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1 P.3d 383

2000-NMSC-012

In the Matter of THE PETITION OF PNM GAS SERVICES, A Division of Public Service Company of New Mexico, for A Revision to Its Rates, Rules, Forms and Charges Pursuant to Advice Notice Nos. 592, 593, and 594

PNM GAS SERVICES, a division of Public Service Company of New Mexico, Appellant,

v.

NEW MEXICO PUBLIC UTILITY COMMISSION, Appellee,

v.

NEW MEXICO ATTORNEY GENERAL, Cross-Appellant,

and

INCORPORATED COUNTY OF LOS ALAMOS, Intervenors.

No. 24148.

Supreme Court of New Mexico.

April 17, 2000.

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New Mexico Public Utility Commission, Anastasia S. Stevens, Commission Counsel, Santa Fe, for Appellee.

Patricia A. Madrid, Attorney General, Jeff Taylor, Assistant Attorney General, Santa Fe, for Cross–Appellant.

Virtue, Najjar & Bartell, P.C., Daniel A. Najjar, Santa Fe, for Intervenors.

OPINION

SERNA, Justice.

{1} PNM Gas Services (PNMGS), a division of Public Service Company of New Mexico (PNM), petitioned the New Mexico Public Utility Commission (Commission) for a rate increase in the amount of approximately $13.3 million. Following a full hearing before a hearing examiner concerning PNMGS's gas rates in Case No. 2662, the hearing examiner determined that PNMGS's then-existing rates were not fair, just, and reasonable and recommended that PNMGS's rates be decreased by $547,184. In a final order, the Commission denied PNMGS's requested rate increase, and the Commission ordered a reduction in PNMGS's gas rates by approximately $6.9 million. PNMGS appeals from the Commission's final order and requests that this Court vacate and annul the order.

{2} PNMGS raises numerous issues on appeal which, according to PNMGS, indicate that the Commission acted unlawfully or unreasonably: (1) the Commission denied recovery of $5.9 million in costs incurred in retiring high cost debt; (2) the Commission denied recovery of $11.4 million in rate discounts granted to transportation customers under a newly established cost/benefit test; (3) the Commission denied recovery of over $7 million in fees paid to reserve gas under two gas purchase agreements; (4) the Commission denied recovery of $457,000 in expenses incurred in the settlement of litigation between PNMGS and Mewbourne Oil Company; (5) the Commission denied all recovery of rate case expenses; (6) the Commission accepted a thirty-year weather normalization instead of PNMGS's proposed ten-year weather normalization; and (7) the Commission accepted the Commission Staff's proposed rate of return over PNMGS's proposed rate of return. PNMGS asserts two additional issues with which the Attorney General, in a cross-appeal, joins: (1) the Commission rejected PNMGS's and the Attorney General's request to change the rate design in the recovery of reliability costs through a mechanism labeled Rate Rider 12; and (2) the Commission increased the residential access charge by $5.56, even though PNMGS requested an increase of only $1.00.

{3} We believe that evidence in the record supports the Commission's decision to apply a cost/benefit test in disallowing Rate Rider 8 discounts, to adopt the proposed

thirty-year weather normalization, to accept Staff's proposed rate of return, and to decline to change the rate design through the Rate Rider 12 mechanism; however, we hold that the Commission's conclusions concerning reacquired debt and the residential access charge, as well as the Commission's decision to deny PNMGS the opportunity to recover reservation fees in a separate proceeding and to deny in their entirety the Mewbourne settlement expenses and rate case expenses, are not supported by substantial evidence in the record. As a result, we vacate and annul the Commission's final order.

I. Standard of Review

{4} Under the Public Utility Act, this Court "shall vacate and annul the order complained of if it is made to appear to the satisfaction of the [C]ourt that the order is unreasonable or unlawful." NMSA 1978, § 62–11–5 (1982, repealed effective July 1, 2003).

> The scope of review of Commission decisions is limited to the question of whether the Commission acted fraudulently, arbitrarily or capriciously, whether the decision is supported by substantial evidence, and, generally, whether the actions of the Commission are within the scope of its authority. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Attorney Gen. v. New Mexico Pub. Serv. Comm'n, 101 N.M. 549, 553, 685 P.2d 957, 961 (1984) (citation omitted). Because of the multiple roles inherently served by agencies such as the Commission in administrative proceedings, *see Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.,* 101 N.M. 291, 294, 681 P.2d 717, 720 (1984), this Court reviews the whole record, including both the evidence in favor of and the evidence contrary to the Commission's decision, in order to determine whether the decision is supported by substantial evidence. *See id.* at 293, 681 P.2d at 719. PNMGS, and the Attorney General with respect to the cross-appeal, must bear the burden of demonstrating that the Commission's order is unreasonable or unlawful, NMSA 1978, § 62–11–4 (1965), and "this Court must view the evidence in the light most favorable to the decision made by the Commission." *Attorney Gen.,* 101 N.M. at 553, 685 P.2d at 961.

II. General Principles Implicated in a Rate Case

{5} In the context of a general rate case, the Legislature has delegated exclusive authority to the Commission to set the rates charged by PNMGS. *See* NMSA 1978, § 62–6–4(A) (1996, repealed effective July 1, 2003). The Commission "is vested with considerable discretion in determining the justness and reasonableness of utility rates." *Attorney Gen.,* 101 N.M. at 553, 685 P.2d at 961; *accord* NMSA 1978, § 62–8–7 (1991, prior to 1998 amendment, repealed effective July 1, 2003).

{6} Generally, the Commission establishes a utility's rates based on the utility's revenue requirement, which is determined through an assessment of a number of different factors. "The traditional elements of the rate-making process and the establishment of the total revenue requirement are (1) determination of the costs of the operation, (2) determination of the rate base which is the value of the property minus accrued depreciation, and (3) determination of the rate of return." *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n,* 94 N.M. 731, 733, 616 P.2d 1116, 1118 (1980). The ratemaking process is prospective in nature in that "[p]ast deficits may not be made up by excessive charges in the future nor may past profits be reduced by disallowances to future operating expense." *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n,* 90 N.M. 325, 341, 563 P.2d 588, 604 (1977) (quoted authority omitted); *accord Behles v. New Mexico Pub. Serv. Comm'n (In re Application of Timberon Water Co.),* 114 N.M. 154, 161, 836 P.2d 73, 80 (1992). The setting of rates thus requires a certain amount of prediction by the Commission concerning a utility's future revenue requirement. Although "there is no way of learning precisely what it will cost to render any particular service," *Mountain States,* 90 N.M. at 338, 563 P.2d at 601, the Commission attempts to predict with reasonable accuracy a utility's future operat-

ing costs by utilizing a test-year method. Under the historical test-year method employed by the Commission in this case, the Commission evaluates a utility's operating costs for a specified preceding twelve-month period and uses the utility's past experience as a guide to the utility's future revenue requirement. *See* Charles F. Phillips, Jr., *The Regulation of Public Utilities* 188 (2d ed.1988).

{7} Because of the level of complexity involved in setting rates and the number of variables at issue in every rate proceeding, the Commission is "not bound to the use of any single formula or combination of formulae in determining rates. The rate-making function involves the making of pragmatic adjustments. It is the result reached, not the method employed, which is controlling." *Mountain States,* 90 N.M. at 338, 563 P.2d at 601, *quoted in Hobbs Gas Co.,* 94 N.M. at 734, 616 P.2d at 1119; *accord State ex rel. Sandel v. New Mexico Pub. Util. Comm'n,* 1999-NMSC-019, ¶ 15, 127 N.M. 272, 980 P.2d 55. Within this flexible framework, the Commission must balance

> the interest of consumers and the interest of investors ... to the end that reasonable and proper services shall be available at fair, just and reasonable rates, and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities for the rendition of service to the general public and to industry.

NMSA 1978, § 62-3-1(B) (1967, repealed effective July 1, 2003).

{8} Ultimately, the Commission must ensure that rates are neither unreasonably high so as to unjustly burden ratepayers with excessive rates nor unreasonably low so as to constitute a taking of property without just compensation or a violation of due process by preventing the utility from earning a reasonable rate of return on its investment. *See* NMSA 1978, § 62-8-1 (1953, repealed effective July 1, 2003) ("Every rate made, demanded or received by any public utility shall be just and reasonable."); *see also General Tel. Co. v. Corporation Comm'n (In re Application of General Tel. Co.),* 98 N.M. 749, 753, 652 P.2d 1200, 1204 (1982) ("[T]he failure of [a utility commission] to provide rates that will give the company a reasonable rate of return constitutes a violation of due process and a taking of property without just compensation."). A reasonable rate of return is one that provides a fair opportunity for the utility to receive just compensation for its investments, *Mountain States,* 90 N.M. at 334, 563 P.2d at 597, and that fulfills the statutory goal in Section 62-3-1(B) of enabling the utility "to attract new capital to maintain, improve, and expand its services in response to consumer demand." Phillips, *supra,* at 170. "There is a significant zone of reasonableness ... between utility confiscation and ratepayer extortion." *Behles,* 114 N.M. at 161, 836 P.2d at 80.

{9} Although "[t]he Commission is vested with considerable discretion in determining whether a rate to be received and charged is just and reasonable," *Hobbs Gas Co.,* 94 N.M. at 733, 616 P.2d at 1118, and the Commission must have "the ability ... to adapt to changes in circumstances in the rate-making determination from one year to the next," *id.* at 736, 616 P.2d at 1121, the Commission is not free to disregard its own rules and prior ratemaking decisions or "to change its position without good cause and prior notice to the affected parties." *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n,* 115 N.M. 678, 681, 858 P.2d 54, 57 (1993). In this context, we apply a five-factor balancing test, articulated in *Retail, Wholesale & Department Store Union v. NLRB,* 466 F.2d 380, 390 (D.C.Cir.1972), to determine whether an agency's change from a prior position may be applied retroactively:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale, 466 F.2d at 390, *quoted in Hobbs Gas Co.,* 115 N.M. at 682, 858 P.2d at 58.

{10} If we determine under the applicable standard of review that the Commission's order in a rate proceeding is unlawful or unreasonable, we "have no power to modify the action or order appealed from;" instead, we must vacate and annul the order en toto. NMSA 1978, § 62–11–5 (1982, repealed effective July 1, 2003). "However, we are not precluded from declaring or determining that parts of a Commission order are unlawful and/or unreasonable (which requires vacating and annulling en toto) but at the same time declaring other parts of the order to be reasonable and lawful." *Hobbs Gas Co.,* 115 N.M. at 680, 858 P.2d at 56. With these general principles in mind, we turn to the specific issues presented by PNMGS on appeal.

III. Reacquired Debt

{11} PNMGS sought to recover adjusted net losses on reacquired debt derived from a gross loss of $5,990,800 at the end of the base period. PNMGS's costs on reacquired debt stemmed from two instances of debt refinancing by PNM. PNM operates both PNMGS, which is a gas utility, and an electric utility through two separate divisions that are independently regulated by the Commission. In 1986, PNM separately refinanced approximately $54.6 million, $55.2 million, and $60.45 million of its high-cost debt, which was in the form of first mortgage bonds. In Case No. 2147, PNMGS's most recent litigated rate case before the Commission prior to the present proceeding, PNMGS sought to recover the portion of PNM's net losses from reacquired debt incurred in 1986 that were attributable to the gas utility division of the company. The Commission, in that rate case, permitted PNMGS to recover those costs, a total of approximately $8.5 million, through rate base treatment and amortization recovery. At the end of the test-year period utilized in the present proceeding, PNMGS maintained on its books losses of approximately $5.5 million associated with the cost of reacquiring debt in 1986. On a separate occasion, in 1994, PNM retired additional high-cost debt of approximately $45 million. PNMGS experienced losses of approximately $400,000 associated with the 1994 refinancing, for which PNMGS had not previously sought recovery.

{12} In the present proceeding, PNMGS petitioned the Commission to recover the costs of reacquiring debt in 1986 and 1994. Specifically, PNMGS sought continued recovery of the $5.5 million in losses on reacquired debt remaining from 1986 and the $400,000 in losses on reacquired debt incurred in 1994. After offsetting for gains associated with the reacquired debt, PNMGS proposed to recover adjusted net losses on reacquired debt of $359,857 in annual amortization expenses and to include the remaining unamortized balance of $4,648,695 in the rate base.

{13} The Attorney General's expert witness, James D. Cotton, explained the process involved in reacquiring high-cost debt.

> Bonds, or long-term debt, are generally a significant component of a utility's capital structure. Loss on reacquisition of debt usually happens when a utility acquires some of its older bonds which have higher interest rates than current rates in the debt market. In order for a utility to reacquire an old bond issuance that carries a higher than current market interest rate, it must pay a premium over the face value of its bond.... Since the utility and its investors paid *more* than face value for the bonds, the utility has taken a loss upon reacquiring the bonds, and the utility has effectively increased its investment in the utility. That is why the "loss" is added to rate base and this amount is amortized to expense for ratemaking purposes over the remaining life of the bonds.

For the reasons expressed by Mr. Cotton, the Commission has previously allowed PNMGS and other utilities to recover losses on reacquired debt. Indeed, "a nearly unanimous consensus of state regulatory bodies agree that gains as well as losses resulting from the repurchase of debentures should be passed on to ratepayers." *Washington Gas Light Co. v. Public Serv. Comm'n,* 450 A.2d 1187, 1216 (D.C.1982). The Commission established in Case No.1916 that it would permit recovery for losses on reacquired debt as

long as the utility demonstrated that the benefit to current and future ratepayers exceeds the costs associated with the reacquisition.

{14} The Commission Staff and the Attorney General advocated against recovery of losses on reacquired debt in the present rate case due to the methodology used in establishing the rate of return for PNMGS. In determining a reasonable rate of return for a utility, the Commission considers several factors, including the utility's capital structure, which refers to the ratio between the company's debt and equity, and the utility's cost of capital, which, according to Staff witness James Brack, represents the "weighted average of individual rates on long term debt, preferred stock, and common equity." *See* Phillips, *supra*, at 369 (describing cost of capital as a "composite of the cost of the several classes of capital used by a utility—debt, preferred (and preference) stock, and common stock . . .—weighted on the basis of an appropriate capital structure"). PNMGS, as a division of PNM, has neither debt and equity in its own name upon which to base the cost of capital nor an actual capital structure of its own. Furthermore, compared to less risky A-rated utility companies, PNM is a more risky BB junk-bond-rated company, and the business operating risks associated with PNM's electric utility division are significantly different from those applicable for PNMGS. PNMGS believed that it was important to relieve its ratepayers from the risks and problems associated with the electric utility division of PNM. As a result, PNMGS proposed the use of a hypothetical, or imputed, capital structure and a hypothetical cost of capital, including a hypothetical cost of debt. Specifically, even though PNMGS would likely not be treated as an A-rated company if it existed as a separate entity, PNMGS proposed to treat the gas utility division of PNM as if it were a separate A-rated company. PNMGS developed a hypothetical capital structure and cost of debt on the basis of eight A-rated natural gas distribution companies. PNMGS asserted that a hypothetical capital structure and cost of debt would benefit ratepayers by lowering PNMGS's overall cost of capital. Thus, although PNM has a cost of debt of 7.76%, PNMGS proposed the use of an imputed cost of debt of 7.56%.

{15} Staff also utilized a hypothetical capital structure and cost of capital in calculating the appropriate rate of return for PNMGS. Staff, like PNMGS, used eight A-rated natural gas distribution companies in formulating a hypothetical capital structure but proposed a cost of debt of 7.30%, instead of PNMGS's proposed 7.56%, based on more current data available at the time Staff submitted the pre-filed testimony of its expert, Mr. Brack. In addition, the Attorney General's expert, Mr. Cotton, testified that the use of a hypothetical capital structure and cost of capital for PNMGS was appropriate in this proceeding. However, Staff and the Attorney General relied on the use of a hypothetical capital structure and cost of debt in opposing recovery of losses on reacquired debt.

{16} According to the Attorney General's expert, Mr. Cotton, "[c]apital structure and the cost of debt are directly related to the amount of debt reacquired." Mr. Cotton further explained that "[t]he result of reacquiring long-term debt is a lower actual cost of debt." Thus, "[i]f the Company had used its actual capital structure at test period end, then, of course, its adjustment for gains and losses on reacquired debt might have been appropriate." However, PNMGS had proposed a hypothetical capital structure and cost of debt, and, according to Mr. Cotton, "[i]t is inconsistent for the Company to claim the loss on reacquiring debt but not to then use the lower cost of debt that resulted from the Company's actions. In the Company's proposal, the result is that ratepayers receive none of the benefit of the debt reacquisition." Similarly, Staff's expert, Dennis Gee, testified that "it is not likely that the benefits to ratepayers of these transactions can be shown in this proceeding. . . . Staff believes that the necessary nexus cannot be drawn between any benefits from gain/loss on reacquired debt transactions because these [affect] the actual capital structure and cost of capital but . . . [do] not [affect] an imputed capital structure and cost of capital."

{17} Based on this testimony, the Commission determined "that PNMGS has failed, therefore, to carry its burden of prov-

ing that the costs of losses on reacquired debt are outweighed by the cost of capital benefits to ratepayers." The Commission further determined that it was not bound by prior decisions allowing recovery of losses on reacquired debt, including Case No. 2147, because none of those cases involved a rate of return based on both an imputed capital structure and an imputed cost of debt. The Commission concluded that "PNMGS's request to use an imputed cost of debt in its cost of capital ... has made direct measurement of the debt reacquisition's effect on rates impossible." Finally, the Commission determined that, due to the substantial benefits realized by shareholders from the reacquired debt, estimated by the Commission to be approximately $80 million on a company-wide basis, PNM would have "undertaken the debt retirements had it anticipated that the losses on reacquired debt would be disallowed in rates," and denied all recovery of the losses.

{18} After reviewing the record as a whole, we believe the Commission's decision to disallow recovery of losses on reacquired debt is not supported by substantial evidence. We first address the Commission's determination that PNMGS failed to carry its burden of proof. Although PNMGS's use of an imputed capital structure and an imputed cost of debt made it difficult to calculate directly the extent of benefit realized by ratepayers, PNMGS nonetheless contended that the reacquisition of debt allowed it to utilize an imputed cost of debt in calculating its revenue requirement and that the imputed cost of debt was itself a benefit that ratepayers received from the retirement of high-cost debt. According to PNMGS's expert, Thomas Sategna, PNMGS's actual cost of debt would have been 10.82% if PNM had not retired the high-cost debt at issue in the rate proceeding. Comparing this figure to the proposed 7.56% imputed cost of debt and using PNMGS's proposed imputed capital structure, Mr. Sategna calculated that PNMGS's annual revenue requirement would have been approximately $2.37 million higher in the absence of the reacquisition of debt in 1986 and 1994. Dr. Charles Moyer testified that

> [i]t is only because PNM has prudently seized opportunities to lower its embedded cost of debt ... that PNMGS has been able to adopt the comparable firm capital structure and debt costs. Without having taken these actions to lower its imbedded debt costs, PNMGS would have sought full recovery of its actual imbedded debt costs and it would have sought a return on equity consistent with its current financial condition (as reflected in its junk bond status).

Another PNMGS expert, J. Patrick Keene, testified that "[t]he nexus can be drawn between" the costs of reacquiring debt in 1986 and 1994 and the benefits realized by ratepayers. "Absent PNM's actions to reduce its cost of long term debt, PNMGS would have been unable to include a cost of debt comparable to financially healthier companies in this proceeding." Thus, PNMGS contended that the lower overall cost of capital from its proposed imputed cost of debt, made possible by the reacquisition of high-cost long-term debt, resulted in a substantial benefit to ratepayers. Additionally, PNMGS experts testified that ratepayers also received an indirect benefit of a more financially stable utility. *Cf. Arkansas La. Gas Co.*, 150 Pub. Util. Rep. 4th (PUR) 333, 361, 1994 WL 121423 (Ark. Pub. Serv. Comm'n 1994) (adopting a utility's proposed actual cost of debt but reviewing expert testimony by a staff witness proposing a hypothetical cost of debt and including recovery for losses on reacquired debt because, although difficult to quantify, the reacquired debt provided some benefit to ratepayers).

{19} While not disputing PNMGS's contention that the reacquisition of debt enabled the utilization of an imputed cost of debt that was lower than PNM's actual cost of debt, the Commission rejected PNMGS's calculation of the benefit received by ratepayers in using the imputed cost of debt. The Commission determined that the calculations were not persuasive due to Mr. Sategna's use of the proposed imputed capital structure to derive the amount of $2.37 million. According to the Commission, PNMGS failed to carry its burden of proof by not providing additional calculations based on its actual capital structure. Based on our review of the record as a whole, however, we believe

this determination was arbitrary and capricious. As previously mentioned, Staff also utilized a hypothetical capital structure in its calculations, and the Attorney General's expert testified that the use of a hypothetical capital structure was appropriate. In fact, PNMGS has no actual capital structure of its own. Although, in denying recovery for losses on reacquired debt, the Commission referenced testimony by Mr. Cotton, the Attorney General's expert, that an imputed capital structure was not in the best interests of ratepayers, we believe the Commission disregarded the context of Mr. Cotton's remark. Mr. Cotton further testified that using the actual capital structure would have been inappropriate, and he utilized the proposed imputed capital structure in his calculations "because it is more representative of the parent's (PNM) capital structure during the time that rates will actually be in effect than the base period (actual) capital structure." Indeed, the Commission's reference to Mr. Cotton's comment concerning ratepayer benefit can only be regarded as spurious due to the Commission's ultimate wholesale adoption of the hearing examiner's recommendations regarding the proposed imputed capital structure. The hearing examiner concluded that the capital structure for PNM's electric utility division was unrelated to PNMGS, that the two utility divisions had significantly different operating risks, and that, therefore, the use of PNMGS's proposed hypothetical capital structure was just and reasonable.

{20} Further, the Commission had previously adopted the use of a hypothetical capital structure in determining an appropriate rate of return for PNMGS in Case No. 2147, yet the Commission expressed no concern in that rate case that an imputed capital structure would prevent a cost/benefit analysis with respect to losses on reacquired debt. In fact, the Commission allowed recovery of such losses in Case No. 2147 without requiring additional calculations utilizing an actual capital structure. Under these circumstances, we do not believe that the Commission provided adequate notice to PNMGS that additional proof would be necessary. With respect to the adequacy of PNMGS's offer of proof, we believe it is significant that nearly all of the losses at issue concerned the proposed continued recovery of losses which the Commission had previously held in Case No. 2147 to confer a benefit to ratepayers in excess of the costs associated with reacquisition. Therefore, we reject the Commission's determination that PNMGS failed to carry its burden of proof.

{21} As a related matter, we reject the Commission's determination that changed circumstances justified a departure from its previous decisions. The Commission deemed this a "unique" case because of the use of both an imputed capital structure and an imputed cost of debt. The Commission determined that the use of an imputed cost of debt constituted a changed circumstance justifying departure from Case No. 2147 because PNMGS could not demonstrate a benefit to ratepayers. As discussed above, however, because the imputed cost of debt in this case was lower than PNM's actual cost of debt, we believe that PNMGS's rate of return methodology did not prevent it from carrying its burden by showing that the benefit to ratepayers in the use of an imputed cost of debt outweighed the costs associated with the retirement of high cost debt.[1] In addition, considering that the vast majority of losses on reacquired debt were approved by the Commission in Case No. 2147 and considering that PNMGS has no actual capital structure or cost of debt of its own, PNMGS reasonably relied on the Commission's prior determinations concerning losses on reacquired debt. A "radical departure from past practice . . . without sufficient pri-

1. Mr. Cotton implied that losses on reacquired debt should be denied because PNM may have been improperly attempting to shift to ratepayers the costs necessary to counteract PNM's negative retained earnings due to losses incurred in non-regulated activities such as banking and real estate. By explaining in rebuttal and on cross-examination of Mr. Cotton that the debt retired by PNM was issued prior to the experience of negative retained earnings, we believe that PNMGS effectively negated Mr. Cotton's suggestion of a relationship between PNM's losses from non-regulated activities and the bulk of the costs from reacquired debt that PNMGS sought to recover. Thus, viewing the record as a whole, we conclude that the Commission's reliance on this factor as a changed circumstance is not supported by substantial evidence.

or notice of departure and without reasonable justification as reflected by the record ... [is] improper." *General Tel. Co.*, 98 N.M. at 756, 652 P.2d at 1207. Applying the five-factor test adopted in *Hobbs Gas Co.*, 115 N.M. at 682, 858 P.2d at 58, we conclude that although the Commission's order in this case, to a limited extent, fills a void in the law with respect to the use of an imputed cost of debt, the slight interest in applying the Commission's new rule is outweighed by PNMGS's reasonable reliance on the Commission's prior practice and the significant burden imposed under the new rule.

{22} We also reject the Commission's final basis for denying recovery of losses on reacquired debt: shareholder benefit. The appropriate test for the recovery of losses on reacquired debt is not whether the utility would have retired the debt irrespective of rate case recovery; instead, as the Commission established in Case No. 1916, the proper test is whether the benefits to ratepayers outweigh the costs associated with the reacquisition. Nevertheless, we agree with the Commission that the relationship between shareholder and ratepayer benefit related to the reacquisition of debt is an important concern; however, as indicated by Mr. Cotton's testimony concerning the basis for recovery of losses on reacquired debt quoted above in Paragraph 13, the Commission's established methodology of amortizing losses as an expense and including unamortized amounts in the rate base, coupled with a lower cost of debt in calculating the overall cost of capital, achieves a proper balance between shareholders and ratepayers. *Cf. Southern Bell Tel. & Tel. Co.*, 159 Pub. Util. Rep. 4th (PUR) 425, 436, 1994 WL 791922 (S.C. Pub. Serv. Comm'n 1994) (stating that amortization and rate base treatment "provides a sharing of refinancing costs between the ratepayer and the shareholder" and "does not allow [the utility] to overrecover its costs"). In this case, Staff's proposed imputed cost of debt of 7.30%, which was adopted by the Commission, represented a lower cost of debt that inured to the benefit of ratepayers.

{23} It appears that the Commission believed that the use of an imputed capital structure disrupted the balance between ratepayers and shareholders. According to the Commission, "for ratepayers to obtain the full benefits of a loss on reacquired debt, one must apply the lower actual cost of debt to the actual capital structure, which *presumably* has a much greater percentage of debt than the imputed capital structure." (Emphasis added.) While it is true that an imputed capital structure can impact the balance between ratepayers and shareholders by potentially exaggerating or understating the extent to which reacquired debt decreases the overall cost of long-term debt, there is no evidence in the record indicating that PNMGS's proposed imputed capital structure tipped the balance in favor of shareholders. We therefore conclude that the Commission's reliance on shareholder benefit, a factor not previously considered by the Commission with respect to losses on reacquired debt, is not supported by substantial evidence.

{24} Beyond the lack of substantial evidence in the record to support the Commission's decision to deny recovery of losses on reacquired debt, we are troubled by the punitive aspects of the Commission's reasoning. The Commission broadly determined that recovery for losses on reacquired debt is inconsistent with a rate of return methodology based on an imputed cost of debt. As the hearing examiner noted in reference to the positions of Staff and the Attorney General, however, PNMGS, under this view, "could never recover loss on reacquired debt if the Commission were to determine that an imputed capital structure and cost of capital were proper for ratemaking purposes." The Commission, in response to this criticism, determined that a complete bar to recovery was appropriate because "it was PNMGS's choice in this case ... to use an imputed cost of debt as well as an imputed capital structure and an imputed, comparable group cost of equity." As noted above, PNMGS does not have an actual capital structure or cost of debt of its own. Additionally, although PNMGS proposed the use of an imputed cost of debt, the ultimate decision to implement that proposal rested with the Commission. Further, as reflected by the expert testimony in this case, the Commission has the power

to adopt an imputed cost of debt and an imputed capital structure for purposes of ratemaking even if it is not initially proposed by the utility. *See Zia Natural Gas Co. v. New Mexico Pub. Util. Comm'n (In re Petition by Zia Natural Gas Co.),* 2000–NMSC–011, ¶ 10, 128 N.M. 728, 998 P.2d 564; *cf. United Water Del., Inc. v. Public Serv. Comm'n,* 723 A.2d 1172, 1174 (Del.1999). Dr. Moyer, PNMGS's expert, testified that PNM would have been imprudent not to refinance its high-cost debt, and there is no evidence in the record that the losses incurred by PNM in reacquiring debt were imprudent. The Commission's determination of an inconsistency between losses on reacquired debt and an imputed cost of debt would appear to apply regardless of the amount of a utility's losses, whether the losses were prudently incurred, and the extent of benefit realized by ratepayers.

{25} We believe it is improper for the Commission to penalize PNMGS for its proposed methodology, a methodology supported by the Attorney General and Staff, found just and reasonable by the hearing examiner, and ultimately adopted by the Commission, by prohibiting the utility from having an opportunity to recover costs that were, undisputedly, prudently incurred. We believe that such a blanket rule fails to achieve a fair balance between ratepayers and investors. *See* § 62–3–1(B). *See generally Federal Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944) ("From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business.... [T]he return to the equity owner ... should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." (citation omitted)), *quoted in State v. Mountain States Tel. & Tel. Co.,* 54 N.M. 315, 336, 224 P.2d 155, 169 (1950). While it is true that "[n]either New Mexico case law nor the Public Utility Act imposes any one particular method of valuation upon the Commission in ascertaining the rate base of a utility," *Hobbs Gas Co.,* 94 N.M. at 734, 616 P.2d at 1119, we believe that the Commission's decision to deny recovery for losses on reacquired debt in this case, without support in the record and contrary to the Commission's previously established policy, is unreasonable and unlawful.

IV. Issues Related to Take–or–Pay Costs

{26} Prior to the mid–1980's, it was common for long-term gas purchase contracts to include a take-or-pay clause, which "requir[es] the purchaser to take, or failing to take, to pay for the minimum annual contract volume of gas which the producer-seller has available for delivery," 8 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* 1069–70 (Patrick H. Martin & Bruce M. Kramer eds., 1999). *See* 4 *id.* § 724.5. Because of a decrease in the demand for natural gas and a decline in the price of gas during the 1980's, however, local distribution companies (LDC's), such as PNMGS, attempted to avoid the harsh effects of take-or-pay provisions, and in addition to actions by federal and state regulatory agencies, nationwide litigation arose between gas producers and LDC's. *See generally General Motors Corp. v. Public Serv. Comm'n,* 87 Md.App. 321, 589 A.2d 982, 983–86 (1991). As a result, PNMGS incurred substantial costs, including costs associated with contract renegotiation, penalties for violating take-or-pay clauses, and expenses incurred in the settlement of litigation, including attorney's fees. These costs became known as producer take-or-pay (PTOP) costs.

{27} In a prior proceeding, Case No. 2183, the Commission accepted a stipulation that distributed PTOP costs between ratepayers and PNMGS shareholders. According to the stipulation, shareholders would absorb 25% of the PTOP costs at issue in Case No. 2183, and ratepayers would be responsible for the remaining 75%. The stipulation provided that the portion of PTOP costs recoverable from ratepayers would be collected through a rate rider and would be collected from all customer classes on a volumetric basis. A number of issues raised by PNMGS on appeal relate, either directly or indirectly, to PTOP costs.

A. Rate Rider 8 Discounts

{28} In Case No. 2340, the Commission addressed the proper interpretation and im-

plementation of the stipulation concerning PTOP costs adopted in Case No. 2183. The Commission established a tariff mechanism, labeled Rate Rider 8, that would allow PNMGS to recover the ratepayers' 75% portion of PTOP costs incurred by PNMGS. In accordance with the stipulation in Case No. 2183, the Commission applied the Rate Rider 8 take-or-pay surcharge to all customer classes.

{29} PNMGS has both transportation customers, who buy from PNMGS the service of transporting through PNMGS's gas pipelines natural gas purchased by the transportation customer from a different supplier, *see* NMSA 1978, § 62–6–4.1 (1993, repealed effective July 1, 2003) (providing for the contract carriage of natural gas), and sales customers, who buy natural gas directly from PNMGS. *See generally* NMSA 1978, § 62–8–4 (1941, repealed effective July 1, 2003) ("[E]very utility shall have the right to make reasonable classifications of its users"). PNMGS's transportation customers tend to be industrial or large commercial natural gas users, compared to the mainly residential and small commercial customers comprising the class of sales customers.

{30} Under the Rate Rider 8 tariff, PNMGS recovers the ratepayer portion of PTOP costs from both sales customers and on-system transportation customers, meaning those transportation customers within PNMGS's service area. Because the gas transportation market is highly competitive, however, the Commission, in Case No. 2340, adopted the hearing examiner's recommendation that PNMGS be allowed to discount the Rate Rider 8 surcharge for transportation customers in order to provide an incentive to continue purchasing transportation service from PNMGS. The Commission determined that the granting of prudent Rate Rider 8 discounts would be more beneficial to PNMGS and ratepayers generally in terms of revenue and increased load than the loss of transportation customers to competitors of PNMGS. Additionally, the loss of a transportation customer and that customer's contribution to Rate Rider 8 would result in an increase of other customers' contribution to Rate Rider 8 in order to fully satisfy ratepayers' 75% contribution to recovery of take-or-pay costs. The decision to allow PNMGS to discount Rate Rider 8 surcharges for on-system transportation customers was consistent with the Commission's existing policy to allow cost-of-service discounts in negotiating on-system and off-system transportation rates provided that the discounted rate is above the variable cost of service.

{31} In Case No. 2340, the Commission noted that "it is uncontested that [PNMGS] should be allowed to recover the discounts; it is the manner of recovery that is at issue." The Commission determined that requested recovery of Rate Rider 8 discounts should be reviewed in general rate proceedings, such as the present case, and that "the Commission will treat the discounts in the same manner as discounts for transportation rates."

{32} Relying on the Commission's approval in Case No. 2340, PNMGS began granting Rate Rider 8 discounts to transportation customers in July 1992. In the present proceeding, PNMGS sought to recover actual Rate Rider 8 discounts granted from July 1992 through the end of the test period in the amount of $5,374,665.[2] PNMGS con-

2. Additionally, PNMGS sought rate recovery for Rate Rider 8 discounts that PNMGS anticipated granting to transportation customers. Although PNMGS claims on appeal that the Commission improperly excluded anticipated discounts from its review of Rate Rider 8 discounts, we believe the Commission's decision to limit its review to actual Rate Rider 8 discounts is supported by the Commission's decision in Case No. 2340, in which the Commission rejected PNMGS's proposal of immediate recovery of discounts by reallocating them through Rate Rider 8 and accepted the position of Staff and the Attorney General that such discounts should be deferred until a general rate proceeding. The Commission concluded that the stipulation in Case No. 2183 did not contemplate the reallocation of discounts and that "the Commission can fully examine transportation discounts and determine the amount attributable to Rate Rider 8 costs and those attributable to cost of service components." The Commission's decision to exclude anticipated discounts from review in this case is therefore consistent with the Commission's determination that it must "fully examine" Rate Rider 8 discounts in order to determine whether rate recovery is just and reasonable. The Commission's decision is also supported by the testimony of the Attorney General's expert, Steven Ruback, that anticipated discounts "are highly speculative," and Staff's expert, Gary Roybal, that recovery of

tended that the Commission should review Rate Rider 8 discounts under a general prudence standard and that all of the discounts were reasonable.

{33} The hearing examiner accepted the positions of Staff and the Attorney General that Rate Rider 8 discounts should be evaluated under a cost/benefit test instead of PNMGS's proposed test of prudence. However, the hearing examiner modified the cost/benefit test on the basis of rebuttal testimony from PNMGS. Whereas Staff had determined the net benefit of Rate Rider 8 discounts to PNMGS by calculating PNMGS's total revenues from discounted transportation customers, including both on-system and off-system transportation customers, the hearing examiner accepted PNMGS's position that a net benefit should be determined by assessing revenues associated only with Rate Rider 8, meaning revenues from discounted on-system transportation customers but not revenues from off-system transportation customers. Using this analysis, the hearing examiner concluded that PNMGS should be allowed to recover $3,644,636.

{34} The Commission agreed with the hearing examiner that PNMGS's proposed recovery of Rate Rider 8 discounts should be evaluated under a cost/benefit test. However, the Commission rejected the hearing examiner's modified cost/benefit test, and applying Staff's cost/benefit model, the Commission determined that PNMGS had a negative net economic benefit of $109,032 from Rate Rider 8 discounts. Instead of allowing recovery for this amount, the Commission then determined that "we are confident that this shortfall in fact was more than made up by PNMGS in the form of discount on-system and off-system revenues received between August 1990 and April 1992." Therefore, the Commission denied any recovery for Rate Rider 8 discounts.

{35} On appeal, PNMGS claims that the Commission's use of a cost/benefit test for Rate Rider 8 discounts constitutes the retroactive application of a change in Commission practice without sufficient justification and prior notice. PNMGS also claims that the cost/benefit test applied by the Commission is arbitrary and capricious.

{36} We first address PNMGS's contention that the Commission unreasonably departed from prior practice. As discussed above, in determining whether the Commission has engaged in improper retroactive adjudicatory rulemaking, we assess the five factors articulated in *Hobbs Gas Co.*, 115 N.M. at 682, 858 P.2d at 58. PNMGS claims that the Commission established a prudence test for Rate Rider 8 discounts in Case No. 2340 and that it relied on this test to its substantial detriment. PNMGS thus contends that under *Hobbs Gas Co.* the Commission's action was improper. We agree with the Commission, however, that this issue presents a matter of first impression for the Commission, that its treatment of Rate Rider 8 discounts is consistent with, and a logical extension of, prior Commission practice, and that any reliance on PNMGS's part on a prudence test was not reasonable under the circumstances.

{37} In Case No. 2340, the Commission clearly granted PNMGS authority to discount the Rate Rider 8 surcharge for on-system transportation customers; however, the Commission did not establish a prudence standard for the recovery of these discounts. Instead, the Commission determined that Rate Rider 8 discounts would be treated like other transportation discounts, such as cost-of-service discounts. The Commission had previously addressed transportation discounts in Phase I of Case No. 2068.

{38} With respect to potential recovery of cost-of-service transportation discounts, the Commission determined in Case No. 2068 that PNMGS would not be foreclosed from seeking recovery but, as a general matter, the utility would bear the burden of absorbing the discounted difference between a negotiated rate and a fully allocated cost-of-service rate. The Commission rejected PNMGS's contention that placing the risk of lost revenues from cost-of-service discounts on the utility would discourage the negotia-

anticipated discounts would improperly shift PTOP costs from Rate Rider 8 to base rates in conflict with the stipulation approved in Case No. 2183.

tion of rates, because the potential loss of revenues from a loss of customers to competitors provides a "major incentive" to negotiate transportation rates. Nonetheless, the Commission determined that the allocation of costs from cost-of-service discounts "involves a variety of factors and equities that should be considered," and the Commission left open the possibility of granting recovery for cost-of-service discounts under certain limited scenarios.

{39} Based on the Commission's decision in Case No. 2068, Staff's expert, Mr. Roybal, testified that recovery of Rate Rider 8 discounts should similarly be determined based on all factors and equities associated with PNMGS's discounting procedure. Mr. Roybal testified that "embedded in [the Case No. 2068 transportation discount] framework is the consideration of the costs and benefits associated with the discount activities of a gas utility." Mr. Roybal further testified that this proceeding presented the Commission with the first request for recovery of any form of transportation discounts, and the Commission therefore had not had the opportunity to refine its remarks concerning transportation discount recovery in Case No. 2068. Staff proposed a cost/benefit test for recovery of Rate Rider 8 discounts in order to further the principles articulated in Case No. 2068 concerning transportation discounts generally.

{40} As related by Mr. Roybal's testimony, the proper standard for evaluating recovery of Rate Rider 8 discounts was a matter of first impression before the Commission. The Commission has a duty to ensure that "[n]o public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person within any classification." NMSA 1978, § 62–8–6 (1993, repealed effective July 1, 2003). The stipulation in Case No. 2183 provided that ratepayers' portion of PTOP costs would be recovered from all customer classes. Mr. Roybal testified that recovery for PNMGS's actual Rate Rider 8 discounts "results in an extreme inequity to the detriment of sales customers and full-tariff transportation customers." Mr. Roybal additionally testified that recovery of discounts through base rates would shift the allocation of PTOP costs contrary to the stipulation in Case No. 2183 and that doing so would improperly place "the entire risk of PNMGS discount activities ... upon sales customers and full-tariff transportation customers." The Attorney General's expert, Mr. Ruback testified that PNMGS's methodology, by holding non-discounted ratepayers responsible for 100% of Rate Rider 8 discounts, "has the effect of absolving the Company from any discount responsibility." According to Mr. Ruback, "[s]ales customers should be spared additional [PTOP] costs." An expert witness for intervenor United States Executive Agencies (USEA), Jatinder Kumar, testified that "PNMGS' proposal imposes most of the risks associated with discounts on full rate customers while PNMGS retains the benefits of discounts ... [and] provide[s] PNMGS with economic incentives to maximize profits at the expense of full rate customers."

{41} On the basis of the record in this case and the Commission's prior decisions, we believe that the Commission acted reasonably in adopting a cost/benefit test to determine whether the Rate Rider 8 discounts provided a benefit to ratepayers or, instead, only served to place an undue burden on sales customers and non-discounted transportation customers.[3] Under these circumstances, we believe the Commission's adoption of a cost/benefit test was a reasonable response "to fill a void in an unsettled area of law." *Hobbs Gas Co.*, 115 N.M. at 682, 858 P.2d at 58.

{42} The Commission clearly articulated in Case No. 2340 that recovery of Rate Rider 8 discounts was not guaranteed. Because the Commission indicated that Rate Rider 8 discounts would be treated like other trans-

3. Because the Commission determined in Case No. 2340 that PNMGS "should be allowed to recover" Rate Rider 8 discounts, compared to the determination in Case No.2068 that the utility would generally be required to absorb cost-of-service transportation discounts absent extraordinary circumstances, it was also proper for the Commission to adopt a cost/benefit test in favor of a strict reliance on the factors articulated in Case No.2068 as had been advocated by the Attorney General.

portation discounts and because PNMGS was aware of the Commission's ruling regarding transportation discounts in Case No. 2068, we believe that PNMGS's reliance on the Commission's application of a prudence test to Rate Rider 8 discounts was unreasonable. PNMGS should have known that the Commission would scrutinize Rate Rider 8 discounts to ensure that there would be no unreasonable discrimination in rates between on-system transportation customers and sales customers through an improper shifting of responsibility for PTOP costs. Thus, we conclude that the Commission's use of a cost/benefit test to evaluate Rate Rider 8 discounts did not constitute improper retroactive adjudicative rulemaking.

{43} PNMGS's other contention regarding the Commission's decision to disallow Rate Rider 8 discounts focuses on the form of the cost/benefit test applied by the Commission. PNMGS claims that the Commission acted arbitrarily and capriciously by including off-system discounted transportation revenue as a benefit under the test. We disagree. The purpose of the cost/benefit test was to ensure that recovery of Rate Rider 8 discounts would not unduly burden non-discounted ratepayers and that the risk of discounting the Rate Rider 8 surcharge be equitably distributed between shareholders and ratepayers.

{44} In Case No. 2340, the Commission determined that Rate Rider 8 discounts should be evaluated in a general rate case in order to "fully examine transportation discounts and determine the amount attributable to Rate Rider 8 and those attributable to cost of service components." Thus, consistent with the different treatment of cost-of-service discounts in Case No. 2068, the Commission clearly intended to separate the evaluation of requested recovery of Rate Rider 8 discounts from cost-of-service discounts. As the hearing examiner in the present proceeding noted, however,

> Under PNMGS' wrongful position of guaranteed Rate Rider 8 discount recovery, those discounts would carry no risks for PNMGS. Based on this position, PNMGS determined that it was in its best interest to arbitrarily discount Rate Rider 8 costs in their entirety before discounting costs of service rates. Therefore, the Commission cannot determine whether a discount should have been attributed to cost-of-service . . . or to Rate Rider 8 costs in this proceeding as contemplated by the Commission in . . . Case No. 2340.

{45} Mr. Roybal explained the reason for including off-system transportation discounts in the benefit aspect of his analysis:

> Because rates to sales customers and full-tariff transportation customers are designed to recover total fixed costs of PNMGS, it is Staff's position that the risks of PNMGS' discounting activities are placed on sales customers and full-tariff transportation customers. The benefits associated with all discount activities, including discount off-system transportation agreements, are factors to be considered and included in the analysis to determine the overall costs and benefits associated with PNMGS' discount activities.

We believe Mr. Roybal's testimony indicates a concern about PNMGS's failure to differentiate cost-of-service discounts from Rate Rider 8 discounts.

{46} With PNMGS's treatment of Rate Rider 8 discounts in relation to cost-of-service discounts in mind, the Commission's decision to include total discounted revenues is understandable. Mr. Ruback summarized the basis of the Commission's decision regarding cost-of-service discounts in Case No. 2068 as follows: "If the Company cannot recover these costs from transportation customers, because of such customers' competitive alternatives, they should not be reallocated to captive customers. This is a business risk which investors voluntarily undertake and have been compensated for." We believe the Commission was properly cautious that PNMGS may have been attempting to structure discounts in order to circumvent the recovery criteria established for cost-of-service discounts in Case No. 2068, thereby overstating Rate Rider 8 discounts and resulting in unnecessary and unreasonable shifting of PTOP costs to sales customers. Because cost-of-service discounts are available to off-system transportation customers, we cannot conclude

that it was arbitrary and capricious for the Commission to include total discounted transportation revenue in its cost/benefit test in order to ensure that recovery of transportation discounts would not unreasonably shift the risk of discounting to ratepayers.

{47} This same rationale, however, does not apply to the Commission's decision to deny recovery of its calculation of a negative net economic benefit of $109,032 based on transportation revenues earned prior to Case No. 2340. Because PNMGS did not begin granting Rate Rider 8 discounts until after Case No. 2340 and did not request rate recovery for cost-of-service discounts negotiated prior to that time, we believe that these transportation revenues are wholly unrelated to PNMGS's request to recover Rate Rider 8 discounts. Thus, although the Commission's cost/benefit test is supported by the record, we conclude that the decision to deny recovery of PNMGS's negative net economic benefit from Rate Rider 8 discounts of $109,032 on this basis was arbitrary and capricious and is not supported by substantial evidence in the record.

B. Reservation Fees

{48} PNMGS sought a three-year amortization of $7,062,261 in reservation fees paid under two gas purchase contracts with Amoco Producing Co. and Conoco, Inc. PNMGS entered into these gas purchase contracts as part of its settlement of price dispute litigation with Amoco and Conoco concerning take-or-pay clauses. As stated by PNMGS's witness, Mr. Christopher, a reservation fee "represents the cost to the supplier for reserving gas supplies for the purchaser" and is separate from, and significantly less costly than, the market value of the commodity. A reservation fee is intended to guarantee an adequate supply of gas for peak demands with lower cost supplies.

{49} In seeking rate recovery of the reservation fees, PNMGS introduced a significant amount of expert testimony that the fees were reasonably and prudently incurred. For example, Mr. Christopher testified that, at the time PNMGS reached an agreement with Amoco and Conoco concerning the reservation of gas, there was a long-term projection of rising demand accompanied by rising prices, prompting PNMGS to seek long-term contracts; however, because prices had reached record lows, producers were reticent to enter into long-term contracts, thereby creating a difficult negotiating environment for PNMGS. Additionally, the contract price of the reservation fees, according to Mr. Christopher, was competitive with bids from similarly situated producers having large reserves for the reservation of winter supplies. Mr. Christopher also testified that the reservation contracts with Amoco and Conoco allowed PNMGS to negotiate more favorable agreements with other producers.

{50} Staff and the Attorney General opposed recovery of the reservation fees. Staff's expert, Mr. Roybal, and the Attorney General's expert, Mr. Ruback, testified that, although reservation fees are commonly included in gas purchase contracts and it is difficult to determine the reasonableness of reservation fees, PNMGS's reservation fees under the Amoco and Conoco contracts were unreasonable and excessive. Mr. Ruback testified that the price of reserved gas under the Amoco and Conoco contracts greatly exceeded prices in other gas purchase contracts at that time and exceeded prices to which PNMGS had agreed in other contracts. Mr. Ruback concluded that "sufficient gas was available [at the time of the agreement with Amoco and Conoco] so that the Company should not have paid such a high premium for a 3-year contract as opposed to a one or two year contract."

{51} According to Mr. Roybal and Mr. Ruback, PNMGS agreed to pay excessive reservation fees to Amoco and Conoco because they served as additional consideration in the settlement of the gas purchase contract disputes involving take-or-pay issues. Mr. Ruback testified that "these excessive reservation fees are 'residual TOP costs.' At some time the Company must have made the decision that reservation fees would likely be passed through 100% to ratepayers via the PGAC, but if classified as TOP costs, at least 25% would be absorbed by the Company." In other words, Staff and the Attorney General took the position that PNMGS attempt-

ed to disguise its PTOP costs as reservation fees in order to circumvent the cost sharing methodology contained in the approved stipulation in Case No. 2183. Thus, Staff and the Attorney General argued that these costs should not be included in PNMGS's revenue requirement.

{52} The hearing examiner noted that PNMGS offered at one time to settle the dispute with Amoco and Conoco without any provision for reservation fees. Based on this fact and the testimony of Mr. Ruback and Mr. Roybal, the hearing examiner concluded that

> [t]he evidence presented in this case is clear. PNMGS has not met its burden of proving by a preponderance of evidence that the reservation fees were just, reasonable and prudently incurred.... The reservation fees were an integral part of PNMGS' settlement of PTOP disputes and carried value in the settlement of those disputes.

The hearing examiner recommended against allowing rate recovery of the reservation fees in the present proceeding but did not indicate whether PNMGS should be allowed to seek recovery of the fees as PTOP costs in a separate proceeding under the cost sharing methodology of Case No. 2183.

{53} The Commission agreed with the hearing examiner that the reservation fees were not reasonably and prudently incurred. Additionally, the Commission clarified the ambiguity concerning any future attempt to recover the reservation fees as PTOP costs. First, although Case No. 2508, in which PNMGS sought alternative recovery of the reservation fees as a cost of gas, was still pending at the time of the Commission's final order in the instant proceeding, the Commission adopted as part of its final order the hearing examiner's recommendation in Case No. 2508 that the reservation fees are not a cost of gas and consequently not recoverable through PNMGS's purchased gas adjustment clause (PGAC), *see Hobbs Gas Co.*, 115 N.M. at 679, 858 P.2d at 55 (discussing the purpose of a PGAC). Thus, the Commission found that the reservation fees could only be recovered in a general rate proceeding, such as the present case, or as PTOP costs through Rate Rider 8. Second, the Commission determined that because the reservation fees were not prudently incurred they "cannot be recovered in base rates in this case." Finally, the Commission determined "that PNMGS is foreclosed from seeking ... recovery" of the reservation fees as PTOP costs in a separate proceeding. The Commission concluded that PNMGS settled its recovery of PTOP costs associated with the litigation between Amoco and Conoco through a stipulation in Case No. 2503/2521 and that the Commission would not alter that stipulation by allowing Rate Rider 8 recovery of reservation fees.

{54} On appeal, PNMGS claims that the Commission's determination that its reservation fees were not prudently incurred is not supported by substantial evidence in the record. Alternatively, PNMGS claims that the Commission's decision to foreclose Rate Rider 8 recovery of the reservation fees was arbitrary and capricious. We will address each of these contentions in turn.

{55} With respect to the issue of prudence, we believe PNMGS misperceives the applicable standard of review. PNMGS attempts to buttress its argument by discussing the amount of evidence it introduced before the Commission to show that the reservation fees were prudently incurred. However, we do not question whether substantial evidence supports an alternative conclusion; instead, we must determine whether substantial evidence supports the conclusion reached by the Commission. As discussed above, Staff and the Attorney General introduced expert testimony explaining the basis for their position that the reservation fees were excessive and unreasonable. While PNMGS contends that this evidence improperly relies on hindsight review rather than assessing the circumstances known by PNMGS at the time of its agreements with Amoco and Conoco, we must review the whole record in a light most favorable to upholding the decision of the Commission. We do not believe that PNMGS's evidence renders the expert testimony of Mr. Ruback and Mr. Roybal unworthy of belief or otherwise incredible. *See Otero County Elec. Coop. v. New Mexico Pub. Serv. Comm'n*, 108 N.M. 462, 465–66, 774 P.2d 1050, 1053–54

(1989) ("While we review any evidence that supported [the utility's] position, we use that evidence only to test the credibility of evidence supporting the Commission's decision and reject that decision only if the evidence in support of that decision was rendered incredible."). Thus, we conclude that the Commission's determination that the reservation fees were imprudent is supported by substantial evidence in the record.

{56} Nonetheless, we agree with PNMGS that the Commission acted arbitrarily and capriciously by denying PNMGS the opportunity to recover the reservation fees as PTOP costs in a separate proceeding. In order to explain our decision on this issue, it is necessary to more closely scrutinize the stipulation reached in Case No. 2503/2521. In that proceeding, PNMGS did not initially request recovery for the reservation fees in its petition to recover the PTOP costs associated with its litigation with Amoco and Conoco. Although PNMGS attempted to inject the issue of reservation fees in Case No. 2503/2521 in its rebuttal testimony, it voluntarily withdrew this issue following objections by other parties that it exceeded the scope of rebuttal. Thus, at the time the parties agreed to the stipulation, the issue of reservation fees was not an outstanding issue in Case No. 2503/2521.

{57} The stipulation in Case No. 2503/2521 explicitly provided: "A final order issued by the Commission approving this Stipulation shall not constitute a bar to any future litigation of issues raised in the pleadings and testimony or any issues which could have been raised or any other matters which have not been addressed specifically by this Stipulation." The stipulation contained no explicit provision dealing with reservation fees. It is clear from the terms of the stipulation that it resolved the recoverable amount of PTOP costs initially requested by PNMGS in that case and, as the hearing examiner noted, did not resolve the issue of reservation fees. Thus, no party to the stipulation could have reasonably believed that the stipulation would bar future litigation of the reservation fee issue.

{58} Based on our review of the stipulation in Case No. 2503/2521, we conclude that the Commission's concern about altering the stipulation in that case by permitting PNMGS to seek Rate Rider 8 recovery of the reservation fees is unfounded. The Commission has a statutory duty to balance the interests of investors and ratepayers in a neutral manner. *See* § 62–3–1(B). Based on Staff's and the Attorney General's position that the reservation fees were disguised PTOP costs, based on the Commission's application of its previously established cost-sharing methodology to the other PTOP costs associated with PNMGS's litigation with Amoco and Conoco, and based on the Commission's determination that recovery of the reservation fees was limited to either a general rate proceeding or Rate Rider 8, we conclude that the Commission's decision in this proceeding to deny rate recovery *and* to preclude PNMGS from the opportunity of seeking future recovery of reservation fees as PTOP costs was arbitrary and capricious.

C. Mewbourne Settlement

{59} PNMGS had two gas purchase contracts with Mewbourne, a gas well operator, that were labeled GP 11560 and GP16368. Both of these contracts contained take-or-pay clauses. PNMGS introduced expert testimony that both of these contracts were reasonable and prudent.

{60} In 1993, Mewbourne filed two claims against PNMGS for breach of contract, alleging that PNMGS failed to take or pay for certain quantities of gas. Mewbourne claimed take-or-pay deficiencies, with prejudgment interest, in excess of $2 million between the two claims. PNMGS filed two counterclaims against Mewbourne relating to refunds for alleged overpayment of gas and to a natural gas compression agreement. After performing a risk analysis of Mewbourne's claims, in conjunction with a consulting firm, and estimating litigation expenses if the case were to go to trial, PNMGS engaged in extended negotiations and eventually agreed to settle the claim with Mewbourne in June of 1995. Pursuant to the settlement, PNMGS agreed to pay Mewbourne $457,000 as full and complete settlement of Mewbourne's take-or-pay claims, and Mewbourne agreed to pay PNMGS $197,000 as full and

complete settlement of PNMGS's counterclaims.

{61} In this proceeding, PNMGS sought to recover PTOP costs associated with its settlement of litigation with Mewbourne. Specifically, PNMGS sought rate recovery of the settlement amount of $457,000 and litigation expenses of $204,957.43. PNMGS proposed to credit its settlement proceeds of $197,000 to its PGAC. In addition to its expert testimony concerning the prudence of the gas purchase contracts with Mewbourne, PNMGS introduced the testimony of two witnesses that the requested litigation expenses associated with Mewbourne's claims were necessary and reasonable.

{62} Based on a Commission rule requiring utilities to immediately credit a PGAC with refunds from gas suppliers, the Commission adopted the hearing examiner's recommendation that the proceeds received by PNMGS from the Mewbourne settlement immediately be credited to the PGAC. The Commission also allowed rate recovery of a portion of PNMGS's litigation expenses, $61,737.94, incurred in association with PNMGS's successful settlement of its counterclaims against Mewbourne. The Commission then determined that PNMGS imprudently extended the take-or-pay clause in gas purchase contract GP 11560 with Mewbourne in 1985 for an additional five years. The Commission further determined that PNMGS was imprudent in not relieving itself of the take-or-pay obligation in its management of GP 16368. As a result, the Commission determined that shareholders, rather than ratepayers, should bear the burden of PNMGS's failure to relieve itself of take-or-pay obligations with Mewbourne. Because the Commission determined that the take-or-pay clauses were imprudent, it also denied the remaining litigation expenses of $143,219.49. On appeal, PNMGS claims that the Commission's determination that its PTOP costs were imprudently incurred is unsupported by substantial evidence.[4]

{63} We separately evaluate the Commission's determination of imprudence for each contract with Mewbourne. The Commission has previously defined prudence in this context as the standard of care expected of a reasonable person acting under the circumstances faced by a utility's management at the time of the decision at issue. The Commission considers only those facts known or knowable by a utility at the time of the decision, and it eschews any form of hindsight review.

{64} Staff's expert, Estevan Lopez, testified that it was imprudent for PNMGS to extend GP 11560 with Mewbourne in 1985. According to Mr. Lopez, "PNMGS' decision to extend GP 11560 needlessly exposed it to unwarranted risk of future added costs with little, if any, benefit expected in return for that exposure." PNMGS attempted to counter this evidence. However, we do not believe that PNMGS's rebuttal renders Mr. Lopez's contrary opinion incredible. *See Attorney Gen.*, 101 N.M. at 553, 685 P.2d at 961 ("Although conflicting testimony was presented to the Commission, evidence of two conflicting opinions in the record does not mean that the decision arrived at is unsupported by substantial evidence."); *see also Las Cruces Prof'l Fire Fighters & Int'l Ass'n of Fire Fighters, Local 2362 v. City of Las Cruces*, 1997–NMCA–044, ¶ 12, 123 N.M. 329, 940 P.2d 177. Thus, we conclude that the Commission's determination that PNMGS was imprudent in extending the take-or-pay clause in GP 11560 is supported by substantial evidence.

{65} We reach a different conclusion, however, with respect to the Commission's determination of imprudence for the take-or-pay clause in GP 16368. Unlike GP 11560, Staff did not oppose recovery for PTOP costs associated with GP 16368. Staff's witness, Mr. Lopez, did not oppose such recovery on the basis that PNMGS's predecessor, Southern Union Gas Co., executed the contract with Mewbourne and the

4. We reject PNMGS's claim that the Commission improperly gave separate treatment to its proceeds and expenses from the settlement with Mewbourne. PNMGS received its proceeds as settlement for its counterclaims against Mewbourne, and these counterclaims involved issues entirely distinct from PTOP costs. The Commission acted well within its discretion in ascertaining the source of PNMGS's settlement proceeds and treating them accordingly.

contract was assigned to PNMGS upon its acquisition of Southern Union. According to Mr. Lopez, "PNMGS did not make the decision to extend this particular contract and its shareholders should not be expected to bear the cost which resulted from that decision."

{66} The Commission apparently accepted the proposition that because PNMGS was not involved in signing the contract it could not be held responsible for the existence of the take-or-pay clause. Additionally, the Commission concluded, on the basis of the protracted and complex history of PNMGS's acquisition of Southern Union, that it was not imprudent for PNMGS to accept GP 16368 as a part of the acquisition. Nonetheless, the Commission concluded that "PNMGS had the opportunity after the acquisition to renegotiate the contract or manage its purchases or both." This conclusion is without support in the record. In fact, the only testimony concerning the prudence of GP 16368 came from Mr. McFearin, who testified that Southern Union acted prudently in entering into the contract with Mewbourne. There was no testimony that PNMGS had an opportunity to renegotiate GP 16368 with Mewbourne or what costs PNMGS would have reasonably incurred in the process of such a renegotiation. Thus, the Commission's determination of imprudence concerning PNMGS's failure to manage properly its contract with Mewbourne is based solely on conjecture. As a result, we conclude that the Commission's decision to disallow PNMGS's PTOP costs associated with GP 16368 is unsupported by substantial evidence. For the same reason, the Commission improperly denied the portion of PNMGS's requested litigation expenses related to its settlement of GP 16368.[5]

V. Rate Case Expenses

{67} PNMGS sought recovery of $925,845 in rate case expenses. PNMGS obtained this figure by estimating its total expenses for consulting costs and for external and internal legal costs incurred in litigating the present rate case. The hearing examiner recommended full recovery of rate case expenses through a three-year amortization. However, the Commission rejected the hearing examiner's recommendation and denied all recovery of rate case expenses. PNMGS contends on appeal that the Commission's decision is not supported by substantial evidence and is an unjustified departure from prior Commission practice.

{68} In establishing a revenue requirement for a utility, the Commission determines a utility's test-year costs of operation. *See Hobbs Gas Co.*, 94 N.M. at 733, 616 P.2d at 1118. "[T]he Commission has an obligation to allow a utility expenses that are necessary in providing utility service, that benefit ratepayers, and that are prudently incurred." *Zia Natural Gas*, 2000–NMSC–011, ¶ 13, 128 N.M. 728, 998 P.2d 564. Because rate proceedings are a part of the normal course of business for a utility and because rate proceedings, by establishing just and reasonable rates, are conducted for the benefit of both ratepayers and shareholders, it is widely accepted that rate case expenses are one aspect of a utility's operating costs and are recoverable in a general rate proceeding. *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 120–21, 59 S.Ct. 715, 83 L.Ed. 1134 (1939) ("Even where the rates in effect are excessive, on a proceeding by a commission to determine reasonableness, we are of the view that the utility should be allowed its fair and proper expenses for presenting its side to the commission."); *Du Page Util. Co. v. Illinois Commerce Comm'n*, 47 Ill.2d 550, 267 N.E.2d 662, 668 (1971); *Butler Township Water Co. v. Pennsylvania Pub. Util. Comm'n*, 81 Pa.Cmwlth. 40, 473 A.2d 219, 221 (1984). As a result, the Commission typically allows rate recovery for prudently incurred rate case expenses. *Cf. Maine Water Co. v. Public Utils. Comm'n*, 482 A.2d 443, 453 (Me.1984) ("The allowance for ratemaking purposes of rate case expenses depends . . . upon whether those expenses were prudently incurred.").

5. Our decision on this issue should not be interpreted as expressing any view concerning the portion of PTOP costs from GP 16368 to which PNMGS is entitled or the extent to which the Commission's cost-sharing methodology for PTOP costs from Case No. 2183 should be applied to the PTOP costs involved in this case.

{69} In this case, PNMGS's evidence of rate case expenses, an estimate of expenses based on an overall cost budget minus in-house legal expenses, mirrored the evidence PNMGS has introduced in prior litigated rate proceedings before the Commission. Additionally, PNMGS introduced testimony concerning the utility's efforts to minimize attorney's fees. Neither the Attorney General nor Staff objected to recovery of rate case expenses or to the reasonableness of PNMGS's estimate.

{70} The Commission denied all recovery of rate case expenses based on its claim of a changed circumstance justifying departure from prior Commission practice. The Commission contends that it was bound by a change in the law. In 1993, the Legislature enacted the following statute: "In any commission rate proceeding in which the utility seeks rates to recover adjusted test-year litigation expenses there shall be no presumption that the litigation expenses are prudent." NMSA 1978, § 62–13–3(B) (1993, repealed effective July 1, 2003). The Commission contends that Section 62–13–3(B) altered the burden of proof previously utilized for rate case expenses.[6]

{71} In reviewing the Commission's construction of a provision in the Public Utility Act, we

> begin by according some deference to the agency's interpretation. The [C]ourt will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function. However, the [C]ourt is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law.

Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) (citations and internal quotation marks and quoted authority omitted).

{72} Generally speaking, when a utility petitions the Commission for an increase in rates, "the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility." NMSA 1978, § 62–8–7(A) (1991, prior to 1998 amendment, repealed effective July 1, 2003). The Commission has interpreted this provision to require that utilities demonstrate that a proposed revenue requirement or a proposed rate is just and reasonable. *See Otero County Elec. Coop.*, 108 N.M. at 464–65, 774 P.2d at 1052–53 (discussing Section 62–8–7(A)). However, the Commission has applied a different standard with respect to individual operating costs, including rate case expenses.

> Presumption as used by the commission means a general disposition by the commission to view expenses incurred as reasonable. In a rate case ... it would be burdensome to require a utility to justify every expenditure which is the basis of the request for rate relief. Therefore, unless an expense is challenged, the commission assumes it was reasonably incurred.

Public Serv. Co., 50 Pub. Util. Rep. 4th (PUR) 416, 427 (N.M. Pub. Util. Comm'n 1982); *see Attorney Gen.*, 101 N.M. at 552, 685 P.2d at 960 ("The normal burden to be met in making a *prima facie* case regarding costs incurred ... is a demonstration that the costs were, in fact, incurred.").

{73} We presume that the Legislature was aware of existing law, including the Commission's rules, at the time it enacted Section 62–13–3(B). *See State ex rel. Human Servs. Dep't (In re Kira M.)*, 118 N.M. 563, 569, 883 P.2d 149, 155 (1994). Thus, given the Commission's prior holding regarding a presumption of reasonableness for operating costs actually incurred by a utility and our discussion in *Attorney General* regarding the difference between the "normal burden" of demonstrating that costs were incurred and the heightened burden of demonstrating the reasonableness of individual costs, 101 N.M. at 552, 685 P.2d at 960, we agree with the Commission that the Legislature intended to effect a change in policy

6. Although the Legislature had previously addressed the general issue of costs in Section 62–13–3(A), *see* 1983 N.M. Laws ch. 250, § 6; 1941 N.M. Laws ch. 84, § 82, the Legislature had not addressed litigation expenses prior to the 1993 enactment of Section 62–13–3.

with respect to litigation expenses by enacting Section 62–13–3(B). *But cf. Millinocket Water Co. v. Maine Pub. Utils. Comm'n,* 515 A.2d 749, 753 (Me.1986) (concluding that a newly promulgated Commission rule requiring a utility to allocate rate case expenses by issue merely restated requirement of demonstrating prudence of rate case expenses and did not create a new rule for purposes of due process). We also agree with the Commission that the existence of this statute provided adequate notice to PNMGS of a change in circumstances. Therefore, we agree with the Commission that PNMGS, by presenting only a budget-based estimate with no itemization of costs or evidence of reasonableness, failed to carry its burden of proving that its requested rate case expense of $925,845 was reasonable and prudent.

{74} Nevertheless, we do not believe that the Legislature, by enacting Section 62–13–3(B), intended that the Commission ignore the reality of the situation before it. The Commission relied on Section 62–13–3(B) to disapprove of the use of an estimate for rate case expenses. We do not accept this application of Section 62–13–3(B). Although we agree that PNMGS did not introduce sufficient evidence that its entire estimate of $925,845 was reasonable and prudent, we believe, based on the nature of a general rate proceeding, that it was appropriate and reasonable for PNMGS to continue its prior practice of relying on an estimate of rate case expenses.

{75} A utility incurs ongoing rate case expenses throughout a general rate proceeding, from the pre-filing of testimony through the filing of exceptions to a hearing examiner's recommended decision. Because rate case expenses form a part of a utility's operating costs, a utility typically provides an estimate of rate case expenses in order to avoid the constant adjustments in the proposed revenue requirement that a showing of actual rate case expenses would necessarily entail. We do not believe that the Legislature, merely by removing the presumption of reasonableness with respect to litigation expenses, intended to preclude the pragmatic practice of estimating rate case expenses. Instead, we believe that the Legislature intended that utilities demonstrate the reasonableness of rate case expenses, whether estimated or actual.[7] Therefore, we reject the Commission's reliance on Section 62–13–3(B) as sufficient justification for departing from prior Commission practice in disallowing PNMGS's use of an estimate for requesting rate case expenses.

{76} Further, while PNMGS did not itemize its estimate or identify the amount of the estimate that applied to outside legal representation, PNMGS nonetheless satisfied its burden of proof regarding the reasonableness of attorney's fees generally through the testimony of its witness, Ramon Gonzales, and no party introduced any evidence in this case suggesting that PNMGS's attorney's fees were not prudently incurred. Thus, we believe it was unreasonable for the Commission to disregard the fact that PNMGS's overall estimate included reasonable and prudent costs for outside legal representation. Additionally, it is unquestionable that in a proceeding of this magnitude PNMGS reasonably and prudently incurred substantial costs for consulting fees and other expenses involved in litigating this rate proceeding. Even if PNMGS failed to demonstrate that its overall estimate was reasonable and prudent, it is clear from the record that PNMGS prudently incurred considerable rate case expenses in this proceeding.

{77} While the Commission was appropriately circumspect about PNMGS's overall estimate, we believe that the Commission's denial of rate case expenses in their entirety was arbitrary and capricious. When confronted with a questionable estimate of

7. Of course, we do not intend to prevent the Commission from relying on evidence of actual rate case expenses to find that a utility's estimate is unreasonably high. For example, in Case No. 2147, the Commission relied on evidence of actual costs for an expert witness fee introduced by the Attorney General to reduce PNMGS's estimated rate case expenses from $500,000 to $350,000. *Cf. City of El Paso v. Public Util. Comm'n,* 916 S.W.2d 515, 526 (Tex.App.1995) (dismissed by agreement of the parties; judgment, but not opinion, withdrawn) ("The law does not require the Commission to accept the [petitioner's] conclusion of what is reasonable and award it an amount in excess of actual costs.").

rate case expenses on one hand and irrefutable evidence that a utility has prudently incurred substantial, if unquantified, rate case expenses on the other, the Commission cannot simply deny recovery altogether; the Commission instead must determine the amount of reasonable and prudent rate case expenses incurred by the utility. We conclude that it was unreasonable and without support in the record for the Commission to determine that PNMGS incurred no reasonable rate case expenses in this proceeding. *Cf. Butler*, 473 A.2d at 221 ("The declaration of a policy based on general conclusions may not be substituted for an evaluation of the evidence in each case."). On remand, we believe that the Commission must assess PNMGS's estimate and determine a prudent amount of rate case expenses.[8]

VI. Weather Normalization

{78} Natural gas usage is heavily dependent on weather, with higher usage occurring during colder weather. Because ratemaking is prospective in nature, the Commission, in an attempt to accurately predict a natural gas utility's revenue requirement based on past activity, utilizes a weather normalization adjustment to minimize the potentially distorting effect of unusually high- or low-usage test years. The weather normalization adjustment consists of an average weather calculation based on long-term weather data.

{79} PNMGS proposed a weather normalization adjustment based on ten years of weather data that covered the Albuquerque area and twenty-one other locations in PNMGS's service territory. Staff supported PNMGS's weather normalization adjustment. The Attorney General, however, argued against adopting PNMGS's weather normalization adjustment and instead proposed an adjustment based on thirty years of weather data for only the Albuquerque area. According to the Commission, "[b]ecause the base period for this case was warmer than normal, PNMGS's adjustment would have the effect of increasing base period net operating income by $3,956,231. The Attorney General's thirty-year adjustment would reduce PNMGS's proposed revenue requirement by an additional $3.7 million." (Footnote omitted.) PNMGS contended that a ten-year adjustment provides greater predictability of normal weather and annual revenue requirements. In fact, PNMGS had switched to a ten-year adjustment for internal and external financial forecasting, and the stipulation in PNMGS's last rate case employed a ten-year adjustment. Additionally, PNMGS contended that the Attorney General's thirty-year adjustment was improper because it was limited to the Albuquerque area, which is responsible for only 50% of PNMGS's total load.

{80} The hearing examiner recommended that the Commission accept PNMGS's proposed ten-year adjustment because an analysis of actual residential usage during the ten-year period revealed that PNMGS's proposal was "closer than the [Attorney General's] thirty-year method on an annual average basis for the period studied." However, the hearing examiner noted that a

8. The Commission may utilize its own expertise and experience with amounts of rate case expenses typically incurred by a utility in a comparable rate case proceeding. *See Popowsky v. Pennsylvania Pub. Util. Comm'n*, 674 A.2d 1149, 1153–54 (Pa.Cmwlth.1996) (stating that a utility bears the burden of proving that rate case expenses are just and reasonable and upholding the Commission's decision to reduce an unreasonably high estimate to the amount of actual costs incurred by the utility in a prior proceeding); *cf. Calderon v. Navarette*, 111 N.M. 1, 3, 800 P.2d 1058, 1060 (1990) (stating that a court may rely on "its own knowledge and expertise regarding the nature of the services rendered by [an attorney] to calculate the value of the [attorney's] fee"). *Compare* N.M. Pub. Util. Comm'n Case No. 2147 (allowing recovery of $350,000 in a litigated rate proceeding), *with Public Serv. Co.*, 111 Pub. Util. Rep. 4th (PUR) 313, 376–77, 1990 WL 488711 (allowing recovery of $1,284,918 in regulatory expenses for the rate proceeding at issue, as well as regulatory expenses from other proceedings). Alternatively, the Commission may order PNMGS and other parties to supplement the record with evidence of actual costs or the reasonableness of PNMGS's estimate. *See* Commission Decisions & Orders, Exceptions, Rehearings, Reopening Proceedings, 17 NMAC 1.2.39.5.4 (Dec. 31, 1998) ("The Commission on its own motion may at any time reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of such proceeding.").

thirty-year data set "provides a greater number of data points to level out high points and low points for normalization purposes." The Commission adopted the Attorney General's thirty-year adjustment because it concluded that a longer period utilized for adjustment "will tend to better capture the variability of the weather."

{81} PNMGS now contends that the Commission's decision lacks substantial evidence in the record. We disagree. In previous litigated rate cases, the Commission has utilized a thirty-year weather normalization adjustment based on data from numerous locations throughout PNMGS's service territory. The Attorney General's expert, Mr. Cotton, testified that a thirty-year adjustment "more appropriately reflects recent and short-term weather conditions." In addition, Mr. Cotton testified that the application of a consistent weather normalization adjustment over time provides a utility with the greatest opportunity to earn a fair and reasonable rate of return. However, Mr. Cotton testified that there was no available thirty-year weather data in this case other than data for the Albuquerque area. Thus, the Commission was presented with two deficient data sets; PNMGS's proposal was limited to a shorter period of time, while the Attorney General's proposal was limited to a smaller portion of PNMGS's service territory.

{82} We believe it was in the Commission's discretion to decide that the Attorney General's proposal would provide a more accurate representation of PNMGS's revenue requirement. Mr. Cotton testified that "the Albuquerque data serves as a reasonable proxy" for PNMGS's entire service area. The fact that PNMGS introduced expert testimony supporting an alternative view is not dispositive. *See Attorney Gen.,* 101 N.M. at 553, 685 P.2d at 961. While PNMGS's analysis raised some concerns about the Attorney General's proposal, it did not render the position of the Attorney General's expert incredible. We again emphasize the narrow scope of our review. "The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Las Cruces Prof'l Fire Fighters,* 1997–NMCA–044, ¶ 12, 123 N.M. 329, 940 P.2d 177. As the hearing examiner noted, "[s]ince both proposals raise concerns, the Commission must determine which will more accurately set PNMGS' revenue level." Viewing the evidence in the whole record in a light most favorable to the Commission's decision, we conclude that there is substantial evidence to support the Commission's use of the thirty-year weather normalization adjustment advanced by the Attorney General. *Cf. National Fuel Gas Distribution Corp. v. Pennsylvania Pub. Util. Comm'n,* 677 A.2d 861, 863 (Pa.Cmwlth.1996) (concluding that substantial evidence supported the utility commission's decision to utilize a thirty-year weather normalization adjustment instead of the ten-year adjustment proposed by the utility).

VII. Rate of Return

{83} PNMGS proposed a rate of return of 9.93% based on its calculation of the weighted cost of capital. For its proposal of the weighted cost of capital, meaning the weighted average of the cost of long-term debt, the cost of preferred stock, and the cost of common equity, PNMGS relied on data available at the time it filed its case in chief on August 28, 1995. On January 16, 1996, Staff filed a proposal for a rate of return of 9.17% that was based on financial data that became available on December 15, 1995. The Commission accepted the hearing examiner's recommendation to adopt Staff's proposed rate of return of 9.17%. PNMGS now contends on appeal that the Commission's conclusion on this issue is contrary to decisions of this Court in other rate cases because it was not based on the most current data available to the Commission.

{84} In contrast to the proposals regarding capital structure, cost of debt, and cost of preferred stock, the difference between Staff's and PNMGS's proposed cost of equity went beyond changes in market data. PNMGS's expert, Dr. Moyer, derived his 12.2% cost of equity by averaging two separate discounted cash flow (DCF) model estimates with two separate capital asset pricing model (CAPM) estimates and an estimate of the average comparable earnings of the eight

comparison natural gas distribution companies. Staff's expert, Mr. Brack, similarly averaged two DCF model cost of equity estimates, using a dividend yield plus growth DCF model that Staff had also used in prior rate cases, but Mr. Brack's proposal did not include CAPM or comparable earnings estimates.

{85} On cross-examination concerning the cost of equity proposal, Mr. Brack testified that, generally speaking, the cost of equity for utilities will be higher when interest rates are higher. Mr. Brack also testified that the interest rate for long-term government bonds was 6.64% at the time of PNMGS's proposal, 6.03% at the time of Staff's proposal, and 6.98% at the time of the hearing. Finally, Mr. Brack testified that the fluctuating interest rate would have an impact on a portion of the difference between PNMGS's proposed 12.2% cost of equity and Staff's proposed 11.00% cost of equity.

{86} On appeal, PNMGS contends that the Commission erred by overlooking Mr. Brack's testimony about recent changes in interest rates. PNMGS contends that Mr. Brack's testimony indicates that Staff's proposed rate of return was unreasonably low due to "a temporary dip in interest rates that had more than reversed itself by the time of the hearing." PNMGS, relying on precedent of this Court, claims that the Commission was bound to use the interest rates prevailing at the time of the hearing. Thus, PNMGS contends that the Commission erroneously adopted Staff's proposed rate of return of 9.17%.

{87} As PNMGS notes, this Court has previously stated that "[c]ommon sense requires that the latest available economic information should be utilized in order to insure that the projected figures bear a meaningful relation to future as well as past and present fiscal realities." *Mountain States,* 90 N.M. at 340, 563 P.2d at 603 (citations omitted). However, we disagree with PNMGS that our holding in *Mountain States* applies to the facts of this case. The DCF model is a mathematical formula that includes a number of variables, the determination of some of which has been described as "highly complex." Phillips, *supra,* at 376–77. In fact, Dr. Moyer described the DCF model as dependent on some subjective factors that require a certain amount of judgment on the part of an expert. With respect to the specific testimony highlighted by PNMGS, Mr. Brack testified that, although fluctuating interest rates have an impact, the cost of common equity is also dependent on "the pricings the stocks were being traded at at the time and dividends that were being given by the different companies in our comparable group." Indeed, PNMGS's own question of Mr. Brack limited the relationship of interest rates only to "a portion of the difference" between the two parties' cost of common equity proposals. Further, PNMGS introduced no current data beyond long-term interest rates. On rebuttal, PNMGS made no attempt to recalculate its proposed rate of return by utilizing the most current financial data available, and PNMGS failed to introduce any evidence that more recent data would produce a different rate of return using Staff's cost of equity analysis. PNMGS also failed to elicit on cross-examination, and introduced no evidence in its rebuttal testimony, whether a fluctuating interest rate or other recent financial data would affect Staff's analysis of the proper hypothetical capital structure, the cost of debt, or the cost of preferred stock. Thus, Staff's and PNMGS's original proposed rates of return represent the only complete analyses of financial data introduced in this proceeding.

{88} Based on our review of the record, we believe the Commission simply lacked enough evidence of data more recent than that utilized by Staff to reformulate the proposals of Staff and PNMGS concerning the weighted cost of capital. The Commission, instead, relied on the most current comprehensive data analysis introduced by the parties. The hearing examiner found that PNMGS's proposed cost of equity represented "an optimal return" and was therefore inappropriate for ratemaking purposes. The hearing examiner concluded that Staff's proposed cost of common equity was fair and reasonable and relied on Staff's proposed capital structure, cost of debt, and cost of preferred stock because they were based on the most recent financial data in evidence.

We believe that the Commission acted well within its discretion in accepting the hearing examiner's recommendation to utilize Staff's data for PNMGS's cost of capital and capital structure and to adopt Staff's proposed rate of return. PNMGS's contention that the Commission should have utilized the evidence of an increase in interest rates at the time of the hearing would have required speculation on the part of the Commission. Thus, we reject PNMGS's argument that the Commission improperly established a rate of return of 9.17%, and we hold that the Commission did not contravene this Court's opinion in *Mountain States.* Nonetheless, we trust that the Commission will, in accordance with our directive in *Mountain States,* attempt to rely on the most recent data available on remand.

VIII. Rate Structure

{89} Once the Commission determines a utility's revenue requirement, including a reasonable rate of return, it establishes a rate structure that provides the utility a reasonable opportunity to recover its revenue requirement and that fairly distributes just and reasonable rates between different classes of ratepayers. *See Mountain States,* 90 N.M. at 333, 563 P.2d at 596 ("[T]raditionally and logically there is a great measure of public policy that enters into the apportionment of rates."). *See generally* Phillips, *supra,* at 409–11. We have previously determined that "the [L]egislature intended utilities to bear the burden of proof for inquiries about their rate structure." *Otero County Elec. Coop.,* 108 N.M. at 465, 774 P.2d at 1053. Further, the Commission "is not required to rely on any one rate-design method." *Attorney Gen. v. New Mexico State Corp. Comm'n (In re Rates & Charges of U.S. West Communications, Inc.),* 121 N.M. 156, 165, 909 P.2d 716, 725 (1995). "Extreme nicety in the allocation is not required, but only reasonable measures are necessary." *Mountain States,* 90 N.M. at 339, 563 P.2d at 602. PNMGS and the Attorney General appeal two different aspects of the Commission's rate structure in this case.

A. Rate Rider 12

{90} PNMGS incurs a normal operating expense known as reliability costs, which a PNMGS expert defined as "those costs which are incurred by PNMGS in the course of acquiring and delivering gas supplies to its system for the purpose of meeting the swing and peak winter requirements of the end users on its system." Reliability costs include reservation fees, premium prices for peak period gas supplies, facility costs associated with peak demands, and demand charges paid to interstate pipelines. As mentioned above, PNMGS has both transportation customers and sales customers. Under the rate structure existing at the time PNMGS petitioned for an increase in rates, PNMGS collected reliability costs only from sales customers, either through PNMGS's PGAC or, for facility-related reliability costs, in the rate base. PNMGS sought to modify the rate structure to allocate reliability costs between transportation and sales customers.[9] Specifically, PNMGS proposed to recover reliability costs through a reliability volumetric surcharge labeled Rate Rider 12.

9. According to PNMGS's expert witnesses, PNMGS's contracts with its transportation customers, which were approved by the Commission, include a term that requires transportation customers to provide a daily balance of gas usage in order to allow PNMGS to deliver exact quantities needed by the customers. However, PNMGS experienced problems under these agreements, including the inability of transportation customers to provide accurate daily balancing, thereby failing to match the delivery of gas with usage. As a result, according to PNMGS's expert, Melvin Christopher, because PNMGS had an existing firm transportation agreement, as opposed to an interruptible transportation agreement, with El Paso Natural Gas Co., an interstate pipeline, "transportation customers have been able to indirectly use this service [of firm transportation] while contracting for less expensive interruptible or capacity release service with El Paso." In other words, if transportation customers underestimate daily use, resulting in an under-delivery of gas to PNMGS's system from the transportation customers' supplier, these customers would still receive 100% of needed gas supplies from PNMGS's system without incurring reliability costs because PNMGS's sales customers are paying reliability costs to maintain a firm supply of gas regardless of the customer class actually using higher-priced firm gas supplies. PNMGS thus sought to rectify the inequitable distribution of reliability costs.

{91} The Attorney General and Staff supported PNMGS's proposal to allocate reliability costs between transportation customers and sales customers through the Rate Rider 12 mechanism. However, Staff's expert, Estevan Lopez, testified that PNMGS had not "quantitatively proven that transportation customers actually cause specific reliability related costs to be incurred or rely on system supply for reliability." "[N]otwithstanding the difficulty of proving or quantifying the level of service and the extent of that cost," Mr. Lopez nonetheless supported Rate Rider 12 because of several highly persuasive indicators, such as transportation customers' weather-sensitive loads resulting in peak demand and the lack of daily balancing on the part of transportation customers, which suggest that transportation customers relied on reliability service without incurring any reliability costs. Staff concluded that PNMGS's proposal represented "a reasonable attempt to address this problem."

{92} Various intervening transportation customers strenuously opposed the Rate Rider 12 proposal. USEA's expert, Mr. Kumar, testified that, while daily imbalances do occur for transportation customers, "[t]here is no evidence that transportation customer imbalances are increasing PNMGS' gas supply costs or the costs recovered from sales customers. In fact, there is evidence that transportation customer imbalances result in a net benefit to sales customers." Mr. Kumar concluded that PNMGS incurred no increased costs from transportation customer imbalancing and advocated that PNMGS's Rate Rider 12 proposal be rejected.

{93} The Commission determined:

> While we recognize that transportation customers might receive benefits or incur costs for system reliability from time to time, . . . [w]e believe that Rate Rider 12 . . . should not be implemented without more comprehensive analysis in conjunction with a wide array of transportation service issues . . . .

As a result, the Commission denied any reallocation of reliability costs between transportation customers and sales customers. On appeal, PNMGS and the Attorney General argue that there was substantial evidence in the record for the Commission to determine an appropriate methodology for recovering reliability costs from transportation customers and that the Commission, by deferring resolution of this issue until a future proceeding, failed to fulfill its statutory obligation of setting just and reasonable rates. *See* § 62–8–7(D).

{94} Rate structure is a matter of public policy, *Mountain States,* 90 N.M. at 333, 563 P.2d at 596, and it is "based upon extremely complex and elusive information." *Id.* at 338, 563 P.2d at 601. As stated above, PNMGS bore the burden to prove the reasonableness of its proposed rate structure. There was a great deal of conflicting expert testimony in this case on the issue of transportation customers' responsibility for PNMGS's reliability costs. As Staff's expert, Mr. Lopez, stated, PNMGS and the Attorney General clearly established that some transportation customers likely benefit from reliability costs as a theoretical matter; however, PNMGS and the Attorney General did not establish that transportation customers, *as a class,* are responsible to any particular degree for PNMGS's reliability costs. Further, the evidence did not clearly establish that the Rate Rider 12 mechanism would fairly allocate reliability costs among the different classes of customers. *See generally* § 62–8–6 ("No public utility shall, as to rates or services, . . . subject any corporation or person within any classification to any unreasonable prejudice or disadvantage."). Although PNMGS introduced rebuttal testimony to counter the evidence provided by intervening transportation customers, we do not believe that the expert testimony in favor of Rate Rider 12 rendered incredible the expert testimony in opposition. *See Otero County Elec. Coop.,* 108 N.M. at 465, 774 P.2d at 1053. Thus, while PNMGS and the Attorney General demonstrated that transportation customers' possible responsibility for reliability costs is a noteworthy ratemaking issue that deserves attention by the Commission, we are unable to conclude that the Commission lacked substantial evidence to defer a change in rate structure on reliability costs until this issue could be more thoroughly examined.

{95} It is within the Commission's discretion to resolve a utility's petition for a rate increase by establishing just and reasonable rates, while also deferring resolution of ambiguous questions concerning rate structure. *See id.* Unlike *Mountain States,* in which the Corporation Commission improperly failed to exercise its affirmative obligation of setting rates after determining that the utility was entitled to an increase in revenue and having substantial evidence from which to establish just and reasonable rates, 90 N.M. at 333, 563 P.2d at 596, the Commission in this case fulfilled its statutory obligation of setting just and reasonable rates. *See id.* at 338, 563 P.2d at 601 ("Relating each customer's rate to the actual cost of the service rendered to him [or her], even if such cost were susceptible of ascertainment, would be highly impractical for it would lead to a multitude of varying rates."). The Commission's decision to defer resolution of the Rate Rider 12 issue for another proceeding "allowed [the Commission] to leave the utility's income stream intact, while preserving its mandate under Section 62–8–1 to determine the reasonableness of [the utility's] rate structure." *Otero County Elec. Coop.,* 108 N.M. at 465, 774 P.2d at 1053.

B. Residential Access Fee

{96} PNMGS collects rates from residential customers through a fixed customer service charge, known as a residential access fee, and a variable commodity charge, which reflects an individual customer's gas usage based on a specified per-therm charge. A residential access fee is intended to cover customer costs that exist regardless of whether the customer uses gas and independent of the amount of usage by any particular customer. *See* Phillips, *supra,* at 431 (describing customer costs as including "a portion of the distribution system, local connection facilities, metering equipment, meter reading, billing, and accounting"). Under the rate structure in existence at the time PNMGS filed for an increase in rates, PNMGS's rates were designed with a $9.00 residential access fee. In petitioning the Commission to increase rates, PNMGS proposed a change in rate structure that would increase the residential access fee by 11%, from the existing charge of $9.00 to $10.00. PNMGS's expert witness, Johnny Ray Johnson, testified that full customer cost of service for monthly service charges would be over $17.00 and that the $1.00 requested increase "represents a gradual movement toward full cost of service rates." Aside from this brief testimony, PNMGS introduced no other evidence supporting the increased residential access fee.

{97} The Attorney General specifically opposed an increase in the residential access fee. The Attorney General's expert, Mr. Ruback, testified that he believed that PNMGS's rate structure should not include a residential access fee because it "is anti-conservation. A fixed portion of a customer's bill eliminates the ability of the customer to control his [or her] bill and a higher charge reduces the commodity rate, thereby encouraging . . . [a] wasteful use of energy." *See generally Washington Gas Light,* 450 A.2d at 1208 ("The higher the marginal cost of gas to the consumer (the commodity charge), the greater the incentive to reduce energy waste or to shift to lower cost energy sources."). Mr. Ruback testified that a fixed monthly service charge was also detrimental to competition in the utility industry. As an alternative to eliminating the monthly service charge, Mr. Ruback advocated that the charge should be reduced from $9.00 to $7.25. Mr. Ruback testified that, while PNMGS does have a certain level of customer costs, "Commissions have established a longstanding practice of pricing customer charges below the level of customer costs . . . [because of] public acceptability, which is a valid rate design [criterion]." In accordance with this longstanding practice, the $10.00 access fee proposed by PNMGS would have been higher than the customer service charge of nineteen utilities in this region of the country. Additionally, Mr. Ruback testified that, if a customer service charge were to be designed to recover full customer costs, "those costs should only include the direct costs attributable to billing, collection, meters, and services. . . . I do not believe that indirect costs such as Administrative and General Expenses and General Plant should be considered direct costs" because these

indirect costs "do not vary directly with the number of customers on the system." *See generally* Phillips, *supra*, at 431 (stating that customer costs "vary with the number of customers"). Mr. Ruback explained that his proposed service charge of $7.25 reflected a full cost of service for all direct customer costs, and he contended that "[a]n additional increase of $1.00 [over the existing $9.00 fee] is entirely unjustified on a cost basis." PNMGS introduced no rebuttal testimony in response to the Attorney General's evidence.

{98} The hearing examiner recommended retaining the existing residential access fee "since a rate decrease is called for in this case." The Commission, despite ordering a decrease in rates significantly larger than the hearing examiner's, ordered an increase in the residential access fee of over 60%, from $9.00 to $14.56. The Commission's only explanation for such a dramatic increase in the residential access fee was the comment of several members of the public in a separate proceeding about negative feelings toward high winter bills in comparison with summer bills caused by a lower fixed service charge and a higher per-therm charge. Although the Commission concedes that these comments are not properly considered as evidence in this case, the Commission took administrative notice of the comments for purposes of redesigning the access fee to collect 80% of overall cost of service. The Attorney General and PNMGS contend on appeal that the Commission's dramatic departure from the existing $9.00 residential access fee is unsupported by substantial evidence. We agree.

{99} We acknowledge that the Commission has considerable discretion in the area of rate design. We also assume that the Commission, in exercising its expert judgment and in making public policy decisions necessarily implicated by rate design, may rely in part on public commentary in its task of evaluating the evidence in the record and formulating a proper rate structure. Nevertheless, the Commission cannot rely on its own expert judgment, regardless of the source of that judgment, as a substitute for evidence in the record. In this case, the Commission purported to be acting in response to customer dissatisfaction with a low residential access fee. However, the only evidence in the record concerning customer response to service charges came from Mr. Ruback, who testified that utility commissions typically set customer charges below customer costs because a service charge "is widely misunderstood and often resented by customers." *Cf. Washington Gas Light*, 450 A.2d at 1201. Without substantial evidence in the record, we reject customer dissatisfaction as a basis for the Commission's action.

{100} PNMGS proposed an increase in the residential access fee in order to move in the direction of a service charge reflecting full customer costs. Although PNMGS bore the burden "to prove the reasonableness of its entire rate structure," *Otero County Elec. Coop.*, 108 N.M. at 465, 774 P.2d at 1053, PNMGS introduced no evidence that a rate design that recovers a service charge reflecting full customer costs is just and reasonable. Specifically, there is no evidence in the record to refute Mr. Ruback's testimony that a higher residential access fee has a negative impact on both conservation and competition, both of which are relevant rate design factors, or to refute the evidence that establishes that the Commission's $14.56 access fee greatly exceeds the customer service charge for nineteen utilities in the region. *See Mountain States*, 90 N.M. at 339, 563 P.2d at 602 (listing factors appropriately considered in rate design, such as "cost of service," "existence of competition," and "comparison with other rates in other geographic areas"); *see also Washington Gas Light*, 450 A.2d at 1203 (discussing conservation); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (same); Phillips, *supra*, at 410–11 (same). We have previously discouraged the use of cost of service as a sole criterion in designing rates, *Mountain States*, 90 N.M. at 339, 563 P.2d at 602, and we reject the Commission's attempt to do so in this case without a basis in the record.

{101} In any event, even assuming that the Commission had relied on Mr. Johnson's testimony concerning full cost of service recovery and Mr. Ruback's testimony that "[t]here is no rate design [criterion] or regu-

latory requirement that the customer charge recover a specific level of [customer] costs," there is no indication from the Commission's order that the Commission relied on a full customer cost model. The Commission's order states that the Commission "decided in this case to design rates which collect eighty percent of the cost of service allocated to the residential classes through an 'access fee' that will be charged to every residential consumer monthly, regardless of consumption." It is clear from the Commission's calculations that the Commission's reference to "cost of service" referred to overall cost of service, including both customer costs and commodity costs.[10] Even if the Commission had accepted Mr. Johnson's proposed full cost of service for *all* customer costs over Mr. Ruback's proposed full cost of service for only direct customer costs, no witness in this case testified that it would be appropriate to establish a rate design for a customer service charge based on a utility's overall cost of service. Without a basis in the record, we reject the Commission's attempt to design a customer service charge based on overall cost of service instead of customer cost of service.

{102} Finally, we note "that the generally accepted rate-making principles for the development of a sound rate design include continuity and stability." *United States v. Public Utils. Comm'n,* 635 A.2d 1135, 1143 (R.I.1993); *accord* Phillips, *supra,* at 410. The Commission has previously adhered to the principle of gradualism in establishing rate structures for public utilities in this State, and the Commission stated in its final order that "the guiding principle of rate design is to set rates which will move the relative rate of return of each end-use class closer to unity, or full cost of service contribution, *in a gradual manner that avoids rate shock.*" (Emphasis added.) Indeed, PNMGS's proposal of a $1.00 increase was intended to represent a gradual movement toward a full customer cost of service access fee. There is no testimony in the record concerning the effect that an unusually high access fee would have on consumers. Thus, by increasing the residential access fee by over 60%, we believe the Commission improperly overlooked the potential that a dramatic shift in rates for residential consumers would cause rate shock, and the Commission thereby violated the fundamental rate-design principle of stability in rates. We therefore conclude that the Commission's residential access fee of $14.56 is not supported by substantial evidence in the record.

IX. End Result of the Commission's Order

{103} Although we have determined that individual issues decided by the Commission are not supported by substantial evidence, the Commission nonetheless contends that this Court is bound to apply an "end result" test and that PNMGS fails to demonstrate that the end result of decreasing rates by approximately $6.9 million is unreasonable. *See Hope Natural Gas Co.,* 320 U.S. at 602, 64 S.Ct. 281 ("If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."), *quoted in part in Attorney Gen. v. New Mexico Pub. Serv. Comm'n,* 111 N.M. 636, 642, 808 P.2d 606, 612 (1991). While it is true that the Commission has considerable discretion in fixing rates charged by utilities, "this 'considerable discretion' does not mean . . . that the [Commission's] authority is boundless." *Sandel,* 1999–NMSC–019, ¶ 16, 127 N.M. 272, 980 P.2d 55. Nor does the flexibility necessarily accorded the Commission in setting rates render this Court's review of its orders superficial in nature. While the result reached in a rate proceeding is ultimately controlling, we must review the method employed by the Commission and the Commission's application of its chosen methodology to the evidence in the record in order to determine in a meaningful way whether the result is unreasonable or unlawful.

{104} In this case, the Commission determined on the basis of substantial evi-

10. In fact, we estimate that the Commission's access fee of $14.56, producing a total revenue of $60,885,038, would have recovered over 84% of full customer costs based on Mr. Johnson's calculation of customer costs of $72,191,548.

dence that PNMGS is entitled to a rate of return on its investment of 9.17%. Given this determination, we believe that the Commission's decision to deny recovery for the costs involved in the reacquisition of debt, as well as the Commission's complete denial of the Mewbourne settlement costs and PNMGS's rate case expenses for this proceeding, unreasonably hinders PNMGS's ability to obtain the reasonable rate of return established by the Commission. *See, e.g., General Tel. Co.,* 98 N.M. at 757, 652 P.2d at 1208 ("The deduction of 41% from the rate of return determined to be just and reasonable is in conflict with the SCC's own finding as to the necessary rate of return, and exceeded the SCC's authority."); *Hobbs Gas Co.,* 94 N.M. at 734–35, 616 P.2d at 1119–20 (stating that the Commission's denial of a requested acquisition adjustment was not supported by substantial evidence and "resulted in a return on actual equity capital of only 7.5 percent rather than the 15 percent which the Commission admits to be a 'just and reasonable' return on equity"). We conclude that the end result of the final order is unreasonable and unlawful.

X. Conclusion

{105} We conclude that the Commission's denial of recovery of losses on reacquired debt, the denial of the opportunity for PNMGS to recover reservation fees in a separate proceeding, the denial in their entirety of the Mewbourne settlement expenses and rate case expenses, and the dramatic increase in the residential access charge are not supported by substantial evidence in the record. We therefore conclude that the Commission's order is unreasonable and unlawful, and we vacate and annul the Commission's final order.

{106} **IT IS SO ORDERED.**

MINZNER, C.J., BACA, FRANCHINI and MAES, JJ., concur.

1 P.3d 417

2000-NMSC-015

In the Matter of Santiago R. CHAVEZ An Attorney Disbarred from Practice Before the Courts of the State of New Mexico

No. 23,890.

Supreme Court of New Mexico.

May 10, 2000.

Santiago R. Chavez, Pro Se, Taos.

OPINION

PER CURIAM.

{1} This matter came before the Court upon the recommendations of the disciplinary board in two separate proceedings conducted pursuant to the Rules Governing Discipline, Rules 17–101 through 17–316 NMRA 2000. Following a full evidentiary hearing held in disciplinary cause numbered 01–99–366, Santiago R. Chavez (respondent) was found to have committed multiple violations of the Rules of Professional Conduct, Rules 16–101 through 16–805 NMRA 2000, while indefinitely suspended from the practice of law. We adopt the recommendations of the disciplinary board in disciplinary cause numbered 01–99–366 and order that Santiago R. Chavez be disbarred.

{2} In the second proceeding, respondent entered into a conditional agreement not to contest and consent to discipline in disciplinary cause numbered 11–99–381. Under that agreement, respondent declared his intention not to contest allegations that he committed further violations of the Rules of Professional Conduct before and during his period of suspension. We also adopt the disciplinary board's recommendations in disciplinary cause numbered 11–99–381 and approve the conditional agreement not to contest and consent to discipline. We impose additional discipline pursuant to that agreement, including an award of discovery sanctions and restrictions on respondent's employment as a law clerk, a paralegal, or in any other position of a quasi-legal nature.

I.

{3} Respondent was indefinitely suspended from the practice of law by this Court on October 2, 1996. *See In re Chavez,* 1996–NMSC–059, 122 N.M. 504, 927 P.2d 1042. A specification of charges alleging two new counts of professional misconduct was filed against respondent in disciplinary cause numbered 01–99–366 on January 27, 1999. Another specification of charges alleging an additional six counts of professional misconduct was filed against Respondent in disci-

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Arne Leonard, Deputy Disciplinary Counsel, Albuquerque.

plinary cause numbered 11–99–381 on November 16, 1999. Although tried separately below, we consolidate our discussion of the causes for purposes of this opinion.

A.

{4} After respondent's license was suspended in October 1996, his sister moved to Taos at respondent's request to work with respondent at the Chavez Law Firm. Respondent's sister, who was a licensed New Mexico attorney at that time, was to serve as the sole attorney for the firm and respondent was to serve as her legal assistant. This relationship proved unworkable. Respondent's sister subsequently left the firm and was granted inactive status on March 3, 1997.

{5} When respondent's sister joined the Chavez Law Firm, the firm was representing two individuals who were buyers in a real estate transaction. To complete this transaction, the buyers each paid $18,000.00 to cover the purchase price of $36,000.00; these payments were deposited in the Chavez Law Firm's trust account in December 1996 and January 1997. The Chavez Law Firm was to hold these funds and deliver them to the sellers' attorney in exchange for the deed to the property. Respondent delivered a cashier's check for $18,000.00 to the sellers' attorney on or about March 13, 1997.

{6} The remaining $18,000.00 of the purchase price was not delivered in a timely manner. By letter dated April 15, 1997, respondent was informed that the sellers had authorized their attorney to terminate the agreement to sell their interest in the property if the remaining $18,000.00 owed by the buyers was not received by April 25, 1997. The sellers' attorney subsequently referred the matter to the disciplinary board on June 3, 1997. Respondent failed to deliver the remaining $18,000.00 needed to complete the transfer until July 3, 1997.

{7} The delay in delivering the remaining monies needed to complete the real estate transaction was due to the fact that the firm's trust account contained insufficient funds, in part, because respondent had misappropriated a substantial portion of the monies by transferring those monies to the firm's operating account and using them to pay the firm's expenses. On January 3, 1997, respondent signed his sister's name to a $1,000.00 check drawn on the firm's trust account. After respondent's sister discovered this check, she ratified his act of signing her name on it, and steps were taken to add respondent's name as an authorized signatory to the trust account. Although these steps were never completed, respondent signed his own name on checks drawn on the firm's trust account on at least seven occasions in February 1997. These additional checks totaled at least $8,250.00.

{8} On December 9, 1997, the chief disciplinary counsel filed a complaint against respondent regarding the aforementioned real estate transaction. Respondent failed to respond to disciplinary counsel's repeated inquiries regarding the complaint until after he was personally served with the specification of charges on January 29, 1999. In his response, respondent claimed that one of the buyers assented to the use of his funds by the firm during this period. At the hearing on these charges, however, both the buyer and respondent testified that the buyer had not assented to such use of the funds.

B.

{9} On November 12, 1998, Gail Vernon-Kowalski filed a complaint with the disciplinary board alleging that respondent failed to account for two checks totaling $2,602.20 that she had provided to him in order to complete a quiet title action on her behalf. She had retained respondent to represent her in December 1994, which was prior to his suspension from the practice of law. The client paid him $1,500.00 in December 1994, and $1,102.20 in August 1995. In a letter enclosing the August 1995 check for $1,102.20, the client requested a "break down" of the monies she previously had sent to him. After not having spoken to respondent for some time, the client wrote to him again on July 2, 1998, complaining that he had not informed her of his suspension from the practice of law and also requesting an accounting of monies expended, a status report, and copies of any work that respondent had done on the case.

Respondent failed to respond to the client's request.

{10} Respondent also failed to reply to disciplinary counsel's numerous inquiries regarding the client's complaint until after he was personally served with the specification of charges arising from the complaint on December 6, 1999. During a prehearing conference before the chairperson of the hearing committee, respondent agreed and was ordered to make his files and trust account records regarding this matter available to disciplinary counsel at 10:00 a.m. on February 15, 2000. When disciplinary counsel arrived to review the trust account records at the appointed time, respondent was unable to produce them and again failed to produce the required trust account records the next day despite having been ordered to do so by the hearing committee. Respondent subsequently faxed a letter to disciplinary counsel explaining, for the first time, that he could not produce these trust account records because they do not exist.

C.

{11} On July 16, 1999, Eutimio Rivera filed a complaint with the disciplinary board alleging that he and his son had paid respondent a total of $5,000.00 in January and February 1999 to defend them in a quiet title suit. One of the checks was made payable to respondent's spouse at respondent's request. The client alleged that respondent failed to advise him of respondent's suspension and that he understood respondent was an attorney. When respondent failed to file an answer on behalf of the client and his son, they retained a licensed attorney in Albuquerque, who sent a letter to respondent on May 6, 1999, requesting a refund of the fees paid by the client and his son. In a letter to the client's new attorney dated May 24, 1999, and on two or three other occasions, respondent stated that he would refund the monies he received from the client and his son. Nevertheless, respondent failed to refund these monies.

{12} Respondent also failed to respond to disciplinary counsel's repeated inquiries regarding this complaint until after he was served with the specification of charges on December 6, 1999. In his response, respondent attached unsigned drafts of pleadings that he allegedly had prepared, however, respondent failed to produce any additional files or documents regarding the matter in response to disciplinary counsel's discovery requests.

D.

{13} On September 20, 1999, Larry Barela filed a complaint with the disciplinary board alleging that he had paid respondent $2,500.00 to represent him in a quiet title suit on January 12, 1999. The client's check for $2,500.00 was negotiated by respondent on January 25, 1999, and paid to respondent's spouse. The client alleged that respondent initially told him the quiet title suit would take approximately six months to complete. When contacted again by the client in May 1999, respondent stated that he would need more time to complete the matter. The client alleged that respondent never told him that respondent was suspended from the practice of law until he telephoned respondent a third time in July 1999 to obtain an update on his case. At that time, when respondent told the client that his license had not been reinstated, the client requested a refund of his monies, but respondent failed to provide any refund. The client subsequently filed suit in the Magistrate Court of Taos County to recover these monies.

{14} As with the other complaints that are the subject of these disciplinary proceedings, respondent failed to respond to disciplinary counsel's numerous inquiries regarding this complaint until after he was served with the specification of charges on December 6, 1999. In his response, respondent provided copies of unsigned drafts of pleadings that he allegedly had prepared on behalf of his client.

II.

{15} In disciplinary cause numbered 01-99-366, we agree with the disciplinary board's conclusion that respondent committed several serious violations of the Rules of Professional Conduct arising from his employment with the Chavez Law Firm. We

also accept the agreement under which respondent declared his intention not to contest the allegations that he committed further acts of professional misconduct in disciplinary cause numbered 11-99-381 with regard to the aforementioned matters. The misconduct at issue warrants respondent's disbarment, the imposition of restrictions on his employment as a law clerk, a paralegal, or in any other position of a quasi-legal nature, and the award of discovery sanctions.

A.

{16} The Rules of Professional Conduct and the Rules Governing Discipline still apply to respondent notwithstanding his contention that he was acting as a legal assistant for his sister or was only performing ministerial tasks necessary to close his practice at the time the misconduct occurred. "Attorneys, even though suspended, are still subject to the jurisdiction of this Court and are required to follow our rules in closing their practices." *In re Herkenhoff*, 119 N.M. 232, 234, 889 P.2d 840, 842 (1995) [hereinafter *Herkenhoff I*]; *cf. Florida Bar v. Ross*, 732 So.2d 1037, 1041 (Fla.1998) ("[S]uspended attorneys . . . are all subject to the continuing jurisdiction of this Court by virtue of the respective orders under which they were disciplined."). Respondent was so advised when the Court directed him to "observe all Rules of Professional Conduct and Rules Governing Discipline during the period of suspension." *In re Chavez*, 1996-NMSC-059, 122 N.M. 504, 507, 927 P.2d 1042, 1045.

{17} Respondent did not heed this direction. He violated Rule 16-115(A) by failing to maintain client funds in the Chavez Law Firm's trust account and by allowing that trust account to fall into a negative balance. He violated Rule 16-115(B) by failing to promptly deliver the funds with which he was entrusted to the parties entitled to receive those funds. His participation in the improper withdrawals from the Chavez Law Firm's trust account also violated Rules 16-102(D) and 16-804(C) because such participation amounted to conduct that was dishonest, fraudulent, deceitful, and a misrepresentation. His failure to respond to the chief disciplinary counsel's complaints violated Rules 16-801(B) and 16-803(D), which require all lawyers in this state to respond to lawful demands for information from disciplinary authorities and to give full cooperation and assistance to such authorities in discharging their functions and duties with respect to discipline and disciplinary procedures. Finally, respondent's trust account violations and his failure to respond to disciplinary counsel's inquiries violated Rules 16-804(D) and (H) because such conduct is prejudicial to the administration of justice and adversely reflects on his fitness to practice law.

{18} Under the circumstances presented here, respondent was a knowing participant in the willful misappropriation of funds from the Chavez Law Firm's trust account. Neither respondent's expectation that he would be able to replenish the trust account with a settlement from another case, nor the fact that the funds eventually were replenished and delivered to their rightful owner several months later, are sufficient to change this conclusion. *See In re Rohr*, 1997-NMSC-012, 122 N.M. 774, 931 P.2d 1390. Intent to permanently deprive the client of the funds in question is not a necessary element of misappropriation under Rule 16-115. Such misappropriation includes "not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." *In re Wilson*, 81 N.J. 451, 409 A.2d 1153, 1155 n. 1 (1979).

{19} This Court consistently has held that "[m]isappropriation of client funds is a most egregious breach of an attorney's fiduciary duties and generally results in disbarment." *In re Darnell*, 1997-NMSC-025, 123 N.M. 323, 326, 940 P.2d 171, 174; *accord In re Wilson*, 409 A.2d at 1155. There is nothing in the record that would cause us to retreat from that holding in this case. On the contrary, we note the presence of several aggravating circumstances warranting an increase in the degree of discipline to be imposed, including respondent's substantial experience in the practice of law, his pattern of misconduct, his multiple offenses, his bad faith obstruction of the disciplinary proceeding, and his submission of a false statement

during the disciplinary process. All of these factors are recognized as aggravating circumstances in Section 9.22 of the American Bar Association's Standards for Imposing Lawyer Sanctions (1992) [hereinafter ABA Standards], and we agree that they "are appropriate for consideration in the imposition of sanctions for violations of the New Mexico Rules of Professional Conduct." *In re Lally,* 1999-NMSC-003, ¶ 14, 126 N.M. 566, 973 P.2d 243.

{20} Respondent's prior disciplinary record, which involves offenses of the same nature, also is an aggravating circumstance warranting an increase in the degree of discipline to be imposed in this case. *See In re Houston,* 1999-NMSC-032, ¶ 19, 127 N.M. 582, 985 P.2d 752; *In re Richards,* 1999-NMSC-030, ¶ 20, 127 N.M. 716, 986 P.2d 1117. When, as here, a lawyer continues to violate the Rules of Professional Conduct after his license to practice law has been suspended, this Court will not hesitate to impose the more severe sanction of disbarment. *See In re Schmidt,* 1996-NMSC-019, ¶ 1, 121 N.M. 640, 916 P.2d 840 [hereinafter *Schmidt I*]; *Herkenhoff I,* 119 N.M. at 234, 889 P.2d at 842.

{21} A more severe sanction is necessary to protect the public when a lesser sanction has proven insufficient to stop a suspended lawyer from repeating the same type of misconduct with another client and to vindicate the Court's authority when a lawyer has disregarded the directions issued by the Court in a prior order imposing a term of suspension. *See Herkenhoff I,* 119 N.M. at 234, 889 P.2d at 842; *In re Schmidt,* 1997-NMSC-008, ¶ 14, 122 N.M. 770, 931 P.2d 1386 [hereinafter *Schmidt II*]. Under the circumstances presented here, we have no choice but to disbar respondent from the practice of law.

B.

{22} In and of itself, respondent's misconduct while employed with the Chavez Law Firm warrants his disbarment. Our duty to protect the public, the legal profession, and the administration of justice, however, does not end with respondent's disbarment. Accordingly, we must address the other charges that were pending against respondent in disciplinary cause numbered 11-99-381 at the time he was disbarred by this Court in disciplinary cause numbered 01-99-366.

{23} Based on the uncontested allegations in cause numbered 11-99-381, we conclude that respondent violated Rule 16-103 by failing to act with reasonable diligence and promptness in representing the aforementioned clients. He violated Rule 16-104 by failing to keep his clients reasonably informed about the status of a matter, failing to explain the matter to the extent reasonably necessary to permit each client to make an informed decision regarding the representation, and failing to promptly comply with reasonable requests for information. He violated Rule 16-105 by collecting fees that were unreasonable. He violated Rule 16-107(B) by representing clients when that representation was materially limited by his own interests. He violated Rule 16-115 by failing to hold his clients' funds separate from his own funds in a trust account, failing to promptly deliver to each client any funds that client is entitled to receive, failing to keep complete records of trust account funds and client property in the manner required by Rule 17-204, and failing to promptly render a full accounting regarding such property. His failure to respond to disciplinary counsel's numerous inquiries regarding each complaint violated Rules 16-801(B) and 16-803(D), and amounted to conduct that was prejudicial to the administration of justice in violation of Rule 16-804(D). In addition, the aforementioned misconduct violates Rule 16-804(H) by adversely reflecting on respondent's fitness to practice law.

{24} With regard to his conduct in the Barela and Rivera matters, respondent also violated Rule 16-505(A) by practicing law in New Mexico where doing so violates the regulation of suspended lawyers under Rule 17-212(C). Rule 17-212(C) specifically prohibits a disbarred or suspended lawyer from accepting any new retainer or engaging as an attorney for another in any new case or legal matter of any nature, and we have stated unequivocally that "[a]n attorney who has been suspended or disbarred may not contin-

ue to provide legal services to members of the public, with or without remuneration." *In re Herkenhoff*, 1997–NMSC–007, ¶ 19, 122 N.M. 766, 931 P.2d 1382 [hereinafter *Herkenhoff II*]; *see also Schmidt II*, 1997–NMSC–008, ¶ 13, 122 N.M. 770, 931 P.2d 1386 ("A lawyer who has been disbarred has been found seriously wanting in one or more of the areas of character, knowledge, or training, and, therefore, can no more provide representation to another person than can an unlicensed layperson.").

{25} Respondent cannot escape the conclusion that he was engaging in the unauthorized practice of law simply by claiming that he was a legal assistant acting as an intermediary for another lawyer, that he did not sign the pleadings he drafted for his clients, or that he had not entered an appearance in any court. "Only two types of legal representation are recognized—litigants appearing pro se or those appearing through licensed counsel of record." *Schmidt II*, 1997–NMSC–008, ¶ 13, 122 N.M. 770, 931 P.2d 1386. One is not authorized to undertake legal representation in any other capacity, regardless of whether one calls oneself a legal assistant, an intermediary, a scrivener, or just a friend. *See id.; cf. In re Bright*, 171 B.R. 799, 803 (Bankr.E.D.Mich.1994) ("A disclaimer that the non-lawyer is only providing 'scrivener' or 'paralegal' services is irrelevant if the non-lawyer in fact engages in unauthorized practice of law."); *Cincinnati Bar Ass'n v. Telford*, 85 Ohio St.3d 111, 707 N.E.2d 462, 464 (1999) (similar).

{26} Moreover, this Court has declined to adopt a definition of the practice of law that is limited to signing pleadings or appearing in court on another's behalf. Instead, we have determined what constitutes the practice of law in each case by conducting a fact-specific inquiry that takes several different indicators into consideration. *See State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 526, 514 P.2d 40, 45 (1973); *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 439, 575 P.2d 943, 948 (1978). Under this approach, "[t]he practice of law is not restricted to appearances in court; it also encompasses giving legal advice and counsel." *Telford*, 707 N.E.2d at 463; *see also State ex rel. Disciplinary Comm'n of the Supreme Court v. Owen*, 486 N.E.2d 1012, 1013 (Ind.1986) ("[T]he core element of practicing law is the giving of legal advice to a client. Merely entering into such a relationship constitutes the practice of law."); *Kennedy v. Bar Association of Montgomery County, Inc.*, 316 Md. 646, 561 A.2d 200, 210 (1989) (concluding that "the very acts of interview, analysis and explanation of legal rights constitute practicing law "); *In re Conduct of Devers*, 328 Or. 230, 974 P.2d 191, 196 (1999) (concluding that act of revising and redrafting settlement agreement for client "is the work of a lawyer, not a scrivener"). Thus, we have held that an unlicensed person "was engaging in the practice of law by providing [a] client with legal advice and assistance" even though the unlicensed person had not entered an appearance or otherwise disclosed his participation in the case to the court or opposing counsel. *Herkenhoff II*, 1997–NMSC–007, ¶ 14, 122 N.M. 766, 931 P.2d 1382.

{27} An unlicensed person may not use a licensed attorney simply as a facade to cover up the fact that he or she is engaging in the unauthorized practice of law. *See Attorney Grievance Comm'n v. James*, 355 Md. 465, 735 A.2d 1027, 1039 (1999) (disbarring attorney who "simply continued to practice out of the same office, while using, ... another attorney as a facade" during period of suspension); *In re Mitchell*, 901 F.2d 1179, 1188 (3d Cir.1990) (concluding that licensed attorney cannot lawfully serve as "front" for suspended attorney by "freely permit[ting] his name to be used without exercising any supervision"). While an unlicensed person's preparation of legal documents ordinarily does not constitute the unauthorized practice of law when it is performed under the proper supervision of a licensed attorney who retains responsibility for the unlicensed person's work, *see* Rule 16–505 cmt., the same conclusion does not follow when proper supervision and exercise of responsibility by a licensed attorney is absent. A licensed attorney cannot lawfully "abdicate all responsibilities to legal assistants" by "[h]aving a legal assistant conduct all meetings with the

clients, during which the clients' objectives and the means for pursuing them are discussed." *In re Houston*, 1999–NMSC–032, ¶ 17, 127 N.M. 582, 985 P.2d 752; *see also In re Bright*, 171 B.R. at 805 ("The lawyer is not adequately supervising the non-lawyer if the lawyer does not know about the existence or content of the meetings between the non-lawyer and the [client], if the lawyer relies solely on the non-lawyer as intermediary, neglecting to meet directly with the client, or if the lawyer fails to use his independent professional judgment to determine which documents prepared by the non-lawyer should be communicated outside the law office." (citations omitted)); *Florida Bar v. Beach*, 675 So.2d 106, 109 (Fla.1996) (concluding that unlicensed person is not authorized to act as "conduit for giving legal advice by obtaining and relaying, without supervision, case-specific information to persons whom [the lawyer] never actually met or consulted"). Under such circumstances, the unlicensed person is engaging in the unauthorized practice of law "by deciding when a lawyer needs to be called, by determining which lawyer to call, by controlling what questions are asked and how the questions are phrased, and by personally interpreting the information received from the lawyer." *In re Bright*, 171 B.R. at 804.

{28} "Where the individual charged with unauthorized practice [of law] has had legal training, his activities are subject to even closer scrutiny." *In re Discipline of Jorissen*, 391 N.W.2d 822, 825 (Minn. 1986); *accord In re Mitchell*, 901 F.2d at 1185. In the case of a suspended lawyer, closer scrutiny is required in part because that lawyer remains subject to the Court's disciplinary jurisdiction by virtue of the Court's prior disciplinary orders and the suspended lawyer's continuing obligations under the Rules Governing Discipline and the Rules of Professional Conduct. *See Herkenhoff I*, 119 N.M. at 234, 889 P.2d at 842; *Ross*, 732 So.2d at 1041. Respondent was directed to observe all the Rules of Professional Conduct during his period of suspension. *See In re Chavez*, 1996–NMSC–059, 122 N.M. at 506, 927 P.2d at 1045. Those rules include provisions that prohibit him from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," Rule 16–804(C), or "conduct that the lawyer knows is criminal or fraudulent," Rule 16–102(D).

{29} It is a violation of Rules 16–102(D) and 16–804(C) for a suspended attorney to undertake legal representation by intentionally misleading others to believe that he or she still is licensed to practice law. *Cf. In re Conduct of Devers*, 974 P.2d at 196 ("[I]ntentional failure to disclose a suspension to a client ... is a misrepresentation of a material fact."). A misrepresentation of this nature "need not be verbal. One can make a misrepresentation by one's actions as well." *In re Discipline of Jorissen*, 391 N.W.2d at 826. According to the uncontested allegations before us, there is no question that respondent intentionally "led others to believe he was an attorney representing a client. Such conduct is dishonest, fraudulent, and deceitful ...." *Id.* Thus, in addition to concluding that respondent violated Rules 16–505(A) and 17–212(C) by engaging in the unauthorized practice of law during his suspension, we also conclude that he violated Rules 16–102(D) and 16–804(C) by misrepresenting the status of his license to his clients.

{30} Engaging in the unauthorized practice of law while suspended from the practice of law provides an independent justification for disbarring respondent. Under Section 8.1 of the ABA Standards, "[d]isbarment is generally appropriate when a lawyer ... intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession." *Standards for Imposing Lawyer Sanctions* § 8.1 at 47 (1992). The commentary to this standard states that "[t]he most common case is one where a lawyer has been suspended but, nevertheless, practices law. The courts are generally in agreement in imposing disbarment in such cases." *Id.; accord James*, 735 A.2d at 1039; *In re Conduct of Devers*, 974 P.2d at 198.

{31} Respondent's continued misconduct during the period of his suspension also warrants restrictions on his future employment as a law clerk, a paralegal, or in any other

position of a quasi-legal nature. *Cf.* Rule 16–505(D) ("A lawyer shall not ... employ or continue the employment of a disbarred or suspended lawyer as a law clerk, a paralegal or in any other position of a quasi-legal nature if the suspended or disbarred lawyer has been specifically prohibited from accepting or continuing such employment by order of the Supreme Court or the disciplinary board."). Serious restrictions on respondent's authority to perform work of a quasi-legal nature are particularly appropriate given the numerous instances of misconduct that arose while he claimed to be working as a legal assistant for the Chavez Law Firm and later as an independent paralegal. One of the purposes of our rules governing resigned, disbarred, or suspended attorneys "permits this Court to assure the public that an attorney will not continue to practice law after becoming unlicensed." *Herkenhoff I,* 119 N.M. at 232, 233, 889 P.2d at 840, 841. The restrictions we impose in this case are consistent with this purpose and decisions of disciplinary authorities in other jurisdictions. *See, e.g., In re Mitchell,* 901 F.2d at 1185–87; J. Anthony McClain, *Employment of Disbarred or Suspended Attorneys,* 58 Ala. Law. 106 (1997).

C.

{32} In disciplinary cause numbered 11–99–381, the hearing committee awarded discovery sanctions against respondent after finding that he repeatedly failed to produce documents at the times ordered by the committee. These sanctions included: (1) permitting petitioner to amend the specification of charges by adding an allegation that respondent violated the record keeping requirements of Rule 16–115(A); (2) taking it as established that respondent did not maintain a trust account for the fee received from Ms. Vernon–Kowalski; (3) prohibiting respondent from introducing into evidence any documentary material that was not provided to petitioner as of the deadline imposed by the hearing committee; and (4) awarding as costs the reasonable value of the time that petitioner's counsel spent waiting for respondent to arrive and produce the requested documents after the discovery deadline had expired. Following the submission of affidavits by disciplinary counsel, the hearing committee set the reasonable value of petitioner's counsel's time at $125.00 per hour (which was the hourly rate that respondent had charged his clients) for a total of $500.00.

{33} We affirm the hearing committee's award of discovery sanctions in this disciplinary proceeding. Rule 1–037(B)(2) NMRA 2000 of the Rules of Civil Procedure provides for the imposition of discovery sanctions for failure to obey an order to provide or permit discovery. The sanctions imposed here are of the type contemplated by this rule.

{34} "A court order issued under Rule [1–0]37(A) is not a prerequisite to imposition of Rule [1–0]37(B) sanctions; any clearly articulated order requiring or permitting discovery can provide the basis of sanctions for noncompliance." *Marchman v. NCNB Texas Nat'l Bank,* 120 N.M. 74, 90, 898 P.2d 709, 725 (1995). Further, New Mexico courts have noted the authority of some administrative tribunals to impose discovery sanctions in certain situations. *See, e.g., Weiss v. New Mexico Bd. of Dentistry,* 110 N.M. 574, 581, 798 P.2d 175, 182 (1990); *Lara v. City of Albuquerque,* 1999–NMCA–012, ¶¶ 18–21, 126 N.M. 455, 971 P.2d 846; *Sandoval v. United Nuclear Corp.,* 105 N.M. 105, 107, 729 P.2d 503, 505 (Ct.App.1986). Reading Rule 1–037(B) together with the procedural components of the Rules Governing Discipline, we hold that the disciplinary board and its duly appointed hearing committees are authorized to impose discovery sanctions under appropriate circumstances, such as those presented here.

{35} Rule 17–301(B) of the Rules Governing Discipline states that the Rules of Civil Procedure shall be used in formal disciplinary proceedings except where clearly inapplicable to disciplinary proceedings or inconsistent with or otherwise provided for by the Rules Governing Discipline. While the Rules of Professional Conduct already require lawyers to respond to disciplinary counsel's requests for a response to a complaint and to provide additional information to disciplinary counsel if asked to do so, *see* Rules 16–801(B), 16–803(D); *Schmidt I,* 1996–NMSC–019, ¶ 7, 121 N.M. 640, 916 P.2d

840, we do not view the discovery sanctions available under Rule 1–037(B) as clearly inapplicable, inconsistent with, or otherwise provided for by the Rules Governing Discipline when such cooperation is lacking and discovery proceedings under Rule 17–311 become necessary. Hearing committees have the power and the duty to conduct hearings into formal charges of misconduct upon assignment by the chair of the disciplinary board. *See* Rule 17–104(C)(1). In carrying out this duty, discovery sanctions under Rule 1–037(B)(2) must be available to a hearing committee "in order to achieve compliance with its orders and to insure that a determination of a case on the merits is made only after a full, good faith disclosure of all relevant facts." *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 241, 629 P.2d 231, 317 (1980). For these reasons, we affirm the discovery sanctions imposed in this case.

III.

{36} NOW, THEREFORE, IT IS ORDERED that Santiago R. Chavez is hereby DISBARRED from the practice of law pursuant to Rule 17–206(A)(1).

{37} IT IS FURTHER ORDERED that during disbarment respondent shall not (1) handle any client funds, including payment of unearned fees and (2) operate as an independent paralegal.

{38} IT IS FURTHER ORDERED that respondent may act only as a legal assistant under direct supervision of an attorney who is unrelated to respondent and who is approved by the office of disciplinary counsel.

{39} IT IS FURTHER ORDERED that should respondent be reinstated to the practice of law, he shall be placed on probation for no less than one year during which time all trust account activities undertaken by respondent shall be supervised on a monthly basis by an attorney who is unrelated to respondent or by a CPA who is unrelated to respondent, either of whom shall be approved by the office of disciplinary counsel.

{40} IT IS FURTHER ORDERED that respondent shall pay the normal hourly rate charged by the supervising attorney or CPA.

{41} IT IS FURTHER ORDERED that Respondent shall satisfy all of the conditions ordered by this Court on October 2, 1996, and all conditions specified herein, prior to any application for reinstatement.

{42} IT IS FURTHER ORDERED that the following additional discipline shall be imposed:

(1) Respondent shall remain subject to all provisions in this Court's order dated February 23, 2000;

(2) Respondent shall remain subject to all provisions of this Court's opinion dated November 20, 1996;

(3) Respondent shall make restitution to the following persons in the following amounts on or before June 1, 2000, with interest to accrue at the rate of fifteen percent (15%) per annum on any unpaid balance after that date, and such restitution shall be reduced to transcripts of judgment:

(a) Larry Barela	$2,500.00
(b) Eutimio Rivera	$3,500.00
(c) Jose Rivera	$1,500.00
(d) Gail B. Vernon–Kowalski	$2,602.20

(4) Respondent shall return any files and any documents in his possession regarding Larry Barela, Eutimio Rivera, Jose Rivera, and Gail B. Vernon–Kowalski (including abstracts of title and surveys) to each of these former clients on or before June 1, 2000.

(5) Respondent shall pay the costs of all disciplinary proceedings in the amount of $21,007.73, plus costs awarded as discovery sanctions in the amount of $500.00, on or before March 1, 2001, with interest to accrue at the rate of fifteen percent (15%) per annum on any unpaid balance after that date, and such costs shall be reduced to a transcript of judgment.

(6) In addition to the provisions of this Court's order dated February 23, 2000, respondent's employment of a legal or quasi-legal nature shall be subject to the following conditions:

(a) Respondent shall advise disciplinary counsel within ten (10) days of any employment (or change of employment) in any capacity with a person or firm that provides legal services;

(b) Respondent shall function as a legal assistant, legal secretary, paralegal, law clerk, employee of a lawyer, or employee of a firm that provides legal services in any capacity only under the close supervision of a supervising attorney within that entity who is approved by disciplinary counsel. Such supervision shall be continuous and regular;

(c) In order to be considered for approval as a supervising attorney, the proposed supervising attorney must file a written report with disciplinary counsel agreeing to provide supervision and outlining the type of work being performed by respondent as well as the supervising mechanism utilized by the supervising attorney to supervise the actions of respondent;

(d) Under no circumstances shall respondent solicit, initiate, or accept the representation of a client on his own behalf or on behalf of another. If respondent receives any inquiries which might reasonably be interpreted as a request for legal representation, respondent shall inform the person making the inquiry that respondent is not licensed to practice law and can be of no assistance to them in obtaining legal representation;

(e) Respondent shall have no contact with his supervising attorney's clients or any clients of the supervising attorney's firm except when his supervising attorney is present or otherwise in a position to directly supervise respondent's communications with the client;

(f) In any communication with a client that occurs outside the presence of the supervising attorney, respondent shall provide the following notice: "Please be advised that I, Santiago 'Jaime' R. Chavez, am not licensed to practice law and cannot provide you with any legal advice or accept any fees from you. Should you have any unanswered questions or concerns about my communications with you, please contact my supervising attorney, [supervisor's name], at [supervisor's telephone number]";

(g) Respondent's work area must be physically located within the same office or premises as the supervising attorney;

(h) During the course of his employment, respondent shall be prohibited from attending any court or administrative proceedings unless his supervising attorney is present, makes an appearance, and notifies or has notified the court or tribunal of respondent's status as a non-lawyer;

(i) Respondent shall be prohibited from having any access whatsoever to client funds; and

(j) Respondent shall bear the entire responsibility of ensuring that his supervising attorney reports to disciplinary counsel and confirms the parameters of respondent's employment to disciplinary counsel on at least a quarterly basis.

(7) Should respondent be permitted to apply for reinstatement to the practice of law, he must demonstrate to the satisfaction of the hearing committee that all of the conditions specified herein have been satisfied before his application for reinstatement can be granted; and

(8) Should any of the terms and conditions be violated by respondent, disciplinary counsel shall bring such violation to the attention of this Court pursuant to Rule 17–206(G) and, should respondent be found in contempt, this Court may impose additional sanctions including fines, further restrictions on his law-related employment, and further restrictions on any application for reinstatement.

{43} IT IS FURTHER ORDERED that respondent is hereby sanctioned in the amount of $500.00 in costs for the time disciplinary counsel had to wait past the appointed time at which respondent was to have the documents ready for review (two hours for two attorneys at $125.00 per hour).

{44} IT IS SO ORDERED.

1 P.3d 429

2000-NMCA-033

STATE of New Mexico,
Plaintiff–Appellee,

v.

Ronald CUMPTON, Defendant–Appellant.

No. 20,216.

Court of Appeals of New Mexico.

Feb. 8, 2000.

Certiorari Denied, No. 26,215,
April 4, 2000.

Patricia A. Madrid, Attorney General, Joel Jacobsen, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Shelly A. Scott, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

KENNEDY, Judge.

{1} Ronald Cumpton (Defendant) appeals his sentence on a plea to several counts arising from a traffic accident resulting in death and bodily injury. Defendant pled guilty without a plea and disposition agreement to vehicular homicide, and he pled no contest to incidents involving death or great bodily harm, tampering with evidence, and unlawful taking of a motor vehicle. He received the basic sentences authorized by statute, with no aggravating or mitigating circumstances increasing or reducing them. Feeling there were mitigating factors which, as of right, should have entitled him to a reduction of his sentence, he appeals. Defendant also appeals claiming NMSA 1978, § 66–7–201 (1989) is vague, as there is no way to distinguish between subsections (B) and (C) in defining the elements of the crime. We disagree and affirm the district court on both issues.

FACTS

{2} Defendant began the evening of April 12, 1998 around 4:00 or 5:00 in the afternoon by drinking and having an argument with his fiancee. The police were called and removed Defendant from the scene. He requested to be taken to his place of employment, where he picked up a company-owned 1992 International tanker truck and drove off. He drove from Artesia north to Lake Arthur and back. He had a beer with a hitchhiker he picked up and took another beer with him for the road. He visited his cousin Robert. This cousin and his wife told police Defendant was extremely drunk when he was at their house. Defendant left them and briefly visited another cousin's house. He began to return to his cousin Robert's house. At about 11:00 p.m., Defendant ran a stop sign at an intersection.

{3} As Defendant's truck crossed the intersection, Michelle Perea and her fiancé, Maurice Ingram, were simultaneously traveling across the intersection. Perea saw the truck was not stopping at the intersection and slammed on her brakes. Perea's vehicle struck the right rear tire and axle of the truck. Both air bags in Perea's vehicle deployed, pinning the occupants in the vehicle.

{4} The crash seriously injured Michelle Perea, fracturing her left femur, right ankle, and right arm. She was thirteen weeks pregnant with twins, one of whom died shortly after the accident, and the other of whom was born prematurely and also died. No direct evidence was presented as to the proximate cause of their deaths. Maurice Ingram, the father of the twins, died at the scene.

{5} Following the crash, Defendant exited his truck, went to the Perea car, removed Ms. Perea's and Mr. Ingram's eleven-month-old boy from a rear seat and handed him to a passerby. Defendant checked on Maurice Ingram, but could not find a pulse. He believed Ingram was dead. He attempted to free Perea from behind the steering wheel, but was unsuccessful. He asked a passerby if 911 had been called and was told it had. Defendant began to panic and called his cousin. He returned to the tanker and left the scene of the accident. He went to his cousin's house where he walked in the door, grabbed a bottle of Southern Comfort, and guzzled about half of it with the intention of masking his alcohol level at the time of the accident. Defendant was followed to his cousin's house from the accident scene by a witness. He was arrested at his cousin's house.

{6} Defendant was charged with homicide by vehicle, great bodily injury by vehicle,

knowingly leaving the scene of an accident involving death or personal injuries, tampering with evidence, and unlawful taking of a motor vehicle.

{7} Defendant entered pleas of guilty and no contest as noted above. There was no plea and disposition agreement; he pled "straight up" to the information. He was questioned by the district court as to his knowledge of the nature of the plea and the charges against him. The district judge then certified the results of the plea proceeding, indicating Defendant's voluntary and knowledgeable entry of the plea with understanding of its consequences. The district court sentenced him to:

> Six (6) years, followed by Two (2) years statutory parole as to Count 1 [vehicular homicide];
>
> Three (3) years, followed by Two (2) years statutory parole, as to each of Counts 2–3 [Great bodily injury by vehicle and accidents involving death or great bodily harm respectively]; and,
>
> Eighteen (18) months, followed by One (1) year statutory parole as to each of Counts 4–5 [Tampering with evidence and Unlawful taking of a motor vehicle, respectively].
>
> The sentence imposed in each Count shall run consecutively to each other.

The district court suspended all but fourteen (14) years in the custody of the Corrections Department and two (2) years statutory parole. Defendant entered an unconditional plea, never contested the case against him, and reserved no right to contest his sentence.

DISCUSSION

Sentence

{8} Felony sentencing by the district court is governed by NMSA 1978, § 31–18–15 (1993). Basic sentences for various degrees of crime are authorized; a sentence in a felony case is presumed by the statute to be the basic sentence. *See* § 31–18–15(B). The district court may alter the sentence in consideration of aggravating or mitigating circumstances as provided in other statutes. The statute requires the judge to put any aggravation or mitigation determinations on the record. *See* NMSA 1978, § 31–18–15.1 (1993). No record is required to be made when the judge simply imposes the basic sentence for the particular degree of crime. Basic sentences were imposed by the court below.

{9} Defendant asserts the district court refused to consider mitigating evidence. The fact is the court merely did not mitigate. Defendant argues the sentences imposed by the district court are too harsh. The sentences are those prescribed as basic by the legislature.

{10} Accordingly, Defendant does not present us with a viable appellate issue to review. *See State v. Augustus,* 97 N.M. 100, 101, 637 P.2d 50, 51 (Ct.App.1981) (citing *State v. Madrigal,* 85 N.M. 496, 513 P.2d 1278 (Ct.App.1973), for the proposition that while sentences may be reviewed for abuse of discretion, there is no abuse of discretion if the sentence imposed is authorized by law).

{11} Defendant may well be a reformed, religious, and remorseful person as he argued below and on appeal; these are factors properly taken into account should a judge wish to mitigate a sentence. Defendant is also a person who got drunk, killed one person, injured another seriously, deprived an eleven-month-old child of his father, ran from the scene, and tried to conceal evidence of his crime. These could easily be germane facts should the judge wish to do otherwise. These facts were all known to the district court by way of the pre-sentence report, as Defendant told the court in his statement at sentencing.

{12} There is no obligation on the part of a judge to depart from the basic sentence. The opportunity for a district court to mitigate a sentence depends solely on the discretion of the court and on no entitlement derived from any qualities of the defendant. *See State v. Sosa,* 1996–NMSC–057, 122 N.M. 446, 448, 926 P.2d 299, 301; *State v. Callaway,* 109 N.M. 564, 569–70, 787 P.2d 1247, 1252–53 (Ct.App.1989), *rev'd on other grounds,* 109 N.M. 416, 785 P.2d 1035 (1990). The focus of Defendant's remorse has shifted in this appeal from the cost of human life and the suffering he caused, to remorse for acquiescing in his own punishment without objection. Defendant stated at

his sentencing, "Your Honor, I know you have the Pre–Sentence Report and are aware of everything that occurred. I was driving the vehicle that night and I accept full responsibility." Defendant's sentences for the crimes of which he was convicted were neither mitigated nor aggravated by the district court. Defendant is entitled to no more than a sentence prescribed by law, and he received one in this case.

Vagueness of Statute Concerning Accident Involving Death or Personal Injuries

{13} Defendant also appeals his sentence for accident involving death or personal injuries, arguing the statute is vague because there is no way to distinguish between the elements of the offense contained in Section 66–7–201(B) and (C). Defendant is wrong. Section 66–7–201(B) states:

> Any person failing to stop or to comply with the requirements of Section 66–7–203 NMSA 1978 where the accident results in great bodily harm or death is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31–18–15 NMSA 1978.

Section 66–7–201(C) states:

> Any person who *knowingly fails* to stop or to comply with the requirements of Section 66–7–203 NMSA 1978 where the accident results in great bodily harm or death is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31–18–15 NMSA 1978.

(Emphasis added.)

{14} All that is required of the statute is for it to be sufficiently complete in its description of the elements of the offense that it provides notice to a person of ordinary intelligence of the conduct proscribed by law. *See State v. Pierce,* 110 N.M. 76, 81, 792 P.2d 408, 413 (1990). Subsection (C) requires the additional element of knowing behavior not mentioned in the preceding section. Defendant argues the statute does not tell him what knowledge he should have had to be more criminally culpable for leaving the scene. Questions of knowledge are held to be questions of fact. *See State v. Rowell,* 119 N.M. 710, 717, 895 P.2d 232, 239 (Ct.App. 1995), *rev'd on other grounds,* 121 N.M. 111, 908 P.2d 1379 (1995); *see also People v. Gregory,* 217 Cal.App.3d 665, 266 Cal.Rptr. 527, 534 (1990) (defining "knowingly" as requiring only knowledge that the facts exist which bring the act or omission within the provisions of the code, not any knowledge of the unlawfulness of such act or omission); *Ballentine's Law Dictionary* 703 (3d ed.1969) (defining the most common meaning of knowingly as "having knowledge, not of the act's unlawfulness, but merely knowledge of those facts which are essential to make it unlawful"). "A statute requiring the fact-finder to determine whether a defendant committed a knowing or willful violation is less likely to be found vague because the jury must determine scienter." *Rowell,* 119 N.M. at 718, 895 P.2d at 240. "In ascertaining whether a statute defining a criminal offense is sufficient to forestall a challenge of vagueness, the court reviews the statute in light of the facts of the case and the conduct which is prohibited by the statute." *State v. Duran,* 1998–NMCA–153, ¶ 31, 126 N.M. 60, 966 P.2d 768 (citing *State v. Wood,* 117 N.M. 682, 686–87, 875 P.2d 1113, 1117–18 (Ct.App.1994)).

{15} The question Defendant poses is therefore better answered by looking at what knowledge he possessed when he left the scene of the accident. Applying the standard above, the knowledge required of Defendant is not the degree of his crime, but the extent of the factual circumstances of the incident. Under any interpretation of the "knowingly failed" portion of the statute, Defendant clearly knew what he needed to know. The facts speak for themselves.

{16} Because the essence of a vagueness claim rests on a lack of notice, a party may not succeed on the claim if the statute clearly applies to the defendant's conduct. *Duran,* 1998–NMCA–153, ¶ 31, 126 N.M. 60, 966 P.2d 768. Defendant knew he was drunk and obnoxious at his house the afternoon of the crash when the police were called. Defendant knew he was drunk when he took his employer's tanker truck. At the scene of the crash he believed the passenger in the car he struck was dead. He knew Ms. Perea was trapped in the car. Defendant stated his adrenaline started kicking in at the

scene, and he was sobering up somewhat. His training as an Emergency Response Team member in the Washington Department of Corrections started coming back to him. When Defendant fled to his cousin Robert's house in the tanker truck after the incident, he told Robert he had drunk too much and knew he should not be driving.

{17} A fair inference from these facts is that Defendant, in consideration of this knowledge, panicked, called his cousin, and drove away without identifying himself or giving the required information. At his cousin's house, he drank a considerable dose of liquor to knowingly conceal the true extent of his intoxication. He was found and arrested when and where he was not because of his giving aid and information at the scene, but because a witness followed him to his cousin's house.

{18} When Defendant panicked and acted on facts known to him and left the scene without identifying himself, went to his cousin's house, and attempted to obscure the evidence of his intoxication, Defendant indisputably acted on knowledge of specific facts. Those facts made him believe he had been in a crash involving death and serious injury to other persons. He left the scene because of that knowledge. When Defendant declined to contest the evidence against him on either the accident involving injury or death or the tampering with evidence charges, and instead entered his unconditional plea, he acted with knowledge of very specific facts as well.

{19} Under the statute, Defendant argues a fact finder should have to find "that a defendant knew the facts that made his actions a fourth degree felony or a third degree felony." Even if Defendant is correct, Defendant himself deprived any fact finder from assessing the evidence of the case because he pled to the indictment. Defendant declined to contest the actions and statements upon which his charges were based. The facts are as he accepted them, and they are sufficient to show there is no vagueness between the fourth and third degree felonies in this case.

{20} The Court has not considered the facts not of record presented in Defendant's brief by way of footnote. Counsel should not refer to matters not of record in their briefs. *See Sosa v. Empire Roofing Co.*, 110 N.M. 614, 618, 798 P.2d 215, 219 (Ct.App.1990).

{21} For the foregoing reasons, the sentence imposed by the district court is affirmed.

{22} **IT IS SO ORDERED.**

PICKARD, Chief Judge and ARMIJO, Judge, concur.

1 P.3d 433

2000-NMCA-038

STATE of New Mexico, Plaintiff–Appellee,

v.

Anna TORRES, Defendant–Appellant.

No. 20,154.

Court of Appeals of New Mexico.

March 10, 2000.

Certiorari Denied, No. 26,261, May 1, 2000.

Patricia A. Madrid, Attorney General, M. Victoria Wilson, Assistant Attorney General, Santa Fe, for appellee.

Phyllis H. Subin, Chief Public Defender, Donna M. Bevacqua, Assistant Appellate Defender, Santa Fe, for appellant.

OPINION

KENNEDY, Judge.

{1} Defendant appeals her conviction for "knowingly issuing or transferring a forged writing with intent to injure or defraud" in violation of NMSA 1978, § 30–16–10(B) (1963), claiming an insufficiency of evidence to support her conviction. Defendant asserts

there was insufficient evidence that she issued or transferred documents with the intent to injure or defraud. We disagree. She further asserts the documents she is convicted of passing do not "purport to have legal efficacy" as required by the statute. This latter question is not a question of sufficiency of the evidence, it is a question of law. *See State v. Wasson*, 1998–NMCA–087, ¶¶ 5–6, 125 N.M. 656, 964 P.2d 820. The documents passed by Defendant satisfy the statute under that standard. We accordingly affirm her conviction. Recognizing a need to clarify the view concerning the "legal efficacy" of forged documents as a matter of law, we issue this formal opinion.

FACTS

{2} Mr. and Mrs. Arrevolos hired Defendant to help process immigration applications with the United States Department of Justice Immigration and Naturalization Service (INS) for their son, who was illegally residing in the United States. Defendant accepted a payment of $230 to perform the work. Defendant told the Arrevoloses INS would take about two months to process the documents. About a month later, the Arrevoloses returned to Defendant, who told them the documents would arrive at their house and not to ask her about it anymore. About three weeks later, the Arrevoloses went back to Defendant and asked Defendant to return their money and the documents. Defendant said the papers were at the bank and she would have them the following day.

{3} A couple of days later, Defendant returned the documents she had been given and gave the Arrevoloses a partially completed INS application. She also produced two additional documents and gave them to the Arrevolos: one was a receipt for money purporting to show she had paid INS a $70 processing fee for the documents and the other was a return receipt from the United States Postal Service (USPS) indicating INS had received the documents. Both documents were signed by Joseph Vigil, an alleged employee of INS, as the recipient of the respective items.

{4} The State presented evidence that the USPS return receipt had originally been attached to a letter sent to Joseph Vigil by a nursing home where Defendant worked. Mr. Vigil was in Clayton, New Mexico, at the time he allegedly signed the return receipt and was not an employee of INS. The State's handwriting expert identified some of the handwriting on the return receipt as definitely belonging to Defendant, and some of the handwriting as probably belonging to Defendant. The State's expert also testified that the cash receipt was written by Defendant and showed evidence of alteration, erasure, and the use of correction tape. The State's expert did not issue a conclusive opinion about the validity of the money receipt.

{5} According to Defendant she returned the papers to the Arrevolos without accepting any money and told them she could not help them when they could not produce the documentation she needed to complete her work. She does not attempt to explain how the Arrevolos came to possess two documents that bear her handwriting and indicate transactions between her and INS. Defendant argues the two documents she provided the Arrevolos were not "of legal efficacy" as required by the forgery statute and urges we vacate her conviction.

DISCUSSION

Standard of Review

{6} Defendant posits there was insufficient evidence in her trial for the jury to convict her of forgery. In reviewing her claim, we view the evidence in the light most favorable to sustaining the verdict. *See State v. Apodaca*, 118 N.M. 762, 765–66, 887 P.2d 756, 759–60 (1994). We do not reweigh the evidence or substitute our judgment for that of the jury. *See State v. Lankford*, 92 N.M. 1, 2, 582 P.2d 378, 379 (1978) ("Where testimony is conflicting, such conflict raises questions of fact for a jury to decide."). We resolve conflicting evidence and indulge all inferences in favor of the jury's decision. *See Apodaca*, 118 N.M. at 766, 887 P.2d at 760.

{7} Whether the forged documents in this case "purport to have legal efficacy" is a question of law. *See Wasson*, 1998–NMCA–087, ¶¶ 6–9, 125 N.M. 656, 964 P.2d 820; *see also* UJI 14–1643 NMRA 2000 committee commentary. We review questions of

law de novo. *See Wasson,* 1998–NMCA–087, ¶ 6, 125 N.M. 656, 964 P.2d 820.

Legal Efficacy

{8} Section 30–16–10 defines the elements of forgery as follows:

Forgery consists of:

A. falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or

B. knowingly issuing or transferring a forged writing with intent to injure or defraud.

Defendant sets forth a number of arguments asserting that the receipts in question do not possess legal efficacy as required by statute. Defendant's narrow reliance on *Wasson* is misplaced. Defendant urges that our interpretation of a document having legal efficacy be limited to " 'an instrument which upon its face could be made the foundation of liability' and 'an instrument good and valid for the purpose for which it was created.' " *Id.* ¶ 7 (quoting *State v. Nguyen,* 1997–NMCA–037, ¶ 14, 123 N.M. 290, 939 P.2d 1098). We disagree.

{9} The statute does not require the document to be a facially valid document of the sort it purports to be. First, *Wasson* directs us in our interpretation of the forgery statute by explaining that "[t]he 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.* ¶ 6 (quoting *State v. Ogden,* 118 N.M. 234, 243, 880 P.2d 845, 854 (1994)). Next, *Wasson* defines "legal efficacy" in much broader terms than the Defendant uses, explaining that "the statute applies to any writing which *purports* to have legal efficacy." *Id.* ¶ 9 "In New Mexico ... forgery is complete when the false instrument is issued or transferred with the requisite intent, regardless of its acceptance, or whether further steps are taken by the recipient to verify the writing." *Nguyen,* 1997–NMCA–037, ¶ 16, 123 N.M. 290, 939 P.2d 1098. "[F]orgeries often involve documents relied upon to establish financial obligations and entitlements in the conduct of private business, [but] ... also may involve 'any document required by law to be filed or recorded or necessary or convenient to the discharge of a public official's duties.' " *Wasson,* 1998–NMCA–087, ¶ 7, 125 N.M. 656, 964 P.2d 820 (citation omitted) (quoting 4 Charles E. Torcia, *Wharton's Criminal Law* § 491, at 94 (15th ed.1996)). "It is sufficient ... to constitute a forgery if there is a reasonable possibility that the false writing or instrument may operate to cause injury, although no actual injury therefrom is necessary." 36 Am.Jur.2d *Forgery* § 24 (1968) (footnote omitted).

{10} Based on New Mexico precedent, the proper basis for analyzing whether forgery has occurred is the actual role the document plays in the fraudulent transaction between victim and defendant. The INS receipt purports to have legal efficacy because on its face it would appear to put the onus on INS to act in some way—to process a completed form or explain why, having received documents upon which it should act, it has or has not done so. Moreover, it appears to be a "document required by law to be recorded or necessary or convenient to the discharge of a public official's duties." *Wasson,* 1998–NMCA–087, ¶ 7, 125 N.M. 656, 964 P.2d 820. Likewise, the USPS receipt would seem to appear on its face "good and valid for the purpose for which it was created," and would, "if genuine, ... apparently operate to the legal prejudice of the [USPS]." *Nguyen,* 1997–NMCA–037, ¶ 14, 123 N.M. 290, 939 P.2d 1098. Defendant's argument centers on the misplaced idea that the documents do not actually possess legal efficacy. By so insisting the Defendant ignores the work of this Court in *Wasson,* where we point out "the statute plainly is not limited to writings which actually have legal efficacy. Rather, the statute applies to any writing which purports to have legal efficacy." *Wasson,* 1998–NMCA–087, ¶ 9, 125 N.M. 656, 964 P.2d 820. Ballantine's Law Dictionary 1029 (3d ed.1969) defines "purport" as "[t]he apparent, but not necessarily the legal, import of the instrument."

Sufficiency of the Evidence

{11} The jury found Defendant defrauded the Arrevoloses by taking money

for work she did not perform. She gave two receipts to the Arrevoloses to prove she had worked and to justify keeping their money. The fraud began when Defendant took money for work she either intended not to perform or just did not perform. It was consummated when she intentionally and fraudulently tried to retain the money. The Arrevoloses relied upon Defendant's representation that she would perform work and, because of Defendant's representation, paid her money.

{12} When the deal fell through, Defendant could easily have returned the papers and the money. She did not. She waited a few days and then returned the partially completed paperwork and two receipts to her victims. On their face, the receipts said two things: (1) INS had received both documents and money from Defendant which she sent on behalf of the Arrevoloses; and (2) Defendant had done at least some work for which she had been contracted.

{13} That Defendant had in fact done no work is evidence of her intent to use the documents to defraud the Arrevoloses. The fraudulent representation that Defendant would work for her pay was made by Defendant and relied on by the Arrevoloses at the inception of the contract. Whether the Arrevoloses actually relied on the receipts is immaterial. Defendant intended that the documents establish her right to money to which she was not entitled. The receipts are forged documents of "legal efficacy" provided by Defendant in furtherance of her intent and scheme to defraud the Arrevoloses of their money.

CONCLUSION

{14} The issue of whether the real crime was forgery or misdemeanor fraud is moot. Defendant's conviction for forgery is affirmed.

{15} **IT IS SO ORDERED.**

WECHSLER and BUSTAMANTE, JJ., concur.

1 P.3d 974

2000-NMCA-042

Rose Mary PEDERSEN, Petitioner–Appellant,

v.

Edmund J. PEDERSEN, Respondent–Appellee.

No. 20,454.

Court of Appeals of New Mexico.

April 17, 2000.

Mark A. Filosa, Filosa & Filosa, Truth or Consequences, for Respondent–Appellee.

James T. Locatelli, Las Cruces, for Petitioner–Appellant.

OPINION

ALARID, Judge.

{1} This case presents the issue of whether a disabled parent is entitled to a mandatory credit against his child support obligation based upon federal social security benefits paid directly to the child as the dependent of a disabled wage-earner. For the reasons set forth below, we hold that the decision to award such a credit is discretionary, subject to the requirements of NMSA 1978, § 40–4–11.2 (1989). Because the trial court appears to have erroneously believed that he was required to award such a credit in Father's favor, we reverse.

{2} Under NMSA 1978, § 40–4–11.1 (1988, as amended through 1995), child support is calculated based on the *parents'* gross income. There is no provision in Section 40–4–11.1 for calculating basic child support based on the *child's* income. Rather, the child's income (whether from social security, his or her own earnings, from a trust established by grandparents or other sources) is relevant solely as a ground for deviating from the guidelines pursuant to Section 40–4–11.1.

{3} Other states have made express provision in their guidelines for setting-off social security benefits payable to the child. Laura W. Morgan, *Child Support Guidelines* § 2.03[e] at note 88 (1999 Supp.). If our Legislature had intended to enact a mandatory deduction for social security benefits payable to the child, it could have easily made express provision in the worksheet for crediting social security benefits against the disabled spouse's child support obligation.

{4} In *Mask v. Mask*, 95 N.M. 229, 620 P.2d 883 (1980), the father had been ordered to pay child support of $50 a month. After many years of ignoring this obligation, he retired. At that point his child qualified for social security benefits as the dependant child of a retired wage-earner. These benefits amounted to $228 a month. It is not clear from the reported decision what other resources the parents had. Under these facts, the Supreme Court held that it would be "inequitable" not to apply $50 a month of the social security benefit as a set-off against child support. This still resulted in a net gain to child of $178 a month from the social security benefit. We find it significant that in *Mask*, the Supreme Court held that the father "*may* receive a credit against his support obligation." *Id.* at 231, 620 P.2d at 885 (emphasis added). We believe that the Supreme Court's use of *may*, rather than *shall*, was intended to underscore the trial court's discretion in allocating social security benefits payable directly to the child.

{5} In the present case, the $370 a month social security payment very likely will make a significant difference in the standard of living of the household to which it is allocated. In contrast to *Mask*, the present case presents a situation in which *not* allowing a credit may be the more equitable result. We hold that, in allowing a credit against basic child support for off-schedule sources of income, such as social security benefits paid directly to the child, Section 40–4–11.2 requires the trial court to exercise its discretion on a case-by-case basis, with the child's standard of living a crucial factor.

{6} On remand, the trial court should calculate the parties' basic child support obligations without regard to the $370 a month social security benefits received by the child as the dependant of a disabled wage-earner. Then, pursuant to Section 40–4–11.2, the trial court should make findings explaining how and why the child's receipt of $370 a month in social security benefits justifies giving Father a full or partial credit against the guideline amount of child support. The burden of proving grounds for a credit should be allocated to Father. *See* § 40–4–11.2.

{7} The trial court's May 14, 1999 Modification Order is vacated and this matter remanded for further proceedings consistent with this opinion.

{8} **IT IS SO ORDERED.**

BUSTAMANTE and ARMIJO, JJ., concur.

1 P.3d 975

2000-NMCA-045

Ernest D. VALENCIA and Rafelita L. Valencia, husband and wife, Plaintiffs–Appellees,

v.

Loretta LUNDGREN and Craig Lundgren, husband and wife, Defendants–Appellants.

No. 20,082.

Court of Appeals of New Mexico.

May 1, 2000.

Victor A. Titus, Titus & Murphy, Farmington, for Appellees.

Todd M. Ackley, Kirtland, John C. Booth, Farmington, for Appellants.

OPINION

PICKARD, Chief Judge.

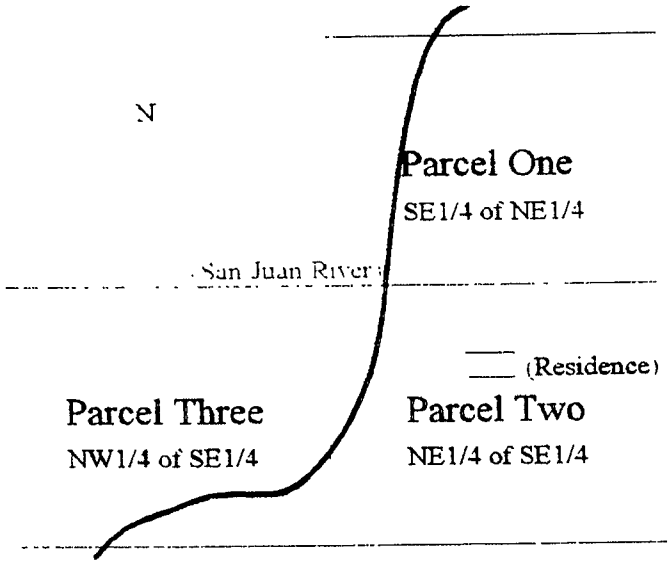
{1} Loretta Lundgren (Daughter) filed suit against her brother, Ernest Valencia (Son), in order to establish certain easements across his property in favor of her property. Son moved for summary judgment on the ground that he owned the property upon which Daughter resided (the Residence). Son argued he was the Residence's rightful owner pursuant to our State's recording statute because he recorded a deed purporting to transfer the Residence to him before Daughter recorded a deed purporting to transfer the Residence to her. The trial court accepted Son's argument and granted his motion for summary judgment.

{2} Daughter claims the trial court erred on the ground that Son lacked standing to invoke the recording statute. Daughter argues she foreclosed summary judgment when she raised the factual issue of whether Son acquired the Residence by gift, because persons who have not given consideration in exchange for the title to property cannot invoke the recording statute. If we reverse the trial court's decision, Daughter asks us to construe her deed and Son's deed together, uphold her claim to the Residence, and remand to the trial court for further proceedings in regard to her claim of easements appurtenant to the Residence. We reverse the trial court's decision and remand for

further proceedings consistent with this opinion.

BACKGROUND

{3} Joe Valencia (Father) acquired three contiguous 40-acre parcels of land in northern New Mexico in the early 1940s. The parcels, which together form the shape of a backwards "L" and which are diagramed below, are located in Section 18. Township 29 North of Range 9 West. The upper right parcel (Parcel One) is the SE1/4 of the NE1/4 of Section 18. The lower right parcel (Parcel Two) is the NE1/4 of the SE1/4 of Section 18. And the lower left parcel (Parcel Three) is the NW1/4 of the SE1/4 of Section 18.



{4} On November 4, 1992. Father executed two deeds in which he transferred a substantial part of his property holdings. In the first deed (Son's deed), Father conveyed Parcel One and Parcel Two to Son, with no exceptions. In the second deed (Daughter's deed), Father conveyed to his adopted daughter (Second Daughter) a tract of land and "the house[,] being the second house East from the San Juan River." The property description contained in the second deed puts Father's conveyance to Second Daughter in Parcel Three. This deed cannot be accurate, however, because at no time was there a "second house East from the San Juan River" in Parcel Three. In fact, "the house" is actually located in Parcel Two. Second Daughter recorded her deed in 1994.

{5} Son quitclaimed his interest in Parcel One and Parcel Two to Father in December 1992. In January 1993, Father reconveyed Parcels One and Two to Son. It appears that Father and Son performed these transactions in order to accommodate Father's conveyance to Second Daughter because the January deed contains the same boundary descriptions as the December deed, but it excepts five parcels from the December grant. The January deed's property description puts the exceptions on Parcels One and Two. This deed cannot be accurate, however, because four of the five exceptions are actually located on Parcel Three. Son recorded the deed on the same date Father delivered it to him. Father executed another deed in March 1993, which deed purports to transfer all three parcels to Son. Father executed this deed to correct the legal description contained in the January deed; however, it lists the same five exceptions contained in the January deed.

{6} In November 1995, Father executed a deed purporting to transfer to Daughter the same property he had transferred to Second Daughter in 1992. Daughter filed suit against Son in order to establish certain easements across his property in favor of her

property in June 1998. The day after Daughter filed her complaint. Second Daughter quitclaimed her interest in Father's property to Daughter. Daughter claims ownership of the Residence through Second Daughter's quitclaim deed, which is hereinafter referred to as Daughter's deed.

DISCUSSION

I. RECORDING STATUTE

{7} Son and Daughter both claimed ownership of the Residence by deed at the trial court level. Son recorded his deed first. Son argued that because he recorded his deed first, he was entitled to judgment as a matter of law pursuant to our State's recording statute. The recording statute states in relevant part:

> No deed, mortgage or other instrument in writing not recorded in accordance with [NMSA 1978, §] 14–9–1 [(1991)] shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith or judgment lien creditor, without knowledge of the existence of such unrecorded instruments.

NMSA 1978, § 14–9–3 (1990). The trial court accepted Son's argument and granted his motion for summary judgment. In its summary judgment order, the trial court found: "Any deed to Loretta Valencia [Daughter], Lorena Valencia [Second Daughter], or Loretta Lundgren [Daughter] [was] filed subsequent to that granting title to Ernest Valencia and [is] therefore void and of no legal effect."

{8} Daughter claims the trial court erred as a matter of law because it applied the recording statute in total disregard to her factual averment that Son acquired his deed by gift. Daughter argues the trial court's legal analysis effectively and improperly reads the term "purchaser" out of the recording statute. Daughter relies on *Withers v. Board of County Commissioners,* 96 N.M. 71, 628 P.2d 316 (Ct.App.1981), and *Arias v. Springer,* 42 N.M. 350, 78 P.2d 153 (1938), in support of her argument.

{9} In *Withers,* we addressed the issue of whether a person had standing to invoke the recording statute after he had submitted a successful bid to purchase certain real property. *See id.* at 72, 628 P.2d at 317. Answering in the negative, we reasoned that such a person had to be, but was not, a "purchaser" within the meaning of the recording statute. *See id.* In support of our holding, we relied on our Supreme Court's decision in *Arias* for the meaning of the term "purchaser." *See id.* In *Arias,* the Supreme Court stated:

> The word "purchaser" has two well-defined meanings. The common and popular meaning is that he is one who obtains title to real estate in consideration of the payment of money or its equivalent; the other is a technical meaning and includes all persons who acquire real estate otherwise than by descent. It includes acquisition by devise.
>
> It is evident that the word is used in the statute in its popular sense.... The object of the statute is to prevent injustice by protecting those who, without knowledge of infirmities in the title, invest money in property or mortgage loans; and those who have acquired judgment liens without such knowledge.

Id. at 359, 78 P.2d at 159 (citations omitted).

{10} The import of *Withers* and *Arias* is that a person can qualify as a purchaser under the recording statute if and only if he has invested money or money's worth in consideration for the title to real property. *See Withers,* 96 N.M. at 72, 628 P.2d at 317 ("[T]he clear and consistent reasoning of New Mexico case law ... holds that the object of the recording statute is to protect those who invest money in property ... without knowledge of infirmities in title."). If a person has not made such an investment, that person cannot invoke the recording statute to invalidate a conflicting deed irrespective of the fact that the person recorded the deed first. *See id.* We hold that the trial court therefore committed reversible error by failing to consider the issue of whether Son obtained title to the Residence by gift. *See Garcia v. Sanchez,* 108 N.M. 388, 395, 772 P.2d 1311, 1318 (Ct.App. 1989) (ruling that case may be remanded for application of correct principles of law when decision is based upon an error of law).

{11} The record indicates that Daughter properly raised this issue in the trial court. Daughter submitted an affidavit supporting her factual contention that Son did not give consideration for the Residence. In her affidavit. Daughter stated that despite her comprehensive review of Father's financial records, she had not discovered any receipt or record indicating Father had received money in exchange for deeding Parcels One, Two, and Three to his children. She alleges her affidavit draws credibility from Daughter's intimate knowledge of Father's financial affairs when she lived with and cared for Father in his residence until he died. Daughter points out that neither Son nor Son's attorney submitted any evidence disputing the triable issue raised in her affidavit. In fact, Son's attorney appears to have conceded the issue at the summary judgment hearing. Daughter's unrebutted affidavit forecloses summary judgment. *See Pharmaseal Lab., Inc. v. Goffe,* 90 N.M. 753, 756, 568 P.2d 589, 592 (1977) (ruling that summary judgment is foreclosed when the record discloses the existence of a substantial dispute concerning a material factual issue).

{12} On remand, the trial court is instructed to hear evidence and enter findings on the issue of whether Son acquired the Residence by gift. If the trial court finds that Son did not give Father consideration in exchange for the title to the Residence, it shall, for the reasons stated below, construe Son's deed and Daughter's deed together.

II. DEED CONSTRUCTION

{13} Daughter claims her deed and Son's deed should be construed together to give effect to both gifts insofar as possible because Father executed the conflicting deeds as part of a single transaction. We agree. The general rule in deed construction is that the grantor's intent is to be ascertained from the language employed in the deed or deeds, viewed in light of the surrounding circumstances. *See Hyder v. Brenton,* 93 N.M. 378, 381, 600 P.2d 830, 833 (Ct.App.1979). A court should not look beyond the language in the deeds to determine the grantor's intent if the deeds are unambiguous. *See Sanders v. Lutz,* 109 N.M. 193, 195–96, 784 P.2d 12, 14–15 (1989). However, when two deeds executed as part of substantially one transaction are ambiguous when compared with one another, a court may look beyond the four corners of the deeds in order to ascertain the grantor's intent. *See Camino Sin Pasada Neighborhood Ass'n v. Rockstroh,* 119 N.M. 212, 214–15, 889 P.2d 247, 249–50 (Ct.App.1994) (applying rule that where deeds are ambiguous, extrinsic evidence can be used to determine grantor intent); *Thompson v. Schlittenhart,* 47 Wash. App. 209, 734 P.2d 48, 50 (1987).

{14} The original deeds to the children, which Father executed on the same day, are ambiguous because they conflict with one another. In particular, Son's deed gives him Parcel One and Parcel Two with no exceptions and yet Daughter's deed gives her a house that appears to be located on Parcel Two. In addition, there is other evidence in the record supporting Daughter's contention that the overlap in the original deeds is merely a mistake and that Father really intended to convey the Residence to Second Daughter, and not to Son. That evidence is Father's last will and testament.

{15} In his will, Father stated that if his wife predeceased him, which she did, he wanted Second Daughter to take the "family residence and the land on which it is situate[d]." Father specifically described Second Daughter's bequest as follows:

> A tract of land approximately 150 feet by 250 feet in dimensions, being 250 feet from East to West and 150 feet from North to South, and the house being the second house East from the San Juan River;
>
> Located at the Northwest Quarter of the Southeast Quarter (NW[1]/4 SE[1]/4) of Section Eighteen (18), Township Twenty-nine (29) North, Range Nine (9) West, N.M.P.M., San Juan County, New Mexico; TOGETHER WITH the water rights appurtenant thereto and the mineral rights appurtenant thereto.

{16} Father's bequest to Second Daughter contains the same mistaken description of the Residence as the descriptions of the Residence contained in the later deeds Father delivered to Second Daughter and Daughter. The property descriptions in Father's will

and Daughter's deed put Father's bequest/gift in Parcel Three. And yet, it is indisputable that the family residence—i.e., the Residence—is actually located in Parcel Two and that there is no "second house East of the San Juan River" in Parcel Three.

{17} It appears that Father and Son attempted to correct the apparent overlap in Son's deed and Daughter's deed. In particular. Son quitclaimed his interest in Parcel One and Parcel Two to Father in December 1992. Less than one month later. Father turned around and reconveyed Parcels One and Two to Son; however, this time he excepted five parcels from the grant. It is plausible that Father and Son performed these transactions in order to accommodate Father's conveyance to Second Daughter. However, we do not resolve this issue on appeal because, as Son and Daughter admit, several triable issues of material fact remain unresolved.

{18} On remand, if the trial court finds that Son is not a purchaser, the trial court is instructed to construe the deeds together in light of the surrounding circumstances to best ascertain Father's intent. The trial court shall base its determination, not upon which donee recorded his or her deed first, but upon what property interests Father intended to convey to Son and Second Daughter when he executed the deeds on November 4, 1992. *See Armijo v. Armijo,* 4 N.M. 57, 65, 13 P. 92, 95 (1887) (stating that an unrecorded deed is good, and passes the title to property, as against the grantor and the grantor's heirs and devisees). The trial court may aid its determination by considering, among other things, (1) whether Father's multiple conveyances, along with his last will and testament, support the conclusion that he mistakenly transposed Parcel Two's property description and Parcel Three's property description in the deeds and (2) whether Father's second deed to Son, which was executed in January 1993, supports the conclusion that Father and Son attempted to correct the apparent overlap in Son's deed and Daughter's deed by putting his conveyance to Second Daughter within one of the second deed's five exceptions.

CONCLUSION

{19} For the reasons stated, we reverse and remand for further proceedings consistent with this opinion.

{20} **IT IS SO ORDERED.**

BOSSON and WECHSLER, JJ., concur.

2 P.3d 264

2000-NMSC-013

STATE of New Mexico, Plaintiff–Appellant,

v.

Jesus Diaz NUNEZ and David Michael Chavez, Defendants–Appellees.

State of New Mexico, Plaintiff–Appellee,

v.

Edward Vasquez, and Alex Gallegos, Defendants–Appellants.

State of New Mexico, Plaintiff–Appellee,

v.

Marguerite Vasquez, Defendant–Appellant.

Nos. 23,796, 23,860.

Supreme Court of New Mexico.

Dec. 30, 1999.

Rehearing Denied May 10, 2000.

[redacted]

[redacted]

[redacted]

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, for State of New Mexico.

Liane E. Kerr, Albuquerque, for Jesus Diaz Nunez.

Reber Boult, Albuquerque, for David Michael Chavez.

Phyllis H. Subin, Chief Public Defender, C. David Henderson, Assistant Appellate Defender, Susan Gibbs, Assistant Appellate Defender, Santa Fe, for Edward Vasquez and Marguerite Vasquez.

D. Eric Hannum, Albuquerque, for Alex Gallegos.

S. Rafe Foreman, Flower Mound, TX, for Saul Salcido.

Randi McGinn, Allegra C. Carpenter, Albuquerque, for Amicus Curiae New Mexico Criminal Defense Lawyer's Association.

Mark L. Drebing, Albuquerque, for Amicus Curiae City of Albuquerque and Albuquerque Police Department.

OPINION

FRANCHINI, Justice.

{1} This case concerns five consolidated appeals in which each of the defendants faced criminal charges for the possession or sale of drugs, and were also subject to the civil forfeiture of property, such as vehicles and currency, that was allegedly associated with the crime. These appeals each raise the same issue: whether civil forfeiture under the Controlled Substances Act, NMSA 1978, §§ 30-31-1 to -41 (1972, as amended through 1997), is punishment and is limited by the protections against double jeopardy guaranteed by the New Mexico Constitution, N.M. Const. art. II, § 15, and the double-jeopardy statute, NMSA 1978, § 30-1-10 (1963). We

conclude that civil forfeiture under the Act is punishment for the purposes of New Mexico's protections against double jeopardy.

I. FACTS

{2} The double-jeopardy issue we address today was properly preserved at the trial level by all the defendants in these consolidated cases. Some of the defendants raised issues other than the one resolved by this opinion. Because we decide all the cases on double-jeopardy grounds, we will not address any other issues.

A. *State v. Nunez*

{3} Jesus Diaz Nunez was arrested on April 7, 1995, and, on May 9, 1995, was charged with possession of marijuana with intent to sell. On April 10, 1995, a complaint for forfeiture was filed against Nunez's 1981 Ford Crown Victoria, in which he was allegedly transporting the marijuana. Nunez was indigent and was unable to obtain legal representation to contest the forfeiture. He did not appear at the forfeiture hearing and a default judgment was entered in May 1995. *See State ex rel. Department of Pub. Safety v. One 1981 Ford Crown Victoria,* No. SF–95–789(c) (N.M.Dist.Ct. May 25, 1995) (Default Judgment).

{4} Nunez, through a public defender, on August 18, 1995, filed a motion to dismiss the criminal charges based upon the violation of the Double Jeopardy Clauses of the United States and New Mexico Constitutions. The court determined that the forfeiture was penal in nature and that "[s]ince the State elected to obtain forfeiture before seeking criminal punishment, the State cannot now seek a second punishment in a criminal proceeding; and, therefore, defendant's motion should be granted." *See State v. Nunez,* No. CR–95–128–S (N.M.Dist.Ct. Aug. 28, 1995) (Order to Dismiss). The State appeals, and we affirm.

B. *State v. Chavez*

{5} David Michael Chavez was arrested on June 20, 1994, for possession of drug paraphernalia and possession of marijuana with intent to distribute. The police seized $3268 in currency from his home. On July 7, 1994, Chavez was again arrested for possession of marijuana with intent to distribute. The Albuquerque Police Department (APD) police seized a 1986 Chevrolet van, which was allegedly used to transport the marijuana, $50 in currency found in the vehicle, and $300 in currency found in Chavez's home.

{6} On July 19, 1994, the APD filed a petition of forfeiture against the $3268 seized in June and, on August 8, 1994, filed a petition of forfeiture against the vehicle and $350 seized in July. Chavez filed answers to the petitions in which he asserted that he was the owner of the vehicle and currency seized by the police. Half a year after the forfeiture petitions were filed, criminal charges for the two arrests were filed against Chavez on February 9, 1995.

{7} In March 1995, Chavez and the APD arrived at two compromise settlements regarding the seized property. Regarding the vehicle and currency seized in July 1994, a judgment was entered in which the APD kept the $350 and the van was returned to Chavez. *See State ex rel. Albuquerque Police Dep't v. One 1986 Chevrolet Blue and White Van,* No. MS 94–162 (N.M.Dist.Ct. Mar. 6, 1995) (Judgment of Forfeiture). As to the $3268 seized in June 1994, a judgment was entered in which the APD kept $2179 and $1089 was returned to Chavez. *See State ex rel. Albuquerque Police Dep't v. Three Thousand Two Hundred Sixty Eight Dollars,* No. MS 94–147 (N.M.Dist.Ct. Mar. 9, 1995) (Judgment of Forfeiture).

{8} A few days after the forfeiture settlements, on March 13, 1995, Chavez filed a motion to dismiss the criminal charges. He argued that the State had punished him once by forfeiting his property and was therefore barred by principles of double jeopardy from punishing him a second time in the criminal proceedings. The trial court granted the motion to dismiss. *See State v. Chavez,* No. CR–95–312 (N.M.Dist.Ct. May 5, 1995) (Order re: Motion to Dismiss for Double Jeopardy). The State appeals, and we affirm.

C. *State v. Gallegos*

{9} Alex Gallegos was arrested for possession of cocaine on September 1, 1994.

The police seized $299 found under his mattress. Gallegos testified that he was employed by a construction company and the money was the remainder of his paycheck which he had cashed earlier on the day of the arrest. The police testified that they asked Gallegos for proof, such as a pay stub or a letter from his employer, that the money was from a paycheck but that such proof was never provided. A forfeiture complaint was filed against the $299 on October 3, 1994. Gallegos, hoping to recover the money, sought the help of an attorney who told him that the legal fees for handling such a matter would cost far more than $299. Gallegos concluded he had no choice but to let the money go. A default judgment was entered on May 4, 1995, when Gallegos failed to appear to contest the forfeiture. *See State ex rel. Albuquerque Police Dep't v. Two Hundred Ninety Nine Dollars,* No. MS 94–00214 (N.M.Dist.Ct. May 4, 1995) (Default Judgment).

{10} Criminal charges were filed against Gallegos on April 27, 1995. He moved, on October 16, 1995, to dismiss the criminal charges on double-jeopardy grounds. This motion was denied. *See State v. Gallegos,* No. CR–95–1108 (N.M.Dist.Ct. Feb. 14, 1996) (Order). Gallegos pleaded guilty to possession of cocaine on February 28, 1996, and a judgment was filed in May 1996. *See State v. Gallegos,* No. CR–95–1108 (N.M.Dist.Ct. May 17, 1996) (Judgment, Sentence and Order Suspending Sentence). He now appeals his criminal conviction on double-jeopardy grounds, and we reverse.

D. *State v. Edward Vasquez* and *State v. Marguerite Vasquez*

{11} Edward and Marguerite Vasquez, husband and wife, were arrested on August 25, 1995, at a border patrol checkpoint. In October of 1995, they were charged with possession of cocaine with intent to distribute, conspiracy to distribute cocaine, possession of marijuana with intent to distribute, and conspiracy to distribute marijuana. The police seized a 1983 Ford Fairmont that was allegedly used to transport the drugs, $40 that was in Edward's possession, and $39 that was in Marguerite's possession. A petition of forfeiture against the vehicle and currency was filed on September 8, 1995. When the Vasquezes failed to appear to contest the forfeiture, a default judgment was entered on November 14, 1995. *See In re Forfeiture of a White 1983 Ford Fairmont,* No. CV–95–315 (N.M.Dist.Ct. Nov. 14, 1995) (Default Judgment of Forfeiture).

{12} In response to the narcotics charges on March 7, 1996, Edward filed a pre-trial motion to dismiss in which Marguerite claims to have joined, arguing that, because they had already been penalized by the forfeiture, double jeopardy prevented further prosecution. The trial court denied the motion, apparently at a hearing on March 12, 1996. Edward and Marguerite, in a single trial, were convicted on all counts by a jury on March 15, 1996. *See State v. Vasquez,* No. CR–95–383 (N.M.Dist.Ct. Mar. 21, 1996) (Judgment and Sentence). They now appeal their criminal convictions on double-jeopardy grounds, and we reverse.

II. NEW MEXICO AND THE FEDERAL CONSTITUTION

{13} It is settled law in New Mexico that "[w]e are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, 'unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter.'" *State ex rel. Serna v. Hodges,* 89 N.M. 351, 356, 552 P.2d 787, 792 (1976) (quoting *People v. Brisendine,* 13 Cal.3d 528, 119 Cal.Rptr. 315, 531 P.2d 1099, 1112 (1975)), *overruled on other grounds by State v. Rondeau,* 89 N.M. 408, 412, 553 P.2d 688, 692 (1976). Moreover, "when this Court derives an interpretation of New Mexico law from a federal opinion, our decision remains the law of New Mexico even if federal doctrine should later change." *State v. Breit,* 1996–NMSC–067, ¶ 27, 122 N.M. 655, 930 P.2d 792. The United States Supreme Court has recognized the rights of states, under their own law, to depart from federal interpretations.[1]

{14} New Mexico interprets its State Constitution using the interstitial approach. As we explained in *State v. Gomez*,

> Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined. A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.

1997–NMSC–006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (citation omitted).

{15} Thus, the first step in the *Gomez* analysis is a determination of whether the United States Constitution protects the right in question. As a matter of principle, we prefer to interpret our State Constitution in conformity with federal doctrine. "[W]e recognize the value of uniformity in the advancement and application of the rights guaranteed by both our state and federal constitutions ." *Breit*, 1996–NMSC–067, ¶ 27, 122 N.M. 655, 930 P.2d 792,. An effective federalist system depends upon a significant measure of cooperation and consistency between state and federal governments. *See State v. Hunt*, 91 N.J. 338, 450 A.2d 952, 964 (N.J. 1982) (Handler, J., concurring). This is why, under *Gomez*, we will not invoke the State Constitution unless a constitutional right is not protected under federal law. *Gomez*, 1997–NMSC–006, ¶ 19, 122 N.M. 777, 932 P.2d 1. If it is not, then under the second step of the *Gomez* analysis, we inquire whether our jurisprudence is distinctive, whether there are differences in our system of governance, or whether federal doctrine is wanting. We have not hesitated, when any of these three circumstances have been present, to conclude that the New Mexico Constitution provides greater protection of individual rights than does the federal constitution.[2]

{16} In our opinion today, we reject federal doctrine regarding the double-jeopardy implications of civil forfeiture as it is applied under the Controlled Substances Act. In 1996, the United States Supreme Court, in a singular reversal of its recent double-jeopardy jurisprudence, issued *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996). In *Ursery*, the Supreme Court held that "[i]n rem civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." *Ursery*, 518 U.S. at 292, 116 S.Ct. 2135. The Court thus—in the realm of controlled-substance-related forfeitures, and in essentially every other type of civil forfeiture—eliminated any double-jeopardy ground for dismissing civil forfeiture cases under the United States Constitution. Many articles and cases have meticulously summarized, criticized, and applied *Ursery*. We will not replicate this oft-repeated information except to describe aspects of *Ursery* that are distinct from established New Mexico law. We conclude, under the first part of the *Gomez* analysis, that, after *Ursery*, the federal constitution does not prevent the State from bringing, under the Controlled Substances Act, separate criminal and civil forfeiture actions for the same offense. The rights asserted by the defendants before us are not protected under federal law.

{17} Under the second part of the *Gomez* analysis, we justify our departure from federal constitutional doctrine because of the distinctive characteristics of New Mexico's double-jeopardy and forfeiture jurisprudence.[3] *See Gomez*, 1997–NMSC–006, ¶ 19, 122 N.M. 777, 932 P.2d 1. As we demonstrate in detail below, New Mexico has a time-honored precedent that has always regarded forfeiture as punitive. Moreover, the New Mexico and federal double-jeopardy protections are facially different and, recently, our double-jeopardy case law has departed from the federal standard. As the many New Mexico cases cited in this opinion demonstrate, were we to follow *Ursery*, we would be in conflict with, and would be required to dismantle, a significant body of settled law, much of which was decided independently of federal case law.[4]

{18} We emphasize that our opinion today is founded entirely and exclusively on the New Mexico State Constitution. We cite to federal jurisprudence, not on its own authority, but solely on the basis of the strength of its argument. Much of this opinion is devot-

ed to distinguishing federal law from New Mexico law. When we refer with approval to federal cases, we do so because, in our view, they provide a truthful statement of matters we decide entirely under the New Mexico Constitution. New Mexico law is the sole authority upon which we base our decision today.

III. RELEVANT FORFEITURE LAWS

{19} The Controlled Substances Act defines controlled substances, empowers the Board of Pharmacy to administer and regulate their manufacture, distribution, and dispensation, and establishes penalties for the illegal trafficking of controlled substances. Pertinent to this case are the Act's provisions for civil forfeiture, NMSA 1978, §§ 30–31–34 to –37 (1972, as amended through 1989).

{20} The types of property that may be forfeited are listed in NMSA 1978, § 30–31–34 (1989):

> The following are subject to forfeiture:
>
> A. all controlled substances and all controlled substance analogs which have been manufactured, distributed, dispensed or acquired in violation of the Controlled Substances Act;
>
> B. all raw materials, products and equipment of any kind including firearms which are used or intended for use in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance or controlled substance analog in violation of the Controlled Substances Act;
>
> C. all property which is used or intended for use as a container for property described in Subsection A or B of this section;
>
> D. *all conveyances, including* aircraft, *vehicles* or vessels, which are used or intended for use to transport or in any manner to facilitate the transportation for the purpose of sale of property described in Subsection A or B of this section;
>
> E. all books, records and research products and materials, including formulas, microfilm, tapes and data, which are used or intended for use in violation of the Controlled Substances Act;
>
> F. narcotics paraphernalia or *money which is a fruit or instrumentality of the crime;*
>
> . . . .
>
> H. all drug paraphernalia as defined [in subsection (V) of the "Definitions" section of the Act, NMSA 1978, § 30–31–2 (1997)].

(Emphasis added.) The forfeitures of the various automobiles and trucks in these consolidated cases were carried out under the auspices of Subsection D of this statute. The cash forfeitures were authorized by Subsection F. Several of the remaining provisions of this statute regulated the forfeiture of the controlled substances, contraband, and instrumentalities that gave rise to the various criminal prosecutions in these cases.

{21} The Act specifies that the judicial forfeiture proceeding is civil rather than criminal:

> In the event of seizure pursuant to [a court order or under specific circumstances that do not require a court order], proceedings under . . . the Rules of Civil Procedure for the District Courts of New Mexico shall be instituted promptly and not later than thirty days after seizure.

NMSA 1978, § 30–31–35(C) (1981).

{22} The New Mexico forfeiture statute includes innocent-owner provisions that protect property from forfeiture when the violation of the Controlled Substances Act was committed without the owner's "knowledge or consent." Section 30–31–34(G)(1), (2), (4). We shall address below the double-jeopardy significance of these provisions. We will also address the statutory provision that places the burden of proof in a forfeiture action, not on the State to prove that the property was used in a crime, but on the defendant to prove that it was not. *See* NMSA 1978, § 30–31–37 (1972). The forfeiture laws also provide for the disposition of forfeited property, and we shall mention the implications behind the fact that law enforcement agencies may benefit from the proceeds of forfeitures. *See* § 30–31–35(E).

{23} The holding by the United States Supreme Court in *Ursery* that double jeopardy is not implicated by civil forfeitures under

18 U.S.C. § 981(a)(1)(A) (1994), and 21 U.S.C. § 881(a)(6) & (a)(7) (1994 & Supp. II 1996), applies to the double-jeopardy analysis of our Section 30–31–34 only for purposes of the United States Constitution. *See Ursery*, 518 U.S. at 291–92, 116 S.Ct. 2135. However, unless this Court determines otherwise, *Ursery* has no authority when our forfeiture laws are viewed in light of the New Mexico Constitution.

IV. DOUBLE JEOPARDY

A. The Double Jeopardy Clause

{24} The New Mexico Double Jeopardy Clause differs from its federal counterpart. The Fifth Amendment to the United States Constitution states simply, "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb ...." U.S. Const. amend. V. New Mexico specifies double-jeopardy protections that are only implicit in the federal version:

> No person shall ... be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he [or she] may not again be tried for an offense or degree of the offense greater than the one of which he [or she] was convicted.

N.M. Const. art. II, § 15.

{25} This constitutional protection is reiterated and expanded by our double-jeopardy statute:

> No person shall be twice put in jeopardy for the same crime. *The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment.* When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he [or she] may not again be tried for a crime or degree of the crime greater than the one of which he [or she] was originally convicted.

Section 30–1–10 (emphasis added). The non-waiver provision is especially significant because federal case law expressly denies a similar interpretation of the Fifth Amendment.[5]

{26} In times past we regarded our State Constitution's Double Jeopardy Clause as being "subject to the same construction and interpretation as its counterpart in the Fifth Amendment to the United States Constitution." *State v. Day*, 94 N.M. 753, 756, 617 P.2d 142, 145 (1980); *accord Swafford v. State*, 112 N.M. 3, 7 n. 3, 810 P.2d 1223, 1227 n. 3 (1991) (finding no suggestion "that the New Mexico double jeopardy clause, in the multiple punishment context, provides further protection than that afforded by the federal clause as interpreted by relevant federal case law"). However, with *State v. Breit*, in keeping with our interstitial relationship with the Federal Constitution, we parted ways with the United States Supreme Court's views of the Fifth Amendment. In *Breit*, we held that the Double Jeopardy Clause of the New Mexico Constitution barred retrial following a mistrial caused by prosecutorial misconduct, when the prosecutor knew his or her conduct was improper and prejudicial, and either intended to provoke a mistrial or acted in willful disregard of the resulting mistrial, retrial, or reversal. *Breit*, 1996–NMSC–067, ¶ 32, 122 N.M. 655, 930 P.2d 792. We concluded that the reasoning of *Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), was flawed because it barred retrial only if the prosecutor intended to provoke a mistrial. *See Breit*, 1996–NMSC–067, ¶¶ 19–24, 122 N.M. 655, 930 P.2d 792.

{27} When compared to recent United States Supreme Court Fifth–Amendment jurisprudence, New Mexico's constitutional and statutory protection against double jeopardy, on its face, is of a different nature, more encompassing and inviolate.

B. The Moments When Jeopardy Attaches

{28} Civil and criminal proceedings each have different moments of attachment. In a criminal trial, jeopardy attaches at the moment the trier of fact is empowered to make any determination regarding the

defendant's innocence or guilt. *See State v. Davis,* 1998–NMCA–148, ¶ 14, 126 N.M. 297, 968 P.2d 808. In a nonjury trial, this means that jeopardy attaches when the court begins to hear at least some evidence on behalf of the state.[6] In a jury trial, jeopardy attaches at the point when a jury is impaneled and sworn to try the case. *State v. James,* 93 N.M. 605, 606, 603 P.2d 715, 716 (1979). In the case of a guilty plea or plea of nolo contendere, jeopardy attaches at the time the court accepts the defendant's plea. *See State v. James,* 94 N.M. 7, 9, 606 P.2d 1101, 1103 (Ct.App.) (guilty), *rev'd on other grounds,* 93 N.M. 605, 603 P.2d 715 (1979); *State v. Degnan,* 587 A.2d 71, 72 (R.I.1991) (nolo). We will explain below why double jeopardy is not waived by a guilty plea.

{29} In civil forfeiture proceedings, many authorities have suggested that jeopardy attaches at the time the court enters its final judgment.[7] This is because the final decree of forfeiture marks the moment when the ownership rights of the defendant are altered. Thus, as we shall explain below, even if there was no trial because the defendant did not appear at the forfeiture hearing, jeopardy attaches upon the issuance of a default judgment order. We hold that jeopardy attaches in a civil forfeiture proceeding at the time the court enters its final judgment, either at the conclusion of a trial or upon entering a default judgment.

{30} The protection against multiple prosecutions of the same offense is not dependent upon whether jeopardy first attached in the criminal or the civil proceeding. Whatever the sequence, the New Mexico Double Jeopardy Clause forbids the prosecution of the same infraction in two separate proceedings. *See Department of Revenue v. Kurth Ranch,* 511 U.S. 767, 804, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (Scalia, J., dissenting) ("[I]f there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference."). The New Mexico Constitution bars whichever action placed the defendant in jeopardy a second time for the same offense.

{31} In cases like those we address today, if the civil forfeiture is pursued first, resulting in either a trial or a default judgment, the double-jeopardy defense would arise upon the subsequent initiation of a criminal proceeding. Conversely, if the defendant is first subjected to a criminal prosecution, the double-jeopardy defense would be triggered at the moment the state commenced a subsequent forfeiture action.

V. FORFEITURE DEFINED

{32} In the New Mexico Constitution, the ownership of property is as meaningful and fundamental as the rights to life, safety, and happiness:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

N.M. Const. art. II, § 4.

{33} Forfeiture is the complete divestiture of the ownership of property without compensation. *See* Black's Law Dictionary 661 (7th ed.1999). Thus, it extinguishes one of the most fundamental liberty interests. Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution,* 39 N.Y.L. Sch. L.Rev. 1, 10 (1994) [hereinafter Cheh, *Easy*]. It is a statutorily created sanction for the commission of certain illegal acts or for the breach of certain obligations or conditions. *See* Black's Law Dictionary 661.

{34} Forfeiture, as a means of combating the trafficking of controlled substances, is based on the principle that people who commit crimes must not profit from their wrongdoing.

> Modern forfeiture is justified as a means of taking the profit out of crime and as a device to destroy criminal "enterprises," that is, any business, association, cartel, or concerted action that tends to continue operating even if involved individuals are jailed. These are laudable objectives that appeal to good common sense and elementary principles of morality. It is the essence of justice to deprive a criminal of his

> booty and to destroy what are, in effect, nests of criminal activity.

Cheh, *Easy, supra,* at 5–6 (footnote omitted). Thus, ideally, forfeitures under the Controlled Substances Act discourage illegal economies and divest criminals of the profits of the drug trade.

{35} Civil forfeiture is often analyzed as the confiscation of three different types of property: First is *contraband,* which is anything that, by law, "cannot be possessed at all or possessed only under strict conditions," such as contaminated or misbranded products, controlled substances, unlawfully possessed firearms, counterfeit money, stolen property, and vehicles with false identification numbers.[8] Second are *proceeds,* which are the monetary profits derived from an illegal enterprise as well as any goods or investments purchased with that money. *See* Rachel L. Brand, *Recent Developments,* 20 Harv. J.L. & Pub. Pol'y 292, 306 (1996). Third are *instrumentalities,* which are property used in committing a crime—they are integral to the crime, the means without which the crime could not have been committed as charged, the sine qua non of trafficking in controlled substances. In New Mexico, under the Controlled Substances Act, contraband is summarily forfeited by the State. *See* NMSA 1978, § 30-31-36 (1987). Summary forfeiture of contraband does not implicate double jeopardy. Contraband is property that is illegal in itself, regardless of how it was acquired, how it was used, whether or not anyone even owns it. No one has the right, under Article II, Section 4 of our Constitution, to acquire, possess, or protect contraband. However, in the forfeiture of all other types of property under the Controlled Substances Act, jeopardy attaches.

VI. THE NEW MEXICO MULTIPLE PROSECUTIONS TEST

A. The Three-Part Test From *Schwartz* and the Two-Part Test from *Ursery*

{36} Among the distinctive state characteristics in New Mexico's double-jeopardy jurisprudence is the three-pronged "[m]ultiple punishment analysis" described in *State ex rel. Schwartz v. Kennedy:*

> Multiple punishment analysis ... entails three factors: (1) whether the State subjected the defendant to separate proceedings; (2) whether the conduct precipitating the separate proceedings consisted of one offense or two offenses; and (3) whether the penalties in each of the proceedings may be considered "punishment" for the purposes of the Double Jeopardy Clause.

120 N.M. 619, 626, 904 P.2d 1044, 1051 (1995).

{37} In contrast, the *Ursery* majority justified its conclusion by applying a two-pronged test. *Ursery,* 518 U.S. at 277–78, 116 S.Ct. 2135. The *Ursery* court quoted that test from one of its earlier forfeiture cases: *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984), *superceded on other grounds by statute as noted by Cooper v. City of Greenwood,* 904 F.2d 302, 305 n. 3 (5th Cir.1990). This two-pronged test is supposed to determine whether a forfeiture statute was intended by Congress to be punitive or remedial.

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

89 Firearms, 465 U.S. at 362–63, 104 S.Ct. 1099 (quoting *United States v. Ward,* 448 U.S. 242, 248–49, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)) (citation omitted), *quoted in part in Ursery,* 518 U.S. at 277–78, 116 S.Ct. 2135.

{38} The most obvious distinction between these two tests is that *Schwartz* includes two factors left unexpressed by *Ursery* that, to us, seem indispensable in evaluating a multiple prosecution double-jeopardy claim: whether there were "separate proceedings" and whether the proceedings were directed at only "one offense." By discounting these considerations, the *Ursery* Court avoids addressing whether the cases in question are multiple punish-

ment or multiple prosecution cases. If we conclude, under *Schwartz*, that these are separate proceedings seeking separate punishments for a single offense, there is no question that the prohibition against multiple prosecutions has been violated. The most conservative members of the United States Supreme Court have admitted that, even if the double-jeopardy clause does not reach multiple punishments, it does protect against multiple prosecutions. *See, e.g., Ursery,* 518 U.S. at 297, 116 S.Ct. 2135 (Scalia, J., concurring).

{39} However, of greater significance is the almost complete reliance by the two-part *Ursery/89 Firearms* test on the legislative determination to label a particular sanction "civil" or "criminal." The first question the Court asks is "whether Congress intended proceedings under 21 U.S.C. § 881, and 18 U.S.C. § 981, to be criminal or civil." *Ursery,* 518 U.S. at 288, 116 S.Ct. 2135. In implementing this first prong, the *Ursery* Court found that "[t]here is little doubt that Congress intended these forfeitures to be civil proceedings," because Congress designed forfeiture under the statute to be *in rem,* impersonally "targeting the property itself." *Id.* at 288–89, 116 S.Ct. 2135. The Court also noted that federal forfeitures are governed by civil procedure mechanisms rather than criminal procedure mechanisms. *Id.* at 289, 116 S.Ct. 2135. We shall respond to these in rem and civil/criminal arguments below.

{40} In the second stage of the analysis, the Court evoked the declaration of *89 Firearms,* that, "'"[o]nly the clearest proof"' that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction." *89 Firearms,* 465 U.S. at 365, 104 S.Ct. 1099 (quoting *Ward,* 448 U.S. at 249, 100 S.Ct. 2636 (quoting *Flemming v. Nestor,* 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960))). The Court found that the federal forfeiture statutes, "while perhaps having certain punitive aspects, serve important nonpunitive goals." *Ursery,* 518 U.S. at 290, 116 S.Ct. 2135. The second question is structured to further reinforce the Court's complete deference to legislative intent. This prong asks whether the forfeiture proceedings "are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Id.* An affirmative answer to this question depends upon a very high standard—"clearest proof"—which guarantees that legislative intent will prevail except in the most egregiously punitive circumstances. *See id.;* Adam C. Wells, Comment, *Multiple–Punishment & the Double Jeopardy Clause: The United States v. Ursery Decision,* 71 St. John's L.Rev. 153, 170 (1997). In the context of all the other arguments of *Ursery,* "clearest proof" is such an inaccessible standard that it requires the judiciary to suspend its own interpretation of the constitution in favor of that of the legislature.[9] Unlike federal courts, New Mexico courts have never used the expression "clearest proof" as a standard for evaluating the legitimacy of forfeiture actions.

{41} Commentators—including those courts that have followed *Ursery*—almost universally interpret *Ursery* to justify the abrogation of any double-jeopardy protection in civil forfeiture actions.[10] *Ursery* states explicitly that its holding applies to "civil forfeitures generally." *Ursery,* 518 U.S. at 270, 116 S.Ct. 2135. It is difficult to imagine a forfeiture scenario that would be so punitive as to surpass the bar set by *Ursery.*

{42} We have discovered only two cases—only one of which deals with forfeiture—that held, under the *Ursery* "clearest proof" standard, that a sanction was punitive for double jeopardy purposes. In *State v. Klein,* 702 N.E.2d 771, 772 (Ind.Ct.App. 1998), *transfer denied,* 719 N.E.2d 386 (1999) (Sullivan, J., dissenting to transfer denial), the defendant was prosecuted for various crimes in relation to an accusation of sexual assault. Under an Indiana statute that authorized the seizure of property that had been used in the commission of certain enumerated crimes, the state forfeited his vehicle, claiming it had been used to escape. *Id.* The Indiana Court of Appeals applied the two-part *Ursery* test and found that because forfeiture of the vehicle was stipulated by the relevant statute as a sanction for the specific crimes of attempted rape and criminal confinement, double jeopardy prevented further

prosecution for those crimes after the forfeiture had taken place. However, the charges of attempted criminal deviate conduct and criminal deviate conduct were not barred by double jeopardy because those crimes were not among the enumerated offenses in the forfeiture statute. *Id.* at 773–75.

{43} The non-forfeiture case, *People v. Wood*, 260 A.D.2d 102, 698 N.Y.S.2d 122, 124–27 (1999), mentioned *Ursery* and held that double jeopardy prevented a criminal contempt proceeding for harassment after the defendant had already been sanctioned in a family-court contempt proceeding based on same underlying conduct. The court in *Wood* could hardly dispute that the defendant had already been punished because the sanction under the first proceeding was a jail sentence.

{44} Even if there are other cases like these, they are all solitary exceptions to the otherwise universal impact of the two-part *Ursery* test: the abrogation of any double-jeopardy protection when a civil forfeiture and a criminal prosecution are brought for the same offense. As we demonstrate below, we would have to discard a significant body of established New Mexico law if we were to construe so narrowly our own Double Jeopardy Clause.

B. New Mexico's Doctrine Regarding Deference to Legislative Intent

{45} The immediate virtue of the *Schwartz* test over the *Ursery/89 Firearms* two-part test is that there is no deference to legislative intent regarding the determination of fundamental constitutional rights. The congressional decision to describe forfeiture as a civil proceeding is one of the main arguments the *Ursery* Court depends upon to support its conclusion that forfeitures are not punishment. *See Ursery*, 518 U.S. at 288–89, 116 S.Ct. 2135.

{46} The Controlled Substances Act explicitly declares that forfeiture shall be instituted under "the Rules of Civil Procedure for the District Courts of New Mexico." Section 30–31–35(C). However, in New Mexico, the fact that the Legislature has chosen to label a proceeding "civil" or "criminal" is not dispositive of the true nature of that proceeding. We settled this matter in *State ex rel. Schwartz v. Kennedy*. In that case we concluded that if the penalty in a civil proceeding "may be fairly characterized only as a deterrent or as retribution, then the revocation is punishment; if the penalty may be fairly characterized as remedial, then it is not punishment for the purposes of double jeopardy analysis." *Schwartz*, 120 N.M. at 630, 904 P.2d at 1055; *accord New Mexico Taxation & Revenue Dep't v. Whitener*, 117 N.M. 130, 133, 869 P.2d 829, 832 (Ct.App.1993) (discussing with approval the holding of *United States v. Halper*, 490 U.S. 435, 447–48, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), *abrogated by Hudson v. United States*, 522 U.S. 93, 95, 100–03, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), that "the labels 'criminal' and 'civil' were not of paramount importance and could not be utilized to defeat the applicable protections of constitutional law"). The resolution of the issue before us turns, not on the fact that a forfeiture proceeding is instituted under the rules of civil procedure, but on whether the sanction of forfeiture was intended to be a form of punishment. *See Whitener*, 117 N.M. at 134, 869 P.2d at 833 (stating that "the most relevant consideration was the character of the sanction and whether it could fairly be called punitive in nature").

{47} The *Ursery* Court's willingness to cede to Congress so much of its control over fundamental constitutional protections is contrary to New Mexico law. *See* Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 Buff.Crim. L.Rev. 679, 683 (1999) (The United States Supreme Court "now routinely blesses whatever label a legislature places on a sanction."). Our Court of Appeals has expressed disapproval for such an approach, stating that, in New Mexico, "[t]he State cannot restrict an individual's constitutional rights by statute." *Whitener*, 117 N.M. at 134, 869 P.2d at 833; *accord State v. Barber*, 108 N.M. 709, 710–11, 778 P.2d 456, 457–58 (Ct.App.1989) (legislature cannot diminish a right expressly guaranteed by the constitution). "If an action by the government violates a constitutional prohibition, no amount of evidence manifesting the legislature's purportedly benign intent in au-

thorizing that action can render the action constitutional." *In re P.S.*, 175 Ill.2d 79, 221 Ill.Dec. 853, 676 N.E.2d 656, 663 (1997) (Heiple, C.J., dissenting).

{48} It is the role of the judiciary, and not the legislature, to interpret the constitution. The mere fact that the legislature has chosen to affix to a statute the appellations "civil" or "criminal" does not sanctify the deprivation of constitutional rights that are guaranteed to all criminal defendants. Most emphatically, legislative intent should not be considered determinative of multiple prosecution cases. Legislative intent, no matter how well meaning, cannot bestow constitutional legitimacy upon the imposition of multiple punishments in multiple proceedings for a single offense. Legislators, in choosing whether to describe a sanction as "civil" or "criminal," will naturally seek to minimize the likelihood of judicial scrutiny. *Cf.* Andrew J. Gottman, Note, *Fair Notice, Even for Terrorists: Timothy McVeigh and a New Standard for the ex Post Facto Clause,* 56 Wash. & Lee L.Rev. 591, 645 (1999) ("No rational Congress would ever place a criminal label on a retrospective bill."). The New Mexico Double Jeopardy Clause may not be circumvented simply because the Legislature has labeled one of two sanctions as "civil."

{49} To be sure, in a *single* proceeding, the New Mexico Double Jeopardy Clause does not prevent the Legislature from authorizing multiple punishments for the same offense.[11] In that circumstance we do defer because it is the role of the Legislature to define crimes and ascribe the proper punishments. *See State v. Tsethlikai,* 109 N.M. 371, 373, 785 P.2d 282, 284 (Ct.App.1989) ("When conduct by a defendant violates two statutory provisions, the role of the constitutional guaranty is limited to assuring that the sentencing court has not exceeded its legislative authority."). There are, of course, limitations on this legislative power. *See Swafford,* 112 N.M. at 13–14, 810 P.2d at 1233–34 (setting forth "a two-part test for determining legislative intent to punish").

C. *Schwartz* Distinguished

{50} The issues we addressed in *Schwartz* differ from the issues we address today. *Schwartz* concerned an administrative sanction rather than a nominally civil forfeiture. Specifically, *Schwartz* addressed "whether double jeopardy prohibits the State from subjecting an accused drunk driver to both an administrative driver's license revocation proceeding and a criminal prosecution." *Schwartz,* 120 N.M. at 623, 904 P.2d at 1048. In applying our three-part test, we concluded that the State had subjected the DWI defendants to separate proceedings and that the conduct precipitating the separate proceedings consisted of a single offense. *Id.* at 626–28, 904 P.2d at 1051–53. However, as to the third part of the test, we concluded that the administrative license revocation was not punishment for double-jeopardy purposes.

{51} In making this determination we followed the United States Supreme Court's holding in *Halper,* 490 U.S. at 447, 109 S.Ct. 1892, that the legislative choice to apply the labels "criminal" or "civil" are not determinative of whether a particular sanction is punitive. *Schwartz,* 120 N.M. at 628–29, 904 P.2d at 1053–54. In *Schwartz* we held that "[i]n order to ascertain whether these sanctions are punitive we must look at the purposes that the sanctions actually serve. We make this determination by evaluating the government's purpose in enacting the legislation, rather than evaluating the effect of the sanction on the defendant." *Id.* at 631, 904 P.2d at 1056 (citation omitted). Looking at the purposes behind the administrative revocation of a driver's license, we concluded that it is "significant that the operation of automobiles on public highways is an activity that is regulated by the government." *Id.* An essential aspect of government regulation is issuing of licenses that are conditional; they are valid only as long as the participant adheres to the standards "set by the government for participation in a regulated activity." *Id.* Upon a violation, the administrative sanction is not punitive if it "reasonably serves regulatory goals adopted in the public interest." *Id.* Though we found that the license revocation did have certain punitive

aspects, we concluded that the primary objectives of the sanction were predominately remedial. *Id.* at 633–34, 904 P.2d at 1058–59. We held that suspending a driver's license for DWI "serves the legitimate nonpunitive purpose of protecting the public from the dangers presented by drunk drivers and helps enforce regulatory compliance with the laws governing the licensed activity of driving." *Id.* at 632, 904 P.2d at 1057.

{52} In contrast, the statutes applicable to the cases we address today do not concern a regulated lawful activity, but rather an illegal criminal activity. Trafficking in controlled substances is not a government-granted privilege that is taken away by the sanction of forfeiture. As we explain in detail below, forfeitures under Section 30–31–34 were not designed—and indeed could never be designed—to serve the remedial objective of compensating the government or society for the incalculable costs of the illegal drug trade. Forfeiture inflicts a pecuniary penalty as punishment for the crime and seeks to deter any recurrence of the crime. Applying the logic of *Schwartz,* even though forfeiture has some remedial aspects, the design and motives behind the forfeiture statutes are unquestionably punitive. The forfeitures in the cases at hand are distinct from the administrative sanction discussed in *Schwartz* because their purposes and intentions are primarily punitive.

{53} The *Schwartz* test set forth New Mexico's distinctive method for evaluating possible violations of the protections against multiple prosecutions and multiple punishments. Even though the *Schwartz* test was directed at administrative license revocation rather than civil forfeiture, we find it to be entirely adaptable to the cases we address today. A measure of the dispassionate nature of the three-part *Schwartz* test is that it is conducive, on the one hand, of the holding in *Schwartz* that administrative revocations are not punitive, and on the other hand, of our holding today that forfeitures under the Controlled Substances Act are punitive. The two-part *Ursery/89 Firearms* test would be an unnecessary departure from New Mexico law.

{54} The rights asserted by the defendants in the cases before us today are not protected by the federal test. Following *Gomez,* we therefore will examine whether there is protection under the New Mexico test. *See Gomez,* 1997–NMSC–006, ¶ 19, 122 N.M. 777, 932 P.2d 1. We now apply the three-pronged *Schwartz* test.

VII. SEPARATE PROCEEDINGS

{55} Applying the first prong of the *Schwartz* test, there is no dispute that, under current New Mexico law, the criminal prosecution and the forfeiture action are separate proceedings. We certainly reject any attempt to contrive an identity between the two proceedings such as that set forth in *United States v. Millan,* 2 F.3d 17, 20 (2d Cir.1993), in which the court asserted that the two actions were both were part of a "single, coordinated prosecution." If there were only one proceeding, these cases would not be before us.

VIII. ONE OFFENSE

{56} The second factor in the *Schwartz* test—whether the conduct at issue consists of one or more than one offense—is more complex. Because two different bodies of law are applied—drug trafficking laws and forfeiture laws—we must determine whether each statute punishes different conduct or both apply to the same conduct. Most courts, if they address this question, answer it by invoking the well-worn *Blockburger* test which states that when "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact the other does not." *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The *Blockburger* test has been augmented by our courts and is integral to New Mexico's double-jeopardy jurisprudence. *See Swafford,* 112 N.M. at 8–9, 810 P.2d at 1228–29 (incorporating *Blockburger* into New Mexico test for analyzing multiple punishment claims); *Schwartz,* 120 N.M. at 626–27, 904 P.2d at 1051–52 (applying *Blockburger* in determining "whether the conduct precipitating

the revocation hearing and the criminal prosecution consists of one offense or two offenses").

{57} We conclude that an examination of the Controlled Substances Act reveals that there is no fact needed to prove the drug trafficking violation that is not also needed to prove the grounds for forfeiture. All the forfeitures of property under Section 30–31–34 are expressly predicated on the fact that the defendant was "in violation of the Controlled Substances Act." The forfeiture statute entirely subsumes the criminal offense.

{58} This interpretation is further supported by the innocent owner provisions that limit the application of the forfeiture statute exclusively to those who are in "violation of the Controlled Substances Act." *See* § 30–31–34(G)(1), (2), (4). By making an exception for innocent owners the Legislature could only have intended the criminal offense to be an element necessary to justify the civil forfeiture action.

{59} Therefore, in the case of forfeitures under the Controlled Substances Act, we hereby establish a presumption that when a forfeiture action and a criminal action are directed at the same defendant and rely on the same general evidence, then both proceedings concern the same offense. The State will bear the burden of proving otherwise. Specifically, the State will have to prove with clear and convincing evidence that the criminal action and forfeiture action are unquestionably directed at completely distinct and unrelated offenses.

{60} We establish this presumption in favor of defendants because they should be protected from an unfair partitioning of their offenses. When there is more than one count of trafficking in controlled substances, the State is forbidden from instituting a criminal action on some counts and a forfeiture action on the others. In New Mexico, this partitioning would run afoul of the Double Jeopardy Clause. *See State v. Boeglin*, 90 N.M. 93, 95, 559 P.2d 1220, 1222 (Ct.App.1977) ("An offense may not be split into many parts and made the subject of multiple prosecutions."). It would be incumbent on the State to prove that it was not splitting the same offense in order to preserve the tactical advantages of bringing a separate forfeiture action.

IX. PUNISHMENT

{61} The third *Schwartz* factor, whether both proceedings impose punishment, is the most contentious. Though this factor and the second part of the *Ursery/89 Firearms* test address the same basic question, *Schwartz* does not defer to legislative intent nor does it require the insurmountable "clearest proof" standard.

A. The Punitive/Remedial Evaluation under *Schwartz*

{62} As mentioned above, in *Schwartz* we stated that the punitive or remedial nature of a sanction is established by looking at the purposes behind the statute that authorizes the sanction. *Schwartz*, 120 N.M. at 631, 904 P.2d at 1056; *accord Whitener*, 117 N.M. at 133, 869 P.2d at 832 (describing the holding of *Halper*, 490 U.S. at 448, 109 S.Ct. 1892, and stating that "the determination of whether a given civil sanction constituted punishment required a particularized assessment of the penalty imposed and the purposes that the penalty may be fairly said to serve").

