IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

vs. **No. S-1-SC-39897**

DEMESIA PADILLA,

Defendant-Respondent.

STATE OF NEW MEXICO'S BRIEF IN CHIEF

On Writ of Certiorari to the Court of Appeals
The Honorable Cindy M. Mercer, District Judge

RAÚL TORREZ
Attorney General

James W. Grayson
Chief Deputy Attorney General

Walter Hart
Assistant Attorney General

201 Third St., NW, Suite 300
Albuquerque, New Mexico 87102
(505) 717-3523
jgrayson@nmag.gov
WHart@nmag.gov

Attorneys for Plaintiff-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases:

Cases from Other Jurisdictions:

New Mexico Constitution, Statutes, and Rules:

Other Authorities:

INTRODUCTION

The Legislature requires the State to file second degree felony charges within six years. The State satisfied this requirement in the present case by filing public corruption charges against Defendant Demesia Padilla in Santa Fe County before the statute of limitations expired.

The State alleged in its charging document that the crimes occurred in Santa Fe County. Before the original statute of limitations expired, a magistrate judge bound over the charges despite Defendant's objection to venue. *After* the original statute of limitations expired, Defendant filed a motion to dismiss for improper venue, which the district court granted with respect to some – but not all – of the charges. Defendant did not raise the statute of limitations, and the district court did not address it. The State promptly refiled the dismissed charges in the proper venue. Although these charges were filed after the original expiration of the statute of limitations, less than six total years had passed when combining the time from the triggering of the statute of limitations to the initial filing of charges with the time from dismissal to refiling.

Defendant, for the first time, raised a statute of limitations issue in the new venue. The district court denied Defendant's motion to dismiss, and the Court of Appeals denied Defendant's application for interlocutory appeal. A jury of Defendant's peers found Defendant guilty of the charges beyond a reasonable

doubt. On direct appeal, the Court of Appeals relied on the statute of limitations to overturn the jury's verdict after having denied Defendant's interlocutory appeal on this issue.

A statute of limitations for criminal acts protects against stale investigations and therefore focuses on the time for filing charges, not the time in which a defendant is brought to trial. Accordingly, this Court has held in another context that a timely filed charging document stops the running of the statute of limitations. Legally and logically, this principle applies to charges filed in the district court regardless of any question later raised about venue. The district court in any venue has general subject matter jurisdiction, and because venue may be waived or forfeited such that venue is proper unless and until it is ruled to be improper, charges are properly pending once filed regardless of venue.

It is the filing of charges that stops the running of the statute of limitations, and the statute of limitations is thus suspended while charges are validly pending. If a defendant raises the issue of venue and the court rules that venue belongs in another county, the time the action was pending, that is, the period from the filing of charges until dismissal without prejudice, is excluded from the limitations period. After dismissal, charges must be refiled in the proper venue before the total time in which no charges are pending exceeds the statute of limitations.

This interpretation of the statute of limitations is consistent with the language and purposes of the statute, the Court of Appeals' reasoning in *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, the widely accepted application of similar statutes of limitations in other jurisdictions, and the ends of justice. The State respectfully asks this Court to adopt this interpretation of the statute of limitations and to reinstate the jury's verdict.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant is the former Secretary of the New Mexico Taxation and Revenue Department. On June 29, 2018, the State filed a criminal information in Docket Number D-101-CR-2018-00400 charging Defendant with one count of engaging in an official act for personal financial gain, one count of embezzlement, one count of computer access with intent to defraud, and five counts of violation of ethical principles of public service. For Counts 2 and 3, the embezzlement and computer access charges, the information alleged a continuing offense in Santa Fe County between December 19, 2011, and January 22, 2013. The statute of limitations would have expired for these charges on January 21, 2019, but the State filed its information approximately seven months earlier.

