact testimony and evidence should not have been admitted during the sentencing phase.<sup>75</sup> The majority held that the admission of such evidence did not violate the defendant's constitutional guarantees.<sup>76</sup> However, when looking at the testimony at issue, it is apparent that Justice Minzner would likely have opposed the admission of such evidence—due to its highly prejudicial value—in a less violent criminal case.<sup>77</sup> Perhaps due in part to the aggravated circumstances surrounding this brutal crime, Justice Minzner declined to show sympathy for this particular defendant.

Justice Minzner's voting pattern in civil cases proves that she is consistently in favor of individual interests. Unlike Justice Franchini, who is protective of a defendant's rights in criminal cases but who is more likely to hold for the governmental/corporate interest in civil cases, Justice Minzner proves to be pro-individual in both the criminal and civil context.<sup>78</sup> This is apparent when looking at Minzner's concurring and dissenting opinions in civil cases. For instance, in *New Mexico Dep't of Health v. Compton*,<sup>79</sup> Justice Minzner believed that the majority did not properly consider an individual's due process rights when it held that a three-day delay for a procedurally required hearing was not unconstitutional because of the unintentional nature of the delay.<sup>80</sup> Justice Minzner asserted that such a delay, even if caused by extenuating circumstances, violates procedural due process requirements.<sup>81</sup> Thus, Justice Minzner concluded that when an individual's liberty

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<sup>74</sup> See *id.* at 739 (affirming defendant's conviction and sentence).

<sup>75</sup> See *id.* at 766–69 (Franchini, J., special concurrence and partial dissent) (agreeing with the defense's argument prohibiting the introduction of the highly prejudicial and emotional victim impact testimony during the sentencing phase in a death penalty case).

<sup>76</sup> See *id.* at 750 (explaining that "victim impact evidence, brief and narrowly presented, is admissible during the penalty phase of death penalty cases" (quoting *State v. Clark* 990 P.2d 793, 808 (1999))).

<sup>77</sup> See, e.g., *State v. Urioste*, 52 P.3d 964, 971 (N.M. 2002) (Minzner, J., dissenting) (disagreeing with the majority and concluding that a valid investigatory traffic stop requires reasonable suspicion, which here was lacking as the information was conveyed by an anonymous tip).

<sup>78</sup> See *tbls.* 1–2.

<sup>79</sup> 34 P.3d 593 (N.M. 2001).

<sup>80</sup> *Id.* at 608 (Minzner, J., dissenting).

<sup>81</sup> See *id.* at 609 (Minzner, J., dissenting) (finding that the delay—despite being caused by the impairment of the presiding judge's health—violated the defendant's due process rights).

is at issue, that individual's right to a prompt hearing is of the utmost importance.

Another example of Justice Minzner's allegiance towards individual rights is evidenced by her opinion in *Tercero v. Roman Catholic Diocese of Norwich*.<sup>82</sup> In *Tercero*, Minzner's dissent construed the long-arm statutes broadly—believing that the plaintiff, who alleged that a priest in the defendant's diocese sexually molested him as a child, should be permitted to bring a tort action in New Mexico against the defendant.<sup>83</sup> Justice Minzner recognized that reasonable minds can differ on this issue, but she was nevertheless persuaded that jurisdiction was “statutorily and constitutionally appropriate.”<sup>84</sup> Justice Minzner believed that while the majority's decision was not unconstitutional, the individual's interest—to bring suit in New Mexico—should supercede the larger entity's interest in a case where the individual meritoriously alleged a personal wrong.<sup>85</sup> Justice Minzner established her belief that when two permissible decisions are equally reasonable, the court should favor the individual's interest over the governmental or powerful interests at issue.<sup>86</sup>

#### D. Justice Gene E. Franchini

In the context of criminal cases, the two extremes of the court's ideological spectrum are apparent: Justice Baca to the far right and Justice Franchini to the far left. In the criminal context, Justice Franchini—who became a member of the Court in 1990<sup>87</sup>—has the most liberal record of any member of the court. Justice Franchini favored the protection of the defendant's interests 82% of the time in criminal cases, and only decided in favor of the prosecution 18% of the time.<sup>88</sup> In fact, Justice Franchini only favored the prosecution

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<sup>82</sup> 48 P.3d 50 (N.M. 2002).

<sup>83</sup> See *id.* at 60, 64 (Minzner, J., dissenting) (disagreeing with the majority's narrow construction of New Mexico's long-arm statute which precluded the district court from obtaining jurisdiction over the Connecticut Diocese for a tort action).