{63} As noted above, *Schwartz* makes it clear that a nonpunitive sanction need not be " 'solely' " remedial. *Schwartz*, 120 N.M. at 633–34, 904 P.2d at 1058–59 (discussing statement from *Halper*, 490 U.S. at 448, 109 S.Ct. 1892, that "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term" (emphasis added)). *Schwartz* concluded that "the fact that the regulatory scheme has some incidental deterrent effect does not render the sanction punishment for the purposes of double jeopardy analysis." *Schwartz*, 120 N.M. at 633, 904 P.2d at 1058. Common sense tells us that there are circumstances in which the reverse is true as well: certain statutory schemes—like forfeitures under the Controlled Substances Act—may have certain remedial as-

pects though their purposes are primarily punitive.

{64} Thus, *Schwartz* indicates that determining whether a sanction is remedial or punitive for double-jeopardy purposes requires a balancing of all the purposes behind the sanction. *See id.* at 633–34, 904 P.2d at 1058–59 (indicating that an incidental deterrent purpose does not outweigh the remedial intent of a sanction). This is ascertained by examining the statutory scheme that creates the sanction. We also believe that if neither the remedial nor the punitive purposes predominate, the evaluation should be guided by whether the sanction affects a fundamental right. Thus, in a close case, if the right at stake were statutory, such as the loss of an administrative license, the most likely conclusion would be that the sanction is remedial. However, in the matter we address today, there is much disagreement about whether the purposes of forfeiture under the Controlled Substances Act are more remedial than punitive. Our conclusion about this matter is strongly influenced by the fact that the purpose of the sanction is to deprive the defendant of the fundamental constitutional right of "acquiring, possessing and protecting property." *See* N.M. Const. art. II, § 4. This creates a strong presumption that the sanction is punitive.

{65} Thus, as we explain below, while New Mexico's forfeiture statutes under the Controlled Substances Act have certain remedial goals, they primarily serve decidedly punitive objectives. Moreover, there are certain aspects—or earmarks—of these forfeiture laws that are demonstrative of their punitive nature. As one commentator concluded, "New Mexico's drug forfeiture statute, codified in its Criminal Offenses law, is intended as a penalty for convicted drug felons. It is penal and punitive in nature, not remedial, as most civil statutes purport to be." 1 Steven L. Kessler, *Civil & Criminal Forfeiture: Fed. & State Practice* § 9.04[5] (1999) (footnote omitted).

B. Remedial Aspects of Forfeitures under the Controlled Substances Act

{66} In this section we will outline a number of remedial qualities that are usually ascribed to forfeitures associated with controlled-substances prosecutions. Even though some of these remedial qualities apply to the New Mexico Controlled Substances Act, they do not outweigh its punitive nature.

1. Reimbursement

{67} The most frequently mentioned objective is that forfeiture reimburses the government for the cost of its efforts to minimize the availability of illegal drugs including investigating, prosecuting, and incarcerating drug traffickers. Moreover, civil forfeiture allegedly helps compensate for the societal costs of the drug trade such as caring for victims, lost productivity, and social programs that combat the temptation of illegal drugs. *See* Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate,* 10 Ga. St. U.L.Rev. 241, 260 n. 81 (1994) ("Forfeiture is remedial . . . because it compensates the government for its expenditures on law enforcement activities and on other societal problems resulting from the offending instrumentalities."). There is no claim that forfeiture reimburses the government dollar for dollar, even if a specific dollar amount could be determined. Rather, forfeiture is defended as a "rough justice" remedy or a "a reasonable form of liquidated damages" designed to indemnify the costs related to the trafficking of controlled substances.[12] As explained below, the New Mexico Controlled Substances Act was created without this purpose in mind.

2. Removes harm

{68} Forfeiture is also ascribed the remedial objective of removing harm from society and from the stream of commerce. Thus, social betterment and not individual punishment is the goal when the state eliminates harmful substances, confiscates dangerous instrumentalities, abates nuisances, and impounds illegal goods.[13] There is little doubt that the removal of harm is an aspect of forfeitures under the Controlled Substances Act. But this aspect, by itself, does

not render forfeiture a predominately remedial sanction.

3. Confiscation of harmful property

{69} Similarly, the confiscation of contraband, and proceeds, and instrumentalities of the illegal drug trade is justified as a way of protecting society from harm. Possession of contraband, such as a controlled substance, is unlawful for all citizens and its forfeiture is not punishment. *See* J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis,* 60 Minn. L.Rev. 379, 478 (1976). Proceeds are the profits of illegal activities and property purchased with those illegal profits and their forfeiture deprives the owner of nothing to which he or she is entitled. Cheh, *Easy, supra,* at 15. It is claimed as well that the forfeiture of instrumentalities-property that is used to facilitate a crime-serves remedial objectives. The harmful nature of such property and the remedial character of such forfeitures is disputed. *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda,* 65 U. Chi. L.Rev. 35, 45–46 (1998). Forfeiture of harmful property can be beneficial. However, this factor, even when considered with the other remedial qualities we mention, does not outweigh the punitive nature of forfeiture under the Controlled Substances Act.

4. Restitution

{70} Forfeiture proceeds can be used to provide restitution for victims of the illegal drug trade. *See* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive & Excessive Penalties,* 144 U. Pa. L.Rev. 101, 174 n. 215, 175 n. 216, 176 n. 220 (1995). However, New Mexico's Controlled Substances Act makes no provision for the direct compensation of victims. At best, victims may benefit obliquely when forfeited property or the proceeds of their sale revert to the general fund or are used by law enforcement agencies. *See* § 30–31–35(E) (permitting law enforcement agencies to use forfeited property or sell it and apply proceeds to state, county, municipal general funds).

5. Encouraging the proper management of property

{71} Often mentioned is the argument that forfeiture encourages property owners to actively manage their property to ensure that it will not be used for illegal purposes. *See Ursery,* 518 U.S. at 290, 116 S.Ct. 2135. Under federal law, innocent owners may lose property even when they never consent to or are completely unaware of the illegal use of their property.[14] Such an outcome in New Mexico is precluded, both by the innocent owner provisions of the Controlled Substances Act and by the determinations of our courts. *See* § 30–31–34(G)(1), (2), (4); *In re Forfeiture of One 1970 Ford Pickup Truck,* 113 N.M. 97, 100, 823 P.2d 339, 342 (Ct.App. 1991) (holding an innocent co-owner's portion of confiscated property not subject to forfeiture).

C. Punitive Aspects of Forfeitures under the Controlled Substances Act

{72} In this section we shall explain the factors that demonstrate how forfeitures under the Controlled Substances Act were designed to be punitive.

1. New Mexico precedent regards forfeitures as punitive

{73} Were we to follow *Ursery's* holding that civil forfeitures are not punitive, we would be forced to repudiate over a quarter century of consistent and unequivocal statements by the New Mexico appellate courts that civil forfeiture is indeed quasi criminal, penal, and punitive in nature.[15] Moreover, the presumption that forfeiture is punitive can be traced to the earliest opinions of the Territorial Supreme Court, prior to our statehood.[16] This presumption continued after New Mexico was admitted into the Union.[17] In more recent years, the forfeiture of water rights has similarly been regarded as punishment.[18]

{74} The *Ursery* majority did not mention its holding in *Boyd v. United States,* 116 U.S. 616, 634, 6 S.Ct. 524, 29 L.Ed. 746 (1886), *overruled on other grounds by Warden, Md. Penitentiary v. Hayden,* 387 U.S. 294, 302–07, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), that forfeitures have a "quasi criminal

nature." This concept was reiterated by the Court a number of times in the subsequent decades including another case the majority did not discuss, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) (stating "a forfeiture proceeding is quasi-criminal in character"). In New Mexico, this "quasi-criminal" characterization of civil forfeitures was adopted from *1958 Plymouth*, and has become a fixture of our jurisprudence.[19] The validity of this quasi-criminal characterization is bolstered by the holdings of both New Mexico and federal appellate courts that the exclusionary rule applies to forfeiture proceedings. Evidence obtained in violation of the search and seizure protections guaranteed by the United States and New Mexico Constitutions can be used neither at the defendant's criminal trial nor at the forfeiture proceeding.[20]

{75} For these reasons, it is well established in New Mexico that, "[f]orfeitures are not favored at law and statutes are to be construed strictly against forfeiture." *State v. Ozarek*, 91 N.M. 275, 275, 573 P.2d 209, 209 (1978).[21] Forfeitures, "should be enforced only when within both the letter and the spirit of the law." *Mitchell v. City of Farmington Police Dep't (In re Forfeiture of Two Thousand Seven Hundred Thirty Dollars & No Cents)*, 111 N.M. 746, 748–49, 809 P.2d 1274, 1276–77 (1991) [hereinafter *$2730.00*]. We regard forfeiture with mistrust because it divests the individual of the right "of acquiring, possessing and protecting property"-one of the most fundamental liberty interests. *See* N.M. Const. art. II, § 4. It is "not a mere restraint on use, temporary loss, or a device used to satisfy pre-existing debts or secure jurisdiction." Cheh, *Easy*, *supra*, at 10. It is the most extreme sanction the state can bring against the property owner. *Id.* ("Forfeiture is to fines what capital punishment is to incarceration."). With regard to the fundamental right to property, the state can devise no penalty more extreme than taking away property without compensation. It is true that the state may impose penalties more harsh or expensive than the forfeiture of such property as an old car or a small amount of cash. But with regard to that car or cash, and the fundamental right of ownership, no penalty is more extreme than stripping a person of that right without compensation.

{76} We would have to renounce a significant body of precedent were we to conclude that forfeitures were remedial rather than punitive. Though many of our early forfeiture cases are far removed from the sanctions contemplated by the Controlled Substances Act, New Mexico has never, in any context, in addressing any issue, ever effectuated a forfeiture without characterizing it as penal or quasi-criminal or punitive.

2. In rem

{77} The *Ursery* majority rests a preponderance of its rationale upon the in rem nature of the forfeiture proceeding, which it characterizes in terms of the guilty property fiction. In this segment we will explain why in rem jurisdiction and the guilty property fiction are not synonymous. Additionally, we shall show why the in rem doctrine does not imply, as *Ursery* suggests, that forfeiture is a remedial sanction. Rather, a proper understanding of in rem doctrine supports the conclusion that forfeiture is punitive for double-jeopardy purposes under the Controlled Substances Act.

a. In rem jurisdiction is directed at persons' interests

{78} Most commonly, "in rem" is defined as a proceeding or action instituted against a thing in contradistinction to "in personam" actions which are directed against a person. Black's Law Dictionary 797. However, in modern jurisprudence, this definition is neither conceptually nor practically accurate. It is true that the names of the proceedings are styled as if the inanimate object were a defendant in a civil or criminal action. *See, e.g., State v. One 1967 Peterbilt Tractor (In re Seizure & Intended Forfeiture of One 1967 Peterbilt Tractor)*, 84 N.M. 652, 506 P.2d 1199 (1973). However, as the United States Supreme Court sagely observed over 120 years ago, "in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property

owned by them, or of some interest therein." *Pennoyer v. Neff,* 95 U.S. 714, 734, 24 L.Ed. 565 (1878), *overruled on other grounds by Shaffer v. Heitner,* 433 U.S. 186, 206, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). An in rem action is directed, not *against* the property per se, but rather at resolving the interests, claims, titles, and rights in that property.[22] And it is persons-as individuals, governments, corporations-who possess those interests, claims, titles, and rights.[23]

{79} The in rem doctrine has its origins in the need for the court to have jurisdiction over property when its owner is absent, when there is no owner, or when the extent of ownership is unknown.[24] In such circumstances, in rem jurisdiction allows the court to dispose of the property, with absolute finality, as to everyone anywhere who has any interest in it whatsoever, whether they are present, absent, or unknown, and even if there is no owner. *Flesch v. Circle City Excavating & Rental Corp.,* 137 Ind. App. 695, 210 N.E.2d 865, 868–69 (1965) (an action in rem determines "the right in specific property against all of the world, equally binding on everyone") This quality of in rem jurisdiction is of significant value in a forfeiture proceeding under the Controlled Substances Act. Forfeiture under the Act deprives defendants of ill-gotten and ill-used property. However, the illegal drug trade is a global enterprise. In many cases one cannot presume that all those who have an interest in the property are known, have been apprehended, or are within the court's jurisdiction. *See* Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America,* 96 Mich. L.Rev.1910, 1918 (1998) (review of Leonard Levy, *A License to Steal: The Forfeiture of Property* (1996)) (Some, if not most, defendants whose property is subject to forfeiture "are persons or entities over which an American court will typically have no personal jurisdiction."). In rem jurisdiction allows the court to divest any wrongdoer anywhere of any interest they may possess in that unlawful property.

b. The guilty property fiction

{80} Our Court has previously criticized the in rem doctrine as being "rooted in the hoary annals of admiralty law" when courts often could not obtain in personam jurisdiction over those who committed maritime offenses, but could obtain in rem jurisdiction over the wrongdoers' ocean vessels. *$2730.00,* 111 N.M. at 748, 809 P.2d at 1276; *see also* Herpel, *supra,* at 1916–19. Thus, in maritime law, an action was brought against a ship as if it were the wrongdoer. This aspect of in rem doctrine is known as the guilty property fiction. This fiction treats inanimate objects as if they were sentient beings.

{81} The guilty property fiction-as opposed to the less theoretical and more practicable understanding of in rem jurisdiction which recognizes its effect on persons-is indispensable to all the *Ursery* Court's arguments that forfeitures are not punishment.[25]

> [This] forfeiture proceeding ... is *in rem.* It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted, and punished. *The forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.*

Ursery, 518 U.S. at 275, 116 S.Ct. 2135 (quoting *Various Items of Personal Property v. United States,* 282 U.S. 577, 581, 51 S.Ct. 282, 75 L.Ed. 558 (1931) (alteration, omissions, and emphasis in original)). Because only persons can be punished, the majority's claim that persons are not the object of a forfeiture action separates forfeiture from the realm of punishment.

{82} However, in New Mexico, we have expressly dismissed the guilty property fiction as "anachronistic" and not reflective of the true nature of an in rem civil forfeiture proceeding under the Controlled Substances Act. *See $2730.00,* 111 N.M. at 748, 809 P.2d at 1276; *see also 1970 Ford Pickup,* 113 N.M. at 99, 823 P.2d at 341. In fact, this Court has noted that the United States Supreme Court itself has characterized this fiction "as ' "archaic," "an animistic survival from remote times," "irrational" and "atavistic." ' " *$2730.00,* 111 N.M. at 748, 809 P.2d at

1276 (quoting *Continental Grain Co. v. Barge FBL-585,* 364 U.S. 19, 23, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (1960) (quoting *In re The R. Lenahan, Jr.,* 48 F.2d 110, 112 (2d Cir.1931))). These criticisms are still valid and distinctive aspects of New Mexico law.

c. In rem jurisdiction is punitive

{83} "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Oliver Wendell Holmes, *The Path of Law,* 10 Harv. L.Rev. 457, 469 (1897). The fact that the guilty property fiction is old does not mean it is either venerable or applicable to modern law. *See* Leading Case, *Double Jeopardy Clause–In Rem Civil Forfeiture,* 110 Harv. L.Rev. 206, 214 (1996) ("In *Ursery,* the Court failed to recognize that modern civil forfeiture is far different in application, motivation, and result from the civil forfeiture statutes used in 'the earliest years of this Nation.' " (quoting *Ursery,* 518 U.S. at 274, 116 S.Ct. 2135)). Once it is accepted that the purpose of in rem forfeiture is to target, not the property by itself, but a person's interest in that property, it is self-evident that the forfeiture is punishment.[26]

> To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated . . . .

Place v. Norwich & N.Y. Transp. Co., 118 U.S. 468, 503, 6 S.Ct. 1150, 30 L.Ed. 134 (1886); *see also Continental Grain,* 364 U.S. at 23–24, 80 S.Ct. 1470.

{84} The problems that gave rise to the guilty property fiction still exist: courts must still deal with property that has no owner and defendants who do not reside within the jurisdiction or who are unidentified. The purpose of in rem jurisdiction, even in its most archaic form, was to extend the jurisdiction of the courts. It still serves the same purpose. However, it must not be forgotten that the in rem action is directed, not at the property itself, but at any interest that may exist in that property, and that when, as the consequence of a crime, the court divests a defendant, without compensation, of any interest in property-that defendant has been punished. In rem was never intended, and should never be interpreted, to abrogate fundamental constitutional rights.

3. Deterrence

{85} "Deterrence" is defined as "[t]he act or process of discouraging certain behavior, particularly by fear." Moreover, as an objective of criminal law, deterrence connotes "the prevention of criminal behavior by fear of punishment." Black's Law Dictionary 460. Deterrence is a way of using the punishment of a defendant as an example to others who might be tempted to commit the same crime. It is an announcement to the world of the consequences for those who are caught committing the prohibited act. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal–Civil Law Distinction,* 42 Hastings L.J. 1325, 1355 n. 166 (1991) [hereinafter Cheh, *Constitutional*]. "In order for a deterrent to be effective, the potential costs to that individual, discounted by the probability that the individual will incur such costs, must be sufficiently high to dissuade her [or him] from taking that action. Thus, the strength of the deterrent depends on the size of the penalty." Leading Case, *supra,* at 212. Sanctions that deter are different from those that remedy. A deterrent "must amount to more than recompense or restitution. The theory is that humans, as rational weighers of the risks and benefits of their actions, will risk being penalized if the worst they face is having to pay market value for their illicit gains." Cheh, *Constitutional, supra,* at 1355 (1991) (footnote omitted).

{86} It is universally acknowledged that our forfeiture statutes are meant to deter those who contemplate trafficking in controlled substances. As the definition indicates, deterrence is accomplished by instilling fear in potential drug dealers. The cost of the forfeiture is designed to exceed, if possible, any profitability from the crime. *See* Leading Case, *supra,* at 212. Defendants are deprived of all the profits and

proceeds of their drug trade, and potentially any worldly goods, including legally acquired property, that served as an instrumentality to crime. The harsh punishment is intended as an object lesson to the world of the consequences of being involved with illegal drugs. This deterrent function of forfeitures under the Controlled Substances Act serves a decidedly punitive purpose.

4. No correlation to harm

{87} It is apparent that, on their face, the forfeiture provisions of the Controlled Substances Act were never intended to serve as a source of restitution for the state's costs of investigating and prosecuting the crime, the harm to any innocent victims from illegal drug trade, or the unmeasurable cost to society from the trafficking of controlled substances. *See* Cheh, *Easy, supra,* at 18 ("[C]ivil asset forfeitures never were intended to serve as a form of restitution nor are they designed to serve that goal."). A statute that attempted to, for example, recompense the government for its investigation and prosecution costs, would devise a fine that reasonably approximated the dollar amount of the government's efforts, based upon past average expenditures. In contrast, under the Controlled Substances Act, the value of the property forfeited is never mentioned and has absolutely no bearing on the reasons for its confiscation.[27] The statute makes no demand that the State correlate its prosecutorial expenses to the value of the seized property. *See* Cheh, *Easy, supra,* at 10 ("Whether the nature or the value of any property seized bears any equivalence to harms caused by use of the property or to the culpability of the property owner is pure happenstance."). The Legislature did not intend to overwhelm the courts with contentious accountings of the costs associated with the illegal drug trade.

{88} Moreover, under the Act, the law enforcement agency seizing the property may "take custody of the property for use by law enforcement agencies in the enforcement of the Controlled Substances Act or remove it for disposition in accordance with law." Section 30-31-35(E)(2). This aspect of contemporary forfeiture law has been much criticized and raises serious constitutional concerns.[28] The law enforcement agency may keep the forfeited property or the proceeds therefrom. Section 30-31-35(E). But the value of the property is applied toward the nebulous enterprise of enforcing the Act. Section 30-31-35(E)(2). Nothing in this statute requires the value of the property to be applied in a remedial fashion to reimbursing the agency's costs in prosecuting the specific crime from which the property was derived.

{89} If it is clear that the sanction greatly exceeds the quantum of harm, then it is punitive. Conversely, forfeiture is no more remedial if the state's expenditures or the cost of the harm exceed the value of the forfeited property. In fact, the State indicated that it may have lost money in the prosecution of both Nunez and the Vasquezes even after forfeiting their property. These disparities merely underscore the contention that the forfeitures are punitive. The cases of Nunez and the Vasquezes further illustrate that any parity between costs and recovery under the Controlled Substances Act is both coincidental and unintentional. Also unpersuasive is the notion, set forth in *Halper* and mentioned by the State, that forfeitures are a "rough justice" approximation of the monetary costs of the crime. *See Halper,* 490 U.S. at 446, 449, 109 S.Ct. 1892. Such a rationale is merely an admission that value of the sanction is unrelated to the cost of ameliorating the harm and further underscores the punitive nature of these forfeitures.

{90} If a remedial sanction is designed to recompense the utterly incalculable social costs of the illicit drug trade then there is no question that civil forfeiture is punitive. There will never be a consensus about the monetary value of the social damage caused by illegal drugs, much less any particular defendant's share of that cost. The property is taken without regard to its value or the defendant's portion of responsibility for the social devastation. The forfeiture can, thus, only be characterized as a sanction whose correlation to the harm is completely arbitrary-in other words it is punishment. *See* King, *supra,* at 164 (stating that a civil sanction is punitive if, "assuming the statute does

makes some attempt [sic] to calibrate sanctions to a remedial purpose, that the particular sanction in question was imposed in a form or amount unrelated to that purpose").

5. Tied to crime

{91} Among the most compelling arguments that civil forfeiture is punitive is that it is conditioned upon the commission of a crime. The forfeiture necessarily requires proof of the criminal offense and by its terms compels the defendant to relinquish property rights precisely because he or she has committed a crime.[29] Our Court of Appeals was correct in determining "that the legislature's choice to tie forfeiture directly to the commission of drug offenses under the Controlled Substances Act confirms the punitive nature of these provisions." *Albuquerque Police Dep't v. Martinez (In re Forfeiture of Fourteen Thousand Six Hundred Thirty Nine Dollars),* 120 N.M. 408, 412–13, 902 P.2d 563, 567–68 (Ct.App.1995) [hereinafter *$14,639*].

6. Innocent owner

{92} Our forfeiture statute includes some innocent owner provisions. A common carrier is not subject to forfeiture "unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of the Controlled Substances Act." Section 30–31–34(G)(1). Aircraft, vehicles, and vessels cannot be forfeited if the violation of the Act was "committed or omitted without [the owner's] knowledge or consent." Section 30–31–34(G)(2). The "forfeiture of a conveyance encumbered by a bona fide security interest shall be subject to the interest of a secured party if the secured party neither had knowledge of nor consented to the" violation of the Act. Section 30–31–34(G)(4).

{93} Our Court of Appeals properly concluded that these innocent owner provisions demonstrate the "legislature's intent to punish only those persons involved in drug trafficking." *$14,639,* 120 N.M. at 413, 902 P.2d at 568. The force of this reasoning is exemplified by our Court of Appeals holding in *In re Forfeiture of One 1970 Ford Pickup,* mentioned above, which protected an innocent co-owner from forfeiting her proportionate interest in property because of the crimes of a guilty co-owner. 113 N.M. at 100, 823 P.2d at 342. Federal law is less respectful of the rights of innocent people than we are in New Mexico. There are no New Mexico controlled-substances cases that have affirmed the forfeiture of property when the owner was completely unaware of any illegal activity by the lessors or borrowers as in *Calero–Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 680–90, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) (holding that forfeiture of a yacht, after police found marijuana on board, was not unconstitutional even though owner-lessor of yacht was totally innocent and unaware of presence of drugs), or *United States v. One 1978 Chrysler Le Baron Station Wagon,* 648 F.Supp. 1048, 1051 (E.D.N.Y.1986) (affirming forfeiture of innocent company's car which was used to transport drugs by an employee who was the son of the company's president and primary stockholder). Forfeiture in New Mexico is a sanction that applies only to wrongdoers. "If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense." *Austin v. United States,* 509 U.S. 602, 617, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).

D. Summation

{94} Because of the strength of New Mexico precedent, the punitive nature of in rem jurisdiction, the deterrent function of the sanction, the lack of correlation between the penalty and the crime, the fact that the sanction is tied to a crime, the exclusion of innocent owners from the sanction, and the fact that a fundamental right is affected, we conclude that the remedial objectives of forfeitures under the Controlled Substances Act are incidental, and that the purposes of the sanction are decidedly punitive for double-jeopardy purposes.

X. PROCEDURAL ISSUES

{95} With the exception of *Chavez,* all the cases in these consolidated appeals were

resolved by guilty pleas to the criminal charges, forfeitures as a result of default judgments, or both. The State argues that the defendants waived their double-jeopardy defense with their plea agreements and that jeopardy did not attach with the default judgments, and, thus, their double-jeopardy claims are barred. We disagree.

A. Plea Agreements

{96} The State maintains that the guilty plea of Gallegos resulted in a waiver of the defendant's double-jeopardy claims. The State bases its argument on *Montoya v. New Mexico,* 55 F.3d 1496 (10th Cir.1995). In *Montoya,* the defendant violated the terms of his probation. As a result, his probation was revoked and he was sentenced to his previously suspended sentence plus an additional four years under the Habitual Offender Act, NMSA 1978, §§ 31–18–17 to –20 (1977, as amended through 1993). In a federal habeas petition brought before the Tenth Circuit Court of Appeals, Montoya contended that the additional four years amounted to an increased sentence after retrial in violation of double jeopardy. *Montoya,* 55 F.3d at 1497–98. The Tenth Circuit held that Montoya had waived his double-jeopardy claim under the United States Constitution because he agreed, in his original plea bargain, to a sentence enhancement if he should ever violate probation. *Id.* at 1499. The Tenth Circuit declined to apply the New Mexico non-waiver statute, Section 30–1–10, because it raised a statutory-rather than constitutional-claim, and "[s]tate claims are not cognizable in habeas proceedings unless they are constitutional in nature." *Id. Montoya* is distinguishable from the cases before this Court because it was decided under the United States Constitution, not under the laws of the State of New Mexico.

{97} In the case of *Gallegos* before us today, we interpret the effect of the defendant's plea agreement under the New Mexico Constitution and New Mexico law. Generally, a guilty plea waives the right to appeal. *State v. Handa,* 120 N.M. 38, 41, 897 P.2d 225, 228 (Ct.App.1995). There are exceptions to this rule, however. One exception applies when the defendant has reserved an issue for appeal as part of the plea agreement. *See State v. Hodge,* 118 N.M. 410, 415–16, 882 P.2d 1, 6–7 (1994). Another exception applies when, as in this case, the issue raised on appeal concerns a double-jeopardy claim.

{98} As we have stated above, under the New Mexico anti-waiver statute, the double-jeopardy defense may be raised at any time, both before and after judgment. Section 30–1–10; *see Breit,* 1996–NMSC–067, ¶ 11, 122 N.M. 655, 930 P.2d 792 ("The right to be protected from double jeopardy is so fundamental, that it cannot be relinquished even if a conviction is affirmed on appeal."). A plea agreement, which may result in the waiver of other potential claims, has no effect on a defendant's right to raise a double-jeopardy defense. *See Handa,* 120 N.M. at 42–43, 897 P.2d at 229–30; *State v. Jackson,* 116 N.M. 130, 132–33, 860 P.2d 772, 774–75 (Ct.App.1993).

{99} We note that the Court of Appeals, in addressing this issue in *Handa,* 120 N.M. at 40–43, 897 P.2d at 227–30, and *Jackson,* 116 N.M. at 132–33, 860 P.2d at 774–75, while relying on the anti-waiver statute, also applied an exception established in *United States v. Broce,* 488 U.S. 563, 569, 574–76, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), to the general rule that a guilty plea waives appeal of all issues. *Broce* is only applicable to federal constitutional claims. The anti-waiver statute is sufficient to permit a defendant to raise a double-jeopardy claim on appeal even if that claim was not raised before the trial court and even though the defendant entered into a guilty plea agreement which was not conditioned on reservation of that claim.

{100} We thus hold that Gallegos did not waive his double-jeopardy claim by entering into a guilty plea agreement.

B. Default Judgments

{101} Because Nunez, Gallegos, Edward Vasquez, and Marguerite Vasquez failed to appear at their forfeiture hearings, their property was forfeited by default judgment. The State would have us dismiss their double-jeopardy claims on the basis that

jeopardy cannot attach if the defendants made no appearance during the forfeiture proceedings. The State suggests that because the defendants never appeared and never filed claims or answers, they were not parties and waived their rights to contest the forfeiture actions. This means, according to the State, that the defendants were never put at risk, the sanction was not applied directly against them, they voluntarily abandoned their property, were not punished by the forfeiture, and were thus never placed in jeopardy. Federal courts have adopted this line of reasoning.[30]

{102} It is absurd to claim that a person is not punished by a default forfeiture judgment. As we have explained, we look to the purpose served by statutory sanctions in order to determine whether they are punitive in nature. *Schwartz,* 120 N.M. at 631, 904 P.2d at 1056; *accord Whitener,* 117 N.M. at 133, 869 P.2d at 832. We have now established that the New Mexico forfeiture statutes are unquestionably punitive, not only in their effect, but in their purposes. Once the punitive nature of the forfeiture statutes is established, it is nonsense to hold that the state seeks to punish if the defendant appears, but not if the defendant fails to appear. If punishment is intended, jeopardy attaches. Whether the court has punished the defendant depends upon the character of the sanction—the deprivation of property through forfeiture—and not upon defendant's presence or absence during the proceeding.

{103} We hold that jeopardy does attach upon the entry of a default judgment in a forfeiture proceeding under the Controlled Substances Act.

XI. SINGLE TRIAL

{104} We hold that civil forfeiture under the Controlled Substances Act is punishment for double-jeopardy purposes under the New Mexico Constitution. We therefore hold that, henceforth, all forfeiture complaints and criminal charges for violations of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding. The single proceeding will eliminate the potential for double-jeopardy violations. *See* Luis Garcia–Rivera, Comment, *Dodging Double Jeopardy: Combined Civil and Criminal Trials,* 26 Stetson L.Rev. 373, 375–76 (1996) ("[T]he only feasible way to avoid double jeopardy is to bring both civil and criminal suits in one combined proceeding."). It will also remedy some of the other factors that bring into question the fairness of modern forfeiture. Most notably, the indigent defendant will have available the assistance of counsel in the forfeiture proceeding because both the property and the criminal actions will take place in a single trial.[31] Of course, the State is not restricted from bringing only a criminal action or only a forfeiture action. However, if it elects to bring both a forfeiture complaint and a criminal proceeding growing out of the same facts, the action may be brought only in a single, bifurcated proceeding.

{105} We are not unmindful that a single proceeding may pose some logistical or procedural complexities. *See, e.g.,* Garcia–Rivera, *supra,* at 398–404 (discussing procedural differences between criminal trial and civil forfeiture). However, bifurcated proceedings are a common mechanism for dealing with factually identical but procedurally distinct aspects of a single action.[32] There is no other way, under current New Mexico law, that the State will be able to prosecute, under the Controlled Substances Act, both the crime and the forfeiture.

XII. BURDEN OF PROOF

{106} One of the most onerous aspects of the New Mexico forfeiture statutes is that the defendant bears the burden of showing that he or she should be exempt from the provisions of the forfeiture statutes:

> It is not necessary for the state to negate any exemption or exception in the Controlled Substances Act in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under the Controlled Substances Act. The burden of proof of any exemption or exception is upon the person claiming it.

Section 30–31–37. This ambiguous language fails to specify the precise burden of proof borne by the State when it initiates a forfei-

ture action. Forfeiture is nominally a civil action. *See $14,639,* 120 N.M. at 413, 902 P.2d at 568 (forfeiture requires "a civil burden of proof"). Under a civil burden of proof, the State would only need to establish its case by a preponderance of the evidence. *See* UJI 13–304 NMRA 1999 ("It is a general rule in civil cases that a party seeking a recovery [or a party relying upon a defense] has the burden of proving every essential element of the claim [or defense] by the greater weight of the evidence.").

{107} However, Section 30–31–37 may be a statutory exception to the general rule that civil claims must be established by a preponderance of the evidence. Its ambiguous language suggests that the burden of proof in a forfeiture action is not on the State to prove that the property was used in a crime, but on the defendant to prove that it was not. This leaves open the possibility that the State is initially required to offer no more than probable cause that the property in question is contraband, proceeds, or the instrumentality of a drug crime. This is a standard adopted by federal law and by some states. *See* Sean M. Dunn, Note, *United States v. Ursery: Drug Offenders Forfeit Their Fifth Amendment Rights,* 46 Am. U.L.Rev. 1207, 1212–15 (1997) (discussing burdens of proof under federal law).

{108} The fact that the State bears a low burden of proof—be it either probable cause or preponderance of the evidence—when it initiates the deprivation of a fundamental constitutional right raises grave due process concerns. *See Schaefer v. Whitson,* 32 N.M. 481, 484, 259 P. 618, 619 (1927). ("Appellant's right to be protected in the possession of his property is fundamental. His objection is not strictly legal, technical or unsubstantial. It goes to the very right itself."). It is true that in *State v. Ozarek,* 91 N.M. at 276, 573 P.2d at 210, we stated "that the burden imposed on the owner is the burden of going forward and not the burden of persuasion." However, any fairness to the defendant is undermined by the fact that the State can rebut any defense by no more than a preponderance of the evidence.

{109} The advantages to the State under these circumstances cannot be overstated. At the time the forfeiture action is filed, the property is almost always already in possession of the State because it was confiscated at the time of the arrest. The proceeding begins with a virtual presumption that the confiscation was proper. Moreover, because forfeitures are nominally civil proceedings, protections that are indispensable in a criminal setting—such as proof beyond a reasonable doubt, the right to counsel, presumption of innocence, the right to confront one's accusers—are not guaranteed. *See Helvering v. Mitchell,* 303 U.S. 391, 401–04, 58 S.Ct. 630, 82 L.Ed. 917 (1938). The State's case can be established with evidence that would be inadmissible in a criminal court, and oftentimes the defendants cannot afford counsel either because they are indigent or because the property that would be used to pay a lawyer has been taken by the State.[33] Critics argue that absolving the government of a stringent burden of proof has "shifted the power to impose economic sanctions from judges to prosecutors." David B. Smith, *Asset Forfeiture: A Serious Threat to Our Property Rights,* Briefly . . . Perspectives on Legis., Reg., & Litig., Oct. 1998, at 3 [hereinafter Smith, *Threat*]. We agree that applying the civil burden of proof to forfeitures under the Controlled Substances Act places an unfair burden on defendants.

{110} We therefore hold that, in the forfeiture portion of the trial, the burden of proof will be on the State to prove by clear and convincing evidence that the property in question is subject to forfeiture. In doing so, we are joining the Supreme Court of Florida's decision to place this standard of proof upon state forfeiture proceedings. *See Department of Law Enforcement v. Real Property,* 588 So.2d 957, 967 (Fla.1991) ("We conclude that the state has the burden of proof at trial, which should be by no less than clear and convincing evidence."). This is a measure urged by many critics of drug-related forfeitures. *See, e.g.,* Smith, *Threat, supra,* at 25.

{111} We are not expressly deciding at this time whether the burden of proof set forth in Section 30–31–37 is always unconstitutional. That statute may still apply in a solitary forfeiture action that involves no

criminal prosecution. However, in a bifurcated proceeding, both the criminal portion and the forfeiture portion are unquestionably criminal in nature. "The property owner effectively stands accused of either criminality outright or indifference to it." Cheh, *Easy, supra,* at 38. In a criminal proceeding the State cannot be relieved of the burden of establishing under a stringent standard of proof that a defendant should be stripped of a constitutional right—the right of "acquiring, possessing and protecting property." *See* N.M. Const. art. II, § 4.

XIII. RETROACTIVITY

{112} The final question is the extent to which our holding today applies retroactively. The New Mexico Constitution provides that, "[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." N.M. Const. art. IV, § 34. The threshold question in retroactively applying a new rule of criminal law is whether doing so would violate constitutional prohibitions against ex post facto laws. *See* U.S. Const. art. I, § 10 (states may not pass ex post facto laws); N.M. Const. art. II, § 19 (same prohibition). The Latin phrase "ex post facto" implicates in its literal meaning any law passed "after the fact." Generally, this means "that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." *Collins v. Youngblood,* 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

{113} In *Santillanes v. State* we set forth factors to be considered in determining whether a new rule of criminal law should be applied retroactively: "[R]etrospective or prospective application must be determined on a case by case basis by looking at three issues: the purpose of the new rule, the reliance placed upon the old rule, and the effect upon the administration of justice that retroactive application would have." *Santillanes v. State,* 115 N.M. 215, 224, 849 P.2d 358, 367 (1993). This three-pronged analysis was taken by the *Santillanes* Court from the 1965 United States Supreme Court case, *Linkletter v. Walker,* 381 U.S. 618, 636, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), *overruled by Griffith v. Kentucky,* 479 U.S. 314, 320–22, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).[34]

{114} The retroactive application of law is triggered at the moment when a change of law becomes enforceable. A change of law by an appellate court is not established until the date the court's opinion is filed. Obviously, once the new rule is enforceable, it will apply to all subsequently filed cases. Conversely, it seems apparent that a change of law by an appellate court will have no retroactive application to any case that is finalized before the date the court's decision is filed. *State v. Rogers,* 93 N.M. 519, 521, 602 P.2d 616, 618 (1979) ("The question of whether or not a rule of law is to be applied retrospectively arises only for causes that have been finalized."). A case is finalized when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith,* 479 U.S. at 321 n. 6, 107 S.Ct. 708. Between these extremes are cases that are pending on the rule's effective date. In those circumstances, on direct appeal, retroactivity is limited to two situations: either the issue that is addressed by the new rule must be raised and preserved below, or the failure to apply the rule must constitute fundamental error.[35]

{115} However, when the new rule applies to the protection against double jeopardy, it is not apparent that retroactive application should be precluded from finalized cases. Moreover, it is evident that the preservation and fundamental error requirements for pending cases do not apply. This is because, under New Mexico's non-waiver statute, Section 30–1–10, the double-jeopardy defense cannot be waived and may be raised at any time, including on appeal. Conceivably, under our holding today, the non-waiver provision could require the State to reopen cases as old as 1972 when the Controlled Substances Act was first passed. This question was alluded to by our Court in *Jackson v. State,* 1996–NMSC–054, ¶¶ 3–8, 122 N.M. 433, 925 P.2d 1195. We chose to "address the issue of retroactivity on its merits" but

expressly avoided analyzing the applicability of the non-waiver statute. *Id.* ¶ 5.

{116} We conclude that the retroactive application of our holding today to finalized cases would, under the *Santillanes* test, have a deleterious "effect upon the administration of justice." *Santillanes,* 115 N.M. at 224, 849 P.2d at 367. Evaluating the validity of old and forgotten forfeitures under the Controlled Substances Act would be unjust because of the mere impracticality of recovering evidence, regenerating court records, sorting out the relevant criminal charges, retrieving property, refreshing the memories of witnesses, and locating parties. It would be so difficult to breathe life into the many ancient cases that neither the State nor the former defendants would be guaranteed a fair adjudication. Sometimes the only possible way of ameliorating past wrongs is by assuring that they never happen in the future. We hold that our decision today will be retroactive only to those cases that are pending on the date this opinion is filed.

XIV. CONCLUSION

{117} We hold that the New Mexico Double Jeopardy Clause forbids bringing criminal charges and civil forfeiture petitions for the same crime in separate proceedings. Our holding is unaffected by whether jeopardy attached first in the criminal proceeding or in the civil forfeiture action. Moreover, the defendants' double-jeopardy rights are unaffected by either guilty pleas or default judgments.

{118} In the cases of Chavez and Nunez, we affirm the dismissal of their criminal charges. Further, we reverse the criminal convictions of Gallegos, Edward Vasquez, and Marguerite Vasquez.

{119} We further order that, henceforth, civil forfeiture complaints and criminal charges for the same crime under the Controlled Substances Act may both be brought only in a single, bifurcated proceeding. Furthermore, in the forfeiture portion of the proceeding, the State must prove its case by clear and convincing evidence. Our holding today is retroactive to cases pending on the date this opinion is filed.

{120} **IT IS SO ORDERED.**

MINZNER, C.J., and THOMAS A. DONNELLY, Judge New Mexico Court of Appeals (sitting by designation), concur.

BACA and SERNA, JJ., (Dissenting).

ORDER ON MOTIONS FOR REHEARING

{121} Motions for rehearing having been filed in this case together with briefs submitted by the parties and the Court being fully advised: The motions for rehearing hereby are denied.

{122} In order to clarify one portion of the opinion, however, we have opted to do so by this separate published Order. *See State v. Gonzales,* 1999 NMSC–033, ¶ 32, 128 N.M. 44, 989 P.2d 419.

{123} The question arises whether the State may be permitted to set aside default judgments it has obtained in *pending cases* so that it may proceed with criminal prosecutions which would otherwise constitute double jeopardy. Rule 1–055(C) NMRA 2000 provides: "For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 1–060." In general, "because default judgments are disfavored and causes generally should be tried on their merits, we have counseled trial courts to be liberal in determining the existence of grounds that satisfy Rule 60(B)." *Sunwest Bank of Albuquerque v. Rodriguez,* 108 N.M. 211, 213, 770 P.2d 533, 535 (1989). "A trial court has abused its discretion in setting aside a default judgment if its decision constituted arbitrary or unreasonable action." *Id.* "When there are no intervening inequities, any doubt should, as a general proposition, be resolved in favor of the movant to the end of securing a trial upon the merits." *Springer Corp. v. Herrera,* 85 N.M. 201, 203, 510 P.2d 1072, 1074 (1973).

{124} There are a number of authorities for the proposition that any party obtaining a default may move to have it set aside. 10 James Wm. Moore et al., *Moore's Federal Practice* § 55.50[2][f] (3rd ed.1999); *Ferraro v. Arthur M. Rosenberg Co.,* 156 F.2d 212,

214 (2d Cir.1946); *Gray v. John Jovino Co.*, 84 F.R.D. 46, 47 (E.D.Tenn.1979) ("And, as was stated by a panel, [in *Ferraro*] upon which sat the late Judge Learned Hand, even where it is the plaintiff who seeks to set aside the defendant's default judgment, '... whoever makes the motion must show an adequate basis for it ...'"). The issue was also considered in *School City of Gary v. Continental Elec. Co.*, 158 Ind.App. 132, 301 N.E.2d 803, 810 (1973), in which Justice Black in *Klapprott v. United States*, 335 U.S. 601, 614–15, 69 S.Ct. 384, 93 L.Ed. 1099 (1948) is quoted: "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *See also* William H. Danne, Jr., Annotation, *What Constitutes 'Good Cause' Allowing Federal Court to Relieve Party of His Default Under Rule 55(c) of the Federal Rules of Civil Procedure*, 29 A.L.R. Fed. 7 (1976) ("While it is usually the party suffering the default entry who moves to set it aside, Rule 55(c) does not preclude the party who obtained the default from doing so.")

{125} We, therefore, hold that it is appropriate, to accomplish justice, to allow the State to move to set aside default forfeiture judgments already obtained in *pending cases* and to proceed in one bifurcated criminal prosecution in the manner set out in the filed opinion.

{126} Justices Baca and Serna dissent from the original opinion.

{127} **IT IS SO ORDERED.**

/S/ PAMELA B. MINZNER
PAMELA B. MINZNER, Chief Justice

/S/ JOSEPH F. BACA
JOSEPH F. BACA, Justice

/S/ GENE E. FRANCHINI
GENE E. FRANCHINI, Justice

/S/ PATRICIO M. SERNA
PATRICIO M. SERNA, Justice

/S/ PETRA JIMENEZ MAES
PETRA JIMENEZ MAES, Justice

SERNA, Justice (dissenting).

{128} I must respectfully **DISSENT.** Under the majority opinion, New Mexico stands alone from both the federal analysis and the analysis of other states, despite the fact that *Ursery* has been examined by numerous state courts. In its radical departure, the majority even goes much further than the proposed analysis by Justice Stevens, the only Justice on the United States Supreme Court who dissented from *Ursery*. Ultimately, I am not persuaded that we should reject *Ursery*, and even if I were, I believe the opinion errs by creating a constitutionally protected property right to drug proceeds.

I. The Majority Creates a Constitutional Right to the Proceeds of Crime

{129} The majority's proceeds of crime analysis is, to me, deeply troubling. In a laudable attempt to simplify this area of law, the majority simply goes much too far. In doing so, I believe the majority ignores the admonition in *Breit* that "[r]aising the bar of double jeopardy should be an exceedingly uncommon remedy." *Breit*, 1996–NMSC–067, ¶ 35, 122 N.M. 655, 930 P.2d 792. The majority defines proceeds as the "monetary profits derived from an illegal enterprise as well as any goods or investments purchased with that money." *Majority Opinion*, ¶ 35.[1] The majority holds that "[n]o one has the right, under Article II, Section 4 of our Constitution, to acquire, possess, or protect contraband. However, in the forfeiture of *all other types of property* under the Controlled Substances Act, jeopardy attaches." *Majority Opinion*, ¶ 35 (emphasis added). In other words, the proceeds or fruits of crime (drug money or purchases made with drug money) are protected under Article II, Section 4 of the New Mexico Constitution under the majority opinion. This holding is both unprecedented and unsupported; it is also certainly bad policy.

1. The forfeiture statute's only reference to proceeds is "money which is a fruit" of the drug crime, and does not include purchases made with drug proceeds. Section 30–31–34(F). Thus, by relying upon the definitions of academic commentators rather than our statute, the majority appears to be unintentionally expanding the scope of the statute.

{130} The majority takes the extraordinary step of elevating the fruits of crime to the level of a constitutional interest. *See Majority Opinion,* ¶ 75 ("It is true that the state may impose penalties more harsh or expensive than the forfeiture of such property as an old car or a small amount of cash. But with regard to that car or cash, and the fundamental right of ownership, no penalty is more extreme than stripping a person of that right without compensation."). Although there is some contrary language regarding proceeds within the opinion, *see Majority Opinion,* ¶ 69 (outlining remedial qualities of forfeiture and noting that one is that "[p]roceeds are the profits of illegal activities and property purchased with those illegal profits and their forfeiture deprives the owner of nothing to which he or she is entitled"),[2] any confusion in the majority's position on the forfeiture of drug proceeds is transcended by the majority's treatment of Defendants in these cases, particularly Defendant Chavez. If the majority intended to hold that the New Mexico Constitution does not protect drug proceeds, the majority would have reversed the dismissal of Chavez's criminal charges because the forfeiture of currency in his case would not have been punishment due to the fact that Chavez reached a settlement agreeing that this money was drug proceeds.

{131} Defendant Chavez was charged with, among other things, possession of marijuana with intent to distribute for two different occasions. As the majority notes, Defendant Chavez and APD reached "compromise settlements" regarding the currency. *Majority Opinion,* ¶ 7. APD kept $2529, and returned $1089 to Chavez. Chavez kept his van. In other words, currency was the only item Chavez forfeited, and he bargained for this result, thereby conceding that the currency which he forfeited to APD was the fruit of his illegal sale of drugs. Because there was no default judgment, even under the majority's analysis, Chavez knowingly agreed that the money was drug proceeds. Chavez accepted and, in fact, bargained for the result in the forfeiture of his drug proceeds, and he did not appeal the forfeiture judgment. This Court has before it a final judgment by a New Mexico court that Chavez's currency was drug proceeds. Thus, the issue of whether Chavez's currency was legally acquired has been finally resolved and is not before this Court.

{132} Despite this judgment, the majority astonishingly, and without specific discussion, affirms the dismissal of Chavez's criminal charges on the basis of double jeopardy. In order to reach this result, the majority must conclude that the judgment involving Chavez in which he forfeited only drug proceeds to APD resulted in a deprivation of Chavez's constitutional right to property, thereby constituting punishment for purposes of the double jeopardy clause. Thus, the majority apparently concludes that in spite of Chavez's concession that the currency was drug proceeds, the forfeiture of the money constitutes jeopardy. It is indeed remarkable to create for drug dealers a constitutional right to the proceeds of their criminal activity.

{133} The same result is true for Defendant Gallegos, although this conclusion may be obscured by the fact that the forfeiture was obtained by a default judgment. Because Gallegos failed to contest the forfeiture of $299, the trial court entered a default judgment. Again, however, this is a final determination that Gallegos' currency was not legally acquired and was in fact the fruits of his crime. The majority, in the recitation of the facts, implies that Gallegos legally obtained his currency and could not contest the forfeiture due to his inability to afford an attorney.[3] *Majority Opinion,* ¶ 9. These

2. *See Majority Opinion,* ¶ 86 ("Defendants are deprived of all the profits and proceeds of their drug trade, and potentially any worldly goods, including legally acquired property, that served as an instrumentality to crime.").

3. The majority apparently has accepted Gallegos's argument that "there is utterly no evidence in the record to show that the $299 ... was either a proceed or an instrumentality of illegal activity. Rather, the evidence in the district court presents a nearly airtight demonstration that the money came from [his] paycheck ...." This argument misunderstands the appropriate inquiry in this case. This appeal does not present the opportunity for this Court to review the validity or accuracy of the default judgment. Instead, the default judgment is a conclusive judicial finding that the money was the fruit of

facts are irrelevant; Gallegos does not challenge the validity of the forfeiture judgment, and thus, for purposes of this appeal, it is an established fact that Gallegos's currency is drug proceeds. By reversing Gallegos's conviction on double jeopardy grounds, the majority concludes that Gallegos was punished by forfeiting property to which, according to the majority, he has a constitutional right, which, as demonstrated, can only refer to his drug proceeds.

{134} By creating a constitutional property right in drug proceeds, the majority goes much further than even Justice Stevens in *Ursery*. Justice Stevens, in his dissent, writes that proceeds of crime are not a legal property interest, similar to illegal drugs and paraphernalia, and concurred in the affirmance of the conviction of defendants resulting in life imprisonment, and a $250,000 criminal fine, as well as forfeiture of currency in the amount of $405,089 in a separate proceeding because "*the forfeiture of such proceeds is not punitive.*" *Ursery*, 518 U.S. at 298, 116 S.Ct. 2135 (Stevens, J., concurring in judgment in part and dissenting in part) (emphasis added). Justice Stevens concluded that "[t]he forfeiture of ... proceeds [of unlawful activity], like the *confiscation of money stolen from a bank*, does not punish respondents because it exacts no price in liberty or lawfully derived property from them." *Id.* (emphasis added). In other words, Justice Stevens believes that one has no right to the proceeds of a crime, such as drug money. This proposition is universally recognized, even by the commentators on whom the majority opinion so heavily relies.

> Seizure of the profits or proceeds of crime is similarly noncontroversial. The idea of depriving a criminal of the profits of his [or her] wrongdoing is rooted in equity and is morally compelling. The idea that one should not profit from [one's] own wrong undergirds the familiar equitable rule that a killer cannot inherit from his [or her] victim.

Cheh, *Easy, supra*, at 15; *see e.g.*, Brand, *supra*, at 305 ("Neither forfeiture of the proceeds of crime, such as money obtained from a drug deal or property bought with that money, nor forfeiture of contraband, such as illegal drugs, deprives an accused of anything to which he [or she] has a legal right."). For some reason, however, the majority has chosen to reject this ubiquitous proposition, and in doing so, in my opinion, denigrates the fundamental nature of the right to acquire and possess legally obtained property.

{135} Thus, the majority holds, as no other court has held and as no Justice on the Supreme Court has advocated, that individuals have a constitutionally protected property right to the proceeds of the unlawful sale of illicit drugs.[4] Although the majority may be attempting to limit such a right to proceeds in drug cases by including "stolen property" within its definition of "contraband," *Majority Opinion*, ¶ 35, I disagree that a plausible distinction exists between drug money and stolen money because both are not possessed legally, both are the fruits of crime, and both, unlike contraband such as controlled substances, are not property which is inherently illegal. While it may be reasonable to conclude that the forfeiture of a vehicle as an instrumentality, which is legally acquired property that has merely been used in an illegal manner, is punishment, I believe it is a critical error to reach a similar conclusion regarding drug proceeds, which, unlike the vehicles at issue, were never legally acquired. The majority is allowing Chavez to negotiate, concede, and forfeit his drug profits and then to pick his punishment—$2529 rather than criminal charges which carry possible jail time, a true deprivation of his liberty interest. Because the only property taken from both Defendants Chavez and Gallegos was

Gallegos's crime. If the majority believes that Gallegos's money was legally acquired, then it is paradoxical that the forfeiture judgment is left intact by the majority's opinion.

4. Further, the majority, while recognizing that forfeiture involves a property interest, mistakenly refers to this interest as "one of the most fundamental liberty interests." *Majority Opinion*, ¶ 33, ¶ 75 ("We regard forfeiture with mistrust because it divests the individual of ... one of the most fundamental *liberty* interests.") (emphasis added). I believe the right to property is separate and distinct from the right to liberty. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571–72, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

drug proceeds, currency to which neither had any legal right, I would reverse the district court's dismissal of Chavez's criminal charges and affirm Gallegos's criminal conviction.

II. Default Judgments

{136} The majority also concludes that jeopardy attaches to a default judgment in a forfeiture proceeding. *See Majority Opinion,* ¶ 102 (asserting, without support, that because forfeiture is punitive that it is "absurd" and "nonsense" to conclude that default judgments do not violate double jeopardy). Respectfully, I disagree. A default judgment either renders the property "ownerless" or represents abandonment of the property by the owner. Even Justice Stevens recognized this fact in dismissing the majority's reliance in *Ursery* on the government's ability to summarily forfeit unclaimed property: "Property that is not claimed . . . is considered abandoned; it proves nothing that the Government is able to forfeit property that *no one owns.*" 518 U.S. at 312, 116 S.Ct. 2135 (Stevens, J., concurring in judgment in part and dissenting in part) (emphasis added). Other courts have reached a similar conclusion regarding default judgments. "If no one makes a claim to the property in a civil forfeiture proceeding, the property is then 'ownerless,' and, therefore, its forfeiture punishes no one." *State v. Selness,* 154 Or.App. 579, 962 P.2d 739, 742 (1998), *review allowed,* 328 Or. 418, 987 P.2d 511 (1999).

> [T]he most persuasive reason why a forfeiture that is based upon a default or failure to file a timely claim, does not bar a subsequent criminal prosecution, is that the defendant has either failed to assert an ownership interest in the first instance, or by failing to answer, has effectively abandoned any claim to the property.... Moreover, "[t]o hold otherwise, would allow criminal defendants to choose their punishment. *A criminal defendant could decide to forfeit material possessions in lieu of going to prison.*"

People v. Prince, 43 Cal.App.4th 1174, 51 Cal.Rptr.2d 138, 146 (1996) (emphasis added) (quoting *United States v. Walsh,* 873 F.Supp. 334, 337 (D.Ariz.1994)). This is apparently the successful strategy which Defendants Gallegos, Nunez, Edward Vasquez and Marguerite Vasquez employed.

{137} Under the Forfeiture Act, a contested forfeiture action could establish that a person other than the defendant is the actual owner of the property, and the property could still be subject to forfeiture if the owner knew that the property was used for illegal purposes, in which case the defendant could not legitimately claim any form of personal punishment regardless of whether the criminal defendant received notice of the proceeding. A contested forfeiture action could also establish a record from which it would be possible for an appellate court to review in a meaningful way a claim of double jeopardy. For example, in the case of Defendant Gallegos, he should at least have to appear at the proceeding to force the government to establish a record concerning the property's taint rather than force this Court, as the majority does, to presume, possibly inaccurately, that he told the truth about the source of his forfeited money. Without a contested claim, we should instead presume from the default judgment that the money *was* the fruit of a crime as shown by the government and that the property has been abandoned.

{138} Because a default judgment establishes that the property is either ownerless or abandoned, then there is no owner, including the defendant, who has been punished or put in jeopardy for purposes of the Double Jeopardy Clause. Defendants Nunez, Gallegos, Edward Vasquez and Marguerite Vasquez presumably forfeited instrumentalities and proceeds through default judgments, thereby abandoning their ownership of the property. Thus, I would conclude that these Defendants were not punished by the default proceedings and double jeopardy does not apply. I would reverse the dismissal of the criminal charges against Defendant Nunez, and affirm the convictions of Defendant Gallegos, Defendant Edward Vasquez, and Defendant Marguerite Vasquez.

III. No Distinctive State Characteristics

{139} Under the *Gomez* standard, this Court departs from federal analysis because the federal analysis is flawed, because of

distinctive state characteristics, or because of undeveloped federal analogs. *Gomez*, 1997–NMSC–006, ¶ 20, 122 N.M. 777, 932 P.2d 1. The majority concludes that prior holdings of this Court represent a distinctive state characteristic. With respect, I disagree. The majority asserts that "New Mexico has a time-honored precedent that has always regarded forfeiture as punitive," that the constitutional provisions are facially different, that New Mexico's "double-jeopardy case law has departed from the federal standard," and that following *Ursery* would require "dismantl[ing] a significant body of settled law, much of which was decided independently of federal case law." *Majority Opinion*, ¶ 17.

A. Previous Departure From Federal Law

{140} Most importantly, the majority's assertion that New Mexico has departed from the federal standard is misleading. In *Schwartz*, 120 N.M. at 625–26, 904 P.2d at 1050–51, this Court stated:

> The double jeopardy Clause "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." Here we are concerned with the third of these protections, the protection against multiple punishments.

Both *Schwartz* and the present case involve double jeopardy claims arising out of criminal proceedings following civil proceedings. Thus, under *Schwartz*, this case involves multiple punishments, as the majority apparently agrees by applying the test derived from *Schwartz*.[5]

{141} In *Schwartz*, we held that, in respect to multiple punishments, "our analysis is identical for both the federal and state clause." *Id.* at 625, 904 P.2d at 1050. "We reserve[d] the question, however, whether the New Mexico Double Jeopardy Clause, under circumstances other than the multiple punishment doctrine, provides greater protection than the federal clause." *Id.* By departing from federal law and holding that the Double Jeopardy Clause of the New Mexico Constitution provides broader protection in the multiple punishment context, the majority is deviating from, not following, this critical aspect of *Schwartz*. As support for this departure, the majority relies on *Breit*. However, because *Breit* involved prosecutorial misconduct in the context of multiple prosecutions rather than multiple punishments, *Breit* partially answers the question reserved in *Schwartz* and does not support the majority's departure from federal law in the specific context of multiple punishment. Indeed, as demonstrated by *Schwartz*, this Court has consistently declined to depart from federal law when addressing multiple punishment. "We find no suggestion ... in the reported New Mexico case law that the New Mexico double jeopardy clause, in the multiple punishment context, provides further protection than that afforded by the federal clause as interpreted by relevant federal case law." *Swafford*, 112 N.M. at 7 n. 3, 810 P.2d at 1227 n. 3.

{142} As noted above, I believe that the analysis in *Schwartz* summarizes federal law, and, in any event, as discussed below, the *Schwartz* test does not conflict with the analysis of *Ursery*. As in *State v. Woodruff*, 1997–NMSC–061, ¶¶ 16–19, 124 N.M. 388, 951 P.2d 605, when our cases rely on a federal analysis, a subsequent overruling of the federal analysis by the Supreme Court, as apparently the majority believes occurred with *Ursery*, does not render the earlier New Mexico cases "established precedent providing a basis for interpreting the New Mexico constitutional provision(s) more broadly than the federal analog(s)." *Id.* ¶ 15. Our cases have repeatedly declined to depart from the federal analysis on the multiple punishment prong of double jeopardy. *See Schwartz*, 120 N.M. at 625, 904 P.2d at 1050 ("Due to the similarity of the Federal and State Double Jeopardy Clauses, this Court consistently has construed and interpreted the state clause as providing the same protections offered by the federal clause."); *Swafford*, 112 N.M. at

5. As I discuss below, I believe the majority has merged the analysis and principles of successive prosecution and multiple punishments.

13, 810 P.2d at 1233 ("Taking as our cue the repeated admonitions of the Supreme Court that the sole limitation on multiple punishments is legislative intent, we adopt today a two-part test for determining legislative intent to punish.") (citations omitted). In this case, as discussed further below, I believe there are distinctive state characteristics, specifically, our relatively narrow forfeiture statute, that argue against, not in favor, of departing from *Ursery*.

B. Facial Distinctions Between the Federal and New Mexico Provisions are Irrelevant

{143} The majority asserts that the New Mexico Double Jeopardy Clause is facially different from the federal counterpart. *See Majority Opinion*, ¶¶ 24–27. However, the facially different language relates to successive criminal prosecutions and clearly does not apply to the present cases. *See* N.M. Const. art. II, § 15 (stating that "when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he [or she] may not again be tried for an offense or degree of the offense greater than the one of which he [or she] was convicted."). This provision embodies the well-established principle that conviction of a lesser offense implies an acquittal of a greater offense, *see State v. Martinez*, 120 N.M. 677, 678–79, 905 P.2d 715, 716–17 (1995), and it does not concern the issue of multiple punishment in the cases before this Court. The majority also relies on Section 30–1–10, the non-waiver provision. Contrary to the majority's position, I do not believe that this statutory provision "expand[s]" the constitutional protection of double jeopardy. *See Majority Opinion*, ¶ 25. I believe this is a statutory right that would, similar to *Swafford*, protect defendants from multiple punishments not intended by the Legislature. I do not believe that the Legislature, by enacting this provision, intended to limit its own authority to enact separate punishments to be administered in separate proceedings that would otherwise be permissible under the Constitution. *See Montoya*, 55 F.3d at 1499 (stating that Section 30–1–10 is statutory rather than constitutional).

C. Dismantling of New Mexico Precedent is Not Required

{144} The majority declares that New Mexico has a "time-honored precedent that has always regarded forfeiture as punitive." *Majority Opinion*, ¶ 17. There are multiple problems with this statement: (1) much of the older authority cited by the majority is clearly distinguishable; (2) more recent case law is dependent on federal law; and (3) even if the proposition were true, the test in *Schwartz* does not require this Court to hold that forfeiture violates double jeopardy.

{145} The majority states that "the presumption that forfeiture is punitive can be traced to the earliest opinions of the Territorial Supreme Court, prior to our statehood," *Majority Opinion*, ¶ 73, and relies on *United States v. Lucero*, 1 N.M. (Gild.) 422, 449 (1869). However, a careful read of *Lucero* reveals that this Court viewed in rem forfeiture that does not involve the regulation of trade, such as the present case, as *remedial* in nature, *not punitive*, in accordance with the United States Supreme Court's opinion in *Taylor v. United States*, 44 U.S. (3 How.) 197, 210, 11 L.Ed. 559 (1845) (opinion of Story, J.) ("In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, *and truly deserve to be called, remedial*." (emphasis added)). Rather than rejecting the Supreme Court's position in *Taylor* that in rem forfeiture is remedial, this Court in *Lucero* merely distinguished *Taylor* because the statute at issue involved the regulation of trade. Beyond *Lucero*, the other cases relied upon by the majority only incidentally refer to punishment and forfeiture and therefore do not provide adequate support for the proposition in the opinion. Further, these cases arose in different contexts and could not have contemplated the narrow form of forfeiture permitted in Section 30–31–34 because that statute was not yet in existence.

{146} It is true that recent New Mexico cases have referred to forfeiture as being punitive in nature. However, none of these

cases discussed principles of double jeopardy; in fact, no New Mexico case has even alluded to a double jeopardy problem with forfeiture even though the statute has existed since 1972.[6] Rather, these cases largely stem from this Court's discussion of forfeiture in *Ozarek,* which was dependent on federal law concerning the right against self-incrimination and the exclusionary rule. *See Ozarek,* 91 N.M. at 276, 573 P.2d at 210 (relying on *Plymouth Sedan,* 380 U.S. at 700, 85 S.Ct. 1246). The Supreme Court, in *Ursery,* did not overrule those cases. Thus, *Ozarek* stands for the proposition that forfeiture is punitive for purposes of *some* procedural due process rights; however, *Ozarek* did not transform forfeiture into a truly criminal proceeding that would require such constitutional procedural protections as the right to confront witnesses and the requirement of proof beyond a reasonable doubt. The majority opinion similarly fails to designate a civil forfeiture proceeding as a fully criminal action by adopting a clear and convincing standard of proof rather than proof beyond a reasonable doubt as would be required in a criminal proceeding. Therefore, *Ozarek* and its progeny do not require the result reached by the majority in this case. *See State v. Catlett,* 133 Wash.2d 355, 945 P.2d 700, 704 (1997) (rejecting a defendant's argument that prior case law describing forfeiture as punitive and quasi-criminal required a conclusion that forfeiture was punishment for purposes of double jeopardy, because the prior case had addressed the exclusionary rule under the Fourth Amendment, had not addressed double jeopardy, and was therefore inapposite to the double jeopardy analysis).

{147} Finally, even if New Mexico has "time-honored" precedent noting that forfeiture is punitive, this conclusion is not dispositive under the *Schwartz* test. In *Schwartz,* this Court, relying on *Halper,* set forth the following test in determining, not merely whether a particular sanction has some punitive aspects, but whether the sanction is punishment for the specific purposes of double jeopardy: "If the penalty may be fairly characterized *only* as a deterrent or as retribution, then the revocation is punishment; if the penalty may be fairly characterized as remedial, then it is not punishment for the purposes of double jeopardy analysis." *Schwartz,* 120 N.M. at 630, 904 P.2d at 1055 (emphasis added); *accord State v. Hanson,* 543 N.W.2d 84, 87–88 (Minn.1996) (addressing the exact issue this Court addressed in *Schwartz* and concluding that, under *Halper,* a civil sanction is punishment for purposes of double jeopardy only if its purposes can be characterized as "solely deterrent/retributive"). Under this test, a particular penalty may have incidental punitive aspects and still be fairly characterized as remedial. *Id.* at 633, 904 P.2d at 1058 ("[T]he fact that the regulatory scheme has some incidental deterrent effect does not render the sanction punishment for the purposes of double jeopardy analysis."). Thus, in order to follow *Ursery,* this Court would not need to "dismantle" any New Mexico law.

IV. The *Schwartz* Test is Not "Unique" to New Mexico

{148} The analysis ultimately adopted by the majority is actually strikingly similar to the *Ursery* test. This signifies to me that the test itself, though not necessarily its application, is not flawed under the majority's analysis.

{149} The test adopted in the opinion, taken from *Schwartz,* is

> (1) whether the State subjected the defendant to separate proceedings; (2) whether the conduct precipitating the separate proceedings consisted of one offense or two offenses; and (3) whether the penalties in each of the proceedings may be considered "punishment" for the purposes of the Double Jeopardy Clause.

6. *Cf. Ursery,* 518 U.S. 267, 275, 116 S.Ct. 2135, 135 L.Ed.2d 549 ("For the *Various Items* Court to have held that the forfeiture was prohibited by the prior criminal proceeding would have been directly contrary to the common-law rule, and would have called into question the constitutionality of forfeiture statutes thought constitutional for over a century. *See United States v. Curtiss–Wright Export Corp.,* 299 U.S. 304, 327–28, 57 S.Ct. 216, 81 L.Ed. 255 (1936) (Evidence of a longstanding legislative practice 'goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice').").

Schwartz, 120 N.M. at 626, 904 P.2d at 1051. Although the majority asserts that the Supreme Court in *Ursery* "left unexpressed" and "discount[ed]" the first two factors in *Schwartz,* which the majority considers "indispensable," *Majority Opinion,* ¶ 38, a careful review of *Ursery* reveals that the Supreme Court was clearly aware of these factors and merely assumed their presence for purposes of the analysis under the third prong: whether the proceedings constitute punishment. *Ursery,* 518 U.S. at 273 n. 1, 116 S.Ct. 2135. I believe that the two-part test in *Ursery* actually represents an attempt to clarify the third prong articulated in *Schwartz,* whether the penalties in the two proceedings constitute punishment, and is very similar to the majority's analysis comparing the punitive and the remedial purposes of the statute. Thus, I am uncertain why the majority rejects the federal analysis in *Ursery;* it appears that the majority is merely rejecting the result in *Ursery.*

{150} The test to determine whether civil forfeiture constitutes punishment in *Ursery* is: (1) whether the legislative body intended to create a criminal punishment; and (2) if not, whether the statutory scheme was so punitive either in purpose or effect as to negate the legislative body's intention to establish a civil remedial mechanism. 518 U.S. at 277, 116 S.Ct. 2135. This test was derived from earlier cases and is consistent with, rather than a reversal of, the Court's recent double jeopardy jurisprudence. According to federal courts, for example, *Ursery* does not represent a "new rule of law" for purposes of applying its holding retroactively. *United States v. Emmons,* 107 F.3d 762, 765 (10th Cir.1997).

{151} The majority departs from *Ursery* in the rejection of *Ursery*'s requirement of the "clearest proof" that a statute is so punitive as to render the forfeiture proceedings essentially criminal in character.[7] The majority concludes that " 'clearest proof' is such an inaccessible standard that it requires the judiciary to suspend its own interpretation of the constitution in favor of that of the [L]egislature," and asserts that "[u]nlike federal courts, New Mexico courts have never used the expression 'clearest proof' as a standard for evaluating the legitimacy of forfeiture actions." *Majority Opinion,* ¶ 40. However, this rule in *Ursery* is derived from *89 Firearms,* which was cited in *Schwartz* with apparently no objection to its analysis. *See Schwartz,* 120 N.M. at 628, 904 P.2d at 1053. Nevertheless, the majority eschews this test and instead, without support, creates a presumption that a separate proceeding involving the deprivation of the "fundamental constitutional right of 'acquiring, possessing and protecting property,' " violates double jeopardy under the New Mexico Constitution. *See Majority Opinion,* ¶ 64 (stating that the purpose of depriving a defendant of property "creates a strong presumption that the sanction is punitive" and therefore unconstitutional). This analysis conflicts with existing New Mexico law that holds that defendants bear the burden of demonstrating a violation of double jeopardy. *See State v. Gonzales,* 1997–NMCA–039, ¶¶ 18–19, 123 N.M. 337, 940 P.2d 185. Additionally, the majority's analysis, hinging on the right to property, conflicts with this Court's opinion in *In re Nelson,* 79 N.M. 779, 450 P.2d 188 (1969) (per curiam), which was cited with approval in *Schwartz,* 120 N.M. at 631, 904 P.2d at 1056. In *Nelson,* this Court upheld the indefinite suspension of a license to practice law and, in addressing a due process claim, concluded that there was no due process violation because the suspension was for "the protection of the public, the profession, and the administration of justice, and not the punishment of the person disciplined." *Nelson,* 79 N.M. at 784, 450 P.2d at 193. Although a professional license is a recognized property right un-

7. One other significant difference in the analysis of the majority is the inexplicable rejection of reliance on legislative intent, the first prong of the *Ursery* test, even though this test would seem to expedite the punishment analysis used by the majority in some situations. *Cf. State v. Franco,* 257 Neb. 15, 594 N.W.2d 633 (1999) (concluding that the legislature's intent to make a forfeiture statute criminal necessitates application of double jeopardy without further inquiry). The majority characterizes *Ursery* as engaging in "almost complete reliance" on the legislative labeling of "civil" or "criminal." *Majority Opinion,* ¶ 39. Contrary to the majority's suggestion, however, this prong of the test does not cede judicial power to the legislative branch.

der the New Mexico Constitution, *Mills v. New Mexico Bd. of Psychologist Exam'rs*, 1997–NMSC–028, ¶ 14, 123 N.M. 421, 941 P.2d 502, this Court did not apply any presumption that the deprivation of that right constituted punishment. Thus, the majority's analysis is inconsistent with *Schwartz* and other New Mexico cases. Without support in New Mexico law, the majority appears to reject *Ursery*'s allegedly result-oriented approach to forfeiture in favor of another.

V. The Forfeiture Statute is Not Sufficiently Punitive to Become Criminal in Nature

{152} The majority relies on *Schwartz* in order to determine whether a separate forfeiture proceeding violates double jeopardy. However, as stated above, the test in *Schwartz* determines whether a sanction may be fairly characterized as remedial. Additionally, *Halper*, on which *Schwartz* relied, stated that a civil sanction may be considered as punishment for purposes of double jeopardy only if it is "so extreme and so divorced from the Government's [remedial objective] as to constitute punishment." *Halper*, 490 U.S. at 442, 109 S.Ct. 1892. The majority, although claiming to apply this analysis, recasts the test and, without authority, presumes a sanction to be punitive *unless* its punitive aspects are "outweigh[ed]" by its remedial aspects. *Majority Opinion*, ¶ 66; *accord Majority Opinion*, ¶ 64 ("We also believe that if neither the remedial nor the punitive purposes predominate, the evaluation should be guided by whether the sanction affects a fundamental right."). I believe this test again violates our admonition that "double jeopardy should be an exceedingly uncommon remedy." *Breit*, 1996–NMSC–067, ¶ 35, 122 N.M. 655, 930 P.2d 792.[8]

{153} The majority states that one of the most compelling arguments supporting the conclusion that civil forfeitures are criminal is that they are conditioned on the commission of a crime. *Majority Opinion*, ¶ 91 ("The forfeiture necessarily requires proof of the criminal offense and by its terms compels the defendant to relinquish property right precisely because he or she has committed a crime."). In addition, the majority states that the innocent owner provision supports this conclusion. I disagree. An owner's property can be subject to forfeiture even though that owner did not commit a crime. Section 30–31–34(G)(2) states that "no conveyance is subject to forfeiture under this section by reason of any act or omission established for the owner to have been committed or omitted without his [or her] knowledge or consent." Thus, the forfeiture statute only requires the state to prove that the owner knew or consented to the use of his or her conveyance by an individual violating the Controlled Substances Act, not that the owner, himself or herself, violated the Controlled Substances Act, either by possessing or distributing controlled substances. This supports the conclusion in *Ursery* that forfeiture "encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes," thereby reinforcing the remedial objectives of the statute. 518 U.S. at 290, 116 S.Ct. 2135; *id.* at 294, 116 S.Ct. 2135 (Kennedy, J., concurring) ("The key distinction is that the instrumentality-forfeiture statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property.").

{154} The opinion holds that forfeiture is "the most extreme sanction the state can bring against the property owner." *Majority Opinion*, ¶ 75 ("'Forfeiture is to fines what capital punishment is to incarceration.'" (quoting Cheh, *Easy, supra*, at 10)). The statutory criminal fines for the activities at issue range from $5000 to $15,000, while the value of the forfeitures in the present case range from $39 to $2179 or a 1989 Chevy pickup. Thus, the value of the forfeit-

8. The holding in *Halper* "does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. Such an inquiry would be amorphous and speculative, and would mire the court in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name." *Halper*, 490 U.S. at 453, 109 S.Ct. 1892 (Kennedy, J., concurring) (citation omitted).

ed items in these cases does not appear to exceed the criminal fines possible, and in fact was often substantially lower, whereas obviously, capital punishment is always more severe than any amount of incarceration.

{155} Importantly, the majority, by relying so heavily on commentators, incorrectly analogizes the New Mexico forfeiture statute to modern federal law. *Compare* Section 30–31–34, *with* 21 U.S.C. § 881 (1994 & Supp. II 1996). As alluded to above, a reading of the federal counterpart reveals a clear difference, which in fact served as the basis of Justice Stevens' dissent in *Ursery:* "The following shall be subject to forfeiture to the United States and no property right shall exist in them: ... *All real property,* including any right, title, and interest ... in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment ...." 21 U.S.C. § 881(a)(7) (emphasis added). While the opinion attempts to characterize forfeiture in New Mexico as extremely broad and far reaching, New Mexico's statute is actually much narrower than the federal counterpart, which allows forfeiture of any property, including a residence and land. New Mexico's statute is limited to contraband, paraphernalia, containers, conveyances, and cash proceeds. Thus, under New Mexico law, real property, even if purchased with drug proceeds, can never be subject to forfeiture. The majority's reliance on commentators' analysis of the much-broader federal forfeiture law demonstrates the problematic tendency towards theory, rather than reasoning based on the facts before the Court.

{156} Further, with respect to the types of property articulated in the statute, the forfeiture of conveyances is limited to the most extreme drug crimes, trafficking and distribution, which are second, third, and fourth degree felonies. As a result, the statute is, contrary to the opinion's conclusion otherwise, tied to the seriousness of the crime. Thus, the narrow nature of New Mexico's statute does not call for the majority's departure from federal law, and in fact may have even been acceptable to Justice Stevens. Justice Stevens emphasized that his disagreement with the majority opinion in *Ursery* was largely founded on the forfeiture of a house, and in fact noted that the early cases relied on by the majority "involved the forfeiture of vessels whose entire mission was unlawful and on the Prohibition-era precedent sustaining the forfeiture of a distillery .... Notably none of those early cases involved the forfeiture of a home as a form of punishment for misconduct that occurred therein." *Ursery,* 518 U.S. at 320–21, 116 S.Ct. 2135 (Stevens, J., concurring in judgment in part and dissenting in part); *see also id.* at 300 n. 3, 116 S.Ct. 2135 (discussing the "unusual scope and the novelty of" 21 U.S.C. § 881(a)(7)).

VI. Forfeiture in New Mexico May Be Fairly Characterized as Remedial

{157} Applying the *Schwartz* test, I believe that the forfeiture statute can neither be characterized "only as a deterrent or as retribution," *Schwartz,* 120 N.M. at 630, 904 P.2d at 1055, nor as "so extreme and so divorced" from the government's remedial objectives that it may be characterized as criminal. The majority argues that forfeiture is punishment because it is not related to the amount of damages suffered by the State concerning the illegal drug trade. However, I believe this overlooks one of the most important remedial purposes of forfeiture: The primary purpose of forfeiture is to remove the means of committing the crime. *See Albuquerque Police Dep't v. Martinez (In re Forfeiture of Fourteen Thousand Six Hundred Thirty Nine Dollars),* 120 N.M. 408, 902 P.2d 563 (Ct.App.1995) (stating that the purpose of forfeiture of instrumentalities "is to prevent their use in the commission of subsequent offenses involving transportation or concealment of controlled substances and to deprive the drug trafficker of needed mobility" (quoting the comment to Uniform Controlled Substances Act § 505, 9 U.L.A. 835 (1988))). Indeed, although *Halper* only contemplated that a sanction be "rationally related" to remedial objectives, *Halper,* 490 U.S. at 451, 109 S.Ct. 1892, New Mexico's statute is narrowly tailored to serve this goal by targeting property owners who know or

consent to the drug crime, making the future misuse of their property more likely. In addressing the argument that the forfeiture of instrumentalities "is justified as a way of protecting society from harm," the majority concedes that the "[f]orfeiture of harmful property can be beneficial." *Majority Opinion,* ¶ 69. Further, unlike *Kurth Ranch,* 511 U.S. at 782, 114 S.Ct. 1937, where "the legitimate revenue-raising purpose that might support ... a [drug] tax could be equally well served by increasing the fine imposed upon conviction," the State in this case cannot achieve this remedial aim by increasing the criminal penalties. Increasing criminal penalties under the Controlled Substances Act would not have the desired effect of removing instrumentalities from the drug trade and would not reach "innocent" owners who knowingly allow their property to be used for the purpose of selling illegal drugs, but do not themselves violate the Act. With this statutory purpose in mind, I disagree with the majority that forfeiture in New Mexico constitutes punishment for purposes of double jeopardy under *Schwartz* because the forfeiture statute may be fairly characterized as remedial.

VII. Advisory Conclusions Concerning Due Process

A. Right to Counsel

{158} The majority opinion contains several holdings which appear to me to be advisory. The majority attempts to create a right to counsel in the second part of a single, bifurcated proceeding which would resolve forfeiture disputes following a criminal trial.[9] *See Majority Opinion,* ¶ 104 ("Most notably, the indigent defendant will have available the assistance of counsel in the forfeiture proceeding because both the property and the criminal actions will take place in a single trial."). The majority apparently does so on the basis of due process, but without any form of due process analysis. *See Majority Opinion,* ¶ 104 (discussing "fairness"). This Court recently concluded that a sentence enhancement based on a prior misdemeanor conviction not resulting in a term of imprisonment obtained without counsel does not violate the New Mexico or federal constitutions. *See Woodruff,* 1997-NMSC-061, ¶ 37, 124 N.M. 388, 951 P.2d 605. Although we left unaddressed the specific question of whether actual imprisonment or a designated term of potential imprisonment triggers the right to counsel in misdemeanor cases under the New Mexico Constitution, *see id.* ¶ 25 n. 3, it is significant that no court has interpreted either a state or federal constitutional right to counsel to apply outside the context of actual or potential incarceration, aside from a limited number of cases involving the termination of parental rights. To now imply that counsel is required in a civil proceeding seems inconsistent at best and would call into question countless heretofore constitutionally-obtained misdemeanor convictions. The majority references no authority for the proposition that counsel must be provided for civil proceedings. Defending against a civil forfeiture in New Mexico is far less onerous than defending oneself against criminal charges, with much less at stake. Further, because this availability of counsel depends on the criminal trial preceding the forfeiture, and no counsel is thus required under the majority opinion for individuals facing only forfeiture, equal protection concerns arise. Additionally, the majority's reference to counsel raises questions of whether a bifurcated proceeding requires a jury to remain for the forfeiture portion. In my view, neither the right to counsel nor the right to due process in the New Mexico Constitution would require state-provided counsel or a right to a trial by jury in a forfeiture proceeding, whether bifurcated with a criminal proceeding or not.

B. Burden of Proof

{159} The majority concludes "that the State bears a low burden of proof ... when it initiates the deprivation of a fundamental

9. This holding also appears to be internally inconsistent. *See Majority Opinion,* ¶ 109 (noting the State's advantages in a forfeiture, and stating that "because forfeitures are nominally civil proceedings, protections that are indispensable in a criminal setting—such as proof beyond a reasonable doubt, the right to counsel, presumption of innocence, the right to confront one's accusers—are not guaranteed").

constitutional right [which] raises grave due process concerns." *Majority Opinion,* ¶ 108. The majority cites Section 30–31–37 as support for this conclusion. However, because this Court strictly construes the forfeiture statute, I believe this is an incorrect interpretation of the statute. Section 30–31–37 relieves the State of its obligation to "negate any exemption or exception in the Controlled Substances Act.... The burden of proof of any exemption or exception is upon the person claiming it." This statute does not remove the State's obligation to prove the affirmative requirements within the forfeiture statute itself that the property was involved in a drug transaction. *Cf. Ursery,* 518 U.S. at 299 n. 1, 116 S.Ct. 2135 (Stevens, J., concurring and dissenting) ("To justify [the] forfeiture, the Government assumed the burden of proving (a) that respondent had committed such an offense, and (b) that the property had played some part in it."). Further, with respect to the innocent owner exception, and despite the wording of the Section 30–31–37, this Court has held "that the burden imposed on the owner is the burden of going forward and not the burden of persuasion." *Ozarek,* 91 N.M. at 276, 573 P.2d at 210 ("The owner need only assert that the vehicle was used without his [or her] knowledge and consent to shift the burden to the State.").

{160} The majority holds that, "in the forfeiture portion of the trial, the burden of proof will be on the State to prove by clear and convincing evidence that the property in question is subject to forfeiture." *Majority Opinion,* ¶ 110. Inexplicably, the majority also states that the burden of proof in Section 30–31–37 may not always be unconstitutional. *See Majority Opinion,* ¶ 111 ("[Section 30–31–37] may still apply in a solitary forfeiture action that involves no criminal prosecution."). This peculiar reasoning also seems to raise grave equal protection concerns. Apparently, although the majority concludes that forfeiture of property, a fundamental constitutional right, is punishment if one is also criminally prosecuted, when the State institutes only forfeiture proceedings, it is not punishment for purposes of invoking due process protections such as a heightened burden of proof.

{161} Further, the majority is apparently basing its declaration of the unconstitutionality of the standard of proof under the Controlled Substances Act on the Due Process Clause. However, despite the alleged unconstitutionality of the statute, the majority does not disturb the outstanding forfeiture judgments against these defendants. Clearly, the majority could not due so, because the forfeiture judgments, not having been appealed by these defendants, are not subject to the Court's review. This additionally illustrates the advisory nature of this aspect of the majority's opinion.

VIII. Single Offense

{162} The majority determines that the crime of distribution or trafficking of controlled substances and the forfeiture of proceeds or instrumentalities constitutes a single offense. Specifically, the majority "conclude[s] that an examination of the Controlled Substances Act reveals that there is no fact needed to prove the drug trafficking violation that is not also needed to prove the grounds for forfeiture," thus, "[t]he forfeiture statute entirely subsumes the criminal offense." *Majority Opinion,* ¶ 57. In order to reach this result, the majority applies the federal test from *Blockburger,* 284 U.S. at 304, 52 S.Ct. 180.

{163} This Court previously applied *Blockburger* to a similar question in *Schwartz,* and as previously discussed, *Schwartz* addressed an analogous double jeopardy issue by applying federal law instead of state constitutional law. Indeed, the Court of Appeals, in *State v. Powers,* 1998–NMCA–133, ¶¶ 21–29, 126 N.M. 114, 967 P.2d 454, recently discussed, in the context of successive prosecutions, whether the *Blockburger* "same elements" test sufficiently protects the right against double jeopardy under the New Mexico Constitution. In *Powers,* the Court of Appeals held that the "same elements" test from *Blockburger* "adequately protects Defendant's right to be free from double jeopardy in the context of successive prosecutions governed by our state constitution." *Powers,* 1998–NMCA–133, ¶ 29, 126 N.M. 114, 967 P.2d 454. The majority in this

case does not overrule *Powers*, and as the interstitial approach from *Gomez* would require, the majority fails to indicate that present federal law on this particular question is inadequate to protect Defendants' rights in this case. In fact, the majority concedes that the United States Supreme Court, in *Ursery*, failed to address the issue of whether a forfeiture and a drug crime constitute a single offense for purposes of double jeopardy. *Majority Opinion*, ¶ 38. Thus, notwithstanding the majority's generalized claim of exclusive reliance on state constitutional law, *Majority Opinion*, ¶ 18, the majority is clearly applying federal law to this particular factor of the *Schwartz* test. *See Michigan v. Long*, 463 U.S. 1032, 1040–41, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) ("[W]hen ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."). Thus, under the interstitial approach of *Gomez*, the majority's departure from federal law is therefore limited to the third factor of the *Schwartz* test: whether forfeiture constitutes punishment for purposes of double jeopardy.

{164} On the question of whether forfeitures under Section 30–31–34 and criminal convictions under Sections 30–31–20, –22, constitute a single offense for purposes of double jeopardy, I believe the majority misapplies federal law and misinterprets the statutory provisions under the Controlled Substances Act. The majority asserts that the innocent owner provisions support the conclusion that a single offense is at issue because these provisions "limit the application of the forfeiture statute exclusively to those who are in 'violation of the Controlled Substances Act.'" *Id.* (quoting Section 30–31–34(G)(1)). I disagree because I believe the innocent owner provision reveals the distinct elements required for forfeiture as compared to the elements required for the crime of distribution or trafficking controlled substances. The plain language of the forfeiture statute states that a common carrier is not subject to the forfeiture of a conveyance "unless it appears that the owner ... is *a consenting party or privy to* a violation of the Controlled Substances Act," Section 30–31–34(G)(1), and that other owners' conveyances are not subject to forfeiture unless the owner knows or consents to the drug crime, Section 30–31–34(G)(2). As a result, forfeiture of an instrumentality has the following elements: (1) the subject property is a conveyance; (2) it was "used or intended for use to transport or in any manner facilitate the transportation for the purpose of sale of" controlled substances, Section 30–31–34(D); and (3) the owner of the subject property knew or consented to such use, Section 30–31–34(G)(2). By contrast, the crime of possession of a controlled substance with intent to distribute or traffic has different elements: (1) the defendant had a controlled substance; (2) the defendant knew it was a controlled substance; and (3) the defendant intended to transfer it to another. *See* UJI 14–3104 NMRA 1999; UJI 14–3111 NMRA 1999. Thus, the forfeiture of an instrumentality requires proof of the distinct element of the use of a conveyance to transport a controlled substance, whereas the crime of possession with intent to distribute requires proof of a higher level of a culpable mental state on the part of the owner/defendant, an intention to transfer the controlled substance. "If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing." *Owens v. Abram*, 58 N.M. 682, 684, 274 P.2d 630, 631 (1954), *cited with approval in State v. Tanton*, 88 N.M. 333, 335, 540 P.2d 813, 815 (1975).

{165} By way of illustration, it is useful to consider the facts relating to Defendant Marguerite Vasquez. Marguerite was arrested while driving a vehicle registered in her name and later forfeited to the government. Her husband, Edward Vasquez, was a passenger in the car. The police seized roughly two kilograms of marijuana, 123 grams of cocaine, and currency in the amount of approximately seventy-nine dollars. At trial on his criminal charges, Edward claimed that the drugs were his, that

his wife knew nothing about them, and that they were for his personal use. In order to forfeit Marguerite's proportionate interest in the vehicle, assuming it was community property, the government had the burden to prove by a preponderance of evidence that *Edward Vasquez* used the vehicle for transporting the controlled substance for the purpose of sale and that *Marguerite Vasquez* knew or consented to that use. By contrast, in order to prosecute her for possession with intent to distribute, the State needed to prove beyond a reasonable doubt that *Marguerite* had a higher level of mental culpability, that she intended to sell the controlled substances. In other words, assuming they had challenged the forfeiture and asserted an ownership interest in the property, the government needed to refute Edward Vasquez's assertions that Marguerite did not know about the drugs and that they were for personal use in order to meet its burden in the forfeiture action, but it did not need to refute his assertion that the drugs were his and not Marguerite's until it chose to prosecute Marguerite for the criminal offense. This difference in elements further underscores the above-stated difference in purposes for these statutes: the forfeiture of a conveyance is directed at an owner of property, irrespective of the owner's commission of a crime, in order to prevent the future misuse of the property, whereas the crime of possession with intent to distribute, being directed only at criminal offenders, serves only the criminal law interests of deterrence and retribution. Under the *Blockburger* same elements test, then, each "offense" requires proof of a fact that the other does not. *Cf. Tanton,* 88 N.M. at 335, 540 P.2d at 815 ("The facts offered in municipal court to support a conviction for driving while under the influence of intoxicating liquors would not necessarily sustain a conviction for homicide by vehicle in the district court.").[10] Therefore, even if the majority were correct that forfeiture is punishment under the New Mexico Constitution, there can be no violation of double jeopardy because these were separate offenses. *Cf. State v. Clark,* 124 Wash.2d 90, 875 P.2d 613, 616, 618 (1994) (concluding, under *Austin,* that forfeiture is punishment for purposes of the Double Jeopardy Clause in the United States Constitution, but declining to hold that double jeopardy had been violated because the defendant had failed to demonstrate that the forfeiture and the crime were single offenses), *overruled by Catlett,* 945 P.2d at 703–06 (overruling *Clark* concerning the issue of punishment based on *Ursery* and concluding, under an independent state constitutional analysis, that forfeiture is not punishment for purposes of double jeopardy under the Washington Constitution).

IX. Retroactivity

{166} Following the emphasis the majority places upon the forfeiture of instrumentalities and proceeds, *see Majority Opinion,* ¶ 75 ("But with regard to that car or cash, and the fundamental right of ownership, no penalty is more extreme than stripping a person of that right without compensation."), and the double jeopardy protection of the New Mexico Constitution, *see Majority Opinion,* ¶ 27 ("When compared to recent United States Supreme Court Fifth–Amendment jurisprudence, New Mexico's constitutional and statutory protection against double jeopardy, on its face, is of a different nature, more encompassing and inviolate."), the majority then places arbitrary limits upon those defendants who have allegedly suffered the violation by restricting the retroactivity of the holding. *See Majority Opinion,* ¶ 116. Although the majority claims that the holding is the inevitable result of New Mexico law, dating back to territorial days, the majority reaches a contradictory conclusion by holding that forfeiture as punishment is a "new rule of law" which, if applied to forfeiture cases dating back to 1972, would "have a deleterious 'effect upon the administration of justice.'" *Majority Opinion,* ¶ 116 (citation omitted). If precedent required the result

10. Of course, the fact that the majority is willing to consider the forfeiture even though it was obtained pursuant to a default judgment requires a somewhat hypothetical approach to this issue. In any event, we clarified in *Owens* that a violation of double jeopardy occurs only when the second prosecution is for the same act and crime both in law and fact as the first prosecution. 58 N.M. at 684, 274 P.2d at 631–32.

advanced by the majority, as the majority claims it does, then this case would not represent a "new rule of law" and the *Santillanes* retroactivity analysis would be inapposite.[11] *See Santillanes,* 115 N.M. at 223, 849 P.2d at 366 ("The issue of retroactive effect arises only when a court's decision overturns prior case law or makes new law when law enforcement officials have relied on the prior state of the law.").

X. Successive Prosecution Versus Multiple Punishment

{167} The majority criticizes the United States Supreme Court for not "addressing whether the cases in question are multiple punishment or multiple prosecution cases." *Majority Opinion,* ¶ 38. I believe this insight by the majority is highly significant and, if explored, could substantially clarify double jeopardy law. Unfortunately, however, the majority opinion suffers from the exact deficiency that it places on the Court's opinion in *Ursery.* The majority opinion relies heavily on the analysis of this Court in *Schwartz.* In *Schwartz,* we determined that the issue presented by the appeal was one of multiple punishment. Indeed, the three-part test from *Schwartz* that is used by the majority can only be directed at multiple punishment and could not be construed as a true successive prosecution inquiry. The third part of the test considers "whether the penalties in each of the proceedings may be considered 'punishment' for the purposes of the Double Jeopardy Clause." *Schwartz,* 120 N.M. at 626, 904 P.2d at 1051. By contrast, for successive prosecution cases, courts assess whether the defendant was subjected to more than one criminal prosecution for a single offense. Thus, under a true successive prosecution inquiry, the issue of multiple punishment would be irrelevant; it would be a violation of double jeopardy to subject a defendant to multiple prosecutions regardless of whether an earlier prosecution resulted in acquittal, and therefore no punishment, or conviction, and therefore punishment. The harm the defendant suffers is the proceeding itself, regardless of the outcome.

{168} Although *Schwartz* and the majority's reliance on that case should make clear that the majority opinion treats this issue as one of multiple punishment, the majority opinion itself demonstrates some confusion on this issue. *Majority Opinion,* ¶ 30 ("The protection against *multiple prosecutions of the same offense* is not dependent upon whether jeopardy first attached in the criminal or civil proceeding."). Under the heading of "New Mexico multiple prosecutions test," the majority refers to the "multiple punishment analysis" of *Schwartz, Majority Opinion,* ¶ 36, but then discusses the application of this test as "indispensable in evaluating a multiple prosecution double-jeopardy claim." ¶ 38. The majority contends that "[i]f we conclude, under *Schwartz,* that these are separate proceedings seeking separate punishments for a single offense, there is no question that the prohibition against multiple prosecutions has been violated." *Majority Opinion,* ¶ 38. I believe this confusion between multiple punishment and multiple prosecution cases, which finds its genesis in *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943), and was perpetuated in *Halper,* represents a fundamental flaw in the majority's opinion.

{169} We stated in *Swafford,* 112 N.M. at 7, 810 P.2d at 1227:

> of the essence of judicial power.... [A]ny conflict between court rules and statutes that related to procedure are today resolved by this Court in favor of the rules."). *See generally Gomez,* 1997-NMSC-006, ¶ 14, 122 N.M. 777, 932 P.2d 1, (characterizing the preservation requirement in Rule 12-216 as a rule of appellate practice and procedure). Thus, in order to interpret the statute in a manner that would not render it unconstitutional, I believe that Section 30-1-10 stands for the proposition that double jeopardy is a fundamental right within the meaning of Rule 12-216(B).

11. I agree that this case should not be applied retrospectively, but for a different reason. I believe that the anti-waiver statute applies only to violations of the statutory protection of double jeopardy and not to constitutional claims. Indeed, under Article III, Section 1 of the New Mexico Constitution, the legislative branch does not create rules of preservation with respect to constitutional rights, or generally for that matter, and to the extent that Section 30-1-10 conflicts with Rule 12-216, it would have to be declared unconstitutional. *See Southwest Community Health Servs. v. Smith,* 107 N.M. 196, 755 P.2d 40 (1988) ("Pleading, practice and procedure are

> The underlying idea, one that is deeply ingrained in at least the Anglo–American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him [or her] to embarrassment, expense and ordeal and compelling him [or her] to live in a continuing state of anxiety and insecurity.... Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the same offenses charged.

(Quotation marks and citation omitted). The separate forfeiture proceedings in these cases violates none of the interests protected by the successive prosecution prong of double jeopardy. First, the forfeiture proceeding cannot be considered a true criminal prosecution. Further, as in *Powers,* the fact that different governmental agencies pursue the forfeiture action and the criminal prosecution "severely limit[s] the extent to which the [forfeiture proceeding] could be used by the State as an opportunity to rehearse its trial strategy for the subsequent felony charges." *Powers,* 1998–NMCA–133, ¶ 28, 126 N.M. 114, 967 P.2d 454. Additionally, the statute clearly provides for separate proceedings and clearly contemplates both a forfeiture sanction and a criminal sanction. Because the State criminally charged Defendants in these cases prior to the entry of the forfeiture judgments, the time at which jeopardy attached according to the majority, Defendants "could not reasonably expect that the [forfeiture proceeding] would relieve [them] of any further obligation to answer in court" for the criminal charges. *Powers,* 1998–NMCA–133, ¶ 27, 126 N.M. 114, 967 P.2d 454. Similarly, because the singular goal of the double jeopardy prohibition against multiple punishment is to "prevent the sentencing court from prescribing greater punishment than the legislature intended," *Swafford,* 112 N.M. at 7, 810 P.2d at 1227 (internal quotation marks and citations omitted), the Legislature's clear indication that forfeiture is complementary to criminal sanctions abates any concern regarding this prong of double jeopardy. Due to the absence of any violation of these interests traditionally thought to be protected by double jeopardy, I do not believe that the Double Jeopardy Clause was ever intended to reach the type of situation at issue in this case, referred to as "successive punishments" in *Kurth Ranch. See Hess,* 317 U.S. at 554–56, 63 S.Ct. 379 (Frankfurter, J., concurring).

XI. Conclusions

{170} The majority holds that New Mexico law has distinctive characteristics which warrant departure from federal analysis. However, the test in the majority's opinion is rather similar to the federal approach; it simply reaches a different result with a substantially similar analysis, a result which is extremely broad, unsupported by authority, and in fact contradicted by *all* nine Justices of the Supreme Court. Even the authors of the numerous law review articles upon which the majority relies do not support the majority's holding that drug proceeds are protected as a constitutional property interest.

{171} The present cases warrant neither a radical departure from *Ursery* nor a conclusion that these cases involve punishment for purposes of the Double Jeopardy Clause. Even if the majority's decision to depart from *Ursery* were appropriate, there is insufficient justification to hold that proceeds of criminal activity are a constitutionally protected property interest. Further, I believe that even if a forfeiture action is punishment for purposes of double jeopardy, a default judgment does not constitute punishment because the property is ownerless or abandoned. All of the consolidated cases before this Court could have been completely resolved by these two issues alone. Beyond these issues, I conclude that, under either the *Ursery* or *Schwartz* tests, the forfeiture statute, both in purpose and in effect in these cases, is remedial and not sufficiently punitive to transform the proceeding from civil to criminal in character for purposes of the Double Jeopardy Clause.

{172} I therefore, respectfully, **DISSENT.**

BACA, J., concurs.

XV. APPENDIX: ENDNOTES

1. *See Oregon v. Hass,* 420 U.S. 714, 719, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) ("[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."); *Cooper v. California,* 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

2. *See, e.g., Gomez,* 1997–NMSC–006, ¶¶ 33–40, 122 N.M. 777, 932 P.2d 1 (interpreting N.M. Const. art. II, § 10; holding that state must show exigent circumstances to justify warrantless search of automobile; contrary to *United States v. Ross,* 456 U.S. 798, 800, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)); *Breit,* 1996–NMSC–067, ¶¶ 19–24, 32–36, 122 N.M. 655, 930 P.2d 792 (interpreting N.M. Const. art. II, § 15; holding that jeopardy attaches at trial when prosecutorial misconduct is prejudicial to defendant, when prosecutor knows the conduct is improper but acts either with intent to provoke a mistrial or with willful disregard of the consequences of the conduct; contrary to *Oregon v. Kennedy,* 456 U.S. 667, 679, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982)); *Campos v. State,* 117 N.M. 155, 158–59, 870 P.2d 117, 120–21 (1994) (interpreting N.M. Const. art. II, § 10; holding that warrantless arrest must be based on probable cause and exigent circumstances; contrary to *United States v. Watson,* 423 U.S. 411, 423, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976)); *State v. Attaway,* 117 N.M. 141, 151–52, 870 P.2d 103, 113–14 (1994) (interpreting N.M. Const. art. II, § 10; establishing, on state constitutional grounds, knock-and-announce rule for entry to execute warrant, prior to similar interpretation of federal constitution in *Wilson v. Arkansas,* 514 U.S. 927, 934, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995)); *State v. Gutierrez,* 116 N.M. 431, 432, 863 P.2d 1052, 1053 (1993) (interpreting N.M. Const. art. II, § 10; holding that good-faith exception in *United States v. Leon,* 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), is incompatible with the warrant guarantees of the New Mexico Constitution); *State v. Cordova,* 109 N.M. 211, 217, 784 P.2d 30, 36 (1989) (interpreting N.M. Const. art. II, § 10; holding that New Mexico would retain two-pronged test for probable cause established in *Aguilar v. Texas,* 378 U.S. 108, 114–15, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 412–13, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), contrary to *Illinois v. Gates,* 462 U.S. 213, 230–39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), which abrogated both *Aguilar* and *Spinelli*).

3. We base our holding today only on the unique characteristics of New Mexico's double-jeopardy jurisprudence.

4. *See, e.g., State ex rel. Schwartz v. Kennedy,* 120 N.M. 619, 634, 904 P.2d 1044, 1059 (1995) (stating forfeitures are punitive); *Mitchell v. City of Farmington Police Dep't (In re Forfeiture of Two Thousand Seven Hundred Thirty Dollars & No Cents),* 111 N.M. 746, 749, 809 P.2d 1274, 1277 (1991) [hereinafter *$2730.00*] (stating that forfeitures under Controlled Substances Act are penal and are gauged by standards applicable to criminal proceedings).

5. *See, e.g., Ricketts v. Adamson,* 483 U.S. 1, 11, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987) (federal double jeopardy is subject to knowing and intelligent waiver); *Montoya v. New Mexico,* 55 F.3d 1496, 1499 (10th Cir.1995) (defendant may waive double-jeopardy defense by means of plea agreement). *But see State v. Jackson,* 116 N.M. 130, 133, 860 P.2d 772, 775 (Ct.App.1993) ("Being bound by the broad, clear language of Section 30–1–10, we reject any argument that Defendant successfully waived his double-jeopardy claim at the plea hearing.").

6. *State v. James,* 93 N.M. 605, 606, 603 P.2d 715, 716 (1979); *State v. Archuleta,* 112 N.M. 55, 58, 811 P.2d 88, 91 (Ct.App.1991).

7. *See Gordon v. Eighth Judicial Dist. Court,* 112 Nev. 216, 913 P.2d 240, 243 (1996); *see also* Stanley E. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn By Any Other Name Would Prick as Deep,* 39 St. Louis U. L.J. 1235, 1253 (1995).

8. Cheh, *Easy, supra,* at 14; Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objec-*

tives: Understanding and Transcending the Criminal–Civil Law Distinction, 42 Hastings L.J. 1325, 1341 (1991) [hereinafter Cheh, *Constitutional*].

9. *See* Andrew J. Gottman, Note, *Fair Notice, Even for Terrorists: Timothy McVeigh and a New Standard for the ex Post Facto Clause,* 56 Wash. & Lee L.Rev. 591, 646 (1999) (suggesting that the "clearest proof" standard allows for manipulation by the courts because a court can always claim that there is no clear proof that a statute has a punitive effect as long as there is even a single factor that indicates a remedial effect); Leading Case, *Double Jeopardy Clause—In Rem Civil Forfeiture,* 110 Harv. L.Rev. 206, 210 n. 54 (1996) ("[T]he Court's 'clearest proof' rule, devoid of guidance as to the necessary showing, fails *to* protect defendants adequately."); Brand, *supra,* at 302–03 ("The sweeping determination that civil forfeitures are non-punitive precludes any further inquiry into double jeopardy considerations in such cases, thus leaving no room for consideration of the Double Jeopardy Clause's 'humane' objectives.").

10. *See, e.g., In re 1982 Honda,* 681 A.2d 1035, 1038 (Del.1996) (using *Ursery* to conclude that Delaware forfeiture statute is not criminal and does not punish); *State v. Kienast,* 553 N.W.2d 254, 256 (S.D.1996) (same regarding South Dakota forfeiture statute); Sean M. Dunn, Note, *United States v. Ursery: Drug Offenders Forfeit Their Fifth Amendment Rights,* 46 Am. U.L.Rev. 1207, 1240 (1997) ("Because the Court in *Ursery* held that civil forfeitures pursuant to § 881 do not constitute punishment for double jeopardy purposes, it is likely that individuals facing drug charges now will be forced to defend themselves in two separate proceedings."); Jennifer B. Hendren, *Annual Survey of Caselaw: Criminal Law,* 19 U. Ark. Little Rock L.J. 707, 711 (1997) ("*Ursery* may be read as adopting the view that no in rem forfeiture would implicate the Double Jeopardy Clause.").

11. *See Swafford,* 112 N.M. at 9, 810 P.2d at 1229 ("[T]he question of whether punishments are unconstitutionally multiple depends on whether the legislature has authorized multiple punishment.").

12. *See Halper,* 490 U.S. at 449, 109 S.Ct. 1892 (rough justice); *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 237, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) (liquidated damages).

13. *See Emerald,* 409 U.S. at 237, 93 S.Ct. 489 (Civil forfeiture "prevents forbidden merchandise from circulating in the United States."); Leach & Malcolm, *supra,* at 260 n. 81 ("Forfeiture is remedial because it protects the community by removing dangerous instrumentalities from the stream of commerce . . . .").

14. *See, e.g., Bennis v. Michigan,* 516 U.S. 442, 447–53, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996) (upholding the forfeiture of a car owned jointly by a married couple which was used by the husband in his illegal activity with a prostitute, despite wife's innocence of any crime); *Calero–Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 665, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) (upholding the forfeiture of a yacht leased to two individuals who brought a marijuana cigarette on board although the owner had no prior knowledge that the yacht would be wrongfully used); *United States v. Sixty Acres,* 930 F.2d 857, 860–61 (11th Cir.1991) (upholding the forfeiture of an Alabama farm and residence to which the wife held title despite her testimony that she was a battered woman and feared reporting her husband's illegal drug activity).

15. *See State v. One 1967 Peterbilt Tractor (In re Seizure & Intended Forfeiture of One 1967 Peterbilt Tractor),* 84 N.M. 652, 654, 506 P.2d 1199, 1201 (1973) ("[N]otwithstanding this is not a criminal proceeding, it is, nevertheless, on the principal issue involved in this appeal of such a nature that it is proper to gauge it by the same standards applicable in a criminal proceeding."); *State v. Cessna Int'l Fin. Corp. (In re Forfeiture of One Cessna Aircraft),* 90 N.M. 40, 42, 559 P.2d 417, 419 (1977) ("The forfeiture provisions of the Controlled Substances Act are penal in nature and consequently no pre-seizure notice or hearing is constitutionally required."); *State ex rel. Albuquerque Police Dep't v. One Black 1983 Chevrolet Van,* 120 N.M. 280, 282, 901 P.2d 211, 213 (Ct.App.1995) (quoting

Cessna, 90 N.M. at 42, 559 P.2d at 419, that forfeitures are penal); *State v. Ozarek,* 91 N.M. 275, 275–76, 573 P.2d 209, 209–10 (1978) ("The forfeiture provisions of the Controlled Substances Act are penal in nature."); *State v. Barela,* 93 N.M. 700, 701, 604 P.2d 838, 839 (Ct.App.1979) (stating forfeiture proceeding was quasi criminal), *overruled on other grounds by In re Forfeiture of 1982 Ford Bronco (State v. Stevens),* 100 N.M. 577, 579, 673 P.2d 1310, 1312 (1983); *1970 Ford Pickup,* 113 N.M. at 99, 823 P.2d at 341 (quoting *Ozarek,* 91 N.M. at 276, 573 P.2d at 210, that forfeitures are penal); *$2730.00,* 111 N.M. at 749, 809 P.2d at 1277 ("The forfeiture provisions of the Controlled Substances Act are penal in nature."); *Albuquerque Police Dep't v. Martinez (In re Forfeiture of Fourteen Thousand Six Hundred Thirty Nine Dollars),* 120 N.M. 408, 412–13, 902 P.2d 563, 567–68 (Ct.App.1995) [hereinafter *$14,639*] (stating that direct tie between forfeiture of property and commission of drug offenses confirms the punitive nature of forfeiture laws); *Schwartz,* 120 N.M. at 634, 904 P.2d at 1059 (concluding from *Kurth Ranch,* 511 U.S. at 768, 114 S.Ct. 1937, that forfeitures have "distinctly punitive purposes"); *City of Albuquerque v. Chavez,* 1997–NMCA–034, ¶ 19, 123 N.M. 258, 939 P.2d 1066 (mentioning quasi criminal concept), *rev'd on other grounds,* 1998–NMSC–033, 125 N.M. 809, 965 P.2d 928; *City of Albuquerque v. Haywood (In re Forfeiture of ($28,000.00)),* 1998–NMCA–029, ¶ 9, 124 N.M. 661, 954 P.2d 93 (mentioning quasi-criminal character of forfeiture and citing *Peterbilt Tractor* and *$14,-639*).

16. *See United States v. Lucero,* 1 N.M. (Gild.) 422, 449 (1869) (" '[S]o far as statutes for the regulation of trade impose fines or create forfeitures, they are doubtless to be construed strictly as penal, and not literally as remedial laws.' " (quoting *Mayor [of Philadelphia] v. Davis,* 6 Watts & Serg. 269, 276 (Pa.C.P.1843))); *Milligan v. Cromwell,* 3 N.M. (Gild., E.W.S. ed.) 557, 564, 9 P. 359, 362 (1886) ("The act of 1882 fixes the maximum of interest that may be recovered on such contracts at 12 percent per annum, but does not provide a punishment for charges in excess thereof, except the implied forfeiture of such excess."); *Scottish Mortgage & Land Inv. Co. v. McBroom,* 6 N.M. 573, 588, 30 P. 859, 863 (1892) ("It is true that the statute makes such a transaction a misdemeanor, but the same statute prescribes the punishment, to wit, a fine of not less than $25 nor more than $100, and the forfeiture of double the amount of such interest so collected or received."), *aff'd,* 153 U.S. 318, 14 S.Ct. 852, 38 L.Ed. 729 (1894).

17. *Seward v. Denver & R.G.R. Co.,* 17 N.M. 557, 585, 131 P. 980, 989–90 (1913) ("The company, claiming a compliance with the order, should show that it had provided two seats, and had provided a ton of coal or a load of wood, but no stove; could this court punish by fine, forfeiture, or contempt for a failure to comply with the order?").

18. *See State ex rel. Erickson v. McLean,* 62 N.M. 264, 272, 308 P.2d 983, 988 (1957) (" 'Forfeiture is a "punishment annexed by law to some *illegal act* or negligence in the owner of lands, . . . whereby he loses all his interests therein." ' " (quoting 2 Clesson Selwyn Kinney, *Treatise on Irrigation & Water Rights* § 1118, at 2020 (2d ed.1912))); *State ex rel. Reynolds v. South Springs Co.,* 80 N.M. 144, 146, 452 P.2d 478, 481 (1969) (same).

19. *See, e.g., Ozarek,* 91 N.M. at 276, 573 P.2d at 210 (quoting "quasi criminal" statement from *1958 Plymouth,* 380 U.S. at 700, 85 S.Ct. 1246); *$2730.00,* 111 N.M. at 749, 809 P.2d at 1277 (stating forfeiture proceedings are quasi criminal); *Haywood,* 1998–NMCA–029, ¶ 9, 124 N.M. 661, 954 P.2d 93 (mentioning quasi-criminal character of forfeiture and citing *Peterbilt Tractor* and *$14,-639*).

20. *See $14,639,* 120 N.M. at 412, 902 P.2d at 567. *See generally One 1995 Corvette v. Mayor & City Council,* 353 Md. 114, 724 A.2d 680, 682–85(Md.), *cert. denied,* 528 U.S. 927, 120 S.Ct. 321, 145 L.Ed.2d 251 (1999).

21. *Accord State v. Sunset Ditch Co.,* 48 N.M. 17, 26, 145 P.2d 219, 224 (1944); *1970 Ford Pickup,* 113 N.M. at 99, 823 P.2d at 341 (quoting *Ozarek,* 91 N.M. at 275–76, 573 P.2d at 209–10).

22. *See Shaffer,* 433 U.S. at 207, 97 S.Ct. 2569 (recognizing "that '[t]he phrase, "judi-

cial jurisdiction over a thing," is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing' " (quoting Restatement (Second) of Conflict of Laws § 56 introductory note (1971))); *ReMine ex rel. Liley v. District Court,* 709 P.2d 1379, 1382 (Colo.1985) (en banc) (stating the term "in rem" encompasses "any action brought against a person in which the essential purpose of the suit is to determine title to or affect interests in property").

23. *See Shaffer,* 433 U.S. at 212, 97 S.Ct. 2569 ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification."); *The Chickie,* 141 F.2d 80, 86 (3d Cir.1944) ("The action in rem directs a plaintiff's claim to a thing. True, the plaintiff's judgment, if he is successful, affects persons, but only so far as concerns their interest in the thing, which is personified as a defendant in the litigation.").

24. *See Devlin v. State ex rel. New Mexico State Police Dep't,* 108 N.M. 72, 74, 766 P.2d 916, 918 (1988) (stating that the location of the property within the court's forum confers in rem jurisdiction when the defendant is absent); *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.,* 974 F.2d 450, 462 (4th Cir.1992) (discussing maritime cases in which no owner came forward).

25. *See, e.g.,* Wells, *supra,* at 169 ("This resort to legal fiction is flawed because it elevates form over substance by failing to account for the reality of in rem forfeiture actions-namely, that civil forfeiture often does punish the owner of the property."); Brand, *supra,* at 305 ("The Court's willingness to justify, on such contrived arguments, the seizure of property as crucial as one's home is worrisome."); Leading Case, *supra,* at 210 n. 54 ("[I]f the Court does not rest its decision on the in rem basis of the proceeding, its opinion is left with only one justification: the naked force of precedent.").

26. *See Austin v. United States,* 509 U.S. 602, 616 n. 9, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) ("[F]orfeiture proceedings historically have been understood as imposing punishment despite their in rem nature."); *United States v. Baird,* 63 F.3d 1213, 1223 (3d Cir. 1995) (Sarokin, J., dissenting) (The forfeiture of property and monies "is dependent not on the criminal nature of the property, but on the illegal use their owners make of them.... Therefore, it is the owners who are punished by the forfeiture of such property." (citation omitted)).

27. *See* § 30-31-34; *see also Peterbilt Tractor,* 84 N.M. at 657, 506 P.2d at 1204 ("The risk of forfeiture is attendant on the factor of transportation or storage and not on the value of the vehicle used to transport or to keep."); *cf. Ex parte Ariza,* 913 S.W.2d 215, 221 (Tex.App.1995, pet. granted) (Smith, J., on motion for rehearing) ("The federal forfeiture statute contains no formula which attempts to correlate the value of the forfeited property with the government's damages."), *rev'd per curiam on other grounds,* 934 S.W.2d 393 (Tex.Crim.App.1996, no pet.).

28. *See generally* Blumenson & Nilsen, *supra,* at 35-114; David B. Smith, *Asset Forfeiture: A Serious Threat to Our Property Rights,* Briefly ... Perspectives on Legis., Reg., & Litig., Oct. 1998, at 4-7 [hereinafter Smith, *Threat*].

29. *See United States v. Ursery,* 59 F.3d 568, 574-75 (6th Cir.1995) (proof); Leach & Malcolm, *supra,* at 260 n. 81 ("Forfeiture is punitive because it involves a real transfer of value from the wrongdoer to the sovereign precisely because the wrongdoer has done wrong.").

30. *See United States v. German,* 76 F.3d 315, 319 (10th Cir.1996); *United States v. Torres,* 28 F.3d 1463, 1465 (7th Cir.1994); *McGowan v. United States,* 899 F.Supp. 1465, 1468 (W.D.N.C.1995).

31. We note that in 1996 the New Mexico Legislature passed a new Forfeiture Act that would have ameliorated many of the concerns, discussed in this opinion, that plague modern forfeiture. For unknown reasons, the Act was vetoed by the governor. *See* Forfeiture Act, S. 10, 42d Leg., 2d Sess. (N.M.1996) (vetoed Mar. 6, 1966). Included in the Act was a provision that shifted to the State the initial burden of proof in a forfeiture hearing: "The burden of proof is on the prosecution to establish, by clear and convincing evidence, that the property is subject

to forfeiture." *Id.* § 9(B). Law enforcement agencies would no longer be permitted to personally profit from forfeiture assets. Rather, the trial court would direct the disposition of forfeited property. Proceeds would go first to victim restitution and then to the general fund. *See id.* § 12. Another provision would have required a single proceeding for both the criminal action and the forfeiture, similar to the requirement we introduce in this opinion:

> A. A judgment for the forfeiture of property shall be entered only upon:
>
> (1) conviction of an owner of the property for a crime related to the forfeiture; *any forfeiture proceeding shall be brought in the same proceeding as the criminal matter: however, the two issues shall be bifurcated and presented to the same jury; and*
>
> (2) proof by clear and convincing evidence that the property is forfeitable under state law and that a person convicted of a crime related to the forfeiture is an owner of the property.

Id. § 4(A)(1) & (2) (as amended by S. Judiciary Comm., Jan. 30, 1996; amendment struck by S. Fin. Comm., Feb. 3, 1996). The New Mexico Senate Judiciary Committee incorporated the "same proceeding" provision, italicized above. This amendment would have obviated double-jeopardy claims like those before us today. This amendment was subsequently struck by the Senate Finance Committee, and, in any event, the entire bill was vetoed by the governor.

Interestingly, the United States House of Representatives recently passed the Civil Asset Forfeiture Reform Act which was similar in significant ways to our own vetoed Forfeiture Act. *See* Civil Asset Forfeiture Reform Act, H.R. Res. 216, 106th Cong., 1st Sess. (1999); *see also* Stephen Labaton, *House Passes Bill Making It Harder to Seize Property,* N.Y. Times, June 25, 1999, at A1 ("An unusual coalition of liberals and conservatives persuaded the House of Representatives to approve legislation Thursday to make it much harder for Federal and state law enforcement authorities to confiscate property before they bring criminal charges in narcotics and other cases."). This Court is obviously not alone in its concerns about inherent injustices of modern forfeiture law.

32. *See Christopher P. v. State,* 112 N.M. 416, 417, 816 P.2d 485, 486 (1991) (bifurcated hearing on motion to transfer matter from children's court to adult court, in which children's court judge first determined whether child committed delinquent acts, then addressed whether child was amenable to treatment); *State v. Luna,* 93 N.M. 773, 779, 606 P.2d 183, 189 (1980) (discussing bifurcated hearing when insanity defense is raised in which issue of insanity is separated from issue of guilt), *abrogated on other grounds by Horton v. California,* 496 U.S. 128, 151, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

33. Cheh, *Easy, supra,* at 46 (presumption); Smith, *Threat, supra,* at 4, 24 (hearsay, lawyer); Shannon T. Noya, Comment, *Hoisted by Their Own Petard: Adverse Inferences in Civil Forfeiture,* 86 J.Crim. L. & Criminology 493, 495–96 (1996); Blumenson & Nilsen, *supra,* at 47–50 (In an action against property "few of the constitutional safeguards imposed on criminal prosecutions apply.").

34. We note that *Santillanes* makes no mention of the fact that the United States Supreme Court discarded the *Linkletter* test in 1987. In *Griffith v. Kentucky* the high court adopted a rule of universal retroactivity, holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith,* 479 U.S. at 328, 107 S.Ct. 708. Our courts have never, except incidentally, expressed approval or preference for the rule of *Griffith. See, e.g., State v. Acosta,* 1997–NMCA–035, ¶ 10, 123 N.M. 273, 939 P.2d 1081 (mentioning the *Griffith* rule); *Stroh Brewery Co. v. Director of N.M. Dep't of Alcoholic Beverage Control,* 112 N.M. 468, 480 n. 12, 816 P.2d 1090, 1102 n. 12 (1991) (Montgomery, J., dissenting) (noting that *Linkletter* was "severely undercut" by *Griffith*).

35. *See* Rule 12–216(B) NMRA 1999 (on appeal question must be preserved below, be of general public interest, or involve fundamental error); *State v. Osborne,* 111 N.M. 654, 662, 808 P.2d 624, 632 (1991) (fundamen-

tal error applies even if the issue is not preserved below).

2 P.3d 315

2000-NMSC-014

STATE of New Mexico, Plaintiff–Appellee,

v.

Carlos A. ANTILLON, Defendant–Appellant.

No. 23,796.

Supreme Court of New Mexico.

Dec. 30, 1999.

Rehearing Denied May 10, 2000.

See also 2 P.3d 264.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, for State of New Mexico.

Phyllis H. Subin, Chief Public Defender, C. David Henderson, Assistant Appellate Defender, Susan Gibbs, Assistant Appellate Defender, Santa Fe, for Carlos A. Antillon.

OPINION

FRANCHINI, Justice.

{1} Carlos Antillon was arrested for trafficking in controlled substances. The State forfeited his vehicle and he then pleaded guilty to criminal charges. When he appealed the criminal conviction on double-jeopardy grounds, the trial court did not permit him to perfect the record by including materials related to the forfeiture. We remand so that Antillon may perfect the record and we order that his conviction be vacated in accordance with our holding in *State v. Nunez,* No. 23,-796, 2000–NMSC–013, ¶ 114, 129 N.M. 63, 2 P.3d 264, which is filed concurrently with this opinion.

I. FACTS

{2} This case was appealed to the Court of Appeals. On August 1, 1996, that Court certified this case to us along with several other cases that questioned whether civil forfeiture under the Controlled Substances Act is punishment for double-jeopardy purposes. We entered an order on August 19, 1996, accepting certification and consolidating the cases under a single docket number. The double jeopardy question is addressed in *State v. Nunez.* Because this case raises an issue distinct from the subject matter of *Nunez,* we now sever it and issue a separate opinion.

{3} Carlos Antillon was arrested on April 27, 1995, and, on May 11, 1995, was charged with possession of marijuana with intent to distribute. *See* NMSA 1978, § 30–31–22(A)(1)(a) (1990) (prohibiting distribution of marijuana). Antillon pleaded guilty to the charge on August 29, 1995, and a judgment was entered in October 1995. *See State v. Antillon,* No. CR 95–43 (N.M.Dist.Ct. Oct. 2, 1995) (Judgment and Suspended Sentence).

{4} Antillon claims that the State seized his 1988 Chevrolet S–10 pickup truck in which he was transporting the marijuana and filed a petition for forfeiture on May 9, 1995. Prior to his guilty plea in the criminal prosecution, a default forfeiture judgment was entered on July 28, 1995. The record, however, contains copies of neither the forfeiture complaint nor the forfeiture judgment and sentence. Antillon moved to supplement the record proper to include the forfeiture materials. The district court denied the motion, stating that "[t]he time for appeal on the civil forfeiture matter has expired." *State v. Antillon,* No. CR 95–42, at 2 (N.M.Dist.Ct. Feb. 26, 1996) (Order Denying Motion to Perfect Record Proper for Appeal) [hereinafter *Denial of Mot. to Perfect*].

{5} Antillon appeals his criminal conviction on double-jeopardy grounds. We remand this case to the district court to permit Antillon the opportunity to perfect the record. We also order that, upon the perfection of the record, his criminal conviction be reversed in accordance with the holding of *State v. Nunez,* 2000–NMSC–013, ¶ 114, 129 N.M. 63, 2 P.3d 264, in which we concluded that civil forfeiture under the Controlled Substances Act, NMSA 1978, §§ 30–31–1 to –41 (1972, as amended through 1997), is punishment for the purposes of the New Mexico Double Jeopardy Clause, N.M. Const. art. II, § 15. As explained in *Nunez,* Antillon's guilty plea to the criminal charges and the fact that he made no appearance at the forfeiture proceeding will have no effect upon his double-jeopardy claims. *Id.* ¶¶ 92–100.

II. ANTILLON'S ATTEMPTS TO PERFECT THE RECORD

{6} In New Mexico, "[t]he defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment." NMSA 1978, § 30–1–10 (1963). However, such a defense must be supported by a factual basis in the record. *See State v. Wood,* 117 N.M. 682, 687, 875 P.2d 1113, 1118 (Ct.App.1994). The State contends that Antillon's appeal should be dismissed because the record does not contain copies of either the forfeiture complaint or the judgment and sentence forfeiting the 1988 Chevrolet S–10 pickup truck. Without proof in the record of both his criminal conviction and his civil forfeiture, there is no basis for Antillon's argument that he was twice placed in jeopardy. We may not review matters that are outside the record. *See State v. Romero,* 87 N.M. 279, 280, 532 P.2d 208, 209 (Ct.App.1975) (refusing to review trial court's refusal to grant motion to suppress because record did not include transcript of hearing on that motion).

{7} Antillon made a motion to the trial court to supplement the record with these documents, but the motion was denied. *See Denial of Mot. to Perfect,* at 2. Antillon did not appeal the order denying this motion, and these documents were never made part of the record before this Court. For these reasons, the State urges us to dismiss Antillon's case.

{8} The district court's denial of Antillon's motion to perfect the record raises several troubling questions. We first note that the reason the trial court denied Antillon's motion to perfect the record appears to have

been because "[t]he time for appeal on the civil forfeiture matter has expired." *Id.* at 2. The court's rationale is perplexing and unresponsive because Antillon was appealing his criminal conviction and not "the civil forfeiture matter." He filed the January 1996 motion to perfect the record because he needed the forfeiture documents to support his double-jeopardy defense to his criminal conviction—a defense he had earlier raised in his November 1995 docketing statement filed with the Court of Appeals.

{9} Second, the claim that the time for appeal had expired also appears to miss the mark. A notice of appeal must "be filed within thirty (30) days after the judgment or order appealed from is filed in the district court clerk's office." Rule 12–201(A) NMRA 1999. The default forfeiture judgment was filed on July 28, 1995. However, the judgment in the criminal case was not filed until October 2, 1995. That same day, Antillon's notice of appeal in the criminal case was mailed to the Court of Appeals. Antillon never appealed the civil forfeiture but he did timely file his appeal of the criminal judgment.

{10} Third, the trial court's concern that the time for appeal had passed is also misplaced in light of Section 30–1–10, which declares that the defense of double jeopardy "may be raised by the accused at any stage of a criminal prosecution, either before or after judgment." *See also State v. Edwards,* 102 N.M. 413, 415, 696 P.2d 1006, 1008 (Ct. App.1984) (defense of double jeopardy can be raised for the first time on appeal). On November 7, 1995, Antillon filed his docketing statement with the Court of Appeals, which is the first appearance in the record of the double-jeopardy issue. Antillon could not have raised a double-jeopardy claim until he was twice placed in jeopardy. Jeopardy attached in the civil forfeiture when the default judgment was filed on July 24, 1995, and in the criminal conviction when the court accepted the guilty plea on August 29, 1995. *Nunez,* 2000–NMSC–013, ¶¶ 28–31, 129 N.M. 63, 2 P.3d 264 (discussing the moments when jeopardy attaches in both criminal and civil actions). This August date is the earliest point at which Antillon would have been subjected to double jeopardy, although as explained above, his thirty-day time limit in which to file an appeal did not begin until the criminal judgment was filed in October.

{11} Fourth, we are concerned with the unfairness of the court's denial of Antillon's motion to perfect. In accordance with his responsibility to include the forfeiture documents into the record, Antillon, in the second week of January 1996, filed with the district court a motion to perfect the appellate record. *See Nichols v. Nichols,* 98 N.M. 322, 325, 648 P.2d 780, 783 (1982) (appellant bears primary burden of properly preparing the record on appeal); *State ex rel. State Highway Comm'n v. Sherman,* 82 N.M. 316, 318, 481 P.2d 104, 106 (1971); *Westland Dev. Co. v. Saavedra,* 80 N.M. 615, 618, 459 P.2d 141, 144 (1969). A few days later, on January 16, 1996, Antillon filed two documents with the Court of Appeals: a "Defendant–Appellant's Motion to Supplement Record on Appeal" and an "Amendment to Defendant–Appellant's Motion to Supplement Record on Appeal." As indicated above, the district court denied the motion to perfect. *See Denial of Mot. to Perfect,* at 2. There is nothing in the record to indicate the disposition of the Motion and Amendment submitted to the Court of Appeals.

{12} These thwarted attempts by Antillon to perfect the record raise fundamental issues. Since, under Section 30–1–10, the defense of double jeopardy cannot be waived, and since, in many cases, double jeopardy can only be raised for the first time on appeal, it is unjust to prevent the defendant from including evidence relevant to that defense in the record proper. The New Mexico Constitution does not permit such a result. Because it is in the interest of justice to allow the parties to properly present their claims on appeal, the court rule regarding the correction or modification of the record proper is broadly worded:

> If anything material to either party is omitted from the record proper by error or accident, the parties by stipulation, or the district court or the appellate court on motion or on its own initiative, may direct that the omission be corrected, and a sup-

plemental record proper transmitted to the appellate court.

Rule 12–209(C) NMRA 1999. The trial court erred in denying Antillon's motion to introduce evidence relevant to his double-jeopardy claim.

III. NO DISPUTE AS TO THE EXISTENCE OF THE MISSING DOCUMENTS

{13} Although the record is missing the forfeiture complaint and the judgment and sentence of forfeiture, the existence of the forfeiture action is not at all speculative. In its Order Denying Motion to Perfect Record Proper for Appeal, which comes to us as a supplemental record proper, the district court made specific findings regarding the forfeiture against Antillon:

> 1. The State filed a Petition for Forfeiture seeking forfeiture of Defendant's vehicle on May 9, 1995;
>
> . . . .
>
> 3. The Petition for Forfeiture was served on Defendant on May 11, 1995;
>
> 4. On July 24, 1995, the Clerk of District Court entered a Certificate as the State of the Record certifying that Defendant had failed to enter an appearance or otherwise respond to the Petition;
>
> 5. On July 24, 1995, the State filed a Motion for Default Judgment against the Defendant;
>
> 6. On July 28, 1995, the court entered the Default Judgment in favor of the State;
>
> . . . .

Denial of Mot. to Perfect, at 1–2. The State disputes none of these findings.

{14} In the past we have supplied by inference facts that are omitted from the record, with the proviso that none of the parties have disputed the facts in question. For example, *Nichols v. Nichols* concerned a divorce in which the trial court, upon the motion of the husband, set aside its first judgment and issued a new judgment. The record on appeal contained no motion to set aside the first judgment, no transcript of the hearing to reconsider, and no order to vacate that judgment. *Nichols*, 98 N.M. at 324, 648 P.2d at 782.

{15} The husband submitted to this Court a motion asking us to order the district court to correct the record. *Id.* at 324–25, 648 P.2d at 782–83. We denied his motion, reasoning that there were several expedient procedural mechanisms the husband could have used to perfect the record without asking us to compel the district court to do so. *Id.* at 325, 648 P.2d at 783. Nevertheless, we concluded that "[t]he fact that the record does not reflect that Husband timely filed a motion against the first judgment is not fatal." *Id.* at 326, 648 P.2d at 784. We found circumstantial evidence of the second judgment in the pleadings submitted by the parties:

> [I]n their supplemental briefs, both parties, while not agreeing on much else, do state that they both met with the trial judge on January 19, 1981, and that at the close of their meeting the judge requested that they submit new proposed findings of fact and conclusions of law. "[T]he express . . . admissions of the briefs may be recognized as properly filling a hiatus in the transcript." [*Royko v. Griffith Co.*, 147 Cal.App.2d 770, 306 P.2d 36, 40 (Cal. Ct.App.1957).] We therefore deem it established for the purposes of this appeal that there was a January hearing at which the trial court requested the parties to submit new findings and conclusions.

Id.

{16} In Antillon's case, evidence of the forfeiture proceedings are included in the supplemental record proper in the form of express findings set forth in an order of the trial court. Such evidence is even more substantial than the inferences drawn from the briefs in *Nichols*. In light of such evidence it would be unjust to conclude that no forfeiture occurred.

IV. CONCLUSION

{17} Because there is no dispute among the parties as to the existence of the forfeiture proceedings, because there is strong circumstantial evidence in the record of the time and disposition of those proceedings, because the double-jeopardy defense can be raised for the first time on appeal and the evidence related to that defense can there-

fore not be excluded from the record on appeal, because the trial court improperly denied the motion to perfect the record, and because the missing evidence concerns a fundamental right which cannot be waived, we conclude Antillon should be permitted to raise his double-jeopardy defense.

{18} However, we are mindful of the principles that require any facts before us to be established by the record. *See Sherman,* 82 N.M. at 317, 481 P.2d at 105; *Westland,* 80 N.M. at 618, 459 P.2d at 144. Therefore, in the interests of judicial expediency, we remand this case so that Antillon may provide the required forfeiture documents to the district court, at which time his criminal conviction is to be reversed as required by our holding in *State v. Nunez,* 2000–NMSC–013, ¶ 114, 129 N.M. 63, 2 P.3d 264.

{19} **IT IS SO ORDERED.**

MINZNER, C.J., and THOMAS A. DONNELLY, J., New Mexico Court of Appeals (sitting by designation), concur.

BACA, J. and SERNA, JJ., Dissent.

SERNA, Justice (dissenting).

{20} I must respectfully **DISSENT.** As demonstrated in depth in my dissent in *State v. Nunez,* 2000–NMSC–013, 129 N.M. 63, 2 P.3d 264, I disagree with the analysis and conclusions of the majority regarding forfeiture. Assuming Defendant showed that a default judgment exists, a default judgment does not constitute punishment because the property is ownerless or abandoned. Further, even if Defendant had established his ownership of the vehicle in a forfeiture proceeding, I do not believe it constitutes punishment for purposes of double jeopardy. Thus, I would affirm his conviction, and I believe it is unnecessary to remand to the district court.

{21} I therefore, respectfully, **DISSENT.**

BACA, J., concurs.

2 P.3d 856

2000-NMSC-018

STATE of New Mexico, Plaintiff–Respondent,

v.

JASON L., a child, Defendant–Petitioner.

No. 25,806.

Supreme Court of New Mexico.

May 23, 2000.

[redacted]

[redacted]

[redacted]

Phyllis H. Subin, Chief Public Defender, Nancy M. Hewitt, Assistant Appellate Defender, Santa Fe, for Petitioner.

Patricia A. Madrid, Attorney General, Ralph E. Trujillo, Assistant Attorney General, Santa Fe, for Respondent.

OPINION

MINZNER, Chief Justice.

{1} Defendant Jason L., a minor, appeals from a decision of the New Mexico Court of Appeals reversing a district court's order suppressing a concealed weapon. *See In re Jason L.*, 1999–NMCA–095, 127 N.M. 642, 985 P.2d 1222. We granted Defendant's petition for certiorari because his appeal raised two important issues: (1) when was he seized for purposes of his constitutional protections, *see* U.S. Const. amend. IV; N.M. Const. art. II, § 10, and (2) was his seizure justified? The Court of Appeals apparently assumed that Defendant's Fourth Amendment rights were not implicated until he was searched and that reasonable suspicion supported that search. *See Jason L.*, 1999–NMCA–095, ¶ 18, 127 N.M. 642, 985 P.2d 1222. On this record, however, we believe the district court found Defendant had been detained prior to the search and concluded that he was detained without justification, contrary to his Fourth Amendment rights. We hold that the Court of Appeals erred in overturning the district court's determinations. We

therefore reverse the Court of Appeals and affirm the district court's order.

I.

{2} Defendant was arrested and charged with unlawful possession of a handgun contrary to NMSA 1978, § 30–7–2.2 (1994). At the suppression hearing, the State presented the testimony of the two arresting officers, Officer McDaniel and Officer Jordan. McDaniel testified first and as follows.

{3} At approximately 10:00 p.m. on Thursday, July 17, 1997, the officers were returning from an unrelated call when they noticed two boys walking eastbound on 13th Street toward Washington in Roswell. No relevant activity had been reported in the area that evening. The officers proceeded past Defendant and his companion, Filemon M., and observed them. McDaniel believed their actions were suspicious. He stated that "they kept looking back over their shoulders to see where I was at or if I was gonna' turn." "Both boys looked at [us] . . . [however] the one who kept looking at [me] was [Filemon M.]." McDaniel admitted that his police report only noted that Filemon M. was looking back at him. The boys never stopped walking; instead they continued forward, looking back over their shoulders. McDaniel noticed Filemon M. "messing with the left side of his waistband [as] if he was adjusting something or messing with something underneath his big, heavy coat." Next, McDaniel turned off his headlights, parked behind a wall, and positioned himself behind a fence where he was not visible. McDaniel was suspicious because the boys had not traveled as far as he expected they would have had they continued walking at their previous speed.

{4} Based on these observations, McDaniel decided to approach the two boys. He returned to his vehicle and stopped them on the street without engaging emergency equipment. After approaching the boys, McDaniel believed they continued to act suspiciously. He based this belief on the fact that Filemon M. continued to fuss with his waistband and appeared to be trying to keep himself separated from the officers by positioning Defendant between them. McDaniel testified that he did not observe any criminal activity. Upon contact, McDaniel asked the boys what they were doing. The boys responded they were "just walking," and McDaniel thought this was a good answer. Filemon M. continued to fuss with the left side of his waistband, which led McDaniel to ask an additional question. He asked the boys whether they had any knives or weapons on them. At first the boys did not respond; after McDaniel repeated the question, the boys eventually answered, "No."

{5} McDaniel then asked Filemon M. to open his jacket. At this point, McDaniel described Filemon M.'s jacket as a big, baggy coat. McDaniel did not tell Filemon M. that he did not have to unzip his jacket. Nothing was visible when Filemon M. unzipped his jacket. McDaniel proceeded to pat down Filemon M. and felt a firearm in his waistband. The firearm was identified as a .22 caliber pistol. After McDaniel secured the weapon, Filemon M. stated he had another weapon. McDaniel searched Filemon M. and found another gun located on the right side of his belt. The officers then searched Defendant and found a .22 caliber firearm located in the front waistband of his pants under his coat.

{6} Jordan testified as follows. Filemon M. kept looking back at the police officers. He wore a "big, white jacket." Jordan thought it was peculiar that Filemon M. was wearing a jacket in the middle of July and reaching for his side as he walked but commented, however, that maybe it was cold or "it could have been cooler than I thought it was." He also noted that the boys were walking very slowly.

{7} The two officers pulled up behind the boys and McDaniel either said, "Can we talk to you for a minute?" or, "Come here." Filemon M. was acting very nervous. He kept trying to move behind Defendant, who appeared to be more willing to talk with the officers. Jordan did not remember McDaniel asking the boys if they had weapons or guns. When asked if the conversation occurred, Jordan answered that it might have occurred after McDaniel asked Filemon M. to open his jacket. McDaniel asked Filemon M. to open

his jacket and Filemon M. reacted by reaching for his waistband. At that point, McDaniel grabbed Filemon M.'s hand and again asked him to open his jacket. Both officers saw the weapon in plain view in Filemon M.'s waistband and both yelled, "Gun!" pursuant to their training. After the officers saw the gun, they handcuffed Filemon M. and secured the weapon. Jordan searched Filemon M. to see if he was carrying any other weapons. During the search of Filemon M., Defendant was standing in front of the patrol car "like Officer McDaniel asked him to do." After two guns were found on Filemon M., McDaniel searched Defendant. At no point did Jordan observe any suspicious conduct by Defendant.

{8} The State charged Defendant and Filemon M. with unlawful possession of a handgun. At the conclusion of the hearing, the district court granted Defendant's motion to suppress stating:

> [T]he most recent case dealing with this, [*State v. Eli L.*, 1997–NMCA–109, 124 N.M. 205, 947 P.2d 162]. . . . [held] that we will not dispense with the requirement of individualized particularized suspicion. In this particular case, both the officers testified that . . . there was no criminal activity that was taking place. They were still within the permissible curfew time. In light of what our appellate courts have held, that there must be individualized, particularized suspicion, I can't find, based on the testimony, that there was any reasonable suspicion relating to [Defendant].

The Court of Appeals held that once the search of Filemon M. revealed he was carrying two guns, reasonable suspicion existed to search Defendant. *See Jason L.*, 1999–NMCA–095, ¶ 18, 127 N.M. 642, 985 P.2d 1222.

{9} Defendant has not argued on appeal that the New Mexico Constitution affords him greater protection than that afforded under the United States Constitution. *Cf. State v. Gomez*, 1997–NMSC–006, ¶¶ 22–23, 122 N.M. 777, 932 P.2d 1 (discussing requirements for preserving state constitutional claims for appellate review). We therefore review his claim, as did the Court of Appeals, only under the Fourth Amendment.

II.

{10} The standard of review for suppression rulings is "whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party." *State v. Werner*, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994) (quoting *State v. Boeglin*, 100 N.M. 127, 132, 666 P.2d 1274, 1279 (Ct.App.1983)). The appellate court must defer to the district court with respect to findings of historical fact so long as they are supported by substantial evidence. *See State v. Attaway*, 117 N.M. 141, 144, 870 P.2d 103, 106 (1994). "Factfinding frequently involves selecting which inferences to draw." *State v. Lopez*, 109 N.M. 169, 171, 783 P.2d 479, 481 (Ct.App.1989). "[A]ll reasonable inferences in support of the [district] court's decision will be indulged in, and all inferences or evidence to the contrary will be disregarded." *Werner*, 117 N.M. at 317, 871 P.2d at 973 (quoting *Boeglin*, 100 N.M. at 132, 666 P.2d at 1279). The fact that another district court could have drawn different inferences on the same facts does not mean this district court's findings were not supported by substantial evidence. *See Lopez*, 109 N.M. at 171, 783 P.2d at 481. Conflicts in the evidence, even within the testimony of a witness, are to be resolved by the fact finder at trial. *See State v. Bloom*, 90 N.M. 192, 194, 561 P.2d 465, 467 (1977).

{11} In this case, we have no findings of fact from the district court. "This is a regular occurrence when we review decisions on motions to suppress evidence in criminal cases." *State v. Gonzales*, 1999–NMCA–027, ¶ 11, 126 N.M. 742, 975 P.2d 355, *cert. denied*, 126 N.M. 533, 972 P.2d 352 (1999). In circumstances such as this, "our practice has been to . . . employ presumptions [and as] a general rule, we will indulge in all reasonable presumptions in support of the district court's ruling." *Id.* ¶ 15. One constraint upon that practice is that without an indication on the record that the district court rejected the uncontradicted evidence, we presume the court believed all uncontradicted evidence. *See id.* ¶ 16. When the evidence conflicts, we consider the evidence that supports the district court's ruling; and

we will draw all inferences and indulge all presumptions in favor of the district court's ruling.

{12} In this case there is conflicting evidence. For example, McDaniel testified that both boys kept looking back at the officers. Jordan indicated that Filemon M. kept looking back at the officers. McDaniel testified he asked the boys if they had any weapons; Jordan did not remember this exchange. McDaniel testified he could not see a weapon after Filemon M. unzipped his jacket so McDaniel conducted a pat-down. Jordan testified that Filemon M. reached for his waistband when asked to open his jacket. McDaniel grabbed his hand and again asked that Filemon M. open his jacket. At that point, the gun was visible. On some facts, the officers agreed. Sometimes one officer testified to something the other did not mention. We presume the district court believed the facts on which the officers agreed as well as the facts to which only one officer testified. We consider all that evidence; where the evidence conflicted, we consider only the evidence supporting the court's ruling. The relevant facts then are as follows.

{13} Defendant and Filemon M. were walking down the street together and Filemon M. was looking back at the police officers. Filemon M. was wearing a big, baggy coat and Defendant was wearing a coat on an evening that may have been cool. Filemon M. was fussing with his waistband. Neither boy seemed to cover as much ground as the officers had expected. Based on these observations, the police officers decided to approach the two boys. The two officers pulled their vehicle up to the boys and Officer McDaniel said, "Come here." Filemon M. appeared to be very nervous and was trying to position Defendant between the police officers and himself. McDaniel asked the boys what they were doing and the boys answered that they were "just walking." McDaniel then asked the boys if they were armed. The boys failed to respond immediately; McDaniel repeated the question. Eventually, the boys responded, "No." McDaniel then searched Filemon M. and found the first gun.

{14} Our task is to determine at what point during the encounter Defendant's right to be free from unreasonable search and seizure was implicated. "[A] seizure subject to Fourth Amendment scrutiny" does not occur every time a police officer approaches a citizen. *State v. Walters,* 1997-NMCA-013, ¶ 10, 123 N.M. 88, 934 P.2d 282. "Whether or not a search and seizure, including a stop and frisk of an individual by law enforcement officers, violates the Fourth Amendment is judged under the facts of each case by balancing the degree of intrusion into an individual's privacy against the interest of the government in promoting crime prevention and detection." *State v. Jones,* 114 N.M. 147, 150, 835 P.2d 863, 866 (Ct.App.1992). In developing that balance, courts have distinguished various types of encounters between police officers and the public on the basis of the degree of intrusion and required an appropriate level of suspicion to justify the particular intrusion. *See Lopez,* 109 N.M. at 171, 783 P.2d at 481. Arrests and investigatory stops are seizures invoking Fourth Amendment protections; community caretaking encounters are consensual, beyond the scope of the Fourth Amendment. *See Walters,* 1997-NMCA-013, ¶ 10, 123 N.M. 88, 934 P.2d 282. An arrest must be supported by probable cause and an investigatory stop must be supported by reasonable suspicion. *See id.* The police do not need any justification to approach a person and ask that individual questions; however, the officer may not "convey a message that compliance with their requests is required." *Florida v. Bostick,* 501 U.S. 429, 435, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

{15} In *Terry v. Ohio,* the United States Supreme Court held that a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away." 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In *Lopez,* the New Mexico Court of Appeals stated that restraint on a person's freedom, within the meaning of *Terry,* can be the result of either physical force or a showing of authority. *See Lopez,* 109 N.M. at 170, 783 P.2d at 480. When determining whether a person is seized we consider "all of the circumstances surrounding the incident" in order to determine

whether "a reasonable person would have believed that he [or she] was not free to leave." *Id.* (quoting *United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). Under *Lopez,* when determining whether a reasonable person would feel free to leave, courts should look at all of the factual circumstances, considering the following three factors: "(1) the conduct of the police, (2) the person of the individual citizen, and (3) the physical surroundings of the encounter." 109 N.M. at 171, 783 P.2d at 481.

{16} The State argues that Defendant was not seized until the officers initiated physical contact; or in other words, prior to the pat-down search the encounter was consensual. The district court's oral ruling, however, suggests the court believed Defendant had been seized earlier. The court's remarks refer only to the time of night and the absence of any reports of criminal activity; there is no mention of facts that became apparent during the encounter. Physical contact is not essential to a seizure. In *Lopez,* the Court of Appeals identified other circumstances in which a reasonable person might believe he or she could not end an encounter with the police.

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

109 N.M. at 170, 783 P.2d at 480 (quoting *Mendenhall,* 446 U.S. at 554, 100 S.Ct. 1870). Giving proper deference to the district court, we conclude there was substantial evidence to support a finding that the officers made a show of authority and that a person in Defendant's position would not have felt free to leave after McDaniel twice asked the boys if they had any knives or weapons.

{17} The boys were approached at night on an empty street by two armed police officers whom they knew had been observing them prior to the encounter. *See United States v. Sanchez,* 89 F.3d 715, 718 (10th Cir.1996) (stating that the "threatening presence of several officers" and the "absence of other members of the public" are factors that could indicate that a reasonable person would not feel free to ignore an encounter with the police). The police officers did not ask to speak to the boys, but rather demanded that they approach. *See Smith v. United States,* 558 A.2d 312, 314 (D.C.Cir. 1989) (en banc) (holding police officer's show of authority, by announcing he was a police officer and ordering defendant to stop, was an investigative seizure implicating Fourth Amendment protections), *overruled in part on other grounds by Green v. United States,* 662 A.2d 1388, 1390 (D.C.Cir.1995). The tenor of the encounter changed when McDaniel asked Defendant if he was in possession of weapons. "Generally, courts throughout the country have ruled that a field inquiry becomes a *Terry* stop upon unsupported outright accusations of criminal activity." *In re J.G.,* 320 N.J.Super. 21, 726 A.2d 948, 953 (App.Div.1999) (internal quotation marks omitted). We believe the "use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory" is one factor that could lead a reasonable person to believe he or she is not free to terminate an encounter with the police. *Sanchez,* 89 F.3d at 718. Further, we also believe that questions asked in an "[a]ccusatory, persistent, and intrusive" manner can make "an otherwise voluntary encounter . . . coercive." *United States v. Little,* 60 F.3d 708, 712 (10th Cir.1995) [hereinafter *Little II*].

{18} At no point did the officers tell either boy they were free to leave or that they were not required to answer their questions. While case law has not required such advice, its absence is a relevant factor. *See Little II,* 60 F.3d at 713. It is also relevant that Defendant was fifteen years old at the time of the encounter. *See generally Lopez,* 109 N.M. at 171, 783 P.2d at 481. "Characteristics such as whether the person being questioned is a child or an adult . . . are objective and relevant" to the question of whether a reasonable person would feel free to leave. *United States v. Little,* 18 F.3d

1499, 1505, n. 6 (10th Cir.1994) (en banc) [hereinafter *Little I*].

{19} In *Lopez* the Court of Appeals determined that whether a person has been seized in violation of the Fourth Amendment is a mixed question of law and fact. 109 N.M. at 170, 783 P.2d at 480. The Court stated that "as a matter of law, a person is seized when the facts show accosting and restraint such that a reasonable person would believe he [or she] is not free to leave. However, we believe the question of whether the facts show such accosting and restraint is factual in nature." *Id.* We now conclude that because a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away," *Terry,* 392 U.S. at 16, 88 S.Ct. 1868, *Lopez* essentially transformed the legal determination of a seizure into a factual finding. We take this opportunity to modify *Lopez* so that an appellate court can engage in a "meaningful review of [a] lower court['s] determinations." *State v. Attaway,* 117 N.M. 141, 145, 870 P.2d 103, 107 (1994). The determination of a seizure has two discrete parts: (1) what were the circumstances surrounding the stop, including whether the officers used a show of authority; and (2) did the circumstances reach such a level of accosting and restraint that a reasonable person would have believed he or she was not free to leave? The first part is a factual inquiry, which we review for substantial evidence. The second part is a legal inquiry, which we review de novo. We hold that on the evidence presented at the hearing, viewed in the light most favorable to the district court ruling, there was substantial evidence supporting a determination that the officers detained Defendant with a show of authority. We further conclude, as a matter of law, the show of authority in this case was such an accosting and restraint that a reasonable person would have believed he or she was not free to leave after McDaniel asked about weapons a second time.

{20} Having determined there was substantial evidence supporting the ruling that a seizure occurred prior to that search, we note that not all seizures are unconstitutional. We recognize an "officer may detain a person in order to investigate possible criminal activity." *State v. Cobbs,* 103 N.M. 623, 626, 711 P.2d 900, 903 (Ct.App. 1985). Investigatory detention is permissible when there is a reasonable and articulable suspicion "that the law is being or has been broken." *Id.* A reasonable suspicion is a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law. *See State v. Watley,* 109 N.M. 619, 624, 788 P.2d 375, 380 (Ct.App.1989). "Unsupported intuition and inarticulate hunches are not sufficient." *Cobbs,* 103 N.M. at 626, 711 P.2d at 903. Reasonable suspicion must exist at the inception of the seizure. *See Eli L.,* 1997–NMCA–109, ¶ 11, 124 N.M. 205, 947 P.2d 162. The officer cannot rely on facts which arise as a result of the encounter. *See United States v. Bloom,* 975 F.2d 1447, 1456 (10th Cir.1992) *overruled in part on other grounds by Little I,* 18 F.3d at 1504. Since Defendant was seized prior to the search of Filemon M., the fruits of that search are not relevant to the determination of whether there was reasonable and articulable suspicion to support the seizure of Defendant. In this case, the district court determined no reasonable suspicion existed to support a seizure of Defendant. We review this legal determination de novo. *See Eli L.,* 1997–NMCA–109, ¶ 6, 124 N.M. 205, 947 P.2d 162.

{21} *Eli L.* is dispositive. In *Eli L.* the Court of Appeals held that officers must possess "at the time the Child was stopped . . . reasonable individualized suspicion that the Child had committed or was about to commit a crime." 1997–NMCA–109, ¶ 11, 124 N.M. 205, 947 P.2d 162. In closing argument, the district court specifically asked the State what facts supported a finding that reasonable suspicion existed to stop Defendant, assuming that a reasonable and articulable suspicion existed for the stop of his companion. In response, the State relied on Filemon M.'s conduct. As stated in *Eli L.,* New Mexico has "not dispense[d] with the requirement of individualized, particularized suspicion." *Id.* ¶ 12 (quoting *Jones,* 114 N.M. at 150, 835 P.2d at 866). Therefore, the district court was correct in refusing to rely on Filemon M.'s conduct to justify Defendant's detention.

{22} We also believe the district court correctly characterized Defendant's detention as a stop and appropriately required a showing of reasonable suspicion. Under the appropriate standard of review, the only suspicious conduct attributable to Defendant in the record was that he was wearing a coat of unknown weight on a summer evening and walking slowly in the company of someone who was fussing with his waistband and looking back at police officers. Individualized, particularized suspicion is a prerequisite to a finding of reasonable suspicion, and the district court did not err in concluding that the State had not established individualized, particularized suspicion that Defendant had committed or was about to commit a crime. On this record, the district court correctly concluded that the officers lacked reasonable suspicion to detain Defendant for investigation.

III.

{23} On the evidence presented at the suppression hearing, viewed in the light most favorable to Defendant, the district court could find that the police officers detained Defendant with a show of authority and that a reasonable person in Defendant's position would not have felt free to leave. The court also did not err in concluding that the officers made an investigatory stop, which required reasonable suspicion, and that they had not proved their suspicion of Defendant was reasonable. Therefore, we conclude that the district court was correct in ruling that Defendant was seized by the officers within the meaning of the Fourth Amendment and in violation of his rights under that amendment. Accordingly, we reverse the Court of Appeals and we affirm the order of the district court suppressing the evidence in this case.

{24} **IT IS SO ORDERED.**

FRANCHINI, J., concurs.

SERNA, J., specially concurring.

BACA, J., and MAES, J., dissenting.

SERNA, Justice (specially concurring).

{25} I concur in the majority opinion. I write separately only to emphasize the limited scope of the majority opinion and to provide additional guidance to trial courts on this issue.

{26} As the majority and dissenting opinions in this case explain, trial courts must assess a number of factors in determining whether a show of authority transformed an otherwise consensual encounter into an investigatory stop. Based on the trial court's suppression of the evidence, we view the evidence relating to these factors in a light most favorable to the ruling. This case involves two armed, uniformed officers approaching two juveniles on an empty street at night after making visual contact with the juveniles and observing their movements for a period of time. Indulging all reasonable presumptions in favor of the district court's ruling, we must presume that the district court inferred from these historical facts, based on context, based on the characteristics of the individuals being approached, and based on witness demeanor, that this constituted a threatening officer presence. I do not believe that such an inference could be characterized as clearly erroneous or unsupported by substantial evidence. Additionally, the officers made a focused inquiry about illegal activity and did not accept the juveniles' failure to answer. We must again presume that the district court inferred that this line of questioning was accusatory and indicated to the juveniles that a response to the question was compulsory. Although there is no indication from the audiotape transcript of the suppression hearing that the officers used a coercive tone of voice, the trial court is in a better position to draw such inferences from the officers' demeanor and the background facts, including the locality in which the encounter occurred, the officers' pointed interest in Filemon M., the failure to advise Jason L. that he was not under arrest and was free to leave, and the use of commanding language to initiate the encounter. *See Michigan v. Chesternut,* 486 U.S. 567, 575 n. 7, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988) ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth

Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted."). Thus, I believe that this finding is also supported by substantial evidence.

{27} Of course, another district court could draw different inferences from these facts, especially considering that defendants bear the initial burden of demonstrating that a consensual encounter has been transformed into an investigatory stop by a show of authority, *see State v. Baldonado,* 115 N.M. 106, 110, 847 P.2d 751, 755 (Ct.App.1992). Thus, by holding that the trial court's factual findings are supported by substantial evidence, the Court does not hold that the presence of two armed, uniformed officers constitutes a threatening presence as a matter of law. *Compare United States v. Bloom,* 975 F.2d 1447, 1454 (10th Cir.1992) ("Defendant was outnumbered, and he knew it."), *overruled in part by United States v. Little,* 18 F.3d 1499 (10th Cir.1994) (en banc) (*Little I*), *with United States v. Mixon,* No. 98–3004, 1999 WL 436269, at *3 (10th Cir. June 29, 1999) (unpublished opinion) ("The plain-clothed officers approached Defendant and Mr. Rodriguez displaying their badges to identify themselves. The number of officers-two-matched the number of individuals being questioned-Defendant and Mr. Rodriguez. We cannot say that this constituted a threatening presence."), *cert. denied,* 528 U.S. 1066, 120 S.Ct. 624, 145 L.Ed.2d 517 (1999). Additionally, the Court does not create a per se rule that juveniles in general are more likely to feel coerced by police questioning. *See Little I,* 18 F.3d at 1505 n. 7 ("[W]hat we reject are rules which state or imply that *all* women, *all* minorities, or *all* young people are always more vulnerable to coercion."). Finally, the majority opinion does not and should not imply that this Court has created a per se rule that an officer's question about criminal conduct, even if repeated after a failure to answer, constitutes coercive conduct. *See United States v. Glass,* 128 F.3d 1398, 1407 (10th Cir.1997) (rejecting a per se rule that particularized focus, incriminating questions, and a request for consent to search constitutes a seizure under the Fourth Amendment); *see also United States v. Hernandez,* 93 F.3d 1493, 1499 (10th Cir.1996) ("Asking questions which may elicit incriminating answers is irrelevant to a determination of whether an encounter was consensual, although the manner in which the questions are asked is relevant; 'accusatory, persistent, and intrusive' questioning may turn an otherwise voluntary encounter into a coercive one if it conveys the message that compliance is required."). Instead, we merely presume from the district court's ruling that the court reasonably inferred from the specific factual context in this case that the questioning conveyed a message that a response was compelled at the time that the officer repeated the question concerning weapons.

{28} Once these historical facts, accompanied by reasonable inferences and presumptions, have been established, the question of whether these facts rise to the level of a seizure invoking the protections of the Fourth Amendment is reviewed de novo. Applying the historical facts, including the reasonable inferences of a threatening officer presence and coercive questioning, to the legal question of whether, under the totality of circumstances, a reasonable person would feel free to terminate the police encounter, I agree with the majority that the district court properly concluded that Jason L. was seized at the time the officers repeated the question about weapons.

{29} I would emphasize, however, the limited scope of this legal conclusion. This conclusion is not based on the sole fact of a repeated question concerning criminal activity. As courts have observed, the legal question of seizure should be determined on the basis of the totality of circumstances and will only rarely rest on any single factor. *See Bostick,* 501 U.S. at 439, 111 S.Ct. 2382 (rejecting a per se conclusion of a seizure based on the single factor of a confined location and stating, "We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."); *Glass,* 128 F.3d at 1406 ("[T]his court has steadfastly refused

to view any one of [the] factors as dispositive.").

{30} Additionally, the Court does not conclude that Defendant was seized prior to the time that Officer McDaniel repeated the question about weapon possession. In other words, even accepting the district court's determination of a threatening officer presence and, viewing the evidence in a light most favorable to the ruling, accepting that the officers ordered the juveniles to "come here," asked what they were doing, and asked for the first time whether the boys had weapons, these facts do not amount to a seizure as a matter of law, *Cf. Hernandez,* 93 F.3d at 1499 ("A limited number of routine questions about travel plans and relationship to passengers, followed by a question about possession of contraband and a request to search, are not sufficient to render an otherwise consensual encounter coercive."); *United States v. Angell,* 11 F.3d 806, 809–10 (8th Cir.1993) ("In the light of the totality of the circumstances, we conclude that [the officer's] actual language [of 'Stay there' or 'Hold it right there'], although perhaps somewhat more peremptory than precatory in tone, did not convert what would clearly have been a consensual encounter into a seizure within the meaning of the Fourth Amendment."); *Brown v. City of Oneonta,* 195 F.3d 111, 122 (2d Cir.1999) (similar); *United States v. Sanchez,* 89 F.3d 715, 718 (10th Cir.1996) (similar); *United States v. Polk,* 97 F.3d 1096, 1098 (8th Cir.1996) (holding that the display of a badge for the second time and informing the individual that the officer is on narcotics detail does not, "standing alone, constitute a Fourth Amendment seizure"). The totality of circumstances amounted to a seizure as a matter of law only when the officers, by repeating the question in the context of the encounter up until that time, conveyed the message to a reasonable person that a response was compulsory.

{31} I would stress that, even with the district court's inferences regarding the presence of the officers and the nature of the questioning, this case presents a very close question under the Fourth Amendment. *See generally Glass,* 128 F.3d at 1407 (discussing *Bloom,* in which the court held that a seizure occurred when two DEA agents, one of whom was uniformed and armed, confronted the defendant in a private train compartment, blocked the defendant's exit, asked if he was carrying drugs, and asked for consent to search luggage, and stating that "[e]ven with the presence of these factors . . . *Bloom* was a close case"). In future cases, the absence of even one of the relevant circumstances present in this case might call for a different legal conclusion under federal law. *See id.* (discussing *United States v. Carhee,* 27 F.3d 1493 (10th Cir.1994)). "[C]haracterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." *Mendenhall,* 446 U.S. at 554, 100 S.Ct. 1870 (Opinion of Stewart, J.).

{32} I would finally like to point out that the majority opinion should not be interpreted as expressing any view as to whether the officers had reasonable suspicion to stop Filemon M. Indeed, I agree with the dissent that, under the facts of this case, reasonable suspicion did exist with respect to Filemon M. prior to the frisk even though there was no particularized reasonable suspicion with respect to Jason L. at that time. I also agree with the dissent that, if Jason L. had not been seized by the officers prior to the frisk of Filemon M., the discovery of two firearms on Filemon M., combined with the close proximity of Jason L. to the officers, would sufficiently justify a limited pat-down of Jason L. for weapons in order to ensure officer safety. However, because I conclude that Jason L. was seized prior to the frisk of Filemon M., and thus prior to a credible threat to officer safety, I must agree with the majority that the district court properly granted Defendant's motion to suppress.

BACA, Justice, dissenting.

{33} I must respectfully dissent from the majority's opinion. I would reverse the district court's suppression of evidence and hold that the officers' search of Jason L. did not violate his Fourth Amendment rights. I disagree with the majority's conclusion that a

seizure of Jason L. occurred during the initial encounter between the youths and officers. Even when considering the facts in a light most favorable to the prevailing party, I do not believe that the initial encounter created an atmosphere such that a reasonable person would have believed that he or she was not free to leave. I would find that the initial encounter was consensual in nature. It was only after Officer McDaniel reached for and made contact with Filemon M.'s hand just prior to the discovery of the weapons, that the encounter escalated into a *Terry* stop as to Filemon M. only. I believe that it was objectively reasonable for the officers, having discovered two weapons on Jason L's companion, to initiate a protective frisk of Jason L. limited only to the discovery of weapons.

{34} It is well-settled that police/citizen encounters fall within one of three categories: "(1) consensual encounters which do not implicate the Fourth Amendment[;] (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by reasonable suspicion of criminal activity [the "*Terry*" stop][;] and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause." *United States v. Hill*, 199 F.3d 1143, 1147 (10th Cir.1999) (citing *United States v. Shareef*, 100 F.3d 1491, 1500 (10th Cir.1996)). Consensual encounters are not seizures within the meaning of the Fourth Amendment, and need not be supported by suspicion of criminal wrongdoing. *See Florida v. Royer*, 460 U.S. 491, 497–98, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). An officer is free to approach people and ask questions without violating the Fourth Amendment rights of the individual questioned. *Id.*

{35} Although I agree with the majority's modifications of *State v. Lopez*, I cannot agree that substantial evidence exists to show that the officers used a show of authority during the initial encounter nor that circumstances established that the officers' display of authority rose to such a level that a reasonable person would have believed he or she was not free to leave. 109 N.M. 169, 171, 783 P.2d 479, 481 (Ct.App.1989) (stating "[a] reviewing court must determine whether the [district] court's result is supported by substantial evidence"); *see also United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (concluding "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). In assessing whether a seizure has occurred, the *Lopez* Court identifies three factors to consider when reviewing the factual circumstances surrounding an encounter—factors I believe are consistent with the majority's modifications of *Lopez:* "(1) the conduct of the police, (2) the person of the individual citizen [1], and (3) the physical surroundings of the encounter." *Lopez*, 109 N.M. at 171, 783 P.2d at 481. Commonly cited examples of circumstances that might create a belief in a reasonable person that he or she was not free to terminate the encounter include; "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 170, 783 P.2d at 480.

{36} When the officers made their initial contact with the youths, the exchange appears to have been conducted in a conversational manner. After exiting their patrol car and approaching the youths, Officer Jordan testified that Officer McDaniel asked them, " 'Can we talk to you for a minute?' or 'Come here,' one of the two." He was not certain which. Officer McDaniel asked the youths

1. This factor requires courts to consider the characteristics of the defendant "in seeking to determine whether even a facially innocuous encounter might, in the circumstances, have overborne the citizen's freedom to walk away." *United States v. Black*, 675 F.2d 129, 134 (7th Cir.1982) (holding that defendant, as an articulate, intelligent young man, "was not so naive or vulnerable to coercion that special protection from police contacts was required by the Fourth Amendment"). In *United States v. Seventy–Three Thousand, Two Hundred Seventy–Seven Dollars*, 710 F.2d 283, 288 (7th Cir.1983), for example, the court interpreted this factor to include individual's "educational and psychological background, age, etc."

what they were doing, and received an answer that they were "just walking" which Officer McDaniel considered a "pretty good" response. There is no evidence that the officers commanded the youths in a tone of voice that could be considered as compelling action. The officers did not have their emergency lights engaged which might have signaled to the youths that they were not free to terminate the encounter. Nor is there evidence that either officer had his weapon drawn. Furthermore, I cannot agree with the interpretation of the facts that there were several armed officers creating a threatening presence. I do not believe two officers, in one patrol car, constitutes "several" officers in the manner likely contemplated by *Mendenhall* and *Lopez*. To adhere to such a conclusion might presumptively transform every standard two person officer patrol into an intimidating situation even during what might otherwise be considered a consensual encounter. Furthermore, evidence that it was late at night on an empty street, without more, is not sufficient to transform the encounter into a *Terry* stop. Finally, there is no evidence that Jason L.'s education, psychological background, or his age of fifteen, made him particularly vulnerable to intimidation by the officers. *See Seventy–Three Thousand, Two Hundred Seventy–Seven Dollars,* 710 F.2d at 288. Thus, even under the majority's modification of *Lopez,* I cannot agree that substantial evidence existed to support the conclusion that the officers' conduct demonstrated a show of authority. Nor can I agree that, as a matter of law, the circumstances of this case would communicate to a reasonable person that he or she was not free to decline the officer's requests or terminate the encounter. *See Florida v. Bostick,* 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (reversing the Florida Supreme Court adoption of a per se rule that every encounter on a bus is a seizure and adhering to the rule that "a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter").

{37} It is an established tenet of Fourth Amendment jurisprudence that investigatory detentions require that an officer have a reasonable suspicion that criminal activity is afoot before he [or she] may conduct a brief investigatory stop of a person. *See Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *see also State v. Eli L.,* 1997–NMCA–109, ¶ 12, 124 N.M. 205, 947 P.2d 162 (quoting *State v. Jones,* 114 N.M. 147, 150, 835 P.2d 863, 866 (Ct.App.1992), for the proposition that "we will not dispense with the requirement of individualized, particularized suspicion"). In *State v. Cobbs,* the majority correctly notes that "[u]nsupported intuition and inarticulate hunches are not sufficient." 103 N.M. 623, 626, 711 P.2d 900, 903 (Ct.App.1985); *see also Terry,* 392 U.S. at 27, 88 S.Ct. 1868 ("[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."). The reasonable suspicion standard is "a commonsensical proposition," and "[c]ourts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street." *United States v. Lender,* 985 F.2d 151, 154 (4th Cir.1993) (holding that an officer's observation of a man holding his hand out with a group of other men looking down at his open palm in an high drug trafficking area, late at night, constituted reasonable suspicion); *see also Illinois v. Wardlow,* 528 U.S. 119, 120 S.Ct. 673, 674, 145 L.Ed.2d 570 (2000) ("[T]he reasonable suspicion determination must be based on commonsense judgments and inferences about human behavior."). The determination as to whether an investigatory detention is reasonable must be analyzed viewing the totality of the circumstances. *See Ohio v. Robinette,* 519 U.S. 33, 34, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (stating "In applying this test, the Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.").

{38} The officers had sufficient reasonable suspicion to justify an investigatory stop of Filemon M. While both youths were

walking and prior to the initial contact with the youths, the officers testified to several observations of Filemon M.'s conduct that raised their suspicion that criminal activity was afoot: Filemon M. glanced back at the officers several times, both youths appeared to alter the speed of their gait to avoid contact with the police after having been apprised of the officers' presence, and perhaps, most importantly, Filemon M. appeared to be fidgeting with or adjusting something in his waistband under a heavy jacket. Later, while speaking with the youths, during what I believe was a consensual encounter, Filemon M. continued to adjust something in his waistband, appeared very nervous, hesitated upon being questioned about possession of any weapons, and finally reached for something at his waistband. I believe these facts were sufficient to justify the search of Filemon M. under the reasonable suspicion standard that criminal activity was afoot. It is only at the point where Officer McDaniel initiated physical contact with Filemon M., when he reached for his waistband and the officer discovered the first weapon, which from the officers' testimony, appears to be a virtually simultaneous occurrence, that the consensual encounter transformed into a *Terry* stop—*as to Filemon M. only.* Only then could it be said that Officer McDaniel, "by means of physical force or show of authority" prevented Filemon M. from leaving. *Terry,* 392 U.S. at 19 n. 16, 88 S.Ct. 1868.

{39} The question now arises as to whether the search of Filemon M. then transformed the consensual encounter between Jason L. and the officers into a *Terry* stop requiring reasonable suspicion. I do not believe that it did. In *United States v. Davis,* 202 F.3d 1060, 1063 (8th Cir.2000), the Court disagreed with the argument that "the suspicion justifying a protective frisk must be present at the outset of an investigative stop." The Court reasoned that "[t]he danger to officer safety that justifies a protective search may arise after a consensual encounter or investigative stop has commenced." *Id.* In *Davis,* the defendant argued that after the officer's fruitless search of the defendant's companion, a consensual encounter was transformed into an investigative detention unsupported by reasonable suspicion that criminal activity was afoot; and that defendant's subsequent conduct—nervous behavior, movement behind his companion, and reaching into a jacket—could thus not form the basis for reasonable suspicion justifying the search of defendant's person. *Id.* at 1061. The Court disagreed and stated while protective searches normally occur during investigative detentions, "it need not follow from the fact that [because defendant's companion] was momentarily seized during the protective frisk that the frisk was also an investigative stop." *Id.* at 1062.

{40} It is true that no reasonable suspicion existed to support a *Terry* stop search of Jason L. prior to the discovery of weapons on Filemon M. However, even during the search of Filemon M., Jason L. was not subject to a seizure that would invoke Fourth Amendment protections. It is clear from the officers' testimony that only Filemon M.'s conduct had attracted their attention and that they noticed no suspicious conduct by Jason L., aside from previous observations that he was wearing a jacket during a July night, and had changed the pace of their walk after Filemon M. saw the officers. In addition, during the search, Jason L. was standing a short distance away from the activities occurring around Filemon M. and there is no evidence that during that time, he was commanded to move to a certain area or remain where he was. In contrast, Officer Jordan's testimony reveals that Jason L. "was standing right in front of the patrol car just like Officer McDaniel *asked* him to do." In short, the officers' actions could not have led Jason L. to reasonably believe that he was not free to terminate the encounter; the encounter was not transformed into an investigatory detention by the search of Filemon M.

{41} The *Davis* Court states that "[t]he only relevant question is whether [the officer] reasonably concluded, after pat-searching [the defendant's companion], that officer safety justified a pat-down search of [the defendant] because 'criminal activity may be afoot and [Davis] may be armed and presently dangerous.'" *Id.* at 1063 (citing *Terry,* 392 U.S. at 30, 88 S.Ct. 1868). As such, I

would find that in view of the totality of the circumstances, it was objectively reasonable for the officer to conduct a protective frisk of Jason L after discovering weapons on Filemon M. The protective pat-down of Jason L. was a momentary intrusion; however, had the search yielded no weapons, he would still have been free to leave and terminate the encounter with the officers. Although in *Davis,* the defendant's nervous conduct and suspicious behavior was sufficient to form the basis for the officer's reasonable conclusion that he was armed and dangerous, *id.* at 1063, in the present case, sufficient justification for a protective frisk, resulted after Officer McDaniel discovered two weapons in possession by Jason L.'s companion.

{42} During the suppression hearing, the officers repeatedly testified that they conducted a pat-down search of Jason L. after discovering two weapons on Filemon M. for purposes of officer safety. The Court of Appeals cites to cases standing for the general proposition that officers may conduct a search for weapons on the associate of a person lawfully arrested, where that associate is a potential threat to officer safety. *In re Jason L.,* 1999–NMCA–095, ¶ 16, 127 N.M. 642, 985 P.2d 1222. In *Lewis v. United States,* the Court stated, "The fact that [appellant's] companion had just been arrested for unlawful possession of a firearm" and because both persons appeared to be more than just casual acquaintances, based on the officers observations of them walking together before approaching them "is a particularly compelling justification for the frisk of appellant." 399 A.2d 559, 561 (D.C.1979). I believe that the Court's commentary captures the essence of the question at issue in this case:

> In *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 ... (1967), the Court affirmed the right of a limited search "to assure * * * that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him" despite the absence of probable cause for an arrest. We think that *Terry* recognizes and common sense dictates that the legality of such a limited intrusion into a citizen's personal privacy extends to a criminal's companions at the time of arrest. It is inconceivable that a peace officer effecting a lawful arrest ... must expose himself to a shot in the back from defendant's associate because he cannot on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance.

Id.; accord United States v. Poms, 484 F.2d 919, 922 (4th Cir.1973) (accepting reasoning in *United States v. Berryhill,* 445 F.2d 1189, 1193 (9th Cir.1971), that "[a]ll companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed."); *People v. Garner,* 50 Ill.App.3d 294, 8 Ill.Dec. 357, 365 N.E.2d 595, 596 (1977) ("Although a police officer may not search a person simply because he is in the company of another person lawfully arrested ... he is not precluded from conducting a 'pat-down' of the companions of that person in order to protect himself or others, who may be nearby."). Thus, I agree with the Court of Appeals' reasoning that "even if the companion is not sufficiently suspected so that he could be legitimately seized for investigation, the circumstances may nonetheless indicate that the officer should take appropriate precautions." *Jason L.,* 1999–NMCA–095, ¶ 16, 127 N.M. 642, 985 P.2d 1222 (citing 4 Wayne R. LaFave, *Search and Seizure* § 9.5(a), at 263 (3d ed.1996) (internal quotes omitted).

{43} During a highly dangerous situation created by the discovery of two weapons on an individual lawfully searched, officers must be able to secure the immediate vicinity without pause. I find it entirely reasonable that the officers conducted a search of Jason L. precisely for the stated reason of officer safety. After Officer McDaniel completed the first pat-down of Filemon M., found a weapon and secured it in the patrol car, Filemon M. then alerted the officers that they had failed to find his other concealed weapon stating, "I have another one on the other side." Officer Jordan then found the second weapon on Filemon M. The fact that the officers testified that up until the search of Filemon M., that Jason L. was not acting suspiciously and that they did not have rea-

son to suspect that Jason L. was armed and dangerous, does not prevent the officers from taking appropriate precautions to protect themselves and secure the area by conducting a limited pat-down on Jason L. for weapons.

{44} The district court's conclusion that Jason L. was improperly seized is not supported by substantial evidence. I would find that the initial encounter of the officers with the youths was consensual in nature. As such, I would hold that the officer's protective frisk of Jason L. was objectively reasonable having just discovered two weapons on his companion and consequently that Jason L.'s Fourth Amendment right to be free from unreasonable searches and seizures was not violated. Therefore, I would reverse the district court's order suppressing the weapons.

2 P.3d 871

2000-NMCA-037

Rebecca SITTERLY, as Conservator for Emily Seten, Plaintiff–Appellee,

v.

Muriel T. MATTHEWS, as Trustee for the Muriel T. Matthews Trust, Defendant/Counterclaimant–Appellant.

No. 19,577.

Court of Appeals of New Mexico.

March 7, 2000.

Certiorari Denied, No. 26,258, April 27, 2000.

Kim E. Kaufman, Rebecca Sitterly, Albuquerque, for Appellee.

Peter H. Johnstone, Law Office of Peter H. Johnstone, Albuquerque, for Appellant.

OPINION

PICKARD, Chief Judge.

{1} Rebecca Sitterly (Sitterly), as conservator for Emily Seten (Seten), filed suit against Muriel T. Matthews (Matthews), as Trustee for the Muriel T. Matthews Trust (Trust), to vacate an easement on Seten's property that ran in favor of the Trust's property (Matthews Property). At trial, Sitterly argued the easement for ingress and egress should be vacated because (1) the purpose for the easement ceased to exist when the Trust obtained another means of accessing the Matthews Property and (2) the Trust abandoned the easement not only by failing to use it, but also by erecting, or allowing Seten to erect, a fence that made it impossible to use.

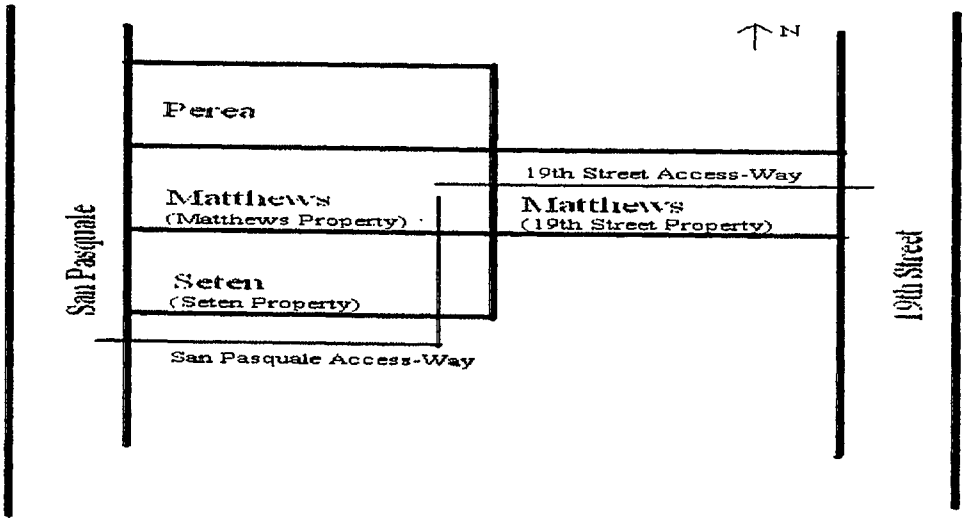
{2} Matthews counterclaimed that Sitterly, by filing suit against her, was in breach of contract because Matthews and Seten had previously executed an agreement whereby each party allegedly agreed to not sue the other over any dispute concerning their respective properties. On the easement issues, Matthews argued that (1) the cessation of purpose doctrine does not apply in this case because the easement can still be used for

the purpose of ingress and egress and (2) the easement has not been abandoned, but merely neglected or temporarily suspended.

{3} The trial court denied Matthews' counterclaim on the ground that the parties did not intend to bar this lawsuit, which involves an easement dispute, by agreeing to resolve the prior dispute, which involved a property transfer allegedly effectuated by fraud and undue influence. The trial court terminated the easement on both grounds set forth in Sitterly's complaint. We affirm.

BACKGROUND

{4} The property at issue (Nuanes Property) originally belonged to the Nuanes family. The Nuanes Property was bounded on its north, east, and south sides by other residences, and it was bounded on its west side by a public street (San Pasquale). At some point, the Nuanes family split its property into a north parcel (now the Matthews Property) and a south parcel (now the Seten Property), both of which contained houses occupied by Nuanes family members. The house fronts were located very close to San Pasquale, so the Nuaneses had to park their vehicles in the backyards of their respective parcels. The diagram below shows the location of the properties.



{5} At the time when the Nuanes family split their property into two parcels, the backyard to the north parcel could only be accessed from San Pasquale. The San Pasquale access-way required the north parcel's owners to travel along the south side of the residence on the south parcel, across the backyard of the south parcel, and into the backyard of the north parcel (see diagram). Although the San Pasquale route was inconvenient, the Nuanes family used it to access the backyard of its north parcel as a matter of necessity.

{6} In the 1940s, the Love family obtained the south parcel by tax deed. The tax deed did not expressly reserve an easement for ingress and egress across the south parcel, but the Nuaneses continued to use the San Pasquale route to access the north parcel.

{7} In 1961, the Love family transferred the south parcel to Seten's trustee. The deed reserved a 12–foot easement across the south parcel for ingress and egress for the benefit of the owners of the north parcel who were still the Nuanes family. In furtherance of this transfer, the Love family brought suit against the Nuanes family and others to vacate any existing easement on the south parcel.

{8} In 1962, the trial court entered an amended and modified final decree in which it imposed a 12–foot easement, for ingress

and egress, in favor of the Nuanes family. Four years later, the Nuanes family brought a quiet title suit against several parties, including Seten's trustee. The district court affirmed the decree it had entered in the 1961 Love lawsuit.

{9} In 1988, Seten, who was 87 years old and of questionable competence, transferred the Seten Property to a person who two years later conveyed it to the Trust. In August 1990, the Trust purchased the Matthews Property for the purpose of converting the residence located on it into apartments. One month later, the Trust purchased the property to the east side of the Matthews Property (19th Street Property) for the purpose of providing its apartment tenants with easier, safer, and more convenient access to the Matthews Property. After the Trust purchased the 19th Street Property, the Matthewses and their tenants exclusively used the 19th Street access-way for ingress and egress to the backyard of the Matthews Property.

{10} In late 1991 or early 1992, Muriel Matthews erected, or permitted Seten to erect, a fence between the Matthews Property and the Seten Property. The fence completely blocked the easement, making it impossible for vehicles to ingress and egress from the Seten Property to the rear of the Matthews Property. At the time the fence was erected, the easement had no longer been needed or used for more than one year because of the more convenient, less circuitous route provided by the 19th Street access-way.

{11} In 1994, the Trust transferred the Seten Property by deed to another trust. Later that year, a conservator was appointed for Seten, and he filed suit on Seten's behalf against various Matthews entities in order to cancel Seten's transfer to the Trust on the grounds that it was procured by fraud and undue influence. This lawsuit was settled (1995 Agreement) three months later. Under the terms of the 1995 Agreement, the Seten Property was returned to Seten. The signatories to the 1995 Agreement specifically and mutually released each other from any claims which have or may develop "from the facts or issues involved in this lawsuit." Sitterly acted as the conservator's legal counsel in this matter.

{12} In 1996, Sitterly was appointed to serve as Seten's conservator at a conservatorship proceeding. In 1997, Sitterly filed suit in order to extinguish the easement because it reduced the value of the Seten Property.

DISCUSSION

I. PRIOR RELEASE

{13} At trial, Matthews asked the trial court to dismiss Sitterly's complaint on the ground that by signing the 1995 Agreement, Matthews and Seten had agreed to not sue each other over any dispute concerning their respective properties. The trial court denied Matthews' request on the ground that the parties did not intend to bar the instant lawsuit, which involves an easement dispute, by agreeing to resolve the earlier dispute, which involved a property transfer allegedly effectuated by fraud and undue influence.

{14} On appeal, Matthews claims the 1995 Agreement is unambiguous and thus argues that the trial court erred when it looked beyond the four corners of the contract and considered the intentions of the parties. Alternatively, Matthews claims that if the 1995 Agreement was ambiguous, the trial court erred by concluding that the parties, in signing the 1995 Agreement, did not intend to bar the instant lawsuit.

{15} We must interpret the 1995 Agreement, along with its release provisions, in the same way that we would interpret any other contract. *See Ratzlaff v. Seven Bar Flying Serv., Inc.*, 98 N.M. 159, 162, 646 P.2d 586, 589 (Ct.App.1982). Whether a contractual provision is ambiguous is a question of law, which we review de novo on appeal. *See Mark V, Inc. v. Mellekas*, 114 N.M. 778, 782, 845 P.2d 1232, 1236 (1993).

{16} In the case at bar, the 1995 Agreement is very broadly worded in that it purports to release the parties from liability for a vast range of claims and causes of action. However, it also limits its application to the claims contained in or developed from the facts or issues involved in that lawsuit. It is not clear from the 1995 Agreement just

what facts and issues were involved in that lawsuit. As a result, the scope of the release created by the 1995 Agreement is ambiguous. *See id.* at 781–82, 845 P.2d at 1235–36 (concluding that ambiguity exists when a contract is reasonably susceptible of different constructions). In order to resolve this ambiguity, a court may look not only to the language contained in the 1995 Agreement, but also to the circumstances surrounding its execution in an attempt to determine as a factual matter the intent of the parties. *See id.*

{17} At trial, Sitterly testified that she did not intend to address in the 1995 Agreement the easement issue presented by her complaint in this lawsuit because she sought only the cancellation of Seten's transfer in the 1995 Agreement and nothing more. According to Sitterly, the earlier lawsuit sought relief on the narrow ground that Leone Matthews had obtained the Seten Property through fraud and undue influence. According to Matthews' brief, "[r]ather than litigate the matter, the parties agreed to settle the litigation by Leone Matthews returning the property deeded to her by Emily Seten to the Conservator. . . ."

{18} Sitterly acknowledged before the trial court that she referred to the easement in the 1995 Agreement, but she testified that she did so only for the purpose of ensuring that Seten received the same description of real property that Leone Matthews had taken in the Seten Transfer. Sitterly also testified that the easement was so far removed from her consideration at the time she drafted the 1995 Agreement that she did not even know where the easement was located. The trial court found that her lack of knowledge was reasonable because the easement was not clearly described in the deed, and there was no indication on the property, itself, of the existence of any easement.

{19} Based on Sitterly's testimony, the trial court found that the earlier lawsuit sought the return of Seten's property and did "not involve any allegation concerning or issue involving . . . the ultimate abandonment of or cessation of purpose of the easement across the Seten Property." The trial court's finding is supported by substantial evidence. *See Landavazo v. Sanchez,* 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990) (ruling that substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion).

{20} Matthews' retort is that she also testified at trial and her testimony reflects her understanding that, in signing the 1995 Agreement, she terminated "any and all claims or causes of action that could be brought by [Sitterly] against [Matthews] in regard to the property. . . ." We reject Matthews' claim on the grounds that she essentially asks us to reweigh the evidence and reassess the witnesses' credibility. *See Sanchez v. Homestake Mining Co.,* 102 N.M. 473, 476, 697 P.2d 156, 159 (Ct.App.1985) (ruling that when considering a substantial evidence claim, we may not reweigh the evidence or substitute our judgment for the factfinder). Accordingly, we affirm this issue.

II. EASEMENT

{21} At trial, Sitterly asked the trial court to vacate the easement in favor of the Matthews Property on the grounds that (1) the purpose for the easement ceased to exist when the Trust obtained another means of accessing its property and (2) the Trust abandoned the easement not only by failing to use it, but also by erecting, or permitting Seten to erect, a fence that made it impossible to use. *See* 28A C.J.S. *Easements* § 119 (1996) (footnotes omitted) (stating that an "easement granted for a particular purpose terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment"). The trial court granted Sitterly's request for relief on both grounds set forth in her complaint. We review each basis for relief in turn.

A. *Standard of Review*

{22} The issues of whether the underlying purpose of an easement has ceased to exist and whether an easement has been abandoned are questions of fact. *See Olson v. H & B Properties, Inc.,* 118 N.M. 495, 498, 882 P.2d 536, 539 (1994) (interpreting the trial court's role as factfinder in a cessation

of purpose case); *Ritter–Walker Co. v. Bell*, 46 N.M. 125, 128, 123 P.2d 381, 383 (1942) (ruling the trial court's determination on abandonment of easement issue subject to substantial evidence standard). We review factual questions for substantial evidence. *See Baker v. Benedict*, 92 N.M. 283, 287, 587 P.2d 430, 434 (1978). Substantial evidence is relevant evidence that a reasonable mind would find adequate to support a conclusion. *See Landavazo*, 111 N.M. at 138, 802 P.2d at 1284. Additionally, we review the trial court's conclusions of law de novo to determine whether the trial court correctly applied the law to the facts. *See Jacob v. Spurlin*, 1999–NMCA–049, ¶ 7, 127 N.M. 127, 978 P.2d 334.

B. *Cessation of Purpose*

{23} An easement created to serve a particular purpose terminates when the underlying purpose for the easement ceases to exist. *See Olson*, 118 N.M. at 498, 882 P.2d at 539. In a cessation of purpose case, the trial court must first determine why the easement was created. *See id.* If the trial court determines that the purpose no longer exists, then it may terminate the easement. *See id.*

1. *Purpose*

{24} The trial court determined that the easement in favor of the Matthews Property was created for the purpose of ingress and egress as a matter of necessity. The trial court based its determination on the following uncontested facts:

> 3. Both the Matthews Property and the Seten Property were at one time owned by a common grantor, the Nuanes family, which purchased the property in 1902. At some undeterminable time, the property was split into a north and south parcel, both occupied by Nuanes family members....
>
> 4. The north parcel (now the Matthews Property) had no access from 19th Street directly to the rear, and had no car access from San Pasquale except by the circuitous route of going along the south side of the residence on the south parcel (now the Seten property), across the backyard of the south parcel, and into the backyard of the Nuanes' north parcel. By necessity, the Nuanes family used this method of access to get to the rear of their residence, which otherwise would have been completely inaccessible.
>
> 5. R.E. Love and Dovie May Love obtained the Seten Property by a tax deed which did not reserve any easement for any purpose, but the Nuanes family continued to use the access way....

{25} On appeal, Matthews attacks the trial court's finding that the easement was an easement by necessity. Matthews argues that in 1962, as a result of the quiet title action filed by the Love family against the Nuanes family and others, the district court confirmed the easement as an easement by grant. The thrust of Matthews' argument appears to be that if the easement can be characterized as an easement by grant, then the trial court misapplied the cessation of purpose doctrine. *See Valicenti v. Schultz*, 27 Misc.2d 801, 209 N.Y.S.2d 33, 37 (1960) ("[W]hen we are dealing with an easement by grant, the fact that it may have also qualified as an easement of necessity, does not detract from its permanency as a property right, which survives the termination of the necessity.").

{26} We reject Matthews' argument because, as stated above, the Nuanes family did not take any easement by grant when the Love family obtained the south parcel by tax deed in the 1940s. We also reject Matthews' argument insofar as it suggests that the original conveyance to the Love family was transformed from an easement by necessity to an easement by grant merely because subsequent conveyance instruments contained easement descriptions.

{27} The trial court's finding that the easement in favor of the north parcel was implicitly reserved as a matter of necessity is supported by substantial evidence. *See Hurlocker v. Medina*, 118 N.M. 30, 31, 878 P.2d 348, 349 (Ct.App.1994) (ruling that easements by necessity arise from implied grant or reservation of right of ingress and egress to landlocked parcel); Black's Law Dictionary 528 (7th ed.1999) (defining "reserved easement" as "[a]n easement created by the

grantor of real property to benefit the grantor's retained property and to burden the granted property"). Furthermore, substantial evidence supports the trial court's determination that the "easement across the Seten Property began as an easement by necessity which was [merely] incorporated into the deeds relating to both properties by judicial decrees of 1961 and 1966." The district courts entered these decrees at a time when the San Pasquale route was still the only access-way to the north parcel's backyard. There is no evidence in the decrees that causes us to believe that the district courts intended to expand the easement by necessity to anything more. As a consequence, subsequent takers to the north parcel only received an easement by necessity. *See* 28A C.J.S. *Easements* § 110 (1996) (stating that a grantee "can obtain no greater easement than the grantor had acquired"); *Abo Petroleum Corp. v. Amstutz*, 93 N.M. 332, 335, 600 P.2d 278, 281 (1979) (holding that grantor cannot convey more than what is originally acquired).

2. *Cessation*

{28} After finding that the easement was created for the purpose of ingress and egress as a matter of necessity, the trial court then determined that the easement's purpose ceased to exist when the Trust purchased the 19th Street Property. The trial court based its determination on the following uncontested fact:

> 17. On September 25, 1990, the Muriel T. Matthews Trust purchased the 19th Street Property. The stated purpose for the purchase was to provide better access to the Matthews Property.... The 19th Street access was a direct route into the Matthews Property, was safer and was more convenient for most routes into the area.

{29} The trial court's determination that the easement was rendered unnecessary when the Trust purchased the 19th Street Property is supported by substantial evidence. We are less certain, however, about accepting the trial court's determination that the easement's purpose ceased to exist when the Trust obtained an alternative means of accessing the Matthews Property. *See Crabbe v. Veve Assocs.*, 150 Vt. 53, 549 A.2d 1045, 1048 (1988) ("Although [the easement holders] have access to the road by means of an alternative, circuitous route, this does not mean that the purpose of the easement[ ] has ceased to exist.").

{30} Notwithstanding our reservation in applying the cessation of purpose doctrine to the case at bar because the easement here was not an easement by grant, we nevertheless uphold the trial court's decision on the ground that the easement, as an easement by necessity, became a nullity when the Trust obtained another means of ingress and egress. *See* 25 Am.Jur.2d *Easements and Licenses* § 108 (1996) ("[A]n easement of necessity lasts only as long as the necessity continues."). Sitterly argued throughout the course of this case that the easement was created as a matter of necessity and that the necessity came to an end when the Trust purchased the 19th Street Property; thus, we may uphold the trial court's decision to vacate the easement on that basis. *See Manouchehri v. Heim*, 1997–NMCA–052, ¶ 13, 123 N.M. 439, 941 P.2d 978 ("When to do so would not be unfair to the appellant, we can affirm a ruling by the trial court on a ground other than what was expressed by that court."). We next consider whether the trial court could also have properly granted Sitterly's request for relief on the ground of abandonment.

C. *Abandonment*

{31} The owner of the dominant property may abandon the right to an easement. *See Posey v. Dove*, 57 N.M. 200, 211, 257 P.2d 541, 548 (1953). In order to abandon such an easement, the owner must evince a clear and unequivocal intention to do so. *See id.* The owner's "intention may be evidenced by acts as well as words[,] but where an act is relied on as the proof, it must unequivocally indicate such intention." *Id.*

{32} The trial court found that the Trust evinced a clear and unequivocal intention to abandon the easement based on the following uncontroverted facts:

> purchase of the 19th Street Property which afforded safer, more convenient and more direct access to the Matthews Property; use of the new access for ingress and egress since shortly after September, 1990;

instructions to tenants of the Matthews Property to use the 19th Street Property for ingress and egress; statements of John Matthews that the 19th Street Property was being purchased to provide access to the [Mathews] Property; tearing down a fence, shrubbery and structures which separated the Matthews Property from the 19th Street Property in order to create the new access; construction of or consent to the construction of a fence which completely blocked the easement on the Seten Property; failure to take any action to keep the easement open; and allowing the easement to be completely obstructed for many years prior to trial by the gate on the Seten Property and by automobiles of Ms. Seten's tenants.

{33} Matthews does not contest the trial court's numerous findings in support of its determination, but instead only disputes whether those findings provide substantial evidence of abandonment. Yet from the uncontroverted facts, we hold that the trial court could reasonably conclude that the Trust clearly and unequivocally abandoned the easement. *See Kelly v. Smith*, 58 Misc.2d 883, 296 N.Y.S.2d 451, 452 (Sup.Ct. 1969) (finding that the act of closing off of an easement by a flower bed evinced the unequivocal intention to abandon the easement, as did the act of purchasing, then using of another parcel as the sole means of ingress and egress); *Sieber v. White*, 366 P.2d 755, 759–60 (Okla.1961) (holding that the trial court's finding of abandonment was not against the weight of the evidence where an iron railing fence was erected on the easement and the lot was combined with another one so that another means of access was obtained); *see also Montoya v. Torres*, 113 N.M. 105, 109, 823 P.2d 905, 909 (1991) (stating substantial evidence standard).

CONCLUSION

{34} For the reasons stated, we affirm.

{35} **IT IS SO ORDERED.**

APODACA, and WECHSLER, JJ., concur.

2 P.3d 878

2000-NMCA-046

STATE of New Mexico, Plaintiff–Appellee,

v.

Remigio Pena MORALES, Defendant–Appellant.

No. 19,989.

Court of Appeals of New Mexico.

April 6, 2000.

Certiorari Denied, No. 26,306, May 24, 2000.

Patricia A. Madrid, Attorney General, Max Shepherd, Assistant Attorney General, Albuquerque, for Appellee.

Phyllis H. Subin, Chief Public Defender, Carolyn R. Glick, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

WECHSLER, Judge.

{1} Defendant was convicted of two counts of forgery and appeals the district court's judgment and sentence. He argues that: (1) the State failed to prove with substantial evidence the knowledge and intent elements of forgery; (2) the trial court erred in admitting into evidence prior statements of Defendant's mother for impeachment purposes; (3) the trial court erred in refusing Defendant's requested jury instruction concerning mistake of fact; and (4) cumulative error deprived him of a fair trial. We affirm.

Facts and Procedural History

{2} On December 1, 1996, Defendant cashed a check in the amount of $45 at Albertson's. The check was drawn on the account of Esther Peña, Defendant's mother,

and was ostensibly signed by Ms. Peña. Western Commerce Bank returned the check to Albertson's advising that the account had been closed. The account was closed September 4, 1992. Albertson's posted the returned check which had the notation "Account Closed" on its face in its customer service area. On December 3, 1996, when Defendant sought to cash a second check at Albertson's on the same account, the grocery manager, Thomas Ellis, would not approve the check for cashing. According to Mr. Ellis' testimony, he asked Defendant for identification and ultimately called the bank to confirm that the account was closed. Mr. Ellis instructed a clerk to call the police. When Defendant learned that the police had been called, he asked Mr. Ellis to return his identification and ran out of the store. Another Albertson's employee testified that Defendant ran when Mr. Ellis asked Defendant to go to a back room and sought to take hold of Defendant. Mr. Ellis did not return Defendant's identification.

{3} Mr. Ellis testified that he observed Defendant as Defendant fled from the store. According to Mr. Ellis, Defendant ran away from the store at a "dead run," pursued by Mr. Ellis, crossed two streets, and ran down an alley located behind a store. Mr. Ellis further testified that he saw Defendant dive into the passenger side window of a waiting car which then drove off.

{4} Ms. Peña testified as part of the State's case. She stated during direct and cross-examination that she had authorized Defendant to sign checks when she had checking accounts. She had occasionally told Defendant to cash checks made payable to her by other persons and had mistakenly given Defendant permission to sign her name on those checks. At the time of the transactions with which Defendant is charged, she was not aware of which checks he was cashing and thought he was cashing third-party checks. She did not authorize Defendant to cash checks on a closed bank account, or tell him she had a closed account. She testified that she did not remember telling police officers that she had a telephone conversation with a grocery store employee whom she told that Defendant did not have authority to cash her check. She also did not remember telling a police officer that she did not authorize Defendant to cash any of her checks.

Sufficiency of the Evidence

[redacted] {5} Defendant contends that the State did not present sufficient evidence to prove that Defendant knew the two checks had false signatures or that Defendant had an intent to defraud. Both knowledge and intent are essential elements of forgery. *See* NMSA 1978, § 30–16–10(B) (1963). The trial court instructed the jury that the State had the obligation to prove beyond a reasonable doubt as to each count that "[D]efendant gave or delivered to Albertson's a check knowing it to have a false signature intending to injure, deceive or cheat Albertson's or another." We analyze Defendant's sufficiency of the evidence claim by inquiring whether there was substantial evidence of each of the elements of forgery for both checks to support a guilty verdict beyond a reasonable doubt. *See State v. Duran,* 107 N.M. 603, 605, 762 P.2d 890, 892 (1988). The evidence may be direct or circumstantial. *See id.*

[redacted] {6} Defendant argues that the only evidence of knowledge or intent presented by the State was the evidence of his flight from the Albertson's store. Defendant does not dispute that he fled Albertson's when he learned that the police had been called. Rather, Defendant takes the position that the probative value of evidence of flight is so limited that it cannot provide substantial evidence of the forgeries in this case. In addition, Defendant offered an alternative reason for his flight: that he had failed to pay traffic tickets and complete community service.

{7} Evidence of flight is relevant evidence in a criminal case "because it tends to show consciousness of guilt." *State v. Smith,* 89 N.M. 777, 783, 558 P.2d 46, 52 (Ct.App.), *rev'd on other grounds,* 89 N.M. 770, 558 P.2d 39 (1976). Our appellate cases express concern with the probative value of evidence of flight as to knowledge and intent in the absence of other circumstances. *See State v. Rodriguez,* 23 N.M. 156, 178, 167 P. 426, 433 (1917) (holding that jury may draw an inference of guilt from flight or concealment if the evidence is offered in connection with other

circumstances); *State v. Kenny,* 112 N.M. 642, 646, 818 P.2d 420, 424 (Ct.App.1991) (stating that even cumulative evidence of flight is admissible to corroborate other evidence). In this case, flight is not the only circumstantial evidence of Defendant's knowledge and intent that constitutes substantial evidence to support the verdicts.

{8} First, Defendant's mother's testimony could have provided a basis for the jury to conclude that Defendant did not have the authority to sign the checks and knew that he lacked the authority. *See State v. Vigil,* 87 N.M. 345, 350, 533 P.2d 578, 583 (1975) ("The determination of the weight and effect of the evidence, as well as inferences to be drawn from both direct and circumstantial evidence, are matters reserved for the determination of . . . the trial jury.") Defendant admits that his mother's testimony "was sometimes conflicting" and "ambiguous." At trial, Ms. Peña acknowledged her testimony at the preliminary hearing that she did not give Defendant authority to cash her checks. This testimony directly contradicted other testimony she gave concerning the checks from other persons that she had in her possession. She consistently testified that she did not give Defendant authority to sign checks on her bank account after it had been closed. The State was further able to substantially impeach her testimony with the testimony of two police officers. From the inconsistencies in Ms. Peña's testimony, the jury could reasonably decide not to credit her testimony concerning Defendant's authority to cash or sign her checks. *See State v. Ortiz–Burciaga,* 1999–NMCA–146, ¶ 22, 128 N.M. 382, 993 P.2d 96 ("It is the 'exclusive province of the jury' to resolve factual inconsistencies in testimony." (quoting *State v. Orgain,* 115 N.M. 123, 126, 847 P.2d 1377, 1380 (Ct.App.1993))). The jury could thus reasonably conclude that Defendant did not have the authority to cash or sign the checks and knew that he lacked the authority to do so.

{9} Second, in contrast with the cases cited by Defendant, we have more than evidence of mere spontaneous flight in this case. *See Rodriguez,* 23 N.M. at 163, 167 P. at 427 (stating that defendant fled while being brought to the courthouse for trial); *Kenny,* 112 N.M. at 645, 818 P.2d at 423 (stating that the defendant fled after police stopped the car in which he was riding). The testimony of Mr. Ellis describes not only the fact of flight, but also the circumstances of the flight. The circumstances included Defendant's running to a car which was hidden from view behind another store away from Albertson's and driven by another person. The car took off immediately after Defendant jumped into the passenger window.

{10} The circumstances surrounding Defendant's flight are sufficient for the jury to reasonably conclude that Defendant was conscious of his guilt with regard to the checks and had a car waiting. Thus, the circumstances surrounding Defendant's flight in this case show not only spontaneous flight, as was the case in *Rodriguez* and *Kenny,* but also show evidence of a planned escape.

{11} Defendant claimed that he did not flee Albertson's because of the check incident, but rather, he fled because of outstanding traffic violations. Indeed, Defendant's explanation of his flight is relevant evidence. *See Rodriguez,* 23 N.M. at 178, 167 P. at 433 (stating that absence of explanation or reasons or motives prompting flight may be considered by jury). However, in this case, Defendant's alternative motive provides a justification for spontaneous flight only. It does not explain why he needed to prepare to flee by having a car waiting for him in the alley. The jury was free to reject Defendant's reasons for his flight and could reasonably conclude that he expected to flee the Albertson's store that night. *See State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988) (recognizing that the jury is free to reject a defendant's version of the facts).

{12} Moreover, the jury also had before it evidence of Defendant's successful passing of the December 1, 1996 check. This evidence, in turn, provided a basis for understanding Defendant's attempt to pass a check on December 3, 1996. The jury was able to consider this evidence along with Ms. Peña's conflicting testimony about her authorization and Defendant's flight in order to draw an inference about Defendant's knowledge that he lacked the authority to sign or cash the checks. *See Vigil,* 87 N.M. at 350, 533 P.2d

at 583 (stating that inferences to be drawn from the evidence are matters for the jury). From all this evidence, the jury could reasonably conclude that Defendant took the actions he did on December 3, 1996 because he knew he lacked the authority to sign both the December 1, 1996 and December 3, 1996 checks.

Impeachment

{13} Over Defendant's objection, the trial court permitted the testimony of Officer Kelley Lowe and Sergeant David Edmondson to impeach Ms. Peña. Defendant contends that the officers' testimony was not inconsistent with the testimony of Ms. Peña and therefore was not permissible for impeachment purposes.

{14} Officer Lowe testified that Ms. Peña told him that she had received a telephone call from the grocery store inquiring about the cashing of one of her checks. He also testified that Ms. Peña told him that she did not authorize the check. Officer Edmondson testified that Ms. Peña told him that when called by a grocery store employee, she said that she had not given Defendant authority to sign her check.

{15} Defendant acknowledges that Ms. Peña testified inconsistently at trial. As emphasized by Defendant on appeal, Ms. Peña's testimony included statements that Defendant had authority to cash her checks even though she may have qualified her testimony to include only the signing of checks when she had checking accounts. Ms. Peña testified that she did not remember telling a police officer that Defendant did not have authority to cash her checks or that she had made a similar statement to a grocery store employee.

{16} The Rules of Evidence permit a party to impeach the credibility of a witness with evidence that the witness made a statement which is inconsistent with the witnesses' trial testimony. *Cf. State v. Gutierrez,* 1998–NMCA–172, ¶¶ 8, 10, 126 N.M. 366, 969 P.2d 970 (holding that prior inconsistent statement not under oath is inadmissible as substantive evidence); *see also* Rule 11–613 NMRA 2000. The officers' testimony about Ms. Peña's statements pointed out the inconsistencies in her testimony. The trial court did not abuse its discretion in admitting the officers' testimony. *See State v. Olivas,* 1998–NMCA–024, ¶ 23, 124 N.M. 716, 954 P.2d 1193 (stating standard of review for decision to allow prior inconsistent statement as abuse of discretion). Nor did the trial court abuse its discretion if, as Defendant argues, the police officers' testimony misrepresented what Ms. Peña told them. The trial court did not limit Defendant's ability to cross-examine the officers or to argue any discrepancies in the testimony to the jury.

Requested Mistake–of–Fact Jury Instruction

{17} Defendant asserts that the trial court erred in denying Defendant's requested jury instruction concerning mistake of fact. Defendant argued that he honestly believed that he wrote the check on an open bank account of his mother but was mistaken in his belief. We have addressed this issue in *State v. Griscom,* 101 N.M. 377, 378–79, 683 P.2d 59, 60–61 (Ct.App.1984) in the context of fraud. In this case, as in *Griscom,* the jury instructions on the elements of forgery required the jury to find that Defendant intended to injure or defraud. The trial court adequately instructed the jury, and Defendant had full opportunity to explain to the jury his honest belief and that he was mistaken and argue to the jury that he did not intend to defraud Albertson's.

Cumulative error

{18} Because we conclude that there was no error, there cannot be cumulative error. *See State v. McGuinty,* 97 N.M. 360, 364, 639 P.2d 1214, 1218 (Ct.App.1982) (stating that cumulative error does not arise when there are no errors and the defendant has received a fair trial).

Conclusion

{19} For the above stated reasons, we affirm the judgment and sentence of the district court.

{20} **IT IS SO ORDERED.**

SUTIN and KENNEDY, JJ., concur.

2 P.3d 883

2000-NMCA-049

STATE of New Mexico, Petitioner–Appellee,

v.

ADAM M., Respondent–Appellant.

No. 20,329.

Court of Appeals of New Mexico.

April 20, 2000.

Certiorari Denied June 10, 2000.

Patricia A. Madrid, Attorney General, M. Victoria Wilson, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Lisabeth L. Occhialino, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

WECHSLER, J.

{1} Adam M. (Child) appeals the children's court's judgment and disposition in two consolidated delinquency proceedings. At the dispositional hearing, the children's court ordered Child committed to the custody of Children, Youth, and Family Department (CYFD) for two consecutive two-year commitments. Because the Children's Code (the Code) does not contemplate consecutive commitments, we reverse and remand.

Factual and Procedural Background

{2} The petition in children's court proceeding JR 97–326–3, filed on June 13, 1997, alleged that Child committed assault with a deadly weapon. The children's court entered a consent decree on August 6, 1997, suspending the proceedings for the lesser period of six months or until CYFD released Child. It ordered Child to sign a probation agreement with CYFD for the suspension period. On November 21, 1997, the State filed a petition to revoke probation alleging that Child had violated various provisions of the probation agreement. On December 24, 1997, the children's court adjudged Child to be a delinquent child. Child entered an amended probation agreement, and the children's court continued Child's probation until January 7, 2000. On March 3, 1998, the State filed a second petition to revoke probation, again alleging that Child engaged in various violations of his probation agreement. Child entered a third probation agreement, and the children's court entered a judgment and disposition suspending a commitment to the custody of CYFD for an indeterminate period not to exceed two years and placing Child on probation for that period.

{3} On December 18, 1998, the State again filed a petition to revoke probation, asserting that Child raped a minor and

thereby violated his probation agreement under which he agreed not to commit any unlawful act. Later that same day, the State filed a separate petition in children's court proceeding JR 98-501-1 asserting that Child committed criminal sexual penetration and criminal sexual contact with a minor.

{4} The children's court accepted Child's no contest plea in a single document that related to both proceedings, JR 97-326-3 and JR 98-501-3. It held a single dispositional hearing on the two petitions. As its disposition, the children's court committed Child to the custody of CYFD for a period not to exceed two years in JR 97-326-3 and ordered a separate commitment to the custody of CYFD for a period not to exceed two years in JR 98-501-3. It ordered the two commitments to run consecutively. Child appeals the two commitments.

Authority of the Children's Court to Impose Consecutive Commitments

{5} The children's court's authority to impose a commitment is statutory. *See In re Angela R.*, 105 N.M. 133, 137, 729 P.2d 1387, 1391 (Ct.App.1986) (stating that children's court, as a court of limited jurisdiction, may only act in manner specifically authorized by statute). Thus, we look to the Code to determine whether the children's court has the authority to impose consecutive commitments. In doing so, we examine the Code "in its entirety and construe each part to achieve a harmonious result." *State v. Adam M.*, 1998-NMCA-014, ¶ 15, 124 N.M. 505, 953 P.2d 40. When possible, we give effect to the clear and unambiguous language of the Code. *See State v. Jonathan M.*, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990); *Adam M.*, 1998-NMCA-014, ¶ 15, 124 N.M. 505, 953 P.2d 40.

{6} Our examination of the Code does not reveal any authority for the children's court to order consecutive commitments for the same underlying behavior which is the subject of two separate petitions combined for disposition. NMSA 1978, § 32A-2-19(B)(2)(a)-(d) (1996) sets out the commitment options of the children's court for the disposition of an adjudicated delinquent offender. It includes only: (1) a short-term commitment of one year; (2) a long-term commitment of no more than two years; or (3) a commitment to age 21, unless sooner discharged, for a delinquent offender who committed a serious offense specified in the Code or a youthful offender as designated in the Code. The Code authorizes the children's court to order a disposition of a child found to be delinquent "for the supervision, care and rehabilitation of the child." Section 32A-2-19(B).

{7} The State contends that the children's court's authority to impose consecutive commitments extends from the common law which allowed a court the discretion to impose consecutive sentences involving an adult offender. According to the State, we are to construe the Code presuming that the legislature knows the common law and that the legislature intended the Code to be consistent with it. *See State v. Gabehart*, 114 N.M. 183, 185, 836 P.2d 102, 104 (Ct.App. 1992) (stating that repeal of common law is disfavored and found only when legislative intent is evident).