The district court extended the time to conduct a preliminary examination due to defense counsel's unavailability, and the preliminary examination was not held until October 29, 2018. At the preliminary hearing, Defendant raised the issue

of venue, and Defendant subsequently filed an objection to venue on November 29, 2018, in which Defendant objected to venue for all counts. The magistrate judge nonetheless bound the charges over for trial.[1]

Defendant was arraigned on the original information on July 13, 2018, and she was arraigned on the second amended information on February 14, 2019. Ten months after the original information was filed, on April 25, 2019, Defendant filed a motion to dismiss for improper venue and argued that venue was proper in either Bernalillo County or Sandoval County but not in Santa Fe County. Defendant did not mention the statute of limitations. The State filed a response in which it argued that venue was proper because elements of the crimes had been committed in Santa Fe County.

On June 11, 2019, nearly a year after charges had been filed and more than five months after the expiration of the original statute of limitations, the district court denied Defendant's motion to dismiss with respect to Count 1 but granted the motion to dismiss with respect to Counts 2 and 3. The court dismissed Counts 2 and 3 without prejudice. Defendant did not appeal the dismissal without prejudice.

[1] The judge initially found no probable cause for Count 2, the charge of embezzlement, but subsequently reconsidered this ruling. The State filed two amended informations to reflect the initial and reconsidered findings from the preliminary examination, but Counts 2 and 3 of the second amended information mirror the original information.

On August 1, 2019, a Sandoval County grand jury indicted Defendant on the embezzlement and computer access counts. **[RP 1]** Defendant moved to dismiss the charges as violating the statute of limitations. **[RP 57]** The State argued that the statute of limitations was tolled during the pendency of the first proceeding pursuant to *Martinez*.**[RP 60-69]** The court denied Defendant's motion to dismiss. **[RP 83]** At trial, a jury found Defendant guilty of the embezzlement and computer access charges beyond a reasonable doubt. **[RP 442, 444]**

II. THE DIVIDED OPINION OF THE COURT OF APPEALS

In a divided opinion, the Court of Appeals reversed. *State v. Demesia Padilla*, 2023-NMCA-___, A-1-CA-40038 (N.M. Ct. App. March 31, 2023). The majority concluded that a statutory tolling provision, NMSA 1978, § 30-1-9 (1963), applied to the dismissal for improper venue and foreclosed any tolling under *Martinez* because the charges were not refiled within five years of the crimes as required by Section 30-1-9. The majority observed that *Martinez* did not consider "whether the time period between the first timely filing and any subsequent refiling could be excluded by Section 30-1-9(B)" and limited *Martinez* to cases in which Section 30-1-9 does not apply. Op. ¶ 12.

In dissent, Judge Duffy undertook a more detailed analysis of Section 30-1-9. After conducting a historical review of the provision and a comprehensive survey of other jurisdictions, Op. ¶¶ 19 n.9, 24-25 (Duffy, J., dissenting), Judge

Duffy concluded that Section 30-1-9 applies only to less serious crimes and, for those crimes, supplements—rather than replaces—tolling while a case is pending. Whereas tolling in the absence of Section 30-1-9 applies only to the time a case is pending, Section 30-1-9 applies to the time between dismissal and refiling. Op. ¶¶ 19, 25 (Duffy, J., dissenting). This supplementary tolling benefit is limited to less serious crimes and requires refiling for those crimes within five years "to ensure that less serious crimes do not linger in perpetuity." *Id.* ¶ 26 (Duffy, J., dissenting). In this case, the statute of limitations stopped during the time the charges were pending in Santa Fe County and started again upon dismissal, such that the statute had not expired at the time of the indictment in Sandoval County. *Id.* ¶ 29 (Duffy, J., dissenting).

III. ARGUMENT

A. The filing of charges in a court having jurisdiction over the action stops the statute of limitations from running while the action is pending.