<sup>84</sup> *Id.* at 61 (Minzner, J., dissenting).

<sup>85</sup> See *id.* at 60, 64 (Minzner, J., dissenting) (advocating for “a broad standard of due process . . . that . . . [does] not offend ‘traditional notions of fair play and substantial justice’”).

<sup>86</sup> See *id.* at 63 (Minzner, J., dissenting) (reviewing New Mexico case law pertaining to long-arm jurisdiction and concluding that “our cases instruct us to . . . assert jurisdiction over the Diocese of Norwich”).

<sup>87</sup> See Shea Andersen, *Governor Appoints Lawyer to State Supreme Court Seat*, THE ALBUQUERQUE TRIBUNE, Jan. 30, 2003, at [http://www.abqtrib.com/archives/news03/013003\\_news\\_supreme.shtml](http://www.abqtrib.com/archives/news03/013003_news_supreme.shtml) (last visited Mar. 3, 2003).

<sup>88</sup> See tbl.1.

in six out of the thirty-four divided criminal cases in the past five years.<sup>89</sup> Of the cases in which Justice Franchini departed from his usual pro-individual stance, only two of these cases show any partiality towards the prosecution.<sup>90</sup> Interestingly, both of these cases were decided in 2002, and the way in which Franchini directed his vote may have been motivated in part by upcoming events, particularly the retirement announcement of Justice Baca.<sup>91</sup> Perhaps Justice Franchini did not feel the need to remain as pro-individual, knowing that the Court's most conservative voice in criminal cases would be gone by the end of the year.

The remaining four cases in which Justice Franchini held in favor of the prosecution, with respect to the issue upon which the court was divided, are not particularly helpful for predicting which criminal issues are important enough to him, such that he will depart from his usual rights-protective stance. In *State v. Martinez-Rodriguez*,<sup>92</sup> Justice Franchini authored the opinion that ultimately reversed the defendant's conviction for receiving a stolen vehicle but affirmed all of the other convictions against the defendant.<sup>93</sup> While Justice Franchini did concede an issue to the defendant, in the pro-prosecution/pro-defendant paradigm—when viewing the case in its entirety—he was classified as having been more in favor of the prosecution. The dividing issue in *Martinez-Rodriguez* was whether the defendant had standing to raise other issues, and the Court majority—led by Justice Franchini—claimed that the defendant lacked the necessary standing.<sup>94</sup> However, while Franchini may be characterized as pro-prosecution in this limited instance, he did not completely shed his pro-defense attitude, as he did allow one of the defendant's convictions to be reversed.<sup>95</sup>

In *State v. Traeger*,<sup>96</sup> Justice Franchini—along with all of the

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<sup>89</sup> *Id.*

<sup>90</sup> See *State v. Urioste*, 52 P.3d 964, 966, 971 (N.M. 2002) (concurring with the majority opinion that the police had reasonable suspicion in a search and seizure case because the tip given to the police by an informant was corroborated and because it predicted the future movements of the defendant); see also *State v. Frank*, 52 P.3d 404, 409 (N.M. 2002) (holding—in a majority opinion issued by Justice Franchini—that the court did have jurisdiction over a crime committed on state-owned land within an Indian community).

<sup>91</sup> See Bob Schwartz, *Justice Baca Rides Off Into Retirement*, ALBUQUERQUE JOURNAL, July 27, 2002, at E1, 2002 WL 24374947 (tracing Justice Baca's career and lauding his service on the New Mexico bench).

<sup>92</sup> 33 P.3d 267 (N.M. 2001).

<sup>93</sup> See *id.* at 281 (holding that, under the facts of the case, the defendant could not be convicted for both unlawful taking of a vehicle and receiving a stolen vehicle).

<sup>94</sup> See *id.*

<sup>95</sup> See *id.* at 281–82 (vacating the conviction of receiving a stolen vehicle).

<sup>96</sup> 29 P.3d 518 (N.M. 2001).

justices—decided in favor of the prosecution, affirming the defendant's conviction. In this case, there were separate concurring opinions authored by Justices Franchini and Minzner, but the Court was not divided on a prosecution/defense paradigm. Rather, the Court was divided about whether a baseball bat should be defined as a deadly weapon as a matter of law or whether the jury should decide this question in their deliberations.<sup>97</sup> Justice Franchini concluded that a baseball bat, when used as a deadly weapon, was a deadly weapon as a matter of law. Again, this case does not demonstrate any significant departure by Justice Franchini from his pro-individual rights position since the dividing issue here was limited in nature.