{8} However, the Code is distinct from the common law which did not make separate provisions for children. Additionally, the Code as written is entirely inconsistent with the judicial discretion under the common law to sentence a criminal offender convicted of multiple crimes to consecutive sentences. Under the Code, when a child is adjudicated a delinquent, the children's court enters a judgment making "a juvenile disposition." NMSA 1978, § 32A-2-18(A) (1996); *see also* § 32A-2-19(B). Indeed, the Code uses the word "sentence" only when referring to an "adult sentence" which, under the Code, may only be imposed upon a youthful offender or a serious youthful offender, neither of which applies in this instance. *See* NMSA 1978, § 32A-2-20(A) (1996) (discussing disposition of a youthful offender); NMSA 1978, § 32A-2-3(H) (1996) (defining serious youthful offender); *see also* § 32A-2-18(B) (discussing effect of a judgment resulting in an adult sentence for youthful or serious youthful offender). The distinct and deliberate use of these terms in the Code indicates the Code's intent to treat juvenile of-

fenders differently from adult criminals. *See Jonathan M.*, 109 N.M. at 790, 791 P.2d at 65 (stating requirement that court give effect to clear and unambiguous statutory language). In addition, the Code declares that a purpose of the delinquency act is the removal of children who commit delinquent acts from "the adult consequences of criminal behavior." NMSA 1978, § 32A–2–2(A) (1993).

{9} To be sure, the Code creates proceedings which, for the purposes of this case, are significantly different from criminal proceedings. Even though a delinquency petition may state several offenses, as distinguished from a criminal proceeding in which the court sentences the defendant separately for each charge which results in a conviction, the children's court may order only a single commitment on such petition. *See* § 32A–2–19(B). The State so concedes. Also in contrast with a criminal sentence which is set in duration, a long-term commitment to CYFD is indeterminate. *See* § 32A–2–19(B)(2)(b) (stating that long-term commitment is for no more than two years); *see also State v. Dennis F.*, 104 N.M. 619, 621, 725 P.2d 595, 597 (Ct.App.1986) (discussing distinction between criminal sentence and commitment under prior law). Moreover, after CYFD receives custody of a delinquent child by way of commitment, the child must be released before the commitment expires if the purposes of the commitment are met. *See* NMSA 1978, § 32A–2–23(C) (1995); *see also Adam M.*, 1998–NMCA–014, ¶ 4, 124 N.M. 505, 953 P.2d 40. The flexibility in the commitment procedures allows CYFD to accomplish the rehabilitative purposes of the Code. *See Adam M.*, 1998–NMCA–014, ¶ 4, 124 N.M. 505, 953 P.2d 40.

{10} The Code further addresses the rehabilitative purpose of a long-term commitment by permitting the children's court to extend its judgment of commitment for additional periods of one year each until the child reaches the age of twenty-one. This extension is authorized upon a finding that it "is necessary to safeguard the welfare of the child or the public interest." Section 32A–2–23(D). Thus, if CYFD's rehabilitative effort is incomplete, the Code provides a mechanism to continue the child's commitment. Importantly, however, the Code does not enable the children's court to order any greater period than two years for an initial commitment at a dispositional hearing for a delinquent child, regardless of the number of offenses that the child has committed. *See* § 32A–2–19(B)(2)(b). In other words, the children's court must exercise its discretion over a long-term commitment at the end of the commitment, after reviewing a record of the child's performance while committed, instead of at the beginning when the court has less information before it. The legislature has made this choice. Therefore, given the structure of the Code, with its rehabilitative purpose in delinquency dispositions, and its express manner of addressing delinquent children who are not rehabilitated during a long-term commitment, we do not read Section 32A–2–19 to include unexpressed authority for the children's court to order consecutive commitments. *See Jonathan M.*, 109 N.M. at 790, 791 P.2d at 65 (recognizing that construction of Children's Code requires consideration of its legislative purpose); *Adam M.*, 1998–NMCA–014, ¶ 15, 124 N.M. 505, 953 P.2d 40 (stating that the Children's Code should be read as a whole so that the legislative intent is properly realized).

{11} In addition, the fact that the State filed two separate petitions, one for probation violation and the other for the substantive offense, does not lead us to the conclusion that the children's court had authority to order consecutive commitments. The State had the right to file two separate petitions and pursue each to adjudication and disposition. *See In re Augustine R.*, 1998–NMCA–139, ¶ 7, 126 N.M. 122, 967 P.2d 462. But each petition has the same ultimate dispositional purpose: care, supervision, and rehabilitation. *See* § 32A–2–19. As we have discussed, after the disposition of commitment, the burden of rehabilitation shifts from the children's court to CYFD with the court having the subsequent opportunity to address commitment at the conclusion of a long-term commitment. Consecutive commitments would give rise to a presumption that CYFD will be unable to accomplish its objectives within the indeterminate commitment period. Thus, consecutive commit-

ments would short-circuit the Code-established procedure and undermine the balance between the children's court and CYFD that the Code contemplates.

{12} The State argues that consecutive commitments would not interfere with CYFD's role. Under the State's position, if CYFD determined that a delinquent child who had been placed in CYFD's custody for two consecutive commitments had rehabilitated prior to the completion of the first commitment, CYFD would release the child from the first commitment and the child would not complete serving even the first day of the second commitment. Nothing in the Code even intimates such a procedure. This silence is meaningful to us, indicating that the legislature did not intend such procedure because it did not contemplate consecutive commitments. Moreover, under the Code, the Juvenile Parole Board, not CYFD, decides whether to release a child prior to the completion of a commitment. *See* § 32A–2–23(A)(1) ("[T]he juvenile parole board pursuant to the Juvenile Parole Board Act [Chapter 32A, Article 7 NMSA 1978] has the exclusive power to parole or release the child."); *Dennis F.*, 104 N.M. at 621, 725 P.2d at 597 (stating authority under prior law).

{13} Instead, the Code unambiguously intends a disposition that includes a commitment for no more than an indeterminate period of two years. If separate dispositional hearings are held on each petition, the Code allows the children's court to enter a judgment which begins a long-term commitment from the entry of the judgment. *See In re Augustine R.*, 1998–NMCA–139, ¶ 7, 126 N.M. 122, 967 P.2d 462 (noting that children's court could properly adjudicate a child delinquent who had previously been adjudicated and committed to CYFD and commit the child to the custody of CYFD for an indeterminate period not to exceed two years). The effect of the second commitment is to extend CYFD's custody. *See id.* If, as in this case, a single dispositional hearing is held on more than a single petition, Section 32A–2–19(B) permits only a dispositional judgment which includes a single commitment.

Conclusion

{14} For the foregoing reasons, we find that the Code does not authorize the children's court to order consecutive commitments from one dispositional hearing, regardless of the number of petitions filed by the State. We therefore reverse and remand to the children's court for entry of an order consistent with this opinion.

{15} **IT IS SO ORDERED.**

ALARID and BOSSON, JJ., concur.

3 P.3d 128

2000-NMCA-044

STATE of New Mexico, ex rel., STATE HIGHWAY AND TRANSPORTATION DEPARTMENT OF NEW MEXICO, Petitioner,

v.

CITY OF SUNLAND PARK, Respondent–Appellant.

Paseo Del Norte Limited Partnership, a New Mexico limited partnership, Petitioner,

v.

City of Sunland Park, Respondent–Appellant,

v.

Board of County Commissioners of Doña Ana County, Intervenor–Appellee.

No. 19,570.

Court of Appeals of New Mexico.

Feb. 8, 2000.

Certiorari Denied, No. 26,262, May 25, 2000.

OPINION

BUSTAMANTE, Judge.

{1} The City of Sunland Park (the City) appeals the district court's issuance of a permanent injunction ordering the City to either remove or abandon a pipeline it constructed on Doña Ana County (County) land to deliver water to land it sought to annex. The City makes numerous arguments on appeal, which can be roughly summarized as follows: (1) the district court lacked equity jurisdiction to hear and enter the injunction; (2) the requirements for issuing an injunction were not met; and (3) a municipality with the power of eminent domain cannot be considered a trespasser for purposes of entering an injunction. We determine that the district court had jurisdiction to hear the injunction but that the County did not demonstrate it would be irreparably harmed by the City's construction of the pipeline. We therefore reverse and remand with instructions that the district court withdraw the injunction.

FACTS

{2} In 1997, the City, acting on the petition of a nearby landowner, passed an ordinance seeking to annex approximately thirty-seven acres of land. The land the City sought to annex included that of the annexation petitioner, as well as certain public lands that lay between the City's existing boundary and the petitioner's land. Shortly after the City passed the ordinance, the New Mexico Highway and Transportation Department (the Highway Department) and Paseo Del Norte Limited Partnership (PDN) appealed the annexation to the Third Judicial District Court pursuant to NMSA 1978, § 3–7–17(C) (1998), and Rule 1–074 NMRA 2000. The Highway Department and the County subsequently moved to add the County as a party to the annexation appeal because of possible questions concerning the ownership of some of the public land included in the annexation. Over the City's objection, the district court granted the motion.

{3} For a more thorough discussion of the facts surrounding the annexation, *see State ex rel. State Highway & Transportation Department v. City of Sunland Park*, 1999–NMCA–143, 128 N.M. 371, 993 P.2d 85

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(*State ex rel. Highway Dep't I*). In that case we held that the County's motion to intervene was untimely and should not have been granted. *See id.* ¶ 11. We also held, however, that the attempted annexation was invalid because the City failed to comply with one of the relevant provisions of the Municipal Code having to do with the annexation of territory. *See id.* ¶¶ 17–25.

{4} Following passage of the annexation ordinance, but during the pendency of the appeal to district court, the City began constructing an underground pipeline to provide water service to the annexed land. The pipeline was to be composed of two sections: one section underlying an unused railroad bed and running from the City's existing water facility to State Highway 136, the other underlying the right of way along a portion of State Highway 136, adjacent to but outside a portion of the State Highway 136 right of way the City included in the annexation ordinance, and running to the land owned by the annexation petitioner. The City's effort to condemn a utility easement along the railroad bed was the subject of *City of Sunland Park v. Paseo Del Norte Ltd. Partnership*, 1999–NMCA–124, 128 N.M. 163, 990 P.2d 1286. Because the district court had not yet awarded damages, we concluded that the order appealed from was not final, and we dismissed for lack of appellate jurisdiction. *See id.* ¶¶ 11, 20. This appeal involves only the portion of the pipeline paralleling State Highway 136.

{5} Before beginning construction, the City applied for and was issued a permit by the Highway Department to construct the portion of the pipeline paralleling State Highway 136. The City then hired a private contractor to begin installing the pipeline. Soon thereafter, the Highway Department sought to revoke the permit. The City successfully moved to prevent the Highway Department from revoking the permit by obtaining a restraining order in the First Judicial District Court in Cause Number SF 97–2891(c). The Third Judicial District Court took judicial notice of that action in this case.

{6} Upon learning of the construction, the County, which by this time had been made a party to the appeal of the annexation, sought a temporary restraining order of its own to prevent the City from proceeding with construction of the pipeline pending resolution of the annexation appeal. In support of its position, the County argued that to allow Sunland Park to continue installing the pipeline "w[ould] prejudice the authority and prerogative of the County to serve the subject-matter property and surrounding area with water service if the annexation [were] not approved by the [district c]ourt." The district court granted the County's request, finding that "good cause exist[ed] for [a] Restraining Order." Several days later, following a hearing, the district court continued and modified the temporary restraining order until after the court heard and ruled on the merits of all of the issues before it. The district court specifically ordered that if the City chose to resume construction of the pipeline it would "assume[ ] the risk" that the court might "require [the City] to abandon or remove the pipeline in place."

{7} The district court held a hearing on both the annexation and pipeline construction issues on February 6 and February 11–13, 1998. The record reflects that the district court made sure to keep the testimony and argument on the two issues separate. Several months later the district court entered its order concerning the pipeline. It found that the County owned the right of way along State Highway 136, under which the City had begun constructing the pipeline. It also found that "[t]he County has no adequate remedy at law and w[ould] be irreparably harmed if the City's pipeline [were] completed and used to deliver water utilities under the City's plan because it would be disruptive of the County water and wastewater plans for the same area." Accordingly, the court made the injunction permanent but stayed it temporarily. The court ordered the City to, after the stay was lifted, "give the County notice that it ha[d] abandoned the pipeline or, alternatively, if the City ch[ose] to remove the pipeline, . . . [to] present the County with its plan of action to remove the pipeline[,] which removal [was to] take place within a reasonable time." It is from this order that the City appeals.

DISCUSSION

1. Jurisdiction of the District Court to Issue the Injunction

A. Jurisdiction to Hear and Issue the Injunction in the Context of the Annexation Appeal

{8} The City first argues that the district court's jurisdiction was limited by Rule 1-074. Specifically, the City argues that the district court lacked jurisdiction to hear and issue the injunction because the scope of review at the hearing was limited by Rule 1-074 to the annexation appeal and because the County failed to file a proper pleading under either Rule 1-074 or Rule 1-003 NMRA 2000. We disagree.

{9} In essence, the City seems to be arguing that the district court could not exercise its appellate and original jurisdictions concurrently. Of course, we agree that under Rule 1-074 review of the annexation was limited "to consideration of whether it was enacted in accordance with the governing statute." *State ex rel. Highway Dep't I,* 1999-NMCA-143, ¶ 17, 128 N.M. 371, 993 P.2d 85. We see no reason why, however, under the facts and circumstances of this case, the district court could not at the same time exercise its equitable jurisdiction.

{10} The district courts of this State have broad jurisdiction—legal and equitable, original and appellate. *See* N.M. Const. art. VI, § 13; *Sims v. Sims,* 1996-NMSC-078, ¶ 27, 122 N.M. 618, 930 P.2d 153. As our Supreme Court noted in *Sims,* "Under our court rules, there is 'one form of action to be known as "civil action",' in which *all* claims may be joined and *all* remedies are available." *Id.* ¶ 27 (quoting Rule 1-002 NMRA 2000) (emphasis added). Moreover, "[e]quity favors the prevention of a multiplicity of actions, and the interposition of a court of equity may be invoked to prevent a multiplicity of actions." 27A Am.Jur.2d *Equity* § 23 (1996). Thus, "where a court of equity has all the parties before it, it will adjudicate upon all of the rights of the parties connected with the subject matter of the action, so as to avoid a multiplicity of suits." *Burnworth v. Hughes,* 234 Kan. 69, 670 P.2d 917, 922 (1983); *see also Lougee v. New Mexico Bureau of Revenue Comm'r,* 42 N.M. 115, 132, 76 P.2d 6, 16 (1938); *State ex rel. Stenberg v. Moore,* 253 Neb. 535, 571 N.W.2d 317, 322 (1997); 27A Am.Jur.2d *Equity* § 24 (discussing the factors courts consider in determining whether to exercise equity jurisdiction to avoid a multiplicity of suits); *id.* § 25 ("[T]here is no fixed number of actions which will constitute a multiplicity of suits so as to require or justify the assumption of equitable jurisdiction; it depends on the circumstances of the case whether equity will take jurisdiction."). Finally, "[a]bsent an abuse of discretion, we will not disturb the district court's exercise of its equitable jurisdiction on appeal." *Moody v. Stribling,* 1999-NMCA-094, ¶ 30, 127 N.M. 630, 985 P.2d 1210.

{11} We also note that "only if a *statute* so provides with express language or necessary implication will New Mexico courts be deprived of their inherent equitable powers." *Sims,* 1996-NMSC-078, ¶ 30, 122 N.M. 618, 930 P.2d 153 (discussing interrelation of equitable and statutorily provided remedies) (emphasis added). And the Rules of Civil Procedure themselves indicate that they "shall not be construed to extend or limit the jurisdiction of the district courts of the [S]tate." Rule 1-082 NMRA 2000. Thus, to the extent the City's argument can be understood to imply that Rule 1-074 was meant to deprive district courts of equitable jurisdiction in administrative appeals, it is incorrect.

{12} It is clear that, as a matter of judicial economy, the district court exercised its equitable jurisdiction to address an equitable issue involving the same parties and same general subject matter before it. Moreover, as we have noted, the court took care to keep testimony having to do with the appeal of the annexation separate from testimony having to do with the injunction. We therefore see no abuse of discretion in the district court's exercise of its equitable jurisdiction in the context of a Rule 1-074 case.

{13} The City next argues that the district court lacked jurisdiction because the County never filed proper pleadings; namely, the County never filed a complaint, *see* Rule 1-003, or a statement of appellate issues, *see* Rule 1-074(J). Again, we disagree.

{14} As a general proposition, the City is correct that a civil action is initiated by the filing of a complaint, as Rule 1–003 states. One need look no further than Rule 1–074 itself, however, to see that the filing of a complaint is not the only way to invoke the district court's jurisdiction: An aggrieved party seeking review of an administrative decision does not invoke the district court's jurisdiction by filing a complaint, but instead by filing a notice of appeal. *See* Rule 1–074(C). In this context it is too simplistic to say that the court lacked jurisdiction to hear the injunction because there was no "complaint" in the court file.

{15} We likewise do not view the County's failure to file a statement of appellate issues as a jurisdictional defect. Indeed, although the City couches its argument in terms of the district court's jurisdiction, the thrust of its argument is that it was prejudiced by the absence of a statement of appellate issues. It is clear, however, that the statement of appellate issues is designed to be a substitute for full briefing in a Rule 1–074 appeal. It is akin to the docketing statement in this Court, which a party files in advance of assignment of his case to one of the Court's three dispositional calendars, and which takes the place of full briefing when a case is decided on the Court's summary calendar. *Compare* Rule 1–074(K) (elements of a statement of appellate issues) *with* Rule 12–208(C) NMRA 2000 (elements of a docketing statement). *See also* Rule 12–210 NMRA 2000 (outlining this Court's calendaring procedure). Moreover, Rule 1–074(O) provides that parties to an administrative appeal to district court are to file briefs only when the court so directs, which it did in this case. The County complied by filing a brief that included a discussion of the propriety of an injunction. The City also filed a brief addressing not only what it perceived to be the procedural barriers to the district court hearing the injunction but also the merits of the injunction (in addition, of course, to the City's position on the annexation appeal). We agree that the procedural posture of the case below was unusual, perhaps even unorthodox. We are satisfied, however, that the issues were sufficiently well defined and joined to conclude that the City was not prejudiced in any way by the County's filing of a brief but not a statement of appellate issues. And again, we find no support for the proposition that the failure to file a statement of appellate issues in the context of a Rule 1–074 appeal constitutes a jurisdictional defect. We therefore conclude that the City's argument is without merit.

B. The Absence of a Necessary Party

{16} The City next argues that the district court lacked jurisdiction because a necessary party was absent below. The City points out that Jack Pickel, who was the annexation petitioner and who stood to receive water service upon completion of the pipeline, was not a party to the action for injunction. But the absence of an indispensable (let alone necessary) party is not considered a jurisdictional defect in New Mexico. *See Sims,* 1996–NMSC–078, ¶ 53, 122 N.M. 618, 930 P.2d 153. Moreover, where, as here, the allegedly necessary party knew of the litigation and even appeared as a witness yet chose not to participate, there is no reason to vacate the district court's order and force the parties to repeat the proceedings. *See C.E. Alexander & Sons, Inc. v. DEC Int'l, Inc.,* 112 N.M. 89, 92–93, 811 P.2d 899, 902–03 (1991). The City's argument that there was no procedural mechanism whereby Pickel could have joined the action for injunction is unpersuasive. As we have discussed, once the district court's equitable jurisdiction was properly invoked, the court had the ability to consider the rights of all of the parties who might have been affected by the injunction.

2. Merits of the Injunction

{17} As we have indicated, we review the district court's decision to grant equitable relief for an abuse of discretion. *See Moody,* 1999–NMCA–094, ¶ 30, 127 N.M. 630, 985 P.2d 1210. "Generally, we find an abuse of discretion only when the district court's decision is contrary to logic and reason. We examine the findings and determine if substantial evidence supports these findings; if it does, we will not find an abuse of discretion." *Id.* (citations omitted). "[E]quitable relief may not be granted where the

complainant has failed to produce sufficient evidence in support of his prayer for relief." *Tiller v. Owen*, 243 Va. 176, 413 S.E.2d 51, 53 (1992).

{18} "Generally, the remedy for alleviating an encroachment is the issuance of an injunction ordering removal of the encroaching structure." *Amkco, Ltd. v. Welborn*, 1999–NMCA–108, ¶ 14, 127 N.M. 587, 985 P.2d 757, *cert. granted*, 128 N.M. 150, 990 P.2d 824 (1999). But "[i]njunctions are harsh and drastic remedies which should issue only . . . where there is a showing of irreparable injury for which there is no adequate and complete remedy at law." *Padilla v. Lawrence*, 101 N.M. 556, 562, 685 P.2d 964, 970 (Ct.App.1984); *accord Hill v. Community of Damien of Molokai*, 1996–NMSC–008, ¶ 51, 121 N.M. 353, 911 P.2d 861.

{19} The phrases "irreparable injury" and "no adequate and complete remedy at law" tend to overlap. An injury that is irreparable is without adequate remedy at law. *See Williams v. Compressor Eng'g Corp.*, 704 S.W.2d 469, 472 (Tex.App.1986). Thus, "[a]n 'irreparable injury' is an injury which cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard." *Parkem Indus. Servs., Inc. v. Garton*, 619 S.W.2d 428, 430 (Tex.Civ.App.1981); *accord Armintor v. Community Hosp.*, 659 S.W.2d 86, 89 (Tex. App.1983); *see also Jessen v. Keystone Sav. & Loan Ass'n*, 142 Cal.App.3d 454, 191 Cal. Rptr. 104, 106 (1983). "The injury must be actual and substantial, or an affirmative prospect thereof, and not a mere possibility of harm." *Parkem Indus. Servs., Inc.*, 619 S.W.2d at 430 (citation omitted). It is not enough that the party seeking injunctive relief merely claim irreparable harm; he must come forth with evidence of the irreparability of his harm or inadequacy of any remedy. *See City of Las Cruces v. Rio Grande Gas Co.*, 78 N.M. 350, 352, 431 P.2d 492, 494 (1967) ("The question here is whether Rio Grande [Gas Company] has demonstrated that it will suffer an irreparable injury."); *Tom James Co. v. Mendrop*, 819 S.W.2d 251, 253 (Tex.App.1991); *Williams*, 704 S.W.2d at 472; *Texas Employment Comm'n v. Norris*, 636 S.W.2d 248, 253 (Tex.App.1982) (holding in part that the "trial court abused its discretion in granting a temporary injunction in the absence of a showing that the plaintiff did not have an adequate remedy at law").

{20} Upon reviewing the evidence the County presented, we conclude that the County failed to show that it would be irreparably harmed and lacked any adequate remedy and, consequently, that the district court abused its discretion in enjoining the City's construction of the pipeline. Albert Racelis, the Assistant County Planner, testified that the County has a contract to serve the Santa Teresa Port of Entry with water through infrastructure built by the State, but he acknowledged that there were, at most, sixteen acre-feet of water available to the County to serve the Port of Entry and that it would take twenty-nine acre feet of water to serve it fully. He testified that the County had plans to expand the water facilities at the Port of Entry and that the planned expansion would run adjacent to and could serve the land the City sought to annex, but he did not know what the water needs were on those adjacent lands. The County entered into evidence resolutions its Commissioners had passed through the years indicating the County's intent to provide water service to unincorporated areas of the County. But Racelis testified that the County had neither customers nor a system for billing customers for domestic water.

{21} Based on the foregoing, the County's alleged harm—that is, the economic harm it would suffer if its plans to supply water to parts of the County were thwarted by the City's construction of a water system covering some of the same areas—is entirely too speculative to support the issuance of an injunction. *See Parkem Indus. Servs., Inc.*, 619 S.W.2d at 430. Racelis did testify that the County would lose a possible revenue source for recuperating money it had spent on developing a plan for a water system and would spend constructing a system, whenever construction might begin. Those costs are clearly quantifiable, though. *Cf. Armintor*, 659 S.W.2d at 89 (affirming issuance of injunction because decrease in quality of hospital's care absent the injunction could not be compensated). Evidence of those costs

would have helped to demonstrate the adequacy or inadequacy of any remedy the County would have at law. Yet the County presented no evidence of actual past or future losses. In fact, the County came perilously close to not showing any actual injury at all, much less irreparable injury. In short, the County's plans to supply water to its residents are too incomplete and indefinite to support injunctive relief. The district court abused its discretion in issuing the injunction. *See Rio Grande Gas Co.,* 78 N.M. at 353, 431 P.2d at 495 (affirming denial of injunctive relief because there was no showing that municipality's unlawful distribution of natural gas outside of statutorily limited service area harmed gas company on whose territory municipality's distribution was encroaching).

{22} We point out that the County indicated it had offered to purchase the pipeline the City had already laid. It could still seek to purchase the line, if it felt strongly about developing a water system in the area. In addition, Racelis testified that the County has an operating agreement with the water and sanitation district of Anthony, another municipality located in Doña Ana County, to help the County effectuate its water plans. There is no reason the County could not enter into a similar agreement with the City if it thought the area served by the City's pipeline were important to its plans.

{23} Finally, we acknowledge that under certain circumstances the continuing interference with another's rights in land might "render[ ] a remedy at law inadequate," such that an injunction is proper. *Kennedy v. Bond,* 80 N.M. 734, 738, 460 P.2d 809, 813 (1969). Here, although the City alleges that the County (and the State) took inconsistent positions regarding ownership of the right of way along State Highway 136, it does not challenge directly the district court's finding that the County owns the relevant portion of the right of way. That finding is therefore binding on appeal. *See Kruskal v. Moss,* 1998–NMCA–073, ¶ 17, 125 N.M. 262, 960 P.2d 350. It does not, however, dispose of the issue of harm to the County. Resolution of that issue would turn on whether the City has the authority to condemn the right of way and pay the County compensation therefor. *See State ex rel. State Highway Comm'n v. City of Albuquerque,* 67 N.M. 383, 355 P.2d 925 (1960) (discussing intergovernmental eminent domain). We refrain from deciding the issue because it would depend on facts that were not made a part of the record below, as the County points out, and because, as a result of the insufficiency in the record, the district court did not have an opportunity to rule on the issue. *See* Rule 12–216(A) NMRA 2000.

CONCLUSION

{24} For the foregoing reasons, we reverse and remand with instructions that the district court withdraw the injunction.

{25} **IT IS SO ORDERED.**

WECHSLER and ARMIJO, JJ., concur.

3 P.3d 135

2000-NMCA-043

Jean A. PETERSON as Personal Representative of the Estate of Jeffrey Oelcher, Plaintiff–Appellant,

v.

WELLS FARGO ARMORED SERVICES CORP., Defendant–Appellee.

No. 19,644.

Court of Appeals of New Mexico.

March 20, 2000.

Certiorari Denied, No. 26,282, May 9, 2000.

Hazen H. Hammel, Cates & Hammel, P.C., Los Lunas, Mark M. Rhodes, Rhodes & Salmon, P.C., Albuquerque, for Appellant.

J.E. Casados, Gallagher, Casados & Mann, P.C., Albuquerque, for Appellee.

OPINION

WECHSLER, Judge.

{1} Jean Peterson (Plaintiff), personal representative of the estate of Jeffrey Oelcher, appeals from the trial court's order granting summary judgment in favor of Defendant Wells Fargo Armored Service Corporation (Wells Fargo). In essence, the order determines that Wells Fargo complied with the insurance provisions of the Workers' Compensation Act and therefore workers' compensation is the exclusive remedy for the death of Jeffrey Oelcher, Plaintiff's son. *See* NMSA 1978, §§ 52–1–6(C) & (D) (1990) (effective January 1, 1992), 52–1–8 (1989), 52–1–9 (1973); *Harger v. Structural Servs., Inc.*, 121 N.M. 657, 666, 916 P.2d 1324, 1333 (1996). We conclude that Wells Fargo did not substantially comply with the filing provisions of the Act and that summary judgment is inappropriate and therefore reverse and remand.

Facts and Procedural Posture

{2} The following facts are assumed for purposes of summary judgment; they may still be subject to some dispute in the trial court. On August 25, 1994, Wells Fargo employed Jeffrey Oelcher as a driver-guard. On that day, Oelcher and a partner had been assigned a Budget Rentals van to use in their route from Albuquerque to Socorro, Gallup, and Grants and back to Albuquerque. Two men in a pickup truck ambushed the van on a back road. One of the men, who was lying in the bed of the pickup, fired a gun at the van. The bullet went through the windshield, which was not armored or in any other way reinforced, and struck Oelcher in the head. Oelcher died either immediately or a very short time after being shot.

{3} Oelcher was survived by his mother, Plaintiff; his stepfather, Ken Peterson; his fiancé, April Dunton; and his two minor children born to April Dunton. On August 30, 1994, Ken Peterson called the Workers' Compensation Administration (the Administration) and asked whether Wells Fargo or Borg–Warner, its parent company, had workers' compensation insurance. He was told that the Administration's records did not show that either company had workers' compensation insurance. The next day, Sandy Offerdahl of Travelers Insurance (Travelers), wrote Dunton. The letter told Dunton that Travelers was the workers' compensation carrier for Wells Fargo and asked Dunton to contact Offerdahl. During September 1994, Offerdahl and Dunton spoke by telephone several times. Offerdahl indicated that she wanted copies of the birth certificates of the children so that she could begin processing workers' compensation benefits. Ultimately, on September 15, 1994, Dunton told Offerdahl that she wanted to appeal the amount of the benefits, that she was represented by an attorney, and that Plaintiff had advised her not to send Offerdahl copies of the birth certificates. On September 20, 1994, Offerdahl sent the attorney a letter identifying Travelers as the workers' compensation carrier and asking for birth certificates. The attorney never responded.

{4} In February 1995, Plaintiff, as personal representative of her son's estate, filed a

complaint and then an amended complaint in district court seeking damages for wrongful death. As to Wells Fargo, the complaint alleged that the "Big Red" armored cars used by Wells Fargo had frequent mechanical difficulties and, as a result, Wells Fargo had used ordinary rental vans from Budget on some of its routes, including the route Oelcher was on at the time of his death.

{5} On August 1, 1995, the trial court ordered Wells Fargo to produce evidence, before September 13, 1995, of its compliance with the insurance provisions of the Act. Thereafter, Wells Fargo's attorney allowed Plaintiff's attorneys to inspect the copy of the policy that he had. Two years later, at the hearing on the motion for summary judgment, Wells Fargo's attorney informed the trial court that at the time Plaintiff's attorneys looked at the policy, the terms and conditions of the policy were not available.

{6} Also in September 1995, Plaintiff's attorneys contacted the Administration to determine if a notice of accident report, referred to as an E-1, had been filed. On September 22, 1995, Alex Maestas, then Records Manager for the Administration, searched the computer data base and the archives and told the attorneys that no such report had been filed. Maestas executed an affidavit on that date to that effect. Two years later, Maestas did the same search and found an E-1 for the incident. Maestas could not explain why he had been unable to find the report two years earlier. Although the statute requires that a copy of the E-1 be served on the worker, *see* NMSA 1978, § 52-1-58(A) (1990), it is undisputed that no service had been made.

{7} On September 15, 1995, Plaintiff filed a motion for leave to amend her complaint to add a claim of negligence against Wells Fargo. The motion indicated that Wells Fargo had failed to produce evidence that it had complied with the insurance provisions of the Act and that it still had not filed proof of coverage as required by the Act. Plaintiff attached a second amended complaint to the motion. In addition to the allegations previously made concerning the failure to keep the Big Red armored vans in good repair, the second amended complaint specifically alleged that Wells Fargo had failed to comply with the provisions of the Act concerning insurance and therefore Plaintiff was entitled to sue Wells Fargo for its alleged negligence.

{8} On November 15, 1995, Wells Fargo filed proof of insurance coverage for calendar year 1994 with the Administration. On November 29, 1995, the trial court granted the motion to amend the complaint. The second amended complaint was formally filed on December 5, 1995.

{9} Almost two years later, in September 1997, Wells Fargo filed a motion for summary judgment. Plaintiff filed a response. The trial court held argument on the motion on May 1, 1998. On July 17, 1998, the trial court filed an order granting summary judgment in favor of Wells Fargo. This appeal followed.

Applicable Statutory Provisions

{10} The Workers' Compensation Act (the Act) is, by statute, the exclusive remedy for on-the-job injuries or deaths. However, in order to take advantage of the exclusive remedy provisions of the Act, an employer must comply with the provisions of the Act concerning insurance. *See* §§ 52-1-6(C) & (D); 52-1-8; 52-1-9. If the employer fails to comply with those provisions, the worker can sue the employer either for compensation benefits or for damages in tort caused by the employer's negligence. *See Harger*, 121 N.M. at 666, 916 P.2d at 1333. The worker has the choice of remedy.

{11} The provisions of the Act concerning insurance are relatively straightforward. Employers are given a choice. They may either qualify as self-insured pursuant to the provisions of the Act and the regulations of the Administration, or they may purchase insurance to cover their potential liability under the Act. *See* § 52-1-4; 11 NMAC 4.8.8 (1996); *In re Mission Ins. Co.*, 112 N.M. 433, 435, 816 P.2d 502, 504 (1991); *Addison v. Tessier*, 62 N.M. 120, 125, 305 P.2d 1067, 1069-70 (1957). The standards for allowing employers to self-insure their liability are relatively high, requiring, among other things, a tangible net worth in excess of $2.5 million, at least three years in busi-

ness, a risk management program, and a workers' compensation specific occurrence or aggregate insurance with retention of $250,000 and statutory upper limits. *See* 11 NMAC 4.8.8.1.

{12} If the employer chooses to obtain insurance, the insurance policy must make the insurer directly and primarily liable to the injured worker or his dependents. *See* § 52–1–4. All states require that the compensation liability be insured, either through private insurance, self-insurance, or insurance provided by state funds. *See* 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 92.11, at 17–1 to 17–5 (1999). The rationale is straightforward: to make sure that injured workers or their dependents will be able to collect the benefits due to them even if the employer goes out of business or becomes bankrupt. *See id.* § 92.12. In addition, the Act requires the employer to file proof of insurance coverage with the director of the Administration. *See* § 52–1–4(A); 11 NMAC 4.11.8 (1996).

Filling of Proof of Coverage

{13} Plaintiff contends that summary judgment was improper because there are disputed issues of fact concerning whether Wells Fargo substantially complied with the statutory requirement that it file proof of insurance coverage with the Administration. *See* § 52–1–4; 11 NMAC 4.11.8; *see also Roth v. Thompson*, 113 N.M. 331, 334–35, 825 P.2d 1241, 1243–44 (1992) (explaining that summary judgment is improper if there are disputed issues of material fact). In the trial court and on appeal, Wells Fargo offered three arguments on this issue. First, it argued that it complied with the statute by filing proof of coverage with the National Counsel for Compensation Insurance (NCCI.). Second, it argued that by filing proof of coverage in November 1995, it substantially complied with the statute. Third, it argued that the date that it complied with the filing requirements does not matter because Plaintiff was on notice that benefits were available. For the following reasons, we conclude that summary judgment was inappropriate. *See Rummel v. Lexington Ins. Co.*, 1997–NMSC–041, ¶¶ 16–17, 123 N.M. 752, 945 P.2d 970 (recognizing that summary judgment is inappropriate if the trial court misapplied the law).

{14} As this Court has observed in a somewhat different context, "[s]ubstantial compliance means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted and accomplishes the reasonable objectives of the statute." *Vaughn v. United Nuclear Corp.*, 98 N.M. 481, 485, 650 P.2d 3, 7 (Ct.App.1982) (analyzing substantial compliance under the Subsequent Injury Act); *see also Gambrel v. Marriott Hotel*, 112 N.M. 668, 672, 818 P.2d 869, 873 (Ct.App.1991) (measuring substantial compliance by evaluating the purposes of the Subsequent Injury Act). The purpose of the mandatory filing requirement is to notify a worker that the employer has complied with the insurance provisions of the Act. *See Shope v. Don Coe Constr. Co.*, 92 N.M. 508, 510, 590 P.2d 656, 658 (Ct.App.1979). With the filing, the worker is conclusively presumed to have accepted the Act. *See id.; cf. Junge v. John D. Morgan Constr. Co.*, 118 N.M. 457, 464, 882 P.2d 48, 55 (Ct.App.1994) (holding that sole proprietor's filing on behalf of company did not establish proprietor's acceptance as an employee). The filing requirement also serves as a benefit to the worker because, if followed, the worker will know that the employer has insurance and the name and address of the responsible insurer. *See Quintana v. Nolan Bros., Inc.*, 80 N.M. 589, 590, 458 P.2d 841, 842 (Ct.App. 1969); *see also Junge*, 118 N.M. at 464, 882 P.2d at 55 (stating that filed certificates were for benefit of workers, not employer).

1. *NCCI Filing*

{15} We first examine whether filing proof of coverage with NCCI establishes substantial compliance. We assume without deciding that the Administrator considered this method of filing acceptable in 1994. We note that the proof of coverage in question shows the named insured as Baker Industries and makes no mention of either Wells Fargo or Borg–Warner, the parent company of Wells Fargo. As a result, it is not surprising that the Administration informed Ken Peterson

that it had no record of insurance for Wells Fargo or Borg–Warner. We fail to understand how the NCCI certificate informed the employees of Wells Fargo or their dependents of the fact that Wells Fargo had obtained compensation insurance if the Administration could not ascertain coverage from the same information. Thus, in these circumstances, the filing with the NCCI would not suffice to inform Wells Fargo's employees of coverage and was not, therefore, substantial compliance with the filing requirement.

2. *November 15, 1995 Filing with Administration*

{16} We next address the question of whether Wells Fargo substantially complied with the filing requirement by filing a certificate of coverage with the Administration on November 15, 1995. In the trial court, Wells Fargo argued that Plaintiff did not file the negligence action in this case until December 5, 1995, and therefore the November 1995 filing constituted substantial compliance. In response, Plaintiff argued that the lawsuit was filed in February 1995 and her motion to amend the complaint was filed in September 1995, which related back to the initial filing. *See* Rule 1–015(C) NMRA 2000. We agree with Plaintiff that Wells Fargo's November 1995 filing was not substantial compliance, although for somewhat different reasons.

{17} We note initially that all the cases that have found substantial compliance with the filing requirement have involved significantly shorter periods of time than in this case. *Compare Mirabal v. International Minerals & Chem. Corp.*, 77 N.M. 576, 578, 425 P.2d 740, 742 (1967) (filing forty days after accident and eight months before any suit filed); *Shope*, 92 N.M. at 509, 590 P.2d at 657 (filing roughly one month after the accident and roughly six weeks before common law claim filed); *Quintana*, 80 N.M. at 589, 458 P.2d at 841 (filing seventy-six days after accident and some (unspecified) amount of time before suit filed); *with Security Trust v. Smith*, 93 N.M. 35, 37–38, 596 P.2d 248, 250–51 (1979) (holding that filing proof of coverage eleven months after the accident and six weeks after common law action commenced was not substantial compliance); *Montano v. Williams*, 89 N.M. 86, 87–88, 547 P.2d 569, 570–71 (Ct.App.1976), *aff'd*, 89 N.M. 252, 550 P.2d 264 (1976) (failing to file proof of insurance or produce policy during ensuing common law litigation was not substantial compliance). Moreover, in none of those cases has the plaintiff sought to amend the complaint after suit was filed.

{18} As we have stated, in addition to notice, the purpose of the filing requirement is to provide information to the injured worker. In circumstances of death, this purpose extends to the worker's dependents. In this case, Wells Fargo did not meet this informational purpose solely by satisfying the technical filing requirement in November 1995. It produced insurance documents for Plaintiff in September 1995 only after being ordered by the trial court to produce evidence of its compliance with the Act's insurance provisions.

{19} The documents that Well Fargo's produced included pages of a Continental Insurance Company (Continental) policy that included workers' compensation insurance applicable in New Mexico during 1993–1994. The first page shows the insured as Baker Industries, a subsidiary which was dissolved prior to Oelcher's death; however, someone had crossed out Baker Industries and written in by hand "Borg–Warner Security Corporation." The production also included a revised schedule A that indicated that the named insured is completed to read Borg–Warner Security Corporation and Wells Fargo Armored, among others. This partial production of only three pages of the Continental policy was inconclusive as to whether Wells Fargo had workers' compensation insurance coverage for its employees on August 24, 1994. The inconclusive nature of the September 1995 production was borne out by the documents Wells Fargo later filed as a supplement to its motion for a summary judgment. These later documents included an endorsement to the Continental policy which specifically provided that the policy covered only Baker Industries and specifically excluded all other Borg–Warner Corporation operations from the policy. The endorsement indicates that Baker Industries or its insur-

ance agent may issue certificates of insurance to parties that have an interest in the Continental policy, but Wells Fargo did not file any such certificate of insurance.

{20} Substantial compliance with the mandatory filing requirement exists when the circumstances accomplish the same purposes as the filing requirement. *See Shope,* 92 N.M. at 510, 590 P.2d at 658. The rationale for this result is evident: when an employer maintains workers' compensation insurance and provides information to an injured worker concerning the insurance that enables the worker to obtain compensation, the purposes of the Act are fulfilled and the employer is entitled to the Act's protections from suits in tort. *See generally id.* On the other hand, when an employer does not provide certainty that coverage exists, the worker or the worker's dependents do not know how to proceed to obtain compensation for an injury. When this uncertainty continues for an extended period of time, the likely result is litigation rather than the efficient resolution of the claim that the Act contemplates. *See Mirabal,* 77 N.M. at 578, 425 P.2d at 742 (stating that one purpose of the prior workers' compensation act was to avoid uncertainty in litigation).

{21} In general, if the employer files the appropriate document before the worker files a tort suit, the employer has provided sufficient certainty and has substantially complied with the filing requirement such that the worker cannot sue in tort. *Compare Mirabal,* 77 N.M. at 578, 425 P.2d at 742 (holding that employer substantially complied by paying benefits and filing the policy eight months before the worker filed a tort suit); *Shope,* 92 N.M. at 510–11, 590 P.2d at 658–59 (holding that employer substantially complied even though it filed the proof of insurance fifteen days late because the filing was two months before the common law suit was filed); *Quintana,* 80 N.M. at 590, 458 P.2d at 842 (holding that employer substantially complied even though proof of coverage was filed after the accident that caused the employee's death but before employee filed suit); *with Security Trust,* 93 N.M. at 37–38, 596 P.2d at 250–51 (holding no compliance where employer did not file the appropriate document until after the worker filed a tort suit); *Montano,* 89 N.M. at 90–91, 547 P.2d at 573–74 (holding no compliance where employer never filed an appropriate document and never produced a policy of compensation insurance). However, the substantial compliance doctrine requires not only that the employer file proof of insurance coverage before the worker files a suit, but also that the employer actually had maintained workers' compensation insurance coverage for its employees as of the date of the injury in question. *See Mirabal,* 77 N.M. at 578, 425 P.2d at 742 (observing written evidence of workers' compensation coverage in record); *Shope,* 92 N.M. at 510, 590 P.2d at 658 ("We must keep in mind that defendant actually had compensation insurance within the mandatory 30 day period, but was late in filing this certificate by 15 days."); *Quintana,* 80 N.M. at 589, 458 P.2d at 841 (noting that employer had policy at time of accidental injury). The doctrine contemplates that the failure of an employer to file in a timely manner is due to a technical error that is promptly corrected. *See Quintana,* 80 N.M. at 590, 458 P.2d at 842 (noting that employer's "technical delay" did not permit wrongful death suit); *Mirabal,* 77 N.M. at 578, 425 P.2d at 742 ("It would seem contrary to legislative intent that any technical delay which in no way prejudices a claimant would give rise to a common-law suit.").

{22} It is not clear whether Wells Fargo's failure to file proof of insurance was due to technical or substantive reasons. We do not decide that question on the record before us. Regardless, Wells Fargo's failure to promptly correct the problem caused litigation surrounding insurance coverage, precisely the uncertainty that the filing statute addresses. Wells Fargo then compounded the problem with its incomplete and inconclusive September 1995 production which led to Plaintiff's filing the motion to amend the complaint to add a negligence claim against Wells Fargo. On November 15, 1995, at a stage of the litigation when Wells Fargo had previously produced documentation concerning its coverage and Plaintiff had sought to amend her complaint, the filing of proof of coverage no

longer had any substantive value. Because the purpose of the Act's filing requirement had already either been met or frustrated, the November 15, 1995 filing was not substantial compliance with the Act.

3. *Actual Notice*

{23} Wells Fargo also argues that Plaintiff had actual notice that compensation benefits were available due to the contacts between Offerdahl and Dunton. In addition, Wells Fargo points to a facsimile communication to Plaintiff's attorneys from the Administration in August 1995 identifying the insurance policy in question and providing the name and address of the insurer. Wells Fargo relies on case law construing actual notice as sufficient to show substantial compliance with the filing requirement. *See Shores v. Charter Servs., Inc.,* 106 N.M. 569, 570, 746 P.2d 1101, 1102 (1987); *Baldwin v. Worley Mills, Inc.,* 95 N.M. 398, 399–400, 622 P.2d 706, 707–08 (Ct.App.1980).

{24} We recognize that the parties do not dispute that contacts between Offerdahl and Dunton took place. However, we are not persuaded by the argument that these contacts constituted actual notice. We agree with Wells Fargo that the cases do not require knowledge that benefits are available; they require that Plaintiff have "actual knowledge, and thus notice, of the existence of a workmen's compensation policy of insurance." *Baldwin,* 95 N.M. at 400, 622 P.2d at 708. However, in September 1995, Plaintiff had been given conflicting information concerning the existence of a policy. The Administration had told Ken Peterson that Wells Fargo did not have compensation insurance. Later, Offerdahl told Dunton that Travelers was the compensation carrier. Still later, the Administration told Plaintiff's attorneys that Continental was the compensation carrier. When all of these facts are considered, reasonable minds could differ as to whether Plaintiff had actual knowledge of the existence of a policy of compensation insurance. Thus, Wells Fargo was not entitled to summary judgment on this basis.

{25} In an argument that would avoid the problems engendered by the provision of conflicting information, Wells Fargo additionally contends that if Peterson did not have actual knowledge of the compensation insurance, she was at least on notice such that she should inquire further. The record, however, shows that Plaintiff did inquire further, but that Wells Fargo resisted her efforts to obtain a copy of the insurance policy. When Wells Fargo finally provided a copy for Plaintiff's inspection, it was an incomplete copy. We therefore find no merit in Wells Fargo's argument.

Conclusion

{26} We reverse the order granting summary judgment in favor of Wells Fargo and remand to the district court for further proceedings consistent with this opinion.

{27} **IT IS SO ORDERED.**

APODACA and BOSSON, JJ., concur.

3 P.3d 142

2000-NMCA-047

STATE of New Mexico, Plaintiff–Appellant,

v.

Jason JONES, Defendant–Appellee.

State of New Mexico, Plaintiff–Appellee,

v.

Joaquin Cordova, Defendant–Appellant.

Nos. 19,977, 20,372.

Court of Appeals of New Mexico.

April 14, 2000.

Certiorari Denied, No. 26,314, May 25, 2000.

Patricia A. Madrid, Attorney General, Anita Carlson, Assistant Attorney General, Santa Fe, for Appellant.

Phyllis H. Subin, Chief Public Defender, Nancy M. Hewitt, Assistant Appellate Defender, Santa Fe, for Appellee.

Patricia A. Madrid, Attorney General, Arthur W. Pepin, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Susan Roth, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

BOSSON, Judge.

{1} These appeals consider the felony offense of battery upon a peace officer. *See* NMSA 1978, § 30-22-24 (1971). This Court consolidated these cases on its own motion because they raise the common question of whether spitting, and in one case throwing urine, upon a peace officer is encompassed by this statute. To analyze this question we must determine the impact of the holding in *State v. Padilla*, 1997-NMSC-022, ¶ 2, 123 N.M. 216, 937 P.2d 492, on the statute and its corresponding uniform jury instruction. *See* UJI 14-2211 NMRA 2000. We determine that, depending upon context, a rational jury could find beyond a reasonable doubt that spitting or throwing urine upon a peace officer falls within the terms of the statute. We also hold that when the injury, threat to safety, or challenge to authority of a peace officer is in dispute, then upon request the jury must be instructed that the battery resulted in an "actual injury, actual threat to safety, or meaningful challenge to authority." *Padilla*, 1997-NMSC-022, ¶ 7, 123 N.M. 216, 937 P.2d 492. For the reasons that follow, we reverse both cases and remand for further proceedings.

BACKGROUND

JASON JONES

{2} Jason Jones yelled from his parked car at a cruising police officer. When the officer began to stop his car, Jones drove off, and for some time Jones refused to pull over. When he finally did, the officer arrested and handcuffed Jones for driving under the influence of liquor and placed him in the rear of a patrol car. During the trip to the police station, Jones' conduct vacillated between periods of calm followed by outbursts of anger. In one irate moment, Jones told the officer, "I'm going to pull something out of me and put it on you to kill all of your daughters." Then Jones leaned forward and spat on the officer, which caused phlegm to land on the side of the officer's face and shoulder.

{3} The parties stipulated to these facts and asked the trial court to determine whether they supported a conviction as a matter of law under the battery upon a peace officer jury instruction, as amended to conform with *Padilla*, 1997-NMSC-022, 123 N.M. 216, 937 P.2d 492. The trial court found that these facts did not satisfy the elements of the crime under UJI 14-2211, and dismissed the charge against Jones. The State appeals the dismissal, requesting that the case be remanded and the indictment reinstated.

JOAQUIN CORDOVA

{4} Joaquin Cordova violated detention center rules of the Roosevelt County Jail by attending breakfast while nude and then flooding the day room. For this behavior, Cordova was placed in solitary confinement. After a few days without a shower or the ability to flush his toilet, Cordova became agitated. One evening during a welfare check, when the corrections officer checked on the prisoner through the food tray slot in the cell door, Cordova spat on the officer. The officer quit performing the remaining welfare checks on Cordova's cell for the duration of his shift for fear of being spit on again.

{5} The next morning another corrections officer served breakfast to Cordova. This officer heard Cordova scream and curse at him. As the officer left Cordova's cell, he heard a crash and returned to find Cordova's food tray splattered across the floor. When the officer began to clean up the mess, Cordova screamed that he had "something else" for the officer, and threw liquid on him contained in a "little white cup, like a meds cup." Cordova screamed that the liquid was urine. Thereafter, the officers subdued Cordova with pepper spray and placed him in hand and leg restraints. A jury convicted Cordova of two counts of battery upon a peace officer. Cordova appeals, arguing that the trial court erred in refusing to give his requested jury

instruction, which would have tracked the language of *Padilla*, 1997–NMSC–022, ¶ 7, 123 N.M. 216, 937 P.2d 492.

DISCUSSION

{6} Battery upon a peace officer is "the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner." Section 30–22–24(A). The purpose of the battery upon a peace officer statute "is to protect the safety and authority of peace officers." *Padilla*, 1997–NMSC–022, ¶ 5, 123 N.M. 216, 937 P.2d 492 (emphasis omitted). *Padilla* found that the statute's felony sanctions were aimed at behavior that was above and beyond the "mere affronts to personal dignity" that are actionable under tort law. *Id.* ¶ 6. Therefore, it was inappropriate to graft the analysis of tort law onto this section of the criminal code. *Padilla* observed that the penalty for battery upon a peace officer, a fourth degree felony, was the same as that for an aggravated battery upon a peace officer, which requires "painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body." NMSA 1978, § 30–22–25(B) (1971). Both are punishable by eighteen months imprisonment. In balancing the conduct and penalties involved, the Court reasoned that only if the unlawful conduct comprising a battery upon a peace officer rises to the level of an "actual injury, actual threat to safety, or meaningful challenge to authority," could any logic be discerned from the punishment that accompanies the statute. *Padilla*, 1997–NMSC–022, ¶ 7, 123 N.M. 216, 937 P.2d 492. Otherwise, even a mundane civil battery, such as rudely grabbing a ticket from an officer's hands, or any other touching no matter how insignificant, could, at the prosecutor's whim, become punishable as a felony. The Supreme Court sought to avoid such an absurd result. *See id.* ¶ 6; *see also State v. Ortega*, 113 N.M. 437, 439, 827 P.2d 152, 154 (Ct.App.1992).

{7} Thereafter, the uniform jury instruction (UJI) for battery upon a peace officer was amended, ostensibly to conform with the holding of *Padilla*. *See* UJI 14–2211. Although Use Note 3 to the UJI acknowledges that *Padilla* defined unlawful conduct as that which "meaningfully challenges" an officer's authority, the text of the instruction omits the term "meaningfully." *Id.* Nor does the UJI use the word "actual" when describing the threat to an officer's safety. These terms were fundamental to the definition of unlawfulness in *Padilla*, and their absence from the amended UJI is inexplicable.

{8} Because this Court is vested with the responsibility to review a UJI in the absence of controlling Supreme Court precedent, we must decide whether the amended UJI sufficiently states the law as applied to the facts of these particular prosecutions. *See State v. Wilson*, 116 N.M. 793, 795, 867 P.2d 1175, 1177 (1994) (holding that the "Court of Appeals is *not* precluded from considering error in jury instructions"). Thus, the question before us is twofold. First, must the jury instruction include the terms, "meaningful challenge," "actual threat," or "actual injury," if so requested? Second, can spitting on an officer constitute battery upon a peace officer, assuming a jury is properly instructed according to the evidence? We answer both questions in the affirmative.

The Jury Instruction for Section 30–22–24 after *Padilla*

{9} In response to the first question, we think that *Padilla* requires the jury instruction to reflect the State's burden of proof, which includes an "actual injury, actual threat to safety, or meaningful challenge to authority," when the issue of a challenge to authority or threat to safety is in dispute and the defendant requests such language in the instruction. *See Padilla*, 1997–NMSC–022, ¶ 7, 123 N.M. 216, 937 P.2d 492. The Supreme Court's goal in *Padilla*—to separate felonious conduct from lesser offenses—would be undermined if these terms are not included in an instruction to the jury. Without language that focuses upon the context of the act and the nature of the injury, the jury is not instructed, as it must be under *Padilla*, to distinguish mere rude, insolent, or angry conduct that could be punished as a misdemeanor, from truly felonious conduct that poses a threat or a challenge that is

proportional in consequence to the punishment extracted.

{10} Language focusing on context may be critical because, as *Padilla* demonstrated, a contextual analysis is necessary to determine what constitutes a meaningful challenge to authority or an actual threat to safety. Although the behavior in that case involved squirting baby oil on corrections officers as they subdued an inmate, the opinion noted that the atmosphere inside the jail, the context of the battery, had already become unruly to the point of rebellion. *See id.* ¶ 8. Under these circumstances, the Court held that "a jury could find beyond a reasonable doubt that [the defendant's] acts exacerbated a serious situation in the jail and created unnecessary danger for or jeopardized the authority of the detention officers." *Id.* Thus, the jury must be directed to look to the surrounding circumstances to determine whether a battery is merely offensive in the ordinary civil sense, or whether it rises to the level of "unnecessary danger" envisioned by the definition of unlawfulness in *Padilla*, 1997–NMSC–022, ¶ 8, 123 N.M. 216, 937 P.2d 492.

{11} By restricting the class of conduct punishable as a felony, *Padilla* reflects the accepted legal principle that police are trained to tolerate more than the average citizen is expected to endure. *See City of Alamogordo v. Ohlrich*, 95 N.M. 725, 726, 625 P.2d 1242, 1243 (Ct.App.1981). A useful analogy can be drawn to the use of "fighting words," which are not protected as speech under the First Amendment to the United States Constitution. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Fighting words are not protected because their utterance would cause an average person to react violently. *See State v. James M.*, 111 N.M. 473, 476, 806 P.2d 1063, 1066 (Ct.App.1990). In New Mexico, the use of fighting words is punishable when directed towards a fellow citizen. *See id.* at 475, 806 P.2d at 1065 (yelling obscenities at another citizen was likely to incite a breach of the peace). However, if similar language is directed towards the police, we expect greater restraint and self-control. *See Ohlrich*, 95 N.M. at 726, 625 P.2d at 1244 (dismissing disorderly conduct conviction of defendant who yelled obscenities at police officer). Our legislature has not made the use of profanity towards peace officers a crime, much less a felony, although some would argue that condoning this behavior is to "foster disrespect for law and order." *Id.* at 727, 625 P.2d at 1244 (Hernandez, J., dissenting). We recently declined an invitation to lower our expectations of police officers, reiterating that they are " 'expected to have a higher tolerance for offensive conduct.' " *State v. Hawkins*, 1999–NMCA–126, ¶ 11, 128 N.M. 245, 991 P.2d 989 (quoting *James M.*, 111 N.M. at 477, 806 P.2d at 1067). We presume the legislature is aware that police are held to a higher standard when it comes to defining unlawful conduct punishable as a felony. *See State v. Cleve*, 1999–NMSC–017, ¶ 14, 127 N.M. 240, 980 P.2d 23; *Padilla*, 1997–NMSC–022, ¶ 6, 123 N.M. 216, 937 P.2d 492. And we believe our Supreme Court's construction of Section 30–22–24, as expressed in *Padilla*, reflects this "higher tolerance" expected of police officers with respect to minor, technical batteries. *Cf. Padilla*, 1997–NMSC–022, ¶ 6, 123 N.M. 216, 937 P.2d 492 ("It is absurd to think the legislature intended to make felonious mere affronts to personal dignity.").

{12} We observe that even if some offensive conduct, like spitting, does not always rise to the level of a felony, it may still be punishable by one means or another. For example, under any circumstance, intentionally spitting upon a peace officer is abusive, and therefore, if supported by the evidence, it might be punishable as resisting, evading, or obstructing an officer. *See* NMSA 1978, § 30–22–1(D) (1981) (making "resisting or abusing any . . . peace officer in the lawful discharge of his duties" a misdemeanor). Additionally, as the Supreme Court pointed out in *Padilla*, a jailer or corrections officer could invoke a host of institutional sanctions to punish such behavior. *Padilla*, 1997–NMSC–022, ¶ 10, 123 N.M. 216, 937 P.2d 492. For these reasons, we take our Supreme Court at its word. When the element of unlawfulness is in dispute and the facts of the case are open to interpretation, the trial court must indulge a request for an instruction that the charged conduct rise to the level

of an "actual injury, actual threat to safety, or meaningful challenge to authority" before a jury can convict of a felony. *Id.* ¶ 7.

{13} Our holding today is in line with the majority rule that imposes penal sanctions only for those batteries resulting in actual physical injury. *See* 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 7.15(a) (1986). Although the State urges us to adopt the minority approach that upholds spitting upon a peace officer as a felony, with or without actual injury, our statute does not reflect any such legislative intent. Unlike the few jurisdictions that apply the minority rule, the language of our battery upon a peace officer statute does not cover acts intending to "injure, insult or provoke," Ariz.Rev.Stat. §§ 13–1203, –04(5) (1989 & Cum.Supp.1999), or proscribe applications of force designed to "embarrass" the victim. *See People v. Terry,* 217 Mich.App. 660, 553 N.W.2d 23, 24–25 (1996) (per curiam) (applying Michigan jury instruction containing foregoing language to affirm conviction for assault of prison guard intended to embarrass). New Mexico's statute demands more.

{14} While the parties urge us to define the legal boundaries of a "meaningful challenge" to authority, we decline to do so. Because its definition demands knowledge of the context in which the battery arose, this question is best left to juries to decide using their collective common sense and wisdom as a guide. *See State v. Trevino,* 116 N.M. 528, 531, 865 P.2d 1172, 1175 (1993) (holding that the common sense of the jury " 'is sufficient to apply the [contributing to the delinquency of a minor] statute to each particular case, and point out what particular conduct is rendered criminal by it' " (quoting *State v. McKinley,* 53 N.M. 106, 111, 202 P.2d 964, 967 (1949))). The term "meaningful" provides a means to prevent treating petty conduct that could be interpreted as an incidental challenge to authority as though it were a strict liability felony.

Does Spitting upon a Peace Officer Violate Section 30–22–24?

{15} We turn now to the second question of whether spitting could constitute a battery upon a peace officer, assuming a proper instruction. We emphasize that the answer depends upon the context in which the battery takes place. In Jones' case, for instance, depending upon the evidence actually presented, a rational, properly instructed jury could find beyond a reasonable doubt that his spitting upon an officer from the rear seat of the officer's car constituted a "meaningful challenge" to the authority the officer was lawfully exercising over him pursuant to his arrest for DWI. Although it is unclear from the record, it also appears that the battery occurred while the officer was driving his vehicle. If so, the spitting could pose an actual threat to safety if it affected the officer's ability to operate the vehicle. Because spitting on an officer could fall within the statute under either prong (safety or authority), we reverse the order of dismissal and reinstate Count I of Jones' indictment.

{16} Cordova's case also requires reversal but for different reasons. The jury was not instructed in the language of *Padilla,* nor was counsel able to argue that the challenge to authority had to be meaningful, despite the presence of evidence supporting this claim. After the presentation of the evidence at trial, Cordova tendered a jury instruction for each count of battery upon a peace officer that included the word "meaningfully." Counsel pointed out that the UJI's Use Note quoted the holding from *Padilla.* Cordova argued that *Padilla* called for a higher standard than reflected in the UJI, and insisted that "meaningfully" was a key word which imposed a burden upon the State to prove more than just a mere, incidental challenge to authority. The trial court refused the instruction.

{17} The error went beyond a refusal to instruct. During closing argument, Cordova began to argue that in order to convict, the jury must find that any challenge to the officer's authority was meaningful. This comment drew an immediate objection. The State argued that Cordova was attempting to redefine the law given to the jury. Cordova stated that he was only arguing New Mexico Supreme Court precedent. The trial judge told counsel that his "argument is with the Supreme Court, and not with this jury," and

sustained the objection. In effect, these rulings limited the State's burden to proving only that Cordova had committed a mere unwanted touching; that is, the rulings ignored the Supreme Court's holding in *Padilla*. Because the evidence here called into question the challenge to an officer's authority or whether the safety of an officer was actually threatened, the requested instruction should have been given in the terms of a "meaningful challenge to authority," on an "actual threat to safety," and defense counsel should have been allowed to argue the point to the jury. *Padilla*, 1997–NMSC–022, ¶¶ 2, 7, 11, 123 N.M. 216, 937 P.2d 492. Thus, we reverse and remand for a new trial.

{18} Similar to the case against Jason Jones, we believe that Cordova's act of spitting upon jailers or throwing urine at them could constitute a "meaningful challenge" to their authority, depending upon the context and assuming a properly instructed jury. Whereas we find that there was sufficient evidence upon which to base a conviction, we do not find that the evidence was so overwhelming against Cordova as to make this error harmless. *See Sanchez v. State*, 103 N.M. 25, 27, 702 P.2d 345, 347 (1985).

{19} We add one further observation regarding the sufficiency of the evidence in each case to amount to an "actual threat to the safety" of the officer. We acknowledge that spitting or throwing bodily waste may give rise to rational concerns about infection or communicable disease. The jailers in the Cordova prosecution argued as much. Defendant Jones threatened as much as he spat upon the officer. However, we have not been cited to any authority, and we know of none, that based criminal liability for battery upon the victims' subjective and unsubstantiated fears that they could develop a disease. *Cf. Brock v. State*, 555 So.2d 285, 287–88 (Ala.Crim.App.1989) (reversing first degree assault conviction when no evidence about HIV transmission was presented and "the role of saliva in the transmission of [HIV] is unclear" (citation and internal quotation marks omitted)). *But see State v. Bird*, 81 Ohio St.3d 582, 692 N.E.2d 1013, 1016 (1998) (affirming no contest plea of HIV-infected defendant who spat in police officer's face because plea made it unnecessary to decide whether HIV could be transmitted by saliva). To the contrary, the authorities all involve batteries with bodily waste from known carriers of communicable disease. *See, e.g., Weeks v. State*, 834 S.W.2d 559, 562–65 (Tx. Ct.App.1992) (sustaining attempted murder conviction of HIV-infected inmate who spat into face of guard); *Commonwealth v. Brown*, 413 Pa.Super. 421, 605 A.2d 429 430–31 (1992) (sustaining aggravated assault conviction against inmate with HIV and hepatitis who flung fecal material into guard's mouth). Neither case before us contains evidence that the accused carried any communicable disease. We will not assume as a matter of law that one has been battered by a harmful disease unless supported by the evidence, especially in the absence of clear legislative intent to make such unsubstantiated apprehension a felony.

CONCLUSION

{20} We hold that a reasonable jury could find that spitting or throwing urine upon a peace officer comes within the purview of battery upon a peace officer. However, when there is evidence to support a defendant's position that his challenge to an officer's authority was not meaningful, nor actually threatened an officer's safety, and the defendant so requests, then the jury must be instructed, using those terms taken from the Supreme Court's opinion in *Padilla*. Therefore, we reinstate Jones' indictment and reverse Cordova's conviction, and we remand for a new trial for Cordova with a jury instruction that conforms with this opinion.

{21} **IT IS SO ORDERED.**

BUSTAMANTE and ARMIJO, JJ., concur.

3 P.3d 149

2000-NMCA-041

STATE of New Mexico, Plaintiff–Appellee,

v.

Wilma Kay COOPER, Defendant–Appellant.

No. 20,300.

Court of Appeals of New Mexico.

April 14, 2000.

Patricia A. Madrid, Attorney General, Arthur W. Pepin, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Carolyn R. Glick, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

BOSSON, Judge.

{1} Defendant appeals her conviction for battery upon a peace officer, NMSA 1978, § 30–22–24 (1971). Defendant contends her conviction should be reversed for four reasons: (1) the trial court refused to instruct the jury that her challenge to the officer's authority had to be "meaningful," pursuant to *State v. Padilla*, 1997–NMSC–022, ¶ 7, 123 N.M. 216, 937 P.2d 492; (2) the trial court erred by allowing Defendant to be convicted based on the threatening actions of others, not Defendant, that occurred after the battery; (3) the evidence was insufficient to sustain her conviction; and (4) prosecutorial misconduct. *State v. Jones*, 129 N.M. 165, ¶ 9, 3 P.3d 145, ¶ 9 (Ct.App.2000), filed contemporaneously with this case, requires the jury instruction to state that a defendant's conduct "meaningfully challenges an officer's authority" when the defense requests such language. Based on the reasoning of that opinion, we reverse and remand for a new trial with an appropriate jury instruction. We discuss the remaining appellate issues as they pertain to retrial.

BACKGROUND

{2} After her brother's funeral, Defendant attended a gathering of family and friends at a private residence. A policeman, Officer Grau, arrived at the residence to investigate Defendant's nephew, Joseph Foster, for reckless driving. In the presence of about five guests, Foster cursed the officer. Defendant approached the two in an effort to calm down Foster and help the officer. When the officer requested his driver's license, Foster refused to comply and began to walk away. The officer grabbed Foster's arm and again requested a license. By this time the crowd had grown to seven or eight people, who were encouraging Foster to cooperate with the officer.

{3} Meanwhile, a second officer, Detective Jackson, drove by and noticed the officer in the middle of the crowd with Foster who was waiving his arms defiantly. Detective Jackson stopped to assist Officer Grau at the scene. Although the crowd, now ten to thirteen people, continued to urge Foster to cooperate, Detective Jackson testified that their shouts caused Foster to become more disruptive. To defuse the situation, the officers attempted to separate Foster from the crowd. As they did so, Foster grabbed Defendant Wilma Kay Cooper and told the officers that he wanted his aunt (Defendant) to come with him.

{4} Detective Jackson told Defendant that she could not go with Foster, but the pair advanced towards the officers nonetheless. Detective Jackson twice held up his hands and asked Defendant to stop. Foster and Defendant continued to walk towards the officers, and again Detective Jackson raised his hands and ordered Defendant to stay back. According to the testimony, Detective Jackson may have put his hand in Defen-

dant's face, and Defendant responded by slapping the Detective's hand away and telling Detective Jackson to keep his hand out of her face. At this time, Detective Jackson told Defendant that she was under arrest. Defendant retorted that Detective Jackson could not arrest her, and the crowd echoed her protest.

{5} Detective Jackson repeatedly tried to get hold of Defendant's arm, but Defendant kept turning away. Finally, Detective Jackson succeeded in grabbing Defendant's shirt sleeve, and her arm was pulled out of the sleeve. At this point, the crowd, now about twenty in number, "swarmed" the pair "almost like a mob" and tried to separate Defendant from Detective Jackson. The crowd pinned Detective Jackson and Defendant against the back of a parked car. Concerned for his safety, Detective Jackson called for assistance. Then someone (not Defendant) struck Detective Jackson's head, such that his glasses were torn off and he became dizzy. The blow to the head caused Detective Jackson to let go of Defendant and draw his side arm to force the crowd away. Defendant was arrested and then charged with battery upon a police officer, resisting arrest, and disturbing the peace. After her conviction of all three crimes, Defendant appeals only her felony conviction for battery upon a peace officer.

DISCUSSION

{6} Defendant's first argument is that her conviction should be reversed because the trial court did not use the jury instruction outlined in *Padilla*, 1997–NMSC–022, ¶ 7, 123 N.M. 216, 937 P.2d 492. This instruction would have informed the jury members that to convict Defendant, they had to find that her battery (slapping the detective's hand) posed an "actual injury, actual threat to safety, or [a] meaningful challenge to authority." *Id.* The merits of this argument are addressed in the companion case to this appeal and will not be reiterated at length. *See Jones*, 129 N.M. 165, ¶¶ 9–11, 3 P.3d 145–46, ¶¶ 9–11. Defendant requested an instruction phrased in the language of *Padilla*, which was denied. Defendant also introduced evidence that she slapped the detective's hand away from her face because Detective Jackson was being rude and disrespectful; she claimed she was not intending to challenge the officer's authority or to threaten his safety. Because this evidence, if believed, could rebut the charge of an "unlawful" battery upon a peace officer, as defined in Section 30–22–24 and amplified by *Padilla*, the court's failure to instruct as requested was reversible error and mandates a new trial. *See Padilla*, 1997–NMSC–022, ¶ 11, 123 N.M. 216, 937 P.2d 492; *see also State v. Magby*, 1998–NMSC–042, ¶ 14, 126 N.M. 361, 969 P.2d 965 (holding that instruction which misdirected jurors as to the appropriate standard constitutes reversible error). The remaining issues are discussed insofar as they relate to the resolution of this case on remand.

{7} Defendant argues that the trial court also erred as a matter of law by allowing the State to pursue a theory that her battery constituted a threat to the officer's safety, based solely on what occurred thereafter. The State was allowed to present a kind of domino theory; that "but for" slapping the officer's hand, Detective Jackson would not have arrested Defendant, then Defendant would not have resisted her arrest, and finally, the crowd would not have become hostile to the point of attacking Detective Jackson. The State asserts that by slapping the officer, "*coupled* with retreating and asserting he could not arrest her," Defendant "*incited* the already excited crowd to close in and physically attack [Detective] Jackson." (Emphasis added.) The crux of the issue is whether the State was entitled to prove an "actual threat to safety" by virtue of Defendant's conduct (resisting arrest) that occurred *after* the battery and for which she was separately charged and convicted.

{8} Defendant urges this Court, as she did the jury, to confine the scope of the evidence under consideration to the circumstances existing at the time of the hand slap, and whether that slap, taken in context, meaningfully challenged the officer's authority or actually threatened his safety. Defendant's argument was not successful at trial. In response to this argument, the State told the jury to "look very closely at your jury

instructions, especially [the battery upon a peace officer instruction,] there is not a single reference in that jury instruction to two things the defense is trying to tell you. First of all, . . . the language out of the instruction reads 'the Defendant's conduct' threatens the officer's safety, not a single act or a simple act." Defendant objected to the State's interpretation of the instruction. At the bench conference that followed, the trial judge determined that it was up to the jury to decide what the term "conduct" in the instruction meant: whether the conduct at issue was limited to the simple act of the battery or included Defendant's behavior afterwards, including her resisting arrest.

{9} We believe that the "conduct" referred to in the jury instruction, and implied in the statute, means Defendant's conduct leading up to and including the slap, and anything she did or said afterwards that explained her reasons for touching the officer. This would not include, however, Defendant's response, or that of the crowd, to the officer's intervening decision to arrest her. Defendant, after all, was charged with battery, not inciting a riot. Her acts of resisting arrest and disturbing the peace were already the basis for separate prosecutions. We think the legislature intended the jury to concentrate on the touching and its impact in light of the immediate circumstances, not what happened two or three events later, which, we emphasize, resulted in convictions unchallenged by this appeal.

{10} *People v. Gentry,* 48 Ill.App.3d 900, 6 Ill.Dec. 617, 363 N.E.2d 146 (1977), is a case on point. In *Gentry,* a policeman confronted the defendant while investigating a shooting. *See id.* 6 Ill.Dec. 617, 363 N.E.2d at 147. The defendant became argumentative with the police. *See id.* This exchange took place in a crowd of about thirty observers. *See id.* According to the officer, the defendant pulled away when he attempted an arrest. *See id.* When the policeman finally grabbed the defendant, he was attacked by the crowd, but not by the defendant. *Id.* 6 Ill.Dec. 617, 363 N.E.2d at 148. At trial for disorderly conduct (he was also convicted of resisting arrest), the police testified that the defendant was "in the process of committing" disorderly conduct as he argued with the police. Disorderly conduct was defined as an act which "creates a clear and present danger of a breach of [the] peace or an imminent threat of violence." *Id.* 6 Ill.Dec. 617, 363 N.E.2d at 150 (citation and internal quotation marks omitted). The prosecution relied on the fight following the arrest as evidence of a breach of the peace sufficient to support a disorderly conduct conviction. The appellate court disagreed, pointing out, "[T]his disturbance occurred *after* defendant was arrested and involved family and friends of defendant, who were obviously incensed over his arrest. Nothing in the record suggests defendant's conduct prior to this time threatened a breach of the peace." *Id.* Further, *Gentry* held that the defendant could not be accountable for the size of the gathering crowd, stating that a person's behavior "does not evolve into a crime simply because persons standing nearby stop, look and listen." *Id.* We find *Gentry* 's approach instructive.

{11} The State is correct that battery is not judged in a vacuum. It must be viewed in light of the factual setting to determine whether an actual threat to safety or a meaningful challenge to authority occurred. *See Jones,* 129 N.M. 165, ¶ 9, 3 P.3d 145, ¶ 9. For instance, the defendant in *Padilla,* 1997-NMSC-022, ¶ 3, 123 N.M. 216, 937 P.2d 492 instigated a disturbance in jail by fighting and kicking his cell door. This conduct led another inmate to defy a correctional officer's order for everyone to return to their cells. *See id.* The defendant was aware that a one man rebellion against the authority of the corrections officers was under way, and chose to aggravate it by pouring baby oil on the officers while they restrained the hostile inmate. *See id.* A jailer testified that the inmate was more difficult to restrain because of the baby oil. *See id.* The defendant's actions could have constituted an "actual threat" to officer safety because of the surrounding circumstances. But the court did not rely upon an unraveling chain of causation, as in the case at bar, to hold the accused responsible for intervening events outside the immediate scope of his actions.

{12} The trial court initially observed that any conduct after the hand slap was irrelevant to the battery charge. Later in the trial, however, the court reversed course. During closing arguments, the pros-

ecution argued that Defendant's conduct under the battery statute included her post-battery actions of resisting arrest. We believe the trial court had it right the first time. Defendant's conduct after the slap was too attenuated from the slap itself to prove an actual threat to safety or a meaningful challenge to authority.

{13} Confining the State to the immediate events of the battery hardly renders Defendant immune from the statute's reach. Detective Jackson testified that, before the hand slap, Defendant repeatedly disobeyed his orders to stay back. When Detective Jackson pointed at Defendant and commanded her to stop, she slapped his hand and said something along the lines of, "You don't have to put your finger in my face." This alone could reasonably be construed as a meaningful challenge to the detective's attempt to assert his lawful authority. We hold only that there was insufficient evidence to justify a conviction under the "safety" prong of the statute.

{14} Defendant's final argument on appeal is that the prosecutor's closing argument warranted a mistrial. After arguing the evidence against Defendant, the prosecutor implored the jury to "think of one other thing by your verdict today, you can send a message if you convict this . . .," which drew a swift objection from Defendant. At the bench conference that followed, the trial court asked the prosecutor what message she wanted to send. The prosecutor responded that she wanted the jury to stand behind the officers and keep them out of harm's way. The judge correctly told counsel that the argument was improper and asked her not to make such a statement. The prosecutor resumed by asking the jurors to imagine what would happen if "we didn't have people like Phil Jackson, who puts his life on the line every single day to enforce those laws and protect this community. We have to protect these officers, ladies and gentlemen. We have to do whatever we can to keep them safe and out of harm's way. And to get there . . .," which drew another objection. The judge recessed the jury so counsel could argue a mistrial motion.

{15} The sole duty of a prosecutor is to see that justice is done. *See State v. Pennington,* 115 N.M. 372, 376, 851 P.2d 494, 498 (Ct.App.1993). Prosecutorial commentary that urges a jury to convict for reasons other than the evidence defies the law and undermines the integrity of a verdict. *See State v. Diaz,* 100 N.M. 210, 213–14, 668 P.2d 326, 329–30 (Ct.App.1983). While a prosecutor " 'may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' " *Id.* at 215, 668 P.2d at 331 (quoting *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)). As we recently observed, this kind of "pandering is at best unprofessional; at worst, it places in jeopardy an otherwise just verdict." *See State v. Phillips,* 128 N.M. 777, ¶ 31, 999 P.2d 421, ¶ 31 (Ct.App.2000); *see also* ABA Standards for Criminal Justice, *The Prosecution Function & Defense Function* § 3–5.8(d) (3d ed.1993) (stating that the "prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence").

{16} Although we refrain, despite our concerns, from reviewing the mistrial motion, we urge prosecutors to adhere carefully to the trial judge's efforts to control argument during trial. *See Bell v. State,* 723 So.2d 896, 897 (Fla.Dist.Ct.App.1998) (cautioning district attorney not to consider the harmless error and fundamental error rules as "a license to violate both the substantive law and the ethical rules that prohibit improper argument"). This appellate court issue has been rendered moot due to our reversal on other grounds and remand for a new trial.

CONCLUSION

{17} We reverse Defendant's conviction for battery upon a peace officer for lack of a proper instruction as requested.

{18} **IT IS SO ORDERED.**

BUSTAMANTE and ARMIJO, JJ., concur.

3 P.3d 672

2000-NMSC-016

BOARD OF COMMISSIONERS OF RIO ARRIBA COUNTY, Petitioners-Appellants,

v.

John M. GREACEN, in his individual and official capacities, Administrative Office of the Courts, Administration Human Resources, Fiscal Service Department, and State of New Mexico, Respondents-Appellees.

No. 25,384.

Supreme Court of New Mexico.

April 24, 2000.

Butkus & Reimer, P.C., R. Galen Reimer, Albuquerque, for Appellants.

Patricia A. Madrid, Attorney General, Steven L. Bunch, Assistant Attorney General, Santa Fe, for Appellees.

Douglas W. Decker, Gallup, for Amicus Curiae Board of Commissioners of McKinley County.

Paul L. Biderman, Paul S. Nathanson, Pamela Lambert, Albuquerque, for Amici Curiae Judicial Education Center Institute of Public Law University of New Mexico School of Law.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., Peter Franklin, Santa Fe, for Amicus Curiae New Mexico Finance Authority.

OPINION

BACA, Justice.

{1} Petitioners, the Board of Commissioners of Rio Arriba County (collectively referred to as Rio Arriba), appeal an adverse trial court ruling granting summary judgment in favor of Respondents (collectively referred to as Greacen). The Court of Appeals, recognizing that this case presents significant questions of law under the New Mexico Constitution and issues of substantial public interest, certified the case to this Court. *See* NMSA 1978, § 34–5–14(C) (1972) (stating that the supreme court has appellate jurisdiction over "significant question[s] of law under the constitution of New Mexico" and "issue[s] of substantial public interest"). We accepted certification and now address whether Rio Arriba has the authority to enact local traffic ordinances and retain collected penalty assessments for violations of those traffic ordinances. We conclude that Rio Arriba does have the authority to enact county traffic ordinances. However, Rio Arriba does not have the authority to alter the comprehensive funding and allocation system of the Española Magistrate Court and therefore does not have the ability to retain any penalty assessments. We reverse in part and affirm in part.

I.

{2} On September 25, 1997, Rio Arriba enacted the Rio Arriba Uniform Traffic Ordinances. *See* Rio Arriba County, N.M., Ordinances §§ RA–1–2 to –8–138 (1997). Both parties agree that the Rio Arriba Traffic Ordinances are substantially similar to the provisions of the State Motor Vehicle Code. *See* NMSA 1978, §§ 66–1–1 to –8–141 (1978, as amended through 2000). After the enact-

ment of the Rio Arriba Traffic Ordinances, county sheriff deputies issued citations to enforce the county traffic ordinances until they were enjoined from doing so by the district court on January 29, 1998. Rio Arriba then sought to enforce the citations that had been issued based on its county ordinances in the Española Magistrate Court. Believing the county ordinances to be unenforceable, the Administrative Office of the Courts directed the Española Magistrate Court not to enforce the citations. Rio Arriba then filed a petition seeking a writ of mandamus, or in the alternative, a complaint for declaratory and injunctive relief seeking to order enforcement of their county traffic ordinances in the Española Magistrate Court. After cross-motions for summary judgment, the district judge ruled in favor of Greacen, holding that Rio Arriba did not have the authority to enact the local motor vehicle ordinances and that the County had no authority to retain the penalty assessments derived from the county traffic ordinances. Rio Arriba filed a timely appeal, and the Court of Appeals properly certified the matter to this Court. We now address: (1) whether Rio Arriba has the authority to enact a local motor vehicle code; and (2) whether Rio Arriba has the authority to retain the penalty assessments collected by the Española Magistrate Court.

II.

{3} This case was decided on a motion for summary judgment under Rule 1–056 NMRA 2000. Summary judgment is appropriate when the parties do not dispute the facts, but only the legal effect of those facts. *See Gardner–Zemke Co. v. State,* 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990). We review de novo the trial court's ruling on a motion for summary judgment to determine whether any genuine issues of material fact exist and whether the movant was entitled to judgment as a matter of law. *See* Rule 1–056(C); *Gallegos v. State Bd. of Educ.,* 1997–NMCA–040, ¶ 9, 123 N.M. 362, 940 P.2d 468. We find that no material issues of fact exist in this case, and since the disposition of this case turns solely on the resolution of legal issues, we conclude that the trial court's resolution of this matter on summary judgment was procedurally correct.

{4} This is primarily a matter of statutory construction and thereby concerns a pure question of law, subject to de novo review. *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). In this statutory review, we recognize that "it is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object—underlying the statute." *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994). In deriving this legislative objective we must "give a statute its literal reading if the words used are plain and unambiguous, provided such a construction would not lead to an injustice, absurdity or contradiction." *Atencio v. Board of Educ.,* 99 N.M. 168, 171, 655 P.2d 1012, 1015 (1982) (citing *State v. Nance,* 77 N.M. 39, 419 P.2d 242 (1966)). "Unless the context suggests some specialized meaning, we interpret a statute in accordance with the common meaning of the statutory language." *Welch v. Sandoval County Valuation Protests Bd.,* 1997–NMCA–086, ¶ 5, 123 N.M. 722, 945 P.2d 452.

III.

{5} Rio Arriba County was recognized by the Territorial Government of New Mexico in 1852, and was later organized as a corporate and political body. 1876 N.M. Laws, ch. 1, § 1. This organization continued after New Mexico became a State on January 6, 1912. *See* NMSA 1978, § 4–38–1 (1876) ("The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners."). Counties are recognized in Article X of the New Mexico Constitution; however, that Article does not define the existence or extent of county powers. Therefore, we must look to statutory and case law limitations placed on county powers. We have previously held, "A county is but a political subdivision of the State, and it possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers." *El Dorado at Santa Fe, Inc. v. Board of County Comm'rs,* 89 N.M. 313, 317, 551 P.2d 1360, 1364 (1976)

(citing *Dow v. Irwin,* 21 N.M. 576, 157 P. 490 (1916)); *see also* 56 Am.Jur.2d *Municipal Corporations* § 194, at 246–47 (1971) ("A county, as a subdivision of the state, and its board of commissioners or supervisors, as a creature of statute, have only such powers as are expressly conferred upon them by the state or are necessarily implied from those expressly given."). Therefore, we look for powers that were expressly granted to Rio Arriba by the Legislature or necessarily implied in the performance of an express power to justify the enactment of Rio Arriba's traffic ordinances.

{6} Rio Arriba argues that it has the express statutory authority to enact county traffic ordinances, despite the existence of the comprehensive State Motor Vehicle Code. *See* §§ 66–1–1 to –8–141. In support of this contention Rio Arriba advances three statutorily based justifications. The first two arguments are derived from the powers expressly granted to counties as provided in NMSA 1978, § 4–37–1 (1975):

> *All counties are granted the same powers that are granted municipalities* except for those powers that are inconsistent with statutory or constitutional limitations placed on counties. Included in this grant of powers to the counties are those powers *necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants.* The board of county commissioners may make and publish any ordinance to discharge these powers not inconsistent with statutory or constitutional limitations placed on counties.

(Emphasis added.) First, Rio Arriba highlights the language, "All counties are granted the same powers that are granted municipalities," to assert that it has the same powers as those granted to municipalities, and specifically the powers granted in the State Motor Vehicle Code in NMSA 1978, § 66–8–130(B) (1990) ("All penalty assessments under a municipal program authorized by this section shall be processed by the municipal court, and all fines and fees collected shall be deposited in the treasury of the municipality."). Second, Rio Arriba justifies its enactment of the local ordinances by citing to the "police powers" invoked by the language, "necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants." Section 4–37–1; *see also Brazos Land, Inc. v. Board of County Comm'rs,* 115 N.M. 168, 174, 848 P.2d 1095, 1101 (Ct.App.1993) (referring to the power contained in Section 4–37–1 as "police powers"). Finally, Rio Arriba asserts that because counties are included in the definition of "local authorities" as defined by NMSA 1978, § 66–1–4.10(E) (1990), it should have all of the powers afforded local authorities. These powers include the specific authorization contained in NMSA 1978, § 66–7–8 (1978), to "adopt additional traffic regulations which are not in conflict with such provisions [of the Motor Vehicle Code]." We review each of these claims.

A.

{7} Rio Arriba argues that the Legislature has expressly granted counties all the powers granted to municipalities, including the power to adopt its own traffic code. Rio Arriba directs our attention to Section 4–37–1 which states: "All counties are granted the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties." Specifically, Rio Arriba invokes the language relating to municipalities contained in Section 66–8–130(A): "Any municipality may, by passage of an ordinance, establish a municipal penalty assessment program similar to that established in Sections 66–8–116 through 66–8–117 NMSA 1978 for violations of provisions of the Motor Vehicle Code . . . ." This rule contemplates the passage of a local penalty assessment program for violations of the State Motor Vehicle Code. Furthermore, NMSA 1978. § 3–17–6(A)(10) (1965), provides an express indication of the Legislature's intent to allow adoption of a traffic code by a municipality: "A municipality may adopt by ordinance the conditions, provisions, limitations and terms of [a] . . . traffic code . . . ." Thus, when we read Section 3–17–6 together with Section 4–37–1, we conclude that counties

have the power to enact local traffic ordinances.

{8} We find support for this conclusion in our case law. The Court of Appeals discussed the relationship between an express legislative grant of power to municipalities and the corresponding county authority under Section 3–37–1 in *Board of County Commissioners v. Padilla*, 111 N.M. 278, 804 P.2d 1097 (Ct.App.1990). In *Padilla* the County argued that, under Section 4–37–1, it had the same powers the Legislature had granted to municipalities in NMSA 1978, § 3–13–4(A) (1965) to enter into a collective-bargaining agreement and to establish a merit-based personnel system. *Id.* at 282, 804 P.2d at 1101. The Court of Appeals stated,

> The statute providing counties with the same powers granted to municipalities limits those powers only insofar as they "are inconsistent with statutory or constitutional limitations placed on counties." § 4–37–1. Consequently, the sole restriction on applying a county merit system to employees of the Treasurer is that such application be consistent with statutory and constitutional provisions relating to the powers of boards of county commissioners vis-a-vis county treasurers.

Id. at 283, 804 P.2d at 1102. The Court then detailed the "relative authority of the [County] Treasurer and the Board [of County Commissioners]." *Id.* at 284–85, 804 P.2d at 1103–04. In upholding the County's power to enact the collective-bargaining and merit-based personnel system, the *Padilla* Court relied on Section 4–37–1, and the power granted to municipalities in Section 3–13–4(A) to "establish by ordinance a merit system for the hiring, promotion, discharge and general regulation of municipal employees." Likewise, in this case, based on the plain meaning of Section 4–37–1, granting counties the same powers as municipalities, and Section 3–17–6, granting municipalities the power to enact a traffic code, Rio Arriba, like a municipality, has the authority to adopt local county traffic ordinances. *See Atencio*, 99 N.M. at 171, 655 P.2d at 1015 (giving "a statute its literal reading if the words used are plain and unambiguous, provided such a construction would not lead to an injustice, absurdity or contradiction").

B.

{9} Rio Arriba also correctly argues that it has all of the powers of a "local authority" as defined in 1978 NMSA, § 66–1–4.10(E) (1990). Section 66–1–4.10(E) defines local authorities as "every county, municipality and any local board or body having authority to enact laws relating to traffic under the constitution and laws of this state." This section assumes that counties would have the power to enact traffic ordinances by grouping counties with municipalities and other bodies "having authority to enact laws relating to traffic." *Id.*

{10} The powers expressly granted to "local authorities" contained in NMSA 1978, § 66–7–9(A) (1995), confirm this result. Section 66–7–9 provides:

> The provisions of the Motor Vehicle Code *shall not* be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from ... (7) restricting the use of highways as authorized in the Motor Vehicle Code; [or] ... (11) adopting other traffic regulations as specifically authorized by the Motor Vehicle Code;

(Emphasis added.) We are particularly convinced by the use of the mandatory language, "shall not" in Section 66–7–9. Also, the language quoted above indicates a clear legislative intent to allow local authorities to regulate traffic in their jurisdictions.

{11} Finally, Section 66–7–8, which provides for the uniform applicability of the Motor Vehicle Code, also supports Rio Arriba's claim by expressly reserving the power to local authorities to "adopt additional traffic regulations which are not in conflict with such provisions [of the Motor Vehicle Code]." Thus, Rio Arriba fits within the definition of a local authority, and has the powers of local authorities to enact traffic regulations.

C.

{12} Finally, Rio Arriba seeks to justify enactment of their county traffic ordi-

nances by directing us to the "general welfare powers" or "police powers" that the New Mexico State Legislature has conferred to counties through Section 4–37–1. The exact provisions of Section 4–37–1 have rarely been construed by New Mexico courts and never in the context of Motor Vehicle regulations. *See Bolton v. Board of County Comm'rs,* 119 N.M. 355, 367, 890 P.2d 808, 820 (Ct.App. 1994) (citing Section 4–37–1 and Section 4–38–24 to conclude, "Indisputably, the County possesses the authority to construct or repair county roads within its boundaries."); *see also Brazos Land, Inc.,* 115 N.M. at 174, 848 P.2d at 1101 (citing Section 4–37–1 as justification for zoning regulation); *Board of County Comm'rs v. City of Las Vegas,* 95 N.M. 387, 389, 622 P.2d 695, 697 (1980) (citing Section 4–37–1 for county power to enact both "general police power ordinances and zoning ordinances" but deciding that regulation of a municipal landfill was not within the police power).

{13} Section 4–37–1 is clearly a grant of power to counties to enact ordinances that are "necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants." Despite Rio Arriba's reliance on Section 4–37–1, Rio Arriba does not provide any evidence as to the necessity of their local ordinances. Nor does Rio Arriba relate the ordinances to any particular local problem that would justify the use of the general welfare power. Given that the State of New Mexico has adopted the comprehensive State Motor Vehicle Code, it is very difficult to comprehend how the Rio Arriba Code could further the safety and well-being of the local residents by merely duplicating the state regulations. Since the Rio Arriba ordinances substantially parallel the Motor Vehicle Code, we are suspicious of the public purpose that the Rio Arriba's traffic ordinances purports to further. Even a State legislative enactment based on the police powers of the state must be "reasonably necessary to prevent manifest evil or reasonably necessary to preserve the public safety, or general welfare." *Alber v. Nolle,* 98 N.M. 100, 105, 645 P.2d 456, 461 (Ct.App.1982) (citing *State v. Dennis,* 80 N.M. 262, 454 P.2d 276 (Ct.App.1969)). We believe that these same principles apply with equal force to local ordinances and local interests where the State has already sought to regulate the same or substantially similar conduct. Since Rio Arriba does not cite to any particular local "manifest evil" or other local "general welfare" concern, Rio Arriba's justification based on the general welfare clause must fail. *See id.*

{14} Despite Rio Arriba's failure to convince this Court that its duplication of the State Motor Vehicle Code furthered legitimate goals derived from its general welfare or police powers, we nonetheless conclude that the powers given to counties in Section 4–37–1 to exercise the powers of municipalities, and the powers granted to local authorities as contained in Section 66–7–8 and Section 66–7–9, dictate our holding that Rio Arriba has the statutory authority to enact motor vehicle ordinances. (*See* ante at Section III, A and B.) We now turn to potential conflicts between the county ordinance and State law.

IV.

{15} Greacen correctly asserts that Rio Arriba can not adopt local ordinances that are inconsistent with those of the State. Counties are granted the same powers as those given to municipalities except for those that "are inconsistent with statutory or constitutional limitations placed on counties." Section 4–37–1. A further limitation on county powers is found in the Motor Vehicle Code. Section 66–7–8 provides: "The provisions of Article 7 of Chapter 66 NMSA 1978 [the State Motor Vehicle Code] shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any ordinance, rule or regulation in conflict with such provisions unless expressly authorized herein." Together, these statutory provisions provide sufficient support for us to adhere to the rule announced in *Casuse v. City of Gallup,* where we stated that "when two statutes that are governmental or regulatory in nature con-

flict, the law of the sovereign controls." 106 N.M. 571, 573, 746 P.2d 1103, 1105 (1987).

{16} Greacen argues the entire Rio Arriba Code is inconsistent with the State Motor Vehicle Code because it is designed to supplant or replace the State Motor Vehicle Code. This argument is not supported by New Mexico case law. In *State ex rel. Coffin v. McCall*, the defendant was convicted under the Carlsbad City Code of driving while under the influence. 58 N.M. 534, 273 P.2d 642 (1954). The defendant claimed that because the State had passed the State Motor Vehicle Code designed to ensure uniformity throughout the state, the city ordinance should be deemed inconsistent and invalid. *Id.* at 536, 273 P.2d at 642. In evaluating the alleged inconsistency this Court reasoned, "the test is whether the ordinance permits an act the general law prohibits, or vice versa." *Id.* at 537, 273 P.2d at 644; *accord* 7A Am.Jur.2d *Automobiles and Highway Traffic* § 21 at 550 (1997) ("A conflict exists when the local regulation is facially inconsistent with the state law, such as when the ordinance prohibits an act permitted by statute or permits an act prohibited by statute." (footnote omitted)). *McCall* held there was no invasion of State statutory authority where the local ordinance "merely complements the statute and is nowhere antagonistic therewith." 58 N.M. at 538, 273 P.2d at 644.

{17} There are a number of provisions of the Rio Arriba County Ordinances that we believe are antagonistic with New Mexico statutory law. For example, Rio Arriba purports to punish certain offenses deemed to be felonies with punishment up to imprisonment for eighteen months and/or a five thousand dollar fine. This is in direct conflict with NMSA 1978, § 4–37–3 (1993), which specifically and expressly limits the penalties that may be assessed by a county to "a fine of three hundred dollars ($300) or imprisonment for ninety days or both the fine and imprisonment." [1] These provisions are clearly contrary to and antagonistic with the limitations placed on county enforcement power contained in Section 4–37–3 and are therefore invalid.

{18} A second conflict is present within Rio Arriba County Ordinance 8–102, relating to driving under the influence of intoxicating liquor. *See* RA–8–102. In that section, Rio Arriba purports to regulate all persons within the State: "It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle *within this state.*" Section RA–8–102 (emphasis added). This provision is clearly antagonistic with the jurisdictional limit placed on county ordinances found in NMSA 1978, § 4–37–2 (1975). ("County ordinances are effective within the boundaries of the county, including privately owned land or land owned by the United States. However, ordinances are not effective within the limits of any incorporated municipality.").

{19} While we will not engage in an evaluation of each and every provision of the Rio Arriba Traffic Ordinances to test for inconsistencies, it is likely that a further evaluation will reveal other individual conflicts with State law. Inconsistencies revealed by future examinations will not immediately fail, but based on the reasoning in *McCall*, must be tested to ensure that the county ordinance merely "complements" and is not "antagonistic" with State law. Where the Rio Arriba code does not complement the State law, the law of the sovereign must take precedent. *See Casuse*, 106 N.M. at 573, 746 P.2d at 1105.

{20} Having concluded that Rio Arriba has the authority to enact ordinances that are not inconsistent with State law, we now turn to the issue of the propriety of Rio Arriba's enforcement and disposition of funds collected in the enforcement of those ordinances.

V.

{21} Rio Arriba properly sought enforcement of their county ordinances in the Española Magistrate Court. The magistrate courts are the courts of competent jurisdiction to hear violations of the county ordinances. NMSA 1978, § 35–3–4 (1985),

1. The three exceptions to Section 4–37–3 allow for the imposition of a greater penalty in the case of driving while under the influence and dumping of regular and toxic refuse. *See* § 4–37–3.

defines the criminal jurisdiction of the magistrate court as over "all cases of misdemeanors and petty misdemeanors, including offenses and complaints under ordinances of a county." In contrast, the municipal court has "jurisdiction over all offenses and complaints under ordinances *of the municipality.*" NMSA 1978, § 35–14–2 (1988) (emphasis added). Accordingly, the Española Magistrate Court is the proper forum for Rio Arriba to seek enforcement of its county ordinances.

{22} However, in addition to seeking enforcement of the traffic ordinances in the Española Magistrate Court, Rio Arriba sought to have the Española Magistrate direct payments received under their county ordinances to the Rio Arriba County Treasurer. The Rio Arriba Code reads, "Payment of any penalty assessment must be made by mail to the Rio Arriba County Treasurer within thirty days from the date of arrest." Section RA–8–117(B). As justification for the diversion of funds to their County Treasurer, Rio Arriba reasserts its argument that it has the same powers as municipalities. *See* § 4–37–1 (*See* infra Section III–A) Rio Arriba cites Section 66–8–130(B) for the proposition: "All penalty assessments under a municipal program authorized by this section shall be processed by the municipal court, and all fines and fees collected *shall be deposited in the treasury of the municipality.*" (Emphasis added). Rio Arriba argues that, like a municipality, as a county it can also retain the penalty assessments. *See* § 4–37–1.

{23} Rio Arriba's argument is unconvincing and fails to recognize the source of the enforcement power of the magistrate court. The magistrate court is not controlled by the local enactments of the County of Rio Arriba, but by the statutes governing the administration of the courts and the rules issued by the Supreme Court of the State of New Mexico. *See* NMSA 1978, § 35–7–1 (1997) ("The magistrate courts shall operate under the direction and control of the supreme court.").

{24} The magistrate courts are clearly and unambiguously directed to send all monies collected to the Administrative Office of the Courts. NMSA 1978, § 35–7–4 (1993) directs: "Each magistrate court shall pay to the Administrative Office of the Courts, not later than the date each month established by regulation of the director of the administrative office, the amount of all fines, forfeitures and costs collected by him during the previous month, except for amounts disbursed *in accordance with law.*" (Emphasis added.) The Administrative Office of the Courts is directed to "deposit the amount of all fines and forfeitures with the state treasurer for credit to the current school fund" and to "deposit the amount of all costs, except all costs collected pursuant to Subsections D and E of Section 35–6–1 NMSA 1978, for credit to the general fund." Section 35–7–4. There is no discretion given to the magistrate court to determine the collection or disbursement of funds.

{25} Rio Arriba argues that the language, "except for amounts disbursed in accordance with law" contained in Section 35–7–4 could be interpreted as allowing Rio Arriba to enact laws that can control the disbursement of the funds. This argument is not well taken. Counties of the State of New Mexico are political bodies vested with the power to pass local ordinances, but counties are not vested with the power to alter the funding and disbursement system of the State magistrate courts.

{26} We find support for our conclusion in the statutes governing the administration of the magistrate courts as well as in the New Mexico Constitution. New Mexico Constitution, Article VI, § 30 reads, "All fees collected by the judicial department shall be paid into the state treasury as may be provided by law and no justice, judge or magistrate of any court shall retain any fees as compensation or otherwise." While it is indisputable that this Section prevents the retention of fees as compensation by judges of the State of New Mexico, we believe that this amendment also expresses a clear intention that fees collected by the judicial department constitute state money.

{27} Rio Arriba argues that "fees" as described in N.M. Const. art. VI, § 30, are distinct from "penalties" as described in their

county code. We disagree. NMSA 1978, § 35–7–5(A) (1979), is sufficiently broad to answer any doubt that penalties are also public money for the purpose of Article VI, § 30. Section 35–7–5 provides: "All money collected by a magistrate court in connection with civil and criminal actions is *public money of the state* held in trust by the magistrate until received by the Administrative Office of the Courts or disbursed in accordance with law." (Emphasis added.) Furthermore, Section 35–7–4, describes the money collected as "all fines, forfeitures and costs." This language is also sufficiently broad to encompass penalty assessments.

{28} Finally, since the enforcement authority rests in the magistrate courts, we see no distinction between money mailed to the magistrate courts by individual violators and money collected at the court's facilities. Rio Arriba does not have the authority to direct the mail-in-payment of any funds to their county treasurer. All funds collected by the magistrate courts are indeed state funds and need to be processed as such, regardless of whether the violation is of a local county ordinance or of the State Motor Vehicle Code. Therefore, the collection and disbursement of funds from the magistrate courts shall remain as described in the New Mexico statutes regardless of whether they are processing a county citation or a state citation. Rio Arriba does not have the power to alter the organization of the magistrate court and therefore does not have the ability to retain any fees collected from the issuance of their local traffic ordinances absent express authorization by the Legislature.

VI.

{29} Based on express provisions in the State Motor Vehicle Code governing local authorities, such as Rio Arriba, and the corresponding powers of counties and municipalities, we hold that Rio Arriba has the statutory authority to adopt local traffic ordinances that are not inconsistent with the laws of the State of New Mexico. We believe that the general grant of police power given to local authorities was designed to address particular local problems, and not to merely duplicate the statutes in the State Motor Vehicle Code. However, New Mexico statutory authority dictates that despite having the power to enact the local traffic ordinance, Rio Arriba does not have the power to alter the administration of the magistrate courts. Rio Arriba does not have the power to retain any fees, forfeitures, costs, or penalties because this money is public money that has been directed by statute for payment to the Administrative Office of the Courts. This process was established at the State level and the enactment of the local ordinance has no effect on that administration. Rio Arriba is ordered to pay any funds it has retained in reliance on its local traffic ordinances to the Administrative Office of the Courts. We therefore overrule the portion of the district court ruling that held that Rio Arriba did not have the authority to enact the local ordinances. We affirm the portion of the district court ruling that held that Rio Arriba does not have the power to retain any penalty assessments collected in reliance on their local ordinances.

{30} **IT IS SO ORDERED.**

MINZNER, C.J., FRANCHINI, SERNA and MAES, JJ., concur.

3 P.3d 680

2000-NMCA-048

TARIN'S, INC., Plaintiff–Appellant,

v.

Bob TINLEY, Investment Company of the Southwest, and Advanced Mechanical Inc., d/b/a Total Service Company, Defendants–Appellees.

No. 19,945.

Court of Appeals of New Mexico.

Nov. 3, 1999.

John B. Speer, Albuquerque, for Appellant.

Lester C. Cannain, Albuquerque, for Appellee Advanced Mechanical, Inc.

Richard D. Barish, Albuquerque, for Appellees Investment Company of the Southwest, Inc. and Bob Tinley.

OPINION

BUSTAMANTE, Judge.

{1} Plaintiff Tarin's, Inc. (Tarin), appeals the dismissal of its suit against Defendants. Tarin argues that its suit against Advanced Mechanical, Inc., doing business as Total Service Company (Advanced), should not have been dismissed because it was a third-party beneficiary of the contract between Advanced as subcontractor and the general contractor. Tarin also argues that Investment Company of the Southwest (ICSW), the closely-held corporation of Bob Tinley (Tinley), and Tinley individually, should not have been dismissed as defendants because ICSW and Tinley improperly revoked a license they granted to Tarin to draw utilities from connections to their property. We reverse.

{2} Before discussing the case in more detail, we address a motion pending before this Court. After Tarin filed its appeal, ICSW and Tinley filed a motion to

dismiss the appeal as to them for lack of a final order. The basis of the motion was the district court's failure to rule on a counterclaim ICSW included in its answer to Tarin's complaint. Nowhere in the district court's judgment is there any mention of the counterclaim. We therefore grant the motion and dismiss the appeal as to ICSW only. *See Alcala v. St. Francis Gardens,* 116 N.M. 510, 511, 864 P.2d 326, 327 (Ct.App.1993) (indicating judgment is not final unless "all issues of law and of fact necessary to be determined have been determined, and the case has been completely disposed of to the extent the court has power to dispose of it"). We nonetheless refer to ICSW in our discussion because our disposition may affect ICSW on remand.

FACTS

{3} Tarin operates a dry cleaning and tuxedo rental business in northeast Albuquerque. Early in 1995, Tarin moved its business to a new location adjacent to the building where it had been a tenant of Defendants ICSW and Tinley. Tarin hired Defendant R.L. Encinio (Encinio) to serve as general contractor to alter and prepare the new building to meet Tarin's needs. Encinio, in turn, hired Defendants Advanced and On Line Electric, Inc. (On Line), as subcontractors, to install and upgrade the gas and electrical connections to the new building.

{4} The contractors apparently performed most of the work to Tarin's satisfaction. There were, however, problems with the electrical and gas connections. Rather than establishing a new electrical connection for Tarin's building, On Line improperly connected Tarin's electricity to the electric meter on the adjacent building, which Tarin previously rented from ICSW and Tinley. Similarly, Advanced connected Tarin's gas to the meter on ICSW's building instead of installing an independent gas source for Tarin. It is unclear from the record whether Tarin knew the connections were improper at the time of installation. It is also unclear whether Tinley was aware of or objected to the connections. And there is no indication in the record what the billing arrangements were for the connections. Tarin used the improper connections for approximately two years without problem or incident.

{5} On May 31, 1997, Tarin's boiler began malfunctioning. He hired a boiler service to diagnose the problem and learned that Tinley had shut off the gas to Tarin's building at the meter. Tinley would not allow Tarin to reconnect to the meter, so Tarin hired a contractor to install a new gas line. Tarin lost two days of business as a result of the problem with its boiler and the work to correct the gas connection.

{6} About a month later, Tarin lost electricity to its business when Tinley shut off the power supply and locked the switch. To rectify the problem, Tarin rented a mobile generator, had Public Service Company of New Mexico install a pole and equip it with transformers, and hired a contractor to install new electrical connections between Tarin's buildings and the new transformers. Tarin was forced to close its business for one day while work was being done to correct the problems with its electrical service.

{7} Shortly after correcting its utility connections, Tarin filed a complaint against Tinley, ICSW, Encinio, Advanced, and On Line, seeking damages for interruption of its business and for the costs of the new service. Advanced filed an answer denying most of Tarin's allegations and asserting that the complaint failed to state a cause of action against it because Tarin was not in privity of contract with Advanced. Advanced then filed a motion to dismiss the complaint as to it because of the lack of privity between it and Tarin. Tinley also answered, but before he did the district court heard argument on Advanced's motion to dismiss. The court granted the motion but gave Tarin ten days to file an amended complaint.

{8} Tarin's first amended complaint was substantially similar to the original complaint, except that it sought to explain more fully the relationship between Advanced and Encinio and specifically alleged that Tarin was a third-party beneficiary of the contract between Advanced and Encinio. Once again, Advanced filed an answer and a motion to dismiss, arguing that Tarin failed to make factual arguments to support a third-party beneficiary claim. ICSW and Tinley each

filed nearly identical motions to dismiss and for sanctions, arguing in part that neither had a duty to allow Tarin to continue to use the improper utility connections or to notify Tarin of the possibility that his utility service would be cut off. The district court ordered the first amended complaint dismissed and gave Tarin thirty days to file another amended complaint.

{9} Three days after the district court entered its order dismissing Tarin's complaint, Tarin filed a response to Tinley's motion to dismiss. Tarin then filed a second amended complaint. This complaint was largely unchanged from the first amended complaint (and in turn from the original complaint). As had become the pattern by this point in the litigation, Advanced filed an answer and a motion to dismiss the complaint. Tinley and ICSW (jointly this time) filed a motion to dismiss or in the alternative for summary judgment and for sanctions. Tinley and ICSW also jointly filed an answer in which, as noted, ICSW counterclaimed against Tarin and both ICSW and Tinley sought to enjoin Tarin from parking its vehicles so as to obstruct an easement of ingress and egress that borders their respective lots.

{10} After a hearing, the district court ordered that the second amended complaint be dismissed with prejudice as to Advanced and that ICSW and Tinley be dismissed with prejudice as defendants. Tarin appeals that order. (We note that neither Encinio nor On Line ever answered any of the complaints—nor, apparently, did Tarin seek default judgments against either—thus, neither is a party to this appeal.)

DISCUSSION

Advanced's Motion to Dismiss

{11} In its motion to dismiss the second amended complaint, Advanced admitted that it entered into an oral contract with Encinio to perform certain work on Tarin's building but argued that the complaint failed to state a claim against it because Tarin was neither in privity of contract with Advanced nor a third-party beneficiary of the contract between Advanced and Encinio. A motion to dismiss tests the legal sufficiency of the complaint. *See Kirkpatrick v. Introspect Healthcare Corp.,* 114 N.M. 706, 709, 845 P.2d 800, 803 (1992). "A motion to dismiss should be granted only when it appears that the plaintiff is not entitled to recover under any facts provable under the complaint." *Id.* We treat all of the complaint's well-pleaded allegations as true but disregard conclusions of law and unwarranted factual deductions. *See Saenz v.. Morris,* 106 N.M. 530, 531, 746 P.2d 159, 160 (Ct.App.1987).

{12} "Ordinarily, the obligations arising out of a contract are due only to those with whom it was made; a contract cannot be enforced by a person who is not a party to it or in privity with it ...." 17A Am.Jur.2d *Contracts* § 425 (1991) (footnotes omitted). Privity of contract is "[t]hat connection or relationship which exists between two or more contracting parties." *Black's Law Dictionary* 1199 (6th ed.1990). Privity of contract has also been defined as "the name for a legal relation arising from right and obligation," or the "legal relationship to the contract or its parties." *La Mourea v. Rhude,* 209 Minn. 53, 295 N.W. 304, 307 (1940). "In construction contracts, in the absence of an express agreement otherwise, a subcontractor is not in privity with the owner and must look to the general contractor, while the owner is liable only to the general contractor." *Jensen Constr. Co. v. Dallas County,* 920 S.W.2d 761, 772 (Tex.App.1996); *see also Waterford Condominium Ass'n v. Dunbar Corp.,* 104 Ill.App.3d 371, 60 Ill.Dec. 110, 432 N.E.2d 1009, 1011 (1982) (affirming dismissal of complaint against subcontractors for lack of privity); *Mariacher Contracting Co. v. Kirst Constr., Inc.,* 187 A.D.2d 986, 590 N.Y.S.2d 613, 614 (1992) (mem.) (reversing judgment in favor of subcontractor against landowner for lack of privity). Absent privity, a subcontractor owes no duty to a property owner. *See Grgic v. Cochran,* 689 S.W.2d 687, 690 (Mo.Ct.App.1985).

{13} Even if Tarin was not in privity of contract with Advanced, an issue we do not decide here given our standard of review, it might still have enforceable rights under the contract between Encinio and Advanced as a third-party beneficiary. *See Casias v. Continental Cas. Co.,* 1998–NMCA–083, ¶ 11, 125 N.M. 297, 960 P.2d 839. There

are two classes of third-party beneficiaries: intended beneficiaries and incidental beneficiaries. *See* Restatement (Second) of Contracts § 302 (1981); *Permian Basin Inv. Corp. v. Lloyd*, 63 N.M. 1, 7, 312 P.2d 533, 537 (1957) (quoting 4 Arthur L. Corbin, *Corbin on Contracts* § 776, at 18–19 (1951)); *accord Casias*, 1998–NMCA–083, ¶ 11, 125 N.M. 297, 960 P.2d 839. Only intended beneficiaries can seek enforcement of a contract. *See* Restatement (Second) of Contracts §§ 304, 315; *see also Stotlar v. Hester*, 92 N.M. 26, 30, 582 P.2d 403, 407 (Ct.App.1978). The promisor must have "had reason to know the benefit was contemplated by the promisee as one of the motivating causes for entering the contract." *Stotlar*, 92 N.M. at 30, 582 P.2d at 407. "The paramount indicator of third party beneficiary status is a showing that the parties to the contract intended to benefit the third party, either individually or as a member of a class of beneficiaries." *Valdez v. Cillessen & Son, Inc.*, 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987). The burden is on the person claiming to be a third-party beneficiary to show that the parties to the contract intended to benefit him. *See Casias*, 1998–NMCA–083, ¶ 11, 125 N.M. 297, 960 P.2d 839. He may do so using extrinsic evidence if the contract does not unambiguously indicate an intent to benefit him. *See id.; Stotlar*, 92 N.M. at 30, 582 P.2d at 407.

{14} "[I]n the construction context, a property owner is ordinarily not a third-party beneficiary of a contract between the general contractor and a subcontractor." *Thomson v. Espey Huston & Assocs.*, 899 S.W.2d 415, 419 (Tex.App.1995). Certainly property owners derive benefit from the contracts between general contractors and subcontractors. But those contracts

> are made to enable the principal contractor to perform; and their performance by the subcontractor does not in itself discharge the principal contractor's duty to the owner with whom he has contracted. The installation of plumbing fixtures or the construction of cement floors by a subcontractor is not a discharge of the principal contractor's duty to the owner to deliver a finished building containing those items; and if after their installation the undelivered building is destroyed by fire, the principal contractor must replace them for the owner, even though he must pay the subcontractor in full and has no right that the latter shall replace them. It seems, therefore, that the owner has no right against the subcontractor, in the absence of clear words to the contrary.

4 Arthur L. Corbin, *Corbin on Contracts* § 779D, at 46–47 (1951). Thus, in the context of construction contracts, we may generally start the analysis with the idea that "[f]rom the subcontractors' perspective, as well as the general contractor's, subcontracts are intended primarily to benefit those parties rather than the property owner." *Thomson*, 899 S.W.2d at 419. However, this "presumption" is subject to challenge by appropriate proof. *See Casias*, 1998–NMCA–083, ¶ 11, 125 N.M. 297, 960 P.2d 839.

{15} Turning to this case, we hold that the district court erred in granting Advanced's motion to dismiss. We acknowledge that the complaint is not a paragon of clarity. It is thin on facts and fails to enumerate clearly the theories upon which Tarin seeks recovery. But that is the nature of notice pleading. *See Stock v. Grantham*, 1998–NMCA–081, ¶ 24, 125 N.M. 564, 964 P.2d 125. Although there is nothing in the complaint indicating that Advanced was in any way connected with the contract between Tarin and Encinio, it is conceivable that Tarin could prove a relationship to the contract between Encinio and Advanced sufficient to give Tarin a right to seek enforcement of the contract. The second amended complaint does allege that Tarin was a third-party beneficiary of the contract between Encinio and Advanced. Determining whether Tarin was either in privity with or a third-party beneficiary of the contract between Encinio and Advanced would require an inquiry into the terms of the contract and into the facts and circumstances surrounding its formation. Without that information it was improper to dismiss on the pleadings. *See Kirkpatrick*, 114 N.M. at 711, 845 P.2d at 805.

{16} Advanced argues, though, that because its agreement with Encinio was oral, there is no contract language for the

district court to look to in determining whether Tarin has a right to seek enforcement. We disagree. Certainly the lack of a written contract makes the task more difficult.

> However, when construing an oral contract the words constituting the agreement are merely parts of and imbedded in a general conversation, and the meaning must be interpreted with reference to the circumstances under which the parties contracted in light of the objectives to be accomplished. In cases involving contracts wholly or partially composed of oral communications, the precise content of which are not of record, courts must look to surrounding circumstances and course of dealing between the parties in order to ascertain their intent.

Boyle v. Steiman, 429 Pa.Super. 1, 631 A.2d 1025, 1033 (1993) (citation omitted). We see no reason a property owner could not, as a matter of law, be in privity with a subcontractor or be the third-party beneficiary of a contract between a general contractor and a subcontractor simply because the contract was oral. *Cf. Manor Junior College v. Kaller's Inc.*, 352 Pa.Super. 310, 507 A.2d 1245, 1246–48 (1986) (affirming dismissal but analyzing claim of third-party beneficiary status of property owner in suit against subcontractor involving oral contract).

{17} Finally, Advanced argues that a ruling in Tarin's favor would be bad public policy; that it "would upset years of contracting practices and add incalculable risks to every subcontract entered into." We think that argument assumes too much. Our ruling merely requires there to be a more thorough inquiry into the facts of this case. We do not hold that property owners are at all times and under all circumstances in privity with or third-party beneficiaries of oral contracts between general contractors and subcontractors. But to hold that a property owner could *never* have a right to seek enforcement of a contract of this kind would fly in the face of the principle of freedom of contract. *See Vidimos, Inc., v. Laser Lab Ltd.*, 99 F.3d 217, 219–20 (7th Cir.1996) (stating that if the parties to a contract make clear their intention to confer the power of enforcement on a third party, "the concept of freedom of contract becomes a compelling ground for allowing the third party to enforce the contract"). Again, our holding is limited to the sufficiency of Tarin's complaint and does not address the merits of Tarin's underlying claims.

Tinley's and ICSW's Motion

{18} The joint motion that Tinley and ICSW filed was to dismiss, pursuant to Rule 1–012(B)(6) NMRA 1999, or in the alternative for summary judgment, pursuant to Rule 1–056 NMRA 1999. "If, on a [Rule 1–012(B)(6) motion], matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 1–056 ...." Rule 1–012(C) NMRA 1999. Tinley and ICSW attached portions of a deposition to the motion, and, although we cannot be sure because neither a tape nor a transcript of the motion hearing was made a part of the record on appeal, we have no reason to think the district court excluded those matters from its consideration. We therefore treat the motion as one for summary judgment. *See GCM, Inc. v. Kentucky Cent. Life Ins. Co.*, 1997–NMSC–052, ¶¶ 9, 11, 124 N.M. 186, 947 P.2d 143; *Sanders v. Estate of Sanders*, 1996–NMCA–102, ¶ 7, 122 N.M. 468, 927 P.2d 23. "When a party 'actually admit[s], for purposes of the summary judgment motion, the veracity of the allegations in the complaint,' a reviewing court should 'consider the facts pleaded as undisputed and determine if a basis is present to decide the issues as a matter of law.'" *GCM*, 1997–NMSC–052, ¶ 13, 124 N.M. 186, 947 P.2d 143 (quoting *Matkins v. Zero Refrigerated Lines, Inc.*, 93 N.M. 511, 513, 602 P.2d 195, 197 (Ct.App. 1979)) (alteration in original).

{19} The parties seem to agree that, if anything, Tarin had a license to "extract" utilities from Tinley's connections. We also agree. "Connecting with utility lines situated upon another's property is a privilege to use his land and does not create an interest in that land, and therefore, is nothing more than a license ." *Carr v. Barnett*, 580 S.W.2d 237, 241 (Ky.Ct.App.1979).

The parties' dispute is over whether Tinley and ICSW had a duty to notify Tarin before revoking his license, and whether it was necessary for Tinley and ICSW to allow Tarin to remove his personal property from the adjacent property. For purposes of our discussion we assume without deciding that Tinley could be personally liable to Tarin as an officer of ICSW (although ICSW actually owns the property on which the utility connections were made), an issue the parties contest in their briefs to this Court. *See Stinson v. Berry,* 1997–NMCA–076, ¶ 17, 123 N.M. 482, 943 P.2d 129.

{20} A license is the permission to do something on the land of another that, without permission, would be a trespass, a tort, or otherwise unlawful. *See Quantum Corp. v. State Taxation & Revenue Dep't,* 1998–NMCA–050, ¶ 10, 125 N.M. 49, 956 P.2d 848; Jon W. Bruce & James W. Ely, Jr., *The Law of Easements & Licenses in Land* ¶ 11.01 (rev. ed. 1995) (Bruce & Ely). The creation of a license requires no particular formality: "A license may be created by parol, a writing, or can be implied from the acts of the parties, from their relations, and from usage and custom." *Sammons v. American Auto. Ass'n,* 912 P.2d 1103, 1105 (Wyo.1996); *see also* Restatement of Property § 515 (1944).

{21} The most salient feature of a license is its revocability. "Generally, a license is revocable at the will or the pleasure of the servient tenant.... It may be revoked without notice and without cause, because ... a licensee has no possessory interest in the property. The license may be revoked at will no matter how long it has continued." 25 Am.Jur.2d *Easements & Licenses* § 143 (1996) (footnotes omitted); *see also* Bruce & Ely, ¶ 11.06[1], at 11–14 ("As a personal privilege, a license is generally revocable at the will of the licensor."). Revocation can either be express or implied, as by conduct of the licensor that is inconsistent with the continued exercise of the privilege. *See* Bruce & Ely, ¶ 11.06[1], at 11–17. Although not an issue in this case, some courts have carved out narrow exceptions to the general rule of revocability in order to prevent inequity. *See Tatum v. Dance,* 605 So.2d 110, 112–13 (Fla.Dist.Ct.App.1992); *see also* Restatement of Property § 519. Jurisdictions are split, however, on whether licenses can become irrevocable, *see Tatum,* 605 So.2d at 112, and commentators have criticized the notion, *see* Bruce & Ely, ¶ 11 .06[2], at 11–18.

{22} As noted, however, the issue in this case is not whether Tinley and ICSW could revoke Tarin's license, but instead whether they were required to notify him of their intent to revoke and to allow him to remove his personal property from their property. The idea that a licensor must provide notice of his intent to revoke is inconsistent with the maxim that a license is revocable at will. And in an older case, our Supreme Court suggested that notice is not necessary before revocation of a license. *See Chaves v. Torlina,* 15 N.M. 53, 65, 99 P. 690, 694 (1909) (dictum). We acknowledge, however, that there is authority that indicates that a licensee may be entitled to notice of revocation under certain circumstances. *See, e.g.,* 25 Am.Jur.2d *Easements & Licenses* § 147 ("[W]here the licensee has erected structures or other improvements on the property on the faith of the license, he is entitled to reasonable notice of revocation and an opportunity to remove the improvements, if they are removable."). But we agree that "the reasonable notice required by law in such cases is only for the purpose of giving the licensee an opportunity for the removal of such personal property as he may be using on the land in connection with the enjoyment of his license." *Profile Cotton Mills v. Calhoun Water Co.,* 189 Ala. 181, 66 So. 50, 53 (1914). In other words, notice goes to the reasonableness of the opportunity a licensee is afforded to remove his personal property from the servient estate, not to the revocability of the license. *See* Restatement of Property § 519 cmt. c; *Sammons,* 912 P.2d at 1106.

{23} The parties agree that Tinley did not give Tarin notice before cutting off his utility service (either time, although Tinley argues with some force that Tarin was on constructive notice of Tinley's intent to revoke Tarin's license to acquire electricity after having to correct the improper gas connection). But as the foregoing discussion

makes clear, the only reason notice would be necessary would be to allow Tarin to remove personal property from Tinley's and ICSW's property. There is nothing in the record to indicate that Tinley and ICSW refused to allow Tarin to remove personal property from their property following revocation of Tarin's license; Tarin does not argue that he was prevented from removing the improperly installed gas pipes and electric lines. All Tarin was precluded from removing was the gas and electricity themselves, which were obviously not his personal property. Thus, Tarin failed to allege facts sufficient to support liability against either Tinley or ICSW related to Tarin's license. As such, summary judgment as to all claims based on property law concepts was proper. *See GCM,* 1997–NMSC–052, ¶ 27, 124 N.M. 186, 947 P.2d 143; *Doyle v. Peabody,* 781 P.2d 957, 961 (Alaska 1989) (holding that plaintiff was not entitled to compensation for the cost of having to sink a well on his own property after the defendant, the plaintiff's neighbor, revoked the plaintiff's license to draw water from the defendant's well.).

{24} However, as Tarin argues on appeal, his complaint can reasonably be read to include a tort claim against Tinley. And viewing the complaint broadly, we agree that it can be interpreted to encompass a claim for prima facie tort; Tarin did allege that Tinley's actions in cutting off the utilities "were actuated by malice and with the purpose of injuring [Tarin]." *See Schmitz v. Smentowski,* 109 N.M. 386, 394, 785 P.2d 726, 734 (1990); *Beavers v. Johnson Controls World Servs., Inc.,* 120 N.M. 343, 348–51, 901 P.2d 761, 766–69 (Ct.App.1995) (discussing the elements of a prima facie tort claim). The factual situation that emerges from the sparse record before us would seem to provide at least surface support for the four elements of the tort. *See Beavers,* 120 N.M. at 348–51, 901 P.2d at 766–69. We decline to conduct a detailed analysis of the elements and their proper balance because we do not have a sufficient factual record available to us. The record does, however, raise issues of material fact sufficient to defeat a motion for summary judgment. *See* Rule 1–056. We thus reverse and remand as to Tinley on this one issue. Obviously, we do not state any views as to the merits of the case.

CONCLUSION

{25} The appeal is dismissed as to ICSW only for lack of a final order. The judgment of the district court granting Advanced's motion to dismiss is reversed. The court's dismissal of Tinley as a defendant is reversed as explained above. We remand for proceedings consistent with this opinion.

{26} **IT IS SO ORDERED.**

APODACA and SUTIN, JJ., concur.

3 P.3d 689

2000–NMCA–052

STATE of New Mexico, Plaintiff–Appellee,

v.

David CLARK, Defendant–Appellant.

No. 20,131.

Court of Appeals of New Mexico.

April 25, 2000.

Certiorari Denied, 26,339, June 16, 2000.

Patricia A. Madrid, Attorney General, Ralph E. Trujillo, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Donna Bevacqua, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

BOSSON, J.

{1} Defendant, David Clark, stole horses from within the boundaries of the Navajo Nation, and was later apprehended in Gallup, New Mexico, away from tribal lands, while transporting the horses for sale. He was charged and found guilty in district court of various crimes. Defendant raises eight issues on appeal; the two principal ones are: (1) whether New Mexico has jurisdiction to prosecute a Navajo defendant for crimes initiated within Indian country but continued outside of tribal boundaries within the State of New Mexico, and (2) whether convicting Defendant for both larceny of livestock and transporting stolen horses violates his right to be free of double jeopardy. We reverse on the double jeopardy issue, but affirm on jurisdiction. Remaining issues are discussed summarily in a companion memorandum opinion that does not merit publication.

BACKGROUND

{2} Defendant, his brother, Melvin Clark, and his son-in-law, Gerald Kaufman, stole horses from within Navajo tribal territory and then drove the horses away from tribal lands into Gallup, New Mexico, where they were arrested with the horses. Defendant was charged and convicted of larceny of livestock, conspiracy to commit a felony, transporting stolen livestock, failure to produce a bill of sale, and transporting stolen horses without a certificate of inspection. Defendant originally entered into a plea agreement which placed him on probation. However, he violated the conditions of his probation, and the State moved to revoke Defendant's probation. Defendant, represented by a second attorney, then moved to set aside the original plea agreement on the ground that it contained an illegal banishment provision, and a new trial was ordered. Represented by a third attorney, Defendant was tried before a jury on June 24–25, 1998, and convicted on all counts. Defendant was subsequently sentenced in accordance with NMSA 1978, Section 31–18–17 (1993), because of a prior felony conviction. In addition to the two paramount issues of jurisdiction and double jeopardy, Defendant raises on appeal (1) whether the trial court abused its discretion in refusing to limit the State's cross-examination of a potential defense witness, (2) whether the police stop of Defendant's vehicle violated the United States Constitution, (3) whether the convictions were supported by substantial evidence, (4) whether a prior defense attorney provided ineffective assistance of counsel, (5) whether the State violated discovery rules, and (6) whether Defendant's due process rights to a fair trial were violated by the alleged impropriety of a former trial judge.

DISCUSSION

State Jurisdiction to Prosecute

{3} Defendant argued below, and now on appeal, that the State had no jurisdiction to prosecute him for a crime that occurred in Indian country. The trial court ruled that because Defendant was arrested outside of Indian country for crimes of a continuing nature, he was being prosecuted for a state crime over which the State did have jurisdiction.

{4} Relying on *United States v. Stands,* 105 F.3d 1565 (8th Cir.1997), Defendant argues that because the essential ele-

ments of larceny occurred within Navajo tribal lands, the federal government and not the State had jurisdiction in this case. The issue in *Stands,* however, was whether the federal court had jurisdiction over an offense that spanned two jurisdictions, not whether the state court might also have jurisdiction. While concluding that federal jurisdiction existed because much of the offense occurred in Indian country, the Eighth Circuit did not address the question of concurrent state jurisdiction. *See id.* at 1571. Defendant also argues, without any citation to authority, that ownership of the horses was a question for tribal law, not state law.

{5} Defendant correctly recites that the federal government has jurisdiction over certain "major" crimes listed in 18 U.S.C. § 1153 (1994), including larceny, when these crimes are committed by an Indian in Indian country. *See State v. Ortiz,* 105 N.M. 308, 310, 731 P.2d 1352, 1354 (Ct.App.1986). However, as the State points out, New Mexico has historically held that it also has jurisdiction over crimes that continue into State territory. *See Territory v. Harrington,* 17 N.M. 62, 66, 121 P. 613, 615 (1912). In *Harrington,* cattle were stolen from Navajo tribal lands and brought into New Mexico. The Territorial Supreme Court held that the trial court had jurisdiction to prosecute a cattle thief for larceny when the cattle were driven from tribal lands into the jurisdiction of the territory with continuing larcenous intent. The court stated:

> We are clearly of the opinion that where the original taking of the thing, upon which the charge of larceny is predicated, was at a place without the jurisdiction of the trial court, but within the state, and the thing was brought into the county within its jurisdiction, the intent to seal [sic] continuing, the thief carrying away the goods becomes guilty of a complete larceny in every county or locality into which he takes them while his intent to steal continues.

Id.

{6} We reaffirmed this principle of law in *State v. Stephens,* 110 N.M. 525, 526–27, 797 P.2d 314, 315–16 (Ct.App.1990). In *Stephens,* the defendants stole property in Texas but were arrested and charged with larceny in New Mexico. *See id.* at 526, 797 P.2d at 315. We emphasized that when the unlawful possession continues "in the state into which the stolen property is brought[, it] constitutes a new caption and asportation—a new deprivation of the owner of his right to his property and its possession." *Id.* at 527, 797 P.2d at 316; *accord* P.H. Vartanian, Annotation, *Person Who Steals Property in One State or Country and Brings It into Another as Subject to Prosecution for Larceny in Latter,* 156 A.L.R. 862, 866 (1945); *see also State v. McKinley,* 30 N.M. 54, 56, 227 P. 757, 758 (1924) (stating when "property is stolen in one county and is taken or driven into and through other counties, with the larcenous intent still existing, a new and complete larceny is committed in each and all of said counties"). Accordingly, we hold that the trial court had jurisdiction to prosecute Defendant for larceny.

{7} Defendant also claims that the State had no jurisdiction to prosecute him for conspiracy, because the charge was bootstrapped onto the larceny conviction. We observe, first of all, that Defendant made no separate jurisdictional argument for conspiracy. *See In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (stating issues "unsupported by cited authority will not be [considered] . . . on appeal"). However, even had this issue been fully briefed, conspiracy, like larceny, can also be a continuing crime. *See State v. Villalobos,* 120 N.M. 694, 697, 905 P.2d 732, 735 (Ct.App. 1995) (stating that "a conspiracy may continue for an extended period of time and across jurisdictional lines"); *State v. Thoreen,* 91 N.M. 624, 633, 578 P.2d 325, 334 (Ct.App. 1978) (conspiracy to commit fraud in obtaining loan continues until loan is obtained). Because the conspiracy in this case involved larceny of livestock, which itself was continuing, the conspiracy continued until Defendant and his co-conspirators were arrested in Gallup. Thus, the State had jurisdiction to prosecute Defendant for conspiracy as well as larceny.

Double Jeopardy Prohibition Against Multiple Punishments for the Same Offense

{8} Defendant argues that his conviction for both transporting stolen livestock,

under NMSA 1978, § 30–18–6 (1963), and larceny of livestock, under NMSA 1978, § 30–16–1 (1987), violated the double jeopardy clause of the United States and New Mexico constitutions, which provide that no person shall "be twice put in jeopardy" for the same offense. U.S. Const. amend. V; N.M. Const. art. II, § 15. These provisions protect against multiple punishments for the same offense and against successive prosecutions for the same offense following acquittal or conviction. *See State v. Powers,* 1998–NMCA–133, ¶ 12, 126 N.M. 114, 967 P.2d 454. Defendant correctly states that when one offense is subsumed by the other, the trial court's imposition of concurrent sentences for separate convictions does not render a double jeopardy violation harmless, because " 'the second conviction, even if it results in no greater sentence, is an impermissible punishment.' " *State v. Pierce,* 110 N.M. 76, 87, 792 P.2d 408, 419 (1990) (quoting *Ball v. United States,* 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)).

{9} In *Swafford v. State,* 112 N.M. 3, 13–15, 810 P.2d 1223, 1233–35 (1991), our Supreme Court established a two-part test for determining whether separate convictions under different criminal statutes in the same trial are prohibited. Under this test, we ask first "whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes." *Id.* at 13, 810 P.2d at 1233. If the conduct is not unitary, but is separate and distinct, the inquiry ends and there is no double jeopardy. *See id.* at 14, 810 P.2d at 1234. If, however, the conduct can reasonably be said to be unitary, we must then determine "whether the legislature intended multiple punishments for unitary conduct." *Id.*

{10} Under *Swafford,* the first part of "the task is merely to determine whether the conduct for which there are multiple charges is discrete (unitary) or distinguishable." *Id.* "If two events are sufficiently separated by either time or space (in the sense of physical distance between the places where the acts occurred), then it is a fairly simple task to distinguish the acts." *Id.* at 13–14, 810 P.2d at 1233–34. The State argues that in this case the conduct was not unitary because the larceny was complete before Defendant transported the stolen livestock into Gallup. Defendant argues, however, that the conduct was unitary because there was no separation in time or space between the larceny and the transporting; the larceny, if continuing, involved the same act of transporting stolen horses.

{11} Because Defendant was prosecuted for larceny of livestock in the State of New Mexico, and not for larceny within the Navajo Nation, the facts supporting both charges were that Defendant was caught in McKinley County, transporting five stolen horses in a trailer, taking them away from their rightful owner. New Mexico had no jurisdiction to prosecute Defendant for the larceny that occurred before the horses left Navajo tribal lands. Thus, both charges, larceny and transporting, were clearly supported by the same unitary conduct.

{12} Having determined that the conduct was unitary, we must next ask "whether the legislature intended multiple punishments for unitary conduct." *Swafford,* 112 N.M. at 14, 810 P.2d at 1234. The double jeopardy clause does not prevent the legislature from authorizing multiple punishments for the same criminal act prosecuted in a single proceeding. *See, e.g., Whalen v. United States,* 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *State v. Nunez,* 129 N.M. 63, 78, 2 P.3d 264, 279 (1999). In determining legislative intent, we apply the test articulated in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to the elements of each statute, to see "whether each provision requires proof of an additional fact which the other does not." Section 30–16–1 defines larceny as "the stealing of anything of value which belongs to another," and specifically provides that larceny of livestock is a third degree felony. While the common-law requirement of asportation does not appear in Section 30–16–1, the Uniform Jury Instruction for larceny requires the jury to find that (1) "[t]he defendant took and carried away [property] belonging to another," and (2) "[a]t the time he took this property, the defendant intended to permanently deprive the owner of it." UJI 14–1601 NMRA 2000.

Additionally, New Mexico case law has interpreted its larceny statutes as incorporating the requirement that a stolen item be carried away. *See Stephens,* 110 N.M. at 526–27, 797 P.2d at 315–16 (stating that larceny is a continuing crime in which unlawful possession and asportation deprive the owner of his right to property and its possession); *State v. Lopez,* 94 N.M. 349, 352, 610 P.2d 753, 756 (Ct.App.) (concluding that the language of a jury instruction should include, "the defendant took and carried away property 'without the consent of the owner' "(citation omitted)), *aff'd on other grounds,* 94 N.M. 341, 610 P.2d 745 (1980).

{13} In this case, Defendant was not just charged with larceny, but with larceny of livestock. In *State v. Pacheco,* 81 N.M. 97, 99, 463 P.2d 521, 523 (Ct.App.1969), this Court stated that "[a]t all times since 1884, New Mexico has consistently treated the larceny of livestock differently from the larceny of other things." This Court stressed that "the larceny of livestock statute was apparently enacted to protect the ownership thereof, to prevent a kind of larceny peculiarly easy of commission and difficult of discovery and punishment, and to protect the important industry of stock raising." *Id.* at 100, 463 P.2d at 524. Thus, in order for Defendant to have committed the crime of larceny of livestock, he must have carried the horses away from the place where he stole them. The term " '[c]arried away' means moving the property from the place where it was kept or placed by the owner." UJI 14–1603 NMRA 2000. As one commentator has observed,

> [t]he word 'carrying' in the expression 'carrying away' (the common law requirement of an asportation) is not to be taken literally, for one can be guilty of larceny of property which he cannot pick up in his hands, as by riding away a horse, leading away a cow, driving off in an automobile or pulling or pushing a heavy object along the ground.

2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.3(b), at 346 (1986).

{14} Section 30–18–6 defines transporting stolen livestock as "knowingly transporting or carrying any stolen or unlawfully possessed livestock or any unlawfully possessed game animal, or any parts thereof," and classifies it as a fourth degree felony. Like the larceny statute, transporting stolen livestock requires the carrying away of stolen livestock. Larceny of livestock contains the additional element of stealing the animals with the intent to permanently deprive the rightful owner of his property. However, transporting stolen livestock contains no element that larceny of livestock does not, and thus the elements of transporting stolen livestock are subsumed within the larceny statute when the subject is livestock. Applying the *Blockburger* test to the elements of the two statutes, we conclude that "one statute is subsumed within the other." *Swafford,* 112 N.M. at 14, 810 P.2d at 1234. Thus, "the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both." *Id.*

{15} We hold that Defendant's conviction for transporting stolen livestock, when considered with his conviction for larceny of livestock, violates his constitutional right to be free of double jeopardy. Accordingly, we reverse the transporting stolen livestock conviction while affirming the conviction of larceny of livestock.

CONCLUSION

{16} We affirm the jurisdiction of the State to prosecute Defendant, based on these facts, for conspiracy and larceny. However, based on principles of double jeopardy, we reverse Defendant's conviction for transporting stolen livestock and remand for the district court to set aside the judgment and sentence pertaining to that conviction.

{17} **IT IS SO ORDERED.**

WECHSLER and BUSTAMANTE, JJ., concur.

3 P.3d 695

2000-NMCA-051

ONTIVEROS INSULATION CO., INC., and Rawson, Inc. Builders Supply, Cross Claimants–Appellees,

v.

Ricardo M. SANCHEZ, Geraldine Sanchez, and Nancy Bustamante, Cross Defendants–Appellants.

No. 19,817.

Court of Appeals of New Mexico.

May 15, 2000.

Lee E. Peters, Hubert & Hernandez, P.A., Las Cruces, for Appellees.

Paul A. Bleicher, Albuquerque, for Appellants.

OPINION

ARMIJO, Judge.

{1} Ricardo and Geraldine Sanchez and Nancy Bustamante (Homeowners) appeal from an adverse judgment of the district court which found them liable to Ontiveros Insulation Co., Inc. and Rawson, Inc. Builders Supply (collectively, Subcontractors) for a sum of $13,321.61, plus costs and prejudgment interest. This appeal requires us to review a grant of equitable relief, that is, a subcontractor's claim of unjust enrichment against a property owner for whom it provided labor and materials, but with whom it was not in privity of contract. The facts are not in dispute. For the reasons discussed below, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

{2} The district court entered judgment upon the parties' stipulated facts. Homeowners each contracted with William C. Parker, the general contractor, for the construction of their respective homes. The original contracts specified that the Sanchezes would pay $63,000 and Bustamante would pay $73,000 for the completed homes. The stipulated facts do not indicate whether this price was to include the cost of land. Parker purchased building materials, which included doors and windows, from Rawson and hired Ontiveros to install insulation and a heating system. Subcontractors furnished the services and materials as contracted, and the parties agree that, as a result, value was added to the homes.

{3} Unfortunately for all involved, Parker, the general contractor, declared bankruptcy prior to completing construction of the homes, but after Subcontractors had provided the labor and materials. At the time of bankruptcy, Parker had finished some portion of the work, although the extent to which the homes stood completed is not indicated in the record. Also, at this point in time, the Sanchezes had paid Parker $26,000, or approximately 41% of the original contract price, and Bustamante had paid him $45,000, or approximately 62% of her original contract price. The record does not indicate that Homeowners intended any portion of these amounts to compensate Subcontractors for the labor and materials. Parker failed to pay Subcontractors any amounts for their labor and materials.

{4} Upon Parker's default, Homeowners completed their homes by other means. Completion of each home ultimately cost the Sanchezes $125,456 and Bustamante $120,-851, including the cost of purchasing the land. The post-construction appraisal of the Sanchez and Bustamante homes ultimately exceeded the actual costs of construction by approximately $19,000 and $20,000, respectively. While the stipulated facts do not indicate the pre-construction appraised value of Bustamante's home, such that any comparison can be made, the post-construction appraised value of the Sanchezes' home was $14,000 greater than the pre-construction appraisal.

{5} Seeking what they saw as their due, Subcontractors filed liens on the homes. Before they could enforce these liens, however, Homeowners defaulted on their mortgages and the mortgagor foreclosed on the properties. Homeowners subsequently exercised their rights of redemption and reclaimed the properties free and clear of any liens. Subcontractors also sought relief from Parker; however, their claims were discharged in Parker's bankruptcy. Neither the foreclosure and redemption, nor the bankruptcy actions, are directly implicated in the present appeal.

{6} Finally, Subcontractors sued Homeowners directly, claiming that Homeowners had been unjustly enriched by the uncompensated value which the labor and materials added to the homes. The district court en-

tered judgment in Homeowners' favor, concluding that they had paid more than their original contract price for the homes and, therefore, had not been enriched.

The Prior Appeal

{7} Subcontractors appealed the district court's judgment to this Court, which reversed and remanded on its summary calendar. In reversing, this Court ruled that the trial court was required to consider the homes' post-construction appraisal values in its consideration of whether or not Homeowners were unjustly enriched. The matter was remanded for this determination. *See Ontiveros Insulation Co. v. Sanchez,* No. 18,-625 (N.M.Ct.App. Oct. 19, 1997). On remand, and upon consideration of the post-construction appraised value of Homeowners' homes, the district court entered judgment in Subcontractors' favor. Homeowners now appeal.

Standard of Review

{8} Before turning to the substance of the present appeal, we address the parties' disagreement as to the procedural stance of this appeal and the applicable standard of review. Homeowners urge us to review the district court's ruling as based upon summary judgment. Subcontractors, on the other hand, argue that the district court entered its judgment on the merits. This dispute ultimately concerns which party bears the benefit of any inferences to be drawn from the stipulated facts. Upon an appeal challenging summary judgment, we construe reasonable inferences from the record in an appellant's favor. *See Rummel v. St. Paul Surplus Lines Ins. Co.,* 1997–NMSC–042, ¶ 9, 123 N.M. 767, 945 P.2d 985. On appeals from judgments on the merits, we construe the record in favor of affirmance, giving the prevailing party the benefit of all reasonable inferences. *See Zemke v. Zemke,* 116 N.M. 114, 118, 860 P.2d 756, 760 (Ct.App.1993).

{9} We have carefully reviewed the record. While the matter came before the district court upon the parties' cross-motions for summary judgment, judgment was entered, as the district court made clear in its preface to the written judgment, "on the merits." We, therefore, construe all inferences in favor of affirming the judgment below. Finally, as this appeal requires us to review the district court's exercise of its equitable powers, we will reverse only upon a showing that the court abused its discretion. *See Amkco, Ltd., Co. v. Welborn,* 1999–NMCA–108, ¶ 13, 127 N.M. 587, 985 P.2d 757 ("On appeal, we review a decision of the trial court granting or denying equitable relief for abuse of discretion."), *cert. granted,* 128 N.M. 150, 990 P.2d 824 (1999).

The Present Appeal

{10} We now turn to the question presented: Are Homeowners entitled to prevail on their claim that any enrichment was not "unjust?" Homeowners argue that where a subcontractor seeks relief directly from the property owner with whom it has had no contact, it is virtually impossible for any claimed enrichment to be found "unjust." Subcontractors acknowledge that there is a paucity of New Mexico case law factually supportive of their position in this case; nonetheless, they contend that as is always the focus in equity, the only facts that matter are those here presented. *See, e.g.,* J.R. Kemper, Annotation, *Building and Construction Contracts: Right of Subcontractor who has Dealt only with Primary Contractor to Recover Against Property Owner in Quasi Contract,* 62 A.L.R.3d 288, 293 (1975) (emphasizing such cases turn upon application of the law to "the facts and circumstances of a given case").

{11} New Mexico has long recognized actions for unjust enrichment, that is, in quantum meruit or assumpsit. *See Tom Growney Equip., Inc. v. Ansley,* 119 N.M. 110, 112, 888 P.2d 992, 994 (Ct.App.1994). To prevail on such a claim, one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust. *See generally* Restatement of the Law of Restitution §§ 1, 40, 41 (1937, as supplemented through 1988). The theory has evolved largely to provide relief where, in the absence of privity, a

party cannot claim relief in contract and instead must seek refuge in equity. *See Tom Growney Equip., Inc.*, 119 N.M. at 112, 888 P.2d at 994; *see also Hydro Conduit Corp. v. Kemble*, 110 N.M. 173, 175, 793 P.2d 855, 857 (1990) ("This quasi-contractual obligation is created by the courts for reasons of justice and equity, notwithstanding the lack of any *contractual* relationship between the parties." (citation and internal quotation marks omitted.))

{12} Subcontractors' suits against property owners are generally not favored. *See id.* at 176, 793 P.2d at 858; *see also George M. Morris Constr. Co. v. Four Seasons Motor Inn, Inc.*, 90 N.M. 654, 656–57, 567 P.2d 965, 967–68 (1977) (disapproving of subcontractor's personal action against property owner upon facts presented). *But see United States ex rel. Sunworks Div. of Sun Collector Corp. v. Insurance Co. of N. Am.*, 695 F.2d 455, 458 (10th Cir.1982) (recognizing subcontractor's right, under New Mexico law, to claim unjust enrichment against property owner in present context). Remedy is instead viewed as best sought from the underlying general contractor. This general disfavor, however, is not required by anything intrinsic to the subcontractor-property owner relationship, but rather is a reflection of the jurisprudence of equity. Simply, equity does not take the place of remedies at law, it augments them; in this regard, an action in contract would be preferred to one in quasi-contract. *See Sims v. Sims*, 1996–NMSC–078, ¶ 29, 122 N.M. 618, 930 P.2d 153.

{13} We decline, however, to apply this traditional reticence regarding consideration of equitable relief in the present context. To do so would ignore the basic foundation of equity. As the Missouri Court of Appeals has framed the issue:

> Equity is reluctant to permit a wrong to be suffered without remedy. It seeks to do justice and is not bound by strict common law rules or the absence of precedents. It looks to the substance rather than the form. It will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality. And once rightfully possessed of a case it will not relinquish it short of doing complete justice. It weighs the equities between the parties and adopts various devices to protect against unjust enrichment.

Merrick v. Stephens, 337 S.W.2d 713, 719(Mo.Ct.App.1960) (footnotes omitted), *quoted in Ortiz v. Lane*, 92 N.M. 513, 519, 590 P.2d 1168, 1174 (Ct.App.1979) (Hernandez, J., specially concurring); *cf. Hydro Conduit Corp.*, 110 N.M. at 179, 793 P.2d at 861 (" 'Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. *They are obligations created by law for reasons of justice.*' " (Emphasis added.) (quoting Restatement Law of Contracts § 5 cmt. a (1932)). Accordingly, rather than shying from application of equitable principles in the present case, we inquire more closely as to the particular equities of this specific matter.

{14} The parties agree that the labor and materials added value to the properties. It is axiomatic, however, that courts provide remedy in quantum meruit to prevent *unjust* enrichment. To prove their claim, therefore, it would not be enough that Homeowners were merely enriched at Subcontractors' expense: That enrichment must also be unjust. The well-founded cautionary rules Homeowners invoke are specific iterations of this basic principle. As a general matter, the limitations are premised on the bedrock principle that it makes little sense to remedy one wrong by inflicting another. *See Tom Growney Equip., Inc.*, 119 N.M. at 113, 888 P.2d at 995.

{15} The question before us, therefore, is whether the district court abused its discretion in *not* determining that Subcontractors' action failed because of one of the limitations upon actions for unjust enrichment which Homeowners assert. Homeowners argue, first, that they have paid to the general contractor a substantial portion of the original contract price and that they should not, therefore, be required to pay any further amount. Second, they argue that they did not request or know of the furnished work or materials and should not, therefore,

be liable. We are not persuaded by either argument.

{16} As to the payments Homeowners previously remitted to the now-bankrupt general contractor, Homeowners emphasize that they, respectively, paid the general contractor 42% and 61% on the underlying contracts. They note these payments as evidence of their having paid a substantial amount on the original contract, such that providing relief to Subcontractors would be error. We do not agree.

{17} Where a property owner pays to the general contractor "a very substantial part" of the monies due and owing, the subcontractor does not generally have an equitable claim for relief against the property owner. *Sundance Mechanical & Util. Corp. v. Atlas,* 118 N.M. 250, 255, 880 P.2d 861, 866 (1994); *see also Hydro Conduit Corp.,* 110 N.M. at 175, 793 P.2d at 857. Such payment makes reasonable the presumption that the property owner has already paid for the conferred benefit. *See Hydro Conduit Corp.,* 110 N.M. at 175, 793 P.2d at 857. It follows, then, that if a defendant has already *paid* for the benefit, there has been no enrichment, much less *unjust* enrichment. As such, this limitation upon the action is consistent with the basic rule.

{18} However, we find no abuse of discretion in the district court's implied finding that 42% and 61% payments—or, to aggregate, payments totaling 52%—on the underlying contracts are not "very substantial." *Cf. Sundance Mechanical & Util. Corp.,* 118 N.M. at 253, 255, 880 P.2d at 864, 866 (noting payments of 85% on underlying contract as "a substantial portion thereof"). First, as the stipulated record does not indicate what portion of the work remained unfinished upon the general contractor's default, we cannot tell what relation an aggregate payment of 52% on the original contracts bears to what services and materials the general contractor and Subcontractors had provided. The stipulated record does indicate, however, that Subcontractors received *no* compensation for the approximately $14,000 in work and materials they provided-work which the parties agree—added value to the homes. Moreover, it is clear that, in the aggregate, Homeowners never paid $65,000 out of $136,000 agreed upon in the original contract, but that their homes are now appraised, again in the aggregate, at $40,000 more than they expended. Given the state of the stipulated record, we cannot conclude that it was contrary to logic and reason for the district court's *refusal* to conclude that Homeowners had already paid for the services and materials Subcontractors had provided.

{19} In so concluding, we recognize that Homeowners each paid another contractor to have the homes finished. We also note that each spent more than they had originally contracted for with the now-bankrupt general contractor. However, it is not indicated in the record whether the original contract prices included the costs of purchasing the land or not; as such, these amounts cannot be confidently construed as parallel. More importantly, the question here raised is whether Homeowners paid to the *general contractor* a very substantial part of the original contract price. *See Hydro Conduit Corp.,* 110 N.M. at 176, 793 P.2d at 858. That they hired others to finish the work begun and abandoned does not of itself suggest that Homeowners have already paid for Subcontractors' labor and materials. Upon the standard of review applicable, the district court did not abuse its discretion by concluding that Homeowners did not pay for the benefit conferred upon them.

{20} As to their claimed lack of request or knowledge, Homeowners claim they had no specific knowledge of Parker's hiring of Subcontractors or of purchasing materials. *See Tom Growney Equip., Inc.,* 119 N.M. at 113, 888 P.2d at 995. However, this is of little concern. While Homeowners may not have known the specifics of Parker's arrangement with the subcontractors, it would make little sense—certainly not at the prices of the homes at issue—for Homeowners to have contracted for homes to be built without heating systems, insulation, doors, and windows. In this regard, we conclude that the district court did not abuse its discretion in determining on the stipulated facts that Homeowners should have known such services and materials would be provid-

ed. *See generally* Restatement, *supra*, § 40(c) (noting liability where defendant "knew *or had reason to know*" of benefit conferred (emphasis added)); *cf. Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 48, 703 P.2d 1197, 1203 (1985) (en blanc) ("What is important is that it be shown that it was not intended or expected that the services be rendered or the benefit conferred gratuitously, and that the benefit was not conferred officiously." (Internal quotation marks omitted.)).

{21} Finally, we note that while the record discloses no reason why any party should bear the blame for Parker's bankruptcy, abandonment of the underlying construction contract, or failure to pay Subcontractors, the equities weigh heavily in Subcontractors' favor. Among these considerations, the subcontractors pursued all possible remedies before turning to the present action. Indeed, but for Homeowners' mortgage defaults and the resulting foreclosure and redemption, Subcontractors could claim an adequate remedy at law without resort to equity. Conversely, by virtue of the foreclosure actions, Homeowners redeemed the properties free and clear of any liens and now live in homes appraised at $19,000 and $21,000 more than expended. As to the work and materials for which Subcontractors now seek compensation, this turn of events has inured directly to their disadvantage and Homeowners' advantage. In light of this record, the district court did not abuse its discretion in providing equitable relief to Subcontractors.

{22} In so holding, we wish to emphasize that recovery on such an action may not be had in every instance where a subcontractor has furnished labor or materials which benefit a third person with whom there is no privity of contract. Our decision today is limited to affirming the propriety of quasi contract as a remedy in a particular factual situation. Each case must be decided according to the essential elements of quasi contract. The most significant requirement for a subcontractor's successful recovery is that the enrichment be unjust. In the present case, Subcontractors exhausted their remedies against the person with whom they contracted, namely, Parker. Despite those efforts, they did not receive any value for the labor and services rendered. Although Homeowners paid over sums of money to Parker, Homeowners were never specifically put on notice that their payments to Parker, or any portion thereof, were intended to pay for the labor and materials furnished to the residences.

CONCLUSION

{23} Construing all reasonable inferences from the stipulated facts in Subcontractors' favor, we find in the district court's ruling no abuse of discretion. The judgment of the district court is affirmed.

{24} **IT IS SO ORDERED.**

BOSSON and WECHSLER, JJ., concur.

4 P.3d 37
2000-NMCA-054

STATE of New Mexico,
Plaintiff–Appellee,

v.

Abe TAPIA, Defendant–Appellant.

No. 20,158.

Court of Appeals of New Mexico.

May 17, 2000.

Certiorari Denied, No. 26,378,
June 22, 2000.

Patricia A. Madrid, Attorney General, M. Anne Kelly, Assistant Attorney General, Santa Fe, for Appellee.

David Henderson, Santa Fe, for Appellant.

OPINION

WECHSLER, Judge.

{1} Defendant Abe Tapia appeals his conviction for aggravated assault on a peace officer (Officer Keith Mundy). Defendant raises three issues on appeal. First, Defendant argues that the district court erred when it refused to find as a matter of law that Officer Mundy's arrest of Defendant's son was illegal. Second, Defendant argues that the jury instruction addressing lawful discharge was misleading and confusing for the jury. Third, Defendant argues that his conviction is not supported by sufficient evidence because Officer Mundy was not acting in the lawful discharge of his duties at the time of the assault. We determine that a reasonable juror could have been confused by the jury instruction on lawful discharge and therefore reverse.

Facts

{2} The testimony was conflicting, and this Court does not reweigh the evidence on appeal. Rather, all disputed facts are resolved in favor of the prevailing party and all reasonable inferences are made in support of the verdict. *See State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). We therefore discuss the facts in the light most favorable to the State, the prevailing party in this case.

{3} Officer Mundy testified that he responded to a call concerning criminal damage to property which occurred at the De Vargas Mall in Santa Fe. The victim, Christopher Yardman, claimed that Eric Gonzales had damaged his truck. Sometime later, while Officer Mundy was investigating the property damage claim, he was again called to the De Vargas Mall regarding a fight. When he arrived, the same victim, Christopher Yardman, was being placed into an ambulance. Officer Mundy interviewed Yardman at the scene and later at the hospital. Yardman

identified his assailants as Eric Gonzales and Johnny Tapia (Johnny). Yardman described the vehicle driven by the assailants, gave their addresses, and gave directions to Johnny's residence.

{4} Officer Mundy also testified that he worked on the two cases for approximately two hours without interruption. During that time, Officer Mundy made calls to the on-duty assistant district attorney to keep her informed about his investigation. Officer Mundy testified that he believed, and was also told by the assistant district attorney, that he did not need an arrest warrant to arrest Johnny because he was pursuing an ongoing investigation.

{5} Officer Mundy further testified that after deciding to go to Johnny's home, he secured the assistance of Officer John Howard as back-up. Officer Mundy and Officer Howard drove to Johnny's home at about 11:30 p.m. The officers saw three barking dogs in a fenced yard in front of the home. According to Officer Howard's testimony, one of the dogs, Rocky, ran to the gate and tried to push his head through a space in the fence while baring his teeth and growling.

{6} At trial, Defendant testified that there was enough slack in the fence for a dog to get through the gate. The State offered testimony that Rocky was a difficult dog to control, and Defendant and his wife admitted to Rocky's history of biting people.

{7} Defendant testified that he heard Rocky barking and went outside to investigate. Officer Mundy testified that he told Defendant that he needed to talk to his son, Johnny. Defendant held Rocky and told the officers, "Let's go on in." After entering the home with the officers, Defendant released Rocky into the yard.

{8} Officer Mundy testified that when Johnny came into the living room from his room, Officer Mundy could see that Johnny had been in a fight because his hands were swollen and red. Officer Mundy told Johnny that he was under arrest. At some point, either just before or just after Officer Mundy told Johnny he was under arrest, Defendant's demeanor changed from cordial and cooperative to hostile and agitated. Defendant argued that he needed to see an arrest warrant and instructed his son not to say anything. While Officer Mundy and Defendant were exchanging words, Johnny walked back to his room and shut the door. Officer Mundy testified that he feared that Johnny was going to get a weapon out of his room and that he therefore followed Johnny to his room. Defendant followed after Officer Mundy. Officer Mundy testified that when he and Defendant reached the door of Johnny's room, Defendant pinned him against the door jamb and grabbed his arm. Defendant testified that he merely moved in front of Officer Mundy and told him that he could not go into the room. At this point, Officer Howard stepped in and told Defendant to come to the living room and sit down. Officer Mundy went into the room and saw that Johnny was using a portable or cellular telephone. Officer Mundy took the telephone from Johnny, arrested and handcuffed him, and brought him to the living room.

{9} At this point, Rocky was at the front door, growling and baring his teeth. Officers Mundy and Howard testified that Defendant said something to the effect that he would like to see the officers get by Rocky. Officer Mundy checked his mace canister and found it to be almost empty. He testified that he asked Defendant more than once to restrain the dog but that Defendant refused and that he then told Defendant that he would use his weapon if Rocky came after them. According to Officer Mundy, Defendant threatened to shoot him if he shot Rocky. He partially drew his weapon before Defendant agreed to hold Rocky.

{10} Thereafter, Officer Howard and Johnny left the house followed by Officer Mundy while Defendant held Rocky by the collar. There was conflicting testimony about whether Rocky was lunging at that time. Although Defendant testified to the contrary, Officers Mundy and Howard testified that Defendant told the dog, "Get him" several times as the group attempted to leave the yard. Officer Mundy testified that he backed out of the yard and that when he was approximately one foot away from the gate, Defendant released the dog. Officer Mundy testified that he hit a pole in his attempt to

get through the gate before the dog got there. Officer Howard testified that the dog was released as he was about to take Johnny through the gate and Officer Mundy was about eight to ten feet away.

Jury Instructions

Instructions Given

{11} The district court instructed the jury on both aggravated assault on a peace officer and the lesser charge of aggravated assault. The instructions included elements instructions for both crimes. The elements instruction for aggravated assault on a peace officer named the victim as "Officer Keith Mundy". The elements instruction for aggravated assault named the victim as simply "Keith Mundy". The court also instructed the jury on the necessity of exigent circumstances to make an arrest in Instruction No. 12, and the court instructed the jury on lawful discharge in Instruction No. 11. Instruction No. 11 reads in its entirety as follows:

> A Defendant does not have the right to assault a police officer, regardless of whether the police officer's conduct is lawful or unlawful, if the officer is acting in good faith within the scope of his duties.
>
> An officer is engaged in the performance of his official duties if he is simply acting within the scope of what the officer is employed to do. The test is whether the officer is within that compass or is engaging in a personal frolic of his own.

Test for Lawful Discharge of Duties

{12} The crime of aggravated assault upon a peace officer is defined as "unlawfully assaulting or striking at a peace officer with a deadly weapon while he is in the lawful discharge of his duties." NMSA 1978, § 30-22-22(A) (1971). At trial, Defendant argued that Officer Mundy did not act within the lawful discharge of his duties when he arrested Defendant's son. Defendant therefore contends that if Officer Mundy was not acting in the lawful discharge of his duties, the State failed to prove all the elements of the crime.

{13} The standard for determining whether an officer was acting within his or her lawful discharge of duties is whether the officer was performing his or her official duties. *See State v. Doe,* 92 N.M. 100, 103, 583 P.2d 464, 467 (1978). According to *Doe,* even if an officer makes an arrest without probable cause, the officer is performing official duties if the officer is acting in good faith and within the scope of what the officer is employed to do. *See id.* " 'The test is whether the agent is acting within that compass or is engaging in a personal frolic of his own.' " *Id.* (quoting *United States v. Heliczer,* 373 F.2d 241, 245 (2d.Cir.1967)).

{14} *State v. Frazier,* 88 N.M. 103, 104-05, 537 P.2d 711, 712-13 (Ct.App.1975), relied upon by Defendant, does not require a different standard from *Doe.* Our Supreme Court in *Doe* considered whether a police officer acted within the "lawful discharge of his duties" when engaging in an unlawful arrest. *Doe,* 92 N.M. at 103, 583 P.2d at 467 (citations omitted). The Court distinguished *Frazier* on the basis that the officer in *Frazier* did not have a "legitimate reason for stopping the defendant," *id.* at 105, 537 P.2d at 713, the officer was acting in a civil matter, and the officer admitted that "he had no grounds to believe [the] defendant was committing or had committed a criminal offense." *Id.* at 104-05, 537 P.2d at 712-13. Since *Doe,* the holding in *Frazier* has been limited. *Frazier* does not hold, as Defendant suggests, that an officer's actions must be lawful to fall within the officer's official duties. Under *Doe,* there is a significant difference between not having a "legitimate reason" to act and acting unlawfully in the context of this case. *Id.*

Instruction on Illegality of the Arrest

{15} Defendant argues that Officer Mundy acted illegally when he came to the residence and arrested Johnny. Officer Mundy did not obtain a warrant for the arrest, and, according to Defendant, exigent circumstances did not exist to justify a warrantless arrest. *See Campos v. State,* 117 N.M. 155, 159, 870 P.2d 117, 121 (1994) (holding that under the New Mexico Constitution, a warrantless arrest is invalid unless probable cause and exigent circumstances exist to support the arrest). Defendant contends

that he was therefore entitled to a directed verdict on the issue of the illegal arrest.

{16} As we have outlined above, the fact that an arrest was unlawful does not preclude a finding that an officer acted in the "lawful discharge" of his duties. *See Doe,* 92 N.M. at 103, 583 P.2d at 467 (stating that officer acting in good faith remains in lawful discharge of his duties, whether the officer's actions are lawful or unlawful); *State v. Jones,* 114 N.M. 147, 152, 835 P.2d 863, 868 (Ct.App.1992) (holding that absent evidence of bad faith, officers acted in official capacity despite illegality of stop). Defendant was not entitled to a directed verdict on the illegality of the arrest because such determination is not controlling in deciding whether an officer is acting within the lawful discharge of his duties.

{17} In addition, sound public policy favors protecting police officers from assault or battery, regardless of whether the officer's actions were technically legal or illegal. As our Supreme Court observed in *Doe,* societal interests demand that a police officer carrying out his or her duties in good faith be free from threat or physical harm. *See Doe,* 92 N.M. at 102–03, 583 P.2d at 466–67. If the officer acts illegally, those harmed may pursue private remedies rather than potentially exacerbating excitable circumstances by acting at the scene. *See id.; see also State v. Chamberlain,* 112 N.M. 723, 729, 819 P.2d 673, 679 (1991) (holding officer's illegal presence in home insufficient to constitute provocation for murder).

{18} Alternatively, Defendant argues that if he was not entitled to a directed verdict, the court should have instructed the jury that the arrest was illegal. We do not agree. The district court correctly conveyed the standard by which the jury should have evaluated the officer's actions under *Doe* by instructing the jury as follows:

> An officer is engaged in the performance of his official duties if he is simply acting within the scope of what the officer is employed to do. The test is whether the officer is within that compass or is engaging in a personal frolic of his own.

This portion of the instruction was sufficient to instruct the jury of the substance of the lawful discharge of an officer's duties. As we have previously discussed, any further instruction in line with Defendant's argument would have been irrelevant to the matter before the jury. *See Doe,* 92 N.M. at 103, 583 P.2d at 467. The district court did not err in refusing Defendant's tendered instruction. *See State v. Rivera,* 115 N.M. 424, 432, 853 P.2d 126, 134 (Ct.App.1993) (discerning no error in trial court's refusal of jury instruction containing "unnecessary" information); *cf. State v. Tave,* 1996–NMCA–056, ¶ 19, 122 N.M. 29, 919 P.2d 1094 (reversing conviction upon use of prejudicial jury instruction containing irrelevant information).

{19} Furthermore, instructing the jurors on the illegality of the arrest would likely serve to confuse them. While the issues of the legality of the officer's actions and the lawful discharge of an officer's duties are facially similar, this similarity only complicates the substantive distinction between the concepts of "lawful discharge" on one hand and "lawful arrest" on the other.

{20} Search and seizure concepts—such as "unlawful arrest"—are not, however, entirely irrelevant to the lawful discharge inquiry. The district court may wish to assist the jury in its determination of the lawful discharge of an officer's duties by instructing the jury about the substantive aspects of law pertinent to the theory of the defense. *See State ex rel. Highway Dep't. v. Strosnider,* 106 N.M. 608, 612, 747 P.2d 254, 258 (Ct.App. 1987). The district court assisted the jury in this case by instructing about the law of arrest and exigent circumstances in Instruction No. 12. The district court, therefore, did not err by instructing the jury on exigent circumstances and denying Defendant's motion for a directed verdict on the illegality of Johnny's arrest.

Error in Lawful Discharge Instruction

{21} Despite the fact that the instructions correctly reflected *Doe* and assisted the jury to evaluate the evidence, the instructions were nonetheless flawed. Instruction No. 11, the lawful discharge instruction, was the only instruction that explained the term

"lawful discharge" to the jury. Naturally, the jury would turn to this instruction for an explanation of the lawfulness of Officer Mundy's conduct. As noted earlier, the instruction correctly sets forth the requirements of *Doe. See Doe,* 92 N.M. at 103, 583 P.2d at 467. But the instruction also included a factor not pertinent to the jury's analysis, that is, whether Defendant had a right to assault a police officer.

{22} At trial, Defendant did not claim that he had a right to assault Officer Mundy. Such a claim would have been a complete defense to all assault charges. Instead, Defendant claimed that the State had failed to prove the "lawful discharge" element of Section 30–22–22. Instruction No. 11 incorrectly focuses upon Defendant's right to assault a police officer, an issue that was not a part of Defendant's theory of defense. We believe that the instruction could have confused the jurors and caused them to believe that they were choosing between whether Defendant had an absolute right to assault Officer Mundy and whether Officer Mundy was acting in lawful discharge of his duties. *See State v. Parish,* 118 N.M. 39, 42, 878 P.2d 988, 991 (1994) (stating that reversible error can arise from instructions that confuse or misdirect a reasonable juror). Given that choice, the jury would have been much more likely to find that Officer Mundy was acting in lawful discharge of his duties than it might have otherwise, especially since the issue of Defendant's right to assault a police officer had not been injected into the trial previously. *See State v. Stampley,* 1999–NMSC–027, ¶ 48, 127 N.M. 426, 982 P.2d 477 (reversing for new trial when jury instructions left no alternative but to consider a vague definition of a crime that lead to two possible interpretations, one of which was completely erroneous).

{23} The State contends that it is unlikely that the jury would be confused by Instruction No. 11 because Defendant did not argue that he had a right to assault Officer Mundy and because excessive force was not an issue in the case. We agree that Defendant would not have been entitled to a jury instruction on the question because he did not make it a theory of the case. *Cf. State v. Baca,* 114 N.M. 668, 673, 845 P.2d 762, 767 (1992) ("If the evidence supports a theory of the case, the defendant is entitled to an instruction on that theory."). However, it is on this basis that we consider Instruction No. 11 confusing to the jury. The instruction introduced an issue into the case relating to one of the elements of the crime and the jury would not know how to apply the concept to the evidence presented.

{24} Additionally, the other instructions given do not cure the error. *See Parish,* 118 N.M. at 41–42, 878 P.2d at 990–91. As noted above, the elements instruction for aggravated assault with a deadly weapon merely deletes the lawful discharge element, as well as Officer Mundy's title. This instruction does not discuss the "lawful discharge" question. Similarly, the instruction regarding exigent circumstances and the validity of an arrest does not address the question of a "right to assault" that is raised by the lawful discharge instruction. These instructions do not clarify the confusion the jury might have experienced due to Instruction No. 11.

{25} Considering the instructions as a whole, we conclude that a reasonable juror could have been confused or misdirected by the lawful discharge instruction. *See Parish,* 118 N.M. at 42, 878 P.2d at 991. Therefore, we reverse Defendant's conviction.

Sufficiency of the Evidence

{26} Having concluded the verdict below was entered upon flawed jury instructions, we must now review the sufficiency of the evidence supporting that verdict. *See State v. Rosaire,* 1996–NMCA–115, ¶ 20, 123 N.M. 250, 939 P.2d 597. If the verdict is not supported by the required quantum of evidence, retrial is barred; however, if substantial evidence was presented at trial in support of his conviction, this matter will be remanded for a new trial. *See State v. Post,* 109 N.M. 177, 181, 783 P.2d 487, 491 (Ct.App. 1989). We reach this issue for a second reason, as well: Defendant challenges the standard by which the jury is to judge Officer Mundy's actions.

{27} We first address Defendant's argument as to the applicable standard. De-

fendant asserts that whether an officer is acting within the lawful discharge of his or her duties can only be measured by an objective reasonable officer standard. In this regard, Defendant argues that Officer Mundy's conduct was not objectively reasonable because a reasonable officer would have known that Johnny's arrest was illegal. Defendant's argument then proceeds to the conclusion that because Officer Mundy's conduct could not be considered reasonable, the State failed to prove the element of lawful discharge beyond a reasonable doubt. Defendant also argues that any subjective belief that Officer Mundy may have had about the legality of his actions is not determinative because, under the objective standard, Officer Mundy's actions were contrary to established Fourth Amendment principles.

{28} Defendant relies on *Frazier*, 88 N.M. at 104, 537 P.2d at 712, for the proposition that lawful discharge is measured only by the objective reasonable officer standard. In *Frazier*, the officer stopped the defendant who ran from a motel room after being evicted. *See id.* When the officer stopped the defendant a second time, the defendant hit him. *See id.* We held that there were no reasonable grounds for restraining the defendant "absent a reasonable belief that a criminal offense had been committed." *Id* . at 105, 537 P.2d at 713.

{29} It is true that there is an objective aspect of the lawful discharge standard in that conduct that a reasonable officer would believe to be unlawful will not fall within the lawful discharge of an officer's duties, regardless of the participating officer's belief about its legality. *See Doe,* 92 N.M. at 103, 583 P.2d at 467. Objectively unreasonable conduct could not, under *Doe* 's definition, be within the compass of an officer's duties. *See id.* This objective aspect of the standard ensures that officers cannot remain deliberately ignorant of the requirements of the Constitution and law and still be considered to be in lawful discharge of their duties.

{30} However, we have never applied a purely objective standard in determining whether officers have acted lawfully; indeed, *Doe* emphasizes the subjective aspect of the lawful discharge issue. *See Doe,* 92 N.M. at 103, 583 P.2d at 467. Under *Doe,* an officer acts in good faith if the officer was not on a personal frolic. *See id.* The officer's state of mind is therefore relevant in considering whether the officer is engaged in the lawful discharge of the officer's official duties because the issue of personal frolic is answered only by looking at what the officer himself or herself believed. Thus, the proper standard by which to measure whether an officer is acting in the lawful discharge of his or her duties is subjective, provided that the conduct is not such that a objectively reasonable officer would not consider it to be unlawful.

{31} Turning to the sufficiency of the evidence, the relevant facts are that: (1) Officer Mundy was actively investigating a crime; (2) Officer Mundy contacted the assistant district attorney for advice as to whether an arrest warrant was needed and was advised to the contrary; (3) without any break in the investigation, Officer Mundy decided to go to the suspect's residence to confirm his involvement in the crime; (4) once there, Officer Mundy was invited into the residence by the suspect's father and saw evidence satisfying him of the suspect's role in the crime; (5) believing that he could arrest the suspect without a warrant, Officer Mundy informed him that he would be arrested; (6) when the suspect ran into another room, Officer Mundy followed him to ensure that there was no threat to him or his partner.

{32} We note that *Campos* encourages officers to continue investigations and obtain more, not less, information before obtaining an arrest warrant. *See Campos,* 117 N.M. at 159, 870 P.2d at 121. Furthermore, each case should be evaluated on its facts. *See id.* at 158, 870 P.2d at 120. Finally, it is significant that Officer Mundy obtained advice from the assistant district attorney, who presumably knows the law of warrantless arrests, before he decided that he could arrest the suspect. These considerations support

our conclusion that Officer Mundy acted reasonably. Thus, there was sufficient evidence for the jury to have reasonably concluded that Officer Mundy was acting within the scope of his duties.

Conclusion

{33} For the reasons stated above, we reverse Defendant's conviction and remand for a new trial.

{34} **IT IS SO ORDERED.**

APODACA and ARMIJO, JJ., concur.

4 P.3d 664

2000-NMSC-019

In the Matter of Roger MOORE, Esq., An Attorney Licensed to Practice Before the Courts of the State of New Mexico.

No. 26,279.

Supreme Court of New Mexico.

June 27, 2000.

Sally Scott-Mullins, Deputy Chief Disciplinary Counsel, Albuquerque, for Disciplinary Board.

J. Wayne Griego, Albuquerque, for Respondent.

OPINION

PER CURIAM.

{1} Pursuant to Rule 17-211 NMRA, this matter came before the Court for consideration of the recommendation of the hearing committee and the disciplinary board to accept a conditional agreement not to contest and consent to discipline tendered by Roger Moore. By the terms of the consent agreement, respondent agreed not to contest the charges that he had violated Rules 16-115(A) and (B), 17-204(A)(1), (2), and (4) through (7), and 16-804(H). For the reasons that follow, we accept the recommendation and impose the discipline to which respondent agreed.

{2} This matter began with a complaint from a chiropractor that respondent failed to pay the bill for treatment provided to his client, despite having issued a letter stating payment would be made from the settlement. The pertinent language in the letter respondent sent the chiropractor states:

> [Client] has requested that my office tender to your office a letter stating that payment of any bill for services she may incur will be made from settlement or ultimate judgment which [client] may receive as a result of the . . . automobile accident. It is understood that [client] will be ultimately responsible for the payment of any bill for services incurred with your office.

Respondent denied to the chiropractor and later to disciplinary counsel that the letter in question obligated him to withhold funds to pay the chiropractor. Respondent contended that the letter only stated that his client would pay the bill from the settlement funds, although he acknowledged his letter was sent in response to a request for a letter of protection.[1] Respondent also argued that there was no assignment of proceeds, as was the case in *Romero v. Earl*, 111 N.M. 789, 810

1. "Letter of protection" is the customary nomenclature for a document by which a lawyer notifies a medical vendor that payment will be made when the case is settled or judgment is obtained. This is a common practice by which lawyers representing personal injury plaintiffs ensure clients will receive necessary medical treatment, even if unable to pay until the case is concluded.

P.2d 808 (1991), and that without an unambiguous assignment, no individual responsibility for payment to the healthcare provider could be imposed upon him.

{3} In *Romero,* this Court considered the effect of an agreement signed by the lawyer and the client granting to a doctor a lien on the proceeds of a personal injury suit. We held that once a lawyer has executed such an assignment, he or she is "obligated to distribute the proceeds of [the] claim in accordance with [it]," and that this obligation may be enforceable against the lawyer. *Id.* at 790, 810 P.2d at 809. A subsequent disciplinary case, *In re Rawson,* 113 N.M. 758, 833 P.2d 235 (1992), demonstrated that formal assignment language is not essential to the creation of the obligation. *Id.* at 761, 833 P.2d at 238. In *Rawson,* the attorney sent letters to three doctors stating they would be paid from the proceeds of any recovery the client received. Although Rawson's letter did not contain formal assignment language, it did contain a promise to pay the doctors from the proceeds of the suit. Relying on *Romero,* we stated that "[t]he attorney in such a situation is obligated to distribute the proceeds of the settlement in accordance with the promise to the creditors. . . ."[2] *Id.*

{4} The language of the letter respondent sent to the chiropractor in this case clearly communicated that payment would be made "from settlement or ultimate judgment." The fact that the letter ended by saying that the client would be ultimately responsible for payment did not change the message. A client remains ultimately liable for paying the medical vendor, for example, when no recovery is received. The essence of the letter, and the language that obligated respondent to pay the vendor from the settlement proceeds was the statement that the client had asked him to communicate that payment would be made from settlement proceeds. It should have been obvious to respondent that this is the message he was sending, especially since he acknowledged that the letter was sent in response to a request for a letter of protection. Indeed, if respondent sent this letter intending that the vendor rely upon it to continue to render care and to postpone collection efforts, while intending not to be obligated to dispense settlement proceeds to the vendor, a more serious question of misrepresentation and fraud could arise. As we noted in *Rawson,* in response to the contention that the doctors were not paid because the client changed her mind, an attorney's obligation to abide by a client's directives "does not extend to assisting the client in defrauding courts and creditors." *Id.* at 762, 833 P.2d at 239. The consent agreement requires that any letter respondent sends to a medical vendor to indicate that payment will be made from the proceeds of settlement or suit, if not intended as a letter of protection, state in capital letters that it is not a letter of protection. If respondent decides to send such a letter, he should be reminded that, notwithstanding the capitalized disclaimer, he has a continuing obligation not to engage in dishonest or fraudulent conduct or statements. We agree with and adopt the language of the disciplinary board's formal reprimand in *In re Ellis,* S.Ct. No. 19,226, 29 *State Bar Bulletin* 29, (September 27, 1990) that "[w]hen dealing with an attorney, another person (whether an attorney or a lay person) has the right to expect that the attorney will be honest and straightforward."

{5} Because respondent failed to disburse his client's settlement funds in accordance with the letter quoted above, disciplinary counsel appropriately investigated the handling of the settlement funds in respondent's trust account. A request for trust account documentation for the period in question revealed that respondent had not maintained all required documents, nor properly recorded all transactions. In turn, an audit of respondent's trust account was con-

2. The claim Rawson made, that he did not pay because his client changed her mind, was also made by respondent, who asserted his client disputed the amount of the bill. If this occurs, the lawyer must follow the requirements of Rule 16-115(C), which governs the resolution of disputes over entitlement to money or property in the lawyer's possession. The lawyer should hold the disputed amount in trust, and attempt to facilitate a resolution of the dispute. Failing this, the lawyer may deposit the disputed funds in court and allow the client and the vendor to resolve the dispute judicially.

ducted and revealed systemic problems with his trust account maintenance and record keeping. Of 164 transactions reviewed by the auditor, 78 were not only unidentified, but also were unidentifiable by respondent. He failed to maintain copies of deposit slips, a check register, or a complete copy of all checks written, nor did he keep copies of bank statements or perform the reconciliations required by Rule 17–204(A)(7).[3]

{6} Additionally, on a number of occasions, respondent's trust account balance fell below the amount indicated on his ledgers that should be holding for clients. In the case of the client whose personal injury claim was involved in this complaint, respondent presented at the eleventh hour a statement signed by the client stating she agreed that respondent could use her funds. This document, however, failed to discharge respondent's trust account obligations. Although respondent was not charged with violating Rule 16–108, it is unlikely that the document signed by respondent's client adequately reflects compliance with that rule.

{7} Rule 16–108(A) governs business transactions with clients. It requires that the terms of the transaction be fair and reasonable to the client, that the terms be disclosed to the client in writing, that the client be given a reasonable opportunity to seek the advice of independent counsel, and that the client consent in writing. Borrowing money from clients is not condoned by this Court. If an attorney determines to brave these conflict-infested waters, he or she is well advised to do so on an arm's length basis. This would include execution of customary loan documents, and the payment of a reasonable amount of interest. Further, once the money has been loaned to the attorney, it should be removed from trust. The attorney should not, as respondent did, disburse the funds from trust for the attorney's personal or business purposes. Doing so violates the prohibition of Rule 16–115(A) against commingling trust funds with the attorney's funds.

{8} This Court has repeatedly instructed New Mexico lawyers that violations of the record keeping and substantive requirements for trust accounts are viewed "as being of the most serious nature." *In re Ruybalid,* 118 N.M. 587, 589, 884 P.2d 478, 480 (1994). Any attorney who disregards the cautionary tales proffered in our opinions discussing the discipline imposed for such transgressions[4] may one day be, as respondent is now, one step away from license suspension, and facing a lengthy and expensive period of probation during deferral of suspension, as well as other conditions.

{9} NOW THEREFORE, IT IS ORDERED that the recommendation hereby is ADOPTED and the conditional agreement not to contest and consent to discipline hereby is APPROVED;

{10} IT IS FURTHER ORDERED that Roger Moore hereby is SUSPENDED from the practice of law for a definite period of eighteen (18) months pursuant to Rule 17–206(A)(2);

3. When disciplinary counsel requested respondent's trust records, he informed her that he did not keep his bank statements because his office had been vandalized in the past and he was concerned about client confidentiality. Respondent stated he was unaware that he was required to physically maintain the bank statements, apparently believing that having the information available from the credit union was sufficient. This precise question has not come before this Court as an issue to be decided in a disciplinary case. Because this case comes before the Court for consideration of a consent agreement, the issue is not before us now. We note, however, that Rule 17–204(A) obligates the attorney to "maintain" the required records. The primary definition of "maintain", according to *The English Language Unabridged Webster's Third International Dictionary,* is "to hold in the hand." We also note that because the obligation to maintain the required records is the attorney's, the attorney would be held responsible if the financial institution does not have all of the required records when they are requested by disciplinary counsel. By far the better practice is for the attorney to take responsibility for preserving the necessary documentation. If office security is a concern, the attorney must take whatever steps are necessary to protect confidential information, whether it concerns clients' legal matters or trust account records.

4. Of course, if the transgressions include misappropriation of client funds, the attorney can expect disbarment. *In re Rohr,* 1997–NMSC–012, 122 N.M. 774, 931 P.2d 1390; *In re Hamar,* 1997–NMSC–048, 123 N.M. 795, 945 P.2d 1013.

{11} IT IS FURTHER ORDERED that the period of suspension shall be deferred under the following terms and conditions:

(1) Respondent shall be placed on probation throughout the deferral period under the supervision of a licensed New Mexico attorney selected or approved by disciplinary counsel;

(2) Respondent shall meet with the supervising attorney as often as the supervisor deems necessary or advisable, but no less than once per month;

(3) Respondent shall accept instruction from and comply with all directives of the supervisor concerning trust account record keeping and management procedures;

(4) Respondent shall demonstrate to the satisfaction of the supervising attorney that his current trust account is in compliance with the requirements of Rules 16–115 and 17–204 NMRA;

(5) Respondent's supervisor shall provide quarterly reports to disciplinary counsel concerning respondent's compliance with supervision. Thirty (30) days prior to the conclusion of the eighteen (18) month probationary period, the supervisor shall advise disciplinary counsel whether respondent has satisfactorily complied with the supervisor's instructions and directives;

(6) Respondent shall submit to and bear the expense of an audit of his trust account during the probationary period, conducted at a time and by auditors selected or approved by disciplinary counsel. If the audit reveals further violations of Rule 16–115, including violations of Rule 17–204, disciplinary counsel shall seek to have the deferral of respondent's suspension, or some portion thereof, revoked and may file additional charges of misconduct based upon the findings of the audit;

(7) Respondent shall compensate his supervisor at an hourly rate to be determined between him and his supervisor;

(8) Respondent shall reimburse the disciplinary board for all costs incurred in the investigation and prosecution of this matter in the amount of $3,424.07 on or before July 12, 2000;

(9) Respondent shall observe all provisions of the Rules of Professional Conduct and Rules Governing Discipline during his probationary period; and

(10) Respondent agrees that any letter he sends to medical providers to indicate that the medical provider's bill will be paid from the proceeds of settlement or suit, if such letter is not intended as a letter of protection, shall state in capitalized letters that it is not a letter of protection;

{12} IT IS FURTHER ORDERED that at the conclusion of the eighteen-month deferred suspension period, reinstatement shall be automatic so long as all conditions set forth herein and in the conditional agreement and consent to discipline are fulfilled; however, if the deferred period of suspension or any portion thereof is revoked, or any condition or obligation set forth is not fulfilled, disciplinary counsel may object to reinstatement pursuant to Rule 17–214(B) NMRA; and

{13} IT IS FURTHER ORDERED that failure to abide by the terms and conditions of the agreement may result in the filing of a motion for order to show cause pursuant to Rule 17–206(G) NMRA.

{14} IT IS SO ORDERED.

4 P.3d 668

2000-NMCA-055

Stephen R. WHITTINGTON, et al., Plaintiffs–Appellants,

v.

STATE of New Mexico DEPARTMENT OF PUBLIC SAFETY, Darren P. White, in his capacity as Secretary of the New Mexico Department of Public Safety, and Frank Taylor, in his capacity as the Chief of the New Mexico State Police, Defendants–Appellees.

No. 19,065.

Court of Appeals of New Mexico.

May 5, 2000.

Certiorari Granted, No. 26,362, June 28, 2000.

Jill Henson, Rowley Law Firm P.C., Clovis, for Appellants.

Ellen S. Casey, S. Barry Paisner, Hinkle, Cox, Eaton, Coffield & Hensley, L.L.P., Santa Fe, for Appellees.

Mark B. Stern, Robert M. Loeb, U.S. Department of Justice, Washington, D.C., Amicus Curiae for United States.

Carl J. Butkus, Butkus & Reimer, P.C., Albuquerque, Amicus Curiae for John Raymond, et al.

OPINION

ALARID, Judge.

{1} On December 29, 1999, we withdrew on our own motion our previous opinion, filed on September 13, 1999. The following opinion hereby is substituted in its place.

{2} On remand from the United States Supreme Court, we reconsider our decision in *Whittington v. Department of Public Safety,* 1998–NMCA–156, 126 N.M. 21, 966 P.2d 188, *judgment vacated by New Mexico Dept. of Public Safety v. Whittington,* 119 S.Ct. 2388 (1999), in light of the Supreme Court's decision in *Alden v. Maine,* 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). Upon doing so we affirm the decision of the district court.

{3} On September 3, 1998, we held that the Eleventh Amendment to the United States Constitution does not give the State of New Mexico Department of Public Safety (the Department) sovereign immunity from suit in state court for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C §§ 201–219 (1978). *See generally Whittington,* 1998–NMCA–156, 126 N.M. 21, 966 P.2d 188. Consequently, we reversed the district court's decision to dismiss the Appellants' suit against the Department. *See id.* ¶ 16. The New Mexico Supreme Court subsequently denied the Department's petition for a writ of certiorari, *see Whittington v. Department of Public Safety,* 126 N.M. 534, 972 P.2d 353 (1998), and the Department appealed the case to the United States Supreme Court, *see Whittington,* 119 S.Ct. at 2388.

{4} The United States Supreme Court addressed the same issues presented in *Whittington* in its decision in *Alden.* In *Alden,* a group of probation officers sued the State of Maine in federal district court for allegedly violating the overtime provisions of the FLSA. *See* 119 S.Ct. at 2246. The federal court dismissed the suit based on the State's Eleventh Amendment immunity. The dismissal was affirmed on appeal. *See Mills v. Maine,* 118 F.3d 37 (1st Cir. 1997). The plaintiffs then re-filed their lawsuit in state court. The state trial court dismissed the suit based on the State's immunity from suit. The Maine Supreme Judicial Court affirmed. *See Alden v. State,* 715 A.2d 172 (Me.1998). Due to the importance of the issues presented in *Alden,* the United States Supreme Court granted certiorari. *See Alden v. Maine,* 525 U.S. 981, 119 S.Ct. 443, 142 L.Ed.2d 398 (1998); *see also Alden,* 119 S.Ct. at 2246. After an exhaustive examination of the origin and history of the Eleventh Amendment and sovereign immunity, the Supreme Court held "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject non-consenting States to private suits for damages in state courts." *Alden,* 119 S.Ct. at 2246.

{5} Because the Supreme Court, whose decision in *Alden* binds us, has concluded that sovereign immunity shields non-consenting states from FLSA suits in state court, we

vacate our September 3, 1998, decision and now affirm the decision of the district court dismissing the direct FLSA claims as set forth in Counts I, III, and IV of the Appellants' Second Amended Complaint. We note, however, that the district court order dismissing Counts I, III, and IV was certified as a final order pursuant to Rule 1–054(C)(1) NMRA 1999 and that it does not purport to address Count II, Appellants' contract claim. Our disposition of the direct FLSA claims set out in Counts I, III, and IV should not be understood as precluding Appellants from asserting in the context of Count II that the written employment policies of the Department constitute a contract within the scope of NMSA 1978, § 37–1–23 (1976), *see Garcia v. Middle Rio Grande Conservancy District,* 1996–NMSC–029 ¶¶ 15, 19, 121 N.M. 728, 918 P.2d 7, and that the provisions of the FLSA were incorporated into any contract between Appellants and the Department, *see Bernalillo County Deputy Sheriffs Ass'n v. County of Bernalillo,* 114 N.M. 695, 699, 845 P.2d 789 (1992) (noting that FLSA provisions are read into and become part of every employment contract subject to the terms of the Act); *West v. State,* 324 So.2d 579 (La.Ct.App.1975) (holding that waiver of sovereign immunity as to employment contract extends to related FLSA claims).

{6} **IT IS SO ORDERED.**

PICKARD, C.J., and BUSTAMANTE, J., concur.

4 P.3d 670

2000-NMCA-059

Nancy SCHEIDEL, Respondent–Appellant,

v.

Paul Neal SCHEIDEL, Petitioner–Appellee.

No. 19,937.

Court of Appeals of New Mexico.

May 31, 2000.

Michael C. Jordan, Albuquerque, for Appellant.

William Short, Albuquerque, for Appellee.

OPINION

BUSTAMANTE, Judge.

{1} Brigadier General Paul Neal Scheidel (Husband) appeals from the trial court's order enforcing the terms of a Marital Settlement Agreement (MSA) entered into by Husband and Nancy Scheidel (Wife). The MSA divided Husband's military retirement benefits between the parties and prohibited Husband from taking any voluntary action to reduce Wife's share of those benefits. The MSA also contained an indemnity provision that would require Husband to compensate Wife for reductions in her benefits that

might result from voluntary action by Husband. In the proceedings below, Wife successfully sought indemnity from Husband after Husband waived a portion of his retirement pay. On appeal, Husband argues that the trial court's order violates federal law. Husband further asserts that the trial court's determination that he violated the terms of the MSA, thereby triggering the indemnity provision, was in error. We affirm.

FACTS AND PROCEDURAL BACKGROUND

{2} Husband and Wife were married on June 3, 1960, while Husband was in the Air Force. Husband retired from the military in 1986. After the parties divorced in 1991, they entered into the MSA at issue, which was incorporated into the court's amended final decree. For the purposes of this appeal, the most significant portions of the agreement provide as follows:

> D. Wife is awarded fifty percent (50%) of the community property interest in Husband's military retirement benefits. At the time of execution of this Marital Settlement Agreement, fifty percent (50%) is equal to $1,861.00 monthly.... Wife shall share in all future increases in the military retirement benefits....
>
> (1) Wife's interest in Husband's military retirement pay shall be calculated according to the following formula:
>
> Wife's interest is expressed as one-half of the community interest.
>
> Community interest is two hundred eighty-eight (288) months marriage divided by three hundred (300) months service equals .96 of the amount remaining after Veterans Administration compensation of $259.00 monthly (or the Veterans Administration compensation amount, as the same may change from time to time by government action) is deducted from gross monthly military retirement pay.
>
> Wife's interest is equal to one-half of the community interest, or .96 divided by 2 equals .48 or 48 percent (48%).
>
> ....
>
> (4) Husband shall never voluntarily modify his military retirement pay in such a manner as to cause Wife's share to be diminished or reduced. If Husband does so, he will be responsible to pay to Wife the difference in monies she then receives via direct payment and the amount due her as calculated above.

The MSA also provides that Wife shall receive her payments from the Defense Finance and Accounting Service (DFAS), pursuant to a direct payment program established by federal law. *See* 10 U.S.C. § 1408(d)(1)–(2) (1994 & Supp. IV 1998).

{3} At the time of the divorce Husband was 30% disabled, and he received a commensurate amount of disability pay in lieu of retirement benefits. However, Husband suffered worsening heart problems in the years following the divorce. He had a number of strokes, and began taking medication to thin his blood. He also developed serious dental problems. Husband's condition required that he be hospitalized and put on medication to thicken his blood before he could have his dental problems treated. Because the Veterans Administration (VA) provides dental care only to military persons who are completely disabled, Husband applied for a reevaluation, and received a 100% disability rating.

{4} In accordance with federal law, Wife's share of Husband's military pension is based upon Husband's retirement pay, excluding any amounts received from the VA as disability pay. *See* 10 U.S.C. § 1408(a)(4)(B) (1994). Because a military retiree must waive a corresponding amount of retirement pay in order to receive veterans' disability benefits, *see* 38 U.S.C. § 5305 (1994), the amount received monthly by Wife as her share of the retirement benefits decreased dramatically after Husband's disability rating increased. Based upon the indemnity provision in the MSA, Wife therefore filed a motion for order to show cause, seeking an order forcing Husband to compensate her for the reduction in benefits. The trial court determined that Husband had violated the terms of the MSA by applying for and receiving a higher disability rating, and required Husband to indemnify Wife for her losses. This appeal followed.

DISCUSSION

1. Federal Preemption

{5} Husband asserts that the trial court's order is directly at odds with the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (the USFSPA), and the Supreme Court's ruling in *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

{6} Enacted in response to *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the USFSPA eliminated federal preemption in regard to the post-marital disposition of military pensions. *See Walentowski v. Walentowski*, 100 N.M. 484, 486, 672 P.2d 657, 659 (1983). Specifically, the USFSPA authorizes state courts to treat "disposable retired pay ... as property of the [military] member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1) (1994). "[D]isposable retired pay" is defined as "the total monthly retired pay to which a member is entitled," less certain deductions. 10 U.S.C. § 1408(a)(4). Among the amounts that are deducted from the retired pay of the military member are any amounts waived in order to receive disability benefits. *See* 10 U.S.C. § 1408(a)(4)(B). Interpreting these provisions, the Supreme Court held in *Mansell* that disability payments are excluded from the scope of the USFSPA. By extension, the Court concluded that state courts lack the power to treat military retirement pay that has been waived in order to receive disability benefits as property that is divisible upon divorce. *See Mansell*, 490 U.S. at 594–95, 109 S.Ct. 2023.

{7} In reliance upon *Mansell*, Husband contends that the trial court's order, which requires him to compensate Wife for the reduction in benefits that she suffered as a result of the increase in his disability rating, amounts to an impermissible distribution of disability benefits to Wife. We disagree.

{8} Courts in a number of other states have addressed post-judgment waivers of retirement pay in circumstances similar to those presented here. In recognition of the fact that *Mansell* merely prohibits state courts from ordering the division of the military spouse's disability pay, several courts have determined that nothing in *Mansell* or in the USFSPA prohibits them from enforcing indemnity provisions designed to guarantee a minimum monthly income to the non-military spouse. *See, e.g., Abernethy v. Fishkin*, 699 So.2d 235, 239–40 (Fla.1997); *In re Marriage of Strassner*, 895 S.W.2d 614, 617–18 (Mo.Ct.App.1995); *Owen v. Owen*, 14 Va. App. 623, 419 S.E.2d 267, 269–71 (1992). However, these courts have observed that the enforceability of such an indemnity provision depends upon the source of the funds committed in satisfaction of the military spouse's obligation. *See, e.g., Abernethy*, 699 So.2d at 239 (affirming enforcement of settlement agreement because it "did not expressly provide for a division of disability," which, under the USFSPA and *Mansell*, would be invalid). Neither the marital settlement agreement, nor the court order enforcing the relevant portions of that agreement, may require the military spouse to remit disability funds, specifically, to the non-military indemnitee. *See Mansell*, 490 U.S. at 594–95, 109 S.Ct. 2023. However, so long as the military spouse is free to satisfy an indemnity obligation from any source, these courts have ruled that the enforcement of such indemnity provisions does not result in the impermissible division of disability benefits. *See Abernethy*, 699 So.2d at 240; *Strassner*, 895 S.W.2d at 618; *Owen*, 419 S.E.2d at 269–70.

{9} We find these cases persuasive. Not only is the rationale analytically sound, but the result is equitable. As this Court has previously noted, one spouse should not be permitted to benefit economically in the division of property from a factor or contingency that could reduce the other spouse's share, if that factor or contingency is within the first party's complete control. *See Irwin v. Irwin*, 121 N.M. 266, 271, 910 P.2d 342, 347 (Ct.App.1995).

{10} We acknowledge that when deciding cases with similar facts, courts in some jurisdictions appear to have reached conclusions contrary to ours. *See, e.g., Ashley v. Ashley*, 337 Ark. 362, 990 S.W.2d 507, 509 (1999); *In re Marriage of Pierce*, 26 Kan.App.2d 236, 982 P.2d 995, 998 (1999); *Ryan v. Ryan*, 257

Neb. 682, 600 N.W.2d 739, 744–45 (1999); *Johnson v. Johnson*, No. 02A01–9901–CV–00015, 1999 WL 713574, at * 3–5 (Tenn.Ct. App.1999), *appeal granted*, Apr. 10, 2000; *Wallace v. Fuller*, 832 S.W.2d 714, 718 (Tex. Ct.App.1992). Upon closer review, however, we find many of these cases distinguishable, and we find that they do not dissuade from our position.

{11} For example, in *In re Marriage of Pierce*, in contrast to this case, the settlement agreement at issue did not specify that the wife was to receive a certain sum of money per month, nor did it preclude the husband from doing anything to alter the amount the wife was to receive. *See* 982 P.2d at 997. As such, the court rightly held that the husband was free to waive his retirement pay in favor of disability benefits and that *Mansell* precluded the trial court from ordering otherwise. *See In re Marriage of Pierce*, 982 P.2d at 998. In several of the other cases, the courts rightly held that settlement agreements or divorce decrees that purported to order a division of the former military spouse's disability benefits violated *Mansell* and the USFSPA. *See Ryan*, 600 N.W.2d at 741–42, 744; *Wallace*, 832 S.W.2d at 718. Finally, at least one of the courts that appears to have reached a conclusion contrary to ours had to distinguish a case from within its jurisdiction—a case with facts more similar to ours—to reach the result it did. *Compare Ashley*, 990 S.W.2d at 508–09 (reversing order that husband remit to former wife certain money that he had waived in order to receive disability benefits), *with Hapney v. Hapney*, 37 Ark.App. 100, 824 S.W.2d 408, 409 (1992) (affirming award of support because the "divorce decree did not purport to award the [wife] a portion of the [husband's] disability benefits").

{12} Accordingly, we hold that federal law does not prohibit state courts from enforcing indemnity provisions which ensure the payment of a minimum sum to a non-military spouse as his or her share of a community pension, provided that veterans' disability benefits are not specified as the source of such payments. Husband nonetheless advances three theories in support of his contention that the order entered by the trial court should be reversed.

{13} First, Husband suggests that the trial court's order specifically requires him to indemnify Wife with disability benefit monies. Although we agree with Husband that an order expressly distributing disability benefits would offend the USFSPA, we disagree that the order so provides in this case. Nowhere does the order state that Husband must remit disability benefits directly to Wife. Perhaps Husband relies upon paragraph four of the decree, which indicates that direct payment from the DFAS should be accomplished if possible, because the DFAS handles the distribution of military retirement and disability monies. However, we do not regard this conditional provision as an implicit requirement that Husband utilize disability pay in satisfaction of his obligation to Wife.

{14} Second, Husband contends that the only sources available to fulfill his financial obligations to Wife are his monthly retirement pay and disability benefits, because he has no other income. He thus contends that, as a practical matter, any payment to Wife must come from a protected source—either his disability pay, or his 50% share of the retirement benefits. We are not persuaded that this circumstance renders the trial court's order unenforceable. The critical factor, for the purposes of complying with federal law, is that the court order does not specifically require that disability benefits provide the source of the funds paid to the non-military spouse. *See Abernethy*, 699 So.2d at 240. As stated above, no such explicit allocation of disability benefits was ordered in this case. Additionally, in the likely event that Husband shall pay Wife directly, we note that Husband is free to utilize any other assets, of a non-income-producing nature, to satisfy his obligations. In light of the fact that Husband's increased disability rating has inured to his financial benefit, effectively creating additional income to him at Wife's sole expense, we do not hesitate to suggest that Husband may be required to shuffle assets or rearrange his finances in order to facilitate the satisfaction of his indemnity obligations to Wife.

{15} Finally, Husband argues that the trial court's order violates 38 U.S.C. § 5301(a)

(1994), which protects disability pensions from attachment by creditors. However, enforcement of the indemnity provision does not operate as an impermissible assignment of exempt funds. As stated above, neither the court order nor the MSA require Husband to utilize disability benefits in satisfaction of his obligations to Wife.

{16} In conclusion, although we agree with Husband that *Mansell* prohibits state courts from ordering the division of veterans' disability benefits, we uphold the order of the trial court. We so rule because neither the order nor the MSA that it enforces expressly assign Husband's disability benefits to Wife.

2. Enforcement of the MSA

{17} As set forth above, paragraph 3(D)(4) of the MSA prohibits Husband from taking any voluntary action that would reduce Wife's retirement benefit payments, and requires Husband to indemnify Wife in the event of such reduction in her benefits. Applying these provisions, the trial court found that Husband's application for an increased disability rating was voluntary, and in furtherance of his own financial interests. The court further determined that the deterioration in Husband's medical condition did not mitigate the voluntary nature of his conduct. As a result, the court held that Husband had violated paragraph 3(D)(4) of the MSA, and required him to indemnify Wife for her resulting losses.

{18} Husband asserts that the trial court's findings concerning the voluntariness of his actions were in error. We will affirm the trial court's findings if they are supported by substantial evidence. *See Garcia v. Mayer*, 1996–NMCA–061, ¶ 11, 122 N.M. 57, 920 P.2d 522.

{19} First, Husband contends that the life-threatening nature of his medical condition, and his inability to obtain dental care absent VA assistance, rendered his conduct involuntary. We find Black's and Webster's definitions helpful. In pertinent part, both dictionaries indicate that "voluntary" conduct is the product of free will or choice. *See* Black's Law Dictionary 1575 (6th ed.1990); Webster's Third New International Dictionary (unabridged) 2564 (1986). Although Husband's medical needs and his financial interests assuredly motivated him to seek reevaluation of his disability status, we agree with the trial court that these considerations cannot be equated with coercive external forces that compelled Husband to seek a heightened disability rating and to waive his retirement pay in favor of disability benefits. Rather, we conclude that Husband's medical needs and financial interests were precisely the sort of factors that a rational individual would take into account when deciding upon a course of conduct. Therefore, we affirm the trial court's determination that Husband's actions were voluntary, thus triggering his contractual duty to compensate Wife for the losses occasioned thereby.

{20} Taking a slightly different tack, Husband argues that his medical needs were of such exigency that his conduct should be regarded as the product of coercion or duress. Duress, as a principle of contract law, applies defensively against a party attempting to enforce contractual rights. More specifically, it renders contracts voidable which have been tainted by coercive influence in their formation. *See generally* 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 4.9, at 443–46 (2nd ed.1998) [hereinafter Farnsworth]; *cf. First Nat'l Bank v. Sanchez*, 112 N.M. 317, 320, 815 P.2d 613, 616 (1991) (explaining that the doctrine of economic duress, which may be asserted by way of defense to an action to enforce a contractual agreement, is designed to discourage or prevent abuse of power in the bargaining process). The only contract at issue in this case is the MSA. However, we do not understand Husband to suggest that Wife coerced Husband to enter into the MSA. Rather, Husband claims "duress" insofar as his application for an increased disability rating was motivated by pressing health and financial needs. Otherwise stated, Husband asserts that external, coercive forces induced him to breach his contract with Wife. Duress cannot provide any defense or relief under such circumstances. The doctrine fulfills the purpose of policing contract formation: it does not allow a party to avoid his

contractual obligations where external forces have induced him to breach a contract validly formed. *See* 1 Farnsworth § 4.9, at 444–46. We therefore reject Husband's duress argument.

{21} Alternatively, Husband argues that the increase in his disability rating was the result of "government action," such that Wife's entitlement to a portion of Husband's retirement benefits was eliminated. Confronted with this issue below, the trial court concluded that the portion of the MSA which subjects Wife's entitlement to modification in the event of "government action" altering Husband's disability benefits was not implicated in this case. We are persuaded that the trial court's interpretation is correct. In view of the indemnity provision prohibiting Husband from "voluntarily" modifying his retirement pay in a manner that would decrease Wife's share, and also in view of the fact that the MSA expressly entitled Wife to share in any increases in Husband's retirement pay, without reciprocally requiring Wife to suffer decreases, we are persuaded that the "government action" clause was only intended to apply to unilateral government adjustments in the VA disability schedule. Therefore, we reject Husband's argument that the change in his disability rating, and his corresponding waiver of retirement pay, constituted "government action" such that his indemnity obligations might be avoided.

{22}Finally, Husband asserts that the trial court's order amounts to an impermissible award of spousal support or alimony. This argument is based upon Husband's assertion that either his retirement benefits or his disability pay must provide the source of Wife's indemnity payments. Because both the retirement and disability pay are Husband's sole and separate property, Husband reasons that the payments to Wife cannot be regarded as distributions of community property. Therefore, he contends, they can only be classified as periodic spousal support payments. We are unpersuaded by Husband's novel argument. The trial court's order simply enforces Husband's contractual duty to indemnify Wife. *See Herrera v. Herrera*, 1999–NMCA–034, ¶ 9, 126 N.M. 705, 974 P.2d 675 (holding marital settlement agreements are contracts, subject to contract law). Moreover, Wife's right to indemnity has as its theoretical source Husband's military retirement pension, the relevant portion of which accrued during the marriage and is therefore classifiable as community property. *See Walentowski*, 100 N.M. at 486, 672 P.2d at 659. The enforcement of such a contractual duty, particularly a contractual duty having at its origin a guarantee to preserve Wife's share of a community asset, cannot be construed as an award of alimony.

CONCLUSION

{23} Based on the foregoing discussion, we affirm the trial court's enforcement of the MSA. The parties shall bear their respective costs and attorney fees.

{24} **IT IS SO ORDERED.**

PICKARD, C.J., and ARMIJO, J., concur.

4 P.3d 1221
2000-NMSC-017

STATE of New Mexico, Plaintiff–Respondent,

v.

Marcos MASCAREÑAS, Defendant–Petitioner.

No. 25,577.

Supreme Court of New Mexico.

May 25, 2000.

Phyllis H. Subin, Chief Public Defender, Lisabeth L. Occhialino, Assistant Appellate Defender, Santa Fe, for Petitioner.

Patricia A. Madrid, Attorney General, Steven S Suttle, Assistant Attorney General, Santa Fe, for Respondent.

OPINION

BACA, Justice.

{1} Defendant, Marcos Mascareñas, appeals his conviction and sentence of twelve years imprisonment for negligent child abuse resulting in death, contrary to NMSA 1978, § 30–6–1(C) (1973, as amended through 1989).[1] We granted certiorari pursuant to NMSA 1978, § 34–5–14(1972) (outlining the scope of our appellate jurisdiction) to review the Court of Appeals' decision affirming Mascareñas' conviction for child abuse. *See also* Rule 12–502 NMRA 2000. Mascareñas appeals his conviction on several grounds; 1) fundamental error occurred because the trial court failed to provide the jury with an instruction for negligent child abuse that adequately defined criminal negligence; 2) fundamental error occurred because the jury instructions omitted an essential element requiring that the State prove he acted "without justification"; 3) the child abuse statute is unconstitutionally vague; 4) the trial court committed reversible error by refusing to allow the testimony of his rebuttal expert witness regarding the public's awareness of shaken baby syndrome (SBS); 5) insufficient evidence exists to support the verdict; 6) the trial court improperly admitted evidence of Mascareñas' prior drug use and a prior injury to the child; 7) the State's opening statement and closing argument contained misleading statements about the law and facts not in evidence; 8) his conviction and twelve year sentence, despite lacking criminal intent, amounts to cruel and unusual punishment; and 9) the cumulative effect of the trial court's errors deprived him of his right to a fair trial. Because we reverse Mascareñas' conviction based on the deficiencies in the jury instructions and hold that sufficient evidence exists to support remand, we need not reach his other claims of error.

I.

{2} On October 6, 1996, emergency medical technicians were summoned to render assistance to six-month old Matthew Cisneros, who was suffering from a seizure. Upon arrival, the medical technicians found Matthew unresponsive and displaying signs that his brain was not receiving oxygen. He was transported to the emergency room at Holy Cross Hospital in Taos where tests revealed the likelihood that Matthew had suffered head trauma. The treating physician diagnosed Matthew's injuries as subdural hematoma, cerebral edema, and cardio-pulmonary arrest all of which were consistent with shaken baby syndrome. Matthew later went into complete respiratory and cardiac arrest and was successfully resuscitated. Matthew was

1. We note that Mascareñas was convicted under the statute, as amended through 1989, prior to the adoption of the 1997 amendment to Section 30–6–1. Unless otherwise indicated, our discussion of Section 30–6–1 refers to the 1989 statute.

transported via helicopter to the Pediatric Intensive Care Unit at University of New Mexico Hospital in Albuquerque. Over the next four days Matthew's neurologic functions deteriorated and brain death was declared on October 10, 1996. Matthew died after he was taken off life support. Mascareñas was subsequently arrested and charged with child abuse resulting in death.

{3} At trial, Mascareñas testified that Matthew was left in his care after Lisa, the child's mother, left for work in the morning. Matthew then became agitated and began crying. Mascareñas testified that he was frustrated that Matthew would not stop crying and admitted that he shook Matthew "hard once." He also testified that he tossed Matthew in the air, took him for a ride in his truck, and fed him in the attempt to calm him down. After returning home, Matthew had a seizure and Mascareñas testified that he and his cousin drove Matthew to Lisa's parents' home a short distance away and then called 911 to summon emergency medical assistance.

{4} During the trial, Matthew's treating doctors, a radiologist, and a pathologist, testified as the State's expert witnesses. They stated that the cause of death was SBS and that Matthew displayed classic SBS symptoms. The radiologist testified that CT scans of Matthew's head indicated that he had suffered two separate injuries, one occurring in the last twelve to eighteen hours, the other, ten to fourteen days earlier. Although the State's expert witnesses testified that it was their opinion that only forceful, repeated shaking could cause the severe injuries associated with SBS, one State expert witness did concede that there was a debate within the medical community as to whether one shake was sufficient to cause the injuries associated with SBS.

{5} Mascareñas based his defense on his lack of knowledge of SBS. He explained that his initial failure to tell family members and medical personnel that he had shaken Matthew was because he did not know that shaking a baby could cause the symptoms Matthew displayed. Medical personnel testified that Mascareñas answered their questions without hesitation. At trial he testified, "I hurt to know that my stupidity and ignorance caused this to my child, to my baby."

{6} Despite his defense, Mascareñas was convicted of negligent child abuse resulting in death and sentenced to twelve years in prison. He now appeals his conviction claiming the jury instructions failed to adequately define the requisite criminal negligence standard. We agree and hold that the failure to adequately define the criminal negligence standard constitutes fundamental error.

II.