The Legislature established a statute of limitations of six years for second degree felonies. NMSA 1978, § 30-1-8 (2022). Defendant was convicted of second degree felonies with a triggering date of January 22, 2013, and the State filed its initial information within the limitations period on June 29, 2018. The plain language and purpose of Section 30-1-8 show that the filing of the information tolled the statute of limitations while the first action was pending. The statute

restarted upon the dismissal of the charges without prejudice and again stopped with the filing of the indictment in Sandoval County. Because less than six years elapsed without charges pending, the State complied with the statute of limitations.

1. Standard of Review

"Statutory construction is a matter of law that is reviewed de novo." *State v. Surratt,* 2016-NMSC-004, ¶ 12, 363 P.3d 1204 (quoting *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182). In the interpretation of a statute, the "primary goal is to ascertain and give effect to the intent of the Legislature." *State v. Morales*, 2010-NMSC-026, ¶ 6, 148 P.3d 24. In pursuing this goal, a reviewing court "examine[s] the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *Leger v. Leger*, 2022-NMSC-007, ¶ 26, 503 P.3d 349. The context of a statute includes other statutes pertaining to the same subject matter, including those that have "the same purpose or object" such that they may be considered "*in pari materia.*" *State v. Torres*, 2022-NMSC-024, ¶ 35, 521 P.3d 77.

A statute of limitations is generally liberally construed in favor of a defendant. However, this Court has cautioned that "the rule of liberal construction 'is only one factor influencing interpretation of punitive legislation, and it should not be used to defeat the policy and purposes of a statute.'" *Morales*, 2010-NMSC-

026, ¶ 13 (quoting *State v. Ogden*, 1994-NMSC-029, ¶ 27, 118 N.M. 234). Ultimately, "'the language of penal statutes should be given a reasonable or common sense construction consonant with the objects of the legislation, and the evils sought to be overcome should be given special attention.'" *Id.* (quoting *Ogden*, 1994-NMSC-029, ¶ 27); *accord Martinez*, 1978-NMCA-095, ¶ 23.

2. Under the plain language and purposes of Section 30-1-8, the statute of limitations excludes the time while an action is pending.

Section 30-1-8 prohibits the prosecution of a defendant "in any court of this state unless the indictment is found or information or complaint is filed within the time as provided." For a second degree felony, the time as provided is six years. Under this plain language, the State's information filed in Santa Fe County satisfied the statute of limitations. The district court had jurisdiction over the subject matter, and a magistrate judge found probable cause to support the charges and bound the charges over for trial. Defendant was thus subject to a timely and valid prosecution in Santa Fe County. For this reason, the filing of the information stopped the clock from running. Indeed, if Defendant had not moved for dismissal for improper venue or if the court had not granted the motion, the prosecution would have continued in Santa Fe County, and a valid conviction could have been had under the original information; there simply would have been no room for any statute of limitations argument.

The district court's determination of improper venue in Santa Fe County for two of the charged offenses did not erase the State's compliance with the plain language of the statute. Section 30-1-8 expressly provides for the statute of limitations to be satisfied by the filing of a complaint or information and the finding of an indictment. The dismissal of charges without prejudice restarted the statute of limitations, and the State again complied with the plain language of the statute with the finding of the indictment in Sandoval County.

The purposes of Section 30-1-8 support this plain language analysis. The purpose of a statute of limitations for criminal acts is to "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). Statutes of limitation "also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Id.* These interests focus on the "timely *initiation of a prosecution*," that is, "the timeliness of the charging document itself, not the timeliness of trial." *State v. Collier*, 2013-NMSC-015, ¶ 33, 301 P.3d 370. Accordingly, "a timely filed charging document stops the statute of limitations clock from running on any explicitly charged offenses and any lesser included offenses upon which the district court properly instructs the jury at trial." *Id.* ¶ 37 (relying on the purpose of Section

30-1-8 to reject the defendant's argument that the statute of limitations had run for an uncharged lesser included offense because the jury had not been instructed on that offense within the limitations period). Other jurisdictions agree with this principle. *See State v. Strand*, 674 P.2d 109, 110 (Utah 1983) ("The filing of an information commences the action and thus tolls the running of the applicable statute of limitations.").