The remaining two cases in which Justice Franchini decided in favor of the prosecution are *ACLU v. City of Albuquerque*<sup>98</sup> and *State v. Arellano*.<sup>99</sup> In *ACLU*, the Court was divided over the specific grounds upon which to invalidate an ordinance. While both the majority opinion and Justice Maes' concurring opinion declared this ordinance unconstitutional, Justice Maes' concurrence was more protective of the individual's interests, as she implicated a constitutional fundamental freedom in deciding this case, while the majority merely applied preemption as a means for striking down the ordinance.<sup>100</sup> Thus, while Justice Franchini ultimately decided in favor of the individual over the law enforcement officials, in terms of the issue dividing the Court, he was not as protective of individual rights as Justice Maes.

Similarly, in *Arellano*, Justice Franchini concurred with the majority opinion that denied the defendant a new trial despite the fact that the court failed to administer the oath—required under New Mexico law—to the jury before it delivered its verdict.<sup>101</sup> Justice Franchini agreed that a new trial should not be granted,

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<sup>97</sup> See *id.* at 526 (discussing whether a baseball bat falls within the definition of bludgeon—thus making it a deadly weapon—as defined by the New Mexico statute).

<sup>98</sup> 992 P.2d 866, 871–75 (N.M. 1999) (striking down a curfew ordinance for minors because the law was preempted by the New Mexico Delinquency Act, because it violated constitutional protections from warrantless arrests, and because it was deemed to undermine the intent of the legislature to make minors committing crimes *delinquents* rather than *criminals*).

<sup>99</sup> 965 P.2d 293, 297 (N.M. 1998) (determining whether it was reversible error to allow a jury to deliberate and reach a decision without having been sworn in by the court).

<sup>100</sup> See *ACLU*, 992 P.2d at 876–79 (Maes, J., specially concurring) (displaying her displeasure with the majority's preemption rationale and instead arguing that the Court should analyze the issue according to Supreme Court precedence, which places great importance on the right to move about freely (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972))).

<sup>101</sup> See *Arellano*, 965 P.2d at 296–97.

2003]

New Mexico

959

based in part on the act of bad faith displayed by the defense.<sup>102</sup>

It is likely that the defense counsel's devious strategic plan ruined the chance for a new trial in Justice Franchini's mind. Therefore, this case shows one instance in which Justice Franchini will not favor the defense—when purposeful misconduct or intentionally devious tactics are employed.

Despite Justice Franchini's strict adherence protecting the defendant's individual liberties in criminal cases, he does not maintain this forceful position in civil cases. Justice Franchini only held for the individual in civil cases 33% of the time, while he favored the governmental/corporate interest 67% of the time.<sup>103</sup> Justice Franchini's pro-government stance in civil cases tends to show that individual grievances over monetary damages are not enough to trigger application of the expansive liberty rights that Franchini grants in criminal cases.<sup>104</sup>

#### *E. Justice Petra J. Maes*

Justice Maes replaced Justice McKinnon III in 1998 and in 2003, she became the first Hispanic woman ever to serve as Chief Justice of a state's high court.<sup>105</sup> While Justice McKinnon III was extremely protective of individual rights, Justice Maes is more moderate on such issues. Justice Maes tends to be the swing vote on the five-member panel. As such, in criminal cases her vote is often outcome dispositive, since Justices Serna and Baca typically vote for the prosecution, while Justices Minzner and Franchini typically defend the rights of the accused.

During her tenure as a Supreme Court Justice, Justice Maes authored separate opinions on only three occasions when there have been divided cases. Two of these separate opinions were dissents

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<sup>102</sup> See *id.* at 296. (noting that defense counsel "knew of the defect in the proceedings . . . yet engaged in gamesmanship . . . [and] admitted to the trial court that he knowingly withheld [information] from the court").

<sup>103</sup> See tbl.2 (depicting the total percentage of cases in which each justice voted in favor of the individual interest and the governmental/corporate interest in civil cases).