{7} Mascareñas did not object to the jury instruction or tender a curative instruction. Because he failed to preserve this error for appeal, we review only for fundamental error. *See State v. Sosa*, 1997–NMSC–032, ¶¶ 23–24, 123 N.M. 564, 943 P.2d 1017 ("Having failed to proffer accurate instructions, object to instructions given, or otherwise preserve the issue for appeal . . . we will limit our evaluation to the claim of fundamental error."); Rule 12–216 NMRA 2000 (setting forth preservation requirements). In *State v. Clark*, we stated, "To the extent alleged violations rise to the level of fundamental error, the question will be reviewed on appeal and, if fundamental error exists, a new trial will be ordered." 108 N.M. 288, 297, 772 P.2d 322, 331 (1989), *habeas corpus relief granted on other grounds by, Clark v. Tansy*, 118 N.M. 486, 882 P.2d 527 (1994). Fundamental error exists "when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *State v. Baca*, 1997–NMSC–045, ¶ 41, 124 N.M. 55, 946 P.2d 1066. In *State v. Garcia*, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942), this Court observed, "[e]rror that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive."

III.

{8} Mascareñas claims that fundamental error occurred because the trial court failed to provide the jury with an instruction defining criminal negligence. The jury was provided an instruction which

tracked the language of UJI 14–602 NMRA 1999.[2] The negligent child abuse instruction provided to the jury read:

> For you to find Marcos Mascareñas guilty of child abuse resulting in death as charged in Count 1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. Marcos Mascareñas negligently caused Matthew Cisneros to be placed in a situation which endangered the life or health of Matthew Cisneros or to be cruelly punished.
> 2. To find that Marcos Mascareñas *negligently* caused child abuse to occur, you must find that Marcos Mascareñas *knew or should have known* of the danger involved in forcefully shaking Matthew Cisneros and *acted with reckless disregard* for the safety or health of Matthew Cisneros.
> 3. Marcos Mascareñas['] actions resulted in the death of Matthew Cisneros.
> 4. Matthew Cisneros was under the age of 18.
> 5. This happened in New Mexico on or about the 6th day of October, 1996.

(emphasis added). Mascareñas argues that this instruction fails to adequately define the requisite culpable mental state for criminal negligence by including language confusing criminal negligence and civil negligence. Specifically, he argues that the use of the term "negligently" in the second element of the jury instruction, juxtaposed with the terms "knew or should have known" and "acted with a reckless disregard" creates the "distinct possibility that the jury understood the applicable negligence standard to criminalize 'careless' conduct or perhaps only 'extremely careless' conduct." *See State v. Magby,* 1998–NMSC–042, ¶ 15, 126 N.M. 361, 969 P.2d 965 (noting that neither understanding was correct) (citing *State v. Yarborough,* 1996–NMSC–068, ¶ 21, 122 N.M. 596, 930 P.2d 131).

{9} Criminal negligence has been defined as including "conduct which is reckless, wanton, or willful." *State v. Arias,* 115 N.M. 93, 96, 847 P.2d 327, 330 (Ct.App.1993), *overruled on other grounds by State v. Abeyta,* 1995–NMSC–52, 120 N.M. 233, 242, 901 P.2d 164, 173; *see also State v. Harris,* 41 N.M. 426, 428, 70 P.2d 757, 757 (1937) (defining criminal negligence as "conduct . . . so reckless, wanton, and willful as to show an utter disregard for the safety of [others]"). In contrast, we have defined civil negligence to include conduct "a reasonably prudent person would foresee as involving an unreasonable risk of injury to [himself] [herself] or to another and which such a person, in the exercise of ordinary care, would not do." UJI 13–1601 NMRA 2000. Mascareñas argues that it is impossible to determine if jurors applied the incorrect civil negligence standard typically invoked by the "knew or should have known" language or the proper criminal negligence standard which requires a finding that he acted in reckless disregard of the danger.

{10} Both parties agree that the State must prove criminal negligence to secure a child abuse conviction under Section 30–6–1(C). *See Santillanes v. State,* 115 N.M. 215, 222, 849 P.2d 358, 365 (1993); *see also Yarborough,* 1996–NMSC–068, ¶ 18, 122 N.M. 596, 930 P.2d 131 ("[O]nly criminal negligence may be a predicate for a felony unless another intention is clearly expressed by the legislature."). The jury instruction provided by the trial court in this case conformed to the requirements articulated in *Santillanes* and tracked the language of Rule 14–602.[3]

{11} The substantive considerations in this case have already been resolved by our opinion in *Magby* where this Court addressed a challenge similar to Mascareñas' claim. *See Magby,* 1998–NMSC–042, 126 N.M. 361, 969 P.2d 965. In *Magby,* the defendant was charged with abuse of a child resulting in death, in violation of Section 30–6–1(C). After Magby removed the bit and

2. This Court has adopted the new UJI Rule 14–602, effective February 1, 2000. Unless otherwise indicated, all references to Rule 14–602, are to the rule as it existed prior to the latest changes.

3. We note that UJI 14–602 was amended in 1993 in response to the requirements articulated in *Santillanes.*

bridle from a horse that a four-year-old girl was sitting on with her mother, the horse bolted into a gallop causing the child to fall. *Id.* ¶ 2. She later died from her injuries. The jury was provided with an instruction containing the same language as the instruction given at Mascareñas' trial: "To find that Robert Leon Magby negligently caused child abuse to occur, you must find that Robert Leon Magby knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of Heather Naylor." *Id.* ¶ 5 (emphasis omitted). Magby tendered a jury instruction that defined "reckless disregard" which the trial court improperly rejected.[4] *Id.* ¶ 9.

{12} At the outset, we note that because Magby offered a proper curative instruction, Magby's conviction was properly reversed under a reversible error standard. *See State v. Cunningham,* 2000–NMSC–009, ¶ ¶ 18–19, 128 N.M. 711, 998 P.2d 176. However, because Mascareñas failed to preserve the error we examine the jury instructions for fundamental error. Despite this difference, we find the substantive analysis of the errors in the jury instructions in *Magby* analogous and persuasive. In *Magby,* this Court held that the failure to define reckless disregard "result[ed] in the distinct possibility of juror confusion as to the mens rea necessary for conviction." 1998–NMSC–042, ¶ 1, 126 N.M. 361, 969 P.2d 965. This Court concluded that "the ordinary meaning of the terms 'negligently' and 'reckless disregard' may misdirect jurors as to the standard of negligence required for conviction, thereby rendering UJI 14–602 fatally ambiguous." *Id.* ¶ 13. *Magby* highlighted the "distinct possibility that the jury understood the applicable negligence standard to criminalize 'careless' conduct or perhaps only 'extremely careless' conduct" neither of which were correct interpretations. *Id.* ¶ 15. The *Magby* Court found that because it was impossible to determine whether the jury had a correct or incorrect understanding of the instructions, reversible error occurred. *See id.* ¶ ¶ 15–16. The same concerns are implicated in this case.

{13} The Court of Appeals, in its memorandum opinion, concluded that *Magby* was applicable to this case, but refused to address the merits of Mascareñas' claim stating that he had failed to properly preserve the issue for review and that "we decline to consider it as fundamental error." *State v. Mascareñas,* NMCA 18,871, slip op. at 4 (Jan. 13, 1999). The Court of Appeals also held that *Magby* 's rule was not retroactively applicable. *Id.* We disagree and hold there is a distinct possibility that Mascareñas was convicted of child abuse based on the improper civil negligence standard, a crime which *Santillanes* determined does not exist in New Mexico. 115 N.M. at 219, 849 P.2d at 362 ("[O]ur interpretation of this criminal statute requires that the term 'negligently' be interpreted to require a showing of criminal negligence instead of ordinary civil negligence."). The jury instructions failed to sufficiently define the proper negligence standard for child abuse, and there is no way to determine if the jury based their conviction on the terms "knew or should have known," language typically associated with a civil negligence standard, or on the proper criminal negligence standard which requires that they find defendant acted in "reckless disregard" of the safety of the child. Thus, we find that the trial court's failure to provide the jury with an instruction that adequately defined criminal negligence was an error.

{14} Despite the presence of this error, the State contends that the facts in this case demonstrate circumstances sufficient to distinguish Mascareñas' conduct from Magby's. The State argues that Magby's conduct could have been viewed as merely careless while Mascareñas "acted with great and repeated violence against his baby." Because of this, the State posits that "[i]t is highly unlikely that this jury did not have a correct understanding of the instructions [because] [t]he facts of this case leave little room for speculation as to whether shaking Matthew endangered his life or whether the Petitioner should have known of the danger involved and acted with reckless disregard of that

4. The instruction tendered by Magby read:

"For you to find that the Defendant acted recklessly in this case, you must find that he knew or should have known that his conduct created a substantial and foreseeable risk, that he disregarded that risk and that he was wholly indifferent to the consequences of his conduct and to the welfare and safety of others."

danger." This argument is similar to that addressed by this Court in *Santillanes.* 115 N.M. at 223, 849 P.2d at 366. In *Santillanes,* this Court found that the trial court erred by failing to properly instruct the jury on criminal negligence. However, the Court held that it did not amount to reversible error, reasoning, "no rational jury could have concluded that Santillanes cut his nephew's throat . . . without satisfying the standard of criminal negligence that we have adopted today." *Id.* The *Santillanes* Court was confident that "there could be no dispute that the element of criminal negligence was established by the evidence." *Id.* Based on the comparison of the defendant's conduct in *Magby* and the present case, as well as the reasoning articulated in *Santillanes,* the State argues that no rational jury could have found that Mascareñas shook his baby with such violence without satisfying the requisite criminal negligence standard. We disagree.

{15} In this case, the extent of how severely and how often Matthew was shaken was a disputed issue at trial, and the State's contention that Mascareñas shook Matthew with great and repeated violence was not conclusively established. If the jury believed Mascareñas' defense that he did not know that shaking Matthew could cause the injuries associated with SBS and that he shook the child only "hard once," it is possible that the jury could have, with an instruction properly defining criminal negligence, attributed his conduct to mere carelessness and not reckless disregard of Matthew's safety and health. Therefore, unlike the *Santillanes* Court, we cannot state with confidence that the jury concluded that Mascareñas' actions in shaking his baby satisfied the proper criminal negligence standard. Also, in this case, a rational jury might have concluded that Mascareñas shook his baby "hard once" without acting in "reckless disregard" of Matthew's safety. Thus, despite the State's arguments to the contrary, the factual analogies identified by the State are not relevant here.

{16} We hold that the trial court erred by failing to provide the jury with an instruction that adequately defined the proper culpable mens rea for negligent child abuse.

IV.

{17} In this Court's recent opinion in *Cunningham,* we held that a fundamental error analysis requires that we consider jury instructions as a whole to determine "the existence of circumstances that 'shock the conscience' or implicate a fundamental unfairness . . . that would undermine judicial integrity if left unchecked." 2000–NMSC–009, ¶ 21, 128 N.M. 711, 998 P.2d 176. In the context of jury instructions, this Court has held that a reviewing appellate court must determine whether "a reasonable juror would have been confused or misdirected" by the jury instructions provided. *See State v. Parish,* 118 N.M. 39, 42, 878 P.2d 988, 991 (1994). In *State v. Allen,* we stated that "[a]mbiguous instructions are those that are 'capable of more than one interpretation.'" 2000–NMSC–002, ¶ 77, 128 N.M. 482, 994 P.2d 728 (quoting *Parish,* 118 N.M. at 42, 878 P.2d at 991). In this case, there were no other instructions provided to the jury that might have cured any ambiguities. *See Parish,* 118 N.M. at 41–42, 878 P.2d at 990–91 ("[I]f a jury instruction is capable of more than one interpretation, then the court must next evaluate whether another part of the jury instructions satisfactorily cures the ambiguity.").

{18} Despite the error in the jury instruction, the State seeks to save the conviction by directing us to the language in *State v. Carnes,* 97 N.M. 76, 78, 636 P.2d 895, 897 (Ct.App.1981), which states, "The failure to instruct the jury on the *definition or the amplification* of the elements of an offense is not error when there has been a failure to request such an instruction." (emphasis added). Both the State and Court of Appeals cite with approval *Magby*'s reference to *Carnes,* 97 N.M. at 78, 636 P.2d at 897, to support the argument that a failure to adequately define criminal negligence does not rise to the level of fundamental error and reversal would be warranted in future cases only when the defendant offered a curative definitional instruction. *Mascareñas,* NMCA 18,871, slip op. at 4 (Jan. 13, 1999) (citing *Magby,* 1998–NMSC–042, ¶ 18, 126 N.M. 361, 969 P.2d 965). Based on this language, the Court of Appeals inferred from *Magby*'s citation to *Carnes* that the omission of the definition of "reckless disregard" in the in-

structions in this case did not rise to the level of fundamental error. *See Mascareñas,* NMCA 18,871, slip op. at 4 (Jan. 13, 1999). By relying on this language the State and the Court of Appeals presupposes that the instruction on "reckless disregard" in this case is a mere amplification or definition. We believe the definition of "reckless disregard" is of central importance to Mascareñas' defense, and therefore conclude that the Court of Appeals' and the State's interpretation of *Magby* and their reliance on *Carnes* is misplaced.

{19} *Carnes* and the cases it relied upon involved claims of error predicated on the trial court's failure to or refusal to accept jury instructions that required the amplification or definition of terms. *Id.* at 78, 636 P.2d at 897. The Court in *Carnes* held that the trial court's refusal to accept defendant's tendered instruction defining the term "hostage" in connection with kidnapping charges did not mandate reversal because the term was not a technical term and because "jurors could properly apply the common meaning of hostage ... and the application of the common meaning did not prejudice defendant." *Carnes,* 97 N.M. at 79, 636 P.2d at 898 (internal citation omitted). "[A] failure to give a definitional instruction is not a failure to instruct on an essential element." *State v. Allen,* 2000–NMSC–002, ¶ 76, 128 N.M. 482, 994 P.2d 728 (quoting *State v. Crain,* 1997–NMCA–101, ¶ 11, 124 N.M. 84, 946 P.2d 1095).

{20} In this case, clearly the opposite situation exists from that in *Carnes.* We find it instructive that in *State v. Ervin,* upon which *Carnes* relies, the Court stated, "The defendant did not make a tender nor was there evidence which would make this amplification a critical determination." 96 N.M. 366, 367, 630 P.2d 765, 766 (1981) (no evidence presented that the failure to define "dwelling" in connection with a burglary charge was a critical determination). Mascareñas is not merely seeking an amplification of a term—his argument that the jury instructions should have included a definition of "reckless disregard" to prevent confusion of the standard necessary to sustain a conviction is, under these facts, a "critical determination." In this case, the trial court's failure to provide the instruction was a critical determination akin to a missing elements instruction. *See State v. Kirby,* 1996–NMSC–069, ¶ ¶ 3–6, 122 N.M. 609, 930 P.2d 144 (characterizing a jury instruction that required the State prove the defendant unlawfully drove a wide mobile home transport vehicle "such that an ordinary person would anticipate that death might occur under the circumstances" as a failure to instruct on the essential element of criminal negligence). Because Mascareñas' defense theory rested on the claim that he was unaware of the risks associated with SBS, we agree that the instructions, as provided, failed to conform to the requirements we have outlined in *Magby* and had the potential effect of confusing the jury as to the proper standard of negligence to apply.

{21} There is simply no way to determine that the jury delivered its verdict on a legally adequate basis. Furthermore, *Magby*'s finding that reversible error existed because the trial court refused defendant's tendered instruction does not preclude this Court from finding that the trial court's failure to define criminal negligence despite Mascareñas' failure to object or tender a curative instruction, also rises to the level of fundamental error. To allow Mascareñas' conviction to stand when there is a distinct possibility that he was convicted under a civil negligence standard and not the proper criminal negligence standard would result in a miscarriage of justice and therefore we find that fundamental error occurred.

V.

{22} Notwithstanding the existence of the fundamental error in the jury instructions, the State argues that *Magby*'s discussion of prospective and retroactive application of judicial rules precludes relief in this case. The State directs us to language in *Magby* where this Court concluded that its holding had "no bearing on cases in which a jury has already rendered a verdict, unless a proper curative instruction was tendered and refused." *Magby,* 1998–NMSC–042, ¶ 18, 126 N.M. 361, 969 P.2d 965 (citing *Carnes,* 97 N.M. at 78, 636 P.2d at 897). Regarding the decision to only apply its holding prospectively, the *Magby* Court stated:

> We stress that our holding on the negligent child abuse instruction tendered in

> this case is not applicable retroactively to other cases. As in *Santillanes*, our holding has only prospective application to cases in which a verdict has not been reached and those cases on direct review in which the issue was raised and preserved below.

Id., ¶ 18. Based on this language, the State argues this Court has no power to redress the error in the jury instructions because Mascareñas did not tender a curative instruction, a verdict had already been reached, and the case was pending review at the time *Magby* was decided without having properly preserved the issue for review. The Court of Appeals' unpublished memorandum opinion agreed with the State's argument, holding, "[Mascareñas] cannot avail himself of the Court's decision in *Magby*" because "[u]nlike that case [Mascareñas] failed to object to the jury instruction or tender a curative instruction." *Mascareñas*, NMCA 18,871, slip op. at 4 (Jan. 13, 1999). We do not disagree with *Magby*'s recitation of the principles of retroactive and prospective application of judicial decisions, however, we hold that they are not relevant to this inquiry. Because this case involves a claim of error requiring the clarification of an existing rule, and not one premised on the application of a new judicial rule, we review for fundamental error and are not bound by *Magby*'s prohibition of retroactive application in this case.

A.

{23} *Magby* relied on *Santillanes* to conclude that its holding on the negligent child abuse instruction was not applicable retroactively to other cases and only prospectively to those cases where a verdict had not been reached and to cases on direct review when the issue was properly preserved. *See Magby*, 1998–NMSC–042, ¶ 18, 126 N.M. 361, 969 P.2d 965. In *Santillanes*, the Court invoked its inherent power to "give its decision prospective or retroactive application without offending constitutional principles." 115 N.M. at 223, 849 P.2d at 366 (citing *Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982)). The *Santillanes* Court, weighing the considerations outlined in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), concluded that the criminal negligence standard it adopted should be given only prospective application. *See Santillanes*, 115 N.M. at 224, 849 P.2d at 367.[5]

{24} An appellate court's consideration of whether a rule should be retroactively or prospectively applied is invoked only when the rule at issue is in fact a "new rule." *Santillanes* considered whether its "*new interpretation* of 'negligently' under the child abuse statute, [was] to be given retrospective or prospective application." *Santillanes*, 115 N.M. at 223–25, 849 P.2d at 366–68 (emphasis added). There, we stated that "[t]he issue of retroactive effect arises only when a court's decision overturns prior case law or makes new law when law enforcement officers have relied on the prior state of the law." *Id.* at 223, 849 P.2d at 366; *see also Jackson*, 1996–NMSC–054, ¶ 5, 122 N.M. 433, 925 P.2d 1195 (characterizing a new rule as one "where an appellate decision overrules prior law and announces a new principle"); *Beavers*, 118 N.M. at 398, 881 P.2d at 1383 (quoting with approval *Whenry v. Whenry*, 98 N.M. 737, 739, 652 P.2d 1188, 1190 (1982), which stated

5. We note that our recent opinion in *State v. Ulibarri* recognized that *Santillanes* "failed to mention that the United States Supreme Court had abandoned the *Linkletter* approach." 1999–NMCA–142, ¶¶ 21–23, 128 N.M. 546, 994 P.2d 1164, *aff'd*, 2000–NMSC–007, 128 N.M. 686, 997 P.2d 818; *see Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (stating that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication"); *Ulibarri* also observed that "New Mexico courts have not dealt comprehensively with the issue of retroactivity in the context of criminal cases as yet." In the context of criminal cases, *Ulibarri* appears to continue New Mexico's departure from United States Supreme Court precedent on the issue of retroactivity by relying on the criteria set forth in *Linkletter* and echoed by *Santillanes*. *See also, Jackson v. State*, 1996–NMSC–054, ¶ 6, 122 N.M. 433, 925 P.2d 1195 (citing with approval *Santillanes'* and *Linkletter*'s case-by-case determination of prospective or retroactive application of new rules); *see also Beavers v. Johnson Controls World Servs.*, 118 N.M. 391, 393, 881 P.2d 1376, 1378 (1994) (expressly declining to follow the United States Supreme Court's rule of universal retroactivity in civil cases announced in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 113, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993)). We note that our discussion of the issue of retroactive or prospective application of new rules is limited only to an explanation of why it is inapplicable to this case.

"the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was clearly not foreshadowed."). In *Teague v. Lane,* 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the United States Supreme Court acknowledged the difficulties in considering whether a case announces a new rule stating:

> "[W]e do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."

(internal citations omitted).

{25} Based on this reasoning, we find it more accurate to characterize the holding in *Magby* as merely a clarification of an existing rule and not a new rule. *See Kirby,* 1996–NMSC–069, ¶ 5, 122 N.M. 609, 930 P.2d 144. *Magby*'s holding did not create a new rule that child abuse should be prosecuted under a criminal rather than civil negligence standard—it merely requires that the jury be properly instructed on the criminal negligence standard previously established by *Santillanes.*

{26} We find support for this conclusion in *Kirby,* 1996–NMSC–069, 122 N.M. 609, 930 P.2d 144. In *Kirby,* the Court was faced with the question of whether it should apply a recently announced rule in *Yarborough* that "the difference 'between reckless disregard' and 'would anticipate that death might occur' evinces a failure to instruct on criminal negligence" retroactively or prospectively. *Kirby* concluded that "[t]he rule of Yarborough was not new law, it was a statement of what the law had been at all times applicable to the instant case." *Kirby,* 1996–NMSC–069, ¶ 5, 122 N.M. 609, 930 P.2d 144 (citing *Yarborough,* 120 N.M. at 672–73, 905 P.2d at 212–13).

{27} The same analysis is applicable to the present case. *Magby*'s holding does not represent a new rule of law. It is merely a clarification of the existing rule of *Santillanes:* "[T]he mens rea element of negligence in the child abuse statute . . . require[s] a showing of criminal negligence instead of ordinary civil negligence." *Santillanes,* 115 N.M. at 222, 849 P.2d at 365. In this case, as in *Kirby,* we are only clarifying a "statement of what the law had been at all times applicable to the instant case." *Kirby,* 1996–NMSC–069, ¶ 5, 122 N.M. 609, 930 P.2d 144. *Magby* did not overturn prior case law and instead merely requires a trial court to fulfill its obligation to ensure that a jury is properly instructed as to the correct mens rea requirement for conviction. *See Santillanes,* 115 N.M. at 223, 849 P.2d at 366; *Jackson,* 1996–NMSC–054, ¶ 5, 122 N.M. 433, 925 P.2d 1195. Thus, we overrule *Magby* only to the extent that it assumes its holding requiring more precise identification of the distinctions between criminal negligence and civil negligence is a new rule.

B.

{28} This Court is not bound by *Magby*'s conclusions regarding retroactive application because in this case we have determined that fundamental error exists. We conclude that the reasoning advanced by *Magby* fails to contemplate the inherent power of this Court to review for fundamental error. *See Cunningham,* 2000–NMSC–009, ¶ 21, 128 N.M. 711, 998 P.2d 176. In *Kirby,* we stated that retroactive application of new rules operates independently of a fundamental error analysis. 1996–NMSC–069, ¶ 4, 122 N.M. 609, 930 P.2d 144. *Kirby* also involved a claim of error in the jury instructions that was raised for the first time on appeal. *Id.* ¶ 3. A similar error in the jury instructions at issue in *Kirby* was adjudged to be reversible error in *Yarborough. See Yarborough,* 1996–NMSC–068, 122 N.M. 596, 930 P.2d 131. The application of *Yarborough* to the facts of *Kirby* would mandate a reversal, however, the Court of Appeals' unpublished memorandum opinion in *Kirby* declared that the rule *Yarborough* announced could only have prospective application and thus the Court of Appeals denied relief. *See Kirby,* 1996–NMSC–069, ¶ 4, 122 N.M. 609, 930 P.2d 144. We agree with the rule announced by this Court in *Kirby* that "retrospectivity is irrele-

vant if the trial court committed fundamental error in instructing the jury." *Id.* In reversing the Court of Appeals, *Kirby* concluded that the issue of whether *Yarborough* should be applied retroactively or prospectively was not a proper characterization of the issue. There, this Court highlighted the relationship of fundamental error to the question of retrospectivity: "the retrospectivity of *Yarborough* is irrelevant if the trial court committed fundamental error in instructing the jury." *Id.*

{29} Furthermore, we have stated: "An exception to the general rule barring review of questions not properly preserved below . . . applies in cases which involve fundamental error. Fundamental error cannot be waived." *State v. Varela,* 1999–NMSC–045, ¶ 11, 128 N.M. 454, 993 P.2d 1280 (quoting *State v. Osborne,* 111 N.M. 654, 662, 808 P.2d 624, 632 (1991)). In *State v. Acosta,* the Court of Appeals cited with approval *Kirby* 's conclusion that "cases are not final until there has been a judgment of conviction, sentence, and exhaustion of rights of appeal." 1997–NMCA–035, ¶ 10, 123 N.M. 273, 939 P.2d 1081. In the present case, Mascareñas had not already exhausted all his rights of appeal.

{30} Since we hold that this case involves a mere clarification of an existing rule and because we believe that fundamental error exists in this case, we hold that we are not bound by *Magby* 's conclusion that its holding should be applied only prospectively.

VI.

{31} Mascareñas also claims that there was insufficient evidence to support his conviction. Although we reverse Mascareñas' conviction and remand for a new trial based on the deficiencies in the jury instructions, we believe it prudent to address his claim regarding the sufficiency of the evidence. *See United States v. Miller,* 952 F.2d 866, 874 (5th Cir.1992) ("Although not mandated by the double jeopardy clause, it is accordingly clearly the better practice for the appellate court on an initial appeal to dispose of any claim properly presented to it that the evidence at trial was legally insufficient to warrant the thus challenged conviction."); *see also State v. Rosaire,* 1996–NMCA–115, ¶ 20, 123 N.M. 250, 939 P.2d 597 (stating, "our review of the sufficiency of the evidence is analytically independent from the issue of the defect in the jury instruction."). By addressing Mascareñas' claim of insufficient evidence and determining that retrial is permissible, we ensure that no double jeopardy concerns are implicated. *See Rosaire,* 1996–NMCA–115, ¶ 20, 123 N.M. 250, 939 P.2d 597 ("[W]e hold that where the trial court errs by failing to instruct the jury on an essential element of the crime, retrial following appeal is not barred if the evidence below was sufficient to convict the defendant under the erroneous jury instruction."); *State v. Post,* 109 N.M. 177, 181, 783 P.2d 487, 491 (Ct.App. 1989) ("If all of the evidence, including the wrongfully admitted evidence, is sufficient, then retrial following appeal is not barred [by the Double Jeopardy Clause].").

{32} At trial, emergency medical technicians, medical experts and several of Matthew's treating doctors testified about the extent of the injuries and suggested that only repeated hard shakes could have caused Matthew's injuries. Mascareñas also testified about the circumstances surrounding the shaking of the baby. We conclude that reasonable minds could infer that Mascareñas had the requisite intent necessary to support a conviction under the negligent child abuse statute and therefore that retrial is permissible. *See State v. Allen,* 2000–NMSC–002, ¶ 65, 128 N.M. 482, 994 P.2d 728 (stating that circumstantial evidence may be used to prove intent); *see also Rosaire,* 1996–NMCA–115, ¶ 21, 123 N.M. 250, 939 P.2d 597 ("[W]e consider all of the evidence in support of conviction under the erroneous jury instruction to determine whether Defendant is entitled to acquittal as opposed to retrial.").

VII.

{33} Therefore, for the foregoing reasons, we reverse Mascareñas' conviction and remand for a new trial.

{34} IT IS SO ORDERED.

MINZNER, C.J., FRANCHINI, SERNA and MAES, JJ., concur.

4 P.3d 1231
2000-NMSC-020

STATE of New Mexico, Plaintiff–Petitioner,

v.

Concepcion GUILEZ, Jr., Defendant–Respondent.

No. 25,920.

Supreme Court of New Mexico.

June 15, 2000.

Patricia A. Madrid, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, for Petitioner.

Michener Law Firm, L.L.C., Roger E. Michener, Placitas, for Respondent.

Jones, Snead, Wertheim, Wentworth & Jaramillo, P.A., Lisa N. Cassidy, Jerry Todd Wertheim, Santa Fe, Barbara Bergman, Albuquerque, for Amicus Curiae New Mexico Criminal Defense Lawyers Association.

OPINION

MINZNER, Chief Justice.

{1} Defendant Concepcion Guilez was charged with and convicted of abandonment or abuse of a child, *see* NMSA 1978, § 30–6–1(C)(1) (1989), and reckless driving, *see* NMSA 1978, § 66–8–113(A) (1987). Defendant was also charged with operating a motor vehicle while under the influence of intoxicating liquor or drug, *see* NMSA 1978, § 66–8–102 (1993), to which he pled guilty. The State now appeals from an opinion of the New Mexico Court of Appeals, *State v. Guilez,* 1999–NMCA–127, 128 N.M. 93, 990 P.2d 206, in which the Court reversed the judgment and sentence entered by the district court on the jury's verdicts, and remanded with an order to vacate Defendant's conviction for child abuse and enter an amended judgment and sentence. The Court of Appeals held that under the general/specific statute rule the reckless driving statute was the more specific offense and preempted the child abuse statute when the conduct underlying both convictions was unitary. *See Guilez,* 1999–NMCA–127, ¶ 12, 128 N.M. 93, 990 P.2d 206. On appeal, the State contends the Court of Appeals misapplied the general/specific statute rule. We hold the general/specific statute rule is not applicable on the facts of this case. We therefore reverse the Court of Appeals and affirm the judgment and sentence entered by the district court.

I.

{2} At approximately 10:00 p.m. on April 19, 1997, Officer Richard D. Newman was patrolling a highly traveled portion of Highway 70 when he heard a vehicle on the opposite side of the highway heading towards Tularosa. As the vehicle drew closer, he observed it was a truck, traveling in the inside lane, without operating headlights or taillights. It appeared to be traveling at the posted speed limit or faster; Newman esti-

mated, based on his experience, that the truck was traveling between sixty-five and seventy miles per hour. Newman immediately crossed the median in pursuit of the truck; it took him a few seconds to turn around so that he was driving in the same direction as the truck was traveling. In attempting to catch up with the truck, Newman testified he drove between eighty and ninety miles per hour. Newman saw the truck brake slightly in order to turn onto Old Mescalero Road. Shortly thereafter, just when Newman was beginning to catch up with the truck, the driver made a right turn and collided with a fence. Newman turned on his spotlight and ordered Defendant, who was driving, to exit the truck. Newman noticed Defendant was wet, smelled of alcohol, and had bloodshot eyes.

{3} Defendant told Newman he knew the lights did not work, but that he had been swimming when it got dark so he had decided to try to make it home without lights. He further admitted to drinking one beer. Newman administered three field sobriety tests; Defendant failed each one. Defendant had slurred speech and balance problems. Newman placed Defendant under arrest. Newman then approached the truck, at which point he noticed that of the two children in the cab, a three-year-old boy and a six-year-old girl, only the girl was wearing a seat belt.

{4} Defendant and his girlfriend, Hope Chavez, gave the following account. Defendant had been having problems with the headlights but had fixed them earlier that day. Defendant, Hope, and her two children attended a picnic on the river. Hope drank one beer and Defendant drank between two and three beers. The group left the picnic sometime between 9:00 and 9:30 p.m. The children were damp from swimming. Defendant acknowledged that the three-year-old boy was not in a child safety seat, which Defendant knew was required by law. He testified, however, that he had buckled both children into one seatbelt on the passenger side of the cab.

{5} At some point on the way home, the truck hit a large bump in the road and the headlights stopped working. The taillights and sidelights continued to work. Defendant pulled over and tried to fix the headlights but was not successful. The group was about a mile and a half from the river where some of their friends still remained. Instead of waiting for help, Defendant and Hope decided to keep driving because they did not want the children to catch cold. Defendant proceeded to drive thirty-five to forty miles per hour on the shoulder. After turning onto Old Mescalero Road, it was so dark that Defendant had to stick his head out the window in order to navigate. Defendant thought he was turning onto the road in which Hope lived but instead turned onto another road hitting a private fence at a speed of five to ten miles per hour. According to Hope, the three-year-old boy wriggled out of the seatbelt by which he and his sister had been secured while they waited in the truck and Newman talked to Defendant.

{6} Defendant was charged in an amended criminal information with child abuse, driving while intoxicated, and reckless driving. Before trial, Defendant filed a motion to dismiss the child abuse count arguing that the reckless driving statute was a more specific statute than the child abuse statute and, therefore, under New Mexico's general/specific statute rule the prosecutor could only try him under the reckless driving statute. After a hearing, the district court, referring to *State v. Arellano,* 1997–NMCA–074, 123 N.M. 589, 943 P.2d 1042, held that neither statute was more specific because each statute contained an element, which could be construed as being more specific, that was not contained in the other. After a jury trial, Defendant was found guilty of child abuse and reckless driving.

II.

{7} This Court recently clarified the applicability of the general/specific statute rule in *State v. Cleve,* 1999–NMSC–017, ¶¶ 17–36, 127 N.M. 240, 980 P.2d 23. Both the State and Defendant agree that *Cleve* is the proper starting point. We therefore begin our analysis by reviewing *Cleve.* Two distinct rationales underlie the general/specific statute rule. *See id.* ¶ 17. The first depends on a determination that one statute preempts another. *Cleve* stated the "special law [is] an exception to the general law because the Legislature is presumed not to

have intended a conflict between two of its statutes and because the Legislature's attention is more particularly directed to the relevant subject matter in deliberating upon the special law." *Id.* The second or corollary rationale applies in criminal cases and is an offshoot of the constitutional prohibition against double jeopardy. *See id.* ¶¶ 17, 22–25. If two statutes, one general and one specific, punish the same conduct, and are found to constitute a double jeopardy violation, the general/specific statute rule limits prosecutorial discretion "to the extent that it requires prosecution under one statute instead of another." *Id.* ¶ 22. Therefore in this type of analysis, the "determination that the Legislature did not intend multiple punishment . . . [is] a prerequisite to our inquiry under the general/specific statute rule." *Id.*

{8} Under *Cleve,* then, there are two distinct approaches in determining whether the general/specific statute rule applies. One focuses directly on the legislature's intent. The other arises from express or implied statutory limits on the power of the prosecutor. Both require the application of statutory construction principles. We will call the former a preemption analysis. We will call the latter a quasi-double-jeopardy analysis.

{9} *Cleve* began with a quasi-double-jeopardy analysis, which it described as follows:

> Courts should compare the elements of the two relevant crimes. If the elements of the two crimes are the same, the general/specific statute rule applies, and the prosecution must charge the defendant under the special law absent a clear expression of legislative intent to the contrary. If the elements differ, courts must look to other indicia of legislative intent and determine whether the Legislature intended to limit prosecutorial discretion in the selection of charges for the specific criminal conduct. In ascertaining legislative intent, courts should balance the rule of lenity, which favors applying the general/specific statute rule in cases of ambiguity, with the judiciary's longstanding deference to prosecutorial discretion, which favors the exercise of caution before applying the general/specific statute rule.

Id. ¶ 26 (internal citations omitted). The statutes' language, histories, and stated or implied legislative purposes are also useful factors when ascertaining legislative intent. *See id.* ¶ 27.

{10} The two statutes at issue in *Cleve* were a prohibition against cruelty to animals and an unlawful hunting statute. The Court compared the elements of the statutes, determined they were different, and concluded there was a presumption under the double jeopardy analysis that the legislature intended to separately punish the offenses. *See id.* ¶ 30. The opinion then looked to other indicia of legislative intent. *See id.* ¶ 31. First, the opinion addressed whether the violation of one statute would normally result in violation of another. *See id.* The answer was no, because unlawful hunting would not necessarily meet the elements of cruelty to animals if, for example, a person was hunting out of season. *See id.* The Court then looked at the purposes served by the statutes and determined they were also different. *See id.* The Court concluded there was no double jeopardy violation and therefore did not further address the application of the general/specific statute rule as it relates to multiple punishment. *See id.*

{11} *Cleve* then considered whether one statute preempted the other. *See id.* ¶¶ 32–36. In *Cleve,* the defendant argued "the overall statutory scheme governing hunting and fishing demonstrate[d] a legislative intent to preempt the application of [the cruelty to animals statute] . . . with respect to conduct contemplated by game and fish laws." *Id.* ¶ 32. This Court agreed. We held that despite the lack of conflict between the two particular statutes at issue, the two statutory schemes, as a whole, irreconcilably conflicted. *See id.* This conclusion was supported by a few examples, one being that snaring deer falls within the hunting activity contemplated by the game and fish statutes, yet it supported Defendant's convictions under the cruelty to animals statute. *See id.* ¶ 34. The Court stated, "[W]e believe the comprehensive nature of the game and fish laws with respect to hunting activity demonstrates a legislative intent to preempt application of [the cruelty to animals statute] to the hunting of game animals." *Id.* ¶ 36.

III.

{12} As in *Cleve*, we begin by applying the double jeopardy analysis, and thus our first task is to determine whether there is unitary conduct. *See Swafford v. State*, 112 N.M. 3, 13, 810 P.2d 1223, 1233 (1991). To do this, we "determine whether the conduct for which there are multiple charges is discrete (unitary) or distinguishable." *Id.* at 14, 810 P.2d at 1234. In this case, the conduct is distinguishable.

{13} The conduct supporting child abuse began when Defendant placed the younger child in the truck without a child restraint device and was completed, although continuing, when Defendant initially began to drive after having consumed alcohol. On the other hand, the conduct supporting reckless driving did not begin until Defendant began driving carelessly and heedlessly. Reckless driving was established at least by the time the lights ceased to work and Defendant continued to drive on the highway. The act required to commit child abuse was completed, although continuing, before the act of reckless driving began. Under our cases this conduct is not unitary. *See State v. Foster*, 1999-NMSC-007, ¶ 34, 126 N.M. 646, 974 P.2d 140 (holding conduct not unitary when act required to complete crime of aggravated kidnapping was complete, though continuing, before the act required to complete crime of murder began).

{14} In *Swafford*, we stated that "similar statutory provisions sharing certain elements may support separate convictions and punishments where examination of the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." 112 N.M. at 14, 810 P.2d at 1234. In this case, the conduct supporting child abuse and reckless driving was not unitary, but rather was composed of a number of separate acts that in part overlapped. As approved in *Swafford*, "the jury reasonably could have inferred independent factual bases" for separate statutory offenses. *Id.* When the conduct is not unitary, we cease the double jeopardy inquiry. *See id.* at 14, 810 P.2d at 1234. Because we hold there is no double jeopardy violation, there is no need to apply the general/specific statute rule as it applies to multiple punishment. *See Cleve*, 1999-NMSC-017, ¶ 31, 127 N.M. 240, 980 P.2d 23.

{15} When applying the preemption analysis, the question is "whether the Legislature intended to create an exception to a general statute by enacting another law dealing with the matter in a more specific way." *Cleve*, 1999-NMSC-017, ¶ 32, 127 N.M. 240, 980 P.2d 23. A preemption analysis is utilized when there is a conflict between either two statutes or, as in *Cleve*, two statutory acts. In *Cleve* the conflict was clear because the hunting and gaming act legalized conduct which also satisfied the elements of the cruelty to animals statutes. *See id.* ¶ 34. This kind of direct conflict, however, is not required. In *State v. Blevins*, the Court stated that "[i]t is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute." 40 N.M. 367, 368, 60 P.2d 208, 209 (1936) (quoted authority omitted). Therefore, for the purpose of the general/specific statute rule, the presence of two laws that prohibit "the same matter" is considered a conflict. When the conflict is not irreconcilable, however, the analysis is one of legislative intent; we consider the same type of factors that are considered in the double jeopardy analysis. The emphasis is not on whether the legislature intended to limit prosecutorial discretion, but rather whether the legislature intended to repeal the child abuse statute, as it applies to children in vehicles, when it enacted the Motor Vehicle Code, generally, and the reckless driving statute, specifically.

{16} First, we look to the plain language of two statutes to determine whether it indicates a legislative intent to preempt one statute with another. *See Cleve*, 1999-NMSC-017, ¶¶ 8, 16, 32, 127 N.M. 240, 980 P.2d 23. In this case, the language of the statutes is quite similar. The relevant provision of the child abuse statute addresses persons who "knowingly, intentionally or negligently, and without justifiable cause," cause or permit "a child to be . . . placed in a situation that may endanger the child's life or heath." § 30-6-1(C). The reckless driving

statute governs driving "any vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property." § 66–8–113(A). Looking at the language alone, one could reasonably conclude that reckless driving was designed to be "regarded as an exception to" child abuse. *Blevins,* 40 N.M. at 368, 60 P.2d at 209 (quoted authority omitted). This conclusion, however, does not end the inquiry.

{17} The purposes behind the statutes do not reflect an intent to preempt; the legislative goals of these two statutes are clearly different. The child abuse statute was designed to give greater protection to children than adults. The statute recognizes that adults owe a greater responsibility to minors, who are more vulnerable than adults. The child abuse statute provides, in general, for greater penalties when a child is the victim; for instance, child abuse resulting in great bodily harm is a first degree felony, *see* § 30–6–1(C), whereas aggravated battery resulting in great bodily harm is a third degree felony, *see* NMSA 1978, § 30–3–5(C) (1969). The penalties imposed by the child abuse statute recognize that children are under the care and responsibility of adults. When an adult, without justification, endangers a child's safety, the adult is more culpable than when the safety of another adult is jeopardized. On the other hand, the reckless driving statute punishes conduct that might harm either a member of the general public or any property.

{18} A review of the history of these two statutes further supports a finding that there was no intent to preempt. In 1973, the legislature adopted the child abuse statute, § 30–6–1(C)(1), and specified that abuse not resulting in great bodily harm or death was a fourth degree felony; abuse that did inflict great bodily harm or death was a second degree felony. *See* 1973 N.M.Laws, ch. 360, § 10. In 1984, the legislature increased the penalty for all subsequent offenses under the statute. *See* 1984 N.M.Laws, ch. 92, § 5. In 1989, the legislature again increased the penalties, this time making a first offense of child abuse, not inflicting great bodily harm or death, a third degree felony; abuse resulting in great bodily harm or death became a first degree felony. *See* 1989 N.M.Laws, ch. 351, § 1. In 1978, the legislature enacted the reckless driving statute, § 66–8–113(A). The penalty for a first offense is five to ninety days in jail and/or a fine between twenty-five and one hundred dollars. *See* 1978 N.M.Laws, ch. 35, § 521. The statute was amended in 1987, but the penalty remained unchanged. *See* 1987 N.M.Laws, ch. 97, § 4. The history of the child abuse statute compared with the history of the reckless driving statute compels the conclusion that the legislature has expanded protection for children. The legislature has steadily increased the penalty for conduct harmful to children, while leaving alone the reckless driving statute's penalties and providing no extra protection for children under this statute. We believe this history clearly shows the legislature's intent to protect children from abuse.

{19} The State has argued on appeal that, because neither the reckless driving statute nor the child abuse statute cover the entire course of Defendant's conduct, the general/specific statute rule cannot apply. In other words, the State argues that, because reckless driving does not include Defendant's failure to secure his son in a car seat and because child abuse does not include the damage inflicted upon the fence, the general/specific statute rule is inapplicable. The State's argument misapprehends our holding in *Cleve.* In a preemption analysis, the issue is not only whether the reckless driving statute preempts the child abuse statute, but also whether the Motor Vehicle Code as a whole preempts the child abuse statute.

{20} In this case, in fact, it could be argued that the State should have prosecuted Defendant for driving while intoxicated, reckless driving, and violation of the child restraint statute, *see* NMSA 1978, § 66–7–369(A)(2) (1991) (requiring that children between the age of one and five be secured in either a child passenger restraint device or by a seatbelt in the rear seat). Under the facts of this case, this result would be inappropriate, because the Motor Vehicle Code as a whole does not appear to preempt the child abuse statute. The Code does not generally

provide extra protection for children. The child restraint statute is the only portion of the Code that contemplates protecting children, *see* NMSA 1978, § 66–7–368 (1983) (stating that the purpose behind the child restraint statutes "is to minimize the likelihood of injury or death to young children riding in certain vehicles"). The child restraint statute, however, is a strict liability crime, *see* NMSA 1978, § 66–7–369(A)(2), assessing a penalty of twenty-five dollars, *see* NMSA 1978, § 66–8–116(A) (1995). Although the stated purpose of the child restraint statute is to minimize the likelihood of harm to children, it is unlikely the legislature intended that statute to be the sole mechanism to punish child abuse that involves a motor vehicle. When a number of offenses, in the aggregate, endanger the life or health of a child, Section 66–7–369(A)(2) is an unlikely deterrent.

{21} The Court of Appeals held and Defendant contends on appeal that where two statutes proscribe the same conduct and one statute can be found in the Motor Vehicle Code the enactment of the Motor Vehicle Code indicates a legislative intent to preempt. *See Guilez,* 1999–NMCA–127, ¶¶ 12, 19–20, 128 N.M. 93, 990 P.2d 206. The Court of Appeals concluded that "the Legislature intended that the reckless driving statute ... be the applicable statute governing child abuse not resulting in great bodily harm or death, where the alleged offense involves the operation of a motor vehicle." *Id.* ¶ 12. The State argues the Court of Appeals misapplied *Cleve* as well as other existing case law. We agree with the State that to the extent the Court of Appeals, in applying *Cleve,* in large part rested its decision on the notion that the legislature's enactment of a comprehensive motor vehicle code indicates an intent to preempt the field, *see Guilez,* 1999–NMCA–127, ¶ 12, 128 N.M. 93, 990 P.2d 206, the Court of Appeals misapprehended our holding in *Cleve.*

{22} We recognize that *Cleve* quoted *State v. Yarborough,* 1996–NMSC–068, ¶ 27, 122 N.M. 596, 930 P.2d 131, for the proposition that the enactment of a comprehensive motor vehicle code indicates "a legislative intent to preempt the field." *Cleve,* 1999–NMSC–017, ¶¶ 27, 36, 127 N.M. 240, 980 P.2d 23. *Yarborough* noted, however, only that "*[o]ther jurisdictions* have held that the enactment of a comprehensive motor vehicle code shows a legislative intent to preempt the field." 1996–NMSC–068, ¶ 27, 122 N.M. 596, 930 P.2d 131 (emphasis added). The common thread of the holdings cited in *Yarborough* was not that a motor vehicle code generally preempts a criminal code, but rather that a specific motor vehicle code statute may preempt another criminal statute. *See State v. Davidson,* 78 Idaho 553, 309 P.2d 211, 215–16 (1957); *Blackwell v. State,* 34 Md.App. 547, 369 A.2d 153, 158–59 (1977); *State v. Wilcox,* 216 Or. 110, 337 P.2d 797, 803 (1959); *State v. Collins,* 55 Wash.2d 469, 348 P.2d 214, 215 (1960).

{23} In fact, *Yarborough* held "that the legislature intended to preempt the crime of involuntary manslaughter with the specific crime of homicide by vehicle when the predicate offence is a violation of the Motor Vehicle Code." 1996–NMSC–068, ¶ 30, 122 N.M. 596, 930 P.2d 131. This conclusion directly followed a discussion in which the Court determined that to hold otherwise was to conclude that the legislature, by enacting the vehicular homicide statute, enacted a useless statute. *See id.* ¶ 29. The reason this Court determined the vehicular homicide statute would be otherwise useless was because the two statutes punished exactly the same conduct and the vehicular manslaughter statute had a higher mens rea; the Court could not imagine any circumstances under which the State would choose to prosecute under the later-enacted vehicular homicide statute when it could achieve the same punishment under the involuntary manslaughter statute. *See id.* This specific concern has no application in the present case because there are obvious instances in which reckless driving would not be child abuse.

{24} The holding of the Court of Appeals contravenes the intent of the child abuse statute by decreasing the protection for children when the abuse suffered is a result of driving offenses. We therefore conclude that the child abuse statute is neither preempted by the reckless driving statute, specifically, nor by the Motor Vehicle Code, generally. This holding does not overrule *Yarborough* and should not be construed to mean there

will not be instances where the Motor Vehicle Code will preempt offenses found in our Criminal Code. The Motor Vehicle Code is a comprehensive code which often overlaps with the Criminal Code both in the conduct it prohibits and the purposes it serves to promote; *Yarborough* exemplifies such a circumstance. In *Yarborough*, not only did the statutes prohibit the same conduct, but the purpose of the vehicular homicide statute and the involuntary manslaughter statutes was essentially the same. Both statutes were designed to protect people from reckless acts resulting in death. The relevant provision of the involuntary manslaughter statute achieved that goal by providing a general prohibition against unintentional killings by unlawful acts, *see* NMSA 1978, § 30–2–3(B) (1994), whereas the homicide by vehicle statute achieved that same goal by providing a specific prohibition against unintentional killings by the unlawful operation of a motor vehicle, *see* NMSA 1978, § 66–8–101 (1991). A comparison of the child abuse and reckless driving statutes simply does not support an analogous result. While the comprehensive nature of the Motor Vehicle Code is relevant to a finding of whether the general/specific statute rule applies, for preemption to occur, there must be a strong indication of legislative intent, which should be determined on a case-by-case basis. In the present case we lack a strong indication of legislative intent.

IV.

{25} We conclude that under the facts of this case, the general/specific statute rule is inapplicable. We therefore reverse the Court of Appeals and affirm the judgment and sentence of the district court.

{26} **IT IS SO ORDERED.**

BACA, SERNA, and MAES, JJ., concur.

FRANCHINI, J., dissenting.

FRANCHINI, Justice, (Dissenting)

{27} This is a case of statutory interpretation and the statute should be interpreted by the Court as the legislature understood it at the time it was passed. *Doe v. State ex rel. Governor's Organized Crime Prevention Commission,* 114 N.M. 78, 80, 835 P.2d 76, 78 (1992).

{28} In 1973, the legislature passed the predecessor statute to Section 30–6–1 defining child abuse and neglect. This version is identical to the current statute and differs only in the penalty provision which was increased in 1989. In 1978, five years after the child abuse statute, the legislature enacted the current reckless driving statute. From the plain meaning of the language, the conduct addressed by the two statutes is strikingly similar. The child abuse statute, as applied to *Guilez,* addressed conduct of "knowingly, intentionally, or negligently, and without justifiable cause, *causing or permitting a child to be ... placed in a situation that may endanger the child's life or health.*" *See* § 30–6–1(C)(1) (emphasis added). The reckless driving statute referred to the driving of any vehicle "carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution ... and at a speed or in a manner so as *to endanger or be likely to endanger any person* or property." *See* § 66–8–113(A) (emphasis added).

{29} Thus, both statutes refer to conduct endangering a person. Further, the Legislature did not choose to exclude children from the definition of persons in the reckless driving statute. That would have clarified the two. Since this was not done, the resulting overlap alone makes the Legislature's intent ambiguous. The general/specific rule of statutory interpretation applies when the statutory intent is ambiguous. *See State v. Trujillo,* 1999–NMCA–003, ¶ 15, 126 N.M. 603, 973 P.2d 855.

{30} As a general principle of statutory interpretation, a comprehensive statutory scheme passed subsequent to a statute that addresses the same area will supersede the prior statute. *Cf. State v. Arellano,* 1997–NMCA–074, ¶ 6, 123 N.M. 589, 943 P.2d 1042. That is the case here. The legislature passed the child abuse statute in 1973. In 1978, the Legislature passed the Motor Vehicle Code, including the reckless driving statute that addressed the same "endangering" conduct. From the corresponding language of the two statutes it is reasonable to infer the Legislature's intent to have the reckless driving statute preempt the child abuse statute when the "abuse" in question is based solely on driving a vehicle.

{31} This Court has held that the legislature has preempted the field in two instances, *Cleve,* 1999–NMSC–017, ¶ 36, 127 N.M. 240, 980 P.2d 23, and *Yarborough,* 1996–NMSC–068, ¶ 29, 122 N.M. 596, 930 P.2d 131. In *Cleve,* we held: "Like the comprehensive Motor Vehicle Code addressed in *Yarborough,* ... we believe the comprehensive nature of the game and fish laws with respect to hunting activity demonstrates a legislative intent to preempt application of Section 30–18–1 to the hunting of game animals."

{32} In *Yarborough,* we held: "We agree with amici that the history of this statute leads to the conclusion that the legislature intended to preempt involuntary manslaughter when the predicate offense is a misdemeanor contained within the Motor Vehicle Code."

{33} The majority opinion does not overrule either *Yarborough* or *Cleve.* Therefore they are controlling here and, since they are, the end result in the majority opinion cannot be reached.

{34} In this case, we see the same situation as in *Yarborough.* Child abuse does not require the use of a vehicle but when the predicate offense is a misdemeanor contained within the Motor Vehicle Code (reckless driving) the Motor Vehicle Code must preempt the charge of child abuse. I see no difference in the preemption rule simply because the felony here is child abuse rather than involuntary manslaughter. That, in my view, is a distinction without a real difference.

{35} In my opinion, the Court of Appeals was correct in applying the general/specific rule of statutory interpretation in this matter.

{36} For these reasons, I respectfully dissent.

5 P.2d 573
2000-NMCA-050

STATE of New Mexico,
Plaintiff–Appellee,

v.

Brian MADSEN, Defendant–Appellant.

No. 20,081.

Court of Appeals of New Mexico.

April 17, 2000.

Certiorari Denied, No. 26,322,
June 8, 2000.

Patricia A. Madrid, Attorney General, Ralph E. Trujillo, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Will O'Connell, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

BUSTAMANTE, Judge.

{1} Defendant appeals his convictions for unlawful carrying of a deadly weapon and trafficking cocaine. On appeal, he contends (1) the trial court erred in denying his motion to suppress evidence and (2) the judge pro tempore was improperly appointed and therefore lacked authority to preside over this case. For the reasons set forth below, we reject Defendant's contentions and affirm the judgment and sentence of the trial court.

FACTS

{2} On August 12, 1997, Detective William Brown of the Roswell Police Department obtained a search warrant for room 115 of the Leisure Inn motel in Roswell. The search warrant authorized the search of the motel room for firearms and related evidence. The basis for the search warrant was the complaints of two victims, James Hughes and Sophia Cooper (Victims). Mr. Hughes reported that four days earlier, on August 8, Defendant chased and pointed a gun at Victims as they were driving down the street. Mr. Hughes identified Defendant in a photo array as the person who aimed a gun at Victims. Ms. Cooper complained that on August 11, Defendant grabbed and beat her in room 115 of the motel. Ms. Cooper is the former girlfriend of Defendant.

{3} The police attempted to corroborate the complaints of Victims before obtaining the search warrant. Detective Jody Scifres conducted a surveillance outside the motel room on the day the warrant was issued. At approximately 6:15 p.m., he observed Defendant drive through the parking lot of the motel, park his motorcycle in front of room 115 and enter the room. The officer ran a license plate check on the motorcycle, and it was registered in Defendant's name.

{4} At approximately 8:45 p.m., Sergeant Pennington and Detectives Brown, Scifres, and Hill drove into the parking lot of the Leisure Inn and were about to execute the search warrant when they observed Defendant talking on a pay phone in front of the motel. The pay phone was approximately 50 to 100 yards away from the motel room to be searched. Although Defendant was not observed with a firearm and did not appear to be engaged in any criminal activity, the officers decided to "make contact" with him at the pay phone for safety reasons. Detective Scifres testified that because Defendant was suspected of pointing a firearm at Victims, it was safer to approach him at the pay phone and thus avoid a possible confrontation with him later in the room as the search warrant was being executed. Detective Brown similarly testified that it was more prudent to contact Defendant out in the open than in the motel room. Sergeant Pennington testified that the officers made contact with Defendant to "talk with him."

{5} The officers pulled up to Defendant in a dark, unmarked vehicle. All four of the officers got out of the vehicle, drew their weapons, identified themselves as the police, and ordered Defendant to step away from the phone and to show his hands. The officers testified that they drew their weapons and ordered Defendant to show his hands because he was suspected of aggravated assault and was believed to be armed and dangerous. Defendant moved away from the phone but did not put up his hands. His left hand was concealed under his shirt. The officers repeatedly ordered Defendant to raise his hands, but he refused to comply and stared blankly at the officers.

{6} Finally, two officers grabbed Defendant, pushed him against the wall, and held his hands to the wall. Around this time, Defendant announced that he had a loaded gun. A loaded .45 caliber semiautomatic handgun was removed from the waistband of his pants. Defendant was then arrested for unlawfully carrying a deadly weapon and was handcuffed. He was escorted to a patrol car that had just arrived at the scene and was searched by Detectives Scifres and Brown. The officers found on Defendant two bags of cocaine, one bag of marijuana, rolling papers, $1480 in cash, a pager, and a chrome magazine with eight rounds in it.

DISCUSSION

Motion To Suppress

{7} Defendant moved to suppress the evidence against him on the grounds that he was unlawfully stopped, detained, and searched by the officers. The trial court denied the motion. We review the trial court's denial of Defendant's motion to suppress to determine whether "the law was correctly applied to the facts, viewing them in the manner most favorable to the prevailing party." *State v. Esguerra*, 113 N.M. 310, 313, 825 P.2d 243, 246 (Ct.App.1991). Although we review the trial court's application of the law to the facts de novo, we will not disturb "the trial court's findings of historical fact if they are supported by substantial evidence." *State v. Shaulis–Powell*, 1999–NMCA–090, ¶ 7, 127 N.M. 667, 986 P.2d 463. We indulge all reasonable inferences in support of the trial court's ruling even when the trial court did not enter any findings of fact in deciding the motion to suppress. *See State v. Wagoner*, 1998–NMCA–124, ¶ 16, 126 N.M. 9, 966 P.2d 176.

{8} Defendant argues that the officers lacked reasonable suspicion to stop and detain him because he was not observed committing a crime at the pay phone, and the report that he brandished a gun at Victims four days earlier did not justify an investigative stop under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). He also argues that the detention was not authorized under the search warrant because he was not named in the search warrant and was not in the motel room when the officers arrived to execute the warrant.

{9} This Court has observed that "in appropriate circumstances, a police officer may detain a person in order to investigate possible criminal activity, even if there is no probable cause to make an arrest." *State v. Cobbs*, 103 N.M. 623, 626, 711 P.2d 900, 903 (Ct.App.1985); *see also Terry*, 392 U.S. at 20–22, 88 S.Ct. 1868. When making an investigatory stop, the officer "must have a reasonable suspicion, based upon specific articulable facts and any rational inferences

that can reasonably be drawn from such facts, that the law has been or is being violated." *State v. Lovato,* 112 N.M. 517, 519, 817 P.2d 251, 253 (Ct.App.1991). Therefore, we determine the existence of reasonable suspicion under an objective standard: "Would the facts available to the officer warrant the officer, as a person of reasonable caution, to believe the action taken was appropriate?" *State v. Galvan,* 90 N.M. 129, 131, 560 P.2d 550, 552 (Ct.App.1977); *see also In re Jason L.,* 1999–NMCA–095, ¶ 10, 127 N.M. 642, 985 P.2d 1222. ("The existence of reasonable suspicion ... must be judged by the totality of the circumstances and the reasonable inferences ... drawn therefrom.").

{10} In this case, the officers had arrived at the motel to execute a search warrant for room 115 when they saw Defendant using a pay phone in front of the motel. The officers had information that Defendant had assaulted two victims with a firearm four days earlier and had beaten one victim in the motel room the previous day. Defendant had been identified by one of the victims in a photo array. One of the officers had also seen Defendant in the motel parking lot earlier in the evening during a surveillance of the motel room. Therefore, Defendant was a known suspect of violent criminal offenses when the officers saw him. Because of the complaints of past violent criminal activity, the officers decided to approach Defendant for safety reasons and to question him. Considering the facts and circumstances known to the officers when they saw Defendant, we conclude it was reasonable for the officers to approach Defendant to question him about the alleged crimes reported by victims.

{11} Defendant argues that the detention cannot be upheld as a *Terry* stop because he was not acting in a suspicious manner when approached by the officers. He also argues that because the complaints of Victims involved an assault that occurred four days earlier, the stop lacked the exigency required under *Terry.* We believe Defendant reads *Terry* too narrowly. The test for determining the validity of a *Terry* stop is whether the officer making the stop has reasonable suspicion, based on specific and articulable facts, "that *the law has been or is being violated.*" *Lovato,* 112 N.M. at 519, 817 P.2d at 253 (emphasis added).

{12} The issue of whether police officers can make an investigatory stop for a completed, rather than an ongoing or imminent, crime was addressed by the United States Supreme Court in *United States v. Hensley,* 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). There, police officers stopped the suspect's vehicle almost two weeks after an armed robbery in which he had been implicated. The officers stopped him based on a "wanted flyer" issued by a police department in a neighboring state. The *Hensley* court extended the *Terry* doctrine to stops for past criminal activity, holding that "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion." *Hensley,* 469 U.S. at 229, 105 S.Ct. 675. Acknowledging that exigent circumstances may not be as "pressing" when a crime has already been completed, the Court nonetheless concluded that "the strong government interest in solving crimes and bringing offenders to justice" outweighed the individual's interest to be free of a stop and detention, particularly where "felonies or crimes involving a threat to public safety" were the subject of investigation. *Id.,* at 228–29, 105 S.Ct. 675.

{13} Here, Defendant was suspected of committing aggravated assault four days before the stop. Aggravated assault, or assault with a deadly weapon, is an inherently dangerous crime and a felony. *See* NMSA 1978, § 30–3–2(A) (1963); *State v. Arredondo,* 1997–NMCA–081, ¶ 16, 123 N.M. 628, 944 P.2d 276 ("Aggravated assault, or 'assault with weapons,' is one of the inherently dangerous crimes which provide a police officer with reason to conduct a protective search."), *overruled on other grounds by State v. Steinzig,* 1999–NMCA–107, ¶ 30, 127 N.M. 752, 987 P.2d 409. Therefore, we hold that officers could properly stop and detain Defendant to investigate the report of the aggravated assault even though it occurred four days earlier.

{14} Nor can we ignore the fact that, when the officers approached Defendant, they were armed with a search warrant to search the motel room where he had been staying. In *Michigan v. Summers,* 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), the United States Supreme Court, in establishing a limited exception to the probable cause requirement, held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705, 101 S.Ct. 2587 (footnote omitted); *see also State v. Graves,* 119 N.M. 89, 92–93, 888 P.2d 971, 974–75 (Ct.App.1994) (examining *Summers* in context of detention of non-resident found on premises to be searched).

{15} In *Summers,* police officers encountered the defendant as he was walking down the front steps of his house just as they were about to execute a search warrant. The officers requested that the defendant reenter the house and detained him during the search. The defendant was arrested after illegal drugs were found in his basement. The Court explained that, in light of the defendant's connection to the home, the existence of the search warrant provided "an objective justification for the detention." *Summers,* 452 U.S. at 703, 101 S.Ct. 2587. The Court also noted that a detention pursuant to the execution of a valid search warrant promotes legitimate law enforcement interests, including (1) "preventing flight in the event that incriminating evidence is found," (2) "minimizing the risk of harm to [law enforcement] officers," and (3) facilitating "the orderly completion of the search." *Id.,* at 702–03, 101 S.Ct. 2587.

{16} We conclude that the *Summers* exception applies to this case. Defendant states that he did not rent the room subject to the search warrant. However, we do not believe this fact renders the detention unreasonable under *Summers. See Graves,* 119 N.M. at 92, 888 P.2d at 974 (holding police may detain non-resident if "they have a reasonable basis to believe that the non-resident has some type of connection to the premises or to criminal activity"). Here, it is undisputed that the officers had information that Defendant was staying in room 115 and had beaten his former girlfriend in the room. Defendant was also seen entering the room approximately two hours before the officers arrived to execute the search warrant. Therefore, when the officers saw Defendant, they had a reasonable basis to believe he had a connection to the room and to the criminal activity reported by Victims.

{17} Moreover, detaining Defendant advanced all three of the governmental interests outlined in *Summers.* First of all, the detention served the interest of protecting the officers. The officers testified that because they saw Defendant when they arrived at the motel and suspected him of being armed and dangerous, they decided to detain him at the pay phone for safety reasons. *See* 2 Wayne R. LaFave, *Search & Seizure,* § 4.9(e), at 645–46 (3d ed. 1996) ("[T]he police, obligated to carry out the command of the search warrant, cannot simply avoid the suspect and conceal their suspicions of him, nor can they devote their undivided attention to him and make sure that once he has departed he does not return and try to forcibly thwart execution of the warrant."). Moreover, because Defendant was standing only 50 to 100 yards from the motel room, he might have been in a position to observe the officers executing the search warrant or could have become aware of the execution of the search warrant upon returning to the room. Therefore, he posed a flight risk to the officers. Lastly, by detaining Defendant, the officers could have obtained his cooperation and assistance during the search.

{18} Defendant, however, argues that the detention was unlawful because he was not in the motel room when the officers arrived to execute the search warrant. Rather, he was using a pay phone on motel grounds, approximately 50 to 100 yards from the room to be searched. We conclude that, based on Defendant's close proximity and demonstrated connection to the room, the detention at the pay phone was reasonable under the circumstances. *See Graves,* 119 N.M. at 93, 888 P.2d at 975; *see also United States v. Cochran,* 939 F.2d 337, 339 (6th Cir.1991) ("*Summers* does not impose upon police a duty

based on geographic proximity (i.e., defendant must be detained while still on his premises); rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence.").

{19} We note that when presented with similar factual scenarios, courts in other jurisdictions have upheld, under *Summers,* the detentions of persons found outside the premises to be searched pursuant to a search warrant. *See, e.g., Cochran,* 939 F.2d at 339 (concluding defendant properly detained after driving short distance from home to be searched); *Fromm v. State,* 96 Md.App. 249, 624 A.2d 1296, 1298–99, (1993) (determining police properly detained defendant who was leaving neighboring apartment building as officers arrived to execute search warrant); *State v. Ailport,* 413 N.W.2d 140, 144 (Minn. Ct.App.1987) (holding officers properly detained defendant, who was known to have violent criminal history, when he pulled into motel parking lot as officers were about to execute search warrant for room); *but see United States v. Edwards,* 103 F.3d 90, 94 (10th Cir.1996) (holding that under the circumstances stop was invalid where defendant non-resident was stopped three blocks from residence to be searched); *United States v. Sherrill,* 27 F.3d 344, 346 (8th Cir.1994) (holding warrantless stop not valid where defendant was stopped one block from house). Consistent with this line of precedent from other jurisdictions, we hold that, in this case, the stop of Defendant at the pay phone, while still on the motel compound, just a short distance from the room about to be searched, was justified under the holdings of *Summers* and *Graves.*

{20} Moreover, because Defendant was suspected of having committed a violent felony, the officers had legitimate safety concerns and were justified in drawing their weapons and ordering Defendant to show his hands. "Where there is reason for the officers to fear for their safety, they may unholster their guns and use reasonable force in effectuating the stop without such action automatically constituting an arrest." *Lovato,* 112 N.M. at 522, 817 P.2d at 256; *cf. State v. Jimmy R.,* 1997–NMCA–107, ¶¶ 2–3, 124 N.M. 45, 946 P.2d 648 (officer responding to call from concerned citizen about gun shots in the neighborhood was justified in drawing weapon, ordering juveniles to the ground, and handcuffing and searching juveniles).

{21} By ignoring the officers, refusing to show his hands, and keeping one hand under his shirt, Defendant's actions confirmed the officers' suspicions that he was armed and dangerous. Therefore, the officers were justified in grabbing Defendant and attempting to search him for weapons. *See State v. Flores,* 1996–NMCA–059, ¶ 17, 122 N.M. 84, 920 P.2d 1038 ("During an investigatory stop, when an officer reasonably believes the individual may be armed and dangerous, he or she may check for weapons to ensure personal safety ."); *see also Cobbs,* 103 N.M. at 630, 711 P.2d at 907 (noting that officer may conduct protective patdown search if there is reasonable suspicion that suspect has committed, is committing or will commit an "inherently dangerous crime"). *Arredondo,* 1997–NMCA–081, ¶ 16, 123 N.M. 628, 944 P.2d 276 (citing *Cobbs* with approval and concluding officer's protective search of defendant was justified upon reasonable belief that defendant had recently "used a handgun to commit an aggravated assault").

{22} Before the officers could search Defendant for weapons, however, he voluntarily stated that he had a loaded gun. At that point, the officers had probable cause to believe that Defendant was committing the crime of unlawfully carrying a deadly weapon, *see* NMSA 1978, § 30–7–2 (1985), and could arrest him, *see State v. Blakely,* 115 N.M. 466, 469, 853 P.2d 168, 171 (Ct.App. 1993). Defendant was then taken to the patrol car and was lawfully searched incident to arrest. *See State v. Garcia,* 100 N.M. 120, 126, 666 P.2d 1267, 1273 (Ct.App.1983) ("Where a warrantless arrest is valid, a reasonable search incident to the arrest also will be upheld."). Therefore, for the reasons discussed above, we hold that the stop, seizure, and search of Defendant were lawful.

Appointment of Judge Pro Tempore

{23} Before Defendant's second trial, the Chief Justice of the New Mexico Supreme

Court appointed the Honorable James J. Wechsler, a New Mexico Court of Appeals judge, as district judge pro tempore to preside over Defendant's case. Defendant argues, pursuant to *State v. Franklin,* 78 N.M. 127, 129, 428 P.2d 982, 984 (1967), and *State v. Boyer,* 103 N.M. 655, 658–60, 712 P.2d 1, 4–6 (Ct.App.1985), that there was no basis to appoint a district judge pro tempore in this case, and Judge Wechsler was therefore without jurisdiction to preside over Defendant's second trial.

{24} Article VI, Section 15(C) of the New Mexico Constitution provides:

> If any district judge is disqualified from hearing any cause *or is unable to expeditiously dispose of any cause in the district,* the chief justice of the supreme court may designate any retired New Mexico district judge, court of appeals judge or supreme court justice, with said designees' consent, to hear and determine the cause and to act as district judge pro tempore for such cause.

(Emphasis added.) Defendant acknowledges that the Chief Justice has broad authority to designate a judge pro tempore, including a Court of Appeals judge, to preside over a case. *See id; Vigil v. Reese,* 96 N.M. 728, 729, 634 P.2d 1280, 1281 (1981) ("The chief justice has the constitutional duty and authority to designate a judge to try a case *for any reason* when [she] determines that the public business so requires.").

{25} Here, it appears that Judge Wechsler was appointed district judge pro tempore because the then presiding judge was unable to meet the demands of his criminal docket. Article VI, Section 15(C) of the New Mexico Constitution allows the designation of a judge pro tempore if a district judge "is unable to expeditiously dispose of any cause in the district." Therefore, we determine that the Chief Justice could properly determine that the presiding judge was unable to expeditiously dispose of this matter due to his heavy criminal docket and that it was appropriate to appoint Judge Wechsler as district judge pro tempore to preside over Defendant's case. We therefore conclude that Judge Wechsler possessed proper jurisdiction, sitting as a district court judge, to decide Defendant's case.

CONCLUSION

{26} We hold that the trial court properly denied Defendant's motion to suppress evidence. We also hold that the judge pro tempore was properly appointed. Therefore, we affirm Defendant's convictions.

{27} **IT IS SO ORDERED.**

APODACA and ARMIJO, JJ., concur.

5 P.3d 579

2000-NMCA-053

STATE of New Mexico, Plaintiff–Appellant,

v.

Odilon Martinez REYNAGA, a/k/a Odilon Reynaga Martinez, and Sergio Bustillos, a/k/a Sergio Morales, Defendants–Appellees.

No. 20,005.

Court of Appeals of New Mexico.

April 26, 2000.

Certiorari Denied, No. 26,343, June 15, 2000.

Patricia A. Madrid, Attorney General, Arthur W. Pepin, Assistant Attorney General, Santa Fe, for Appellant.

Phyllis H. Subin, Chief Public Defender, Trace L. Rabern, Assistant Appellate Defender, Santa Fe, for Appellees.

OPINION

ALARID, Judge.

{1} In these two consolidated cases, the State appeals from the trial court's order suppressing evidence based upon the failure of officers executing a search warrant to comply with the knock-and-announce procedures mandated by the New Mexico constitution. For the reasons set forth below, we affirm.

BACKGROUND

{2} On October 21, 1997, Albuquerque police executed a search warrant at a mobile home located in southeastern Albuquerque. The police were aware that the front door of the home opened outward and that the landing was too small for the entire team of officers to position themselves immediately outside the door. Prior experience with mobile homes suggested that if the police were required to break open the door, it could take from a few seconds to a minute to pry open the door using a special tool.

{3} The officers executing the warrant devised a plan by which two officers dressed in work clothes would approach the mobile home in the guise of maintenance men and trick the occupants into opening the door by representing to the occupants that they were there to service the air conditioning. The remaining three officers, who were dressed in full assault gear with markings clearly identifying them as "Albuquerque Police," would remain hidden in an unmarked van parked outside the mobile home.

{4} Although the search warrant had been issued as part of a drug investigation, the police had no reason other than the fact of a drug investigation to believe that the occupants of the mobile home presented an enhanced risk of injury to the officers executing the warrant or that there was an increased risk that evidence would be destroyed if the officers announced their presence and purpose prior to attempting entry.

{5} When the officers arrived at the mobile home, the plainclothes officer driving the van could see that the door to the mobile home was open.[1] He advised the raid team

1. At the suppression hearing, the second plainclothes officer confirmed that the plainclothes officer driving the van announced to the officers in the back of the van that the door to the mobile home was open. However, the second officer later testified somewhat inconsistently that the front door was closed when they reached the landing and that one of the occupants opened the

of that fact. He pulled up, parking the van kitty-corner to the mobile home within 20 feet of the landing. The two plainclothes officers left the van and approached the mobile home. As they approached the mobile home, Defendant Reynaga came to the door. The van was visible from the doorway of the mobile home. The lead plainclothes officer engaged Reynaga in small talk in Spanish as the two officers approached the mobile home. When the officers got to the landing, the lead officer explained that they were there to fix the air conditioning. The officers could see that there was a second occupant, later identified as Defendant Bustillos, inside the mobile home near the door, but could not tell what he was doing.

{6} At that moment, the door to the van slid open and the remaining three officers left the van and ran toward the mobile home yelling "Police!" or "Policia!" When Reynaga attempted to pull the door shut, the lead plainclothes officer put his foot in the doorway and blocked the door with his body. Reynaga attempted to back into the mobile home, but the raid team seized him as they moved into the mobile home. Because they were not wearing body armor, the two plainclothes officers entered the mobile home behind the uniformed officers. During the subsequent search of the mobile home, the raid team discovered cocaine.

{7} Defendants were indicted for trafficking and conspiracy to commit trafficking in cocaine. Citing *State v. Attaway,* 117 N.M. 141, 870 P.2d 103 (1994), Defendants moved to suppress the evidence seized in the search of the mobile home on the ground that there were no exigent circumstances justifying the officers' failure to knock-and-announce their presence. Following an evidentiary hearing, the trial court entered an order granting the motion to suppress. The State filed a timely notice of appeal from that order.

DISCUSSION

{8} In *Attaway,* our Supreme Court recognized the constitutional status of the rule of announcement:

> [I]f an officer attempts to execute a search warrant without complying with the announcement rule and exigent circumstances are not present, the entry is unreasonable and the officer commits an "unwarranted governmental intrusion" in violation of the accused's Article II, Section 10 rights.

117 N.M. at 150, 870 P.2d at 112. The Supreme Court noted that the announcement rule "embodies the disparate values of privacy, sanctity of the home, occupant safety, and police expedience and safety." *Id.* at 151, 870 P.2d at 113. Within a year of *Attaway,* the United States Supreme Court held that the knock-and-announce principle is an element of the reasonableness inquiry under the Fourth Amendment to the United States Constitution. *See Wilson v. Arkansas,* 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995).

{9} The State argues that the initial intrusion by the lead plainclothes officer, who blocked the doorway of the mobile home with his foot to prevent Reynaga from closing the door, can be justified as an entry pursuant to a ruse. In *State v. Chavez,* 87 N.M. 180, 531 P.2d 603 (Ct.App.1975), we upheld an unannounced, peaceful entry by officers investigating a shoplifting incident. We found support for our decision in federal cases upholding entries by ruse where the entry was accomplished without use of force. 87 N.M. at 181, 531 P.2d at 604. We note parenthetically that many federal cases, *see e.g., Leahy v. United States,* 272 F.2d 487 (9th Cir.1959), turn upon a construction of the specific "[t]he officer may break" language of 18 U.S.C. § 3109, the federal knock-and-announce statute, and therefore are of limited usefulness in determining whether the use of a ruse is consistent with the constitutional announcement rule of Article II, Section 10 of the New Mexico Constitution. Subsequent to *Attaway,* no reported New Mexico case has analyzed the legality of ruses under Article II, Section 10.

{10} We believe that a blanket ruse exception to the announcement rule is incon-

door in response to a knock. It is clear from the testimony of both officers that neither of them identified themselves as police officers prior to the point at which the uniformed members of the raid team emerged from the van and stormed the doorway.

sistent with *Attaway*'s directive that noncompliance with the announcement rule must be justified on a case-by-case basis by a particularized showing of exigent circumstances. We conclude that for a ruse to be a reasonable and constitutional alternative to knocking and announcing, the State must demonstrate that, at the time of execution of the warrant, the police had a reasonable suspicion, based upon the particular circumstances of the case at hand, that exigent circumstances exist. *See State v. Vargas,* 121 N.M. 316, 910 P.2d 950 (Ct.App.1995) (upholding trial court finding of exigent circumstance sufficient to excuse compliance with knock-and-announce requirements); *accord State v. Mastracchio,* 721 A.2d 844 (R.I.1998) (rejecting blanket exceptions to announcement rule; upholding use of ruse where suspect had prior record of violent felonies, including felony-murder conviction and where apartment to be searched was equipped with one-way mirrors).

{11} In the present case, we share the trial court's concern with the manner in which the police executed the warrant. The most important fact revealed by the record is the complete absence of evidence of exigent circumstances that would have justified the substitution of "Rambo"-style tactics for a straightforward announcement of the officers' presence and purpose. Other than the awkwardness involved in serving a warrant to search a mobile home, neither of the officers who testified at the suppression hearing pointed to specific information indicating a heightened risk of danger to the officers executing the warrant or an enhanced risk that evidence would be destroyed. Under the facts of this case, excusing the executing officers' failure to even attempt to comply with the announcement rule would be tantamount to recognizing a per se exception for drug investigations or searches of mobile homes. The United States Supreme Court has previously rejected a blanket drug investigation exception to the Fourth Amendment's announcement requirement, *see Richards v. Wisconsin,* 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997) and we believe a blanket mobile home exception clearly is unwarranted based upon the showing made by the State in the trial court.

{12} We disagree with the State's argument that the knock-and-announce requirement serves no purpose once someone inside a mobile home is alerted to the presence of police. In our view, it is the state of mind of occupants who have conceded the right of the police to enter that reduces the potential for violence, and not the fact that an officer has a foot in the door. When an officer enters by ruse, he merely delays the moment at which the occupants must decide to accede or resist authority. It is not at all clear to us that it is to an officer's advantage for this decision to be made after the officer has entered the premises to be searched. *See* Amicus Brief for Amici States at 12, *Richards v. Wisconsin,* 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997), 1997 WL 101643 (noting that in event of armed confrontation inside house, advantage lies with occupants who are familiar with layout of house). We also believe that the State's argument overlooks the privacy interests of individual occupants, whose privacy interests must be evaluated prospectively, as of the time the entry is made. The United States Supreme Court has noted that "the individual interests implicated by an unannounced, forcible entry should not be unduly minimized." *Richards,* 520 U.S. at 393 n. 5., 117 S.Ct. 1416

{13} The State fails to see that the reasonableness of the manner of execution of a warrant must be evaluated in the light of *each* of the interests served by the announcement rule. A ruse that causes an occupant to open a door in the belief that the door is being opened to a maintenance man may very well serve the interest of avoiding the damage to the door that would result from a breaking. But reducing the risk of damage to private property is only one interest served by the announcement rule. The fact that one interest may have been served by a ruse does not eliminate the need to inquire into how an unannounced forcible entry by an officer masquerading as a maintenance man affected other interests. *Cf. Commonwealth v. Ceriani,* 411 Pa.Super. 96, 600 A.2d 1282 (1991) (holding use of ruse to induce occupant to open door does not obviate requirement of announcing purpose and identi-

ty and allowing occupants opportunity to surrender premises peaceably). A few moments grace between announcement and entry can be crucial to the privacy of occupants, *see Richards,* 520 U.S. at 393 n. 5, 117 S.Ct. 1416, and may reduce the risk that a homeowner will mistakenly respond with deadly force to an apparently unauthorized intrusion, *see* UJI 14–5170, NMRA 2000 (defining justifiable homicide in defense of habitation); UJI 14–5172, NMRA 2000 (defining justifiable homicide in defense of another); *see generally* Mark Josephson, *Fourth Amendment–Must Police Knock and Announce Themselves Before Kicking in the Door of a House?,* 86 J.Crim.L. & Criminology 1229, 1256–57 (1996).

{14} In view of our conclusion that the officers' initial decision to resort to a ruse was not supported by a sufficient showing of exigent circumstances, we reject the State's attempts to use circumstances created by the officers' initial constitutionally-unreasonable conduct to justify the completion of the entry by force. *See State v. Wagoner,* 1998–NMCA–124, ¶ 13, 126 N.M. 9, 966 P.2d 176 (to justify exception to requirements of Fourth Amendment, exigent circumstances must not be result of officers' improper conduct); *Commonwealth v. Ceriani* (suppressing evidence where child induced to open door by ruse followed by simultaneous announcement and forcible entry).

CONCLUSION

{15} The trial court's November 13, 1998 Order of Suppression is affirmed.

{16} **IT IS SO ORDERED.**

PICKARD, C.J. (specially concurring) and BUSTAMANTE, J., concur.

PICKARD, Chief Judge (specially concurring).

{17} I agree with the majority that the trial court's order suppressing evidence should be affirmed. However, I disagree with the majority's adoption of a rule that resort to a ruse is per se unreasonable absent exigent circumstances. While adoption of such a rule appears to be supported within the general language of *State v. Attaway,* 117 N.M. 141, 870 P.2d 103 (1994), the precise issue of whether entry by ruse would be permissible absent exigent circumstances was not raised by the facts of that case and was accordingly not decided therein. Further, no case of which I am aware has adopted such a rule, and the authorities appear to be to the contrary. *See* Wayne R. LaFave, *Search and Seizure,* § 4.8(b) at pp. 604–05 (3rd ed.1996) (indicating that the purposes of the knock and announce requirement are not offended by entry by ruse); *State v. Williamson,* 42 Wash.App. 208, 710 P.2d 205, 207 (1985) (stating that when entry is gained by ruse, there is neither breaking nor entry without valid permission).

{18} I do not believe that we need to decide in this case whether a blanket ruse exception to the announcement rule is inconsistent with *Attaway*'s directive that noncompliance with the announcement rule must be justified on a case-by-case basis by a particularized showing of exigent circumstances. That is because we do not have a simple ruse here. Instead, we have a ruse contemporaneously accompanied by a show of force that seized Reynaga as the raiding officers swept into the trailer. Under these circumstances, in which the ruse was contemporaneously accompanied by an illegal show of force, the State's attempt to compartmentalize the ruse as something that led to circumstances justifying a later entry by force was properly rejected by the trial court, and the trial court's suppression of evidence was well within the holdings of both our own existing cases and the out-of-state cases cited by the majority. *See State v. Chavez,* 87 N.M. 180, 531 P.2d 603 (Ct.App.1975) (holding that entry by ruse is not illegal if force is not an element of the entry); *Commonwealth v. Ceriani,* 411 Pa.Super. 96, 600 A.2d 1282 (1991) (suppressing evidence where entry by ruse was accompanied by force).

{19} In light of the foregoing, I specially concur.

5 P.3d 584

2000-NMCA-057

UNITED WATERWORKS, INC., a Delaware corporation, successor-in-interest to United Water New Mexico, Inc., formerly known as Rio Rancho Utilities Corporation, Plaintiff–Appellant,

v.

NEW MEXICO PUBLIC UTILITY COMMISSION and The Attorney General of the State of New Mexico, Defendants–Appellees.

No. 20,203.

Court of Appeals of New Mexico.

June 5, 2000.

Richard B. Cole, Susan M. McCormack, Keleher & McLeod, P.A., Albuquerque, for Appellant.

Stacey J. Goodwin, Associate General Counsel, New Mexico Public Regulation Commission, Santa Fe, for Appellees.

OPINION

BUSTAMANTE, J.

{1} Plaintiff appeals the order of the district court granting Defendants' motion for summary judgment against Plaintiff on its complaint for declaratory relief for reimbursement of inspection and supervision fees and in favor of Defendants on its motion for penalties and interest. We agree with the district court's interpretation of NMSA 1978, § 62–8–8 (1992), and affirm the summary judgment.

FACTS AND PROCEDURAL BACKGROUND

{2} The relevant facts are undisputed. Plaintiff, United Waterworks, Inc., was the parent corporation of United Water New Mexico, Inc. (UWNM), and is its successor in interest. UWNM was a regulated utility subject to imposition of an inspection and supervision fee under Section 62–8–8. In 1994, the City of Rio Rancho began eminent domain proceedings to condemn UWNM's utility assets. On June 30, 1995, Rio Rancho formally took possession of UWNM's facilities and assumed operation of the utility

services. After June 30, 1995, UWNM conducted no utility business in New Mexico and was no longer subject to regulation by Defendants, the New Mexico Public Utility Commission (PUC), or to the imposition of the inspection and supervision fee.

{3} In February 1996, the PUC billed UWNM for inspection and supervision fees based on gross receipts for UWNM's water and sewer business transacted in New Mexico during the first six months of 1995. *See* § 62–8–8. Plaintiff paid the $29,957.44 principal fee on August 15, 1996. Plaintiff did not pay any interest or penalties on the principal fee, which it tendered under protest. Plaintiff then filed this declaratory judgment action, and Defendants answered and counterclaimed for the payment of interest and penalties on the late paid fees.

{4} Plaintiff and Defendants each filed a motion for summary judgment. In conjunction with their motion for summary judgment, Defendants filed various affidavits and the PUC memoranda concerning the assessment of inspection and supervision fees. The parties also filed a stipulation of facts. The district court granted summary judgment in favor of Defendants and ordered Plaintiff to pay interest and penalties on the principal amount of the fee collected.

DISCUSSION

{5} Section 62–8–8 provides in relevant part:

> Each utility doing business in this state and subject to the control and jurisdiction of the commission with respect to its rates or service regulations shall pay annually to the state a fee for the inspection and supervision of such business in an amount equal to one-half of one percent of its gross receipts from business transacted in New Mexico for the preceding calendar year.... [T]hat sum shall be payable on or before the last day of February in each year.

Plaintiff contends the plain language of this statute prohibits the PUC from assessing a fee against UWNM in 1996 because it lost regulatory jurisdiction over UWNM as of June 30, 1995, when UWNM ceased doing business in New Mexico and no longer possessed any of its utility assets. It argues that the utility must be doing business in New Mexico and be subject to the control and jurisdiction of the PUC at the time the fees are assessed, rather than at some point in the past.

{6} Defendants argue that the statute is ambiguous about whether the fees collected are intended to cover the inspection and supervision expenses of the preceding year or of the year when they are assessed and become payable. They also argue that the district court's interpretation of the statute is reasonable and in keeping with the statute's history and background. We agree with Defendants and also believe that their position is most consistent with a common-sense reading of the statute.

{7} The district court issued a memorandum decision noting that the amount of the fee collected is measured by the gross receipts of the utility business in the previous year. The district court relied on a 1962 Attorney General's opinion stating that the inspection and supervision fees are collected for the PUC's services and that these services must be rendered before the fee can become due and payable. The district court concluded that "the fee is collected in the following year because that is when the receipts of the business and the extent of inspection and supervision can be known."

{8} Because there is no genuine issue involving any material fact, and because the issue on appeal requires us to interpret Section 62–8–8, we consider de novo whether the district court correctly interpreted the statute and correctly applied its interpretation to the facts of this case. *See Self v. United Parcel Serv., Inc.*, 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582; *Romero Excavation & Trucking, Inc. v. Bradley Constr.*, 1996–NMSC–010, ¶¶ 4–5, 121 N.M. 471, 913 P.2d 659.

{9} As Defendants state in their answer brief, the statute is clear about how and when the fee is to be assessed. The statute does not, however, indicate whether the fee collected in February and based on the previous year's gross receipts is for activities by the PUC during the year when the gross receipts were generated or whether the pay-

ment is, in effect, a prepayment for the activities anticipated for the year in which the fee is assessed. Because the language of the statute does not address this question, we are not persuaded by Plaintiff's argument that the plain meaning of the statute answers the issue on appeal.

{10} To date, there have been no cases construing Section 62–8–8, but the attorney general has issued several opinions, beginning in 1943, answering questions concerning this statute. None of these directly answers the question posed by this appeal: whether the PUC has authority to assess and collect a fee for a preceding year when, at the time the fees are assessed, the utility no longer does business in New Mexico. Based on the language and purpose of the statute, and guided by the opinions of the attorney general, we agree with the district court that the PUC had authority under Section 62–8–8 to assess and collect fees from Plaintiff in 1996 based on Plaintiff's 1995 gross receipts.

{11} In 1962, the attorney general issued an opinion concerning when the Public Service Commission should begin collecting inspection and supervision fees from rural electric cooperatives. *See* N.M. Att'y Gen.Op. 62–16 (1962). The opinion states that "the inspection and supervision fees are in fact fees charged for the services of the Public Service Commission in supervising and inspecting these rural electric cooperatives." *Id.* The opinion then goes on to say, "It then naturally follows that before a fee would be due and payable, the Public Service Commission must have inspected and supervised these cooperatives." *Id.* Because the Commission did not have jurisdiction over the rural electric cooperatives until July 1, 1961, there could not have been any fees based on gross receipts for 1960. Instead, according to the attorney general's opinion, the fees should have begun to be collected in 1962, based on gross receipts for business transacted in New Mexico from July 1, 1961, to December 31, 1961. *See id.*

{12} Another opinion, from 1952, interpreted a statute providing for the payment of an inspection and supervision fee to the State Corporation Commission. *See* N.M. Att'y Gen.Op. 52–5533 (1952). The opinion notes that the statute at issue was almost identical to the provision for the payment of fees to the Public Service Commission. *See id.* Using past interpretations of the fee provision for the Public Service Commission as a guide, the attorney general concluded that the State Corporation Commission fees collected in 1951 applied to the transaction of business from the previous year. *See id.*

{13} In 1943, the attorney general was asked whether a utility that went out of business during a calendar year is subject to fees for that year. *See* N.M. Att'y Gen.Op. 43–4266 (1943). The opinion states that "when a utility does business in this state for any part of a year, subject to the supervision of the Public Service Commission, . . . they immediately subject themselves to a full annual fee, regardless of whether or not they operate the entire year." *Id.* The opinion continues:

> Your letter indicates the further question as to whether such private utility companies would be subject to any fees the following year after having sold their properties to a municipality. Even though it is true that such companies would have had gross receipts for a part of the preceding year, they cannot be charged fees for a year in which they do no business in the state subject to the control and jurisdiction of the commission.

Id. Plaintiff relies on this language to support its position that the PUC improperly assessed its fees in 1996, arguing that its predecessor in interest had not done any business in New Mexico in 1996 and therefore that the PUC did not have jurisdiction over it for that year.

{14} The language Plaintiff relies on, when read in the context of the entire opinion, does not aid Plaintiff. The opinion states that a utility cannot be charged fees for a year in which it does no business in the State. It also states that a utility doing business for any part of the year immediately subjects itself to a fee, regardless of whether they operate the entire year. *See id.* In this case, the fees assessed in 1996 against Plaintiff's predecessor in interest, based on its gross receipts from the first half of 1995, were not fees charged for 1996, a year in

which it did no business in New Mexico. The fees were assessed in 1996 but were charges for services rendered during the first half of 1995, a year when Plaintiff's predecessor in interest was doing business in New Mexico and was subject to the jurisdiction of the PUC.

{15} The 1943 opinion must also be read in the context of its time. The opinion was rendered two years after the enactment of the Public Utility Act of 1941. In 1941, inspection and supervision fees were immediately imposed based on revenues from 1940, even though there had been no services rendered in 1940. *See* 1941 N.M.Laws, ch. 84, §§ 44–45. The fees that were based on these revenues were placed in a "Public Utility Fund" to provide immediate and direct support for the operations of the newly formed Public Service Commission. *See id.* § 45. It is not clear from the record in this case how long this practice continued, although the Public Utility Act was amended in 1957 to eliminate direct funding of the Public Service Commission's operations through the inspection and supervision fees. *See* 1957 N.M.Laws, ch. 25, §§ 1, 3. We also note that Defendants filed the affidavit of Dennis Gee, the PUC's utility accounting manager, who stated that since his employment with the PUC began in 1978, new utilities have first been assessed fees in the year following the year of their certification, and that the fee assessment has been for the inspection and supervision of the utility for the preceding year.

{16} The Public Utility Act was again amended in 1961 to bring rural electric cooperatives under limited PUC regulation. *See* 1961 N.M.Laws, ch. 89, § 5. As noted, the 1962 attorney general opinion answered the question of when fees should begin to be assessed against these cooperatives, which became subject to the PUC's regulations in July 1, 1961. *See* N.M. Att'y Gen.Op. 62–16. The opinion states that fees should be assessed beginning in 1962 based on revenues from the last half of 1961 when the PUC acquired jurisdiction over the cooperatives. *See id.* Despite the somewhat confusing language of the 1943 attorney general's opinion, it is clear that in subsequent years fees were charged based on services rendered the previous year. Because the fees are charged for the prior year's services, the fact that a utility has been decertified or no longer conducts business in New Mexico does not permit it to escape liability for fees based on services previously rendered during the time when the utility was operating and subject to the jurisdiction of the PUC.

{17} This interpretation is consistent with the policy and procedures of the PUC. An affidavit filed by Dale Lucero, who has been responsible for assessing, collecting, and recording inspection and supervision fees for the PUC since 1995, indicates that the majority of utilities that have been decertified since 1990 have been assessed and have paid inspection and supervision fees in the year following their decertification, based on partial gross receipts from the previous year. Lucero acknowledged that, prior to his tenure at the PUC, the assessment of fees had not been applied absolutely uniformly and he stated his belief that efforts should be made to assess fees against the few utilities that had not been assessed fees following their decertification.

{18} We determine that the statute grants the PUC authority to assess and collect inspection and supervision fees for the preceding year, despite the fact that, during the year the fees are assessed and become payable, the utility is no longer doing business in New Mexico.

{19} We also determine that the district court correctly ruled in Defendants' favor on the penalty-and-interest fees charged to Plaintiff for the late payment of the fees. *See* NMSA 1978, § 62–8–9 (1992) (providing for the payment of interest and penalties on late payments of fees). We are not persuaded that the circumstances of this case warrant dismissal of Defendants' counterclaim for these fees.

{20} The order of the district court is affirmed.

{21} **IT IS SO ORDERED.**

PICKARD, C.J., and ALARID, J., concur.

5 P.3d 1070

2000-NMCA-058

In the Matter of the ESTATE OF Patricia Jean HARRINGTON, Deceased,

James B. Harrington, Jr. and Custom Beeper Company, Inc., Plaintiffs–Appellants.

v.

Lorna Bannigan, Richard Harwood, Penny Harwood, Lisa Kleiboer, Dana Cordova, and James McCormick, Defendants–Appellees.

Nos. 19,911, 19,912.

Court of Appeals of New Mexico.

June 2, 2000.

Oliver B. Cohen, Albuquerque, Howard L. Anderson, Albuquerque, for Appellants.

Ronald G. Harris, Foster Johnson Harris McDonald, Albuquerque, Robert N. Singer, Singer, Smith & Williams, P.A., Albuquerque, George R. McFall, Suzanne M. Barker, Jennifer A. Noya, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, for Appellees.

OPINION

PICKARD, Chief Judge.

{1} James B. Harrington, Sr. (Harrington) appeals the trial court's decision to liquidate a business he owned co-equally with his wife (Decedent) prior to her death. Upon her death, Decedent passed her entire estate, including her interest in the business, by will to her sister and three daughters (Devisees). The persons nominated to serve as her personal representatives applied for informal probate of Decedent's will, and the trial court granted the application. Harrington petitioned the trial court to set aside the informal probate of Decedent's will on the ground that the will was invalid. By challenging the validity of Decedent's will, Harrington converted what had been an informal proceeding to a formal proceeding, as we explain below.

{2} In the course of the formal proceeding, Decedent's personal representatives, acting on behalf of her estate and the Devisees (collectively, the Estate), called a shareholders' meeting in order to elect directors for the business. Harrington refused to attend the meeting, declaring that he would not operate the business with the Devisees. The Estate responded to Harrington's refusal by petitioning the trial court to appoint a receiver to liquidate the business. The Estate claimed the trial court should grant its petition on the grounds that the parties could not agree on how to operate the business and Harrington had improperly used business funds for his personal purposes.

{3} The trial court denied the Estate's request. As part of its order, however, the trial court informed the parties that if they failed to resolve their differences by a certain date, it would appoint a receiver to liquidate the business. After the deadline passed and no resolution had been reached, the trial court appointed a receiver. The trial court ordered the receiver to take charge of all the assets used in the business and to arrange for the sale of the business in a commercially reasonable manner. The trial court also enjoined Harrington from participating in and

transferring assets from, the business. Approximately eight months later, the receiver found a buyer willing to pay an acceptable price for the business. The trial court ordered the receiver to sell the business to the buyer.

{4} Harrington filed a notice of appeal from that order within 30 days. Prior to filing his notice of appeal, however, Harrington also filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 1–012(B)(1) NMRA 2000. The trial court did not conduct a hearing on the motion until after Harrington's appeal was underway. To our knowledge, the trial court still has not formally ruled upon the motion, although Harrington states in his brief in chief that the trial court orally denied his motion from the bench at the motion hearing and then sent the parties a letter memorializing its denial. Notwithstanding the fact that the trial court has not entered a written order denying or granting the motion, the parties have fully addressed the issue of subject matter jurisdiction in their appellate briefs. Indeed, that issue is the central issue in Harrington's appeal.

{5} On appeal, Harrington claims the trial court erred because, as a trial court sitting in probate, it lacked subject matter jurisdiction to liquidate the business. In the alternative, he claims that even if the trial court had jurisdiction to liquidate the business, its determination to do so pursuant to either NMSA 1978, § 45–3–911 (1975) or NMSA 1978, § 53–16–16 (1967) is not supported by substantial evidence. Harrington ultimately requests that we declare the receivership void ab initio.

{6} The Estate claims we can entertain neither Harrington's subject matter jurisdiction claim nor his substantial evidence claim because the trial court's order appointing a receiver was a final order from which Harrington failed to timely appeal. In the alternative, the Estate claims the trial court had jurisdiction to liquidate the business and that its decision to do so is supported by substantial evidence.

{7} For the reasons stated below, we disagree with the Estate that our ability to review Harrington's subject matter jurisdiction claim is controlled by whether the trial court's receivership order constitutes a final order. Our disagreement with the Estate is inconsequential, however, because we conclude as a matter of law that the trial court had jurisdiction to liquidate the business. We agree with the Estate that the trial court's order appointing a receiver was a final order. In light of our holding on the jurisdiction issue, we also agree with the Estate that Harrington's failure to timely appeal from the trial court's order appointing a receiver precludes us from entertaining his substantial evidence claim. Accordingly, we affirm the trial court's exercise of jurisdiction and dismiss the appeal to the extent that it alleges errors committed pursuant to the exercise of that jurisdiction.

DISCUSSION

I. APPELLATE COURT JURISDICTION

{8} The first issue we address is whether we have the authority to review Harrington's subject matter jurisdiction claim, notwithstanding the facts that the trial court has not entered a written order on Harrington's Rule 1–012(B)(1) motion and that the appeal was not timely filed from an earlier final order. We can, as a general rule, only review formal written orders or judgments from which an appellant has timely appealed. *See* Rule 12–201 NMRA 2000 (stating that appeals from non-evidentiary rulings must be commenced within thirty days of entry of final judgment); *Rice v. Gonzales*, 79 N.M. 377, 378, 444 P.2d 288, 289 (1968) (concluding that because the notice of appeal was not timely, this Court lacked jurisdiction to hear the appeal). The rationale underlying this rule is that a district court's oral rulings merely evidence its intentions, intentions which "can change at any time before the entry of a final judgment." *Bouldin v. Bruce M. Bernard, Inc.*, 78 N.M. 188, 189, 429 P.2d 647, 648 (1967).

{9} It follows from the general rule that we technically lack jurisdiction to review Harrington's subject matter jurisdiction claim. This is true because, although Harrington raised this claim pursuant to a Rule 1–012(B)(1) motion at the trial court level, a motion that Harrington claims has been de-

nied both orally and in a letter, the trial court has yet to enter a formal written order granting or denying the motion. *See Rice,* 79 N.M. at 378, 444 P.2d at 289; *Hamilton v. Doty,* 65 N.M. 270, 274, 335 P.2d 1067, 1070 (1958) (ruling that statements of counsel in the briefs are not part of the record). In addition, there existed an earlier final order from which Harrington did not appeal. In light of the foregoing, the issue becomes whether we must strictly adhere to the general rules and neglect Harrington's jurisdiction claim, or whether there is some good reason why we should address his claim. We favor addressing his claim under the unique facts present in this case. *See Peterson v. Peterson,* 98 N.M. 744, 746, 652 P.2d 1195, 1197 (1982).

{10} In *Peterson,* the New Mexico Supreme Court addressed the issue of whether a district court's failure to enter findings of fact and conclusions of law with its judgment, which failure resulted in technical error, required the Supreme Court to remand the case in order that the district court could correct its error. *See id.* Answering in the negative, our Supreme Court stated:

> [C]ertainly little would be accomplished, other than incurring additional delay and further expense, in remanding this case back to the trial court for the purpose of entering its findings of fact and conclusions of law again in concert with another judgment. Although we must insist upon compliance with the Rules of Civil Procedure, in this case no meaningful purpose would be furthered to remand this case back to the trial court for this purpose alone.

Id.

{11} As in *Peterson,* we see no meaningful reason to adhere to the general rules in the case at bar. If we do not address Harrington's subject matter jurisdiction claim at this time, we would merely be postponing the inevitable. Irrespective of the conclusions we reach in the other issues presented for our review, Harrington's jurisdictional claim will not vanish or go away. The trial court will continue to retain the authority of formally ruling on Harrington's Rule 1–012(B)(1) motion, a motion that we liken to a Rule 1–060(B)(4) motion because Harrington's motion alleges that the entire proceedings below were void. *See* Rule 1–060(B)(4) NMRA 2000 (allowing relief from a final judgment on the ground that the judgment is void for lack of subject matter jurisdiction); *Standard Oil Co. of California v. United States,* 429 U.S. 17, 17–19, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) (ruling that district courts can entertain Rule 60(B) motions after appeal has been taken without leave of the appellate court); 12 James Wm. Moore, *Moore's Federal Practice* § 60.64 (3d ed.1997) [hereinafter Moore] ("Nomenclature is not important. The label or description that a party puts on its motion does not control whether the party should be granted or denied relief. . . ."). After the trial court renders its decision on Harrington's Rule 1–012(B)(1) motion or a subsequent Rule 1–060(B) motion, Harrington will unquestionably appeal the matter to this Court. At that time, we will then have the responsibility of entertaining the exact issue now before us for review. This last point, which we find determinative, warrants further explanation.

{12} The conclusions we reach on the non-jurisdictional issues before us for review will finally determine those matters. The only issue Harrington will be able to maintain at the trial court level, and then again on appeal, is the one going to the trial court's subject matter jurisdiction. *See* Rule 1–060(B)(4) (stating that a motion under this Rule does not affect the finality of a judgment); *James v. Brumlop,* 94 N.M. 291, 294, 609 P.2d 1247, 1250 (Ct.App.1980) (ruling that a party may appeal the denial of a Rule 1–060(B) motion, but the scope of appellate review is limited to the correctness of the denial of the motion, and not to the correctness of the underlying judgment). This issue, as we stated above, will give rise to and constitute a collateral attack on the trial court's final judgment. We will then review the trial court's formal disposition of Harrington's subject matter jurisdiction motion under a de novo standard of review on appeal. *See Classen v. Classen,* 119 N.M. 582, 585, 893 P.2d 478, 481 (Ct.App.1995) (ruling that we review de novo the grant or denial of a Rule 1–060(B)(4) motion).

{13} In light of the standard of review that will govern the inevitable appeal from the trial court's decision, it becomes clear why it would be a waste of resources, both for the litigants and for this Court, for us not to address Harrington's jurisdiction claim today. No matter what decision the trial court renders on this pure issue of law, we will have to conduct our own review. *See id.* Additionally, we will not defer to the trial court's decision in any way because the resolution of this issue in no way depends on facts or inferences drawn from facts. *See id.* Given that reality, coupled with the facts that the parties have fully addressed the issue in their briefs and that the trial court has given every indication that it will deny the motion, we see no reason not to address Harrington's subject matter jurisdiction claim at this time. *See Principal Mut. Life Ins. Co. v. Straus,* 116 N.M. 412, 415, 863 P.2d 447, 450 (1993) ("There is a strong policy in New Mexico of disfavoring piecemeal appeals ... and of avoiding fragmentation in the adjudication of related legal or factual issues...."); Moore, *supra,* § 60.67[2][a] (averring that if an appellant is concerned with an issue involving a matter of law that was not litigated or formally ruled upon at the trial court level, there is no reason for the appellant not to raise the issue in the appeal and no reason to have a Rule 1–060(B) proceeding at all). We will not strictly adhere to the general rules when no legitimate purpose will be served by doing so. *See Peterson,* 98 N.M. at 746, 652 P.2d at 1197. We will entertain Harrington's subject matter jurisdiction claim.

II. DISTRICT COURT JURISDICTION

{14} The second issue we address is whether the trial court, as a district court sitting in probate, had subject matter jurisdiction to liquidate the business. District courts "have original jurisdiction in all matters and causes not excepted in this [Constitution of the State of New Mexico], and such jurisdiction of special cases and proceedings as may be conferred by law." N.M. Const. art. VI, § 13. Probate proceedings are special proceedings and, as a result, district courts sitting in probate possess only the jurisdiction conferred upon them by statute. *See In re Hickok's Will,* 61 N.M. 204, 216, 297 P.2d 866, 874 (1956).

A. *Probate Code*

{15} The jurisdiction enjoyed by district courts sitting in probate is set forth in the New Mexico Uniform Probate Code at NMSA 1978, § 45–1–302 (1978) and at NMSA 1978, § 45–1–303 (1975). Section 45–1–302(A) & (B) defines the district courts' jurisdiction in formal probate proceedings, while Section 45–1–302(C) and NMSA 1978, § 45–1–302.1 (1977) define the district courts' and the probate courts' jurisdiction in informal probate proceedings. Read together, these provisions invest district courts with exclusive original jurisdiction over formal probate proceedings and with concurrent original jurisdiction, which it shares with probate courts, over informal probate proceedings.

{16} In the case at bar, we concern ourselves solely with determining the amount of jurisdiction Section 45–1–302 confers upon district courts because Harrington triggered a formal proceeding when he challenged the validity of Decedent's will. *See* NMSA 1978, § 45–3–401(A) (1975) ("A formal testacy proceeding is litigation to determine whether a decedent left a valid will."). In making this determination, "we seek to give effect to the Legislature's intent, and in determining intent we look to the language used and consider the statute's history and background." *Key v. Chrysler Motors Corp.,* 1996–NMSC–038, 121 N.M. 764, 768–69, 918 P.2d 350, 354–55 (1996). Section 45–1–302 states in relevant part:

> A. The district court has exclusive original jurisdiction over all subject matter relating to:
>
> (1) formal proceedings with respect to the estates of decedents, including determinations of testacy, appointment of personal representatives, constructions of wills, administration and expenditure of funds of estates, determination of heirs and successors of decedents and distribution and closing of estates;
>
> (2) estates of missing and protected persons;

(3) protection of incapacitated persons and minors; and

(4) trusts.

B. The district court in formal proceedings shall have jurisdiction to determine title to and value of real or personal property as between the estate and any interested person, including strangers to the estate claiming adversely thereto. The district court has full power to make orders, judgments and decrees and to take all other action necessary and proper to administer justice in matters which come before it.

1. *Language*

{17} We conclude, based on the foregoing language, that the Legislature intended to confer upon district courts general civil jurisdiction in formal probate proceedings when it enacted Section 45–1–302. *See Gonzalez v. Superior Court,* 117 Ariz. 64, 570 P.2d 1077, 1079 (1977) (en banc). In *Gonzalez,* the Arizona Supreme Court considered "the extent of the jurisdiction of the [district court sitting in probate] under the probate code to deal with a matter not involved in the actual administration of the estate." *Id.* at 1078. The *Gonzalez* court, after interpreting a statute substantially equivalent to our Section 45–1–302, ruled that district courts sitting in probate have "full constitutional jurisdiction in matters which might arise affecting estates." *Gonzalez,* 570 P.2d at 1079; *see* 1 *Uniform Probate Code Practice Manual* 29 (Richard V. Wellman, ed., 2d ed.1977) (stating that Uniform Probate Code Section 1–302 is "designed to describe the probate court [district court sitting in probate] in terms that make it equivalent in stature to a court of general jurisdiction").

{18} We see no reason to depart from the decision set forth in *Gonzales* and hereby rule that district courts sitting in probate possess general civil jurisdiction in formal probate proceedings. It follows from this rule, and we therefore hold, that the trial court had jurisdiction to liquidate the business pursuant to either Section 45–3–911 or Section 53–16–16 as long as the necessary parties were properly before it and proper procedures were utilized. *See* NMSA 1978, § 45–1–103 (1975) ("The principles of law and equity supplement the Probate Code's ... provisions, unless specifically displaced by particular provisions of the code."). In this case, Harrington makes no claims of lack of personal jurisdiction or utilization of improper procedures.

2. *Background*

{19} Our holding finds additional support in the background of Section 45–1–302. The Legislature, motivated by a desire to "promote a speedy and efficient system for the settlement of the estate of the decedent," adopted the Uniform Probate Code in 1975. *See* 1975 N.M.Laws, ch. 257, §§ 1–101, 1–102(B)(3); Unif. Probate Code § 1–102, 8 U.L.A. 24, 26 (1998). In order to promote and achieve this efficiency, it is only logical that the Legislature intended to, and in fact did, confer general civil jurisdiction upon district courts sitting in formal probate. For the Legislature to have done otherwise would be illogical. As one judge has remarked:

> To require a separate action to be filed ... is the ultimate in judicial inefficiency. It makes about as much sense as having two benches in the courtroom, one to sit at when handling law and equity cases and another when handling a probate matter, or requiring different colored robes, black when sitting in law and equity, purple when sitting in probate.

In re Estate of Harrington, 648 P.2d 556, 567 (Wyo.1982) (Raper, J., dissenting).

{20} In our view, the Legislature's clear and express purpose for adopting the Uniform Probate Code would be frustrated if we gave Section 45–1–302 a narrower interpretation than we have here today. *See* NMSA 1978, § 45–1–102(A) (1975) (stating that the Probate Code is to be "liberally construed and applied to promote its underlying purposes and policies."); *Miller v. New Mexico Dep't of Transp.,* 106 N.M. 253, 255, 741 P.2d 1374, 1376 (1987) ("Statutes are to be read in a way that facilitates their operation and the achievement of their goals.").

B. *Harrington's Arguments*

{21} Harrington claims that a decision upholding the general jurisdiction of district

courts sitting in probate would contravene New Mexico case law, which unanimously upholds the rule that district courts sitting in probate lack general civil jurisdiction. *See In re Estates of Salas,* 105 N.M. 472, 474, 734 P.2d 250, 252 (Ct.App.1987). In *In re Estates of Salas,* this Court stated:

> The district court sitting in probate and the probate courts are not invested with general civil jurisdiction. *In re Porter's Estate,* 47 N.M. 122, 138 P.2d 260 (1943); *see also In re Conley's Will,* 58 N.M. 771, 276 P.2d 906 (1954); N.M. Const. art. VI, § 23; NMSA 1978, § 45–1–302 (Cum. Supp.1986).

In re Estates of Salas, 105 N.M. at 474, 734 P.2d at 252.

{22} In our view, *In re Estates of Salas* misstates the jurisdiction conferred upon district courts over probate matters because it fails to distinguish between formal proceedings and informal proceedings. That distinction is of critical importance here.

{23} In addition, the cases upon which *In re Estates of Salas* relies for support are no longer good law. Both *In re Porter's Estate* and *In re Conley's Will* involved the question of whether a district court sitting in probate could determine title to real property. *See In re Porter's Estate,* 47 N.M. at 123–24, 138 P.2d at 261; *In re Conley's Will,* 58 N.M. at 773–774, 276 P.2d at 907. Relying on statutory provisions and case law limiting the jurisdiction of district courts to that enjoyed by probate courts, those cases answered the question presented in the negative because our Constitution expressly prohibits probate courts from proceeding "in any matter wherein the title or boundaries of land may be in dispute or drawn in question." N.M. Const., art. VI, § 23; *see In re Porter's Estate,* 47 N.M. at 123–24, 138 P.2d at 261; *In re Conley's Will,* 58 N.M. at 775–76, 276 P.2d at 907–08. However, ever since our Legislature adopted the Uniform Probate Code, district courts sitting in probate have not been compelled to exercise the same jurisdiction of the probate courts. In fact, by adopting the Uniform Probate Code, the Legislature conferred upon district courts exclusive original jurisdiction over formal probate proceedings, including exclusive jurisdiction over proceedings to determine the title to real property. *See* § 45–1–302(B). In light of the foregoing, we reject Harrington's argument.

III. FINAL ORDER

{24} The last issue we address is whether the trial court's order appointing a receiver to liquidate the business was a final order. An order is generally not considered final unless all issues of law and fact have been determined and the case is disposed of to the fullest extent possible. *See Executive Sports Club, Inc. v. First Plaza Trust,* 1998–NMSC–008, ¶ 5, 125 N.M. 78, 957 P.2d 63. Our case law makes it clear, however, that "finality" is to be given a practical, rather than a technical, construction. *See Central–Southwest Dairy Coop. v. American Bank of Commerce,* 78 N.M. 464, 466–67, 432 P.2d 820, 822–23 (1967). Thus, if an order practically disposes of the merits of the action, the order is deemed final even though further proceedings remain necessary to carry the order into effect. *See Sacramento Valley Irrigation Co. v. Lee,* 15 N.M. 567, 577, 113 P. 834, 838 (1910).

{25} In *Sacramento Valley Irrigation Co.,* a creditor filed suit against a corporation that owed him money. *See id.* at 573, 113 P. at 837. The creditor asked the trial court to enjoin the corporation from exercising its corporate powers and to appoint a receiver to liquidate the corporation's assets so that the corporation could pay its outstanding debts. *See id.* The creditor claimed he was statutorily entitled to such relief because the corporation was insolvent and it was improbable that the corporation could resume operating in a short time. *See* 1905 N.M.Laws, ch. 79, §§ 72–73. The trial court agreed with the creditor and granted his request by decree. *See Sacramento Valley Irrigation Co.* ., 15 N.M. at 578–79, 113 P. at 838. The corporation appealed the trial court's decree. *See id.* at 578, 113 P. at 838.

{26} On appeal, the creditor asked the Supreme Court to dismiss the corporation's case on the ground that the trial court's decree was not final. *See id.* at 578, 113 P. at 838. The creditor argued the decree was interlocutory because the trial court, after

entering its decree, still had to sell the corporation's assets and then distribute the proceeds to the corporation's creditors. *See id.* at 577–78, 113 P. at 838. The Supreme Court rejected the creditor's argument, explaining:

> The finding of insolvency, together with the finding that the corporation cannot resume its business within a short time . . . is a final determination of such facts. It is upon such finding by the court that the [statutory] right to the injunction and receivership is predicated. No further action of the court is contemplated with respect thereto. Errors of the trial court, if any, in the granting of such injunction and the appointment of a receiver and in the findings necessarily precedent thereto can only be reviewed on appeal or writ of error.

See id. at 574, 113 P. at 836.

{27} In the case at bar, the trial court ordered the appointment of a liquidating receiver upon finding that the parties were deadlocked and unable to reach an agreement regarding the disposition of the business. Although the trial court failed to identify a statute supporting its authority to liquidate the business based on its findings, the trial court apparently relied on Section 53–16–16. According to Section 53–16–16:

> A. The district courts may liquidate the assets and business of a corporation:
>
> (1) in an action by a shareholder when it is established that:
>
> (a) the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or
>
> (b) the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or
>
> (c) *the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors;* or
>
> (d) the corporate assets are being misapplied or wasted.

(Emphasis added.)

{28} In accordance with *Sacramento Valley Irrigation Co.,* we conclude as a matter of law that the trial court's finding that the parties were deadlocked was a final determination on that factual issue. *See id.* at 574, 113 P. at 836. After the trial court made this jurisdictional finding, the trial court obtained the statutory authority under Section 53–16–16(A)(1)(c) to appoint a receiver to liquidate the business. The trial court exercised its authority and, upon doing so, we hold that its receivership order became a final, appealable order. *See id.* at 574–75, 113 P. at 836. The fact that the trial court retained control of the case in order to conduct a sale and then distribute the proceeds generated by that sale does not render its order non-final. *See id.* at 578, 113 P. at 838 ("Nothing remains to be done by the court except certain ministerial acts looking to the disposition and distribution of the assets of the corporation. Such being the case[,] we think that the decree [is] . . . subject to appeal or writ of error.").

{29} Harrington had to appeal the trial court's final order appointing the receiver within thirty days in order to perfect his appeal as of right. *See* Rule 12–201(A)(2) (The notice of appeal shall be filed "within thirty (30) days after the judgment or order appealed from is filed in the district court clerk's office."). Harrington failed to do so. As a result, we cannot address the question of whether the trial court's jurisdictional finding under Section 53–16–16(A)(1)(c) is supported by substantial evidence. This is true even though we addressed the question of whether the trial court had subject matter jurisdiction to liquidate the business, a question which we have likened to a Rule 1–060(B)(4)–type motion for the reasons stated above. *See* Rule 1–060(B)(4) (granting relief from a final judgment on the ground that the judgment is void for lack of subject matter jurisdiction; stating that a motion under this Rule does not affect the finality of a judgment); *James,* 94 N.M. at 294, 609 P.2d at 1250 (ruling that a party may appeal the denial of a Rule 1–060(B) motion, but the scope of appellate review is limited to the

correctness of the denial of the motion, and not to the correctness of the underlying judgment).

{30} In crafting our holding, we acknowledge, but find it inconsequential for this appeal, that *Sacramento Valley Irrigation Co.* has been distinguished by *Eagle Mining & Improvement Co. v. Lund*, 15 N.M. 696, 113 P. 840 (1910). In *Eagle Mining & Improvement Co.*, our Supreme Court addressed the issue of whether a trial court's decree appointing a receiver to conserve the assets of an insolvent corporation, but not enjoining the corporation's operations, constituted a final decree. *See id.* at 700, 113 P. at 841. The Supreme Court held that such an order is not final. *See id.* at 703, 113 P. at 842–43. In support of its holding, the Court relied on *Pierce v. Old Dominion Copper Mining & Smelting Co.*, 67 N.J. Eq. 399, 58 A. 319 (Ch.1904), which stated:

> The order appointing a receiver is not necessarily a part of the final decree. The final decree is the decree for an injunction, this most effective and fatal decree, which virtually destroys the corporation, like a judgment of ouster in a quo warranto case, and prevents the corporation from perpetrating fraud. . . . Considered by itself, the order appointing a receiver is properly to be classified among interlocutory orders.

Id. at 326. This passage suggests that a district court's receivership order cannot independently constitute a final order. As *Pierce* points out, however, the determination of whether a receivership decree constitutes a final order is largely dictated by the statute under which the plaintiff seeks relief. *See id.*

{31} In *Pierce* and *Eagle Mining & Improvement Co.*, pursuant to the terms of the pertinent corporation statute, a statutory receiver could not "be appointed unless the statutory injunction, which is the object of the suit, [was] also ordered or ha[d] been already ordered." *Pierce*, 58 A. at 325; *see Eagle Mining & Improvement Co.*, 15 N.M. at 702–03, 113 P. at 842. The district court's receivership decree in *Eagle Mining & Improvement Co.* was therefore deemed interlocutory because the decree really did not resolve anything. In the absence of the statutory injunction, the appointed receiver could do little more than conserve the assets of the insolvent corporation. *See Eagle Mining & Improvement Co.*, 15 N.M. at 700, 113 P. at 842 ("The decree appointing such receiver is in the usual form of such decrees appointing receivers to conserve property pending final disposition of the case in chief under orders from the court."). The district court's decree, which merely maintained the status quo, was properly deemed non-final.

{32} In contrast, the trial court's decision to liquidate the business in its receivership order constituted drastic action. The trial court's order disrupted the status quo. It dictated the fate of the business. Once the order was entered, nothing remained to be done by the trial court but ministerial acts looking to the disposition and distribution of the assets. For the reasons stated above, the fact that the trial court retained control of the case in order to perform these ministerial acts fails to render the receivership order non-final.

CONCLUSION

{33} For the reasons stated, we affirm the trial court's exercise of jurisdiction and dismiss the appeal to the extent that it alleges errors committed pursuant to the exercise of that jurisdiction.

{34} **IT IS SO ORDERED.**

WECHSLER and ARMIJO, JJ., concur.

5 P.3d 1078

2000-NMCA-056

Edward SITZER, Appellant,

v.

STATE of New Mexico TAXATION AND REVENUE DEPARTMENT, Appellee.

No. 20,361.

Court of Appeals of New Mexico.

June 7, 2000.

Michael W. Lilley, Jess R. Lilley, Las Cruces, for Appellant.

Patricia A. Madrid, Attorney General, Gail MacQuesten, Special Assistant Attorney General, Santa Fe, for Appellee.

OPINION

ALARID, Judge.

{1} This is an appeal from an order of the district court upholding the Taxation and Revenue Department's (the Department) denial of a license revocation hearing. We affirm.

BACKGROUND

{2} Appellant, Edward Sitzer, was arrested on September 8, 1998, for allegedly driving under the influence of alcohol. When Appellant refused to submit to a breath alcohol test, the arresting officer served Appellant with a notice of revocation. The notice was prepared on a multiple-copy, preprinted form which contains spaces for indicating the date of service. On the carbon-copy of the notice provided to Appellant, the spaces for indicating the date of service are not filled in. On the copy of the notice retained in the Department's records, the spaces for the date of service have been filled in, certifying that the notice was served on Appellant on September 8, 1998.

{3} The notice included the following printed information:

> REQUEST FOR HEARING: YOU MAY REQUEST A HEARING ON THIS REVOCATION. THE REQUEST MUST BE MADE IN WRITING WITHIN TEN (10) DAYS FROM DATE OF SERVICE OF THIS NOTICE.... **HEARING REQUEST INSTRUCTIONS ARE EXPLAINED ON THE BACK SIDE OF THIS FORM.**
>
> ....
>
> **REQUEST FOR HEARING**
>
> NOTE. The hearing on your license revocation is *completely separate* from your court hearing on the DWI criminal charge. New Mexico law (Section 66–8–112 NMSA 1978) provides that **IF YOU WISH TO CONTEST THE REVOCATION OF YOUR DRIVER'S LICENSE** described on the front side of this form, the Motor

Vehicle Division of the New Mexico Taxation and Revenue Department must **RECEIVE** your **WRITTEN** request for a hearing within **TEN (10) DAYS FROM THE DATE THAT THIS NOTICE WAS SERVED ON YOU.** The date this notice was served is stated under **SERVICE** on the front side. State law does not permit the department to consider an untimely request for a hearing.

NOTE. *This hearing request must be accompanied by a payment of $25.00 or a sworn statement of indigency. (Form MVD–10813, available at any motor vehicle field office.)*

{4} On September 10, 1998, Appellant mailed a written hearing request to the Department. Appellant did not include payment of $25.00 or a statement of indigency. On October 8, 1998, the Department notified Appellant that his request for an administrative hearing had been denied "[b]ased on the fact the request was not received with payment of $25.00 or a sworn Statement of Indigency (66–8–111.1B)."

{5} Appellant filed a notice of appeal from the Department's ruling denying Appellant a hearing on the revocation of his driving privileges. In the district court, Appellant argued three grounds for reversal: (1) the failure of the arresting officer to fill in the date on the Notice of Revocation deprived the Department of jurisdiction; (2) in view of the failure of the arresting officer to fill in the date on the Notice of Revocation, Appellant was not given proper notice of the precise time frame in which to request a hearing; and (3) there is not statutory authority allowing the Department to deny a hearing for failure to accompany the hearing request with the $25.00 fee or statement of indigency.

{6} In a brief order, the district court upheld the Department's denial of a hearing:

ORDER DISPOSING OF APPEAL

THIS MATTER having come before the Court on the appellants [sic] appeal pursuant to NMRA 1998, Rule 1–074 from a denial of a hearing on the revocation of his driver's license in New Mexico ... [the Court] FINDS: (i) that the Appellant's argument that the Appellee had no jurisdiction is without merit; the notice of revocation was in substantial compliance with statutory requirements; (ii) that his second argument that such notice did not adequately advise the Appellant of the time in which to request a hearing is likewise without merit, and moreover is moot inasmuch as the Appellant filed a request for hearing, which would have otherwise been timely but for the failure to send the required fee or statement of indigency, and (iii) that the action of the Taxation and Revenue Department was neither fraudulent, arbitrary nor capricious, and it was not outside the scope of its authority and was otherwise in accordance with law in the denial of a hearing on the grounds that the timely filed request for hearing was not accompanied by the $25 fee of a statement of indigency; that the plain reading of NMSA 1978, Section 66–8–112B makes it mandatory that the fee or statement of indigency to be sent with the request for hearing. This requirement being mandatory, the submission of the fee or statement is part and parcel to the hearing request. This requirement was plainly noted on the notice of revocation served upon the Appellant. The fact that the Taxation and Revenue Department may not be prejudiced by granting a hearing is not a relevant consideration.

IT IS THEREFORE ORDERED that the issues raised by the Appellant lack merit, and the decision of the Taxation and Revenue Department to deny the Appellant a hearing for failing to send the $25 fee or a statement of indigency with the request for hearing be, and the same hereby is, affirmed.

DISCUSSION

{7} On appeal to this Court, Appellant raises the same issues he presented to the district court. We agree with the district court's reasoning, and accordingly, we affirm.

{8} Pursuant to NMSA 1978, § 66–8–112(A)(1) (1978, as amended through 1993), the actual date of service of the notice of revocation by the alleged violator is the operative date from which the ten-day period

within which to request for hearing is calculated. The Legislature has not enacted a certificate of service requirement, much less made certification of the date of service a jurisdictional requirement. *See* NMSA 1978, §§ 66–8–111 through 112 (1978, as amended through 1993). We therefore reject Appellant's first claim of error.

{9} Appellant does not dispute that September 8, 1998, the date of service indicated on the copy of the notice maintained in the Department's records, was the actual date that he was arrested, refused to take a breath alcohol test and thereupon was served with the notice of revocation. The record indicates that within two days of his receipt of the notice of revocation, Appellant sent the following letter to the Department by certified mail addressed to the Department at the mailing address printed on the back of the notice of revocation:

> Dear Sirs:
>
> I hereby request a hearing concerning revocation in reference to the following: Edward L. Sitzer ... citation # 19264 1020764 5, dtd 09/08/98, issued by Deming Police Department, Notice of Revocation # 780822 3.
>
> Sincerely,
>
> Edward L. Sitzer

{10} The return receipt for Appellant's letter, which is included in the record on appeal, indicates that Appellant's letter was received by the Department on September 14, 1998, prior to the expiration of the ten-day period provided by Subsection 66–8–112(B). We hold that Appellant's September 10, 1998, letter and its receipt by the Department on September 14, 1998, within the ten-day period provided by Subsection 66–8–112(B) renders harmless any actual lack of notice or confusion Appellant claims to have experienced as the result of the arresting officer's failure to fill in the date of service. "A party must show prejudice before reversal is warranted." *El Paso Elec. Co. v. Real Estate Mart. Inc.*, 98 N.M. 570, 574, 651 P.2d 105, 109 (Ct.App.1982). Accordingly, we reject Appellant's second claim of error.

{11} The sole ground relied upon by the Department to deny Appellant's request for a hearing was his failure to include a $25.00 fee or a statement of indigency. Subsection 66–8–112(B) provides as follows:

> Within ten days after receipt of notice of revocation pursuant to Subsection A of this section, a person whose license or privilege to drive is revoked ... may request a hearing. The hearing request shall be made in writing and shall be accompanied by a payment of twenty-five dollars ($25.00) or a sworn statement of indigency on a form provided by the department.... Failure to request a hearing within ten days shall result in forfeiture of the person's right to a hearing.

{12} As we read this statute, the written "hearing request" and the $25.00 fee/sworn statement of indigency are conjunctive, mandatory requirements. To "request a hearing," a person contesting revocation of his or her license must comply with *both* requirements within the ten-day period. Here, although Appellant mailed a timely hearing request, Appellant did not accompany his hearing request with the $25.00 fee or a sworn statement of indigency. Appellant thereby "forfeited" his right to a revocation hearing. Accordingly, we reject Appellant's third claim of error.

CONCLUSION

{13} The order of the district court is affirmed.

{14} **IT IS SO ORDERED.**

WECHSLER and KENNEDY, JJ., concur.

5 P.3d 1082
2000-NMCA-067

John LORENTZEN and Deana Lorentzen, Plaintiffs–Appellants/Cross–Appellees,

v.

Ronald Dean SMITH, Defendant–Appellee/Cross–Appellant.

No. 20070.

Court of Appeals of New Mexico.

June 28, 2000.

Michael L. Danoff, Michael L. Danoff and Associates, Albuquerque, for Appellants/Cross–Appellees.

W.T. Martin, Jr., Martin & Shanor, Carlsbad, for Appellee/Cross–Appellant.

OPINION

BOSSON, Judge.

{1} This appeal affords us another opportunity to address the New Mexico Subdivision Act (the Subdivision Act), NMSA 1978, §§ 47–6–1 through –29 (1973, as amended through 1995), in light of our recent opinion in *State ex rel. Udall v. Cresswell*, 1998–NMCA–072, 125 N.M. 276, 960 P.2d 818, and particularly the concept of merger as a means to identify subterfuges that are designed to circumvent the Subdivision Act. In that context, we also discuss whether a contractual right of first refusal at fair market value constitutes an unlawful restraint on alienation of property. Holding that the right of first refusal is enforceable in this case and that the doctrine of merger under the Subdivision Act is not a bar to enforcement, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

{2} In 1978, Camille Smith deeded family land located on the Black River in southern Eddy County to Ronald Smith, Dorothy Lorentzen, and Olivia Quist, in equal undivided interests, so that "the homeplace and lands [would] remain in the family and owned by the family." Two years later, in 1980, the parties executed documents to each other so that each of the three grantees had sole ownership of a one-acre tract for the express purpose of building residences. The remainder of the Camille Smith conveyance (hereafter called "the 52–acre tract") remained with the three grantees, Smith, Lorentzen, and Quist, in undivided thirds. A final plat defining the new one-acre lots was duly prepared and recorded. Each of the three deeds for the residential one-acre lots contained an identical right of first refusal at "fair market appraised value" that could be executed by either of the other two grantees in the event its owner elected to sell. Mutual provisions for ingress and egress to each of the lots were also included in the three deeds. For his residence, Ronald Smith was deeded Lot One, which is the subject of the present dispute.

{3} Smith, Lorentzen, and Quist continued to own the 52–acre tract in undivided thirds until Smith filed a partition action in 1995. That lawsuit was eventually settled in part by Lorentzen and Quist deeding their undivided one-third interests to Smith. Smith then became the sole owner of both the 52–acre tract and Lot One. The settlement documents included a right of first refusal, similar to that contained in the deeds to the one-acre lots, that Lorentzen or Quist could exercise in the event Smith decided to sell the 52–acre tract by "match[ing] the bona fide offer of the third party." Once Smith was deeded the additional 52 acres, that land, together with his one-acre Lot One, formed one contiguous piece of land consisting of approximately 53 acres. Lot One was completely surrounded by the 52–acre tract, although Lot One continued to be separately described on the official plat map.

{4} In 1998, a third party offered Smith $165,000 for both Lot One and the surrounding 52–acre tract. Smith notified Lorentzen and Quist of the offer and their opportunity to exercise the rights of first refusal by matching the third-party offer for the entire property. Lorentzen and Quist each protested that their rights of first refusal were separate for Lot One and the 52–acre tract, so that they had a right to purchase either tract, or both, at their discretion. Lorentzen made an offer to purchase just Lot One, and Quist offered to purchase only the 52–acre tract at fair market value. Neither wanted to purchase both parcels. Smith rejected both offers and took the position that the third-party offer had to be matched in its entirety. When Smith threatened to proceed with the sale, Lorentzen filed this action seeking specific performance of his right of first refusal against Lot One only.

{5} Each side filed motions for summary judgment on the basis of undisputed facts. Smith took the position that (1) the rights of first refusal could not be enforced separately so as to split ownership of the property because to do so would violate the New Mexico Subdivision Act, and (2) the rights of first refusal were unenforceable under New Mexi-

co common law as an unreasonable restraint on alienation of property. The district court agreed with Smith's interpretation of the Subdivision Act and granted Smith summary judgment, from which Lortenzen appeals. The court also held that the right of first refusal was not an unreasonable restraint on alienation of property, from which Smith cross-appeals.

DISCUSSION

The Subdivision Act Does Not Prohibit These Conveyances

{6} The district court determined that Smith could not sell Lot One separately from the 52–acre tract "because to do so is a violation of the [Subdivision] Act." The court correctly noted that the Subdivision Act is paramount to and controlling over a contractual right of first refusal. On that basis, the court ruled that Lorentzen and Quist had to purchase the entire 53 acres at the offered price or withdraw their objections. The question before us is whether the Subdivision Act applies to Smith's intended sale. It involves an interpretation of the Subdivision Act, a question of law which we review de novo. *See Cresswell,* 1998–NMCA–072, ¶ 5, 125 N.M. 276, 960 P.2d 818.

{7} The Subdivision Act, as amended effective July 1, 1996, applies to any "subdivision," defined as "the division of a surface area of land, including land within a previously approved subdivision, into two or more parcels for the purpose of sale, lease or other conveyance or for building development, whether immediate or future." Section 47–6–2(J) (emphasis omitted). The definition of subdivision is then made subject to certain enumerated exceptions not pertinent to our discussion. *See* § 47–6–2(J)(1)–(13).

{8} As an initial inquiry, we ask how this proposed transaction could be viewed as a "division . . . into two or more parcels," when Lorentzen and Quist are purchasing separately what has been separate for more than twenty years, namely Lot One and the 52–acre tract? In response, Smith argues, as he argued below, that under the Subdivision Act, Smith's two parcels, upon being deeded to the same owner, effectively became one by a process of "accretion" or "merger." If we accept Smith's argument, then any separate sale of any part of the "merged" 53 acres, whether to Lorentzen, Quist, or anyone else, would indeed constitute a division of land "into two or more parcels," thereby implicating the remedial protections of the Subdivision Act, unless exempted elsewhere in the statute. Smith takes his merger argument from our recent discussion of the Subdivision Act in *Cresswell,* 1998–NMCA–072, ¶¶ 2–3, 26–27, 125 N.M. 276, 960 P.2d 818, and it is to that opinion that we now turn.

{9} In *Cresswell,* we borrowed the concept of merger from the Attorney General's Manual on the Subdivision Act entitled "Subdividing Land in New Mexico," which we regarded as authoritative. *See id.* ¶ 20 n. 2 (describing origin of Manual). Merger is an analytical device used by the attorney general to examine the substance, as well as the form, of efforts by illegal subdividers to circumvent the Subdivision Act and evade their responsibility to provide necessary infrastructure. *See id.* ¶ 27. For example, in *Cresswell* we discussed a hypothetical situation in which an owner of four separate, contiguous parcels could not divide each parcel into four more parcels without complying with the Act. *See id.* For purposes of the Subdivision Act, the owner's four parcels conceptually would be "merged" into one, so that the owner "could convey no more than four parcels, not four times four, without coming within the scope of the Subdivision Act." [1] *Id.* Using merger, the Subdivision

1. *Cresswell* interpreted the Subdivision Act as it existed before the 1996 amendments when it contained a different definition of the pivotal term "subdivision." Previously, the Subdivision Act was not implicated unless five or more parcels of land were sold within a three-year period. Thus, *Cresswell*'s hypothetical focused on whether the owner could divide each of his four parcels into four more and still steer clear of the then-existing definition of subdivision. We observed that the four original parcels would "merge" into one, for Subdivision Act purposes, to limit the owner's exempt conveyances to a total of four, not four for each separate parcel. Today, with the 1996 amendments, an owner triggers the term "subdivision" (unless otherwise exempted in the Subdivision Act) by dividing into just two, not five parcels. Thus, under the current state of the Subdivision Act, the concept of merger may no longer be necessary to prevent multiple lot splits, or it may need to be applied in

Act's enforcer "looks to the totality of the divisions instead of each individual conveyance" to identify and control subterfuge. *Id.*

{10} Preventing subterfuge by unscrupulous developers is the lodestar of the Act, and merger is one of the innovative tools to work toward that goal. However, while common ownership of multiple parcels triggers merger for analytical purposes, not every instance of common ownership ultimately results in merger. Merger is not an end in itself. It is simply a means toward an end, a tool to examine the substance of the transaction for signs of subterfuge, and to determine with "common sense and reason" whether the common owner is creating a subdivision without complying with the Act. For example, the Manual acknowledges that, "[w]hether the land is 'merged' due to a common owner is also dependent upon whether the land is sold under a common promotional plan," which under the Act is itself evidence of the owner being a "subdivider." *See* § 47–6–2(I). Therefore, in considering merger, we must keep our sights set on the ultimate goal: determining whether the common owner is "engaged in an illegal subterfuge designed to circumvent the laws." To put it another way, not every sale of two contiguous lots owned by the same owner to separate buyers should automatically be considered a division of one "merged" tract, thereby implicating the Subdivision Act. Differentiating between the two depends on the myriad facts and circumstances of a given situation.

{11} In applying these principles to the situation before us, we fail to see how the proposed transaction between Smith and Lorentzen would result in the kind of subterfuge referred to in *Cresswell* and the Attorney General's Manual, or how it would otherwise undermine the strong public policy undergirding the Subdivision Act. Smith begins with two separate parcels that were lawfully created under the Subdivision Act as it existed in 1980. The two parcels were still lawful when the 52–acre tract was consolidated in Smith's name in 1996. If Smith sells Lot One to Lorentzen pursuant to Lorentzen's right of first refusal, there will still be only two parcels: Lot One and the remaining 52–acre tract. If Quist exercises her right of first refusal to purchase the 52–acre tract, there will still be only two parcels of land; only the ownership will have changed. But there will be no "division . . . into two or more parcels," Section 47–6–2(J), which is the operative core of the Subdivision Act. Of course, neither Lorentzen nor Quist could undertake any division of the two existing parcels thereafter without complying with the Subdivision Act.

{12} We recognize that the 52–acre tract presently surrounds Lot One, and practically speaking they are one contiguous expanse of land. But Smith did not take the legal steps necessary to consolidate the two into one; the two parcels remain separate on the official plat map. We appreciate that the legal form of the transaction—two parcels of land—is not controlling for purposes of the Subdivision Act analysis. But without any indication of subterfuge, or evidence that in substance the transaction results in a subdivision, intended or not, then the use of merger as anything more than an analytical device would exceed its purpose. *See Cresswell*, 1998–NMCA–072, ¶ 20, 125 N.M. 276, 960 P.2d 818. Certainly the district court made no findings that would imply a subterfuge or other evasive conduct by any of the parties, and we perceive no such evidence in the record. In our view, use of merger to block these conveyances from Smith to Lorentzen and Quist would elevate form over substance in a manner no less arbitrary, and no less offensive to legislative purpose, sound public policy, and common sense, than the developer's attempted use of merger in *Cresswell* to circumvent the Subdivision Act. *See* § 47–6–27.1 (providing a remedy to the purchaser, but not the seller, to avoid transactions that violate the Subdivision Act).

{13} In arriving at our conclusion, we further observe that Smith's Lot One is already a residential lot with infrastructure in place and improvements in use. A mere change in ownership of the same house from Smith to Lorentzen changes nothing of concern to the Subdivision Act. The same is true

a different manner. It may also be implicated in the exemptions. *See* § 47–6–2(J)(13).

for the 52–acre tract, which is not developed. Smith now owns it, and if he wants to divide it, he must follow the Subdivision Act. If Quist buys the 52–acre tract from Smith, Quist steps into Smith's shoes. If Quist wants to divide it, and there is no indication in the record that she does, then she must follow the Subdivision Act. Thus, the contemplated conveyances are consistent with a seminal motive for the Subdivision Act, to ensure "financial accountability from the subdivider ... to fund essential infrastructure." *Cresswell,* 1998–NMCA–072, ¶ 22, 125 N.M. 276, 960 P.2d 818. In this instance, that infrastructure is either already in place, or would become the responsibility of the purchaser if any division takes place.

{14} We also recognize that practical problems relating to Lorentzen's access to Lot One may still arise and may have to be resolved below. Lot One and the 52–acre tract may end up in the hands of two different owners who may be hostile to each other. The district court may have to examine the contractual provisions for ingress and egress to ensure fairness to all parties. But this is no reason not to proceed; it is merely part of the district court's agenda for consideration on remand.

An Enforceable Right of First Refusal

{15} Lorentzen and Quist have separate, contractual rights of first refusal to Lot One and the 52–acre tract in the event Smith decides to sell. Smith challenges the enforceability of these provisions, claiming they constitute unreasonable restraints on alienation of property. He relies exclusively on the case of *Gartley v. Ricketts,* 107 N.M. 451, 760 P.2d 143 (1988).

{16} In *Gartley,* our Supreme Court declared unenforceable a deed restriction designed to "keep the property in the family" that not only gave a right of first refusal, but at a fixed price that was not related to current market value. *Id.* at 455, 760 P.2d at 147 (internal quotation marks omitted). Relying on an extensive discussion in the Restatement of Property, both first and second editions, the Court held the restriction unreasonable. *See Gartley,* 107 N.M. at 453–54, 760 P.2d at 145–46. Noting superficial similarities between *Gartley* and the right of first refusal before us now, Smith urges reversal. We disagree because we believe the district court correctly concluded that, unlike *Gartley,* this right of first refusal does not materially restrict Smith's right of alienation.

{17} The Restatement (Second) of Property: Donative Transfers § 4.4, at 210 (1983) makes clear that a right of first refusal to a designated person "is not a restraint on alienation, as that term is used in this Restatement," as long as "both the price that the designated person must pay, and the time allowed for the exercise of the right of first refusal" are reasonable. The illustrations to Section 4.4, comment a, demonstrate that a right of first refusal is reasonable when it can be exercised by matching a current bona fide offer or a fair market appraisal. This makes good sense. As long as the price is not restrictive, the right of first refusal restricts the seller only minimally, if at all. The seller can alienate his property at the same price he is offered by a third party; he surrenders nothing significant by offering the property first to the designated person to see if the price can be matched. Unless the clause "reduces the likelihood that an opportunity to sell the property subject to the provision will arise should the owner desire to sell, the provision simply provides a possible buyer who is constantly available." Restatement, *supra,* § 4.4 cmt. a, at 210. The Restatement calls such a right of first refusal a "preemptive provision" which is usually enforceable, as opposed to a "forfeiture restraint," as occurred in *Gartley,* which is far more problematic. *See* Restatement, *supra,* §§ 4.2, 4.4.

{18} The right of first refusal in *Gartley* was at a fixed price, not tied to fair market value, and based on the facts and fair inferences in that opinion, it was likely below the then-current, fair market value for the property. Our Supreme Court properly applied the analysis presented in Section 4.2 of the Restatement pertaining to forfeiture restraints, and found the restriction unreasonable. *See* Restatement, *supra,* § 4.4 cmt. d, illustrations 3 and 4, at 211–13. We agree with our Supreme Court's analysis in *Gartley* because a right of first refusal at a price

below fair market value is much more likely to deter the free alienation of property. To be enforceable, such a provision must satisfy all the reasonableness criteria set forth in Section 4.2 and adopted in *Gartley.*

{19} The contractual rights of first refusal before us in this appeal are not forfeiture restraints; they are merely preemptive provisions as described in Section 4.4 of the Restatement. Thus, they are enforceable as long as the price and timing are reasonable. The reasonableness of the price is self-evident: either matching a bona fide offer for the 52–acre tract, or offering fair market appraised value for Lot One. Smith does not make an issue that the price is unfair, nor could he based on this record. Nor does Smith contend that the time allowed Lorentzen and Quist to exercise their rights of first refusal are unreasonable. Accordingly, and in a manner consistent with *Gartley,* with the Restatement, and with the common law, we affirm the district court and hold that these rights of first refusal are reasonable and do not constitute an unlawful restraint on alienation of property.

CONCLUSION

{20} We affirm the district court's conclusion that the rights of first refusal do not constitute an unlawful restraint on alienation of property. We reverse the district court's conclusion that enforcement of these rights of first refusal would violate the New Mexico Subdivision Act. We remand for enforcement of the rights of first refusal and for further proceedings consistent with this opinion.

{21} **IT IS SO ORDERED.**

APODACA and BUSTAMANTE, JJ., concur.

6 P.3d 486
2000-NMSC-021

STATE of New Mexico, Plaintiff–Appellee,

v.

Sylvestre SANCHEZ, Defendant–Appellant.

No. 25,456.

Supreme Court of New Mexico.

June 26, 2000.

[redacted]

[redacted]

[redacted]

Phyllis H. Subin, Chief Public Defender, Lisabeth L. Occhialino, Assistant Appellate Defender, Santa Fe, for Appellant.

Patricia A. Madrid, Attorney General, M. Anne Kelly, Assistant Attorney General, Santa Fe, for Appellee.

OPINION

MINZNER, Chief Justice.

{1} Defendant Sylvestre Sanchez appeals from a judgment and sentence entered following a jury trial at which he was convicted of first degree murder of James Gentry, contrary to NMSA 1978, § 30–2–1(A) (1994), attempted murder of Darrell Wise, contrary to NMSA 1978, § 30–28–1(A) (1963), and kidnapping of Gentry and Wise, contrary to NMSA 1978, § 30–4–1 (1995). We have jurisdiction under Rule 12–102(A)(1) NMRA 2000. On appeal, Defendant raises an issue of first impression under our Rules of Criminal Procedure. He contends the trial court erred in substituting an alternate juror after the jury retired to deliberate. His contention requires us to interpret Rule 5–605 NMRA 2000, which addresses the use of alternate jurors in district court criminal trials. We conclude the trial court erred in substituting an alternate juror in this case and the error is presumptively prejudicial, because Rule 5–605 does not authorize substitution of an alternate juror after jury deliberations have begun (post-submission substitution). We also conclude the State has not overcome the presumption of prejudice the error creates. Defendant also contends on appeal that the State introduced insufficient evidence to support his convictions and that the constitutional protection against double jeopardy precludes convictions for both murder and kidnapping in this case. Neither contention has merit. Finally, Defendant contends that he received ineffective assistance of counsel, that the trial court erred in allowing the State to exercise one of its peremptory challenges, and that the court erroneously instructed the jury on kidnapping. We need not address these claims. We reverse and remand for further proceedings.

I.

{2} Wise, whose street name is "Black," testified at Defendant's trial. Wise and Gentry encountered Defendant at the home of an acquaintance around midnight on February 22, 1996. Defendant asked Wise for a ride and, after consulting Gentry, Wise agreed. The three men departed in Gentry's truck with Wise in the driver's seat, Gentry in the front passenger seat, and Defendant in the rear section on the right side, behind Gentry. Approximately five minutes later, Wise heard a loud gun shot. Wise saw Gentry slumped over in the front passenger seat. Defendant was pointing a gun at Wise. Defendant said to Wise, "[Y]ou're ... dead ... too, Black" and then pulled the trigger. The gun jammed. After Defendant succeeded in unjamming the gun, a bullet ricocheted throughout the truck, hit Wise in the mouth, and broke two of his lower teeth. Defendant shot Wise four more times before Wise was able to escape from the truck. As Wise fled, he saw Defendant enter a vehicle operated by Bill Davis. Wise returned to the truck and drove until he "ran into the police;" Gentry was dead.

{3} Other evidence corroborated Wise's testimony. A police officer testified that Defendant confessed to shooting Gentry and Wise with a nine-millimeter gun. Gentry was killed by a gunshot wound. A bullet struck the inside panel of the door on the driver's side. One nine-millimeter casing and two .380 casings were found in the truck, and the same gun fired all three casings. A nine-millimeter gun firing .380 bullets is unreliable and "tend[s] to malfunction." Bernadette Hall Davis testified that Defendant told her he was having nightmares. When he opened his eyes the person he killed would be standing in front of him. Defendant also said that one night he went to purchase

drugs with Black and another man. Defendant was sitting in the back seat of the truck when he shot the other man. Defendant then tried to shoot Black, but he got out of the truck. Defendant chased him.

{4} At the conclusion of Defendant's trial, the alternate jurors stayed in the courtroom when the jury retired to deliberate. The court advised the alternate jurors they could go home, but they were not officially released from jury duty and should not discuss the case over the weekend. The court also said that in the event a juror became unable to serve the court might call an alternate to serve. The record indicates the jury began deliberating prior to noon on Friday, recessed for lunch, continued deliberating until approximately 5:00 p.m., and then adjourned for the weekend. On the following Monday, the court was notified that a juror was quite ill. The court permitted the juror to go home and presented counsel with two options: the first alternate juror would replace the juror who was ill; or the trial would be postponed. In the event that the parties chose the first option, the court stated it would "bring in the first alternate, . . . reinstruct him and the jury together . . . [and tell them] they need to begin deliberations from the top all over again." Defendant stated he did not oppose the first option, and the State concurred. The first alternate juror, however, was "on the road" and a substitute driver was not available until the following day. Defendant asked the court to order the juror to appear. The court concluded that his attendance would be a significant inconvenience to him, his employer, and his customers. Over Defendant's repeated objections, the court substituted the second alternate.

{5} The court instructed the jury to "start your deliberations from the beginning," to "bring [the alternate juror] up to speed as to where you are," and to "start things over again as if you were beginning deliberations right now, this morning, today." The court stated that "[t]he instructions I've given you previously, of course, still apply." Next, the court addressed the second alternate and stated, "[Y]ou are a full-fledged member of the jury, as opposed to an alternate. And, as I say, deliberations will be starting all over again with you." The reconstituted jury had retired for deliberations by 11:30 a.m. By 3:30 p.m. the jury had found Defendant guilty of first degree murder, attempted murder, and kidnapping.

II.

{6} At common law,

> adhering to the principle of absolute jury integrity, [the courts] made no provision for substitution of a juror who, after the jury was selected, became unable or disqualified to perform his or her duties. In the event that a member of the jury became incapacitated, the entire jury was discharged. The remaining eligible jurors were immediately recalled along with an additional juror, and they were again empaneled to hear the entire trial.

Standards for Crim. Just.: Discovery and Trial by Jury § 15–2.9 commentary at 174–75 (1993) [hereinafter *Standards for Crim. Just.*] (standards completed July 1995). Rule 5–605 modifies common law practice.

{7} Rule 5–605(B) provides:

> In any criminal case, the district court may direct that not more than six jurors, in addition to the regular jury, be called and impanelled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to a like examination and challenges for cause, take the same oath, and have the same functions, powers, facilities and privileges as the regular jurors.

Rule 5–605(C) states that "[e]xcept in felony cases in which the death penalty may be imposed an alternate juror who does not replace a regular juror shall be discharged before the jury retires to consider its verdict." The text of Rule 5–605(C) supports an inference that the trial court may not substitute an alternate juror after deliberations begin, because that juror would have been released from jury duty. Rule 5–605(B) supports the same inference by providing for

substitution prior to submission. Based on the text of Rule 5–605, Defendant contends on appeal the trial court erred in substituting the second alternate juror. He does not question the trial court's decision to excuse the juror who was ill.

{8} The State contends that Defendant failed to preserve this issue for review. *See* Rule 12–216(A) NMRA 2000. Defendant consented to the first alternate and never relied on Rule 5–605 in objecting to the second alternate. Defendant contends he is entitled to raise this issue under Rule 12–216(B), which authorizes an appellate court to consider certain questions, notwithstanding a defendant's failure to invoke a ruling at trial. In this instance, we must determine the nature of the issue before the Court prior to determining whether Defendant sufficiently brought it to the trial court's attention. For this reason, we depart from our usual procedure and address whether the error was preserved after we have analyzed the nature of the error.

{9} Rule 5–605 is similar to rules in other jurisdictions. Such rules generally protect a defendant's right to an impartial jury by specifically protecting the deliberative process during which a jury reaches its verdict. Post-submission substitution threatens that process. When a juror becomes disabled during deliberations, however, the trial court has limited options. Granting a mistrial may seem an unnecessary waste of scarce resources. Granting a continuance may be impractical. In interpreting a federal rule of criminal procedure similar to Rule 5–605, *see* Fed.R.Crim.P. 24(c) (prior to 1999 amendment), federal courts have recognized competing values and attempted to reconcile them. Recent revisions to that rule, Fed. R.Crim.P. 24(c)(3) (effective December 1, 1999) (authorizing retention of alternate jurors during deliberations and postsubmission substitution), apparently reflect a considered judgment that under some circumstances post-submission substitution is not incompatible with a defendant's right to an impartial jury. *But see Standards for Crim. Just., supra,* at 176 ("Although the goals of efficiency and expediency are served by a system which permits substitution of alternates even after deliberations have begun and although it has been held constitutionally permissible, this approach was rejected in this standard. . . ."). State courts appear to have been more willing than federal courts to view post-submission substitution as reversible error or error that must be proven harmless. *See Commonwealth v. Saunders,* 454 Pa.Super. 561, 686 A.2d 25, 28 (1996); *People v. Burnette,* 775 P.2d 583, 590 & n. 10 (Colo. 1989) (en banc) (interpreting Colorado procedural rule prior to amendment, noting a statute contained similar language); *see generally Hayes v. State,* 355 Md. 615, 735 A.2d 1109, 1111–1120 (1999) (describing the history of the Maryland equivalent of Rule 5–605, examining federal cases dealing with post-submission substitution, describing the state courts as less unanimous in their view, and listing several approaches).

A.

{10} A federal statute originally governed the use of alternate jurors during federal criminal trials. *See* Act of June 29, 1932, ch. 309, 47 Stat. 380, 381 (repealed 1948). The statute permitted substitution of alternate jurors prior to submission. *See id.* "The object of the statute was to prevent mistrials in criminal trials of long duration, where a juror dies or becomes so ill as to be unable to continue the performance of his duties." *American Tobacco Co. v. United States,* 147 F.2d 93, 117 (6th Cir.1944), *aff'd* 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946). Subsequently, the United States Supreme Court Advisory Committee on Rules of Criminal Procedure recommended Federal Rule of Criminal Procedure 24(c), *see* Lester B. Orfield, *Trial Jurors in Federal Criminal Cases,* 29 F.R.D. 43, 44–54 (1962) (describing the history of Rule 24), which continued the statutory practice of allowing alternate jurors to be substituted before submission. 2 Charles A. Wright, *Federal Practice and Procedure* § 388, at 384–85 (2d ed. 1982). Under the proposed rule the trial court had discretion to substitute an alternate juror. *See id.* at 386–87. Any substitution had to occur prior to the discharge of the alternate jurors and before the jury retired to deliberate. *See id.* at 390–91. The Advisory Committee also recommended Federal Rule of

Criminal Procedure 23(b). *See* Lester B. Orfield, *Trial By Jury in Federal Criminal Procedure,* 1962 Duke L.J. 29, 66–73 (describing the history of Rule 23). This proposed rule permitted a jury of less than twelve if the parties stipulated in writing at any time before the verdict and the court approved. *See id.* at 66. Both rules, adopted in 1946, "alleviate[d] the effect of the common law rule" of declaring a mistrial, forming a new jury, and beginning trial de novo. David Paul Nicoli, Comment, *Federal Rules of Criminal Procedure 23(b) and 24(c): A Proposal to Reduce Mistrials Due to Incapacitated Jurors,* 31 Am.U.L.Rev. 651, 651 (1982).

{11} In 1981, the Judicial Conference Advisory Committee on the Federal Rules of Criminal Procedure proposed significant amendments to Rules 23 and 24. *See* Fed. R.Crim.P. 23, 24, preliminary draft of proposed amendments, *reprinted in* 91 F.R.D. 289, 337–45 (1982). "The Advisory Committee has been giving consideration to the serious problem which arises when a juror is lost after deliberations have commenced following a lengthy trial." 91 F.R.D. at 337. The proposed amendment to Rule 24(c) would have permitted the retention of alternate jurors and authorized post-submission substitution. *See* 2 Wright, *supra,* § 388, at 393 n. 25. The proposed amendment to Rule 23(b) authorized "the trial judge to accept a verdict delivered by eleven jurors if the court finds it necessary to excuse a juror for just cause after the jury has retired to deliberate." Nicoli, *supra,* at 665. The Advisory Committee eventually concluded that the amendment to Rule 23(b) was preferable and abandoned the proposed amendment to Rule 24(c); Rule 23(b) was amended in 1983. *See* 2 Wright, *supra,* § 388, at 120 (Supp.1999).

{12} The actions of the Advisory Committee reinforced the view that the federal rules of criminal procedure did not authorize post-submission substitution. *See United States v. Quiroz-Cortez,* 960 F.2d 418, 420 (5th Cir. 1992) (noting the proper procedure after the 1983 amendment to Rule 23(b) was "to proceed with an eleven-person jury"). Nevertheless, in exceptional cases, federal courts affirmed convictions following post-submission substitution. The circumstances surrounding the substitution were dispositive. *See generally United States v. Hillard,* 701 F.2d 1052, 1056–61 (2d Cir.1983) (discussing post-submission substitution prior to 1983). "[P]ending a change in [Rule 24(c)], juror substitution should be permitted only in complex cases where thorough precautions are taken to ensure that the defendants are not prejudiced." *Hillard,* 701 F.2d at 1061.

{13} In *United States v. Kopituk,* 690 F.2d 1289, 1310 (11th Cir.1982), for example, the trial court had discharged the alternate jurors after four days of deliberations in which the alternates were sequestered. Upon discharge, the court "instructed the alternate jurors not to discuss the case with anyone" and "to avoid all newspaper and television coverage of the trial 'in the slim possibility that we might still call you.'" *Id.* at 1306. Six days later a juror was found mentally ill and unfit to serve. *See id.* at 1306–07. Over objection by defense counsel, the court substituted the first alternate juror. *See id.* at 1307. Prior to substitution, the court extensively examined the alternate juror as to her continued fitness to serve and also examined the remaining eleven jurors regarding their ability to begin deliberating anew. *See id.* The court reinstructed the reconstituted jury in full and emphasized that the jury should disregard all previous deliberations and begin deliberations anew. The Eleventh Circuit affirmed the defendant's convictions, concluding post-submission juror substitution did not prejudice the defendant because "adequate safeguards, such as instructing the reconstituted jury that they must begin deliberating anew, [had] been taken." *Id.* at 1309. "[T]he substituted juror procedure upheld herein is a narrowly limited exception to the rule, applicable only in extraordinary situations and, even then, only when extraordinary precautions are taken, as was done [in this case] to ensure that the defendants are not prejudiced." *Id.* at 1311.

{14} Since 1983, federal courts have continued to express the view that substitution of an alternate juror during mid-deliberations violates Rule 24(c) but that violation of the rule is not reversible error unless it prejudices the defendant. *See, e.g., United*

States v. Guevara, 823 F.2d 446, 448 (11th Cir.1987) (noting that facts fell within a narrow exception and that defendants demanded that the court substitute the alternate juror); *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.1985) (noting lack of prejudice and that defendants had consented to the alternate's service). In analyzing post-submission substitution, however, federal courts have been cognizant of a defendant's right to a trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

> The Supreme Court has not specifically ruled on the constitutionality of substituting an alternate juror after jury deliberations have begun. Most of the federal courts that have addressed the issue, however, have held that when circumstances require, substitution of an alternate juror in place of a regular juror after deliberations have begun does not violate the Constitution, so long as the judge instructs the reconstituted jury to begin its deliberations anew and the defendant is not prejudiced by the substitution.

Claudio v. Snyder, 68 F.3d 1573, 1575 (3rd Cir.1995); *see also Miller v. Stagner*, 757 F.2d 988, 995 (9th Cir.1985) (holding California rule permitting post-submission substitution preserved the federal constitutional right to a jury trial). They have recognized that post-submission substitution creates a "danger that the other jurors will have 'already formulated positions or viewpoints or opinions' in the absence of the alternate juror and then pressure the newcomer into passively ratifying this predetermined verdict, thus denying the defendant the right to consideration of the case by twelve jurors." *Quiroz-Cortez*, 960 F.2d at 420 (quoting *United States v. Phillips*, 664 F.2d 971, 995–96 (5th Cir.1981)).

{15} In 1998, the Advisory Committee again proposed amendments to Rule 24(c) that permitted the retention of alternate jurors and authorized post-submission substitution. *See Hayes*, 735 A.2d at 1114; *see also* Fed.R.Crim.P. 24(c) advisory committee note of 1999. "Although Rule 23 makes provision for returning a verdict with 11 jurors, the Committee believed that the judge should have the discretion in a particular case to retain the alternates, a practice not provided for under the current rule." Fed.R.Crim.P. 24(c) advisory committee report, *reproduced in* Court Rules, 119 S.Ct.Rep. 612, 615 (interim ed.1999). The proposed revisions to Rule 24(c) deleted references to pre-submission substitution and to discharging alternate jurors when deliberations have begun. *See* Fed.R.Crim.Proc. 24(c)(1). Rule 24(c)(3) now provides:

> When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a regular juror during deliberations. If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

These amendments became effective December 1, 1999. As a result of these amendments, our Rule 5–605 no longer tracks the federal rule.

B.

{16} Like federal courts, state "courts have generally refused to imply from [provisions allowing alternate jurors to take the place of original jurors who become incapacitated] the authority to make a postsubmission substitution." David B. Sweet, Annotation, *Propriety, Under State Statute or Court Rule, of Substituting State Trial Juror with Alternate After Case Has Been Submitted to Jury*, 88 A.L.R.4th 711, 720 (1991). Some courts have declined to infer from a statute authorizing pre-submission substitution authority for post-submission substitution and refused to review for prejudice. *See Woods v. Commonwealth*, 287 Ky. 312, 152 S.W.2d 997, 998–99 (1941); *State v. Dushame*, 136 N.H. 309, 616 A.2d 469, 470–72 (1992); *State v. Lehman*, 108 Wis.2d 291, 321 N.W.2d 212, 222–23 (1982) A few state courts have held post-submission substitution reversible error as a matter of state constitutional law. In *People v. Ryan*, 19 N.Y.2d 100, 278 N.Y.S.2d 199, 224 N.E.2d 710, 713 (1966), the New York Court of Appeals held that the state

constitution "as it has been construed, prohibits the substitution of an alternate juror—in effect a 13th juror—after the jury has begun its deliberation." For this reason, the New York Court of Appeals reversed convictions based on jury verdicts in which an alternate had been substituted after submission, notwithstanding statutory authorization for post-submission substitution. *See id., see also State v. Bobo,* 814 S.W.2d 353, 356 (Tenn.1991) (holding post-submission substitution violated not only the Tennessee rule of criminal procedure but also the Tennessee state constitutional guarantee of the right to trial by jury).

{17} "If a post-submission substitution has been found to be erroneous, [most] courts next focus on the extent to which the error is prejudicial." *Saunders,* 686 A.2d at 28. Some states might be characterized as following the federal approach. *See generally Hayes,* 735 A.2d at 1120 (characterizing that approach as "an expansive harmless error or presumptive non-prejudice doctrine"). Other courts have suggested that the prosecution must show the trial court took precautions to avoid prejudice. *See Saunders,* 686 A.2d at 27–30; *Burnette,* 775 P.2d at 587–88; *see also Hayes,* 735 A.2d at 1121 (holding in part that post-submission substitution required reversal, absent record evidence the alternate juror had remained qualified to serve); *cf. Plate v. State,* 925 P.2d 1057, 1059–62 (Alaska Ct.App.1996) (holding that post-submission substitution required reversal while acknowledging that under other circumstances deviation from the Alaska rule of criminal procedure might not be reversible error).

{18} In *Burnette,* the Colorado Supreme Court concluded the recall of a discharged alternate juror and post-submission substitution "raise[d] a presumption of prejudice to the defendant's right to a fair trial." 775 P.2d at 588.

> Where an alternate juror is inserted into a deliberative process in which some jurors may have formed opinions regarding the defendant's guilt or innocence, there is a real danger that the new juror will not have a realistic opportunity to express his [or her] views and to persuade others. Moreover, the new juror will not have been part of the dynamics of the prior deliberations, including the interplay of influences among and between jurors, that advanced the other jurors along their paths to a decision. Nor will the new juror have had the benefit of the unavailable juror's views. Finally, a lone juror who cannot in good conscience vote for conviction might be under great pressure to feign illness in order to place the burden of decision on an alternate.

Id. (citations omitted). In *Saunders,* the Pennsylvania Superior Court also determined the proper analysis was to presume post-submission substitution prejudiced a defendant. *See* 686 A.2d at 28. "[T]his presumption may only be rebutted by evidence which establishes that sufficient protective measures were taken to insure the integrity of the jury function." *Id.*

> [The] solution begins with the trial court, prior to impaneling the alternate juror, extensively questioning the alternate and remaining jurors. The trial court must insure that [the] alternate has not been exposed to any improper outside influences and that the remaining regular jurors are able to begin their deliberations anew.

Id. at 29. The court must inform the reconstituted jury "that the discharge of the original juror 'was entirely personal and had nothing to do with the discharged juror's views on the case or the juror's relationship with fellow jurors.'" *Id.* (quoting Sweet, *supra,* § 21a, at 793). The trial court also must direct the reconstituted jury to begin deliberations anew. In the absence of these or similar procedural safeguards, the Pennsylvania Superior Court concluded in *Saunders* that the state had not maintained "the integrity of the jury function," and "the resulting verdict [could not] be accepted." *Id.* at 30. Similarly, the Colorado Supreme Court affirmed its Court of Appeals' decision reversing the defendant's convictions in *Burnette. Burnette,* 775 P.2d at 591 ("[T]he presumption of prejudice was not overcome ....").

{19} In *People v. Page,* 88 N.Y.2d 1, 643 N.Y.S.2d 1, 665 N.E.2d 1041, 1045–46 (1996), the New York Court of Appeals held that post-submission substitution is reversible er-

ror even if the defendant orally consents to the substitution. "[T]he statutory procedure for consenting to substitution of a deliberating juror mirrors the requirements contained in the [New York] Constitution for waiving a jury trial—written consent signed personally by the defendant in open court and in the presence of the court." *Id.* 643 N.Y.S.2d 1, 665 N.E.2d at 1045. The court also noted that "[t]he right to trial by jury guaranteed by the Federal Constitution, however, does not encompass the common-law right to a trial by 12 jurors. Thus, improper replacement of an alternate for a deliberating juror in violation of [federal] [R]ule 24(c) does not implicate a constitutional right." *Id.* 643 N.Y.S.2d 1, 665 N.E.2d at 1046 (citation omitted). *Cf. Bobo,* 814 S.W.2d at 359 (indicating that a defendant can waive the state constitutional right to a trial by jury and consent to post-submission substitution, provided that the waiver is a "voluntary relinquishment" of the right).

{20} Some states have authorized post-submission substitution by statute or rule. *See, e.g.,* Cal.Penal Code § 1089 (West 1985); N.J.R.Ct. § 1:8–2(d). Changes in procedural rules may be the most likely future development in state court practice. *See Hayes,* 735 A.2d at 1119 n. 2 (listing eleven states as having rules or statutes comparable to the recently amended federal rule). Changes in statutes and rules, however, may not be dispositive. The Colorado Supreme Court recently held that the procedure itself created a presumption of prejudice; the court reaffirmed *Burnette. See Carrillo v. People,* 974 P.2d 478, 490–91 (Colo.1999) (en banc). In a state where the procedure implicates a state constitutional provision, such as New York or Tennessee, express authorization for post-submission substitution by statute or rule may not ensure that the procedure is compatible with a defendant's right to an impartial jury under the state constitution.

C.

{21} Some changes in our rule may be constitutionally permissible. *Cf. Page,* 643 N.Y.S.2d 1, 665 N.E.2d at 1045 (describing a statutory requirement for defendant's written consent as one that "mirrors" the state constitutional requirement). *See generally People v. Collins,* 17 Cal.3d 687, 131 Cal. Rptr. 782, 552 P.2d 742, 745–47 (1976) (holding California statute allowing substitution of alternate juror after submission proper under federal and state constitutions when construed as requiring deliberations to begin anew). Changes in the rule may be desirable. *See* Fed.R.Crim.P. 24(c)(1), (3). In the absence of a rule authorizing post-submission substitution, however, we interpret our rule as not authorizing post-submission substitution. *Cf. Hayes,* 735 A.2d at 1120. "We are not at liberty, in a decisional context, to change the language of [our rule] ... If there is to be a change in the rule or the policy underlying the rule, it must come through the normal rule-making process." *Id.*

{22} We understand the federal cases to have construed the federal rule to avoid any question under the federal constitution that a defendant has been denied his or her right to a fair and impartial jury by post-submission substitution. *See Claudio,* 68 F.3d at 1575. A constitutional violation appears to have been avoided under the federal rule by requiring the defendant to show prejudice as a result of the substitution rather than presuming prejudice. A defendant shows prejudice by proving an absence of procedural safeguards. Prejudice, however, is not shown when the facts surrounding the replacement of an alternate juror persuade appellate courts that the handling of the reconstituted jury was adequate to ensure a fair and impartial jury. *See id.* at 1577. State cases reflect different state constitutional provisions and statutes but, in general, also appear to construe rules comparable to Rule 5–605 to protect a defendant's right to a fair and impartial jury and to avoid any question under the relevant state constitution that a defendant has been denied that right. *See Page,* 643 N.Y.S.2d 1, 665 N.E.2d at 1046; *Bobo,* 814 S.W.2d at 356. State courts might be viewed as requiring proof similar to the federal courts to justify post-submission substitution but characterizing the requirement as an obligation to overcome prejudice to avoid reversal, *see Burnette,* 775 P.2d at 588, while federal courts might be viewed as recognizing exceptional circumstances that

authorize a departure from the text of the federal rule. *See Hillard*, 701 F.2d at 1061. Under both approaches, post-submission substitution is an exception to a rule of criminal procedure, which protects constitutional rights. For this reason, both approaches require adequate procedural safeguards; absent such precautions at the trial court level, the text of the rule supports reversal.

{23} We also interpret our rule to avoid any question that it offends either the state or federal constitution. We therefore interpret our rule to require reversal unless in the circumstances of a particular case the trial court has taken sufficient measures to protect the defendant's right to proper jury deliberations. We hold that post-submission substitution is error under Rule 5–605; it is error that creates a presumption of prejudice; the state must show under the circumstances of a particular case that the trial court took adequate steps to ensure the integrity of the jury process.

{24} We believe our construction of Rule 5–605 is consistent with our case law as well as good policy. In *State v. McCarter*, 93 N.M. 708, 711, 604 P.2d 1242, 1245 (1980), we held that when communications between the trial court and the jury "occur in the absence of the accused, a presumption of prejudice arises, and the State must demonstrate that the communication did not affect the verdict." The Court of Appeals extended this holding to apply to problems created by the unauthorized presence of an alternate juror in the jury room, *see State v. Coulter*, 98 N.M. 768, 770, 652 P.2d 1219, 1221 (Ct.App. 1982), as well as a trial court's decision to excuse a seated juror because of an unauthorized contact, *see State v. Pettigrew*, 116 N.M. 135, 140–41, 860 P.2d 777, 782–83 (Ct. App.1993). We believe applying a presumption of prejudice analysis to problems arising out of improper post-submission substitution is a logical and appropriate extension of this line of cases. We believe adopting a presumption of prejudice enlarges the trial court's options without compromising a defendant's federal constitutional right to a trial by jury. This approach balances a defendant's right to trial by jury and the need to conserve scarce resources.

{25} In this case, the presumption of prejudice created by post-submission substitution remains, even after we consider the measures the trial court took to protect the deliberative process. The trial court instructed the reconstituted jury to "bring [the alternate juror] up to speed" and also to "start things over again ." This instruction gave the jury conflicting messages: (1) the original jurors should educate the alternate on each of the juror's positions and then continue deliberating; (2) the jury should begin all deliberations anew. The lapse of time between the first and second periods of deliberation might have facilitated the jury's ability to begin deliberations anew. Nevertheless, the second alternate had not been retained during deliberations and he was not re-examined on his ability to serve as a juror. The court did not question the reconstituted jury on its ability to deliberate anew; nor did the court re-instruct the jury on the elements of the crimes charged. We conclude the trial court's measures were not sufficient to protect Defendant's right to trial by jury, particularly the right to a verdict properly reached.

D.

{26} We now return to the State's contention that Defendant failed to bring the issue he has argued on appeal to the trial court's attention, because he consented to the first alternate and never relied on Rule 5–605 in objecting to the second alternate. We agree with Defendant that the facts of this case raise a question concerning his constitutional rights to an impartial jury. *See* U .S. Const. amends VI, XIV; N.M. Const. art. II, §§ 12, 14 (as amended 1994). "There is no question that the right to trial by a fair and impartial jury is a fundamental right." *See State v. Escamilla*, 107 N.M. 510, 515, 760 P.2d 1276, 1281 (1988). "[M]ost rights, however fundamental, may be waived or lost by the accused," *id.*, but "[t]he State has the burden of establishing that a defendant waived his [or her] constitutional rights and every reasonable presumption against waiver is indulged." *State v. Salazar*, 1997–NMSC–044, ¶ 62, 123 N.M. 778, 945 P.2d 996. Nevertheless, we do require that issues be raised at trial in order to be raised on appeal. *See*

generally State v. Ross, 1996–NMSC–031, 122 N.M. 15, 22–23, 919 P.2d 1080, 1087–88 (discussing preservation of constitutional right of confrontation).

{27} Waiver is not an issue in this case. Defendant never made a "voluntary, knowing and intelligent waiver," *State v. Gilbert*, 98 N.M. 530, 534, 650 P.2d 814, 818 (1982), of the procedural safeguards which ensure his right to a fair and impartial jury. In fact, until this opinion is final, the quantity and quality of the procedural safeguards required by Rule 5–605 will remain a matter of first impression. We cannot characterize Defendant's willingness to accept the first alternate juror as a waiver of his right to a fair and impartial jury while the protection provided by that rule remained unclear.

{28} The State's reliance on Defendant's failure to rely on Rule 5–605 also is misplaced. The trial court appears to have understood the need for procedural safeguards and the requirement that the jury be instructed to deliberate anew. In fact, when describing the two options on how the court could proceed after the original juror fell ill, the court advised the parties that if the parties agreed to substitute the first alternate it would reinstruct the reconstituted jury on the law and also advise the jury to start deliberations all over again. Until Rule 5–605 is amended, the text of that rule would have provided no guidance on what procedural safeguards would have been appropriate under these circumstances. Defendant's objection to the second alternate was sufficient to preserve the appellate claim that in substituting that alternate, the trial court failed to protect his right to a fair and impartial jury.

{29} It is true that Defendant might have alerted the trial court to a deficiency in the procedural safeguards taken. *Cf. Hinger v. Parker & Parsley Petroleum Co.*, 120 N.M. 430, 442, 902 P.2d 1033, 1045 (Ct.App. 1995) (rejecting legal objection to jury instructions raised for the first time on appeal). We need not decide whether, after this opinion is final, a more specific objection than Defendant made in this case would be required to preserve error in the adequacy of particular safeguards taken prior to post-submission substitution. "The rules that govern the preservation of error for appellate review are not an end in themselves, rather they are instruments for doing justice." *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 541, 893 P.2d 428, 437 (1995). In this case, Defendant's objection to the second alternate juror alerted the trial court to the necessity for procedural safeguards that would protect Defendant's right to a fair and impartial jury.

III.

{30} Defendant argues the evidence presented at trial was insufficient to establish he participated in the murder of Gentry, the attempted murder of Wise, and the kidnapping of Gentry and Wise. Defendant contends no physical evidence linked him to the shootings. He notes Wise was a drug dealer who had been high on crack and had a motive to lie to avoid trouble with the Vaughn/Davis family. He also notes his own statements to Hall and to the police served the purpose of protecting the Vaughn/Davis family. Defendant asserts these statements conflicted. He also argues there was no evidence supporting an inference of deception necessary for his kidnapping convictions. We review this claim of error because the Double Jeopardy Clause, U.S. Const. art. V, would bar retrial if Defendant's convictions are not supported by sufficient evidence. *See State v. Post*, 109 N.M. 177, 181, 783 P.2d 487, 491 (Ct.App.1989).

{31} We review the evidence to determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). Under this standard, "[w]e view the evidence in the light most favorable to supporting the verdict and resolve all conflicts and indulge all inferences in favor of upholding the verdict." *State v. Hernandez*, 115 N.M. 6, 26, 846 P.2d 312, 332 (1993). We conclude the State introduced sufficient evidence to carry its burden of proof.

{32} Although the Defendant introduced conflicting evidence, such evidence "does not provide a basis for reversal because the jury is free to reject Defendant's version of the facts." *State v. Rojo,* 1999–NMSC–001, ¶ 19, 126 N.M. 438, 971 P.2d 829. Further, the fact finder resolves conflicts and determines weight and credibility. *See State v. Roybal,* 115 N.M. 27, 30, 846 P.2d 333, 336 (Ct.App.1992). We are not persuaded that the jury could not have believed Wise and Hall or that their testimony was inherently improbable. *See State v. Till,* 78 N.M. 255, 256, 430 P.2d 752, 753 (1967) (discussing inherent improbability). Additionally, we are not persuaded by Defendant's specific claim that there was no evidence supporting an inference of deception, a necessary element of his kidnapping convictions. "[K]idnapping can occur when an association begins voluntarily but where the defendant's real purpose is something other than the reason the victim voluntarily associate[s] with the defendant." *State v. Laguna,* 1999–NMCA–152, ¶ 13, 128 N.M. 345, 992 P.2d 896 (holding deceit was established when the defendant offered the victim a ride while concealing the intent to explore sexual involvement), *cert. denied,* No. 26,017, 128 N.M. 149, 990 P.2d 823 (1999). In this case, there was evidence from which the jury was entitled to find that Defendant entered the car with Wise and Gentry under the false premise of needing a ride and that he actually intended to murder Wise. This evidence supported the element of deception.

IV.

{33} Defendant argues on appeal that the legislature did not intend multiple punishment for unitary conduct that results in kidnapping and murder. Defendant's argument arises from his constitutional rights to be free from double jeopardy. A double jeopardy analysis begins with determining whether the conduct supporting the convictions is unitary. *See Swafford v. State,* 112 N.M. 3, 13, 810 P.2d 1223, 1233 (1991). "When the conduct is unitary and the legislature does not expressly authorize multiple punishments, we apply a strict elements test." *State v. Varela,* 1999–NMSC–045, ¶ 40, 128 N.M. 454, 993 P.2d 1280. In this case, we need not determine whether the conduct was unitary because, when applying the strict elements test, there is no double jeopardy violation. Under the strict elements test, kidnapping is not subsumed by murder. Kidnapping has the element of restraining by deception, which is not an element of first degree murder and first degree murder has the element of killing, which is not an element of kidnapping. When the elements of the statutes are not subsumed within the other, there is a presumption the statutes punish distinct offenses. *See Swafford,* 112 N.M. at 14, 810 P.2d at 1234. Other indicia of legislative intent may rebut the presumption. *See id.* In this case, Defendant did not direct the Court's attention to other indicia of legislative intent. Upon the record and the arguments before us, we conclude there was no double jeopardy violation.

V.

{34} The State presented sufficient evidence to support each and every element of the crimes of first degree murder, attempted murder, and kidnapping. Defendant's convictions do not violate his right to be free from double jeopardy. The trial court erred in recalling a discharged alternate juror without employing sufficient procedural safeguards. For these reasons, Defendant's convictions for first degree murder, attempted murder, and kidnapping are reversed, and we remand for further proceedings consistent with this opinion.

{35} **IT IS SO ORDERED.**

BACA, FRANCHINI, SERNA and MAES, JJ., concur.

6 P.3d 498

2000-NMCA-062

STATE of New Mexico, Plaintiff–Appellee,

v.

Margo PATSCHECK, Defendant–Appellant,

and

State of New Mexico, Plaintiff–Appellee,

v.

Richard Patscheck, Defendant–Appellant.

No. 20,003, 20,030.

Court of Appeals of New Mexico.

June 7, 2000.

Certiorari Denied, Nos. 26,414, 26,418, July 24, 2000.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Lisabeth L. Occhialino, Assistant Appellate Defender, Santa Fe, for Appellant Margo Patscheck.

Liane E. Kerr, Albuquerque, for Appellant Richard Patscheck.

OPINION

WECHSLER, Judge.

{1} Defendants Margo and Richard Patscheck, co-defendants at trial and mother and stepfather of the two victims, appeal their convictions. We have consolidated their appeals because they raise many of the same issues. Only certain issues relating to suppression of evidence meet the criteria for publication under Rule 12–405 NMRA 2000. Therefore, only those issues will be published. The remainder of the opinion, including a listing of the issues and the complete disposition of the case, is contained in a memorandum opinion that will not be published.

{2} The Patschecks were convicted of multiple counts of sexual offenses against Margo's children. The counts arose from Richard's desire, and Margo's acquiescence in it, to engage in various types of sexual relations with the victims on an ongoing basis, with all people participating, over the course of six or seven years from the time the children were preteens.

Suppression of Evidence—Search Warrants

{3} Margo and Richard argue that the trial judge erred when he denied their motions to suppress evidence seized under the authority of search warrants. They argue that the evidence should have been suppressed because the search warrants failed to identify the items to be seized with sufficient particularity and that the searches exceeded the scope of the warrants.

{4} The affidavit in support of the October 14, 1997 search warrant requests permission to search for videotapes and still photographs of the victim and of other juveniles, for pornographic movies, and for sexual devices located in a box on the floor of the master bedroom closet. The return and inventory based on this warrant refers to a "box containing sexual toys[,] . . . [a] photo album[,] . . . binders [with] pornographic magazines[,] . . . [a] polaroid camera, [and] 120 videotapes." The affidavit in support of the October 16, 1997 search warrant reports the successful seizure of items set forth in the October 14, 1997 search warrant and requests permission—based on a subsequent interview with Margo's daughter—to seize pornographic video cassette tapes, a computer located in the office with discs and software, a ledger guide to the video cassettes, and eight-millimeter cassettes. The return and inventory based on this warrant refers to multiple computer disks, eight-millimeter reels, an eight-millimeter projector, multiple slides, a Cumulus computer with monitor, a Packard Bell computer with monitor, and an Emerson computer.

{5} The affidavit in support of the October 20, 1997 search warrant sets forth that the affiant reviewed the material previously seized from the residence, and—based on further interviews with Margo's son and daughter—requests permission to seize pornographic video cassette tapes, a computer with discs and software, clothing used during

sexual activities, and pornographic magazines and photographs. The return and inventory based on this warrant lists the following items: "multiple video cassettes, computer disks, [pornographic] magazines, computers, [and a] scanner."

Particularity of Search Warrants

{6} Margo and Richard argue that the search warrants were impermissibly vague in their description of items the officers were authorized to seize. They argue that the warrants did not explain what constituted "pornographic movies" or "pornographic magazines," did not list the specific titles of particular pornographic movies, or did not set forth specific descriptions of "sexual devices."

{7} The degree of specificity required in a search warrant, however, varies depending upon the circumstances and types of items seized. *See State v. Elam,* 108 N.M. 268, 270, 771 P.2d 597, 599 (Ct.App.1989). Under the circumstances of this case, reference to the general nature of these items was sufficient. There is no indication that the officers were unable to identify applicable evidence based on the descriptions in the search warrants. The search warrants' reference to the general nature of the foregoing evidence adequately conveyed to the officers the type of materials sought. *See, e.g., State v. Jones,* 107 N.M. 503, 505, 760 P.2d 796, 798 (Ct.App.1988) (recognizing case law that holds that the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as possible, considering the circumstances and the nature of activity under investigation); *see also United States v. Kimbrough,* 69 F.3d 723, 727 (5th Cir.1995) ("[G]eneric language is permissible if it particularizes the *types* of items to be seized.").

{8} Margo and Richard also rely upon federal cases interpreting the particularity requirement. Richard argues that the warrants failed to limit the discretion of the executing officers to search for sexual devices and films. Richard correctly notes that "[t]he Fourth Amendment prohibits issuance of general warrants allowing officials to burrow through a person's possessions looking for any evidence of a crime." *Id.* at 727. However, the discretion left to officers executing a search warrant is properly limited when the language of a warrant "particularly describe[s] the place to be searched and the person or things to be seized." *Id.* The test for particularity is "whether an executing officer reading the description in the warrant would reasonably know what items are to be seized." *Id.*

{9} The warrants in this case, when viewed under these standards, are sufficiently particular because they convey to an executing officer the particular items to be seized, such as pornographic movies and videotapes, photographs of Margo's daughter or other juveniles, and specific brands and models of computers. Furthermore, the warrants specified the exact location of the box in which the sexual devices were located. We are satisfied that the warrants were sufficiently particular to direct an executing officer to the items to be seized, despite the generic language used to describe the types of film, photographs, and magazines. *See id.*

{10} The additional federal cases upon which Margo and Richard rely do not lead to a contrary result. *See United States v.. Van Damme,* 48 F.3d 461, 465–67 (9th Cir.1995) (suppressing evidence not in plain view because the attachment describing the items to be seized was not attached to the warrant at the time of the search); *United States v. George,* 975 F.2d 72, 75–76 (2d Cir.1992) (holding portion of warrant invalid because language authorizing officers to search for " 'any other evidence relating to the commission of a crime,' " failed to limit the executing officer's discretion); *United States v. Dozier,* 844 F.2d 701, 707–08 (9th Cir.1988) (holding portion of warrant invalid when warrant sought broad categories of personal papers and the executing officers could not have in good faith relied upon the language of the warrant); *United States v. Guarino,* 729 F.2d 864, 867 (1st Cir.1984) (holding warrant invalid in obscenity prosecution when language of warrant directed executing officers to seize anything that the officers thought was obscene); *In re Grand Jury Proceed-*

ings, 716 F.2d 493, 497–99 (8th Cir.1983) (holding warrant invalid when it authorized a search for all records for seven-year period without specifying transactions, files, or categories of documents). The language used in the warrants in this case is not as broad as that used in the warrants in the above cases. Therefore, the cited cases do not affect our conclusion that the warrants in this case are sufficiently particular.

First Amendment

{11} Margo and Richard both raise arguments that the search warrants did not meet the standards required to seize material presumptively protected by the First Amendment. *See Lo–Ji Sales, Inc. v. New York,* 442 U.S. 319, 326–28, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979). A search warrant infringes upon First Amendment rights if it acts as a prior restraint of protected material. *See Maryland v. Macon,* 472 U.S. 463, 470, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985). However, in the present case, no First Amendment rights were implicated. The warrants were issued not because of the ideas contained in the material, but instead to corroborate Margo's daughter's testimony. *See United States v. Layne,* 43 F.3d 127, 133 (5th Cir.1995) (stating that First Amendment was not implicated in possession of child pornography case where the "warrant was issued to seize evidence corroborating a victim's testimony.... [and] was not issued because of the ideas contained in the material"). Accordingly, any heightened level of particularity implicated by First Amendment cases is not at issue in this case.

Scope of Search Warrant

{12} As a corollary to their particularity arguments, Margo and Richard argue that the trial judge should have suppressed all the evidence seized under the authority of the search warrants because the executing officers exceeded the scope of the warrants. Margo and Richard rely on cases in which the Tenth Circuit held that blanket suppression of all seized evidence was a remedy when executing officers exceeded the scope of search warrants. *See United States v. Foster,* 100 F.3d 846, 848–53 (10th Cir.1996) (holding blanket suppression was appropriate where warrant authorized search for marijuana and four guns and officers seized thirty-five items over seven hours); *United States v. Medlin,* 842 F.2d 1194, 1195–1200 (10th Cir.1988) (holding blanket suppression was appropriate where the warrant sought firearms and the search reaped a total of 667 items not identified in the warrant); *United States v. Rettig,* 589 F.2d 418, 420–23 (9th Cir.1978) (holding blanket suppression was appropriate where warrant authorized search for marijuana related items and officials used the warrant to search for evidence of a cocaine conspiracy). We have not recognized blanket suppression as a remedy for violations of warrants in New Mexico, nor need we on the facts of this case. Nonetheless, we address Defendant's arguments in full.

{13} The Tenth Circuit has recognized that blanket suppression is not always the appropriate remedy when officers exceed the scope of a search warrant. *See United States v. Le,* 173 F.3d 1258, 1269 (10th Cir. 1999). In *Le,* the Tenth Circuit noted that generally, when officers exceed the scope of a search warrant, only the evidence that was seized as a result of a search outside the scope of a warrant should be suppressed. *See id.* The Court stated that blanket suppression applies only when executing officers flagrantly disregard the terms of a search warrant. *See id.* at 1269–70. In the absence of flagrant disregard, "[t]he remedy for any improper seizure ... would be suppression of the items improperly seized." *Id.* at 1271.

{14} Based upon *Le,* even if we were to apply the Tenth Circuit's blanket suppression analysis, blanket suppression of all the evidence seized under the authority of the search warrants would not be appropriate in this case. The executing officers did not flagrantly disregard the terms of the search warrants because they only seized items of the type listed in the search warrants. *See id.* at 1269–70.

{15} In addition, the trial judge in this case analyzed the seized evidence in the manner approved by the Tenth Circuit in *Le.* At the pre-trial suppression hearing, the trial judge considered each piece of evidence to ensure that it was seized under the authority

of an applicable warrant. When the judge had problems with seized items not specified in the search warrant, the judge found the items to be inadmissible. For instance, the trial judge excluded the computer that was seized from the kitchen during the second search, but was not authorized by the second warrant (the warrant referred only to a computer in the office). Similarly, the trial judge excluded sexual devices found in Margo's daughter's room that were not found in the box in the master bedroom closet, as described in the first search warrant. The trial judge also excluded seized clothing items that were not listed in the appropriate return. In addition, although the officers searched a vehicle without an authorizing warrant, no evidence was seized from the vehicle. As a result, even if we were to accept the Tenth Circuit's application of its blanket suppression remedy, Margo and Richard are not entitled to a blanket suppression of all the evidence seized under the authority of the search warrants. *See id.* at 1269–71.

{16} Margo's reliance on *State v. Sansom,* 112 N.M. 679, 683–84, 818 P.2d 880, 884–85 (Ct.App.1991) for the proposition that blanket suppression is a proper remedy is also misplaced. In *Sansom,* we held that it was error for the court to admit an improperly seized rifle. We held that the affidavit supporting the search warrant was insufficient to demonstrate probable cause and that the admission of the rifle prejudiced the defendant. *See id.* at 681–84, 818 P.2d at 882–85. In this case, however, only the particularity and scope of the search warrants are at issue, and we have concluded that the trial judge did not admit any improperly seized evidence. *Sansom* does not suggest that blanket suppression is a remedy when the particularity or scope of search warrants is at issue. *Sansom,* therefore, does not apply.

{17} Margo and Richard further rely on *United States v. Carey,* 172 F.3d 1268, 1270–71 (10th Cir.1999). In *Carey,* the Tenth Circuit suppressed evidence of child pornography seized under a warrant authorizing officers to search for evidence of the sale and possession of cocaine. *See id.* In this case, however, the search at all times remained focused on the seizure of items related to alleged acts of sexual misconduct. At all times the warrants sought only evidence of sexual crimes and the warrants were not disregarded to seize evidence of other, unrelated crimes. The holding in *Carey* does not apply to this case.

{18} We note lastly that Margo's assertion that the officers did not have authority for printing computer documents that contained her name and billing information is without merit. First, there is no indication that this particular argument was raised below. *See State v. Lucero,* 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct.App.1986) (stating that issues raised on appeal must have been specifically raised below). Nevertheless, the officer's authority is implicit in the search warrants' authorization to seize the computers and related documents. This case is unlike *Carey,* upon which Margo relies, because officers in that case exceeded the scope of the warrant by searching for computer files unrelated to the subject matter of the warrant. *See Carey,* 172 F.3d at 1271–76. The trial judge in this case ensured that the admitted evidence was seized under the authority of the warrant that specifically authorized such seizure. We conclude that the executing officers did not exceed the scope of the warrant when they accessed Margo's computer files.

{19} We affirm the trial court's decisions on Defendants' motions to suppress.

{20} **IT IS SO ORDERED.**

PICKARD, C.J. and ARMIJO, J., concur.

6 P.3d 503

2000-NMCA-061

STATE of New Mexico, Plaintiff–Appellee,

v.

Fernando Lewis SANCHEZ, Defendant–Appellant.

No. 20,954.

Court of Appeals of New Mexico.

June 14, 2000.

Certiorari Denied, No. 26,413, July 24, 2000.

Patricia A. Madrid, Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Chris Bulman, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

APODACA, Judge.

{1} Defendant appeals from the trial court's judgment and sentence after Defendant's conviction of forgery. He challenges the trial court's extension of time within which to commence trial under Rule 5–604 NMRA 2000. Our calendar notice proposed to affirm. Defendant has filed a memorandum in opposition to our proposed summary affirmance. Not persuaded by his arguments, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Defendant was indicted for forgery on December 11, 1997. He was arrested a few days later, and he eventually posted bond. He was not arraigned until July 27, 1998. A new bond was set. Defendant posted that bond and was released on September 8, 1998.

{3} On December 29, 1998, the trial judge assigned to Defendant's case recused herself. (*Id.*) A newly appointed judge was assigned to the case. On January 26, 1999, one day before the six-month deadline expired under Rule 5–604, the State filed a

petition for a three-month extension under Rule 5–604(C). Defendant opposed the extension. On January 27, the trial court granted the State's petition. Defendant pled guilty on March 31, reserving the right to appeal the extension of time within which to commence trial. *See State v. Hodge,* 118 N.M. 410, 416, 882 P.2d 1, 7 (1994) (holding that defendant may enter conditional plea of guilty or nolo contendre with approval of the court and consent of the prosecution, preserving an issue for appeal).

II. DISCUSSION

{4} Rule 5–604 provides that trial shall be commenced no later than six months from the date of arraignment or other events not relevant here. Rule 5–604(B)(1). The trial court may extend this time for good cause shown, but the aggregate of all such extensions shall not exceed three months. Rule 5–604(C).

A. Jurisdiction

{5} We first consider whether we have jurisdiction to decide Defendant's appeal. Formerly, Rule 5–604 limited authority to grant extensions of time to the Supreme Court or a judge designated by the Supreme Court. *See State v. Remaly,* 120 N.M. 492, 494, 903 P.2d 234, 236 (1995) (quoting pertinent portion of Rule 5–604). Consequently, this Court had no jurisdiction over extensions of time under the previous version of the rule. *See id.* (holding that Supreme Court had exclusive jurisdiction over petitions for extensions of time under Rule 5–604).

{6} In 1998, Paragraph (C) was added to Rule 5–604, giving trial courts authority to grant extensions not exceeding three months. *See* annotations to Rule–5–604. Citing no authority but the rule itself, Defendant requested in his docketing statement that this case be transferred to the Supreme Court under Rule 12–102(A)(5) NMRA 2000 (appeals to be taken to Supreme Court where jurisdiction is reserved to Supreme Court by New Mexico Constitution or by Supreme Court order or rule). We deny Defendant's request and hold that, although we cannot review a decision of our Supreme Court extending the time for trial under Rule 5–604(D), *see Remaly,* 120 N.M. at 494, 903 P.2d at 236, we can review the trial court's decision under Rule 5–604(C). *See* Rule 12–201(B) NMRA 2000 (appeals not enumerated in Rule 12–201(A) shall be taken to Court of Appeals); *see also State v. Garcia,* 110 N.M. 419, 422, 796 P.2d 1115, 1118 (Ct.App.1990) (holding that Court of Appeals may review defendant's claim that her speedy trial rights were violated when defendant did not rely on delay caused by Supreme Court's extension of time under Rule 5–604). We therefore address the merits of Defendant's claim.

B. Trial Court's Extension of Time

{7} There is no dispute concerning the facts of Defendant's claim. We review the trial court's application of Rule 5–604 to those facts de novo, as a matter of law. *See State v. Wilson,* 1998–NMCA–084, ¶ 8, 125 N.M. 390, 962 P.2d 636 (applying de novo review to trial court's application of six-month rule).

{8} For the reasons that follow, we hold that the trial court did not err in granting the State's petition. We first consider the seven-month delay in arraigning Defendant, in violation of Rule 5–604(A) (providing that defendant shall be arraigned no later than fifteen days after date of indictment, information, or arrest, whichever is later). Defendant does not allege that the State intentionally delayed the arraignment in order to circumvent the six-month rule. We therefore apply Rule 5–604 literally and hold that the six-month period under Rule 5–604 began running from the date of Defendant's arraignment. *See State v. Coburn,* 120 N.M. 214, 217, 900 P.2d 963, 966 (Ct.App.1995) ("Because Defendant does not allege that the State intentionally sought to have the arraignment delayed, we see no reason to set aside the literal application of the rule.").

{9} The judge assigned to Defendant's case was newly appointed to the bench. She stated from the bench that Defendant's case "fell between the cracks" in her office. Defendant insists that the judge's explanation is irrelevant, pointing out that the burden is on the State to timely prose-

cute his case. Even though we agree that the State has a burden to prosecute Defendant's case in a timely fashion, we cannot completely absolve the trial court of responsibility. *See* Rule LR3–107(A) NMRA 2000 ("The judge of each division shall determine . . . general itinerary and schedule ."). We hold that, because the judge was newly appointed and failed to schedule the trial for that reason, good cause existed under Rule 5–604(C) to support the trial court's grant of a three-month extension. *See State v. Portillo,* 110 N.M. 135, 137, 793 P.2d 265, 267 (1990) (holding that Rule 5–604 is to "be interpreted with logic and common sense"); *cf. State v. Aaron,* 102 N.M. 187, 192, 692 P.2d 1336, 1341 (Ct.App.1984) (holding continuance under Interstate Agreement on Detainers was for good cause when judge assigned to case was appointed to Supreme Court and other judges in district had full dockets).

{10} In arguing that the trial court's actions cannot relieve the State from the consequences of Rule 5–604, Defendant relies on civil cases in which the respective defendants sought to be relieved from default judgments, blaming their inaction on their insurance company or their attorney. *See Adams v. Para–Chem Southern, Inc.,* 1998–NMCA–161, ¶ 9, 126 N.M. 189, 967 P.2d 864 (holding defendant not entitled to relief from default judgment because it was bound by inexcusable failure of its insurer to defend complaint and its own inexcusable failure to inquire as to status of litigation); *Padilla v. Estate of Griego,* 113 N.M. 660, 665, 830 P.2d 1348, 1353 (Ct.App.1992) (holding defendants bound by the inexcusable neglect of their attorney). We believe defendant's reliance is misplaced. Our holding in this appeal is that it was excusable for a new judge to fail to schedule the beginning of Defendant's trial within one month of being assigned to Defendant's case. We reject Defendant's implicit proposition that a trial court is the agent of the prosecutor in the manner that an insurance company is the agent for its insured or an attorney is the agent for a client.

III. CONCLUSION

{11} We hold that the trial court did not err in granting the maximum extension of time permitted under present Rule 5–604. We therefore affirm.

{12} **IT IS SO ORDERED.**

WECHSLER and ELLINGTON, JJ., concur.

6 P.3d 1026
2000-NMCA-060

STATE of New Mexico,
Plaintiff–Appellee,

v.

Ladell HAYNES, Defendant–Appellant.

No. 19,659.

Court of Appeals of New Mexico.

March 15, 2000.

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Patricia A. Madrid, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Laurel A. Knowles, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

SUTIN, Judge.

{1} Defendant Ladell Haynes appeals his conviction of distribution of cocaine. On appeal, he argues: (1) that double jeopardy barred his retrial after a mistrial caused by the prosecutor and that trial counsel was ineffective in failing to move for dismissal; (2) that the booking photo of him admitted into evidence to bolster the undercover agent's identification of him as the person who sold the agent cocaine was irrelevant and highly prejudicial and its admission constituted reversible error; (3) that the trial court erred in refusing to give his tendered instruction on eyewitness identification; and (4) that his conviction should be reversed because he was not given notice that he was a target of a grand jury investigation. We hold that the trial court erred in admitting the booking photo into evidence and that, under the circumstances of this case, the error is not harmless. We consider the other issues because they would either afford Defendant greater relief or they will arise on retrial. We affirm on those issues.

FACTS AND PROCEDURAL BACKGROUND

{2} Defendant was accused of selling cocaine to undercover agent Rudy Castro in Alamogordo on August 7, 1996. He was indicted in October 1996, and his case was joined with a case against Richard "Rick" Jackson. Defendant filed a motion to dismiss the indictment based on the fact that he had not been given notice that he was a target of a grand jury investigation. The State responded that target notices were not sent when the matters before the grand jury grew out of undercover investigations. In addition, the State argued that Defendant had failed to show that he was prejudiced by the lack of a target notice. The trial court held an evidentiary hearing and denied the motion.

{3} The case against Defendant and Jackson went to trial on March 24, 1997. During the opening statement, the prosecutor indicated that the evidence would show that Jackson was involved in a second cocaine transaction that took place on August 9, 1996, two days later than the transaction charged in the indictment. At the close of the prosecutor's statement, counsel for Jackson moved for a mistrial, pointing out that the indictment only charged Jackson with the August 7th transaction. Counsel for Defendant joined in the motion. The trial court granted the motion for mistrial. Later, Jackson moved to sever the two cases. The subsequent trials were only of the charges against Defendant.

{4} The case against Defendant went to trial for the second time on September 22, 1997. However, the jury deadlocked and the trial court declared a mistrial based on manifest necessity. Defendant's third trial took place in late February 1998. We will discuss the substance of the testimony in more detail in connection with the issue concerning the admission of the booking photo. At the present, it is enough to note that the main issue was whether Defendant was in fact the person who sold Castro cocaine on August 7, 1996. The only witnesses who testified to the alleged transaction were Castro, who identified Defendant as the person who sold him the cocaine, and Defendant, who testified

that he did not sell Castro cocaine and that there were other black men at the Quik–Stop that day who could be mistaken for him. The jury convicted Defendant and this appeal followed.

I. Double Jeopardy Did Not Bar Defendant's Subsequent Retrial

{5} Defendant argues that his retrial following the first declaration of a mistrial violates principles prohibiting double jeopardy and that his counsel was constitutionally ineffective because he failed to raise the issue below. In *State v. Breit,* 1996–NMSC–067, 122 N.M. 655, 930 P.2d 792, our Supreme Court discussed the circumstances under which prosecutorial misconduct that results in a mistrial will bar a subsequent trial.

> Retrial is barred under Article II, Section 15, of the New Mexico Constitution, when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.

Id., ¶ 32.

{6} We will assume without analysis or decision the presence of the first two *Breit* factors. The third factor is determinative: whether the prosecutor intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal. When the prosecutor does not intend to provoke a mistrial, "the misconduct necessary to bar a retrial must be extraordinary." *State v. Foster,* 1998–NMCA–163, ¶ 21, 126 N.M. 177, 967 P.2d 852; *see also Breit,* 122 N.M. 655, 930 P.2d 792, 1996–NMSC–067, ¶ 33 (suggesting that double jeopardy will rarely bar retrial when the misconduct is an isolated instance). In *Breit,* the misconduct was pervasive and unrelenting, demonstrating that the prosecutor willfully disregarded the possibility of a mistrial. This Court has indicated that this factor is not met when there is no indication that the misconduct was part of a "plan or scheme to inject unfair prejudice into the trial." *State v. Lucero,* 1999–NMCA–102, ¶ 28, 127 N.M. 672, 986 P.2d 468. Moreover, this Court has held double jeopardy will not bar retrial when the prosecutor's misconduct occurs early in the trial and there is nothing in the record indicating that the prosecution would benefit from a further delay in the matter. *State v. Pacheco,* 1998–NMCA–164, ¶ 14, 126 N.M. 278, 968 P.2d 789.

{7} Defendant argues that the prosecutor's conduct was in willful disregard of the possibility of a mistrial. However, there is nothing in the record that suggests that the prosecutor was attempting to delay the trial in order to gain an advantage. On the contrary, the prosecutor's opening statement indicated that the informant, Mark Jenkins, was going to testify and would identify Defendant as the person who sold Castro the cocaine. For reasons not explained in the record, Jenkins did not testify at the trial that resulted in Defendant's conviction. Thus, the record suggests that the prosecution may actually have been disadvantaged by the delay caused by the misconduct. Moreover, the prosecutor contended that her actions were appropriate because evidence concerning Jackson's involvement in the second transaction was before the grand jury. While this does not make the conduct any less wrongful, it does suggest the possibility that the prosecutor thought that the indictment included this transaction, suggesting that the prosecutor's actions were mistaken or negligent rather than an attempt to inject unfair prejudice into the trial. In short, on this record we think the evidence in the record is open to interpretation and does not compel the conclusion that the prosecutor intended to provoke a mistrial or acted in willful disregard of the possibility of a mistrial.

{8} Defendant also argues that his trial counsel was constitutionally ineffective because counsel failed to file a motion to dismiss arguing that the prosecutor's misconduct raised the bar of double jeopardy against a retrial. In considering this issue, we examine "(1) whether the record supports the motion and (2) whether 'a reasonably competent attorney could have decided that [the] motion . . . was unwarranted.'" *State*

v. Martinez, 1996–NMCA–109, ¶ 33, 122 N.M. 476, 927 P.2d 31, (quoting *State v. Stenz,* 109 N.M. 536, 538, 787 P.2d 455, 457 (Ct.App.1990)). However, having determined that the misconduct was not of the character that would bar retrial, we also determine that a reasonably competent attorney could have decided that the motion was unwarranted. Accordingly, we hold trial counsel was not ineffective for failing to file such a motion.

II. The Trial Court Erred in Admitting the Booking Photo–The Error is Not Harmless

{9} Castro testified that he was working undercover at the time of the transaction. He had been driving around Alamogordo in a pickup truck with the informant Jenkins, looking for Rick Jackson. Jenkins, who was driving, spotted Jackson in the parking lot of the Quik–Stop and pulled in there. Jackson and Defendant were two of five black men in the parking lot at the time. Castro and Jackson went to a pay phone, where Jackson placed a call to his (Jackson's) brother, Max. Castro talked to Max on the phone. Castro and Jackson then walked back to the truck.

{10} Castro and Jenkins got in the truck and were about to pull out of the parking lot when, according to Castro, one of the men came up to the truck and offered to sell Castro a half a gram of cocaine. The seller got in the truck with Castro and Jenkins. While Jenkins drove around the parking lot, the seller handed Castro a plastic bag with a white powder in it. Castro inspected the plastic bag and handed the seller $50. Jenkins then stopped the truck and the seller got out. Castro asked the seller his name and the seller replied "Dale." Castro and Jenkins then left the parking lot. From the time they pulled into the parking lot until the time they left was about 10 or 15 minutes. The transaction occurred at about 5:35 p.m.

{11} Castro and Jenkins took the white powder to Agent Humphries. Castro told Humphries that he had purchased the cocaine from a fellow by the name of Dale who hung around with Rick and Max Jackson. About September 19, Castro was driving around Alamogordo with Agent Artiaga and saw "Dale." Castro pointed out "Dale." Artiaga said "that's Ladell Haynes."

{12} On September 21, Agent Caldwell showed Castro a photo. During trial, Castro identified that photo as a photo of Defendant. Defendant objected and a bench conference was held. The microphones in the courtroom did not pick up the bench conference. However, the parties stipulated that during the bench conference defense counsel objected on the grounds that the photo was irrelevant and that it was more prejudicial than probative because it was a booking photo. The judge overruled the objection and the photo was admitted and shown to the jury.

{13} We have examined the photo that was admitted into evidence. There are no particular markings on the photo. However, the photo is actually two photos, side by side. The first photo shows Defendant facing the camera. The second photo shows Defendant in profile. Behind Defendant are lines marked off to show the height of the person being photographed. We think this is unmistakably a booking photo or, more colloquially, a mugshot. *See Barnes v. United States,* 124 U.S.App.D.C. 318, 365 F.2d 509, 510–11 (1966) ("The double-shot picture, with front and profile shots alongside each other, is so familiar, from 'wanted' posters in the post office, motion pictures and television, that the inference that the person involved has a criminal record, or has at least been in trouble with the police, is natural, perhaps automatic."). The State has not argued otherwise.

{14} Defendant acknowledges that a witness may testify about a prior out-of-court identification of a defendant and that such testimony is not hearsay if the declarant testifies at trial and is subject to cross-examination on the out-of-court identification. *See* Rule 11–801(D)(1)(c) NMRA 2000. Defendant also acknowledges that if an ordinary photo had been used for identification, it could have been introduced. The problem in this case stems from the fact that the photo is obviously a booking photo and therefore indicates that Defendant had previously been in trouble with the law. Defendant contends that under the circumstances of this case, the trial court erred in admitting the booking

photo because it was more prejudicial than probative. He further argues that the error was not harmless. We agree on both points.

{15} Defendant relies on *State v. Gutierrez*, 93 N.M. 232, 599 P.2d 385 (Ct.App.1979). In *Gutierrez*, this Court held that it was error for the trial court to admit mugshots and mugshot albums that a witness used to make an out-of-court identification of the defendant. We noted that there were two types of mugshots—mugshots that were taken on the day the defendant was arrested for the crime on which he is being tried and mugshots that were taken at some previous time and indicate previous trouble with the law. *Gutierrez*, 93 N.M. at 234, 599 P.2d at 387. *Gutierrez* involved a mugshot that was from a previous arrest. Ultimately the *Gutierrez* court held that the error was harmless in large part because the gas station attendant who had been robbed had served defendant on a number of occasions in the past and had recognized defendant immediately during the robbery. *Id.* at 235, 599 P.2d at 388. However, we condemned the use of the term "mugshot" and the introduction of the mugshots from which identification was made. *Id.* at 236, 599 P.2d 385, 599 P.2d at 389. We particularly noted that we would "no longer tolerate prosecutorial references to 'mugshots' or 'mugbooks,' or the introduction of 'mugshots' in a criminal case under the circumstances brought to our attention here." *Id.* Recently, in *State v. Ashley*, 1997-NMSC-049, ¶ 12, 124 N.M. 1, 946 P.2d 205, our Supreme Court quoted with approval our statements in *Gutierrez* condemning the use of mugshots and other indirect means of bringing before the jury the fact that the defendant has a criminal past.

{16} The State argues that New Mexico cases support the admission of the photo. In support of this, the State relies on *State v. Candelaria*, 97 N.M. 64, 636 P.2d 883 (Ct. App.1981); *State v. Johnston*, 98 N.M. 92, 645 P.2d 448 (Ct.App.1982); *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct.App. 1978); and *State v. Mordecai*, 83 N.M. 208, 490 P.2d 466 (Ct.App.1971). However, *Johnston*, *Gallegos*, and *Mordecai* are distinguishable because they involve photos taken on the date the defendant was arrested on the charges on which he was being tried. In other words, the photos in those cases did not indicate that the defendant had a prior record or prior involvement with the police.

{17} The State argues, however, that in *Candelaria* this Court distinguished *Gutierrez* as a case that did not involve the defense of misidentification. The State views *Candelaria* as holding that when misidentification is an issue, the mugshot used to identify the defendant becomes relevant. We do not think *Candelaria* goes so far. In that case, the victim had been shown two photo arrays. *Candelaria*, 97 N.M. at 66, 636 P.2d at 885. The first one had a picture of defendant's brother in it, but not the defendant. The victim identified the brother as the perpetrator. The second array had a picture of defendant but not his brother. The victim then identified defendant. At trial, Defendant argued misidentification based on the original identification of his brother by the victim. We held that "[w]hen, as here, there is evidence that the victim positively identified both defendant and defendant's brother on the basis of photographs, it was proper for the jury to know exactly what the victim viewed before making an identification. In this situation, both arrays were admissible without alteration . . . ." *Id.* at 67, 636 P.2d at 886.

{18} Accordingly, *Candelaria* is factually distinct and does not apply to this case. Castro never identified anyone else as the man who sold him cocaine and did not pick Defendant's picture out of a photo array. Furthermore, the case before us is not one in which the significant issue is that of misidentification, as it was in *Candelaria*. Moreover, in *Candelaria*, it was the defendant that raised and pursued the misidentification issue.