The Legislature intended to exclude pending actions from counting toward the limitations period, and the Second Circuit explained why legislatures do so:

> Once an indictment is brought, the statute of limitations is tolled as to the charges contained in that indictment. This is a sensible application of the policies underlying statutes of limitations. The defendants are put on timely notice, because of the pendency of an indictment, filed within the statutory time frame, that they will be called to account for their activities and should prepare a defense. The statute begins to run again on those charges only if the indictment is dismissed, and the Government must then reindict before the statute runs out . . . in order not to be time-barred.

United States v. Grady, 544 F.2d 598, 601 (2d Cir. 1976) (citations omitted). As the Second Circuit explained, the filing of charges fulfills the statutory goals of prompt investigation and charging sufficiently close in time to the conduct so as not to prejudice the accused's ability to defend against the charges or extend criminal liability to the far-distant past. Under Section 30-1-8, the action is tolled

while it is pending. Upon dismissal of the action without prejudice, the limitations period restarts in order to protect against unreasonable delay in refiling.

The Court of Appeals previously relied on the Second Circuit's opinion in *Grady* to interpret Section 30-1-8. In *Martinez*, the State filed a criminal complaint in magistrate court within the statute of limitations. 1978-NMCA-095, ¶ 2. While the complaint was pending but after the original statute of limitations otherwise would have run, a grand jury indictment was filed charging the same offense. *Id.* Much as the Court of Appeals did here, the district court vacated the jury's verdict on the charge because the indictment had not been filed within the statute of limitations. *Id.* The Court of Appeals in *Martinez* reversed. The Court relied on the plain language of Section 30-1-8 and observed that the statute "does not distinguish between complaint, indictment or information. Rather, the statute provides that a complaint, charging a felony, may be filed within the specified time limitation." *Id.* ¶ 18. The Court of Appeals determined that, under Section 30-1-8, "the limitation period was tolled upon the filing of the complaint." *Id.* ¶ 24.

Although the complaint in *Martinez* was still pending at the time the indictment was filed, the Court of Appeals' reasoning does not depend on this fact. The Court specifically raised the possibility that an indictment filed while a complaint is pending should be viewed as a continuation of the original charges. *Id.* ¶ 10. "[I]t would seem that charges initiated by the complaint in the magistrate

court should be considered as continued by the indictment." *Id.* But the Court chose not to decide the case on continuation grounds: "We view the 'continuation' consideration to be valid, however, we decide the case on the basis of 'tolling.'" *Id.* ¶ 11. The Court's view of cases from other jurisdictions reinforces its focus on tolling over continuation.

Other jurisdictions have been divided on the question of tolling for a pending action that is ultimately dismissed. As extensively catalogued by Judge Duffy in a footnote citing nearly forty statutes and cases from other jurisdictions, Op. ¶ 19 n.9 (Duffy, J., dissenting), the vast majority of jurisdictions recognizes that the filing of charges tolls the statute of limitations such that the statute is tolled during the time a prosecution is pending for the same offense despite a later dismissal of the charges. For example, in *Strand*, the state filed an information within the statute of limitations, and the defendant filed a motion to dismiss the information for the absence of the prosecutor's signature on the charging document. 674 P.2d at 110. Due to procedural delays at the defendant's request, the defendant made the motion to dismiss after the original statute of limitations would have run. *Id.* In *State v. Stewart*, 438 A.2d 671, 672 (Vt. 1981), grand jury indictments were filed before the statute of limitations expired, but the trial court dismissed the indictments eight months later for grand jury irregularities and a lack

of specificity. The state filed informations five days later but after the original statute of limitations had run. *Id.* at 672-73.