<sup>104</sup> See *S. Union Gas Co. v. N.M. Pub. Util. Comm'n*, 947 P.2d 133, 137–38 (N.M. 1997) (providing that governmental control of utility rates in order to protect individual consumers was not possible, since the Commission has no jurisdiction over non-public utilities). Justice Franchini concurred with the majority opinion. *Id.* at 138; see also *Handmaker v. Henney*, 992 P.2d 879, 888–89 (N.M. 1999) (Franchini, J., special concurrence and dissent) (supporting his propensity to favor the powerful interest over the individual in civil cases).

<sup>105</sup> See Deborah Baker, *Maes Becomes Nation's First Hispanic Female Chief Justice*, ALBUQUERQUE JOURNAL, Jan. 8, 2003 (pointing out that New Mexico is also the only state where Hispanic men have served as Chief Justice of a state supreme court), at <http://www.abjjournal.com/news/apmaes01-08-03.htm> (last visited Feb. 12, 2003).

and the third was a special concurrence.<sup>106</sup> The reasons that Justice Maes has rarely issued separate opinions are obvious—she is both a moderate and the newest member of the Court. Since Justice Maes has written so few separate opinions, ascertaining her individual position in a specific legal issue is more difficult. It is apparent, however, that in the context of criminal cases, Justice Maes often agrees with her pro-prosecution colleagues in affirming criminal convictions. One example of her pro-prosecution stance is *State v. Carbajal*,<sup>107</sup> in which Justice Maes, who authored the lone dissenting opinion, argued for a different interpretation of a state forgery statute, which if followed, would have upheld the defendant's conviction.<sup>108</sup>

Nevertheless, Justice Maes has acknowledged circumstances that are so egregious that they warrant either a dismissal of charges against the defendant, or at the least, a new trial.<sup>109</sup> In *State v. Martinez*,<sup>110</sup> Justice Maes embraced her pro-individual sentiments when she agreed that a death sentence should not be upheld when it is uncertain whether the defendant knowingly waived his right to be sentenced by a jury of his peers.<sup>111</sup> In this case, the defendant claimed that “the trial court erred in failing to fully inform him of the difference between sentencing by the court and sentencing by a

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<sup>106</sup> *State v. Carbajal*, 48 P.3d 64, 69 (N.M. 2002) (Maes, J., dissenting); *ACLU v. City of Albuquerque*, 992 P.2d 866, 876 (N.M. 1999) (Maes, J., specially concurring); *Alberts v. Schultz*, 975 P.2d 1279, 1289 (N.M. 1999) (Maes, J., dissenting).

<sup>107</sup> 48 P.3d 64 (N.M. 2002).

<sup>108</sup> *See id.* at 69–70 (Maes, J., dissenting) (disagreeing with the majority opinion concerning its interpretation of the legal efficacy element that is required for the offense of forgery).

<sup>109</sup> *See, e.g.*, *State v. Padilla*, 46 P.3d 1247, 1255–56 (N.M. 2002) agreeing that the lower court's acceptance of the defendant's waiver of his right to be present at jury selection and of his right to appeal was more than harmless error); *State v. Martinez*, 43 P.3d 1042, 1049 (N.M. 2002) (joining the majority in finding that the trial court should have explained to the defendant that his chances of receiving the death sentence could be substantially reduced if he opted for a jury trial instead of a bench trial); *State v. Benally*, 34 P.3d 1134, 1139 (N.M. 2001) (concurring in the holding that one of the instructions given to the jury created insurmountable confusion and that a new trial was the correct remedy); *State v. Cardenas-Alvarez*, 25 P.3d 225, 234 (N.M. 2001) (agreeing with the majority that the defendant's conviction had been based on illegally seized evidence); *Patterson v. LeMaster*, 21 P.3d 1032, 1040 (N.M. 2001) (concurring with the majority opinion that the defendant was prejudiced by ineffective counsel); *State v. Nunez*, 2 P.3d 264, 293–94 (N.M. 2000) (holding unanimously that the state could set aside default judgments so that the cases could be tried on their merits); *State v. Paul T.*, 993 P.2d 74, 84 (N.M. 1999) (agreeing that the lower court erred in denying the defendant's motion to suppress evidence and remanding the case for a determination of whether the minor's consent to a search of his pockets was valid).

<sup>110</sup> 43 P.3d 1042 (N.M. 2002).

<sup>111</sup> *See id.* at 1049 (joining in the majority opinion, characterized within the context of this high court study as pro-individual).