{19} With these cases in mind, we turn our attention to the question of whether the probative value of the booking photo outweighed its prejudicial effect. *See* Rule 11-403 NMRA 2000. Both parties agree that the standard of review of this issue is abuse of discretion. *See State v. Woodward*, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995). An abuse of discretion occurs when the trial court's ruling is clearly untenable. *Id.*

{20} We recognize that ordinary photos are considered relevant even if they merely corroborate or illustrate the testimony of a witness. *See, e.g., State v. Pettigrew,* 116 N.M. 135, 139, 860 P.2d 777, 781 (Ct.App. 1993); *State v. Baca,* 86 N.M. 144, 520 P.2d 872 (Ct.App.1974). However, when balancing the probative value of evidence against its prejudicial effect, the trial court must consider the availability of other ways to prove the matter. *See State v. Fuson,* 91 N.M. 366, 368, 574 P.2d 290, 292 (Ct.App. 1978). In this case, Castro had identified Defendant in court. He had testified to a prior out-of-court identification of the perpetrator as Defendant while in the company of Artiaga about six or seven weeks after the transaction. He testified that two days after that he was shown a photo by Caldwell and identified the person in the photo as the perpetrator. There was no question that the photo was of Defendant. Later in the trial, Caldwell corroborated the identification and testified that the photo he showed to Castro was a photo of Defendant. Viewed in this context, the photo itself, while relevant, had relatively little probative value. However, its prejudicial effect was relatively strong because it indicated to the jury that Defendant previously had some sort of trouble with the law. Under these circumstances, we hold that the trial court erred in admitting the booking photo of Defendant.

{21} We note this Court's recent opinion in *State v. Rackley,* 2000–NMCA–027, 128 N.M. 761, 998 P.2d 1212,. In *Rackley,* mugshots of the defendant were admitted in evidence because they "provided critical circumstantial evidence linking Defendant to the hold up by showing that Defendant's appearance was consistent with the appearance of the unidentified person seen running near the scene of the crime." *Id.* at ¶ 16. For this reason, and because the defendant stipulated to the fact of a prior felony conviction, we determined that the defendant had "not demonstrated that the trial court's weighing of the probative value of the mugshots against any prejudice to Defendant amounted to an abuse of discretion." *Id.* at ¶ 20. *Rackley* provides us no reason to decide the present case any differently than we do.

{22} The State argues that the introduction of the photo was harmless error because "it is difficult to conclude the booking photo, alone, was instrumental in determining Defendant's guilt." However, the State's argument misconstrues the standard. The erroneous admission of evidence in a criminal case is "prejudicial and not harmless if there is a reasonable possibility that the evidence ... might have contributed to the conviction." *State v. Torres,* 1999–NMSC–010, ¶ 52, 127 N.M. 20, 976 P.2d 20. As we pointed out previously, the only evidence specifically identifying Defendant as the seller of the cocaine was the testimony of Castro. There was no physical evidence that linked Defendant to the transaction. In essence, this case came down to a swearing match between Castro and Defendant. Moreover, we think it important to point out that Defendant took the stand and testified in his own defense. The prosecution did not bring out any prior convictions, suggesting that there were none. Under these circumstances, we think that there was a reasonable possibility that the erroneous admission of a photo that indicates some type of criminal past might have contributed to the conviction.

III. The Court Did Not Err in Refusing to Give Defendant's Tendered Jury Instruction

{23} We address this issue because it will probably arise on retrial. Defendant contends the trial court erred in refusing to give an instruction regarding identification of a defendant, known as a *Telfaire* instruction, which is a model instruction that was adopted by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Telfaire,* 469 F.2d 552, 558 (D.C.Cir.1972). Our Supreme Court has specifically held that a trial court does not err in refusing a jury instruction concerning identification. *See State v. Ortega,* 112 N.M. 554, 575, 817 P.2d 1196, 1217 (1991). Moreover, in *State v. Gallegos,* 115 N.M. 458, 460, 853 P.2d 160, 162 (Ct.App.1993), this Court specifically held that a trial court does not err by refusing to give a *Telfaire* instruction. We have also specifically recognized that the substance of such identification-related instructions is covered by the uniform jury

instructions on witness credibility and reasonable doubt. *See State v. Mazurek,* 88 N.M. 56, 58, 537 P.2d 51, 53 (Ct.App.1975). The court, therefore, did not err in refusing to give this proposed instruction.

IV. The Court Did Not Err in Denying Defendant's Motion to Dismiss for Lack of Target Notice

{24} Defendant moved to dismiss the indictment because the State failed to send him a target notice, informing him that he was the target of a grand jury investigation. The parties stipulated that no target notice had been sent. They also stipulated that if Defendant had received a target notice, he would have testified that he had never met and did not know Castro, that he had no conversation with Castro at the Quik–Stop that day, and that he did not transact a drug sale with him there. After an evidentiary hearing at which an agent testified why notices were not sent during undercover operations, the trial court denied the motion.

{25} On appeal, Defendant contends that he had a statutory right to receive a target notice under NMSA 1978, Section 31–6–11(B) (1981), and that prejudice is presumed when notice is not given. We need not address the merits because Defendant must show, and has not shown, that he was prejudiced by the lack of a target notice. *See State v. Gutierrez,* 119 N.M. 658, 659, 894 P.2d 1014, 1015 (Ct.App.1995) (holding that a defendant is required to show prejudice in order to obtain dismissal of an indictment). In this context, in order to show prejudice, "[t]he defendant must demonstrate that his missing testimony would have changed the vote of the grand jury on the issue of probable cause." *State v. Dominguez,* 115 N.M. 445, 456, 853 P.2d 147, 158 (Ct.App.1993) (citing *State v. Penner,* 100 N.M. 377, 379, 671 P.2d 38, 40 (Ct.App.1983)). The fact that Defendant did not testify before the grand jury does not, by itself, establish prejudice. *Penner,* 100 N.M. at 379, 671 P.2d at 40. Moreover, given the fact that one jury deadlocked and even more so that a second jury convicted Defendant, we cannot say that Defendant's testimony at the grand jury stage would have changed the vote of the grand jury.

CONCLUSION

{26} The prosecutor's misconduct at the first trial was not so egregious as to raise the bar of double jeopardy to a retrial. The trial court did not err in denying Defendant's motion to dismiss the indictment because he did not receive a target notice, nor did it err in refusing to give Defendant's requested instruction on eyewitness identification testimony. However, under the circumstances of this case, the admission of a mugshot of Defendant was reversible error. Thus, we reverse Defendant's conviction and remand this matter to the trial court. Nothing in this opinion should be construed as indicating this Court's opinion on the appropriateness of another trial in this case.

{27} **IT IS SO ORDERED.**

ALARID and ARMIJO, JJ., concur.

6 P.3d 1032

2000-NMCA-064

STATE of New Mexico, Plaintiff–Appellee,

v.

Anthony TODISCO, Defendant–Appellant.

No. 20,507.

Court of Appeals of New Mexico.

May 30, 2000.

Certiorari Granted, No. 26,397, July 31, 2000.

Patricia A. Madrid, Attorney General, M. Victoria Wilson, Assistant Attorney General, Santa Fe, for Appellee.

John D. Cline, Eric J. Knapp, Freedman, Boyd, Daniels, Hollander, Goldberg & Cline, P.A., Albuquerque, for Appellant.

OPINION

BOSSON, Judge.

{1} Anthony Todisco (Defendant) appeals the Amended Judgment, Partially Suspended Sentence and Commitment Upon Remand entered by the district court after this Court's remand for re-analysis of NMSA 1978, Section 32A–2–20(B) and (C) (1995, prior to 1996 amendment) and a determination of whether Defendant is amenable to treatment and rehabilitation as a child in available facilities. On appeal, Defendant contends that the district court's delay in conducting an amenability hearing on remand violated (1) his right to a speedy sentencing under the Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution, (2) his due process rights, and (3) the six-month rule. Defendant also contends that the district court abused its discretion in determining on remand that he is not amenable to treatment and rehabilitation as a child in available facilities. We affirm.

BACKGROUND

{2} This is Defendant's second appeal in this case. In 1994, Defendant was charged with over twenty offenses arising from the burglaries of three residences, a stolen vehicle and a high-speed police chase. At the time of the alleged offenses, Defendant was fifteen years old. The State sought to have Defendant sentenced as an adult pursuant to Section 32A–2–20(A). In October 1994, Defendant pleaded guilty to two counts of aggravated burglary and one count of residential burglary and no contest to one count of aggravated assault on a police officer.

{3} Following a dispositional hearing in July 1995, the district court determined that Defendant was not amenable to treatment and rehabilitation as a child in available facilities, finding each of the factors under Section 32A–2–20(C) against Defendant. Consequently, Defendant was sentenced as an adult to twenty-four years in the custody of the Corrections Department of the State of New Mexico, with one-third of the sentence suspended, for an actual sentence of approximately fifteen and one-half years. Defendant has been incarcerated as an adult ever since.

{4} Defendant appealed the Judgment, Partially Suspended Sentence and Commitment Upon Remand to this Court, asserting that (1) his pleas were involuntary and (2) the district court erred in its amenability determination. On March 4, 1997, we issued a decision affirming on the plea issue, but reversing on the amenability issue. With respect to amenability, we found substantial

evidence to support the court's findings regarding each of the factors under Section 32A–2–20(C), except one: "whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted[.]" Section 32A–2–20(C)(3). As to this factor, we held that the court erred in treating the aggravated and residential burglaries as crimes against persons rather than against property. Therefore, we reversed the court's amenability determination and remanded for the court to re-weigh the amenability factors "consistently with this decision, based upon the existing record."

{5} Defendant obtained a writ of certiorari from the New Mexico Supreme Court, but after full briefing by the parties, the Court quashed the writ. This Court then issued its mandate to the district court on January 20, 1998. However, because of a change in counsel for Defendant and the grant of a continuance at the parties' request, the district court did not begin its amenability hearing on remand until June 12, 1998.

{6} At the hearing on June 12, 1998, the district court heard argument from counsel regarding the amenability factors under Section 32A–2–20(C), and proceeded to reaffirm its findings from July 1995 with respect to factors (1), (2), (4), and (5), but found factor (3) in favor of Defendant. The district court then turned to the sixth amenability factor: "the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities *currently available.*" Section 32A–2–20(C)(6) (emphasis added). Defendant argued that, in evaluating this factor, the court should consider the availability of Camino Nuevo, a new maximum-security juvenile facility that had opened in Albuquerque in April 1998. Defendant argued that although Camino Nuevo was not available at the time of the initial amenability hearing in 1995, the facility had become available for purposes of Section 32A–2–20(B) and (C)(6) at the time of remand, and therefore it should be considered by the court in re-weighing the amenability factors. The State argued that the new facility should not be considered based on this Court's mandate that the amenability factors were to be re-weighed "based upon the existing record."

{7} On Defendant's motion, the district court granted a continuance of the amenability hearing so that Defendant could apply to this Court for clarification of its mandate. On July 24, 1998, we entered an order denying the application for clarification but stating that "[t]he district court may consider all available facilities in its discretion."

{8} The district court did not resume the amenability hearing until April 30, 1999, more than nine months after this Court disposed of the application for clarification. On March 17, 1999, Defendant filed a motion to dismiss on the ground that the delay in concluding the amenability hearing violated his right to a speedy sentencing. Defendant argued that because he was approaching the age of twenty-one, the delay in re-sentencing him diminished his opportunity for treatment in a juvenile facility and that this "lost chance" caused him grave prejudice. Following a hearing, the court denied the motion to dismiss, finding that "the delay in this matter is not as egregious as delays in other cases[,]" that "much of the delay is attributed to [Defendant,]" and that the prejudice argued by Defendant was conjectural.

{9} Resuming the amenability hearing on April 30, 1999, the district court reaffirmed its June 1998 findings regarding factors (1) through (5). With respect to factor (6), the district court determined, as it had in 1995, that Defendant was not reasonably likely to be rehabilitated because of the limited time he could be held in a juvenile facility due to his age. At the time of the April 1999 hearing, Defendant was twenty years old and had only four months until he turned twenty-one. Therefore, based on all the factors, with the exception of factor (3), the district court determined, once again, that Defendant was not amenable to treatment or rehabilitation as a child in available facilities and should be sentenced as an adult. Defendant was resentenced to twenty-two and one-half years, with one-third of the sentence suspended, for an actual sentence of approximately fifteen years with credit for time served.

DISCUSSION

Waiver

{10} Before turning to the merits of Defendant's claims on appeal, we first consider the State's argument that Defendant waived his constitutional right to speedy sentencing. Specifically, the State argues that Defendant waived his right to speedy sentencing by pleading guilty to two counts of aggravated burglary and one count of residential burglary and no contest to one count of aggravated assault on a police officer. The State also contends Defendant waived his right to speedy sentencing by entry of the district court's order on June 18, 1998, which granted a continuance of the amenability hearing at Defendant's request and expressly noted that Defendant "waived any speedy trial issues" pending his application to this Court for clarification of its mandate following the first appeal.

{11} Defendant asserts, and our review of the record confirms, that the State never argued waiver below. Generally, an appellee has no duty to preserve issues for review and may advance any ground for affirmance on appeal. *See Bruch v. CNA Ins. Co.*, 117 N.M. 211, 212, 870 P.2d 749, 750 (1994). Defendant argues, however, that even as an appellee, the State may not raise fact-based issues for the first time on appeal because Defendant must be alerted to the issue and given the opportunity to present evidence on the factual issue at the district court level. *See State v. Leyba*, 1997-NMCA-023, ¶ 6, 123 N.M. 159, 935 P.2d 1171; *State v. Porras-Fuerte*, 119 N.M. 180, 183, 889 P.2d 215, 218 (Ct.App.1994); *see also State v. Franks*, 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct.App.1994) (reviewing court will not affirm on fact-dependent ground not raised below because it would be unfair to the defendant who lacked opportunity to present evidence relating to the fact below).

{12} Although the existence of waiver is generally a question of fact for the district court to determine, *see State v. Bishop*, 108 N.M. 105, 109, 766 P.2d 1339, 1343 (Ct.App.1988), in this case, the State's waiver arguments are based solely on Defendant's pleas of guilty and no contest and the language contained in the court's order of June 18, 1998. When "the evidence as to waiver is a written instrument, its construction and interpretation may be decided as a question of law." *Id.* Because a determination of the waiver issues raised by the State does not depend on facts not presented below, but rests on the interpretation of written instruments and the law, we address the State's arguments raised for the first time on appeal as a matter of law.

Defendant's Pleas of Guilty and No Contest

{13} Although Defendant may have waived objections to defects in the proceedings that occurred up to the point of the guilty and no contest pleas, including any right to a speedy trial, he did not waive his objections to *subsequent* defects in the proceedings. *See State v. Hodge*, 118 N.M. 410, 414, 882 P.2d 1, 5 (1994) (holding voluntary plea of guilty or no contest "waives objections to *prior defects* in the proceedings and also operates as a waiver of statutory or constitutional rights" (emphasis added)); *see also Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (stating when the defendant makes a voluntary plea, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to* the entry of the guilty plea" (emphasis added)). Defendant's speedy sentencing claim relates to the alleged deprivation of a constitutional right that occurred *after* the entry of the pleas of guilty and no contest. The State cites no authority for the proposition that the entry of the pleas also waived objections to ensuing defects in the proceedings. *See State v. Chandler*, 119 N.M. 727, 733, 895 P.2d 249, 255 (Ct.App.1995) (stating this Court will not consider a proposition unsupported by citation to legal authority).

{14} Moreover, we note that this case is distinguishable from *State v. Michael S.*, 1998-NMCA-041, ¶ 11, 124 N.M. 732, 955 P.2d 201, and *State v. Timothy T.*, 1998-NMCA-053, ¶ 2, 125 N.M. 96, 957 P.2d 525, in which respondents agreed in the plea and disposition agreements to adult sentences and expressly waived "any motions, defenses,

objections, or requests, either made or that could thereafter be made." In those cases, we held that respondents waived the twenty-day time limit applicable to dispositional hearings. *See Michael S.*, 124 N.M. 732, 955 P.2d 201, 1998–NMCA–041, ¶ 11; *Timothy T.*, 125 N.M. 96, 957 P.2d 525, 1998–NMCA–053, ¶ 4. In this case, Defendant did not agree to be sentenced as an adult, did not waive his right to a dispositional hearing under Section 32A–2–20(B), and therefore he did not waive his objections to defects occurring during the dispositional phase of the proceedings. Therefore, we reject, as a matter of law, the State's first waiver argument.

District Court's Order of Continuance

{15} The State also argues Defendant waived the right to speedy sentencing by requesting a continuance of the amenability hearing to seek clarification of this Court's mandate following the first appeal. The district court's order granting the continuance provided, in part: "The child has waived any speedy trial issues that may arise from the continuance of this amenability hearing pending application to the Court of Appeals for clarification of its mandate." The State argues that the court's order of continuance should be read as a complete waiver of Defendant's right to speedy sentencing. Defendant contends that the order of continuance operated as a waiver only for the period of time the application for clarification was pending in this Court. We agree with Defendant. We read the order of continuance as a limited waiver of Defendant's speedy sentencing right for the five-week period from June 18, 1998, when the continuance was granted, to July 24, 1998, when this Court issued its order disposing of the application for clarification. *Cf. Bishop*, 108 N.M. at 109, 766 P.2d at 1343 (construing defendant's motion and district court's order of continuance as limited waiver of six-month rule). Therefore, we also reject, as a matter of law, the State's argument that the order granting the continuance constituted an absolute waiver of Defendant's right to speedy sentencing. We focus, therefore, on the nine-month delay that occurred after the decision and remand from this Court on July 24, 1998.

Right to Speedy Sentencing

{16} Defendant argues that the nine-month delay in concluding his amenability hearing violated his right to speedy sentencing under the Sixth Amendment of the United States Constitution and Article II, Section 14 of the New Mexico Constitution. Defendant's argument presumes that the constitutional right to a speedy trial also applies to sentencing proceedings. The United States Supreme Court has assumed, without deciding, that the Sixth Amendment speedy trial right applies to sentencing. *See Pollard v. United States*, 352 U.S. 354, 361, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957). Since *Pollard*, all federal circuit courts of appeal, including the Tenth Circuit, "which have addressed the issue have either treated the subject as established law or have perpetuated the Court's assumption in *Pollard*." *Perez v. Sullivan*, 793 F.2d 249, 253 (10th Cir.1986); *see United States v. Martinez*, 837 F.2d 861, 866 (9th Cir.1988); *United States v. Campisi*, 583 F.2d 692, 694 (3d. Cir.1978); *United States v. Reese*, 568 F.2d 1246, 1253 (6th Cir.1977); *United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir.1976); *United States v. Tortorello*, 391 F.2d 587, 589 (2d Cir.1968).

{17} Similarly, as Defendant notes in his brief in chief, many state courts also have assumed or expressly held that sentencing is part of the trial for purposes of speedy trial protection under the Sixth Amendment. *See, e.g., Hurst v. State*, 516 So.2d 904, 905 (Ala. Crim.App.1987); *Gonzales v. State*, 582 P.2d 630, 633 (Alaska 1978); *State v. Burkett*, 179 Ariz. 109, 876 P.2d 1144, 1149 (App.1993); *Moody v. Corsentino*, 843 P.2d 1355, 1363 (Colo.1993) (en banc); *State v. Wall*, 40 Conn.App. 643, 673 A.2d 530, 540 (1996); *Moore v. State*, 263 Ga. 586, 436 S.E.2d 201, 202 (1993); *State ex rel. McLellan v. Cavanaugh*, 127 N.H. 33, 498 A.2d 735, 740 (1985); *State v. Avery*, 95 N.C.App. 572, 383 S.E.2d 224, 225 (1989); *Commonwealth v. Pounds*, 490 Pa. 621, 417 A.2d 597, 599 (1980); *State v. Banks*, 720 P.2d 1380, 1385 (Utah 1986); *State v. Dean*, 148 Vt. 510, 536 A.2d 909, 912 (1987); *State v. Ellis*, 76 Wash.App. 391, 884 P.2d 1360, 1362 (1994); *State v. Allen*, 179 Wis.2d 67, 505 N.W.2d 801, 803 (1993).

{18} New Mexico courts have not previously addressed whether the speedy trial right extends to the sentencing phase of a criminal prosecution. We need not decide that issue in this appeal. We assume, without deciding, that the speedy trial right does apply to sentencing proceedings, and for the reasons that follow, we hold that Defendant's rights were not violated in this instance.

{19} Courts that recognize or assume that the speedy trial guarantee extends to sentencing apply the four-factor balancing test from *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), to determine whether a defendant's constitutional right to speedy sentencing has been violated. *See Perez,* 793 F.2d at 254. The *Barker* test requires us to balance (1) the length of delay, (2) the reasons for the delay, (3) the assertion of the right, and (4) prejudice to the defendant. *Barker,* 407 U.S. at 530, 92 S.Ct. 2182; *accord State v. Manzanares,* 121 N.M. 798, 800, 918 P.2d 714, 716 (1996). "In considering each of the four factors, we are deferential to the trial court's fact finding but independently examine the record to determine whether Defendant's constitutional right to a speedy trial was violated." *State v. Tortolito,* 1997–NMCA–128, ¶ 6, 124 N.M. 368, 950 P.2d 811.

{20} This case involves a delay of approximately nine months and six days from July 24, 1998, when this Court disposed of his application for clarification, to April 30, 1999, when the district court resumed the amenability hearing. Assuming, without deciding, that the first three *Barker* factors—the length of the delay, the reasons for the delay and the assertion of the right—weigh in Defendant's favor, we nonetheless conclude that his right to speedy sentencing was not violated because of the absence of evidence in the record to establish prejudice caused by the delay. *See Perez,* 793 F.2d at 256 (noting that necessity of showing substantial prejudice dominates the four-part balancing test in speedy sentencing case).

{21} We further note that even assuming the first three factors weigh in Defendant's favor, the first two factors—the length of the delay and the reasons for the delay—weigh only slightly in his favor. Here, the delay complained of by Defendant was nine months and six days, only slightly longer than the minimum period needed to establish a presumption of prejudice and to trigger further inquiry under *Barker* in a simple case. *See State v. Coffin,* 1999–NMSC–038, ¶ 59, 128 N.M. 192, 991 P.2d 477 (stating in evaluating length of delay, we consider the extent to which the delay extends beyond the bare minimum needed to trigger further judicial inquiry under *Barker*), *Salandre v. State,* 111 N.M. 422, 428 & n. 3, 806 P.2d 562, 568 & n. 3 (1991) (same).

{22} Moreover, the stated reasons for the delay, including the district court's "fairly busy" docket, "the traditional holiday season" and a death in the family of the district judge, are all neutral reasons which do not weigh heavily against the State. *See Tortolito,* 124 N.M. 368, 950 P.2d 811, 1997–NMCA–128, ¶ 9 (noting that neutral reasons, such as negligence or excessive caseload, should weigh less heavily but should nonetheless be weighed against the State since it bears the ultimate responsibility to complete the trial process). We also discern no evidence in the record that the delay in this case was the result of a deliberate attempt by the State to gain a tactical advantage or harass Defendant. *See Perez,* 793 F.2d at 255; *see also Pollard,* 352 U.S. at 361, 77 S.Ct. 481 (holding delay in sentencing "must not be purposeful or oppressive"); *State v. Kilpatrick,* 104 N.M. 441, 445, 722 P.2d 692, 696 (Ct.App.1986) ("[A] deliberate attempt to delay should be weighed heavily against the prosecution.").

{23} We perceive the pivotal factor in this case to be the lack of evidence in the record to support a finding that Defendant was prejudiced by the delay. Traditionally, the right to a speedy trial protects against three types of prejudice: (1) oppressive pretrial incarceration, (2) anxiety and concern of the accused, and (3) the possibility of impairment to the defense. *See Barker,* 407 U.S. at 532, 92 S.Ct. 2182. However, as the Tenth Circuit explained in *Perez,* in a post-conviction situation, "a delay in sentencing involves considerations different from those related to pre-trial delay. The altera-

tion of defendant's status from accused and presumed innocent to guilty and awaiting sentence is a significant change which must be taken into account in the balancing process." *Id.* 793 F.2d at 254. Most of the interests designed to be protected by the speedy trial guarantee "diminish or disappear altogether once there has been a conviction," and "the rights of society proportionately increase[.]" *Id.* at 256. Therefore, "the prejudice claimed by the defendant must be substantial and demonstrable." *Id.; see also Allen,* 505 N.W.2d at 805 (concluding that absence of prejudice outweighs other factors in speedy sentencing case). In this case, Defendant has not demonstrated actual and substantial prejudice.

{24} Defendant argues that the district court's failure to conclude the amenability hearing within a reasonable time, despite repeated, written requests from defense counsel to do so, deprived him of the opportunity to be treated in an existing juvenile facility, such as Camino Nuevo. This "lost chance," he claims, prejudiced him. We hold that Defendant's claim of prejudice is speculative because there is insufficient evidence in the record to conclude that the delay materially affected the court's determination of non-amenability.

{25} At the amenability hearing on April 30, 1999, Judith Hebrlee, Deputy Superintendent of Camino Nuevo, testified that Camino Nuevo is a maximum-security facility for male juveniles that opened in Albuquerque on April 21, 1998. She testified that, in comparison to the New Mexico Boys' School in Springer, Camino Nuevo has a higher level of security and is the equivalent of any maximum-security adult prison. She described the various rehabilitative programs and social services offered at the facility, as well as its intake process. On cross-examination, she testified that youthful offenders cannot be held in the facility past the age of twenty-one. This prompted the district court to state that Defendant would be twenty-one years old in August 1999 and to ask the witness what sort of rehabilitation could be provided to Defendant in the four months before he turned twenty-one. Ms. Hebrlee responded that little could be done for Defendant in that limited time. When asked whether more could have been done for Defendant if he had been committed to Camino Nuevo when it first opened on April 21, 1998, Ms. Hebrlee testified that, with more time, more could have been done for Defendant. In concluding that Defendant was not amenable to treatment or rehabilitation as a child, the court noted, among other things, that Defendant was now almost an adult and rehabilitation was not likely given the short time available to him in a juvenile facility. Defendant offers the above testimony and comments of the district court as the *only* reason Defendant was determined not amenable to treatment or rehabilitation as a child, and therefore proof of prejudice to him as a direct result of the delay. The record, however, does not confirm Defendant's position.

{26} The State points out, and our review of the record confirms, that the district court did not base its decision of non-amenability solely on the limited time that would be available to Defendant in a juvenile facility. "[T]he prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available," § 32A–2–20(C)(6), was only one of six statutory factors considered by the district court in determining that Defendant was not amenable to treatment or rehabilitation as a child. Indeed, the court found that four other factors also weighed against amenability, including the seriousness of the offenses, *see* § 32A–2–20(C)(1), the aggressive and violent manner in which the offenses were committed, *see* § 32A–2–20(C)(2), the sophistication and maturity of Defendant, *see* § 32A–2–20(C)(4), and the previous history of Defendant, *see* § 32A–2–20(C)(5). Obviously, these factors were not affected by any delay in sentencing; they remained in 1999 as they had been in 1995. Therefore, based on all the statutory factors, with the exception of Subsection (3), the court determined, once again, that Defendant was not amenable to treatment or rehabilitation as a child in available facilities.

{27} Moreover, viewing the testimony and the comments of the district court at the

April 30, 1999, hearing in their full and proper context, we find no indication in the record that the court's amenability determination would have been any different even if the remand hearing had been held soon after July 24, 1998, or for that matter even on April 21, 1998, when Camino Nuevo first opened. The district court determined in 1999 that Defendant was not likely to be rehabilitated at Camino Nuevo for the same reasons it concluded in 1995 that he was not likely to be rehabilitated at the New Mexico Boys' School. The court explained that because of the seriousness of the offenses, the violent manner in which the offenses were committed, the sophistication and maturity of Defendant, and his juvenile history, the twin objectives of adequate protection of the public and reasonable rehabilitation of Defendant could only be achieved, in the court's judgment, by a long-term incarceration. And a long-term incarceration could not be achieved by commitment to a juvenile facility—whether in 1995 or 1999. The court also observed that the rehabilitative programs (as opposed to the security) offered at Camino Nuevo were essentially the same as the programs offered at the New Mexico Boys' School; that is, they were the same programs that the court had already determined to be insufficient.

{28} Although the court acknowledged the greater security at Camino Nuevo and did not believe Defendant would escape from the facility before his release at the age of twenty-one, the district still concluded that reasonable rehabilitation was not likely because Defendant would not be held in the facility long enough to benefit from its programs and services. In short, the court found Defendant not amenable to treatment or rehabilitation as a child because it determined that the same unfavorable circumstances that existed in July 1995 continued unchanged in April 1999.

{29} Because the court relied in part on its 1995 findings in determining that Defendant was not amenable to treatment as a child, Defendant cannot attribute the court's decision against him to the nine-month delay from July 24, 1998, to April 30, 1999. Therefore, even assuming the first three *Barker* factors weigh in Defendant's favor, we conclude that the evidence in the record does not support a finding of prejudice caused by the delay. Rather, the evidence suggests that the court would have made the same amenability determination even without the delay in question. A finding of prejudice under *Barker* requires evidence showing a nexus between the undue delay and the prejudice claimed. Such nexus is not apparent in this instance. *See Salandre*, 111 N.M. at 431, 806 P.2d at 571; *see also United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986) (stating that the possibility of prejudice is not sufficient to support claim that speedy trial right was violated); *Coffin*, 128 N.M. 192, 991 P.2d 477, 1999–NMSC–038, ¶ 71 (concluding that State met its burden of showing defense was unimpaired given the speculative nature of witness' availability at original trial date).

Due Process

{30} Defendant also argues that the delay in concluding the amenability hearing on remand violated his due process rights. "To prevail on a claim that delay in the proceedings violated Defendant's right to due process, Defendant must prove prejudice and an intentional delay by the State to gain a tactical advantage." *State v. Gibson*, 113 N.M. 547, 559, 828 P.2d 980, 992 (Ct.App. 1992). The prejudice shown must be "actual" and "substantial." *Id.* For the same reasons just discussed, the record does not demonstrate any of these features.

Rule 5–604

{31} Defendant argues that the delay in this case also violates the six-month rule, Rule 5–604(B) NMRA 2000. *See Michael S.*, 124 N.M. 732, 955 P.2d 201, 1998–NMCA–041. ¶ 9 (holding six-month rule applies to youthful offender proceedings); Rule 10–101(A)(2) NMRA 2000 (holding rules of criminal procedure for the trial courts govern the procedure in all youthful offender proceedings). Rule 5–604(B)(4), which Defendant claims to be the relevant provision, provides, in part,

> [t]he trial of a criminal case, or an habitual criminal proceeding shall be commenced

six (6) months after whichever of the following events occurs latest:

. . .

(4) in the event of an appeal, including interlocutory appeals, the date the mandate or order is filed in the district court disposing of the appeal.

{32} By its express terms, Rule 5–604(B) applies only to trials and habitual criminal proceedings. However, relying on *Michael S.*, 124 N.M. 732, 955 P.2d 201, 1998–NMCA–041, ¶ 8, Defendant argues that the six-month rule should "not be read absolutely literally" and is not intended to " 'cover every eventuality,' " *id.* (quoting *State v. Doe,* 99 N.M. 460, 463, 659 P.2d 912, 915 (Ct.App.1983)), and therefore the rule should be read as applying to sentencing hearings to further the important purpose served by time limits on children's court proceedings.

{33} Defendant's reliance on *Michael S.* is misplaced. *Michael S.* involved an unusual situation in which, if Rule 5–604(B) were to be read literally, no time limit would apply to the trial of youthful offenders under the Children's Code due to a gap created by a series of amendments in the Children's Code and the Children's Court's Rules and a delay or an oversight in not amending the Rules of Criminal Procedure to conform to those changes. This Court noted that "it would be absurd for us to hold that no time limit applies due to the fact that there is literally no rule that expressly covers the situation." *Michael S.*, 124 N.M. 732, 955 P.2d 201, 1998–NMCA–041, ¶ 7.

{34} In this case, however, a literal interpretation of Rule 5–604(B) would not lead to such an absurdity because, in fact, there is a rule of criminal procedure that expressly covers time limits for sentencing hearings. On December 1, 1998, the New Mexico Supreme Court promulgated Rule 5–701(B) NMRA 2000 which provides, "Except for good cause shown, the sentencing hearing shall begin within ninety (90) days from the date the trial was concluded or the date a plea was entered." The existence of a separate rule that establishes time limits for sentencing suggests that Rule 5–604(B) was not intended to apply to sentencing but was intended to apply only to trials and habitual criminal proceedings, as the plain meaning of the rule suggests. *See State v. Michael S.*, 120 N.M. 617, 618, 904 P.2d 595, 596 (Ct.App.1995) (reviewing court ordinarily should give effect to plain language of statute or rule); *State v. Eden,* 108 N.M. 737, 741, 779 P.2d 114, 118 (Ct.App.1989) (reading Rule 5–604(B) according to its plain meaning).

{35} Therefore, we conclude that Rule 5–604(B) is inapplicable to the amenability hearing on remand. Moreover, because Defendant did not assert below, and does not argue on appeal, a violation of Rule 5–701(B), we do not consider the issue on appeal. *See* Rule 12–216(A) NMRA 2000; *State v. Lucero,* 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct.App.1986).

The Court Did Not Abuse Its Discretion On Remand

{36} Finally, Defendant argues that the district court abused its discretion in finding that Defendant "is not amenable to treatment or rehabilitation as a child in available facilities," *see* § 32A–2–20(B)(1), and that he is not likely to be rehabilitated in "facilities currently available." *See* § 32A–2–20(C)(6). Whether Defendant is amenable to treatment or rehabilitation as a child is a determination "ultimately left to the discretion of the district court." *State v. Sosa,* 1997–NMSC–032, ¶ 9, 123 N.M. 564, 943 P.2d 1017; *see* § 32A–2–20(A). On appeal, we do not disturb the lower court's decision unless it "is clearly against the logic and effect of the facts and circumstances of the case." *Sosa,* 123 N.M. 564, 943 P.2d 1017, 1997–NMSC–032, ¶ 7 (internal quotation marks and citation omitted).

{37} In determining that Defendant is not amenable to treatment or rehabilitation as a child in available facilities, the court reaffirmed its previous findings regarding factors (1), (2), (4), (5), and (6) of Section 32A–2–20(C), and found only factor (3) in favor of Defendant. In Defendant's first appeal, we concluded that the court did not abuse its discretion in its findings regarding factors (1), (2), (4), (5), and (6). We are bound by that prior decision of this Court. We found substantial evidence to support those findings and held

that the court erred only in finding that the offenses in question were committed against persons rather than against property. For the same reasons we concluded that the court did not abuse its discretion in the first appeal, we hold that the district court did not abuse its discretion on remand.

CONCLUSION

{38} Assuming, without deciding, that the constitutional right to a speedy trial applies to sentencing proceedings, we conclude that Defendant's right to speedy sentencing was not violated in this case. We also conclude that Defendant was not denied due process, that Rule 5–604(B) is inapplicable to the amenability hearing on remand, and that the district court did not abuse its discretion in determining on remand that Defendant is not amenable to treatment or rehabilitation as a child in available facilities. Therefore, we affirm the Amended Judgment, Partially Suspended Sentence and Commitment Upon Remand of the district court.

{39} **IT IS SO ORDERED.**

ARMIJO, and KENNEDY, JJ., concur.

6 P.3d 1043

2000-NMCA-063

STATE of New Mexico, Plaintiff–Appellee,

v.

Anthony HAMILTON, Defendant–Appellant.

No. 20,151.

Court of Appeals of New Mexico.

June 5, 2000.

Certiorari Denied, No. 26,308, May 24, 2000.

Certiorari Denied, No. 26,403, July 24, 2000.

Patricia A. Madrid, Attorney General, M. Victoria Wilson, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Nancy M. Hewitt, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

BUSTAMANTE, Judge.

{1} On this Court's own motion, the opinion filed in this case on April 7, 2000, is withdrawn and the following is substituted therefor.

{2} Defendant was convicted of aggravated burglary, aggravated assault, armed robbery, and felon in possession of a firearm following his arrest and trial in connection with the break-in of a home in Roswell, New Mexico, in March 1998. On appeal, he argues that the armed robbery conviction should be reversed because, although he took a handgun from the victim, there was no evidence that Defendant was armed when he made the threats that acted as the lever whereby he obtained the gun and some money from the victim. He also argues that the trial court improperly admitted evidence of other bad acts purportedly committed by Defendant on the same day as the robbery of the victim's home and that there was insufficient evidence to support his convictions on the other charges. We affirm.

FACTS

{3} Shortly after 6:00 p.m. on March 23, 1998, Shauna Means, who was home alone at the time, heard a knock at her door. Before Means was able to answer, Defendant, with whom Means was acquainted, kicked in Means's door and entered her home. Means testified that after Defendant entered her home, he reached behind his back and threatened to slash her throat if she tried to run. Defendant told Means he wanted weapons and money. Means responded that she had neither, but Defendant began to search the home anyway. Initially, Means began following Defendant around the home, but because she was afraid she returned to the living room and sat on the couch as Defendant continued to search.

{4} Defendant soon found a handgun belonging to Means's boyfriend. After finding the handgun, Defendant told Means to give him all of her money. She again told Defendant that she did not have any money, but Defendant reached in Means's purse and found a twenty dollar bill, which he took. Next, Defendant pointed the gun at Means's abdomen then moved the gun quickly to one side and fired, narrowly missing Means but putting a hole in the couch. Before leaving, Defendant threatened to return.

{5} Defendant was first tried on the charges on September 1, 1998. Because the jury was unable to reach a unanimous verdict, the trial court declared a mistrial. During the first trial, Defendant testified that he entered Means's home with the intent to collect money owed to him, not with the intent to steal anything. Recognizing the necessity to provide proof of Defendant's criminal intent, the State filed a motion in limine seeking to have the trial court allow it to introduce evidence at the second trial of burglaries Defendant was alleged to have been involved in on the day of, but prior to, the robbery of Means's home.

{6} In support of its motion, the State argued that the evidence would help to show Defendant's motive or intent and should therefore be admitted under Rule 11-404(B) NMRA 2000. The State also argued that it was only seeking to introduce evidence of the events of one day in Defendant's life, which it suggested would not paint Defendant as a bad character generally, but would instead give the jury insight into Defendant's state of mind on the day of the robbery. Indeed, some of the evidence the State sought to introduce was allowed as evidence at the first trial to rebut Defendant's testimony that he had no intent to rob anybody but instead was seeking to collect on some debts. The trial court agreed with the State that the evidence

demonstrated Defendant's motive or intent and ruled it admissible.

DISCUSSION

Acquisition of a Deadly Weapon During the Commission of a Robbery as Armed Robbery

{7} Count Three of the Amended Criminal Information charged Defendant with stealing "items of value from the immediate control of Shauna Means by the use or threatened use of force or violence *while armed with a deadly weapon, namely a firearm,* contrary to NMSA 1978, [§] 30–16–2 [(1973)]." (Emphasis added.) Defendant argues, however, that he cannot be guilty of armed robbery "because the evidence shows that [he] allegedly took the gun and money *before* any use of force or any threatened use of force while armed with a deadly weapon." In other words, Defendant is arguing that there is no evidence he was armed while using the force or threatening to use the force that caused Means to part with the handgun and money. Defendant frames his argument as a challenge to the sufficiency of the evidence, but because there is evidence that Defendant armed himself during the course of the robbery, we understand his argument to be more legal than factual. That is, we understand him essentially to be arguing that, as a matter of law, one cannot be guilty of armed robbery if not armed while using or threatening to use the force that initially causes the victim to part with her property, even if the robber subsequently becomes armed and uses the weapon during the course of the robbery. We review legal questions de novo. *See State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

{8} Section 30–16–2 provides:

> Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.
>
> Whoever commits robbery is guilty of a third degree felony.
>
> Whoever commits robbery while armed with a deadly weapon is, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first degree felony.

"[I]n order to convict for [robbery], the use or threatened use of force must be the factor by which the property is removed from the victim's possession." *State v. Lewis,* 116 N.M. 849, 851, 867 P.2d 1231, 1233 (Ct.App. 1993). Or as this Court has stated on several occasions, the force or threatened use of force must be the lever that serves to separate the property from the victim. *See id.; State v. Curley,* 1997–NMCA–038, ¶ 4, 123 N.M. 295, 939 P.2d 1103; *State v. Baca,* 83 N.M. 184, 184, 489 P.2d 1182, 1182 (Ct.App. 1971). Thus, "[t]he force or intimidation is the gist of the offense." *State v. Sanchez,* 78 N.M. 284, 285, 430 P.2d 781, 782 (Ct.App. 1967).

{9} Here, Means testified that she was frightened by Defendant kicking in the door and threatening to slash her throat before demanding weapons and money and searching her home. Although there is no evidence that Defendant was armed when he entered and threatened Means, there is no question that his forcible entry and threat were sufficient to act as a lever to separate the handgun from Means's possession, and thus to convict Defendant of robbery. *See State v. Ibarra,* 116 N.M. 486, 490, 864 P.2d 302, 306 (Ct.App.1993). The question is whether brandishing the handgun while taking money from Means's purse can serve to elevate Defendant's offense from simple robbery to armed robbery. We conclude that it can.

{10} We have found only a handful of cases from other jurisdictions discussing this issue, and among those the conclusions vary. Some of the cases hold that where the defendant acquires a weapon as part of the loot but immediately flees the scene, it is improper to convict of armed or aggravated robbery. *See Caine v. State,* 453 So.2d 1081, 1083 (Ala.Crim.App.1984); *People v. Williams,* 63 A.D.2d 1035, 406 N.Y.S.2d 341, 343 (1978) (mem.). In *Williams,* the defendant was challenging his conviction of first degree robbery for wrestling away a police officer's loaded service revolver during the course of a struggle then immediately fleeing the scene. *See* 406 N.Y.S.2d at 342. The Appellate Division of the New York Supreme Court reversed, stating,

> Under the peculiar circumstances of this case, we conclude that a robbery which consists of the taking of a weapon, and the immediate flight from the location with that weapon, *without more,* does not constitute robbery in the first degree within the meaning of [the relevant statute]. The fact that the stolen property is a deadly weapon does not *in and of itself* convert the robbery into a robbery in the first degree, i.e., robbery while armed with a deadly weapon.

Id. at 342–43 (citation omitted and emphasis added).

{11} Other cases discussing this issue hold that a conviction for aggravated robbery is proper when a weapon acquired during the commission of a robbery is used to aid the defendant's flight from the scene of the robbery. *See People v. Wallace,* 36 Cal.App.2d 1, 97 P.2d 256, 257–58 (1939) (holding concept of "perpetration" in relevant statute to encompass flight; thus, where acquired weapon aids flight, robbery is considered to have been perpetrated by one who was armed); *see also People v. Hood,* 160 Cal.App.2d 121, 324 P.2d 656, 657 (1958) (throwing whiskey bottles seized while fleeing scene of robbery created fact question as to whether the defendant was armed during perpetration of robbery). As the *Wallace* court said, "The escape of the robbers with their ill-gotten gains by means of arms is as important to the execution of the robbery as gaining possession of the property." *Id.,* 97 P.2d at 257.

{12} As the foregoing cases make clear, the determination of whether a defendant who seizes a weapon during the commission of a robbery is armed "while" committing the robbery is highly fact sensitive. When the defendant acquires the weapon and how he uses it after its acquisition are paramount. On those facts this case is distinguishable from the cases discussed above. In *Wallace,* the case that is perhaps most factually similar to this case, the evidence was that one of the defendants found and pointed a handgun at the victim at about the same time the other two defendants "were *through* looting the cash drawer and were on their way out of the [service] station." *Id.* (emphasis added). In contrast, the evidence in this case is that after finding the handgun, Defendant threatened Means with it and continued looking for and ultimately found other valuables that he took from Means. As such, this case is consistent with cases which hold that when a defendant acquires a weapon during the commission of a robbery and then uses the weapon to harm or threaten his victim, or to acquire additional possessions from his victim, he is guilty of armed robbery. *See Bush v. State,* 580 So.2d 106, 108 (Ala.Crim.App.1991); *Commonwealth v. Boiselle,* 16 Mass.App.Ct. 393, 451 N.E.2d 1178, 1182–83 (1983). Thus, under the facts of this case, Defendant could properly be convicted of armed robbery.

{13} Defendant's reliance on *Lewis* is unavailing; the facts of that case are readily distinguishable from the facts here. In *Lewis,* we reversed the defendant's armed robbery conviction because the defendant neither used nor threatened force to obtain the victim's money. Instead, the defendant and his cohort took money from the victim's coat pocket while the victim was in another room. It was only after the victim discovered his money was missing that the defendant and his cohort pointed a gun at the victim. *See* 116 N.M. at 850, 867 P.2d at 1232. We concluded:

> Under the facts of the present case, the victim's money was removed and separated from his person by stealth. [The d]efendant clearly had control over the victim's money once it had been taken from his clothing. [The d]efendant's use of a weapon only after the money was separated from the victim was merely an action to hold [the] victim at bay as he escaped from the motel.

Id. at 851, 867 P.2d at 1233. In contrast, there was nothing stealthy about the manner in which Defendant obtained Means's money in this case. We emphasize that in *Lewis*—as in *Wallace,* upon which we rely in part—the defendant used the weapon only in making his escape. Although Defendant here asserts that he likewise used the handgun he found only to aid his escape, the record indicates he used the handgun for far more than that. Indeed, he used the handgun not merely as a means for his escape, but also to

bolster his renewed demands—successfully, we add—for Means's money. This is sufficient to elevate his offense to armed robbery. *See Commonwealth v. Goldman,* 5 Mass.App. Ct. 635, 367 N.E.2d 1181, 1182 (1977) ("[P]ossession of a dangerous weapon, rather than its use, is the essential element of [armed robbery]."); *see also State v. Wingate,* 87 N.M. 397, 398, 534 P.2d 776, 777 (Ct.App. 1975) (quoting 2 Ronald A. Anderson, *Wharton's Criminal Law & Procedure* § 547, at 246–47 (1957), for the proposition that the "presence of violence, actual or constructive, is an essential ingredient of robbery").

Admission of Evidence of Other Bad Acts

{14} Rule 11–404(B) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

"In order to admit evidence under Rule [11–404(B)], the [trial] court must find that the evidence is relevant to a disputed issue other than the defendant's character, and it must determine that the prejudicial effect of the evidence does not outweigh its probative value, as set out by [Rule 11–403 NMRA 2000]." *State v. Beachum,* 96 N.M. 566, 567–68, 632 P.2d 1204, 1205–06 (Ct.App.1981). Rule 11–403 gives trial courts considerable though not unlimited discretion to admit or exclude evidence. We will only reverse a trial court's ruling concerning the admission of evidence if the court abused its discretion. *See State v. Aguayo,* 114 N.M. 124, 128, 835 P.2d 840, 844 (Ct.App.1992).

{15} Defendant complains about the admission of testimony by three witnesses concerning suspicious or unlawful activity—specifically, break-ins—at two other homes in Roswell on the same day as the burglary of Shauna Means's home. The State wanted to introduce the testimony as evidence "of what . . . Defendant was doing immediately before he went to [Means's home], because it [would] show[ ] his state of mind, his plan, motive and intent when he entered [Means's home]."

{16} "The initial threshold for admissibility of prior uncharged conduct is whether it is probative on any essential element of the charged crime." *Aguayo,* 114 N.M. at 128, 835 P.2d at 844. Once a court determines that the proffered evidence is probative, it must weigh the probative value of the evidence against its prejudicial effect. *See id.* at 130, 835 P.2d at 846. As we have previously observed, "the probative value of such evidence is often not very great, [but] its prejudicial effect can be substantial." *Id.*

{17} Viewing the contested evidence in this way, we conclude that the trial court abused its discretion by allowing the admission of the witnesses' testimony. None of the three witnesses, including the witness who reported seeing two people removing several items from one of the two homes, was able to identify Defendant as having been responsible for the intrusion at the home. The other two could testify only about damage to and the loss of property from their homes—the other two homes that were broken into on the same day as Means's.

{18} The fact that the testimony was improperly admitted, however, does not necessarily require reversal. Carol Gahegan, who was with Defendant on the day of the break-ins, was given immunity to testify on behalf of the State about what she and Defendant did that day. Defendant did not object to the introduction of her testimony, either below or in this appeal. In fact, at a motion hearing before the second trial, in which the State sought permission to use Gahegan's taped testimony from the first trial because it had been unable to locate her for the second trial, Defendant asserted that he wanted Gahegan to testify at the second trial because she had provided favorable testimony at the first. The State was ultimately able to locate Gahegan before the second trial. She testified about Defendant being in Means's neighborhood at the time Means testified Defendant burglarized her home, but she also testified about Defendant breaking into the other two residences. Thus, the testimony of the other three witnesses was cumulative of Gahegan's testimony. We

therefore conclude that the admission of the testimony of the other three witnesses was harmless. *See State v. Woodward,* 121 N.M. 1, 10, 908 P.2d 231, 240 (1995) ("The erroneous admission of cumulative evidence is harmless error because it does not prejudice the defendant.").

Sufficiency of the Evidence to Convict on the Other Charges

{19} Defendant also argues that there was insufficient evidence to convict him of aggravated burglary, *see* NMSA 1978, § 30–16–4(B) (1963); aggravated assault, *see* NMSA 1978, § 30–3–2(A) (1963); and felon in possession of a firearm, *see* NMSA 1978, § 30–7–16(A) (1987). Defendant bases his argument on the fact that Shauna Means's testimony was the only evidence upon which to convict him of these charges.

{20} In reviewing a case to determine whether there is sufficient evidence to support the verdict, we view the evidence in the light most favorable to the verdict, "resolving all conflicts and indulging all permissible inferences to uphold a verdict of conviction." *State v. Sanders,* 117 N.M. 452, 456, 872 P.2d 870, 874 (1994).

> We do not . . . substitute our judgment for that of the factfinder concerning the credibility of witnesses or the weight to be given their testimony. Testimony by a witness whom the factfinder has believed may be rejected by an appellate court only if there is a physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions.

Id. at 457, 872 P.2d at 875. Moreover, "[t]he testimony of a single witness may legally suffice as evidence to support a jury's verdict." *State v. Riley,* 82 N.M. 298, 299, 480 P.2d 693, 694 (Ct.App.1971). Applying this standard to Means's testimony, we conclude that substantial evidence supports Defendant's convictions.

Cumulative Error

{21} Finally, Defendant argues that cumulative error requires reversal. The cumulative error doctrine requires reversal when "the cumulative impact of errors is so prejudicial that it deprives a defendant of his fundamental right to a fair trial." *State v. Vallejos,* 1998–NMCA–151, ¶ 32, 126 N.M. 161, 967 P.2d 836. Because we have found no such prejudice, we find no cumulative error. *See id.*

CONCLUSION

{22} For the foregoing reasons, we affirm.

{23} **IT IS SO ORDERED.**

ALARID and ARMIJO, JJ., concur.

7 P.3d 478

2000-NMSC-022

STATE of New Mexico, Plaintiff–Appellee,

v.

Shane Glen HARRISON, Defendant–Appellant.

No. 25,157.

Supreme Court of New Mexico.

July 18, 2000.

Rehearing Denied Aug. 10, 2000.

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D. Eric Hannum, Albuquerque, for Appellant.

Patricia A. Madrid, Attorney General, Elizabeth Blaisdell, Assistant Attorney General, Santa Fe, for Appellee.

OPINION

SERNA, J.

{1} Defendant Shane Glen Harrison appeals his convictions for nineteen felony counts, including first degree felony murder for the deaths of George and Pauline McDougall. *See* Rule 12–102(A)(1) NMRA 2000 (appeals from sentence of life imprisonment taken to the Supreme Court). Defendant asserts six errors on appeal: (1) whether the trial court erred by admitting testimony of John Lausell; (2) whether the trial court abused its discretion by admitting expert testimony of a polygrapher; (3) whether the trial court erred by denying Defendant's motion for a mistrial when the State elicited testimony from the polygrapher regarding criminal defendants' polygraph examinations; (4) whether the trial court abused its discretion by refusing to allow Defendant to re-open his case to present rebuttal polygrapher testimony; (5) whether Defendant's trial counsel violated his right to effective assistance of counsel by failing to present rebuttal testimony in a timely manner; and (6) whether the trial court violated Defendant's right to due process by refusing to declare a mistrial because of juror complaints. We affirm Defendant's convictions.

I. Facts and Background

{2} Defendant was charged with five counts of murder, as well as multiple counts of kidnapping, armed robbery, conspiracy, and tampering with evidence. Esther Beckley, Defendant's accomplice, testified against Defendant after entering into a plea agreement with the State. In exchange for her testimony against Defendant and her guilty plea to ten charges, which included two counts of first degree felony murder for the deaths of the McDougalls, the State dismissed three counts of first degree murder and did not pursue the death penalty against her. She received two consecutive life sentences plus thirty-five and one-half years.

{3} On February 23, 1996, a man and a woman robbed a Mac's Steak in the Rough restaurant in Albuquerque. An employee identified the woman as Beckley. Beckley testified that she and Defendant planned and carried out the robbery armed with a BB gun that looked like a .45 caliber gun. The employee did not see the male robber's face, but did hear a male voice. Two witnesses, Liza Turner and John Lausell, testified that Defendant had told each of them that he had robbed the restaurant. Lausell lived with and dated Beckley.

{4} Beckley testified that, in her presence, Defendant bought a Tec–9 nine millimeter semiautomatic pistol and ammunition for that weapon, and also shotgun ammunition. These weapons were used in the five murders. Beckley testified that Defendant kept the Tec–9, the shotgun, and two BB guns, one used in the restaurant robbery and one purchased following the robbery, in a duffel bag. The police recovered the duffel bag containing the murder weapons and BB guns during a search of Defendant's apartment near the time of Defendant's arrest.

{5} Sometime after 2:00 a.m. on March 3, 1996, a Hollywood Video store in Albuquerque was robbed. Employees of the video store arrived at 9:30 a.m. on Sunday, March 3, and discovered the bodies of three employees, Zachary Blacklock, Jowanda Castillo,

and Mylinh Daothi, who had each been shot in the back of the head three times. George and Pauline McDougall, Zachary's grandparents, were scheduled to pick him up at 2:00 a.m., after the store closed. On March 4, the McDougalls' bodies were found in the Sandia Mountains east of Albuquerque near their car; each had died of multiple gunshot wounds.

{6} Beckley testified that she and Defendant planned to rob the video store the night before the actual robbery took place. Beckley testified that she and Defendant drove up to the store in Defendant's black car and saw an employee locking the door. An employee testified that a black car with two people drove up; she identified Defendant and stated that he came up to the doors, attempted to pull them open, and asked her to let him in. She refused, telling him that the store was closed. The employee testified that he became upset and continued to ask to be let into the store, but she did not let him into the store.

{7} Beckley testified that she and Defendant returned to the video store the following night at an earlier time. The last customer that was in the store the night of the robbery testified that he saw a white man, about twenty-five to thirty years old, and a white woman in the store together. The customer positively identified Esther Beckley in a lineup but did not identify Defendant in a lineup. The customer was shown a picture of Lausell, a forty-seven-year-old black man, and testified that Lausell was definitely not the man he saw in the store the night of the robbery.

{8} Beckley testified that after the last customer left the video store, she approached the manager, Mylinh Daothi, displayed her BB gun, and forced her to go into the office at the back of the store in order to get the video surveillance tape which would show her and Defendant in the store. Beckley stated that she retrieved the surveillance tape. Zachary Blacklock then entered the office, and Beckley informed him that a robbery was taking place and instructed him not to move. Beckley testified that Defendant came to the back of the store with Jowanda Castillo. Beckley stated that Defendant pulled out his BB gun and took Mylinh to the front of the store to get into the safe while Beckley stayed in the back with the other two employees. Zachary informed Beckley that his grandparents were going to pick him up. Beckley saw a car drive up and testified that Defendant told her to try to get into the car with the grandparents and prevent them from leaving.

{9} Beckley stated that she told the McDougalls that Zachary and the manager were still busy, and she asked if she could join them in their car because she claimed her car heater did not work. She testified that the McDougalls were very friendly towards her, let her into the car, and spoke with her while they waited. Pauline McDougall was in the driver's seat and George McDougall was in the front passenger seat. Beckley stated that she could see into the store from the McDougall's car and that she saw Defendant and Mylinh walking inside the store. She testified that she heard gunshots but that the McDougalls did not appear to react to the sounds.

{10} Beckley testified that Defendant ran out of the store carrying a plastic trash bag and the Tec–9; he threw the bag into his car, ran to Pauline McDougall's side of the grandparents' car, and told her to open the window. She complied, and he told her to open the door. When it appeared that she would not do so, Defendant instructed Beckley to force her to open the door. Defendant instructed Beckley to exit the vehicle; he got into the back seat, and he told Beckley to follow them driving his car.

{11} Beckley testified that they drove into the mountains and that Defendant and the McDougalls exited their car. She stated that Defendant retrieved his shotgun from his car and walked with the McDougalls into the trees. Beckley recounted that George McDougall turned to Defendant and that Defendant then shot him and Pauline McDougall several times with the shotgun. She testified that Defendant returned to the car, threw the shotgun into the car, and told her that the McDougalls were still making noise. Defendant then pulled the Tec–9 out of his pants, returned to the McDougalls, and shot them multiple times with the Tec–9. Al-

though Beckley testified at trial that Defendant shot the McDougalls, she testified that she had previously told Lausell that she fired the shotgun herself.

{12} Beckley testified that as Defendant drove his car away from the McDougalls, his car bottomed out in a rut. A detective testified that a piece of Defendant's car was found at the McDougall murder scene.

{13} Defendant's neighbor, who was out of town for part of the weekend of the murders, testified that he returned home on Saturday night and noticed that his black leather jacket was missing from his closet, but when he returned home on Sunday, the jacket had been returned. Beckley testified that Defendant wore the neighbor's jacket during the robberies. Defendant had a key to the neighbor's apartment and admitted that he borrowed the jacket that weekend. The neighbor testified that Defendant had previously told him that he knew of a place which could be robbed and that people could get hurt in the robbery. The neighbor was with Defendant when Defendant bought the shotgun used in the murders, and the neighbor testified that Defendant told him that he was buying the shotgun to protect himself. Defendant offered contrary testimony, stating that he bought the shotgun for John Lausell.

{14} A prison acquaintance of Defendant's testified that Defendant told him, prior to the murders, that the next time he committed an armed robbery he would not leave witnesses. A different acquaintance, a man who had been in the county jail with Defendant, testified that Defendant described a robbery which Defendant had committed at the Los Arcos Restaurant, and Defendant told him that if the Defendant had shot the witness who had eventually called the police he never would have been caught.

{15} Defendant gave a statement to the police upon his arrest, on March 12, 1996, which was admitted as evidence in Defendant's trial. Defendant also testified at trial, admitting that he bought the shotgun and the Tec–9 which were used in the five murders and found in his apartment after his arrest. Defendant, in his statement to the police and in his testimony at trial, claimed that Beckley told him that Beckley and others committed the crimes.

{16} Defendant testified at trial that he bought the guns for Lausell and that Beckley took the guns. He testified that he lent his car and his neighbor's jacket to Beckley on the night of the crimes and that he stayed home by himself. He claimed that Beckley came back to his apartment at approximately 5:00 a.m. on Sunday, March 3, and told him he should get rid of the jacket because it had blood on it. Defendant testified that Beckley told him to change the tires on his car, because it was used in the murders; he stated that he did buy new tires. Defendant testified that he and another man drove to the mountains, and Defendant dug up the guns, which were in a black duffel bag, and took them back to his apartment.

{17} A jury found Defendant guilty of nineteen counts but was unable to reach unanimous verdicts on three counts of murder for the deaths of Jowanda Castillo, Zachary Blacklock, and Mylinh Daothi. Defendant was sentenced to two consecutive life terms plus an additional 198 years, totaling a term of 258 years imprisonment.

II. Discussion

A. Lausell's Testimony

{18} The trial court has discretion regarding the admission or exclusion of evidence, and a trial court's evidentiary ruling will not be disturbed on appeal absent an abuse of that discretion. *See State v. Stampley*, 1999–NMSC–027, ¶ 37, 127 N.M. 426, 982 P.2d 477; *State v. Brown*, 1998–NMSC–037, ¶ 32, 126 N.M. 338, 969 P.2d 313. In order to find an abuse of discretion, this Court must conclude that the trial court's decision to admit testimony was obviously erroneous, arbitrary, or unwarranted. *Brown*, 1998–NMSC–037, ¶ 39, 126 N.M. 338, 969 P.2d 313.

{19} Defendant argues that the trial court abused its discretion when it admitted the testimony of Lausell regarding statements made by Beckley to Lausell which implicated Defendant in the murders. Defendant's trial counsel objected on hearsay grounds to Lausell's testimony regarding Beckley's statements to him. The court found that Lau-

sell's testimony was admissible based on Rule 11–801 NMRA 2000.

A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ...

(b) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive....

Rule 11–801(D).

{20} Defendant argues that Beckley admitted that at least some of her statements to Lausell were lies in an attempt to impress him and keep him from leaving her, and Defendant asserts that this motive to lie to Lausell arose before she made her statements to him. Defendant argues that the trial court should not have admitted Lausell's testimony as a prior consistent statement offered to rebut an express or implied charge of recent fabrication because the prior statement, to be admissible, must have been made before the alleged motive arose, relying on *State v. Casaus,* 1996–NMCA–031, ¶¶ 17–20, 121 N.M. 481, 913 P.2d 669, and *Tome v. United States,* 513 U.S. 150, 156, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). In his brief in chief, Defendant asserts that Beckley had two motives to continue reiterating the same story: First, she was still devoted to Lausell, in spite of the fact that he gave information to the police; and second, her plea agreement with the State prevented variation from her original statements because of the threat of the death penalty. Defendant contends that Lausell's testimony improperly bolstered Beckley's credibility.

1. Preservation of Defendant's Appellate Argument

{21} Defendant failed to properly preserve the claim he now argues on appeal. The State, without further analysis, notes Defendant raises this argument for the first time on appeal. Defendant's only response is that he believes his objections speak for themselves. Defendant argues that his objection to the testimony as hearsay was enough to be sufficiently clear to the trial court. We disagree.

{22} Defense counsel objected to Lausell's testimony merely as "hearsay." The trial court stated that it did not understand Defendant's objection and asked defense counsel if he was "contesting what Esther Beckley said was the truth." Defense counsel replied that he was contesting Beckley's truthfulness, but he argued that it did not give the State "the right to come in and utilize hearsay," and that he was objecting on that basis. The State responded that the testimony was admissible as "either prior inconsistent or prior consistent" statements, and the trial court ruled that the testimony was "clearly admissible under [Rule] 11–801." Thus, the State properly countered Defendant's hearsay objection with a reference to Rule 11–801, which the court clearly understood; the State was arguing, and the trial court accepted, that the testimony was not hearsay because it was "consistent with the declarant's testimony and [was] offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *See* Rule 11–801(D)(1)(b).[1]

{23} At this point, in order to preserve the argument, Defendant had to alert the trial court that he believed that the declarant had an improper motive that predated the time she made the statement to Lausell. Defense counsel did not argue to the trial court at that time that Beckley had a motive to lie which predated her statements to Lausell. During Lausell's testimony regarding the statements Beckley made to him concerning the robberies and murders, defense counsel did not object or request the trial court to exclude that portion of Lausell's testimony based on this theory of Beckley's motive to lie to Lausell.

{24} Thus, Defendant did not alert the trial court to the specific nature of his general hearsay objection, even after the State and the trial court clearly believed the testimony was admissible under Rule 11–801. In order

1. Beckley's statements to Lausell, assuming that they were inconsistent, were not made under oath. Thus, Rule 11–801(D)(1)(a) would not apply.

to properly preserve this claim on appeal, Defendant had to argue that he believed that Beckley had a motive to lie before she made the statements to Lausell.

{25} "The question of when a motive to lie arises is a question the trial court answers, reviewable by an appellate court under the abuse of discretion standard." *Brown*, 1998–NMSC–037, ¶ 32, 126 N.M. 338, 969 P.2d 313. In *Brown*, this Court recounted that "Defendants objected to the introduction of [a prior consistent statement] arguing that [the declarant] had a motive to fabricate," which arose before he told the witness his story. *Id.* ¶ 34. Because the defendants made the proper argument at trial, the trial court in *Brown* was then able to consider and rule on the argument, rejecting the defendants' claims that the motive to lie predated the time the declarant made the statement to the witness. *Id.*

{26} The Court of Appeals, in *Casaus*, 1996–NMCA–031, ¶ 19, 121 N.M. 481, 913 P.2d 669 recognized that Rule 11–801(D)(1)(b) requires trial courts to determine "not only whether 'improper influence or motive' exists but also when the motive originated." In *Casaus*, the Court of Appeals concluded that the testimony was inadmissible because the prior consistent statement "did not pre-date the improper influence or motive," and determined that the defendant raised the motive to lie in his opening statements, showing that the motive arose two weeks before the statements were made. *Id.* ¶ 20. In contrast, defense counsel did not mention in opening statements that Beckley's motive to lie was to convince Lausell not to leave her; rather, defense counsel implied that she was lying to police in order to protect Lausell, and that after Lausell turned her into the police, she was coerced by the threat of the death penalty to continue telling the same story. Because Defendant did not alert the trial court to his specific theory that Beckley was lying when she made the statements to Lausell, the trial court never had the opportunity to determine when the motive to lie would have arisen.

{27} While it may be proper for a defendant to have multiple theories of the crime, Defendant, in order to preserve an argument for appeal, must alert the trial court as to which theory is at issue in order to allow the trial court to rule on the objection. On appeal, Defendant argues that Beckley's motive to lie to Lausell arose from an initial motive to keep him from leaving her, and Lausell's testimony was therefore inadmissible under the premotive requirement discussed in *Tome* and *Casaus*. Defendant did not present this argument to the trial court when defense counsel objected to Lausell's testimony, and because of the multiple motives alleged by defense counsel, the trial court could not have assumed which motive to lie defense counsel was referring to when he objected to Lausell's testimony merely as hearsay. Defense counsel maintained throughout the trial that Lausell was actually the murderer in this case; it is paradoxical for Beckley to lie to Lausell in order to keep him by telling him she committed these crimes with Defendant if, in fact, she committed the crimes with Lausell. She would not reasonably tell her accomplice that she committed these very crimes with another person. Thus, if Defendant wanted to assert a new motive and theory of Beckley's statements to Lausell, that Lausell was not involved with the crimes and therefore knew nothing about them and that Beckley was lying to Lausell in order to impress him, he had to inform the trial court of this theory in order to fairly invoke a ruling by the court. As discussed further below, the trial court had instead been repeatedly presented with Defendant's theory that Lausell himself committed the crimes.

{28} "A trial is first and foremost to *resolve* a complaint in controversy, and the rule [of preservation] recognizes that a trial court can be expected to decide only the case presented under issues fairly invoked." *State v. Gomez*, 1997–NMSC–006, ¶ 14, 122 N.M. 777, 932 P.2d 1; *accord* Rule 12–216(A) NMRA 2000 (establishing that in order for an appealing party to preserve a question for review "it must appear that a ruling or decision by the district court was fairly invoked").

We require parties to assert the legal principle upon which their claims are based

> and to develop the facts in the trial court primarily for two reasons: (1) to alert the trial court to a claim of error so that it has an opportunity to correct any mistake, and (2) to give the opposing party a fair opportunity to respond and show why the court should rule against the objector.

Gomez, 1997–NMSC–006, ¶ 29, 122 N.M. 777, 932 P.2d 1.

> [I]t is the responsibility of counsel at trial to elicit a definitive ruling on an objection from the court. It is also trial counsel's duty to state the objections so that the trial court may rule intelligently on them and so that an appellate court does not have to guess at what was and what was not an issue at trial.

State v. Lucero, 116 N.M. 450, 453, 863 P.2d 1071, 1074 (1993).

{29} Because Defendant failed to properly preserve this issue and instead is introducing a new argument on appeal, we review this claim for fundamental error. *Cf. State v. Chamberlain,* 112 N.M. 723, 730, 819 P.2d 673, 680 (1991) ("Failure to make a timely objection to alleged improper argument bars review on appeal, unless the impropriety constitutes fundamental error."). We first determine whether the trial court erred in admitting Lausell's testimony under the arguments Defendant made at trial.

2. Defendant's Preserved Trial Argument

{30} We conclude that the trial court did not err by admitting Lausell's testimony. As noted above, Defendant made a general hearsay objection to Lausell's testimony, and the trial court elicited from defense counsel that he was arguing that Lausell's testimony was inadmissible and that Beckley was lying. The prosecutor countered the hearsay objection with a reference to Rule 11–801, with which the trial court agreed. Because defense counsel did not argue that Beckley's alleged lie referred to a motive to prevent Lausell from leaving her and because his theory of the case was that Lausell himself was an accomplice, the trial court could reasonably presume that if Beckley had a motive to lie which could result in exclusion of the testimony under Rule 11–801, the motive would be consistent with defense counsel's assertions at the time of trial.

{31} At issue before the trial court was Beckley's alleged motive to lie in order to avoid the death penalty and the alleged motive to lie to protect Lausell. These motives occurred *after* she made the statements to Lausell. In the context of the defense counsel's strategy, the trial court properly concluded that Beckley's alleged motive to lie did not predate her statements to Lausell. During opening arguments, defense counsel stated,

> Another one made a deal for her life. And part of that deal is that she's to testify here today....
>
> Oh, they use fancy words like, "She's supposed to tell the truth." Well, no, folks. What she's supposed to tell you is the same story she told them the first time around, *truth be damned.*
>
> ....
>
> ... [S]he is supposed to tell the same story she told the first time she talked to the police ... *to save part of her liberty; another one to save his liberty;* others for the glory of being involved in the case.

(Emphasis added.) Defense counsel was thus arguing that Beckley lied to the authorities when she spoke with them and would lie during her testimony in order to avoid the death penalty. Defense counsel was implying that she was lying to the police in order to protect Lausell because Lausell was the murderer. Defense counsel stated.

> The evidence is going to show that she's in love with John Lausell.... And at the time that she gave these statements to the police, didn't know that John Lausell was fixing to do her in....
>
> That's very important to know, because she tries to direct all the attention away from John Lausell. She tries to act as if John Lausell had nothing to do with this. She tries to keep him as far out of this as much as she can.

{32} Defendant's theories in the trial court regarding Beckley's motives to lie were her desire to protect Lausell and her desire to avoid the death penalty. Thus, under *Tome* and *Casaus,* the trial court did not err in

admitting Lausell's testimony regarding Beckley's statements because Beckley's alleged motive to lie arose at the time she spoke to the police, after she made the statements to Lausell.

3. Fundamental Error Analysis

{33} "The rule of fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done." *State v. Orosco,* 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992). Initially, we determine whether the trial court erred under Defendant's unpreserved appellate argument.

{34} The trial court's admission of Lausell's testimony is consistent with this Court's discussion in *Brown,* 1998–NMSC–037, ¶ 43, 126 N.M. 338, 969 P.2d 313:

> At common law, prior consistent statements were admissible for rehabilitation on several theories: (1) to place a supposed inconsistent statement in context to refute the alleged inconsistency; (2) to support the denial of making an inconsistent statement; (3) to refute the suggestion that the witness's memory is flawed due to the passage of time; and (4) to refute an allegation of recent fabrication, improper influence, or motive.

Under this Court's analysis in *Brown,* this case involves the first two theories: Beckley's prior consistent statements to Lausell were admissible for rehabilitation to place a supposed inconsistent statement in context to refute the alleged inconsistency and to support the denial of making an inconsistent statement. Prior consistent statements, to place an inconsistent statement in context to refute the inconsistency and to support the denial of making an inconsistent statement, are admissible for purposes of rehabilitation, because the "rehabilitative use of the statements does not purport to offer the words for the truth of the matter asserted but, instead, to refute a specific attack against the witness's credibility." *Brown,* 1998–NMSC–037, ¶ 45, 126 N.M. 338, 969 P.2d 313. This Court, in *Brown,* concluded that the first three common law theories of admissibility for rehabilitation are not dependent on motive and are therefore not subject to the premotive requirement of Rule 11–801(D)(1)(b). *Id.* ¶¶ 38–46. Rule 11–801(D)(1)(b) "deals only with the fourth theory on which prior consistent statements may be offered." *Brown,* 1998–NMSC–037, ¶ 43, 126 N.M. 338, 969 P.2d 313. Thus, similar to our holding in *Brown,* 1998–NMSC–037, ¶ 46, 126 N.M. 338, 969 P.2d 313, we believe the trial court's decision to admit Lausell's testimony was proper independent of Rule 11–801(D)(1)(b). As a result, the trial court's ruling was proper irrespective of the motive to lie asserted by Defendant for the first time on appeal.

{35} The State asserts that Defendant, while cross-examining Beckley, suggested that the State had attempted "to get her to fabricate testimony that she gave certain information to Mr. Lausell ." We agree. Defense counsel questioned Beckley:

> Q. Ms. Beckley, you understand and know now that your lover has, at least according to all of these reports and everything else, information that nobody else seems to have about this case. You know that, don't you?
>
> A. Yes.
>
> Q. And you know that yesterday afternoon in particular, the District Attorney's office was trying to get you to say that you gave that information to him?

Thus, the State argues that, in order to rebut Defendant's suggestion that Beckley's testimony at trial was inconsistent with her statements to Lausell, the trial court properly allowed the State to introduce Lausell's testimony for rehabilitative purposes, to place a supposed inconsistent statement in context in order to refute the alleged inconsistency and in order to bolster her denial of making an inconsistent statement. Although Defendant argues that defense counsel merely asked one question regarding Beckley's account of events differing from Lausell's version,[2] de-

2. Defendant argues that this is a "tenuous thread [upon which] the State attempts to hang the full weight of its contention that Esther Beckley's prior consistent statements preceded a 'motive'

fense counsel repeatedly referred to this theory at trial, implying that Lausell's account contained more detail than she provided to him.

{36} During opening statements, defense counsel suggested that Lausell knew information that he could not have obtained from Beckley:

> John Lausell knows lots of intimate information, detailed, about what went on at Hollywood Video, and especially up in the mountains, that Esther Beckley never told him. So one of two things happened: Either the police told him about that information, or he was there. And if he was there, the state made a deal with the devil.

Defense counsel continued with several remarks regarding the theory of what Lausell knew independently, and he questioned Beckley extensively regarding what she told Lausell. Throughout the trial, defense counsel's strategy was to implicate Lausell in the robbery and murders and to imply that Lausell framed Defendant by stating during closing that "only Lausell knew how they were shot" and that "they bought [Lausell's] frame-up."

{37} Following a careful review of the trial transcripts, including the closing arguments, we conclude that the prosecutors used Lausell's testimony as rehabilitation to show that Beckley's statements at trial were not inconsistent with her statements to Lausell. In other words, the State used Lausell's testimony to support Beckley's denial of making an inconsistent statement rather than for the truth of the matter asserted, that Defendant committed the murders and robbery. During closing argument, the State contended,

> The eyewitness to the homicides, Esther Beckley, in prison for the rest of her life. She says Shane Harrison did it. She said that Shane Harrison did it when she talked to John Lausell. She said Shane Harrison did it when she talked to the police. She said Shane Harrison did it when she talked to Mr. Mitch LeMay. She said it here. *She's been completely consistent every single day.* She described everything.

(Emphasis added.). The prosecutor's argument supports the State's theory that the prosecutors were using Lausell's testimony to rebut defense counsel's claim that Beckley's testimony at trial was inconsistent and to bolster her denial of making inconsistent statements at trial.

{38} During closing arguments, the prosecutors' discussion of Lausell was not for the substantive use of Beckley's statements regarding the Defendant; instead, the discussion of Lausell was an attempt to counter defense counsel's claims that Lausell was actually the murderer. The prosecutor stated that Lausell was a "tipster" that pointed the police in the right direction and that he was telling the truth, stating that "[h]e told you the truth. And John Lausell had an alibi." The prosecutor also noted that Lausell had taken a polygraph test, emphasizing that he claimed he was not involved in the robberies and murders. The prosecutor argued that "John Lausell was the fall guy. He was a good fall guy because she loved him, and he became a great fall guy when he got a hundred grand [as a reward for providing information to the police]. So 'John Lausell did it.' " The prosecutors were attempting to counter Defendant's trial strategy that Lausell actually committed the crimes and that Beckley lied to the police in order to protect Lausell and avoid the death penalty. Because the trial court properly admitted Lausell's testimony under Defendant's appellate theory and thus did not err, Defendant clearly did not suffer fundamental error. *Cf. State v. Coffin,* 1999-NMSC-038, ¶ 29, 128 N.M. 192, 991 P.2d 477 (concluding that the trial court's actions "did not constitute error and, therefore, did not rise to the level of fundamental error warranting reversal of Coffin's conviction.").

{39} We conclude, with respect to Defendant's preserved error, that the trial court did not err in admitting Lausell's testimony because Beckley's alleged motives to lie, pro-

that arose the previous afternoon during the State's direct examination." This appears to misapprehend *Brown,* as motive is not relevant under the analysis of the other three forms of rehabilitation articulated in that case. As discussed above, the State is properly relying on two of the three forms unrelated to motive.

tection of Lausell and avoidance of the death penalty, did not predate her statements to Lausell. We conclude that Defendant raises the argument that the trial court erred in admitting Lausell's testimony because Beckley had a motive to lie predating her statements to Lausell for the first time on appeal. Defendant failed to alert the trial court to this theory, and thus, failed to properly preserve this issue for appeal. Reviewing Defendant's unpreserved appellate argument for fundamental error, we hold that the trial court's admission of Lausell's testimony was also proper under *Brown* as a prior consistent statement for purposes of rehabilitation to place an inconsistent statement in context and to support the denial of making an inconsistent statement. The trial court did not err; therefore, the rule of fundamental error does not apply.

B. Polygraph Testimony

{40} "In New Mexico, the trial court has discretion to admit results of polygraph tests into evidence if certain conditions, designed to ensure the accuracy and reliability of the test results, are met." *State v. Sanders,* 117 N.M. 452, 459, 872 P.2d 870, 877 (1994). This Court reviews a trial court's admission of polygraph evidence for an abuse of discretion, and the trial court's ruling "will be disturbed on appeal only when the facts and circumstances of the case do not support the logic and effect of the ruling in question." *See State v. Aragon,* 116 N.M. 291, 293, 861 P.2d 972, 974 (Ct.App.1993).

> [T]he opinion of a polygraph examiner may in the discretion of the trial judge be admitted as evidence as to the truthfulness of any person called as a witness if the examination was performed by a person who is qualified as an expert polygraph examiner pursuant to the provisions of this rule and if:
>
> (1) the polygraph examination was conducted in accordance with the provisions of this rule;
>
> (2) the polygraph examination was quantitatively scored in a manner that is generally accepted as reliable by polygraph experts;
>
> (3) prior to conducting the polygraph examination the polygraph examiner was informed as to the examinee's background, health, education and other relevant information;
>
> (4) at least two (2) relevant questions were asked during the examination; and
>
> (5) at least three (3) charts were taken of the examinee.

Rule 11–707(C) NMRA 2000.

{41} Defendant argues that the trial court abused its discretion in admitting the testimony of Jim Wilson, who gave Lausell a polygraph examination, because Wilson gave Lausell the exam without complying with Rule 11–707, and because Lausell had medical conditions which Defendant claims interfere with accurate testing. As he did in the trial court, Defendant, on appeal, relies on *State v. Anthony,* 100 N.M. 735, 737–39, 676 P.2d 262, 264–66 (Ct.App.1983). In *Anthony,* the Court of Appeals concluded that it was an abuse of the trial court's discretion to admit the polygraph results at issue because, "[a]s conceded by the State, the examiner was not qualified to determine the possible effect of defendant's admitted physical problem [eye irritation causing pain] on the test results," and because of "the ambiguous nature of the relevant questions." *Id.* at 739, 676 P.2d at 266.

{42} Defendant contends that because Wilson was not a physician, pharmacologist, or psychologist, he was not qualified to evaluate the significance of Lausell's medical conditions on the results of the exam. However, neither our rule nor *Anthony* suggests that a polygrapher must be a physician, pharmacologist, or psychologist. Rule 11–707(B) sets out the minimum qualifications for polygraph examiners, requiring at least five years of experience in the administration or interpretation of polygraph examinations or equivalent academic training and at least twenty hours of continuing education during the twelve months prior to the date of the examination. The Court of Appeals noted the importance of assuring that the examiner is "qualified to determine whether the examinee is a fit subject for testing," but did not intimate that Rule 11–707(B) requires a med-

ical degree or other advanced degree. *Anthony,* 100 N.M. at 739, 676 P.2d at 266.

{43} In the present case, the trial court held a hearing outside of the jury's presence to determine the admissibility of Wilson's testimony. Wilson testified that he attended a basic course in 1969 and maintained continuing education since that time. Wilson testified that he had been qualified as an expert in the area of polygraphy in district court more than 500 times, and had performed over 6,000 exams. He testified at length about research regarding the effects of drugs and medical conditions on polygraphy exams since 1983. We conclude that the trial court did not abuse its discretion by finding that Wilson met the qualifications of Rule 11–707(B).

{44} Defendant argues that Rule 11–707(C)(3) requires the examiner to be informed as to the examinee's background, health, education, and other relevant information, and that if the examiner asks those questions but contends that the answers do not effect the test results, the requirements of the rule are meaningless. Defendant asserts that Lausell's medical conditions were more serious than the painful eye irritation at issue in *Anthony.*

{45} The State observes that Wilson testified about the effects of Lausell's medical conditions and medications on his test. Lausell described his medical conditions to Wilson, including a blood disorder, for which he was taking anticoagulants, indigestion and insomnia, for which he was taking Tagamet, as well as congestion and a slight headache. Wilson testified about control question techniques, which he used with Lausell, and stated that this technique was resistant to medications and other countermeasures, and that an examinee has to have the ability to physiologically respond to either pass or fail a test. He noted that medications which would affect the examinee would have the same effect on relevant, control, and neutral questions. Wilson questioned Lausell about his dosage of a particular medication and performed a reaction test to determine whether he could respond to the testing procedure; Lausell responded with a significant change in diastolic pressure.

{46} Defendant cross-examined Wilson regarding the effects of physical conditions and medications on exams. The trial court found that the State satisfied the requirements of Rule 11–707 and allowed Wilson to testify.

{47} "The factual determination of the admissibility of polygraph evidence lies within the sound discretion of the trial court." *Aragon,* 116 N.M. at 293, 861 P.2d at 974. Wilson informed himself as to Lausell's background, health, and other relevant information, as required by Rule 11–707(C)(3), and he addressed Defendant's assertions regarding the effect of physical conditions and medications on Lausell. Any remaining questions about Lausell's performance on the polygraph exam go towards the weight and not the admissibility of the evidence. *Cf. State v. Anderson,* 118 N.M. 284, 301, 881 P.2d 29, 46 (1994) ("We hold that [under Rule 11–702 NMRA 2000] questions about the accuracy of results [of DNA testing] goes to the weight of the evidence and is properly left to the jury."). We conclude that the trial court did not abuse its discretion by admitting Wilson's testimony.

C. Defendant's Motion for Mistrial

{48} Defendant argues that the State elicited testimony from Wilson to the effect that if a defendant in a criminal case takes and fails a polygraph test, the defendant does not have to disclose this test result. Defendant asserts that this testimony improperly suggested to the jury that Defendant may have failed a polygraph test. Defendant acknowledges that he cannot find case law on point, and he relies on an analogy to cases addressing a prosecutor's comment on a defendant's silence. Although conceding that the prosecutor's questions in his case were not specifically a comment on a refusal to make a statement to police or to testify at trial, and thus do not directly implicate Defendant's right to remain silent, he contends that the testimony violated his right to a fair trial. Defendant asserts that his decision whether or not to take a polygraph exam and introduce the results is a tactical decision and is protected by attorney-client privilege. Defendant argues that because

Wilson stated that he performs many tests for defense attorneys under conditions of confidentiality, the prosecutor's questions to Wilson improperly suggested that it was likely that Defendant himself was hiding a failed polygraph test.

{49} "The standard generally used for evaluating allegedly improper prosecutorial comments is whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *State v. Clark,* 108 N.M. 288, 302, 772 P.2d 322, 336 (1989), *overruled on other grounds and sentence vacated by Clark v. Tansy,* 118 N.M. 486, 488–93, 882 P.2d 527, 529–34 (1994), *and overruled on other grounds by State v. Henderson,* 109 N.M. 655, 664, 789 P.2d 603, 612 (1990); *accord United States v. Hernandez–Muniz,* 170 F.3d 1007, 1011 (10th Cir. 1999) (concluding that the prosecutor's remarks did not constitute a comment on the defendant's right not to testify). Even if we were to accept an analogy to a comment on a defendant's silence, however, the prosecutor in the present case asked the question regarding defendants in general and did not specify Defendant in particular. Thus, we do not believe that the jury naturally and necessarily took the question as a comment that Defendant failed a test.

{50} The State contends that the context of this questioning is significant and that the questions were not in reference to Defendant but were rebuttal to Defendant's suggestion that Lausell passed the test because he had nothing at stake. The State notes that Defendant, during cross-examination of Wilson, suggested that Lausell was "rather relaxed about the fact that he has an alibi for the weekend of these homicides" and questioned Wilson regarding the effect of lack of fear on a polygraph test. Defendant questioned whether Lausell's agreement with the State and an alibi, prior to taking the polygraph test, would be a "safe kind of thing." In response to these questions by Defendant, the prosecutor, on redirect, asked whether a criminal defendant has to reveal the results if the defendant takes a test, and Wilson stated that a defendant was not under an obligation to reveal a failed test. The prosecutor asked whether "those people have less to fear, supposedly, than Mr. Lausell," and Wilson responded, "[O]h, absolutely."

{51} Defendant moved for a mistrial, arguing to the trial court that these questions were inappropriate and prejudicial. The prosecutor responded that the questions were intended to contradict Defendant's suggestion "that if you have nothing to lose, you'll pass." The court instructed the prosecutor to "stay clear of the defendant." The prosecutor continued questioning Wilson regarding test subjects' fear and anxiety and whether Lausell was concerned about his results. The State notes that the prosecutor did not mention Defendant and did not state or imply that Defendant had taken a polygraph test during this line of questioning.

{52} The State relies on an analogy to *State v. Rojo,* 1999–NMSC–001, ¶ 57, 126 N.M. 438, 971 P.2d 829. In *Rojo,* this Court discussed a prosecutor's cross-examination of a defense expert on whether criminal investigations regarding background checks included prior felony convictions and whether the prior convictions were admissible in court, and concluded that in context, these questions served the legitimate purpose of eliciting testimony regarding the basis of the expert's claim that police improperly investigated the victim's murder. Under a fundamental error analysis, we held that, "[i]n context, the prosecutor's conduct cannot be construed as an improper effort to introduce evidence of Defendant's prior conviction because the prosecutor did not mention Defendant by name or specify his prior crime." *Rojo,* 1999–NMSC–001, ¶ 57, 126 N.M. 438, 971 P.2d 829.

{53} On appeal, this Court will not disturb the trial court's denial of a mistrial absent an abuse of discretion, "when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Simonson,* 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983). Comparable to our analysis in *Rojo,* in context, we believe that the prosecutor's questions did not improperly imply that Defendant had taken and failed a polygraph exam. *Cf. Chamberlain,* 112 N.M. at 730 n. 4, 819 P.2d at 680 n. 4 (noting that

defendant did not remain silent and concluding that prosecutor's comment did not manifestly intend the remark to be of such a character that the jury would interpret it as a comment on the failure of the accused to testify so as to constitute improper prosecutorial comments). We do not believe that the prosecutor's line of questioning was intended or would be naturally and necessarily interpreted as a comment on Defendant's decision whether to take a polygraph test or on the results of any such test had one been taken. *See Clark*, 108 N.M. at 303, 772 P.2d at 337 ("To decide if the jury would naturally and necessarily assume the statements to be such a comment, the statement must be viewed within its precise context and not in isolation."). Thus, we conclude that the trial court did not err by refusing to grant Defendant's motion for a mistrial.

D. Defendant's Motion to Reopen

{54} Defendant argues that the trial court abused its discretion by refusing to allow him to reopen his case in order to present polygraph testimony. Defendant rested his case on December 18, 1997, and the State did not present rebuttal. The trial court recessed the case for a holiday break until January 5, 1998. On January 2, Defendant moved to reopen the case to present the testimony of Peter Pierangeli, a polygraph examiner, in order to counter Wilson's testimony regarding Lausell's polygraph examination. Defense counsel stated that he did not send Lausell's charts to an expert for evaluation until after the close of evidence. Pierangeli stated that defense counsel first contacted him on December 24, 1997. Defense counsel stated that he had insufficient funds to pay the witness to testify and that he paid for the witness through personal funds.

{55} Pierangeli stated that he received Lausell's charts and that his initial opinion was that the charts were deceptive. Pierangeli stated that he later received a copy of the pretest interview of Lausell and that he would not have evaluated the charts because the pretest was invalid. He believed that the pretest was invalid due to the pauses on the tape, where the recorder was shut off and then resumed.

{56} This Court reviews a trial court's denial of a motion to reopen the case after the close of evidence for an abuse of discretion. *See State v. Ortega*, 112 N.M. 554, 573, 817 P.2d 1196, 1215 (1991). Two factors which appellate courts consider in this context are the extent to which the movant used due diligence to obtain the testimony and the probable value of that testimony. *See State v. Padilla*, 118 N.M. 189, 198, 879 P.2d 1208, 1217 (Ct.App.1994) (holding that the trial court did not abuse its discretion in denying a motion to reopen the case "[i]n view of Defendants' failure to use due diligence to obtain [a witness's] attendance and the minimal value of the proffered testimony" where defendants did not reveal the witness's name or subpoena him until after the first day of trial, creating scheduling conflicts with the witness).

{57} Defendant's trial counsel was clearly aware that the State was using polygraph expert testimony and did not attempt to secure the rebuttal polygrapher to testify until after the close of evidence in this case. Although Defendant argues that reopening the case for this testimony would have caused little or no prejudice to the State, the prosecutor argued that he would need at least two weeks for adequate preparation, including time to find additional experts. The State notes that approximately two weeks had elapsed while the court was in recess, and if the State needed two weeks to prepare, the jury would have a break of at least one month, which would be burdensome.

{58} Defendant argues that his trial counsel stated that he was to blame but that Defendant should not be punished as a result and, if defense counsel is at fault, then Defendant received ineffective assistance of counsel. Defendant claims that Pierangeli's testimony was essential to his case because his testimony would counter Wilson's, and Wilson's testimony supported the credibility of Lausell, which in turn supported the credibility of Beckley.

{59} The State notes that Pierangeli strongly believed that the polygraph test should not have been given because of the

pretest issues and was very reluctant to offer an opinion regarding the charts because the scoring of the test would be invalid. Thus, the State argues, Pierangeli's opinion that the charts were deceptive was unreliable. The State further argues that Pierangeli's remaining testimony was cumulative to defense counsel's aggressive cross-examination of Wilson.

{60} This Court has rejected a similar argument by a defendant in *State v. Hernandez,* 115 N.M. 6, 13, 846 P.2d 312, 319 (1993), in which the defendant attributed inability of counsel to secure an expert witness in a timely fashion to the public defender's office's lack of funds. In *Hernandez,* we held that the trial court did not abuse its discretion in denying a motion for a continuance, noting that defense counsel adequately placed the state's evidence into question through cross-examination. *Id.* at 15–16, 115 N.M. 6, 846 P.2d at 321–22. Here, defense counsel also assertively cross-examined Wilson. In the present case, because defense counsel did not obtain the witness until after the close of evidence, we conclude, from the prejudice to the State, the delay to the case, and the cumulative nature of the testimony, that the trial court did not abuse its discretion in denying Defendant's motion to reopen the case.

E. Ineffective Assistance of Counsel

{61} Defendant has the burden of demonstrating ineffective assistance of counsel by showing that trial counsel did not exercise the skill of a reasonably competent attorney and that Defendant was prejudiced by trial counsel's performance. *See Duncan v. Kerby,* 115 N.M. 344, 348, 851 P.2d 466, 470 (1993). Defendant has the burden of showing that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Hernandez,* 115 N.M. at 17, 846 P.2d at 323; *accord Williams v. Taylor,* 529 U.S. 362, ——, 120 S.Ct. 1495, 1512, 146 L.Ed.2d 389 (2000) (reaffirming this standard from *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and stating that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims"). "If a defendant does not make such a showing, the defendant has not carried his or her burden, and the presumption of effective assistance controls." *State v. Baca,* 1997–NMSC–059, ¶ 24, 124 N.M. 333, 950 P.2d 776; *accord Hernandez,* 115 N.M. at 16, 846 P.2d at 322 (noting that "counsel is presumed competent").

{62} Defendant contends that although his trial counsel was clearly aware that the State would present the testimony of a polygrapher and that the comparable credibility of witnesses would be pivotal to his case, his trial counsel did not consult with experts until after the close of evidence. Defendant asserts that his inability to present rebuttal to the State's polygraph evidence was devastating, claiming that the State's case was primarily based on Beckley's and Lausell's testimony and that the credibility of each of these witnesses was supported by Wilson's polygraph testimony.

{63} "[A] prima facie case is not made when a plausible, rational strategy or tactic can explain the conduct of defense counsel. . . ." *Baca,* 1997–NMSC–059, ¶ 25, 124 N.M. 333, 950 P.2d 776 (citation and internal quotation marks omitted). "The decision whether to call a witness is a matter of trial tactics and strategy within the control of trial counsel." *State v. Orosco,* 113 N.M. 789, 797, 833 P.2d 1155, 1163 (Ct.App.1991), *aff'd,* 113 N.M. at 788, 833 P.2d at 1154; *cf. Baca,* 1997–NMSC–059, ¶ 30, 124 N.M. 333, 950 P.2d 776 (holding that a defendant failed to demonstrate ineffective assistance of counsel when a reasonable attorney may have concluded, as a matter of strategy, not to request a lesser included offense instruction). Defense counsel made a tactical decision before trial not to hire a polygraph expert and to rely on his own cross-examination of Wilson. *See Chamberlain,* 112 N.M. at 734, 819 P.2d at 684 (rejecting ineffective assistance claim, and noting that counsel's decision not to call expert witnesses was a matter of trial strategy); *State v. Vigil,* 110 N.M. 254, 258, 794 P.2d 728, 732 (1990) (rejecting claim that defense counsel's failure to obtain expert testimony was ineffective assistance of counsel). Defense counsel subsequently concluded, af-

ter the close of evidence, that an expert would assist his case and paid for the expert himself. Defendant has failed to demonstrate that defense counsel did not exercise the skill of a reasonably competent attorney.

{64} Further, even if we were to conclude that defense counsel did not exercise the skill of a reasonable attorney, Defendant also failed to meet his burden of showing that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. Even without Wilson's testimony, the jury heard a great deal of testimony implicating Defendant, including Beckley's testimony, testimony that Defendant purchased the murder weapons and had the guns stored in his apartment after the murders, testimony that his car was at the scene of the McDougall's murders, testimony that Defendant attempted to enter the video store after it had closed the night before the murders, and testimony that Defendant was planning a robbery and that people could be hurt during the robbery. Further, the State notes that defense counsel's strategy was at least partially effective in that it resulted in a hung jury on three murders, six felony counts, and the aggravating circumstances for the death penalty. As the State observes, defense counsel represented Defendant from the outset of the case, he had adequate time to prepare, he filed numerous pre-trial motions, he vigorously cross-examined witnesses, and he is an extremely experienced defense attorney. Thus, we conclude that Defendant's argument is without merit.

F. Mistrial

{65} Defendant's final issue on appeal is that his right to due process was violated by the trial court's refusal to declare a mistrial after the court learned that three jurors believed that the jury foreperson was attempting to influence them. The trial court's decision to grant a mistrial is discretionary, and this Court will not disturb the trial court's decision absent an abuse of discretion, when the ruling is clearly against the facts and circumstances of the case. *Simonson,* 100 N.M. at 301, 669 P.2d at 1096.

{66} After the second day of deliberations, the bailiff informed the trial court that some of the jurors were complaining that the foreperson was "being very domineering and trying to influence some of the other members." The trial court instructed the bailiff that the jurors could write notes to him if they had problems, and three jurors sent a note complaining that the foreperson was telling them to convict and being argumentative; one juror complained of feeling "railroaded," one complained that the foreperson was not listening and did not want the jurors to take breaks, and one wrote that the foreperson was trying to keep them from having a hung jury.

{67} While the trial court, prosecutor, and defense counsel discussed their options, the jury submitted two more notes. One note stated, "provisional votes, count 28, 27, 26 guilty. Most of the other counts show guilty eight, innocent three. One is abstaining. I know they cannot in the end. The votes are provisional. The person will vote in the end. The three innocent are firm;" the second note requested a transcript of testimony. Defense counsel moved for a mistrial, stating that "if they've reached a unanimous verdict on those three counts, obviously, to accept that and to declare a mistrial as to the remaining counts." Defense counsel argued that the jury should not continue deliberations due to the coercive behavior of the foreperson. The prosecutor opposed the motion, arguing that the notes indicated that the votes were provisional, that it was "clear that the other jurors are operating independently and making their own decisions ..., so there's no indication of coercion," and that the jury had not yet stated that it could not reach a verdict. With the consent of both the prosecutor and defense counsel, the trial court drafted a note which asked the jury, "After discussion with the other jurors, let me know if the three jurors are firm and will not change their opinion." Two jurors responded, "I don't know," and one responded, "Unless you show me more;" the note also stated that the restaurant robbery "is under discussion now." The bailiff told the court that the three jurors said they were not changing their minds regarding the Hollywood Video situation. Defense counsel again

asked the trial court for a mistrial but, after discussion with the prosecutor and trial court, consented to the trial court sending a note to the jury which stated, "Advise the Court when you have considered all the counts and have arrived at unanimous verdicts on some and not able to arrive at unanimous verdicts on the rest." The jury continued to send various notes regarding the counts and exhibits, and the trial court, with the consent of the prosecutor and defense counsel, sent in a supplemental instruction telling the jury that they had the right to elect a new foreperson if they wished.

{68} Defense counsel again moved for a mistrial, stating that he feared that some members of the jury would force the others into voting for a guilty verdict and that press coverage of an unrelated out-of-state criminal case might influence them. The trial court denied the motion, noting that the jurors were aware they could send notes to the court and that the jury was "working very hard."

{69} Defendant concedes that he is unable to provide this Court with any case law on this issue. Defendant argues that the foreperson's conduct contravenes UJI 14–6008 NMRA 2000, which states, "you are not required to give up your individual judgment.... [D]o not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the purpose of reaching a verdict." Defendant concludes that because three jurors were "firm" for acquittal at least two days before the verdicts, the foreperson's behavior infringed on Defendant's right to be tried by a fair and impartial jury.

{70} The trial court, after consultation with both the prosecutor and defense counsel, informed the jurors to write notes to the court if they felt pressured and informed them that they could select a new foreperson. *Cf. Chamberlain,* 112 N.M. at 731, 819 P.2d at 681 ("Jurors are encouraged to consult with one another before reaching a conclusion."). As the State notes, the jury did not reach unanimous verdicts on three murder counts, demonstrating that the jurors did not give up their individual judgment. We conclude that the trial court did not abuse its discretion in denying Defendant's motion for a mistrial.

III. Conclusion

{71} We conclude that the trial court did not err by admitting Lausell's testimony or the testimony of the polygraph expert. The trial court did not abuse its discretion by refusing to grant Defendant's motions for a mistrial and his motion to reopen the case. Defendant failed to demonstrate that defense counsel did not exercise the skill of a reasonably competent attorney and failed to meet his burden of showing that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. Therefore, we affirm Defendant's convictions.

{72} **IT IS SO ORDERED.**

MINZNER, Chief J., BACA, FRANCHINI and MAES, JJ., concur.

7 P.3d 495

2000-NMCA-066

STATE of New Mexico, Plaintiff–Appellee,

v.

Karen DURANT, Defendant–Appellant.

In the Matter of Vernon O.M. Henning, Contemnor–Appellant.

Nos. 20,564, 20,660.

Court of Appeals of New Mexico.

June 30, 2000.

[redacted]

[redacted]

[redacted]

Patricia A. Madrid, Attorney General, Anthony Tupler, Assistant Attorney General, Santa Fe, for Appellee in No. 20,564.

Sandy Barnhart Y Chavez, Rio Rancho, for Appellant in No. 20,564.

Patricia Madrid, Attorney General, Steven S. Suttle, Assistant Attorney General, Santa Fe, for Appellee in No. 20,660.

Vernon O.M. Henning, Hobbs, Pro Se Contemnor–Appellant.

OPINION

PICKARD, Chief Judge.

{1} We consolidate these appeals for opinion because they raise the common question of whether a conditional discharge order in a criminal case is a sufficiently final order to allow an appeal from it. We hold that a conditional discharge order in a felony prosecution is sufficiently final to be appealable, but that a similar order in a criminal contempt prosecution is not, at least when the order does not require any action or behavior on the part of the contemnor other than to obey the law in the future. We therefore dismiss Henning's appeal and proceed to decide Durant's appeal.

{2} Durant appeals from a conditional discharge order following jury convictions for armed robbery and criminal damage to property. She raises four issues on appeal: (1) insufficient evidence of robbery, (2) insufficient evidence of criminal damage, (3) error in admitting hearsay, and (4) non-unanimous jury. We agree with her contention that there was insufficient evidence of robbery, but affirm the order as it involves the criminal damage charge. The particular facts of this case will be stated following our discussion of the appealability of the conditional discharge orders.

APPEALABILITY

Procedural Background

{3} Henning was ordered to show cause why he should not be held in contempt and imprisoned or fined for failure to appear at a pretrial conference. Following a hearing, the district court found that Henning had notice of the conference and did fail to appear for it without just cause or excuse. Based on these findings the district court found that Henning "should be held in Contempt of Court but the Court FURTHER FINDS that such adjudication should be deferred for six (6) months." The decretal part of the order states:

> IT IS THEREFORE ORDERED that the adjudication of this matter is deferred for six (6) months from the date hereof on the condition that Mr. Henning appears at all times and places set by any Court in the Fifth Judicial District during such six (6) months, at which time this Order may be withdrawn by the Court and this proceeding dismissed.

{4} Durant was charged with a variety of felonies and misdemeanors. At trial, the jury convicted her of armed robbery and criminal damage to property, but acquitted her of the other charges. The district court entered a conditional discharge order pursu-

ant to NMSA 1978, § 31–20–13 (1994). The order referred to the findings of the jury and ordered that, "without adjudication of guilt, further proceedings be deferred" and Durant be placed on probation for 18 months, complete the supervision required by the probation authorities, and complete alcohol treatment.

Discussion

{5} It has long been the rule that, absent an express statute or rule, an appeal will not lie from anything other than a formal written order or judgment, signed by the judge and filed in the record in the case. *See State v. Morris,* 69 N.M. 89, 90–91, 364 P.2d 348, 349 (1961). Further, in criminal cases, " 'the judgment is final for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but [enforcement] .... A sentence must be *imposed* to complete the steps of the prosecution.' " *Id.* at 91, 364 P.2d at 349 (quoting *Zellers v. Huff,* 57 N.M. 609, 611, 261 P.2d 643, 644 (1953)). A final judgment in a criminal case either adjudicates the defendant guilty and imposes, suspends, or defers sentence or dismisses the charges. *See State v. Garcia,* 99 N.M. 466, 471, 659 P.2d 918, 923 (Ct.App.1983).

{6} Appeals are permitted by statute from a "judgment" of civil contempt or a "conviction" of criminal contempt. *See Henderson v. Henderson,* 93 N.M. 405, 406, 600 P.2d 1195, 1196 (1979). Relying on *Zellers,* the *Henderson* Court held that, because no sentence was imposed on Ms. Henderson, no appeal was available. *See id.* "The contempt finding, of itself, is not subject to appeal." *Id.*

{7} The foregoing recitation of the finality rule appears to be based on the much-quoted language that " 'an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible.' " *Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992) (quoting *B.L. Goldberg & Assocs. v. Uptown, Inc.,* 103 N.M. 277, 278, 705 P.2d 683, 684 (1985)). We may term this the "last act" rationale for the finality rule. As Justice Montgomery went on to state, however, this general rule is not "an absolute, inflexible rule, like the law of gravity," but is instead "a general proposition admitting of various exceptions." *Id.* Further, "the term 'finality' is to be given a practical, rather than a technical, construction." *Id.*

{8} One exception, or practical construction of the term "finality," appears to exist when the consequences of the order that is not the last contemplated order in the case are sufficiently severe that the aggrieved party should be granted a right to appeal to alleviate hardship that would otherwise accrue if the appeal were delayed. We may term this the "sufficiently aggrieved" rationale for the finality rule. Thus, for example, in criminal cases, adult defendants who are ordered to undergo diagnostic evaluations before they are sentenced are required to wait until they are sentenced before they appeal. *See Garcia,* 99 N.M. at 468, 659 P.2d at 920 (reciting the earlier history of the case in which Garcia's appeal from the diagnostic commitment was dismissed by memorandum opinion relying on *Morris* because there was no final sentence). In juvenile cases, however, because of the express legislative purpose to avoid separating the child from its family, similar orders of diagnostic commitment have been held to be immediately appealable. *See In re Doe, III,* 87 N.M. 170, 171, 531 P.2d 218, 219 (Ct.App.1975). A child in such a situation is sufficiently aggrieved, while an adult is not.

{9} The rule in other jurisdictions on the specific issue of appealability of conditional discharge orders appears to partake of both the rationales of the general rule and the exception. Thus, in both *Rash v. State,* 318 A.2d 603, 604–05 (Del.1974), and *State v. Ryback,* 64 Wis.2d 574, 219 N.W.2d 263, 267 (1974), the courts followed the general rule that the conditional discharge order was not final because no sentence was imposed and the proceedings were not ended. It appeared to be important to both courts' rulings that the choice of accepting a conditional discharge order was the defendant's, a choice that does not appear in our Section 31–20–13. In *Warren v. State,* 281 Md. 179, 377 A.2d 1169, 1174 (1977), and subsequently *State v.*

Bikle, 60 Haw. 576, 592 P.2d 832, 835 (1979), it was both the absence of a sentence and the lack of significant consequences arising from the conditional discharge order that persuaded the courts to rule such orders to be nonfinal. As *Warren* states:

> Missing here is an additional element, the entry of a judgment upon the finding of guilt. Nor is this merely a technical distinction, for though a suspended sentence avoids a fine or prison term, it is also the judgment upon the finding of guilt and *the collateral effects of that judgment* which the defendant seeks to avoid.

Id. at 1174 (emphasis added).

{10} We find this language to be persuasive. It permits us to draw a clear distinction between Durant's felony case and Henning's contempt case. In the felony case, Durant argues that the presence of conditional discharge language in the habitual offender statute is just the sort of collateral consequence or sufficient aggrievement that should permit her to take an appeal from her conditional discharge order. NMSA 1978, § 31–18–17(B), [(C), and (D)] (1993) provides that "Any person convicted of a noncapital felony in this state ... who has incurred one [, two, or three or more] prior felony conviction[s] ... or conditional discharge ... is a habitual offender and his basic sentence shall be increased ...." Thus, unless a defendant in a felony case is permitted to appeal the conditional discharge order, it can later be used to enhance the sentence.

{11} In the contempt case, however, there are no such collateral consequences, and therefore there is no reason not to apply the general, last-act finality rule. Indeed, in Henning's case, there appear to be no consequences whatsoever to the trial court's order saying that, while Henning "should" be found in contempt, the adjudication would be deferred for six months and Henning should attend properly noticed court dates. Accordingly, we dismiss Henning's appeal and proceed to consider Durant's.

DURANT'S APPEAL

Facts

{12} Durant was charged with a variety of felonies and misdemeanors, including armed robbery, aggravated battery (two counts), extortion, criminal trespass, and criminal damage to property. The charges grew out of an incident in which she went to the victims' home early one morning to try to collect money from one of the victims who was supposed to fix her fence, but allegedly did not do it; to try to collect other money she allegedly loaned to this victim; and to try to recover a skill saw he allegedly stole from her. Police officers, testifying mainly on the basis of statements made by one of the victims and Durant herself, testified to the following facts in the light most favorable to the State: Durant came to the victims' residence and demanded money; when the victims confronted her on the porch and told her she had to leave, Durant stabbed both of them with a knife; as she was leaving Durant took their dog; and there was a broken window at the home. Durant herself testified and her testimony established that she broke the window trying to get the victims to wake up. She also claimed that she acted in self defense and that the victims impaled themselves on her knife with which she was merely threatening them after one of them hit her with a pipe.

Sufficient Evidence of Robbery

{13} Relying on *State v. Baca,* 83 N.M. 184, 489 P.2d 1182 (Ct.App.1971), and *State v. Sanchez,* 78 N.M. 284, 430 P.2d 781 (Ct.App.1967), Durant contends that there is insufficient evidence of armed robbery because there was no evidence that any of her threats or force were the lever by which the victims parted with their dog. We agree. Although, under *State v. Salgado,* 1999–NMSC–008, ¶ 25, 126 N.M. 691, 974 P.2d 661, we review the evidence in the light most favorable to the State, the evidence in this case is undisputed that Durant did not take the dog until she was on her way off of the victims' property. The State contends that Durant's prior violence against the victims was the lever by which the dog was taken, but that evidence is no different than the evidence in *Baca* that the defendant there jumped over a bar with a butcher knife, taking the bartender by surprise, and then took money from the register, or the evi-

dence in *Sanchez* that the defendant there put his fist against the victim's back, took the victim's wallet, and then backed out of the room. In both those cases, the convictions were reversed for insufficiency of evidence. Therefore, we reverse the armed robbery verdict here.

Sufficiency of Evidence of Criminal Damage to Property

{14} Durant contends that the evidence was insufficient to sustain the verdict for criminal damage to property because she testified that she knocked on the window to wake the victims up and she did not intend to break the window. The State confesses error on this point because there was no evidence in the State's case in chief to establish how the window was broken. It is the rule, however, that deficiencies in the State's case can be made up in the defense's case. *See State v. Mead,* 100 N.M. 27, 32, 665 P.2d 289, 294 (Ct.App.1983) (pointing out that "by testifying defendant supplied the necessary proof from which the jury could infer" guilt), *rev'd on other grounds, State v. Segotta,* 100 N.M. 498, 672 P.2d 1129 (1983); *State v. Lard,* 86 N.M. 71, 73, 519 P.2d 307, 309 (Ct.App.1974) (holding that, by electing to testify, a defendant waives any claim that the evidence at the close of the state's case is insufficient to submit to the jury). Furthermore, because the public interest in the proper outcome of criminal appeals does not permit their disposition by party stipulation, we independently review the proceedings to see if the error conceded by the State is supported by the record. *See State v. Maes,* 100 N.M. 78, 80–81, 665 P.2d 1169, 1171–72 (Ct. App.1983). Therefore, we review the record to determine if the evidence was sufficient to support a verdict for criminal damage to property.

{15} The specific question raised is whether Durant's denial of any intent to break the window is controlling. It is not. Our cases have long held that a jury may disbelieve a defendant's testimony. *See State v. Vigil,* 87 N.M. 345, 350, 533 P.2d 578, 583 (1975). Intent can rarely be proved directly and often is proved by circumstantial evidence. *See State v. Wasson,* 1998–NMCA–087, ¶ 12, 125 N.M. 656, 964 P.2d 820. In this case, as in both *State v. Hoeffel,* 112 N.M. 358, 361, 815 P.2d 654, 657 (Ct.App. 1991), and *Lard,* 86 N.M. at 73, 519 P.2d at 309, in which the defendants testified to plausible exculpatory versions, there was sufficient circumstantial evidence to prove Durant's intent to damage the property. There was the evidence recited above of Durant's visit to the victims' house early in the morning, at a time she admitted they would likely be asleep. She also admitted that her dispute with the victim who owed her the money had been building up for several weeks and she felt that the victim was avoiding her. She knocked loudly on the door and got no answer, so she went and knocked on a window, thereby breaking it. She had a knife, from which the jury could infer that she was ready for a fight. She was angry and took the dog after the incident. These facts are sufficient to allow a rational jury to infer that Durant intended to break the window.

Hearsay

{16} Durant contends that the trial court erred in admitting the hearsay statement of one of the victims given to a police officer about one or two hours after the incident. The trial court admitted the statement after hearing evidence that the victim had a stab wound to her arm and appeared visibly shaken; her hands were shaking; she was upset; and the other victim, who also had a slash wound to his arm, appeared in shock and could not talk. This foundational testimony is sufficiently similar to that in our recent decision *State v. Hernandez,* 1999–NMCA–105, ¶¶ 10–15, 127 N.M. 769, 987 P.2d 1156, for *Hernandez* to control. The trial court did not abuse its discretion in admitting the hearsay statement. *See id.*

Unanimous Jury

{17} Durant contends that the trial court should have granted her motion for a mistrial when one of the jurors indicated, during the poll of the jury, that it was not his verdict. When questioning the last juror to be questioned, the juror stated, in response to the question "were these your verdicts?", "I voted different on counts 1, 2 and 3." The juror

then explained that he was relying on majority rule.

{18} There are two reasons to reject Durant's contention. First, count 1 was the armed robbery count, which we reverse, and counts 2 and 3 were aggravated battery counts of which Durant was acquitted. Thus, error, if any, is entirely harmless as it does not affect any of Durant's rights. *See State v. Wright,* 84 N.M. 3, 5, 498 P.2d 695, 697 (Ct.App.1972) (holding that in order to be reversible, error must be prejudicial).

{19} Second, upon interrogation, the juror explained, albeit in a confusing fashion, that he should not have answered the judge the way he did, that it was too confusing. He explained, or so the trial court could have understood, that while the jury first agreed to a majority rule, in the end everyone voted his or her own vote on each count.

CONCLUSION

{20} We dismiss Henning's appeal. On Durant's appeal, we reverse the armed robbery verdict and order Durant discharged on that count and affirm the criminal damage verdict and conditional discharge order based on it.

{21} **IT IS SO ORDERED.**

SUTIN and KENNEDY, JJ., concur.

8 P.3d 154

2000-NMCA-069

STATE of New Mexico,
Plaintiff–Appellee,

v.

Arthur LOPEZ, Defendant–Appellant.

No. 20,939.

Court of Appeals of New Mexico.

May 17, 2000.

Certiorari Denied, No. 26,417,
Aug. 9, 2000.

Patricia A. Madrid, Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Lisa N. Cassidy, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

APODACA, Judge.

{1} Defendant appeals his convictions for aggravated battery and attempted murder. His sole issue on appeal is whether the trial court erred in refusing to suppress certain statements that he made to law enforcement officers. Our calendar notice proposed to affirm the trial court's decision. Defendant has filed a memorandum in opposition to our proposed disposition. Not persuaded by his arguments, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Defendant was an inmate at the Corrections Corporation of American Facility in Estancia, New Mexico. On July 28, 1998, McArthur Cordova, another inmate, was stabbed repeatedly while asleep in his cell. After the stabbing, all the inmates residing in Cordova's cellblock, including Defendant, were locked down in their individual cells. They were ordered to remove their clothing for a visual check concerning signs of an altercation. Fresh marks and bruises were observed on Defendant's back. Defendant was handcuffed and taken to the office of Corrections Officer Juan Ibarra. Officer Ibarra closed the door to his office and began asking Defendant questions. Defendant was not given *Miranda* warnings before questioning. He was not told that his responses to the questions were completely voluntary and that he could leave at any time. Officer Ibarra testified that the purpose of his questions was to evaluate Defendant's involvement in the stabbing, if any, either as a victim or perpetrator. During the questioning, Defendant admitted to stabbing Cordova. He was then returned to lock-down status. Later that day, he was questioned by State Police officers after having been given *Miranda* warnings.

{3} Defendant moved to suppress both statements admitting his involvement in the stabbing. After a hearing, the trial court denied the motion. Defendant appeals that denial.

II. DISCUSSION

A. Standard of Review

{4} The standard of review on appeal from the denial of a suppression motion is whether the trial court correctly applied the law to the facts, viewed in the manner most favorable to the prevailing party. *State v. Boeglin,* 100 N.M. 127, 132, 666 P.2d 1274, 1279 (Ct.App.1983). The trial court's factual determinations are subject to a substantial evidence review, but its application of the law to the facts is subject to a de novo review. *State v. Attaway,* 117 N.M. 141, 145, 870 P.2d 103, 107 (1994).

B. Denial of Suppression Motion

{5} *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), provides that prosecutors may not use statements made during custodial interrogation of a suspect unless the prosecution demonstrates that the suspect was adequately advised of his rights. *See State v. Juarez,* 120 N.M. 499, 502, 903 P.2d 241, 244 (Ct.App. 1995) (discussing *Miranda* requirements). Custodial interrogation involves "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any

significant way." *Miranda,* 384 U.S. at 444, 86 S.Ct. 1602. Whether a person is in custody under the holding in *Miranda* depends on whether there has been such a restriction on the person's freedom as to render him not free to leave. *State v. Munoz,* 1998–NMSC–048, ¶ 40, 126 N.M. 535, 972 P.2d 847.

{6} Defendant argues that, because it is axiomatic that an inmate is not "free to leave" any interrogation, every interrogation of an inmate must be preceded by *Miranda* warnings. In so arguing, Defendant relies on *Mathis v. United States,* 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968). We believe there is nothing in *Mathis* suggesting that an inmate is automatically entitled to *Miranda* warnings every time he is questioned by a prison official by virtue of his prisoner status. *See United States v. Conley,* 779 F.2d 970, 972–73 (4th Cir.1985); *cf. Illinois v. Perkins,* 496 U.S. 292, 299, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990).

{7} We agree with the many courts recognizing that the traditional analysis for determining whether a person is in custody under the holding in *Miranda* cannot be applied where the suspect is already incarcerated for a different crime. We believe that whether an inmate is subjected to custodial interrogation depends on whether he has been subjected to additional restraints on his freedom of movement than is customary. *See Conley,* 779 F.2d at 973; *Cervantes v. Walker,* 589 F.2d 424, 428 (9th Cir.1978). In making that determination, we must look to the totality of the circumstances surrounding the interrogation. *Garcia v. Singletary,* 13 F.3d 1487, 1492 (11th Cir.1994); *Commonwealth v. Larkin,* 429 Mass. 426, 708 N.E.2d 674, 681 (1999). We are concerned with the suspect's subjective belief that his freedom of action is curtailed to a degree associated with formal arrest and whether the belief is objectively reasonable under the circumstances. *U.S. v. Chamberlain,* 163 F.3d 499, 503 (8th Cir.1998).

{8} Some courts have listed a number of factors to be considered, including (1) the language used to summon the individual; (2) the physical surroundings of the interrogation; (3) the extent to which the suspect is confronted with evidence of his guilt; and (4) any additional pressure exerted to detain the suspect. *Cervantes,* 589 F.2d at 428; *People v. Denison,* 918 P.2d 1114, 1116 (Colo.1996) (en banc). No one factor is dispositive. However, in every case, the question is whether the circumstances suggest any measure of compulsion above and beyond the confinement.

{9} Here, the trial court found that the surroundings in which the questioning took place was unexceptional, that Officer Ibarra made no effort to confront Defendant with evidence of guilt, and that no "strong-arm" tactics were used against Defendant. The trial court determined that the evidence did not support a finding of custodial interrogation. Defendant argues otherwise.

{10} Defendant contends that the fact that he was handcuffed is key to a determination that he was subjected to added restraints. The cases he relies on do not support that argument. In *United States v. Vasquez,* 889 F.Supp. 171 (M.D.Pa.1995), the defendant was taken into custody and handcuffed as a suspect. *Id.* at 175. Here, Defendant was handcuffed during his transportation to Officer Ibarra's office and remained handcuffed while outside his cell. There was testimony that such handcuffing was customary for safety purposes. Where such restraint is customary, it cannot be deemed a restraint requiring *Miranda* warnings because in that context the restraint does not add any appreciable measure of pressure or coercion beyond the usual prison environment. *See Conley,* 779 F.2d at 973–74 (handcuffs were standard procedure for transporting inmates).

{11} Defendant contends that his movement to Officer Ibarra's office was evidence of further restraint. We disagree. He was not placed in an interrogation room or segregated area but was taken instead to an office that was large, comfortable, and had windows into the main corridor of the facility. Although it is true that the door to the office was closed, we do not believe that Defendant's movement to the office was evidence of further restraint subjecting the inmate to such coercion as to render his statements

suspect and unfair under the circumstances. *See Conley,* 779 F.2d at 973–74 (defendant handcuffed and moved to conference room); *Larkin,* 708 N.E.2d at 681 n. 6 (if anything, movement from cell block to more open part of facility increases defendant's sense of freedom of movement).

{12} Defendant argues that he was not informed he was free to leave or refuse to answer questions. We agree that this is a matter that can be considered in determining restraint. *Chamberlain,* 163 F.3d at 503; *Larkin,* 708 N.E.2d at 680–81. Although Defendant was not told that he was free to leave or to refuse answering questions, he was not yet a suspect, according to the evidence, and he was not treated as a suspect or told he was a suspect in an effort to intimidate him. Rather, the questioning was for the purpose of determining whether Defendant was the victim or the perpetrator. Additionally, there was testimony that Defendant and Officer Ibarra enjoyed a good relationship. There were no threats made to Defendant. There was evidence from which the trial court could rationally conclude that the atmosphere in which the questioning took place was not dominated by the officer to such an extent so as to overcome Defendant's free will and give him no choice but to submit.

{13} Finally, Defendant contends that the strip search and lock-down were further evidence of restraint. Both the strip search and the lock-down were restraints placed on all the inmates in the cellblock. Consequently, neither of these procedures was an uncustomary restraint placed on Defendant. Because the lock-down and strip search were customary practices when the stabbing of an inmate occurred, we conclude that such practices did not provide evidence of additional pressure upon Defendant of a kind and intensity that, taken in context, would render subsequent statements the product of unfair coercion. For that reason, we hold that his statements were not coerced by these restrictions. *See Chamberlain,* 163 F.3d at 503.

{14} Considering the totality of the circumstances surrounding the giving of Defendant's statement to Officer Ibarra, we agree with the trial court that there was no custodial interrogation under which *Miranda* warnings were required. Because the statements made to Officer Ibarra did not require *Miranda* warnings, the later statements to Officer Ness were not tainted and thus did not require suppression.

III. CONCLUSION

{15} For these reasons, we affirm.

{16} **IT IS SO ORDERED.**

ALARID and BOSSON, JJ., concur.

8 P.3d 157

2000-NMCA-071

STATE of New Mexico, Plaintiff–Appellee,

v.

Roger Van CLEAVE, Defendant–Appellant.

No. 20,036.

Court of Appeals of New Mexico.

June 19, 2000.

Certiorari Granted, No. 20,036, Aug. 8, 2000.

Patricia A. Madrid, Attorney General, William McEuen, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Laurel A. Knowles, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

APODACA, Judge.

{1} Defendant was convicted of possession with intent to distribute methamphetamine and possession of drug paraphernalia. He appeals from the denial of his motion to suppress evidence seized from his automobile by United States Border Patrol agents. Defendant raised various issues on appeal, which, for purposes of our disposition, we have consolidated as three issues: (1) his consent to "inspect" the trunk of his vehicle was not voluntary; (2) even if his consent was voluntary, the use of a dog sniff to "search" the trunk exceeded the scope of consent; and (3) exigent circumstances did not exist to justify the warrantless search. We hold that, even assuming Defendant's consent was voluntary, the consent did not extend to the use of a dog sniff to search his open trunk. We therefore reverse. Because of our disposition, we need not address Defendant's remaining issues.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Early on the morning of December 10, 1996, Defendant approached the United States Border Patrol fixed checkpoint at Orogrande, New Mexico. Agent James Stack, working the primary checkpoint area, did not recognize Defendant as one of the regular commuters who normally pass through the checkpoint at this early hour. The agent inquired of Defendant's citizenship. Defendant responded that he was a U.S. citizen. The agent then asked where Defendant was coming from. Defendant replied he was going to visit his grandparents in Alamogordo and then continuing to Grants for work. Agent Stack found Defendant's response "peculiar" since the agent had not inquired of Defendant's destination but rather his starting point. The agent again asked Defendant where he was traveling from, and Defendant answered that he had spent two days visiting a friend in Chaparral, New Mexico.

{3} Seeing no overnight bag in the car, Agent Stack asked Defendant if he was carrying any luggage. Defendant responded that he had none. Noticing that the ignition key was on a yellow tag, which Agent Stack believed was normally used by automobile dealerships, the agent asked if the vehicle belonged to Defendant. Defendant replied that it belonged to his friend, Buck, but was uncertain about Buck's last name. The agent then requested the registration or title documents for the vehicle. While Defendant was searching through some papers above the visor, the agent observed Defendant "intensely" examining a piece of paper that was titled "Denver Institute of Technology–Enrollment Form." At this time, the agent noticed that Defendant's hands were shaking and that his chest was rising rapidly, indicating nervousness. Defendant was unable to produce any documents for the vehicle. Upon request, Defendant produced a two-

month old driver's license with a home address in Alamogordo.

{4} Agent Stack next requested Defendant's consent to "inspect" the vehicle's trunk. Upon receiving Defendant's consent to inspect the trunk, the agent directed him to the secondary area, where Defendant got out and opened the trunk. At this point, Agent Joe Martinez approached the open trunk with his dog. Agent Stack directed Agent Martinez to conduct a dog sniff of the vehicle by the open trunk. The dog alerted to the open trunk, and Defendant was placed in custody. A warrantless search of the vehicle uncovered illegal drugs and drug paraphernalia. Defendant filed a motion to suppress the evidence seized, which the trial court denied.

II. DISCUSSION

A. Standard of Review

{5} In determining whether a trial court has erred in ruling on a motion to suppress, we examine "whether the law was correctly applied to the facts, viewing [the facts] in the manner most favorable to the prevailing party. All reasonable inferences in support of the court's decision will be indulged in[,] and all inferences or evidence to the contrary will be disregarded." *State v. Esguerra,* 113 N.M. 310, 313, 825 P.2d 243, 246 (Ct.App. 1991). "[T]he denial of a motion to suppress evidence will not be overturned on appeal if the denial is supported by substantial evidence." *State v. Hernandez,* 1997–NMCA–006, ¶ 18, 122 N.M. 809, 932 P.2d 499. Additionally, "we review mixed questions of law and fact de novo, particularly when they involve constitutional rights. Searches and seizures [that] impact Fourth Amendment rights present just such a question." *Id.*

B. Scope of Consent

{6} For purposes of our discussion, we will assume without deciding that Defendant voluntarily consented specifically to the agent's "inspection" of the trunk. This assumption next requires us to address the issue of whether the eventual search exceeded the consent given, thus invalidating the initial voluntariness of the consent. *See State v. Garcia,* 1999–NMCA–097, ¶ 9, 127 N.M. 695, 986 P.2d 491 ("If a search exceeds the scope of consent it is 'not pursuant to a voluntary consent,' and is therefore invalid.") (quoting *State v. Valencia Olaya,* 105 N.M. 690, 695, 736 P.2d 495, 500 (Ct.App.1987)).

{7} "The scope of [a] search is defined by and limited to the actual consent given." *State v. Flores,* 1996–NMCA–059, ¶ 22, 122 N.M. 84, 920 P.2d 1038. "The scope of an individual's consent is measured by an objective reasonableness standard, that is, what a reasonable person would have understood by the exchange between the [agent] and the suspect." *Garcia,* 1999–NMCA–097, ¶ 9. Consent will not be considered voluntary and will thus be deemed invalid if the "search exceeds the scope of consent." *Id.*

{8} To determine if the scope of consent has been exceeded, we must examine the first tier of the analysis on the voluntariness of the consent, articulated in *Valencia Olaya,*—(whether "the consent was unequivocal and specific"). *Valencia Olaya,* 105 N.M. at 694, 736 P.2d at 499. We therefore must determine whether Defendant's consent to inspect the trunk of his vehicle *specifically* included a consent to use a dog to sniff the open trunk. Put another way, we consider "whether the evidence will support an inference that [D]efendant voluntarily consented to a search of the [trunk]." *Id.* at 695, 736 P.2d at 500. "If the evidence permits an inference that [D]efendant consented to a [dog sniff] search of the [trunk], the trial court's ruling must be sustained on the ground that the consent given was unlimited." *Id.*

{9} In this case, to the contrary, in contending that the dog sniff exceeded the scope of consent, Defendant relies on *United States v. Winningham,* 140 F.3d 1328 (10th Cir.1998) and *State v. Warsaw,* 1998–NMCA–044, 125 N.M. 8, 956 P.2d 139. In *Winningham,* the officers opened the door of the defendant's van, obtained his permission a dog sniff of the van, and then directed the dog to the open door. *See Winningham,* 140 F.3d at 1329. The court acknowledged that "[c]onsent is not to be lightly inferred or *unnecessarily extended.*" *Id.* at 1330 (emphasis added). The court determined that

directing the dog to the open door established a "desire to *facilitate* a dog sniff of the van's interior" and exceeded the scope of consent. *Id.* at 1331. Under the facts in this appeal, Agent Stack requested Defendant to open his trunk and then directed Agent Martinez to conduct a dog sniff of the open trunk. The trial court found that the State had not met its burden of showing that Defendant's consent included a dog sniff of the trunk. We agree with the trial court that these facts, similar to those found in *Winningham*, established a desire on the part of Agent Stack to facilitate a search of the open trunk that went beyond the scope of Defendant's consent.

{10} *Warsaw* discussed the privacy expectations protected under the Fourth Amendment. *See Warsaw*, 1998–NMCA–044, ¶ 14. This Court determined there that "the Fourth Amendment governed entry into an open trunk." *Id.* ¶ 16. The officers in *Warsaw* encouraged a dog to search the open trunk of the defendant's vehicle. *Id.* ¶ 17. Agent Stack gave the same encouragement here. We held in *Warsaw* that such action by law enforcement officers constitutes a violation of a defendant's constitutional right against illegal searches. *Id.* We recognize that some of the facts were different in *Warsaw*—namely, consent was not specifically an issue in that case and the defendant was not even present when the officers searched an already-opened trunk. The trunk had been damaged and opened as a result of an accident. This factual variation, however, only highlights the real issue before us—the scope of consent. *Warsaw* clearly held that an individual has a reasonable expectation of privacy concerning objects found in his trunk. *Id.* ¶ 16.

{11} We must consider "whether the individual's conduct demonstrated a subjective expectation of privacy." *Id.* ¶ 14. In other words, could Defendant have a reasonable expectation of privacy if he consented to an "inspection" of the trunk and in fact opened it for the agent? Again, this question emphasizes the issue before us—what was the scope of Defendant's consent? We hold that, in first requesting consent to inspect Defendant's trunk, then directing the dog to sniff downwind of the open trunk, Agent Stack exceeded the scope of consent, resulting in a violation of Defendant's constitutional rights under the Fourth Amendment to the federal constitution. *See Flores*, 1996–NMCA–059, ¶ 22 (holding that when "a search goes beyond the scope of the consent given and there is no unequivocal and specific consent to the particular search," the search is unconstitutional). The two actions of the agent (obtaining consent to inspect and directing the dog sniff) are intertwined or coupled together and must be analyzed and considered as a whole. For that reason, we are not persuaded by the State's reliance on both federal and our own cases holding that a dog sniff around a vehicle alone is not considered a search. *See United States v. Morales–Zamora*, 914 F.2d 200, 203 (10th Cir.1990) (stating that a dog sniff of "the public airspace containing the incriminating odor" is not a violation of an individual's constitutional rights); *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (holding that the use of trained dogs did not constitute a search within the meaning of the Fourth Amendment); *State v. Villanueva*, 110 N.M. 359, 362–63, 796 P.2d 252, 255–56 (Ct.App.1990) (determining that a dog sniff of luggage compartment of a bus was not considered a search within the meaning of the Fourth Amendment).

{12} Based on the facts considered by the trial court, the court concluded that the State failed to meet "its burden of showing by clear and convincing evidence that what Defendant consented to in response to [Agent Stack's] request to 'inspect' the trunk of his vehicle included the use of the canine." *See Garcia*, 1999–NMCA–097, ¶ 8 (stating that the scope of consent "is a question of fact") and ¶ 16 (determining that the defendant's consent to allow officers to "look at" her vehicle did not "encompass drilling into the vehicle"). We must give deference to the trial court's conclusion, which we determine was supported by substantial evidence.

{13} In addition to finding that the State failed to meet its burden of showing that Defendant consented to use of the canine, the trial court also concluded, and the State now argues on appeal, that the question of wheth-

er the trunk was open was irrelevant to the appropriateness of the dog sniff. We disagree. Even though Agent Stack may have had reasonable suspicion to direct Defendant to the secondary area to conduct a dog sniff, we believe that his request that Defendant open his trunk in conjunction with the anticipated dog sniff was a violation of Defendant's constitutional rights. *See United States v. Gay,* 774 F.2d 368, 377 (10th Cir.1985) ("Any police activity that transcends the actual scope of the consent given encroaches on the Fourth Amendment rights of the suspect.").

{14} The State's argument concerning the use of trained detection dogs is unpersuasive because the issue before us is not the use of trained dogs, but the scope of consent. We are also unpersuaded by the State's claim that Defendant did not show that the dog *would not have alerted* to the contraband had the trunk been closed. Because it was the State's burden to show by clear and positive evidence that consent was voluntary, we believe it was the State's burden to show that the dog *would have alerted* in any event with the trunk closed. *See Valencia Olaya,* 105 N.M. at 694, 736 P.2d at 499 (holding that when scope of consent is at issue, it is the State's burden to "establish by clear and convincing evidence that under the totality of the circumstances," defendant's rights were not violated).

{15} The evidence established that Agent Stack's request for consent to inspect the trunk, thus causing Defendant to open the trunk, together with his directing the dog to sniff the trunk, showed a clear "desire to facilitate a dog sniff" of the open trunk and consequently a denial of Defendant's constitutional right against unreasonable searches. *Winningham,* 140 F.3d at 1331; *see also Gay,* 774 F.2d at 377 (stating that exceeding the scope of consent is a violation of an individual's constitutional rights). We simply cannot agree with the trial court's conclusion that the open trunk had no bearing on the dog's ability to sniff out the drugs. Agent Stack's reasonable suspicion became irrelevant when he requested consent to inspect the trunk. *Cf. United States v. Stone,* 866 F.2d 359, 364 (10th Cir.1989) (determining that so long as officers do not ask a defendant to open his trunk, the officers "remain[ ] within the range of activities they may permissibly engage in when they have reasonable suspicion" of criminal activity).

{16} For these reasons, we conclude that the request to inspect the trunk, combined with the direction of the dog sniff, took the agents out of "the range of activities" permissible of law enforcement officers. *Id.* Because the State had the burden of showing that the consent was valid, in order for the State to prevail, it was required to show by clear and positive evidence that the activities fell within the scope of consent. The trial court concluded that the State failed to meet its burden to establish that the "dog sniff" of the trunk was within the scope of consent, and we consider this conclusion to be supported by the evidence and determinative of this appeal. *See Esguerra,* 113 N.M. at 313, 825 P.2d at 245 ("All reasonable inferences in support of the court's decision will be indulged in and all inferences or evidence to the contrary will be disregarded.").

III. CONCLUSION

{17} We conclude that, although Defendant initially consented to an inspection of the vehicle's trunk, the agent's direction of the dog sniff of the open trunk removed the search from the range of permissible activities of the agent. We thus hold that the trial court erred in denying Defendant's motion to suppress the evidence seized from Defendant's vehicle. We reverse and remand for proceedings consistent with this opinion.

{18} **IT IS SO ORDERED.**

WECHSLER J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

{19} This is a United States Border Patrol fixed or permanent checkpoint case. These fixed checkpoints have become fixtures on our landscape. Persons driving in southern New Mexico should know that fixed checkpoints exist at certain locations and that the agents are interested in both illegal immigration and illegal drugs. *See United States v. Martinez-Fuerte,* 428 U.S. 543, 557–60, 96

S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (holding detention at Border Patrol fixed checkpoint legal). Those persons should also expect that at these fixed checkpoints Border Patrol agents might use drug-sniffing dogs. *See United States v. Morales–Zamora,* 914 F.2d 200, 203 (10th Cir.1990) (holding use of dog at police roadblock to sniff drugs outside vehicle not a search under the Fourth Amendment). My dissent in this case relates only to the use of drug-sniffing dogs at Border Patrol fixed checkpoints.

{20} Cases in federal court involving searches at Border Patrol fixed checkpoints are governed by the Fourth Amendment to the United States Constitution. In these Border Patrol cases, if federal case precedent exists, we should follow it. Although if an appellant has properly raised Article II, Section 10 of the New Mexico Constitution in the trial court and then on appeal, under the requirements stated in *State v. Gomez,* 1997–NMSC–006, ¶ 21, 122 N.M. 777, 932 P.2d 1, we are free to analyze the constitutionality of a search under our New Mexico Constitution and determine whether to read our Constitution to provide broader protection than that provided by the federal courts under the Fourth Amendment. Here, Defendant did not sufficiently raise the New Mexico Constitution and did not ask us to apply our Constitution in a more protective way than the protection afforded by the federal cases decided under the Fourth Amendment.

{21} Under Tenth Circuit case precedent, a dog-sniff outside and around a lawfully detained vehicle at a roadblock is not a search within the meaning of the Fourth Amendment. *See Morales–Zamora,* 914 F.2d at 203. I see the question in the present case to be the following: Does an outside dog-sniff become a search within the meaning of the Fourth Amendment where, as here, during the lawful detention at a Border Patrol fixed checkpoint, the trunk of the vehicle is consensually and voluntarily opened by the driver pursuant to a Border Patrol agent's request "to inspect the trunk," and the agent then directs a dog to the area outside but near the trunk to sniff for drugs?

{22} The Fourth Amendment focus in this case should be whether the use of the dog at a Border Patrol fixed checkpoint is a search, not whether the agent exceeded the scope of consent by use of the dog. The focus in this case necessarily is based on federal law interpreting the Fourth Amendment, and not what State law perhaps should be under the New Mexico Constitution.

{23} When we analyze the underlying purpose of the Fourth Amendment protection against unreasonable searches, we must determine whether the police activity "is an intrusion on a legitimate expectation of privacy." *State v. Warsaw,* 1998–NMCA–044, ¶ 14, 125 N.M. 8, 956 P.2d 139 (citing *Illinois v.. Andreas,* 463 U.S. 765, 771, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983)).

> [W]e consider: (1) whether the individual's conduct demonstrated a subjective expectation of privacy, and (2) whether society recognizes the individual's expectation of privacy as reasonable.

Warsaw, 1998–NMCA–044, ¶ 14 (citing *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)).

{24} It is undisputed here that Defendant consented to the agent's inspection of the trunk, that Defendant got out of the vehicle and opened the trunk, and that Defendant was lawfully detained at the time the agent requested consent to inspect the trunk and during the dog-sniff. It is beyond question that Defendant voluntarily relinquished any expectation of privacy he reasonably had insofar as a trunk inspection by the agent was concerned. That is, Defendant waived any Fourth Amendment protection he may otherwise have had to the agent's inspection of the trunk.

{25} We look then at the steps taken by the agent at the location of the voluntarily-opened trunk and during a lawful detention based on reasonable suspicion. The agent had a dog brought to the vehicle, and located the dog downwind from the trunk for the purpose of inspecting the trunk by sniffing to detect drugs. We analyze this activity in the light of *Morales–Zamora,* in which the Tenth Circuit Court of Appeals held that a dog-sniff of the exterior of a vehicle during a lawful city police roadblock detention is not a search within the meaning of the Fourth Amend-

ment. *See Morales–Zamora*, 914 F.2d at 205. In *Morales–Zamora*, the court held that "society does not recognize a reasonable privacy interest in the public airspace containing the incriminating odor." *Id.; see also Bond v. United States*, 529 U.S. 334, 120 S.Ct. 1462, 1466, 146 L.Ed.2d 365 (2000) (Breyer, J., dissenting) ("Consider, too, the accepted police practice of using dogs to sniff for drugs hidden inside luggage."); *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (deciding that exposure of traveler's luggage at airport to a trained canine did not constitute a "search" within the meaning of the Fourth Amendment); *State v. De Jesus–Santibanez*, 119 N.M. 578, 582, 893 P.2d 474, 478 (Ct.App. 1995) (ruling that drug dog brought to vehicle during lawful detention that alerted to bed of truck satisfied probable cause to then *begin search*); *State v. Villanueva*, 110 N.M. 359, 362–63, 796 P.2d 252, 255–56 (Ct.App. 1990) (stating that bus passenger has "no privacy right or reasonable expectation of privacy ... as to the airspace surrounding closed items of luggage," and dog-sniffs of luggage compartment of bus did not constitute a search within the meaning of the Fourth Amendment).

{26} Defendant distinguishes *Morales–Zamora* by drawing a distinction between the "dog-sniff of the outside of the vehicle" in *Morales–Zamora*, which Defendant characterizes as a "standard 'dog sniff,' in which the dog is run around the outside of the vehicle," and the circumstance in which an agent directs "a drug dog to inspect [an] open[ed] trunk." **[BIC 11]** Defendant calls the latter circumstance a search, and proceeds from that premise to argue that the agent exceeded the scope of Defendant's consent to inspect the trunk.

{27} It seems clear under *Morales–Zamora* that if the agent had not gotten the trunk opened, an exterior dog-sniff and alert to the rear quarter panel would not have constituted a search. Defendant in fact concedes this. If then, pursuant to *Morales–Zamora*, a dog-sniff of the exterior of a vehicle with its trunk closed does not implicate the Fourth Amendment, why is the Fourth Amendment implicated if the exterior drug-sniff occurs at the direction of the agent after an agent requests and a driver consents to opening the trunk? I am unable to implicate the Fourth Amendment based either on the idea of police deception or on the scope of consent.

{28} Were *Morales–Zamora* not present, application of the test of privacy in *Warsaw* would be our primary guideline. Pursuant to *Warsaw*, we ask whether, in the context of the consensual trunk opening for "inspection" combined with the directed exterior dog-sniff, (1) defendant "demonstrated a subjective expectation of privacy," and (2) "society recognizes [that] expectation of privacy as reasonable." *Warsaw*, 1998–NMCA–044, ¶ 14. Boiled down in this manner, I find no demonstration here of any subjective expectation of privacy on Defendant's part. Defendant consented to an inspection of the trunk, and without having to be asked to do so got out of the vehicle and opened the trunk. Defendant was present when Agent Stack had Agent Martinez bring the dog out and when the agent located the dog at the rear of the vehicle. Defendant did not act or conduct himself to indicate any concern, and did not object to the use of the dog. *Cf. State v. Garcia*, 1999–NMCA–097, ¶ 14, 127 N.M. 695, 986 P.2d 491 (contrasting an Eighth Circuit case upholding a search as constitutional "because the defendant stood and watched and did not object," and implying that a defendant can imply consent by failing to object); *see also United States v. Martel–Martines*, 988 F.2d 855, 858 (8th Cir. 1993) ("[F]ailure to object made it objectively reasonable for the officers to conclude that his general consent to search the truck included consent to access the compartment in a minimally intrusive manner").

{29} Nor am I persuaded that any subjective expectation Defendant may have had (of which there exists no evidence in this case) is recognized by society as reasonable. Defendant has presented no argument to support such a recognition. While society and courts, too, unquestionably must be ever vigilant and extremely guarded against government and police intrusion of privacy, I do not find the particular circumstances in this case to be ones requiring us to draw a line and hold the agent's use of the dog unconstitutional under

the Fourth Amendment and case law interpreting the Fourth Amendment.

{30} Furthermore, neither New Mexico case law following federal precedent, nor federal precedent itself, compels a determination that the use of the dog constituted a search. Defendant's primary reliance in arguing to the contrary are two cases, namely, *Warsaw* and *United States v. Winningham*, 140 F.3d 1328 (10th Cir.1998). Neither *Warsaw* nor *Winningham* involved a fixed checkpoint stop, and both cases are also significantly different than the present case.

{31} In *Warsaw*, the trunk of the vehicle was opened due to an accident. *See Warsaw*, 1998–NMCA–044, ¶ 2. The vehicle was towed to an impound lot. *See id.* ¶ 3. Defendant later went to the impound lot and then actually told a lot employee that drugs were in a readily inaccessible area in the trunk. The employee told this to his boss, and the employee's boss instructed the employee to call the police. *See id.* ¶ 5. The police brought a drug-sniffing dog to the impound lot, "introduced" the dog to the vehicle by stimulating the dog to locate drugs, and, after the agent reached into the trunk and cleared glass out from the trunk, the dog alerted to a rear-wheel well and then jumped into the trunk. *Id.* ¶ 6. Defendant at no time consented to any of this police activity and, in fact, had wanted to try to get his drugs out of the car before the police were involved. This Court held that defendant had an "expectation of privacy in his open[ed] trunk." *Id.* ¶ 17.

{32} We reasoned in *Warsaw* that the police officer violated the defendant's expectation of privacy by reaching "into the trunk to remove the glass-laden carpet because he expected the narcotics dog to jump in there," by bending "their heads into the trunk to view the object of [the dog's] alert," and by causing the dog to jump into the opened trunk. *Id.* ¶ 17. We held "these activities" to constitute an illegal search. *Id.* We also held in *Warsaw* that the police had probable cause to search the trunk, but that there were no exigent circumstances to justify a warrantless search. *See id.* ¶ 19. In addition, this Court held that defendant's later consent to search was tainted due to the illegality of the search.

{33} *Warsaw* does not address the issue whether a dog-sniff in the exterior car space is a search or, if a search, is an unreasonable one that violates a person's reasonable expectation of privacy. *See Fernandez v. Farmers Ins. Co.*, 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (holding that cases are not authority for propositions they did not consider). Furthermore, in *Warsaw* the defendant did not give consent before the police "reached into the trunk," "bent their heads into the trunk," and caused the dog to jump into the trunk through the officer's "preparation, guidance, and stimulation." *Warsaw*, 1998–NMCA–044, ¶ 17. Moreover, this Court determined that the defendant specifically sought to preserve the contents of his truck as private. *See id.* ¶ 15. In the case before us, on the other hand, consent was given to inspect, no agent or dog entered the trunk space, and Defendant took no action to preserve the contents of his trunk as private. Further, unlike *Warsaw*, the issue whether the use of the dog constituted a search is directly before us. *Warsaw* is not authority upon which to reverse the trial court in this case.

{34} *Winningham* is also markedly distinguishable. In *Winningham*, Border Patrol agents obtained consent to search a van. *See Winningham*, 140 F.3d at 1329. They asked the driver to step out of the van, and then *the agents* opened the sliding door of the van and conducted a visual search of its interior. *See id.* Finding nothing, the agents asked for and obtained consent to "run a dog on [the] vehicle." *Id.* The dog sniffed areas outside the van, and then when the dog reached the opened door, it jumped into the van and sniffed the interior, and eventually alerted at a rear vent. *See id.* at 1330. The trial court found that there was no voluntary consent for the dog to enter the cabin and suppressed the evidence. *See id.*

{35} The Tenth Circuit Court of Appeals affirmed, basing its affirmance on two points: *First*, the officers opened the door, and then unleashed the dog as the dog neared the open door, indicating "[a] desire to facilitate a dog sniff of the van's interior"; and second, the officers had no reasonable suspicion, in that "reasonable suspicion was exhausted after [the agent] searched the van's interior."

Id. at 1331. The court distinguished its previous decision in *United States v. Stone*, 866 F.2d 359 (10th Cir.1989). *Stone* held that "the Fourth Amendment was not implicated when a trained drug dog leapt into the open[ed] hatchback door of a suspect's car during a valid Terry stop because the dog's action was 'instinctive.'" *Winningham*, 140 F.3d at 1330. The court distinguished *Stone* "on both factual and legal grounds," namely, that the "holding in *Stone* was driven not by what the officers did, but what they did not do," and that "the officers in *Stone* acted under reasonable suspicion, a circumstance underscored by our limited holding." *Id.* at 1330, 1331.

{36} *Winningham* is not authority in this case to reverse the trial court. The court did not address the question whether the dog's activity outside the van constituted a search. In *Winningham*, consent was an issue; whether the dog's use constituted a search was not. Moreover, *Winningham* was concerned with the fact that when the agents used the dog they no longer had reasonable suspicion on which to search inside the van with the use of the dog. *See id.* at 1331. In the present case, as in *Stone*, the agents acted under reasonable suspicion. In addition, in the present case, neither agent nor dog entered the vehicle's trunk space; whereas, in *Winningham*, the agents and the dog entered the van.

{37} It is also important to note that neither *Winningham* nor *Warsaw* mentions *Morales–Zamora*, presumably because neither *Winningham* nor *Warsaw* involve the issue of whether *an exterior dog-sniff* constitutes a search or exceeds the scope of a consent to search.

{38} I am very much aware of a concern that, because of the extraordinary ability a dog has to detect odors, a dog-sniff is in the nature of a technological breakthrough to detect drugs. The canine nose power goes far beyond an agent's power of smell or ability to inspect without a destructive search. The arguments are either that the "game" is no longer fair, or that citizens' privacy is impermissibly invaded, because citizens' expectations are based on human limitations, and not on extraordinary sense or modern technological investigative processes that are not physically intrusive.

{39} However, in this day many travelers are familiar with Border Patrol fixed checkpoints. Many traveling citizens are aware that drug dogs are used at border crossings and in international airports. United States Supreme Court opinions refer to "accepted police practice of using dogs to sniff" for hidden drugs. *Bond*, 120 S.Ct. at 1466 (Breyer, J., dissenting). While there may exist skepticism about the benefit of fixed Border Patrol checkpoints, concern about the consequences if one refuses to allow a trunk inspection or objects to the use of a dog, and fear of encroachments on our Fourth Amendment protections from wrongful racial profiling or retaliation for asserting Fourth Amendment or other rights, no one should be surprised by the use of dogs to sniff around our vehicle at a Border Patrol fixed checkpoint, or even to sniff from outside a trunk that the driver voluntarily opens after giving the agent permission to inspect the trunk.

{40} The focus on scope of consent arises only upon a determination first that the conduct constitutes a search. To deviate from federal law and hold the conduct in this case to constitute a search requires that the *Gomez* preservation requirements be met. Because those requirements were not met, we cannot in this case determine whether New Mexico, under its own Constitution, should broaden the privacy interests of citizens and provide greater protection to citizens when Border Patrol agents use drug-sniffing dogs.

{41} Consistent with the underlying basis for my dissent in *State v. Cardenas–Alvarez*, 2000–NMCA–009, 128 N.M. 570, 995 P.2d 492, I think that Tenth Circuit law validates the use of the dog to sniff outside the vehicle notwithstanding the failure of the agent to obtain Defendant's specific consent to the use of the dog to sniff the voluntarily-opened trunk. And also consistent with my dissent in *Cardenas–Alvarez*, failing proper preservation of the issue below as required in *Gomez*, this Court in the present case should not expand Defendant's Fourth Amendment

protection to outlaw this use of a drug-sniffing dog.

8 P.3d 166

2000-NMCA-070

ALLSTATE INSURANCE COMPANY, Plaintiff–Appellant,

v.

Antonio PEREA, Defendant–Appellee.

No. 20,536.

Court of Appeals of New Mexico.

July 11, 2000.

Gordon J. McCulloch, Bradley & McCulloch, P.A., Albuquerque, for Appellant.

Raul A. Lopez, Arnold Padilla, Albuquerque, for Appellee.

OPINION

SUTIN, Judge.

{1} Plaintiff Allstate Insurance Company appeals the district court's decision to confirm an arbitration award in favor of Defendant Antonio Perea rather than consider the facts and issues in a de novo district court trial. We reverse.

FACTS AND PROCEEDINGS

{2} Defendant Perea was injured in an automobile collision involving a minimally insured driver with $25,000 coverage. That driver's insurer paid Defendant the $25,000 policy limit. Defendant then demanded of his own insurer, Allstate, payment of underinsured motorist benefits. Because Defendant had one Allstate policy covering three separate vehicles, Defendant sought to obligate Allstate to $75,000 under the principle of judicial stacking, whereby a class-one insured is entitled to aggregate uninsured motorists coverages. *See Jaramillo v. Provi-*

dence Washington Ins. Co., 117 N.M. 337, 339 n. 1, 871 P.2d 1343, 1345 n. 1 (1994). The parties arbitrated the issue of the extent of Defendant's damages under an arbitration clause in the policy that included the following language:

> Regardless of the method of arbitration, any award not exceeding the limits of the financial responsibility law of New Mexico will be binding and may be entered as a judgment in a proper court.
>
> Regardless of the method of arbitration, when any arbitration award exceeds the financial responsibility limits of New Mexico, either party has a right to trial on all issues in a court of competent jurisdiction.

The arbitration panel awarded $52,500 to Defendant. Based on Allstate's view that the $52,500 award exceeded the $25,000 mandatory financial responsibility limit of New Mexico, Allstate filed an action in district court to determine the extent of Defendant's damages in a trial de novo. Defendant filed a motion asking the court to confirm the arbitration award. The district court granted Defendant's motion and confirmed the arbitration award.

{3} The district court specifically concluded that "[t]he 'statutory limit of liability' as used in the Allstate insurance policy is modified by the stacking of the uninsured/underinsured motorist policies and by New Mexico case law and is $75,000." The court concluded, therefore, that under the policy language "Defendant's recovery [of $52,500] in arbitration did not exceed this modified 'statutory limit of liability,'" which required the court to confirm the award rather than consider the facts and issues in a trial de novo. The issue is a question of law and we review it de novo. *See Rummel v. St. Paul Surplus Lines Ins. Co.*, 1997-NMSC-042, ¶ 10, 123 N.M. 767, 945 P.2d 985.

DISCUSSION

{4} The principal issue is straightforward: Do the phrases "the limits of the financial responsibility law of New Mexico" and "financial responsibility limits of New Mexico" in the arbitration clause in the Allstate policy mean solely the $25,000 mandatory amount for bodily injury required in the New Mexico Mandatory Financial Responsibility Act, NMSA 1978, §§ 66-5-201 to -239 (1978, as amended through 1999), or do they mean the total of three $25,000 uninsured motorists coverages based on the principle of judicial stacking?

{5} We first discuss the applicable law, which consists of the Mandatory Financial Responsibility Act, the Uninsured Motorists' Insurance statute, the New Mexico Uniform Arbitration Act, our case law on judicial stacking, and an instructive New Mexico case regarding a very similar arbitration provision. Following a discussion of the applicable law, we discuss the merits of Allstate's appeal.

A. *The Applicable Law*

{6} The Mandatory Financial Responsibility Act is contained in Part 3 ("Financial Responsibility") of Article 5 of the Motor Vehicle Code and requires New Mexico residents "who own and operate motor vehicles" (referred to hereafter as "owners") to carry a specified amount of liability insurance or otherwise provide evidence of financial responsibility. Sections 66-5-201.1, -205, and -208. When insurance is the form of proof of financial responsibility, those owners must obtain per-person-liability coverage of $25,000 and higher or other amounts under other circumstances not pertinent here. *See* § 66-5-208.

{7} Coverage for uninsured and underinsured motorists (referred to in this opinion as "uninsured" motorists coverage) is contained in Part 4 ("Uninsured Motorists' Insurance") of Article 5 of the Motor Vehicle Code. *See* NMSA 1978, § 66-5-301 (1978, as amended through 1983). Uninsured motorists insurance must be made available by liability insurers to their insureds. *See id.*

{8} Specifically, unless rejected by the insured after offered by the insurer, insurers are required under Section 66-5-301 to include uninsured motorists coverage:

> in minimum limits for bodily injury or death and for injury to or destruction of property as set forth in Section 66-5-215 NMSA 1978 and such higher limits as may be desired by the insured, but up to the limits of liability specified in bodily injury

and property damage liability provisions of the insured's policy....

Section 66–5–301. Section 66–5–215, which is in the Mandatory Financial Responsibility Act, sets out among other subparts that the sum of $25,000 will be sufficient to satisfy the requirements of the Mandatory Financial Responsibility Act when that amount "has been credited upon any judgment rendered in excess of that amount because of bodily injury to or death of one person as a result of any one accident." Thus, the interplay between the Uninsured Motorists' Insurance statute and the Mandatory Financial Responsibility Act ties the coverages to be made available to an insured under the Uninsured Motorists' Insurance law to those amounts ranging between $25,000 and any higher amount of liability insurance the insured obtains. *See* §§ 66–5–208, –301.

{9} As used in the Motor Vehicle Code, NMSA 1978, §§ 66–1–1 to 66–8–141, excluding 66–7–102.1 (1978, as amended through 1999), and therefore as used in the Mandatory Financial Responsibility Act, the term "financial responsibility" is defined in terms of liability of the insured resulting from traffic accidents. "Financial responsibility" is defined as:

> the ability to respond in damages for liability resulting from traffic accidents arising out of the ownership, maintenance or use of a motor vehicle of a type subject to registration under the laws of New Mexico, in amounts not than specified in the Mandatory Financial Responsibility Act [66–5–201 to 66–5–239 NMSA 1978] or having in effect a motor vehicle insurance policy. 'Financial responsibility' includes a motor vehicle insurance policy, a surety bond or evidence of a sufficient cash deposit with the state treasurer.

Section 66–1–4.6(B). The words "financial responsibility" do not appear in the Uninsured Motorists' Insurance statute. While all owners are required under the Mandatory Financial Responsibility Act to prove their financial responsibility, no owner or insured is required under Section 66–5–301 to carry uninsured motorists coverage.

{10} The purpose of mandatory liability insurance under the Mandatory Financial Responsibility Act is to require an owner to be financially responsible in order to protect others who are innocent victims of automobile accidents caused by owners of motor vehicles. *See Allstate Ins. Co. v. Jensen*, 109 N.M. 584, 587, 788 P.2d 340, 343 (1990). The purpose of uninsured motorists coverage, on the other hand, is to protect that owner from others who are uninsured. *See Sandoval v. Valdez*, 91 N.M. 705, 708, 580 P.2d 131, 134 (Ct.App.1978).

{11} The doctrine of judicial stacking in New Mexico case law relates and applies solely to uninsured motorists coverage. The doctrine evolved in New Mexico based on a court-adopted policy "to ensure that the insured will receive the benefit of what he or she has paid for and that people concerned about the dangers of uninsured motorists will be compensated to the full extent of the insurance purchased for their protection." *Rodriguez v. Windsor Ins. Co.*, 118 N.M. 127, 130–31, 879 P.2d 759, 762–63 (1994). Allstate concedes that in this case Defendant could stack his uninsured motorists coverages.

{12} The New Mexico Uniform Arbitration Act recognizes the validity of written contracts to arbitrate. *See* NMSA 1978, §§ 44–7–1 to –22 (1971). Allstate seeks relief here based on Section 44–7–12(A)(5). Section 44–7–12(A) permits a court to vacate an arbitration award where:

> (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 [44–7–2 NMSA 1978] and the party did not participate in the arbitration hearing without raising the objection. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

This section together with an arbitration clause similar to the one at issue in the present case were interpreted in *Bruch v. CNA Ins. Co.*, 117 N.M. 211, 870 P.2d 749 (1994), which, according to Allstate, "provide[s] the analytical framework for this case:"

{13} In *Bruch*, a CNA policy clause read:

> A decision agreed to by ... the ... arbitrators will be binding as to ... [t]he amount of damages. This applies only if the amount does not exceed the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged. If the amount exceeds that limit, either party may demand the right to a trial.

Id. at 212, 870 P.2d at 750. The arbitrators awarded $90,000 to Bruch, more than three times the mandatory $25,000 per-person amount under the Mandatory Financial Responsibility Act. *See id.* Bruch filed a motion in district court to confirm the award. *See id.* CNA, however, demanded a trial de novo based on the language of the clause permitting either party to demand the right to a trial if an arbitration award exceeded the mandatory amount under New Mexico's financial responsibility law. *See id.* The district court granted CNA's right to a trial therefore vacating the arbitration award. *See id.*

{14} The Supreme Court in *Bruch* held that the district court properly granted CNA's motion for a new trial, finding the CNA arbitration clause neither repugnant to public policy nor ambiguous and that the trial court had the authority to vacate the award because the parties mutually accepted this enforceable clause in the policy. *See id.* at 213, 870 P.2d at 751. Underlying its holdings, our Supreme Court determined that Section 44–7–12(A)(5) gave the trial court authority to vacate the arbitration award if there was no arbitration agreement, the issue regarding the existence of an agreement was not adversely determined in prior proceedings, and the party opposing the award did not participate in the arbitration without objecting. *See Bruch,* 117 N.M. at 213, 870 P.2d at 751. The Court then concluded that "[t]he plain language of the contract supports CNA's contention that the parties did not have an agreement, and the record supports CNA's contention that there was no adverse determination." *Id.*

{15} Specifically regarding the clause in question in *Bruch,* the Supreme Court stated "The minimum limit for mandatory bodily injury liability insurance in New Mexico is $25,000, *see* NMSA 1978, §§ 66–5–215 & –301 (Repl.Pamp.1989); *accord* §§ 66–5–205 & –208," *Bruch,* 117 N.M. at 212, 870 P.2d at 750, and that CNA appeared to contemplate "invoking the provision that allowed for a trial de novo if the award exceeded $25,000." *Id.* at 214, 870 P.2d at 752.

{16} *Bruch* does not directly answer the question whether stacking principles are to be invoked in determining the amount intended by the words in the policy clause at issue, referred to hereafter as "financial responsibility limits." We believe, however, that *Bruch* is instructive and provides analytic framework for this case.

B. *The Doctrine of Judicial Stacking Cannot be Borrowed in This Case to Decide the Issue*

{17} In the present case, the district court determined that the arbitration clause language at issue did not violate public policy, and that "Allstate properly preserved the right to appeal by notifying the arbitrators and Perea prior to commencement of the arbitration." Defendant does not attack these determinations. Further, the issue regarding whether an agreement to arbitrate existed was not adversely determined in the arbitration proceeding. As a result, the only *Bruch* factor left for consideration is whether an arbitration agreement existed under which Allstate could be bound by an arbitration award in excess of $25,000 and this issue turns on whether "financial responsibility limits" means judicially stacked $25,000 uninsured motorists coverages or the single $25,000 mandatory amount in Section 66–5–208.

{18} As noted earlier, the district court held that the "statutory limit of liability" was modified by the judicial stacking doctrine. Following the court's word usage, Defendant argues that "statutory limit of liability" is $75,000 as a result of stacking uninsured motorists coverages. Of course, if "financial responsibility limits" in the policy means stacked uninsured motorists coverages, the arbitrators' award of $52,500 does not exceed the "financial responsibility limits," the arbitration award is binding, and neither party is

entitled to a de novo trial in district court. But we do not interpret the language in this manner. We hold that the policy contract language "financial responsibility limits" plainly means the applicable single amount stated in Section 66–5–208(A).

{19} The words "financial responsibility" defined in the Motor Vehicle Code are the guts of the Mandatory Financial Responsibility Act. The provision in a motor vehicle liability insurance policy containing the words "financial responsibility limits of New Mexico" and the "limits of the financial responsibility law in New Mexico" must be considered, without evidence of an intent or expectation to the contrary, to incorporate the definition of "financial responsibility" in the Motor Vehicle Code and to incorporate the applicable provisions of the Mandatory Financial Responsibility Act. *See State ex rel. Udall v. Colonial Penn Ins. Co.,* 112 N.M. 123, 130, 812 P.2d 777, 784 (1991) ("A contract incorporates the relevant law, whether or not it is referred to in the agreement.").

{20} No analysis or statutory interpretation in our Supreme Court's judicial stacking cases provides us with any tool with which we can either rationally borrow the stacking doctrine for use in the context here or reasonably construe "financial responsibility limits" in the policy to mean the stacking of uninsured motorists coverages. *See, e.g., Rodriguez,* 118 N.M. at 127, 879 P.2d at 759; *Jaramillo,* 117 N.M. at 337, 871 P.2d at 1343; *Lopez v. Foundation Reserve Ins. Co.,* 98 N.M. 166, 646 P.2d 1230 (1982). Nor do we find any basis on which to "modify," as did the trial court, the language of the arbitration clause. To do so would, in our opinion, alter the plain wording and meaning of the clause. *See Casias v. Dairyland Ins. Co.,* 1999–NMCA–046, ¶ 11, 126 N.M. 772, 975 P.2d 385.

{21} Furthermore, we are aware of no policy reason, and Defendant provides us with none, that gives us reason to apply the judicial stacking doctrine in construing the clause at issue. Application of the judicial stacking doctrine here simply makes the arbitration award binding requiring the district court to confirm that award rather than try the issues de novo. While a second chance through de novo trial may not seem fair to an insured under certain circumstances, our Supreme Court has left little room for complaint, for it held a very similar agreement is neither against public policy nor ambiguous. *See Bruch,* 117 N.M. at 213, 870 P.2d at 751.

{22} Finally, we note that Section 66–5–303 of the Uninsured Motorists' Insurance statute, enacted in 1969, permits any party aggrieved by an arbitrator's award to appeal that award to the district court de novo. The case of *Dairyland Insurance Co. v. Rose,* 92 N.M. 527, 591 P.2d 281 (1979), states, however, that the Uniform Arbitration Act, enacted in 1971, was intended to supercede the de novo provision in Section 66–5–303 in circumstances in which the insured and insurer agree to binding arbitration. *See Rose,* 92 N.M. at 530–31, 591 P.2d at 284–85. Yet, the Uniform Arbitration Act makes provisions in written contracts to submit a controversy to arbitration "valid, enforceable and irrevocable," *see* § 44–7–1, and nothing in the Uniform Arbitration Act forbids parties to a contract to agree that arbitration is binding under some circumstances and not binding under other circumstances as in this case. *Bruch* reinforces that point. Therefore, to the extent that, pursuant to contract, arbitration is not binding, there exists no arbitration agreement to be bound by an arbitrator's award, and, therefore, a party with a contractual right to an appeal de novo, as well as an aggrieved party under Section 66–5–303, has a right to seek a de novo trial in district court. In fact, in the case before us, were Defendant to have been awarded damages of only $26,000 in the arbitration, rather than $52,500, he very well may have been the one seeking a de novo trial under the contract and under Section 66–5–303 in order to seek a greater damages recovery in district court.

CONCLUSION

{23} We reverse and remand to the district court to try de novo the extent of Defendant's damages.

{24} **IT IS SO ORDERED.**

PICKARD, C.J., and ELLINGTON, J., concur.

8 P.3d 856

2000-NMSC-024

In The Matter of Juan A. DAWSON, ESQ. An Attorney Licensed to Practice Before the Courts of the State of New Mexico.

No. 26,466.

Supreme Court of New Mexico.

Aug. 21, 2000.

DISCIPLINARY PROCEEDING

Arne R. Leonard, Deputy Disciplinary Counsel, Albuquerque, NM, For Disciplinary Board.

Juan A. Dawson, Lovington, NM.

OPINION

PER CURIAM.

{1} This matter came before the Court upon the recommendation of the disciplinary board to accept a conditional agreement not to contest and consent to discipline tendered by the respondent, Juan A. Dawson, pursuant to Rule 17-211 NMRA 2000 of the Rules Governing Discipline. Under that agreement, respondent declared his intention not to contest allegations that he violated Rules 16-101, 16-103, 16-104(A) and (B), 16-115(A) and (B), 16-116(D), 16-302, 16-304(C), 16-503, and 16-804(D) and (H) NMRA 2000 of the Rules of Professional Conduct. We adopt the disciplinary board's recommendation and impose the discipline provided for in the agreement.

{2} Respondent was admitted to practice law in New Mexico in January 1997. He was suspended from the practice of law by this Court in April 2000 for nonpayment of bar dues. *See In re Suspension of Active and Inactive Members of the State Bar of New Mexico for Nonpayment of 2000 Annual Bar License Fee and for Noncompliance with Rule 17-203 NMRA,* Vol. 39, No. 17 SBB 11 (April 27, 2000). Before he was suspended, respondent was charged with violating the Rules of Professional Conduct with regard to his representation of three clients.

{3} On or about July 7, 1999, Ysidro Florez, Jr., filed a complaint with the disciplinary board alleging that respondent engaged in misconduct while representing him in a criminal matter. On or about July 22, 1999, Hector Martinez filed a similar complaint against respondent with the disciplinary board. Mr. Florez and Mr. Martinez each paid respondent to defend them in jury trials

in district court.[1] Each individual also paid respondent at least $1,000.00 to appeal his conviction after the jury trial, according to receipts produced by respondent.

{4} In Mr. Martinez's case, the New Mexico Court of Appeals filed a memorandum opinion affirming the conviction. The opinion noted that the memorandum in opposition filed by respondent on Mr. Martinez's behalf did not provide the court with any additional facts or law to support his position, and directed respondent to follow the appellate rules more closely in the future. Respondent terminated his representation of Mr. Martinez after receiving the Court of Appeals opinion.

{5} In Mr. Florez's case, respondent filed a docketing statement that was identical to the one he previously filed on behalf of Mr. Martinez, except for differences in stating the facts of each case. The Court of Appeals subsequently issued an order to show cause why respondent should not be sanctioned for his failure to file the record proper in Mr. Florez's appeal. Respondent answered the order to show cause by acknowledging that he did not comply with Rule 12–208 NMRA 1999 and that he could not provide evidence that the docketing statement for Mr. Florez's appeal was mailed to the district court clerk. The Court of Appeals then issued a calendar notice rejecting respondent's docketing statement and ordering respondent to file an amended docketing statement that complied with Rule 12–208(C)(4) NMRA 1999 within twenty (20) days.[2]

{6} After this twenty-day period expired, a second order to show cause was issued in Mr. Florez's case alleging that respondent had not filed an amended docketing statement with the Court of Appeals as ordered, and that he had not filed any pleading requesting additional time to do so. Respondent subsequently filed his amended docketing statement with the Court of Appeals. After reviewing the amended docketing statement, the Court of Appeals issued a second calendar notice admonishing respondent for his failure to comply with the first calendar notice and finding that the only differences between respondent's original docketing statement and his amended docketing statement were that: (1) the word "case" was changed to "issues" in the title of one section, and (2) one new sentence was added to that section regarding preservation.

{7} Shortly after the Court of Appeals' second calendar notice was filed, respondent sent a letter to Mr. Florez's spouse informing her that Mr. Florez's appeal had been denied by the Court of Appeals and that additional funds were required to continue respondent's representation in the appeal. Respondent subsequently withdrew as Mr. Florez's attorney and was replaced by an attorney from the public defender's appellate division.

{8} After receiving Mr. Florez's complaint, disciplinary counsel made inquiries to determine the basis for respondent's claim that additional funds were required to continue his representation of Mr. Florez in the appeal after the Court of Appeals issued its second calendar notice. In response to these inquiries, respondent produced copies of some receipts but stated that he did not have a written fee agreement or other documentation indicating the basis for his claim that additional fees were needed after the filing of the second calendar notice. In response to further inquiries about the status of his trust account records, respondent produced some bank statements but was unable to identify any additional trust account records required by Rules 16–115 and 17–204 NMRA 2000 that he had maintained. Respondent further explained that much of his practice involved criminal work for which he requested and was paid a flat fee, and that these flat fee payments were generally "placed into cash

1. Respondent's conduct during these jury trials is not at issue in this disciplinary proceeding, and we express no opinion about whether respondent's conduct constituted ineffective assistance of counsel or provided other grounds for reversal of his clients' convictions.

2. Rule 12–208(C)(4) states the requirements for the contents of the docketing statement, such as a statement of the issues presented by the appeal including how they arose and how they were preserved in the trial court. Service of the docketing statement under Rule 12–208 was necessary to trigger the filing of the record proper in the appellate court under Rule 12–209.

flow" and not deposited into his trust account.

{9} On or about September 20, 1999, the office of disciplinary counsel received another complaint against respondent from Stanley Goddard, II, and Sandra Hinze. Their complaint alleged that respondent had failed to refund a $500.00 payment that Ms. Hinze had sent to respondent in November 1998 in order to commence representation of Mr. Goddard in a criminal matter. In December 1998, Mr. Goddard was released from detention following a court appearance at which respondent did not appear or assist in any way. Because respondent had not represented Mr. Goddard as they had contemplated when the $500.00 advance payment was made, Mr. Goddard and Ms. Hinze asked respondent to give them a full refund and return Mr. Goddard's file in December 1998. Respondent claims that he agreed to refund the $500.00, but failed to follow through in part because he closed his office on December 30, 1998, and was out of the country for several weeks thereafter. He did not refund the $500.00 until after Mr. Goddard and Ms. Hinze filed their complaint with the disciplinary board more than eight months later. He later admitted that he did not return the file.

{10} Rule 16–116(D) requires a lawyer to refund any advance payment of fee that has not been earned upon termination of representation. Rule 16–105(A) NMRA 2000 requires a lawyer's fee to be reasonable. This Court has stated repeatedly that "[a]ny fee is excessive when absolutely no services are provided." *In re Jones,* 119 N.M. 229, 230, 889 P.2d 837, 838 (1995) (citing *In re Martinez,* 108 N.M. 252, 771 P.2d 185 (1989)); *see also In re Cherryhomes,* 115 N.M. 734, 734–35, 858 P.2d 401, 401–02 (1993) (similar). In addition, the rules prohibiting nonrefundable unearned fees have been the subject of two disciplinary notes, *see Disciplinary Note,* Vol. 36, No. 25, SBB 3 (June 19, 1997); *Amendment to Disciplinary Note,* Vol. 36, No. 25, SBB 3 (June 26, 1997), and a formal reprimand by the disciplinary board that was upheld by this Court on appeal, *see In re Eaby,* Disciplinary No. 07–86–92, Vol. 28, No. 27, SBB 9 (July 6, 1989).[3]

{11} For these reasons, a lawyer's claim that he or she charged a client a flat fee or retainer that is nonrefundable will not suffice to justify a failure to deposit unearned client funds in a trust account, a withdrawal of client funds from a trust account to pay fees that have not yet been earned, or a failure to promptly return unearned funds to a client upon termination of the representation. The Rules of Professional Conduct in this state do not permit lawyers to charge nonrefundable unearned fees. Such unearned fees are unreasonable under Rule 16–105(A). Failure to refund the unearned portion of the fee also may interfere with the client's right to discharge his or her lawyer under Rule 16–116(A)(3) and breach the lawyer's duties upon termination of representation under Rule 16–116(D).

{12} Because the Rules of Professional Conduct do not permit lawyers to charge their clients a nonrefundable unearned fee, the unearned portion of a fee paid in advance by the client remains the property of the client. Rule 16–115(A) requires such funds to be held in trust until earned. In order for lawyers and their clients to know what portion of a flat fee or retainer may properly be withdrawn from trust, lawyers must inform their new clients of the basis upon which they will compute the amount of fee earned, *see* Rule 16–105(B), and maintain records that will enable them to determine the ongoing status of the fee, even when the fee arrangement is for a flat fee, *see* Rules 16–115(A), 17–204(A). "The obligation to properly maintain one's trust ac-

3. Courts in other jurisdictions also have interpreted their rules to include a prohibition on nonrefundable unearned fees. *See generally* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban,* 64 U. Cin. L.Rev. 11 (1995). Most recently, the Colorado Supreme Court adopted such a prohibition, but decided to apply some of its rulings prospectively and directed that the issue of nonrefundable unearned fees should be the subject of proposed rulemaking in that state. *See In re Sather,* 3 P.3d 403, 412 n. 11, 414–415 (Colo.2000) (en banc). As the respondent in this case has consented to discipline and there already exists sufficient authority on this issue in New Mexico, we conclude that a prospective ruling or proposed rulemaking is not warranted by the circumstances of this case.

count is an affirmative one. Every attorney is charged with the obligation to determine recordkeeping requirements and to maintain his or her trust account in compliance with the[se] requirements." *In re Turpen,* 119 N.M. 227, 228, 889 P.2d 835, 836 (1995).

{13} We recognize that lawyers in some practice areas, such as criminal defense, may operate in circumstances that warrant the advance payment of fees and the use of alternative fee arrangements in lieu of billing at an hourly rate. We also recognize that it may not be feasible to determine how much of a flat fee has been earned by means of a simple computation of billable hours under certain circumstances. Rule 16–105(A) lists several other factors besides the expenditure of time and labor that may be considered in determining the reasonableness of a lawyer's fee. These factors may allow for the entire fee to be earned before the completion of the representation in some cases, provided that the fee arrangement sufficiently informs the client how the factors will be applied.

{14} Regardless of a lawyer's reasons for requiring an advance payment of a flat fee from a particular type of client, however, these clients are still entitled to the same protections afforded to other members of the public under the Rules Governing Discipline and the Rules of Professional Conduct. After accepting the advance payment of a flat fee, these rules do not permit a lawyer to threaten to prejudice a client's interests by terminating the representation at a critical stage of the proceedings in order to coerce payment of additional fees. *See In re Trujillo,* 110 N.M. 180, 181, 793 P.2d 862, 863 (1990); *cf. Model Rule of Professional Conduct* 1.5 cmt. (1983) ("[A] lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client."). If a dispute arises between the lawyer and client about what part of the fee has been earned, Rule 16–115(C) requires the lawyer to continue to hold the funds in dispute separate from the lawyer's property until the dispute is resolved. *Cf. In re Moore,* 2000–NMSC–019, ¶ 3 n. 2, 129 N.M. 217, 4 P.3d 664 Vol. 39, No. 27 SBB 20 (July 6, 2000) (applying this rule to disputes with a third person). It remains the lawyer's burden to prove the value of the legal services rendered. *See Calderon v. Navarette,* 111 N.M. 1, 3, 800 P.2d 1058, 1060 (1990) (citing *Van Orman v. Nelson,* 78 N.M. 11, 23, 427 P.2d 896, 908 (1967)).

{15} While there was no allegation that respondent's fees were excessive in this case, his improper handling of flat fees or retainers did lead to serious trust account violations and a failure to terminate his representation of clients in an orderly manner. Based on the uncontested allegations before us in this matter, we conclude that respondent violated Rule 16–115(A) by failing to hold the unearned fees paid by Mr. Florez and Mr. Martinez separate from his own property, failing to keep the unearned funds belonging to these clients in a separate account, and failing to keep complete records of such account funds and other property in a manner that conforms to the requirements of Rule 17–204. In addition, respondent violated Rule 16–101 by failing to provide competent representation to Mr. Florez and Mr. Martinez in their appeals, as evidenced by the findings of the Court of Appeals regarding his failure to comply with the Rules of Appellate Procedure. He violated Rule 16–104(B) by failing to explain matters to the extent reasonably necessary to permit Mr. Florez and Mr. Martinez to make informed decisions regarding the representation. He violated Rule 16–804(D) because his actions in representing Mr. Florez and Mr. Martinez were prejudicial to the administration of justice.

{16} With respect to his representation of Mr. Florez, respondent also violated Rule 16–103, by failing to act with reasonable diligence and promptness in representing a client; Rule 16–302, by failing to make reasonable efforts to expedite litigation consistent with the interests of the client; and Rule 16–304(C), by knowingly disobeying an obligation under the rules of a tribunal. With respect to the complaint by Mr. Goddard and Ms. Hinze, respondent violated Rule 16–104(A), by failing to keep a client reasonably informed about the status of a

matter and failing to promptly comply with reasonable requests for information; Rule 16–115(B), by failing to promptly deliver to the client or a third person any funds or other property the client or third person is entitled to receive; and Rule 16–503, by failing to make reasonable efforts to ensure that the conduct of his nonlawyer assistants was compatible with his own professional obligations as a lawyer. Finally, with respect to all of the aforementioned clients, respondent violated Rule 16–116(D), by failing to terminate the representation in an orderly manner, and Rule 16–804(H), by engaging in conduct that reflects adversely on his fitness to practice law.

{17} In addition to agreeing not to contest the above allegations, respondent has consented to disciplinary sanctions that include making restitution to Mr. Florez and Mr. Martinez, as well as completing a two-year deferred suspension and a period of supervised probation that will take effect should he ever be reinstated and resume the active practice of law in this state. In light of respondent's cooperation with disciplinary authorities in this proceeding, his relative inexperience in the practice of law, and the absence of any allegations of intentional dishonesty or conversion of client funds, we conclude that these sanctions are appropriate.

{18} It should be noted, however, that many of the conditions of probation that we impose in this case, such as trust account audits, a law office management consultation, and continuing legal education coursework, involve measures that could be beneficial to many lawyers, regardless of whether they are the subject of a disciplinary proceeding. Thus, if there is a lesson to be learned from this case, it is that lawyers experiencing difficulty in managing their practices should not wait until they receive a complaint from the disciplinary board to confront these difficulties and seek assistance from more experienced practitioners, consultants, or accountants. It would be wise for any newly admitted lawyer contemplating a solo practice to include in his or her business plan provisions for retaining a certified public accountant to audit his or her trust account and receiving additional training in areas relevant to law office management.

{19} NOW, THEREFORE, IT IS ORDERED that the recommendation hereby is ADOPTED and the conditional agreement not to contest and consent to discipline is APPROVED;

{20} IT IS FURTHER ORDERED that Juan A. Dawson hereby is SUSPENDED from the practice of law pursuant to Rule 17–206(A)(2) NMRA 2000 for a period of two (2) years;

{21} IT IS FURTHER ORDERED that should respondent resolve the nonpayment of bar dues and be recommended for reinstatement to active status by the Board of Bar Examiners, the entire period of suspension shall be deferred and respondent shall be placed on probationary status;

{22} IT IS FURTHER ORDERED that during any portion of the deferred suspension period during which respondent is *not* practicing law in New Mexico, he shall be on *unsupervised probation* and shall comply with the following terms and conditions:

(1) Respondent shall observe and comply with the Rules of Professional Conduct and the Rules Governing Discipline;

(2) Respondent shall respond in a prompt and timely manner to complaints filed with the disciplinary board and requests for information from the office of disciplinary counsel;

(3) Respondent shall keep this Court, the State Bar of New Mexico, and the disciplinary board informed of his current address and shall immediately notify the clerk of this Court, the State Bar of New Mexico, and the disciplinary board of any changes in his address and telephone number; and

(4) Within thirty (30) days of the date on which the unsupervised probation commences, respondent shall provide written certification to disciplinary counsel that he has no pending New Mexico cases and that he is not the attorney of record in any New Mexico case.

{23} IT IS FURTHER ORDERED that should respondent be reinstated to active status by this Court, upon recommendation

of the Board of Bar Examiners, he shall notify disciplinary counsel of his intent to return to the practice of law in New Mexico at least thirty (30) days prior to such return;

{24} IT IS FURTHER ORDERED that should respondent be reinstated to active status and return to the practice of law in New Mexico at any time, regardless of whether such return occurs before or after the expiration of the two (2) year period of deferred suspension, he shall be placed on *supervised probation* for a period of two (2) years beginning on the date of his return to the practice of law in New Mexico and he shall comply with the following terms and conditions:

(1) Respondent shall observe and comply with the Rules of Professional Conduct and the Rules Governing Discipline;

(2) Respondent shall respond in a prompt and timely manner to complaints filed with the disciplinary board and requests for information from the office of disciplinary counsel;

(3) Respondent shall be supervised by a licensed attorney, who is approved by disciplinary counsel, at his own expense;

(4) Upon returning to the practice of law in New Mexico, respondent shall retain the services of a law office management consultant, at his own expense and approved by disciplinary counsel, to organize his practice. A copy of the consultant's report shall be provided to disciplinary counsel within three (3) months of his return to the practice of law in New Mexico;

(5) Respondent shall successfully complete at least fifteen (15) hours of continuing legal education in the areas of fee agreements, trust account management, and law office management above and beyond the minimum continuing legal education requirements of New Mexico between the dates of May 15, 2000, and the end of the first three (3) months of supervised probation;

(6) Respondent shall successfully complete at least fifteen (15) hours of continuing legal education in the area of appellate practice above and beyond the minimum continuing legal education requirements of New Mexico between the dates of May 15, 2000, and the end of the first six (6) months of supervised probation;

(7) Respondent shall prominently display the following notice in the reception area of any law office in which he provides legal services during the period of supervised probation:

> To our clients:
>
> Please be advised that the law practice of Juan A. Dawson is being supervised by [supervisor's name & telephone number]. Should you have any unanswered questions or concerns about the handling of your legal work, please contact [supervisor's name].

(8) Respondent shall meet with his supervising attorney on the date he returns to the practice of law in New Mexico and on at least a monthly basis thereafter at times and places directed by the supervising attorney;

(9) Respondent shall follow all reasonable directions of his supervising attorney in a prompt and satisfactory manner;

(10) Respondent shall be responsible for ensuring that the supervising attorney advises disciplinary counsel on at least a quarterly basis as to whether he has met with the supervising attorney as required and is following the supervising attorney's instructions;

(11) Respondent shall provide disciplinary counsel with a quarterly reconciliation of his trust account reflecting the status of the account and that the account is being maintained in accordance with Rules 16–115 and 17–204;

(12) Respondent's trust account shall be audited at his own expense on a random basis two (2) times during the period of his supervised probation by a certified public accountant approved by disciplinary counsel; and

(13) The results of such trust account audits shall be reported to disciplinary counsel and may provide the basis for additional charges of professional misconduct if they reveal further violations of Rule 16–115 (including violations of Rule 17–204).

{25} IT IS FURTHER ORDERED that upon completion of the period of supervised

probation, respondent shall be required to seek reinstatement to non-probationary status pursuant to Rule 17–214(H) NMRA 2000. Respondent shall be reinstated to non-probationary status only upon demonstrating that all of the conditions of the supervised probation have been satisfied;

{26} IT IS FURTHER ORDERED that in consideration of the charges that respondent engaged in defalcation in a fiduciary capacity by failing to properly account for client funds, he shall make restitution to the following persons in the following amounts on or before November 6, 2000, with interest to accrue at the rate of fifteen percent (15%) per annum on any unpaid balance thereafter:

Ysidro Florez	$1,000.00
Hector Martinez	$1,000.00

Respondent shall provide disciplinary counsel with receipts or canceled checks documenting such payments. The restitution to Mr. Florez and Mr. Martinez shall be reduced to transcripts of judgment;

{27} IT IS FURTHER ORDERED that should respondent fail to comply with any of the aforementioned conditions or if disciplinary counsel receives additional complaints against him that give rise to the filing of formal charges of professional misconduct during the two (2) year period of his deferred suspension, upon the filing with this Court of an affidavit from disciplinary counsel attesting to his noncompliance or the filing of such formal charges, respondent's probation may be summarily revoked and the remainder of the period of suspension imposed; and

{28} IT IS FURTHER ORDERED that should respondent violate any of the aforementioned terms and conditions, disciplinary counsel shall bring the violation to the attention of this Court pursuant to Rule 17–206(G) and should respondent be found in contempt of this Court he shall be fined, censured, suspended, disbarred, and/or have his period of probation extended or revoked.

{29} **IT IS SO ORDERED.**

8 P.3d 863

2000-NMCA-072

STATE of New Mexico, Plaintiff–Appellee,

v.

Charlie TAYLOR, Defendant–Appellant.

No. 20,686.

Court of Appeals of New Mexico.

May 16, 2000.

Certiorari Granted, No. 26,432, Aug. 8, 2000.

Patricia A. Madrid, Attorney General, M. Victoria Wilson, Assistant Attorney General, Santa Fe, for Appellee.

Hollis Ann Whitson, Mental Health Unit Coordinator, Sara K. Singhas, Assistant Public Defender, Santa Fe, for Appellant.

OPINION

BOSSON, J.

{1} Charlie Taylor (Defendant) appeals the district court's determination that he committed first degree murder, resulting in his confinement in a secure, locked facility for his natural life under the New Mexico Mental Illness and Competency Code (the Code). *See* NMSA 1978, §§ 31-9-1 to -1.5 (1993). Defendant argues that the State failed to produce sufficient evidence to support a finding of first degree murder. His argument proceeds along three fronts: (1) the State's evidence was insufficient under a clear and convincing standard to support the district court's finding of a deliberate murder; (2) *State v. Rotherham*, 1996-NMSC-048, 122 N.M. 246, 263, 923 P.2d 1131, 1148, precludes the district court from considering any state of mind evidence regarding an incompetent defendant, making it legally impossible to prove the specific intent required for first degree murder; and (3) the victim's provoca-

tion lowered the culpability for the killing from murder to voluntary manslaughter. We reverse the district court on the sufficiency of the evidence to support first degree murder, but affirm on the remaining issues.

BACKGROUND

{2} Defendant stipulated that he shot his wife Rhonda on April 28, 1996, and that the shooting caused her death. Police arrested Defendant the next day. Within a week of his arrest, after filing a criminal complaint charging Defendant with an open count of murder, the district attorney filed a petition with the district court to determine Defendant's competency to stand trial. *See* § 31–9–1 (determination of competency; raising the issue). Defendant was taken to Las Vegas Medical Center's Forensic Unit (Medical Center) for evaluation, after which Defendant was determined not competent to stand trial. The parties stipulated that Defendant was dangerous and waived his rights to hearings under the Code, §§ 31–9–1.2 to –1.3, to determine his prospects of gaining competency within a year. The parties also agreed that Defendant would continue his confinement at the Medical Center for further treatment to address his competency and dangerousness. When the State realized that Defendant would not gain competency to stand trial within one year of the original finding of incompetency, it petitioned the district court for a hearing to determine the sufficiency of the evidence concerning the open charge of murder against Defendant, which the court granted. *See* §§ 31–9–1.4(A), –1.5 (hereinafter "Section 1.5 hearing").

{3} At the Section 1.5 hearing, the details of the killing were reconstructed through the testimony of the medical examiner, the testimony of the law enforcement officers examining the crime scene, and statements Defendant had made to the investigating officers. The State offered all the evidence at the Section 1.5 hearing; Defendant rested his case without producing evidence or testifying. The Section 1.5 hearing yielded the following evidence.

{4} On April 28, 1996, Defendant, his wife Rhonda, and their eighteen-month-old daughter were at home. At some point during the day Rhonda hit their daughter. This behavior was not unprecedented; Rhonda had hit the child on previous occasions. Although, according to the testimony of one of the officers involved in Defendant's arrest, Defendant described Rhonda's behavior as disciplinary, he stated that her manner was abusive and indicated that slapping the "little girl" in the face was inappropriate. Defendant and Rhonda also had argued about the television program she had been watching.

{5} After Rhonda hit the child a third time, Defendant got a gun and shot her. He told the police that when Rhonda abused the child "she had the devil in her eyes," her eyes had fire in them, and that he shot "the devil." Defendant fired six shots, three of which hit Rhonda. One shot grazed the back of her neck, one hit her chest, and another hit her head from short range. The medical examiner testified that either of the latter shots could have caused Rhonda's death. The three other shots included two that were lodged in the structure of the mobile home, and one that was a "targeted hit" on the television.

{6} After the shooting, Defendant drove with his daughter to the foothills of Cooke's Peak north of Deming. Defendant eventually stopped his car, then wandered across the desert on foot with his daughter. Sometime during the night Defendant thought he smelled something burning, began to look for Rhonda, became confused, then lost his daughter. The next day, having abandoned his daughter in the desert, Defendant was stopped and arrested by police as he drove on U.S. Highway 180. When questioned about his daughter, Defendant told the police on one occasion that his daughter was "with Rhonda," and on another that she was "with God," yet he also expressed hope that they could find his daughter. Defendant became very emotional when discussing his daughter, but nevertheless assisted the officers in the search for her. A search team found the daughter alive and unharmed the next day.

{7} After the Section 1.5 hearing, the district court, sitting without a jury, found that the State had produced clear and convincing evidence that Defendant committed first degree murder. The court determined that Defendant's killing of Rhonda "was willful

and deliberate." Because the parties had stipulated that Defendant was dangerous, the district court ordered that he be detained by the Department of Health in a secure, locked facility for the duration of his natural life. *See* § 31-9-1.5(D)(2) (setting the length of confinement to the maximum sentence he could have received in a criminal proceeding).

DISCUSSION

The New Mexico Mental Illness and Competency Code

{8} After the United States Supreme Court determined in *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), that it was a violation of due process and equal protection for the state to hold incompetent criminal defendants indefinitely while awaiting restoration of their competency, New Mexico revised the Code in an effort to comply with *Jackson*. *See Rotherham*, 1996-NMSC-048, 122 N.M. at 252-53, 923 P.2d at 1137-38. The Code set up a procedure whereby the district court holds a factual hearing (the Section 1.5 hearing) to determine whether the incompetent defendant is dangerous and has committed a serious crime. If the court determines that the incompetent defendant is dangerous and has committed a serious crime, it criminally commits the defendant in a "secure, locked, facility" for a fixed period of time "equal to the maximum sentence to which the defendant would have been subject had the defendant been convicted in a criminal proceeding," Section 31-9-1.5(D). At the Section 1.5 hearing, the incompetent defendant may not rebut the charge on the grounds of insanity or lack of mental capacity to form criminal intent. A Section 1.5 hearing is not an adjudication of criminal guilt; the hearing is to determine the maximum time the defendant can be committed for the public's protection and treatment. *See State v. Werner*, 110 N.M. 389, 392, 796 P.2d 610, 613 (Ct.App.1990).

{9} When the defendant completes his maximum time of commitment, or in the event he is determined earlier to be no longer dangerous within the meaning of the Code, *see* § 31-9-1.5(D)(4)(b)-(c), the defendant may still be subject to civil commitment under the Mental Health and Developmental Disabilities Code, NMSA 1978, §§ 43-1-1 to -25 (1976, as amended through 1999), if he "presents a likelihood of harm to himself or others," Section 43-1-12(C). If, through treatment, the defendant becomes competent during his commitment, he faces the original criminal charges at a regular criminal trial. *See* § 31-9-1.5(D)(4)(a). Thus, once found to have committed a crime at a Section 1.5 hearing, the defendant will not regain his liberty until either (1) he completes the term of his criminal commitment or is no longer considered dangerous, *and* the State decides that civil commitment is unwarranted, or (2) the defendant's treatment results in competency and the criminal charges are resolved. Although the Code has been repeatedly challenged on various constitutional grounds, it has continually survived constitutional scrutiny. *See Rotherham*, 1996-NMSC-048, 122 N.M. at 264, 923 P.2d at 1149; *State v. Gallegos*, 111 N.M. 110, 117, 802 P.2d 15, 22 (Ct.App.1990); *Werner*, 110 N.M. at 392, 796 P.2d at 613.

The Effect of *State v. Rotherham*

{10} Defendant presents a question we must resolve before addressing the sufficiency of the evidence: whether the Supreme Court's opinion in *Rotherham* precludes the district court holding a Section 1.5 hearing from considering Defendant's state of mind while committing a criminal act. *Rotherham* viewed the Section 1.5 hearing as a procedure less concerned with a defendant's *mens rea*, and more with whether a "defendant committed the criminal *act*." *Id.*, 1996-NMSC-048, 122 N.M. at 263, 923 P.2d at 1148 (citing *Werner*, 110 N.M. at 391, 796 P.2d at 612). In observing this function of a Section 1.5 hearing, the Court then stated, "Hence, any evidence relating to the defendant's state of mind at the time the criminal act was committed is irrelevant." *Id.* Defendant seizes upon this quote from *Rotherham* as authority that prevents the district court from finding that he committed a specific intent crime because, according to Defendant, that state of mind is now "irrelevant."

{11} Defendant asserts, correctly, that the district court necessarily delved into his mental state by finding that the "killing of Rhonda Taylor was willful and deliberate." Thus,

according to Defendant's reading of *Rotherham*, the district court committed reversible error by making the very mental state determination that is essential to first degree murder. Going to the next logical step, Defendant concludes that under *Rotherham* the most the district court could consider was second degree murder, and perhaps only manslaughter.

{12} We believe Defendant misreads the meaning of *Rotherham*. In that opinion, the Supreme Court expressly relied upon our opinion in *Werner*. *See Rotherham*, 1996-NMSC-048, 122 N.M. at 263, 923 P.2d at 1148. But the holding of *Werner* does not stand for the proposition Defendant urges us to adopt. It states only that a *defendant* cannot present "defenses of insanity and inability to form a specific intent" at the Section 1.5 hearing. *Werner*, 110 N.M. at 392, 796 P.2d at 613. *Werner* says nothing that would minimize the State's burden to prove a specific intent and present evidence accordingly, when it is an essential element of the crime charged.

{13} Seven months after *Werner* was decided, this Court confirmed that while Section 1.5 removes the defense of lack of capacity from consideration, the State nonetheless has the burden of proving the elements of the crime charged, including specific intent. *See Gallegos*, 111 N.M. at 117, 802 P.2d at 22. We observed in *Gallegos* that the defendant was free to contest the specific intent at issue, as was done in that case by putting on evidence that the injury was due to an accident instead of a specific intent to injure. The *Gallegos* opinion stated, "The only thing *Werner* prohibits is defendant attempting to defend on the basis that he lacked capacity to commit the crime or form specific intent." *Id.* We concluded in *Gallegos* that at the Section 1.5 hearing "there was evidence supporting a finding of specific intent to injure" sufficient for aggravated assault. *Id.; see also* NMSA 1978, § 30-3-2(C) (1963) (defining aggravated assault as assault with intent to commit any felony). Read together, *Werner* and *Gallegos* permit *both* parties to offer proof of Defendant's state of mind with only one exception: Defendant may not use lack of mental capacity or insanity to prove lack of specific intent.

{14} Did *Rotherham* alter this balance, such that a specific intent crime can no longer be proved or disproved in a Section 1.5 hearing? We think not. As noted, in *Rotherham* our Supreme Court was affirming, not changing, the law previously articulated in *Werner* and *Gallegos*. There is no indication anywhere in the *Rotherham* opinion that the Court was trying to restate the law or alter the status quo that had already established the irrelevance of mental capacity at a Section 1.5 hearing. Any other conclusion would fly in the face of the ameliorative goals of the Code which include ensuring the long-term commitment and treatment of dangerous, incompetent defendants. *See Werner*, 110 N.M. at 392, 796 P.2d at 613. It follows that, in drafting the Code, our legislature intended to include, not exclude, the most serious crimes involving the most dangerous defendants. We also observe that several of the defendants in the *Rotherham* opinion, like the defendant in *Gallegos*, were facing criminal commitment proceedings for specific intent crimes. *See Rotherham*, 1996-NMSC-048, 122 N.M. at 249-51, 923 P.2d at 1134-36 (first degree murder, arson, attempted kidnaping). Thus, the *Rotherham* opinion would be a strange vessel indeed from which to draw the inference that specific intent has become irrelevant to the Section 1.5 process.

{15} Finally, a fair reading of the language used in *Rotherham*, taken in context, undercuts Defendant's contention. The defendants in *Rotherham* were *not* complaining about the State having to prove state of mind as part of the essential elements of the crime charged. In stating that "any evidence relating to the defendant's state of mind . . . is irrelevant," the Court was addressing the due process complaint, held over from *Werner*, that the defendants were being precluded from defending at a Section 1.5 hearing on the basis of their "inability to form specific intent" due to lack of mental capacity. *Rotherham*, 1996-NMSC-048, 122 N.M. at 263, 923 P.2d at 1148. Thus, taken in context, when the Supreme Court characterized "state of mind" as irrelevant, it was using the term as it pertained to the issue before it:

the irrelevancy of the defendant's *ability* to form a specific intent. Simply put, the Court was never asked to address the present question and did not do so.

{16} We acknowledge the anomaly of a mental incompetent defending against a specific intent crime being precluded from showing an incapacity to form that very specific intent. It is, however, part of the balancing process woven into the Code. *See id.* Its justifications are reflected in the purposes for commitment—treatment as opposed to punishment—and in society's need for protection from dangerous persons found to have committed serious criminal acts. *See id.* And, whatever the hardship may be upon the mentally incompetent, we repeat what has been previously said in *Gallegos;* that the accused is free to disprove specific intent by any means short of lack of mental capacity. *See Gallegos,* 111 N.M. at 117, 802 P.2d at 22. Defendant counters that he in effect has been rendered defenseless, that only the State can "present evidence and make argument regarding Mr. Taylor's mental state at the time of the shooting." But Defendant pushes too hard; he is not defenseless nor has he been denied due process of law. As we shall see shortly, the appeal before us illustrates how an incompetent defendant can fend off a specific intent crime, and how the state can fall short in meeting its burden, without any reliance on the defendant's insanity or lack of capacity to form intent.

Sufficiency of the Evidence

{17} To prove a specific intent crime, the State, by necessity, has to demonstrate more than an act or action of the accused. The State has to demonstrate that the accused harbored a given intention. In a case of first degree murder, the State has to prove a deliberate intention to kill, which "may be inferred from all of the facts and circumstances of the killing." UJI 14–201 NMRA 2000; *see also State v. Duarte,* 1996–NMCA–038, ¶ 7, 121 N.M. 553, 915 P.2d 309. At a Section 1.5 hearing, the defendant is equally entitled to marshal a factual case that disproves either direct or inferential evidence that he had formed, or had the opportunity to form, a deliberate intent to kill. *See Gallegos,* 111 N.M. at 117, 802 P.2d at 22; *see also State v. Motes,* 118 N.M. 727, 729, 885 P.2d 648, 650 (1994) (finding that deliberate murder requires proof of opportunity to deliberate and actual deliberation).

{18} Defendant asserts that the State failed to offer sufficient evidence of deliberation to support a first degree murder finding. We review Defendant's sufficiency of the evidence argument to ensure that "substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty . . . with respect to every element essential to a conviction." *State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). In reviewing the evidence, an appellate court views the ruling in the light most favorable to the prevailing party, resolving all conflicts and permissible inferences in its favor. *See Motes,* 118 N.M. at 729, 885 P.2d at 650. Nevertheless, the review requires scrutiny of the evidence and supervision of the fact-finding process to determine whether any rational fact finder could determine that the evidence presented meets the relevant burden of proof. *See State v. Garcia,* 114 N.M. 269, 274, 837 P.2d 862, 867 (1992); *accord In re R.W.,* 108 N.M. 332, 336, 772 P.2d 366, 370 (Ct.App.1989). For Section 1.5 hearings, the burden of proof the State must meet is clear and convincing evidence of the crime. *See* § 31–9–1.5(D).

{19} To find deliberate, first degree murder, the district court was required to determine that Defendant intended to kill Rhonda "as a result of careful thought; that he weighed the considerations for and against his proposed course of action; and that he weighed and considered the question of killing and his reasons for and against this choice." *Garcia,* 114 N.M. at 274, 837 P.2d at 867. The language of *Garcia* tracks our uniform jury instruction for deliberate murder. *See* UJI 14–201. The instruction distinguishes a deliberate intention from a rash impulse and states that a "mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill." *Id.*

{20} Our review of the evidence reveals that the State's case is skeletal, and the

events surrounding the shooting are vague. Because the witnesses who testified were not at the scene, and Defendant did not testify, our knowledge of the circumstances is limited. The State even concedes that the most basic questions, such as the timing of events and the order in which the shots were fired, are unanswerable.

{21} We do know that Defendant admitted shooting his wife. We also know that he did so because he believed she was possessed by the devil. In its memorandum opinion, the district court acknowledged Defendant's confusion between Rhonda and the devil. In describing how he lost his daughter, Defendant's confusion resurfaced. He told the police that "he was wandering in the desert looking for his wife Rhonda," despite having already shot her in their home. Further, Defendant told police that his daughter was with Rhonda, and on another occasion, with God. These judicial findings put into question Defendant's state of mind at the time of the shooting, and they raise grave doubts about whether Defendant's killing of Rhonda was "[the] result of careful thought." UJI 14–201.

{22} The strongest evidence supporting the district court's finding of first degree murder was Defendant's admission to the police that he armed himself with a hand gun and shot Rhonda after she hit their daughter the third time. Although the retrieval of weapon could have given Defendant the opportunity to deliberate about killing Rhonda, there is no evidence from which we can permissibly infer that Defendant actually did so. We have no statements before the shooting that he wanted to kill Rhonda or wished her dead. *See State v. Cunningham,* 2000–NMSC–009, ¶ 4, 128 N.M. 711, 998 P.2d 176; *State v. Apodaca,* 118 N.M. 762, 767, 887 P.2d 756, 761 (1994). There is no evidence of a carefully crafted plan to kill, *see State v. Gonzales,* 1999–NMSC–033, ¶ 10, 128 N.M. 44, 989 P.2d 419 (finding murder for hire); *Motes,* 118 N.M. at 729–30, 885 P.2d at 650–51 (rendering victim unconscious while she was asleep, then burying her alive), or of Defendant's hot pursuit of the victim, *see Cunningham,* 2000–NMSC–009, ¶ 27, 128 N.M. 711, 998 P.2d 176; *State v. Salazar,* 1997–NMSC–044, ¶ 46, 123 N.M. 778, 945 P.2d 996; *State v. Blea,* 101 N.M. 323, 325, 681 P.2d 1100, 1102 (1984), or a manner of death requiring an extended time to complete, such as strangling and suffocating the victim, *see State v. Rojo,* 1999–NMSC–001, ¶ 24, 126 N.M. 438, 971 P.2d 829. Defendant's rote recitation of what happened, even his admission that he killed his wife, provided no details of reflection or contemplation before the killing, as required of first degree murder convictions. *See Garcia,* 114 N.M. at 275, 837 P.2d at 868 (finding that defendant's statement after a killing that—"I told my brother I did him and I'd do him again"—was insufficient to infer deliberation before the killing); *see also State v. Hernandez,* 1998–NMCA–167, ¶¶ 2–8, 13, 126 N.M. 377, 970 P.2d 149 (finding evidence insufficient to support attempted first degree murder conviction arising from an attempted escape from custody, during which the defendant engaged in a prolonged struggle with an officer for a gun, fired the gun, and exclaimed, "I'll kill you"). The evidence here does not place the shooting in a class with the "most heinous and reprehensible" of murders, such as lying in wait for the victim, which deserve the most severe punishment available under state law. *See Garcia,* 114 N.M. at 272, 837 P.2d at 865.

{23} In holding that the evidence does not rise to the level of deliberate, first degree murder, we acknowledge that in a Section 1.5 hearing the State need only satisfy a clear and convincing standard of proof. This is in contrast to the requirement of proof beyond a reasonable doubt in criminal prosecutions, including those discussed above. Nonetheless, the State offers as evidence of deliberation only an inference that Defendant may have considered Rhonda's killing in the time available to retrieve the weapon. At best, given Defendant's confused state, it is equally plausible that this inferred "careful thought" never took place. We are left to speculate. In neither case, even when viewed in the light most favorable to the State, is there clear and convincing evidence sufficient to "instantly tilt the scales in the affirmative." *In re Sedillo,* 84 N.M. 10, 12, 498 P.2d 1353, 1355 (1972). As pointed out in *Garcia,* 114 N.M. at 275, 837 P.2d at 868,

"evidence equally consistent with two inferences does not, without more, provide a basis for adopting either one." *See also State v. Benton,* 118 N.M. 614, 615–16, 884 P.2d 505, 506–07 (Ct.App.1994) (holding that the rule requiring appellate courts to indulge in all reasonable inferences supporting the district court's ruling does not permit speculation).

{24} The absence of evidence in regard to Defendant's deliberation is evident throughout the record. The debate at the Section 1.5 hearing centered not on first degree murder, but on the distinction between second and third degree murder. During the discussion of provocation, the State admitted, "Perhaps it was a rash impulse, and the State would recognize that." Later, the State argued in favor of second degree murder, "Why shoot the TV? ... It seems like he made a rash, impulsive decision at the very least." The State never argued that Defendant actually deliberated before killing Rhonda, which led to the court's *sua sponte* request for argument on depraved mind murder, proclaiming that it was "having a problem with premeditation at this point."

{25} On appeal, the State also argues that the court's conclusion can be justified under the alternative theory of depraved mind murder. The State suggests that the court "carefully considered" the application of depraved mind murder, and therefore it must have included it within the final order that held, without specificity, that Defendant committed first degree murder. Based on our review of the record, we do not agree. The district court issued findings of fact and conclusions of law in a memorandum opinion, which were adopted in the final order. These conclusions of law specifically state that the killing was "willful and deliberate"; they do not state that the shooting was a depraved mind murder. Nowhere in the memorandum opinion does the district court make findings of fact necessary to support a depraved mind murder ruling. Although a theory of depraved mind murder was thoroughly considered by the district court, its absence from the findings and conclusions implies, if anything, that the theory was abandoned, not adopted, by the district court.

{26} The State would have us treat the district court's final order as if it were the general verdict of a jury. *See Salazar,* 1997–NMSC–044, ¶ 32, 123 N.M. 778, 945 P.2d 996. The State argues that because the final order holds only that Defendant committed first degree murder, without designating any specific theory, then any theory not expressly eliminated should be considered by this Court in an effort to uphold the trial court's ruling. This argument ignores the different roles the judge and jury play in the fact-finding process. Whereas the jury may return a general verdict without specification, *see* Rule 5–609(B) NMRA 2000; Rule 5–611(A) NMRA 2000, a judge sitting without a jury does just the opposite by filing written findings of fact and conclusions of law that specify the factual and legal support for the result reached, *see* Rule 5–605(D) NMRA 2000; Rule 1–052(B)(1) NMRA 2000. We cannot read into findings and conclusions what is not there. For the foregoing reasons, the court's finding of first degree murder is not supported by sufficient evidence in the record and must be reversed.

Provocation

{27} Defendant additionally argues that Rhonda provoked him by hitting their child, and that this provocation lowered the degree of crime from second degree murder to voluntary manslaughter. Defendant contends that once he "comes forth with evidence of provocation, the burden is on the State to show that the defendant did not act as a result of sufficient provocation." To place the burden upon the State to disprove provocation, however, Defendant must demonstrate legally sufficient provocation, which is "sufficient evidence that the provocation was such as to cause a temporary loss of self control in an ordinary person of average disposition." *State v. Manus,* 93 N.M. 95, 99, 597 P.2d 280, 284 (1979), *overruled on other grounds by Sells v. State,* 98 N.M. 786, 788, 653 P.2d 162, 164 (1982). By definition, provocation includes an objective component, and Defendant must demonstrate that his "anger, rage, fear, sudden resentment, terror or other extreme emotions ... would affect the ability to reason" in an ordinary person. UJI 14–222 NMRA 2000. The question of

provocation is not solely a subjective one. *See State v. Stills,* 1998–NMSC–009, ¶¶ 36–37, 125 N.M. 66, 957 P.2d 51 (holding that trial judge must determine whether an ordinary person in the situation would have been provoked).

{28} Assuming, without deciding, that Defendant came forward with enough evidence to meet his burden of production on the issue of sufficient provocation, the State was entitled to attack the sufficiency of this evidence, which it did. The question of whether the circumstances rose to the level of provocation to reduce second degree murder to voluntary manslaughter was for the fact finder to resolve, here the district court judge. *See Sells,* 98 N.M. at 788, 653 P.2d at 164. The district court's decision against Defendant based upon the efficacy of the State's argument is not grounds for reversal.

{29} To support his argument for voluntary manslaughter, Defendant directs this Court to authorities that reverse convictions for failure to offer the jury correct voluntary manslaughter instructions. *See, e.g., State v. Benavidez,* 94 N.M. 706, 708, 616 P.2d 419, 421 (1980), *overruled on other grounds by Sells,* 98 N.M. at 788, 653 P.2d at 164; *Commonwealth v. Berry,* 461 Pa. 233, 336 A.2d 262, 264–65 (1975). These cases do not stand for the proposition that a particular fact pattern is voluntary manslaughter as a matter of law. As noted in our precedent, the application of the provocation defense turns on the specific facts of the individual case. *See Sells,* 98 N.M. at 788, 653 P.2d at 164. Defendant was given ample opportunity to present his theory of provocation to the district court, complete with findings of fact and conclusions of law, which the court refused to adopt. Without demonstrating that the district court applied an incorrect standard, we decline Defendant's invitation to hold that a mother disciplining her child, even with a slap to the child's face, is sufficient provocation as a matter of law to reduce a charge of second degree murder to voluntary manslaughter.

CONCLUSION

{30} For the reasons stated, we reverse the district court's determination that Defendant committed willful and deliberate first degree murder, but we affirm the determination that there was insufficient provocation for voluntary manslaughter. We remand this case to the district court, directing it to enter a finding pursuant to Section 1.5 that Defendant committed second degree murder for the shooting of Rhonda Taylor.

{31} **IT IS SO ORDERED.**

BUSTAMANTE and KENNEDY, JJ., concur.

[redacted]

9 P.3d 70

2000-NMCA-068

STATE of New Mexico, Plaintiff–Appellee,

v.

James N. WILLIAMSON, Defendant–Appellant.

No. 20,505.

Court of Appeals of New Mexico.

June 13, 2000.

Certiorari Denied, No. 26,428, July 31, 2000.

Patricia A. Madrid, Attorney General, M. Victoria Wilson, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Sheila Lewis, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

WECHSLER, Judge.

{1} Defendant James Williamson appeals from the judgment and sentence of the district court filed after he entered a no contest plea to two counts of possession of a controlled substance and possession of drug paraphernalia. Defendant contends that the district court improperly denied his motion to suppress physical evidence that the police seized from him after a traffic stop because the officers illegally detained him and because the officers exceeded the scope of their lawful investigation by asking questions about Defendant's possession of drugs. Defendant additionally argues that the illegality of his detention and the impermissible scope of questioning invalidated his consent to be searched. We affirm.