The high courts of Utah and Vermont observed that some jurisdictions allow for tolling during the time charges are pending while others do not, and these different viewpoints rest almost entirely on the plain language of each state's statute of limitations. *Strand*, 674 P.2d at 112; *Stewart*, 438 A.2d at 674-75. When a statute refers to an action being commenced, "the cases hold that the running of the statute is interrupted by the filing of an indictment or information and does not begin to run again unless and until the indictment is dismissed." *Stewart*, 438 A.2d at 675. This principle applies because an action is "commenced" by the presentation or filing of an information or indictment, which does not depend on the validity of the charging document. *Id.*; *accord Davenport v. State*, 202 P. 18, 23-25 (Okla. Crim. App. 1921); *Hickey v. State*, 174 S.W. 269, 270 (Tenn. 1915). This line of authority is consistent with the Second Circuit's opinion in *Grady*. *Stewart*, 438 A.2d at 675. It rests on the notion that a charging document that is later dismissed provides timely notice to defendants "that they will be called upon to account for their activities and should prepare a defense." *Strand*, 674 P.2d at 112; *accord Stewart*, 438 A.2d at 675 ("The indictments against both defendants stated, at the very least, what statutes were violated, when they were violated, and what acts of the defendant resulted in the violation.").

A different view arises in states with statutes that depend on an indictment being found or brought. *Id.* at 674-75. These jurisdictions decline to apply tolling under the plain language of the statute of limitations because the words "found" or "brought" require the return of an indictment upon which a valid conviction may be maintained. *Id.* "The beginning of a prosecution and a finding of an indictment are not equivalent expressions. A prosecution is begun when an information is filed before a magistrate and a warrant issued for the defendant's immediate arrest." *State v. Disbrow*, 106 N.W. 263, 266 (Iowa 1906). By contrast, "[a]n indictment is found when it is presented by the grand jury in due form in open court and filed with the clerk." *Id.* In jurisdictions that require the finding of an indictment, "the running of the statute of limitations ought not to be interrupted or suspended by the return and pendency of an indictment upon which no valid conviction or judgment can be founded. Such an indictment is no indictment." *Id.* at 266. In addition to Iowa, such jurisdictions also include Idaho. *See State v. Bilbao*, 222 P. 785 (Idaho 1923).

In *Martinez*, the Court of Appeals observed that Section 30-1-8 "provides that a complaint, charging a felony, may be filed within the specified time limitation." 1978-NMCA-095, ¶ 18. New Mexico's statute of limitations, in other words, may be satisfied by the beginning of a prosecution and does not exclusively require the finding of an indictment. In fact, Section 30-1-8 is entitled, "Time

limitations for commencing prosecution." *See State v. Sena*, 2023-NMSC-007, ¶ 18, 528 P.3d 631 ("Reliance on the title of a statute to aid in the analysis is appropriate because a title may be considered part of the act if the title is necessary to the statute's construction."). New Mexico's statute therefore falls within the category of statutes of limitation that incorporate tolling for pending charges.[2] Indeed, the Court of Appeals not only cited *Grady* in support of its holding but also rejected Idaho's approach in *Bilbao* because "[t]he Idaho statute under consideration in *Bilbao* did not apply to a complaint." *Martinez*, 1978-NMCA-095, ¶ 20. The Court of Appeals properly relied on *Grady* and properly distinguished *Bilbao* in its determination that the Legislature incorporated tolling for pending matters in Section 30-1-8. *See State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 14, 127 N.M. 272 ("[T]he Court may view cases from other jurisdictions interpreting practically identical statutory language as persuasive.").

The Legislature enacted Section 30-1-8 in 1963. At that time, the division of authority in other states based on differing statutory language had long since developed. The Legislature can be presumed to have known about this distinction and to have deliberately selected language designating the initiation of a

[2] Judge Duffy described this tolling as "nonstatutory" in order to distinguish it from the tolling in Section 30-1-9. *See* Op. ¶ 18 (Duffy, J., dissenting). Given its source in statutory language, however, it might be more accurately described as Section 30-1-8 tolling.

prosecution as stopping or interrupting the running of the statute of limitations. *See Antillon v. N.M. State Highway Dep't*, 1991-NMCA-093, ¶ 15, 113 N.M. 2 ("Similar statutes of other states comprise a type of extrinsic aid deserving special attention in the process of [statutory] interpretation." (quoting N. Singer, *Sutherland Statutory Construction* § 52.01 at 521 (4th ed. 1984)); *see also* NMSA 1978, § 12-2A-20(B)(2) (1997) (providing for the consideration of "a judicial construction of the same or similar statute or rule of this or another state" in ascertaining the Legislature's intent).