2003]

New Mexico

961

jury.”<sup>112</sup> When the life of the defendant depended upon the judicial outcome, Justice Maes was convinced that justice would best be served if a new hearing was held so that the defendant’s fate could be determined by a jury of his peers rather than by a single judge.<sup>113</sup>

Although Justice Maes is pro-prosecution in criminal cases, this type of pro-government position does not extend to civil cases, in which Justice Maes was against the governmental/corporate interest 69% of the time.<sup>114</sup> For instance, in *ACLU v. City of Albuquerque*,<sup>115</sup> Justice Maes’ separate concurrence provided the most pro-individual view of the issue, as she implicated a fundamental constitutional right when the majority simply decided the case under the doctrine of preemption.<sup>116</sup>

As evidenced by her pro-prosecution record, it appears that Justice Maes will not tolerate anti-social conduct, but is more sympathetic towards innocent individuals who were wronged by a governmental or other powerful corporate entity.

#### IV. CONCLUSION

Concurrent with the writing of this high court study, the New Mexico Supreme Court held an election, in which Justices Minzner and Maes were running for reelection; both justices retained their positions.<sup>117</sup> Another position on the New Mexico Supreme Court became available when Justice Baca announced that he would be stepping down after the 2002 election.<sup>118</sup> Democratic candidate Chief Judge Richard Bosson of the New Mexico Court of Appeals ran against his Republican challenger, Paul D. Barber, to fill this position.<sup>119</sup> Chief Judge Bosson—the Democratic nominee—ultimately won the election. Chief Judge Bosson’s ranking among his peers on the Court of Appeals was the highest of any member of

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<sup>112</sup> *Id.* at 1048.

<sup>113</sup> *Id.* at 1048–49.

<sup>114</sup> *See* tbl.2.

<sup>115</sup> 992 P.2d 866 (N.M. 1999).

<sup>116</sup> *See id.* at 877–79 (Maes, J., specially concurring) (arguing that a curfew law enacted by the City of Albuquerque was an unconstitutional impairment of parental rights and that it was impermissibly overbroad and vague).

<sup>117</sup> *See Election Roundup*, ALBUQUERQUE JOURNAL, Nov. 7, 2002, at <http://www.abqjournal.com/elex/796056news11-07-02.htm> (last visited Feb. 3, 2003).

<sup>118</sup> *Supreme Court*, LAS CRUCES SUN NEWS.COM, Nov. 4, 2002 at <http://www.lcsun-news.com/Stories/0,1413,115%7E24048%7E969588,00.html> (last visited Feb. 3, 2003).

<sup>119</sup> *Id.*; *see also Ex-Judge To Run for State Supreme Court Seat*, ALBUQUERQUE JOURNAL, Aug. 18, 2002, at <http://www.abqjournal.com/elex/754496news08-18-02.htm> (last visited Feb. 3, 2003).

the court, but it is not clear what ideological path he will forge in his new position as a Supreme Court Justice. Justice Bosson replaces Justice Baca, who, from the above analysis proved to be the staunch conservative on the Court, despite his proclaimed democratic affiliation. Additionally, in December 2002, Justice Franchini announced that he would be retiring from the bench, effective December 31, 2002.<sup>120</sup> Indeed, the New Mexico Supreme Court is undergoing a structural overhaul.

With the retirements of Justices Baca and Franchini, the state lost its most conservative and liberal voices, respectively, which will undoubtedly affect the future jurisprudence of the New Mexico Supreme Court. Chief Justice Serna will now be the most pro-prosecution member of the Court, and, perhaps because of a combination of Justice Baca's departure and Justice Serna no longer serving as Chief Justice, he may change the way in which he has aligned himself for the past five years. And perhaps Justice Maes—with newfound confidence from the election—will begin to take a more assertive role in defining her ideological position.

It would only be speculation to say that the pro-prosecution/pro-government side of the New Mexico Supreme Court will be lost after the change in composition of the Court. But one thing is for certain: Despite the liberal make up of the Court, there is still room for conservatism, as evidenced by the statistical analysis of the past five years of New Mexico Supreme Court jurisprudence.

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<sup>120</sup> See *Governor Appoints Albuquerque Lawyer to Supreme Court*, ALBUQUERQUE JOURNAL, Jan. 30, 2003 (announcing that New Mexico Governor Bill Richardson appointed Edward Chavez, an Albuquerque attorney, to fill the vacancy created by Justice Franchini's departure), at <http://www.abqjournal.com/news/apsupct01-30-03.htm> (last visited Mar. 3, 2003).

2003]

New Mexico

963



2003]

New Mexico

965



2003]

New Mexico

967