Facts

{2} In the early morning hours of October 19, 1997, Officer Michael Seifert observed Defendant's car circumvent closed railroad track gates and cross the railroad track to avoid waiting while an oncoming train passed. When Officer Seifert approached Defendant's car, he detected an odor of alcohol coming from the car. He identified Defendant as the driver and noticed Defendant had reddish, bloodshot, watery eyes. Officer Seifert began his investigation and asked Defendant to perform the "walk and turn," the "one-leg stand," and the horizontal gaze nystagmus (HGN) field sobriety tests. Officer Seifert testified that Defendant did "fairly well" on the first two of these tests; however, he was unable to get Defendant to properly perform the HGN test in that he could not get Defendant's eyes to follow the pen Officer Seifert used in performing the test. Officer Seifert called Officer Richard Owen, a training officer, for assistance in performing the HGN test.

{3} Officer Owen had to wait approximately five minutes for the train to pass before he could safely arrive at the scene. When Officer Owen arrived, Officer Seifert turned his attention to the car's passenger. Sergeant Chuckwood, who had driven by the scene, told Officer Seifert that he believed that the passenger had an outstanding municipal court warrant for her arrest. After verifying the outstanding warrant, Officer Seifert placed the passenger under arrest and searched her fanny pack, finding a white, powdery substance that he believed to be cocaine. He confiscated the substance from the passenger and so advised Officer Owen.

{4} Officer Owen testified that he conducted the HGN test upon Defendant. Although he believed that Defendant had been drinking because of the odor of alcohol and his bloodshot, watery eyes, the clues that Officer Owen received from the HGN test were not sufficient to arrest Defendant. When Officer Owen completed conducting the HGN test, he thought about the degree of Defendant's impairment and whether he should conduct any more tests. At that moment, Officer Seifert notified Officer Owen that he had found what he considered to be an illegal substance in the passenger's possession. Officer Owen then asked Defendant whether Defendant had any illegal substances on his person, and Defendant responded that he did not. Officer Owen testified that he next asked Defendant for consent to search his person, and Defendant consented. In his search, Officer Owen found a film canister containing methamphetamine in Defendant's pocket.

Legality of Defendant's Detention and Scope of Questioning

{5} Defendant concedes that Officer Seifert had the authority to stop Defendant for

the commission of a traffic offense and, having reasonable suspicion that Defendant had been drinking, to detain Defendant to perform field sobriety tests. *See State v. Werner*, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994); *City of Albuquerque v. Haywood*, 1998–NMCA–029, ¶ 13, 124 N.M. 661, 954 P.2d 93. Defendant contends, however, that once Officer Owen completed the HGN test, he was no longer entitled to detain Defendant and Defendant's continued detention became unreasonable, amounting to a de facto arrest without probable cause. Defendant also argues that Officer Owen exceeded the scope of permissible inquiries when he asked Defendant about drugs after he conducted the HGN test and decided that the results did not justify an arrest.

{6} We analyze Defendant's arguments in accordance with our Supreme Court's analysis in *Werner*. Under *Werner*, we examine, as a matter of law, the totality of the circumstances to determine whether the officers illegally detained Defendant and whether Officer Owen impermissibly expanded his scope of inquiry. *See Werner*, 117 N.M. at 317, 871 P.2d at 973. In doing so, we view the facts in the manner most favorable to the State, indulging in all reasonable inferences supporting the order and disregarding inferences or evidence to the contrary. *See id.* This analysis contemplates that we balance the character of the officers' intrusion upon Defendant's personal liberty and the justification for the intrusion. *See id.*

{7} Defendant directs his arguments to the justification for his detention, arguing that Officer Owen no longer had reasonable suspicion to detain him after completing the HGN test. Specifically, Defendant argues that Officer Owen illegally detained him and exceeded the scope of the investigation when Officer Owen inquired about drugs. *See id.* at 317–19, 871 P.2d at 973–75.

{8} Under Fourth Amendment standards, when a law enforcement officer makes a lawful stop, the officer may conduct an investigation reasonably related to the circumstances that gave rise to the officer's reasons for the stop. *See id.* at 317, 871 P.2d at 973 ("The scope of activities during an investigatory detention must be reasonably related to the circumstances that initially justified the stop.") Thus, an officer stopping a driver for a traffic violation may investigate the circumstances of the violation. The officer may expand this investigation if "the officer has reasonable and articulable suspicion that other criminal activity has been or may be afoot." *State v. Taylor*, 1999–NMCA–022, ¶ 20, 126 N.M. 569, 973 P.2d 246. Hence, when an officer investigating a traffic violation has a reasonable and articulable suspicion that the driver is impaired, the officer may detain the driver to investigate the officer's suspicions. The officer's investigation, of course, is limited to a reasonable inquiry that is designed to satisfy the officer's reasonable suspicions. *See Haywood*, 124 N.M. 661, 954 P.2d 93, 1998–NMCA–029, ¶ 16. Moreover, the officer's investigation of any reasonable suspicion must proceed diligently. *See Werner*, 117 N.M. at 319, 871 P.2d at 975.

{9} In the case on appeal, Officer Seifert had lawfully stopped Defendant and reasonably expanded the scope of his investigation to include an investigation of whether Defendant was driving while intoxicated. Officer Seifert's administration of field sobriety tests was reasonably a part of this investigation. Officer Owen did not unreasonably delay the investigation; he arrived approximately five minutes after Officer Seifert called him. Both officers could reasonably continue their investigation to satisfy their suspicion of Defendant's impairment, subject, of course, to the requirement that they conduct the investigation diligently. *See Werner*, 117 N.M. at 319, 871 P.2d at 975 ("The concept of diligence has an aspect of speed or haste.").

{10} The presence of drugs in the car, even though in the passenger's possession, was sufficient to reasonably arouse Officer Owen's suspicion that Defendant also had drugs. *See Taylor*, 126 N.M. 569, 973 P.2d 246, 1999–NMCA–022, ¶ 22 (explaining that scope of investigation can include drugs or alcohol if those subjects "become apparent during [an officer's] interaction[ ] with [a detainee]."); *cf. State v. Bolton*, 111 N.M. 28,

39, 801 P.2d 98, 109 (Ct.App.1990) ("While engaged in legitimate investigative work, the Border Patrol agents did not need to close their eyes to criminal activity unrelated to their principal concern."). Officer Owen's suspicion was reasonable given Defendant's impaired appearance and questionable performance on the HGN tests. Although the sobriety tests did not indicate illegal impairment, the tests nonetheless led to continued suspicion about impairment. *See State v. Flores,* 1996–NMCA–059, ¶ 7, 122 N.M. 84, 920 P.2d 1038 ("Reasonable suspicion must be based on specific articulable facts and the rational inferences that may be drawn from those facts."). Therefore, Officer Owen could reasonably expand his questioning of Defendant to inquire if Defendant also had drugs and if Defendant would consent to a search. *See Haywood,* 124 N.M. 661, 954 P.2d 93, 1998–NMCA–029, ¶ 15 (explaining that the purpose of an investigative stop can be expanded by specific, articulable facts that cause an officer to reasonably suspect criminal activity).

{11} As to Officer Owen's detention of Defendant, the time between the completion of the HGN test and Officer Owen's inquiry and search was brief. The detention in question lasted no longer than the time it took for Officer Owen to deliberate about the test results before Officer Seifert discovered drugs on the passenger and notified Officer Owen. The brief time period met the requirements of diligence; the stop in its entirety lasted approximately ten minutes. *See Werner,* 117 N.M. at 319, 871 P.2d at 975 (holding that investigation was not conducted with sufficient haste when the defendant was detained for over forty-five minutes). As to Officer Owen's questions about drugs, Officer Seifert's discovery of drugs on the passenger was sufficient to create a reasonable suspicion that Defendant also had drugs. Thus, the change in the scope of inquiry was permissible and the detention was sufficiently brief.

{12} We do not agree with Defendant that, under *State v. Eli L.,* 1997–NMCA–109, 124 N.M. 205, 947 P.2d 162, and *State v. Jones,* 114 N.M. 147, 835 P.2d 863 (Ct.App. 1992), the passenger's possession of drugs was an insufficient basis for Officer Owen to ask Defendant about drugs and request consent to search for drugs. In *Eli L.,* we held that a child's identification as a gang member was not sufficient to demonstrate individualized suspicion of criminal activity to support a search of the child when the police had only generalized suspicion that other gang members had engaged in criminal activity or wrongdoing. *See Eli L.,* 124 N.M. 205, 947 P.2d 162, 1997–NMCA–109, ¶ 11. The child had whistled in a manner the officer felt was a gang whistle and dressed similarly to gang members. *See id.* ¶ 9.

{13} Similarly, in *Jones,* officers stopped and frisked the defendant based on his apparel and his presence with a known gang member and narcotics distributor in an area known for gang activity. *See Jones,* 114 N.M. at 149, 835 P.2d at 865. This Court concluded that the officers' generalized suspicion that the known gang member had committed crimes without specifically connecting the defendant to any particular crime was insufficient to constitute reasonable suspicion to stop the defendant. *See id.* at 151, 835 P.2d at 867.

{14} In contrast, in this case, Officer Seifert had found what he believed to be drugs in the passenger's possession; he had articulable and more than generalized suspicion about criminal activity. In addition, Officer Owen had a separate and particular suspicion about Defendant. Although Officer Owen originally expressed his suspicions as relating to alcohol use, he detailed in his testimony the facts within his knowledge of Defendant's impairment, including Officer Seifert's statement to him that Officer Seifert could not get Defendant to perform the HGN test. These facts, together with the passenger's drug possession, amounted to a reasonable suspicion that Defendant had drugs. *See State v. Lyon,* 103 N.M. 305, 307, 706 P.2d 516, 518 (Ct.App.1985) ("'Reasonable suspicion' is judged by an objective standard.").

{15} Lastly, we do not consider this case to be controlled by *Flores.* In *Flores,* after officers acting on an anonymous tip were unable to find drugs in the defendant's truck during their roadside search, they moved the defendant and his truck to a city warehouse

where they detained the defendant while they searched the truck and another vehicle for two to three hours. *See Flores,* 1996-NMCA-059, ¶¶ 9–12. We held that the officers did not have reasonable suspicion to further detain the defendant after the roadside drug search did not produce probable cause for arrest. *See id.* ¶ 15. We stated that "[t]he reasonableness of the investigatory stop ended after the first search revealed nothing unusual." *Id.* at ¶ 13.

{16} In this case, to the contrary, the HGN test results did not satisfy Officer Owen's suspicions; not all indicators negated impairment. When Officer Owen completed the HGN test, Officer Owen considered whether and how he could continue his investigation based on the information he had obtained. Diligence in conducting an investigation allows a reasonable opportunity to analyze and integrate information received and to consider additional action that may be taken. Officer Owen was engaged in that thought process immediately after completing the HGN test at the time Officer Seifert told him about the passenger. He did not unreasonably delay the investigation or change the nature of Defendant's detention.

Consent

{17} Defendant additionally argues that his consent to Officer Owen's search was invalidated by an improper detention without probable cause and improper questioning about drugs. Because we find that Defendant was legally detained and that Officer Owen's questioning was a legitimate extension of a lawful investigation, Defendant's consent cannot be invalidated on this basis.

Conclusion

{18} For the above stated reasons, we affirm the district court's judgment and sentence.

{19} **IT IS SO ORDERED.**

ARMIJO and SUTIN, JJ., concur.

9 P.3d 74

2000-NMCA-073

STATE of New Mexico, Plaintiff–Appellee,

v.

Manuel LARA, Defendant–Appellant.

No. 20,435.

Court of Appeals of New Mexico.

July 13, 2000.

Patricia A. Madrid, Attorney General, Santa Fe, Steven S. Suttle, Assistant Attorney General, Albuquerque, for Appellee.

Phyllis H. Subin, Chief Public Defender, Susan Gibbs, Will O'Connell, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

ALARID, Judge.

{1} Defendant appeals from the trial court's Order for Unsatisfactory Discharge from Probation (Order). The issue raised by Defendant's appeal is whether the trial court had jurisdiction to enter the Order after the expiration of the probationary period without a prior revocation of probation. We reverse.

BACKGROUND FACTS

{2} Defendant was convicted of driving while intoxicated (DWI), second or subsequent offense. He entered a no contest plea to the charge and was sentenced to 364 days in the county jail, which was suspended except for time served. Defendant was placed on probation for the remainder of time, which was due to expire March 9, 1999.

{3} While on probation for the DWI charge, Defendant pleaded guilty to disorderly conduct. After learning that Defendant had been arrested and convicted on separate charges, the State filed a Motion for Unsatisfactory Discharge from Probation on February 17, 1999. Prior to the expiration of Defendant's probation term, the trial court ordered Defendant to appear for a hearing on the completion of his probation. On March 15, 1999, following the expiration of Defendant's probation term, the trial court entered its Order finding Defendant had unsatisfactorily completed his probation. Defendant appeals from the Order.

DISCUSSION

{4} Both parties agree that the trial court's authority in this matter is governed by NMSA 1978, § 31–20–8 (1977). It provides:

> Whenever the period of suspension expires without revocation of the order, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime. He shall thereupon be entitled to a certificate from the court so reciting such facts, and upon presenting the same to the governor, the defendant may, in the discretion of the governor, be granted a pardon or a certificate restoring such person to full rights of citizenship.

"Interpretation of a statute is an issue of law, not a question of fact. We review questions of law de novo." *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (citations omitted).

{5} Defendant argues the trial court lacked jurisdiction to impose a sanction, to order him to appear in court, or to rule on the nature of his compliance with the conditions of his probation, after the term of probation expired. He contends his probation term expired without a revocation of the order of probation, and he was entitled to the issuance of a certificate under the statute. Defendant asserts the trial court's jurisdic-

tion under the statute is limited to a ministerial review of the file to determine if a revocation has occurred. Thus, if a revocation of the order of probation has not occurred, the trial court must issue a certificate under the mandatory language of the statute.

{6} When interpreting a statute, we bear in mind that

> [t]he main goal of statutory construction is to give effect to the intent of the legislature. To do this, we look to the object the legislature sought to accomplish and the wrong it sought to remedy. The words of a statute ... should be given their ordinary meaning, absent clear and express legislative intention to the contrary.

Id. (citations and internal quotation marks omitted). Section 31–20–8 provides that a defendant is relieved of any court imposed obligations and has satisfied his criminal liability for the crime "[w]henever the period of suspension expires without revocation of the order." "This court has construed identical language in NMSA 1978, Section 31–20–9 (Repl.Pamp.1981), relating to deferred sentences, as terminating the court's authority to revoke probation beyond the expiration of the probation term." *State v. Apache,* 104 N.M. 290, 291–92, 720 P.2d 709, 710–11 (Ct. App.1986) (citing *State v. Travarez,* 99 N.M. 309, 657 P.2d 636 (Ct.App.1983)).

{7} The statute further states that once the period of suspension expires without revocation of probation, the defendant "shall thereupon be entitled to a certificate" of satisfactory completion. Section 31–20–8. The statute is clear. When the term of probation ends without a revocation of probation, the trial court is mandated by statute to issue a certificate of satisfactory completion. *See State v. Lujan,* 90 N.M. 103, 105, 560 P.2d 167, 169 (1977) ("The words 'shall' and 'must' generally indicate that the provisions of a statute are mandatory and not discretionary.").

{8} The State's argument requires a strained construction of Section 31–20–8. The State contends the statutory language that a probationer is entitled to a certificate "[w]henever the period of suspension expires" can only be interpreted to mean that the trial court cannot evaluate a probationer's performance until after the probation period ends. It asserts the statute does not state "during" or "near the end" of a probationary term. However, this argument ignores the entire phrase, which states "[w]henever the period of suspension expires *without [the] revocation of the order.*" Section 31–20–8 (emphasis added). *See Apache,* 104 N.M. at 291–92, 720 P.2d at 710–11 ("In construing statutes, courts must look to the language used in the act or statute as a whole."). This language implies that absent a revocation of the probation order prior to the expiration of the probation term, the trial court is bound by the mandate of the statute.

{9} Contrary to the State's contention, it is not necessary to wait until after the probation term ends to evaluate the probationer's performance. The State can pursue a certificate of unsatisfactory completion as soon as it becomes aware of a probationer's violation. The statute governing the return of a probation violator states "[a]t any time *during* probation: ... the court may issue a notice to appear to answer a charge of violation." *See* NMSA 1978, § 31–21–15(A)(2) (1989) (emphasis added). This is consistent with our interpretation that the trial court only has jurisdiction to review a probationer's performance during the probation term.

{10} In *Travarez,* this Court addressed a similar issue under Section 31–20–9. While the defendant was serving his probation, the state filed a petition to revoke probation. The petition was granted, but not until after the defendant had completed serving his probation. 99 N.M. at 310, 657 P.2d at 637. Stating that because Section 31–20–9 "relieves defendant of any obligations imposed on him by order of the court when the period of a deferred sentence expires, and he is deemed then to have satisfied his liability for the crime," this Court held that the trial court lacked jurisdiction to revoke the probation after the period of probation expired. *Id.* at 311, 657 P.2d at 638. Like Section 31–20–9 on deferred sentences, Section 31–20–8 has the effect of satisfying a defendant's criminal liability when the period of probation expires. *See* § 31–20–8 (stating that when suspended sentence has been completely served, defen-

dant has satisfied his liability for the crime); *see also Travarez,* 99 N.M. at 311, 657 P.2d at 638 ("It is within the power of the legislature alone to define the court's jurisdiction over the sentencing of offenders.").

{11} Here, the period of suspension had expired without revocation of the order at the time the trial court entered its finding of unsatisfactory completion. The State filed its Motion for Unsatisfactory Discharge from Probation on February 17, 1999, before Defendant's term of probation was due to expire March 9, 1999. However, the motion was neither heard nor ruled upon until March 15, 1999, after the period of suspension had expired. Under *Travarez,* completely serving a deferred sentence satisfies a defendant's criminal liability for a crime, and the trial court lacks further jurisdiction over the defendant, even though the motion to revoke the sentence has already been filed. We see no reason for a different result in this case. Insofar as the State contends Defendant was not punished in any way, and therefore, *Travarez* is inapplicable, we disagree. Contrary to the statute, Defendant was given an unsatisfactory discharge when he was entitled to a certificate of satisfactory discharge. *See* § 31–20–8 (stating that when suspended sentence has been completed, "the defendant is relieved of any obligations imposed on him by the order of the court[,] . . . has satisfied his liability for the crime[,] . . . [and] shall thereupon be entitled to a certificate from the court so reciting").

{12} Therefore, we hold that the trial court is without jurisdiction to enter an order of unsatisfactory completion after the probation period ends. If the State seeks a certificate of unsatisfactory completion, it must obtain an order of the court prior to the end of the defendant's probation term.

{13} Our holding is supported by analogous authority in New Mexico. *See State v. Gaddy,* 110 N.M. 120, 792 P.2d 1163 (Ct.App. 1990). In *Gaddy,* the defendant challenged the trial court's jurisdiction to enhance his sentence after he had completed serving the underlying sentence. *See id.* at 121, 792 P.2d at 1164. Relying on *March v. State,* 109 N.M. 110, 782 P.2d 82 (1989), this Court reasoned that the underlying sentence was valid until the trial court found the defendant to be a habitual offender and enhanced the sentence. *See Gaddy,* 110 N.M. at 122, 792 P.2d at 1165. It was reasonable for the defendant to expect that if he completed the underlying sentence before the state could prove he was a habitual offender, he satisfied his criminal liability and his underlying sentence was not subject to enhancement. *See id.* This Court also relied on *Travarez,* stating the case was significant "because it reflects this court's perception of a legislative intent to deprive trial courts of jurisdiction to alter sentences once those sentences have been satisfied." *Id.* at 123, 792 P.2d at 1166.

{14} In addition, Defendant asserts the trial court's entry of unsatisfactory completion violates his due process rights. He argues that an order of unsatisfactory discharge from probation has the effect of materially delaying and restricting his right to apply for an executive pardon, and therefore, implicates his due process rights. *See State v. Carrasco,* 1997–NMCA–123, ¶ 8, 124 N.M. 320, 950 P.2d 293. Defendant contends that when the probation period expired without the court having either imposed the suspended sentence, or revoked his probation, he had a reasonable expectation in the finality of his sentence. Once the probation period expired, he was entitled to rely on the statute and the court's lack of jurisdiction over him. Because we base our holding on the trial court's lack of jurisdiction to enter the order, we need not address Defendant's due process arguments.

{15} Based on the foregoing, we hold the trial court lacked jurisdiction to order Defendant to appear or to enter the order of unsatisfactory completion after Defendant had completed his probation term. We reverse and remand with instructions to enter a certificate of satisfactory completion.

{16} **IT IS SO ORDERED.**

PICKARD, Chief J., and WECHSLER, J., concur.

9 P.3d 639

2000-NMSC-023

PHOENIX INDEMNITY INSURANCE COMPANY, Plaintiff–Respondent,

v.

Lynette PULIS and Larry Pulis, individually and Lynette Pulis, mother, parent and natural guardian of Steven Reese, a minor, Defendants–Petitioners.

No. 25,978.

Supreme Court of New Mexico.

July 6, 2000.

Rehearing Denied Aug. 17, 2000.

Berardinelli & Associates, David J. Berardinelli, Santa Fe, NM, for Petitioners.

Law Offices of Bruce S. McDonald, Bruce S. McDonald, Albuquerque, NM, for Respondent.

OPINION

MINZNER, Chief Justice.

{1} Appellants Larry and Lynette Pulis appeal from the district court's order granting summary judgment in favor of Appellee Phoenix Indemnity Insurance Company. Phoenix filed a complaint for declaratory relief alleging that Lynette Pulis's minor son, Steven, was not entitled to class-one uninsured motorist (UM) coverage for injuries sustained in an automobile accident. The Pulises counterclaimed. The Pulises and Phoenix both moved for summary judgment. The district court granted Phoenix's motion on the basis that the endorsed named-driver-exclusion provision in the Pulises' policy excluded all coverage if Michael, Steven's older minor brother, were driving. The Court of Appeals affirmed. *See Phoenix Indem. Ins. Co. v. Pulis,* No. 20,343 slip op. at 1 (NMCA Sept. 17, 1999). On appeal, the Pulises contend that (1) exclusion of a minor driver based solely on age violates public policy; (2) the driver exclusion is not applicable because Steven is a class-one insured under the Pulises' UM coverage; and (3) Phoenix's policy is ambiguous as a matter of law. We hold that the named-driver exclusion in this case does not preclude Steven from recovery under the UM coverage provision of the policy. In this case, the driver exclusion was an ineffective rejection of coverage for a class-one insured because the insured had no notice that class-one insureds lacked UM coverage. The provisions for class-one-insured coverage suggested all exclusions were expressed, and UM coverage for class-one insureds was not expressly excluded. We therefore reverse and remand. We do not address the first issue.

I.

{2} The facts are undisputed. Lynette Pulis and Donald Reese are the biological parents of Michael and Steven, who reside with their mother and her husband, Larry Pulis. On October 28, 1996, the Pulises purchased an automobile insurance policy from Phoenix. Prior to purchasing the policy, the Pulises completed Phoenix's New Mexico auto application. The application contained three separate endorsements titled: New Mexico Agreement to Delete Uninsured/Underinsured Motorists Coverage, Business Use Warranty, and Exclusion of Named Driver. The driver-exclusion provision states:

> In consideration of the premium for which the policy is written, it is agreed that the insurance company shall not be liable and no liability or obligation of any kind shall be attached to the insurance company for losses or damages sustained after the effective date of this endorsement while any motor vehicle is driven or operated by....

By endorsing this section of the application, the Pulises elected to exclude Michael from the policy. The Pulises also elected to purchase UM coverage. The portion of the application describing UM coverage provides "that if [the insured] suffer[s] bodily injury or sickness including death, resulting from an accident with a person who does not carry liability insurance, and that driver is at fault, you may make a claim against your own insurance company for general and special damages."

{3} The application also included certain provisions explaining an insured's duties, applicable coverage, applicable exclusions, and limits of liability. The policy was silent on the effect of the named-driver exclusion on an insured's UM coverage. The Pulises' policy went into effect on October 28, 1996 and was therefore in effect on the date of the accident.

{4} On November 5, 1996, during a scheduled visitation, Reese took Michael, fourteen years old, and Steven, ten years old, on an overnight deer-hunting trip without notifying the Pulises. Reese also brought along another boy, Kevin, who was fifteen years old. During the trip, Michael was driving Reese's uninsured Toyota pickup truck. Steven was sitting in the passenger side of the cab and Kevin was standing in the bed of the truck scouting deer with a loaded 30:30 rifle. Michael accelerated and then immediately stopped the pickup truck causing Kevin to fall into the bed of the truck; as he fell, his

rifle accidentally discharged. The bullet struck Michael in the head, fatally wounding him. Steven ran from the truck in an effort to obtain help, but Michael was already dead. Steven was spattered with Michael's blood and sustained emotional injuries.

{5} The Pulises filed a UM claim under their Phoenix policy for Steven's injuries. Phoenix denied coverage contending that the named-driver exclusion excludes all coverage when an excluded driver is operating any motor vehicle. The district judge agreed and granted Phoenix summary judgment.

II.

{6} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582. On appeal, we review de novo the district court's decision to grant summary judgment. *See Hasse Contracting Co. v. KBK Fin., Inc.*, 1999–NMSC–023, ¶ 9, 127 N.M. 316, 980 P.2d 641. The question we address is whether the district court erred in granting summary judgment on the basis that the named-driver exclusion within the Pulises' policy barred Steven from recovery under the UM provision of the policy. This appeal does not raise an issue of first impression for this Court; however, it does provide us with an opportunity to revisit our case law on UM coverage and driver exclusions. We first examine the text of the controlling statutes and our cases interpreting them.

A.

{7} In the Uninsured Motorist Statute, NMSA 1978, § 66–5–301 (1983), the Legislature has provided:

> No motor vehicle or automobile liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person . . . shall be delivered or issued for delivery in New Mexico . . . unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury . . . resulting therefrom, according to the rules and regulations promulgated by, and under provisions filed with and approved by, the superintendent of insurance.

Section 66–5–301(A). This section incorporates UM coverage into every automobile liability insurance policy issued in the state. UM coverage is divided into three distinct classes of insureds: "(1) the named insureds and members of a named insured's household [(class-one insureds)], (2) persons who are injured while occupying an insured vehicle [(class-two insureds)], and (3) persons who sustain consequential damages as a result of personal injuries sustained by persons who are 'class (1)' or 'class (2)' insureds." Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 4.9(e), at 400 (1988); *see also Konnick v. Farmers Ins. Co.*, 103 N.M. 112, 115, 703 P.2d 889, 892 (1985) (defining class-one insured as "the named insured as stated in the policy, the spouse, and relatives residing in the household" and class-two insured as "any person while occupying an insured motor vehicle"). The objective of compulsory UM coverage is "to protect individual members of the public against the hazard of culpable uninsured motorists." *Romero v. Dairyland Ins. Co.*, 111 N.M. 154, 156, 803 P.2d 243, 245 (1990). "[C]ases involving uninsured motorist coverage must be given a qualitatively different analysis by this court than cases which do not involve such coverage." *Padilla v. Dairyland Ins. Co.*, 109 N.M. 555, 558, 787 P.2d 835, 838 (1990). We interpret Section 66–5–301 liberally to implement its remedial purpose; any provision allowing for an exception to uninsured coverage is strictly construed to protect the insured. *See Romero*, 111 N.M. at 156, 803 P.2d at 245.

{8} Nevertheless, by express statutory provision, an insured has the right to reject UM coverage. *See* § 66–5–301(C). To be valid, the method of rejection must comply with the regulations promulgated by the New Mexico Superintendent of Insurance. *See Romero*, 111 N.M. at 156, 803 P.2d at 245. Those regulations require that

> [t]he rejection must be made a part of the policy by endorsement on the declarations

> sheet, by attachment of the written rejection to the policy, or by some other means that makes the rejection a part of the policy so as to clearly and unambiguously call to the attention of the insured the fact that such coverage has been waived.

Id. Because we strictly construe exceptions to UM coverage, unless the named insured rejects UM coverage in a manner consistent with the rules and regulations established by the Superintendent of Insurance, deviations will be invalid, and UM coverage will be deemed part of an insured's liability policy. *See id.* at 157, 803 P.2d at 246.

{9} Further, by express statutory provision, an insured may elect to exclude a driver from coverage under the policy. *See* NMSA 1978, § 66–5–222 (1998). Section 66–5–222 provides a sample form for use as a driver-exclusion provision which states:

> In consideration of the premium for which the policy is written, it is agreed that the company shall not be liable and no liability or obligation of any kind shall be attached to the company for losses or damages sustained after the effective date of this endorsement while any motor vehicle insured hereinunder is driven or operated by....

The driver-exclusion provision signed by the Pulises parallels the language provided by the Legislature in Section 66–5–222.

{10} Driver exclusions are designed to allow an insured to avoid the cost of coverage for "someone with a bad driving record or in a high-risk category, such as a teenage child of the named insureds, since otherwise the premium for the coverage would be exceedingly high." Jay M. Zitter, Annotation, *Validity, Construction, and Application of "Named Driver Exclusion" in Automobile Insurance Policy,* 33 A.L.R.5th 121, § 2[a], at 137–38 (1995). Because named-driver exclusions eliminate significant coverage, such exclusions must be accompanied by "strict requirements in the policies so as to insure the insured's full knowledge and consent to the endorsement." *Id.* at 141. "[A]ll named insureds on a policy are required to sign the driver's exclusion agreement for the exclusion to be valid." *Moore v. State Farm Mut. Auto. Ins. Co.,* 119 N.M. 122, 126, 888 P.2d 1004, 1008 (Ct.App.1994) (emphasis omitted).

B.

{11} This Court and the Court of Appeals have sustained insurance company defenses based on named-driver exclusions. *See Garza v. Glen Falls Ins. Co.,* 105 N.M. 220, 731 P.2d 363 (1986); *State Farm Auto. Ins. Co. v. Kiehne,* 97 N.M. 470, 641 P.2d 501 (1982); *Moore,* 119 N.M. 122, 888 P.2d 1004. These cases addressed named-driver-exclusion provisions substantially similar to Section 66–5–222 as well as the provision in the Pulises' policy and we are certain the district court and the Court of Appeals relied on them. We address the cases in the order in which they were decided.

{12} In *Kiehne,* the plaintiff purchased an automobile policy from State Farm containing liability and UM coverage. 97 N.M. at 470, 641 P.2d at 501. At the time Kiehne purchased the policy, he elected to exclude his minor son from coverage through a named-driver-exclusion endorsement. *See id.* at 470–71, 641 P.2d at 501–02. During the term of the policy, Kiehne's vehicle was driven by the excluded minor son who was involved in an automobile accident which resulted in the death of a passenger. *See id.* at 470, 641 P.2d at 501. The trial court entered a declaratory judgment in favor of State Farm declaring that State Farm had no liability to the passenger's estate under the UM provision of the policy. *See id.* at 471, 641 P.2d at 502. On appeal, we addressed the issue of whether the endorsed named-driver exclusion barred claims by the passenger's estate. In concluding that recovery was barred, we determined that the driver-exclusion endorsement was "clear and unambiguous"; the policy excluded "any kind" of liability. *Id.* " 'Any,' in its usual and ordinary sense, means 'without limit.' " *Id.* Thus, "any" precluded all UM coverage for anyone injured when an excluded driver was operating the vehicle. *See id.* The only recourse of the passenger's estate was the passenger's own UM policy if he or she had one.

{13} As a non-household passenger, the passenger in *Kiehne* was a class-two insured

under the State Farm policy. In *Kiehne*, however, we also made the following comment regarding recovery of the class-one insured:

> In this case, Kiehne bargained for a policy which would exclude all coverage if [Kiehne's son] were the driver of one of the insured automobiles involved in an accident. Kiehne could not have recovered under the uninsured motorist provision had he been the passenger; similarly, the estate of [the passenger] cannot recover. In effect, no automobile insurance policy covering the 1973 Chevrolet existed while [Kiehne's son] drove the automobile. Therefore, no one could be an "insured" and claim coverage under the uninsured motorist provision of the policy.

Kiehne, 97 N.M. at 471–72, 641 P.2d at 502–03.

{14} Four years later, in *Garza*, we were presented with a different but related issue: whether a named-driver exclusion bars recovery under a policy's liability provisions. *See* 105 N.M. at 221–22, 731 P.2d at 364–65. In *Garza*, the plaintiff sought recovery for damages sustained in an automobile accident. *See id.* at 220, 731 P.2d at 363. At the time of the accident, the plaintiff's son was operating the vehicle; he was an excluded driver under the policy insuring the vehicle. *See id.* at 221, 731 P.2d at 364. The plaintiff endorsed the exclusion because his son had a prior conviction for driving while intoxicated and had been involved in multiple accidents. *See id.* The plaintiff acknowledged during his deposition that the insurance agent explained why his son was being excluded and that he knew and "understood that there would be no insurance for him or for his son ... at any time that [his son] was driving one of plaintiff's cars after this drivers exclusion endorsement became effective." *Id.* The language of the exclusion stated that the insurer "shall not be liable and no liability or obligation of any kind shall be attached to the company for losses or damages sustained ... while any motor vehicle insured hereunder is driven or operated by" the plaintiff's son. *Id.* at 221, 731 P.2d at 364. We interpreted this language to withhold all coverage under the policy when the plaintiff's son was operating any vehicle. *See id.* at 222, 731 P.2d at 365. Relying on *Kiehne*, we concluded "that the clear and unambiguous drivers exclusion endorsement ... relieves [Glen Falls] from their obligations of any kind under liability provisions of the policy." *Garza*, 105 N.M. at 222, 731 P.2d at 365 (emphasis omitted).

{15} Similarly, in *Moore*, the Court of Appeals relied on the holdings of *Kiehne* and *Garza* in reaffirming "that a driver exclusion agreement ... applies to uninsured motorist coverage as well as liability coverage in New Mexico." *Moore*, 119 N.M. at 124, 888 P.2d at 1006. In *Moore*, the plaintiff was a named excluded driver on his parents' insurance policy at the time he was involved in an automobile accident. *See id.* at 123–24, 888 P.2d at 1005–06. The plaintiff was the driver of the vehicle; however, the vehicle was not listed as insured on the policy. *See id.* at 123, 888 P.2d at 1005. The Court of Appeals concluded that the plaintiff was wholly without any coverage when he operated any vehicle, whether insured or uninsured. *See id.* at 125, 888 P.2d at 1007. In reaching this conclusion, the Court of Appeals stated that "[i]t would be illogical to allow State Farm to exclude a certain driver from uninsured motorist coverage when he is operating an insured vehicle, and at the same time require it to cover that person while operating an uninsured vehicle." *Id.*

{16} *Kiehne*, *Garza*, and *Moore* establish named-driver exclusions as valid endorsements in New Mexico that are applicable to all auto coverage, including liability and UM coverage. Under these cases, an excluded driver, when operating any vehicle, lacks the coverage that he or she would have as a passenger. Further, our cases lead to the conclusion the district court and the Court of Appeals reached: the vehicle the excluded driver is operating becomes an uninsured vehicle for all purposes.

{17} As applied to the facts of this case, the law as it has evolved with respect to driver exclusions seems inconsistent with our approach to UM coverage. *See Padilla*, 109 N.M. at 558, 787 P.2d at 838. In this case, our precedent creates a gap in coverage for a class-one insured. As a class-one insured, Steven had an expectation of UM coverage if

he were injured in an accident involving an uninsured car. *See Lopez v. Foundation Reserve Ins. Co.*, 98 N.M. 166, 169, 646 P.2d 1230, 1233 (1982). Phoenix's policy did not alert the Pulises that they had no UM coverage in an uninsured car driven by Michael. In enacting the UM statute, "[t]he legislature intended that an injured person be compensated to the extent of liability coverage purchased for his or her benefit." *Foundation Reserve Ins. Co. v. Marin*, 109 N.M. 533, 535, 787 P.2d 452, 454 (1990). Allowing Phoenix's exclusion to apply to class-one insureds without notice or disclosure appears to be contrary to the Legislature's purpose. *Cf. Chavez v. State Farm Mut. Auto. Ins. Co.*, 87 N.M. 327, 330, 533 P.2d 100, 103 (1975) (interpreting former UM statute that is materially identical to the present statute).

{18} The facts of prior cases are, in fact, distinguishable. In *Kiehne*, we were presented with deciding the recovery of a class-two insured, not a class-one insured. Unlike *Kiehne*, the Pulises are seeking recovery under the passenger's policy, which is the same policy insuring the excluded driver when he is not operating a vehicle. *Kiehne* did not reach this situation but rather addressed the recovery of a class-two insured not covered by the same automobile policy. In this situation, the estate could seek recovery only under the deceased's own policy for the injury and death resulting from the accident. We recognize *Kiehne* comments that a class-one insured passenger would have no UM coverage if an excluded driver was driving. *See Kiehne*, 97 N.M. at 471–72, 641 P.2d at 502–03. We are not, however, bound by comments that exceed the scope of the holding. *See generally Groendyke Transport, Inc. v. New Mexico State Corp. Comm'n*, 85 N.M. 718, 721, 516 P.2d 689, 692 (1973) (stating dicta "is not controlling"); *State v. Wenger*, 1999–NMCA–092, ¶ 13, 127 N.M. 625, 985 P.2d 1205, *cert. granted*, 127 N.M. 391, 981 P.2d 1209 (1999) (stating "the Court's footnote . . . can be considered unnecessary dicta"); *State v. Coyazo*, 1997–NMCA–029, ¶ 16, 123 N.M. 200, 936 P.2d 882. In *Garza*, the insured admitted on the record that he was informed by the insurance agent that *no* policy covered the son or anyone else when the son operated *any* vehicle. This was not the case for the Pulises. Here, no record exists supporting the inference that Phoenix's insurance agent informed the Pulises that by endorsing the exclusion no coverage existed for any insured when Michael operated any vehicle.

{19} We believe that under our UM statute and our case law on UM coverage, we must address a question not addressed in either *Kiehne* or *Garza*. That question is whether the named-driver exclusion precludes class-one-insured coverage if the only notice of that possibility arises from the statutory form of driver exclusion provided in Section 66–5–222.

C.

{20} "[E]xclusionary [provisions] in insurance contracts shall be enforced so long as their meaning is clear;" however, if the exclusion is ambiguous or conflicts with legislative intent it is rendered void. *Chavez*, 87 N.M. at 329, 533 P.2d at 102 (internal quotation marks and quoted authority omitted) (alteration in original). We have consistently invalidated rejections of UM coverage provisions that are inconsistent with the requirements imposed by statute and the Superintendent. In *Chavez*, for example, we invalidated a restriction on UM recovery that prohibited an insured from recovery when he or she operated an uninsured motor vehicle owned by the insured at the time of the accident. 87 N.M. at 327–28, 533 P.2d at 100–01. This restriction created a gap in coverage that was in conflict with the UM statute. *See id.* at 330, 533 P.2d at 103. In *Kaiser v. DeCarrera*, 122 N.M. 221, 222–23, 923 P.2d 588, 589–90 (1996), we read UM coverage into a policy where the insured had signed a rejection of UM coverage as part of an application for automobile insurance and had never paid premiums for UM coverage. The written rejection in itself, however, was insufficient to exclude UM coverage. *See id.* at 223, 923 P.2d at 590. The declaration pages excluding UM coverage were not attached to, or otherwise made a part of, the policy; thus, the insured lacked affirmative evidence detailing the extent of their coverage. *See id.* at 222–24, 923 P.2d at 589–91. In

Martinez v. Allstate Ins. Co., 1997–NMCA–100, ¶ 18, 124 N.M. 36, 946 P.2d 240, the Court of Appeals prohibited the application of a household exclusion to reduce class-one UM coverage. In reaching this conclusion, the Court of Appeals stated that "underinsured benefits for a Class I insured may be limited only by the conditions imposed by statute: (1) the insured must have the legal right to recover damages, and (2) the negligent driver must be underinsured." *Id.*

{21} We believe that under these cases exclusions from class-one-insured coverage are invalid when unclear. We see no reason under either our cases or the relevant statutes that the named-driver exclusion should be treated differently. The remaining question is whether in this case the insurance application and contract provided notice that UM coverage for a class-one insured ended when an excluded driver operated the insured vehicle.

D.

{22} Considering the application and policy together, we are persuaded there is an ambiguity created by the election of UM coverage and the driver-exclusion agreement. The auto application and policy do not clearly and explicitly define the limits of insured UM coverage for class-one insureds when the driver is a named excluded driver.

{23} "When there is ambiguity [in an insurance contract] . . . the test is not what the insurer intended its words to mean, but what a reasonable person in the insured's position would have understood them to mean." *Western Commerce Bank v. Reliance Ins. Co.*, 105 N.M. 346, 348, 732 P.2d 873, 875 (1987); *see Federal Ins. Co. v. Century Fed. Sav. & Loan Ass'n*, 113 N.M. 162, 168, 824 P.2d 302, 308 (1992) ("Giving effect to the insured's reasonable expectations, in cases of policy ambiguity, is of course a well-settled approach to construing and applying language in insurance policies."). "[W]hen we speak of the insured's reasonable expectations we refer to what the hypothetical reasonable insured would glean from the wording of the policy and the kind of insurance at issue, rather than how the particular insured who happens to buy the policy might understand it." *Rodriguez v. Windsor Ins. Co.*, 118 N.M. 127, 130, 879 P.2d 759, 762 (1994). The insurer bears the sole burden of issuing an intelligible policy. *See id.* at 131, 879 P.2d at 763. "If the insurer issues an ambiguous policy, the ambiguities are construed against the insurer." *Id.*

{24} Phoenix disclosed other specific situations in which no UM coverage existed for the insureds. For example, the application stated that "[w]e do not cover bodily injury or property damage suffered while occupying or if struck by a motor vehicle owned by you or a relative and not described on the Declarations page(s)" and "[w]e do not insure any car while used in any racing, demolition or stunting activity." (Emphasis omitted). We also note that additional coverage exclusions are found in the "Family Car Policy" issued to the Pulises. In total, the liability exclusion section details twenty scenarios where liability coverage is excluded. No such section exists for the named-driver-exclusion provision; rather, the provision merely states that "no liability or obligation of any kind shall be attached."

{25} On its face, the exclusionary provisions contained in Phoenix's policy are silent as to their applicability to a class-one insured when he or she is a passenger in an uninsured automobile operated by a named excluded driver. Based on the disclosures in the application, we presume that the Pulises were aware of the above restrictions and we believe the Pulises may have read these exclusions as the only exclusions on recovery under UM provisions. The express language of the application only informs a lay person that the named driver is excluded. That is not sufficient notice that class-one insureds are excluded. *See Verbison v. Auto Club Ins. Ass'n*, 201 Mich.App. 635, 506 N.W.2d 920, 924 (1993) (upholding driver exclusion in part because the warnings placed on the exclusion and policy stated "[w]hen a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others . . . remain fully personally liable").

{26} We conclude the excluded-driver provision did not exclude Steven from

UM coverage. In reaching this conclusion we do not preclude all named-driver exclusions. We believe that an insurance company can validly exclude high-risk drivers from any and all coverage; but to do so, they are required to adequately inform an insured of the consequences to all class-one insureds of excluding that driver. This requires written disclosure within the body of the application and policy detailing the lack of UM coverage available to named insureds as well as to household members when they elect to exclude a driver or actual notice of the limitations on coverage. The facts of this case illustrate the necessity to adequately inform the insured of the full extent of coverage and the exclusions and limitations applicable to the policy.

III.

{27} Phoenix's auto insurance application and issued policy, as currently written, fail to notify the insured of the lack of coverage for class-one insureds when an excluded driver is operating any vehicle. Accordingly, we reverse the trial court's grant of summary judgment and remand for further proceedings.

{28} **IT IS SO ORDERED.**

FRANCHINI, SERNA, and MAES, JJ., concur.

BACA, Justice, specially concurring.

BACA, Justice (Specially Concurring).

{29} I agree with the result reached by the majority, however I write separately to express my concern about the consequences of the majority's holding. I have serious concerns about the wisdom of a rule that allows an insurance company, even with proper notice, to deny uninsured or underinsured motorist coverage for all class-one insureds in a particular policy when a person subject to a driver exclusion provision under the same policy takes the wheel. I believe that this case presents an issue of first impression. This Court has not, until now, been confronted with a factual scenario where an excluded driver, Michael, was driving while, a class-one insured, Steven, was injured as a passenger, and sought compensation under the same policy as the excluded driver. I agree with the majority that the issue before us is whether, "the named-driver exclusion precludes class-one-insured coverage" but I am not convinced that any amount of notice would be sufficient to deprive Steven or other members of his family of their class-one status. *See ante* at ¶ 19.

{30} In this case we are not concerned with Michael's coverage as the excluded driver, we are only concerned with Steven's coverage. Steven's coverage as a class-one insured is derived solely from the provisions of the contract without regard to the driver exclusion provision. As a member of the household, Steven was entitled to class-one status and UM coverage. The question then is whether the driver exclusion will be allowed to trump Steven's class-one protection. While the majority concludes that the driver exclusion, when read in concert with the policy was ambiguous and ineffective as a waiver of UM coverage, the majority then holds that if an insurance company "adequately informs an insured of the consequences to all class-one insureds of excluding that driver" then the company can exclude "any and all" coverage. *See ante* at ¶ 26. I disagree, and doubt whether any amount of notice contained within a driver exclusion would be sufficient to deprive the remaining members of the family of their class-one status.

{31} I recognize that it is completely reasonable to allow insureds to bargain away both liability coverage and UM coverage for individual high-risk drivers by signing driver exclusions, and we have so held. *See State Farm Auto. Ins. v. Kiehne*, 97 N.M. 470, 472, 641 P.2d 501, 503 (1982) (holding that driver exclusion applies to UM coverage); *Garza v. Glen Falls Ins. Co.*, 105 N.M. 220, 223, 731 P.2d 363, 366 (1986) (holding that driver exclusion applies to liability coverage). I believe that the Legislature, when drafting the broad language contained in NMSA 1978, § 66–5–222 (1998), intended that the excluded driver would have absolutely no coverage while driving. However, I do not believe that the Legislature intended to eliminate all coverage for the entire family when a driver subject to an exclusion under the same policy

takes the wheel. More importantly, I do not believe that any reasonable insured would understand they are bargaining away their entire family's class-one status by signing a driver exclusion for an individual high-risk driver. *See Western Commerce Bank v. Reliance Ins. Co.*, 105 N.M. 346, 348, 732 P.2d 873, 875 (1987) (stating that test for evaluating policy ambiguities is "what a reasonable person in the insured's position would have understood them to mean").

{32} We have previously described the broad protection of class-one insureds as "covered by policies no matter where they are or in what circumstances they may be; coverage is not limited to a particular vehicle." *Gamboa v. Allstate Insurance Co.*, 104 N.M. 756, 758, 726 P.2d 1386, 1388 (1986). With regard to class-one UM coverage we have stated, "There is no requirement in the statute that the insured have any relation, at the time of the accident, with any vehicle he owns and that is insured with the insurer. The uninsured motorists protection covers the insured and the family members while riding in uninsured vehicles, while riding in commercial vehicles, while pedestrians or while rocking on the front porch." *Chavez v. State Farm Mut. Auto. Ins. Co.*, 87 N.M. 327, 330, 533 P.2d 100, 103 (1975) (quoting *Elledge v. Warren*, 263 So.2d 912, 918 (La.Ct. App.1972)), *superceded by statute recognized in Sandoz v. State Farm Mut. Auto. Ins. Co.*, 620 So.2d 441 (La.Ct.App.1993). I fail to see how these broad protections could be so easily abrogated for the entire family merely by signing a driver exclusion clause that relates to only one driver. Steven was merely riding in an uninsured vehicle, that happened to be driven by an excluded driver under the same policy, when an accident occurred, and he sought compensation for his injuries as a class-one insured. Since UM coverage is personal and follows the individual, and is not dependent on the excluded driver, this is a situation that UM coverage was designed to address.

{33} I recognize, as does the majority, that the Court in *Kiehne* seemed to indicate that the class-one insured, Kiehne, could not recover under his own policy because an excluded driver was operating the vehicle. 97 N.M. at 471–72, 641 P.2d at 502–03; *see ante* at ¶ 13. However, the issue in *Kiehne* was the recovery of a class-two passenger and not a class-one insured. Since class-two insureds derive their coverage from the status of the vehicle and not from the original policy, the passenger in *Kiehne* was properly denied coverage. 97 N.M. at 471–72, 641 P.2d at 502–03. In *Kiehne* there was no coverage on the vehicle while the excluded driver operated it, and therefore, there was no coverage for the class-two insured. However, *Kiehne* did not face the issue that we address today. I believe that the dicta in *Kiehne* which suggested that a class-one insured would not be covered failed to recognize the special status that class-one protection affords under New Mexico law.

{34} In the final analysis, I do not believe that once a family has chosen to pay for the protection of UM coverage, a simple driver exclusion should be allowed to infect the entire family's class-one status regardless of the notice afforded the insured. For these reasons, I specially concur in this case.

9 P.3d 648

2000-NMCA-065

RAUSCHER, PIERCE, REFSNES, INC., Petitioner–Appellant,

v.

The TAXATION AND REVENUE DEPARTMENT OF the STATE of New Mexico, Respondent–Appellee.

No. 19,625.

Court of Appeals of New Mexico.

April 26, 2000.

Certiorari Granted No. 26,344, Aug. 1, 2000.

Mary E. McDonald, Sutin, Thayer & Brown, P.C., Santa Fe, for Appellant.

Patricia A. Madrid, Attorney General, Bridget Jacober, Special Assistant Attorney General, NM Taxation & Revenue Department, Legal Services Bureau, Santa Fe, for Appellee.

OPINION

BOSSON, J.

{1} We consider as a matter of first impression in New Mexico whether the receipts of a securities brokerage firm from the sale of mutual funds to its customers are taxable for gross receipts tax purposes. *See* NMSA 1978, §§ 7-9-1 to -89 (1966, as amended through 1999). The New Mexico Taxation and Revenue Department (the Department) assessed gross receipts tax, together with penalties and interest, on revenues that Rauscher, Pierce, Refsnes, Inc. (Taxpayer) earned as a result of transactions in mutual funds from January 1, 1987 through June 30, 1992. Upon Taxpayer's protest, a hearing officer determined that Taxpayer was earning "commissions or fees" while acting as a "broker," within the meaning of the Gross Receipts and Compensating Tax Act (the Tax Act), and denied the protest. *See* § 7-9-3(F)(1)(b). Taxpayer appeals, alleging primarily that it was not acting as a broker with respect to its mutual fund sales and that its earnings were not "commissions or fees" within the meaning of the Tax Act. We affirm the Decision and Order of the hearing officer denying Taxpayer's protest.

BACKGROUND

{2} Taxpayer is a national brokerage firm whose corporate headquarters at the time of the hearing were located in Dallas, Texas and are now situated in Minneapolis, Minnesota. Taxpayer is a licensed broker-dealer under the New Mexico Securities Act, NMSA 1978, § 58-13B-3 (1986), with one New Mexico office located in Albuquerque. From January 1, 1987 through June 30, 1992, Taxpayer engaged in numerous transactions in mutual funds on behalf of customers.

{3} In a typical transaction, as found by the hearing officer, a sales representative at Taxpayer's New Mexico branch office takes a customer's order and transmits it through a series of clearing offices to the principal fund underwriter. After acceptance by the underwriter, Taxpayer then mails a "transaction confirmation" to its customer confirming the mutual fund purchase, showing the net amount due and the settlement date. Taxpayer transmits payment for the mutual fund shares to the principal underwriter by the settlement date, and Taxpayer's customer transmits payment to Taxpayer for the mutual fund shares. Title to the shares rests briefly in Taxpayer and is then registered in the customer's name, and the transaction is complete. Taxpayer pays to the principal underwriter the public offering price of the mutual fund shares ("net asset value" of the mutual fund shares on the trade date, plus any front end sales charge or "load") less the amount of dealer concessions specified in the agreement between Taxpayer and the principal underwriter. However, Taxpayer collects from its customer the full public offering price of the shares purchased. The dealer concession represents the portion of the front end sales charge that Taxpayer retains for handling the mutual fund purchase transaction.

{4} Taxpayer contends that it was in the business of selling mutual funds that it pur-

chased from the underwriter at one price and then resold to customers at another price. Thus, Taxpayer argues that the transactions in question were "sales" of its own securities that by statute are exempt from the Tax Act. *See* § 7–9–25 (exempting from gross receipts tax "receipts [received] from the sale of stocks, bonds or securities"). The Department contends, and the hearing officer found, that the substance of the transactions, as opposed to its form, was not a true sale of the Taxpayer's own securities. Instead, Taxpayer was actually earning "commissions or fees" (the "dealer concessions") which are taxable when earned by a "broker" from the sale or promotion of stocks, bonds or securities owned by others. *See* § 7–9–3(F)(1)(b). For the reasons that follow, we agree with the Department.

DISCUSSION

Standard of Review

{5} There is a statutory presumption that an assessment of tax made by the Department is correct. *See* NMSA 1978, § 7–1–17(C) (1992). This Court will reverse a hearing officer's decision only if it is "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with the law." NMSA 1978, § 7–1–25(C)(1), (2), (3) (1989); *accord ITT Educ. Servs., Inc. v. Taxation & Revenue Dep't*, 1998–NMCA–078, ¶ 4, 125 N.M. 244, 959 P.2d 969. Any claim of exemption from gross receipts tax is strictly construed in favor of the Department. *See Stohr v. New Mexico Bureau of Revenue*, 90 N.M. 43, 46, 559 P.2d 420, 423 (Ct.App.1976).

State Tax Statutory Sections

{6} Pursuant to Section 7–9–4, an excise tax of 5 percent (5%) of gross receipts is imposed as a gross receipt tax upon any person or entity engaged in business in New Mexico. Section 7–9–3(F)(1)(b) defines gross receipts to include "total commissions or fees derived from the business of buying, selling or promoting the purchase, sale or leasing, as an agent or broker on a commission or fee basis, of any property, service, stock, bond or security." On the other hand, Section 7–9–25 exempts from the tax "receipts from the sale of stocks, bonds or securities." Pursuant to these statutory sections, if Taxpayer was acting as an agent or broker, receiving commissions or fees from selling or promoting the sale of securities, then a taxable event occurs with respect to those commissions or fees. However, if Taxpayer was not acting as an agent or broker, but rather was purchasing securities and reselling them for a profit (not a commission or fee), then no taxable event occurs under the Tax Act with respect to that profit. *See Wing Pawn Shop v. Taxation & Revenue Dep't*, 111 N.M. 735, 739, 809 P.2d 649, 653 (Ct.App.1991) ("[G]ross receipts include only commissions if sale is by agent or broker." (Internal quotation marks and citation omitted.)). Therefore, we must determine two pivotal questions: (1) whether Taxpayer was acting as an agent or broker, and (2) whether Taxpayer received commissions or fees from the transactions.

Taxpayer Was Acting As a Broker

{7} The hearing officer determined that the Taxpayer was not acting as an "agent," in part because, as we shall see, federal securities law requires that Taxpayer purchase mutual fund shares as a "principal." The Department's determination rests instead on the hearing officer's finding that Taxpayer was a "broker" under the Tax Act. Thus, for the Tax Act to apply, we must affirm that finding.

{8} Taxpayer contends that it was not acting as a broker because under federal securities law it takes title to the securities in its own name, as a dealer not a broker, and then sells those securities to its clients. Taxpayer argues that there are two separate transactions, the first being the sale of the securities from the principal underwriter to Taxpayer, and the second being the sale of securities from Taxpayer to its clients. As we will discuss in more detail, the transactions are structured in this fashion to satisfy the needs of federal regulatory law, and we conclude that Taxpayer's characterization of the transactions elevates form over substance. To understand the true nature of the transactions, we will undertake a brief overview of the federal statutes, regulations

and rules that regulate the sale of mutual funds. We will then turn to the applicable New Mexico statutes that employ the term "broker" in the securities context. Finally, we will examine whether Taxpayer's receipts are properly characterized as "commissions or fees" within the Tax Act.

Relevant Federal Law

{9} The sale of mutual funds is highly regulated at the federal level, both by federal statute, the Investment Companies and Advisers Act of 1940 (15 U.S.C. § 80a–1 through –64) (1988) (Investment Company Act), various federal regulations, and by industry rules of the National Association of Securities Dealers (NASD). In addition, entities like Taxpayer engage in the sale of mutual funds to customers pursuant to detailed contracts with the principal underwriters which further define the conditions under which they are permitted to do business in mutual funds. As a result of all these provisions, Taxpayer and similar entities engage in the buying and selling of mutual funds in a highly structured and closely controlled fashion.

{10} The Investment Company Act was promulgated over half a century ago to remedy abuses on the part of the mutual fund industry insiders by eliminating the secondary market in mutual fund shares. *See United States v. NASD,* 422 U.S. 694, 704, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975), Prior to the enactment of that Act, there existed what was known as the "two-price system." *Id.* at 706, 95 S.Ct. 2427 (internal quotation marks omitted). The price of shares of a mutual fund (net asset value) depended on market quotations of stock in the mutual fund's portfolio, much as they do today. As the stock prices fluctuated, so did the mutual fund share prices. The net asset value was computed daily and depended upon the fund's portfolio value at the close of exchange trading. At a specified hour on the following day, the sales price was established based on the closing value of the previous day. Thus, an insider aware that tomorrow's price was going to be higher could buy at the lower price even though the lower price did not reflect actual value. Other shareholders' equity interest would be diluted. Insiders would benefit because, unlike the public, they did not have to pay the load fee and could therefore take advantage of quick in and out trading. The general public could not share in the gain even if they were knowledgeable, because they had to pay the "load" which usually exceeded the daily fluctuation in net asset value. *See id.* at 706–09, 95 S.Ct. 2427.

{11} Section 22 of the Investment Company Act, 15 U.S.C. § 80a–22, was adopted to address this problem. Section 80a–22 regulates the distribution, redemption, and repurchase of mutual funds. It prescribes the conditions under which an underwriter may sell to intermediary companies like Taxpayer for resale to the customer. Under Section 80a–22(b), the price is controlled by having the underwriter sell to Taxpayer at a fixed price, the public offering price less the predetermined dealer concession. Notably, the dealer concession is defined in the Investment Company Act as a "commission, discount or spread." *Id.* Under Section 80a–22(d), Taxpayer can sell the mutual fund shares to its customers only at the public offering price. The Taxpayer has little or no discretion over how the transaction is structured, and it has no control over the purchase price nor the sales price. In addition, Rule 2830(c) of the NASD manual requires the principal underwriter to sell mutual funds only to dealers with whom, like Taxpayer, they have a sales agreement in effect that establishes the dealer concession. Under Section 80a–22(a)(2), NASD may require its members, like Taxpayer, to hold the mutual fund shares a certain minimum amount of time before resale to the public; this eliminates quick in and out trading. Under Rule 2830(g) of the NASD manual, an intermediary, like Taxpayer, must be a NASD member and may only purchase mutual funds either for its own account or to cover purchase orders previously received from customers. Significantly, all of the purchases in question here were to cover purchase orders previously made by customers; none were made for Taxpayer's own investment purposes.

{12} The Investment Company Act defines brokers and dealers separately. Section

80a–2(a)(6) defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." Section 80a–2(a)(11) defines "dealer" as "any person regularly engaged in the business of buying and selling securities for his own account, through a broker or otherwise." Section 80a–22(d), which restricts the price at which mutual funds can be sold to the public (net asset value plus the applicable "load"), on its terms only applies to dealers. The NASD, in an apparent attempt to remedy this situation, adopted contract provisions which require companies dealing in mutual funds to act only as principals in buying and "reselling" mutual fund shares. *See NASD,* 422 U.S. at 713, 95 S.Ct. 2427 (restriction on sales price applies only when members are acting as statutory dealers and not when they are acting as statutory brokers). The contracts between Taxpayer and various investment companies denominate Taxpayer as a principal in buying and reselling mutual fund shares. To act as a principal, Taxpayer must also act as a dealer for federal purposes; it must purchase securities nominally for its own account and then, after receiving the net asset value plus the load from its previously identified customer, it transfers those securities into the customer's name.

{13} We are not persuaded to engraft the nuances of the federal securities laws onto our state tax code. The crux of the matter is that the language and the purpose of the federal regulatory overlay bears little relevancy to our state tax structure. The requirement that Taxpayer be a dealer, buying and selling at two fixed prices to a preexisting customer, holding the shares as a dealer for a minimum time period, earning a fixed "commission, discount or spread" (the dealer concession), is all part of the highly structured system put in place at the federal level to control price, protect share value, and forestall the systematic abuses that occurred in the industry. Federal law that requires Taxpayer, as a price control mechanism, to buy and resell shares as a dealer has little bearing on whether the transactions, for gross receipts tax purposes, are truly sales of the Taxpayer's own securities, as Taxpayer contends, or whether Taxpayer is a "broker or agent" earning a "commission or fee" within the meaning of our state tax laws. Accordingly, we look elsewhere for guidance.

{14} According to Taxpayer, the hearing officer's conclusion that Taxpayer was a broker under the Tax Act conflicts with other decisions of this Court holding that a person who takes title to goods in his own name, and then sells those goods to third parties, is not a broker. *See New Mexico Enter., Inc. v. Bureau of Revenue,* 86 N.M. 799, 528 P.2d 212 (Ct.App.1974). Taxpayer also argues that a limited definition of a real estate broker was given in *Vihstadt v. Real Estate Comm'n,* 106 N.M. 641, 643–44, 748 P.2d 14, 16–17 (1988), and *Watts v. Andrews,* 98 N.M. 404, 407, 649 P.2d 472, 475 (1982) (limiting a broker to one who acts as an intermediary between the principal and third persons in order to consummate the sale or purchase of property). Thus, according to Taxpayer, this Court should employ such a limited definition as well. We decline to limit our review of state law. Taxpayer's argument fails to recognize that the legislature has elsewhere defined a broker or broker-dealer in the securities context more broadly than a broker in a real estate or similar setting.

{15} The Tax Act does not define the term "broker." The New Mexico Securities Act of 1986, NMSA 1978, § 58–13B–2(B) (1999), under which Taxpayer is registered to do business in New Mexico, does not provide separate definitions for broker and dealer. Rather, that act combines the terms "broker" and "dealer" as they are used in federal law and calls the combined position a "broker-dealer." Section 58–13B–2(B), defines " 'broker-dealer' " as "a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account."

{16} Article 8 of the Uniform Commercial Code (U.C.C.), NMSA 1978, § 55–8–303 (1987), as it was in effect at the time of Taxpayer's receipts, defined "broker" broadly as "a person engaged for all or part of his time in the business of buying and selling securities, who in the transaction concerned acts for, or buys a security from, or sells a security to a customer." In 1996, the definition portion of the U.C.C. was amended so

that NMSA 1978, Section 55–8–102(a)(3) (1996) now defines " 'broker' " simply as "a person defined as a broker or dealer under the federal securities laws." Finally, the Uniform Transfer to Minors Act, NMSA 1978, § 46–7–12(C) (1989), defines " 'broker' " as "a person lawfully engaged in the business of effecting transactions in securities or commodities for the person's own account or for the account of others."

{17} Based on the foregoing, we observe that each of the New Mexico statutes defining the term "broker" in a securities setting makes no distinction between a company selling securities for its own account or for the account of others. Essentially, all that is required to be a broker under state law is to effect transactions in securities. In fact, no New Mexico statute even provides for a securities "dealer" separately from a "broker." Thus, the term "broker" under state law appears to subsume within it both a broker and a dealer as defined in the federal law. Accordingly, we draw the reasonable inference that, to our state legislature, the differences between broker and dealer that form a part of federal regulatory law were of little consequence to the task of drafting a tax code. "In interpreting statutes, we seek to give effect to the Legislature's intent and in determining intent, we look to the language used and consider the statute's history and background." *Key v. Chrysler Motors Corp.*, 1996–NMSC–038, 121 N.M. 764, 768–69, 918 P.2d 350, 354–55. In addition, as we have previously noted, there is a presumption in state tax law that all receipts received by a person engaged in a business are subject to the gross receipts tax. *See* § 7–9–5.

{18} For all these reasons, we are drawn to the conclusion that the term "broker" as used in Section 7–9–3(F)(1)(b) should be construed as broadly as it is elsewhere in our statutes. It should include a company like Taxpayer, whether it engages in transactions in securities for its own account or for others, or whether the company takes title to securities in its own name for a brief period of time and then transfers title to its clients. All are brokers for purposes of state tax law. As previously stated, however, Taxpayer's receipts are taxable only if we conclude as well, that while acting as a "broker," Taxpayer was earning "commissions or fees" instead of profits from the sale of its own securities.

Taxpayer's Receipts Were Commissions or Fees

{19} Taxpayer contends that it was simply purchasing the securities, holding them in its own name, and then selling them for a profit, which all agree would not be taxable. *See* § 7–9–25 (receipts received from the sale of stocks, bonds or securities are exempt from taxation). Taxpayer bases this assertion on the fact that at least for a brief period of time, the mutual funds shares are held in "street name," or the name of the broker-dealer. Once Taxpayer receives payment from the customer who placed the order, the securities are then transferred to the name of the customer. According to Taxpayer, it was engaging in two separate transactions: it purchased shares from the underwriter and then sold those shares to its customer. Taxpayer contends that the dealer concession it received from the issuer was simply a price discount and that when Taxpayer sold the securities to its customer for the public offering price, the dealer discount represented its profit and was not subject to gross receipts tax.

{20} According to Taxpayer, the hearing officer's own findings support Taxpayer's position. *See* Finding of Fact 25 ("[T]he dealer concession represents the difference in the price the Taxpayer paid to the principal underwriter for the purchase of the mutual fund shares and the price the Taxpayer received from its customers for those shares."). Although that finding can be interpreted as supporting Taxpayer's argument that the dealer concession was a profit and not a commission or fee, it is capable of more than one meaning. The finding can reasonably be interpreted to state that the amount of commission or fee Taxpayer receives is equal to the dealer concessions. This latter interpretation is supported by other findings of fact by the hearing officer. *See* Finding of Fact 26 ("The dealer concession represents the portion of the front end sales charge included in the prospectus price or public offering price at which the mutual

fund shares are sold to the Taxpayer's customers which the Taxpayer receives as the dealer handling the mutual fund transaction."); Finding of Fact 27 ("NASD Rule 2830(B)(2) defines 'brokerage commissions' to include dealer concessions such as those the Taxpayer receives as the dealer handling mutual fund purchase transactions."). "Unless clearly erroneous or deficient, findings of the trial court will be construed so as to uphold a judgment rather than reverse it." *Herrera v. Roman Catholic Church,* 112 N.M. 717, 721, 819 P.2d 264, 268 (Ct.App. 1991).

{21} As we discussed above, 15 U.S.C. § 80a–22 specifies the price under federal law at which dealers can purchase and sell mutual funds. To ensure that a dealer can profit from the transaction, the statute also provides that the issuer or principal underwriter can sell the shares to the dealer for the public offering price, less a "commission, discount or spread." These three words appear to be used interchangeably. Whether a transaction is taxed should not depend upon whether it is called a commission, discount or spread. If this were the case, then the Taxpayer, or at least the issuer or principal underwriter, could control whether the transaction was taxable simply by how it is labeled.

{22} In the typical sale of securities by a true owner (not a broker) within the meaning of Section 7–9–25, the amount of profit is dependent upon how much the net asset value of the securities has appreciated according to market forces. Here, by contrast, the amount of the dealer concession (the "commission, discount or spread") is a fixed percentage of the net asset value that is determined by the issuer of the securities and is only indirectly affected by market appreciation. One of the purposes of offering the "dealer concession" is to encourage the broker-dealer to sell the fund vigorously, and provide compensation to the broker-dealer for providing the agreed-upon services to Taxpayer's customers (i.e., the shareholders of the fund). In contrast, "no load" funds are usually sold directly by the fund to the customer without a broker-dealer. *See NASD,* 422 U.S. at 699 n. 4, 95 S.Ct. 2427. The entire scheme of paying the broker-dealer a fixed dealer concession has all the appearances of a commission or fee. Taxpayer's contention that the transactions are true sales simply elevates form over substance and is not persuasive. *See Dugger v. City of Santa Fe,* 114 N.M. 47, 52, 834 P.2d 424, 429 (Ct.App.1992) ("A basic tenet of judicial review is not to exalt form over substance.").

{23} In addition to the appearance of the transaction, our conclusion is buttressed by the fact that Taxpayer reports the dealer concessions as ordinary income and not capital gains from an appreciating investment. Transactions must be treated uniformly for all purposes under the tax laws. *See Stohr,* 90 N.M. at 46, 559 P.2d at 423 ("The taxpayer must not attempt to show one scheme for federal tax purposes, and a nontaxable event for purposes of state gross receipts tax."). In addition, NASD Rule 2830(B)(2) defines "brokerage commission" to include dealer concessions like those received by Taxpayer.

{24} We also observe that in at least two of the contracts between Taxpayer and the principal underwriters, the terms "commissions" and "dealer concessions" are used interchangeably. One contract provides that when there is no contingent, deferred sales fee, Taxpayer must return the "dealer concession" it received if the customer sells within a year. If, as Taxpayer argues, it was truly selling the securities and making a "profit," Taxpayer would not be obligated to return that "profit" to the issuer upon resale or redemption by Taxpayer's customer.

{25} Finally, we agree with the observation of the hearing officer that "there is nothing in [Section] 7–9–3(F) to indicate that the legislature intended to distinguish, for gross receipts taxation purposes, the fees or commissions received by securities broker-dealers from mutual fund transactions and those they receive for their role in handling transactions in any other types of securities, stocks or bonds." Commissions of broker-dealers like Taxpayer from other kinds of security transactions not involving mutual funds are routinely subject to gross receipts tax. Nothing in the statute would appear to indicate a conscious legislative choice to cre-

ate an exception for the fees earned by mutual fund brokers. Without any solid indication of legislative intent, we are loath to infer preferential tax treatment for one class of transactions similarly situated to others who are subject to tax.

{26} For all of these reasons, we conclude that the "dealer concessions" that Taxpayer received were "commissions or fees" derived from the sale, or promoting the sale, of stocks, bonds or securities, subject to gross receipts taxes pursuant to Section 7–9–3(F)(1)(b).

Taxpayer's Other Arguments

{27} Taxpayer argues that, by adopting a definition of broker it contends is contrary to established New Mexico law, the hearing officer engaged in unlawful, retroactive rule making. We disagree. Because the hearing officer's interpretation of the word "broker" is supported by the definition of that term in the New Mexico Securities Act, the U.C.C. and the Uniform Transfer to Minors Act, as well as policy considerations implicit in the Tax Act, we do not believe the hearing officer's interpretation was so novel as to constitute rule making. We hold that the hearing officer was not creating a new rule but rather was adjudicating the controversy before him.

{28} Taxpayer argues that because the hearing officer found that only 5% of Taxpayer's sales price is a fee for performing services, and the remaining 95% is for the value of the shares, the predominant ingredient of the transaction is the sale of securities, and thus the performance of services is only incidental to that sale. Pursuant to the predominant ingredient test, Taxpayer contends that the entire transaction should be treated as a sale of securities and as a nontaxable event. *See* § 7–9–3(K); *E G & G, Inc. v. Taxation & Revenue Dep't*, 94 N.M. 143, 607 P.2d 1161 (Ct.App.1979). We fail to see how Section 7–9–3(K), or *E G & G, Inc.* are applicable in this case. As shown above, the transactions are sales in name only; the dealer concessions are the equivalent of commissions or fees earned by a securities broker. Because we conclude that the transactions were not true sales of securities for a profit, the predominant ingredient test does not apply.

{29} Taxpayer's final argument is that its services were provided outside New Mexico, and therefore they were not subject to taxation within this state. We are not persuaded.

{30} Taxpayer contends that it only takes the order for the purchase of securities from its customers in New Mexico and that all other acts which culminate in the purchase of the shares by Taxpayer and transfer of the shares to its customer are completed outside New Mexico. According to Taxpayer, any money it receives is not for the taking of the order but for the completion of the transaction which takes place outside the state. However, Taxpayer received the fee or commission not solely for effectuating the sale of securities, but also for promoting the sale and providing services to its customers after the transactions are completed. According to the terms of at least one contract between Taxpayer and issuer, Taxpayer was obligated to maintain regular contact with its customers, answer questions from the customer regarding the fund, distribute sales and service literature provided by the issuer of the fund, assist in establishing and maintaining of shareholder accounts, assist shareholders in making changes to their account, and provide information or services that the shareholder or fund reasonably requests. All of those services took place in New Mexico.

{31} Even if we were to accept Taxpayer's argument, that it is receiving compensation only for its role in acting as a broker in the purchase and resale transactions, the fact that these acts necessary to complete the transaction are done out-of-state does not mean that the fees received are exempt from taxation. Taxpayer is receiving the fee for bringing together an investor (its customer) and an investment company. That the support services necessary to effectuate that transaction are located out-of-state does not change what Taxpayer is being compensated for: the sale or promotion of the sale of securities. These acts undisputably take place within New Mexico. *See ITT Educ. Servs., Inc.*, 1998–NMCA–078,

¶¶ 6–13, 125 N.M. 244, 959 P.2d 969. The focus must be on what services the customers are contracting for and where those services are taking place. Simply because activity necessary to complete the service takes place out-of-state does not mean that the services provided are immune from New Mexico's gross receipts tax. *See id.* ¶ 13; *see also Mountain States Adver. Inc. v. Bureau of Revenue,* 89 N.M. 331, 332–33, 552 P.2d 233, 234–35 (Ct.App.1976) (recognizing that the court must focus on the service for which the client is paying a fee).

CONCLUSION

{32} We affirm the Decision and Order of the hearing officer.

{33} **IT IS SO ORDERED.**

APODACA and WECHSLER, JJ., concur.

9 P.3d 657

2000-NMCA-074

Ronald MARTINEZ, Petitioner–Appellant,

v.

NEW MEXICO STATE ENGINEER OFFICE and New Mexico State Personnel Board, Respondents–Appellees.

No. 19,621.

Court of Appeals of New Mexico.

June 29, 2000.

Certiorari Denied Aug. 15, 2000.

OPINION

SUTIN, Judge.

{1} This appeal raises the issue whether the New Mexico State Personnel Board is to adjudicate statutory disability discrimination claims in administrative just cause termination proceedings. The terminated employee in this case had a bipolar disorder.

{2} Ronald Martinez appeals the district court's judgment affirming the decision of the New Mexico State Personnel Board (the Board). That decision upheld his dismissal from employment with the New Mexico State Engineer Office (the SEO). After a hearing, the Administrative Law Judge (the ALJ) entered a recommended decision proposing to find that Martinez engaged in misconduct, insubordination, and abusive and threatening behavior toward employees constituting just cause for dismissal. The Board adopted the proposed findings of fact and conclusions of law of the ALJ and dismissed Martinez's appeal, and the district court affirmed.

{3} On appeal to this Court, in addition to a contention that the finding of just cause was not supportable, Martinez contends: (1) the decisions of the Board and the district court were erroneous because the ALJ did not properly consider Martinez's mental disability or the Americans with Disabilities Act of 1990(ADA), 42 U.S.C. §§ 12111 to 12117, in determining whether there was just cause to discharge him; (2) Martinez was denied due process because he was not afforded progressive discipline under the Board Rules; and (3) the district court erred by granting the SEO's motion to supplement the record on appeal to the district court. We affirm.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

{4} Martinez was employed in the Hydrographic Survey Bureau (the Bureau) of the SEO for nine years, from April 1987 to April 1996. Martinez suffers from bipolar affective disorder, also commonly referred to as manic-depression. Bipolar disorder is a psychiatric disorder caused by a chemical imbalance

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and requires continuous medical treatment, usually in the form of lithium therapy. The disorder is characterized by extreme mood swings from severe depression to manic elation. Martinez was diagnosed with the disorder in 1989. Following hospitalization in 1992, Martinez had his treating physician inform his supervisor at the Bureau, Edward Ytuarte, of his medical diagnosis. The psychiatrist explained to Ytuarte that bipolar disorder could be successfully treated with lithium and that Martinez's prognosis was excellent if he complied with treatment. Prior to the diagnosis of bipolar disorder, Martinez had consistently been a good and reliable employee at the Bureau.

{5} After learning of Martinez's condition, his supervisors made efforts to work with him and to accommodate his disability by granting him leave of absence whenever he needed medical treatment or hospitalization. As a condition to returning to work, however, Martinez was required to obtain a release from his doctor certifying that he was fit to work. Eventually, by word of mouth, other employees in the Bureau became aware of Martinez's disorder and his need to control it with medication.

{6} Between 1992 and 1994, Martinez was stable, performed satisfactorily, and was promoted several times. By spring 1995, however, his conduct in the workplace deteriorated, as he became increasingly unstable and disruptive. He had problems concentrating, could not complete simple work tasks, and refused to take direction from his supervisors. Often he disappeared from the workplace without supervisor permission and without approved leave. One supervisor reported that Martinez had become increasingly disruptive, demanding, obnoxious, and abusive toward him and other employees. His opinion was that Martinez's behavior problems were getting out of control and that he needed medical attention which could not be provided in the workplace. He also believed Martinez was a danger to himself and others, stating, "I am afraid that he is going to get violent one of these days."

{7} On May 18, 1995, a coworker, Alice Mayer, complained that Martinez entered her office and violated her "personal comfort zone" by sitting extremely close to her, staring at her, and telling her that her "teeth looked pretty today." Mayer reported that she felt she was being watched by Martinez. Although she went to great lengths to avoid Martinez, she believed that he was keeping track of her because he often appeared during her breaks and knew when she was planning to take leave. Mayer complained to management because she saw a pattern emerging and was worried about the effect of Martinez's aggressive and unpredictable behavior on her and other employees.

{8} Ytuarte, as the Bureau Chief, dealt with these complaints by counseling Martinez in person. He also placed Martinez on administrative leave with pay for five days so that he could "get some rest" and "some medical attention." Ytuarte required that Martinez return to work with a release from a qualified doctor certifying that he was fit to work and in a state of mind in which he could be responsible for his actions and not a threat to himself and others. Martinez was hospitalized in May and did not return to work until late June 1995. He was hospitalized again from November 16 to November 20, 1995, and again from December 6 to December 12, 1995, each time returning to work with a doctor's release.

{9} Whenever Martinez returned to work, however, his disturbing and erratic behavior persisted. Nonetheless, Ytuarte continued to accommodate Martinez by finding tasks that he could perform and by reassigning him to different supervisors. Ytuarte also sought assistance from Martinez's father and other relatives. On several occasions, Martinez's father was summoned to the workplace to address Martinez's behavior problems or to escort him to the hospital with the police when his behavior became intractable. Ytuarte also repeatedly counseled Martinez about the need to stay focused, stay at his work station, perform his job, get along with others and, most importantly, about the need to take his medication.

{10} Martinez's aggressive and confrontational behavior intensified on February 16, 1996. Early that morning, he went to Mayer's office where she was alone. He demanded that she hug him because she would soon

be leaving the Bureau. Although she refused, Martinez insisted on a hug. Eventually, he stopped the improper behavior when he saw another employee approaching. Mayer testified that, during the encounter, she felt trapped by Martinez, was frightened by his conduct and believed she was put in a dangerous and threatening situation.

{11} Immediately following the encounter with Mayer, Martinez initiated a confrontation with his then immediate supervisor, Max Chavez. Martinez demanded to know why Chavez had logged four hours of annual leave on Martinez's timesheet for the previous day. Chavez responded that he had seen Martinez leave that day at approximately 1:00 p.m. without requesting leave or informing anyone that he was leaving. Martinez then became belligerent and began swearing at Chavez. When Chavez instructed Martinez to return to his work area, he became even more abusive and continued cursing at Chavez. As the confrontation escalated, Martinez stood up in a defiant and threatening manner, as if to throw a punch at Chavez. Chavez reported the incident to Ytuarte, believing that his safety was endangered by Martinez.

{12} When Ytuarte later met with Martinez to discuss his confrontation with Chavez, Martinez refused to accept any responsibility for the incident and stated he was being harassed by Chavez. Ytuarte then sent Martinez home and directed him to report back on the morning of February 19, 1996, to continue discussing the matter.

{13} On February 19, Ytuarte informed Martinez that his threatening and abusive conduct would no longer be tolerated. He was urged to get medical attention and to cooperate with his family. Ytuarte testified that, during the meeting, Martinez was upset, disoriented and went off on tangents, at one point talking about his experience in the Army. Believing he was being fired, Martinez began yelling at Ytuarte and then abruptly left his office. As he was leaving the building, he saw and approached Chavez, pointed at him and stated angrily, "I'm going to kick your ass, boy." Chavez testified that he took Martinez's threat seriously. Other employees who witnessed the encounter indicated that they, too, believed Martinez to be a threat to Chavez and to others in the workplace.

{14} Upon overhearing the threat against Chavez and interviewing other employees, Ytuarte determined that Martinez had crossed the line by threatening his supervisor and that his behavior posed a threat to all the employees at the Bureau. Ytuarte testified that at that point he recommended that Martinez be discharged on the grounds of misconduct, insubordination, and threats of physical violence against his supervisor.

{15} On March 4, 1996, while hospitalized at the Las Vegas Medical Center, Martinez contacted the workplace again by telephone. He asked the receptionist if everyone at the Bureau was afraid to come to work because of him and demanded to know who had accused him of sexual harassment. He then stated that if he was fired because of Chavez, he would "finish him off." The telephone call was reported to Bureau management and the Santa Fe police department.

{16} Martinez was issued a notice of contemplated termination by the SEO on March 19, 1996. The notice set forth the reasons for dismissal, including "continued unsatisfactory performance, workplace misconduct, insubordination, and threats of physical abuse directed toward agency employees," and described the incidents occurring in May 1995 and February 1996. Following a pretermination hearing, Martinez's employment with the Bureau was terminated. A notice of final action was served on April 10, 1996. Martinez appealed his termination to the Board on the grounds that the SEO did not properly consider his disability in terminating him, his behavior did not rise to the level of misconduct justifying termination, and he was denied progressive discipline. Following a hearing before an ALJ, and the ALJ's "recommended decision", the Board upheld Martinez's termination for just cause on the grounds of misconduct, insubordination, and threats of physical abuse.

{17} Martinez appealed the Board's decision, and the district court determined that substantial evidence existed in the record for the ALJ to have concluded that Martinez engaged in misconduct and was terminated

for cause, and that "termination was the appropriate discipline and progressive discipline was not necessary." The district court further determined that "the decision of the . . . Board was not arbitrary, capricious or an abuse of discretion."

II. *DISCUSSION*

A. Whether the Board Has Authority to Decide ADA Issues in Personnel Appeal

{18} On appeal, Martinez contends that the Board did not properly apply the ADA and the Equal Employment Opportunity Commission (EEOC) guidelines in determining whether the SEO had just cause to dismiss him. We note that initially Martinez did not raise the ADA in the proceedings below. He argued only that the SEO failed to take into account his disability in terminating him and that his behavior did not rise to the level of misconduct justifying immediate dismissal. Instead, it was the SEO who injected the ADA into this case. In response to Martinez's arguments, the SEO argued that Martinez was terminated in compliance with the ADA. However, neither the ALJ nor the Board specifically referred to the ADA in their written decisions finding just cause to terminate Martinez. In filed exceptions to the ALJ's proposed findings and conclusions, Martinez argued that his termination violated the ADA and the EEOC guidelines, and that the ALJ's recommended decision was contrary to ADA law.

{19} The SEO argues that New Mexico courts do not have jurisdiction to determine issues under the ADA because Martinez failed to appeal a "no probable cause" determination issued by the New Mexico Human Rights Commission (NMHRC) on May 28, 1997, on the issue of discrimination. The SEO also asserts that the Board is without authority to decide claims of discrimination under the ADA and that only the NMHRC is vested with such authority pursuant to the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28–1–1 to –7, 28–1–9 to –14 (1969, as amended through 1995). Finally, the SEO argues that, even applying the ADA to this case, Martinez is not entitled to relief because he is not a qualified individual with a disability, the SEO had a right to discharge a potentially violent and insubordinate employee, and no reasonable accommodation by the SEO would enable Martinez to perform the essential functions of his job.

{20} The threshold issue for us is whether the Board has authority to determine ADA issues in an administrative appeal under the Personnel Act. *See* NMSA 1978, § 10–9–1, and various sections up to and including 10–9–25 (1961). This is a question of law which we review de novo. *See Hyden v. New Mexico Human Servs. Dep't*, 2000–NMCA–002, ¶ 12, 128 N.M. 423, 993 P.2d 740.

{21} The district court, in upholding Martinez's dismissal, concluded that the district court did not have jurisdiction to consider claims under the ADA or the NMHRA because Martinez did not appeal the NMHRD's determination of no probable cause. For slightly different reasons, we conclude that the Board and the district court properly refrained from deciding issues under the ADA. *See In re Drummond*, 1997–NMCA–094, ¶ 12, 123 N.M. 727, 945 P.2d 457 (noting that "we may affirm the court's decision if it is right for any reason and affirming on a different ground would not be unfair to the appellant").

{22} The Board is a public administrative body created by statute. *See* NMSA 1978, § 10–9–8 (1980); *State ex rel. New Mexico Highway Dep't v. Silva*, 98 N.M. 549, 551, 650 P.2d 833, 835 (Ct.App.1982). Therefore, the Board is limited to the power and authority expressly granted or necessarily implied by statute, *see PNM Elec. Servs. v. New Mexico Pub. Util. Comm'n (In re Application of PNM Elec. Servs.)*, 1998–NMSC–017, ¶ 10, 125 N.M. 302, 961 P.2d 147, which expressly defines its duties. *See* NMSA 1978, § 10–9–10 (1983). Among the primary duties of the Board is the power to promulgate rules to carry out the provisions of the Personnel Act and to hear appeals by state employees aggrieved by an agency's action affecting their employment. *See* § 10–9–10(A) and (B). Thus, the Board has both policy-making and quasi-judicial responsibilities. *See Montoya v. Dep't of Fin. &*

Admin., 98 N.M. 408, 412, 649 P.2d 476, 480 (Ct.App.1982).

{23} In hearing appeals and thus acting in its quasi-judicial capacity, the Board conducts evidentiary hearings and makes findings of fact and conclusions of law. *See id.* at 413, 649 P.2d at 481. In particular, NMSA 1978, § 10-9-18(F) (1980), imposes on the Board the duty of determining whether action taken by an agency against an employee "was without just cause." *Silva*, 98 N.M. at 551, 650 P.2d at 835. If the Board determines the agency action was unsupported by just cause, the Board "may modify the disciplinary action or order the agency to reinstate the appealing employee to his former position or to a position of like status and pay." Section 10-9-18(F).

{24} Neither the Personnel Act nor the rules promulgated under the Personnel Act by the Board (the Board Rules) expressly grant the Board the power to resolve claims of discrimination raised by an employee challenging an agency's adverse personnel action. New Mexico courts have not previously addressed whether the Board has implied authority to address complaints of unlawful employment discrimination in a termination proceeding based on just cause under the Board Rules.

{25} Our review of case law from other jurisdictions has revealed sparse authority on this point. We note, however, that in some jurisdictions state personnel boards are expressly empowered by statute or regulation to consider claims of discrimination in administrative personnel proceedings. *See, e.g., Ruiz v. California Dep't of Corrections*, 77 Cal.App.4th 891, 92 Cal.Rptr.2d 139, 143 (2000); *Cunningham v. Dep't of Highways*, 823 P.2d 1377, 1380 (Colo.Ct.App.1991); *Cantrell v. State of Georgia*, 129 Ga.App. 465, 200 S.E.2d 163, 166 (.1973); *Walker v. Dep't of Pub. Works Sewerage*, 549 So.2d 426, 428 (La.Ct.App.1989).

{26} However, such provisions are absent from the Personnel Act and the Board Rules. Furthermore, we find no provision in the NMHRA that impliedly or expressly permits a state employee to adjudicate discrimination claims through the Board in termination proceedings under the Board Rules. Although we recognize that "[l]egislative silence is at best a tenuous guide to determining legislative intent," *Swink v. Fingado*, 115 N.M. 275, 283, 850 P.2d 978, 986 (1993), we conclude that had the Legislature intended for the Board to share authority with the NMHRC or to decide claims alleging violations of state and federal discrimination laws, it would have expressly conferred such authority on the Board and established a procedural mechanism for considering such claims in a manner that would not conflict with the authority of the NMHRC or the administration of the statutory law against discrimination.

{279B In the absence of explicit language in the Personnel Act and the Board Rules, we conclude that the authority to decide whether a violation of the ADA or the NMHRA has occurred rests exclusively with those administrative agencies, such as the EEOC and the NMHRC, who have express statutory authority to adjudicate such claims and have specialized knowledge and expertise in preventing and remedying unlawful discrimination. *Cf. Ex parte Boyette*, 728 So.2d 644, 645-46 (Ala.1998) (per curiam); *Hawkins v. State*, 183 Ariz. 100, 900 P.2d 1236, 1240-41 (Ct.App.1995). Accordingly, an employee who asserts the absence of just cause based on unlawful discriminatory practices in violation of the ADA or the NMHRA must pursue his claim through the EEOC or the NMHRC, using the mandatory grievance procedures set forth in the respective statutes. *See Jaramillo v. J.C. Penney Co.*, 102 N.M. 272, 272-73, 694 P.2d 528, 528-29 (Ct. App.1985) (stating that because the NMHRA provides the right, procedure and remedy, the statutory grievance procedure is mandatory when unlawful discriminatory practices are alleged); *see also Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir.1996) (explaining that, before filing ADA action in federal court, employee must file timely charge with the EEOC or with a state or local agency with authority to grant relief from alleged unlawful discrimination). The Board is without express or implied authority to adjudicate issues under the ADA or the NMHRA in a personnel proceeding. Here, the Board correctly declined to decide ADA claims.

{28} Martinez nevertheless points out that the Board Rules included a Purpose Statement which enumerated several principles to be followed by the Board, including:

> Fair treatment of applicants and employees in all aspects shall be assured for applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex, national origin, political affiliation, age, *disability,* or other non-merit factors, and with proper regard for their primary and constitutional rights as citizens, shall be assured.

State Personnel Board Rules—Purpose Statement (January 2, 1993) (emphasis added). This non-discrimination policy statement is not a contractual carte blanche for adjudication of discrimination claims in personnel proceedings. However, that is not to say that an employee's disability can never be raised in those proceedings. While we have held that the Board is without authority to determine violations under the ADA or the NMHRA, that holding shall not preclude an employee from raising his or her disability in a personnel proceeding to show that the agency's proffered reasons for its action are pretextual and that the real reason for the action was his or her disability. We note this is essentially what Martinez did in this case.

{29} Thus, an ALJ as an evidentiary matter may decide whether the reasons offered by the employer for a termination are pretext for discrimination because of the employee's disability. However, for the reasons discussed above, we conclude that the Board may not determine whether there was a statutory violation of state and federal laws prohibiting discrimination; at least in the administrative context, that authority rests solely with the NMHRD and the EEOC. In short, we conclude that the ALJ and the Board acted appropriately by not determining issues under the ADA. Therefore, we do not consider the parties' arguments regarding whether Martinez was terminated in violation of the ADA.

B. Whether the Board's Just Cause Determination is Supportable

{30} Next, we consider whether the Board's determination that Martinez was terminated with just cause was arbitrary and capricious, not supported by substantial evidence, or otherwise contrary to law. In order to find just cause, "the Board is required to determine not only that there was employee misconduct but also that the agency's discipline was appropriate in light of that misconduct." *Gallegos v. New Mexico State Corrections Dep't,* 115 N.M. 797, 802, 858 P.2d 1276, 1281 (Ct.App.1992); *see Silva,* 98 N.M. at 552, 650 P.2d at 836. While the first prong focuses on the nature of the employee's conduct, the second prong focuses on the reasonableness of the agency's disciplinary action. *See Gallegos,* 115 N.M. at 802, 858 P.2d at 1281.

{31} We apply a whole-record standard of review in considering appeals from an administrative decision by the Board. *See Clark v. New Mexico Children, Youth & Families Dep't,* 1999–NMCA–114, ¶ 7, 128 N.M. 18, 988 P.2d 888. Like the district court, we independently review the entire record of the administrative hearing to determine whether the Board's decision was arbitrary and capricious, not supported by substantial evidence, or otherwise not in accordance with law. *See id.;* NMSA 1978, § 10–9–18(G) (1980, prior to 1998 and 1999 amendments).

{32} Just cause occurs when an employee engages in behavior inconsistent with the employee's position and can include, among other things, incompetency, misconduct, negligence, insubordination, or continuous unsatisfactory performance. *See* Board Rule 17.3 (March 26, 1994). Based on our review of the whole record, we conclude that substantial evidence exists to support the ALJ's finding and the Board's adoption of the finding of just cause to terminate Martinez based on misconduct, insubordination, and abusive and threatening behavior toward employees on February 16 and 19, and March 4, 1996.

{33} Martinez argues that dismissal was improper in light of his known disability. However, the record demonstrates that the Bureau made active and continuous efforts, beginning in 1992, to accommodate Martinez's disability. Ytuarte granted Martinez

leave to seek medical treatment, reassigned him to different supervisors when conflicts arose, gave him simple and manageable assignments when he was unable to concentrate, consulted with his family about his worsening condition, and repeatedly counseled him to take his medication. Despite these efforts, Martinez's behavior continued to deteriorate. The incidents in May 1995 and February 1996 suggested that Martinez was unable to control his disability. His physician stated in 1992 that his condition could be managed with lithium if Martinez complied with the prescribed treatment, though infrequent "break through" episodes were always possible.

{34} Although Martinez testified that he always complied with his doctor's orders, there is evidence in the record that he did not take his medication regularly. One employee testified that on several occasions Martinez told her that he was not taking his medication because he did not think he needed it. Moreover, although there was no medical testimony presented at the hearing, Martinez's frequent hospitalizations in 1995 and 1996 suggested that he was having difficulty regulating his blood lithium level and may not have conscientiously been following his medication prescriptions. According to one medical release in his personnel file, he was in need of "medical regulation" when he was admitted to the hospital on November 16, 1995. In yet another release, dated March 29, 1995, his treating physician stated that he could not guarantee that Martinez would take his medication on his own following his discharge from the hospital.

{35} In light of Martinez's misconduct in the workplace and his apparent failure to control a controllable disability, we conclude the district court's decision was neither arbitrary, capricious, nor contrary to law, and that the termination was appropriate. *See Gallegos,* 115 N.M. at 802, 858 P.2d at 1281; *cf. Fitzhugh v. New Mexico Dep't of Labor,* 1996–NMSC–044, ¶ 42, 122 N.M. 173, 922 P.2d 555 (misconduct justifying denial of unemployment benefits is conduct evincing callousness and deliberate or wanton misbehavior toward employer's interests and expectations).

{36} Martinez asserts that termination was too severe an action and that, under the *Gallegos* standard (whether the agency's discipline was appropriate in light of the misconduct), the discipline was inappropriate. *See Gallegos,* 115 N.M. at 802, 858 P.2d at 1281. We disagree. Martinez's conduct supported a just cause termination. Once it is determined that just cause exists to terminate, termination is appropriate under the Board Rules. *See Lujan,* 1999–NMCA–059, ¶¶ 17, 19, 127 N.M. 233, 979 P.2d 744.

C. Progressive Discipline

{37} Martinez contends that he was denied due process because the SEO failed to provide him progressive discipline prior to his termination, contrary to the Board Rules and the SEO's policy manual. Though "violation of a state law requiring specific procedures does not necessarily constitute a violation of constitutional due process," *State ex rel. Hughes v. City of Albuquerque,* 113 N.M. 209, 210, 824 P.2d 349, 350 (Ct.App.1991), a public employee may be entitled to relief if the procedures mandated by the Board Rules and the administrative agency's employee handbook are not followed. *See Lujan,* 1999–NMCA–059, ¶ 20, 127 N.M. 233, 979 P.2d 744. We determine, however, that the ALJ was correct in determining that the SEO was not required to use progressive discipline and in concluding that Martinez was provided sufficient procedural due process.

{38} According to the Board Rules, the purpose of discipline is to correct unacceptable performance or behavior that is contrary to the employer's legitimate interests. *See* Board Rule 17.1(A) (March 26, 1994). "Progressive discipline shall be used whenever appropriate" and "can range from a reminder to an oral or written reprimand to a suspension, demotion or dismissal." *Id.* at 17.1(B). However, the Board Rules state that "[t]here are instances when a disciplinary action including dismissal is appropriate without first having imposed a less severe form of discipline." *Id.* Similarly, under the SEO's disciplinary policy, which incorporates by reference Board Rule 17, progressive discipline "is to be used to correct unacceptable behavior

and unsatisfactory performance whenever possible."

{39} Here, the ALJ concluded that Martinez's right to procedural due process was not violated, based on two findings of fact: the SEO (1) "followed a policy of progressive discipline" and (2) "was not required to use progressive discipline because of Martinez'[s] insubordination, misconduct in the workplace, and his abusive and threatening actions toward his supervisor." Viewing the record as a whole, we conclude that there is insufficient evidence in the record to support the ALJ's first finding of fact, but sufficient evidence to support his second.

{40} The record reveals that Ytuarte repeatedly verbally counseled Martinez about his performance and conduct troubles. Martinez was also given leave in order to obtain medical assistance for a condition that admittedly was a cause of these troubles. Martinez's personnel file also contained several memoranda from supervisors and coworkers documenting these problems. It is uncontroverted, however, that Martinez was not shown copies of the memoranda until after his dismissal and no one ever explained the disciplinary consequences of not correcting his behavior and performance problems. It is also undisputed that Martinez's performance appraisals did not note any of his conduct or performance problems. Moreover, Ytuarte testified that his counseling sessions with Martinez were not "disciplinary" in nature but merely "consultations" or "visits."

{41} At most, Martinez was only verbally reprimanded before his dismissal. It does not appear that he was ever reprimanded in writing, shown copies of the memoranda documenting his behavioral problems, or warned of the disciplinary consequences of his behavioral and performance deficiencies. This, we believe, is inconsistent with a progressive discipline scheme contemplated under the Board Rules. *See Lujan*, 1999–NMCA–059, ¶ 16, 127 N.M. 233, 979 P.2d 744 (when applying progressive discipline, employer has duty to adequately warn employee by identifying violation involved and consequences of violation); *see also Chicharello v. Employment Sec. Div.*, 1996–NMSC–077, ¶ 6, 122 N.M. 635, 930 P.2d 170. Therefore, considering the record as a whole, we find insufficient evidence that Martinez was afforded progressive discipline.

{42} The Board Rules state, however, that an employee may be subject to immediate dismissal in some instances without first imposing a less severe sanction. *See* Board Rule 17.1(B). In *Lujan*, we recognized that progressive discipline is not required before termination when the conduct for which an employee is terminated constitutes just cause to terminate. *Lujan*, 1999–NMCA–059, ¶¶ 17, 19, 127 N.M. 233, 979 P.2d 744. Martinez was terminated on the grounds of insubordination, misconduct, and threats of physical violence against his supervisor, all of which clearly fall within the category of conduct constituting just cause for dismissal. *See* Board Rule 17.3(B) (March 26, 1994). Moreover, Martinez's conduct posed a threat to the safety of other employees. His conduct resulted from a controllable, yet uncontrolled, psychiatric condition of which his employer was aware. That conduct constituted the type of serious misconduct which does not have to be tolerated by an employer and which justifies immediate dismissal.

{43} We conclude that the Board's decision was affirmable based on the ALJ's second finding of fact that the SEO was not required to apply progressive discipline under the facts of this case. That the ALJ determined that the SEO followed a policy of progressive discipline is of no consequence. Irrelevant and "[e]rroneous findings of fact not necessary to support the judgment . . . are not grounds for reversal." *Sanchez v. N.M. Dep't of Labor*, 109 N.M. 447, 452, 786 P.2d 674, 679 (1990); *see also In re T.J.*, 1997–NMCA–021, ¶ 20, 123 N.M. 99, 934 P.2d 293 (noting that erroneous finding of fact is not ground for reversal where fact-finder entered other findings that support judgment); *cf. Davis v. Los Alamos Nat'l Lab.*, 108 N.M. 587, 591, 775 P.2d 1304, 1308 (Ct. App.1989) (affirming hearing officer's decision if right for any reason).

{44} Furthermore, while the history of Martinez's mental illness and resulting con-

duct and the SEO's consultations and accommodations preceding February and March 1996 cannot be considered in justifying the just cause basis of the termination, that history can properly be considered when evaluating the fairness of Martinez's treatment, *see* Purpose Statement, and the appropriateness of by-passing progressive discipline and determining that termination was the appropriate action under the circumstances.

{45} Therefore, in the case before us, the ALJ properly considered the history and entered findings regarding Martinez's psychiatric disorder, Martinez's "erratic and disruptive workplace behavior," repeated hospitalizations, and the SEO's counseling and continuing efforts to make accommodations for Martinez. Although falling a bit short of the formal progressive discipline contemplated under the Board Rules, this unique history was properly considered to place the cause of and concern about Martinez's conduct in the appropriate context.

{46} Martinez further argues that he was denied due process because the ALJ did not consider whether his termination resulted in disparate treatment. We do not consider this argument because it does not appear Martinez raised the argument below or presented any evidence of disparate treatment at the administrative hearing. *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App.1987) (deciding that in order to preserve issue for review, it must appear that appellant fairly invoked a ruling of the trial court on same grounds argued on appeal). Moreover, Martinez does not cite any pertinent authorities in support of his contention. *See In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (stating that issues unsupported by cited authority will not be considered on appeal). Therefore, we do not consider the issue.

D. Supplementation of Record on Appeal

{47} Finally, Martinez argues that the district court erred in granting the SEO's motion to supplement the record on appeal with a complete copy of the SEO's disciplinary policy. The Board had before it only one of five pages of the policy. In support of its motion, the SEO argued that it had inadvertently omitted the other pages of the policy and that the pages were material to Martinez's progressive discipline claim.

{48} Rule 1–074(I) NMRA 2000 provides:

> If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the agency on request, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

Martinez, however, correctly points out that in administrative appeals the district court is a reviewing court, not a fact-finder, and therefore may consider only evidence presented to the Board in the first instance. *See Zamora v. Village of Ruidoso Downs*, 120 N.M. 778, 782–84, 907 P.2d 182, 186–88 (1995) (defining whole record review of district court). Accordingly, we determine that Rule 1–074(I) cannot be read so broadly as to allow the addition of material in the record that was never presented to the Board in the first instance. Rather, Rule 1–074(I) is limited by the scope of the district court's review as described in *Zamora*. *See id.* Therefore, only material that was in fact presented below but was mistakenly or inadvertently omitted from the record may be included in a supplemental record.

{49} Accordingly, we conclude that the district court erred by supplementing the record on appeal with evidence that was never presented to the Board. However, we determine that such error was harmless in the absence of evidence in the record indicating that the district court relied on the supplemental record in affirming the Board's decision. The decision that Martinez was not entitled to progressive discipline was correct based on the limited provisions of the progressive discipline policy put before the Board. *See In re Estate of Heeter*, 113 N.M. 691, 695, 831 P.2d 990, 994 (Ct.App.1992) ("On appeal, error will not be corrected if it will not change the result."). Therefore, because Martinez has not demonstrated any prejudice, we affirm on this issue as well.

III. *CONCLUSION*

{50} Based on the foregoing discussion, we conclude that (1) the Board does not have authority to determine issues under the ADA in an administrative proceeding pursuant to the Personnel Act; (2) the Board's determination of just cause is supported by substantial evidence; (3) the Board's decision was not arbitrary or capricious or contrary to law; (4) Martinez was not entitled to progressive discipline prior to dismissal and therefore was not deprived of due process; and (5) the district court's error in allowing the SEO to supplement the record on appeal was harmless. Therefore, we affirm the decisions of the Board and of the district court.

{51} **IT IS SO ORDERED.**

APODACA and ARMIJO, JJ., concur.

9 P.3d 668

2000-NMCA-075

STATE of New Mexico, Plaintiff–Appellee,

v.

Michael VALLEJOS, Defendant–Appellant.

No. 20,265.

Court of Appeals of New Mexico.

July 5, 2000.

Certiorari Denied, No. 26,473, Aug. 30, 2000.

Patricia A. Madrid, Attorney General, Patricia Gandert, Ass't Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Sheila Lewis, Ass't Appellate Defender, Santa Fe, for Appellant.

OPINION

PICKARD, Chief Judge.

{1} This case serves to remind us that "[t]he prohibition against double jeopardy 'is not one rule but several, each applying to a different situation; and each rule is marooned in a sea of exceptions.'" *State v. Medina*, 87 N.M. 394, 396, 534 P.2d 486, 488 (Ct.App.1975) (quoting *Comment, Twice in Jeopardy*, 75 Yale L.J. 262, 263 (1965–66)). Today, we address two aspects of the rule proscribing multiple punishment for the

same offense, both of which demonstrate the truth of these words, written over thirty-five years ago.

{2} Defendant appeals his convictions for attempted first degree murder, conspiracy to commit first degree murder, aggravated battery inflicting great bodily harm, conspiracy to commit aggravated battery, and criminal solicitation to commit murder. On appeal, he argues that his state and federal constitutional rights to be protected from double jeopardy were violated by (1) his convictions for both attempted first degree murder and aggravated battery and (2) his convictions for both criminal solicitation and conspiracy to commit murder, although the sentences for these two offenses were merged. He also asserts (3) insufficiency of the evidence to support more than one conspiracy conviction, (4) trial court error in admitting the testimony of two witnesses not timely disclosed by the State, and (5) cumulative error. We affirm on issues (1), (4), and (5), reverse on issues (2) and (3), and remand for further proceedings consistent with this opinion.

I. *FACTS*

{3} On January 20, 1996, Defendant's nephew Chris Sedillo entered a Taco Bell in Los Lunas, New Mexico, and shot Sybil Saiz (Victim), who was standing behind the counter, once in the lower back at close range. Although seriously injured, Victim survived the shooting. Sedillo shot Victim with the help and encouragement of Defendant. Defendant blamed Victim for the shooting of his son Michael Hurtado and sought revenge against Victim. Before the shooting at the Taco Bell, Defendant had confronted Victim and her boyfriend, Robert Castillo, on another occasion in a bank parking lot and at a park and had discharged his gun several times. Defendant had learned that Castillo also had beaten up his son in a store parking lot and wanted to exact revenge.

{4} At trial, the State's theory of the case was that Defendant solicited, conspired with, and aided and abetted Sedillo in the shooting and attempted murder of Victim at Taco Bell. Defendant was convicted by a jury of attempted first degree murder, aggravated battery with great bodily harm, conspiracy to commit first degree murder, conspiracy to commit aggravated battery, and criminal solicitation.

II. *DISCUSSION*

A. Double Jeopardy

{5} The Double Jeopardy Clauses of the New Mexico and the United States Constitutions guarantee that no person shall be "twice put in jeopardy" for the same offense. *See* N.M. Const. art. II, § 15; U.S. Const. amend. V. These guarantees protect an individual against successive prosecutions for the same offense after an acquittal or conviction and against multiple punishments for the same offense. *See Swafford v. State*, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991). This case implicates Defendant's right to be protected from multiple punishments for the same offense.

1. Convictions for Both Attempted Murder and Aggravated Battery

{6} Defendant argues that his convictions for both attempted first degree murder and aggravated battery unconstitutionally subjected him to double jeopardy. New Mexico courts apply the two-part test from *Swafford*, 112 N.M. at 13–15, 810 P.2d at 1233–35, to determine whether convictions under different criminal statutes in the same trial violate the constitutional guarantee against double jeopardy. We first determine "whether the conduct underlying the offenses is unitary, *i.e.*, whether the same conduct violates both statutes." *Id.* at 13, 810 P.2d at 1233. If the conduct is not unitary, there is no double jeopardy violation, and our analysis ends. *See id.* at 14, 810 P.2d at 1234.

{7} If the conduct is unitary, however, we proceed to the second part of the *Swafford* analysis and determine whether the legislature intended to create separately punishable offenses for the unitary conduct. *See id.* Absent a clear expression by the legislature to impose multiple punishments, we apply the strict elements test from *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to make an initial, presumptive determination of legislative intent. *See Swafford*, 112 N.M. at 14, 810 P.2d

at 1234; *see also State v. Campos,* 1996–NMSC–043, ¶ 20, 122 N.M. 148, 921 P.2d 1266 (noting that strict elements test provides tool for inferring legislative intent). If each offense contains an element the other does not, one offense does not subsume the other, and we presume the legislature intended to punish the offenses separately. *See Swafford,* 112 N.M. at 14, 810 P.2d at 1234. We then consider other indicia of legislative intent, including the language, history, and subject of the statutes; the social evils sought to be addressed by each statute; and the quantum of punishment prescribed by each statute. *See id.* at 14–15, 810 P.2d at 1234–35. If these factors reinforce the presumption that the legislature intended to punish offenses separately, we conclude that the convictions under different statutes do not violate the constitutional protection against double jeopardy.

{8} Relying on recent felony murder cases, including *State v. Varela,* 1999–NMSC–045, 128 N.M. 454, 993 P.2d 1280, *State v. Cooper,* 1997–NMSC–058, 124 N.M. 277, 949 P.2d 660, and *Campos,* 1996–NMSC–043, 122 N.M. 148, 921 P.2d 1266 Defendant argues that the crime of aggravated battery is subsumed within the crime of attempted first degree murder, and therefore his convictions for both offenses violate double jeopardy. We believe Defendant's reliance on these cases is misplaced because they were addressing a different question of legislative intent.

{9} Defendant first offers *Cooper* for the proposition that "one assaultive act cannot support a conviction for both aggravated battery and attempted murder." However, *Cooper* does not stand for this proposition. Cooper challenged his convictions for felony murder and aggravated battery on double jeopardy grounds; armed robbery was the underlying felony for the felony murder conviction. *See Cooper,* 1997–NMSC–058, ¶ 53, 124 N.M. 277, 949 P.2d 660. Cooper argued that because the conduct underlying the aggravated battery was the same conduct that caused the victim's death, he could not be twice convicted for the same act. *See id.* ¶ 54. The State argued that the battery, consisting of hitting the victim over the head, was distinct from the struggle that resulted in the victim's death. *See id.* Although Cooper's arguments raised the question of whether battery is always a lesser included offense of second degree murder when the underlying conduct is unitary, the New Mexico Supreme Court did not reach the issue because it determined that the acts constituting the battery and the second degree murder were not unitary. *See id.* ¶ 58. Therefore, the *Cooper* court never addressed the issue on which Defendant relies.

{10} Defendant also relies on *Varela* and *Campos,* both of which discuss the felony murder doctrine and the need for the predicate felony to be independent of or collateral to the homicide. The requirement of an independent felony is known as the collateral felony doctrine. *See Campos,* 1996–NMSC–043, ¶ 8, 122 N.M. 148, 921 P.2d 1266. Under this doctrine, the predicate felony cannot be a lesser included offense of second degree murder. *See id.* ¶ 19. If the predicate felony is a lesser included offense of second degree murder, then the felony murder rule does not apply. *See id.* New Mexico adopted the collateral felony limitation to prevent the unreasonable expansion of the felony murder doctrine and to preclude the possibility that most second degree murders might be raised to first degree murders simply by charging the initial assaultive act as the predicate felony in a felony murder charge, a result the legislature could not have intended. *See id.*

{11} Specifically, Defendant points to language in both *Varela* and *Campos* stating that one cannot be convicted of felony murder if the underlying felony is aggravated assault or aggravated battery because it would be "impossible to commit second degree murder without committing some form of both aggravated assault and aggravated battery." *Varela,* 1999–NMSC–045, ¶ 17, 128 N.M. 454, 993 P.2d 1280; *Campos,* 1996–NMSC–043, ¶ 23, 122 N.M. 148, 921 P.2d 1266. Defendant argues that this language supports the conclusion that aggravated battery is a lesser included offense of second degree murder for purposes of double jeopardy analysis. Therefore, he argues, under the same analysis, aggravated battery is a

lesser included offense of attempted first degree murder, and his conviction for aggravated battery must be vacated.

{12} We determine that the felony murder cases are inapposite for three reasons. First, although New Mexico courts also employ the strict elements test from double jeopardy cases to determine whether a felony is collateral to second degree murder and thus may serve as a predicate felony for the charge of felony murder, *see Campos,* 1996–NMSC–043, ¶ 22, 122 N.M. 148, 921 P.2d 1266 the purpose behind the test differs in each context. Under collateral felony analysis, the purpose of the strict elements test is to determine whether the circumstances surrounding a second degree murder are made sufficiently grave by virtue of the accompanying felony to justify being elevated to first degree murder status. The courts utilize the strict elements test to limit the circumstances under which second degree murder may be so enhanced, and in that context the test is a means of construing legislative intent. But the question of legislative intent in that circumstance is divining when the legislature intended a second degree murder to be converted to a first degree murder. The central concern in that circumstance is preserving the historic delineation between the two degrees of murder that our courts and legislature have carefully guarded over the years. *See Campos,* 1996–NMSC–043, ¶ 10, 122 N.M. 148, 921 P.2d 1266 (referring to reason for collateral or independent felony requirement); *State v. Ortega,* 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991) (imposing mens rea requirement for felony murder); *State v. Garcia,* 114 N.M. 269, 274, 837 P.2d 862, 867 (1992) (emphasizing distinction between first and second degree murder). We also utilize the strict elements test as a vehicle to determine legislative intent in the double jeopardy/multiple punishment context. But the purpose and goals of the test are significantly different in that context. For double jeopardy, we determine whether the legislature contemplated any restriction on multiple punishments for the same criminal act. In many cases, we conclude that the legislature has not imposed any such limits. By contrast, "in collateral felony analysis, we are not examining whether the defendant may be punished separately for felony murder and for the predicate felony; rather we are determining if the felony murder doctrine applies at all." *Campos,* 1996–NMSC–043, ¶ 22 n. 3., 122 N.M. 148, 921 P.2d 1266 Accordingly, whatever may be said about whether a specific crime is subsumed within second degree murder for purposes of the collateral felony doctrine, it bears little or no systemic relationship to the analysis for double jeopardy/multiple punishment purposes. The two doctrines are distant cousins if anything, and one acts at one's peril in drawing superficial parallels between the two. We observe that this is hardly the first time our courts have segregated the use and application of the strict elements test according to its purpose and discouraged cross-comparison. *See State v. Meadors,* 121 N.M. 38, 41–42, 908 P.2d 731, 734–35 (1995) and the treatment of *Meadors* in *Campos,* 1996–NMSC–043, ¶¶ 20–23, 122 N.M. 148, 921 P.2d 1266.

{13} Second, because the questions to be addressed differ in scope, the test is applied differently in each context. In double jeopardy cases, where an offense is defined by a statute providing several alternatives, "we focus on the legal theory of the case and disregard any inapplicable statutory elements." *State v. Cowden,* 1996–NMCA–051, ¶ 7, 121 N.M. 703, 917 P.2d 972 (Ct.App. 1996); *see also State v. Fuentes,* 119 N.M. 104, 888 P.2d 986 (Ct.App.1994) (discussing how to apply strict elements test in multiple punishment context with an alternative elements of statutory crimes). By contrast, in analyzing cases pursuant to the collateral felony doctrine, courts apply the strict elements test "in the abstract." *Varela,* 1999–NMSC–045, ¶ 17, 128 N.M. 454, 993 P.2d 1280. Thus, in *Varela,* the Court observed that it would be impossible to commit second degree murder without committing some form of both aggravated assault and aggravated battery, even though "some statutory definitions of aggravated assault and aggravated battery may include one or more statutory elements that are not elements of second degree murder." *Id.* In other words, a felonious assault or battery will always be a lesser included offense of second degree murder under collateral felony analysis, but

under double jeopardy/multiple punishment analysis it may or may not be, depending upon the legal theories of the crime actually charged and the elements of the statute advanced at trial.

{14} Finally, the collateral felony test differs from the double jeopardy inquiry in that it considers only whether the predicate felony is a lesser included offense of second degree murder, not first degree murder. *See Campos,* 1996–NMSC–043, ¶ 22 n. 3, 122 N.M. 148, 921 P.2d 1266. In this case, the issue is not whether, in the abstract, aggravated battery is a lesser included offense of second degree murder, but whether aggravated battery with great bodily harm is a lesser included offense of attempted first degree murder. Because the elements of second degree murder and attempted first degree murder are different, the discussion in *Varela* and *Campos* would not be dispositive. Therefore, for all the reasons discussed above, we hold that the felony murder cases are inapplicable in deciding Defendant's double jeopardy claim. Rather, we apply the two-pronged *Swafford* test to the particular facts and legal theories of this case.

{15} Applying *Swafford* to this case, we conclude that Defendant's convictions for both attempted first degree murder and aggravated battery do not violate double jeopardy principles. The State concedes that the underlying conduct was unitary, and we agree. Therefore, we turn to the second part of the *Swafford* analysis and determine whether the legislature intended to create separately punishable offenses for the unitary conduct. *See id.* at 14, 810 P.2d at 1234. We find no provision in the statutes explicitly providing for multiple punishments. We thus apply the strict elements test from *Blockburger* to ascertain legislative intent. In comparing the statutory elements of the offenses, if "one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both." *Id.* at 14, 810 P.2d at 1234.

{16} Defendant was charged as an accessory to attempted first degree murder. Attempted first degree murder requires proof that the defendant (1) committed an overt act in furtherance of murder but failed to effect its commission and (2) intended to commit first degree murder, which is defined as a killing with the deliberate intention to take away the life of the victim. *See* NMSA 1978, § 30–2–1(A) (1994); NMSA 1978, § 30–28–1 (1963); UJI 14–2801 NMRA 2000; UJI 14–201 NMRA 2000. Defendant was also charged as an accessory to aggravated battery inflicting great bodily harm. Aggravated battery with great bodily harm requires proof that (1) the defendant touched or applied force to the victim (2) with the intent to injure the victim in a way that would likely result in death or great bodily harm to the victim, and (3) the victim suffered great bodily harm. *See* NMSA 1978, § 30–3–5(A) and (C) (1969); UJI 14–323 NMRA 2000; *see also State v. Carrasco,* 1997–NMSC–047, ¶¶ 27–28, 124 N.M. 64, 946 P.2d 1075.

{17} A comparison of the elements of both offenses as charged against Defendant reveals that each offense contains at least one element the other does not. Attempted first degree murder requires an overt act in furtherance thereof, but does not require any particular result other than the survival of the victim. By contrast, aggravated battery requires a touching or application of force that results in great bodily harm to the victim. Therefore, attempted first degree murder can be committed in ways that do not necessarily include aggravated battery, and thus the statutory elements for attempted murder do not subsume the elements of aggravated battery. Accordingly, we presume the legislature intended to punish the offenses separately.

{18} This presumption, however, can be rebutted by a showing of contrary legislative intent. *See Cowden,* 1996–NMCA–051, ¶ 11, 121 N.M. 703, 917 P.2d 972. Thus, we consider other indicia of legislative intent, including the language, history, and subject of the statutes; the social evils sought to be addressed by each statute; and the quantum of punishment. *See id.* Construing the social evils addressed by each statute narrowly, *see id.* ¶ 12, we conclude that the statutes in question protect different social interests. The prohibition against attempted first degree murder is directed at protecting a per-

son's life from willful and deliberate destruction by another. The aggravated battery statute is directed at preserving the integrity of a person's body against serious injury. Attempted murder requires the deliberate intent to kill the victim. Aggravated battery requires only the intent to injure the victim. *Cf. id.* (analyzing the different social evils addressed by assault with intent to murder and aggravated battery with a deadly weapon). Moreover, attempted first degree murder is a second degree felony, *see* § 30–28–1(A), whereas aggravated battery is a third degree felony, *see* § 30–3–5(C). After considering the various indicia of legislative intent, we conclude that the legislature intended separate punishments for the offenses.

{19} In arguing that there was no double jeopardy violation, the State points to *State v. Martinez,* 120 N.M. 677, 680, 905 P.2d 715, 718 (1995), in which our Supreme Court discussed, in dicta, the very double jeopardy issue before us in this case: "whether aggravated battery is subsumed within the crime of attempted murder when the conduct is unitary." The *Martinez* court suggested that, under a *Swafford* analysis, aggravated battery is not a lesser included offense of attempted murder, and therefore the defendant could be punished for both offenses despite unitary conduct. *See id.* at 677, 905 P.2d at 718. Even though the analysis in *Martinez* was not essential to the decision of that appeal, it is helpful to our analysis, and we apply it to this case in support of our conclusion. Therefore, we hold that Defendant's convictions for both attempted first degree murder and aggravated battery do not constitute double jeopardy.

2. Merger of Criminal Solicitation and Conspiracy to Commit Murder for Sentencing Purposes

{20} The trial court entered an amended judgment and sentence imposing concurrent sentences for the crimes of criminal solicitation and conspiracy to commit murder. Defendant argues, pursuant to *State v. Pierce,* 110 N.M. 76, 87, 792 P.2d 408, 419 (1990), that the trial court's merger of the two offenses for sentencing purposes violates his right to be protected from double jeopardy.

{21} The State attempts to distinguish *Pierce* and argues that *State v. Shade,* 104 N.M. 710, 724, 726 P.2d 864, 878 (Ct.App. 1986), *overruled on other grounds by State v. Olguin,* 118 N.M. 91, 98, 879 P.2d 92, 99 (Ct.App.1994), directly controls this case. *Shade* expressly acknowledges that the trial court may make a formal adjudication of guilt as to both conspiracy to commit and solicitation of murder, but must merge the offenses for purposes of sentencing under NMSA 1978, § 30–28–3(D) (1979). *See id.* at 724, 726 P.2d at 878. Therefore, the State argues, the convictions and merger of the sentences were proper. We conclude that Defendant's criminal solicitation conviction must be vacated on double jeopardy grounds in light of Section 30–28–3(D) and *Pierce,* which appears to overrule that portion of *Shade* on which the State relies.

{22} Here, the parties do not dispute that the conduct underlying both the solicitation and the conspiracy to commit murder is the same. Therefore, we examine the language of the statutes for an expression of legislative intent to impose multiple punishments for the conduct. *See Swafford,* 112 N.M. at 14, 810 P.2d at 1234. Here, the pertinent statute is Section 30–28–3(D). It provides:

> A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited. When the solicitation constitutes a felony offense other than criminal solicitation, which is related to but separate from the offense solicited, the defendant is guilty of such related felony offense and not of criminal solicitation. Provided, a defendant may be prosecuted for and convicted of both the criminal solicitation as well as any other crime or crimes committed by the defendant or his accomplices or coconspirators, or the crime or crimes committed by the person solicited.

{23} The last sentence of Section 30–28–3(D) expressly authorizes multiple prosecutions and convictions for criminal solicitation "as well as any other crime or crimes committed by the defendant." However, the first two sentences provide that a person

shall *not* be "liable" for and "guilty" of criminal solicitation when the solicitation is necessarily incidental to the commission of the offense solicited or when it constitutes a felony offense other than criminal solicitation which is related to but separate from the offense solicited. *See* § 30–28–3(D).

{24} This case requires us to interpret the seemingly incongruous provisions of Section 30–28–3(D) to determine whether the legislature intended multiple convictions and punishments for the offenses of criminal solicitation and conspiracy to commit murder. *See State v. Ogden,* 118 N.M. 234, 242, 880 P.2d 845, 853 (1994) (stating that, in construing statute, we must determine and effectuate intent of legislature, using plain language of the statute as primary indicator of intent). Criminal statutes defining criminal conduct or providing for more severe punishment should be strictly construed. *See id.* When ambiguity persists regarding the intended scope of a criminal statute, we apply the rule of lenity which requires us to interpret the statute in favor of the defendant. *See id.*

{25} As noted in *Shade,* this Court previously interpreted the provisions of Section 30–28–3(D) in *State v. McCall,* Vol. 22, No. 41, SBB 1091 (Ct.App.1983), *rev'd on other grounds,* 101 N.M. 32, 677 P.2d 1068 (1984), which held that conspiracy and solicitation convictions arising from the same conduct must be merged for purposes of sentencing. *See Shade,* 104 N.M. at 724, 726 P.2d at 878; *see also State v. Pinson,* 119 N.M. 752, 754, 895 P.2d 274, 276 (Ct.App.1995). Because this Court's first opinion in *State v. McCall,* 101 N.M. 616, 686 P.2d 958 (Ct.App.1983), was withdrawn from publication, and the second opinion, filed on September 6, 1983, was not published outside the State Bar Bulletin, *see Shade,* 104 N.M. at 724 n. 2, 726 P.2d at 878 n. 2, we attach the pertinent portions of the second *McCall* opinion as an appendix to this opinion.

{26} In *McCall,* the defendant argued that Section 30–28–3(D) prohibits findings of guilt on charges of both solicitation and conspiracy. After analyzing the subsection sentence by sentence, this Court concluded that, under the second sentence, "if the solicitation constitutes conspiracy, defendant would be guilty of the conspiracy and not of the solicitation." *McCall,* Vol. 22, No. 41, SBB at 1101. However, we went on to conclude that because the last sentence expressly authorizes all offenses covered by the first two sentences to be submitted to the jury, multiple convictions for both conspiracy and solicitation were permissible so long as the defendant was not separately sentenced for both offenses. *See id.* at 1102. In short, the *McCall* court did "not see any barrier to a formal adjudication of guilt on both counts so long as there is no separate sentence on each count." *Id.*

{27} When *McCall* was decided, however, habitual liability was perceived as the only possible adverse collateral consequence of multiple convictions for the same offense where concurrent sentences were imposed and, under the facts of *McCall,* habitual liability was foreclosed by statute. *See id.* The merger doctrine has evolved considerably since *McCall* and *Shade.* In *Pierce,* our Supreme Court held that the imposition of concurrent sentences did not render multiple convictions for the same offense harmless. *See Pierce,* 110 N.M. at 87, 792 P.2d at 419. Quoting from *Ball v. United States,* 470 U.S. 856, 864–65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), the *Pierce* court recognized that, besides habitual liability, other potential adverse collateral consequences flow from allowing a separate conviction to stand, including delay in the defendant's eligibility for parole, the use of the second conviction for impeachment purposes, and general social stigma. *See Pierce,* 110 N.M. at 87, 792 P.2d at 419; *State v. Barr,* 1999–NMCA–081, ¶ 12, 127 N.M. 504, 984 P.2d 185. Therefore, according to *Pierce,* and contrary to *McCall* and *Shade,* double jeopardy resulting from multiple convictions for the same offense is not cured by the merger of the offenses for sentencing purposes.

{28} Construing Section 30–28–3(D) narrowly and reasonably in light of the social evil it seeks to address, *see Ogden,* 118 N.M. at 242–43, 880 P.2d at 853–54, we interpret the last sentence to mean that the charges of both criminal solicitation and conspiracy to commit murder can be prosecuted

and submitted to the jury which can convict Defendant of both charges; however, according to the first two sentences, Defendant will not be held "liable" or "guilty" of criminal solicitation upon formal adjudication or entry of judgment and sentence by the trial court. *See State v. Mondragon,* 107 N.M. 421, 424, 759 P.2d 1003, 1006 (Ct.App.1988) ("Giving conviction its ordinary meaning, ... we find that New Mexico defines conviction as the finding of guilt, even before formal adjudication by the court, much less before sentencing."); *cf. State v. Castillo,* 105 N.M. 623, 624, 735 P.2d 540, 541 (Ct.App.1987) (stating that a conviction, under habitual criminal statute, is simply finding of guilt and does not include imposition of sentence). Therefore, because a separate adjudication of guilt as to the crime of criminal solicitation is not permitted under Section 30–28–3(D) and violates double jeopardy under the approach in *Pierce,* we determine that Defendant's conviction for criminal solicitation must be vacated.

B. Insufficiency of the Evidence to Support More than One Conspiracy Conviction

{29} Initially, Defendant argued that his convictions for both conspiracy to commit murder and conspiracy to commit aggravated battery, based on proof of a single agreement, violated his right to be protected from double jeopardy. This issue was later reframed as one of insufficiency of the evidence to support more than one conspiracy conviction. The State argues that Defendant waived the sufficiency issue by not preserving it in the trial court. However, as Defendant points out, this Court may review the sufficiency of the evidence to support a conviction, even though raised for the first time on appeal, because it involves a question of fundamental error or the fundamental rights of the defendant. *See* Rule 12–216(B)(2) NMRA 2000; *State v. Stein,* 1999–NMCA–065, ¶ 9, 127 N.M. 362, 981 P.2d 295. Therefore, we consider Defendant's claim of insufficiency of the evidence.

{30} Defendant argues that because there was proof of only an agreement to murder Victim, and no separate agreement to inflict great bodily harm on Victim, his conviction for conspiracy to commit aggravated battery must be reversed for insufficiency of the evidence. The State concedes that the evidence supports only a single conspiracy to commit murder. Based on the undisputed evidence, we hold that the evidence is insufficient to support Defendant's conviction for conspiracy to commit aggravated battery, and therefore the conviction must be reversed. *See State v. Tisthammer,* 1998–NMCA 115, ¶ 27, 126 N.M. 52, 966 P.2d 760 ("The number of agreements to break the law is the determining factor in deciding the number of conspiracies."); *cf. State v. Castillo–Sanchez,* 1999–NMCA–085, ¶ 31, 127 N.M. 540, 984 P.2d 787 (reversing conspiracy to commit fraud where there was no evidence that it was distinct from conspiracy to commit murder).

C. Late Disclosure of Witnesses

{31} Defendant argues that the trial court erred in refusing to exclude the testimony of prosecution witnesses Maria Alvarado and Raul Sedillo for late disclosure by the State. Defendant also contends that the trial court's admission of the testimony violated his constitutional right to confront and cross-examine witnesses. However, the State points out, and Defendant does not dispute, that he never objected in the trial court on the grounds that his right to confront and cross-examine witnesses was violated. Instead, Defendant objected solely on the grounds of an alleged discovery violation by the State. Because it appears the constitutional argument was not raised below, we do not address it on appeal. *See* Rule 12–216(A) (stating that ruling of trial court must be fairly invoked to preserve question for review); *State v. Lucero,* 104 N.M. 587, 590–91, 725 P.2d 266, 269–70 (Ct.App.1986) (holding that denial of right to confrontation may not be raised for first time on appeal, and hearsay objections were not sufficiently specific to alert trial court to claimed constitutional error).

{32} We do, however, review the trial court's decision allowing the witnesses to testify for abuse of discretion. *See State v. Woodward,* 121 N.M. 1, 4, 908 P.2d

231, 234 (1995). "'An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case."' *Id* . (quoting *State v. Apodaca*, 118 N.M. 762, 770, 887 P.2d 756, 764 (1994)). "Failure to disclose a witness' identity prior to trial in itself is not grounds for reversal." *State v. Griffin*, 108 N.M. 55, 58, 766 P.2d 315, 318 (Ct.App.1988). Defendant has the burden of showing that he was prejudiced by the untimely disclosure. *See id.* Even assuming a discovery violation by the State, we conclude the trial court did not abuse its discretion in allowing both witnesses to testify at the trial.

{33} Defendant claims that he learned for the first time during voir dire that the State intended to call Ms. Alvarado and Mr. Sedillo as witnesses at the trial. However, it appears that Defendant knew approximately five days before trial that the prosecution intended to call Ms. Alvarado as a witness. At that time Defendant objected and requested that the trial court exclude Ms. Alvarado's testimony or allow defense counsel additional time to prepare for the witness. The trial court denied Defendant's motion, but did order the State to make Ms. Alvarado immediately available to the defense which it did the next morning.

{34} On review, we cannot say that the trial court's ruling was an abuse of discretion. *See* Rule 5–505(B) NMRA 2000 (granting trial court broad discretion to address non-disclosure of evidence); *State v. Deutsch*, 103 N.M. 752, 756, 713 P.2d 1008, 1012 (Ct. App.1985) ("Remedies for violation of discovery rules or orders are discretionary with the trial court."). Ordering the prosecution to make Ms. Alvarado available to the defense several days before the trial was reasonable and well within the trial court's discretion under Rule 5–505(B), which, among other things, permits the trial court to "enter such order as it deems appropriate under the circumstances."

{35} Moreover, as the State points out, Defendant has not met his burden of showing prejudice from the late disclosure. Defendant acknowledges that the State made one witness available prior to trial. He does not indicate why the time provided was insufficient, nor does he adequately explain how his cross-examination of the witnesses could have been improved without the late disclosure. *See Griffin*, 108 N.M. at 58, 766 P.2d at 318. Although Defendant claims that he was prevented from interviewing and obtaining other witnesses, he does not identify any such potential witnesses, nor does he indicate whether their testimony would have contradicted Ms. Alvarado's trial testimony. Moreover, with respect to Mr. Sedillo, it appears that Defendant had some notice of his proposed testimony and did not specifically object to that portion of his testimony which he now claims was prejudicial. *See* Rule 12–216(A). Therefore, because we find no abuse of discretion or prejudice, we affirm the trial court's admission of both witnesses' testimony.

D. Cumulative Error

{36} Lastly, Defendant asserts cumulative error based on all claimed errors. We determine that the cumulative error doctrine does not apply in this case. Cumulative error requires a number of errors, each harmless in itself. *See State v. La Madrid*, 1997–NMCA–057, ¶ 24, 123 N.M. 463, 943 P.2d 110 ("Several errors that would in themselves be harmless may together create reversible error if they deprived the defendant of a fair trial."); *see also State v. Martin*, 101 N.M. 595, 601, 686 P.2d 937, 943 (1984) (stating that cumulative error occurs when "the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial"). In this case, we are reversing, in part, based on two individual errors: insufficiency of the evidence and double jeopardy. We further note that Defendant's general objections to overcharging were addressed by this Court in *State v. Orgain*, 115 N.M. 123, 125–26, 847 P.2d 1377, 1379–80 (Ct.App.1993). In that case, we recognized that reversal is the appropriate relief where the defendant claims overcharging and where we find insufficiency of the evidence or merger as to certain convictions. *See id.* at 126, 847 P.2d at 1380.

III. *CONCLUSION*

{37} For the reasons discussed above, we affirm the convictions for attempted first de-

gree murder, aggravated battery resulting in great bodily harm, and conspiracy to commit murder. We reverse the conviction for conspiracy to commit aggravated battery. We remand to the trial court with instructions to vacate the conviction for criminal solicitation and to resentence Defendant consistently with this opinion.

{38} **IT IS SO ORDERED.**

BOSSON and KENNEDY, JJ., concur.

Appendix

State v. McCall, No. 5,922 (N.M.Ct.App. Sept. 6, 1983), Vol. 22, No. 41 SBB 1091 (Oct. 13, 1983).

MARY C. WALTERS, Chief Judge.

. . . .

C. Solicitation and Conspiracy

Defendant next claims that failure to prove the underlying elements of the crimes of fraud and securities fraud vitiates the crimes of solicitation and conspiracy to commit those crimes. We disagree; one may conspire to commit a crime without any success at all, and still be found guilty. *See State v. Lopez,* 81 N.M. 107, 464 P.2d 23 (Ct.App.1969) [*overruled on other grounds by State v. Ruffins,* 109 N.M. 668, 671, 789 P.2d 616, 619 (1990)]. The offense of conspiracy is complete when the agreement is reached. *State v. Davis,* 92 N.M. 341, 587 P.2d 1352 (Ct.App.1978). It was not defendant's or his principals' fault that no injury or damage was suffered in this case so as to preclude convictions on the fraud and securities fraud counts; the evidence discloses their complete disregard for any detrimental consequences to others as a result of their misrepresentations. They conspired to obtain an advantage by misrepresentation even if others were injured or damaged in the process.

Defendant urges further, however, that Section 30–28–3(D) prohibits findings of guilt on charges of both solicitation and conspiracy. That subsection reads:

> D. A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited. When the solicitation constitutes a felony offense other than criminal solicitation, which is related to but separate from the offense solicited, the defendant is guilty of such related felony offense and not of criminal solicitation. Provided, a defendant may be prosecuted for and convicted of both the criminal solicitation as well as any other crime or crimes committed by the defendant or his accomplices or coconspirators, or the crime or crimes committed by the person solicited.

The above portion of the statute appears designed to handle the theory of merger. *See State v. Sandoval,* 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977).

The first sentence provides for no liability when the solicitation is necessarily incidental to the principal offense solicited. Thus, if the theory of defendant's guilt for the principal offense of fraud was that of accessory liability for fraud, and the trial court's findings sustain that supposition, solicitation would be necessarily incidental to the offense solicited and there could be no liability for solicitation.

The second sentence provides that a person is "not guilty" of solicitation when the solicitation constitutes a felony offense other than criminal solicitation. Consequently, if the solicitation constitutes conspiracy, defendant would be guilty of the conspiracy and not of the solicitation.

The third sentence provides that a person may be prosecuted for and convicted of all offenses in the situations covered by the first two sentences. This must mean that the prosecution need not make a pretrial or preinstruction election; rather, all offenses may be submitted to the jury. The "no liability" or "not guilty" determinations contained in the first two sentences would then be made at the time of entering the judgment and sentence. Thus, one could not be separately sentenced for two offenses if his case fit within the first two sentences of Section 30–28–3D. *See State v. Gallegos,* 92 N.M. 370, 588 P.2d 1045 (Ct.App.1978).

There remains the question whether there may be adjudications of guilt when the offenses charged fall within the first two sen-

tences. *See Gallegos; see also State v. Keener,* 97 N.M. 295, 639 P.2d 582 (Ct.App.1981). The first two sentences of subsection D provide that there may not be; the third sentence indicates that a defendant could be adjudicated guilty if "convicted" is defined as it was in *Keener.* But *Keener* arrived at its holding by an interpretation of the Rules of Evidence. Although such an interpretation is not required here, we do not see any barrier to a formal adjudication of guilt on both counts so long as there is no separate sentence on each count. A possible collateral consequence, *see Gallegos,* in terms of habitual liability if defendant were to later commit a crime, is avoided by the express terms of NMSA 1978, Section 31–18–17 (Repl. Pamp.1981), since the solicitation convictions here are part of the same transactions related to the other offenses charged.

Nonetheless, defendant is entitled to relief under Section 30–28–3(D). He was adjudicated guilty on two counts of solicitation to commit fraud; at the same time, he was adjudicated guilty on the fraud and conspiracy to commit fraud counts. Even though we reverse the fraud convictions for failure of the State to prove and the court to find an essential element of fraud (injury, loss, or damage), defendant could not be liable even as an accomplice for criminal solicitation because of the first sentence of Section 30–28–3(D). But since the solicitation also constituted a conspiracy, not dependent on guilt of fraud, defendant properly could be adjudged guilty of conspiracy and not solicitation under the second sentence of the same subsection.

. . . .

10 P.3d 115

2000-NMSC-025

Crystal KENNEDY and Randy Ford, Plaintiffs–Petitioners,

v.

DEXTER CONSOLIDATED SCHOOLS, Donald Warren, Kent Perry, Sue Rodriguez, and James Derrick, Defendants–Respondents.

No. 24,988.

Supreme Court of New Mexico.

Aug. 14, 2000.

Tandy Hunt, Randy Clark, Stout & Winterbottom, Michael L. Stout, Roswell, for Petitioners.

Simons, Cuddy & Friedman, LLP, Robert D. Castille, Santa Fe, for Respondents.

OPINION

FRANCHINI, Justice.

{1} In March 1992, Dexter High School students Crystal Kennedy and Randy Ford were forced to submit to strip searches, conducted by school officials, in the vain attempt to recover a third student's missing ring. Pursuant to the federal Civil Rights Act of 1871, 42 U.S.C. § 1983 (1998), a jury awarded compensatory damages against the school district and four school officials, punitive damages against three of the officials, and attorney's fees to Plaintiffs. In *Kennedy v. Dexter Consolidated Schools,* 1998–NMCA–051, 124 N.M. 764, 955 P.2d 693, the Court of Appeals affirmed the compensatory damages against the school district, but reversed all judgments against individual Defendants on at least one of the following grounds: (1) two of the school officials were entitled to qualified immunity for the strip-to-undergarments search of Randy Ford because while that search violated his rights, those rights were not "clearly established" in 1992; (2) two Defendants deserved qualified immunity because their participation in the search was insufficient to hold them liable; and (3) the jury was improperly instructed that the pre-search detention of the students constituted a separate cause of action. The Court also held that: (4) punitive damages were inappropriate with regard to two Defendants, and (5) attorney's fees were improperly awarded because Plaintiffs' counsel did not supply adequate evidence of the number of hours worked on the case.

{2} We hold: (1) the strip-to-undergarments search of Randy Ford violated his clearly established rights in 1992, and the school officials therefore are not entitled to qualified immunity for that search; (2) where the jury determined that Defendants proximately caused the violation of the students' constitutional rights, the specific involvement of each Defendant is irrelevant to a qualified immunity inquiry; (3) the jury instruction on the pre-search detention was improper but harmless and did not constitute reversible error; (4) evidence presented at trial supported the jury's award of punitive damages; and (5) under 42 U.S .C. § 1988 (1998), attorney's fees cannot properly be awarded absent specific evidence of hours expended. We reverse in part and affirm in part. We reinstate all trial court judgments except at-

torney's fees, which we remand for further proceedings.

FACTS AND PROCEDURE

{3} In March 1992, a Dexter High School student reported to her teacher, Randy Ragland, that she was missing a diamond ring. Mr. Ragland and some of the fourteen and fifteen-year-old students in the class searched the room for the ring. When the search failed, Mr. Ragland ordered his students to remain in the classroom, even though the class period had ended, while he conferred with Principal Warren and other school officials. Some of the officials who were discussing now to proceed had conducted a similar strip search three years earlier. Superintendent Derrick, Counselor Perry, and Ms. Rodriguez had been involved in the 1989 blanket strip search of thirty-five Dexter junior high students in an attempt to recover a missing eight dollars. In response to public criticism, Superintendent Derrick, who was then Principal at the junior high school, had promised that no such strip searches would occur again.

{4} In this case, by the time the school officials determined their course of action, the students had been detained in the classroom through another entire class period without being permitted to use the bathroom. Finally, the officials began to ask for volunteers. Thinking that she would have the opportunity to go to the bathroom, Crystal raised her hand. She was escorted to the bathroom by Ms. Rodriguez and a female teacher. As Crystal urinated, she was ordered to keep the bathroom stall open and to lift her blouse while Ms. Rodriguez watched. This, presumably, would have allowed Ms. Rodriguez to observe whether Crystal, an honor student with no history of disciplinary problems, was attempting to dispose of the ring while urinating. When the ring was not found, Crystal was told to leave her pants and underwear down while the two officials inspected her. Crystal then pulled up her underpants and sat down in order to remove her socks and shoes. After standing up again, she was ordered to remove her shirt and pull her bra away from her body. With school officials in front of and beside her, she pulled her bra, exposing her breasts.

{5} Randy Ford, who may not have entered the classroom until after the ring was reported missing, underwent a similar search. Once in the bathroom, Principal Warren and another school official watched from behind as Randy urinated. When he finished, Randy was told not to button up his pants. He followed orders to disrobe, and stripped himself to his boxer shorts. At this point, the two school officials demanded that he pull his underpants away from his waist and shake them, thereby freeing any object he may have had hidden there.

{6} Crystal and Randy sued the Dexter School District and six school employees, alleging that the searches violated their Fourth Amendment rights and that they were entitled to damages under Section 1983. At trial, the jury found that school employees, acting pursuant to school policy, had violated the Plaintiffs' constitutional rights and that those actions were the proximate cause of harm to both students. Accordingly, a judgment was entered against the Dexter School District and five of the individual employees who the jury determined were involved in the illegal searches. The jury awarded each Plaintiff $50,000 in compensatory damages against the school and the individual Defendants. In addition, the jury awarded punitive damages of $50,000 against Principal Warren to both students; $25,000 against Counselor Perry to both students; and $25,000 against Ms. Rodriguez to Crystal Kennedy. The trial court entered judgments accordingly. Finally, after conducting a post-trial hearing, the trial court awarded attorney's fees pursuant to Section 1988.

{7} After affirming the trial court's judgment against the Dexter School District, the Court of Appeals reversed the judgments against the individual Defendants on various grounds. First, the Court determined that the strip-to-undergarments search of Randy Ford did not violate clearly established law in 1992. *See Kennedy,* 124 N.M. 764, 955 P.2d 693, 1998–NMCA–051, ¶ 41. Second, the Court analyzed the specific involvement of each Defendant and determined that Counselor Perry's limited participation in the searches afforded him qualified immunity from liability for the searches of both Plain-

tiffs, and that Superintendent Derrick's involvement in the search of Randy Ford was too attenuated to subject him to liability for that search. *See id.* ¶¶ 44–46. Because they were entitled to qualified immunity, neither Superintendent Derrick nor Counselor Perry could be retried for those searches. *See id.* Third, the Court set aside the compensatory and punitive damages awarded against all individual Defendants because a theory of liability from which Defendants were qualifiedly immune had erroneously been included in the jury instructions. *See id.* ¶ 48. The judgments against Defendants Derrick, Perry, Warren and Rodriguez were therefore reversed and remanded. Fourth, the Court overturned the trial court's award of punitive damages against Counselor Perry and Ms. Rodriguez on the grounds of qualified immunity and insufficiency of evidence, respectively. *See id.* ¶¶ 50–53. Finally, the Court overturned the award of attorney's fees and remanded that issue to the district court for further proceedings. *See id.* ¶¶ 65–71.

{8} We granted certiorari to discuss the following issues: (1) whether, for purposes of qualified immunity, the strip-to-undergarments search of Randy Ford violated clearly established law in 1992; (2) whether the lesser degree of participation of Counselor Perry and Superintendent Derrick entitles them to qualified immunity for the searches of all the students; (3) whether the erroneous jury instruction constitutes reversible error; and (4) whether the trial court properly awarded attorney's fees. We reverse the Court of Appeals' rulings as to the first three issues, and affirm and remand to the district court on the fourth. We also deem it necessary in our disposition of the appeal to address the issue of punitive damages due to its relationship with the issue of qualified immunity.

SECTION 1983

{9} Plaintiffs seek damages for the denial of their federal constitutional rights pursuant to Section 1983, which reads, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

State and federal courts share concurrent jurisdiction over Section 1983 claims for the denial of federal constitutional rights. *See Martinez v. California*, 444 U.S. 277, 283 n. 7, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); *Carter v. City of Las Cruces*, 1996–NMCA–047, ¶ 5, 121 N.M. 580, 915 P.2d 336. The Court of Appeals did not, nor do we now, disturb the trial court's finding that the constitutional rights of Crystal and Randy had been violated or its resulting award of compensatory damages against the school district. On appeal, we question only the liability of Defendants in their individual capacities.

QUALIFIED IMMUNITY

{10} All Defendants assert that qualified immunity insulates them from liability. Qualified immunity protects government officials from lawsuits that, although colorable, would inhibit or disrupt governmental operations. *See Harlow v. Fitzgerald*, 457 U.S. 800, 813–16, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). It is generally available to government officials performing discretionary functions, but with one important limitation: immunity will not be granted to officials who should have known that their conduct violated the law. *See id.* In order to determine whether an official should have known that her conduct was unlawful, we question: (1) whether Defendant's alleged conduct violated a constitutional or statutory right, and (2) whether the right was clearly established at the time of the alleged conduct. *See Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); *Romero v. Sanchez*, 119 N.M. 690, 692, 895 P.2d 212, 214 (1995); *Flores v. Danfelser*, 1999–NMCA–091, ¶ 24, 127 N.M. 571, 985 P.2d 173; *see also Harlow*, 457 U.S. at 818, 102 S.Ct. 2727; *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official understands that what he is doing violates

that right." *Anderson,* 483 U.S. at 639, 107 S.Ct. 3034.

Qualified Immunity for the Strip-to-Undergarments Search

{11} The Court of Appeals determined that the school officials' conduct violated the students' general Fourth Amendment right not to be strip searched in school without being individually suspected of wrongdoing. *See Kennedy,* 1998-NMCA-051, ¶ 16, 124 N.M. 764, 955 P.2d 693. We agree. According to the Court, however, whether or not that right was clearly established in 1992 turned on the degree of nudity exhibited by the student. Thus, the Court decided that a strip search that resulted in a student's full nudity violated clearly established law in 1992. *See id.* ¶ 39. A strip search that ended with the otherwise naked student still clinging to his underpants, on the other hand, did not violate that student's clearly established rights. *See id.* ¶ 41. We now reverse the Court of Appeals and hold that, in 1992, the search of Randy Ford violated not only his clearly established right to be free from strip searches conducted without individualized suspicion, but also his clearly established rights to be free from searches that are not justified at their inception and are clearly excessive in scope.

{12} We address this issue with some hesitation because although the Court of Appeals devoted much of its opinion to the conclusion that the unconstitutionality of the s trip-to-undergarments search was not clearly established as of 1992, the Court never applied that conclusion to the case at bar. *See id.* ¶¶ 45-47. Rather, the Court's qualified immunity ruling depended upon factual analyses of the respective involvements of each individual Defendant. *See id.* Nevertheless, because the Court of Appeals' determination that the strip-to-undergarments search of Randy Ford did not violate clearly established law provides a latent source of qualified immunity for these or other school officials, we are compelled to rule upon the issue.

{13} The United States Supreme Court has recognized that an inquiry into whether official conduct violates "clearly established" law "depends substantially upon the level of generality at which the relevant legal rule is to be identified." *Anderson,* 483 U.S. at 639, 107 S.Ct. 3034. The *Anderson* Court pointed out that too general a characterization of the legal rule in question (e .g. "due process of law") would effectively subtract the "clearly established" requirement from the doctrine and eliminate a state official's ability to predict whether or not her conduct might give rise to liability. *See id.* Importantly, the Supreme Court also cautioned against requiring too specific a correlation between the misconduct and the established law, refusing to hold that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* at 640, 107 S.Ct. 3034. Rather, in order for state action to violate clearly established law, the unlawfulness must be apparent "in light of pre-existing law." *Id.*

{14} In questioning whether the nude search of Crystal violated clearly established law, our Court of Appeals relied heavily upon the Tenth Circuit's approval of *Doe v. Renfrow,* 631 F.2d 91 (7th Cir.1980), in *Walters v. Western State Hosp.,* 864 F.2d 695, 699-700 (10th Cir.1988). *Kennedy,* 1998-NMCA-051, ¶¶ 39-40, 124 N.M. 764, 955 P.2d 693. In *Renfrow,* the Seventh Circuit wrote, "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude." *Renfrow,* 631 F.2d at 92-93. Relying on the Tenth Circuit's approval of *Renfrow,* as well as the overall "common sense of the proposition," the Court of Appeals ruled that "at least individualized reasonable suspicion is required before school officials can conduct a nude search for a missing ring." *Kennedy,* 1998-NMCA-051, ¶ 40, 124 N.M. 764, 955 P.2d 693.

{15} We agree with the Court of Appeals' use of common sense for the purposes of determining whether the search of Crystal violated clearly established law. *See DeBoer v. Pennington,* 206 F.3d 857, 864-65 (9th Cir.2000) (holding that a right may be established by common sense as well as by closely analogous case law); *Newell v. Sauser,* 79 F.3d 115, 117 (9th Cir.1996); *Wood v.*

Ostrander, 879 F.2d 583, 590 (9th Cir.1989). The Court of Appeals failed, however, to apply an equal measure of common sense to the search of Randy. The same common sense that compels the conclusion that a school official cannot strip a child naked without having some individualized basis to suspect that child of wrongdoing, also mandates that a child cannot be stripped to his boxer shorts by officials who have no reason to suspect him individually. If, as the United States Supreme Court suggested in *Anderson*, law casts light, then certainly the illegality of a strip-to-undergarments search conducted without individualized suspicion falls squarely within the light cast by law forbidding a strip-to-nude search conducted without individualized suspicion. 483 U.S. at 639, 107 S.Ct. 3034. While forcing the exposure of a child's genitals is more invasive than forcing the exposure of a child's chest, midriff, thighs, and underwear, we cannot accept that this distinction marked the outer boundary of the breadth of clearly established Fourth Amendment rights in 1992. We hold that in light of the Tenth Circuit's affirmation of *Renfrow*, the unlawfulness of conducting a strip-to-undergarments search without individualized suspicion was clearly established in 1992. *See Renfrow*, 631 F.2d at 92–93.

{16} Although we believe that the lack of individualized suspicion was enough to clearly establish the illegality of the search of Randy Ford, Plaintiffs also argue that the Court of Appeals improperly limited itself to this issue, when the lack of individualized suspicion represents only one of the elements contributing to the illegality of the search. We agree. In addition to his right to be free from a strip search conducted without reasonable suspicion, Randy had clearly established rights to be free from searches that are not justified at their inception and from searches that are excessive in scope. *See New Jersey v. T .L.O.*, 469 U.S. 325, 341–42, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). We hold that these clearly established rights were violated by the school officials as well.

{17} It was clearly established in 1992 that in order for a school search to be valid, it must be justified at its inception. *See id.; see also Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (generally). A search is justified at its inception when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *T.L.O.*, 469 U.S. at 342, 105 S.Ct. 733; *see also State v. Michael G.*, 106 N.M. 644, 646, 748 P.2d 17, 19 (Ct.App.1987); *Doe v. State*, 88 N.M. 347, 352, 540 P.2d 827, 832 (Ct.App.1975). In *T.L.O.*, a teacher discovered two girls smoking in the bathroom. 469 U.S. at 328, 105 S.Ct. 733. After one of the girls later denied smoking, the Assistant Principal searched the girl's purse and found cigarettes and rolling papers. *Id.* Associating the rolling papers with marijuana use, the school official continued looking through the purse whereupon he discovered a stash of marijuana and evidence of drug dealing. *Id.* The Supreme Court held that the search of the purse was justified by the fact that the official conducting the search had received a report from a teacher specifically alleging that he had witnessed the student engaging in illicit conduct. *Id.* at 345–46, 105 S.Ct. 733. Similarly, in *Michael G.*, the Court of Appeals based its determination that the search of a student's locker for marijuana was justified by the fact that the information precipitating the search was provided by an eyewitness to the student's attempt to distribute the drug. 106 N.M. at 647, 748 P.2d at 20. In *Doe*, the Court of Appeals upheld the search of student who had been detained and required to turn over a marijuana pipe from which school officials had seen the student smoking. 88 N.M. at 352–53, 540 P.2d at 832–33. Thus, the officials responsible for the searches in *T.L.O.*, *Michael G.*, and *Doe* proceeded not only with individualized suspicion, but with eyewitness information that an infraction had occurred.

{18} Unlike *T.L.O.*, *Michael G.*, and *Doe*, there was no individualized suspicion in the present case. Neither did the school officials rely on the information of an eyewitness. In fact, the decision to strip search all the students in Mr. Ragland's class was not justified by any information other than the circumstance of the missing ring. It had

never been made clear, nor is it presently so, that any crime or violation of school rules had ever occurred. Under these circumstances, the search of Randy Ford violated his clearly established right to be free from searches that are unjustified at their inception.

{19} *T.L.O.* also clearly established that a school search must be permissible in scope. A search is permissible in scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 105 S.Ct. 733, 469 U.S. at 342. Here, requiring a student to strip to his underwear while being watched by two school officials is clearly excessive in light of his youth, the significant possibility that the ring was simply lost and no infraction ever occurred, and the non-dangerousness of the hypothesized infraction. Regardless of the degree of the student's physical exposure, subjecting a student to any strip search under these circumstances constitutes a violation of his clearly established rights.

The Specific Involvement of Counselor Perry and Superintendent Derrick

{20} Notwithstanding the amount of analysis devoted by the Court of Appeals to the question of whether a strip-to-undergarments search conducted without individualized suspicion violates clearly established law, its qualified immunity rulings actually depended on an analysis of the specific involvement of Superintendent Derrick and Counselor Perry in the two searches. According to the Court of Appeals, Counselor Perry was qualifiedly immune from liability for both searches because there was insufficient evidence linking his actions to the searches. *See Kennedy*, 1998–NMCA–051, ¶ 44, 124 N.M. 764, 955 P.2d 693. Superintendent Derrick's failure to train school employees that a strip-to-nude search could not be conducted without individualized reasonable suspicion subjected him to liability for the search of Crystal. *See id.* ¶ 42. He was qualifiedly immune from liability for the search of Randy, however, because Randy was not present when the ring was declared missing, and, the Court concluded, Superintendent Derrick had no duty to train school personnel "not to search patently innocent students." *Id.* ¶ 46. We hold that in immunizing Counselor Perry and Superintendent Derrick for their involvement in the search of Randy Ford, the Court of Appeals improperly reweighed the evidence.

{21} A reviewing court may not reweigh evidence or substitute its judgment for that of the factfinder. *See State v. Clifford*, 117 N.M. 508, 512, 873 P.2d 254, 258 (1994). In the present case, the jury heard evidence suggesting that Counselor Perry conferred with Principal Warren prior to the search, threatened the students with a strip search, and ignored the children's protests. Evidence also suggested that Superintendent Derrick failed to enunciate a policy that would protect the students from searches such as these. Based on this evidence the jury determined that both Counselor Perry and Superintendent Derrick had proximately caused a violation of the Plaintiffs' constitutional rights. The Court of Appeals analyzed the same evidence upon which the jury had relied, but came to opposite conclusions. The Court determined that the evidence against Counselor Perry "is not sufficient to impose liability." *See Kennedy*, 1998–NMCA–051, ¶ 44, 124 N.M. 764, 955 P.2d 693. With regard to Superintendent Derrick, the Court held that he enjoys qualified immunity because he "was out of town at the time of the search and had no direct involvement in it." *See id.* ¶ 46. We hold that in coming to these conclusions, the Court of Appeals improperly re-evaluated the evidence.

{22} Qualified immunity requires an inquiry into the extent to which the right allegedly violated is clearly established in light of pre-existing law. *See Romero*, 119 N.M. at 692, 895 P.2d at 214; *Harlow*, 457 U.S. at 816, 102 S.Ct. 2727; *Anderson*, 483 U.S. at 639, 107 S.Ct. 3034. This inquiry is legal in nature. *See Carrillo v. Rostro*, 114 N.M. 607, 615, 845 P.2d 130, 138 (1992). Here, the Court of Appeals' qualified immunity holding rested upon its own interpretation of the facts, rather than upon legal analysis. Thus, apart from constituting an improper reweigh-

ing of the evidence, the Court's attempt to causally separate Counselor Perry and Superintendent Derrick from the searches has no bearing on the legal question of whether the right allegedly violated is clearly established. We reverse the Court of Appeals' holding that Counselor Perry and Superintendent Derrick are entitled to qualified immunity.

THE JURY INSTRUCTION

{23} The Court of Appeals held that the inclusion of a jury instruction that provided for potential liability for the pre-search detention of the students should have been omitted because it failed to account for Defendants' qualified immunity from that particular theory of liability. *See Kennedy,* 1998–NMCA–051, ¶ 48, 124 N.M. 764, 955 P.2d 693. The relevant instruction reads:

> To establish the claim of violation of Constitutional Rights by the Defendants, [Plaintiff] has the burden of proving at least one of the following contentions:
>
> 1. [Plaintiff] was unreasonably subjected to a search of [her/his] person; and/or
> 2. [Plaintiff] was unreasonably detained and not permitted to go to [his/her] classes or to use the restroom facilities[.]

The Court determined that the detention of the students did not violate clearly established law prior to 1992 and that Defendants were therefore entitled to qualified immunity from the separate theory of liability based on the detention. *See id.* ¶ 49. Relying on *Gerety v. Demers,* 86 N.M. 141, 143, 520 P.2d 869, 871 (1974), the Court ruled that the jury verdict must be set aside because the detention instruction was legally inadequate. *See Kennedy,* 1998–NMCA–051, ¶ 49, 124 N.M. 764, 955 P.2d 693. Accordingly, the judgments against all individual Defendants were reversed and remanded. *See id.*

{24} Plaintiffs claim that the Court of Appeals lacked jurisdiction to rule on the jury instructions because Defendants failed to preserve the issue at trial. *See* Rule 12–216 NMRA 2000. Indeed, Defendants neglected to record an objection to the jury instructions at the time that the instructions were tendered. However, an examination of the record reveals that Defendants did timely alert the trial court to its objection to the jury instructions during a directed verdict colloquy in which they attempted to bar a separate claim for illegal detention. *See* Rule 1–046 NMRA 2000.

{25} The defect in the erroneous instruction lies in the fact that it extracted an illusory detention claim from the overall search claim despite the trial court's express ruling that the detention is "not a separate claim." Notwithstanding the renegade instruction, the remaining instructions required the jury to contemplate only an illegal search claim, not a separate detention claim. The liability instructions, for example, define the elements of an illegal search, without mentioning the elements of an illegal detention. The jury instructions regarding damages provide for compensation for harm resulting from the strip searches of the plaintiffs, but make no mention of potential damages for the detention. Finally, the jury instruction explaining the school officials' legal defense also omits any discussion of the detention:

> Defendants claim that it was reasonable to believe that one of the students in Mr. Ragland's class had just stolen a valuable diamond ring and that the search of this limited number of students was warranted after there had been a thorough search and each student had been privately interviewed.

Error certainly resulted from the fact that subpart two, of Jury Instruction No. 3, fractured the search claim into two separate theories, contradicting these instructions and the court's explicit ruling. The Court of Appeals' decision to treat qualified immunity for the detention separately from qualified immunity for the search perpetuates, rather than corrects, this error. In analyzing whether or not the faulty jury instruction constitutes reversible error, we address the erroneous division of the single claim, rather than the availability of qualified immunity for this falsely individuated claim.

{26} Having decided that the trial court erred in separating the single claim into parts, we must now decide whether that error requires reversal. In civil litigation, error is not grounds for setting aside

a verdict unless it is "inconsistent with substantial justice" or "affects the substantial rights of the parties." *See* Rule 1-061 NMRA 2000; *see also Fahrbach v. Diamond Shamrock, Inc.*, 1996-NMSC-063, 122 N.M. 543, 552, 928 P.2d 269, 278 (concluding that trial court's inclusion of another party was harmless error because it did not prevent substantial justice); *Gallegos v. Citizens Ins. Agency*, 108 N.M. 722, 733, 779 P.2d 99, 110 (1989) (holding erroneous admission of evidence was harmless to the issue of liability for breach of contract, but affected party's substantial rights on the issue of punitive damages); *cf. Mallard v. Zink*, 94 N.M. 94, 95-96, 607 P.2d 632, 633-34 (Ct.App.1979) (holding that erroneous granting of a directed verdict was reversible error). An error is harmless unless the complaining party can show that it created prejudice. *See Brooks v. K-Mart Corp.*, 1998-NMSC-028, ¶¶ 6-7, 125 N.M. 537, 964 P.2d 98 (concluding that a modification of jury instruction on store's duty to visitors adequately instructed jurors); *Jewell v. Seidenberg*, 82 N.M. 120, 124, 477 P.2d 296, 300 (1970) (concluding that failure to give appropriate Uniform Jury Instruction was not reversible error under the circumstances); *Gallegos v. New Mexico Bd. of Educ.*, 1997-NMCA-040, ¶ 37, 123 N.M. 362, 940 P.2d 468 (holding that refusal to tender Uniform Jury Instructions in an action brought under Tort Claims Act was not reversible error); *Thorp v. Cash (In re Ferrill)*, 97 N.M. 383, 392-93, 640 P.2d 489, 498-99 (Ct.App.1981) (refusing to reverse without the probability of a different verdict in the absence of the error). We compel the reversal of errors for which the complaining party provides the slightest evidence of prejudice and resolve all doubt in favor of the complaining party. *See Adams v. United Steelworkers of Am.*, 97 N.M. 369, 374, 640 P.2d 475, 480 (1982) (holding erroneous instructions in a wrongful discharge case was reversible error); *Jewell*, 82 N.M. at 124, 477 P.2d at 300.

{27} We will not set aside a judgment based on mere speculation that an erroneous jury instruction influenced the outcome of the case. *Fahrbach*, 122 N.M. at 552, 928 P.2d at 278. In *Fahrbach*, we held that a jury instruction based on a defense theory that had not been contained in the pretrial order was erroneous, but determined that the plaintiff's failure to offer any evidence that the instruction contributed to the jury's verdict rendered the error harmless. *Id.* at 550-52, 928 P.2d at 276-78. Here, Defendants have failed to provide any evidence of prejudice. Because we determine that Defendants were not prejudiced by the trial court's erroneous jury instruction, we hold that the error was harmless.

{28} The record supports this conclusion. In reviewing claimed error in jury instructions, we consider the instructions as a whole, and uphold them if, as a whole, they fairly represent the law applicable to the issue in question. *See Folz v. State*, 110 N.M. 457, 468, 797 P.2d 246, 257 (1990). When read in concert, the jury instructions confirm that the illegal search was the only theory of liability upon which the jury could base its decision. The jury's verdict also suggests that the jury awarded damages according to the illegal search theory alone. The jury declined to hold Mr. Ragland liable for any damages despite the fact that he conducted the detention. If the jury had recognized the detention of the students as a separate grounds for liability, it could not possibly have held the other officials liable for that detention while exculpating the person who, by all accounts, was directly responsible for it. The jury's exoneration of Mr. Ragland clearly shows that they found no Defendant liable for a separate unconstitutional detention. The error did not affect the jury and was therefore harmless. *Cf. Mallard*, 94 N.M. at 96, 607 P.2d at 634.

{29} The Court of Appeals' discussion of *Gerety v. Demers*, 86 N.M. 141, 520 P.2d 869 (1974), does not exempt Defendants from the burden of proving prejudice. In *Gerety*, we suggested in dicta that we assume prejudice where a jury instruction states a proposition of law not supported by evidence, even though a jury may have actually relied upon a separate, well-supported instruction. 86 N.M. at 143, 520 P.2d at 871. Cases arising since *Gerety* have demonstrated that its impact is limited to the inclusion of a jury instruction that is not supported by

the evidence. *See Scott v. Woods,* 105 N.M. 177, 187, 730 P.2d 480, 490 (Ct.App.1986) (reversing judgment where jury instruction failed to state a claim supported by evidence and the surrounding jury instructions failed to clarify jury's obligation); *Salinas v. John Deere Co.,* 103 N.M. 336, 341, 707 P.2d 27, 32 (Ct.App.1984) (holding that a jury instruction on a theory not supported by the evidence was reversible even though evidence existed to support other theories); *Perfetti v. McGhan Medical,* 99 N.M. 645, 655, 662 P.2d 646, 656 (Ct.App.1983) (concluding that because the jury was instructed on a theory of express warranty that was not supported by evidence, judgment must be reversed and remanded for trial that excluded express warranty theory from instructions). We are unwilling to expand this notion to situations in which, as here, the error stems from the severing of a single claim into two separate theories of liability. To expand *Gerety* to apply to technically erroneous jury instructions would create a virtual per se rule of reversible error for any and all erroneous jury instructions and would threaten to remove jury instructions from the ambit of the doctrine of harmless error. Such a misapplication of *Gerety* would be particularly inappropriate in the present case because the remaining jury instructions cured the error.

{30} In *First National Bank v. Sanchez,* we addressed a jury instruction similar to the one now in question. 112 N.M. 317, 322, 815 P.2d 613, 618 (1991). In *Sanchez,* we determined that although an instruction erroneously implied that duress constituted a separate theory of liability when that theory was actually subsumed by the larger breach of contract claim, the claim of duress was merely "another way to complain of the same act that formed the basis for the claimed breach of contract." *Id.* Although the jury instructions constituted reversible error for other reasons, we refused to reverse on the mistaken duress instruction alone. *See id.* In the present case, the erroneous detention instruction was merely another way to complain of the same act that formed the basis of the claimed illegal search. We are unwilling to contravene *Sanchez,* the New Mexico Rules of Appellate Procedure, and our harmless error jurisprudence, in order to extrapolate *Gerety* to apply to the facts of this case. Because the jury instruction was harmless, and because neither Counselor Perry nor Superintendent Derrick is entitled to qualified immunity, we reinstate the compensatory damages against Counselor Perry, Superintendent Derrick, Principal Warren and Ms. Rodriguez.

PUNITIVE DAMAGES

{31} The jury awarded punitive damages against Counselor Perry, Principal Warren, and Ms. Rodriguez. The Court of Appeals affirmed the award against Principal Warren, but reversed the damages against Counselor Perry and Ms. Rodriguez. *See Kennedy,* 1998–NMCA–051, ¶¶ 50–53, 124 N.M. 764, 955 P.2d 693. The Court held that Counselor Perry's qualified immunity protected him from punitive damages, and that there was not sufficient evidence to support such damages against Ms. Rodriguez. *See id.* Because we hold that Counselor Perry was not qualifiedly immune from liability for either of the strip searches, we now analyze the jury's award of punitive damages against him and against Ms. Rodriguez as well.

{32} At trial, the jury was instructed that it could award punitive damages for "willful, wanton, or reckless" conduct. This instruction represents an adequate statement of the current law regarding punitive damages for Section 1983 violations. *See Smith v. Wade,* 461 U.S. 30, 38–48, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (discussing the availability of punitive damages when the defendant's conduct involves reckless or callous indifference to the plaintiff's federally protected rights, as well as when it is motivated by evil motive or intent). The Court recognized "reckless indifference to whether [Defendant's] conduct violated the constitutional rights of the victim" as a sufficient culpable mental state to support punitive damages against Principal Warren. *Kennedy,* 1998–NMCA–051, ¶ 54, 124 N.M. 764, 955 P.2d 693. Recklessness requires indifference to the rights of the victim, rather than knowledge that the conduct will violate those rights. *See Torres v. El Paso Elec. Co.,* 1999–NMSC–029, ¶ 28, 127

N.M. 729, 987 P.2d 386 (stating "recklessness in the context of punitive damages refers to 'the intentional doing of an act with utter indifference to the consequences'" (quoting UJI 13–1827 NMRA 2000)). With regard to Ms. Rodriguez, however, the Court abandoned recklessness as a sufficiently culpable mental state to warrant punitive damages, and exempted her from punitive damages because "there is no evidence that she knew the search was unlawful, much less unconstitutional." *Kennedy,* 1998–NMCA–051, ¶ 53, 124 N.M. 764, 955 P.2d 693. Contrary to the Court's holding, the fact that Ms. Rodriguez may not have known that the search was unconstitutional does not spare her from punitive damages if she was indifferent to that possibility.

{33} In determining whether punitive damages are appropriate in the present case, we must question whether there existed sufficient evidence to support a jury's finding of willfulness, wantonness, or recklessness toward the rights of Plaintiffs on the part of Counselor Perry and Ms. Rodriguez. *See Sunwest Bank v. Daskalos,* 120 N.M. 637, 639, 904 P.2d 1062, 1064 (Ct.App. 1995). We hold that such evidence did exist. Although Counselor Perry did not physically administer the searches, there was testimony that he participated in the decision to execute the search, detained the students in the classroom while threatening them with the possibility of a strip search, and ignored the protests of the students. Ms. Rodriguez administered a particularly humiliating search to Crystal, requiring not only that she strip nude, but that she urinate while Ms. Rodriguez observed her. The fact that Ms. Rodriguez was the secretary of Principal Warren, and was acting at his behest does not excuse her behavior. Counselor Perry's and Ms. Rodriguez' involvement in the 1989 search provides further evidence of a culpable mental state. We hold that there was sufficient evidence presented at trial to support the jury's conclusion that Counselor Perry and Ms. Rodriguez acted intentionally with "utter indifference" toward the rights of the students. We reverse the Court of Appeals' ruling with regard to Counselor Perry and Ms. Rodriguez and reinstate the jury's awards of punitive damages against them.

ATTORNEY'S FEES

{34} Finally, we address the Court of Appeals' reversal of the trial court's award of attorney's fees under Section 1988. The Court of Appeals held that in order to calculate attorney's fees under Section 1988, the district court was required to use the "lodestar" method of multiplying the hours Plaintiffs' counsel reasonably spent on the litigation by a reasonable hourly rate. *See Kennedy,* 1998–NMCA–051, ¶ 66, 124 N.M. 764, 955 P.2d 693. The Court also held that the failure of Plaintiffs' counsel to supply the district court with records disallowed an adequate determination of a lodestar figure. We affirm.

{35} At least within the Tenth Circuit, Section 1988 attorney's fees must be calculated according to the lodestar method. *See United Phosphorus Ltd. v. Midland Fumigant, Inc.,* 205 F.3d 1219, 1233 (10th Cir. 2000); *Case v. Unified Sch. Dist. No. 233,* 157 F.3d 1243, 1249 (10th Cir.1998); *Jane L. v. Bangerter,* 61 F.3d 1505, 1509 (10th Cir. 1995); *see also Hensley v. Eckerhart,* 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The party seeking fees pursuant to Section 1988 has the burden of proving the number of hours spent on the case by means of "meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks." *United Phosphorus,* 205 F.3d at 1233 (quoting *Case,* 157 F.3d at 1250). When a court is dissatisfied with the detail or contemporaneousness of such records, it may reduce fees accordingly. *Id.*

{36} In the present case, neither of Plaintiffs' attorneys provided the trial court with any time sheet or other time record. The attorneys instead submitted separate affidavits asserting that they had worked approximately 400 and 600 hours respectively, but failing to specify how those hours had been spent. The Court of Appeals held that this lack of specificity prevented the defense from contesting Plaintiffs' attorneys' claims and failed to provide the de-

tailed evidence required to support a lodestar calculation. We agree. We hold that a lodestar figure cannot fairly or properly be ascertained unless the prevailing attorney supplies at least some evidence detailing the number of hours spent engaged in specific activities relating to the preparation and litigation of a Section 1983 claim. We also note that where such records have not been kept contemporaneously with the lawsuit, the use of reconstructed time records will not bar a claim for Section 1988 attorney's fees. *See Carter v. Sedgwick County, Kan.*, 929 F.2d 1501, 1506 (10th Cir.1991).

{37} Plaintiffs urge that a federal statute, silent on the means of determining what fees are reasonable, does not preempt state law that describes such means without contradicting the federal statute or underlying policy. Such an assertion has limited applicability to the facts of this case. First, we have been unable to find any state law indicating a New Mexican proclivity toward awarding attorney's fees under Section 1988 in any way other than in keeping with the federal method. While it is true, as Plaintiffs suggest, that we did not require time records for attorney's fees in *Lucero v. Aladdin Beauty Colleges, Inc.*, 117 N.M. 269, 271, 871 P.2d 365, 367 (1994), those fees were awarded pursuant to our state's Human Rights Act, rather than federal statute, and, more importantly, were tabulated according to a method other than the federally mandated lodestar method. There exists no state law on Section 1988 attorney's fees that might, as Plaintiffs suggest, resist preemption. Second, while it is true that Section 1988 is silent as to the means of determining reasonable attorney's fees, the language of the statute itself does not exhaust the law on the matter. As observed above, various Tenth Circuit decisions clearly establish the proposition that at least some record of expended hours is required to recover attorney's fees. We see no reason to stray from these cases. We remand this case to the trial court for a more informed determination of attorney's fees.

CONCLUSION

{38} The Court of Appeals' rulings on damages are reversed for the reasons set out herein. All jury awards for compensatory and punitive damages against Superintendent Derrick, Counselor Perry, Ms. Rodriguez, and Principal Warren are reinstated. The case is remanded for a hearing to determine attorney's fees, in which counsel for Plaintiffs must produce detailed time records.

{39} **IT IS SO ORDERED.**

MINZNER, C.J., BACA, SERNA, and MAES, JJ., concur.

10 P.3d 127

2000-NMSC-026

STATE of New Mexico, Plaintiff–Appellee,

v.

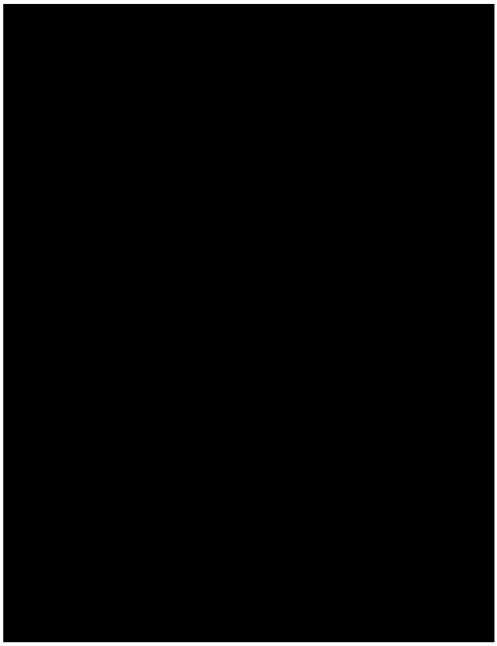
Shawn JACOBS, Defendant–Appellant.

No. 24,062.

Supreme Court of New Mexico.

Aug. 16, 2000.

Rehearing Denied Sept. 7, 2000.



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Phyllis H. Subin, Chief Public Defender, Christopher Bulman, Appellate Defender, Karl Erich Martell, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

Patricia A. Madrid, Attorney General, Steven S Suttle, Assistant Attorney General, Albuquerque, NM, for Appellee.

OPINION

FRANCHINI, Justice.

{1} Defendant Shawn Jacobs appeals his conviction and death sentence for the murder of an eighteen-year-old woman. After the guilt phase of a jury trial, Defendant was convicted of first degree murder (willful and deliberate), felony murder (first degree murder), kidnapping (great bodily harm), attempted criminal sexual penetration (second degree), armed robbery, tampering with evidence (two counts), unlawful taking of a motor vehicle, possession of a stolen vehicle, felon in possession of a firearm, escape from jail, and escape from a peace officer. During the sentencing phase of the trial, the jury found the aggravating circumstance of murder in the commission of a kidnapping and imposed the death penalty under the Capital Felony Sentencing Act (CFSA), NMSA 1978 §§ 31–20A–1 to –6 (1979, as amended through 1991). Defendant also was sentenced to a term of imprisonment of sixty-nine years and six months based on the other convictions and on enhanced penalties as an habitual offender and for the use of a firearm. *See* NMSA 1978, § 31–18–17 (1993); NMSA 1978, § 31–18–16 (1977).

{2} On appeal, Defendant claims error occurred in both the guilt and penalty phases of his trial. Regarding the guilt phase of the trial, he asserts that (1) the joinder of the escape charge was improper; (2) the trial court improperly excused potential jurors during voir dire; (3) the trial court improperly admitted evidence; (4) there was insufficient evidence of a kidnapping independent of the attempted criminal sexual penetration; (5) the police officers who conducted the criminal investigation lacked jurisdiction; and (6) he was wrongfully convicted of being a felon in possession of a firearm. For the sentencing phase of the trial, Defendant contests (1) the jury instructions given in the sentencing phase; (2) the sufficiency of the evidence for the aggravating circumstance of murder during the commission of a kidnapping; (3) the introduction of victim impact testimony; and (4) the constitutionality and implementation of the CFSA.

{3} We affirm Defendant's convictions on all counts. However, because of error in the penalty phase of the trial, we reverse and remand for a new sentencing proceeding on the capital penalty charges.

FACTUAL AND PROCEDURAL BACKGROUND

{4} On the evening of October 24, 1994, the eighteen-year-old victim was discovered in an arroyo near the Four Hills area of Albuquerque by a man who was riding his bike home from his job at the Sandia Laboratories. He first noticed an abandoned Jeep Cherokee that appeared to be stuck in a ditch. As he traveled farther along the trail, he found a woman's body lying face down alongside the path. She had been shot once in the back of the head and was wearing only her underpants, socks, and shoes. After checking for a pulse and finding none, the

man called the Albuquerque Police Department (APD).

{5} The victim had spent the day with two high-school friends, K.P. and J.G. The three friends had cut their afternoon classes and taken a bus to the Coronado Mall. At the mall, they purchased one black tee shirt with an eight-ball design on the front and the words "Smile Now, Cry Later" on the back; they stole two identical tee shirts so that all three would have the same shirt to wear to school the next day. After they left the mall, they were waiting near a bus stop when Defendant, who was driving a new green Jeep Cherokee, offered them a ride. K.P. and J.G. spoke to Defendant and accepted the offer. K.P. rode in the right front passenger seat and J.G. and the victim rode in the back seat. As he drove them to their homes near the intersection of Indian School and Juan Tabo, Defendant told them about an incident that had occurred when he was a student at Highland High School in which he claimed to have been expelled for pulling a gun on a group of athletes. Defendant dropped off K.P. at her home and J.G. next at hers. He and the victim then drove off; no one saw the victim again until her body was found.

{6} The victim's body was taken to the Office of Medical Examiner (OMI) for an autopsy. At trial, the pathologist who performed the autopsy testified that the cause of death was a contact gunshot wound to the back of the head resulting in an excessive amount of sooty black granular residue on the skin and burning of the hair and skin. He also found evidence of blunt trauma: the victim had been struck near the right eye and inside the right ear with a blunt object and there were skin abrasions between the ear and eye, on her right upper arm and shoulder, her back, and her right knee. The autopsy also revealed the presence of two vaginal tears consistent with forced sexual penetration. Gravel and sand were found in the back of the victim's underpants; no semen was found.

{7} A forensic scientist from the APD Crime Lab testified as an expert witness about the results of the DNA testing he had conducted on the blood and tissue found on the barrel of the black powder handgun seized in the search of Defendant's residence. He had conducted tests using blood samples from four subjects: the victim, Defendant, and two witnesses in the case—a boarder in Defendant's home and a friend of Defendant's. The results excluded three of the four individuals as the source of the blood on the gun barrel; the victim could not be excluded. There was testimony that the probability of another Hispanic individual matching the DNA profile of the victim's blood would be approximately 1 in 2000. A firearms expert from the APD Crime Lab testified that he had conducted tests with the black powder handgun found in Defendant's residence. He determined that the caliber of the projectile recovered from the victim's brain and the markings on it were consistent with having been fired from Defendant's gun.

{8} The jury also heard testimony that the Jeep Cherokee found in the arroyo had been stolen from Quality Jeep Eagle sometime over the weekend before the victim's death on Monday, October 24; Defendant had been seen driving a green Jeep between October 22 and October 24; friends had seen him wearing the black eight-ball tee shirt and the Dallas Cowboy jacket after October 24; Defendant had given to a friend the crucifix and chain which the victim had been wearing on the day of her death; and he offered to sell the black powder handgun in question to a friend.

{9} At the conclusion of the guilt phase of his trial, Defendant was convicted of all charges. In the sentencing phase, the jury found the aggravating circumstances of murder in the commission of a kidnapping, determined that the mitigating circumstances did not outweigh the aggravating circumstances, and sentenced Defendant to death.

GUILT PHASE ISSUES

I. Joinder of the Escape Charge.

{10} While awaiting trial on the first degree murder and related charges, Defendant escaped from custody. In response to a medical complaint, Defendant had been taken from the Bernalillo County Detention Center (BCDC) to the emergency room at the Uni-

versity of New Mexico Hospital. While there, Defendant undid the leg cuffs holding him to a hospital bed and fled from the BCDC corrections officer accompanying him. He was subsequently overtaken by the corrections officer, an Albuquerque police officer, and a hospital security officer.

{11} The incident gave rise to an additional indictment charging Defendant with escape from jail under NMSA 1978, § 30-22-8 (1963), or, in the alternative, with escape from a peace officer under NMSA 1978, § 30-22-10 (1963). The State subsequently filed a motion to consolidate the new charges with the original offenses. In its motion, the State argued that the escape attempt would be admissible in the murder trial to show consciousness of guilt and that joinder would promote judicial economy by avoiding two jury trials. Defendant opposed consolidation, arguing that the jury might give the escape evidence improper weight during the penalty phase. After a hearing on the motion, the trial court consolidated the two cases for trial, finding that the escape evidence would be cross-admissible in separate trials, the claim of the possible effect on the jury was speculative, and that any prejudicial effect of the evidence did not substantially outweigh its probative value. *See* Rule 11-403 NMRA 2000. In response to Defendant's concerns, however, the trial court gave a limiting instruction during the sentencing hearing advising the jury not to consider the escape evidence for any purpose during the penalty phase.

{12} Defendant first argues that joinder of the escape charges was improper because it did not meet the criteria for joinder stated in Rule 5-203(A) NMRA 2000. The State argues that this issue was not preserved because at trial Defendant only argued that the jury would misuse the evidence of escape, not that joinder was improper under the rule. We agree that this issue was not preserved. *See* Rule 12-216(A) NMRA 2000. In order to preserve an issue for appeal, it is essential that a party must make a timely objection that specifically apprises the trial court of the claimed error and invokes an intelligent ruling thereon. *State v. Varela*, 1999-NMSC-045, ¶¶ 25-26, 128 N.M. 454, 993 P.2d 1280; *State v. Gomez*, 1997-NMSC-006, ¶ 29, 122 N.M. 777, 932 P.2d 1. This Court held in *State v. Clark*, 108 N.M. 288, 297, 772 P.2d 322, 331 (1989), that, absent fundamental error, even in a death penalty case issues must be properly preserved.

{13} Defendant contends that the escape evidence was prejudicial because the same jury that heard the escape evidence decided whether he should receive the death penalty. The State responds that the jury was given a limiting instruction that it was not to consider Defendant's escape when deliberating on whether to impose the death penalty. Defendant replies that the limiting instruction was insufficient to remove the unfair prejudice and, further, that it conflicted with another jury instruction which instructed the jury that "[i]n deciding the sentence you must consider all the evidence admitted during the trial." *See* UJI 14-7012 NMRA 2000.

{14} On appeal, this Court's review is limited to the question of whether the joinder created "an appreciable risk that the jury convicted for illegitimate reasons." *State v. Duffy*, 1998-NMSC-014, ¶ 42, 126 N.M. 132, 967 P.2d 807. The trial court has broad discretion in resolving the question and will not be reversed on appeal absent a showing of abuse of that discretion. *Id.* To demonstrate error, a defendant must show that his right to a fair trial was prejudiced by the joinder. *Id.*

{15} A defendant might be prejudiced if the joinder of offenses permitted the jury to hear testimony that would have been otherwise inadmissible in separate trials. *See State v. Gallegos*, 109 N.M. 55, 64, 781 P.2d 783, 792 (Ct.App.1989). In this case, however, as Defendant conceded in his pretrial motion and upon appeal, evidence of the escape, even if uncharged, would have been admissible to show consciousness of guilt. This Court has previously recognized the relevance and admissibility of evidence of flight as tending to show a consciousness of guilt. *State v. Trujillo*, 95 N.M. 535, 541, 624 P.2d 44, 50 (1981) (holding admissible evidence of planned flight and an escape from jail); *State v. Smith*, 89 N.M. 777, 783, 558

P.2d 46, 52 (Ct.App.) (holding that evidence of flight, even an aborted plan for flight, tends to show consciousness of guilt), *rev'd on other grounds, Smith v. State,* 89 N.M. 770, 558 P.2d 39 (1976). Cross-admissibility of evidence dispels any inference of prejudice from the jury having heard improper evidence. *See State v. Griffin,* 116 N.M. 689, 693, 866 P.2d 1156, 1160 (1993). We conclude that the trial court, having determined properly that the evidence would be cross-admissible in separate trials and having weighed the probative value against the danger of unfair prejudice, did not abuse its discretion in joining the charges.

{16} The escape evidence was properly before the jury during the sentencing phase. *See* § 31–20A–1(C) (allowing all evidence admitted at trial to be considered); *cf. Clark v. Tansy,* 118 N.M. 486, 492, 882 P.2d 527, 533 (1994) (holding future dangerousness appropriate for consideration by capital sentencing juries as long as the defendant is given an opportunity for rebuttal). Since the jury could properly have considered the escape evidence, we need not address the issue of whether the instruction not to consider the evidence of escape impermissibly conflicted with the instruction to consider all evidence admitted during trial.

{17} Defendant also argues for the adoption of a per se reversible error standard in the case of misjoinder. As discussed, we find no misjoinder in this case. Moreover, this Court has previously rejected the adoption of a per se rule requiring reversal. *See State v. Gonzales,* 113 N.M. 221, 230, 824 P.2d 1023, 1032 (1992) (declining to adopt a per se rule requiring severance and holding that a defendant must show actual prejudice from joinder of charges). Defendant's arguments do not persuade us to change that position.

II. Voir Dire of Jury Panel.

{18} During the jury selection process, the trial court conducted individual voir dire. In the course of that process, four potential jurors stated that their religious beliefs would not permit them to impose the death penalty, regardless of the circumstances. They were each excused for cause by the trial court. Defendant asserts that this was error, claiming that the four prospective jurors were struck because of their religious beliefs and that this exclusion was improper under the United States and New Mexico constitutions. *See* U.S. Const. amends. VI, N.M. Const. art. II, §§ 5, 11, 12, 14, 18; N.M. Const. art. VII, § 3. He claims that his constitutional right to an impartial jury and the constitutional rights of the jurors to serve on a jury were violated.

{19} The decision whether to excuse prospective jurors for cause rests within the sound discretion of the trial court and is reviewed under an abuse of discretion standard. *State v. Hernandez,* 115 N.M. 6, 22, 846 P.2d 312, 328 (1993) (stating that deference is given to the trial court's decision, because that court is in the best position to assess prospective jurors). This Court has previously considered the issue of whether individuals opposed to the death penalty on the basis of their religious beliefs may be excused for cause from capital penalty cases. *State v. Allen,* 2000–NMSC–002, ¶¶ 82–86, 128 N.M. 482, 994 P.2d 728; *State v. Clark,* 1999–NMSC–035, ¶¶ 11–17, 128 N.M. 119, 990 P.2d 793; *State v. Simonson,* 100 N.M. 297, 300, 669 P.2d 1092, 1095 (1983); *State v. Hutchinson,* 99 N.M. 616, 620, 661 P.2d 1315, 1319 (1983). We rejected similar arguments in those cases and are not persuaded by Defendant's argument to change our position.

{20} During voir dire, the four jurors had responded that they could not vote to impose the death penalty regardless of the evidence presented at trial or the trial court's instruction on the law. We conclude that the trial court properly excluded four jurors who could not follow either the jury instructions or their oath; the jurors were not excused on the basis of their religious principles. *See Allen,* 2000–NMSC–002, ¶ 86, 128 N.M. 482, 994 P.2d 728 (holding that trial court did not err in excusing jurors for cause when they would automatically oppose the death penalty); *Clark,* 1999–NMSC–035, ¶ 16, 128 N.M. 119, 990 P.2d 793 (holding that trial court properly removed jurors who could not "view the proceedings impartially and perform their duties in accordance with the juror's oath").

III. Sufficiency of the Evidence for the Kidnapping Charge.

{21} At trial, Defendant was convicted of kidnapping with great bodily harm under NMSA 1978, § 30–4–1 (1973, prior to 1995 amendment). On appeal, Defendant contends that there was insufficient evidence to support his conviction for kidnapping, arguing that there was no evidence of an intentional abduction separate from that necessarily involved in the attempted criminal sexual penetration and murder.

{22} In reviewing the sufficiency of the evidence in a criminal case, we must determine whether substantial evidence, either direct or circumstantial, exists to support a verdict of guilty beyond a reasonable doubt for every element essential to a conviction. *See State v. Rojo*, 1999–NMSC–001, ¶ 19, 126 N.M. 438, 971 P.2d 829. The evidence is reviewed in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences to uphold the conviction and disregarding all evidence and inferences to the contrary to ensure that a rational jury could have found each element of the crime established beyond a reasonable doubt. *Id.*

{23} During the guilt phase of the trial, the court instructed the jury on the elements of kidnapping under UJI 14–404 (withdrawn in 1997) in the following manner:

1. The defendant took or restrained or confined [the victim] by force or deception;
2. The defendant intended to hold [the victim] for service against her will;
3. The defendant inflicted great bodily harm on [the victim];
4. This happened in New Mexico on or about the 24th day of October, 1994.

{24} As the Court of Appeals explained in *State v. Pisio*, 119 N.M. 252, 260, 889 P.2d 860, 868 (Ct.App.1994), the key to finding the restraint element in kidnapping, separate from that involved in criminal sexual penetration, is to determine the point at which the physical association between the defendant and the victim was no longer voluntary. A kidnapping can occur when an association begins voluntarily but the defendant's actual purpose is other than the reason the victim voluntarily associated with the defendant. *Id.* This Court identified distinct and separate conduct in *State v. McGuire*, 110 N.M. 304, 309, 795 P.2d 996, 1001 (1990), when the defendant abducted the victim while stealing her car, raped her, and then later forced her into the woods and murdered her. The Court found that once the defendant had confined the victim with the requisite intent, "he had committed the crime of kidnapping, although the kidnapping continued throughout the course of defendant's other crimes and until the time of the victim's death." *Id.* Under the kidnapping statute in effect at the time, the victim could be confined by force or deception. Section 30–4–1 (1973, prior to 1995 amendment).

{25} In this case, there were several points at which the jury might have found a kidnapping to have occurred. The jury could have found that Defendant kidnapped the victim by deception when he initially offered her a ride home from the mall with another intent in mind. *See McGuire*, 110 N.M. at 308–09, 795 P.2d at 1000–01 (determining that evidence of later sexual assault may be used by jury to infer that defendant had necessary criminal intent at time victim was first restrained); *see also State v. Garcia*, 100 N.M. 120, 124, 666 P.2d 1267, 1271 (Ct.App.1983) (observing that "deception" under the kidnapping statute includes acts that are intended to deceive a victim or omissions that conceal the defendant's purpose). The jury could have found that she was restrained by deception when Defendant changed the intended destination of the ride from her home to the remote location in the Four Hills area of Albuquerque. *See State v. Laguna*, 1999–NMCA–152, ¶ 13, 128 N.M. 345, 992 P.2d 896 (determining that deception occurred when defendant offered ride to victim, concealing intent of making sexual advances toward child), *cert. denied*, No. 26,017 (1999). The jury could also have determined that a kidnapping occurred when the victim made the final walk of 100 yards from the car to her death in the arroyo. *See McGuire*, 110 N.M. at 309, 795 P.2d at 1001 (kidnapping occurred during the course of the defendant's other crimes and

continued until the victim's death). On the facts in this record, we hold that the crime of kidnapping was complete before either the act of attempted criminal sexual penetration or the act of murder began. *See State v. Foster*, 1999-NMSC-007, ¶¶ 33-34, 126 N.M. 646, 974 P.2d 140 (holding that conduct for kidnapping and murder was distinct when the crime of aggravated kidnapping was completed before the act of murder).

{26} We do not agree with Defendant's assertion that the restraint used to kidnap the victim was necessarily the same as that used for the attempted criminal sexual penetration and the murder; Defendant's claim does not present a reasonable view of the evidence. Applying the kidnapping statute in effect to the facts of this case, we determine that there was considerable evidence presented from which the jury could conclude that Defendant took the victim with the intent of holding her for service against her will and then killed her. A rational jury could also have found that the kidnapping, attempted criminal sexual penetration, and the murder were separate acts constituting separate crimes. We conclude that there was sufficient evidence of an independent factual basis for each guilty verdict on the charges of kidnapping, attempted criminal sexual penetration, and murder. Defendant does not contest the sufficiency of the evidence for the murder or attempted criminal sexual penetration charges.

IV. Eyewitness Identification of Defendant.

{27} Defendant argues that the trial court erred when it denied his pretrial motion to suppress both the out-of-court and in-court identifications of the two eyewitnesses. The witnesses were the two friends, J.G. and K.P., who had been with the victim on the day of her death. Defendant appears to argue that their in-court identifications of him were tainted by their having seen a photograph of him on television. He asserts that the denial of the motion to suppress violated his right to due process.

{28} On October 26, 1994, the day after the victim's body was found, J.G. and K.P. met with a police artist to develop a composite sketch of the man who had given the three of them a ride from the mall. In describing Defendant to the artist, both witnesses noted his distinctive ears which they described as being unusually large and folded over. The sketch was then distributed to the media and others to develop leads to the man's identity. In response, an employee of the state penitentiary called to identify the man in the sketch as Shawn Jacobs, an inmate who had been released from prison on October 21, 1994, and gave the police Defendant's address. Additionally, on October 27, 28, and 31, each witness was individually shown three photo arrays. Neither witness could positively identify Defendant from the photo arrays, but one did note at the time that one photograph in the second array resembled the person who had given them the ride. The photograph she singled out was one of Defendant taken in 1992.

{29} On the evening of October 31, the two friends were at the home of K.P.'s grandfather watching the evening news when a photograph of Defendant's face was shown. Both women began screaming the moment they saw the photograph and continued until K.P.'s mother told them to be quiet so that they could hear what was being said on the television. J.G. and K.P. explained that the man in the photograph was the man who had given them a ride on October 24. K.P. called the police to identify the televised photograph as being that of Defendant.

{30} In reviewing the admissibility of an out-of-court photographic identification, we determine whether the procedure used was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification and whether, under the totality of the circumstances, the identification was still reliable. *State v. Stampley*, 1999-NMSC-027, ¶ 14, 127 N.M. 426, 982 P.2d 477. The relevant factors to be considered in reviewing the totality of the circumstances include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention at the time of the crime, the accuracy of the witness's earlier descriptions of the criminal, the certainty of the witness about the identification, and the time elapsed between the

crime and the identification confrontation. *State v. Cheadle,* 101 N.M. 282, 284, 681 P.2d 708, 710 (1983) (relying upon *Manson v. Brathwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)). In determining whether there has been a violation of due process in the conduct of a confrontation, we look to the totality of the circumstances. *State v. Torres,* 81 N.M. 521, 525, 469 P.2d 166, 170 (Ct.App.1970). An in-court identification which is independent of, and not tainted by, the out-of-court identification is admissible. *Id.*

{31} Both witnesses testified at the suppression hearing and at trial that they immediately recognized the televised photograph as being that of the man who had given them a ride from the mall and began screaming in response to seeing him. They each testified that they could not hear what was being said on the broadcast because of their screaming. They also were positive in their in-court identifications of Defendant at trial. Previously J.G. had identified Defendant at the preliminary and suppression hearings and had testified that her identification was based on recognizing him and not because she had seen the photograph on television. Based on the record before us, the trial court could properly have determined that the chance viewing of Defendant's photograph on television was not so impermissibly suggestive as to have tainted the witnesses' later in-court identifications. *See Cheadle,* 101 N.M. at 284–86, 681 P.2d at 710–12 (holding that identification procedure was not impermissibly suggestive even though the witnesses had seen the defendant on television before making out-of-court and in-court identifications).

{32} In addition, a review of the totality of the circumstances supports the reliability of the eyewitness identification. The three women encountered Defendant shortly after 5:00 p.m. when it was still daylight. Both eyewitnesses spoke to him before accepting the ride and noticed the kind of car he was driving. The ride from the mall to the women's homes took about fifteen minutes, during which time both women had ample time to talk to him and to observe what he looked like and what he was wearing. During the ride from the mall, they had commented among themselves about Defendant's ears. The composite sketch prepared by the police artist was accurate enough for an employee of the state penitentiary to identify correctly the man in the sketch as Defendant. The witnesses readily identified Defendant from a current photograph when they saw it on the television broadcast just seven days after their encounter with him. Neither witness displayed any doubt in their in-court identifications. Although the eyewitnesses were initially unable to identify Defendant from any of the photo arrays, they did note in their testimony that his appearance was different in the earlier photographs because he then had a mustache, beard, and longer hair, and his ears did not show in those photographs. They also testified that they had wanted to be certain before singling out any one photograph.

V. Search of Defendant's Residence.

{33} Defendant argues that the trial court erred in denying his pretrial motion to suppress physical evidence taken from his father's house under a search warrant, in particular the Dallas Cowboys jacket belonging to the victim. The following items were named in the warrant and were among the items seized during the search: a Cowboys jacket, a black tee shirt with an eight-ball on the front and the words "Smile Now, Cry Later" on the back, a business card from Quality Jeep Eagle, and a black powder handgun found under the mattress of a waterbed. He asserts that this evidence should have been suppressed because some items were seen by the officers earlier in the evening when they arrested Defendant. He appears to argue that the initial police entry into the house to conduct a protective sweep was illegal and that the officers first spotted the jacket during that entry.

{34} The trial court's denial of a motion to suppress will not be disturbed on appeal if it is supported by substantial evidence, unless it appears that the determination was incorrectly premised. *State v. Boeglin,* 100 N.M. 127, 132, 666 P.2d 1274, 1279 (Ct.App.1983). On appeal, we determine whether the law was correctly applied

to the facts, reviewing the evidence in the light most favorable to support the decision reached below, and resolving all conflicts and indulging all inferences in support of that decision. *Id.*

[redacted] {35} "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie,* 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). It is constitutional if the officers had "a reasonable belief based on specific and articulable facts" that the area to be swept contains an individual who poses a danger to those on the arrest scene. *State v. Valdez,* 111 N.M. 438, 440, 806 P.2d 578, 580 (Ct.App.1990). Because it is intended to protect the safety of officers and others, the sweep is a quick and limited search, targeted to those areas where a person could reasonably be found. *Buie,* 494 U.S. at 334–35, 110 S.Ct. 1093 (stating that arresting officers may "take reasonable steps to ensure their safety after, and while making, the arrest").

{36} The suppression issue was briefed by both parties, and, after a suppression hearing, the trial court determined that the evidence was admissible. At the hearing, the case agent testified that Defendant had been under surveillance for several days after the police received information about his identity and address from the Department of Corrections employee who had seen the composite sketch. On October 31, 1994, the surveillance team arrested Defendant as he drove away from the house. After his arrest Defendant asked if his car could be driven back to the house; the arresting officers agreed to this arrangement. When the officers arrived at the house, they asked Defendant if anyone was in the house and he responded that no one else was there. One of the officers said that he thought someone was in the house because earlier in the day he had seen a man enter the house and had not seen him leave. They decided, as a matter of officer safety, not simply to rely upon Defendant's assurance and conducted a protective sweep of the house.

{37} The officers testified that they conducted the protective sweep following standard operating procedures. One officer stayed with Defendant in the living room while the other checked the rest of the house to make sure no one was there. Both officers testified that they saw the Cowboys jacket on the floor of the living room, but neither touched it. Having determined that the house was empty, the officers waited outside to ensure no one entered; they knew that a search warrant was being obtained and therefore needed to secure the house. Defendant was taken to the police station.

[redacted] {38} Defendant asserts that there were no facts suggesting the need for a protective sweep. We disagree. The officers saw another person enter the house while it was under surveillance. The officers also testified that Defendant had told them that his father was a hunter and that there were guns and other weapons inside. As the officers testified, they had no way of knowing who was in the house or what weapons might be there. Additionally, the officers knew that they were investigating a violent crime in which a gun had been used. The police officers had a reasonable belief that an immediate security sweep of the premises was required for their own safety. For these reasons, we hold that the officers were justified in conducting a protective sweep of the house.

{39} Defendant's claim about the jacket is also without merit. The officers testified during the suppression hearing and at trial that they had already seen Defendant wearing the Cowboys jacket during their surveillance. The officers had noticed the jacket because it was similar to the description given by the victim's mother of what her daughter had been wearing the day she disappeared. The case agent, who prepared the search warrant, stated that the information about Defendant walking out of his house wearing a Dallas Cowboys jacket was already noted in the search warrant affidavit before the officers conducted the protective sweep.

{40} Defendant also argues that the officers conducting the search of his father's house grossly exceeded the scope of the search warrant by taking two items not specified in the warrant: a photograph album and

a bottle of chloroform. He argues that the officers' actions turned the search warrant into an impermissible general warrant, thereby violating the Fourth Amendment and requiring blanket suppression of all the evidence. In making this argument Defendant relies upon *United States v. Foster*, 100 F.3d 846, 849–50 (10th Cir.1996).

{41} The Tenth Circuit Court of Appeals, in assessing similar allegations of searches exceeding the scope of a search warrant, has articulated a general rule that if evidence has been illegally seized, "only the improperly seized evidence, not all of the evidence, must be suppressed, unless there was a flagrant disregard for the terms of the warrant." *United States v. Le*, 173 F.3d 1258, 1269 (10th Cir.1999). A search is generally not invalidated because some items not listed in a search warrant are seized, particularly if these items are not admitted into evidence against a defendant. *Id.* In very rare cases, the Court observed, the unusual remedy of blanket suppression of evidence was applied when there has been a flagrant disregard for the terms of the warrant or when the searches have been predicated on subterfuge. *Id.* at 1269–70; *see also Foster*, 100 F.3d at 852 (upholding the district court's finding that the officers obtained the search warrant with an intent to seize anything of value rather than to adhere to specific terms of warrant); *United States v. Medlin*, 842 F.2d 1194, 1197–99 (10th Cir.1988) (finding that the basis for obtaining the warrant and conducting the search was pretextual). The Tenth Circuit has also determined that "when a logical nexus exists between seized but unnamed items and those items listed in the warrant, the unnamed items are admissible." *United States v. Gentry*, 642 F.2d 385, 387 (10th Cir.1981) (holding that laboratory equipment, although not specified in search warrant, bore a reasonable relationship to the methamphetamine sulfate which was the object of the search and therefore was admissible); *see also United States v. Snow*, 919 F.2d 1458, 1461 (10th Cir.1990) (holding that the defendant's personal financial statement bore a reasonable relationship to the defendant's real estate scheme and was admissible).

{42} Defendant raised the issue of exceeding the scope of the warrant in his pretrial motion to suppress. Although the subsequent suppression hearing afforded Defendant an opportunity to resolve his challenges to the scope of the search, he did not present any evidence on these two items at that hearing. The motion to suppress was denied. A review of the record indicates that the photograph album was introduced into evidence at trial without objection. The officer who collected the Cowboys jacket for evidence during the search of the house testified that he found the album in the front pocket of that jacket. The record does not indicate that the chloroform was introduced into evidence, and Defendant makes no claim that it was.

{43} Under these circumstances, we conclude that the search of the house did not grossly exceed the scope of the warrant. The officers were lawfully on the premises under a warrant issued as part of an investigation of the murder of a young woman. Having discovered the photograph album in the pocket of the victim's jacket, it was reasonable for the officers to conclude that the item was related to the crime being investigated. As for the other item, the bottle of chloroform, even if it arguably may have been improperly seized, the officers' conduct did not exhibit a flagrant disregard for the terms of the warrant. If there had been a finding of an improper seizure, the appropriate remedy in this case would have been suppression of the chloroform. *See Le*, 173 F.3d at 1271; *see also State v. Patscheck*, 2000–NMCA–062, ¶ 15, 129 N.M. 296, ¶ 15, 6 P.3d 498, ¶ 15. Nevertheless, because the chloroform was never introduced into evidence, Defendant's arguments are moot. *See Le* at 1272 (determining that defendant's suppression argument was moot because he was never prosecuted for possession of any of the seized items).

VI. Testimony of the Victim's Mother.

{44} The victim's mother was a witness during the trial. She testified about her daughter's disappearance and identified the victim's personal belongings that had been found by her body, the Cowboys jacket found

in Defendant's house which had been a birthday gift from the mother, and the gold crucifix and chain Defendant had given to a friend of his. At the beginning of the mother's trial testimony, the district attorney elicited general background information from the mother by asking where she lived, how many children she had, and the ages of the children. Defendant characterizes this testimony as victim impact evidence and claims to have been prejudiced by its improper introduction during the guilt phase of the trial.

{45} The admission of evidence is entrusted to the discretion of the trial court and will not be disturbed absent a showing of abuse of that discretion and that an error in the admission of evidence was prejudicial. *See State v. Jett,* 111 N.M. 309, 312, 805 P.2d 78, 81 (1991). As the trial court observed when it admitted the testimony, some background of any witness is appropriate and provides an initial basis for assessing credibility. *See* 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 401.04[4][a], at 401–38 (Joseph M. McLaughlin, ed., 2d ed.2000) (describing background evidence as tied to issues of credibility and as telling the jury something about the witness as a person); *cf. Clark,* 108 N.M. at 299, 772 P.2d at 333 (finding that brief description of background information by victim's mother was not victim impact testimony during period when victim impact evidence was not admissible). This kind of testimony by the victim's mother was not victim impact evidence. There has been no showing of abuse of discretion or of prejudice to Defendant. We conclude that the trial court acted properly.

VII. Testimony about Defendant's Escape.

{46} Defendant also asserts that the testimony of the Albuquerque police officer who helped to block Defendant's escape attempt from the hospital was prejudicial. The officer related Defendant's admissions about picking the lock on the cuffs on his legs with a paper clip and then, in response to a question by the district attorney, the officer said that he had been unable to pick the lock with a paper clip. No objection was made to the testimony at trial. *See* Rule 12–216(A) (requiring that a ruling on a question must have been invoked from the district court for a question to be preserved for appellate review). Additionally, Defendant has not demonstrated how he was prejudiced by testimony. Defendant's assertion of the possibility of prejudice, without more, is insufficient to establish actual prejudice. *See In re Ernesto M.,* 1996–NMCA–039, ¶ 10, 121 N.M. 562, 915 P.2d 318 ("An assertion of prejudice is not a showing of prejudice.").

VIII. Additional Claims of Error.

{47} Defendant raises two claims of error under *State v. Franklin,* 78 N.M. 127, 129, 428 P.2d 982, 984 (1967) (advising appellate counsel to advance a defendant's arguments even if their merits are questionable) and *State v. Boyer,* 103 N.M. 655, 659, 712 P.2d 1, 5 (Ct.App.1985) (recognizing that an attorney should present a client's contentions even if counsel has no faith in them). The first claim is that the police officers who conducted the investigation of the crimes lacked jurisdiction. In the second claim he contends that he was improperly convicted under New Mexico law of being a felon in possession of a firearm. We have considered Defendant's arguments on both issues, but they are without merit and we do not discuss them.

IX. Ineffective Assistance of Trial Counsel.

{48} On appeal, Defendant raises several claims of error by trial counsel which he asserts denied him effective assistance of counsel. Counsel is presumed competent unless a defendant succeeds in showing both the incompetence of his attorney and the prejudice resulting from the incompetence. *Gonzales,* 113 N.M. at 229–230, 824 P.2d at 1031–1032. In making a claim of ineffective assistance of counsel, a defendant must establish that his attorney did not exercise the skill of a reasonably competent attorney. *Jett,* 111 N.M. at 315, 805 P.2d at 84. He must also show the prejudice he suffered as a result of the alleged incompetence. *Id.* The prejudice must be of sufficient magnitude to call into question the reliability of the trial results. *Duncan v. Kerby,* 115 N.M. 344,

348, 851 P.2d 466, 470 (1993). To determine whether there was prejudice, a reviewing court must consider the totality of evidence presented. *State v. Price*, 104 N.M. 703, 709, 726 P.2d 857, 863 (Ct.App.1986).

{49} Defendant complains of trial counsel's failure to object to the excusal for cause of potential jurors who opposed the death penalty and his failure to object to part of a witness's testimony about the escape. A prima facie case for ineffective assistance of counsel is not made if there is a plausible, rational strategy or tactic to explain the counsel's conduct. *State v. Swavola*, 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct.App. 1992). A reviewing court will not attempt to second guess that decision. *State v. Hester*, 1999-NMSC-020, ¶ 11, 127 N.M. 218, 979 P.2d 729. An attorney's decision to object to testimony or other evidence is a matter of trial tactics. Moreover, the issue of excusing potential jurors who cannot fulfill their lawful duties because of their opposition to the death penalty has been resolved by this Court adversely to Defendant's position. Trial counsel had raised the issue in pretrial motions; his argument was rejected by the trial court. As a matter of strategy, counsel may have decided not to advance once again a challenge that has never been sustained by this Court. *See State v. Martinez*, 1996-NMCA-109, ¶ 27, 122 N.M. 476, 927 P.2d 31 (holding that "[f]ailure to renew at trial a motion concerning an evidentiary matter which has been denied in limine does not constitute ineffective assistance of counsel").

{50} Defendant's contention that his trial counsel failed to make certain arguments in opposition to victim impact testimony is misplaced. A review of the record shows that during pretrial motions and at trial, defense counsel relied upon both the federal and New Mexico constitutions and United States Supreme Court case law in opposing the introduction of that testimony. We need not address Defendant's contentions about the jury instructions for aggravating circumstances given during the penalty phase of the trial, because we address that argument on the merits.

{51} Defendant has failed to show that trial counsel was ineffective in defending him. The trial judge, in fact, commented twice upon the professional manner shown by both the counsel for the State and Defendant during the course of the pretrial motions, hearings, and trial. Furthermore, Defendant has offered no evidence to show prejudice—that but for counsel's alleged deficiencies, there was a reasonable probability that the outcome of the trial would have been different. *State v. Baca*, 1997-NMSC-045, ¶¶ 20-21, 124 N.M. 55, 946 P.2d 1066; *accord Williams v. Taylor*, 529 U.S. 362, ——, 120 S.Ct. 1495, 1512, 146 L.Ed.2d 389 (2000) (reaffirming that the test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is to be used for resolving virtually all claims of ineffective assistance of counsel). As the State argues, the evidence against Defendant was overwhelming. Failure to prove either prong of the test defeats a claim of ineffective assistance of counsel. *Baca*, 1997-NMSC-045, ¶ 21, 124 N.M. 55, 946 P.2d 1066. Defendant has proved neither part of the test; his claims, therefore, are rejected.

X. Cumulative Error.

{52} Defendant's final argument about the guilt phase of the trial is that the claimed errors of the trial court had the cumulative effect of depriving him of a fair trial. The principle of cumulative error requires reversal when the cumulative effect of errors occurring during trial was "so prejudicial that the defendant was deprived of a fair trial." *State v. Baca*, 120 N.M. 383, 392, 902 P.2d 65, 74 (1995). This principle is to be strictly applied. *State v. Woodward*, 121 N.M. 1, 12, 908 P.2d 231, 242 (1995). After reviewing the record of the guilt phase of the trial and finding no error, we conclude that Defendant received a fair trial The judgment of the trial court regarding Defendant's guilt is affirmed.

PENALTY PHASE ISSUES

{53} Upon appeal, this Court reviews a sentence of death sentence to determine the validity of that sentence under Section 31-20A-4(C) of the CFSA. A sentence may be invalid if:

(1) the evidence does not support the finding of a statutory aggravating circumstance;

(2) the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances;

(3) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or

(4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 31–20A–4(C).