The plain language, purpose, and context of Section 30-1-8 establish that the time during which a prosecution is pending shall not be counted toward the statute of limitations. The information filed in Santa Fe County interrupted the running of the statute of limitations until the case was dismissed.

3. Dismissal based on venue should not nullify the commencement of a prosecution because proper venue may be overlapping or ambiguous.

The above interpretation of Section 30-1-8 is particularly appropriate for improper venue cases for at least two reasons. *First*, venue in criminal cases may lie in multiple counties because venue is proper in any county in which an element of the crime was committed. NMSA 1978, § 30-1-14 (1963). Venue may also be established to exist in multiple counties by virtue of the fact that venue is subject to a preponderance of the evidence standard of proof. *See State v. Roybal*, 2006-NMCA-043, ¶ 19, 139 N.M. 341. *Second*, "[v]enue is not an element of the crime

charged and does not go to the guilt or innocence of the defendant." *Id.* Venue is thus not jurisdictional and may be waived or forfeited. *State v. Lopez*, 1973-NMSC-041, ¶¶ 8-16, 84 N.M. 805. Because the district court in all venues throughout the state is a court of general jurisdiction, *see* N.M. Const. art. VI, § 13, the district court has jurisdiction to try felony cases even if they are filed in the wrong venue. *See Lopez*, 1973-NMSC-041, ¶ 16 (observing that the defendant made "no claim that he did not get a fair or impartial jury or a fair and impartial judge to preside over the trial" in the county he claimed to be the wrong venue).

Given that venue may lie in multiple counties or may present a complex factual question, parties may not have a resolution on the question of venue until months or years after the filing of an action. This is particularly true of multi-count indictments or informations like the one filed in this case. In *Marsh v. State*, 1980-NMSC-129, ¶ 2, 95 N.M. 224, for example, the district court dismissed charges for improper venue, the Court of Appeals affirmed with respect to one charge but reversed on another, and this Court, presumably years after the initial filing, determined that both counts had been properly filed in Valencia County. The State cannot know whether venue is proper or improper until the issue is raised by the defendant and decided by the trial court or the appellate court, and the State has no way of protecting against the running of a statute of limitations except perhaps to file simultaneous prosecutions in multiple counties, an outcome no one would

advocate and the Legislature would not have intended to require. Further, venue is complicated by the fact that the district court, while empowered to change venue for purposes of obtaining a fair trial, NMSA 1978, § 38-3-3 (2003), is not authorized to transfer venue to another county upon finding that venue is improper; the court must dismiss without prejudice. For all of these reasons, it makes eminent sense and furthers the purposes of Section 30-1-8 and the ends of justice to toll the statute of limitations while an action is pending in the district court based on the good-faith, but mistaken, filing of charges in the wrong venue.

This Court has so recognized in civil cases. *See Bracken v. Yates Petro. Corp.*, 1988-NMSC-072, ¶ 10, 107 N.M. 463. In *Bracken*, the wife of a deceased worker filed a worker's compensation claim in the wrong venue, and the district court dismissed the claim. 1988-NMSC-072, ¶ 1. The wife argued on appeal that venue should have been transferred to avoid the expiration of the statute of limitations. *Id.* ¶ 2. This Court held "that the filing of a complaint in an improper venue tolls the statute of limitations." *Id.*

> When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure.