XI. Aggravating Circumstances.

{54} Upon conviction in a capital felony case, the trial court conducts a sentencing hearing before the same jury to determine whether the penalty should be life imprisonment or the death sentence. Section 31–20A–1(B). Before the death penalty can be imposed, a unanimous jury must have found beyond a reasonable doubt at least one of the statutory aggravating circumstances listed in Section 31–20A–5. *See* § 31–20A–3; *see also State v. Compton*, 104 N.M. 683, 693, 726 P.2d 837, 847 (1986) (describing aggravating circumstances as defining the circumstances under which the legislature considers the death penalty warranted).

{55} In this case, the jury was given a separate instruction for each of two aggravating circumstances: the aggravating circumstances of murder committed during the commission or attempted commission of criminal sexual penetration, and/or of murder committed during the commission of or attempted commission of kidnapping. *See* § 31–20A–5(B). The jury found unanimously, beyond a reasonable doubt, the aggravating circumstance of murder during the commission of a kidnapping and was unable to agree on the aggravating circumstance of murder during the commission or attempted commission of criminal sexual penetration.

{56} Defendant asserts that there was insufficient evidence to support the jury's finding of the aggravating circumstance of murder during the commission of a kidnapping. *See* § 31–20A–5(B). "In assessing the sufficiency of the evidence used to support the death penalty, we must apply a degree of scrutiny that reflects 'the qualitative difference of death from all other punishments.'" *Allen*, 2000–NMSC–002, ¶ 61, 128 N.M. 482, 994 P.2d 728 (quoting *California v. Ramos*, 463 U.S. 992, 998, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)). In support of his argument, Defendant relies upon *State v. Henderson*, 109 N.M. 655, 661, 789 P.2d 603, 609 (1990) *overruled in part on other grounds by Clark v. Tansy*, 118 N.M. at 493, 882 P.2d at 534, in which this Court found insufficient evidence to support the aggravating circumstance of murder in the commission of a kidnapping. Under the facts of *Henderson*, in which the rape and kidnapping appeared to have occurred simultaneously, the Court held that the evidence did not support a finding that the murder of the victim was committed in the commission of a kidnapping. *Id.* Upon remand, double jeopardy barred the submission of this aggravating circumstance to the jury. *Id.* at 663, 789 P.2d at 611.

{57} In arriving at that conclusion, the opinion distinguished *Henderson* from *State v. Guzman*, 100 N.M. 756, 676 P.2d 1321 (1984), a case in which the jury had found three separate aggravating circumstances. *Henderson*, 109 N.M. at 661, 789 P.2d at 609. The facts of this case, however, more closely resemble those of *Guzman*, in which a separate and distinct kidnapping took place before the murder occurred. *See Guzman*, 100 N.M. at 759, 676 P.2d at 1324. In this case, evidence was presented that Defendant initiated the kidnapping well before and separately from the commission of the other felonies although the kidnapping continued until the time of the victim's death. *See Allen*, 2000–NMSC–002, ¶ 75, 128 N.M. 482, 994 P.2d 728; *McGuire*, 110 N.M. at 309, 795 P.2d at 1001. Based on the facts of this case, there was sufficient evidence for the jury to have found beyond a reasonable doubt that the victim was murdered during the commission of a kidnapping.

{58} Defendant also argues that the jury instructions for the aggravating circumstance of murder in the commission or attempted commission of a kidnapping were

in error because they did not require the jury to find a separate and distinct kidnapping apart from the attempted criminal sexual penetration and the murder. His claim of error is based on the assertion that there was inadequate evidence of an independent kidnapping. Because no objection to the alleged error was raised to the trial court, Defendant bases his claim on the principle of fundamental error. *See* Rule 12–216(B) NMRA 2000. This principle is applied to prevent a miscarriage of justice. *State v. Osborne,* 111 N.M. 654, 662, 808 P.2d 624, 632 (1991). To establish fundamental error, there must be a showing that error was of such magnitude that it affected the trial outcome, so that the issue of the defendant's guilt has become "so doubtful that it would shock the judicial conscience to allow the conviction to stand." *Baca,* 1997–NMSC–045, ¶ 41, 124 N.M. 55, 946 P.2d 1066. Defendant has not made this showing.

{59} Furthermore, we find no error in the jury instruction. For the aggravating circumstance of murder during the commission of a kidnapping, the jury was instructed that they must find that (1) the crime of kidnapping was committed, (2) the victim was murdered while Defendant was committing the kidnapping, and (3) the murder was committed with the intent to kill. *See* UJI 14–7015 NMRA 2000. The standard instruction contained all the elements necessary to establish the aggravating circumstance of the murder in the commission of a kidnapping and the evidence established the occurrence of a separate and distinct kidnapping. Defendant does not challenge the jury's determination that the murder was committed with the intent to kill. *Cf. Allen,* 2000–NMSC–002, ¶ 75, 128 N.M. 482, 994 P.2d 728.

{60} Finally, Defendant also asserts that the jury instructions were flawed because they presented two separate aggravating circumstances. His claim is that Section 31–20A–5(B) should be read to permit only one crime to be chosen from among the three aggravating circumstances contained in that section. The identical contention was resolved against Defendant in *Guzman,* 100 N.M. at 761, 676 P.2d at 1326, in which the Court decided that "when the Legislature used the conjunction 'or', they intended that *either* of the crimes could be used as an aggravating circumstance, the basis from which the death penalty can be imposed." Agreeing with that interpretation of the statute, we find no error in the jury instructions. When the evidence shows that more than one aggravating circumstance exists under Section 31–20A–5(B), any and all of the listed crimes may be considered as separate aggravating circumstances. The use of multiple instructions in these circumstances was proper.

XII. Aggravating and Mitigating Circumstances.

{61} Under the CFSA, a defendant may present mitigating evidence to the jury during the sentencing phase of a capital trial to show why the death penalty should not be imposed. Sections 31–20A–2; 31–20A–6. The CFSA requires a jury to weigh the aggravating and mitigating circumstances against each other to determine whether a life or death sentence is appropriate. Section 31–20A–2(B). In this case, after weighing the aggravating and mitigating circumstances and considering both Defendant and the crime, the jury determined unanimously that Defendant should be sentenced to death.

{62} On appeal, this Court is required to review the aggravating and mitigating circumstances to determine whether the evidence would support a finding that the mitigating circumstances were sufficient to outweigh the aggravating circumstances. Section 31–20A–4(C)(2); *Allen,* 2000–NMSC–002, ¶ 81, 128 N.M. 482, 994 P.2d 728. However, because the death sentence has been vacated and this case is being remanded for a new sentencing hearing, we need not address this question. *See State v. Finnell,* 101 N.M. 732, 736, 688 P.2d 769, 773 (1984).

XIII. Influence of Arbitrary Factors.

{63} In the third statutory inquiry under Section 31–20A–4(C)(3), this Court reviews the decision of the jury to impose the death sentence to determine if the sentence was imposed under the influence of any arbitrary factors. Defendant asserts that the admission of victim impact testimony during the

penalty phase of the trial was improper under the state and federal constitutions and New Mexico statutes. We disagree.

{64} The issue of victim impact evidence in New Mexico has been considered by this Court in two recent opinions, both of which held that " 'victim impact evidence, brief and narrowly presented, is admissible during the penalty phase of death penalty cases.' " *Allen,* 2000–NMSC–002, ¶ 52, 128 N.M. 482, 994 P.2d 728 (quoting *Clark,* 1999–NMSC–035, ¶ 37, 128 N.M. 119, 990 P.2d 793). In *Clark,* the Court relied upon *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), which held that the Eighth Amendment does not preclude the use of victim impact evidence in the penalty phase of a capital trial. 1999–NMSC–035, ¶ 37, 128 N.M. 119, 990 P.2d 793. Further, the Court determined that victim impact testimony was consistent with the New Mexico Constitution and that the legislature had provided statutory authority for the introduction of victim impact testimony. *Id.* ¶¶ 42–45. In *Allen,* a majority of the Court found constitutional and statutory authority for the introduction of victim impact testimony. *Allen,* 2000–NMSC–002, ¶ 53, 128 N.M. 482, 994 P.2d 728. The opinion also observed that the rules of evidence governing relevance and the weighing of unfair prejudice against probative value apply to the introduction of victim impact evidence during the penalty phase of death penalty cases. *Id.* ¶ 54 (citing Rules 11–402 NMRA 2000, 11–403).

{65} During the penalty phase of this trial, the prosecutor presented victim impact evidence from two witnesses, the victim's mother and the mother's cousin. The mother testified about her relationship with her daughter and the effect the death had upon her and upon the victim's brother and sister. The cousin testified that the mother worked for her and that she had seen the mother's struggle with the aftermath of her daughter's death. She also testified about the help and support she and the other co-workers had offered to the mother during the two years since the victim's death.

{66} At the conclusion of these statements, however, the prosecutor questioned each of the witnesses about an episode that had occurred while Defendant was awaiting trial. Although Defendant was in custody, he managed to send several magazine subscriptions in the victim's name to her mother's address, so it appeared that her daughter was receiving mail. He also sent one subscription to the mother as though it were a gift from her daughter. The district attorney and Defendant stipulated that the handwriting on the subscription order cards was that of Defendant. The victim's mother testified about receiving the subscriptions, the gift subscription, and the subsequent bills for those items at Defendant's sentencing hearing. She also related how distressing it had been to receive magazines addressed to her daughter and how devastated she was when she learned that Defendant was responsible. The mother's cousin also testified about the impact of the magazine subscriptions upon the mother as follows: "She just couldn't believe somebody would be that cruel to her .... and when she found out that they were coming from Shawn Jacobs, she said, " 'Why does he keep hurting my family?.... Why does he keep hurting me?" In closing argument, the State commented upon Defendant's love of cruelty in tormenting the victim's mother.

{67} We conclude that the mother's initial testimony about the effect of the murder on her and her family was relevant and admissible at the penalty phase of the trial. *See Payne,* 501 U.S. at 825–26, 111 S.Ct. 2597 (permitting the introduction of victim impact evidence to allow the jury to understand the consequences of the crime committed); *see also Allen,* 2000–NMSC–002, ¶ 52, 128 N.M. 482, 994 P.2d 728; *Clark,* 1999–NMSC–035, ¶ 37, 128 N.M. 119, 990 P.2d 793. Nevertheless, the testimony about the magazine subscriptions should not have been admitted during the State's case-in-chief as victim impact evidence, because the evidence goes beyond the scope of what is admissible under *Payne, Clark,* or the CFSA as victim impact evidence. *Payne* held that victim impact evidence was admissible as a "method of informing the sentencing authority about the specific harm caused by the crime in question." 501 U.S. at 825, 111 S.Ct. 2597. Although the magazine subscription testimony did describe harm caused by

Defendant, this harm was not caused by the crimes in question. In *Clark*, we held that victim impact evidence was admissible because it constituted additional evidence as to the circumstances of the crime. 1999-NMSC-035, ¶ 38, 128 N.M. 119, 990 P.2d 793. In this case, the testimony about the magazine subscriptions by both witnesses was not relevant to the crimes for which Defendant was standing trial; it fell outside the scope of "circumstances of the crime." *See* § 31-20A-1(C); Rule 11-402 NMRA 2000 (evidence which is not relevant is not admissible). The State argues that this evidence was admissible under Section 31-20A-2(B) which directs the jury to consider both "the defendant and the crime" in determining whether to sentence a defendant to death or life in prison. However, we do not read Section 31-20A-2(B) to address the scope of evidence that can be heard by the jury, but rather to provide guidance on how to weigh the evidence permitted under Section 31-20A-1(C). Section 31-20A-2(B) may not be used to permit the introduction of otherwise inadmissible evidence.

{68} The State also argues that the subscription evidence is probative of Defendant's lack of remorse. In *Allen*, 2000-NMSC-002, ¶ 108, 128 N.M. 482, 994 P.2d 728, we upheld the state's closing argument in which the prosecutor had argued that the defendant was not remorseful. We construed the argument to have been offered in rebuttal to the defendant's statement at sentencing in which he had expressed remorse for the killing. *Id.* In this case, however, Defendant made no such claim. In fact, the trial court had granted a motion in limine prohibiting evidence that went to lack of remorse during the penalty phase unless Defendant had opened the door. At the point at which the subscription evidence was introduced, Defendant had offered no evidence. Under the circumstances of this case, evidence concerning Defendant's alleged lack of remorse was not admissible.

{69} As we have noted, in New Mexico the death penalty may not be imposed if the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Section 31-20A-4(C)(3). This evidence created a possibility that the jury voted for the death penalty under the influence of an improper factor. As the Supreme Court has stated, "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Because we cannot say that this evidence did not bear on any juror's decision to sentence Defendant to death, we therefore reverse on this issue and remand for a new sentencing hearing.

XIV. Proportionality Review.

{70} This Court reviews a death sentence in order to determine if it is disproportionate to sentences imposed in similar cases using the guidelines established in *State v. Garcia*, 99 N.M. 771, 780, 664 P.2d 969, 978 (1983). *See* § 31-20A-4(C)(4). Defendant asserts that those guidelines are flawed. With an order for a new sentencing hearing, a proportionality review of Defendant's sentence is not called for. *Cf. Clark v. Tansy*, 118 N.M. at 494, 882 P.2d at 535 (determining that when death sentence is vacated, a proportionality review must wait until the event that the death penalty is imposed on remand). *State v. Wyrostek*, 117 N.M. 514, 523, 873 P.2d 260, 269 (1994) (holding that a review of *Garcia* guidelines would be an advisory opinion in absence of actual death sentence).

XV. Constitutionality of the CFSA.

{71} Defendant contends that the Capital Felony Sentencing Act is unconstitutional, arguing that (1) it fails to give juries proper guidance or to require specific jury findings thus precluding adequate appellate review; (2) the statutory mitigating circumstance regarding prior criminal activity is unconstitutionally vague; and (3) the mitigating circumstance that considers a defendant's cooperation with authorities violates the constitutional rights to remain silent, to counsel, to a fair trial, and to due process. *See* §§ 31-20A-6(A), (H). Finally, he asserts that the death penalty constitutes cruel and unusual punishment.

U.S. Const. amends. XIII, XIV; N.M. Const. art. II, §§ 13, 18.

{72} This Court has addressed these arguments in previous cases and held previously that the CFSA is constitutional. Defendant's assertions do not convince us to reconsider our earlier decisions. Defendant's first claim was dealt with in *Clark*, 1999-NMSC-035, ¶ 67, 128 N.M. 119, 990 P.2d 793 (rejecting defendant's assertion that the CFSA did not provide adequate standards for review); *Clark*, 108 N.M. at 307, 772 P.2d at 341 (holding that specific legal standards for weighing aggravating circumstances against mitigating circumstances are not constitutionally required in a capital sentencing procedure); and *Finnell*, 101 N.M. at 736, 688 P.2d at 773 (holding that capital jury does not have to find beyond a reasonable doubt that the death penalty is the appropriate sentence). The contentions regarding the statutory mitigating circumstances were addressed in *Clark*, 1999-NMSC-035, ¶ 69, 128 N.M. 119, 990 P.2d 793 (holding that Section 31-20A-6(H) did not punish a defendant for exercising his constitutional rights to remain silent, to counsel, to a fair trial, and to due process); *Compton*, 104 N.M. at 692, 726 P.2d at 846 (holding that Section 31-20A-6(H) did not violate defendant's right to remain silent); and *State v. Gilbert*, 100 N.M. 392, 402, 671 P.2d 640, 650 (1983) (holding that the language of Section 31-20A-6(A) was not unconstitutionally vague and indefinite). As to the final issue, this Court held explicitly in *Garcia*, 99 N.M. at 777, 664 P.2d at 975, that the death penalty does not necessarily constitute cruel and unusual punishment. *See also Allen*, 2000-NMSC-002, ¶ 112, 128 N.M. 482, 994 P.2d 728; *Clark*, 1999-NMSC-035,¶¶ 60-61, 128 N.M. 119, 990 P.2d 793; *Compton*, 104 N.M. at 695, 726 P.2d at 849.

CONCLUSION

{73} The convictions of Defendant for first degree murder, felony murder, kidnapping, attempted criminal sexual penetration, armed robbery, tampering with evidence, unlawful taking of a motor vehicle, possession of a stolen vehicle, felon in possession of a firearm, escape from jail, and escape from a peace officer are affirmed. The sentence of death is reversed for the reasons set out herein. The case is remanded to the district court for a new sentencing proceeding.

{74} **IT IS SO ORDERED.**

MINZNER, C.J., and MAES, J., concur.

BACA and PATRICIO, JJ., (concurring in part and dissenting in part).

SERNA, Justice (concurring in part and dissenting in part).

{75} I concur in all aspects of the majority's well-reasoned opinion except Section XIII, discussing the influence of arbitrary factors. I do not believe that the jury's decision to sentence Defendant to death was influenced by an arbitrary factor. I must therefore respectfully dissent from the majority's reversal of Defendant's death sentence.

{76} This Court has previously held that victim impact evidence is permissible under the Capital Felony Sentencing Act. In order to assess a potential constitutional violation in the admission of victim impact evidence, we apply the standard in *Payne* and determine whether Defendant received a fundamentally unfair trial. *See Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). In *Payne*, 501 U.S. at 822, 111 S.Ct. 2597, the Supreme Court explained the necessity for allowing the sentencing body to hear relevant evidence regarding both the defendant and the circumstances of the crime, including the effect of the murder on the victim's family.

{77} The testimony concerning the magazine subscriptions was relevant and admissible as victim impact evidence in order to show how the victim's mother was coping with the murder of the victim. *See State v. Allen*, 2000-NMSC-002, ¶ 60, 128 N.M. 482, 994 P.2d 728 (concluding that victim impact evidence may include a victim's family members' "reactions to learning of the victim's death and their efforts to cope with the loss occasioned by the victim's death" (citation omitted)); *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir.1998) (similar). Victim impact evidence is clearly admissible

to demonstrate the effect of the murder on the victim's family. *Payne*, 501 U.S. at 822, 111 S.Ct. 2597 (noting that victim impact evidence is relevant in "demonstrating the loss to the victim's family"). I believe that how the family was managing their grief is properly before the sentencing jury, and the subscription, as a reminder of the victim's death, was the intentional interference by Defendant in the grieving process of the victim's mother. For example, a family may testify that neutral objects belonging to the victim remind them of the loss and thus cause pain. *Cf. McVeigh*, 153 F.3d at 1220 (permitting a family member's testimony regarding a particular coffee cup and wedding ring which served as a constant reminder of the murder and loss of the victim).

{78} I feel that the evidence allows the victim's mother to put her grief in context; the magazine subscriptions were particularly painful to the victim's mother precisely because they were sent by her daughter's murderer. Just as the grief caused by the receipt of any magazine subscription addressed to the victim can be characterized as a circumstance of the crime because it shows the ongoing pain and suffering resulting from the murder, I believe it is appropriate to include as a circumstance of the crime that the perpetrator sent the magazines to torment the victim's family. Defendant's later action of sending the magazines can be described as reprehensible only because of his earlier crime and the initial pain inflicted on the victim's family. This is not a new harm to the victim's mother but the reopening of an old wound. It was Defendant's intentional, heinous crime that caused the victim's mother's grief, and his decision to send the magazine subscriptions was a deliberate choice to inflame the mother's pain from the loss of her daughter. Defendant, through his own intentionally harmful act, should not be permitted to remove from the jury's consideration the victim's mother's efforts to cope with the loss of her daughter and the obstacles to those efforts. "*Payne* specifically allows witnesses to describe the effects of the crime on their families." *McVeigh*, 153 F.3d at 1221, *quoted in Allen*, 2000–NMSC–002, ¶ 60, 128 N.M. 482, 994 P.2d 728. I believe that the jury is entitled to hear victim impact evidence which demonstrates the effect of the murder on the family and the family's attempt to cope with the loss; the magazine subscriptions were relevant and permissible as a negative reminder of the mother's loss. *See Payne*, 501 U.S. at 825, 111 S.Ct. 2597 ("We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.").

{79} As a constitutional matter, *Payne* establishes a stringent standard for reversal with respect to victim impact evidence: whether it is so unduly prejudicial that the defendant received a fundamentally unfair trial. *See Payne*, 501 U.S. at 824, 111 S.Ct. 2597. Although I believe that trial courts should use great caution in evaluating the admissibility of this type of evidence, I do not believe that the evidence of the magazine subscriptions deprived Defendant of a fair trial. *Cf. McVeigh*, 153 F.3d at 1220 (permitting victim's family member to testify that "there was a point where I actually stuck a pistol in my mouth" because of the grief he felt at the loss of a pregnant wife).

{80} Beyond the issue of victim impact evidence, I believe that the evidence is also admissible for another purpose under the CFSA. Under the plain language of the CFSA and this Court's precedent, I believe that the jury was entitled to consider the magazine subscriptions as evidence of the defendant.

{81} As noted by the State, Section 31–20A–2(B) provides that the jury should consider "both the defendant and the crime" in determining whether to impose a sentence of death. By contrast, Section 31–20A–1(C) states that "all evidence admitted at the trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances." Although Section 31–20A–1(C) specifically addresses the subject of evidence, I do not believe that it serves as the only source of permissible evidence under the CFSA. Under this Court's precedent, under the traditional understanding of a sen-

tencing proceeding, and under principles of statutory construction, I believe that Section 31–20A–2(B) and our Rules of Evidence authorize evidence of the defendant.

{82} In *Clark v. Tansy,* 118 N.M. 486, 492, 882 P.2d 527, 533 (1994), this Court recognized that the prosecution may introduce evidence of future dangerousness in a capital felony sentencing proceeding in its case in chief. Future dangerousness is not evidence that would be admissible during the guilt phase of a trial, it does not constitute a circumstance of the crime, and it is neither a statutory aggravating circumstance nor a statutory mitigating circumstance. Thus, if Section 31–20A–1(C) had been intended by the Legislature to limit the types of evidence admissible in a capital sentencing proceeding, then our discussion of future dangerousness in *Clark v. Tansy* was erroneous. As demonstrated by the Court's unanimous holding in this case regarding evidence of escape, however, this Court properly analyzed the issue of future dangerousness in *Clark v. Tansy.*

{83} The United States Supreme Court has articulated with clarity the reasons that future dangerousness is admissible in a capital sentencing proceeding even without express statutory authority:

> This Court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system.
>
> Although South Carolina statutes do not mandate consideration of the defendant's future dangerousness in capital sentencing, the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances. Thus, prosecutors in South Carolina, like those in other States that impose the death penalty, frequently emphasize a defendant's future dangerousness in their evidence and argument at the sentencing phase; they urge the jury to sentence the defendant to death so that he will not be a danger to the public if released from prison.
>
> Arguments relating to a defendant's future dangerousness ordinarily would be inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant simply because he poses a future danger; nor is a defendant's future dangerousness likely relevant to a question whether each element of an alleged offense has been proved beyond a reasonable doubt. But where the jury has sentencing responsibilities in a capital trial, many issues that are irrelevant to the guilt-innocence determination step into the foreground. The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment.

Simmons v. South Carolina, 512 U.S. 154, 162–63, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (plurality opinion) (citations omitted); *accord Tuilaepa v. California,* 512 U.S. 967, 976–77, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (upholding the consideration of prior criminal activity in a capital sentencing proceeding and stating that "[b]oth a backward-looking and a forward-looking inquiry are a permissible part of the sentencing process"). For these reasons, the State may introduce in its case in chief in the sentencing proceeding evidence of future dangerousness as evidence of the defendant under Section 31–20A–2(B).

{84} In fact, the admissibility of future dangerousness is consistent with the United States Supreme Court's discussion of the type of evidence which must be available to the jury in death penalty cases as a constitutional matter. "In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty[, known as the eligibility phase,] and must also ensure that capital sentencing decisions rest upon an individualized inquiry[, known as the selection phase]." *Jones v. United States,* 527 U.S. 373, 381, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999). "What is important at the selection stage is an individualized determination on the basis of . . . the individual and the circumstances of the crime." *Zant v. Stephens,* 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

> Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of ... the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304–05, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion) (citations omitted). Thus, with respect to an individualized penalty assessment, a capital felony sentencing proceeding is similar to traditional sentencing proceedings. *See State v. James*, 109 N.M. 278, 281, 784 P.2d 1021, 1024 (Ct.App.1989) ("[J]udges have wide discretion in the sources and types of information used to assist them in determining the kind and extent of punishment to be imposed."); *State v. Montoya*, 91 N.M. 425, 426, 575 P.2d 609, 610 (Ct.App.1978) (" 'Highly relevant-if not essential-to [the sentencing judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.' " (quoting *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949))); *cf. People v. Mulero*, 176 Ill.2d 444, 223 Ill.Dec. 893, 680 N.E.2d 1329, 1342 (1997) ("[I]t is important [in capital cases] that the sentencing authority possess the fullest information possible with respect to the defendant[ ] ... and the circumstances of the particular offense. The only requirement regarding admissibility of evidence at this stage is that it be relevant and reliable, the determination of which lies within the sound discretion of the trial judge." (citations omitted)).

{85} I believe that the Legislature was aware of the traditional considerations applicable in sentencing proceedings, as well as the defendant's constitutional right to present character evidence, at the time it enacted Section 31–20A–2(B). *See State ex rel. Human Servs. Dep't (In re Kira M.)*, 118 N.M. 563, 569, 883 P.2d 149, 155 (1994) ("We presume the legislature is aware of existing law when it enacts legislation."). In *Allen*, for example, this Court held that Section "31–20A–2(B) of the CFSA already provided statutory authority *for the admission of [victim impact] evidence* in death penalty cases in New Mexico courts prior to the effective date of the crime victim's rights laws." *Allen*, 2000–NMSC–002, ¶ 53, 128 N.M. 482, 994 P.2d 728 (emphasis added). Thus, by providing that "both the defendant and the crime" be considered in a sentencing proceeding, I believe that the Legislature intended that relevant evidence concerning the defendant be admissible during a sentencing proceeding in order to enable the jury to make an individualized determination based on the most complete relevant evidence available.

{86} The sentencing jury in a death penalty case is instructed that "[i]n deciding the sentence you must consider all of the evidence admitted at trial and all of the evidence admitted during this sentencing proceeding." UJI 14–7012 NMRA 2000 (brackets omitted). The jury is told that argument of counsel during opening statements and closing argument is not evidence. UJI 14–7010 NMRA 2000; UJI 14–7012. The jury is further told that it must not consider any information learned about the case outside of the courtroom. UJI 14–7010. Finally, the jury is instructed to determine the sentence based on, *inter alia*, "both the defendant and the crime." UJI 14–7030 NMRA 2000. If the jury's sentencing determination is limited to evidence presented at trial and at the sentencing proceeding, then in order to effectuate the intent of the Legislature that the jury consider "the defendant," Section 31–20A–2(B), it must be permissible under the CFSA to introduce evidence of the defendant. Otherwise, the Legislature's reference to "the defendant" in Section 31–20A–2(B) would become mere surplusage. *See Katz v. New Mexico Dep't of Human Servs.*, 95 N.M. 530, 534, 624 P.2d 39, 43 (1981) ("A statute must be construed so that no part of the statute is rendered surplusage or superfluous."). As a matter of statutory construction, I believe the evidence of the magazine

subscriptions was admissible as evidence of the defendant under Section 31-20A-2(B).[1]

{87} It seems to me that the majority's primary reason for reversing Defendant's sentence of death is that the evidence of the magazine subscriptions is so prejudicial that it should not have been admitted. Although this is a wholly legitimate concern, I believe it is more appropriately addressed under our Rules of Evidence instead of under the CFSA. *Cf. Allen*, 2000-NMSC-002, ¶¶ 54-60, 128 N.M. 482, 994 P.2d 728 (discussing the applicability of certain evidentiary rules to capital felony sentencing proceedings and concluding that the defendant was not "unfairly prejudiced" by the victim impact evidence introduced by the State).

{88} Under Rule 11-403 NMRA 2000, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." In order to determine that the trial court erroneously admitted the evidence under Rule 11-403, however, this Court must conclude that the trial court abused its discretion despite the wide latitude which the trial court possesses in such matters. *See State v. Chamberlain*, 112 N.M. 723, 726, 819 P.2d 673, 676 (1991) ("The trial court is vested with great discretion in applying Rule 403, and it will not be reversed absent an abuse of that discretion."). For the following reasons, I do not believe that the trial court abused its discretion in admitting the evidence of the magazine subscriptions.

{89} I agree that the evidence of the magazine subscriptions is prejudicial to Defendant. Nonetheless, the evidence has significant probative value for a number of reasons. First, the evidence is probative of future dangerousness. Because the evidence could demonstrate that Defendant took pleasure in inflicting the pain associated with his initial crime and that Defendant sought to exacerbate the mother's pain while in prison, the jury would be entitled to infer from the evidence an increased likelihood that Defendant would be dangerous in the future.

{90} Second, Defendant introduced evidence of his character as a child and teenager in order to shift the blame for his actions upon his family and upbringing and to imply that he was not responsible for his actions and is somehow less culpable. At the sentencing hearing, Defendant presented a parade of witnesses who testified that he was a sweet, nonviolent boy in his youth. *See* NMSA 1978, § 31-20A-6(C) (1979) (capacity to appreciate criminality of his or her conduct as a mitigating circumstance). Throughout the approximately 125 pages of transcript testimony, family members, including his grandfather, parents, step-grandparents, and aunt, testified regarding poor parenting, and some individuals mentioned learning disabilities. This is in contrast to a mere thirteen pages of victim impact testimony from the victim's mother, and four pages of victim impact testimony from a family friend of the victim's mother. Further, a defense witness testified that he knew Defendant between 1988 and 1990, approximately four years prior to the murder, and that he did not "see hostility" or a "temper" in Defendant, and that "kids made mistakes." Defendant thus placed the issue of his character before the jury, although defense counsel obviously wished to limit the evidence to Defendant as a child and as a teenager, and I believe the State was entitled to rebut the testimony through which Defendant attempt-

1. Notwithstanding this construction of the CFSA, I do not believe that it is clear that the Legislature would have the authority to prescribe evidentiary rules for a sentencing proceeding; once the Legislature made the substantive policy choice in Section 31-20A-2(B) that the jury is to consider "the defendant and the crime," any statutory limitation on the admissibility of evidence relevant to these issues would be in danger of violating the principle of separation of powers due to an inconsistency with the Rules of Evidence. *See Allen*, 2000-NMSC-002, ¶ 54, 128 N.M. 482, 994 P.2d 728 (discussing the applicability of the Rules of Evidence to a capital felony sentencing proceeding and citing *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 311-12, 551 P.2d 1354, 1358-59 (1976) for the proposition that "the power to prescribe rules of evidence and procedure is constitutionally vested in this Court"). "It is, of course, a well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions." *Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 340, 805 P.2d 603, 607 (1991).

ed to place the blame for his actions upon his family and upbringing.

{91} The magazine subscriptions demonstrated that Defendant was morally culpable for the murder and continued to inflict pain and suffering associated with the murder. *Cf. State v. Cooper*, 151 N.J. 326, 700 A.2d 306, 344 (1997) (testimony of a psychiatrist properly admitted to rebut background and traumatic childhood as mitigating circumstances). This evidence placed Defendant's assertions that he was a "sweet boy" in their proper context.

{92} Third, under the CFSA, Defendant was entitled to introduce as a mitigating factor evidence of a likelihood that he could be rehabilitated. Section 31–20A–6(G). Defendant in fact chose to do so. Defendant presented testimony that he had been seeking redemption. Defense counsel argued to the jury that Defendant was "a sweet little boy," who "exaggerates," and that in this case "this story is about a boy who, when he's punished, invents for himself, a place where he is the king, where he is the most important, where he is in charge of everything." She argued that he "invent[ed] himself in response to a life of punishment and loneliness." Defense counsel also asked the jury whether "a killing, another death [is] really a fitting legacy for a young woman's life?" She argued that Defendant was not "beyond redemption, that he has not all his life been who you may think he is now," that he was once a sweet two-year-old, and that "[e]ven as recently as five or six years ago," his actions are those of a "young man who is still seeking redemption." By saying that Defendant is not beyond redemption, I believe that Defendant was attempting to invoke as a mitigating circumstance a likelihood that Defendant could be rehabilitated. The State should be permitted to respond to this argument. The magazine subscriptions are relevant to rebut Defendant's suggestion of amenability to rehabilitation.

{93} Based on the considerable probative value of this evidence, I do not believe the trial court abused its discretion in concluding that the probative value was not substantially outweighed by any unfair prejudicial impact. *See State v. Rojo*, 1999–NMSC–001, ¶ 48, 126 N.M. 438, 971 P.2d 829 ("In determining whether the trial court has abused its discretion in applying Rule 11–403, the appellate court considers the probative value of the evidence, but the fact that some jurors might find this evidence offensive or inflammatory does not necessarily require its exclusion.") (citation omitted); *cf. State v. Ard*, 332 S.C. 370, 505 S.E.2d 328, 332 (1998). The trial court's decision to admit the evidence concerning the magazine subscriptions does not contravene constitutional principles, statutory requirements, or evidentiary rules. This evidence was properly before the jury, and I do not believe that the jury's sentencing determination was based on an arbitrary factor or was the product of passion or prejudice. Therefore, I respectfully dissent from Section XIII of the majority opinion discussing the influence of arbitrary factors. I would affirm Defendant's sentence.

10 P.3d 153

2000-NMCA-078

NEW MEXICO DEPARTMENT OF HEALTH, Petitioner–Appellee,

v.

Fred COMPTON, Respondent–Appellant.

No. 20,356.

Court of Appeals of New Mexico.

June 14, 2000.

Certiorari Granted, No. 26,419, Sept. 5, 2000.

Beth W. Schaefer, Assistant General Counsel, New Mexico Department of Health, Santa Fe, NM, for Appellee.

Sandra L. Gomez, Michael C. Parks, Protection & Advocacy System, Inc., Albuquerque, NM, for Appellant.

OPINION

WECHSLER, Judge.

{1} Respondent, Fred Compton, appeals from the district court's orders granting two petitions under the Mental Health and Developmental Disabilities Code (the Code). *See* NMSA 1978, §§ 43–1–1 to 43–1–25 (1977 as amended through 1999). Respondent argues that the orders should be reversed and vacated because the petitions were not heard by the district court within the statutory deadlines. We affirm.

Background and Facts

{2} The relevant facts in this case are undisputed. Respondent was admitted to Las Vegas Medical Center (LVMC) on February 18, 1999, under the provisions of Section 43–1–10, which provide for emergency, involuntary commitments. On February 22, 1999, the Department of Health (Department) filed a Petition for a Thirty Day Commitment for Mental Health Evaluation and Treatment, under the authority of Section 43–1–11(A), and a Petition for Appointment of a Treatment Guardian for an Adult, under the authority of Section 43–1–15(B). The district court set a hearing on both motions for February 25, 1999, within the seven-day emergency period set forth in Section 43–1–11(A) and within the three-day period set forth in Section 43–1–15(B). On February 25, 1999, however, the district court entered an order continuing the hearing until March 4, 1999, because the trial judge was ill.

{3} At the hearing on March 4, 1999, Respondent's counsel moved to dismiss the petitions on the basis that Respondent had been more than seven days at LVMC without a hearing, contrary to the statutory requirements. The district court asked Respondent's attorney to explain what remedy Respondent had if grounds for commitment existed, and Respondent's counsel replied, "That he doesn't receive the treatment which he, in accordance with the doctor's testimony, requires." The court granted both of the Department's petitions. LVMC discharged Defendant on March 25, 1999. This appeal followed.

Discussion

{4} Respondent raises three issues on appeal: (1) Respondent's rights were violated because he did not receive a hearing within seven days of his involuntary commitment, (2) Respondent's rights were violated because he did not receive a hearing on the appointment of a treatment guardian within three days of service upon Respondent, and (3) this case is not moot, even though Respondent has since been discharged from LVMC.

{5} We review whether the statutory requirements of Sections 43–1–11(A) and 43–1–15(B) are mandatory as a question of law and determine whether the district court correctly applied the law to the facts of this case. *See Romero Excavation & Trucking, Inc. v. Bradley Constr., Inc.*, 1996–NMSC–010, ¶ 5, 121 N.M. 471, 913 P.2d 659.

{6} Section 43–1–10 of the Code provides that a peace officer may detain a person for an emergency mental health evaluation under certain specific circumstances. However, when a person is involuntarily admitted to an evaluation facility under Section 43–1–10, Section 43–1–11(A) states that the person "has the right to a hearing within seven days of admission unless waived after consultation with counsel." Section 43–1–11(A) also states that if the evaluation facility "decides to seek commitment of the client for evaluation and treatment" for a further thirty days, a petition seeking such commitment "shall be filed with the court within five days of admission." Additionally, Section 43–1–15(B) requires that when a mental health professional petitions the court for the appointment of a treatment guardian, "[a] hearing on the petition shall be held within three court days."

{7} LVMC released Respondent on March 25, 1999, thus potentially mooting this appeal. Respondent, however, argues that this Court should reach the merits of this case and that this case is not moot because Respondent's claims "are capable of repetition, raise questions of public importance, and would otherwise evade appellate review" and thus fall within an exception to the mootness doctrine. *In re Bunnell*, 100 N.M. 242,

244, 668 P.2d 1119, 1121 (Ct.App.1983). The Department does not challenge this position. Therefore, this Court will address the issues presented on their merits. *See id.*

{8} The parties do not dispute that the court continued the hearing on both petitions, which was timely scheduled for February 25, 1999, because the district court judge assigned to hear the motions was ill. The court reset the hearing for March 4, 1999, fourteen days after Respondent's admission to LVMC and seven days after the original hearing date. The questions before this Court, therefore, are (1) whether the statutory hearing deadlines are mandatory and (2) whether a violation of the hearing deadline gives rise to a presumption of prejudice and constitutes reversible error.

The Statutory Hearing Deadlines are Mandatory

{9} Section 43–1–11(A) states that "[e]very adult client involuntarily admitted to an evaluation facility" in an emergency "has the right to a hearing within seven days of admission unless waived after consultation with counsel." Additionally, if the Department petitions the district court to appoint a treatment guardian for that client, Section 43–1–15(B) states that "[a] hearing on the petition shall be held within three court days" after the petition is served on the client and the client's attorney.

{10} Respondent argues that the Code creates specific statutory rights and that those rights are to be strictly construed and strictly enforced. *See State v. Sanchez,* 80 N.M. 438, 440, 457 P.2d 370, 372 (1969) (stating commitment proceedings "are required to be in strict compliance with the statutory requirements"). Our Supreme Court has emphasized that "[i]f there is any class of cases which should be conducted with the utmost care to observe all of the requirements of the statute, it is those cases conducted for the purpose of determining the sanity of a citizen." *Id.* In addition, in *Bunnell,* 100 N.M. at 244–45, 668 P.2d at 1121–22, this Court recognized both that "the State must schedule a hearing [on a petition for a thirty-day commitment] within seven days" and that "[t]he statute does not provide for postponement." While this Court ruled in *Bunnell* that a "short continuance" should be permitted "when counsel establishes that he has not had sufficient time to prepare his client's case," that ruling was based on protecting the client's rights. *Id.* at 245, 668 P.2d at 1122.

{11} Respondent argues that the language of Section 43–1–11(A) and Section 43–1–15(B) is clear and unambiguous. Respondent correctly notes that when the language of a statute is clear and unambiguous, it must be given effect by the courts. *See V.P. Clarence Co. v. Colgate,* 115 N.M. 471, 473, 853 P.2d 722, 724 (1993). Furthermore, Section 43–1–15(B) uses the word "shall" in relation to the timeliness of the hearing. Generally, the "use of the word 'shall' ... imposes a mandatory requirement." *Redman v. Board of Regents,* 102 N.M. 234, 238, 693 P.2d 1266, 1270 (Ct.App.1984). We therefore agree that, based on the plain language of the statutes, the statutory hearing deadlines set forth in the Code are mandatory.

The Effect of the Violation of the Mandatory Timeliness Requirement

{12} Because we hold that the statutory hearing deadlines are mandatory, we next address the question of whether a violation of those deadlines requires dismissal of the petitions and thus reversal of the district court's orders. To answer whether dismissal is appropriate, we must determine whether the mandatory timeliness requirement is jurisdictional. *See Stephens v. State, Transp. Dep't, Motor Vehicle Div.,* 106 N.M. 198, 200, 740 P.2d 1182, 1184 (Ct.App.1987) ("[N]ot all mandatory [statutory] requirements are jurisdictional."). If the statutory requirement is jurisdictional, outright dismissal is the proper remedy because the court is effectively divested of jurisdiction. *See id.* at 201, 740 P.2d at 1185 (remanding for dismissal of driver's license revocation proceedings due to jurisdictional defect). If, however, the statutory requirement is mandatory but not jurisdictional, the proper analysis for dismissal is whether the delay prejudiced Respondent. *See State v. Budau,* 86 N.M. 21, 23, 518 P.2d 1225, 1227 (Ct.App.1973) (applying prejudice

analysis to delay in arraignment); *cf. Redman,* 102 N.M. at 239, 693 P.2d at 1271 (holding failure to commence and complete administrative hearing within statutory deadline to be reversible error in the absence of waiver or good cause).

1. *Jurisdictional Requirement*

{13} In New Mexico, the failure to comply with mandatory statutory requirements appears to raise a bar to jurisdiction when the requirement has been essential to the proper operation of the statute. *See State v. Gardner,* 1998–NMCA–160, ¶¶ 9, 14–15, 126 N.M. 125, 967 P.2d 465 (holding that statutory framework required strict compliance with regulations governing blood-alcohol testing and that results of tests not performed in accordance with regulations were not admissible in evidence).

{14} In *Stephens,* the Motor Vehicle Code allowed the Motor Vehicle Division to revoke a driver's license without a hearing upon the Motor Vehicle Division's receipt of a sworn statement by a police officer. *See Stephens,* 106 N.M. at 199, 740 P.2d at 1183. The Motor Vehicle Code required the officer's statement to be verified under penalty of perjury, while showing that to the officer's knowledge, the driver had been arrested for driving while intoxicated and test results demonstrated that the driver's blood alcohol level exceeded the legal limit. *See id.* When the police officer in *Stephens* failed to notarize the statement, this Court held that because the Division had the authority to revoke a license without a hearing, the sworn statement requirement was an "initial proof requirement" that functioned as a "threshold or prerequisite to the agency's right to proceed." *Id.* at 201, 740 P.2d at 1185. Because the statutory requirement affected the Division's ability to proceed with the revocation, the failure to comply with the statutory requirement was jurisdictional. *See id.*

{15} In this case, the mandatory statutory requirement that a hearing be held within either seven days for a thirty-day commitment or three days to appoint a treatment guardian does not affect the essential power of the district court to adjudicate the issue before it. *See Taylor v. Department of Transp.,* 260 N.W.2d 521, 523 (Iowa 1977) ("If the duty is not essential to accomplishing the principal purpose of the statute ... a violation will not invalidate subsequent proceedings unless prejudice is shown."). The requirement is not a jurisdictional "threshold or prerequisite" to the court's power to hear the merits of Respondent's commitment. *Stephens,* 106 N.M. at 201, 740 P.2d at 1185. Our Supreme Court has explained: " 'The word 'jurisdiction' is a term of large and comprehensive import. It includes jurisdiction over the subject matter, over the parties, and power or authority to decide the particular matters presented.' " *Grace v. Oil Conservation Comm'n,* 87 N.M. 205, 208, 531 P.2d 939, 942 (1975) (quoting *Elwess v. Elwess,* 73 N.M. 400, 404, 389 P.2d 7, 9 (1964)). A court's lack of jurisdiction "means an entire lack of power to hear or determine the case and the absence of authority over the subject matter or the parties." *Grace,* 87 N.M. at 208, 531 P.2d at 942.

{16} Significantly, the Code provides that the seven-day hearing can be waived. *See* § 43–1–11(A). In *Redman,* this Court stated in reference to the timely hearing requirement for a de novo hearing in an administrative agency "that the legislature did not intend [by providing a provision for a timely hearing] a jurisdictional requirement in the sense that the right ... could not be waived." *Redman,* 102 N.M. at 239, 693 P.2d at 1271. This statement implies that a mandatory statutory requirement that is waiveable is not necessarily jurisdictional. The fact that the right to a timely hearing under Section 43–1–11(A) is waiveable is persuasive evidence "that the legislature did not intend a jurisdictional requirement in the sense that the right to a timely hearing could not be waived." *Redman,* 102 N.M. at 239, 693 P.2d at 1271.

{17} Respondent correctly notes that he has a liberty interest at stake. It is clear that Respondent has an "interest in being free from involuntary commitment as a mental patient." *Garcia v. Las Vegas Med. Ctr.,* 112 N.M. 441, 445, 816 P.2d 510, 514 (Ct.App. 1991). This liberty interest can be outweighed by competing interests only under specified conditions. *See id.;* § 43–1–11(C).

A citizen cannot be committed unless the conditions in Section 43–1–11(C) are met. Section 43–1–11(C), therefore, represents the operative and substantive portion of the statute which grants Respondent the right to be free from commitment in the absence of the listed conditions. *See Garcia,* 112 N.M. at 446, 816 P.2d at 515 (describing the portion of the Code which enumerates the proper conditions for commitment as the substantive portion of the statute).

{18} Importantly, the conditions in Section 43–1–11(C) are not at issue in this case. Respondent does not challenge the grounds for his commitment and, therefore, does not challenge the substantive and operative provisions of the Code that allow infringement upon his liberty interest under particular circumstances. The fact that the substantive commitment provisions are not at issue supports the conclusion that the statute's timeliness requirements are not jurisdictional, but are instead "designed to provide order and promptness . . . and [are] not of the essence of the thing to be done." *Stephens,* 106 N.M. at 200, 740 P.2d at 1184.

{19} We acknowledge that other states are split on the issue of whether a hearing following an involuntary commitment is jurisdictional. *Compare Chatman v. State,* 336 Ark. 323, 985 S.W.2d 718, 722 (1999) (holding that failure to abide by statutory deadlines for probable cause hearing in involuntary commitment proceeding deprived successive court of further jurisdiction), *supplemented on denial of rehearing,* 336 Ark. 323, 991 S.W.2d 534 (1999), *and In re Elkow,* 167 Ill.App.3d 187, 118 Ill.Dec. 222, 521 N.E.2d 290, 294 (1988) (holding that any non-compliance with a statutory procedure for involuntary admission renders judgment in case "erroneous and of no effect"), *and State ex rel. Lockman v. Gerhardstein,* 107 Wis.2d 325, 320 N.W.2d 27, 29 (Wis.App.1982) (holding that failure to hold hearing within mandatory fourteen days deprived court of jurisdiction) *with People in Interest of Lynch,* 783 P.2d 848, 851–52 (Colo.1989) (en banc) (holding that failure to hold hearing within statutory ten days did not deprive the court of jurisdiction). But because New Mexico law indicates that hearing deadlines are not jurisdictional when they are designed to provide order and promptness, we believe that the mandatory hearing requirements in the Code are *not* jurisdictional. We consider the Code's hearing provisions to be procedural requirements, the purpose of which is to provide order and promptness. As a consequence, we find it necessary to review whether the failure to comply with the hearing deadline prejudiced Respondent.

2. *Prejudice*

{20} When we review the facts of this case under a prejudice analysis, we emphasize that Respondent should have been released from LVMC on February 25, 1999, when he did not receive a hearing. However, Respondent was not prejudiced as a result of his additional seven-day detention. At the time of his appeal, Respondent had already been released from LVMC and was kept there no longer than he would have been had his hearing been timely. Respondent does not allege, and there is nothing in the record indicating, that Respondent would not have been committed for thirty days had his hearing been held in a timely manner. Also, because there is no indication in the record that Respondent sought to be released on February 25, 1999, or objected to the continuance of his seven-day hearing until the hearing was held seven days later, the district court was unable to grant him dismissal as a remedy. In addition, because the failure to grant a timely hearing did not deprive the district court of jurisdiction, the court had jurisdiction to order both a thirty-day commitment and a treatment guardian, based on the evidence before it.

Conclusion

{21} Because Respondent suffered no prejudice as a result of the statutory violation, we affirm the orders of the district court.

{22} **IT IS SO ORDERED.**

BUSTAMANTE, J., concurs.

ARMIJO, J., specially concurring.

ARMIJO, Judge, specially concurring.

{23} I concur in the opinion entered by the Court this day. However, where, as in the case of Fred Compton, liberty interests are implicated, it is troubling for a person who is involuntarily confined that the remedy of dismissal rests solely upon an analysis of prejudice. This is tantamount to the lack of any effective remedy under the statute, leaving as an open question: What are the protections for these violated liberty interests?

10 P.3d 159

2000-NMCA-076

STATE of New Mexico,
Plaintiff–Appellee,

v.

Mark Jeffrey GLASGOW,
Defendant–Appellant.

No. 19,456.

Court of Appeals of New Mexico.

June 15, 2000.

Certiorari Denied, No. 26,478,
Aug. 30, 2000.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, for Appellee.

Phyllis H. Subin, Chief Public Defender, Susan Roth, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

WECHSLER, Judge.

{1} Defendant appeals his convictions for second-degree murder, aggravated assault, aggravated battery, tampering with evidence, and criminal solicitation to commit tampering with evidence. On appeal, Defendant claims that the evidence was insufficient to support his convictions for second-degree murder, aggravated assault, and aggravated battery. Defendant also contends that the trial court's rulings regarding Defendant's cocaine use on the night of the altercation denied him a fair trial. We conclude that sufficient evidence supported the convictions but that Defendant suffered unfair prejudice from the trial court's change of position in its evidentiary ruling concerning the admission of earlier cocaine use. We therefore reverse and remand for a new trial.

Facts

{2} Defendant Mark Glasgow and Joshua Jones (Josh) attended a dance on April 4, 1997. At the dance, Defendant and Josh met their girlfriends, Kelly Brown (Kelly) and Jessica Bibeau (Jessica). Also attending the dance was a separate group, including Eric Strombeck (Eric), Kristen Clopton (Kristen), and Reece Green (Reece). Sometime after 9:00 p.m., Eric went out to his truck to drink beer. A short while later, Kristen and Reece joined Eric in the truck. While the trio was sitting and drinking beer, they saw Defendant and Josh, whom they did not know, walk in front of the truck on their way to their own truck.

{3} Defendant, Josh, and Eric exchanged words. The testimony conflicts slightly with respect to what actually occurred at that point. According to Eric, Defendant and Josh were yelling so he walked over to them and inquired about what was wrong. Eric testified that Josh got out of his truck, they started yelling at each other, and Josh said, "Go back to your truck, boy." Eric testified that he did not like being called "boy." Eric had a beer bottle in his right hand when he threw the first blow with that hand and hit Josh in the head. The beer bottle flew out of his hand after the first punch. Eric and Josh began exchanging blows. Eric was quite a bit larger than Josh, and he admitted that he was winning the fight with Josh. Eric testified that, while he was fighting with Josh, a loud bang went off and he felt a burning sensation in his hand. He fell to his knees and quit fighting. Eric then felt a hand on his shoulder and a loud bang went off near his ear. After the second loud bang, Josh was lying on the ground.

{4} According to Defendant, when he and Josh were walking to their truck, the group in the other truck were staring at them. Josh said, "What the ... are you staring at?" Eric got out of the truck and the two started arguing. Eric hit Josh with something that he held in his hand. Josh continued to be hit by Eric and never returned any punches. Defendant told Eric to "[g]et off," but Eric "kept kicking Josh's ass." At that point, Defendant went to his truck and grabbed a gun to break up the fight. Defendant testified that he ran over to the fight yelling, "Break it up." His yelling did not stop Eric from hitting Josh. Defendant kicked Eric and hit him in the

head with the gun causing the gun to discharge. Josh fell to the ground, accidently killed by Defendant's gun. Defendant testified that Eric "turned on" him so Defendant shot the gun again. Defendant stated that when he hit Eric with the gun, he believed that there was a serious problem and that his friend could be hurt, possibly killed by Eric.

{5} Defendant was charged and convicted of aggravated assault and aggravated battery on Eric, as well as second-degree murder of his friend Josh. At trial, Defendant relied on the theories of self-defense and defense of another which require proof that Defendant was reasonably afraid for his own safety or that of his friend.

Trial Court's Rulings on Cocaine Evidence

{6} Defendant argues that the trial court prejudiced his case when it changed its ruling with regard to the admission or exclusion of evidence of cocaine use by Defendant. From our review of the trial, it appears that there were two separate instances involving cocaine use. First, Defendant admitted to police that he had used cocaine earlier in the evening prior to going outside with Josh, just before the confrontation took place. Defendant told police: "I was feeling it, the cocaine was making me feel squirrelly. I was paranoid. I was coked up." Second, there was evidence that, just prior to the fight, Defendant and Josh had gone outside to their truck with the intent to use cocaine but had not done so.

{7} According to the record, the trial court heard argument on evidence of cocaine use three times during this trial—during a motion in limine, during voir dire, and in the middle of trial. At the pretrial motion in limine hearing, Defendant asked the trial court to exclude the statement he had made to the police to the effect that he and Josh were going to the truck to do cocaine. Defendant argued that the statement would be irrelevant and unduly prejudicial. At the time Defendant argued to keep out the statement of the plan to use cocaine with Josh, he apparently conceded that the statement referring to his own earlier use of cocaine would be admissible. The trial court ruled that, "We're not going to get into the drugs in the truck.... [A]ny statement ... that ... they went out to the truck to do drugs isn't going to be relevant." Therefore, at the pretrial hearing to exclude evidence of drug use, it appears that all parties and the trial court were referring to the statement that Defendant and Josh went to the truck to use cocaine—not to Defendant's statement that he had used cocaine earlier in the evening.

{8} During voir dire, Defendant questioned the members of the jury venire about whether the use of alcohol would affect their decision on whether Defendant acted in a reasonable manner. The State interrupted the voir dire and argued that the questioning showed Defendant believed his statement made to police regarding his earlier cocaine use was relevant. Both parties believed at the time that the trial court had previously ruled that all evidence showing Defendant had used cocaine earlier in the evening would not be admitted at trial. The trial court could not recall the previous ruling but stated that Defendant had made it clear that his earlier use of cocaine was relevant to his state of mind. When the trial court asked to be reminded about what had happened at the motion in limine hearing, the parties agreed that the trial court had excluded evidence pertaining to the fact "that they were going to the truck to do some lines." The parties and the trial court continued to discuss the matter. During the rest of the exchange, there appears to be quite a bit of confusion about which statement regarding cocaine use was actually being discussed. Finally, the trial court ruled, "We'll just keep it all out."

{9} The statements were discussed one more time, just before the State called its last witness at trial. The State asked the trial court to again clarify its ruling on the cocaine evidence. The trial court understood its ruling to be that "it would be easier if we just didn't raise it at all." The State protested that, since Defendant was claiming self-defense, Defendant's state of mind was critical to the case and, therefore, the admission that he had used cocaine earlier that night was relevant. The State, in making its argument, made a distinction between the two statements regarding cocaine use, arguing that Defendant's admission that he had used

cocaine earlier should be admitted. Defendant countered that he had relied on the trial court's ruling made during voir dire that the court would "keep it all out," referring to all evidence of drug use, past or future. The trial court declared that it was unaware of Defendant's admission that he had used cocaine, that it believed the evidence to be relevant to Defendant's state of mind, but that admission of the evidence at that point might possibly prejudice Defendant. Ultimately, the trial court changed its position and ruled that, if Defendant took the stand and testified about his own state of mind, the door would be opened to cross-examination by the State as to his statements to police about cocaine use. Defendant argues that this change of position by the trial court, in the middle of trial, unfairly prejudiced his ability to persuade the jury that he was acting in self-defense.

Prejudice Resulting from the Trial Court's Ruling

{10} Up to the point of voir dire, Defendant had reason to believe that his cocaine use earlier in the evening would be admissible into evidence at trial. He had not filed a motion in limine in that regard. During voir dire, the court squarely addressed the question. The following exchange took place:

The Court: We are going to either have all the cocaine stuff or we are going to leave it out. If I let her get into this part of the statement that says he used earlier in the evening, then you have this presupposition. You argue that is prejudicial to your client and that the jurors are going to say he was on cocaine all evening long. Was he still under the influence of cocaine? I don't know. But that's certainly beyond the inference the jury is going to draw. If we have no evidence that it was in his blood—was he tested?

[Prosecutor]: No. He just says he was doing it with the other person earlier in the evening, that's my understanding of the evidence.

[Defense Counsel]: Judge, people are reacting to their emotions of alcohol. If you want to interchange drugs, then I think we have got to individually voir dire them, quite frankly.

[Prosecutor]: Oh, please, Steve.

[Defense Counsel]: On drugs in relation to homicide.

The Court: We'll just keep it all out.

At the time of this exchange during voir dire, the trial court balanced the probative and prejudicial value of the earlier cocaine use and ruled that it would not admit such evidence. Consequently, defense counsel did not conduct voir dire concerning the beliefs of the potential jurors about drugs or drugs in relation to homicide. He had the right to plan his defense strategy relying on the trial court's ruling that there would be no evidence of drug use introduced to the jury.

{11} When the trial court later changed its ruling, Defendant was placed at a disadvantage. After the State had presented several witnesses at trial, the court decided that if Defendant took the stand and testified about his state of mind during the shooting, he would subject himself to cross-examination about his earlier use of cocaine. This circumstance is exactly what Defendant was earlier led to believe would not occur. Because defense counsel did not have the opportunity to question potential jurors during voir dire about their attitudes toward drugs, Defendant could reasonably have been uncertain as to whether he could testify about his state of mind in such a manner as to risk introduction of the evidence of his cocaine use earlier in the evening.

{12} Defendant argues on appeal that because of the trial court's final ruling, he was forced to testify about self-defense or defense of another without emotion and without providing explanation about how he was feeling while trying to protect his friend. According to Defendant, the trial court's ruling inhibited Defendant's ability to persuade the jury that he was genuinely concerned for his own safety and for the safety of his friend Josh, evidence that goes to the heart of a theory of self-defense or defense of another. The record does show that Defendant was able to present the basis of his defense in his testimony, in that he was able to tell the jury that he believed Eric was the aggressor, that he was afraid for his friend, that he was

afraid for himself, and that he acted in order to protect his friend. The question is whether Defendant was forced to restrict the manner of his testimony and its persuasiveness.

{13} The State argues that there is nothing in the record to support Defendant's claim. It asserts that Defendant made no offer of proof or other showing below which would direct this Court to determine how his testimony would have been different had the trial court not ruled as it did. The State is correct, but only to a point.

{14} Our criminal trial system entitles a defendant to formulate a strategy to defend the charges brought by the State. *See* N.M. Const. art II, § 14; *March v. State*, 105 N.M. 453, 456, 734 P.2d 231, 234 (1987) (acknowledging a criminal defendant's right to a fair trial, right to appear, and right to present a defense). Any defense strategy, of course, is confined by the law and the rules of evidence and procedure. But even if the evidentiary rules are not properly applied, the right to a fair trial is not impaired unless the defendant can show prejudice. *See State v. Allen*, 2000–NMSC–002, ¶ 46, 128 N.M. 482, 994 P.2d 728 (stating that a defendant must demonstrate prejudice in connection with ruling on admissibility of evidence unless a substantial right is affected); *State v. Jett*, 111 N.M. 309, 312, 805 P.2d 78, 81 (1991) (stating that evidentiary ruling is reversible error upon an abuse of discretion and a showing of prejudice). Such prejudice must be more than speculative. *See In re Ernesto M.*, 1996–NMCA–039, ¶ 10, 121 N.M. 562, 566, 915 P.2d 318, 322 ("An assertion of prejudice is not a showing of prejudice."). However, inconsistent application of the rules may have a prejudicial effect upon defense strategy. We believe this case is an example of such prejudice based upon Defendant's inability to question potential jurors about possible drug-use evidence. *See State v. Orona*, 92 N.M. 450, 452, 589 P.2d 1041, 1043 (1979) ("No more prejudice need be shown than that the trial court's order may have made a potential avenue of defense unavailable to the defendant.").

{15} We base this conclusion on Defendant's right to an impartial jury. *See* N.M. Const. art II, § 14; *Fuson v. State*, 105 N.M. 632, 633, 735 P.2d 1138, 1139 (1987) ("The New Mexico Constitution guarantees the right to trial by an impartial jury."); *State v. Sanchez*, 58 N.M. 77, 84, 265 P.2d 684, 688 (1954) ("There is ... no question that the right to trial by a fair and impartial jury is a fundamental right of the accused."). Rule 5–606(D) NMRA 2000 provides for peremptory challenges of jurors by both the State and the defense in a criminal case. " '[T]he right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire upon which the challenge for cause can be predicated." ' *State v. Ortiz*, 88 N.M. 370, 374, 540 P.2d 850, 854 (Ct.App.1975) (quoting *Ham v. South Carolina*, 409 U.S. 524, 532, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973)) (Marshall, J., dissenting in part and concurring in part). Because of the potential impact of evidence of cocaine use, Defendant wished to address the evidence with the jury on voir dire. Without the opportunity to do so, defense counsel could not be certain that the jury was impartial with regard to the subject of drug use. If the subject had not arisen at trial, there would not have been a problem. That was the state of the case after the trial court's initial ruling at voir dire.

{16} Relying on the ruling at voir dire, the defense understandably would plan its strategy accordingly. The circumstances changed, however, when the trial court changed its ruling to raise the specter of admitting the drug use testimony. If Defendant had testified about his "state of mind" after this ruling, the cocaine use evidence would have been admitted. At that point in the trial, defense counsel did not have the ability to exercise any challenges to jurors arising from the potential impact of such testimony. But because of the trial court's ruling, any state-of-mind testimony offered by Defendant would have been restricted in a manner not previously anticipated. Yet, it was imperative that Defendant testify without restriction to show that he lacked the requisite state of mind because state of mind is highly relevant to self-defense and defense of another. *See* UJI 14–5171 NMRA 2000; UJI 14–1572 NMRA 2000.

{17} The emotional content of testimony is an intangible aspect of trial and is difficult, at the very least, to abstract from a transcript on appeal. We cannot therefore rely upon the dispassionate transcript of the trial to reflect the lack of emotion in Defendant's testimony. Nor can we expect Defendant to make a record of the manner in which his testimony would have been more emotional. Rather, we glean prejudice in this case from the record of the observations made by the State and the trial court regarding the importance of voir dire on drug-use evidence. In this regard, the State acknowledged during argument to the trial court about the scope of voir dire that Defendant's evidence of drug use could have an impact on the jury. Before its final ruling, the trial court specifically acknowledged the impact on the defense of Defendant's inability to address the subject with the jury: "I am afraid that as [defense counsel] implies, it casts a whole different light upon the defense. It casts a whole different light on voir dire."

{18} The State characterized Defendant in its closing argument as lacking emotion and used that characterization to its advantage in challenging Defendant's claims of self-defense and defense of another. In addition, defense counsel acknowledged to the court that in his direct examination of Defendant "he went as close to the edge as [he] could," indicating at least some restriction on defense counsel from what he would otherwise have done on direct. We believe that, as a result, the trial court's change of position infringed upon Defendant's opportunity to challenge jurors who may have been unable to impartially judge the facts of the case, to Defendant's prejudice. Accordingly, Defendant was denied his right to a fair trial.

{19} The State additionally argues that it is unlikely that Defendant was prejudiced because of the substantial evidence against him, including his conflicting statements to friends and police. This argument is akin to a harmless error analysis that we would apply if the trial court had erred on an evidentiary ruling. *See State v. Moore*, 94 N.M. 503, 504, 612 P.2d 1314, 1315 (1980) (applying harmless error analysis to admission of evidence).

{20} Error in the admission of evidence is harmless when there is no "reasonable possibility" that the improperly admitted evidence "might have contributed to the conviction." *State v. Castillo–Sanchez*, 1999–NMCA–085, ¶¶ 25–26, 127 N.M. 540, 984 P.2d 787 (quoting *State v. Torres*, 1999–NMSC–010, ¶ 52, 127 N.M. 20, 976 P.2d 20). In this case, although, as we discuss below, substantial evidence supported the verdicts, Defendant raised plausible defenses which turned on Defendant's state of mind and credibility. The evidence of guilt was not overwhelming, nor was the evidence that Defendant was the aggressor or that he was not justified in his actions. *See Moore*, 94 N.M. at 504, 612 P.2d at 1315 (stating that harmless error occurs when substantial evidence supports the verdict, the admissible evidence is overwhelming in proportion to the improperly admitted evidence, and no testimony rebuts the improperly admitted evidence). We believe that the trial court's change of position in its rulings on cocaine evidence, which impaired Defendant's opportunity to voir dire potential jurors, could have affected the outcome of the trial.

{21} Nonetheless, we wish to emphasize the narrow scope of our holding. At trial, one mistake seemed to compound another with respect to the admissibility of drug evidence. Both parties and the court shared the blame. The degree of error below on this issue, and its fateful timing, drive the result in this appeal. That special set of circumstances limits our holding.

Sufficiency of Evidence

{22} Although we reverse because of the trial court's inconsistent rulings, we nevertheless review the sufficiency of the evidence because retrial would be barred if the evidence were insufficient to support Defendant's convictions. *See State v. Rosaire*, 1996–NMCA–115, ¶ 20, 123 N.M. 250, 939 P.2d 597. In doing so, we view the evidence in the light most favorable to the judgment, and we review whether any rational factfinder could have found that the essential elements of the crime were established beyond a reasonable doubt. *See State v. Garcia*, 114 N.M. 269, 273–74, 837 P.2d 862, 866–67

(1992). We disregard all inferences and evidence contrary to the verdict. *See State v. Montoya*, 116 N.M. 297, 304, 861 P.2d 978, 985 (Ct.App.1993).

{23} Defendant was convicted of second-degree murder. NMSA 1978, § 30–2–1(B) (1994) defines second-degree murder as follows:

> Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

Second-degree murder does not require that Defendant intended to kill Josh. *See State v. Lopez*, 1996–NMSC–036, ¶ 21, 122 N.M. 63, 920 P.2d 1017. It requires only that Defendant knew that his actions created a strong probability of death to another. *Id.*

{24} Defendant claims that he is not guilty of second-degree murder because he was sufficiently provoked by the fact that his friend "was being severely beaten" by Eric. Alternatively, Defendant claims that he is not guilty because he was acting in self-defense or defense of another. With respect to these claims, Defendant argues that the State failed to present sufficient evidence to support the conviction of second-degree murder by failing to prove: (1) that there was not sufficient provocation; (2) that Defendant did not act in self-defense; and (3) that Defendant did not act in defense of another.

Provocation

{25} The Uniform Jury Instructions define provocation as follows:

> "Sufficient provocation" can be any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions. The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition. The "provocation" is not sufficient if an ordinary person would have cooled off before acting.

UJI 14–222 NMRA 2000. Defendant argues that there was sufficient provocation to pull out a gun and defend his friend, who was being beaten by Eric.

{26} Viewing the evidence in the light most favorable to the verdict, there was ample evidence presented showing lack of provocation in this case. For example, the State presented evidence indicating that Defendant began the altercation, and actually provoked the situation. Defendant admitted that he got Josh "riled up" by pointing out that the group in the truck was staring. Defendant testified that he expected a fight and removed his hat as is his practice when he expects a fight. Eric testified that Defendant began the encounter by raising his hands and yelling. Josh and Defendant approached Eric's truck and made threats to hurt Eric. After threatening to hurt Eric, Josh began poking his finger into Eric's chest. Kristen testified that Defendant and Josh walked toward the truck and asked what Eric and Reece were looking at while using obscenities and yelling. Kristen testified further that Defendant and Josh appeared to be "agitated or angry." Kristen believed that Defendant and Josh were trying to provoke Eric and Reece. Reece testified that Defendant and Josh walked toward their own truck, but Defendant did not get into the truck. Instead, Defendant looked at the occupants of the other truck, then backed out of his truck, started walking closer to the truck where Eric was sitting, and began exchanging words. Reece testified that, while Eric and Josh were fighting, Defendant ran up to Eric with the gun, and then he heard shots.

{27} In addition, there was evidence that the fight had been going on for only a very short time and only a few punches were thrown before Defendant shot Josh and Eric. When asked how long Eric had been fighting with Josh before the first shot, Eric stated, "[n]ot too long." Jonathan Kimmel, an eyewitness, testified that before the shots were fired, the fight had not been going on long. He testified that it was "[q]uick like seconds." On cross-examination, Jonathan repeated that the fight was not "long drawn-

out .... It was just quick." Kristen testified that two or three punches were thrown and after another two or three seconds, she saw Defendant move toward the fight and she heard a gunshot and saw a flash. The short time period lends credence to the State's position that Defendant did not act as a result of sufficient provocation.

{28} Viewing the evidence in the light most favorable to the State, the jury could reasonably find that Defendant instigated the fight, immediately retrieved the gun from the truck, and fired. This evidence contradicts Defendant's claim that he was provoked. We recognize that there was conflicting evidence that might support a finding of provocation. However, our standard of review demands that we view the evidence in the light most favorable to the verdict. *See Montoya,* 116 N.M. at 304, 861 P.2d at 985.

Self-Defense and Defense of Others

{29} Defendant additionally argues that he was acting in self-defense or in defense of Josh when he used the gun. He claims that sufficient evidence does not support the convictions of second-degree murder, aggravated battery, and aggravated assault because the State did not prove that he was not acting in self-defense or defense of another. Self-defense or defense of another requires a "reasonable belief in the necessity for the use of deadly force to repel an attack in order to save oneself or another from death or great bodily harm." *State v. Coffin,* 1999-NMSC-038, ¶ 12, 128 N.M. 192, 991 P.2d 477. The evidence must show that an objectively reasonable person, put into Defendant's situation, would have believed that Defendant or another person was being threatened with death or great bodily harm, and that use of deadly force was necessary to prevent that injury. *See State v. Duarte,* 1996-NMCA-038, ¶ 8, 121 N.M. 553, 915 P.2d 309.

{30} The State introduced evidence from which the jury could infer that Eric did not pose an immediate danger of death or great bodily harm to Josh or to Defendant, that the shooting was not a result of Defendant's fear of death or great bodily harm to himself or others, and that a reasonable person in Defendant's situation under the same circumstances would not have acted as Defendant did. *See Coffin,* 1999-NMSC-038, ¶ 13, 128 N.M. 192, 991 P.2d 477. As we noted above, there was sufficient evidence that the fight was initiated by Defendant and lasted only seconds before Defendant shot Eric and Josh. *Cf. State v. Lucero,* 1998-NMSC-044, ¶¶ 7-8, 126 N.M. 552, 972 P.2d 1143 (stating that self-defense claim is not available or may fail if the evidence shows that the defendant was the instigator of the altercation). Defendant believed that Josh was normally a competent fighter and able to take care of himself. In other words, Josh, who was known to Defendant to be a competent fighter, was involved in an altercation that lasted only seconds before Defendant decided to pull out a gun and shoot into the fray. Based on this evidence, the jury could reject Defendant's claim that he was acting out of fear for himself or Josh and could conclude that a reasonable person in the same circumstances as Defendant would not have used deadly force.

Conclusion

{31} For the reasons stated above, we reverse and remand for a new trial.

{32} **IT IS SO ORDERED.**

APODACA and BOSSON, JJ., concur.

10 P.3d 166

2000-NMCA-077

PUBLIC SERVICE COMPANY OF NEW MEXICO and Mellon Bank, N.A., Trustee of the Public Service Company of New Mexico Master Decommissioning Trust, Plaintiffs-Appellants,

v.

John LYONS, et al., Defendants-Appellees.

No. 20,575.

Court of Appeals of New Mexico.

June 22, 2000.

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OPINION

APODACA, Judge.

{1} In this interlocutory appeal, Public Service Company of New Mexico (PNM) and Mellon Bank (Bank) challenge the trial court's order concerning discovery requested by Defendants of various documents in Plaintiffs' possession. The court's order determined that Plaintiffs had implicitly waived their attorney-client privilege and work product protection by affirmatively pleading fraudulent concealment, equitable tolling, and equitable estoppel as pled in Plaintiffs' first amended complaint in anticipation of Defendant raising a statute of limitations defense. Specifically, we consider Plaintiffs' claim that they never made any offensive or direct use (as opposed to defensive or passive use) of protected information and therefore should not be deemed to have waived their attorney-client privilege or work product protection. We agree with Plaintiffs that no waiver of the attorney-client privilege has occurred at this juncture in the litigation. We therefore reverse the trial court on the issue of the attorney-client privilege and remand for further proceedings.

{2} Based on our review of the record and the parties' briefs, the work product protection issue was essentially subsumed in the trial court as part of the attorney-client waiver issue. We thus limit our discussion to the attorney-client privilege issue and instruct the trial court on remand to address any independent work product protection issue under Rule 1-026 NMRA 2000.

I. FACTUAL AND PROCEDURAL BACKGROUND

{3} PNM, a public utility company, is partial owner of the Palo Verde Nuclear Generating Station located in Maricopa County, Arizona. The company is required by federal regulations to assure that there will be sufficient funds to decommission the three units of the plant when those units have reached the end of their useful lives. In 1986, estimates projected that PNM would need to assure the availability of $500 million for its share of decommission costs in the years 2024, 2025, and 2027.

{4} On July 31, 1987, PNM created a settlor-directed, revocable trust to meet its decommissioning obligations. Bank is trustee of the decommissioning trust. The corpus of the trust was invested in a corporate-owned life insurance (COLI) program called the Cost of Money Reduction Program (COMReP). COLI programs are designed to provide tax-free money to fund corporate obligations by using life insurance policies to insure corporate employees. Between 1987 and 1988, PNM used the decommissioning trust corpus to purchase 1729 life insurance policies issued by a number of Defendants and their predecessors.

{5} Plaintiffs have alleged in their amended complaint that these investments were made based on representations from numerous Defendants that the returns would be sufficient to satisfy PNM's decommissioning obligations under federal law. Plaintiffs have also alleged that the complexity of the COMReP insurance investment scheme made it necessary to rely on Defendants for their expertise in monitoring and evaluating the program relating to PNM's funding obligations. Plaintiffs later discovered that the

COMReP insurance investment scheme would not yield sufficient funds for PNM to meet its future obligations. Plaintiffs place the blame on various alleged misrepresentations, material omissions, and other improper conduct on the part of Defendants. Plaintiffs claim that they first discovered the alleged improper conduct and breaches in 1997 after hiring a consultant to review the program. By the end of 1997, Plaintiffs had invested almost $19 million in cash into the COMReP program, but their investment allegedly had a surrender value after taxes of only $13.4 million in 1998. Plaintiffs' complaint alleged that this difference would have left the trust short of the decommissioning obligations by some $372 million in date-of-license expiration dollars.

{6} Plaintiffs sued Defendants under numerous theories. Their original complaint was filed on March 31, 1998. Plaintiffs' theories included fraud, constructive fraud, deceptive insurance practices under NMSA 1978, Section 59A–16–30 (1990), unfair trade practices under NMSA 1978, Section 57–12–10 (1987), breach of contract, breach of fiduciary duty, negligence, negligent misrepresentation, and promissory estoppel.

{7} By the end of April 1999, Plaintiffs had produced 70,000 pages of documents in the lawsuit. They also submitted a log book of documents they claimed were protected by the attorney-client privilege and the work product doctrine. Defendants responded by filing a motion to compel production of documents relevant to Plaintiffs' assertion that they did not discover the alleged improper conduct until 1997. Defendants based their motion on the argument that, "by claiming equitable tolling based on prior ignorance of its claims, a plaintiff waives attorney-client privilege and work product protection for any communications whose contents may shed light on whether the plaintiff is or is not being truthful about its ignorance." At the hearing on the motion, Defendants presented their argument on the assumption that, for purposes of the trial court's ruling on their motion, the documents in question were in fact privileged or otherwise protected.

{8} The trial court granted Defendants' motion, ruling that:

> PNM, by asserting claims of fraudulent concealment, equitable estoppel, and equitable tolling in the First Amended Complaint, in order to avoid statutory limitations, implicitly waived the attorney-client privilege and the protection of the work product doctrine as to its and its attorneys' knowledge, documents and communications from January 1, 1985 through May 2, 1997[,] which relate to the issues of fraudulent concealment, equitable tolling, or equitable estoppel as pled in Plaintiffs' First Amended Complaint.

{9} The trial court characterized any documents pertaining to Plaintiffs' knowledge as relevant and vital to the disposition of the statute of limitations issue. On this basis, the trial court ordered a special master appointed for discovery purposes to review the documents listed in the privilege log and to submit a report to the court on any documents satisfying the court's definition of relevancy. Plaintiffs filed an application for interlocutory appeal from this order. This Court granted the application and assigned the case to our general calendar. Uncertain whether or not the underlying order was subject to Rule 12–503 NMRA 2000, allowing direct appeals from collateral orders, Plaintiffs also filed a petition for writ of error. This Court granted the petition and consolidated the appeals without resolving the appropriate procedure for seeking appellate review of the trial court's order. The parties have since informed this Court that, after the docketing of this appeal, the special master provided the trial court with a list of documents believed to satisfy the court's criteria for production. We should note, however, that any order requiring production has been stayed by the trial court pending disposition of this appeal.

II. DISCUSSION

A. Standard of Review

{10} As a general matter, we review discovery orders for abuses of discretion. *See Hartman v. Texaco*, 1997–NMCA–032, ¶ 20, 123 N.M. 220, 937 P.2d 979. In this appeal, however, the question presented requires our review of the trial court's con-

struction of law regarding privileges; as such, it presents a legal question that we review de novo. *See New Mexico Right to Choose/NARAL v. Johnson,* 1999–NMSC–028, ¶ 7, 127 N.M. 654, 986 P.2d 450.

B. New Mexico's Rules of Privilege and Abrogation of Common Law

{11} In *Ammerman v. Hubbard Broadcasting, Inc.,* 89 N.M. 307, 551 P.2d 1354 (1976), our Supreme Court held that rules of privilege, being evidentiary and thus procedural in nature, were constitutionally the domain of the judiciary. *Id.* at 310, 551 P.2d at 1357. On that basis, the Court concluded that statutory privileges created by the legislature were unconstitutional. *Id.* at 311, 551 P.2d at 1357. This approach is reflected in Rule 11–501 NMRA 2000, limiting privileges to those required by the state constitution and the rules promulgated by the Supreme Court. *See Ammerman,* 89 N.M. at 312, 551 P.2d at 1359 (discussing the limited privileges under Rule 501).

{12} New Mexico's approach to privileges is a special product of our state law jurisprudence. For example, Federal Rule of Evidence 501, from which our own rule is derived, expressly authorizes lower courts to continue developing and recognizing privileges. *See* 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 501.10[3], at 501–16 (Joseph M. McLaughlin, ed., 2d ed.2000). New Mexico, however, does not follow that approach. As our Supreme Court noted since its decision in *Ammerman,* Rule 11–501 prohibits New Mexico courts from engaging in such ad hoc expansion:

> The fact that New Mexico did not follow the approach of Congress but instead limited the privileges available to those recognized by the Constitution, the Rules of Evidence, or other rules of this Court manifests the abrogation and inapplicability of the common law evidentiary privileges.

State ex rel. Attorney General v. First Judicial Dist. Court, 96 N.M. 254, 260, 629 P.2d 330, 336 (1981). In *First Judicial,* the Court rejected the state's contention that a "public interest privilege" could be based, inter alia, on common law evidentiary privileges. *Id.*

{13} For these reasons, we are bound by the privileges expressly stated in Rule 11–502 NMRA 2000 (required reports privileged by statute), Rule 11–503 NMRA 2000 (attorney-client privilege), Rule 11–504 NMRA 2000 (physician-patient and psychotherapist-patient privilege), Rule 11–505 NMRA 2000 (husband-wife privileges), Rule 11–506 NMRA 2000 (communications to clergy), Rule 11–507 NMRA 2000 (political vote), Rule 11–508 NMRA 2000 (trade secrets), Rule 11–509 NMRA 2000 (communications to juvenile probation officers and social service workers), Rule 11–510 NMRA 2000 (identity of informer), and Rule 11–514 NMRA 2000 (news media). In this appeal, we are concerned only with the attorney-client privilege.

{14} Rule 11–503(D) sets forth the following exceptions to the attorney-client privilege: (1) furtherance of crime or fraud, (2) claimants through same deceased client, (3) breach of duty by lawyer or client, (4) document attested by lawyer, and (5) joint clients. None of these exceptions apply to the present case. Rule 11–511 NMRA 2000, however, states the following guidelines for waiver of privilege by voluntary disclosure:

> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

Rule 11–511. This provision is consistent with the general view that a person can be found to have waived a privilege or statutory right. *See Moss Theatres, Inc. v. Turner,* 94 N.M. 742, 744, 616 P.2d 1127, 1129 (Ct.App. 1980). The principle of waiver underlying Rule 11–511, however, raises an important question in light of our Supreme Court's holding in *First Judicial:* If we are rule-bound concerning the recognition of specific privileges and waiver, should our courts engage in the type of ad hoc judicial waiver analysis engaged in by other courts that are

free to apply the common law? For the reasons that follow, in view of the absence of a specific rule governing the at-issue waiver of the kind advocated by Defendants and discussed below, we hold that our courts must adhere closely to waiver as defined in Rule 11–511 and are not free to engage in ad hoc rule-making and waiver analysis as requested by Defendants.

C. The At-Issue Waiver Doctrine

{15} A person who places privileged matters "at-issue" in the litigation can be said to have implicitly consented to disclosure. *See generally Weinstein's Federal Evidence* §§ 503.41 and 511.05. As one commentator has observed: "When the client crosses the threshold and affirmatively raises an issue, either by way of a claim, counterclaim or affirmative defense that effectively can be disproven only through confidential attorney-client communications, courts are in conflict over whether the act of injecting that issue waives the protection of the attorney-client privilege." 2 Paul R. Rice, *Attorney–Client Privilege in the United States,* § 9:50 at 210–211 (2d. Ed.1999). The impressive array of cases in the parties' briefs in this appeal reflects the conflict taking place in the federal and state courts that have addressed the at-issue doctrine. Despite the factual and legal complexity that these cases present, they fall into one of three categories or approaches for application of what we shall term as the at-issue waiver doctrine. As explained by the Tenth Circuit:

> Courts generally employ some version of one of the three following general approaches to determine whether a litigant has waived the attorney-client privilege. The first of these general approaches is the "automatic waiver" rule, which provides that a litigant automatically waives the privilege upon assertion of a claim, counterclaim, or affirmative defense that raises as an issue a matter to which otherwise privileged material is relevant. The second set of generalized approaches provides that the privilege is waived only when the material to be discovered is both relevant to the issues raised in the case and either vital or necessary to the opposing party's defense of the case. Finally, several courts have recently concluded that a litigant waives the attorney-client privilege if, and only if, the litigant directly puts the attorney's advice at issue in the litigation.

Frontier Refining, Inc. v. Gorman–Rupp Co., Inc., 136 F.3d 695, 699–700 (10th Cir. 1998) (citations omitted). Some courts and commentators occasionally refer to the various tests differently. *See, e.g.,* T. Maxfield Bahner and Michael L. Gallion, *Waiver of Attorney-client Privilege via Issue Injection: A Call for Uniformity,* 65 Def. Couns. Journ. 199, 201–04 (1998) (separating cases into four categories). We believe, however, that it is most helpful to limit the cases to the three categories or approaches described by the Tenth Circuit court in *Frontier Refining.*

{16} In considering these three approaches, courts have the option of choosing between two straightforward tests (Approaches 1 and 3, as listed in *Frontier Refining*) and a middle of the road, case-by-case fairness test (Approach 2). At the one extreme (Approach 1), the automatic waiver rule offers simplicity because a court only needs to look to the claim, counterclaim, or defense to see if it makes privileged matters relevant. This approach has been severely criticized as too rigid and has been adopted in only a handful of cases. *See Ghana Supply Comm'n v. New England Power Co.,* 83 F.R.D. 586, 593–94 (D.Mass.1979); *Compagnie Francaise d'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co.,* 105 F.R.D. 16, 25 n. 2 (S.D.N.Y.1984); *Independent Prods. Corp. v. Loew's Inc.,* 22 F.R.D. 266, 277 (S.D.N.Y.1958); *Federal Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.,* 53 F.R.D. 260, 262 (W.D.Okla.1971).

{17} The intermediate approach (Approach 2) is generally referred to as the *Hearn* test because it was first articulated in *Hearn v. Rhay,* 68 F.R.D. 574, 581 (E.D.Wash.1975). *See Weinstein's Federal Evidence* § 503.41 at 503–104.1. That case involved a prisoner who filed a civil rights action against prison officials after being confined in the prison's mental health unit. The defendants raised the defense of qualified immunity, thereby placing the legal advice they received directly at issue in the case. *Id.* The court in *Hearn*

adopted fairness as a guiding principle and set forth a three-part inquiry to determine whether the attorney-client privilege had been waived:

> All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.

Id.

{18} The approach taken in *Hearn* represents the majority view. *See* Rice, *Attorney-client Privilege in the United States* at § 9:50 at 224–25 ("While *Hearn* has not been without its detractors, the court's logic has received overwhelming support in the courts that have addressed the issue."); *see generally Synalloy Corp. v. Gray,* 142 F.R.D. 266, 269 (D.Del.1992); *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.,* 176 F.R.D. 269, 272 (N.D.Ill.1997); *Pippenger v. Gruppe,* 883 F.Supp. 1201, 1204 (S.D.Ind. 1994); *Paramount Communications, Inc. v. Donaghy,* 858 F.Supp. 391, 395 (S.D.N.Y. 1994); *Allen v. West Point–Pepperell Inc.,* 848 F.Supp. 423, 428–29 (S.D.N.Y.1994); *Standard Chartered Bank PLC v. Ayala Intern. Holdings (U.S.) Inc.,* 111 F.R.D. 76, 80 (S.D.N.Y.1986); *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc.,* 82 Ohio App.3d 322, 612 N.E.2d 442, 447–49 (1992); *Republic Ins. Co. v. Davis,* 856 S.W.2d 158, 163 (Tex.1993). The *Hearn* approach best describes the trial court's sweeping decision in this case regarding Plaintiffs' alleged waiver.

{19} The majority view, however, has been applied in a confusing and uneven manner, leading to considerable criticism. *See West Point–Pepperell,* 848 F.Supp. at 429 ("Expansive interpretation of 'at issue' waiver under *Hearn* and its progeny has recently been the subject of significant legal and academic criticism."). Perhaps the strongest academic criticism is found in *Developments in the Law—Privileged Communications,* 98 Harv. L.Rev. 1450, 1639–43 (1985), claiming that only the third prong of the *Hearn* test—that the information be vital—has any limiting force on waiver. The law review strongly proposes that the opposing party's need for the information is anathema to the concept of an absolute privilege. The article is also critical because *Hearn* 's case-by-case balancing approach runs counter to the United States Supreme Court's emphasis on the need for certainty. *Id.*

{20} We consider noteworthy the following summation of criticism in the article: "the faults in the *Hearn* approach are (1) that it does not succeed in targeting a type of unfairness that is distinguishable from the unavoidable unfairness generated by every assertion of privilege and (2) that its application cannot be limited." *Id.; see also* Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator,* 84 Mich. L.Rev. 1605, 1632–33 (1986) (waiver should only be recognized where party has attempted to garble the truth by injecting privileged material itself into the case).

{21} Commentators and academicians are not alone in their criticism of *Hearn.* We deem especially persuasive the following discussion in *Rhone–Poulenc Rorer Inc. v. Home Indemnity Co.,* 32 F.3d 851, 864 (3d Cir.1994):

> Some decisions have extended the finding of a waiver of the privilege to cases in which the client's state of mind may be in issue in the litigation. These courts have allowed the opposing party discovery of confidential attorney client communications in order to test the client's contentions. *See, e.g., Byers v. Burleson,* 100

F.R.D. 436 (D.D.C.1983); *Hearn v. Rhay*, 68 F.R.D. 574 (E.D.Wash.1975). These decisions are of dubious validity. While the opinions dress up their analysis with a checklist of factors, they appear to rest on a conclusion that the information sought is relevant and should in fairness be disclosed. Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue. As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served. Clients will face the greatest risk of disclosure for what may be the most important matters. Furthermore, because the definition of what may be relevant and discoverable from those consultations may depend on the facts and circumstances of as yet unfiled litigation, the client will have no sense of whether the communication may be relevant to some future issue, and will have no sense of certainty or assurance that the communication will remain confidential.

A party does not lose the privilege to protect attorney client communications from disclosure in discovery when his or her state of mind is put in issue in the action. While the attorney's advice may be relevant to the matters in issue, the privilege applies as the interests it is intended to protect are still served by confidentiality.

Id.; see also Remington Arms Co. v. Liberty Mutual Ins. Co., 142 F.R.D. 408, 413 (D.Del. 1992) (acknowledging academic criticism for the "[e]xpansive applications of implied waivers" and concluding that the "core problem, according to this line of reasoning, is that expansive language for determining implied waiver leads to a type of ad hoc determination that ignores the system-wide role of the attorney-client privilege and undermines any confidence the parties can place in the privilege").

{22} We agree with the reservations forcefully discussed in *Rhone*. It follows from the rationale found in *Rhone* and the academic criticism of the *Hearn* approach that the third approach discussed by the Tenth Circuit in *Frontier Refining* merits serious consideration. That approach is to recognize waiver only where a party "seeks to limit its liability by describing that advice and by asserting that he relied on that advice." *Rhone* 32 F.3d at 863. The *Rhone* approach, which also recognizes waiver where direct use is anticipated because the holder of the privilege must use the materials at some point in order to prevail, is followed by a minority of courts. *See, e.g., Harter v. University of Indianapolis*, 5 F.Supp.2d 657, 664–65 (S.D.Ind.1998); *Dixie Mill Supply Co. v. Continental Cas. Co.*, 168 F.R.D. 554, 559 (E.D.La.1996); *Aranson v. Schroeder*, 140 N.H. 359, 671 A.2d 1023, 1030 (1995); *Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 71 (D.N.J.1992); *State v. Hydrite Chem. Co.*, 220 Wis.2d 51, 582 N.W.2d 411, 417–18 (Wis.Ct.App.1998).

{23} We believe the *Rhone* approach best fits New Mexico law. We therefore side with the minority of jurisdictions that require offensive or direct use of privileged materials before the party will be deemed to have waived its attorney-client privileges. In light of New Mexico's rule-bound law of privilege and the absence of Supreme Court case law to the contrary, which we discuss in the next section of our discussion, we believe the issue of waiver should be governed by, and limited to, Rule 11–511 (waiver of privilege by voluntary disclosure), in the absence of any other provision specifically addressing the issue. Our rules reflect a careful, methodical, approach to the development of the rules governing privileges—one that involves public participation and discourages ad hoc judicial intervention. On the other hand, application of the *Hearn*-type test would undermine the "full and frank" communications at the heart of the attorney-client privilege and would be contrary to the certainty that the rules themselves are intended to provide. Without such stability concerning to the privilege, how could an attorney and a client be able to predict, years later, whether their communi-

cations—intended to remain privileged—might be deemed by a later court to be "relevant" or "vital" regarding subsequent litigation. We believe the *Hearn* approach places this venerable privilege in harm's way, something we cannot countenance, and even at the expense of a zealous pursuit of truth. Any development or change in this area should be directed to our Supreme Court, our state's rule-making authority. We thus consider the *Rhone* approach to be based on sound principles and adopt it as law in New Mexico.

{24} The restrictive approach we adopt is consistent with the long-held view that the attorney-client privilege should act as a shield and not a sword. *See Weinstein's Federal Evidence* § 503.41[1]. Confusion in the "at-issue" case law arises because some courts believe that parties are using a privilege as a sword when they refuse to disclose matters relevant to issues or claims that they have injected into the litigation. This belief explains why the *Hearn* ad hoc balancing test has resulted in an expansive view of waiver. By adopting the *Rhone* approach requiring offensive or direct use of privileged information, we believe the "shield/sword" metaphor is more accurately applied.

{25} The *Rhone* approach is also more consistent with the purpose of the attorney-client privilege, which, as we already noted, "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); *see also Swidler & Berlin v. United States,* 524 U.S. 399, 407, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (holding that attorney-client privilege continues after death and noting that the Independent Counsel failed its significant burden to show that the full and frank communication policy at the heart of the privilege would not be undermined). Likewise, Defendants here have failed to show that the specter of a case-by-case judicial ad hoc application of the *Hearn* test would not undermine the purpose of the privilege.

{26} We are also unpersuaded by Defendants' arguments that New Mexico case law supports our adoption of the majority view represented by *Hearn.* As noted in the following section, in examining New Mexico case law, we are persuaded that it is not contrary to, but instead supports our holding.

D. New Mexico Case Law Supports Adoption of the *Rhone* Approach

1. *Skaggs v. Conoco, Inc.*

{27} Both sides in this appeal rely on *Skaggs v. Conoco, Inc.,* 1998–NMCA–061, ¶ 21, 125 N.M. 97, 957 P.2d 526, as support for their respective arguments. In *Skaggs,* however, this Court did not consider it necessary to review the at-issue waiver in great depth. The plaintiffs in that case argued that, by raising the defense of laches, the defendants had waived their attorney-client privilege concerning certain title opinions received from counsel. *Id.* ¶¶ 20–21. Presumably, the plaintiffs were attempting to show that the defendants were on notice that the plaintiffs had an interest to the mineral rights in question. *See id.* ¶ 14 (discussing elements of laches). This Court concluded, however, that "[u]nder the facts presented here, we fail to see how the defense of laches implicates the title opinions sought by Plaintiffs since Defendants have not been shown to have relied upon those opinions to prove their defense of laches." *Id.* ¶ 21.

{28} Despite this quoted language, which we suggest indicates a preference for the more restrictive *Rhone* approach, Defendants note *Skaggs'* citation to *Conkling v. Turner,* 883 F.2d 431, 434 (5th Cir.1989) and that opinion's reliance on *Hearn.* Defendants argue that the reference to *Hearn* is an implicit adoption of that approach. We disagree with this reading of *Skaggs* for two reasons. First, *Hearn* was a fact-intensive test, and *Skaggs* did not suggest either that the trial court engaged in such analysis or that the *Hearn* approach would preclude waiver as a matter of law. In fact, the court in *Skaggs* appears to have noted *Conkling* only because it was the principal case relied on by the [p]laintiffs. *Skaggs,* 1998–NMCA–061, ¶ 21, 125 N.M. 97, 957 P.2d 526. Second, and this point reflects the confusion among many of

the at-issue cases, the facts of *Conkling* actually involved the type of partial use of privileged matters that would have triggered waiver under even the most restrictive approach. *See Conkling,* 883 F.2d at 432–33 (noting that Conkling, as plaintiff, had attempted to defeat the statute of limitations by submitting his own affidavit explaining privileged communications with a former attorney). Consequently, despite *Skaggs'* reference to *Conkling* and *Hearn,* we believe a preference for the more restrictive approach under *Rhone* was instead suggested by *Skaggs'* reliance on the following language in Restatement (Third) of the Law Governing Lawyers § 130 cmt. c, at 231 (Tentative Draft No. 2, 1989):

> Whether an adversary may obtain discovery of materials that otherwise are privileged depends not merely upon what the client pleads but upon the way in which the client will likely prove the assertion. If, for example, the client proposes to prove the allegation [or defense] in ways that do not involve any privileged communication, the exception does not apply.

Skaggs, 1998–NMCA–061, ¶ 21, 125 N.M. 97, 957 P.2d 526 (internal quotation marks omitted).

{29} A preference for a more restrictive approach is also implicit in *Skaggs'* reference to waiver requiring "offensive use" of privileged materials. *Id.* We recognize, of course, that the trial court in this appeal may have been misled by this Court's citation in *Skaggs* to *Marathon Oil Co. v. Moye,* 893 S.W.2d 585, 590 (Tex.App.1994), which in turn follows its "offensive use" reference with an application of the *Hearn* test. Based on our review of cases from other jurisdictions, however, it appears that courts simply define "offensive use" differently. "Offensive use" under *Hearn* was deemed to be implicit from the parties' actions, whereas the restrictive approach requires direct use. Even under the *Hearn* approach, there is considerable room for courts to come to different conclusions on the waiver issue. *Cf. Paramount Communications,* 858 F.Supp. at 395–97 (discussing various distinctions that have emerged in the Second Circuit).

2. *Hartman v. El Paso Natural Gas Co.*

{30} As we previously noted, *Hearn* was based on the court's search for fairness and truth, two goals adopted by our Supreme Court in its discussion of privileges in *Hartman v. El Paso Natural Gas Co.,* 107 N.M. 679, 687, 763 P.2d 1144, 1152 (1988). Defendants point to court decisions quoted in *Hartman* that suggest a narrow construction of the attorney-client privilege and that waiver analysis be done on a case-by-case basis, such as Defendants advocate here under the *Hearn* approach. *Hartman,* however, involved inadvertent disclosure of privileged documents and whether that constituted a waiver of privilege. Its holding is confined to waiver as a function of prior disclosure. *Hartman* did not concern itself with new forms of waiver generally, or the at-issue waiver specifically, and therefore, taken in context, *Hartman* is of little help to our analysis. Because of the debate and confusion that has developed on the question of when privileged matters have been placed at issue, the significant criticism of *Hearn,* and the fact that our Supreme Court in *Hartman* did not specifically or expressly address the issue, we conclude that *Hartman* does not support adoption of the *Hearn* approach.

E. Application of the *Rhone* Approach to this Appeal

{31} In light of our holding that waiver of the attorney-client privilege is governed exclusively by Rule 11–511 and its restriction to waiver by voluntary disclosure, the disposition of this appeal becomes straightforward. The trial court's order clearly reflects application of the *Hearn* approach, including specific determinations that materials relevant and vital to the equitable estoppel, equitable tolling, and fraudulent concealment claims should be disclosed. Because we reject the *Hearn* approach, we reverse the trial court for its reliance on that approach. We remand for the trial court's reconsideration of the issue under the *Rhone* approach, which we have adopted in this opinion.

{32} The trial court applied its waiver analysis to all relevant documents claimed to be protected by attorney-client privilege or the work product doctrine. Our holding is

therefore limited to the "at-issue" waiver theory, and we point out that neither this Court nor the trial court has addressed claims that are unique to work product protection under Rule 1–026. *Cf. Hartman,* 123 N.M. 220, 937 P.2d 979, 1997–NMCA–032, ¶¶ 18–25 (discussing work product discovery issues and noting that work product is distinct from issues governing privileges).

III. CONCLUSION

{33} For these reasons, we reverse the trial court and remand for proceedings consistent with this opinion. The parties shall bear their respective costs on appeal.

{34} **IT IS SO ORDERED.**

BOSSON and ARMIJO, JJ., concur.

10 P.3d 176

2000-NMCA-080

Pedro TARTAGLIA, Individually and as Personal Representative of the Estate of Joseph T. Tartaglia, a/k/a Joe Tartaglia, deceased, Plaintiff/Counterdefendant–Appellee,

v.

Karen Lynne HODGES, Individually and as Successor Trustee of the Romi Tartaglia Revocable Living Trust; and Albert John Meteney, Jr., Defendants/Counterclaimants–Appellants,

v.

Leo Tartaglia, III, Connie Tartaglia, and All Unknown Heirs of Leo Tartaglia, Jr., Counterdefendants–Appellees.

No. 19,749.

Court of Appeals of New Mexico.

July 10, 2000.

Certiorari Denied, No. 26,481, September 11, 2000.

William J. Darling, Margaret P. Armijo, William J. Darling & Associates, P.A., Albuquerque, NM, for Appellants.

Avelino V. Gutierrez, Gutierrez Law Offices, Albuquerque, NM, Robert T. DeVoe, Albuquerque, NM, for Appellee.

OPINION

SUTIN, Judge.

{1} This is a dispute over ownership of a family home. Based primarily on statements attributed to deceased declarants, the trial court imposed trusts on the property in favor of all family members thereby defeating deeds by which one family member held legal title. The holder of that legal title appeals. We affirm.

BACKGROUND

The Immediate Family

{2} Romelia Tartaglia, who died in September 1966, had five children: Romi (Tartaglia) Meteney, the oldest, who died in March 1995; Carlos Tartaglia who died in May 1998; Joe Tartaglia who died in February 1994; Leo Tartaglia who died in 1985; and Pedro Tartaglia, who is living and is a plaintiff in this action.

The Property

{3} In 1957, the Tartaglia family moved into a home on Indian School Road in Albuquerque, New Mexico ("the Indian School property"). Title was placed in Joe's name. In 1966, this home was purchased by the Highway Department for the I–40 right of way. Romelia then purchased the property that is the subject of this action: a home on Eton Street, in Albuquerque, New Mexico ("the property" or "the Eton property"), title to which was placed in Joe's name. In May 1968, Joe executed a quitclaim deed to the property to Romi as grantee. The quitclaim deed was recorded in July 1969.

{4} In July 1981, Joe borrowed $10,000 from Albuquerque National Bank and signed a mortgage on the property. Although record title was in Romi's name, the mortgage contained Joe's representations that included the statements that "Borrower (Joe) is lawfully seised of the estate hereby conveyed and has the right to mortgage the property, the property is unencumbered." Joe was given a release of this mortgage in November 1986. In May 1993, Romi executed a special warranty deed to herself as trustee of a revocable living trust called the Romi Tartaglia Revocable Living Trust ("the trust").

{5} After 1966, subject to their ability to pay, Joe made monthly mortgage payments and paid the taxes and insurance on the property, and the remaining family members, while they lived on the property, paid for the property upkeep, repair, and the family living expenses.

This Lawsuit

{6} Pedro individually, and as personal representative of Joe's estate, filed a complaint in August 1996 to set aside Joe's 1968 quitclaim deed to Romi and Romi's 1993 special warranty deed, alleging as grounds Joe's incapacity and lack of intent to convey to Romi. Pedro is the "Appellee" here. The lawsuit named as Defendants the children of Romi, who are Karen Lynne Hodges and Albert John Meteney, Jr., and also named Hodges as successor trustee of the trust. These defendants are the "Appellants" in this opinion. Pedro also sought an express or resulting trust declaring Joe to have been the trustee of the property, and, in addition, to impose a constructive trust for the benefit of Joe's heirs, namely, himself, Carlos, Romi's children (Defendant Karen Lynne Hodges and Defendant Albert John Meteney, Jr.), and Leo, Jr.'s nephew (Leo III). Appellants counterclaimed to quiet title and added as parties to the counterclaim Leo III, and Connie Tartaglia, who was married to Leo, Jr.

{7} During the pendency of the present lawsuit, the property was sold and the sale proceeds were ordered placed in the registry of the court. The district court filed findings of fact and conclusions of law after a one-day bench trial. The court concluded that Romelia established an express trust in 1966 for the benefit of the family; that a resulting trust for the benefit of all members of the family arose from the 1966 deed in Joe's name; that Joe lacked intent to convey full title to Romi; and that the 1968 deed to Romi and Romi's 1993 deed to herself as trustee were wrongful, giving rise to constructive trusts and requiring the deeds to be set aside. The court then entered judgment: setting aside Joe's 1968 quitclaim deed to Romi and Romi's 1993 special warranty deed to herself as trustee; releasing the sale proceeds in the court registry to Pedro as the personal representative of Joe's estate to be distributed according to the laws of intestate succession; and dismissing the counterclaim with prejudice.

{8} The trial court primarily relied on the testimony of living witnesses reiterating statements of deceased persons to support its findings and conclusions regarding Joe's lack of intent and the existence of express, resulting, and constructive trusts. At the heart of the trial court's findings and judgment are statements attributed to Romelia, Joe, and Romi. It is the admission of those hearsay statements that constitutes the primary basis for Appellants' claim of error requiring reversal.

{9} The court admitted the hearsay statements under Rule 11–803(X) NMRA 2000 at trial. As Appellants correctly point out, the declarants were unavailable, so the appropriate catch-all rule is Rule 11–

804(B)(5) NMRA 2000, and not Rule 11–803(X). This point is inconsequential, however, because the two residual exceptions are identical. A point that is of significant importance to the resolution of this case on appeal is that although the court relied on one of the residual exceptions for admitting the statements at trial, it relied on another rule, Rule 11–804(B)(3), in its findings of fact and conclusions of law, to support the admission of some of the hearsay statements. We explain the significance of this point below.

{10} The court also ruled that Romi wrongfully paid herself $15,600 from Joe's bank account, and that Carlos's heirs were entitled to share in Joe's estate under the laws of intestate succession.

This Appeal

{11} Appellants seek reversal on several grounds. They attack the court's findings of fact regarding Joe's lack of intent to convey and regarding the trusts, on the ground that the findings are based on erroneously admitted hearsay evidence. They attack as unsupported by substantial evidence the court's findings of lack of intent and the existence of trusts. They assert error by the court in failing to apply the statute of limitations to bar the claim that Joe lacked intent to convey. They also attack as contrary to the law and evidence the determination that Romi wrongfully paid herself $15,600 from Joe's bank account, and the determination that Carlos's heirs could share in Joe's estate under the laws of intestate succession.

The 1966 Eton Property Deed to Joe: Express and Resulting Trusts

{12} The court found that Romelia intended in 1957 that the Indian School "home be used by all of the children who, in turn, would share the mortgage payments and upkeep expense as best they could." The court further found that Romelia placed title to the Indian School property in Joe's name because "he was the child who was most often living in the home." This trust, the court found, was intended to continue with the purchase of the Eton property in 1966 with the use of the Indian School property sale proceeds. Again, the court found, title to the Eton property was placed in Joe's name with the intent that he "hold and maintain the Eton home for the living use and benefit of the Tartaglia family." Implicit in this finding is that Romelia manifested her intent that Joe hold title for the benefit of the family. In addition, the court concluded that "[t]he Tartaglia family did not intend that Joe take the sole beneficial interest in the [Eton] property when the title ... was placed in his name."

{13} The court concluded that an express trust was established in 1966 by Romelia and her five children. The terms of that trust were that "Joe was to hold title to the property for the benefit of the Tartaglia family, which was a continuation of the express trust which had been established in 1957 with regard to the Indian School property." The court also concluded that because the family did not intend that Joe take the sole beneficial interest in the Eton property, "a resulting trust was created for the benefit of all members of the Tartaglia family" when Joe took title to the property. Thus, the court determined that, with respect to the 1966 Eton property deed, Romelia's manifest intent in placing title in Joe's name was solely for Joe to hold title for the use and benefit of the family and, further, that a resulting trust was created based on the family's intent that Joe not take the sole beneficial interest in the property.

{14} The court's findings were based on the testimony of Pedro, and of Pete Tartaglia, a cousin. Pedro testified that his mother, Romelia, told Joe, Leo, and Pedro after the Indian School property was purchased in 1957 that the property was being placed in Joe's name because Romelia knew she "wouldn't be living too long more," and because their father was sick. Romelia also told the boys that

> she told Joe that this agreement was made to him because the house belonged to the whole boys, us, that were living in it, and that he would carry out her wishes.... [S]he said there's the house for us whenever, for us. It would never be sold until the last person would die, you know, and then it would be divided among the children, or whatever.

In addition, Pedro testified that, while the Eton property was being purchased, Romelia told Joe, Leo, and Pedro together that:

> [S]he couldn't put [the property] in all three names, that she was going to put it in one name, Joe. And she made him promise to her of her wish that this house belonged to us all, the brothers.... [I]t was there until the last person died; and then from there, they put the house to be sold and give them to the sons, if we was to get married...."

{15} Pedro also testified that, based on what he was told by Romelia, he knew that the money for the down payment on the Eton home came from the sale of the Indian School home. Yet, when asked whether it was also correct that the only basis for his knowledge of where the money came from to make the down payment on the Eton home is what his mother told him, Pedro testified, "No. I seen my mother handle the thing with Joe."

{16} Pete Tartaglia testified that right after Leo, Sr.'s death in 1963, Romelia (Pete's aunt) lived with Pete for two weeks and that Romelia told Pete, with regard to the ownership of the Indian School home, "the reason they had decided to do that was because they wanted to make sure that that house was there for everybody until the last member passed away, and Joe was around the most." Pete further testified that roughly two weeks to a month after Romelia died, Joe told Pete that "the previous arrangements that had been made by my aunt were in effect or were going to be carried out.... [T]he message was that the arrangement was still for them to live there until the last one passed away."

The 1968 Eton Property Deed to Romi: Constructive Trust

{17} The court found that Joe's quitclaim deed dated May 29, 1968, to Romi was "without any consideration whatsoever, and for the sole and single purpose of avoiding the loss and forfeiture of the family home on Eton to the bondsman." This finding was made along with findings regarding contemporaneous circumstances giving credence to Joe's purpose in executing a deed to Romi, namely, findings regarding Joe's two arrests, pledge of the Eton property for a bond, and execution of the deed to Romi "at a time when the bondsman was physically removing personal property from the Eton house to satisfy payment of the bond." The court also found that the delay in recording the deed until July 2, 1969, was further evidence of "Joe's lack of intent to convey to Romi in any manner other than to avoid the bondsman."

{18} The court concluded that the deed "constituted fraud, constructive fraud and a wrongful act" by both Joe and Romi, and the court imposed a constructive trust requiring that the deed be set aside, and that the property be reconveyed by Romi for the benefit of the Tartaglia family. At the same time, the court concluded that "Joe lacked the intent to convey the property to Romi," and "did not make a legal delivery" of the deed to Romi. Based on these holdings, the court imposed a constructive trust and required the reconveyance.

{19} The evidence to support the court's findings consists mainly of Pedro's testimony. Pedro testified that Joe said he (Joe) had signed the house as collateral for the bondsman in order for Joe and Pedro to get out of jail on bond. Joe told Pedro that they were "going to have to pay it back, otherwise they're going to try and take the house from us." Following this, Joe was worried, and Pedro and Joe did the second burglary. Pedro testified that, after the second burglary, Joe was again worried, was "acting real different," stopped eating, and "wasn't taking care of himself physically or mentally," and that Joe told Pedro that "[Joe] had signed the house as collateral, and [the bondsman] wanted their money, so they were going to try and get it some way."

{20} In addition, the court found that after 1968 "Joe, at various times, told Pedro, Carlos, Romi, Connie and Pete ... that the property was being held for the benefit of the Tartaglia family," and also that "Romi told Connie that the property was being held for the benefit of the Tartaglia family." The evidence to support these two findings consists of the testimony of Connie and Pedro. Connie, who moved in the Eton property in

1976 and left in 1980, testified that Romi and Carlos had some kind of a disagreement, that she (Connie) said to them, "Why don't you guys just go your own way? Why don't one of you move out or whatever ...," and that Romi said "because the house belonged to all of them, and they all had a right to be there." Connie also testified that around 1978, she inquired of Joe about who the house belonged to, and Joe told her, "that the house was in his name, but he did not own the house. It was in his name, but it belonged to everyone, you know, to all the boys, and for the reason that other people had mentioned, there was always a place for them to live. They never had to worry." Connie further testified that Joe said "[t]hat the house would be sold, and it would be divided up among the children, the surviving heirs." In addition, Connie testified that Leo had told her the same thing.

{21} Pedro testified that Albert Meteney came to Albuquerque and stayed a few months at the Eton property in the early 90s. Pedro testified that Romi and Albert were in the living room with Joe when Joe told Albert that if he was going to argue and fight he (Albert) could get his things and get out of the house. Pedro further testified that Albert then said, "Mom, I thought you said you owned the house;" that Joe said, "No. This house is ours...." Pedro also testified that sometime before August 1993, Joe told Pedro that he (Joe) had Lou Gehrig's disease and that it was getting worse day by day. Pedro questioned what might then happen "to the house and everything," and Joe said that he was going to put the house in Pedro's and Carlos's names. According to Pedro, both Romi and Carlos were present during this conversation. He (Pedro) heard Romi and Joe arguing and guessed that Romi was upset and mad at Joe because Joe was going to put the house in Carlos's and Pedro's names, and Joe told Romi, "Why don't you go back to Missouri? This is our house." Pedro then testified that he did not hear Romi say anything in response about her owning or having a deed to the property. At the same time, Joe said, "[T]he house was supposed to be for the family, for us, and that was the place—we all had a place to stay, especially if we weren't married or nothing." Pedro testified that Joe said, "[W]ell, the last survivor, he can sell the house and divide it among the sons...."

{22} Further evidence from which the court inferred Joe's trustee status is that in 1981, some thirteen years after Joe's 1968 deed to Romi, Joe borrowed $10,000 from a bank and signed a mortgage on the property to secure the loan. The mortgage stated that "Borrower (Joe) is lawfully seised of the estate hereby conveyed and has the right to mortgage the property." Joe received a release of that mortgage in 1986.

DISCUSSION

I. The Delicate Balance

{23} In addressing the issues surrounding the establishing of trusts based on the hearsay statements of deceased persons, we take note of words of caution of our Supreme Court:

> As a general rule, evidence of mere verbal admissions or statements of persons since dead, or of the alleged cestui que trust, or of mere loose expressions or admissions by the purchaser of property, such as that the purchase money was furnished by another, or that he was purchasing or holding for another, particularly after the death of such purchaser or a long lapse of time, and uncorroborated by other evidence, is insufficient to establish a resulting trust, as such evidence is most unsatisfactory, on account of the facility with which it may be fabricated, the impossibility of contradiction, and the consequences which the slightest mistake or failure of memory may produce.

White v. Mayo, 35 N.M. 430, 437, 299 P. 1068, 1071 (1931) (quotation marks and citation omitted). "[C]ourts typically view with suspicion claims to trusts based upon alleged oral agreements or understandings in cases where ... the grantee is deceased." *In re Estate of McKim*, 111 N.M. 517, 521, 807 P.2d 215, 219 (1991).

{24} In the present case, Romelia, the settlor, and the person who allegedly directed the two deeds into Joe's name, is deceased. Lopez, the grantor of the 1966 Indi-

an School property deed to Joe, presumably is deceased. Joe, the grantee of the 1957 and 1966 deeds, and also the grantor of the 1968 deed to Romi, is deceased; Romi, the grantee of the deed from Joe, and also the grantor of the deed to herself as trustee, is deceased. Indeed, all of the children of Romelia are deceased except Pedro. Thirty years passed between Romelia's death and the filing of this action by Pedro. Twenty-eight years went by after Joe's deed to Romi.

{25} In addition, there exists no evidence that Joe deeded the property to Romi with any actual intent to defraud anyone in his family; rather, his intent appears to have been to defraud a creditor for the benefit of the family. There exists no evidence that Romi accepted the deed in order to defraud anyone in the family. No evidence exists explaining why this 1968 deed was not recorded until over a year after it was executed. Except perhaps for Pete, each person testifying in favor of the existence of trusts had a self-serving pecuniary interest. There exists no evidence, until lawsuits starting in 1995 between Carlos and Romi (or her children), that Joe or anyone else made any attempt to place title back in Joe; nor, apparently, did anyone bother to determine who held title.

{26} Unquestionably, these circumstances heighten suspicion of the validity of the claims of the Appellee in this case. And permeating this history is evidence that Joe was in and out of a mental institution—evidence actually offered by Appellee to show that Joe was not competent to execute the 1968 deed to Romi, a fact Appellee was unable to establish.

{27} Appellants, holders of legal title, were armed at trial with deeds valid on their faces, with established hearsay rules to keep out untrustworthy hearsay statements, with established standards of proof to require corroboration of evidence by interested persons, with related court determinations deciding similar issues in their favor, and with the protection of the high burden of proof required in order to impose an oral trust on property. Yet, Appellee was able to overcome these formidable barriers in the trial court. And it is Appellee who is now armed with his own formidable barriers. Those barriers include the standards of review that require this Court to review the court's admission of evidence for abuse of discretion. If we determine that the evidence was properly admitted, we view the evidence in a light most favorable to the decision below, we resolve all conflicts in the evidence in favor of that decision and to disregard evidence to the contrary, we defer to the trial court in regard to the weighing of conflicting evidence, and we indulge every presumption to sustain the judgment of the trial court. *See Insure New Mexico, LLC v. McGonigle*, 2000–NMCA–018, ¶¶ 7, 8, 128 N.M. 611, 995 P.2d 1053.

{28} This case certainly puts to the test the strength of the well-established statutory, procedural, and evidentiary safeguards against fraud when oral statements of dead people are relied on to establish oral trusts and overturn deeds. The trial court had before it several live witnesses whose credibility the trial court could weigh in determining whether the alleged statements were made or were being fabricated by the witnesses. We must evaluate the strength of the hearsay evidence that persuaded the court below to rule in Appellee's favor. We must also determine whether the trial court could have logically concluded that certain hearsay statements were admissible as statements against interest under Rule 11–804(B)(3) and whether sufficient circumstantial guarantees of trustworthiness exist under Rule 11–804(B)(5) to overcome the concerns about ambiguity, lack of candor, faulty memory, and misperception with respect to the other hearsay statements allowed in evidence. *See State v. Taylor*, 103 N.M. 189, 197, 704 P.2d 443, 451 (Ct.App.1985) (stating the dangers that the hearsay rule is designed to obviate). And, because Appellee's claims would fail without that evidence, we must, like the trial court, determine whether the danger of fraud can be obviated through an evaluation of all of the evidence in light of the concerns set forth in *White* and *McKim*.

{29} We tip the delicate balance in favor of the trial court's ruling admitting the hearsay testimony. We also hold that substantial evidence supported the court's determina-

tions of resulting and constructive trusts requiring a reconveyance of the property to Joe's estate for the benefit of Joe's heirs through intestate succession.

II. The Court Did Not Abuse Its Discretion In Admitting the Hearsay Testimony

A. *Initial Standards*

{30} At the outset, we deem it noteworthy that this was a bench trial, and the general rule pertaining to that type of trial appears to give a judge more flexibility in making admissibility determinations than in jury trials. *See State v. Hernandez*, 1999-NMCA-105, ¶ 22, 127 N.M. 769, 987 P.2d 1156 ("We presume that a judge is able to properly weigh the evidence, and thus the erroneous admission of evidence in a bench trial is harmless unless it appears that the judge must have relied upon the improper evidence in rendering a decision."). Thus, we view the trial court's actions from the perspective of its ultimate determination, and not from the perspective of what it particularly said in admitting items of evidence. Also, "[p]reliminary questions on the admissibility of evidence are determined by the trial judge[,]" and the trial judge need only be satisfied by a preponderance of the evidence that whatever preliminary facts are necessary to admissibility are established. *State v. Roybal*, 107 N.M. 309, 311, 756 P.2d 1204, 1206 (Ct.App.1988).

B. *Appellee Gave Sufficient Notice to Appellants of the Statements*

{31} Appellants claim the trial court erroneously admitted the hearsay evidence because Appellee failed to inform them in advance of trial that he intended to offer the deceased declarants' statements into evidence. Appellee only had to give such notice for the statements offered under Rule 11-804(B)(5). Some of the deceased declarants' statements were properly offered and relied upon as statements against interest under Rule 11-804(B)(3), and these statements could be offered by Appellee without giving advance notice to Appellants. As to the hearsay statements offered, admitted, and relied upon solely under Rule 11-804(B)(5), we conclude that the trial court did not commit reversible error, because although Appellants assert prejudice, they fail to explain how they suffered prejudice.

{32} To illustrate this point, we note that during the trial, when Appellants objected to the court's decision to admit Pedro's testimony regarding certain statements attributed to Romelia under Rule 11-804(B)(5), the court suggested that the trial be interrupted so that Pedro could be made available for a short mid-trial interview. Appellants accepted that procedure rather than a continuance of the trial. There was also a suggestion below that Appellants knew that Appellee's case would involve hearsay based on the depositions taken prior to trial. Appellants apparently felt comfortable enough with their mid-trial interview of Pedro to go on with the trial, notwithstanding Appellee's failure to strictly abide by Rule 11-804(B)(5)(c). After interviewing Pedro, Appellants made no further objection regarding lack of adequate pretrial information, and although Appellants continually either objected or relied on a continuing objection throughout the remainder of trial regarding hearsay testimony supplied by Pedro, Pete, and Connie, Appellants never again made a specific objection or complained about a lack of advance knowledge or fair notice of Appellee's intention to offer statements of deceased persons.

{33} Appellants could have taken the opportunity to demonstrate how they were prejudiced and could have demanded that the action be continued, pending compliance with the rule. And yet, they did none of those things. Rather, Appellants continued with the trial, made no attempt to demonstrate prejudice, and made no further objection about noncompliance under the rule. We do not see this as a basis upon which to reverse the trial court's admission of the hearsay evidence. *See Hartman v. Texaco Inc.*, 1997-NMCA-032, ¶ 25 n. 4, 123 N.M. 220, 937 P.2d 979 (ruling that an assertion of prejudice is not a showing of prejudice, and that in the absence of prejudice, there is no reversible error).

C. *The Court Did Not Abuse Its Discretion In Admitting the Hearsay Statements*

{34} Appellants claim the court abused its discretion when it admitted the hearsay

statements because they do not fit within Rule 11–804(B)(5). Appellants argue that to be admissible under Rule 11–804(B)(5) the statements must be of a type that was not anticipated by the drafters of the rules. *See Wilson v. Leonard Tire Co.*, 90 N.M. 74, 77, 559 P.2d 1201, 1204 (Ct.App.1976). The statements, they say, cannot " 'almost, but not quite,' " fit a specific exception. *In re Esperanza M.*, 1998–NMCA–039, ¶ 26, 124 N.M. 735, 955 P.2d 204 (quoting *State v. Barela*, 97 N.M. 723, 726, 643 P.2d 287, 290 (Ct.App.1982)). Appellants claim the statements nearly, but do not, fit within the specific exceptions for statements against interest and family history.

{35} Appellants paint the court's rationale for admitting the hearsay statements with too broad a brush. Although the court relied on one of the residual exceptions for admitting the hearsay statements at trial, it employed another exception to justify its reliance upon some of those statements when it rendered judgment. In its findings and conclusions, the court stated that certain statements attributed to Joe and Romi were admissible under Rule 11–804(B)(3) as statements against interest. It is thus unduly limiting for us to assess the admissibility of every hearsay statement under Rule 11–804(B)(5).

{36} We believe that the trial court properly relied upon certain statements attributed to Romi and Joe by Connie and Pedro as statements against interest, notwithstanding the fact that it stated during the trial that it was admitting the statements under a different hearsay exception rule. In order to make this point, we will specifically identify the portions of Connie's and Pedro's testimony that the court relied upon under Rule 11–804(B)(3) to render its judgment and then explain why the trial court did not abuse its discretion by admitting that testimony. We also explain why the other hearsay testimony was properly admitted and relied upon under Rule 11–804(B)(5).

1. *Romi's Statements Against Her Interest*

{37} During the trial, Connie testified about a conversation where she, Romi, and Carlos were present. According to Connie, Carlos and Romi were arguing. Connie asked them, "Why don't you guys just go your own way? Why don't one of you move out or whatever?" In response, Romi stated that "the house belonged to all of them." For his part, Pedro testified about a conversation where he, Joe, Romi, and Romi's son, Albert Meteny, were present. According to Pedro, Joe told Albert that "he could get his things and get out of the house." Romi appears to have said nothing when Albert said to her, "Mom, I thought you said you owned the house," and Joe said "No, this house is ours."

{38} In our view, the trial court did not err by admitting and then relying upon this portion of Connie's and Pedro's testimony to render its decision because it could logically have concluded that Romi's statements were against her interest. The deed to the house was in Romi's name at the time these alleged conversations took place. She presumably would have had the power and authority to evict her siblings from the house had she so chosen. And yet, she elected to say, either through her express words or by her silence, that she effectively lacked the authority to unilaterally decide who remained in the house and who did not because the house belonged not only to her, but to her siblings as well. Romi's statements qualify as a statement against interest. *See State v. Gonzales*, 1999–NMSC–033, ¶ 9, 128 N.M. 44, 989 P.2d 419.

{39} Appellants argue that Romi's statements were really not against her interest because she was afraid of her brothers and she may therefore have refused to assert exclusive ownership of the house at the time the conversations took place so as not to upset Carlos and Joe. This determination was for the trial court to make. By making a specific finding that Romi's statement was against her interest, the trial court effectively rejected Appellants' argument that Romi made the statement because she was afraid of her brothers.

2. *Joe's Statement Against His Interest*

{40} Connie also testified that around 1978, she asked Joe who owned the

house. In response to her question, Joe stated "that the house was in his name, but he did not own the house. It was in his name, but it belonged to everyone, you know, to all the boys, and for the reason that other people had mentioned, there was always a place for them to live."

{41} In our view, the trial court did not err by admitting and then relying upon this portion of Connie's testimony. The deed to the house was in Romi's name at the time Joe made this statement; however, assuming that Joe genuinely believed that the house was in his name, it would have been against his interest to say that the "house belonged to everyone" for the same reason it was against Romi's interest to say the things that she said. Joe's statement qualifies as a statement against interest. *See Gonzales*, 128 N.M. 44, 989 P.2d 419, 1999-NMSC-033, ¶ 9.

3. *Other Statements*

{42} We also cannot say that the trial court abused its discretion in determining that the other hearsay statements fit within Rule 11-804(B)(5) and that the elements of that rule were met. The declarants are clearly unavailable. The statements are not covered in the specific exceptions. Nor do they almost, but not quite, fit a particular exception. The statements against interest we have previously held were properly admissible under Rule 11-805(B)(3); the statements at issue here are not statements concerning family history, such as adoption, marriage, or other relationship that is involved in Rule 11-805(B)(4).

{43} Further, the statements were offered as evidence of a material fact, namely, the intent of Romelia, Joe, and family members, in regard to the ownership of the property. The proponents of the statements apparently could procure no other evidence on the point. The statements were clearly probative and were more probative on the issue of intent than any other evidence. The record is completely silent with regard to any actions taken by Romi by which she openly asserted legal title to the exclusion of the other family members. Even in the face of that skepticism and caution with which we must review this type of case, we cannot say that the trial court must have concluded that the general purposes of the rules, as well as the interests of justice, were not best served by the admission of these other hearsay statements.

{44} Moreover, the testimony has a tenor of consistency both among the declarants and, more importantly, with the independent circumstances. The statements of family members, made in the presence of one another, concerning what to do with the family home under circumstances where the parents are elderly, some children are drug addicts and petty criminals, but live in the home, and where circumstances following the statements corroborate the statements themselves, appear to have the sort of trustworthiness contemplated by the drafters of the catch-all exception.

{45} In addition, the property was placed in Joe's name at a time that Romelia was ill, near death. The Indian School property had earlier been placed in Joe's name. The sale proceeds from the sale of the Indian School property were used to purchase the Eton property. Joe was incarcerated on a charge of burglary, and he pledged the Eton property to a bondsman for a bond. At the time Joe conveyed the property to Romi, the bondsman was pursuing the family assets, which were limited to the Eton property. Joe transferred the Eton property to the eldest sibling, Romi, for no consideration. For virtually all of the years following Romelia's death, more than one of the siblings resided on the property, and, depending on the availability of funds, each contributed to meet the various financial obligations required, to keeping title to the property, and to keeping the property habitable.

{46} The hearsay dangers identified in the *Taylor* case do not appear to be present in these circumstances. *See Taylor*, 103 N.M. at 197, 704 P.2d at 451. To the extent that one or more dangers were potentially present, we believe that there exist sufficient "guarantees of reliability inherent in the circumstances surrounding the making of the statement . . . [and] indicia of reliability in that the event was corroborated by other

facts," *id.* at 198, 704 P.2d at 452, to permit the statements in evidence. In addition, the trial court was entitled to resolve preliminary questions of fact under *Roybal* such that a particular danger would be alleviated. *See Roybal,* 107 N.M. at 311, 756 P.2d at 1206. Finally, in this civil case, we are less concerned with the inappropriate use of corroborative evidence. *See State v. Pacheco,* 110 N.M. 599, 602–03, 798 P.2d 200, 203–04 (Ct. App.1990) (noting that other jurisdictions consider the presence of corroborating circumstances relevant in evaluating admissibility under the catch-all exception, but that doing so would be problematic in a criminal case in which confrontation is a concern).

{47} We can see how the trial court could logically determine that the " 'declarant[s'] truthfulness [was] so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.' " *United States v. Tome,* 61 F.3d 1446, 1452 (10th Cir.1995) (quoting *Idaho v. Wright,* 497 U.S. 805, 820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)). We can further see how the trial court could determine that the declarants were " 'particularly likely to be telling the truth when the statement was made.' " *Tome,* 61 F.3d at 1453 (quoting *Wright,* 497 U.S. at 822, 110 S.Ct. 3139)). And we can understand how the district court saw the evidence in a light that favored its admissibility. We do not believe that we have interpreted the residual exception in a way which can be considered a broadening of that exception with commensurate concern that the exception might eventually "swallow the entirety of the hearsay rule." *Id.,* 61 F.3d at 1452. We hold that, under the unique circumstances of this case, the court did not err in admitting the hearsay statements under Rule 11–804(B)(3) and Rule 11–804(B)(5).

III. The Court's Determinations Regarding Lack of Intent and Creation of Trusts Are Supported by Substantial Evidence

{48} Appellants next contend that the court erred in determining that Joe lacked intent to convey title, and in determining that express, implied, and constructive trusts were created. We address these contentions considering the admitted hearsay statements of the deceased declarants.

A. *Lack of Intent*

1. *Statute of Limitation*

{49} Appellants attack the determination that Joe lacked intent to transfer the property to Romi on the ground that the claim to set aside the deed to Romi belonged solely to Pedro as personal representative of Joe's estate, and that the claim was barred by NMSA 1978, § 37–1–4 (1880). Specifically, Appellants argue that Joe signed the deed on May 29, 1968, and Joe's claim to void the deed was barred as of May 29, 1972, more than twenty-four years before the present lawsuit was filed.

{50} Appellee counters that Joe committed conversion of the property when he deeded it to Romi without intent to convey and that the action for conversion did not accrue until Pedro and Carlos discovered in 1995 that Romi deeded the property in 1993 to herself as trustee. Appellee cites NMSA 1978, § 37–1–7 (1880) ("In actions for ... conversion of property, the cause of action shall not be deemed to have accrued until the ... conversion ... shall have been discovered by the party aggrieved.").

{51} The trial court sidestepped the contentions of both Appellants and Appellee. Using a different tack, and based presumably on the idea that that issue need be addressed only in regard to the claims seeking to establish trusts, the court concluded that the cause of action for constructive trusts did not accrue until after June 23, 1995, when Romi's children filed their counterclaim against Carlos in the collateral litigation between Romi's children and Carlos.

{52} While the court ruled both that Joe lacked intent to convey and that Joe's transfer was wrongful requiring the imposition of a constructive trust, the court addressed the statute of limitations issue only in regard to the claim for constructive trust and did not address Appellants' argument that the statute of limitations barred the estate's claim of lack of intent to convey. Appellants do not argue that the statute of limitations bars

either the estate's or Pedro's claim regarding a constructive trust. Indeed, Appellants say in their reply brief that "the statute of limitations has expired only on the claims regarding lack of intent to transfer the property and not on the trust issues." We need not address whether Appellants' statute-of-limitations defense to the claim regarding Joe's lack of intent has merit. Even were we to hold in Appellants' favor, the determination would not change any result, since we hold that the court did not err in determining that trusts arose that require the deeds to Romi individually and as trustee to be invalidated and the property to be reconveyed.

2. *Substantial Evidence*

{53} Appellants attack the determination that Joe lacked intent to transfer legal and beneficial title to the property to Romi on the grounds that the deed was valid on its face and that Joe's intent is unknown.

{54} Joe's intent is material on the issue whether trusts were created or imposed. The trial court was not persuaded, as Appellants contend, that Joe "intended to part with control and dominion over the land irretrievably." *Den–Gar Enters. v. Romero,* 94 N.M. 425, 428, 611 P.2d 1119, 1122 (Ct. App.1980). In this case, it is obvious that the court inferred lack of intent to transfer full title to Romi when it determined that the transfer was without consideration, was made under circumstances compelling a conclusion that the transfer was simply a tactic to escape the clutches of the bondsman who was collecting on the bond obligation, and was made while the property was the subject of express and resulting trusts formed two years earlier. Furthermore, Joe later borrowed $10,000 from a bank and mortgaged the property. These determinations provide substantial evidence from which the court could reasonably infer a lack of intent to convey full legal title to Romi.

B. *Creation and Imposition of Trusts*

{55} The court determined that an express trust was established, a resulting trust was created, and constructive trusts were imposed, with regard to the property. The trusts are all to the same effect: the property was to be held by a family member for the benefit of the Tartaglia family.

{56} Appellants contend that Appellee did not meet the high proof threshold that must be met in order to establish oral or implied trusts. They point out that, whether constructive or resulting, these two forms of implied trusts can be proved only by clear, cogent, and convincing evidence. *See Bassett v. Bassett,* 110 N.M. 559, 563, 798 P.2d 160, 164 (1990). *But see McKim,* 111 N.M. at 519, 807 P.2d at 217 (questioning the use of this proof burden when seeking restitutionary remedies to prevent unjust enrichment under circumstances not involving fraud or other wrongful conduct).

{57} In reviewing the district court's findings regarding the trusts, "we reverse only if convinced that, viewing the evidence in the light most favorable to the prevailing party, the findings cannot be sustained by the evidence or permissible inferences therefrom." *McKim* at 519–20, 807 P.2d at 217–18. "Even where the standard of proof is clear and convincing evidence, it is for the factfinder and not the appellate courts to weigh conflicting evidence and arrive at the truth." *Bassett,* 110 N.M. at 563, 798 P.2d at 164.

{58} An express trust is one that is created by the manifest intention of the settlor to create it. *See Aragon v. Rio Costilla Coop. Livestock Ass'n,* 112 N.M. 152, 154–55, 812 P.2d 1300, 1302–03 (1991). An express trust must pass statute of frauds muster. *See id.* at 155, 812 P.2d at 1303. Some memorandum manifesting and proving the trust must exist. *See id.* No such memorandum exists in the case before us. Therefore, the trust that Romelia intended to create failed as an express trust.

{59} A resulting trust, however, can result from a failed express trust. *See id.* "[A] resulting trust arises where circumstances raise an inference that the settlor does not intend that the person taking or holding title shall have the beneficial interest." *Id.* The court determined that "[t]he Tartaglia family did not intend that Joe take the sole beneficial interest in the property when the title to the property was placed in

his name." The evidence and findings support this determination, and the court's conclusion that, as a result, "a resulting trust was created for the benefit of all members of the Tartaglia family" is not erroneous.

{60} A constructive trust "is imposed to prevent the unjust enrichment that would result if the person having the property were permitted to retain it." *Id.* at 156, 812 P.2d at 1304. The circumstances where a court might impose a constructive trust may involve actual or constructive fraud, duress, undue influence, abuse of a confidence, breach of a fiduciary duty, "or similar wrongful conduct." *Id.* More generally, such a trust can be imposed based upon the "breach of any legal or equitable duty," or the "commission of a wrong." *Id.* at 157, 812 P.2d at 1305.

{61} In the present case, the court determined that "[t]he execution of the Quitclaim Deed, dated May 29, 1968, from Joe to Romi constituted fraud, constructive fraud and a wrongful act by Joe and Romi against the remaining members of the Tartaglia family." The court determined the same regarding Romi's deed to herself as trustee. Presumably, these determinations, which led the court to further conclude that this conduct "imposed a constructive trust" requiring the deeds to be set aside, were based on the circumstances surrounding the execution of the deed to Romi (namely, escaping the bondsman), the lack of consideration for that deed, the failure to record the deed for over a year, and the history from 1957 to 1968 during which Romelia and Joe acted with the intent that a trust for the benefit of the family be created. This evidence and the court's related findings support the court's determination of imposition of a constructive trust. Once the premise of a trust for the benefit of the family was established, the court could reasonably conclude that Joe acted wrongfully in deeding the property to Romi and then in not assuring that the property was deeded back and that Romi acted wrongfully in asserting title to the exclusion of the family. As the trial court concluded, a breach of this trust for and among family members may be considered a breach by Joe and Romi of a duty upon which a constructive trust could properly be imposed.

IV. The Court's Conclusion of Law Regarding Check on Joe's Account Is Harmless Even If Erroneous

{62} Romi wrote out and signed a check payable to herself dated September 22, 1993, drawn on Joe's checking account, for $15,600. The check was signed, "Joseph Tartaglia, by Romi Meteney, POA," and stated that it was for "Repayment of Loan." The court did not enter a finding of fact specifically regarding this check. The court did, however, enter the following conclusion of law:

> The payment by Romi to herself of $15,600 from Joe's Credit Union account was made without a power of attorney from Joe and without proof of a loan for $15,600 from Romi to Joe and removed available funds for the mortgage, insurance and upkeep of the property and was wrongful.

The court's judgment does not grant any relief with respect to this specific circumstance.

{63} Appellants attack the court's conclusion of law on several grounds, yet show us no connection between this conclusion and any relief granted by the court. And the court did not award any amount of money against any party in this action based on this check. We are not informed by Appellants of any future significance the conclusion might have.

{64} Further, the record fails to show any claim for damages or specific mention of a right to relief in regard to this check. Neither party has pointed us to any testimony regarding the check. All we have is the check itself and the testimony that Romi told Pete that she had a power of attorney. The first mention by Appellee of a "wrongful" transfer appears in Appellee's amended requested conclusions of law. Indeed, the court's letter "Decision" in which the court summarizes its findings and rulings and requests the final drafts of requested findings of fact and conclusions of law, does not mention the check or anything that would indicate that this issue was significant in any regard.

{65} The court's conclusion is a rebel without a cause. Even were it erroneous, it is not necessary to the court's decision, and it is not a basis for reversal. *See Corlett v. Smith*, 107 N.M. 707, 711, 763 P.2d 1172, 1176 (Ct.App.1988). We, therefore, need not address the various arguments regarding whether the conclusion was correct.

V. The Court's Inclusion of Carlos's Heirs Was Not Erroneous

{66} Before his death in 1998, Carlos unsuccessfully sought to intervene in the lawsuit. In denying Carlos intervention in the present case, the district court concluded that Carlos's claims were adjudicated or could have been adjudicated in a prior lawsuit, that the claims he sought to assert in the present action were barred by res judicata, and that Carlos had no interest in the property. However, after trial, the court determined that Carlos's heirs were entitled to share in the property along with all of Joe's heirs. Specifically, the court found that "Carlos was a beneficiary of the express trust established in 1966 for the benefit of the Tartaglia family; as a beneficiary of said trust, Carlos's heirs are entitled to share in Joe's estate under the laws of intestate succession."

{67} Appellants attack this finding as a determination of heirship that the court had no jurisdiction to decide. Appellants point to a separate, pending action, commenced in the Second Judicial District Court in June 1996, three months before the present action was filed, in which Pedro applied for "Informal Appointment of Personal Representative" in an unsupervised administration. The day after Pedro's application was filed, he was informally appointed personal representative of Joe's estate in an unsupervised administration. The record contains no documents filed in that informal proceeding other than Pedro's application and the order that appoints him as the personal representative. It would appear that Pedro's intent in filing the application and obtaining informal appointment was to file the present action as the personal representative of Joe's estate. Indeed, the complaint in the present action alleges that appointment. The answer states no defense attacking Pedro's right to sue or the court's authority to entertain the action.

{68} Appellants argue that the issue of heirship should be determined in a separate action. Appellants further argue that, in the present case, the procedures required in the New Mexico Probate Code, NMSA 1978, §§ 45-3-101 to -1302 (1975, as amended through 1995), for the establishment of heirship were not followed, placing the issue "beyond the Court's authority." Other than their general cite to the Probate Code, Appellants cite to no specific Probate Code provision or other authority for their position that the trial court had no jurisdiction or authority to determine that Carlos's heirs had the right under the trust to share in Joe's estate. Nor do Appellants show us where below they objected to or sought dismissal of the present action on the ground that the district court in the present case lacked jurisdiction or authority to entertain the relief sought by Pedro as the personal representative of Joe's estate.

{69} The Probate Code permits a personal representative to administer and distribute the estate, maintain actions to recover possession of or to determine title to property, and to prosecute claims for the protection of the estate. *See* §§ 45-3-703(D), -709, -715(A)(22). Once appointed as the personal representative of Joe's estate, Pedro was exercising his right, if not his duty, in bringing this action. The district court clearly has jurisdiction to hear the issues at hand. *See* NMSA 1978, § 45-1-302 (1978). The only question is whether the same district court can entertain the informal probate proceeding in one docketed action and, in a separate docketed action to recover property, determine that the heirs of Joe's brother Carlos are entitled to share by intestate succession, along with Joe's other siblings or their heirs, in the proceeds from the sale of the property. This is not a jurisdiction issue.

{70} Appellants next attack the court's finding on the ground that the trial court erred in granting relief to Carlos or Carlos's heirs because Carlos is not a party to this action. Carlos, they point out, actually sought and was denied intervention, and this

denial was upheld in an earlier appeal. Appellants argue that both the trial and appellate courts found that Carlos had no interest in the property and that his claims were barred by res judicata, becoming the law of the case binding the trial court.

{71} In pressing their res judicata and law of the case contentions, however, Appellants ignore the express language of this Court's opinion upholding the denial of Carlos's intervention. We said that, to the extent that a count of the complaint in this case concerned "the declaring of a trust holding the property for the heirs of Joe Tartaglia[,] ... Carlos could not have raised this matter in any of his previous lawsuits." We also said that intervention was properly denied because Carlos's interest as an heir would be protected by Pedro on behalf of the estate. Thus, we do not need to resort to the "discretionary and flexible" aspects of the doctrine of law of the case. *See Trujillo v. City of Albuquerque,* 1998–NMSC–031, ¶¶ 41–42, 125 N.M. 721, 965 P.2d 305 (holding that the doctrine of law of the case is discretionary and flexible).

{72} Our prior holding expressly did not foreclose the relief sought here. In addition, our prior holding raises considerable doubt about whether the issues in this case could have been raised by Carlos before, and Appellants' briefs have not shown us how res judicata would apply with reference to any facts, such as the records of the prior suits, other than the trial court's order denying intervention in this case and our opinion upholding that order on appeal. *See Griffin v. Guadalupe Med. Ctr., Inc.,* 1997–NMCA–012, ¶ 20, 123 N.M. 60, 933 P.2d 859 (holding that briefs need to provide references to the evidence and that this Court will not search the record to find facts to overturn a trial court's decision).

{73} The trial court reasonably determined that because the title is to be returned to Joe's estate in trust for the family, Carlos, along with other family members, has a right to share in the proceeds from the sale of the property. All family members were intended beneficiaries. The court obviously determined that the reasonable and equitable result was to include Carlos's heirs with all of the other family members. We cannot quarrel with the result. We hold that the court did not err in including Carlos's heirs.

CONCLUSION

{74} The court did not err in finding the existence of a resulting trust and imposing a constructive trust on the property that required the reconveyance of the property for the benefit of Joe's heirs through intestate succession. We affirm those determinations.

{75} **IT IS SO ORDERED.**

PICKARD, C.J., and BOSSON, J., concur.

10 P.3d 191

2000-NMCA-079

STATE of New Mexico, ex rel. CHILDREN, YOUTH AND FAMILIES DEPARTMENT, Petitioner–Appellee,

v.

In the Matter of ANDREA Lynn M., a child, and Concerning Adrian M., Respondent–Appellant,

and

the Navajo Nation, Intervenor.

No. 20,405.

Court of Appeals of New Mexico.

Aug. 4, 2000.

Angela L. Adams, Chief Children's Court Attorney, Rebecca J. Liggett, Children's Court Attorney, Children, Youth & Families Dep't, Santa Fe, NM, for Appellee.

Robert Waterworth, Nancy L. Simmons, Law Offices of Nancy L. Simmons, Albuquerque, NM, for Appellant.

Levon B. Henry, Attorney General, Thomas W. Christie, Assistant Attorney General, Joseph Borrack, The Navajo Nation, Department of Justice, Window Rock, AZ, for Intervenor.

OPINION

WECHSLER, Judge.

{1} Appellant Adrian M. (Father), appeals the children's court order transferring jurisdiction and legal custody of Andrea M. (Child) to the Navajo Nation Family Court. Father argues on appeal that the transfer of jurisdiction was improper under the transfer provision of the Indian Child Welfare Act, 25 U.S.C. § 1911(b) (1983) (ICWA), because he objected to the transfer and because good cause existed for the children's court to retain jurisdiction. We affirm the children's court transfer because we cannot apply Section 1911(b) to the record in this case and because the transfer accomplishes the intent of ICWA.

Facts and Procedural History

{2} In May 1996, the Children, Youth and Families Department (the Department) filed an abuse and neglect petition on behalf of Child against Mother and Father, enrolled members of the Navajo Nation then living in Albuquerque. The petition alleged that Child had been sexually abused. In June 1996, after a custody hearing, the children's court ordered that Child be placed in the legal custody of the Department. In the same order, the court stated that Child was subject to ICWA and that the Department had notified the Navajo Nation of the custody proceedings. The court also stated that Child was to be placed in a Navajo foster home within a few days of the order placing custody of Child with the Department. Thereafter, in September 1996, the children's court entered a stipulated judgment and disposition awarding legal custody of Child to the Department for a period of two years and noting that Child had been placed with a Native American family.

{3} In June 1997, the Navajo Nation filed a motion to intervene in the children's court proceeding. The Navajo Nation asserted that Child was an Indian child and that the Navajo Nation was Child's "tribe" within the meaning of ICWA. *See* 25 U.S.C. § 1903. The Navajo Nation asserted that under ICWA, the Navajo Nation had the right to intervene in the proceeding. *See* 25 U.S.C.

§ 1911(c). The children's court granted the Navajo Nation's motion to intervene.

{4} In August 1998, the Navajo Nation filed a motion to transfer the case to the Navajo Nation Family Court. The Department, the guardian ad litem, and Father opposed the motion to transfer. In its response to the Navajo Nation's motion to transfer, the Department agreed with the Navajo Nation that by the time of the motion to transfer, Mother lived in Crownpoint, New Mexico, and Father lived in Thoreau, New Mexico. The children's court initially declined to transfer the case and stated:

> It seems to me that a smooth transition of this Child into the Tribe's custody is in her best interests. I am therefore, at this time, not ready to relinquish this court's jurisdiction of [Child] to the Tribe. I wish to allow the motion to remain open.

The court reasoned that an abrupt change in circumstances would not serve the best interests of Child.

{5} In February 1999, the Department filed a motion for consideration of the Navajo Nation's treatment plan. The Department's motion stated that the Department now supported the Navajo Nation's motion to transfer after having considered the Navajo Nation's family treatment plan. At the hearing on the Department's motion, Father's counsel advised the court for the first time that Father objected to the transfer under Section 1911(b). Father's counsel expressed Father's concern about how the Navajo Nation Family Court would handle enforcing his visitation rights and to whom the Navajo Nation Family Court would likely award custody of Child. Notwithstanding Father's objection, the children's court granted the motion to transfer because the transfer was in the best interests of Child.

Applicability of Section 1911 of the Indian Child Welfare Act to the Transfer of Jurisdiction

{6} In promoting the policy of protecting the best interests of Indian children and the stability of Indian tribes, ICWA provides for a dual jurisdictional scheme under which, based upon the Indian child's domicile or residence, jurisdiction over Indian child custody proceedings lies either exclusively with the tribe or concurrently with both the state and tribe, depending upon the Indian child's domicile or residence. *See* 25 U.S.C. § 1911(a) & (b); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). If the Indian child resides or is domiciled within the reservation of the child's tribe, jurisdiction over child custody proceedings is exclusively vested in the tribe. *See* 25 U.S.C. § 1911(a). If, on the other hand, the Indian child does not reside or is not domiciled on the tribe's reservation, the tribe and the state share concurrent jurisdiction over child custody proceedings. *See* 25 U.S.C. § 1911(b); *Holyfield*, 490 U.S. at 36, 109 S.Ct. 1597 (stating that although states and tribes share concurrent jurisdiction under Section 1911(b), such concurrent jurisdiction is presumptively tribal jurisdiction). Section 1911(a) and (b) provide:

> (a) Exclusive jurisdiction
>
> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe....
>
> (b) Transfer of proceedings; declination by tribal court
>
> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

It is quite clear that in custody disputes to which ICWA is applicable, factual inquiry as to domicile and residency of the child is essential in order to apply Section 1911(a) or (b).

{7} In this case, none of the parties presented evidence demonstrating the residence or domicile of Child at any point in

the proceedings, nor did any of the parties request findings of fact on the issue. Accordingly, no such findings were entered by the children's court. As an appellate court, we cannot determine fact-intensive issues such as domicile because fact finding is a function of the trial court. *See Pinnell v. Board of County Comm'rs,* 1999–NMCA–074, ¶ 14, 127 N.M. 452, 982 P.2d 503; *State v. Franks,* 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct.App.1994); *see also In re Begay,* 107 N.M. 810, 813, 765 P.2d 1178, 1181 (Ct.App. 1988) (recognizing factual components of a finding of domicile). The lack of evidence of Child's residence or domicile makes it impossible to determine whether Section 1911(b) applies. That Section relates only to an "Indian child not domiciled or residing within the reservation of the Indian child's tribe." In the absence of evidence in the record to the contrary, we assume the record supports the ruling of the lower court. *See Reeves v. Wimberly,* 107 N.M. 231, 236, 755 P.2d 75, 80 (Ct.App.1988) ("Upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the trial court's decision, and the appellate court will indulge in reasonable presumptions in support of the order entered.").

{8} More significantly, the children's court's transfer follows the congressional intent underlying ICWA. When enacting ICWA, Congress declared that the policy promoted by the Act was "to protect the best interests of Indian children and to promote the stability and security of Indian tribes." 25 U.S.C. § 1902. Congress enacted ICWA to remedy the difficulties arising from state-facilitated proceedings that often resulted in the removal of Indian children from their homes with little or no consideration of an Indian child's cultural heritage or the tribe's interest in the removal of Indian children from their Indian homes. *See* 25 U.S.C. § 1901; *see also Holyfield,* 490 U.S. at 37, 109 S.Ct. 1597 (stating that ICWA "'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society'" (quoting H.R.Rep. No. 95–1386, at 23 (1978))); 25 U.S.C. § 1901(5) ("[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."). ICWA, therefore, contemplates transfer from state to tribal courts when Indian children, communities, and families are involved in custody proceedings.

{9} Mother, Father, and Child are all enrolled members of the Navajo Nation. At the time of the motion to transfer, Mother and Father were living within or in proximity to the boundaries of the Navajo Nation, or at the very least in Indian Country. *See* 25 U.S.C. § 1903(10) (stating that ICWA defines reservation using the definition in 18 U.S.C. § 1151 which defines Indian country to include lands within the boundary of a reservation as well as dependent Indian communities and lands held in trust); *see also In re Adoption of Baby Child,* 102 N.M. 735, 738, 700 P.2d 198, 201 (Ct.App.1985) (holding tribal court had exclusive jurisdiction over adoption proceeding when the record indicated that an illegitimate child's mother gave her residence as located on an Indian reservation and nothing in record indicated information to the contrary).

{10} The enrollment and location of the family members supports the children's court's transfer in light of the congressional intent of ICWA that bases jurisdiction upon tribal affiliation and location of the Indian child. Furthermore, the transfer addresses the Navajo Nation's interest in Navajo children whose parents are both tribal members, as contemplated by ICWA. The transfer is additionally supported considering ICWA's mandate to protect the best interests of Indian children, which includes being raised in surroundings that reflect the child's Indian heritage. Finally, considerations such as the accessibility of the forum and the convenience of the parties further support the transfer.

{11} Cases such as this one are moving targets for courts that retain jurisdiction in custody matters. The state children's court assumes jurisdiction at the outset and makes determinations regarding custody. Long pe-

riods of time pass, the parties move, and the Navajo Nation takes a strong interest in the custody issue. In this case, circumstances had significantly changed, and the children's court was asked to transfer the matter to the jurisdiction of the Navajo Nation. If the parents, both enrolled members of the Navajo Nation and both living in Indian Country, are unwilling or otherwise uninterested in specifically testing the legal authority of the court to transfer jurisdiction on account of strict domiciliary requirements, we believe that a proper disposition of a transfer issue can well be for the children's court to act as it did in this case, namely, in accordance with what the court determined was in the best interests of this child. Certainly, as we have stressed above, the children's court's actions were entirely consistent with Congress's policy in enacting ICWA.

{12} Father also argues that Section 1911(b) exclusively governs the ability of the children's court to transfer the case to the Navajo Nation, and Father emphasizes that Section 1911(b) appears to give either parent an absolute veto over transfer to tribal court. *See* § 1911(b) ("The court . . . shall transfer . . . absent objection by either parent."). However, Section 1911(b) does not contemplate the circumstances before the children's court when it transferred this case to the Navajo Nation. As discussed above, Section 1911(b) addresses only those situations in which an Indian child is domiciled and is residing outside the child's reservation. In this case, the record is silent about Child's domicile at any stage in the proceedings, and Father, who bore the burden of persuasion in opposing the transfer, failed to demonstrate to the children's court the importance of a finding of domicile for the proper application of Section 1911(b). The fact that Father somewhat ambiguously objected to the transfer of the proceedings in this case does not, in our opinion, draw us into Section 1911(b).

{13} We do agree with Father that once proper jurisdiction has attached, a court cannot subsequently be divested of its jurisdiction by the actions of the parties. *See Spear v. McDermott,* 121 N.M. 609, 616, 916 P.2d 228, 235 (Ct.App.1996); *see also Holyfield,* 490 U.S. at 49, 109 S.Ct. 1597 (stating that exclusive tribal jurisdiction was not "meant to be defeated by the actions" of the parties). In *Spear,* the grandparents and mother of an Indian child took the child to the Cherokee reservation in Oklahoma under the pretense that they would return the child within a week. *See id.* at 613, 916 P.2d at 232. When they arrived within the reservation, the grandparents and mother sought a custody disposition from the tribal court. *See id.* After the New Mexico court held grandparents in contempt for failing to return the child to New Mexico, this Court held on appeal that the grandparents' removal of the child from New Mexico and the tribal court orders awarding custody could not defeat the jurisdiction of the New Mexico court. *See id.* at 615–17, 916 P.2d at 234–36.

{14} Unlike the parties in *Spear,* Mother did not seek a custody order from the Navajo Nation Family Court while the case was still in the state children's court in an effort to divest the children's court of jurisdiction. Nor does the record indicate Mother moved to Indian Country for the sole purpose of divesting the children's court of jurisdiction. Rather, after Mother's return to Indian Country, Mother continued to participate in the proceedings in the state children's court and by all indications continued to perform the obligations imposed upon her by the children's court.

{15} Additionally, the children's court was not facilitating a divestiture of its jurisdiction by an act of Mother. The court willingly transferred the case upon motion of the Navajo Nation nearly three years after the initiation of the abuse and neglect proceeding, after the parties changed their circumstances and after the court again had the opportunity to consider the best interests of Child. At the time of transfer, the residence of Mother and Father provided the children's court with substantial reasons for the court to exercise its inherent discretion to transfer, regardless of whether jurisdiction was initially properly established in the children's court under Section 1911(a) and (b). This case, therefore, does not present the question of whether Mother could divest the children's court of its jurisdiction by returning to the

jurisdictional boundaries of the Navajo reservation, as was the situation in *Spear*.

Applicability of New Mexico Statute

{16} Father raised NMSA 1978, § 32A–1–9(D) (1999) for the first time on appeal in a supplement to his reply brief. Section 32A–1–9(D) bars a transfer of jurisdiction to tribal court over a parent's objection. We refuse to apply this statute to the issues in this appeal because the statute was never raised below and, therefore, the issue has not been properly preserved. *See Rivera v. Trujillo,* 1999–NMCA–129, ¶ 15, 128 N.M. 106, 990 P.2d 219; *City of Carlsbad v. Grace,* 1998–NMCA–144, ¶ 15, 126 N.M. 95, 966 P.2d 1178.

Conclusion

{17} For the reasons stated above, we affirm the transfer of jurisdiction to the Navajo Nation Family Court.

{18} **IT IS SO ORDERED.**

BOSSON and SUTIN, JJ., concur.

[redacted]

10 P.3d 845

2000-NMCA-082

Kenneth D. CRONIN and Brigitte Cronin, Husband and Wife, Plaintiffs–Appellants,

v.

SIERRA MEDICAL CENTER, El Paso Southwestern Cardiovascular Associates, P.A., Kenneth–Eisenburg, M.D., Jerry W. Miller, M.D., Felice L. Bruno, M.D., and Joe Kidd, M.D., Defendants–Appellees,

and

Ralph Paone, M.D., Mountain Shadows Home Health Care Services, and H.W. Handy, M.D., Defendants.

No. 19,895.

Court of Appeals of New Mexico.

June 19, 2000.

Certiorari Denied, No. 26,515, Sept. 13, 2000.

Cynthia A. Fry, Albuquerque, NM, Jose R. Coronado, Law Offices of Jose R. Coronado, Las Cruces, NM, for Appellants.

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Larry W. Hicks, R. Duane Frizell, Hicks & Lucky, P.C., El Paso, TX, for Appellee Miller.

Cynthia S. Anderson, R. Shawn Oller, Kemp, Smith, Duncan & Hammond, P.C., El Paso, TX, for Appellee Sierra Medical Center.

OPINION

PICKARD, Chief Judge.

{1} Kenneth Cronin and Brigitte Cronin (Plaintiffs) filed a medical malpractice lawsuit against Sierra Medical Center, El Paso Southwestern Cardiovascular Associates, P.A., Dr. Kenneth Eisenberg, Dr. Felice Bruno, Dr. Jerry Miller, and Dr. Joe Kidd (Defendants) after Mr. Cronin (Patient) experienced certain health complications arising out of heart bypass surgery. Plaintiffs, who reside in New Mexico, traveled to Texas so that Patient could undergo the surgery. Dr. Eisenberg performed the surgery at Sierra Medical Center (Hospital). The surgery was successful; however, Patient developed a staphylococcus aureus infection in his surgical wound. Dr. Eisenberg asked Dr. Bruno and Dr. Miller to help him treat the staph infection. Both doctors agreed to do so. Dr. Bruno performed mediastinal debridement and sternal rewiring, and Dr. Miller prescribed certain antibiotics. In the course of his antibiotic treatment, Patient experienced vertigo and loss of equilibrium.

{2} Plaintiffs subsequently formed the belief that Patient's health complications were caused by Dr. Miller's failure to adequately monitor the administration of the antibiotic therapy, so they filed suit. In their complaint, Plaintiffs asserted claims of medical negligence, battery, negligent infliction of emotional distress, and loss of consortium. Plaintiffs claimed they were entitled to damages because Defendants knew or should have known that the antibiotics prescribed by Dr. Miller can cause bilateral weakness in the inner ear labyrinthine systems, which results in vertigo and loss of equilibrium, and yet they allowed Patient to take the antibiotics until he sustained severe and permanent damage.

{3} Defendants responded to Plaintiffs' complaint by filing motions to dismiss for lack of personal jurisdiction. In their motions, Defendants claimed the trial court lacked the authority to assert personal jurisdiction over them because (1) they did not transact business in New Mexico, (2) they did not commit a tort in New Mexico, and (3) they lack minimum contacts with New Mexico such that due process considerations would be offended if the trial court were to assert personal jurisdiction over them. The trial court accepted Defendants' arguments and dismissed Plaintiffs' complaint without prejudice. Plaintiffs now appeal.

{4} For the reasons stated more fully below, we agree with the trial court that it lacked personal jurisdiction over El Paso Southwestern Cardiovascular Associates, P.A., Dr. Eisenberg, Dr. Bruno, Dr. Miller, and Dr. Kidd (Non–Hospital Defendants). Plaintiffs did not claim at the trial court level that Non–Hospital Defendants transacted business in New Mexico, so we limit our discussion to whether the trial court could assert jurisdiction over these defendants under the "commission of a tortious act" prong of our analysis. Upon doing so, we conclude that even if Non–Hospital Defendants committed a tort in New Mexico, the trial court still lacked the authority to assert personal jurisdiction over them because they lack minimum contacts with New Mexico and therefore did not commit a tortious act under our long-arm statute. However, we disagree with the trial court that it lacked personal jurisdiction over Hospital because Plaintiffs' causes of action lie within the wake of Hospital's intentional, purposeful, and persistent transaction of business in New Mexico. We therefore affirm in part and reverse in part.

BACKGROUND

{5} Plaintiffs reside in Las Cruces, New Mexico. In November 1995, they traveled to El Paso, Texas, so that Patient could under-

go heart bypass surgery at Hospital. Patient decided to have the surgery performed at Hospital after reading its business advertisements in the local telephone directory, viewing its commercials on television, and hearing it recommended to him by some of his fellow employees who apparently had received medical care there in the past. Dr. Eisenberg performed the surgery at Hospital. After recuperating at Hospital for a few days, Patient was discharged. Plaintiffs returned to Las Cruces, where Patient was scheduled to complete his rehabilitation at home with the assistance of his wife and Mountain Shadows Home Health Care Services (Home Care).

{6} Approximately one month after returning to his home in Las Cruces, Patient complained of chest pain. He returned to El Paso in order to be examined by Dr. Eisenberg. Dr. Eisenberg performed the examination in his office at El Paso Southwestern Cardiovascular Associates, P.A., which is the same professional association that employs Dr. Bruno and Dr. Kidd. The following day, Dr. Eisenberg admitted Patient for hospitalization at Hospital. Patient's surgical wound had become infected, and the purpose of hospitalizing him was to treat his infection.

{7} Dr. Eisenberg asked Dr. Bruno and Dr. Miller to help him treat Patient's staph infection. Both doctors agreed to do so. Dr. Bruno performed mediastinal debridement and sternal rewiring, while Dr. Miller prescribed certain antibiotics to treat the infection. Dr. Miller's antibiotic prescription was utilized for the remainder of Patient's three-week stay at Hospital. Hospital's nurses monitored and administered to Patient throughout his stay at Hospital during this three-week period.

{8} At discharge, Hospital's staff arranged for home health care for Patient so that he could complete his antibiotic therapy in Las Cruces. Hospital and Dr. Miller contacted Home Care, informing it to carry out the orders of Patient's treating physicians, one of whom was Dr. Miller, who ordered the continuation of antibiotic therapy. Pursuant to these orders, Patient received antibiotic therapy at his home in Las Cruces.

{9} Approximately two weeks into his therapy at home, Patient informed Dr. Bruno that he was experiencing vertigo and loss of equilibrium. Dr. Bruno immediately ordered Home Care to discontinue the therapy upon hearing Patient's complaints. Plaintiffs subsequently formed the belief that Patient's vertigo and loss of equilibrium had been caused by Dr. Miller's failure to terminate treatment with the antibiotics, which have a known detrimental effect on the hearing organs (ototoxic effect) when used for too long of a duration, before Patient suffered severe and permanent damage to his inner ears. Plaintiffs filed a medical malpractice lawsuit against Defendants in January 1998.

STANDARD OF REVIEW

{10} The issue presented for our review is whether the trial court had the authority to assert personal jurisdiction over Defendants, none of whom reside in New Mexico. This is a question of law, which we review de novo. *See Campos Enters., Inc. v. Edwin K. Williams & Co.*, 1998–NMCA–131, ¶ 5, 125 N.M. 691, 964 P.2d 855. If, as here, a district court bases its ruling upon the parties' pleadings and affidavits, the applicable standard of review largely mirrors the standard that governs appeals from the award or denial of summary judgment. *See Harrell v. Hayes*, 1998–NMCA–122, ¶ 11, 125 N.M. 814, 965 P.2d 933. In this respect, both a district court and this appellate court must construe the pleadings and affidavits in the light most favorable to the complainant. *See Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996–NMCA–057, 121 N.M. 738, 742, 918 P.2d 17, 21. The complainant need only make a prima facie showing that personal jurisdiction exists when a district court does not hold an evidentiary hearing. *See Tercero v. Roman Catholic Diocese of Norwich, Conn.*, 1999–NMCA–052, ¶ 12, 127 N.M. 294, 980 P.2d 77, *cert. granted*, 127 N.M. 391, 981 P.2d 1209 (1999).

DISCUSSION

{11} Plaintiffs failed to serve process upon Defendants within the territorial limits of New Mexico. Nevertheless, they contend that the trial court had the authority to assert personal jurisdiction over the non-

resident Defendants. In order for this contention to hold true, the conduct Plaintiffs complain of must meet a three-part test: (1) Defendants must have done at least one of the acts enumerated in our long-arm statute, (2) Plaintiffs' causes of action must have arisen from the act or acts, and (3) Defendants must have had minimum contacts with New Mexico sufficient to satisfy constitutional due process. *See Visarraga v. Gates Rubber Co.*, 104 N.M. 143, 146, 717 P.2d 596, 599 (Ct.App. 1986).

A. *Long–Arm Statute and Causes of Action*

{12} Plaintiffs claim Defendants' conduct satisfies the requirements of our long-arm statute. *See* NMSA 1978, § 38–1–16 (1971). Section 38–1–16(A) provides that any party, whether or not a resident of New Mexico, who does one or more of our long-arm statute's enumerated acts submits to the jurisdiction of the courts of this State so long as the complainant's cause of action arises from:

> (1) the transaction of any business within this state;
>
> (2) the operation of a motor vehicle upon the highways of this state;
>
> (3) the commission of a tortious act within this state;
>
> (4) the contracting to insure any person, property or risk located within this state at the time of contracting; [or]
>
> (5) with respect to actions for divorce, separate maintenance or annulment, . . . if one party to the marital relationship continues to reside in the state.

Section 38–1–16(A). The parties agree that based on the facts presented in this case, we need only consider whether Defendants' conduct falls within subsections (1) and (3) of our long-arm statute.

1. *Business*

{13} Plaintiffs claim Defendants transacted business in New Mexico. The determination of whether a party has transacted business within the meaning of our State's long-arm statute must be made on a case-by-case basis. *See Telephonic, Inc. v. Rosenblum*, 88 N.M. 532, 534, 543 P.2d 825, 827 (1975) (stating that the resolution of this issue is to "be determined by the facts in each case"). It appears from the record that Plaintiffs raised this claim only as to Hospital at the trial court level. We restrict our analysis accordingly. *See Beneficial Fin. Co. v. Alarcon*, 112 N.M. 420, 424, 816 P.2d 489, 493 (1991) (ruling that matters not properly before the trial court cannot be considered for the first time on appeal).

{14} Plaintiffs contend that Hospital transacted business in New Mexico because it placed advertisements in several New Mexico telephone directories, produced television commercials that could be and were viewed by New Mexico customers, and previously performed health care services for other New Mexico customers. In support of their contention, Plaintiffs provided the trial court with copies of Hospital's written ads, which appeared in the white and yellow pages of the Roswell, Alamogordo, Silver City, and Las Cruces telephone directories for the years 1994 to 1997. Plaintiffs also produced Patient's affidavit in which he stated that he was aware of and had seen Hospital's commercial advertisements on his television. In his affidavit, Patient averred that he decided to have the surgery performed at Hospital based on its general solicitations, as well as on the recommendation from some of his fellow employees who apparently had received medical care at Hospital in the past.

{15} We agree with Plaintiffs that the evidence they produced at the trial court level supports their contention that Hospital intentionally initiated commercial activities in New Mexico for the purpose of realizing pecuniary gain. *See Kathrein v. Parkview Meadows, Inc.*, 102 N.M. 75, 76, 691 P.2d 462, 463 (1984) (finding that defendant's advertisements in yellow pages, coupled with a letter to the plaintiff, constituted the transaction of business); *Frazer v. McGowan*, 198 Conn. 243, 502 A.2d 905, 909–10 (1986) (ruling that Connecticut had jurisdiction over nonresident hospital that placed ads in yellow pages of Connecticut telephone directories). This determination is further compelled by the fact that Patient was not the first New Mexico resident to receive medical care at Hospital on account of its commercial activities within this State. *See Roberts v. Piper*

Aircraft Corp., 100 N.M. 363, 367–68, 670 P.2d 974, 978–79 (Ct.App.1983) (ruling that nonresident defendant who solicited business by advertising in a trade journal that is circulated in New Mexico and who previously had performed work for other New Mexico residents availed itself of the privilege of conducting business in New Mexico); *Moore v. Graves*, 99 N.M. 129, 132–33, 654 P.2d 582, 585–86 (Ct.App.1982) (same).

{16} Plaintiffs also contend that their causes of action arise from Hospital's transaction of business in New Mexico. This contention is based on Plaintiffs' allegation that, but for Hospital's solicitations, Patient would not have sought treatment at Hospital nor would he have endured certain health complications arising from Dr. Miller's prescription and Defendants' negligent failure to monitor the administration of potentially ototoxic antibiotics. Again, we agree with Plaintiffs. *See Kathrein*, 102 N.M. at 77, 691 P.2d at 464 (finding that complainant would not have visited her husband at out-of-state alcohol treatment center, where she allegedly suffered emotional and psychological damages, if not for nonresident defendant's efforts to encourage her to make that visit); *Winward v. Holly Creek Mills, Inc.*, 83 N.M. 469, 472, 493 P.2d 954, 957 (1972) (ruling that a cause of action arises out of a defendant's transaction of business for purposes of our long-arm statute when the cause of action lies "within the wake of defendant's commercial activity").

2. *Tort*

{17} Plaintiffs contend that Defendants committed a tortious act in New Mexico. This contention is based on Plaintiffs' theory that, although Defendants' negligent conduct may have occurred in Texas, a tort is not complete until there is injury. *See Peralta v. Martinez*, 90 N.M. 391, 393, 564 P.2d 194, 196 (Ct.App.1977). Plaintiffs assert that Patient did not sustain a cognizable injury until he began to experience vertigo and loss of equilibrium. Inasmuch as Patient experienced these health problems in New Mexico, and not in Texas, Plaintiffs assert that the allegedly tortious act occurred in New Mexico. *See Roberts*, 100 N.M. at 366, 670 P.2d at 977 (ruling that when negligent acts occur outside New Mexico which cause injury within New Mexico, a "tortious act" has been committed within this State); *Beh v. Ostergard*, 657 F.Supp. 173, 175–76 (D.N.M.1987) (ruling that a "tortious act" occurred in New Mexico when complainant allegedly developed certain health complications in New Mexico from the negligent implantation of an intrauterine contraceptive device in California, because a tort is not complete until a complainant endures a cognizable injury).

{18} Defendants argue that we should reject Plaintiffs' continuing tort theory because it is "based largely on the outdated 'place of wrong' choice of law rule." We decline the opportunity to address Defendants' contention because our Supreme Court continues to endorse the place-of-the-wrong rule. *See Torres v. State*, 119 N.M. 609, 613, 894 P.2d 386, 390 (1995) (applying place-of-the-wrong rule); *State v. Wilson*, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994) (ruling that this Court is bound by direct Supreme Court precedent).

{19} Defendants also argue that they did not, either individually or collectively, commit a tortious act in the first place. For purposes of this discussion only, we reject Defendants' argument and assume without deciding that they committed a tort in New Mexico and that Plaintiffs' sustained damages therefrom. We do so for two reasons. First, as stated above, Plaintiffs' causes of action arise out of Hospital's intentional, purposeful, and persistent transaction of business in New Mexico. It is therefore unnecessary for us to consider whether Hospital's conduct satisfies another subsection of our long-arm statute. *See Visarraga*, 104 N.M. at 146, 717 P.2d at 599 (stating that in order to satisfy the requirements of our long-arm statute, a non-resident defendant need only complete one of the statute's enumerated acts that gives rise to the plaintiff's cause of action). Second, as stated below, we conclude that even if Non–Hospital Defendants committed a tortious act that caused Plaintiffs damages in New Mexico, the trial court would still lack the authority to assert jurisdiction over them because they lack minimum contacts with this State. *See Tarango*

v. Pastrana, 94 N.M. 727, 728, 616 P.2d 440, 441 (Ct.App.1980) (holding that even if the defendants committed a tort, the trial court still lacked personal jurisdiction over them because they lacked minimum contacts with New Mexico).

{20} The proper two-step analysis for determining issues of personal jurisdiction is set forth in *Aetna Casualty & Surety Co. v. Bendix Control Division,* 101 N.M. 235, 680 P.2d 616 (Ct.App.1984), wherein we stated:

> In reviewing challenges to jurisdiction under our state's long-arm statute, two levels of analysis are necessary. First, the court must determine whether plaintiff has alleged an event in New Mexico, *see* Section 38–1–16, so as to subject defendant to that statute. Secondly, if the threshold requirements have been met, the court must determine whether the exercise of personal jurisdiction over the defendant is consistent with the requirements of due process.

Id. at 240, 680 P.2d at 621 (citations omitted); *see Tarango,* 94 N.M. at 728, 616 P.2d at 441 (stating that the question of personal jurisdiction over non-resident defendants involves more than the technical " 'transaction of any business' " or the technical " 'commission of a tortious act' " within New Mexico). It is to the minimum contacts portion of that analysis that we now turn.

B. *Minimum Contacts*

{21} In order for a non-resident defendant to be subjected to the personal jurisdiction of an out-of-state court, he must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (citations omitted); *accord Telephonic, Inc.,* 88 N.M. at 534, 543 P.2d at 827. "A central factor in determining whether these 'minimum contacts' were established is the degree to which defendant purposefully initiated its activity within the State." *Customwood Mfg., Inc. v. Downey Constr. Co.,* 102 N.M. 56, 57, 691 P.2d 57, 58 (1984). "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its law." *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *accord Tercero,* 1999–NMCA–052, ¶ 18, 127 N.M. 294, 980 P.2d 77.

{22} For the reasons stated above, we believe that Hospital established certain minimum contacts with this State by intentionally, purposefully, and persistently soliciting the business of New Mexico customers. It placed advertisements in several New Mexico telephone directories, produced television commercials that could be and were viewed by potential customers in New Mexico, and previously performed health care services for other New Mexico customers. Hospital's advertisements support the conclusion that it intentionally initiated commercial activities in New Mexico for the purpose of realizing pecuniary gain. *See Hanson,* 357 U.S. at 253, 78 S.Ct. 1228; *Tercero,* 1999–NMCA–052, ¶ 16, 127 N.M. 294, 980 P.2d 77.

{23} We believe, however, that Non–Hospital Defendants lack minimum contacts with New Mexico because they did not purposefully initiate any activities in this State. This is true even though technically they may have committed a tortious act in New Mexico. *See Tarango,* 94 N.M. at 728, 616 P.2d at 441 (holding that even if the defendants committed a tort in New Mexico, the trial court still lacked personal jurisdiction over them because they lacked minimum contacts with this State).

{24} In *Valley Wide Health Servs., Inc. v. Graham,* 106 N.M. 71, 72–73, 738 P.2d 1316, 1317–18 (1987), the New Mexico Supreme Court addressed the issue of whether a Colorado physician had subjected himself to the jurisdiction of our state courts by giving a New Mexico patient allegedly negligent medical advice in a telephone call. Answering in the negative, our Supreme Court stated that prior to the physician's telephone call, a doctor-patient relationship had already been established in Colorado. *See id.* at 73, 738 P.2d at 1318. The Supreme Court determined that the physician had not purposely initiated activity in this State, but instead had simply

responded to his patient's call for help as the patient's treating physician. *See id.* at 72–73, 738 P.2d at 1317–18. It was mere happenstance that the patient lived in New Mexico.

{25} In our view, the case at bar falls under the rubric set forth in *Valley Wide Health Services, Inc.*. Although *Valley Wide Health Services, Inc.* involved a phone call and this case involved discharge instructions including the continuation of the antibiotic therapy that allegedly hurt Patient, the Supreme Court's underlying rationale in *Valley Wide Health Servs., Inc.* still holds true. It is determinative that other than Hospital, Defendants acted in New Mexico only after Patient had unilaterally initiated a doctor-patient relationship in Texas. This type of action does not constitute purposeful action. As one court so aptly put it:

> The case at bar does not involve a product which was deliberately or foreseeably shipped into the forum state's markets. It focuses on a service, not performed in the forum state but in a foreign state, rendered after the plaintiff voluntarily traveled to the foreign state so that he could benefit from that service which was available there only.
>
> When one seeks out services which are personal in nature, such as those rendered by attorneys, physicians, dentists, hospitals or accountants, and travels to the locality where he knows the services will actually be rendered, he must realize that the services are not directed to impact on any particular place, but are directed to the needy person himself. While it is true that the nature of such services is that if they are negligently done, their consequences will thereafter be felt wherever the client or patient may go, it would be fundamentally unfair to permit a suit in whatever distant jurisdiction the patient may carry the consequences of his treatment, or the client the consequences of the advice received.
>
> Unlike a case involving voluntary interstate or international economic activity, which is directed at the forum state's markets, the residence of a recipient of personal services rendered elsewhere is irrelevant and totally incidental to the benefits provided by the defendant at his own location. It is clear that when a client or a patient travels to receive professional services without having been solicited (which is prohibited by most professional codes of ethics), then the client, who originally traveled to seek services apparently not available at home, ought to expect that he will have to travel again if he thereafter complains that the services sought by him in the foreign jurisdiction were therein rendered improperly.
>
> Any other rule would seem to be not only fundamentally unfair, but would inflict upon the professions the obligation of traveling to defend suits brought in foreign jurisdictions, sometimes very distant jurisdictions, there brought solely because the patient or client upon his return to his own home decided to sue at home for services sought by himself abroad.

Gelineau v. New York Univ. Hosp., 375 F.Supp. 661, 667 (D.N.J.1974) (citation and footnote omitted); *Tarango*, 94 N.M. at 729–30, 616 P.2d at 442–43 (quoting the same passage from *Gelineau*).

{26} We acknowledge Plaintiffs' argument that their case differs from *Gelineau* and *Tarango* in that they allege a continuing tort, whereas the other cited cases involve a discrete set of services that could be said to have been rendered strictly outside the patient's home state. This point notwithstanding, we fail to see why the case at bar falls outside the purview of *Valley Wide Health Services, Inc.*. When a person unilaterally seeks specialty care, which Patient no doubt did by traveling to Texas to undergo heart bypass surgery and then again to receive treatment for his staph infection, follow-up care, including medical prescriptions, are almost sure to follow. This type of follow-up care, without any evidence that the non-resident physician reached into the forum state in order to attract the patient's business, simply does not constitute the purposeful availment that is both contemplated in and required by our due process analysis. Nor are we impressed by Patient's conclusory affidavit that all doctors "provided medical services to me ... at Mountain Shadows." The 600-page record in this case is replete with case notes, discharge summaries, and specific information, and all it shows is the

transfer of follow-up care, including prescriptions, to New Mexico. *See Rivera v. Trujillo,* 1999–NMCA–129, ¶ 8, 128 N.M. 106, 990 P.2d 219.

{27} The citizens of New Mexico would be ill-served if we were to establish a rule that effectively compelled non-resident specialist physicians to prescribe only so much medicine as would get patients home. *See Prince v. Urban,* 49 Cal.App.4th 1056, 57 Cal.Rptr.2d 181, 186 (1996). We instead choose to reiterate the longstanding rule that a non-resident defendant will not be subjected to the jurisdiction of the courts of this State unless his or her activities are properly characterized as purposeful availment, rather than incidental. *See Valley Wide Health Servs., Inc.,* 106 N.M. at 72–73, 738 P.2d at 1317–18.

CONCLUSION

{28} For the reasons stated, we affirm in part and reverse in part and remand with instructions to the trial court to reinstate Plaintiffs' complaint against Hospital only.

{29} **IT IS SO ORDERED.**

APODACA and BUSTAMANTE, JJ., concur.

10 P.3d 853

2000-NMCA-081

Robert P. CRESON, Don E. Williams, Fred Benners, Don Michael Dowdle, and Oliver H. Daniels, Trustees of the Public Lands Royalty Trust, and George L. Scott, Plaintiffs–Appellants,

v.

AMOCO PRODUCTION COMPANY, and Amerada Hess, Defendants–Appellees.

No. 19,794.

Court of Appeals of New Mexico.

June 21, 2000.

Certiorari Denied, No. 26,469, Sept. 13, 2000.

Ernest L. Carroll, Mary Lynn Bogle, Losee, Carson, Haas & Carroll, P.A., Artesia, NM, John M. Eaves, Kerry Kiernan, Eaves, Bardacke, Baugh, Kierst & Kiernan, P.A., Albuquerque, NM, for Appellants.

William F. Carr, Bradford C. Berge, Michael H. Feldewert, Campbell, Carr, Berge

& Sheridan, P.A., Santa Fe, NM, David M. Castro, Amerada Hess Corporation, Houston, TX, Michael Homeyer, BP Amoco Corporation, Houston, TX, for Appellees.

OPINION

APODACA, Judge.

{1} Plaintiffs sued Defendants for an accounting and damages as the result of alleged miscalculations of royalties owed under an agreement known as the Unit Agreement and involving the Bravo Dome Carbon Dioxide Gas Unit (the Unit). After a non-jury trial and entry of findings of fact and conclusions of law, the trial court entered judgment in Defendants' favor on all of Plaintiffs' claims but ordered Defendants to account to Plaintiffs for all past and future deductions from the actual sales price used to calculate the royalty payment.

{2} Plaintiffs appeal, challenging the trial court's conclusion that the Unit Agreement executed by the parties in 1979 authorized certain deductions for unit expenses in calculating the royalty payment. Plaintiffs also challenge the trial court's determination that the Unit Agreement nullified a prior royalty payment provision in a document known as the Amoco Assignment, which was more favorable to them.

{3} We hold that the Unit Agreement, not the Amoco Assignment, controls the method for calculating royalties and that "net proceeds derived from the sale of Carbon Dioxide Gas at the well," a controlling clause contained in the agreement, is not ambiguous. We also hold that the trial court did not err in determining that post-production, value-enhancing costs were properly used by Defendants under the Unit Agreement to calculate the value of or net proceeds from the carbon dioxide gas sold downstream from the wellhead and the resulting royalty ultimately paid to Plaintiffs. We therefore affirm the trial court's judgment.

I. FACTUAL BACKGROUND

{4} The primary question we must address is whether the Unit Agreement provides for the deduction of unit expenses from the sales price of the gas before calculating the royalties Defendants must pay to Plaintiffs. Defendant Amoco Production Company (Amoco) operates the Unit. Defendant Amerada Hess (Hess) owns some of the leases contained within the Unit. Both Amoco and Hess are working interest owners (the WIOs). Plaintiff George Scott (Scott) owns an overriding royalty interest on production from leases owned only by Hess, and the remaining Plaintiffs, as trustees of the Public Lands Royalty Trust (the Trust), own overriding royalty interests on production from leases owned by both Amoco and Hess. The Unit was formed to consolidate and coordinate the production of carbon dioxide gas in an area consisting of more than 750,000 acres controlled by a variety of leases and with more than one thousand royalty owners. Carbon dioxide gas is injected into oil wells to enhance recovery of oil.

A. The Unit Agreement

{5} Four provisions of the Unit Agreement are particularly relevant. Article 1.16 defined "Unit Expense" as "all cost, expense or indebtedness incurred by the [WIOs] or Unit Operator pursuant to this Agreement and the Unit Operating Agreement for or on account of Unit Operations." Article 1.14 of the Unit Agreement defined "Unit Operations" as "all operations conducted pursuant to this agreement and the Unit Operating Agreement."

{6} Article 6.3 of the Unit Agreement stated:

> *Basis of Payment to Royalty Owners.* It is recognized by the parties hereto that there is no preeminent market for Carbon Dioxide Gas. Therefore, the parties hereto agree that, as further consideration for entering into this agreement, royalties paid upon the Unitized Substances allocated to each Tract shall be based on the greatest of the following:
>
> (a) *The net proceeds derived from the sale of Carbon Dioxide Gas at the well* whether such sale is to one or more parties to this agreement or to any other party or parties.

The Unit Agreement differed from most unit agreements generally used in the oil and gas industry because it contained the royalty

clause provision of Article 6.3. Model forms of unit agreements do not contain royalty clauses because the royalties are generally paid pursuant to the underlying leases. According to Defendants, Article 6.3 was included in the Unit Agreement because there was no market price for carbon dioxide gas and some of the leases involving land within the Unit provided for royalties based on market price.

{7} Yet another provision of the Unit Agreement comes into play in this appeal—Article 14.3. Plaintiffs rely heavily on this article to exempt them, as royalty owners, from payment of any unit expenses. Article 14.3 provided:

> *Royalty Owners Free of Cost.* This Agreement is not intended to impose, and shall not be construed to impose, upon any Royalty Owner any obligation to pay Unit Expense unless such Royalty Owner is otherwise so obligated.

Article 14.3 is a standardized provision in the American Petroleum Institute's model form unit agreement. Plaintiffs argue that, because compression, dehydration, gathering, and depreciation are "unit expense[s]," as that term is used in Article 14.3, Defendants cannot deduct these costs from the sales price before computing Plaintiffs' royalties.

B. Valuation Method

{8} Plaintiffs ratified the Unit Agreement in June of 1979 after consulting with an attorney who was a board certified specialist in oil and gas law in Texas. Plaintiffs' royalties under the Unit Agreement were based on a percentage of the carbon dioxide gas produced. This percentage is not disputed. What is at issue is the method of valuing the "net proceeds derived from the sale of carbon dioxide gas at the well," the clause used in Article 6.3. It is undisputed that a small percentage of the carbon dioxide gas "is sold in the form in which it emerges from the wellheads prior to processing or transportation" and that the carbon dioxide gas is marketable in its unprocessed state at the wellheads. It is also undisputed that compression, dehydration, and gathering are processes to make the carbon dioxide gas suitable for delivery into the pipeline system and that these expenses, along with depreciation, are unit expenses under the Unit Agreement. These processes take place on the Unit and within the boundaries of the combined leases.

{9} Defendants have calculated the royalties under the Unit Agreement by subtracting or "netting back" an amount for operating costs, capital costs, and depreciation expenses for the gathering, compressing, and dehydration facilities and functions in the Unit. It is undisputed that the royalties paid to Plaintiffs, even after making these cost adjustments for carbon dioxide gas sold downstream of the wellheads, were still higher than the price received for the carbon dioxide gas actually sold at the wellheads. The trial court also found, and Plaintiffs do not dispute that, since production began on the Unit in 1984, Plaintiffs have received royalties on the same basis as the State of New Mexico and that the state approved the categories and amounts of cost adjustments used to arrive at the value for "net proceeds ... at the well." The State has not contested these same cost adjustments that Plaintiffs now dispute. Plaintiffs do not claim that the cost adjustments Defendants used were inflated or did not reflect the actual costs incurred to enhance the value of the gas in the marketplace. They only dispute the use of these cost adjustments in calculating the royalties to be paid under the Unit Agreement, in light of Article 14.3, which states that unit expenses shall not be imposed as obligations of Plaintiffs, as royalty owners.

II. DISCUSSION

A. Standard of Review

{10} In determining whether the Unit Agreement is ambiguous, the trial court could properly consider the context of the agreement, including the circumstances surrounding it, and any relevant usage of trade or course of dealing. *See Mark V, Inc. v. Mellekas,* 114 N.M. 778, 781, 845 P.2d 1232, 1236 (1993). The question of whether an ambiguity exists is a question of law. *See id.* If the agreement is found to be ambiguous—in other words, if it is reasonably and fairly susceptible to different constructions—the meaning to be assigned unclear terms then

becomes a question of fact. *See id.* If, however, the contract is unambiguous, we determine its meaning as a matter of law. *See Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 7, 123 N.M. 526, 943 P.2d 560. This Court reviews questions of law under a de novo standard of review and questions of fact under a substantial evidence standard of review. *See id.* at 781-82, 845 P.2d at 1236-37; *see also Allsup's Convenience Stores v. North River Ins. Co.*, 1999-NMSC-006, ¶¶ 27-28, 127 N.M. 1, 976 P.2d 1.

B. Interpretation of "net proceeds ... at the well"

{11} The question posed by Article 6.3 is whether, when the sale of the gas occurs at a place other than the wellhead, Defendants could make post-wellhead cost adjustments in valuing the "net proceeds ... at the well." Relying in part on expert testimony, the trial court determined that the phrase "net proceeds ... at the well" had a long standing and unambiguous meaning in the oil and gas industry in computing royalty settlement or payment.

{12} The trial court concluded that "net proceeds" implied that the parties intended to make deductions to account for costs and, because the royalty provision was based on net proceeds at the well, a producer should deduct "from downstream sales proceeds those post production value enhancing costs associated with transporting and processing the gas up to the point of sale." Plaintiffs do not challenge the trial court's holding that the phrase is unambiguous. At oral argument, Plaintiffs conceded the lack of ambiguity. What they do take issue with, however, is the trial court's interpretation of the phrase. Plaintiffs argue that Article 6.3 provides for the payment of royalties based on a percentage of the net of all costs or expenses *except unit expense.* The basis of that argument is that Article 14.3 prohibits assessing those unit expenses on Plaintiffs, which, according to Plaintiffs, Defendants have essentially done by deducting those costs in their computations of royalties.

{13} Commentators have noted that royalty clauses in instruments creating overriding royalty interests generally provide that proceeds will be delivered free of the cost of production. *See, e.g.*, 3 P. Martin & B. Kramer, *Williams and Meyers Oil and Gas Law* § 645, at 594 (1999) (referred to as *Williams and Meyers*). Because of how common these provisions are, "royalty and overriding royalty interests are usually defined as interests [that] are free of production costs." *See id.* The commentators and case law, however, generally distinguish between production costs and costs incurred post-production. *See id.* at 595. We consider this to be an important distinction. "A royalty or other nonoperating interest in production is usually subject to a proportionate share of the costs incurred subsequent to production where the royalty or nonoperating interest is payable 'at the well.'" *See id.* § 645.2, at 597-98.

{14} In the absence of an express agreement to the contrary, such post-production costs generally include transportation costs, expenses of treatment such as dehydration, expenses of compressing gas so that it can be delivered into a pipeline, and other "costs incurred in adding value to the wellhead product." *See id.* at 601-04; *see also* E. Kuntz, *A Treatise on the Law of Oil and Gas* § 40.4, at 344 (1989) (stating that "[i]f the provision [that] refers to proceeds refers specifically to sales of gas at the well, then the royalty is determined by the value at the well and not by the proceeds of sales elsewhere" and noting that the net value includes reducing the amount of proceeds by allocable costs).

{15} In this appeal, the royalty clause in the Unit Agreement (Article 6.3) provided for payment based on the "net proceeds derived from the sale of Carbon Dioxide Gas at the well." We determine, as did the trial court, that this clause is unambiguous and means that Plaintiffs are entitled to royalties based on the value of the carbon dioxide gas as it emerges at the wellhead.

{16} Our determination is amply supported by the case law. In *Martin v. Glass*, 571 F.Supp. 1406 (N.D.Tex.1983), the court was faced with the question of whether compression charges were properly chargeable to the royalty owners under a lease that

provided for payment based on "net proceeds at the well received from the sale [of the gas]." *Id.* at 1410. Interpreting this phrase according to its ordinary, popular, and commonly accepted meaning, the federal court determined that the royalty owners were entitled to the value of the gas delivered or produced to the mouth of the well and this royalty was free of all costs up to that point. *See id.* at 1411. The court also determined that " 'net proceeds' clearly suggests that certain costs are deductible." *Id.; see also Phillips Petroleum Co. v. Johnson,* 155 F.2d 185, 188–89 (5th Cir.1946) ("[T]he stipulation for a share of the 'net proceeds derived' ought to be enforced, effect being given to the words 'net at the mouth of the well' by allowing as expense the cost of transporting, separating, and marketing.").

{17} The parties in *Martin* stipulated that there was insufficient pressure at the wellhead to enable the gas to enter the purchaser's gathering line without compression. *See Martin,* 571 F.Supp. at 1416. Despite the fact that there was no market for the gas as it existed at the wellhead, the court applied Texas law and determined that compression was a marketing expense as opposed to a production expense and was properly deducted from the value used to calculate royalties. *See id.*

{18} In a later case, the Texas Court of Appeals defined production costs as:

> expenses incurred in exploring for mineral substances and in bringing them to the surface. Absent an express term to the contrary in the lease, these costs are not chargeable to the non-operating royalty interest. Costs incurred after production of the gas or minerals are normally proportionally borne by both the operator and the royalty interest owners.

Parker v. TXO Prod. Corp., 716 S.W.2d 644, 648 (Tex.Ct.App.1986). In *Parker,* the compressors were installed to increase production from the wells. *See id.* The court distinguished the facts in *Martin* where compression was necessary, not to bring the gas to the wellhead, but to deliver the gas into the purchaser's gathering line. The court then determined that the costs of compression in *Parker* were production costs to increase the amount of gas recovered at the well and should not have been deducted in calculating the royalty payments. *See id.*

{19} In *Piney Woods Country Life School v. Shell Oil Co.,* 726 F.2d 225, 228 (5th Cir. 1984), the court interpreted leases that provided for royalties based on market value except when the gas was sold at the well. At issue was the propriety of deducting processing costs from the price used to calculate royalties. *See Piney Woods,* 726 F.2d at 230. Noting that different calculations were to be used depending on whether the sale or use was "at the well," the court concluded:

> [T]he purpose is to distinguish between gas sold in the form in which it emerges from the well, and gas to which value is added by transportation away from the well or by processing after the gas is produced. The royalty compensates the lessor [or royalty owner] for the value of the gas at the well: that is, the value of the gas after the lessee fulfills its obligation under the lease to produce gas at the surface, but before the lessee adds to the value of this gas by processing or transporting it.

Id. at 231; *see also Atlantic Richfield Co. v. State,* 214 Cal.App.3d 533, 262 Cal. Rpt. 683, 688 (1989) (construing legislation providing for payment to the state based on "market value at the well" in the context of offshore drilling and concluding that California provides for determining the value at the well by deducting the costs of transporting the produced gas to an onshore processing facility and processing the gas to obtain a commercially marketable product); *Judice v. Mewbourne Oil Co.,* 939 S.W.2d 133, 137 (Tex.1996) (stating that " '[n]et proceeds' expressly contemplates deductions, and we note once again that 'at the well' means before value is added by preparing the gas for market").

{20} In *Piney Woods,* the WIOs passed expenses to the royalty owner for treating and transporting the natural gas according to a complex formula that compensated it for these expenses and capital investment. *See Piney Woods,* 726 F.2d at 240. Because the royalty clause provided for payment based on value "at the well," the court rejected the royalty owners' argument that they could not

be charged for these expenses as costs of discovery and production and that production costs included any costs necessary to make the gas marketable.

{21} In allowing royalty owners to be charged with processing costs, including all post-production expenses relating to processing, transportation, and marketing, the court emphasized "that processing costs are chargeable only because, under these leases, the royalties are based on value or price at the well. Processing costs may be deducted only from valuations or proceeds that reflect the value added by processing." *Id.* The court noted that the function of processing costs in determining royalties based on market value at the well is to adjust for imperfect comparisons. Deductions for these costs may be "an indirect means of determining what a buyer would have paid ... at the wellhead." *Id.; accord Merritt v. Southwestern Elect. Power Co.,* 499 So.2d 210 (La.Ct. App.1986).

{22} We recognize that other states have not allowed costs of compression, dehydration, and gathering to be charged to the royalty owner under certain circumstances. Those circumstances are not present in this case, however. *See, e.g., Garman v. Conoco, Inc.,* 886 P.2d 652, 654 (Colo.1994) (en banc) (answering a question certified to the court without considering specific contractual terms, the court concluded that post-production costs undertaken to convert raw gas into a marketable product were not deductible based on the implied covenant to market). In this appeal, Plaintiffs have conceded that the carbon dioxide gas was marketable at the wellhead and that some small portion of the gas was actually sold at the wellhead. *Cf. Gilmore v. Superior Oil Co.,* 192 Kan. 388, 388 P.2d 602, 607 (1964) (disallowing the costs of compression as part of the lessee's duty to market the gas produced); *Sternberger v. Marathon Oil Co.,* 257 Kan. 315, 894 P.2d 788, 791 (1995) (determining that, although expenses in making the product marketable were not deductible, where the gas is marketable at the wellhead, but for the lack of a purchaser at that location, the costs of transportation may be properly deducted).

{23} In *West v. Alpar Resources, Inc.,* 298 N.W.2d 484 (N.D.1980), the court determined that a royalty clause providing for payment based on "proceeds from the sale of the gas" was ambiguous, and the court thus disallowed deductions for any costs incurred by the WIO. *Id.* at 491. In construing the contractual provision against the WIO as lessee, the court noted that the WIO's predecessor in interest could easily have limited royalty payments to the net proceeds received from the sale after allowance of certain costs. *See id.; see also Hanna Oil & Gas Co. v. Taylor,* 297 Ark. 80, 759 S.W.2d 563, 564–65 (1988) (interpreting a provision based on "proceeds received ... at the well"). In this appeal, however, the royalty clause provides expressly for "net proceeds" rather than proceeds. *See Hurinenko v. Chevron, USA, Inc.,* 69 F.3d 283, 285 (8th Cir.1995) (distinguishing *West* as having been based on the "proceeds" clause where the clause in *Hurinenko* used "market value at the well" and, therefore, processing costs could be deducted from gross sales revenues).

{24} Article 6.3, the royalty clause, expressly used the term "net proceeds," and it is undisputed that the carbon dioxide gas was marketable and was actually marketed at the wellhead. Even under cases from other jurisdictions, such as *Garman* and *Sternberger,* the costs of compression, gathering, and dehydration in this case would be deductible. Because the carbon dioxide gas was marketable at the wellhead, this would be considered post-production, value-enhancing costs that could be deducted from the value of the gas at its termination point as a means of establishing the value of the gas at the wellhead, before the gas was sold downstream at an enhanced value. We thus hold that the post-production values Defendants added was properly deducted before calculation of royalties due.

{25} We also observe that, in contrast to the plentiful authority in support of the trial court's interpretation, Plaintiffs have not offered any contrary authority under similar facts and circumstances. For this reason, we are confident that the trial court's interpretation and application of the "net proceeds ... at the well" clause is fully supported by all

judicial opinions on the subject. Plaintiffs would have us deviate from accepted law on the basis of little or no authority, a course we do not choose to embark upon.

C. Depreciation of Capital Expenditures

{26} Plaintiffs argue that, even if this Court affirms the trial court's interpretation of the Unit Agreement, the trial court erred in allowing deductions for depreciation of capital costs. Plaintiffs do not, however, provide us with any more specific arguments or with any authority on this issue. We understand this argument to raise an issue regarding the method of accounting or the formula Defendants used to arrive at the royalty based on net proceeds at the well for sales that occurred downstream. We note that Plaintiffs did not assert below that the cost adjustments used to derive a "net proceeds at the well" value were inflated or did not reflect the actual costs incurred to enhance the value of the gas.

{27} But even beyond those findings, because Defendants are required by the final judgment to provide Plaintiffs with an accounting of the deductions taken in the past as well as all future deductions, we determine that the specific issue of whether depreciation expenses were proper is not ripe for review. In this regard, we note that deductions for depreciation of capital investments may be proper if those capital expenditures related to enhancing the value of the gas after it reached the wellhead in a marketable state. *See generally Piney Woods,* 726 F.2d at 240 ("[Royalty owners] may be charged with processing costs, by which we mean *all expenses,* subsequent to production, relating to the processing, transportation, and marketing. . . ."). (Emphasis added).

D. Article 14.3

{28} The trial court concluded that Article 14.3 set forth the general proposition that royalty owners would not bear the capital intensive costs of developing the producing property. The court also concluded that there was no conflict between Articles 6.3 and 14.3. Finally, the court concluded that the deductions for unit expenses in calculating royalties did not violate this provision. Plaintiffs challenge these conclusions and assert that the plain language of the Unit Agreement required that Article 6.3 be subject to the free-of-cost provision of Article 14.3.

{29} This assertion fails in two respects. First, as we discuss later in this section, Article 6.3 did not shift costs to Plaintiffs but was merely used to determine the "net value at the wellhead," on which the Unit Agreement clearly states royalties were to be calculated. Additionally, even if we were to agree with Plaintiffs that Article 6.3 did in fact shift some of the cost to them and that Article 14.3 freed Plaintiffs of all costs, we are still unpersuaded. Article 14.3 provided that Plaintiffs were free of costs "unless [Plaintiffs were] otherwise so obliged." Reading this part of Article 14.3 in conjunction with Article 6.3 would indicate that Plaintiffs were "so obliged." In either case, Plaintiffs' contention that the two provisions cannot be read in conformity with one another fails.

{30} Plaintiffs would distinguish cases such as *Martin* and *Piney Woods* because the facts there do not state that they contained a "free of cost" provision. As noted in *Williams and Meyers,* however:

> Inasmuch as gas royalty is ordinarily payable in money rather than in kind and is measured by value or proceeds at the wellhead, it is not customary, as in the case of oil royalty payable in kind, to specify that the royalty is free of cost of production. Freedom from such costs of production is implicit in the provision for payment of a share of the proceeds or value at the wellhead. However an occasional lease makes this specific even in the case of the gas royalty.

Williams and Meyers § 643.2, at 530.1. We interpret Section 14.3 as an explicit statement of what is implicit in most leases providing for the payment of royalties based on "net proceeds at the well." In other words, Section 14.3 specifies that the royalties will be free from the costs of production. The section does not permit royalty owners to reap the benefits of an enhanced value of the gas sold downstream. *See, e.g., Danciger Oil*

& Refineries, Inc. v. Hamill Drilling Co., 141 Tex. 153, 171 S.W.2d 321, 323 (1943) (determining that a royalty clause providing for payment "free and clear of operating expenses" referred to expenses necessary to production and not to post-production expenses). Free of cost provisions are not inconsistent with allowing post-production, value-enhancing costs to be used to calculate the value of the gas at the wellhead. *See id.*

{31} Plaintiffs also argue that the parties' course of dealing and Defendants' conduct after the Unit Agreement was ratified established the parties' intent that the royalty owners would not bear any cost of the unit operations. It is clear that Defendants repeatedly represented, before and after ratification, that royalty owners would not pay or be liable for any of the expenses involved in the Unit and that the unit operator would pay all the expenses of the Unit. This is evidenced by the Unit Agreement itself, the brochure outlining the program for unit operations that was sent to royalty owners prior to ratification, and solicitation letters sent by Amoco.

{32} In testimony before the State Energy and Minerals Department in July of 1980, Amoco's representative was asked if the Unit Agreement contemplated that a royalty owner would pay any of the costs of the Unit and the unit operation and the response was "No. All such costs will be borne by the working interest owners." In orally explaining the Unit Agreement in March 1980 to royalty owners, Amoco's representative stated that Article 6 provided for royalty payments based on the greater of the "net proceeds per mcf. derived from the sale of CO at the well or [a] minimum value of 12 [cents] at the well." We are not persuaded, however, that deductions for the costs of compression, gathering, dehydration, and capital depreciation used to establish "net value at the well" for downstream sales is equivalent to requiring Plaintiffs to pay for or bear these costs.

{33} Instead, these costs were used as a means of calculating the value of the carbon dioxide gas at the wellhead for those sales that occurred downstream. Because there is no "net proceeds at the well" for downstream sales, it is necessary to reconstruct this value for these sales. Use of these costs for this limited purpose, in our view, is not equivalent to assessing those costs directly to the royalty owners. As another court stated in the context of reconstructing a market value where one did not exist,

> all increase in the ultimate sales value attributable to the expenses incurred in transporting and processing the commodity must be deducted. The royalty owner shares only in what is left over.... In this sense he bears his proportionate part of that cost, but not because the obligation (or expense) of production rests on him. Rather, it is because that is the way in which Louisiana law arrives at the value of the gas at the moment it seeks to escape from the wellhead.

Freeland v. Sun Oil Co., 277 F.2d 154, 159 (5th Cir.1960); *see also Danciger*, 171 S.W.2d at 323 (determining that a royalty clause providing for payment "free and clear of operating expenses" referred to expenses necessary to production and not to post-production expenses).

{34} Similarly, we are persuaded that the deductions for post-production, value-enhancing expenses in this case when used as a means of valuing the net proceeds at the well does not mean that an obligation of production or unit expenses is being imposed on Plaintiffs. Although it is undisputed that unit expenses include costs of compression, gathering, dehydration, and capital depreciation, we are not persuaded that this precludes these expenses, to the extent they are post-production, value-enhancing expenses, from being used to assess the value of gas sold downstream solely for the purpose of determining the value at the wellhead, on which the royalty was calculated under the Unit Agreement. Defendants bore all the responsibility for financing and constructing the facilities used for these purposes. Plaintiffs were not required to pay for these expenses. We thus hold that using these costs in a formula to value the carbon dioxide gas at the wellhead when the gas had been sold at an enhanced value downstream does not violate Article 14.3 of the Unit Agreement.

{35} Nor are we persuaded that Amoco's post-ratification conduct evinces a

different intent. Plaintiffs cite to Amoco's negotiations with the State regarding the specific deductions used to determine the value of the gas for State royalty purposes and internal Amoco documents discussing the company-wide policy and procedures for calculating and reporting "gas marketing costs" as an aid to valuing gas produced under various royalty clauses providing for payment based on a value "at the wellhead" or proceeds received by Amoco. In our view, this evidence does not change the meaning or interpretation of "net proceeds at the well." At most, it documents that the specific method of calculating the net proceeds at the well was not established in the Unit Agreement.

{36} In summary, because "net proceeds ... at the well" is an unambiguous phrase and evinces a clear intent that deductions will be made and the gas is to be valued at the wellhead, we affirm the trial court's determination that the computations of Plaintiffs' royalties for gas sold downstream were subject to deductions for post-production, value-enhancing costs.

E. The Amoco Assignment

{37} Plaintiffs argue that the Unit Agreement did not nullify its 1975 Amoco Assignment involving the Trust. In the Amoco Assignment, Amoco acquired mineral leases that the Trust's predecessor in interest, Public Lands Exploration, Incorporated (PLEI), had purchased. The Amoco Assignment provided that Amoco would calculate and pay royalties based on calculations used to pay the United States or the State of New Mexico, whichever was greater. This provision was referred to as the "Limited Favored Nations Clause." PLEI later assigned its royalty interest from the Amoco Assignment to Plaintiffs, effective December 31, 1976.

{38} The Unit Agreement provided in part:

> 3.3 *Leases and Contracts Conformed and Extended.* The terms, conditions, and provisions of all leases, subleases, and other contracts relating to exploration, drilling, development, or operation for oil and gas, including but not limited to Carbon Dioxide Gas, on lands committed to this agreement are hereby expressly modified and amended to the extent necessary to make the same conform to the provisions hereof but otherwise shall remain in full force and effect. *Further, the parties hereto hereby expressly consent ... for the Lessors as to other [than federal or state] leases ... to hereby establish, alter, change, or revoke the drilling, producing, rental, minimum royalty, and royalty requirements of Federal, State, and other leases committed hereto and the regulations in respect thereto to conform said requirements to the provisions of this agreement....*

(Emphasis added.) Plaintiffs argue that the plain language of this Article conforms only the contract provisions relating to "exploration, drilling, development and operations" for carbon dioxide gas and does not conform prior leases or contracts regarding the distribution of unitized substances or their proceeds. We note that, in making this argument, Plaintiffs neglected to quote the second sentence of Article 3.3, which expressly includes minimum royalties and royalty requirements as being conformed to the Unit Agreement.

{39} In their reply brief, Plaintiffs argue that the Limited Favored Nations Clause is not a royalty requirement but a method for calculating the required royalties. Without citation to authority, they assert that the term "royalty requirements" refers to a requirement that royalty be paid under certain circumstances. We are not persuaded that the phrase "royalty requirements" would not include the calculation of royalties. Even assuming Plaintiffs' interpretation had merit, however, their argument ignores that part of the Article conforming the minimum royalty of other leases to the provisions of the Unit Agreement.

{40} Because Article 3.3 expressly provides for the minimum royalty and royalty requirements of other leases to be conformed to the Unit Agreement, we determine that the Unit Agreement, rather than the Amoco Assignment, controlled Amoco's obligations regarding the payment of royalty in this case. *Cf. Hitzelberger v. Samedan Oil Corp.*, 948 S.W.2d 497, 508 (Tex.Ct.App.1997) (interpreting a conforming clause as an amend-

ment to "individual leases to the extent necessary to make them conform to the unit agreement").

III. CONCLUSION

{41} We conclude that the trial court was correct in determining the Unit Agreement was not ambiguous in using the phrase "net proceeds derived from the sale of carbon dioxide gas at the well." We hold that post-production, value-enhancing costs were properly included by Defendants in calculating the royalty owed to Plaintiffs. We thus conclude that the trial court's determination in this regard was not error. Finally, we conclude that the provisions of the Unit Agreement, and not the Amoco Assignment, governed the manner in which royalties were to be calculated. We therefore affirm the trial court's judgment in favor of Defendants.

{42} **IT IS SO ORDERED.**

BOSSON and ARMIJO, JJ., concur.

10 P.3d 863

2000-NMCA-083

TPL, INC., Protestant–Appellant,

v.

NEW MEXICO TAXATION & REVENUE DEPARTMENT, Respondent–Appellee.

No. 20,321.

Court of Appeals of New Mexico.

June 27, 2000.

Certiorari Granted, No. 26,505, Sept. 13, 2000.

Tracy J. Ahr, Claudia G. Crawford, Keleher & Mcleod, P.A., Albuquerque, NM, for Appellant.

Patricia A. Madrid, Attorney General, Bruce J. Fort, Special Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

PICKARD, Chief Judge.

{1} This appeal involves NMSA 1978, § 7–9–57 (1989), which permits a deduction from gross receipts tax for money received for the performance of certain services, but does not permit the deduction if the buyer of the service makes initial use or takes delivery of the "product of the service" in New Mexico. The central question on appeal is whether Taxpayer, whose services performed for a federal agency (Buyer) were the deconstruction of ammunition, ordnance, and other energetic material, was entitled to a deduction because its services allegedly did not result in a product and therefore it was impossible for Buyer to initially use or take delivery of a product in New Mexico. We uphold the hearing officer's decision that there was a product of the service which was used or for which delivery was taken in New Mexico. We also reject a number of Taxpayer's other contentions.

BACKGROUND

{2} Taxpayer is a New Mexico corporation with offices in Albuquerque, New Mexico. Taxpayer provides deconstructive services, whereby it takes physical possession of energetic materials and then renders them inert through sophisticated processes it has developed. Buyer is a part of the United

States Army Materiels Central Command. Buyer is headquartered in Rock Island, Illinois.

{3} Taxpayer and Buyer entered into three demilitarization contracts between January 1992 and April 1997. The contracts were administered in Phoenix, Arizona, and were paid from Columbus, Ohio. Under the terms of these contracts, Buyer shipped surplus munitions to Taxpayer in New Mexico. Taxpayer assumed responsibility for deconstructing the munitions. In order to fulfill its responsibility, Taxpayer had to determine how to disassemble the munitions, actually disassemble the munitions, and then dispose of the munition residuals in a safe and environmentally responsible manner.

{4} Buyer retained ownership of the munitions until the demilitarization process was completed. After Taxpayer performed its deconstructive services, Buyer transferred title to all materials and components arising out of the disassembly and demilitarization of the munitions to Taxpayer. Taxpayer then assumed responsibility, as well as liability, for disposing the inert materials in a safe manner.

{5} In June 1997, the Department audited Taxpayer's gross receipts reporting practices for tax periods January 1992 through April 1997. The Department disallowed Taxpayer's claimed deductions of the receipts it had obtained from performing the three demilitarization contracts it had entered into with Buyer during that time frame. Taxpayer filed a written protest with the Department, which was submitted to the hearing officer for consideration.

{6} The hearing officer denied the protest on two bases. The hearing officer concluded that Buyer made initial use of the product in New Mexico when it transferred title to the inert materials and risk of loss to Taxpayer as consideration for the services performed. She also concluded that Buyer took delivery of the product in New Mexico because Taxpayer performed the services on property purportedly owned by Buyer in New Mexico.

STANDARD OF REVIEW

{7} The issue presented for our review is whether the hearing officer properly denied Taxpayer's claimed gross receipts tax deductions on the grounds that Buyer initially used or took delivery of a product in New Mexico. *See* § 7–9–57. This issue requires us, in part, to answer a question of statutory interpretation, which we review de novo. *See Cox v. Municipal Boundary Comm'n,* 120 N.M. 703, 705, 905 P.2d 741, 743 (Ct.App.1995) (ruling that interpretation of a word as it appears in a statute presents a question of law); *Western Bank of Las Cruces v. Malooly,* 119 N.M. 743, 748, 895 P.2d 265, 270 (Ct.App.1995) (ruling that we review questions of law de novo). To the extent that we are asked to apply the law of gross receipts tax deductions to undisputed facts, we are again presented with a question of law, which we review de novo. *See Quantum Corp. v. Taxation & Revenue Dep't,* 1998–NMCA–050, ¶ 8, 125 N.M. 49, 956 P.2d 848.

{8} There is a statutory presumption that "all receipts of a person engaging in business are subject to the gross receipts tax." NMSA 1978, § 7–9–5 (1966). A taxpayer has the burden of overcoming the statutory presumption created by Section 7–9–5. *See Wing Pawn Shop v. Taxation & Revenue Dep't,* 111 N.M. 735, 741, 809 P.2d 649, 655 (Ct.App.1991). When a taxpayer claims a tax deduction, the statute giving rise to such a deduction "must be construed strictly in favor of the taxing authority, the right to the . . . deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Security Escrow Corp. v. Taxation & Revenue Dep't,* 107 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct.App.1988). Put another way, taxation is the rule and the burden is on the taxpayer to bring itself within any claimed exception. *See NRA Special Contribution Fund v. Board of County Comm'rs,* 92 N.M. 541, 549, 591 P.2d 672, 680 (Ct.App.1978).