Id. ¶ 10. In reaching this decision, the Court recognized the "general policy of Congress and the states . . . to prevent timely actions brought in improper venues

from being time barred." *Id.* Likewise, the Court of Appeals, while weighing "the policy favoring access to judicial resolution of disputes" against a "venue mistake," reached a similar conclusion in *Amica Mutual Insurance Co. v. McRostie*, 2006-NMCA-046, ¶ 17, 139 N.M. 486.

A contrary view would be illogical. According to the Court of Appeals' majority, the statute of limitations expired on January 21, 2019. But at that time, charges were properly pending in Santa Fe County, and the charges had been bound over for trial over the defendant's venue objection. Effectively, the Court of Appeals' majority held that the statute of limitations expired retroactively upon the district court's venue ruling. Nothing in Section 30-1-8 indicates a legislative intent for retroactive application of a statute of limitations. Further, if that were the case, the district court should have dismissed the charges with, rather than without, prejudice, but Defendant tellingly did not appeal the dismissal without prejudice.

B. Section 30-1-9 is a tolling statute that applies only if the statute of limitations has expired, only to less serious crimes, and only to the period of time between dismissal and refiling.

The majority opinion of the Court of Appeals relied on Section 30-1-9 as the exclusive source of tolling for dismissed actions that result in a lapse of time between dismissal and refiling. In doing so, the majority opinion misconstrued the statute.

Section 30-1-9 is a tolling provision. *State v. Hill*, 2008-NMCA-117, ¶ 9, 144 N.M. 775. It comes into operation only if the statute of limitations under Section 30-1-8 has expired. *Id.* ¶ 10. For the reasons expressed above, the statute of limitations in this case did not expire because (1) the State complied with the plain language of the statute by filing the information in Santa Fe County within six years of the commission of the crime and (2) the filing of charges stopped the running of the limitations period such that the refiling of charges in Sandoval County was timely. The Court of Appeals in *Martinez* expressly rejected the argument that, by enacting Section 30-1-9, "the Legislature excluded all other tolling situations." 1978-NMCA-095, ¶ 13. The Second Circuit similarly rejected this argument in *Grady*: "What [the appellants] ignore is that [the tolling statute] is operative, by its express terms, only after the limitations period has run, while in this case that limitation period has not run because it has been tolled by the continued pendency of the first indictment." 544 F.2d at 601 n.3.

Further, Section 30-1-9 is limited in scope. Section 30-1-9 does not apply in this case because it establishes an outer filing limit of five years and could not, under any circumstances, operate as a tolling mechanism for the second degree felonies of which Defendant was convicted by a jury. As Judge Duffy correctly determined, Section 30-1-9 applies only to "less serious offenses." Op. ¶ 26 (Duffy, J., dissenting).

Given the tolling for pending charges inherent in the language of Section 30-1-8, Section 30-1-9 augments Section 30-1-8 in the context of misdemeanor offenses by tolling the time between dismissal and refiling, a period not reached by Section 30-1-8 tolling. *See* Op. ¶ 25 (Duffy, J., dissenting). This statute therefore supplements the tolling recognized in *Martinez* and *Grady*. Because the State does not seek to toll the time between dismissal and refiling, Section 30-1-9 is simply beside the point in determining whether the State timely refiled the charges.

Section 30-1-8, not Section 30-1-9, applies in this case. Under Section 30-1-8, the State timely commenced the prosecution by filing an information within the statute of limitations and by refiling the charges in the proper county before the time between dismissal and refiling, combined with the period before the filing of the information, exceeded the six-year statute of limitations.

CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reverse the majority opinion of the Court of Appeals and affirm the jury's verdict.

Respectfully submitted,

RAÚL TORREZ
Attorney General

/s/ James W. Grayson
James W. Grayson
Chief Deputy Attorney General

Walter Hart
Assistant Attorney General

201 Third St., NW, Suite 300
Albuquerque, New Mexico 87102
(505) 717-3523
jgrayson@nmag.gov
WHart@nmag.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed through File and Serve with automatic service to Defendant through her counsel of record.

/s/ James W. Grayson
Chief Deputy Attorney General