DISCUSSION

I. TAX DEDUCTION

{9} Taxpayer claims it is entitled to a gross receipts tax deduction under Section 7–

9–57. Section 7–9–57, as it existed during the relevant time period, provided in relevant part:

> A. Receipts from performing a service may be deducted from gross receipts if the sale of the service is made to a buyer who delivers to the seller either a nontaxable transaction certificate or other evidence acceptable to the secretary that the transaction does not contravene the conditions set out in Subsection C of this section.
>
> . . .
>
> C. Receipts from performance of a service shall not be subject to the deduction provided in this section if the buyer of the service or any of the buyer's employees or agents:
>
> (1) makes initial use of the product of the service in New Mexico; or
>
> (2) takes delivery of the product of the service in New Mexico.

Id. According to Taxpayer, it is entitled to a deduction because there was no product generated by its services. In the alternative, Taxpayer argues that even if such a product existed, Buyer did not initially use the product in New Mexico nor did it take delivery of the product in New Mexico. We address each argument in turn.

A. *Product*

{10} Taxpayer claims that because the services it performed were deconstructive, "there simply is no 'product of the service.'" If this claim holds true, then it follows that Taxpayer is entitled to a deduction because Buyer cannot initially use or take delivery of something that simply does not exist. Taxpayer attempts to support its claim by resorting to a plain language analysis of Section 7–9–57(A) and, in particular, of the term "product," as that term is used in the statute.

{11} In construing a statute's meaning, we seek to "determine and give effect to the intention of the legislature." *Security Escrow Corp.*, 107 N.M. at 543, 760 P.2d at 1309. When the legislature has not defined a word in the statute, as in this case where it has failed to define product, we will give that word "its ordinary meaning unless a different intent is clearly indicated." *Quantum Corp.*, 1998–NMCA–050, ¶ 10, 125 N.M. 49, 956 P.2d 848. If the language of a statute is unambiguous, the literal meaning of the words must be applied. *See Cummings v. X–Ray Assocs. of New Mexico, P.C.*, 1996–NMSC–035, ¶ 45, 121 N.M. 821, 918 P.2d 1321.

{12} Taxpayer asserts that the term product is defined in Webster's New Collegiate Dictionary as "something produced" and in Black's Law Dictionary as "[s]omething produced by physical labor or intellectual effort or something produced naturally or as a result of natural process as by generation of growth." The thrust of Taxpayer's assertion is that the term product refers to tangible objects that have been assembled or put together and not to items that have been pulled apart or broken down, as the energetic materials were in this case.

{13} The Department contends, and we agree, that Taxpayer's definition of product is unduly narrow and incomplete. In addition to the meanings provided by Taxpayer, the term product is defined in Webster's II New Riverside University Dictionary (Riverside Publishing, 1984) as "[a] direct result; consequence," in American Heritage Dictionary of the English Language (New College Edition, 1981) as "[a] direct result; consequence," and in World Book Dictionary (Doubleday & Co., 1972) as "that which is produced; result of work or growth." It is evident from the foregoing definitions that the term product refers not only to tangible objects that have been assembled, but also to results or consequences that might yield lesser objects, whether in terms of weight, quantity, or chemical composition, than existed prior to any action having been initiated.

{14} In the case at bar, we initially observe that the service provided by Taxpayer consisted of taking dangerous munitions located in New Mexico, rendering those munitions safe, and then disposing of or recycling those munitions. The product of those services was not only neutralized materials but, more importantly, the ability to dispose of the inert munitions in an environmentally reasonable way, as well. It was this ability

to safely dispose of the materials that Buyer bargained for when it entered into the demilitarization contracts with Taxpayer. That the inert munitions were disassembled and otherwise broken down into either their constituent parts or their component particles does not render the product of that service any less valuable, real, material, or substantial. Inert munitions are of immense value to a military agency seeking their disposal. To state otherwise is to suggest that Buyer gave consideration to Taxpayer for producing nothing.

B. *Initial Use or Taking Delivery*

{15} Taxpayer claims the hearing officer erred when she concluded that Buyer made initial use or took delivery of the product in New Mexico when it transferred title to the inert materials to Taxpayer as consideration for the services performed. The parties dispute whether consideration was given or received when Buyer transferred title to the inert munitions to Taxpayer. This dispute does not impact our analysis one way or the other, so we do not attempt to resolve the matter in this appeal. It is dispositive that Buyer transferred title to the munitions when they were capable of being disposed-and Taxpayer admits this-and that this happened in New Mexico. *See Phillips Mercantile Co. v. Taxation & Revenue Dep't,* 109 N.M. 487, 488–89, 786 P.2d 1221, 1223–24 (Ct.App.1990) (ruling that an out-of-state buyer need not hold property in its hands in order to use the property or the service performed on the property for imposition of compensating tax); *Reed v. Jones,* 81 N.M. 481, 468 P.2d 882 (Ct.App.1970).

{16} In *Reed,* a business located in Texas sent one of its bread delivery trucks to a business located in New Mexico in order to receive mechanical repairs. *See id.* at 481–82, 468 P.2d at 882–83. After the repairs were accomplished, the bread truck was driven back to Texas. *See id.* This Court determined that the in-state taxpayer was not entitled to a gross receipts tax deduction because the bread truck was initially used in New Mexico. *See id.* We came to this decision despite the fact that the bread truck was destined for a delivery route in Texas. It was enough that the product of the mechanic's service was a functioning vehicle, which vehicle was used in New Mexico when it became functional.

{17} In our view, Buyer made initial use or took delivery of the product generated by Taxpayer's services when it transferred title to the disposable materials to Taxpayer. This is true because the product in this case was inert munitions capable of being disposed. Initial use took place when Buyer employed the inert materials in a way that was consistent with its purpose for entering into the demilitarization contracts with Taxpayer in the first place; specifically, ridding itself of the responsibility of holding energetic materials. Under the terms of the contract and federal law, Buyer could achieve its goal of ridding itself of the responsibility of holding the materials only by relinquishing title to the materials to Taxpayer after the materials were rendered inert. That Buyer relinquished title to the disposable materials to Taxpayer while they were in New Mexico dictates the conclusion that Buyer used the product for its intended purpose in New Mexico and that Taxpayer was therefore not entitled to its claimed deduction. If we concluded otherwise, the purpose of the gross receipts tax would be undermined. *See Proficient Food Co. v. Taxation & Revenue Dep't,* 107 N.M. 392, 393, 758 P.2d 806, 807 (Ct.App.1988) (stating that the purpose of the gross receipts tax is that individuals should pay taxes for the "privilege of engaging in business within New Mexico."). We hold that Taxpayer did not meet its burden of overcoming the statutory presumption that the receipts in question were subject to gross receipts tax.

II. FAIR HEARING

{18} Taxpayer claims the hearing officer's decision should be overturned because she (1) reached legal conclusions based on evidence and theories that varied from those advanced by the parties and (2) denied Taxpayer the opportunity to present evidence in support of its theory that it engaged in a transaction for the sale of the materials with the federal government. We address, and

then reject, each one of Taxpayer's claims in turn.

A. *Legal Conclusions*

{19} Taxpayer claims the hearing officer demonstrated bias and abused her discretion by "search[ing] through the details of the contracts . . . to find support for her theor[ies]." Taxpayer cites no case law, and we have found none, that stands for the proposition that a hearing officer cannot make her own determination of the legal significance of exhibits and other evidence the parties have submitted for her consideration. What the hearing officer did in the case at bar is what we and what all other judges and hearing officers do every day; specifically, decide cases in accordance with the law and the facts as we view them. Neither judges nor hearing officers are limited word-for-word to the parties' arguments.

{20} Taxpayer may have a legitimate complaint to the extent that the hearing officer inferred that consideration was given for the transfer of title to the deconstructed munitions for all three contracts. Taxpayer's complaint in this regard would be legitimate inasmuch as it contends it could have presented evidence to rebut the inference that consideration was exchanged for two of the contracts. However, Taxpayer does not dispute any of the facts that we have relied upon for affirmance. The hearing officer's decision is amply supported by her conclusion that Buyer made initial use of the product in New Mexico when it transferred title to the materials to Taxpayer after they were rendered inert and made disposable. Taxpayer does not dispute this. The hearing officer found it significant that the neutralized materials remained in New Mexico. Again, Taxpayer had an opportunity to contest whether the neutralized materials had in fact remained in New Mexico. That being the case, we will not reverse the decision on the basis of Taxpayer's claim that the hearing officer considered facts not offered by a party and that were subject to dispute. *See State ex rel. Martinez v. Lewis,* 116 N.M. 194, 206, 861 P.2d 235, 247 (Ct.App.1993) (holding that erroneous findings of fact not necessary to support the judgment are not grounds for reversal).; *In re Estate of Heeter,* 113 N.M. 691, 695, 831 P.2d 990, 994 (Ct.App.1992) ("On appeal, error will not be corrected if it will not change the result."); *Westland Dev. Co. v. Romero,* 117 N.M. 292, 293, 871 P.2d 388, 389 (Ct.App.1994) ("An appellate court will affirm a lower court's ruling if right for any reason.").

{21} Taxpayer's claim that the hearing officer was biased is undermined by the fact that the hearing officer ruled against the Department on a number of issues presented for her review at the hearing—issues that do not form a part of the instant appeal. This fact supports the conclusion that the hearing officer was not biased. *See Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (stating that there is a presumption of honesty and integrity applicable to administrative adjudication officers).

B. *Evidence Presented*

{22} Taxpayer claims the hearing officer demonstrated bias and abused her discretion by denying Taxpayer "the opportunity to present evidence in support of its alternative theory concerning a deduction for the sale of materials to the government . . . ." Although this alternative theory was not set forth in the prehearing statement of issues, Taxpayer contends that it should nevertheless have been allowed to present evidence on the matter at the hearing because it raised the issue in its formal protest.

{23} Taxpayer cites no case law, and we have found none, that stands for the proposition that a hearing officer abuses her discretion by failing to admit evidence that was not listed in the prehearing order. *See In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). This in and of itself is enough to reject Taxpayer's claim. In addition, however, it appears from the record that Taxpayer failed to tender any evidence on this issue at the hearing, but instead waited until forty days after the hearing was conducted to tender such evidence, which it did with its post-hearing brief. Accordingly, we will not reverse the hearing officer's decision on this basis. *See* NMSA 1978, § 7–1–24(G) (1993) (requiring that hearings be conducted "so that both complaints and defenses

are amply and fairly presented."); 3 NMAC 1.8.8.2 ("Every party shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing.").

III. CONSTITUTIONAL CLAIMS

{24} Taxpayer claims that the hearing officer's decision should be overturned because it violates (1) the equal protection clauses of our state and federal constitutions, (2) the federal commerce clause, (3) the due process clauses of our state and federal constitutions, and (4) the state constitutional right that taxes be applied uniformly and equally. We address, and then reject, each one of Taxpayer's claims in turn.

A. *Equal Protection*

{25} Taxpayer claims the Department violated its right to equal protection by arguing that Taxpayer contracted to perform services for the federal government as a single, unitary entity, rather than for Buyer as an individual agency. The Department admits that its position in the case at bar is a departure from its earlier practices in this regard. Whether the Department's admitted departure constitutes an equal protection violation is irrelevant in this case, however, because the hearing officer did not base her decision on the Department's position, nor have we. *See In re Estate of Heeter*, 113 N.M. at 695, 831 P.2d at 994 ("On appeal, error will not be corrected if it will not change the result.").

B. *Commerce Clause*

{26} Taxpayer claims the hearing officer's decision violates the federal commerce clause because it unlawfully discriminates against interstate commerce. A state tax withstands a commerce clause challenge when the tax (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the taxing state. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). When services are performed entirely within the taxing state, the commerce clause is not violated by the imposition of a gross receipts tax. *See Mountain States Adver., Inc. v. Bureau of Revenue*, 89 N.M. 331, 333, 552 P.2d 233, 235 (Ct.App.1976); *Markham Adver. Co. v. Bureau of Revenue*, 88 N.M. 176, 177, 538 P.2d 1198, 1199 (Ct.App.1975).

{27} In the case at bar, the Department imposed gross receipts tax on the receipts Taxpayer obtained in exchange for performing deconstructive services for Buyer in New Mexico. No tax was imposed on receipts Taxpayer obtained in exchange for providing services outside New Mexico because no such services were rendered. *See Mountain States Adver., Inc.*, 89 N.M. at 333, 552 P.2d at 235. Accordingly, we reject Taxpayer's commerce clause argument.

C. *Due Process*

{28} Taxpayer claims the hearing officer's decision violates its right to due process because the decision rests "on arguments and analysis [Taxpayer] had no opportunity to address." As we stated above, there is no merit to this claim. The hearing officer properly based her decision on the exhibits and other evidence the parties submitted for her review. The hearing officer's decision is supported by her conclusion that Buyer made initial use of the product in New Mexico when it transferred title to the materials to Taxpayer after they were rendered inert and made capable of disposal. Taxpayer had an opportunity to respond to this issue at the formal hearing, so we will not reverse the decision on this due process argument. *See In re Estate of Heeter*, 113 N.M. at 695, 831 P.2d at 994 ("On appeal, error will not be corrected if it will not change the result."); *Westland Dev. Co.*, 117 N.M. at 293, 871 P.2d at 389 ("An appellate court will affirm a lower court's ruling if right for any reason.").

D. *Uniformity Clause*

{29} Taxpayer claims the hearing officer's decision violates New Mexico's constitutional requirement that taxes be applied uniformly and equally. *See* N.M. Const., art. VIII, § 1. The uniformity clause provides in relevant part:

> Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class. Different methods may be provided by law to determine value of different kinds of property, but the percentage of value against which tax rates are assessed shall not exceed thirty-three and one-third percent.

{30} Taxpayer's claim, as the cited text would suggest, is without merit because the uniformity clause is concerned with the taxation of property, not services. *See Sunset Package Store, Inc. v. City of Carlsbad*, 79 N.M. 260, 262, 442 P.2d 572, 574 (1968) (ruling that "the tax involved is a privilege tax, ... as such, it is in the nature of a non-property tax to which Art. 8, § 1, is not applicable."). There is no basis upon which we may apply the uniformity clause to the case at bar. That being the case, we will not reverse the hearing officer's decision on this claim.

CONCLUSION

{31} For the reasons stated, we affirm.

{32} **IT IS SO ORDERED.**

APODACA and ARMIJO, JJ., concur.

10 P.3d 871

2000-NMCA-085

STATE of New Mexico, Plaintiff–Appellee,

v.

Dave DARKIS, Defendant–Appellant.

No. 20,222.

Court of Appeals of New Mexico.

July 6, 2000.

Certiorari granted, No. 26,474, Sept. 21, 2000.

Patricia A. Madrid, Attorney General, M. Anne Kelly, Assistant Attorney General, Santa Fe, NM for Appellee.

Phyllis H. Subin, Chief Public Defender, Christopher Bulman, Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

ARMIJO, Judge.

{1} Dave Darkis (Defendant) challenges his conviction for felony possession of cocaine. This appeal presents a question regarding double jeopardy—specifically, the prohibition against successive prosecutions—and a defendant's right to have the jury instructed in accordance with that defendant's theory of defense. For the reasons discussed below, we reverse Defendant's conviction, remanding the matter for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

{2} The facts of this case are not significantly in dispute. In late April 1998, Defendant was arrested upon a probation violation. In conducting a search attendant to arrest, police discovered in Defendant's coat pocket two "scorched" pipes. Police performed a field test on one of the pipes, but found no evidence of any drug. The next day, the State charged Defendant in magistrate court with possession of drug paraphernalia, a misdemeanor. Defendant pled guilty, waiving his right to counsel, and the magistrate court sentenced him to 30 days in jail and 334 days on probation.

{3} Sometime thereafter, the arresting officer sent the pipes to the state laboratory for more comprehensive testing. When the laboratory testing was completed, the State learned that one of the pipes contained trace amounts of cocaine residue. Armed with this new evidence, in late October 1998, the State charged Defendant with possession of cocaine. By this time, he had completed his service of the thirty-day sentence on the prior misdemeanor conviction. By motion, Defendant argued that this second prosecution would violate his right not to twice be placed in jeopardy. Concluding that the elements of the alleged greater crime did not necessarily subsume the elements of the lesser, the district court denied the motion. The matter went to trial in February 1999.

{4} The State presented evidence at trial as to the discovery of the pipes on Defendant's person, the initial field examination of the pipes, and the subsequent laboratory testing which determined the existence of cocaine residue. In response, Defendant took the stand and admitted to being addicted to cocaine; however, he maintained that his friend had found these pipes in an alley the day he was arrested and that, while he knew they were crack pipes, he had never smoked cocaine in them. He further testified that he did not know the pipes contained de minimis amounts of the drug.

{5} At the close of evidence, Defendant requested a jury instruction regarding misdemeanor possession of drug paraphernalia,

arguing that the State failed to show Defendant knowingly possessed the cocaine residue and that the evidence supported, if anything, only a conviction on the lesser charge. The State responded that no such instruction should be given as Defendant had already pled to, been convicted of, and served time upon a charge for misdemeanor possession of paraphernalia. Without explaining its rationale, the district court denied Defendant's request and instructed the jury only as to felony possession of cocaine. Defendant argued at closing that the State had failed to show he knowingly possessed cocaine and that, at most, he could only be found guilty of possessing drug paraphernalia.

{6} The jury convicted Defendant upon the felony charge. As Defendant had two prior felony convictions, the underlying sentence of eighteen months was enhanced to four years in prison. Defendant appeals.

DISCUSSION

{7} Defendant makes two arguments of error below. First, he claims that the district court erred by not applying our Supreme Court's "same-evidence test," as articulated in *State v. Tanton*, 88 N.M. 333, 335, 540 P.2d 813, 815 (1975). He claims that the New Mexico Constitution demands a greater protection of a criminal defendant's right to be free from successive prosecutions than is provided by the federal, same-elements test. *Cf. Swafford v. State*, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991) (recognizing need for greater protections of defendant's rights in context of successive prosecution). If Defendant were to prevail on this argument, we would reverse his conviction and the State would be prohibited from seeking a retrial. Alternatively, Defendant argues that the district court erred in refusing his tendered jury instruction as to the misdemeanor. If Defendant were to prevail on this argument, we would reverse and the matter would be remanded for a new trial. We address each of Defendant's arguments in turn.

1. *The Felony Prosecution and Double Jeopardy*

{8} We do not reach Defendant's arguments pertaining to whether, in instances of successive prosecutions, New Mexico applies the same-elements, same-evidence, or another double jeopardy analysis. Instead, we hold that the jurisdictional exception to double jeopardy, which remains the law of our state, applies. We explain further.

{9} In *State v. Goodson*, 54 N.M. 184, 217 P.2d 262 (1950), our Supreme Court first recognized a jurisdictional exception to double jeopardy. The Court discussed the general rule as applied in other jurisdictions, that is, that "[a]n acquittal or conviction for a minor offense included in a greater will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense." *See id.* at 186, 217 P.2d at 263 (internal quotation marks and citation omitted). It then adopted the rule for our state, stating:

> Reason and logic do not support a rule whereby one guilty of the crime of rape may escape a possible sentence of 99 years in the penitentiary by the expedient of pleading guilty to a charge of assault and battery in a justice court where the penalty may be as low as a fine of $5.00.

Id. at 188, 217 P.2d at 265; *accord Tanton*, 88 N.M. at 337, 540 P.2d at 817.

{10} Importantly, our Supreme Court has resolutely adhered to this rule. For example, in *State v. Manzanares*, 100 N.M. 621, 624, 674 P.2d 511, 514 (1983), our Supreme Court reversed this Court's application of United States Supreme Court precedent holding that the jurisdictional exception no longer applied in New Mexico. It again summarily reversed this Court, on the same grounds, in *State v. Padilla*, 101 N.M. 58, 59, 678 P.2d 686, 687 (1984). Nonetheless, Defendant points to a federal district court opinion to argue that the rule no longer applies in New Mexico. *See Salaz v. Tansy*, 730 F.Supp. 369 (D.N.M.1989). While Judge Parker of the United States District Court for the District of New Mexico has presented persuasive reasoning for rejecting the exception, our Supreme Court has already spoken on this point. *See Manzanares*, 100 N.M. at 624, 674 P.2d at 514 ("The United States Supreme Court cases do not appear to pro-

hibit the application of the jurisdictional exception."). Accordingly, Defendant's argument is of no moment in this Court. *See id.* at 622, 674 P.2d at 512 ("The Court of Appeals is to be governed by the precedents of this Court ... even when a United States Supreme Court decision seems contra." (Citation omitted.)).

{11} Turning now to the application of the exception to the case before us, the felony prosecution subsequent to Defendant's misdemeanor conviction and sentence in magistrate court did not violate double jeopardy. Our magistrate court has no jurisdiction to hear felony matters. *See* NMSA 1978, § 35–3–4 (1985). The prior misdemeanor proceeding did not place Defendant in jeopardy as to the felony charged for cocaine possession.

2. *The Requested Misdemeanor Jury Instruction*

{12} Our analysis, however, is not complete upon our determination that Defendant was not placed in double jeopardy. We must also address Defendant's argument that the district court erred in refusing his request for a jury instruction as to possession of drug paraphernalia. On these grounds, we reverse Defendant's conviction and remand for a new trial.

{13} Contrary to the State's argument, the appropriate analysis on this point is not whether felony possession of cocaine contains all of the elements of possession of paraphernalia. Rather, in New Mexico, we apply the fact-dependant, cognate analysis. *See State v. Meadors,* 121 N.M. 38, 44, 46–47, 908 P.2d 731, 737, 739–40 (1995) (overruling *State v. Henderson,* 116 N.M. 537, 541, 865 P.2d 1181, 1185 (1993) to extent it applied same-elements test in this context).

{14} In *Meadors,* our Supreme Court announced the following test regarding the issuance of lesser-included offense instructions:

> [T]he trial court should grant such an instruction if (1) the defendant could not have committed the greater offense in the manner described in the charging document without also committing the lesser offense, and therefore notice of the greater offense necessarily incorporates notice of the lesser offense; (2) the evidence adduced at trial is sufficient to sustain a conviction on the lesser offense; and (3) the elements that distinguish the lesser and greater offenses are sufficiently in dispute such that a jury rationally could acquit on the greater offense and convict on the lesser.

Id. at 44, 908 P.2d at 737. We recognize that the Court tailored this test to apply specifically to a prosecution, not defense, request. *See id.* at 41–42, 908 P.2d at 734–35. Indeed, the Court specifically refrained from "defin[ing] the precise contours of the defendant's right to a lesser-included offense instruction." *Id.* at 46, 908 P.2d at 739. Nonetheless, it did make clear "that the defendant's right to such an instruction is at least as great as the State's right, and that the defendant is entitled to such an instruction if, under the facts of a given case, the State would be so entitled." *Id.* at 47, 908 P.2d at 740. Upon consideration of this test, we also need not determine the outward extent of a defendant's right to request a lesser-included offense instruction. The *Meadors* test is sufficient for present purposes.

{15} Defendant was charged by criminal information. The State alleged "that on or about the 28th day of April, 1998, ... Defendant did intentionally possess a controlled substance, to wit: Cocaine, which is a narcotic drug...." As such, the document does not contain any specific allegations as to the theory of the State's case. However, we do not confine our analysis only to the charging document. We eschew such a strict method of analysis as unnecessary in the context of a defendant's request for a lesser-included instruction. Instead, we believe the appropriate focus is not merely upon the specific wording of the information, but also on the facts the State had arrayed and the theory of its case. We explain below.

{16} Of paramount concern to our Supreme Court in *Meadors* was defendant's due process right to notice, when analyzing the propriety of the State's request for a lesser-included offense instruction. *See id.* at 42, 908 P.2d at 735. While avoiding an "overly technical" or inflexible approach, the first *Meadors'* factor reflects this concern.

Id. at 44, 908 P.2d at 737. It effectively limits the State to its articulated theory of its case; that is, once initiated, the State cannot seek to have the jury instructed on a prosecution theory crafted in the middle of a case. To allow otherwise would deny a defendant due process by enabling the State to gain an unfair advantage by changing its established prosecutorial strategy late in the trial process. Conversely, to adhere strictly to the *Meadors'* analysis in the context of a defendant's request for a lesser-included offense instruction, ignores the Court's principal concern in that case and its implicit admonition that a defendant's right to a lesser-included offense instruction is effectively greater than the State's. *See id.* at 47, 908 P.2d at 740 ("[T]he defendant's right to such an instruction is at least as great as the State's right.").

{17} Moreover, we recognize that the Court in *Meadors* did not appear to limit itself strictly to the State's factual allegations as contained in the charging document, but considered an offense to be subsumed by a greater offense where " 'the greater offense cannot be committed [under the facts of the case as alleged in the charging document *and supported by the evidence*] without also committing the lesser offense.' " *Id.* at 43, 908 P.2d at 736 (quoting *State v. DeMary,* 99 N.M. 177, 179, 655 P.2d 1021, 1023 (1982)) (alteration in original, but emphasis modified from original); *see State v. Jacobs,* 102 N.M. 801, 804, 701 P.2d 400, 403 (Ct.App.1985). In this regard, the charging document does not take on some talismanic quality under *Meadors,* but merely serves as a reliable indicator of the State's theory for purposes of determining whether Defendant was afforded proper notice of the charges against him.

{18} Turning then to the established theory of the State's case, Defendant clearly could not have committed possession of cocaine without also committing possession of paraphernalia. The State's theory was simple: Defendant was found in possession of two pipes; these pipes were scorched, indicating previous use, and while field tests indicated no presence of cocaine, laboratory testing indicated the presence of cocaine residue. As such, the State clearly sought to bootstrap a conviction for felony drug possession to Defendant's admitted possession of the cocaine pipes. But for the pipes, the State put forth no evidence or argument linking Defendant to any drug. Upon this record, we conclude that *Meadors'* first factor is satisfied.

{19} Regarding the second and third factors, the record clearly supports Defendant's entitlement to his requested instruction. First, as noted, the State presented evidence that Defendant was found with drug paraphernalia in his possession. Second, Defendant explicitly argued at trial that the State had failed to prove he knowingly possessed the cocaine residue. Thus, the distinctive element of the felony charge, as construed on the present record, was sufficiently in dispute that a rational jury could acquit on the felony and convict on the misdemeanor. Upon this record, we conclude the district court erred in denying Defendant's requested jury instruction. *See Meadors,* 121 N.M. at 52, 908 P.2d at 745; *State v. Escamilla,* 107 N.M. 510, 512, 760 P.2d 1276, 1278 (1988) (concluding defendant entitled to lesser-included offense instruction where evidence could be reasonably viewed as sustaining verdict that lesser-included offense was highest level of offense committed).

{20} Concluding thus, we do not ignore the State's contention that double jeopardy precludes Defendant's request for the lesser-included instruction. Instead, we are unpersuaded by it. *Cf. State v. Cowden,* 1996–NMCA–051, ¶ 8, 121 N.M. 703, 917 P.2d 972 (recognizing cognate approach analysis as inapplicable to double jeopardy questions). We have found no authority—either within or without our jurisdiction—contrary to this conclusion, and the State has failed to direct us to any support for its summary argument. We determine that double jeopardy alone does not prevent a defendant from seeking an instruction consistent with the theory of his defense. In the present case, we view Defendant's request for this instruction as tantamount to his seeking an instruction on an affirmative defense. *See State v. Castrillo,* 112 N.M. 766, 769, 819 P.2d 1324, 1327 (1991) ("If the evidence supports a theory of the case, a defendant is entitled to instruction on that theory."); *State v. Cooper,* 1999–NMCA–159, ¶ 17, 128 N.M. 428, 993 P.2d 745 (holding where defense-of-another theory was reasonably supported in law and evidence, "[d]efendant was entitled to an oppor-

tunity to prove his defense theory, supported by an appropriate jury instruction"). Here, Defendant argued that the State failed to meet its burden of demonstrating his knowing possession of cocaine. Instead of merely making this argument and leaving to the jury the up-and-down question of whether to convict on the cocaine charge, Defendant sought to allow the jury the ability to make a choice, that is, as between a lesser and a greater charge. This is a valid and appropriate defense strategy.

CONCLUSION

{21} We reverse Defendant's conviction for felony possession of cocaine and remand the matter for a new trial. Upon remand, if Defendant is convicted of the lesser charge, that conviction shall be vacated as redundant of the prior misdemeanor conviction. *See State v. Varela,* 1999–NMSC–045, ¶ 40, 128 N.M. 454, 993 P.2d 1280.

{22} **IT IS SO ORDERED.**

BOSSON and SUTIN, JJ., concur.

10 P.3d 876

2000-NMCA-084

STATE of New Mexico ex rel. TUCUMCARI POLICE DEPARTMENT, Plaintiff–Appellee,

v.

ONE HUNDRED FOUR THOUSAND NINE HUNDRED NINETY–NINE DOLLARS AND NO/100 ($104,999.00) IN U.S. CURRENCY IN THE POSSESSION of Vera Rebecca WALTON and Charles B. Jones and Claimed by Darrell Strickland, and all Unknown Claimants of Interest in the Premises Adverse To Plaintiff, Defendants–Appellants.

No. 20,605.

Court of Appeals of New Mexico.

July 20, 2000.

Certiorari Denied, No. 26,493, Sept. 13, 2000.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Ass't Attorney General, Santa Fe, NM, for Appellee.

Dean E. Border, Border Law Office, P.A. Tucumcari, NM, for Appellants.

OPINION

PICKARD, Chief Judge.

{1} Darryl Strickland (Defendant) appeals from the trial court's judgment and order determining that money seized from his vehicle during a routine traffic stop is subject to forfeiture under the New Mexico Controlled Substances Act (the Act). *See*

NMSA 1978, §§ 30-31-1 through -42 (1972, as amended through 1997). On appeal, Defendant asks us to reverse the trial court's judgment on the ground that the Tucumcari Police Department (the Department) failed to present any evidence that he obtained the seized money in connection with committing a criminal offense covered under and prohibited by the Act. We agree with Defendant and reverse the trial court's judgment.

BACKGROUND

{2} Defendant's stepdaughter and a male companion were traveling in Defendant's vehicle in Tucumcari, New Mexico, when they were stopped by a Department police officer for exceeding the speed limit and for opening the door on the driver's side of the vehicle while the vehicle was in motion. The police officer asked the occupants where they were traveling from, where they were traveling to, and why they were traveling in the first place. Both occupants stated that they were traveling to their home state of Texas after visiting the stepdaughter's sick uncle. However, they gave conflicting responses as to the state from which they were returning. The stepdaughter claimed they were returning from Kansas City, Kansas, while her male companion claimed they were returning from St. Louis, Missouri.

{3} The police officer became suspicious after eliciting this and a few other conflicting statements from the stepdaughter and her driving companion. In light of his suspicions, the police officer asked the stepdaughter for consent to search Defendant's vehicle for weapons, drugs, and large amounts of cash. She honored the police officer's request and signed a form giving him consent to search the vehicle.

{4} The police officer did not find any weapons or drugs in the vehicle. However, in the course of his search, the police officer discovered a backpack in the vehicle's trunk, which his dog alerted on. He located and then removed from the backpack two shoe boxes, which contained several duct-taped bundles of currency. Both occupants denied knowledge and reputed ownership of the currency, which amounted to $104,999.00. After police questioning, the stepdaughter stated that the money belonged to her stepfather. According to the stepdaughter, she and her driving companion had met a man at a motel in Kansas the previous night, and he had placed the backpack in the vehicle for her stepfather.

{5} When the police officer contacted Defendant about this incident, Defendant initially denied knowing anything about the backpack or the money contained in the backpack. A few minutes later, Defendant changed his posture and admitted to the police officer that the money belonged to him. Defendant stated that although he did not know exactly how much money was in the backpack, the money was proceeds from a legitimate boot supply business he owned and operated in Texas. The police officer decided at that point to hold the money pending proof of ownership.

{6} The Department subsequently assigned two police officers to investigate whether Defendant's purported business actually existed and whether the seized money was generated by sales contracts entered into and performed by that business. The police investigators visited the address Defendant had listed as his business address. Instead of finding a business, they found a residence with no indications of a business. The police investigators also reviewed receipts Defendant offered to substantiate his claim that the seized money was proceeds from sales. They found several spelling errors and other discrepancies that made them question the validity of the proffered receipts. The police investigators ultimately concluded that the seized money was not generated by Defendant's business. The officers also sent the backpack and bundles of money to the crime lab, but no drugs were found.

{7} The Department, based on the foregoing, filed a civil forfeiture action against Defendant. The Department claimed it was entitled to the seized money because it was the fruit or instrumentality of a drug-related crime Defendant had committed in violation of the Act. No criminal charges were filed against anyone. After conducting a trial on the matter, the trial court agreed with the Department and entered a judgment in its favor. Defendant now appeals.

DISCUSSION

{8} The trial court forfeited Defendant's money in favor of the Department on the ground that the Department "made a prima facie showing that the currency seized herein was the fruit and/or instrumentality of a drug transaction." Defendant contends that the trial court erred because the Department failed to present any evidence that he committed a criminal offense covered under the Act. We agree with Defendant that the Department had to prove he committed a violation of the Act before his money could be forfeited, and that the Department failed to meet its burden of proof in this case.

{9} The property subject to forfeiture under the Act is listed in Section 30-31-34. This section specifically provides that the following property may be forfeited:

> A. all controlled substances and all controlled substance analogs which have been manufactured, distributed, dispensed or acquired in violation of the Controlled Substances Act;
>
> B. all raw materials, products and equipment of any kind including firearms which are used or intended for use in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance or controlled substance analog in violation of the Controlled Substances Act;
>
> C. all property which is used or intended for use as a container for property described in Subsection A or B of this section;
>
> D. all conveyances, including aircraft, vehicles or vessels, which are used or intended for use to transport or in any manner to facilitate the transportation for the purpose of sale of property described in Subsection A or B of this section;
>
> E. all books, records and research products and materials, including formulas, microfilm, tapes and data, which are used or intended for use in violation of the Controlled Substances Act;
>
> F. narcotics paraphernalia or money which is a fruit or instrumentality of the crime[.]

Section 30-31-34.

{10} Based on the facts presented in this case, the only provision that might potentially have allowed the trial court to forfeit Defendant's money in favor of the Department is Section 30-31-34(F). The "crime" set forth in Section 30-31-34(F) refers to a crime that is covered under the Act. *See State v. Nunez,* 2000-NMSC-013, ¶ 57, 129 N.M. 63, 2 P.3d 264 ("All the forfeitures of property under Section 30-31-34 are expressly predicated on the fact that the defendant was 'in violation of the Controlled Substances Act.' "); *In re Forfeiture of Fourteen Thousand Six Hundred Thirty Nine Dollars ($14,639),* 120 N.M. 408, 412-13, 902 P.2d 563, 567-68 (Ct.App.1995) (concluding that the legislature has tied forfeiture directly to the commission of drug offenses under the Act). Thus, unless Defendant or his agents committed a crime in violation of the Act, his property was not subject to forfeiture under the Act.

{11} In the case at bar, the Department failed to produce any evidence that Defendant, his stepdaughter, or her driving companion committed a crime in violation of the Act. Instead, the only evidence the Department presented was that a police officer discovered a substantial amount of currency in Defendant's vehicle and that the currency did not appear to be proceeds generated by a legitimate business enterprise. The Department cites nothing in the Act criminalizing the possession of currency that may have been acquired through a drug transaction that appears to have been consummated in another state, and there was no evidence presented of any violation of laws committed in this state. Indeed, our legislature would probably lack the authority to criminalize a drug transaction committed in another state or permit others to obtain the proceeds derived therefrom without establishing more of a nexus with this state. *See State v. Sung,* 2000-NMCA-031, ¶ 10, 128 N.M. 786, 999 P.2d 430 ("[O]ur legislature has consistently imposed a territorial limitation on the crime . . . likely out of concern that it not exceed the scope of the state's authority to prosecute acts taking place outside its geographical limits."); *State v. Losolla,* 84 N.M. 151, 152, 500 P.2d 436, 437 (Ct.App.1972) ("[T]he

law is that a crime must be prosecuted in the jurisdiction where it was committed.").

{12} In light of the foregoing, we hold that the Department's failure to produce any evidence that Defendant obtained the seized money in connection with committing a criminal offense covered under or prohibited by the Act undermines the trial court's judgment. *See State v. Ozarek,* 91 N.M. 275, 276, 573 P.2d 209, 210 (1978) (ruling that the object of forfeiture under the Act is to penalize the defendant for the commission of an offense against the law); *In re Forfeiture of Fourteen Thousand Six Hundred ThirtyNine Dollars ($14,639),* 120 N.M. at 412–13, 902 P.2d at 567–68 (concluding that the legislature intended to and did in fact tie forfeiture directly to the commission of drug offenses under the Act). Accordingly, we reverse the trial court's decision forfeiting Defendant's money in favor of the Department.

CONCLUSION

{13} For the reasons stated above, we reverse.

{14} **IT IS SO ORDERED.**

BOSSON and KENNEDY, JJ., concur.

11 P.3d 131

2000-NMSC-028

STATE of New Mexico,
Plaintiff–Appellee,

v.

Rudy Anthony GONZALES, Jr.,
Defendant–Appellant.

No. 24,724.

Supreme Court of New Mexico.

Aug. 9, 2000.

Marc H. Robert, P.C., Marc H. Robert, Albuquerque, NM for Appellant.

Patricia A. Madrid, Attorney General, Max Shepherd, Assistant Attorney General, Santa Fe, NM for Appellee.

OPINION

SERNA, Justice.

{1} Defendant Rudy Gonzales Jr. appeals his convictions of first degree deliberate intent murder, conspiracy to commit murder, and tampering with evidence. On appeal, Defendant argues eight separate grounds for reversal: (1) the trial court improperly admitted the State's polygraph evidence because the State did not provide the requisite notice to Defendant under our Rules of Evidence; (2) the trial court erred in denying Defendant's motions for a mistrial after the State presented testimony of two of Defendant's prior bad acts; (3) defects in the audiotape recording of the trial deprived Defendant of a meaningful right to appeal his convictions in violation of his right to due process; (4) the jury's verdict was a product of intimidation from extraneous information; (5) the State violated the rules of discovery by failing to disclose the polygraph evidence; (6) Defendant received ineffective assistance of counsel at trial; (7) prosecutorial misconduct violated Defendant's right to a fair trial; and (8) there was insufficient evidence to support Defendant's convictions. Defendant finally claims, as an alternative to reversal on any single ground, that the cumulative errors of the trial court deprived him of a fair trial and mandate reversal of his convictions.

{2} We address in this opinion Defendant's first two points of error only. We have thoroughly examined the facts and law applicable to Defendant's remaining claims and summarily conclude that they are without merit. With respect to Defendant's claim concerning the admission of polygraph evidence, we conclude that the trial court did not abuse its discretion in determining that Defendant had an adequate opportunity to prepare rebuttal to the polygraph evidence and suffered no prejudice from the State's late disclosure of the evidence. With respect to the prior bad acts, we conclude that the trial court properly cured any harm from the inadvertent presentation of one prior bad act with an admonition to the jury not to consid-

er the evidence, and we conclude that the testimony concerning Defendant's other prior bad act amounts to harmless error. The minor errors committed in the course of the trial did not deprive Defendant of a fair trial, and we therefore decline to apply the doctrine of cumulative error. We affirm Defendant's convictions.

I. Facts

{3} On June 24, 1993, Gerald Chavez called the police to report his girlfriend, Lisa Duncan, missing. After arriving at Ms. Duncan's house and inspecting the scene, the police determined that criminal activity had likely taken place. The police then interviewed Mr. Chavez on several occasions about his relationship with Ms. Duncan and the circumstances surrounding his discovery that Ms. Duncan was missing. Mr. Chavez was initially reluctant to disclose the nature of his relationship with Ms. Duncan because he was married, and the police initially considered him to be a suspect in her disappearance, though not high on a list of suspects.

{4} The police also spoke to Ms. Duncan's ex-husband, Donald Duncan. Mr. Duncan initially emerged as the most obvious suspect. Mr. Duncan had been convicted in 1985 of six counts of criminal sexual penetration and incest in relation to incidents involving his step-daughter, Heidi Rodriguez, and a daughter from a previous marriage. Ms. Duncan testified against Mr. Duncan at his trial. After Mr. Duncan served approximately eight years of his sentence for these crimes, the district court granted Mr. Duncan habeas corpus relief on the ground of ineffective assistance of counsel, which this Court affirmed, *see Duncan v. Kerby,* 115 N.M. 344, 851 P.2d 466 (1993). The State subsequently entered a nolle prosequi on the indictments against Mr. Duncan.

{5} After his release from prison in April of 1993, Mr. Duncan had contact with Ms. Duncan on several occasions. The police learned that the two had at least one argument in the months immediately preceding Ms. Duncan's disappearance. As a result, the police devoted a considerable amount of time during their initial investigation on Mr. Duncan.

{6} The police also attempted to speak to Heidi Rodriguez, Ms. Duncan's daughter. At the time, Ms. Rodriguez had a relationship with Defendant, and she was living with Defendant and his family, including his father, Rudy Gonzales Sr., at their home in Bernalillo, New Mexico. Although the police were able to interview Ms. Rodriguez once at the Gonzaleses' house, police detectives faced some difficulty speaking to Ms. Rodriguez because they were frequently intercepted by Defendant's father. Rudy Gonzales Sr. told the police that he had formerly been in law enforcement and that he wanted to know why the police were interested in speaking to Ms. Rodriguez.

{7} At Ms. Duncan's house, the police had discovered a handcuff key in a hallway. In addition, the police determined Ms. Duncan's house to be an organized crime scene, which indicated to police a likelihood that the crime was planned and that the perpetrator knew the victim. Because of these facts, the police became suspicious of Rudy Gonzales Sr. due to his past experience in law enforcement. The police also suspected that Ms. Rodriguez might have some knowledge about the crime due to her relationship with Rudy Gonzales Sr.

{8} As a result of suspicions about Mr. Chavez, Mr. Duncan, and Ms. Rodriguez, the police requested that each of them take a polygraph examination, to which they all agreed. Additionally, the police surmised the approximate time of the suspected crime from the time Ms. Duncan left her place of employment and from a store receipt found in her car that listed the time of purchase as 10:12 p.m. on June 21, 1993. The police investigated the whereabouts of Mr. Chavez and Mr. Duncan during the approximate time that Ms. Duncan disappeared. The police concluded that, although Mr. Duncan had the most obvious motive to harm Ms. Duncan, he did not have the opportunity to commit the crime. Similarly, the police determined that Mr. Chavez did not have the opportunity to commit the crime. During the interview process, the police determined from an investigatory standpoint that Mr. Duncan's personality-type was probably more likely to result in a disorganized, or violent, crime scene

rather than the organized crime scene found at Ms. Duncan's house. The police also believed that Mr. Duncan was the least likely of the suspects to have had handcuffs. As a result of the interviews, the polygraph tests, and other aspects of the investigation, the police compiled a preliminary list of suspects, with Rudy Gonzales Sr. as the primary suspect, followed by Mr. Chavez and then Mr. Duncan.

{9} The police located Ms. Duncan's body on September 30, 1993, buried underneath a piece of concrete in a shallow grave in a remote area of Sandoval County. Her hands were handcuffed behind her back, several of her bones were broken, and her head was severed from the rest of the body. The medical investigator determined that the cause of death was a single gunshot to the head.

{10} After finding Ms. Duncan's body, the police continued with their investigation. However, the police were unable to make any substantial progress, and the investigation was essentially stagnant until September of 1996. At that time, the police learned from Leroy Gutierrez's mother that Leroy, who was a friend of Defendant and his father, was having nightmares and making references to a killing in his sleep, such as, "Why did they choke her?" The police then interviewed Leroy Gutierrez. As a result of the interview, the police arrested Defendant and Rudy Gonzales Sr. and searched the Gonzales home.

{11} Leroy Gutierrez, who had been fifteen years old at the time of Ms. Duncan's disappearance and was eighteen years old at the time of Defendant's trial, testified against Defendant. Leroy explained that he lived near the Gonzaleses and had spent a great deal of time at their house from age eleven. He testified about two incidents between Ms. Duncan and the Gonzaleses leading up to Ms. Duncan's disappearance. During the first incident, Ms. Duncan arrived at the Gonzales home with a police officer. She was visibly very upset and wanted to speak to Defendant and her daughter because she believed they had stolen a ring from her. Although Ms. Duncan did not find Heidi Rodriguez or Defendant at that time, Leroy testified that they were both inside the Gonzales home. Heidi Rodriguez also testified at Defendant's trial and related a similar version of this incident.

{12} The second incident also involved Ms. Duncan's stolen ring. According to Leroy, he drove Rudy Gonzales Sr. and Ms. Rodriguez to a jewelry store in Albuquerque to meet Ms. Duncan approximately two weeks before her disappearance. Rudy Gonzales Sr. gave Leroy a gun and told him to pull out the gun and start shooting if he saw Rudy Gonzales Sr. signal him. Rudy Gonzales Sr. then went into the jewelry store to meet Ms. Duncan while Leroy and Heidi Rodriguez stayed outside in Rudy Gonzales Sr.'s truck. After a few minutes, Ms. Duncan exited the store with Donald Duncan, and an argument ensued between Mr. Duncan and Rudy Gonzales Sr. After Leroy saw Rudy Gonzales Sr. signal him, he got out of the truck and gave the gun to Rudy Gonzales Sr., but they left shortly afterward without further incident. Heidi Rodriguez and Donald Duncan gave similar testimony about the incident at the jewelry store. According to Mr. Duncan, Rudy Gonzales Sr. told Ms. Duncan that he would return her ring only if she paid him, so Ms. Duncan asked Mr. Duncan to accompany her to the jewelry store to ensure that he returned her ring. Mr. Duncan testified that Rudy Gonzales Sr. grabbed Ms. Duncan in the jewelry store and demanded payment for the ring, so Mr. Duncan interceded and forced Rudy Gonzales Sr. to leave.

{13} Approximately two weeks after the incident at the jewelry store, Rudy Gonzales Sr. and Defendant told Leroy to drive them to Ms. Duncan's house to discuss the ring. At Ms. Duncan's house, Defendant and his father went inside, and Defendant told Leroy to back the truck into the driveway when he whistled to him. Leroy later saw Ms. Duncan drive up to her house and go inside, and he then heard a commotion in the house. After a few minutes, Defendant whistled to Leroy, and after pulling into the driveway and exiting the truck, Leroy saw Ms. Duncan on the ground. She had blood on her mouth and nose, and because she was not moving, Leroy believed that she was dead. Rudy Gonzales Sr. then handcuffed her hands be-

hind her back, during which Leroy heard a breath from Ms. Duncan, and told Leroy that "this is what happens to rats." Leroy testified that both Defendant and Rudy Gonzales Sr. told him not to tell anyone about this or something similar would happen to him. Leroy testified that Defendant and his father rolled Ms. Duncan in a piece of carpet and placed her in the truck.

{14} Rudy Gonzales Sr. then instructed Leroy to drive back to Bernalillo and gave him directions to a dirt road. Leroy waited in the truck while Defendant and his father dragged Ms. Duncan away from the road. After about twenty minutes, Leroy heard a gunshot. Leroy testified that Defendant later told him that he and his father had returned to the dirt road the following day to bury the body more thoroughly.

{15} Michael Cosentino and Bill Woolstenhulme also testified about statements made to them by Defendant. Mr. Cosentino was a close friend of Defendant's for ten years, and he testified that Defendant told him that his father had choked Ms. Duncan in her house until she lost consciousness. Defendant told Cosentino that they wrapped her in carpet, put her in their truck, and took Ms. Duncan out of town. Defendant put a pistol to her head and shot her. Defendant also told Cosentino that Ms. Duncan had begged for her life before he shot her. Bill Woolstenhulme, who had numerous prior felony convictions and had previously served as an informant, met Defendant in jail. Woolstenhulme testified that Defendant told him that Ms. Duncan was threatening to press charges for the theft of her ring, and Defendant then related a story similar to the one Defendant told Cosentino, omitting the detail of who pulled the trigger.

{16} The State also introduced physical evidence linking Defendant and his father to the murder. The State introduced Ms. Duncan's .22 caliber pistol and a newspaper article concerning her disappearance, both of which were found in a box in Rudy Gonzales Sr.'s bedroom closet. Additionally, the State introduced two empty handcuff cases found in the same closet.

{17} The jury returned guilty verdicts on the charges of willful and deliberate first degree murder, conspiracy to commit murder, and tampering with evidence. The trial court sentenced Defendant to life imprisonment for first degree murder to run consecutively with nine years imprisonment for conspiracy to commit murder, and eighteen months for tampering with evidence to run concurrently with the sentence for conspiracy.

II. Polygraph Evidence

{18} On appeal, Defendant first argues that the trial court erred in admitting the State's polygraph evidence due to the State's failure to provide adequate notice of the polygraph examiner's testimony. The trial in this case began on April 9, 1997. At a hearing on March 17, 1997, the State informed Defendant for the first time of its intent to use as evidence the polygraph results from the tests performed on Mr. Chavez, Mr. Duncan, and Ms. Rodriguez in 1993. The State then filed an amended witness list on March 20, 1997, that included the polygraph examiner, Ralph Costain. The State did not provide Defendant with a copy of the polygraph examiner's report, a copy of his charts, and a copy of his audio recordings of the testing until March 31, 1997. Defendant then filed a motion to exclude the evidence because the State did not comply with the notice requirements of Rule 11–707(D) NMRA 2000.

{19} The trial court determined that the State violated Rule 11–707(D) and granted Defendant's motion to exclude. However, the trial court made the ruling conditional; if Defendant attempted to show that Mr. Duncan killed Ms. Duncan, then the State would be permitted to introduce the polygraph evidence relating only to Mr. Duncan in rebuttal. At trial, one of Defendant's primary avenues of defense was to argue that Mr. Duncan committed the crime. During opening statements, defense counsel told the jury that Mr. Duncan was the primary suspect in the case and insinuated that Mr. Duncan was the only individual who would have been angry enough at Ms. Duncan to commit such a heinous crime. As a result, the trial court allowed the State, after Mr. Duncan testified but still in its case in chief, to call the polygraph examiner to the stand to testify about

Mr. Duncan's polygraph results. Mr. Costain testified that the results of the polygraph test indicated that Mr. Duncan was being truthful when he denied involvement in Ms. Duncan's disappearance.

{20} Defendant argues that the trial court erred in admitting the polygraph evidence. We disagree. Our Rules of Evidence require that a

> party who intends to use polygraph evidence at trial, shall not less than thirty (30) days before trial or such other time as the district court may direct, serve upon the opposing party a written notice of such party's intention to use such evidence. The following reports shall be served with the notice: (1) a copy of the polygraph examiner's report, if any; (2) a copy of each chart; (3) a copy of the audio or video recording of the pretest interview, actual testing and posttest interview; and (4) a list of any prior polygraph examinations taken by the examinee in the matter under question....

Rule 11–707(D).

{21} Rule 11–707(D) thus imposes a notice requirement of thirty days as a condition for admitting polygraph evidence. It is clear from the plain language of Rule 11–707(D), however, that it does not establish a rigid thirty-day notice requirement. The rule, by providing that notice may be given at "such other time as the district court may direct," confers some discretion on trial court judges to determine whether a different notice requirement, either longer or shorter than thirty days, is appropriate for a particular case. "The purpose of [Rule 11–707(D)] ... is to prevent surprise and to give the opposing party an opportunity to collect rebuttal evidence." *State v. Baca*, 120 N.M. 383, 388, 902 P.2d 65, 70 (1995). In evaluating the issue of adequate notice under Rule 11–707(D), then, trial courts must seek to effectuate these purposes. Thus, the rule provides trial courts with the guideline that, in a typical case, an opposing party should be given notice at least thirty days before trial in order to prevent unfair surprise and to ensure adequate opportunity to prepare rebuttal.

{22} In *Baca*, for example, this Court considered a trial court's exclusion of evidence offered by the defendant that a State's witness failed a polygraph exam based on the defendant's failure to comply with the notice requirements of Rule 11–707(D). 120 N.M. at 387–88, 902 P.2d at 69–70. We first noted in *Baca* that "[a]dherence to the procedural rules for proffering evidence provides the best opportunity for a fair trial, and, unless justice and fairness are shown to dictate otherwise, we will uphold the exclusion of polygraph results when a party does not follow these rules." *Id.* at 388, 902 P.2d at 70. We also admonished the defendant for failing to comply with the notice requirements of Rule 11–707(D). *Id.* However, because the State had administered the polygraph test in the first instance, we determined that "the State cannot argue that it was surprised by Baca's attempt to introduce the test results." *Id.* Additionally, the State was aware of the results of the exam and the method of testing and had the option of conducting another exam if it was unsatisfied with the results of the first exam. *Id.* As a result, we determined that, despite the defendant's technical violation of the notice requirements of Rule 11–707(D), "the purposes of [the rule] would not be subverted by the admission of the polygraph results in this case," and the trial court therefore erred in excluding the evidence. *Id.*

{23} As our discussion of the issue in *Baca* indicates, the notice requirement of Rule 11–707(D) may be applied in a flexible manner based on the purposes of the rule. Further, "[w]e review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *State v. Sarracino*, 1998–NMSC–022, ¶ 20, 125 N.M. 511, 964 P.2d 72. With these principles in mind, we turn to the trial court's ruling in this case.

{24} At a hearing on Defendant's motion to exclude the polygraph evidence held on the day before trial, the State argued that Defendant received constructive notice of the intent to use the polygraph evidence long before trial because, during discovery, the State provided Defendant with the polygraph

results and the questions asked during the examination. The State also attempted to excuse its late disclosure by arguing that, due to the multiple law enforcement agencies involved in the case and the different phases of the case during the long period of time since Ms. Duncan's disappearance, the prosecutors were unable to obtain the charts and tapes from the polygraph examinations until March 31, 1997, and they immediately provided copies to Defendant. The State argued that the notice of intent to use the polygraph evidence on March 17, 1997, coupled with the disclosure of the charts and tapes ten days prior to trial, prevented any unfair surprise and provided Defendant an adequate opportunity to collect rebuttal evidence. Defense counsel contended that the late disclosure prejudiced his ability to prepare for a pretrial interview with the State's expert and argued that it would be impossible to obtain another expert to review the results of the examination. The trial court granted Defendant's motion to exclude the polygraph evidence, denied the State's alternative request for a continuance, and denied the State's request for an interlocutory appeal on the issue.

{25} The following day, the trial court considered the State's motion in limine to prevent Defendant from introducing evidence of Donald Duncan's 1985 conviction. Defense counsel indicated that he intended to use the evidence to demonstrate that Donald Duncan had a motive to kill Ms. Duncan. The State argued, under Rule 11–403 NMRA 2000, that the prejudicial effect of the evidence substantially outweighed its probative value because Ms. Duncan had later recanted her testimony against Mr. Duncan, a police investigation had cleared Mr. Duncan of Ms. Duncan's murder, and any inference of motive would be purely speculative. The trial court permitted Defendant to introduce the evidence of the charges against Mr. Duncan and Ms. Duncan's testimony against him. However, the trial court informed the State that it would be permitted to attack Defendant's theory about Mr. Duncan on rebuttal and that the State's rebuttal could include the polygraph evidence relating to Mr. Duncan. The trial court stated that the notice requirements of Rule 11–707(D) applied only to introduction of the evidence in the State's case in chief and did not apply to rebuttal. The trial court advised counsel that it would consider allowing the polygraph evidence in the State's case in chief if Defendant "opened the door" to the use of the polygraph evidence early in the trial.

{26} We first address the trial court's interpretation of Rule 11–707(D) concerning rebuttal and the trial court's conditional ruling that the evidence would be admissible to rebut Defendant's theory about Mr. Duncan. We believe that the trial court improperly discouraged Defendant's pursuit of a primary defense theory based on the State's violation of the rules. The trial court's ruling placed Defendant in the awkward position of choosing between a viable defense theory or the admission of otherwise inadmissible evidence. We cannot sanction this aspect of the trial court's ruling. Once the trial court determined that the State failed to comply with Rule 11–707(D), without determining that the circumstances in the case warranted a departure from the presumptive notice requirement of thirty days, the trial court erred in making its ruling conditional on Defendant's attempt to implicate Mr. Duncan in the crime.

{27} We also believe the trial court misconstrued the scope of the notice requirement for polygraph evidence. Rule 11–707(D) does not provide an exception to the notice requirement for rebuttal evidence. A party must comply with the notice requirement regardless of the purpose for which the evidence is to be used. Indeed, it is implicit in the very nature of polygraph evidence that it will be relevant only to bolster testimony that an opposing party has attempted to impeach through cross-examination. *See* Rule 11–707(C) (providing that, subject to specific conditions, a polygraph examiner's opinion may "be admitted as evidence as to the truthfulness of any person called as a witness"). Thus, it would frustrate the purposes of the notice requirement in Rule 11–707(D) to create an exception for rebuttal polygraph testimony. We now expressly direct trial courts not to consider an opponent's theory at trial or a proponent's limited rebut-

tal use for purposes of evaluating whether a proponent of polygraph evidence has adequately complied with the notice requirement of Rule 11–707(D).

{28} In this case, the trial court improperly conditioned the exclusion of evidence on Defendant's theory at trial. We therefore agree with Defendant that the trial court erred in this aspect of its initial ruling. If the trial court's decision to admit the polygraph evidence had been based solely on its initial conditional ruling concerning the rebuttal use of the evidence, we would agree with Defendant that the trial court erred in admitting the evidence. However, the record demonstrates that the trial court did not rely solely on the rebuttal use of the testimony; instead, the trial court's later ruling admitting the evidence properly focused on the purposes of Rule 11–707(D) and the analysis articulated by this Court in *Baca*.

{29} On the first day of the trial, the State requested that the trial court allow the polygraph evidence based on Defendant's opening statement suggesting that Mr. Duncan committed the crime. The trial court deferred its ruling at that time. On the second day of the trial, the trial court revisited the admissibility of the polygraph evidence. The trial court did not simply rely on its earlier conditional ruling; the trial court instead expressly indicated that it would reconsider its earlier ruling excluding the polygraph evidence. The trial court noted that Defendant had first been given notice of the State's intent to use the polygraph evidence on March 17, 1997, thereby eliminating any undue surprise related to the polygraph testimony. Additionally, the trial court asked the State whether it intended to present the polygraph evidence earlier or later in the trial. After the State indicated that it would not call the polygraph examiner until the following week, the trial court told defense counsel that there should be sufficient time to have an expert review the charts and tapes. Finally, the trial court noted that Defendant had "opened the door" by naming Mr. Duncan as a suspect. The trial court concluded that Defendant would not be prejudiced by admission of the evidence because there had been sufficient time to prepare rebuttal and noted that if the State had intended to call the expert polygraph examiner earlier in the trial, then, due to the lesser amount of time available to Defendant to prepare rebuttal, the ruling would have been different.

{30} Consistent with our interpretation of Rule 11–707(D), we cannot condone the trial court's reliance on Defendant "opening the door" for the admission of the polygraph evidence. Defendant's theory at trial and the relative probative value of the State's polygraph evidence are irrelevant under Rule 11–707(D); factors of this nature are more appropriately considered in balancing the danger of unfair prejudice and probative value under Rule 11–403. However, this consideration was merely one factor in the trial court's analysis. As stated above, the purposes of Rule 11–707(D) are to prevent unfair surprise and to ensure an adequate opportunity to prepare rebuttal. The trial court determined that both of these purposes were satisfied in this case. Defendant initially received notice of the State's intention to use the polygraph evidence on March 17, 1997, and Mr. Costain did not testify until April 16, 1997. Additionally, the trial court specifically found that Defendant had an adequate opportunity to prepare rebuttal in this case. This finding is supported by the record. Defense counsel thoroughly cross-examined Mr. Costain about the basis for his conclusions. In fact, at a hearing on Defendant's motion for a new trial, the trial court explicitly noted the effectiveness of defense counsel's cross-examination and found that the cross-examination essentially negated the expert's testimony.

{31} Under these circumstances, we do not believe that the trial court's erroneous consideration of the rebuttal use of the evidence constitutes an abuse of discretion. The limited question we must address on appeal is whether the trial court's decision to admit the polygraph evidence "is clearly against the logic and effect of the facts and circumstances of the case," *State v. Simonson*, 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983), or can otherwise be characterized "as clearly untenable or not justified by reason." *State v. Litteral*, 110 N.M. 138, 141, 793 P.2d

268, 271 (1990). Because the trial court's ruling was properly founded on the purposes of Rule 11–707(D) and because Defendant suffered no undue surprise or prejudice from the admission of the polygraph evidence, we do not believe that the trial court abused its discretion in admitting the evidence regardless of the rebuttal purpose of the evidence.

{32} In any event, even if the trial court's decision to admit the polygraph testimony had been erroneous, the error would have been harmless. In order to warrant reversal, the erroneous admission of evidence must cause prejudice to a defendant. *See* Rule 11–103(A) NMRA 2000 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ."). In determining whether a particular error committed by the trial court is harmless, we apply a three-part test: (1) the conviction must be supported by substantial evidence without reference to the improperly admitted evidence; (2) there must be such a disproportionate amount of permissible evidence against the defendant that the improperly admitted evidence appears minuscule in comparison; and (3) there was no substantial conflicting evidence to discredit the permissible evidence introduced by the State. *State v. Moore*, 94 N.M. 503, 504, 612 P.2d 1314, 1315 (1980). We utilize this three-part test to assess the more general question of whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Clark v. State*, 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991).

{33} As listed in detail above, there is clearly substantial evidence supporting Defendant's convictions without the polygraph evidence. In addition, we believe that the evidence of the polygraph testimony was minute in comparison to the permissible evidence supporting Defendant's guilt. The only purpose of the polygraph evidence was to bolster Mr. Duncan's denial of involvement in Ms. Duncan's disappearance. However, the State introduced other evidence that supported Mr. Duncan's denial, including testimony from a police detective that, based on extensive investigation of Mr. Duncan's whereabouts at the time of the crime, he did not have the opportunity to commit the murder. More importantly, there was overwhelming evidence of Defendant's guilt independent of Mr. Duncan's credibility. Finally, Defendant did not introduce substantial conflicting evidence discrediting the permissible evidence introduced by the State.

{34} We determine that there is no reasonable possibility that the results of Mr. Duncan's polygraph examination contributed to Defendant's convictions. As a result, we conclude that any possible error in the admission of this evidence would have been harmless and therefore would not warrant reversal.

III. Prior Bad Acts

{35} Defendant contends that the trial court erred by denying two of Defendant's motions for a mistrial following the separate improper introduction of two of Defendant's prior bad acts. We review a trial court's denial of a motion for mistrial under an abuse of discretion standard. *State v. Saavedra*, 103 N.M. 282, 284, 705 P.2d 1133, 1135 (1985).

{36} Defendant first argues that the trial court should have granted his motion for a mistrial after Mr. Woolstenhulme inadvertently testified that Defendant told him he was incarcerated on a bomb charge. Defendant immediately objected to this testimony and moved for a mistrial. *See* Rule 11–404(B) NMRA 2000 ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); *see also Saavedra*, 103 N.M. at 284, 705 P.2d at 1135 ("The case law in New Mexico is clear and consistent in holding that erroneous admission of evidence of prior crimes of the accused is error, absent special circumstances."). The trial court sustained Defendant's objection but denied Defendant's motion for a mistrial. With defense counsel's agreement, the trial court instructed the jury not to consider the testimony.

{37} "The overwhelming New Mexico case law states that the prompt sustaining of the objection and an admonition to disregard the answer cures any prejudicial effect of

inadmissible testimony." *Simonson*, 100 N.M. at 301, 669 P.2d at 1096; *accord State v. Vialpando*, 93 N.M. 289, 296–97, 599 P.2d 1086, 1093–94 (Ct.App.1979) ("New Mexico has frequently held that a prompt admonition from the court to the jury to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which otherwise might result."); *see State v. Foster*, 1998–NMCA–163, ¶ 24, 126 N.M. 177, 967 P.2d 852, *cert. denied*, 126 N.M. 533, 972 P.2d 352 (1998). We conclude that the trial court's curative instruction minimized any prejudice from the witness's inadvertent remark. Thus, the trial court did not abuse its discretion in denying Defendant's motion for a mistrial. *Cf. State v. McDonald*, 1998–NMSC–034, ¶ 28, 126 N.M. 44, 966 P.2d 752.

{38} Defendant's second motion for a mistrial, however, presents a more difficult question. Defendant contends that the State intentionally elicited inadmissible prior-bad-act testimony from Heidi Rodriguez. On redirect examination, the State asked Ms. Rodriguez if she was afraid of Defendant and why she was afraid. Defense counsel objected to the question, but the trial court overruled the objection. Ms. Rodriguez then testified that she and Defendant "used to fight and he'd throw me around." Defense counsel again objected and argued that the prosecutor intentionally sought to introduce character evidence showing a violent character. The trial court sustained the second objection but denied Defendant's motion for a mistrial. Defendant did not request an admonishing instruction, and the trial court did not give one.

{39} We have previously distinguished between inadvertent remarks made by a witness about a defendant's inadmissible prior crime or wrong and similar testimony intentionally elicited by the prosecutor. *See Saavedra*, 103 N.M. at 284–85, 705 P.2d at 1135–36; *State v. Rowell*, 77 N.M. 124, 125–29, 419 P.2d 966, 967–70 (1966); *see also Simonson*, 100 N.M. at 301, 669 P.2d at 1096 (distinguishing cases in which a prosecutor deliberately asks a question in order to elicit improper evidence); *State v. Ferguson*, 77 N.M. 441, 445, 423 P.2d 872, 875 (1967) (same). We apply a different analysis to inadmissible testimony intentionally elicited by the prosecution. Specifically, regardless of whether a trial court admonishes the jury not to consider the testimony, we must determine whether there is a reasonable probability that the improperly admitted evidence could have induced the jury's verdict. *See Saavedra*, 103 N.M. at 285, 705 P.2d at 1136; *Vialpando*, 93 N.M. at 297, 599 P.2d at 1094; *cf. Clark*, 112 N.M. at 487, 816 P.2d at 1109.

{40} The State does not contend on appeal that Ms. Rodriguez's remark was inadvertent or that the prosecutor did not intentionally seek to elicit inadmissible testimony. We also note that the trial court did not attempt to mitigate any possible prejudice by offering to instruct the jury not to consider the testimony. Nonetheless, we believe that other mitigating factors are present in this case which adequately ensure that there is no reasonable probability that the improper testimony from Ms. Rodriguez contributed to the jury's verdict. *Cf. State v. Gibson*, 113 N.M. 547, 556, 828 P.2d 980, 989 (Ct.App. 1992) (discussing mitigating factors).

{41} First, Ms. Rodriguez's testimony was entirely cumulative of earlier testimony in the trial to which Defendant did not object and was largely cumulative of testimony which the trial court properly allowed over Defendant's objection. During direct examination of the State's first witness, Leroy Gutierrez, the prosecutor, intending to establish that Defendant and Ms. Rodriguez were living together as a couple, asked Leroy to "describe [Ms. Rodriguez's] relationship with [Defendant]." Leroy inadvertently responded that Defendant and Ms. Rodriguez "got in fights" and that Defendant "was abusive." Defendant did not object to this testimony. During direct examination of Ms. Rodriguez, the State asked about an incident between Defendant, Ms. Rodriguez, and Ms. Duncan that had occurred at Ms. Duncan's house. Ms. Rodriguez testified that Defendant was angry, pushed Ms. Rodriguez, pushed Ms. Duncan, and broke some plates. After Ms. Duncan went into her bedroom to call the police, Defendant unsuccessfully attempted to push her bedroom door open. Although Defendant objected to this testimony as improper evidence of character, the trial court found that the testimony was relevant to

prove motive and properly concluded that the testimony was admissible under Rule 11–404(B) (providing that evidence of other crimes, wrongs or acts may "be admissible for other [non-character] purposes, such as proof of motive"). Defendant complains of neither of these statements on appeal. Thus, we believe, due to the cumulative nature of the testimony, that Defendant suffered no measurable prejudice from Ms. Rodriguez's remark. *See State v. Woodward*, 121 N.M. 1, 10, 908 P.2d 231, 240 (1995) ("The erroneous admission of cumulative evidence is harmless error because it does not prejudice the defendant."); *cf. Gibson*, 113 N.M. at 556, 828 P.2d at 989 (discussing the "marginal" impact of improper testimony based on other evidence properly admitted at trial).

{42} Additionally, we note that neither the prosecution nor Ms. Rodriguez emphasized the improper testimony. *Cf. McDonald*, 1998–NMSC–034, ¶ 28, 126 N.M. 44, 966 P.2d 752; *Gibson*, 113 N.M. at 556, 828 P.2d at 989. Finally, as demonstrated by the section of this opinion outlining the facts established at trial, we believe that the permissible evidence introduced by the State overwhelmingly supports Defendant's guilt and that the improper testimony by Ms. Rodriguez is minuscule in comparison to the properly admitted evidence. *See Moore*, 94 N.M. at 504, 612 P.2d at 1315 (discussing factors relevant to a harmless error analysis). Thus, we conclude that there is no reasonable probability that the improper testimony contributed to the jury's verdict. "Even if the testimony should not have been admitted, the district court acted well within the bounds of its discretion in determining that the evidence did not so taint the trial as to require a mistrial." *Foster*, 1998–NMCA–163, ¶ 24, 126 N.M. 177, 967 P.2d 852.

IV. Conclusion

{43} The trial court's decision to admit the polygraph evidence was based on the State satisfying the purposes of Rule 11–707(D), and we therefore conclude that the trial court did not abuse its discretion in admitting the evidence. The trial court adequately cured any prejudice resulting from inadvertent testimony of another crime committed by Defendant by admonishing the jury not to consider the testimony. The State improperly intended to elicit testimony of Defendant's other wrong to establish character; however, because the erroneous introduction of this evidence amounts to harmless error, the trial court did not abuse its discretion in denying Defendant's motion for a mistrial.

{44} Defendant's remaining points of error are without merit. We also conclude that Defendant's claim of cumulative error fails because, "taken together, the cumulative effect of any errors was slight," *Woodward*, 121 N.M. at 12, 908 P.2d at 242, and "the record as a whole demonstrates that [Defendant] received a fair trial." *State v. Martin*, 101 N.M. 595, 601, 686 P.2d 937, 943 (1984). We therefore affirm Defendant's convictions.

{45} **IT IS SO ORDERED.**

MINZNER, C.J., BACA, FRANCHINI, and MAES, JJ., concur.

11 P.3d 141

2000-NMSC-027

STATE of New Mexico, Plaintiff–Appellee,

v.

Charlie ALLISON, Defendant–Appellant.

No. 25,726.

Supreme Court of New Mexico.

Sept. 5, 2000.

Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Enfield, LLP, Peter Schoenburg, Albuquerque, NM, for Appellant.

Patricia A. Madrid, Attorney General, Joel Jacobsen, Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

SERNA, Justice.

{1} Defendant Charlie Allison appeals his convictions for willful and deliberate first degree murder, aggravated battery, aggravated assault, conspiracy, and tampering with evidence. *See* Rule 12–102(A)(1) NMRA 2000 (appeals from sentence of life imprisonment taken to the Supreme Court). Defendant asserts six errors on appeal: (1) whether the trial court abused its discretion by denying his motion to grant a continuance; (2) whether the trial court erred in allowing the prosecutor to impeach him with an unrelated arrest without first disclosing the information to the defense; (3) whether the trial court erred by admitting a tape and transcript of a witness's out-of-court statement; (4) whether prosecutorial misconduct deprived him of his right to due process and a fair trial; (5) whether Defendant's trial counsel's performance constituted ineffective assistance of counsel; and (6) whether the errors constitute cumulative error. We conclude that the prosecutor's failure to disclose Defendant's unrelated arrest and the failure of the trial court to cure the error were prejudicial, and we must therefore reverse Defendant's convictions and remand for a new trial. For guidance upon remand, we address whether the trial court erred by admitting a witness's out-of-court statement. Because we reverse on the issue of disclosure, we do not review Defendant's other contentions.

I. Facts and Background

{2} On July 3, 1997, Defendant and Chris Trujillo drove in Defendant's car to apartments located in Albuquerque. Defendant and Trujillo were standing on a first-floor balcony of one of these apartments when they became involved in an argument with four young men located at ground level in front of the balcony: Joseph Ortiz, Juan Ortega, Jesus Canas, and Javier Mendez. Shots were fired from the balcony at a downward angle, all from the same gun. Mendez was killed, and Canas was wounded. Defendant and Trujillo departed in Defendant's car. Defendant admitted to changing the distinctive rims on the car in order to make the car less recognizable after he viewed a news report which included a description of the car.

{3} Trujillo was a member of the Barelas gang. The State introduced evidence that Defendant was also a member of the Barelas gang. Ortega testified that he, Canas, and Mendez were all members of the Juaritos gang; Mendez stated, "Juaritos," prior to being shot. Ortega stated that he, Mendez, and Canas walked together to the apartments, unarmed, and he identified Defendant as one of the men standing on the balcony. He testified that he heard Defendant tell Mendez to leave the area and that Defendant pulled out a gun and fired two or three times at Mendez. Ortega testified that Trujillo took the gun and shot at Ortega and Canas. He stated that Trujillo and Defendant drove away in Defendant's car.

{4} Ortiz, Defendant's cousin, was a former member of the Barelas gang; he was expelled from the gang several years prior to the shooting and warned that he was unwelcome in the area. He testified that he planned to meet Mendez at the apartments on the day of the shooting. The State claims that the record supports an inference that the argument began when the Barelas gang members on the balcony challenged Ortiz's right to be in the neighborhood. Ortiz stated that he heard an argument and gunshots, and then he saw Mendez on the ground. He could not recall various details regarding the incident; as a result, the prosecutor played a tape of an interview between Ortiz and Detective Shawn. Ortiz told the detective that he saw "two guys," that "they looked straight at me, and they told me, 'What are you doing here,'" and, "'You don't belong here.'" During the interview, Ortiz said that he and Mendez exchanged a few words with the men on the balcony, and then described the shooting. Ortiz said that he didn't recognize them, but he did describe a "big guy" wearing black jeans and a black t-shirt, presumably Defendant, and a shorter "skinny guy" wearing jeans and a striped shirt, presumably Trujillo. According to Ortiz, the smaller man had the gun. Although the larger man asked for the gun, the smaller man did not want to give it to him. Ortiz recounted that

the smaller man said, " 'Oh, you guys think I'm joking,' " and then began shooting. Ortiz told the detective that Mendez saw the gun and said, "Well no, no, you don't have to do that, you don't have to do that."

{5} Defendant admitted that he was standing next to Trujillo on the balcony when the shooting occurred, that he drove both to and from the apartments with Trujillo, and that he changed the appearance of the car in order to make it less recognizable. However, Defendant claimed at trial that he was not a gang member, that he was not involved with the shooting, and that he altered the appearance of the car because he feared gang retaliation.

II. Discussion

A. Failure to Disclose Defendant's Unrelated Arrest

{6} Defendant argues that the prosecutor intentionally failed to disclose an arrest report regarding Defendant which occurred almost one year before trial and approximately six months after the shooting. Defendant was arrested in January of 1998 for using a false name during a traffic stop. The prosecutor conceded that he received the report before Defendant began testifying, yet chose not to disclose it to defense counsel or bring it to the attention of the trial court because he believed that he was under no duty to do so.

> When evidence is disclosed for the first time during trial, this Court must consider the following factors to determine whether the error is reversible: (1) whether the State breached some duty or intentionally deprived the defendant of evidence; (2) whether the improperly non-disclosed evidence was material; (3) whether the non-disclosure of the evidence prejudiced the defendant; and (4) whether the trial court cured the failure to timely disclose the evidence.

State v. Mora, 1997-NMSC-060, ¶ 43, 124 N.M. 346, 950 P.2d 789.

1. Duty to Disclose

{7} The first question is whether the State breached a duty or intentionally deprived Defendant of evidence. Defendant argues that the State was required to disclose any statement by Defendant known to it as well as any prior criminal record under Rule 5-501(A) NMRA 2000. Rule 5-501(A) provides that

> the state shall disclose or make available to the defendant:
>
> (1) any statement made by the defendant . . . within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney;
>
> (2) the defendant's prior criminal record, if any, as is then available to the state;
>
> (3) any books, papers, documents . . . or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant;
>
> . . . .

Rule 5-505(A) NMRA 2000 provides:

> If, subsequent to compliance with Rule 5-501 . . . and prior to or during trial, a party discovers additional material or witnesses which he [or she] would have been under a duty to produce or disclose at the time of such previous compliance if it were then known to the party, he [or she] shall promptly give written notice to the other party or the party's attorney of the existence of the additional material or witnesses.

{8} The State argues that the context of Rule 5-501(A)(2), which requires the State to disclose a defendant's prior criminal record, supports the notion that "prior" refers to the time preceding the arrest on the particular charge at issue; thus, because Defendant's undisclosed arrest occurred after his arrest for the crimes in the present case, the State believes it is under no obligation to inform defense counsel.[1] The State argues

1. The State asserts that Defendant relies on cases involving exculpatory *Brady* material, *see Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by which a duty to disclose

that any continuing duty only relates back to events occurring prior to the time of the initial disclosure but not known to the prosecutor at that time. We disagree. To limit the duty to a criminal record prior to the arrest on the charge at issue arbitrarily restricts Rule 5-501(A)(2). *Cf. Standards for Crim. Just.: Discovery and Trial by Jury* § 11-2.1(a) commentary at 29 (1993) (commentary completed 1995) (noting that disclosure of prior convictions or *pending charges* "enables defense counsel effectively to advise the defendant whether to plead guilty, and whether to testify at any trial" and "puts the defense on notice of any need to move to restrict the use of prior convictions for impeachment purposes").

{9} "The purpose of discovery in a criminal case, indeed the purpose of a trial itself, is to ascertain the truth." *State v. Manus,* 93 N.M. 95, 103, 597 P.2d 280, 288 (1979).

> The articles regulating discovery are intended to eliminate unwarranted prejudice which could arise from surprise testimony. Discovery procedures enable the defendant to properly assess the strength of the state's case against him [or her] in order to prepare his [or her] defense. If a defendant is lulled into a misapprehension of the strength of the state's case by the failure to fully disclose, such prejudice may constitute reversible error.

State v. Selvage, 644 So.2d 745, 750 (La.Ct. App.1994) (concluding that, because defense counsel was aware of the possibility of the defendant's prior convictions, defense counsel's advice regarding the defendant testifying would not have been different even if fully informed by the prosecution). This rationale would logically apply whenever the arrest occurred if the prosecutor actually possessed the information, as is the situation in the case before the Court.

{10} Further, the State does not address Defendant's contention that the prosecution must disclose any statement by a defendant which is known to the district attorney under Rule 5-501(A)(1).[2] The allegation that Defendant lied to a police officer regarding his identity was a statement known by the district attorney, contained in the arrest report. We conclude that the statement was subject to disclosure.

{11} Additionally, Rule 5-501(A)(3) requires the prosecutor to disclose any documents which the prosecutor intends to use as evidence at trial. We believe that the record supports an inference that the prosecutor intended to use the arrest report to impeach Defendant regardless of his testimony on direct examination concerning the lack of any other arrests. On direct examination, Defendant's attorney asked him if he had "ever been arrested prior to this," to which Defendant responded, "I have never been arrested, not in juvenile offenses, not for adult offenses." On cross-examination, the prosecutor followed up on the questions on direct regarding other arrests. The prosecutor asked whether the arrest for the present case was "the only time [Defendant had] ever been arrested," to which Defendant answered affirmatively. The prosecutor then raised a new topic by asking Defendant the following series of questions:

Q. Have you ever lied about your name?

A. No.

Q. Never once?

A. No, none that I remember.

Q. You never lied about who you are?

A. No.

arises from the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Rule 5-501(A)(6) specifically addresses a prosecutor's duty to disclose "material evidence favorable to the defendant," *see State v. Brown,* 1998-NMSC-037, ¶ 14, 126 N.M. 338, 969 P.2d 313 (discussing Rule 5-501(A)(6) in relation to a *Brady* claim); thus, Rule 5-501(A)(1) to (3) create disclosure obligations beyond those required by the Due Process Clause. *See* Rule 5-501 committee commentary.

2. For purposes of this opinion, we need not define the exact parameters of what constitutes a "statement" which the prosecutor must disclose under Rule 5-501(A)(1). *See generally* Fed. R.Crim.P. 16(a)(1)(A) (requiring disclosure of "any relevant written or recorded statements made by the defendant," oral statements, recorded in writing, by the defendant made in response to official interrogation, and oral statements by the defendant made during an interrogation that the government intends to use at trial).

Q. Charlie Allison never said I'm somebody else?

A. No.

Regardless of Defendant's lies at trial regarding other arrests, the allegation that Defendant lied to a police officer about his identity would have been admissible under Rule 11–608(B) NMRA 2000 as a specific instance of conduct which demonstrates untruthfulness. We believe that this line of questioning concerning Defendant's lie to the police officer about his identity, which went beyond the issue of whether Defendant had other arrests, demonstrates an intent on the part of the prosecutor to use the evidence at the time the prosecutor became aware of the arrest report.

{12} In *State v. Clark*, 105 N.M. 10, 11–12, 727 P.2d 949, 950–51 (Ct.App.1986), a defendant appealed his conviction of receipt of stolen property. Following a hearing, the trial court allowed the prosecutor to cross-examine the defendant regarding the fact of the defendant's prior forgery conviction pursuant to Rule 11–609 NMRA 2000 (impeachment by evidence of conviction of a crime), if the defendant testified. *Clark*, 105 N.M. at 14, 727 P.2d at 953. During direct examination, defense counsel elicited the fact of the forgery conviction from the defendant; during cross-examination, the prosecutor questioned the defendant as to whether he altered a driver's license in order to carry out the forgeries. *Id.* Defense counsel moved for a mistrial because of the prosecutor's intentional failure to disclose the information about the altered license to the defendant, but the trial court denied the motion. *Id.* at 15, 727 P.2d at 954. The prosecutor obtained the license alteration information from the investigatory report of the prior forgery arrest, which had been attached to the judgment and sentence for the prior forgery conviction; the prosecutor disclosed the judgment and sentence to defense counsel but withheld the investigatory report. *Id.* The Court of Appeals noted,

> Notwithstanding that the facts surrounding the altered license would be inadmissible as an underlying circumstance of a prior conviction, those same facts are admissible under [Rule 11–608(B)], as a specific instance of conduct which is probative of truthfulness.

Clark, 105 N.M. at 15, 727 P.2d at 954. The defendant argued that the prosecutor had a duty to disclose the license alteration information based on Rule 5–501(A). *Clark*, 105 N.M. at 15, 727 P.2d at 954. In *Clark*, the State argued "that because the prosecutor intended to use the information to impeach defendant's credibility, the [investigatory] report is somehow not a statement or document required to be disclosed by the rule." *Id.* at 15–16, 727 P.2d at 954–55. The Court of Appeals rejected this argument and held that "[e]vidence which the state intends to use at trial must be disclosed," and that "[t]he state must also disclose items which are material to the preparation of the defense." *Id.* at 16, 727 P.2d at 955. We agree. "[T]he primary function of the disclosure of the criminal record relates to potential impeachment." 4 Wayne R. LaFave et al., *Criminal Procedure* § 20.3(e), at 860 (2d. ed.1999).

{13} In *State v. Milto*, 751 So.2d 271, 277–78 (La.Ct.App.1999), the prosecutor gave the defense counsel a copy of the defendant's rap sheet which included numerous arrests but did not include the defendant's arrest or conviction for resisting arrest. *Id.* at 277. The Louisiana court rejected the state's arguments that defense counsel had access to the records and that the defendant was clearly aware of the conviction himself. *Id.* at 277–78. In the present case, the State also emphatically relates that Defendant was aware of his arrest. "These arguments do not address the fact that the prosecutor was clearly in possession of the information prior to his cross-examination of the defendant and had a [continuing] duty to disclose the conviction as soon as he became aware of it." *Id.* at 278. Indeed, the State's argument that Defendant's awareness of the arrest relieves any discovery violation would frustrate the purposes of Rule 5–501(A)(2). A criminal defendant, having been personally subjected to police custody, will always be aware of prior arrests. A defendant, however, might not recall a particular arrest or be aware of the significance of an arrest to impeachment through cross-examination.

{14} Defendant analogizes his situation with cases in which a defendant is impeached with his or her own statement regarding the matter upon which the defendant is accused. Although the State distinguishes these cases without discussion or authority, we believe that they are similar to the present one in that the defendants are aware of their own statements. The actions of the prosecutor and trial court are at issue, not whether Defendant knew or should have known of his own arrest or statement. The discussion in *United States v. Sukumolachan,* 610 F.2d 685 (9th Cir.1980), is instructive:

> [Defendant] argues that the appropriate remedy for such a discovery violation is a new trial, citing *United States v. Lewis,* 511 F.2d 798 (D.C.Cir.1975), and *United States v. Padrone,* 406 F.2d 560 (2d Cir. 1969). In these cases convictions were reversed and remanded for new trials where incriminating statements were not disclosed until after defendants had taken the stand, and were then used for impeachment. Had the defendants in those cases known of the statements, they might have chosen not to testify and thus to avoid impeachment. A new trial was required because there was no other way to correct the prejudice resulting from the failure to disclose until after the defendants had taken the stand and exposed themselves to impeachment.

Id. at 687–88 (concluding that there was no abuse of discretion because the defendant received the statement before he would have taken the stand and he avoided impeachment by not testifying).

[redacted] {15} The trial court also believed that the prosecutor intentionally kept the information from defense counsel, stating, "You held onto this because you knew it would be thunder, right?" "In a criminal case, the district attorney should not hesitate to show his [or her] entire file to the defendant. It is not the primary duty of the district attorney to convict a defendant. It is his [or her] primary duty to see that the defendant has a fair trial, that justice is done." *Manus,* 93 N.M. at 103, 597 P.2d at 288 (quotation marks and quoted authority omitted); *Clark,* 105 N.M. at 16, 727 P.2d at 955 ("The process is far too important and the goal too dear to allow this kind of trial maneuvering.").

{16} We conclude that the prosecutor had a duty to disclose the arrest report to defense counsel before Defendant testified. Rule 5–501(A) creates a duty on the part of the prosecutor to disclose any statement by Defendant, his prior criminal record, and any document which is material to the defense or that the State intends to use as evidence at trial. Rule 5–505(A), as a continuing duty to disclose, obligated the prosecutor to disclose the arrest report to defense counsel when he became aware of it and intended to use it at trial.

2. Materiality of the Arrest Report

[redacted] {17} The second *Mora* factor is whether the improperly non-disclosed evidence was material. "Whether evidence is material depends on 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" *State v. Fero,* 107 N.M. 369, 371, 758 P.2d 783, 785 (1988) (quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). The State argues that "proof that Defendant lied on the stand tended to resolve, not create, doubts about his guilt. Because it bolstered rather than undermined confidence in the outcome of Defendant's trial, it was not material in the operative sense of that word." However, this assertion supports the importance of the information to Defendant, and the impact of the prosecutor's tactic on the jury, even though the evidence is not exculpatory. In *Clark,* the Court of Appeals rejected a similar prosecution argument that this type of information is not material:

> As to the assertion that the [investigatory] report was not material to the defense, the state offers no authority for the proposition that information that would certainly impact a defense counsel's tactical trial decisions is not material to the defense. Receipt of the report would clearly affect counsel's decisions on further suppression

> motions; on whether defendant should testify; on the preparation of defendant for cross-examination; and on the extent of information elicited by defense counsel on direct.

Clark, 105 N.M. at 16, 727 P.2d at 955. We agree. We conclude that the information regarding Defendant's prior arrest was material to the defense.

3. Prejudice

{18} The third factor is whether Defendant was prejudiced by the prosecutor's failure to disclose his arrest. In both *Clark* and *Milto*, the appellate courts, although concluding that there was a discovery violation, affirmed the convictions at issue because the discovery violation did not cause prejudice to the defendants. *See Clark*, 105 N.M. at 16, 727 P.2d at 955 (concluding that the defendant did not show prejudice, and thus affirming the trial court's denial of a mistrial); *Milto*, 751 So.2d at 278 (concluding that because of the defendant's extensive criminal record and defense counsel's awareness of it, no actual prejudice resulted, stating that "there is little support for the concept that the advice of counsel as to whether or not to testify would have been different had he been aware of one additional misdemeanor conviction"). Here, however, defense counsel was attempting to portray Defendant as an individual without any criminal record, and had counsel been aware of Defendant's arrest, he may have altered his strategy. Defendant argues that the disclosure of his prior arrest prejudiced him greatly because his credibility was critical to his defense. He asserts that the disclosure was devastating both at the time of cross-examination and when the prosecutor referred to it in closing arguments. The State argues that "[t]he question before this Court is whether loss of the ability to lie on the stand without having one's lies exposed constitutes prejudice for purposes of the *Mora* test." We reject this characterization; had defense counsel been aware of the arrest, he may have chosen not to have Defendant testify or may have questioned him differently on direct, and the prosecutor's intentional actions prevented that opportunity. *Cf. State v. Wells*, 639 S.W.2d 563, 566 (Mo.1982) (en banc) ("The state cannot logically contend that it was unaware this information [regarding contradictory statements by a state witness] would be meaningful to appellant's counsel. By withholding disclosure until its opening statement at trial, the state achieved the very result the discovery rules were designed to prevent—surprise and deception. The discovery rules seek to foster informed pleas, expedited trials, a minimum of surprise, and the opportunity for effective cross-examination."); *Sukumolachan*, 610 F.2d at 688 (noting that "the court denied appellant the opportunity to testify without impeachment" because the evidence, although excluded from the government's case in chief, would have been admissible for impeachment had the defendant taken the stand).

{19} The prosecutor used the arrest both in cross-examination in order to impeach Defendant and in closing in order to characterize Defendant as a "liar," supporting Defendant's claim that he was prejudiced by the prosecutor's failure to disclose the arrest. The prosecutor, in closing argument, stated:

> This is a man that would lie about his own name in January of 1998, a man who would lie about his own name and say my name is Michael Barns when he was stopped driving a car that didn't have a license plate on it. If you think that he'll lie about his name because of a stop with no license plate, do you think he would lie about what happened on July 3d in front of 1200 Coal, Southwest? You bet, you bet you he would lie, big time.

Cf. United States v. Camargo-Vergara, 57 F.3d 993, 999 & n. 5 (11th Cir.1995) (concluding that the prejudicial impact of the government's failure to disclose defendant's statement was emphasized by prosecutor's reference to it in closing argument). Thus, the prosecutor was using the undisclosed evidence not merely to counter Defendant's testimony regarding other arrests, but instead as a specific instance of conduct to demonstrate untruthfulness, to assert that Defendant would lie regarding the murder as he lied to the police officer. We conclude that Defendant was prejudiced by the prosecutor's failure to disclose the arrest report.

4. **Trial Court's Duty to Cure**

{20} "In determining prejudice to a defendant where the state initially deprives defendant of the evidence but later produces the evidence, the reviewing court should consider whether the failure to timely disclose the evidence was cured by the trial court." *Mora*, 124 N.M. 346, 950 P.2d 789, 1997-NMSC-060, ¶ 44 (quotation marks and quoted authority omitted). The trial court granted defense counsel's motion to continue the case until the following morning, but denied Defendant's motion for a mistrial. The trial court judge noted that the prosecutor's actions were "inappropriate:"

> This is cross-examination material of the Defendant in a murder trial and it's my belief that you should not walk the ethical edge in something as important as a murder trial; that you should be as clean and above board as you possibly can in fear that you are going to lose a good solid conviction based upon something you didn't have to do.

The judge believed that he had "fashioned what [he] perceived to be a fair remedy at the time." However, merely continuing the case and excluding the circumstances surrounding the arrest is an inadequate cure for the prosecutor's failure to disclose the evidence to Defendant, especially considering the manner in which the prosecutor used the information in closing.

{21} The trial judge could have cured the error but did not do so, apparently because of his feelings regarding Defendant's testimony. Both the trial court and the State focused on Defendant's possible lie during direct, and his further lies on cross-examination, asserting that he opened the door to the subject of his prior arrests. As discussed above, the prosecutor's use of the information went beyond Defendant's testimony on direct examination by inquiring into the allegation that Defendant lied about his identity. But even assuming Defendant lied regarding his other arrest, the question is not whether the other arrest and allegation about Defendant's identity were otherwise admissible; the proper question is, instead, whether the prosecutor should have disclosed the arrest report to defense counsel as soon as he was aware of it and planned to use the information at trial. *See Selvage*, 644 So.2d at 750 ("We agree with the trial court that, by testifying, a defendant subjects himself [or herself] to being questioned about previous convictions. However, a discovery violation by the state presents a separate issue regarding the admissibility of the evidence.") (citation omitted).

{22} After the prosecutor questioned Defendant about whether he had other arrests and whether Defendant ever lied to another about his identity, the prosecutor asked to approach and show the arrest report to Defendant in order to refresh his recollection, asking him to identify himself in the photograph and to state when the photograph was taken. Defendant responded, "I believe it was . . . when they booked me into the jail." The prosecutor continued with some questions regarding when the picture was taken and how his hair appeared in the photograph. During a bench conference regarding the length of Defendant's hair, the trial court finally asked, "Was he arrested in 1998 for something?" The prosecutor responded, "For concealing ID." Defense counsel objected, and the court asked if the report had been disclosed to defense counsel. After the bench conference ended, the court continued the case until the following morning.

{23} At this stage in the case, little information regarding the arrest had gotten before the jury. It seems that the extreme remedy of a mistrial was not needed to cure the failure to disclose. In order to cure the error, the trial court could have excluded any further information or reference to the arrest. Instead, the court concluded that the prosecutor should have disclosed the information "as a matter of form" but was not under any duty to do so. The court, mistakenly referring to "[Rule 5-] 505," apparently distinguished between a duty to disclose "priors" and a duty to disclose "a subsequent arrest that happened after the alleged incident;" however, as previously mentioned, Rule 5-505 implicates a *continuing* duty to disclose. The judge stated that Defendant, who "took the stand yesterday and lied," did something much more "severe" than the prosecutor and that he would "not do any-

thing at this point to protect him from his lies." The trial court judge appears to have assumed that defense counsel was not aware of the arrest, stating that "[c]ertainly if you had known about this, you would have asked the question more carefully I think, but your client went way out on a limb," and that "it's also poor form for your client not to tell you about that stuff before he takes the stand." The court then decided that the circumstances surrounding the stop and arrest would not be allowed in, but that the prosecutor would be allowed to ask Defendant about the arrest and about giving a false name.

{24} The prosecutor again asked about the other arrest:

> Q. Now, you testified yesterday that you had never ever been arrested other than in connection with this case, this shooting; is that right?
>
> A. I thought that you were talking about—
>
> Q. Could you answer that question? You did say that, didn't you?
>
> A. Yes.

The prosecutor questioned Defendant as to whether he gave a false name to the police officer, the details of the actual arrest, and whether he told the officer that he had a driver's license under the false name.

{25} Under the *Mora* test, we conclude that Defendant is entitled to a new trial. The prosecutor has a duty to disclose this type of information to the defense; the prosecutor intentionally kept this information from defense counsel in order to impeach Defendant. *See Clark*, 105 N.M. at 16, 727 P.2d at 955 ("The [Supreme Court of New Mexico] criticized, however, as we do today, the 'gamesmanship' inherent in this type of litigation tactic."). The information was material to Defendant's case. The knowledge of the arrest may very well have affected defense counsel's decision to question Defendant regarding his criminal record or even to advise Defendant to testify. Finally, the trial court did not adequately cure the error.

{26} The State's case centered on the issue of credibility. The State presented eyewitness testimony regarding the incident, but the testimony differed as to whether Defendant or Trujillo fired the gun. Ortega testified that Defendant fired shots towards them and then Trujillo took the gun and continued firing, while Ortiz stated that Trujillo fired shots and Defendant attempted and failed to get the gun from Trujillo. Either scenario supports Defendant's liability, whether as the principal or the accomplice. However, given the inconsistent versions of the incident by the State's witnesses and Defendant's denial of involvement in the shooting, the jury's assessment of Defendant's credibility was critical to this case. *Cf. Lewis*, 511 F.2d at 803 ("Although the government presented a strong case even without the use of the statement, we cannot say that the error was harmless or did not prejudice Lewis, as use of the statement not only impeached Lewis's credibility in general, but undermined a significant element in his defense—namely that he had not been addicted at the time of his arrest."). The State was able to undermine Defendant's credibility through the use of non-disclosed information. We conclude that there is a reasonable possibility that the State's impeachment of Defendant and use of the undisclosed arrest in closing argument contributed to the jury's verdict. *Cf. Clark v. State*, 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991).

B. Admission of the Tape and Transcript

{27} The State called Ortiz as a witness to the shooting, and after Ortiz stated that he could not recall particular details of the crime, the prosecutor played an audio tape of Ortiz's July 3rd statement for the jury and placed the transcript of the tape into evidence. The prosecutor offered the tape as a prior recollection recorded under Rule 11–803(E) NMRA 2000, to which defense counsel properly objected. Noting that defense counsel did not object to the tape as a prior consistent statement, Defendant argues on appeal that Ortiz's earlier statement was inconsistent with his in-court testimony and thus inadmissible as a prior consistent statement under Rule 11–801(D)(1)(b) NMRA 2000. However, the trial court did not admit the evidence under Rule 11–801. The court admitted the evidence under Rule 11–803(E) and under Rule 11–803(X) (providing an ex-

ception to the hearsay rule for "[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness"). The court found "that the circumstances of the original statement, the proximity in time to the shooting itself, all are indicia of reliability in that statement."

{28} As the State notes, Defendant's argument regarding whether he may assert on appeal that Rule 11-801 prohibits admission of this evidence in spite of the fact that it was admitted by the trial court under Rule 11-803 was addressed in *State v. Padilla*, 118 N.M. 189, 197, 879 P.2d 1208, 1216 (Ct.App. 1994). In *Padilla*, the Court of Appeals held that the prior statements were properly admitted under Rule 11-803(E) and stated:

> Defendants argue on appeal that [the witness's] testimony is not covered by [Rule] 11-801(D)(1)(b). We see no error in the admission of this testimony since, as we have discussed, the evidence is admissible under [Rule] 11-803(E). *See State v. Mata Y Rivera*, 115 N.M. 424, 429, 853 P.2d 126, 131 (Ct.App.[1993]) ("[E]vidence admissible for one purpose is not to be excluded because it is inadmissible for another purpose.").

Padilla, 118 N.M. at 197, 879 P.2d at 1216. Further, the trial court judge did not admit the evidence under Rule 11-801(D)(1), noting that "I'm not admitting it as a prior inconsistent statement." Thus, Defendant's argument regarding Rule 11-801(D)(1)(b) is both misplaced and unpersuasive.

{29} The State asserts that Defendant has waived any argument regarding Rule 11-803. Although Defendant argues in his reply brief that he "clearly established in his opening brief that the trial court erred in admitting Mr. Ortiz's prior statement as a recorded recollection because it lacked an adequate foundation," Defendant, in his brief in chief, merely stated that the evidence was inadmissible under Rule 11-803(E), without argument or citation to any case law. However, Defendant makes a cursory argument in his reply brief, relying on *Padilla*.

{30} Under Rule 11-803(E),

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him [or her] to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

Ortiz appeared to deny that the information in his statement to Detective Shawn regarding people on the balcony was correct: "Yes, I read the statement and I said I did see two guys, but I don't know why I said it. I guess I said it out of scaredness [sic] or something. But I didn't see nobody." Ortiz, when confronted with his earlier statements regarding descriptions of the individuals on the balcony, stated that he didn't recall them and repeatedly said, "I must have said it because it's on the tape, but I don't remember." Because it appears that the witness was denying the information from the tape, the trial court erred in admitting the evidence under Rule 11-803(E). *See Padilla*, 118 N.M. at 197, 879 P.2d at 1216 (upholding the admission of a past recollection recorded and noting that the witnesses "testified that they once had knowledge they no longer possessed but which they had *accurately conveyed* to [a detective] at the time of the incident") (emphasis added); *see also* 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 803.10[4][c], at 803-52 to -53 (Joseph M. McLaughlin ed., 2d ed. 2000) ("[T]he witness must testify either that the witness recalls having made an accurate memorandum or that, though the witness now does not recollect his or her state of mind when making the record, the witness would not have made it unless it were correct."). However, the trial court also found the evidence admissible under Rule 11-803(X) and Defendant fails to challenge this basis of the trial court's ruling.

> We remind counsel that we are not required to do their research, and that this Court will not review issues raised in appellate briefs that are unsupported by cited authority. When a criminal conviction is being challenged, counsel should properly present this [C]ourt with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice and is in violation of our rules of appellate procedure.

State v. Clifford, 117 N.M. 508, 513, 873 P.2d 254, 259 (1994) (citations omitted).

{31} The trial court has discretion regarding the admissibility of evidence, and this Court will not disturb the trial court's ruling absent an abuse of that discretion. *See State v. Brown,* 1998–NMSC–037, ¶ 32, 126 N.M. 338, 969 P.2d 313. We must conclude that the trial court's decision to admit testimony was obviously erroneous, arbitrary, or unwarranted in order to find an abuse of discretion. *Brown,* 126 N.M. 338, 969 P.2d 313, 1998–NMSC–037, ¶ 39. Because Defendant has not advanced persuasive arguments on this issue, and in fact failed to address all grounds upon which the trial court admitted the evidence, he has not demonstrated that the trial court abused its discretion by admitting the audio tape and transcript.

III. Conclusion

{32} We conclude that the trial court did not abuse its discretion by admitting the audio tape and transcript of Ortiz's statement. We conclude that Rule 5–501(A) creates a duty for the prosecutor to disclose any statement by Defendant, Defendant's prior criminal record, and material which the State intends to use as evidence at trial. Defendant's arguments that this information would have affected his decisions regarding trial strategy are persuasive. Further, the prosecutor's use of this information during closing to reason that a person who "would lie about his name because of a stop with no license plate" would lie regarding the crimes at issue supports Defendant's assertion that he suffered prejudice as a result of the prosecutor's failure to disclose the evidence. Finally, the trial court's grant of a continuance was an inadequate cure under the facts of this case. For these reasons, we reverse Defendant's convictions and remand to the trial court for further proceedings consistent with this opinion.

{33} **IT IS SO ORDERED.**

MINZNER, C.J., BACA, FRANCHINI, and MAES, JJ., concur.

11 P.3d 153

2000-NMCA-086

Linda MACIAS, Plaintiff–Appellant,

v.

James JARAMILLO and Joe C. Jaramillo, Jr., Personal Representatives of the Estate of Joe C. Jaramillo, Deceased, and State Farm Mutual Automobile Insurance Company, and John Doe (unknown Personal Representative of the Estate of Joe C. Jaramillo, Deceased), Defendants–Appellees.

No. 20,510.

Court of Appeals of New Mexico.

Aug. 15, 2000.

OPINION

SUTIN, Judge.

{1} The issue in this appeal is whether a plaintiff who files an action seeking recovery against an estate loses her cause of action if she has not joined a duly appointed personal representative of the dead person's estate before the statute of limitations has run.

{2} Plaintiff Linda Macias filed a complaint on May 14, 1998, against James Jaramillo and Joe C. Jaramillo, Jr. (the Jaramillos), as personal representatives of the estate of Joe C. Jaramillo, deceased (Decedent), as a result of injuries Plaintiff received when she was struck on June 7, 1995, by an automobile driven by Decedent. Decedent was the father of the Jaramillos. Plaintiff sued the Jaramillos based on a statement of James Jaramillo that the Jaramillos were the personal representatives of Decedent's estate. At the time the complaint was filed, and by the time the statute of limitations had run, neither the Jaramillos nor anyone else had, in fact, been appointed personal representative of Decedent's estate.

{3} Plaintiff filed an amended complaint after the statute of limitations had run, naming Decedent's insurer and "John Doe" as the unknown personal representative of Decedent's estate as defendants. Because the Jaramillos had not been duly appointed as personal representatives of Decedent's estate before the statute of limitations had run against Plaintiff's claim, the district court ruled that the complaint was a nullity and that the amended complaint would not relate back. Consequently, the court dismissed Plaintiff's claim with prejudice. We determine that Plaintiff's claim is viable and reverse.

FACTS AND PROCEEDINGS

{4} Soon after the June 7, 1995, accident, Plaintiff's first attorney began correspondence with Decedent's insurer, State Farm, that continued into October 1996. After a year's hiatus in correspondence, Plaintiff's first attorney informed State Farm in October 1997 that he was no longer representing Plaintiff. In January 1998, Plaintiff's second attorney began correspondence with State Farm that continued into March 1998.

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Terri L. Sauer, Miller, Stratvert & Torgerson, P.A. Albuquerque, NM for Appellees.

{5} Decedent died in July 1997. Plaintiff first learned of Decedent's death sometime around April or May 1998, very near the June 7, 1998, statute of limitations deadline. On May 13, 1998, Plaintiff's lawyer spoke on the telephone with James Jaramillo. James told the lawyer that he and his brother Joe were the personal representatives of Decedent's estate. Upon receiving this information, on May 14, 1998, Plaintiff filed her complaint naming as defendants the Jaramillos as personal representatives of their father's estate. On May 15, 1998, Plaintiff's lawyer sent State Farm a copy of Plaintiff's complaint with a letter that stated: "With your permission, I spoke with James Jaramillo about who was the personal representative of his father's estate and he replied it was him and his brother." James was himself a State Farm insurance agent.

{6} The Jaramillos were served on May 29, 1998. They did not file an answer. Rather, on February 23, 1999, some nine months after the complaint was filed, and after the three-year statute of limitations deadline in NMSA 1978, § 37–1–8 (1976) had passed on June 7, 1998, they filed their motion to dismiss. Apparently, settlement discussions, including discussions regarding possible mediation, took place in the interim.

{7} The Jaramillos based their February 23 motion to dismiss the complaint on the grounds that they were not the personal representatives of Decedent's estate, the complaint did not name a true legal entity and no controversy existed giving the court subject matter jurisdiction, and the claim was barred by the statute of limitations. This caused Plaintiff to file a first amended complaint on February 25, 1999, unilaterally dropping the Jaramillos from the caption and adding State Farm and "John Doe (unknown Personal Representative of the Estate of Joe C. Jaramillo, Deceased)" as defendants.

{8} The lawyers who represented the Jaramillos also represented State Farm in defense of the amended complaint. They asked the court to dismiss the first amended complaint on the grounds that the original complaint was a nullity because Decedent was dead and no personal representative had yet been appointed, and that the amended complaint's naming of "John Doe" was similarly defective. Plaintiff filed a proceeding in the district court of Doña Ana County (No. D–307–PB–9900055) on March 25, 1999, in order to obtain appointment of a personal representative of Decedent's estate.

{9} The district court held that Plaintiff's claim was barred by the statute of limitations and her amended complaint did not relate back under Rule 1–015(C) NMRA 2000. Based on those determinations, the court granted the Jaramillos' motion to dismiss and entered a "Final Order" on May 5, 1999, dismissing the action and all claims with prejudice. However, the dismissal was "not without a considerable degree of consternation on the Court's part."

{10} On appeal, Plaintiff contends that (1) the Jaramillos lacked standing to bring a motion to dismiss the first amended complaint, (2) John Doe had the capacity to be sued, (3) the first amended complaint relates back to the original complaint, (4) equitable estoppel precludes a statute of limitations defense, and (5) public policy favors the right of action over the right of limitation.

DISCUSSION

{11} The district court felt constrained by our decision in *Mercer v. Morgan,* 86 N.M. 711, 526 P.2d 1304 (Ct.App.1974), in which we held that a complaint filed against a dead person was a nullity and that an amendment to add the personal representative after the statute of limitations had run would not relate back under Rule 1–015(C).

{12} We are convinced that the *Mercer* rule should not apply in this case, and that under the circumstances of this case Rule 1–015(C) is applicable, and the only question is whether Rule 1–015(C) conditions have been met to allow relation back. We first look at whether the complaint was a nullity. We next discuss Rule 1–015(C).

A. The Complaint Was Not a Nullity

{13} Our "nullity" jurisprudence appears to have begun with *Mercer* in 1974. This Court cited a 1949 annotation in *American Law Reports* and several cases from other jurisdictions in saying "[w]e follow the general rule that a suit brought against a defen-

dant who is already deceased is a nullity and of no legal effect." *Mercer*, 86 N.M. at 712, 526 P.2d at 1305. This Court then ruled that an amendment adding a duly appointed personal representative after the running of the statute of limitations did not relate back under Rule 15(c), because there was no pending action to which it could relate. *See id.* at 712–13, 526 P.2d at 1305–06.

{14} More recently, our Supreme Court in *Chavez v. Regents of the University of New Mexico*, 103 N.M. 606, 611–12, 711 P.2d 883, 888–89 (1985), held that an amendment to add the personal representative as a party plaintiff after the statute of limitations had run related back to the filing of the original complaint under Rule 1–015(C). The statute of limitations had run before the personal representative was appointed. *See Chavez*, 103 N.M. at 610, 711 P.2d at 887. The Court in *Chavez* distinguished *Mercer*, saying that it "is not the situation in the present case," *Chavez*, 103 N.M. at 610, 711 P.2d at 887. The facts in *Chavez* differ from those in *Mercer* and the present case in that *Chavez* involved a plaintiff who failed to first secure the appointment of a personal representative to commence a wrongful death action. However, the circumstances in *Chavez* are close enough for us to draw on the policy statements that support the *Chavez* decision. The Supreme Court stated:

> New Mexico follows the principle that in the interests of justice and to promote the adjudication of a case upon its merits, amendments should be freely granted and allowed to relate back to the date a complaint was originally filed so as to avoid the bar of the statute of limitations whenever the requirements of Rule 15(c) are met. Where the real parties in interest received sufficient notice of the proceedings or were involved unofficially at an early stage, the statute of limitations should not be used mechanically to bar an otherwise valid claim.

Id. at 610, 711 P.2d at 887 (citations omitted). The Court specifically determined that the complaint was "[not] a nullity ab initio requiring dismissal and the institution of a new suit after the plaintiff qualifies as a personal representative," *id.*, and overruled this Court's decision in *Mackey v. Burke*, 102 N.M. 294, 694 P.2d 1359 (Ct.App.1984). *Mackey* held that "[s]ince the original complaint is a nullity, plaintiffs' arguments on application of Rule 15(c) are irrelevant. It is a nullity for the reason that the natural parents lacked capacity to sue." *Id.* at 299, 694 P.2d at 1364. *Mackey* was an action by the decedent's parents, in which the father was not made personal representative until after the statute of limitations had run. See *id.* *Mackey* was overruled despite the existence of a statute stating that an action for wrongful death " '*shall* be brought *by and in the name* or names *of the personal representative* or representatives of such deceased person.' " *Id.* at 296, 694 P.2d at 1361 (quoting NMSA 1978, § 41–2–3 (1953)).

{15} Here, Plaintiff was injured by an insured tortfeasor who then died. Decedent was certainly no longer in existence—thus creating the idea of "nullity"—but Decedent's insurance remained in existence. *See* NMSA 1978, § 45–3–803(D)(2) (1993). His estate also still existed and was subject to liability merely upon the filing of appropriate documents under the Probate Code. *See* NMSA 1978, § 45–3–301 (1978) and § 45–3–401 (1975). Thus, the only real issue is whether the policy against stale lawsuits should bar this action. We think not.

{16} Under the crunch of an approaching statute of limitations bar, the circumstances in this case indicate both diligence and an honest attempt on Plaintiff's part to pursue the right procedural course, rather than staleness or disregard of the procedural rules. We see no reason to determine the complaint a "nullity" where Plaintiff named the sons of a tortfeasor decedent after one of them stated that they were the personal representatives, in order to get an action on file within the limitations period. Plaintiff here was clearly laboring under a mistake, having been misled by James Jaramillo. *Cf. Marino v. Gotham Chalkboard Mfg. Corp.*, 259 F.Supp. 953, 954 (S.D.N.Y. 1966) (mem.) ("[A] party which knows that it is the intended defendant can neither take steps which lead the plaintiff down the garden path, nor can it sit back and knowingly take advantage of plaintiff's mistake.").

{17} When a plaintiff who has learned of the death of a tortfeasor faces an imminent limitations bar, we see little reason to forbid the plaintiff the ability to get his or her claim on file by naming "John Doe" as the personal representative of the tortfeasor's estate and then proceeding diligently pursuant to the Probate Code procedure to obtain the appointment of a personal representative. We think that the naming of the Jaramillos in the original complaint was little different than naming "John Does" in their capacities as personal representatives, with the knowledge and expectation that a formal legal entity, the personal representative of Decedent's estate, would shortly and lawfully come into existence to act for Decedent's estate and to answer for the tortious actions of Decedent. *Cf. Valdez v. Ballenger,* 91 N.M. 785, 786–87, 581 P.2d 1280, 1281–82 (1978) (holding that an amendment substituting appointed personal representative for John Doe as personal representative related back to original complaint). We therefore hold that Plaintiff's original complaint was not a nullity.

B. NMSA 1978, § 45–3–104 (1975) Does Not Bar the Action

{18} Even with her complaint no longer considered a nullity, Plaintiff's claim must overcome the hurdle of the Probate Code section that disallows commencement of a "proceeding to enforce a claim against the estate of a decedent . . . before the appointment of a personal representative." Section 45–3–104(A). The obvious purpose of this provision is to prevent the adjudication of claims against the assets of decedents before a personal representative is appointed to defend a decedent's estate. We do not find this section inconsistent with the notion that, in order to escape the bar of the statute of limitations, a plaintiff may bring an action before the appointment of a personal representative by naming the prospective personal representative as "John Doe" and then diligently pursuing the appointment of the personal representative. We therefore do not think that Section 45–3–104 is an obstacle to the mere filing of Plaintiff's complaint.

C. The Amendment Relates Back

{19} Rule 1–015(C) was written to provide a safe harbor from the application of statutes of limitation.

> Statutes of limitations are meant to provide parties with formal and seasonable notice that a claim is being asserted against them. Rule 15(c) is based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of the rights sought to be enforced. If the original pleading gives fair notice of the general fact situation out of which the claim arises, the defendant will not be deprived of any protection afforded by the state statute of limitations. The opportunity to take advantage of plaintiff's pleading mistakes is not one of those protections.

3 James Wm. Moore, *Moore's Federal Practice* ¶ 15.15[2], p. 15–145 (2d ed.1996) (footnotes omitted). The rule is in furtherance of "[t]he general philosophy of the pleading rules . . . that they should give fair notice, should be liberally construed, be subject to liberal amendment, and that decisions should be on the merits and not on technical niceties of pleading." *Id.* at 15–146.

{20} "The rationale of Rule 1–015 is to preclude use of the statute of limitations 'mechanically to prevent adjudication of a claim where the real parties in interest were sufficiently alerted to the proceedings or were involved in them unofficially from an early stage.'" *Rivera v. King,* 108 N.M. 5, 10, 765 P.2d 1187, 1192 (Ct.App.1988) (quoting *Galion v. Conmaco Int'l, Inc.,* 99 N.M. 403, 406, 658 P.2d 1130, 1133 (1983)) (internal quotation marks omitted).

{21} Rule 1–015(C) reads:

> C. **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if

the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

{22} "The purpose of the statute of limitations is to prevent stale claims. This purpose is not compromised by allowing relation back when the requirements of Rule 1–015 are met." *Rivera*, 108 N.M. at 10, 765 P.2d at 1192 (citation omitted).

{23} Our analysis is equally grounded in the salutary mandate in Rule 1–015(A), "leave [to amend] shall be freely given when justice so requires," because a court's discretion to deny a motion to amend a complaint is limited by this mandate. *See Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir.1998); *see also Rivera*, 108 N.M. at 9, 765 P.2d at 1191 ("Motions to amend are addressed to the sound discretion of the trial court, and will be reversed on appeal only for abuse of discretion."). "The purpose of this rule [Rule 15(a)] is to provide parties the opportunity to amend a claim that was filed when significant facts remained unknown so that the controversy will be decided on the merits of the case." *O'Brien v. City of Grand Rapids*, 783 F.Supp. 1034, 1036 (W.D.Mich.1992). *Jacobsen* sets out what a court may consider in determining whether to permit an amendment:

> In sum, the motion should not be denied "unless there is a substantial reason to do so". Toward that end, the district court may consider factors such as whether there has been "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment".

Jacobsen, 133 F.3d at 318 (citations and emphasis omitted).

{24} At the outset, for clarity, we summarize the critical limitations' deadlines and dates. The statute of limitations asserted in this case as a bar to Plaintiff's claim is Section 37–1–8, the three-year statute relating to personal injury claims. The Probate Code limitation on the presentation of claims against a decedent's estate, *see* § 45–3–803, was apparently not raised below, presumably because of the manner in which the issues were presented to and addressed by the district court. Under Section 45–3–803(A)(1), a tort claim against a decedent's estate that arose before the death of the decedent is barred against the estate or the personal representative "unless presented within . . . one year after the decedent's death." In the present case, Plaintiff filed her claim in time to satisfy either statute of limitations. The action was filed on May 14, 1998. The three-year deadline under Section 37–1–8 was June 7, 1998. The one-year deadline under Section 45–3–803 was a specific date in July 1998.

{25} The threshold question whether an amended complaint can furnish the real person or name of a fictitious or John Doe defendant in the original complaint is answered by whether the three conditions of Rule 1–015(C) are met. *See Watson v. Unipress, Inc.*, 733 F.2d 1386, 1389 (10th Cir. 1984). Only the two specifically numbered conditions, namely (C)(1) and (C)(2), are pertinent here, because the occurrence asserted in the amended complaint is the same as that asserted in the original complaint. The issues before us, then, are whether before July 1998 the party to be added received sufficient notice so that "he will not be prejudiced in maintaining his defense on the merits," and "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." Rule 1–015(C)(1), (2).

{26} In the present case, Decedent's assets and insurance continued to exist after his death. The assets and insurance existed at the time of the original complaint, at the time the statute of limitations ran, and at the time the amended complaint was filed. While it is true that at none of these points had a personal representative of Decedent's

estate been appointed, we see no reason to require the "existence" of a duly appointed personal representative under the circumstances of this case.

{27} Many months of correspondence occurred between Plaintiff's lawyers and State Farm. Upon learning of decedent's passing, Plaintiff's attorney communicated with State Farm, and State Farm gave the attorney permission to speak to Decedent's son James. Plaintiff's attorney spoke directly to James, who told Plaintiff's attorney that he and his brother were the personal representatives of their father's estate. Plaintiff then immediately named Decedent's sons in that capacity. After learning that James had apparently been mistaken, Plaintiff filed an amended complaint naming State Farm and "John Doe (unknown Personal Representative of the Estate of Joe C. Jaramillo, Deceased)" as party defendants. Plaintiff then sought appointment of a personal representative. Under the Probate Code, Plaintiff, as a creditor of the estate, could seek appointment of herself as personal representative. *See* NMSA 1978, § 45–3–203(F)(3) (1975).

{28} It is apparent from his conversation with Plaintiff's attorney that James knew why Plaintiff wanted to know the name of the personal representative. Except for the fact that James was a State Farm agent and presumably knew of his father's death, the record is silent on whether State Farm was actually aware that Decedent died well before Plaintiff filed her action. State Farm was unquestionably aware that Plaintiff asserted a claim against Decedent almost immediately after the accident, and State Farm knew that the complaint was filed. State Farm retained counsel to defend the Jaramillos and used the same lawyers to defend itself against the amended complaint.

{29} Those with real and close interests in Decedent's assets and liability insurance, the Jaramillos, had actual notice before June 7, 1998, of Plaintiff's claim and lawsuit, and they and their mutual lawyers knew that all that stopped the claim and lawsuit from proceeding was the appointment of a personal representative of Decedent's estate. It was not a surprise to anyone that Plaintiff's claim was aimed at Decedent's estate, and that it would take only a few documents filed in court to legally effectuate an estate and obtain appointment of a personal representative in order to enforce the claim in question. We see no prejudice to Decedent's estate.

{30} Application of the phrase in Rule 1–015(C)(2) "but for a mistake concerning the identity of the proper party," does not in our opinion change the result here. The Jaramillos knew or should have known that the naming of the Jaramillos was a mistake, also that the naming of the Jaramillos was little different than naming the party defendant as "John Doe, as personal representative of the decedent's estate." While the Jaramillos may have been advised by their legal counsel that they could raise the defense that the complaint was a nullity, they were unquestionably on notice that Decedent's estate and insurance was the target and that the Jaramillos or a creditor could be appointed as personal representative. "[T]he 'mistake' condition 'is not limited to cases of misnamed or misdescribed parties, rather the Rule is widely understood to allow the addition of new parties that were never originally named or described.'" *Sendobry v. Michael*, 160 F.R.D. 471, 474 (M.D.Pa.1995) (mem.) (quoting *Heinly v. Queen*, 146 F.R.D. 102, 107 (E.D.Pa.1993)). In addition, "[a] party who participated in conduct described in a complaint should reasonably expect to be named regardless of whether the caption refers to that party as 'John Doe' or as an 'unnamed defendant.'" *Id.* at 473. Thus, "[t]he mistake aspect of Rule 15 is 'designed to insure that, prior to the expiration of the limitation period, the new defendant knew (or should have known) that his joinder was a distinct possibility.'" *Id.* at 474 (quoting *Taliferro v. Costello*, 467 F.Supp. 33, 36 (E.D.Pa.1979)).

{31} Our reading of Rule 1–015(C) does not lay any waste to the policy against staleness. This procedure is "in the interests of justice and to promote the adjudication of a case upon its merits." *Chavez*, 103 N.M. at 610, 711 P.2d at 887; *see also Gaston v. Hartzell*, 89 N.M. 217, 220, 549 P.2d 632, 635 (Ct.App.1976) ("[T]he law favors the right of action rather than the right of limitation . . . [and][f]ault of defendant and injustice to plaintiff are other reasons to favor action.");

Sanchez v. Candelaria, 5 N.M. 400, 407, 23 P. 239, 241 (1890) (holding that the purpose of statute permitting amendments to pleadings is "to promote the attainment of substantial justice between the parties. Technical objections are to be disregarded, and the case tried upon its merits.").

{32} Additionally, the designation of the particular capacity of "John Doe" (or, here, the Jaramillos) as the personal representative of the estate of the tortfeasor provides the clarity required in Rule 1–010(A) NMRA 2000, and it reasonably forecasts the plaintiff's intent to proceed to seek "[a]n amendment changing the party against whom a claim is asserted" under Rule 1–015(C). Also, the designation of capacity as personal representative serves to forecast a plaintiff's need to join an indispensable or necessary party to the action under Rule 1–019 NMRA 2000. Because of the Section 45–3–104 requirement that the claim cannot be enforced absent the appointment of a personal representative, the addition of the personal representative actually amounts to the joinder of a party required for a just adjudication of the merits of a plaintiff's claim.

{33} Below, Plaintiff did not argue Rule 1–019 as a basis for a later amendment adding a duly appointed personal representative, and we therefore will not determine whether Rule 1–019 can serve as a basis in this case to permit such an amendment. We note, however, that we have permitted amendment after a statutory *jurisdictional* deadline (as opposed to a statute of limitations deadline) has passed to add an indispensable or necessary party, absent a showing of prejudice. *See State ex rel. Sweet v. Village of Jemez Springs, Inc. City Council*, 114 N.M. 297, 301–02, 837 P.2d 1380, 1384–85 (Ct.App. 1992). In *Sweet*, we permitted the addition of a necessary or indispensable party to an appeal after the time for filing the notice of appeal had expired. *See id.* Although the appeal was from the decision of a local land use authority to a district court, we made specific note of a Supreme Court's rule then in existence, the predecessor to Rule 12–301 NMRA 2000, that permitted "an appellate court to add parties 'on such terms as it may deem proper' at any stage of any proceeding." *Sweet*, 114 N.M. at 301, 837 P.2d at 1384. Rule 12–301 now actually permits appeals to proceed against a dead person's estate *without a personal representative having been appointed. See* Rule 12–301.

CONCLUSION

{34} We apply the rationale and policy in *Chavez* to allow amendment of Plaintiff's complaint to add or substitute a duly appointed personal representative as a party defendant in place of the Jaramillos in the original complaint.

{35} We remand to the district court to grant leave to Plaintiff to proceed expeditiously to obtain appointment of a personal representative of Decedent's estate and to amend her complaint to add or substitute a duly appointed personal representative of Decedent's estate. We deny Plaintiff's motions to sanction the Jaramillos for failing to file a timely answer brief and to strike that answer brief.

{36} **IT IS SO ORDERED.**

BUSTAMANTE and ARMIJO, JJ., concur.

11 P.3d 550

2000-NMSC-029

Ana GONZALES, Plaintiff–Appellee and Cross–Appellant,

v.

NEW MEXICO DEPARTMENT OF HEALTH, Las Vegas Medical Center, Defendant–Appellant and Cross–Appellee.

No. 24,645.

Supreme Court of New Mexico.

Sept. 27, 2000.

Walter G. Lombardi, Louis N. Colon, Santa Fe, for Appellant and Cross–Appellee.

James A. Burke, Santa Fe, for Appellee and Cross–Appellant.

OPINION

FRANCHINI, Justice.

{1} After a four-day trial, a jury found that Defendant Las Vegas Medical Center (LVMC) had retaliated against Plaintiff Ana Gonzales (Gonzales) after she pursued a discrimination claim under the New Mexico Human Rights Act, NMSA 1978, §§ 28–1–1 to –15 (1969, as amended through 1987, prior to 1991, 1993, 1995, and 2000 amendments). In 1990, Ana Gonzales brought a claim alleging that LVMC had discriminated against her because of her Hispanic national origin. *See* NMSA 1978, § 28–1–7(A) (1987, prior to 1995 amendment). In 1994, the New Mexico Human Rights Commission (HRC) concluded that Gonzales had failed to make a prima facie case of discrimination. Gonzales then appealed to the district court for a trial de novo under NMSA 1978, § 28–1–13(A) (1987). The jury determined that she had not been discriminated against but that she had suffered retaliation at the hands of LVMC. She was awarded damages and attorney's fees. LVMC filed an appeal directly to this Court under Section 28–1–13(C) of the Human Rights Act, and Gonzales filed a cross-appeal. We affirm the determinations of the trial court.

{2} On appeal, LVMC presents the following challenges to the proceedings below: (1) whether the trial court erred in refusing to dismiss Gonzales's retaliation claim; (2) whether the trial court erred in refusing to admit evidence about the changed structure of the crisis hotline in November 1995 and Gonzales's involvement with it; (3) whether the trial court erred in refusing to admit evidence of the HRC decision and order; (4) whether the trial court erred in refusing to admit evidence that Gonzales could have mitigated her damages by working on a different hotline; and (5) whether the trial court erred in refusing to instruct the jury on Gonzales's duty to mitigate damages.

{3} In the cross-appeal, Gonzales asks the Court to address the following issues: (1) whether the district court erred by failing to award stronger sanctions against LVMC for alleged abuses of discovery and destruction of evidence; (2) whether the trial court erred with respect to her discrimination claim by

(a) by refusing to instruct the jury on disparate impact, (b) declining to give an instruction based on a federal Equal Employment Opportunity Commission (EEOC) regulation relating to disparate impact, and (c) refusing to instruct the jury that a minority may discriminate against a person of the same ethnic background; and (3) whether the district court erred regarding attorney's fees in (a) reducing attorney's fees because Gonzales was only partially successful at trial, (b) failing to award attorney's fees for legal work done before the HRC, and (c) failing to award interest on the judgment and attorney's fees.

{4} Regarding LVMC's claims, we hold that the jury was reasonable in concluding that Gonzales was a victim of retaliation and affirm the trial court on this issue. We also affirm the trial court's ruling not to admit the evidence that LVMC claims should have been introduced to rebut Gonzales's claim of retaliation, as well as the court's decision to exclude evidence and jury instructions regarding the question of mitigation. As for the claims of Gonzales, we affirm the trial court's refusal to instruct the jury concerning disparate impact, discrimination against a minority by a minority, and the EEOC regulation relating to disparate impact. We affirm the trial court's determination that attorney's fees should not be awarded for those areas in which Gonzales did not prevail at trial or in the discrimination claim before the HRC. We also affirm the court's determinations not to assess interest on attorney's fees or the judgment and not to impose greater discovery sanctions against LVMC.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Crisis Hotline

{5} In the summer of 1989, LVMC was awarded a contract from the New Mexico Department of Health to provide outpatient mental health services to clients in San Miguel and Mora counties; the new program was called San Miguel/Mora Mental Health Services (SM/MMHS). The contract required LVMC to provide a twenty-four hour telephone crisis hotline for emergency situations.

{6} At that time the Hospital Administrator of LVMC was Pablo Hernandez, M.D., who had a practice of conducting monthly breakfast meetings to convey information to the entire LVMC staff. During a breakfast meeting in late summer or early fall of 1989, Dr. Hernandez described the contract for outpatient services and invited the staff to suggest program ideas for SM/MMHS. Gonzales, a Psychologist II at LVMC, did not attend this particular meeting.

{7} One person who did attend was Harold Pullings, also a Psychologist II. In response to Dr. Hernandez's request for ideas, Pullings thought of a telephone crisis hotline that he could manage on an on-call basis during his off-duty hours. Pullings was supervised by Thomas Sturm, Ph.D., Director of LVMC's Psychology Department. He described the idea to Dr. Sturm, who suggested Pullings submit a proposal to Dr. Hernandez. Dr. Sturm also recommended that at least one other person should work on the hotline in a backup capacity. Pullings approached another Psychologist II, Rudy Grano, who agreed to work with him. The crisis hotline idea was presented to Dr. Hernandez. After consulting with Dr. Sturm about the qualifications of Pullings and Grano, Dr. Hernandez approved the project without advertising for bids or notifying the rest of the Psychology Department staff. Pullings began working on the hotline in November of 1989, with Grano joining him a month later. Dr. Hernandez testified that the need to begin the program was urgent.

{8} On November 3, 1989, Gonzales learned that the management of the crisis hotline had been awarded to Pullings. A few days later, she complained to Dr. Sturm that she believed the award to Pullings was unfair. She testified that Dr. Sturm told her that, if Pullings approved, she could work on the hotline every other weekend in a backup capacity. She told him that she was not interested in such minimal participation; she believed she was qualified to assume Pullings' role as manager of the hotline. Gonzales wanted to have the same opportunity that Pullings had to submit a proposal for the operation of the crisis hotline. Dr. Sturm responded that he did not have the authority

to give her Pullings' job. He suggested that if she wanted that job, she would need to submit her own proposal to Dr. Hernandez for consideration.

{9} Dr. Hernandez testified that Gonzales never submitted any request or personally asked him if she could work on the hotline in any capacity. Gonzales testified that she would have submitted a written application for the crisis hotline if she had known that such an application would have afforded the same opportunity that was given to Pullings. She concluded that the matter had been decided with such finality that a submission would have been demeaning and futile. In a memorandum dated November 7, Gonzales expressed her interest in working on the community program in Las Vegas, stating that she "would appreciate hearing from [Dr. Sturm] about what is available and what [she needs] to do to qualify." However, Dr. Sturm testified that, to his knowledge, although the SM/MMHS contract was renewed annually, the position of manager of the crisis hotline was never opened for bids. In the fall of 1995, Gary Buff, Ph.D., who had succeeded Dr. Hernandez as Hospital Administrator, decided to reorganize the crisis hotline and sent a memorandum to all eligible clinicians, including Gonzales, soliciting their participation on the hotline.

B. Complaint Before the HRC

{10} On February 16, 1990, Gonzales filed a charge of discrimination with the HRC. She alleged that LVMC discriminated against her on the basis of her Hispanic national origin in violation of Section 28–1–7(A) of the Human Rights Act when it failed to advertise or offer her the part-time position as manager of the crisis hotline. Gonzales's discrimination complaint was heard by the HRC in a three-day hearing in January 1994. The HRC issued its decision, findings of fact, and conclusions of law in August 1994. The HRC concluded that Gonzales had failed to make a prima facie case that her Hispanic national origin motivated LVMC's failure to announce formation of the crisis hotline or to offer her a position. The HRC found that LVMC did not have "the illegal discriminatory intent necessary to find in favor of Gonzales." The HRC was, however, critical of LVMC's hiring practices, noting in particular "the cavalier attitude in which the Center was permitted to offer job opportunities without following any state selection process."

C. Appeal to District Court

{11} Gonzales, on August 29, 1994, appealed the HRC's decision in district court, seeking a trial de novo as provided by Section 28–1–13(A). She alleged the following as the basis of her complaint: first, that LVMC discriminated against her, based upon her national origin, in November 1989 by selecting Pullings to work on a crisis hotline without "any rational selection process" in violation of Section 28–1–7(A) of the Human Rights Act; and second, that LVMC retaliated against her because she filed a complaint with the HRC in violation of Section 28–1–7(I)(2). On May 8, 1997, the jury returned a verdict partially in favor of each party. The jury determined that LVMC did not discriminate against Gonzales because of her national origin by not awarding her a position on the crisis hotline but found that LVMC did retaliate against her for filing a charge of discrimination with the HRC. The jury awarded $170,000 in damages on the retaliation claim.

{12} On May 22, 1997, the trial court entered a judgment for Gonzales for $170,000, plus costs and attorney's fees as provided by law. Gonzales then sought additional attorney's fees for the representation she received in the HRC hearing. She also moved to impose interest on the judgment, fees, and costs. The trial court received affidavits and held a hearing on the matter of attorney's fees. On August 28, 1997, the court awarded to Gonzales attorney's fees of $90,384 plus gross receipts tax and costs. The court declined to impose attorney's fees for either the discrimination claim at trial or for pursuing the HRC claim. The court did not impose interest on the judgment.

II. DISCUSSION

A. Discovery Sanctions

{13} Gonzales argues that the trial court abused its discretion by failing to

award stronger sanctions against LVMC for abuse of the discovery process and destruction of evidence. In March 1995, after LVMC had failed to respond in a timely manner to interrogatories, Gonzales filed a motion to compel production. *See* Rule 1–037(A) NMRA 2000. Following the failure of LVMC to supply all the requested information, the trial court granted the motion in July 1995. In August 1995, again citing LVMC's failure to provide discovery, Gonzales filed a motion for sanctions, including default judgment. *See* Rule 1–037(B). The court denied the request for default judgment but did order LVMC to compensate Gonzales's attorney for time spent on discovery in the amount of $1615. In February 1996, Gonzales filed another motion for default judgment, or, in the alternative, to limit defenses, alleging this time that LVMC had withheld evidence of the existence of another hotline operated by social workers at SM/MMHS. The court did not grant the motion but did award Gonzales costs and attorney's fees of $7968.75 for the motion and hearing.

{14} On December 4, 1996, Gonzales again filed a motion for default judgment or other sanctions alleging LVMC failed to comply with discovery and destroyed evidence. In November 1996, LVMC had informed Gonzales that neither Pullings nor his then supervisor, Dr. Gatling, maintained personal records of their work on the hotline. Pullings stated in a sworn affidavit that he used the notes to prepare monthly statistical reports and then discarded them after completing the reports. Gonzales argued that these notes were medical records that Pullings had a duty to preserve and that they were evidence critical to her case. Their destruction, she alleged, precluded her from learning what work Pullings, Dr. Sturm, and Dr. Gatling had performed for the hotline. LVMC responded that the documents in question were Pullings' personal notes, which he was not required to make or preserve, and that he had discarded any remaining notes after he stopped working on the hotline. The trial court apparently accepted LVMC's explanation; in January 1997, the court denied the motion for default judgment and sanctions as not being well-taken.

{15} The choice of sanctions for abuse of the discovery process falls within the sound discretion of the trial court and will be reversed only for abuse of discretion. *Medina v. Foundation Reserve Ins. Co.*, 117 N.M. 163, 166, 870 P.2d 125, 128 (1994). "[T]he discretion we speak of is fact-based" and "requires us to look at the facts relied on by the trial court as a basis for the exercise of its discretion, to determine if these facts are supported by substantial evidence." *Lopez v. Wal-Mart Stores, Inc.*, 108 N.M. 259, 260, 771 P.2d 192, 193 (Ct.App.1989).

{16} The trial court did not abuse its discretion. The record shows that LVMC's compliance with discovery was frequently dilatory and perfunctory. But, the record also shows that Gonzales's complaints about the severity of the discovery abuses were often inflated and that her claims as to the probative nature of Pullings' papers were speculative. The sanctions imposed were proportional to the offenses, and those the trial court refused to impose were not warranted by the conduct of the parties. *See Gonzales v. Surgidev Corp.*, 120 N.M. 151, 158, 899 P.2d 594, 601 (1995) (deferring to the trial court's decision about sanctions, absent abuse of discretion).

B. Sufficiency of the Evidence

{17} On appeal, LVMC argues that the trial court erred when it refused to dismiss Gonzales's claim that LVMC took retaliatory action against her after she filed a discrimination complaint with the HRC. LVMC first raised the issue in a motion for summary judgment, arguing that Gonzales had failed to prove a prima facie case because she did not show an adverse employment action on the part of LVMC. LVMC's argument was continued in motions for a directed verdict after the close of evidence by Gonzales and at the close of trial, and in a motion for partial judgment notwithstanding the verdict. All these motions were denied by the trial court.

{18} When a case has been fully tried on the merits, an appellate court reviews the record to determine whether the evidence is sufficient to support the jury's verdict, rather than assessing the sufficiency

of the prima facie case. *Cf. Wilson Corp. v. State ex rel. Udall,* 121 N.M. 677, 686, 916 P.2d 1344, 1353 (Ct.App.1996) (stating that the issue on appeal is the sufficiency of all the evidence, not just that of the prima facie case). After the trial court denied their motion for directed verdict, LVMC proceeded with their case, thereby waiving any objection to the sufficiency of the evidence up to that point. *See Martinez v. City of Grants,* 1996-NMSC-061, ¶ 14, 122 N.M. 507, 927 P.2d 1045; *cf. Green v. General Accident Ins. Co. of Am.,* 106 N.M. 523, 527, 746 P.2d 152, 156 (1987) (holding that "denial of a motion for summary judgment is not reviewable after final judgment on the merits"). The motion for a judgment notwithstanding the verdict preserved LVMC's challenge to the sufficiency of the evidence for appeal. *See Barber v. Pound (In re Estate of Strozzi),* 120 N.M. 541, 544, 903 P.2d 852, 855 (Ct.App. 1995). "When a motion for judgment notwithstanding the verdict has been denied, the verdict of the jury will not be disturbed unless unsupported by substantial evidence." *Page & Wirtz Constr. Co. v. Solomon,* 110 N.M. 206, 209, 794 P.2d 349, 352 (1990). We examine the record for "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoted authority and quotation marks omitted). In assessing the sufficiency of the verdict, we consider the evidence in the light most favorable to support the verdict, resolve all conflicts in the evidence in the prevailing party's favor, and give the prevailing party the benefit of all favorable inferences that are reasonable to draw from the evidence while disregarding any contrary inferences. *Smith v. FDC Corp.,* 109 N.M. 514, 519, 787 P.2d 433, 438 (1990). It is not the task of a reviewing court to sit as a trier of fact; we do not reweigh the evidence. *Id.*

{19} The Human Rights Act prohibits retaliation against any individual who has raised a discrimination complaint under the Act. Section 28-1-7(I)(2). It is an unlawful discriminatory practice for "any person or employer to ... engage in any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or has filed a complaint, testified or participated in any proceeding under the Human Rights Act." *Id.*

{20} In interpreting our state Human Rights Act, we have previously indicated that it is appropriate to rely upon federal civil rights adjudication for guidance in analyzing a claim under the Act, with the following reservation:

> Our reliance on the methodology developed in the federal courts, however, should not be interpreted as an indication that we have adopted federal law as our own. Our analysis of this claim is based on New Mexico statute and our interpretation of our legislature's intent, and, by this opinion, we are not binding New Mexico law to interpretations made by the federal courts of the federal statute.

Smith, 109 N.M. at 517, 787 P.2d at 436.

{21} The methodology referred to in *Smith* is the analytical framework articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), for assessing employment discrimination claims. In *McDonnell Douglas,* the Supreme Court created the following burden shifting methodology: a plaintiff bears the initial burden of establishing a prima facie case; once the prima facie case is established, the employer bears the burden of producing evidence of a legitimate, nondiscriminatory reason for its action; and finally, a plaintiff must be afforded an opportunity to rebut the employer's proffered reason. *Id.* at 802-04, 93 S.Ct. 1817. "Although intermediate evidentiary burdens shift back and forth under this framework, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000) (quoting *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

{22} Although in *McDonnell Douglas* the Supreme Court explained that a prima facie case of denial of employment based on racial discrimination consists of four factors articulated in the opinion, the Court recognized that "[t]he facts necessarily will

vary in Title VII cases, and the specification ... of the prima facie case required from [claimants] is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas,* 411 U.S. at 802 & n. 13, 93 S.Ct. 1817. In the Tenth Circuit, the *McDonnell Douglas* methodology has been adapted to review allegations of retaliatory adverse employment actions against those who have filed discrimination claims. *See, e.g., Jeffries v. Kansas,* 147 F.3d 1220, 1231 (10 th Cir.1998); *Archuleta v. Colorado Dep't of Insts.,* 936 F.2d 483, 486 (10 th Cir.1991). To establish a prima facie case in a retaliation claim, the plaintiff must prove: (1) she engaged in a protected activity, (2) she was subject to adverse employment action, and (3) a causal connection existed between the protected activity and the adverse employment action. *Jeffries,* 147 F.3d at 1231. In this case, the following jury instruction on retaliation given at trial reflected the standard articulated by the Tenth Circuit:

> In order to establish a prima facie claim of retaliation, the plaintiff must show: (1) she filed a complaint with the New Mexico Human Rights Commission alleging discrimination; (2) adverse action by the defendant subsequent to the complaint to the Human Rights Commission; and (3) a causal connection between the plaintiff's filing of the complaint and the adverse action.

{23} Reviewing the evidence presented by Gonzales at trial, we conclude that a reasonable trier of fact could have found in favor of Gonzales. The jury had heard evidence that after filing the HRC complaint: (1) she was unfairly criticized by her supervisor and told nobody would believe her allegations of discrimination; (2) she was told that Dr. Sturm had called her a trouble-maker; (3) she was transferred from the main location to a more remote building and ceased to receive client referrals; (4) the crisis hotline was renewed annually without placing the manager position up for bids; and (5) she was not given the same notice of hotline openings that was afforded to other employees. A reasonable trier of fact could have determined from this evidence that Gonzales suffered adverse employment action, which in this context refers broadly to "threats, reprisals or discrimination." Section 28–1–7(I)(2). Based upon the evidence, the jury could reasonably have believed that LVMC took retaliatory action against Gonzales after she filed the HRC complaint. The district court properly denied the motion for judgment notwithstanding the verdict. Thus, we hold that the jury reasonably concluded that retaliation was the motive behind the unfair criticism and isolation to which she was subjected, as well as LVMC's failure, after the HRC complaint, to hire Gonzales for the hotline, to give her the same notice as other employees, to permit her to apply in the same manner as other employees, and to open the management of the hotline for bids when the SM/MMHS contract was renewed each year.

C. Evidentiary Rulings

{24} LVMC raises a number of challenges to the trial court's rulings on the admissibility of evidence. As LVMC correctly states, a trial court has a great deal of discretion in deciding whether to admit or exclude evidence and will be reversed on those decisions only when it is clear that the court has abused its discretion. *Behrmann v. Phototron Corp.,* 110 N.M. 323, 327, 795 P.2d 1015, 1019 (1990). The decision to admit evidence from an administrative hearing also falls within the discretion of the trial court. *Id.* (stating that administrative hearings can vary in timeliness, investigator's skill and experience, whether a hearing was held, and the motivation of the parties). We have reviewed the rulings of the trial court and find no abuse of discretion.

{25} LVMC contends that they should have been permitted to introduce evidence about the structure of the reorganized crisis hotline in November 1995, an untimely application by Gonzales to work on that hotline, and the number of hours she worked on the hotline in 1996 as evidence of the lack of discrimination and retaliation. Gonzales objected because the evidence LVMC wanted to introduce occurred after the time period that formed the basis for her damages claim. She claimed that the acts of discrimination and retaliation occurred in the six-year period between November 1989, when the hotline

began, until November 1995, when the hotline structure and application procedures were changed by Dr. Buff. Gonzales argues that the evidence was properly excluded under Rule 11–402 NMRA 2000 because it was not relevant to the issues at trial. Gonzales also relies on Rule 11–403, which permits the trial court to exclude evidence that might confuse the issues. We are not persuaded that the trial court abused its discretion in excluding evidence about hotline activity occurring after the relevant time period.

{26} LVMC argues that it was also error for the trial court to exclude evidence about the unfavorable outcome of the HRC investigation and hearing concerning Gonzales's discrimination claim. LVMC had initially filed a motion in limine to prohibit introduction of evidence about the HRC hearing at trial arguing that, because the trial was de novo, the administrative proceedings were irrelevant. In response, the trial court ruled that Gonzales could introduce evidence of the fact that she filed the HRC complaint to establish the basis for her retaliation claim, but permitted no testimony about the HRC proceeding or outcome. Both parties had an opportunity to present to the jury all the evidence that had been introduced during the HRC hearing. During trial, however, LVMC sought to introduce evidence of the HRC determination against Gonzales. The trial court denied the request on the basis that under Section 28–1–13(A) of the Human Rights Act the trial in district court was to be a trial de novo. We find no error in the decision of the trial court; admission of the HRC evidence might well have sidetracked the trial into an evaluation of the merits of that decision rather than focusing on the issues at trial. *Cf. Behrmann*, 110 N.M. at 328, 795 P.2d at 1020.

{27} LVMC claims that the trial court erred when it refused to admit its mitigation evidence and to instruct the jury on mitigation of damages. Generally, a "discharged employee must mitigate his or her damages by securing other employment if not reinstated by defendant." *Vigil v. Arzola*, 102 N.M. 682, 689, 699 P.2d 613, 620 (Ct.App.1983), *rev'd in part on other grounds;* 101 N.M. 687, 687 P.2d 1038 (1984), *and overruled in part on other grounds by Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 650, 777 P.2d 371, 378 (1989) (recognizing an employee's duty of mitigation). LVMC had wanted to show that Gonzales could have worked overtime on a different hotline operated by social workers at SM/MMHS, as opposed to the LVMC hotline staffed by psychologists, during the relevant period. The trial court excluded the evidence about the other hotline and also refused to instruct the jury on the issue of mitigation. On appeal, LVMC claims that, had the trial court not excluded mitigation evidence, it would have shown that substantially equivalent work existed and that Gonzales did not make reasonable attempts to obtain it. Gonzales vigorously disputed the equivalency of the two hotlines as career opportunities and also argued that she was unaware of the second hotline and any job opportunities it might present.[1] Under the facts and circumstances of this case, involving the issue of opportunity for overtime pay rather than alternative employment, the trial court could properly have concluded that evidence of the social worker hotline was not relevant to the issue of mitigation.

D. Jury Instructions

{28} Both parties object to the trial court's refusal to give certain of their submitted jury instructions. An appellate court reviews challenged jury instructions to determine whether they correctly state the law and are supported by the evidence introduced at trial. *Pittard v. Four Seasons Motor Inn, Inc.*, 101 N.M. 723, 727, 688 P.2d 333, 337 (Ct.App.1984); *see* Rule 1–051(A), (B) NMRA 2000.

{29} LVMC objects to the trial court's refusal of their instruction on mitigation of damages. Because we find no error in the exclusion of the mitigation evidence, we

1. It was the disclosure of the existence of this hotline during discovery in 1996 that led Gonzales to file a motion for sanctions against LVMC for abuse of discovery, claiming that LVMC had withheld this information from the HRC hearing. As a result, the trial court awarded Gonzales $7968.75 in attorney's fees and costs.

agree with the court's decision to refuse the instruction which was based on the excluded evidence. *See* UJI 13-301 to -08 Introduction NMRA 2000. ("It is the evidence adduced at trial which truly determines the issues for jury determination. Regardless of the pleadings, it is the duty of the court to submit to the jury only those issues which are supported by the evidence and determinative of the case.")

{30} Gonzales claims that the trial court erred when it refused her proposed jury instruction on disparate impact as a form of discrimination. A disparate impact claim differs from a disparate treatment claim in that it does not involve a showing of discriminatory intent, but rather addresses those situations when an apparently neutral employment policy has a discriminatory effect. *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1242 (10 th Cir.1991); *cf. Hill v. Community of Damien of Molokai*, 121 N.M. 353, 364–66, 911 P.2d 861, 872–74 (1996) (analyzing the discriminatory effect of a facially neutral restrictive covenant on group homes). A plaintiff may establish a prima facie case of disparate impact discrimination by showing that a "specific identifiable employment practice or policy caused a significant disparate impact on a protected group." *Ortega*, 943 F.2d at 1242. Statistical evidence showing that a protected class is under-represented in a given employment situation may be used to a demonstrate disparate impact. *See Smith*, 109 N.M. at 519 n. 4, 787 P.2d at 438 n. 4. In order to establish a prima facie case, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

{31} As evidence of her claim, Gonzales relies primarily on an exhibit showing total overtime earnings on the LVMC psychologist hotline for the relevant period, broken down by the individual participants. On appeal, she claims the exhibit demonstrated disparate impact because Hispanic psychologists earned significantly less than their Anglo counterparts during that time period. Gonzales appears to be arguing that because the Hispanic psychologists' overtime earnings were not proportional to their representation on the hotline, this constitutes prima facie evidence of disparate impact-that the distribution of earnings alone proves that a discriminatory practice must have existed.

{32} The trial court did not err in refusing the jury instructions because Gonzales did not present sufficient evidence of disparate impact. She did not identify a facially neutral practice of LVMC or tie the earnings chart to any LVMC practice. *See Ortega*, 943 F.2d at 1242. Additionally, statistical evidence offered in support of a claim of disparate impact "must cross a threshold of reliability before it can establish even a prima facie case of disparate impact." *Id.* at 1243 (quoted authority and quotation marks omitted). The earnings chart does not meet that threshold of reliability; it does not indicate the number of hours worked by each individual, their length of service on the hotline, their responsibilities on the hotline, or differing hourly rates of pay among the employees. Gonzales included herself on the chart as an Hispanic psychologist even though she did not work on the hotline during this period, which further distorted the alleged relationship between Hispanic participants and their earnings. Gonzales introduced no expert testimony to explain whether her statistics were demonstrative of discrimination. Thus, on their face, the statistics are of questionable merit. *Cf. Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651–53, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (concluding that a prima facie case fails because of flawed statistics); *Watson*, 487 U.S. at 995, 108 S.Ct. 2777 (stating that "statistical disparities must be sufficiently substantial that they raise an inference of causation").

{33} Gonzales also proposed a jury instruction directed at Dr. Hernandez, based on dicta in *Dominguez v. Stone*, 97 N.M. 211, 213, 638 P.2d 423, 425 (Ct.App.1981), stating that it was possible for a member of a minority group to practice discrimination against members of the same minority group. She

argues that the trial court erred in refusing the instruction. Even assuming that the instruction contained a correct statement of the law, it must be supported by evidence introduced at trial. *See Pittard,* 101 N.M. at 727, 688 P.2d at 337. Gonzales does not cite to any evidence in the record that would have supported giving such an instruction.

E. Attorney's Fees

{34} When the trial court entered a judgment for Gonzales for $170,000 in accordance with the jury's verdict, it also provided for costs and attorney's fees as provided by law. The trial court received affidavits and held a hearing on the matter of attorney's fees, after which it awarded Gonzales attorney's fees of $90,384 plus gross receipts tax and costs. The award reflected the fees and costs for pursuing the retaliation claim in district court but not for the discrimination claim because Gonzales had not prevailed on that issue. Gonzales had also requested attorney's fees for the representation she received in the HRC hearing, which the trial court refused. On appeal, Gonzales argues that the court erred by not awarding full attorney's fees for the district court litigation and by denying attorney's fees for the HRC legal representation.

{35} The award of attorney's fees in this case is governed by Section 28–1–13(D) of the Human Rights Act: "In any action or proceeding under this section if the complainant prevails, the court in its discretion may allow actual damages and reasonable attorney's fees, and the state shall be liable the same as a private person." We review the award of attorney's fees for abuse of discretion. *Lucero v. Aladdin Beauty Colleges, Inc.,* 117 N.M. 269, 271, 871 P.2d 365, 367 (1994). Analogous principles for addressing the award of attorney's fees may be found in federal civil rights cases. *See Hensley v. Eckerhart,* 461 U.S. 424, 434–36, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). If a plaintiff has obtained only partial success, an award determined by using the hours spent on the whole litigation may be excessive. *Id.* at 436, 103 S.Ct. 1933.

{36} Gonzales had two complaints against LVMC: employment discrimination and retaliatory acts. She was not successful in pursuing the discrimination claim before the HRC or in district court. Section 28–1–13(D) of the Human Rights Act may be interpreted to include attorney's fees for administrative proceedings, but in order to receive the fees, the complainant must prevail. The trial court did not abuse its discretion by refusing the award of attorney's fees for her representation before the HRC. To the extent that the trial court reduced her attorney's fees because of the failure of the discrimination claim at trial, we find no abuse of discretion.

F. Interest on Attorney's Fees and the Judgment

{37} Gonzales moved the court to assess interest on the judgment, fees, and costs. The trial court declined any accrual of interest, and Gonzales claims this was an abuse of discretion. Gonzales bases her claim on what we consider to be an erroneous construction of two statutes. She relies upon NMSA 1978, § 56–8–4(A) (1993), which provides that "[i]nterest shall be allowed on judgments and decrees for the payment of money." However, subsection (D) of this statute states that "[t]he state and its political subdivisions are exempt from the provisions of this section except as otherwise provided by statute or common law." Section 56–8–4(D). In contrast, Section 28–1–13(D) of the Human Rights Act states that, with respect to actual damages and attorney's fees, "the state shall be liable the same as a private person." Gonzales contends that Section 28–1–13(D) is a statutory exception that requires LVMC to pay interest because it makes the state "liable the same as a private person."

{38} We do not find Gonzales's argument persuasive for two reasons. First, an interest award under Section 56–8–4 is not an absolute right, but rather is a matter to be left to the discretion of the trial court. *See Kennedy v. Moutray,* 91 N.M. 205, 206, 572 P.2d 933, 934 (1977) ("Interest is an element of damages to be considered by the trial court."); *Trujillo v. Beaty Elec. Co.,* 91 N.M. 533, 538, 577 P.2d 431, 436 (Ct.App. 1978) ("The granting of interest is within the

discretion of the trial court and is not a matter of right under the statute."). Second, Section 28–1–13(D) makes no mention of the assessment of interest, and Gonzales has offered no authority suggesting that the phrase "actual damages and reasonable attorney's fees" should be expanded to include interest. We decline to consider such an expansion. The trial court did not abuse its discretion by refusing to permit the accrual of interest.

III. CONCLUSION

{39} For the foregoing reasons we affirm the trial court. Specifically, we affirm all the trial court's determinations regarding discovery sanctions; the jury's conclusion that Gonzales was a victim of retaliation; the trial court's decisions not to admit evidence that LVMC claims would have rebutted Gonzales's claim of retaliation; the trial court's exclusion of evidence and jury instructions regarding mitigation of damages; the trial court's ruling denying Gonzales's requested jury instructions; and the trial court's determination not to award attorney's fees for Gonzales's discrimination claim at trial and for the HRC hearing because her claim did not prevail before either tribunal. Finally, the trial court properly refused to permit the accrual of interest on the judgment and attorney's fees.

{40} IT IS SO ORDERED.

BACA, SERNA, and MAES, JJ., concur.

MINZNER, Chief Justice (specially concurring).

SPECIAL CONCURRENCE

MINZNER, Chief Justice.

{41} I concur in the opinion authored by Justice Franchini with the following exception. I am not persuaded that we ought to rely on all of the facts listed by the Court in paragraph 23 in affirming the jury's verdict. I write separately to emphasize the significance, for me, of some of the facts.

{42} As the opinion notes in paragraph 22, Ana Gonzales was required to show she was subject to an adverse employment action. Under federal law, an adverse employment action occurs when an employer imposes a tangible, significant, harmful change in the conditions of employment. *See Burlington Indus. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). Adverse employment actions cover more than quantifiable losses of salary or benefits. *Jeffries v. Kansas,* 147 F.3d 1220, 1232 (10th Cir.1998). For purposes of a Title VII retaliation claim, an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity. *Chuang v. University of Cal. Davis,* No. 99–15036, 2000 WL 1224780 (9th Cir. Aug.30, 2000). Actions having an adverse impact on future employment opportunities can constitute adverse employment actions for purposes of Title VII retaliation claims. *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 986 (10th Cir.1996). In addition, "reassignment with significantly different responsibilities" can be an adverse employment action. *Burlington,* 524 U.S. at 761, 118 S.Ct. 2257.

{43} The jury heard testimony that Gonzales was moved to an isolated office outside the main building shortly after filing her discrimination complaint and that she ceased to receive referrals for new patients after her move to the new office. This evidence is a sufficient basis upon which the jury could have concluded that Gonzales had suffered an adverse employment action. Though Gonzales did not suffer a reduction in salary or benefits or a change in job title, forcing Gonzales to relocate to a more remote location and ceasing to refer new patients to her could have been interpreted by the jury to be practices designed to physically isolate Gonzales from her peers, single her out from other psychologists by virtue of a reduced patient load, and negatively affect her opportunities for future promotions. Based on this evidence, the jury could have found that Las Vegas Medical Center's actions were designed to force Gonzales out of her job in retaliation for her discrimination complaint.

{44} For these reasons, I specially concur.

11 P.3d 564

2000-NMCA-088

STATE of New Mexico, Plaintiff–Appellee,

v.

William Mark MANN, Defendant–Appellant.

No. 19,479.

Court of Appeals of New Mexico.

June 6, 2000.

Certiorari Granted, No. 26,582, Oct. 19, 2000.

Patricia A. Madrid, Attorney General, Arthur W. Pepin, Assistant Attorney General, Santa Fe, NM, for Appellee.

Billy R. Blackburn, Albuquerque, NM, for Appellant.

OPINION

APODACA, Judge.

{1} Defendant appeals his convictions for second-degree murder, intentional child abuse resulting in death, and aggravated battery of a household member. He raises three issues on appeal: (1) extraneous material was presented to the jury by one of the jurors, which (a) tainted the jury process and (b) entitled Defendant to a new trial, or at the least an evidentiary hearing, to determine whether Defendant was prejudiced by the extraneous material; (2) his convictions

for both second-degree murder and intentional child abuse resulting in death violate his right not to be placed in double jeopardy; and (3) the trial court erred in not giving an instruction on defense of another as a defense to the aggravated battery against a household member.

{2} On Issue 2, we hold that although Defendant can be charged with both second-degree murder and intentional child abuse resulting in death, he cannot be convicted of both crimes without violating his right to be free from double jeopardy. On Issue 3, we determine that Defendant was entitled to a jury instruction on his defense of another claim to the charge of aggravated battery against a household member. Finally, on Issue 1, the panel is divided, and on that issue this opinion represents a dissenting view. The majority having held otherwise on this issue, we affirm only the conviction of intentional child abuse resulting in death, based on our disposition of Issue 2. Departing from the views expressed by my esteemed colleagues, I would hold that extraneous material came before the jury, resulting in a presumption of prejudice to Defendant. I would also hold that the State failed to rebut the presumption and as a result Defendant is entitled to a new trial. Because I dissent on this issue, this opinion will first discuss Issues 2 and 3, on which the entire panel concurs, followed by my own discussion and proposed disposition of Issue 1.

I. FACTUAL AND PROCEDURAL BACKGROUND

{3} In the early morning hours of August 30, 1996, Noel Mann, Defendant's six-year-old son, suffered a fatal injury as a result of being impaled in the chest by a screwdriver. Defendant contended that the child, upon leaving the bathroom, slipped on a rug, knocked the screwdriver off a hamper, and then fell on the screwdriver, causing the fatal injury. The State contended that Defendant intentionally stabbed the child with the screwdriver. After the child received the injuries, Defendant's live-in fiancee, called 911 and attempted to help the child. Defendant, apparently believing that it would be fatal to the child if he was moved, attempted to prevent his fiancee from assisting by physically attacking her.

{4} During the trial, Defendant called a physicist as an expert witness to testify on the possibility or probability for the child's injury to have occurred in the manner contended by Defendant. The expert witness testified regarding the mechanics, including the speed of falling bodies, the biomechanics of hard objects striking the human body, the amount of force necessary to cause certain injuries, and the probability, in general terms, of a screwdriver falling off a hamper in such a manner as to cause the injuries that ultimately resulted in the death of Defendant's son. The expert concluded that, although a series of events playing out as Defendant posited was not "impossible," the "probability" of such an occurrence "was extremely small."

{5} After the jury returned a guilty verdict, Defendant's trial attorney interviewed some of the members of the jury. The interviews revealed that during jury deliberations, Juror No. 7, who had a background in engineering and physics, presented his views on Defendant's expert witness' testimony to the other eleven jurors. In particular, Juror No. 7 performed probability calculations for the other jurors and wrote those calculations down on an easel. The calculations he performed and presented were not presented by Defendant's expert witness.

{6} Defendant filed a motion for a new trial based on this information and filed a request for an evidentiary hearing to determine whether and to what extent extraneous material was considered by the jury in reaching its verdict. The trial court did not hold an evidentiary hearing, but instead, outside of the presence of both the State and Defendant, interviewed Juror No. 7 and the four other jurors that Defendant indicated had knowledge of the extraneous material. A transcript of those interviews was made available to both Defendant and the State. The trial court also informed both counsel before the scheduled interviews that if there were additional jurors they wanted to be interviewed or additional questions they requested be asked, they were to so advise the trial court. After interviewing the five ju-

rors, the trial court ruled that the jury based its decision solely on the evidence presented at trial. The court thus denied the motion for a new trial.

II. DISCUSSION

A. Defendant's Conviction for Second-Degree Murder and Child Abuse Resulting in Death Violated Defendant's Right to be Free from Double Jeopardy

{7} Defendant, relying on his constitutional right of protection from double jeopardy as guaranteed by the Fifth Amendment to the United States Constitution and Article II, Section 15 of the New Mexico Constitution, contends that his conviction for second-degree murder for the death of his child and his conviction for child abuse resulting in death for the death of the same child violates his right to be free from double jeopardy. *See* U.S. Const. Amend V; N.M. Const. art. II, § 15. We agree.

{8} The double jeopardy clauses of both constitutions protect against multiple punishments for the same offense. *Swafford v. State,* 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991). Our Supreme Court has adopted a two-part test, known as the *Swafford* analysis, to be used in analyzing a double jeopardy claim based upon multiple punishments for the same offense.

> The first step is to ask whether the conduct underlying the offenses is unitary, i.e., whether the same conduct of the defendant violates more than one statute. The second step is to ask whether the Legislature intended to impose multiple punishments for the unitary conduct. Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial.

State v. Carrasco, 1997–NMSC–047, ¶ 22, 124 N.M. 64, 946 P.2d 1075 (citations omitted; internal quotation marks omitted).

{9} Conduct is unitary if it is not sufficiently separated by time or place, and the object and result or quality and nature of the act cannot be distinguished. *See State v. Livernois,* 1997–NMSC–019, ¶ 20, 123 N.M. 128, 934 P.2d 1057; *State v. Contreras,* 120 N.M. 486, 490, 903 P.2d 228, 232 (1995); *Swafford,* 112 N.M. at 13–14, 810 P.2d at 1233–34. Defendant was charged with and ultimately convicted of second-degree murder and child abuse resulting in death. The State's theory was that Defendant impaled his son in the chest with a screwdriver. It is not disputed that there was only one act, the impaling of the child with the screwdriver, and only one victim. *Cf. State v. Barr,* 1999–NMCA–081, ¶ 18, 127 N.M. 504, 984 P.2d 185. As a result, there was no separation of time or place, and the result, quality, and nature of the act cannot be distinguished. *Swafford,* 112 N.M. at 13–14, 810 P.2d at 1233–34. Consequently, the act was unitary.

{10} Because we have determined that the conduct was unitary, we must next consider the second prong—whether the Legislature intended to impose multiple punishments in this instance. *Carrasco,* 1997–NMSC–047, ¶ 23, 124 N.M. 64, 946 P.2d 1075. Initially, we conduct this inquiry by determining if the elements of one offense are subsumed within the elements of the other. *Id.* If they are, then for double jeopardy purposes, the statutes are the same, and Defendant cannot be punished for violating both statutes. *Id.*

{11} To find Defendant guilty of child abuse resulting in death, the jury was required to find the following elements: (1) Defendant intentionally and without justification cruelly punished his son; (2) Defendant's actions or failure to act resulted in his son's death; (3) Defendant's son was less than eighteen years of age. *See* UJI 14–602 NMRA 1999; NMSA 1978, § 30–6–1(C) (1989). "Intentionally" is defined as purposely doing an act. *See* UJI 14–610 NMRA 1999. The elements of second-degree murder are: (1) Defendant killed another human being without lawful justification; and (2) Defendant knew that his acts created a strong probability of death or great bodily harm to another human being. *See* UJI 14–210 NMRA 1999; NMSA 1978, § 30–2–1(B) (1994). The State must also prove that Defendant acted intentionally, that is, that he purposely did the act the law declares to be a

crime even if he did not know it was unlawful. *See* UJI 14–141 NMRA 1999.

{12} Under either statute, there is a requirement that the jury find that Defendant intentionally committed an act that resulted in the death of his son. Because there are additional elements to the crime of child abuse resulting in death, namely that the victim is less than eighteen, and that Defendant must be acting to cruelly punish the victim, our inquiry should focus on whether Defendant could have committed intentional child abuse resulting in death without committing second-degree murder. Under either statute, he must act intentionally. Under the second-degree murder statute (Section 30–2–1(B)), Defendant must do an act that creates a strong probability of death or great bodily harm. Under the child abuse statute (Section 30–6–1(C)), Defendant's actions must result in the death of the victim. An act that results in the death of the victim, by definition, has a strong probability of resulting in the death of the victim.

{13} Because the child abuse statute requires a finding that Defendant intended to cruelly punish the child and that the victim be under the age of eighteen, the child-abuse statute and the second-degree murder statute can stand independently and thus the elements of one are not subsumed within the other. If the two statutes can stand independently, then there is a rebuttable presumption that the legislature intended multiple punishments. *Carrasco,* 1997–NMSC–047, ¶ 23, 124 N.M. 64, 946 P.2d 1075. Other indicia of legislative intent, however, such as the language, history, and subject of the statutes may be used to overcome the presumption. *See Swafford,* 112 N.M. at 14, 810 P.2d at 1234.

{14} Under the facts of this appeal, we believe the presumption that multiple punishments are appropriate is overcome by the general rule that one homicide by the acts of one defendant should result in one homicide conviction. *See State v. Cooper,* 1997–NMSC–058, ¶ 53, 124 N.M. 277, 949 P.2d 660; *see also State v. Mora,* 1997–NMSC–060, ¶ 64, 124 N.M. 346, 950 P.2d 789 (stating that defendant's right to be free from double jeopardy is violated by his conviction of intentional child abuse resulting in death and felony murder); *State v. Pierce,* 110 N.M. 76, 85, 792 P.2d 408, 417 (1990) (holding that it is a violation of double jeopardy for defendant to be sentenced for both intentional child abuse resulting in death and first-degree murder). Applying the rationale and holdings of *Cooper* and *Mora,* we hold that Defendant cannot be punished for both intentional child abuse resulting in death and second-degree murder.

{15} The next question we must address is which conviction should be vacated. As a general rule, the lesser offense must be vacated. *See Pierce,* 110 N.M. at 86–87, 792 P.2d at 418–19. Based on the facts of this case, Defendant could not have committed the offense of intentional child abuse resulting in death without also committing second-degree murder. For that reason, second-degree murder is a lesser included offense of intentional child abuse resulting in death. "The rule of merger precludes an individual's *conviction and sentence* for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted." *Id.* at 86, 792 P.2d at 418 (emphasis added). Defendant's conviction for second-degree murder must therefore be vacated.

B. Defendant Was Entitled to an Instruction on Defense of Another

{16} Defendant requested a jury instruction on defense of another by use of non-deadly force. Defendant orally amended the instruction in open court. The instruction requested was a defense to the charge of aggravated battery against a household member. Defendant contended that he was attempting to hold the screwdriver still to protect his son because he was afraid the boy might suffer more extensive injuries if the screwdriver was moved. It was Defendant's theory that if in fact he committed a battery against Patricia St. Jeor, the household member, it was justified because he was attempting to defend his son from further injury. The trial court refused to give the instruction on the basis that "it was [the court's] recollection that Mr. Mann testified

that he didn't remember this happening, that he didn't remember striking Ms. St. Jeor, and speculation as to why he did that would be speculation, and there's insufficient evidence before the court at this time for this instruction to be given."

{17} When a defendant raises defense of another as a justification for his actions, an instruction on the defense should be given "'if there is any evidence, even slight evidence, to support the claim.'" *State v. Lucero,* 1998-NMSC-044, ¶ 6, 126 N.M. 552, 972 P.2d 1143 (quoting *State v. Duarte,* 121 N.M. 553, 556, 915 P.2d 309, 312 (Ct.App.1996)). Our Supreme Court has interpreted this standard to "require evidence that is 'sufficient to allow reasonable minds to differ as to all elements of the defense.'" *State v. Lopez,* 2000-NMSC-003, ¶ 23, 128 N.M. 410, 415, 993 P.2d 727 (quoting *State v. Branchal,* 101 N.M. 498, 500, 684 P.2d 1163, 1165 (Ct.App.1984)). UJI 14-5182 NMRA 1999 sets forth the elements of the defense of another—nondeadly force by defendant:

> The defendant acted in defense of another if:
>
> 1. There was an appearance of immediate danger of bodily harm to _____ as a result of _____; and
>
> 2. The defendant believed that _____ was in immediate danger of bodily harm from _____ and _____ to prevent the bodily harm; and
>
> 3. The defendant used the amount of force that the defendant believed was reasonable and necessary to prevent the bodily harm; and
>
> . . . .
>
> 5. The apparent danger to _____ would have caused a reasonable person in the same circumstances to act as defendant did.

{18} We must review the evidence presented to determine if there is any evidence, however slight, to support all elements of the defense. *Lucero,* 1998-NMSC-044, ¶ 6, 126 N.M. 552, 972 P.2d 1143. If a defendant presents sufficient evidence so that reasonable minds may differ as to all elements of the defense, the defense instruction must be given. *State v. Gallegos,* 104 N.M. 247, 249, 719 P.2d 1268, 1270 (Ct.App.1986) (abrogated in part on other grounds by *State v. Alberico,* 116 N.M. 156, 168, 861 P.2d 192, 204 (1993)). There need not be a showing by Defendant that his son was in actual danger from the actions of Ms. St. Jeor. Rather, there must be a showing that Defendant was in fear of apparent or immediate danger. *Id.* at 250, 719 P.2d at 1271. There must be evidence, however, that Defendant's fear was reasonable. *Id.* There must be some evidence that Defendant "acted as a reasonable person would have acted in the same circumstances." *Id.* With these principles in mind, we now examine the evidence presented.

{19} The victim of the aggravated battery testified that after hearing a commotion in the bathroom and a scream, she rushed to the bathroom to see what was going on, rushed back to call 911, put some clothes on, and then returned to the bathroom. She approached the child in an attempt to calm him and keep him still when she was struck by Defendant. She testified that "[Defendant] made a terrible animal sound, a terrible animal sound like a wounded animal."

{20} Defendant testified that after his son was impaled by the screwdriver, he knew the child had to be kept still and that he, Defendant, had to keep the screwdriver still so it would not cause additional damage. He also testified that, when Ms. St. Jeor came to help, he thought she was going to move the child, and he pushed her away for that reason. He also testified that he remembered standing up and pushing her out of the way.

{21} Dr. Samuel Roll, a clinical psychologist, testified that the human and parental instinct is such that it would not be unusual for parents to resort to primitive instincts when they perceive their child is in danger. When presented with a hypothetical representing Defendant's claims of what occurred, Dr. Roll testified that "anyone approaching the child, if the person felt they were protecting the child and there was some way that they had in their head was important to protect the child, if there was some risk of anyone doing anything to hurt the

child, I think that anyone who walked into that context would be at risk for being repelled by any force by this person who felt that he was trying to protect his child from further harm." Dr. Roll also stated that Defendant's reaction to the perceived threat was likely to occur among people in general. The psychologist then testified that Defendant told him that he thought Ms. St. Jeor was going to move the screwdriver and he "moved her out of the way." Finally, the witness explained that:

> One of the situations that makes any of us behave about as primitive[ly] as we can behave is when our child is in danger and we think there [is] some way to help [when] someone is endangering the child. At that point we become primitive and probably call on very basic instincts, not just for human beings, but almost any mammal. [If s]omebody is going to hurt the child, the first step is to make sure that you keep that person away from the child. So that's very primitive, very predictable....

{22} The sheriff's deputies and emergency personnel who responded to the scene of the incident testified that when they arrived, Defendant would not allow the emergency personnel access to the child. Deputy Ronnie Weller testified that when he arrived, "[Defendant] was in a crouched position on the floor over the child. Deputy Johnston was attempting to get [Defendant] to let go of the child. [Defendant] was rocking and making some noises, kind of like grunting, also saying things to the nature of if they move him they will kill him." Deputy Johnston testified that Defendant was adamant about the child not being moved. According to Deputy Johnston, Defendant stated "Don't pull the screwdriver out[;] you will kill him." Richard Kearnery, a paramedic with the Bernalillo Fire Department testified that Defendant told him not to pull the screwdriver out and that Defendant was growling and showing his teeth. Mr. Kearney testified as well that normally you do not remove objects that have penetrated someone until the injured person is in an emergency room or operating room.

{23} Having reviewed and considered these facts, we hold that there was sufficient evidence for a jury to find that Defendant feared his son was put in danger by the actions of Ms. St. Jeor and that those fears were reasonable. *See Gallegos,* 104 N.M. at 250, 719 P.2d at 1271; *see also State v. Ungarten,* 115 N.M. 607, 611, 856 P.2d 569, 573 (Ct.App.1993) (stating that when there is evidence presented in support of a defense, however slight, it is the court's duty to instruct on the defense).

{24} The State claims that the "hybrid test" adopted by our Court in *Gallegos,* 104 N.M. at 250, 719 P.2d at 1271, precludes the giving of the instruction in this case. We disagree. Under the hybrid test, there must be "evidence that an objectively reasonable person, [placed in] Defendant's subjective situation, would have thought that [his son] was threatened with [harm], and that the use of ... force was necessary to prevent the threatened injury." *Duarte,* 121 N.M. at 557, 557–58, 915 P.2d at 313, 313–14. The State contends Defendant's actions were unreasonable per se and consequently an objectively reasonable person would not have acted as Defendant acted. Dr. Roll, however, essentially testified that it was not unlikely for a person in Defendant's subjective position to act in that manner.

{25} We hold that there was sufficient evidence presented to require the giving of the defense-of-another instruction as a defense to the charge of aggravated battery on a household member.

C. Whether Extraneous Material Reached the Jury and, if so Whether the State Rebutted the Presumption that the Extraneous Material Was Prejudicial

{26} This subsection of the opinion represents only the dissenting view of the author. Judge Armijo's opinion, joined by Judge Wechsler, represents the majority opinion of the Court on Issue 1.

{27} I will address Issues 1(a) and 1(b) together, rephrasing those issues because I believe the proper inquiry in this case is whether the State has rebutted any pre-

sumption of prejudice that might arise from the introduction of extraneous material.

{28} Defendant contends that Juror No. 7 relied on his expertise as an engineer, as well as his background in physics, in performing calculations that discredited Defendant's expert witness, and as a result, brought extraneous material before the jury. The State disputes that contention. According to the State, by performing calculations and presenting them to the jury, Juror No. 7 was simply filtering the evidence presented through his engineering experience and sharing that experience with the jury within the context of the deliberation process. I disagree. By filtering the evidence, to use the State's description, Juror No. 7 was using his "scientific, technical or other specified knowledge [to] assist the trier of fact to understand the evidence." *Shamalon Bird Farm v. U.S. Fidelity & Guar. Co.*, 111 N.M. 713, 714, 809 P.2d 627, 628 (1991) (quoting NMRA 2000, § 11–702). In essence, Juror No. 7 was acting as an expert witness, and it is precisely this "filtering" that I would determine brought extraneous material before the jury. *See State v. Steinkraus*, 76 N.M. 617, 620, 417 P.2d 431, 432 (1966) (determining that expert testimony is to be considered additional evidence).

{29} The jurors were instructed before opening statements that they were to decide the case based solely on the evidence presented at trial. *See* UJI 14–101 NMRA 1999. At the conclusion of evidence, they were instructed that it was their duty to determine the facts from the evidence produced in court. *See* UJI 14–606 NMRA 1999. The jury was properly instructed that it was to consider only the evidence before it and that it was not to consider any extraneous information in reaching a verdict.

{30} Extraneous information has been defined as "[c]ommunication of specific knowledge from a particular juror to others." *State v. Sacoman*, 107 N.M. 588, 590, 762 P.2d 250, 252 (1988). In *Sacoman*, our Supreme Court recognized the balance that must be drawn between the jury fairly considering the evidence before it and drawing upon its collective life experiences, on the one hand, and considering facts not before it, on the other.

> Most certainly jurors are not precluded from drawing on their wisdom and experience and engaging in a free exchange of ideas and subjective opinions during the course of their deliberations.... The point, however, is that such deliberations must take their content from the record facts before them, not from external facts brought into the jury room by a juror and thus not screened through the judicial process.

Id. at 591, 762 P.2d at 253 (quoting *People v. Huntley*, 87 A.D.2d 488, 452 N.Y.S.2d 952, 955 (1982).

{31} The first inquiry, then, is whether extraneous information reached the jury. *See State v. Doe*, 101 N.M. 363, 366, 683 P.2d 45, 48 (Ct.App.1983). If the calculations performed by Juror No. 7 and presented to the jury are not extraneous information, the inquiry is over. In its most general sense, extraneous information consists of facts or evidence not elicited during trial that is communicated to the jury. *See Sacoman*, 107 N.M. at 590, 762 P.2d at 252. In *Sacoman*, two jurors provided information to the other jurors concerning procedures relied on by restaurants to pay employees who failed to punch the time clock at the end of their shift. The Court concluded that this constituted extraneous information. *Id.* at 591, 762 P.2d at 253.

{32} From *Sacoman*, and the cases on which it relied, I would determine that extraneous information is material that (a) would not otherwise be available to the other jurors because the information was not presented at trial, and (b) the information was available to the juror who disseminated it either as a result of his specialized training or his peculiar experiences. *See Sacoman*, 107 N.M. at 591, 762 P.2d at 253. Applying these principles to this case, I would examine the information available to the jury at the beginning of deliberations, as well as the information presented to the jury by Juror No. 7.

{33} Defendant's expert, Dr. Alan Watts, testified in depth regarding the mechanics involved when a body falls forward and a screwdriver or other object is dropped on a

hard surface. He also testified in more general terms regarding the probability of a screwdriver being knocked on the floor and bouncing up in such a way as to impale a body falling forward.

{34} Juror No. 7, during the trial court's interview, stated that "[m]y issue was I don't think they answered the right question." He then went on to explain in detail what information he presented to the jury. "In my professional judgment ... looking at this from [an] engineering problem, this whole scenario with [a] screwdriver on top of a hamper ultimately impaling a kid, there's a sequence that has to occur in some form or fashion for that to happen." The juror then went through his own five-step probability calculations that apparently took about thirty minutes. By the juror's own admission, none of that information was presented during the trial and was available to him only because of his background in engineering and physics. Apparently, Juror No. 7 felt compelled to present his probability calculations to the other jurors because he concluded that the "right question" was not asked.

{35} The trial court interviewed only five of the twelve jurors and, although the court did not make an explicit finding that extraneous information was presented to the jury, it did find that at least the five jurors interviewed did not rely upon any extraneous material in reaching their decision. The trial court stated, "I believe that the jury in this case took the evidence as they saw it *in court*, made a decision based on their [conscience] and on the evidence *presented in court.*" (Emphasis added.) It is not clear from the court's ruling whether it found that extraneous material had actually reached the jury but concluded in any event that Defendant was not prejudiced or whether the court determined that, even assuming such material reached the jury, Defendant was not prejudiced. Whichever determination on the first prong was made by the trial court, it clearly found no prejudice to Defendant.

{36} In my view, whether the trial court actually found the information provided by Juror No. 7 to constitute extraneous material is not controlling. Having reviewed the information presented by Juror No. 7, in view of the principles enunciated by our Supreme Court in *Sacoman*, I would conclude, as a matter of law, that the information indeed constituted extraneous material. Specifically, it was information that would not otherwise be available to the jury and constituted a "[c]ommunication of specific knowledge from a particular juror to others." *Sacoman*, 107 N.M. at 590, 762 P.2d at 252; *see also Shamalon Bird*, 111 N.M. at 715, 809 P.2d at 629 (describing what constitutes expert testimony); *Steinkraus*, 76 N.M. at 620, 417 P.2d at 432 (stating that expert testimony is to be considered evidence).

{37} The majority poses the issue as whether a juror's reliance on his technical background, as well as his communication of this reliance to fellow jurors, constitutes misconduct. I submit that what transpired in the jury room in this case was beyond communication relying on technical background. What occurred here was the bringing into the jury room of the juror's *own calculations* based on his specialized knowledge, as well as his version of responses to questions that he maintained were never asked of the sole expert witness who testified on the subject at trial. It matters not that Juror No. 7 based his own calculations upon the testimony of Dr. Watts or other facts adduced at trial. *See Alford v. Drum*, 68 N.M. 298, 302, 361 P.2d 451, 453 (1961) (acknowledging that expert testimony is often based on facts already in the record). What matters is that, in using these facts, which in themselves were not extrinsic, to perform his own calculations and then proceeding to explain those calculations by using his own five-step process, independent of Dr. Watts' testimony, Juror No. 7 presented extraneous material. It also is not significant, as maintained by the majority, whether the juror's own calculations discredited Dr. Watts' testimony on the likelihood or probability of the impaling of the young boy occurring in the manner testified to by Defendant. To me, the real issue is whether Juror No. 7's presentation was equivalent to that of an expert witness. *Shamalon Bird* held that expert testimony is testimony explaining "steps followed [by the expert witness] in reaching [his] conclusion." *Shamalon Bird*, 111 N.M. at 715, 809 P.2d at

629. That is precisely the role played by Juror No. 7 during jury deliberations.

{38} The majority proposes that "it was not improper for Juror No. 7 to have expressed what he felt were the questions Dr. Watt's testimony did not answer." In so doing, the majority claims, the juror was only "recognizing and showing his views" concerning the weakness of Defendant's defense. The record reflects, however, that in making his presentation to his fellow jurors, Juror No. 7 did not argue that Dr. Watts had not provided certain *answers,* thus weakening the defense's theory, but instead claimed that the "*right questions*" had not been asked. Apparently, in his thirty-minute presentation, Juror No. 7 not only provided the so-called right questions but then proceeded to answer them. Consequently, to categorize the juror's statements to his fellow jurors as merely a "common sense" opinion, as the majority terms it, is not a correct characterization of what occurred.

{39} The majority also emphasizes that Defendant accepted the possibility that Juror No. 7 would use his expertise during deliberations because Defendant did not challenge Juror No. 7 during voir dire. Acceptance of Juror No. 7 at voir dire, however, did not give that juror carte blanc permission to inject into jury deliberations evidence (*his own* opinion, *his own* calculations, *his own* five-step process, and *his own* responses to questions he insisted were not asked at trial) that I maintain constituted impermissible and extraneous material. *See Steinkraus,* 76 N.M. at 620, 417 P.2d at 432 ("[O]bservations and conclusions [by an expert witness] are facts [that] . . . constitute evidence. . . .").

{40} Juror No. 7, having disclosed his technical and professional background, assured the trial court and the parties during voir dire that, despite that background, he would be able to reach a verdict based solely on the evidence adduced at trial. He later took an oath to that effect. I submit he violated that oath. To be sure, as the majority observes, Defendant took a calculated risk by not objecting to or challenging Juror No. 7's selection as a juror, either for cause or by using one of his peremptory challenges. But that risk did not include consenting to a violation of the juror's duty to reach a verdict based solely on the evidence presented at trial. In my view, Juror No. 7 took much more into the jury room then his own life and technical experiences.

{41} The majority relies on a California Supreme Court case, *In re Malone,* 12 Cal.4th 935, 50 Cal.Rptr.2d 281, 911 P.2d 468 (1996), for the proposition that "[i]t is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial." *Id.* at 486. Although that quote is a correct statement of the law, the majority fails to recognize the discussion immediately following the quoted passage on what does constitute juror misconduct. "[A] juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." *Id.*

{42} I do not claim, as the majority implies, that "specialized training *alone* . . . render[s] a juror's active participation in deliberations improper." I am not concerned that Juror No 7's general technical background rendered his participation in the jury deliberation as extraneous. During deliberations, Juror No. 7 could have stated that, based on his experience, Defendant's theory was virtually impossible. That would not have been improper. What concerns me, however, was the in-depth, 30–minute dissertation concerning probability calculations that he injected into the case.

{43} Juror No. 7 claimed he had "expertise or specialized knowledge of a matter at issue"—whether it was possible that the child impaled himself—and that he knew the answers to the right questions that were never asked. Juror No. 7 did not just use his "educational [and] employment background[ ] to express an opinion on a technical subject," but presented himself as an expert to the other jurors. Again, I do not suggest that specialized training alone somehow rendered the juror's participation as extraneous. I instead conclude that his claim of "expertise", as well as his "expert" presentation, was juror misconduct. *See id.* (holding such claims as juror misconduct).

{44} The trial court interviewed five of the twelve jurors. There were different versions among the jurors questioned by the court concerning whether Juror No. 7 had brought calculations on a piece of paper into the jury room, which he then transferred onto a board as he explained his own calculations to his fellow jurors. To be sure, questioning of the remaining jurors at an evidentiary hearing could have cleared up once and for all the extent of materials or figures previously calculated that were brought into the jury room. The question of whether Juror No. 7 brought any document into the jury room is inconsequential, however. What is significant to me is that the juror went through his own calculation process, whether transferred from a piece of paper or whether imprinted mentally in his own mind. Regardless, Juror No. 7 told the trial court that he used his "professional judgment," approaching the case much like he would any "engineering problem," and stated that "this whole scenario with [a] screwdriver ... there's a sequence that has to occur." He admitted to performing a "fairly simple five-step probability" calculation that he claimed, to use the majority's words, "grew out of Dr. Watts' testimony." *See Shamalon Bird*, 111 N.M. at 715, 809 P.2d at 629 (stating that such five-step probability calculations are methods used by expert witnesses).

{45} The majority notes that Juror No. 7 was simply experimenting with the probability of events happening as Defendant claimed. Relying on *State v. Chamberlain*, 112 N.M. 723, 819 P.2d 673 (1991), the majority proposes that such experiments are not improper. *Id.* at 733, 819 P.2d at 683. Our Supreme Court in that case, however, did "not consider ... experimentations based on facts [or expert opinion] not properly before the jury." *Id.* at 731, 819 P.2d at 684. The Court only determined that "the jury ... did not consider evidence or statements that were not presented to the court." *Id.* In this appeal, we are addressing the issue of whether evidence in the form of expert testimony was presented to the jury without first being filtered through the judicial process. *See Sacoman*, 107 N.M. at 591, 762 P.2d at 253 (holding that all evidence must be "screened through the judicial process").

{46} In *Chamberlain*, the jury conducted experiments with evidence that was presented at trial. *Chamberlain*, 112 N.M. at 731, 819 P.2d at 684. No juror in that case claimed to have "expertise or specialized knowledge of a matter at issue." *In re Malone*, 50 Cal.Rptr.2d 281, 911 P.2d at 486. Nor did one juror give a thirty-minute presentation based on his or her own calculations. The Court in *Chamberlain* determined that experimenting with testimony and evidence from the trial were not improper; however, it acknowledged that "potential error may occur if an experiment creates a new evidentiary fact outside of the record for the jury." *Chamberlain*, 112 N.M. at 732, 819 P.2d 673.

{47} Juror No. 7 did not merely use Dr. Watts' testimony and the evidence presented at trial but expounded on the evidence and "testified" with answers to questions he contended were never posed to Dr. Watts. Juror No. 7's "experiment creat[ed] a new evidentiary fact outside of the record for the jury." *Id.* In short, *Chamberlain* did not consider juror misconduct in terms of "a juror's own claim to expertise or specialized knowledge of a matter at issue." *In re Malone*, 50 Cal.Rptr.2d 281, 911 P.2d at 486. It only discussed "evidence [and] statements that were presented" at trial. It thus appears to me that *Chamberlain* is not relevant to the facts in this appeal.

{48} Other cases cited by the majority, when viewed in their entirety, actually support the conclusion that the actions of Juror No. 7 went far beyond the use of his educational and professional background and resulted in juror misconduct. *See e.g., United States v. McMann*, 435 F.2d 813, 818 (1970) ("To the greatest extent possible all [evidence, including expert opinion] must pass through the judicial [process], where the fundamental guarantees of procedural law protect the rights of those accused of crimes."); *Ertsgaard v. Beard*, 310 Or. 486, 800 P.2d 759, 766 (1990) (holding new trial should be granted when a juror gives "specialized knowledge [to other jurors] concerning one of the disputed facts in the case under consideration"). The majority states that it

would be improper to overturn a verdict "the moment a juror passes a fraction of an inch beyond the record evidence." *McMann*, 435 F.2d at 817. Juror No. 7's presentation, however, went far beyond "a fraction of an inch."

{49} I share the majority's support of the case law protecting and insulating the privacy of our jury system. That protection disallows inquiries into intrinsic matters. As the majority concedes, however, it does not disallow inquiry into extrinsic matters that may have breached our jury deliberative process.

{50} Stripped of its language concerning the sanctity of jury room deliberations, the majority's opinion, in my view, represents nothing more than a different "judgment call" or "take" on the material presented by Juror No. 7. Was it or was it not extraneous? The majority goes through great lengths to show that it was not. I respectfully disagree with that conclusion. When all is said and done, I view the material as opinion evidence supporting the State's theory, independent of the testimony of the only expert at trial. That independent opinion evidence, I submit, was extraneous material as discussed in the case law. *See e.g., In re Malone*, 50 Cal. Rptr.2d 281, 911 P.2d at 486 ("[A] juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct.").

{51} Because I would conclude that extraneous information was considered by the jury, I next discuss whether that information prejudiced Defendant, a determination required by *Sacoman*. Once a determination is made that extraneous information is presented to the jury, there is a presumption of prejudice. *See Sacoman*, 107 N.M. at 591, 762 P.2d at 253. This presumption may be rebutted by a showing of no actual prejudice. *Id.* In *State v. Pierce*, 109 N.M. 596, 788 P.2d 352 (1990), Justice Ransom, specially concurring, recognized certain procedures to follow when it is determined that extraneous material has reached the jury:

> If a defendant makes a preliminary showing of the existence of extraneous prejudicial information ... that implicates a due process violation, the court must conduct a hearing to determine the existence of a taint on the jury deliberation process. The introduction of extraneous prejudicial information ... creates a presumption of prejudice. If, at the hearing, the trial court finds a reasonable possibility of prejudice, a new trial should be granted.

Id. at 605–06, 788 P.2d at 361–62 (Ransom, J., specially concurring) (footnotes omitted).

{52} In determining prejudice, the trial court must consider "how the material was received [by the jury], how long it was available to the jury, the extent to which the jury discussed the material, whether [the jurors] considered [the material] before they reached a verdict or after, and, if before, at what point in the deliberations they received the material." *Doe*, 101 N.M. at 366–67, 683 P.2d at 48–49. Additionally, "[t]he strength of the State's case has a bearing on the issue of prejudice." (citation omitted).

{53} The jury received the material when Juror No. 7 stood up before the jury, advising his fellow jurors of his expertise as an engineer and telling them that, in his professional judgment, they needed to consider other information not presented by Defendant's expert or presented by the State. At an easel, the juror gave a discourse to the other jurors in physics and probabilities. As previously noted, it took approximately thirty minutes for the material to be presented. It was not simply a passing reference made by one juror to another. The presentation was given before the jury took a vote on the intentional child abuse resulting in death charge or the second-degree murder charge. The material was presented after the first full day of deliberations but only three or four hours into the jury's verdict consideration.

{54} From Juror No. 7's own words ("I don't think they answered the right question."), I believe the extraneous information provided by him was apparently intended to contradict Defendant's case, for he then gave a thirty-minute discourse of his own five-step probability process. This is a factor the trial court must consider as well. *See Sacoman*, 107 N.M. at 591–92, 762 P.2d at 253–54. (stating that extraneous information contradicting an asserted defense "was identified in [*People v. Martinez*, 82 Cal.App.3d 1, 147 Cal.Rptr. 208, 220 (1978)] as a factor consti-

tuting prejudice [requiring] that the conviction be reversed"). The information presented was not "screened through the judicial process." *Sacoman,* 107 N.M. at 591, 762 P.2d at 253 (quoting *Huntley,* 452 N.Y.S.2d at 955 (internal quotation marks omitted)). This presents not only possible problems implicating due process, but it also may implicate a defendant's right to confront the evidence against him pursuant to the U.S. Const. Amend. VI. *See Parker v. Gladden,* 385 U.S. 363, 364, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966). The information was not subjected to scrutiny by Defendant's trial counsel. Any doubt there may be on what effect or prejudice the information provided had on the jury, I submit, should be resolved in favor of Defendant, in light of the existing presumption of prejudice.

{55} In *Martinez,* a case cited with approval by our Supreme Court in *Sacoman,* the California Court of Appeal set forth three factors that must be considered in deciding whether a defendant was prejudiced by juror misconduct in receiving evidence not presented in court—"[W]hether the jury's impartiality has been adversely affected, whether the prosecution's burden of proof has been lightened[, or] whether any asserted defense has been contradicted." *Martinez,* 147 Cal.Rptr. at 220. "If the answer to [*any one*] of these questions is in the affirmative, the defendant has been prejudiced. . . ." *People v. Castro,* 184 Cal.App.3d 849, 856, 229 Cal.Rptr. 280, 284 (1986); *see also Smoketree–Lake Murray, Ltd. v. Mills Concrete Constr. Co.,* 234 Cal.App.3d 1724, 286 Cal.Rptr. 435, 449 (Ct.App.1991). The California courts, when faced with the issue of extraneous material being presented to the jury, have consistently held that once extraneous material is brought before the jury, there is a presumption that the material prejudiced the complaining party, and unless the presumption is rebutted, the complaining party is entitled to a new trial. *See Smoketree–Lake Murray, Ltd.,* 286 Cal.Rptr. at 447. ("In reviewing the denial of a motion for new trial based on jury misconduct, the appellate court has a constitutional obligation to review the entire record, including the evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial." (Internal quotation marks omitted)).

{56} Because extraneous information was presented, the burden shifted to the State to rebut the presumption of prejudice. *See Sacoman,* 107 N.M. at 591, 762 P.2d at 253. Additionally, when the factors set forth in our own case of *Doe,* 101 N.M. at 366, 683 P.2d at 48, and by the California courts in *Martinez* and *Castro* are considered, the presumption of prejudice is great. The evidence (1) was presented before the jury reached a decision on the intentional child abuse and second-degree-murder charge; (2) contradicted Defendant's case, due to a great extent on Juror No. 7's thirty-minute discourse involving a five-step process, based entirely on the premise that he did not "think they answered the right question;" and (3) was before the jury for a substantial period of time. The fact that there might be "[c]onvincing evidence of guilt does not deprive a defendant of the right to a fair trial." *Martinez,* 147 Cal.Rptr. at 220.

{57} The trial court interviewed only five of the twelve jurors. Four jurors testified that the information presented by Juror No. 7 was not the determinative factor or even a significant factor in their decision. Juror No. 7 testified that the information he presented was only one of many factors that influenced his decision. Seven of the jurors, however, were not interviewed by the trial court. For this reason, there is no way of knowing whether those seven jurors were in any way influenced by the extraneous material. I believe this fact raises "a reasonable possibility of prejudice." *Pierce,* 109 N.M. at 605–06, 788 P.2d at 361–62 (Ransom, J., specially concurring).

{58} It was the State's burden to show that Defendant was not prejudiced by the extraneous material, not Defendant's burden to show otherwise. By failing to have those seven jurors interviewed by the trial court, I would hold that the State failed to rebut the presumption that the extraneous material prejudiced Defendant. For this reason, it cannot be said that Defendant acquiesced or waived the trial court's "interviews" with the

remaining seven jurors. It was not Defendant's duty to assist the State in rebutting the presumption of prejudice that Defendant was entitled to under our case law.

{59} Alternatively, I would hold that due process and fair trial requirements imbedded in our state's Constitution required the trial court to conduct a full evidentiary hearing. At that hearing, the parties would be afforded the right to examine and cross-examine all jurors, not only the five jurors interviewed privately and in chambers by the court.

{60} In determining a remedy, I considered whether remanding the case for the trial court to interview the other jurors would be feasible. To do so, however, is problematic after the lapse of time in this appeal since trial. The trial ended in February 1998, over two years ago. Consequently, there may be great risk that the juror's recollections regarding the impact of the extraneous material would be impaired. Additionally, the trial judge who presided at trial has since retired, therefore requiring a new judge to conduct the interviews. For these reasons, I believe that the State could not meet its burden of showing Defendant was not prejudiced. I would hold, then, that the State had an opportunity to rebut the presumption of prejudice during the initial interviews and failed to do so at that time. This failure, in my view, cannot be corrected by conducting interviews of the remaining jurors on remand. I therefore would conclude that Defendant's convictions for both second-degree murder and intentional child abuse resulting in death should be reversed and the case remanded for a new trial on those two charges.

{61} On remand, Defendant could be charged with both second-degree murder and intentional child abuse resulting in death. *See Pierce,* 110 N.M. at 87, 792 P.2d at 419. In a new trial, however, the State would be permitted to proceed on both theories. If a jury eventually returned guilty verdicts on both charges, the trial court would then dismiss the second-degree-murder charge, because it is a lesser included offense of child abuse resulting in death.

{62} The majority having expressed a different view and holding on this issue, I dissent.

III. CONCLUSION

{63} We conclude that: (1) Defendant's right to be free from double jeopardy was violated by his convictions and sentencing for both second-degree murder and intentional child abuse resulting in death; and (2) there was sufficient evidence presented to support an instruction on defense of another to the aggravated battery on a household member charge and the trial court erred by not giving such an instruction.

{64} Because second-degree murder is a lesser included offense of intentional child abuse resulting in death and the rule of merger prohibits both a conviction and sentence for the lesser charge, we remand for the entry of an order vacating Defendant's conviction for second-degree murder. Defendant's conviction of intentional child abuse resulting in death is affirmed. We reverse Defendant's conviction for aggravated battery of a household member and remand for a new trial consistent with this opinion, only on that issue.

{65} **IT IS SO ORDERED.**

WECHSLER and ARMIJO, JJ., concurring in part.

ARMIJO, Judge.

{66} We concur in that portion of Judge Apodaca's opinion regarding the double jeopardy and jury instruction issues. However, our opinion below represents the opinion of the Court regarding Defendant's claim of juror misconduct. This issue is one of first impression in New Mexico, the question being whether a juror's reliance upon his disclosed technical background, as well as his communication of this reliance to his fellow jurors, constitutes misconduct. On this issue, we affirm the district court's denial of Defendant's motion for a new trial.

STANDARD OF REVIEW

{67} We begin by noting the applicable standard of review. It is well estab-

lished that we would reverse the trial court's ruling on allegations of juror misconduct only upon an abuse of discretion. *See Gonzales v. Surgidev Corp.*, 120 N.M. 133, 148, 899 P.2d 576, 592 (1995); *State v. Chavez*, 98 N.M. 682, 684, 652 P.2d 232, 234 (1982) ("The trial court has broad discretion in granting or denying a motion for new trial, and such an order will not be reversed absent clear and manifest abuse of that discretion."). This standard applies both to the district court's ultimate ruling and to our review of the means by which it inquired into Defendant's allegations. *See State v. Sacoman*, 107 N.M. 588, 592, 762 P.2d 250, 254 (1988); *see also Hard v. Burlington N.R.R.*, 870 F.2d 1454, 1461–62 (9th Cir.1989). Reliance upon this standard reflects not only the important policies implicated by motions for new trial, *see State v. Gonzales*, 105 N.M. 238, 241, 731 P.2d 381, 384 (Ct.App.1986) (noting interest in enforcing lawful verdicts), but also the trial court's unique position in passing upon such questions in the first instance, *see Allyn v. Boe*, 87 Wash.App. 722, 943 P.2d 364, 369 (1997) (noting in review of claimed juror misconduct that trial court "saw both the witnesses and the trial proceedings, and had in mind the evidence").

FACTUAL AND PROCEDURAL BACKGROUND

{68} The trial, which included the testimony of thirty-nine witnesses, lasted for more than a month. Upon its deliberation, the jury convicted Defendant, among other counts, of unlawfully killing his son. Some time after the verdict, Defendant's representatives interviewed several of the jurors, including Juror No. 7, and moved for a new trial claiming that Juror No. 7 had improperly shared "calculations, and expert opinions" during deliberations. Specifically, Defendant alleged:

> 6. The juror took it upon himself to serve the function of prosecution expert witness during deliberations by doing calculations, explaining physics and engineering to the remainder of the jurors and conducting experiments which discredited the opinions given by Dr. Watts.
>
> 7. That same juror actually presented calculations which he had independently done in order to discredit the opinions of Dr. Watts. He had them written on a sheet of paper which he copied on to the easel.

We restrict our remaining discussion of the facts to the issue of alleged juror misconduct involving Juror No. 7.

Juror No. 7

{69} Defense counsel knew of Juror No. 7's professional status and technical background prior to selecting him to serve on the jury. Indeed, prior to voir dire, an extensive process in which the parties and court invested approximately a full week, counsel had prospective jurors complete a detailed questionnaire which inquired, among other matters, as to each potential juror's background, employment, and education. Juror No. 7, in his response to the questionnaire, informed counsel of his technical background and his employment as an engineer with the Sandia National Laboratories. Then, upon individual voir dire—during which counsel and the court spoke to Juror No. 7 individually and on the record—he again disclosed that he worked at Sandia National Laboratories and that "[his] training is as an engineer." In response to further questioning from the court, he stated that despite his background, he would be able to reach a verdict based solely on the evidence at trial. Defendant made no objection to Juror No. 7 serving on his jury.

Doctor Watts' Testimony

{70} At trial, Defendant called Dr. Alan Watts to testify as an expert witness regarding the general probability of Noel being killed in a manner consistent with Defendant's theory. Doctor Watts described his understanding of the series of events necessary to support Defendant's theory of the accident:

> [T]he boy trips on a rug . . . and starts to lose balance as he goes forward. He now puts his arms out, and his left arm goes over the top of a nearby sink and catches the top of the hamper a couple inches

higher. There are various items on top of the hamper. . . .

And there's also a screwdriver underneath. His hand sweeps across and somehow moves the screwdriver off the hamper. At the same time, he is falling forward. So what we have is a boy already starting to move and a screwdriver starting from a height of about two feet eight and a half . . . and now the issue is can the screwdriver get to the floor before the boy's chest does.

Doctor Watts thereafter discussed basic principles of physics and applied them to the hypothesis that Noel accidentally impaled himself upon a dropped screwdriver. He further demonstrated to the court that a screwdriver or other rod dropped onto a hard surface will bounce. As part of his presentation, he performed several calculations on the board in the court room. These calculations pertained primarily to the angle at which the screwdriver may have landed and the force Noel's body would have exerted upon it on impact.

{71} Doctor Watts made clear that the object of his demonstration was not to prove that Defendant's screwdriver fell "one way or the other" the day Noel was killed, "but that it's random every time." While he stated he could not calculate the precise probability of Noel having been stabbed as Defendant claimed, he did represent that there was "a relatively small overall probability" of such an occurrence, that its occurrence would be a "freakish accident." He further stated: "So although I can't predict a precise behavior on any one screwdriver and any one bounce you can anticipate it becomes possible for the blade to be pointing upward as the boy's body comes down."

{72} The State put on no rebuttal expert testimony. However, it extensively cross-examined Dr. Watts. On cross-examination, the State brought out several factors that Dr. Watts had not considered in formulating his opinion. For example, Dr. Watts did not consider the angle of the wound paths in Noel's chest and how this would affect the probability of his being stabbed in the manner Defendant suggested. He did not consider the screwdriver's position on top of the hamper in relation to the other items on the hamper and how this would have affected how it fell. And he did not consider Noel striking the sink with his arm on his way down and how this may have affected the force with which he fell.

Juror Interviews

{73} In his motion alleging juror misconduct, Defendant identified five jurors who he believed to have information pertaining to the claimed misconduct. In response, the district court conducted in camera, record interviews with these five jurors. In order, the court interviewed Jurors Nos. 9, 4, 10, 7, and 6.

{74} Juror No. 9 told the district court that as to the charges Defendant had unlawfully killed his son, the jury was "leaning toward conviction early on." He also expressed his personal opinion, also formulated early on:

> [T]hat kid didn't fall on that screwdriver and stab himself. Just no way. Not in a zillion billion years did that happen.
>
> You know, there's no way a kid can fall with enough force to jab a screwdriver into his chest and not smash his face. How did he not break his nose or bruise his lips[?] How does that happen? It just—it's impossible to happen.

Of Juror No. 7, he noted that he had written "some calculations" on the dryerase board that had been provided to the jury. He also stated: "But, see, I kind of viewed that more as here is a guy that knows numbers, knows mathematics, who knows probabilities. I viewed it as his life experience."

{75} Juror No. 4 also noted that the jury had a show of hands on the murder charge early on and that this "vote" was unanimous in favor of conviction. Of Juror No. 7, he noted that "[h]e didn't say he did any experiments at home" and that "[h]e didn't bring papers" into the jury room. He also noted of Juror No. 7's presentation: "he says, Let's take Dr. Watts' figures. And you might fly this by that—being an engineer and probably half-way physisist [sic], he said using his figures, it can't come out the way he said it

did. In my mind, common sense tells me it can't come out."

{76} Juror No. 10 stated that she "d[id]n't know if [Juror No. 7] brought anything from home. He did have a couple of figures that he had thought about and it was explaining his point of view on the testimony of Dr. Watts." She also noted that the jury took early, initial votes on the counts against Defendant, although she could not remember in which order, and that "[t]here was a lot of guilty, a couple of not guilty and a couple of undecided."

{77} Next, the district court interviewed Juror No. 7, who spoke at length regarding all aspects of the jury's deliberations. Of his own participation, he maintained that he did not dispute or discredit Dr. Watts' testimony; instead, he said Dr. Watts' were "fine calculations and I would agree with the calculations." Instead of disagreeing with the testimony, he felt it did not "answer the right question," that is, he could not see the "logical tie" between Dr. Watts' testimony and Defendant's conclusion that his son died as he argued. Instead, he felt Defendant's theory "just doesn't jive." Therefore, to "verify [his] own gut feeling" on the subject, Juror No. 7 sought to "quantify" his thinking on the evidence at trial.

{78} Toward this end, he walked through "a probability calculation, and [he] did this in [his] head first." This calculation found its genesis in Dr. Watts' calculations presented at trial. Juror No. 7 insisted that he conducted no experiments. Instead, he told the court that he used his "professional judgment" and approached the matter as an "engineering problem." As he stated to the court, echoing Dr. Watts' explanation of the series of events necessary to prove Defendant's theory correct, "this whole scenario with [a] screwdriver on top of a hamper ultimately impaling a kid, there's a sequence that has to occur in some form or fashion for that to happen." Accordingly, he "did a fairly simple five-step probability" calculation which, again, grew out of Dr. Watts' testimony.

{79} This exercise, in essence, distilled five distinct events from Defendant's argument of what happened to Noel. Juror No. 7 approached these events as questions: (a) did the screwdriver land at the correct angle to the floor relative to Noel's falling body?; (b) did it land "blade up"?; (c) did it separate itself, as it fell, from the other items with which it had been knocked off the hamper?; (d) did it land at the correct location on the floor?; and finally (e) how frequently ought such accidental deaths occur in the population-at-large? Of the last question, he stated:

> Well, I go quite regularly to the hardware stores. I have never seen an OSHA warning label on a screwdriver that says "caution, this might be hazardous to your health, take the following precautions." . . . So I am saying man, there's no-I guess you would call that consumer protection or something, but there's no evidence from somebody that that's kind of their job to look out for our protection on this that ever indicates there's a problem.

It is not clear from the record to what extent Juror No. 7 conducted this inquiry in his head and to what extent he shared it with his colleagues on the jury.

{80} Finally, the court interviewed Juror No. 6. Of Juror No. 7, she stated: "I feel that the particular juror that-the engineer juror, to me that was just his way of venting his feelings and thoughts and emotions during the deliberation." She further stated:

> We all went home that weekend over deliberation, and it was on my mind, the whole trial during the whole weekend, and I don't see how any of us could have not thought about it. If he took it upon himself to do the calculations and maybe possibly explain a few things in better English that certain people could understand-I mean, during deliberation I think jurors discuss all the evidence and, you know, some things are presented to us in such a legal fashion that it kind of goes over our head maybe, and sometimes we do need it just explained on like a kindergartner level.

{81} None of the jurors told the district court that Juror No. 7's statements played a significant role in their having reached the decision they did. After conducting the interviews, the district court denied Defen-

dant's motion for a new trial, ruling that no juror misconduct had occurred; that is, the district court ruled Defendant had failed to show that Juror No. 7 had introduced any extraneous influence to the deliberations. Specifically, the court stated:

> The one thing that I do know is I am not God. I am sworn to do this job under the boundaries of the law. At the same time to attempt, if such occurs, to correct what is an obvious ... miscarriage of justice. What I cannot do and should not do is place my personal feelings, my feelings of what may or may not have been done by the jury. As I stated before, I believe in the jury system.
>
> ....
>
> [A]gain, and after the most serious contemplation, I find that there has not been sufficient evidence before this Court to require either a further inquiry into the jury's conduct, nor is there such that would require me in my role as a judge to set aside that verdict. I feel I believe in the jury system. I believe that the jury in this case took the evidence as they saw it in court, made a decision based on their [consciences] and on the evidence presented in court, although some people may feel that they would have come to a different resolution. That is not what our system is about, and for me to place myself in the stead of the jury to overturn that would be, I feel, [betrayal] of everything I believe about our system.

{82} Defendant appeals from this ruling.

DISCUSSION

{83} As a central matter, this appeal implicates an age-old and venerated interest. The analysis we apply today has evolved expressly to safeguard the secrecy of jury deliberations from unwarranted invasion.

{84} The privacy of jury deliberations has been protected as nearly inviolable since the seventeenth century. *See generally* Note, *Public Disclosures of Jury Deliberations,* 96 Harv. L.Rev. 886, 891 n. 31 (1983). This protection is not motivated by some anachronistic concern, but is founded upon the prevailing interests of ensuring freedom of expression and debate, preventing the harassment of jurors, insulating the jury decision-making process from public pressure, and securing stability within the system and finality of judgments. *See, e.g., Clark v. United States,* 289 U.S. 1, 13, 53 S.Ct. 465, 77 L.Ed. 993 (1933); *Duran v. Lovato,* 99 N.M. 242, 247, 656 P.2d 905, 910 (Ct.App.1982); *see generally Public Disclosures of Jury Deliberations,* 96 Harv. L.Rev. at 888–92. Above all, we rely upon juries to perform the profoundly democratic function of standing between an accused and the prosecutorial machinery of the State. For all these reasons, courts have long been understandably reluctant to intrude upon juror execution of this duty. *See, e.g., McDonald v. Pless,* 238 U.S. 264, 267, 35 S.Ct. 783, 59 L.Ed. 1300 (1915) (noting concern that "all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding"); *Silagy v. Peters,* 905 F.2d 986, 1009 (7th Cir.1990) (recognizing potential of "constant attempts to undermine jury verdicts through the scrutiny of the juror's thoughts and deliberations"); *Hurst v. Citadel, Ltd.,* 111 N.M. 566, 570, 807 P.2d 750, 754 (Ct.App.1991) (declining to review affidavits pertaining to intrajuror communications).

{85} In deference to these concerns, we have disallowed inquiries into matters *intrinsic* and allowed inquiry only into matters *extrinsic* to the deliberative process. *See, e.g.,* Rule 11–606(B) NMRA 2000; *Hurst,* 111 N.M. at 569, 807 P.2d at 753; *see also Claudio v. State,* 585 A.2d 1278, 1302 (Del.1991) (discussing explicit distinction between intrinsic and extrinsic influences on jury deliberations). For this reason, it was Defendant's threshold burden below to show that something *extrinsic* to the trial process made its way into the jury's deliberation of the charges against him. This burden is not discharged merely by allegation; rather, Defendant must make an affirmative showing that some extraneous influence came to bear on the jury's deliberations. *See State v. Sena,* 105 N.M. 686, 688, 736 P.2d 491, 493 (1987) (ending inquiry upon defendant's failure to adduce sufficient evidence of juror misconduct). Only upon his discharge of this

burden will a court make any inquiry as to what prejudice this impermissible influence worked.

Did Juror No. 7 introduce an extraneous influence upon deliberations?

{86} This appeal raises a pair of related, but subtly distinct questions. First, does Juror No. 7's *status* as an engineer, with a general technical background, render his active participation in deliberations an extraneous influence on the process? And second, did the substance of Juror No. 7's statements to his fellow jurors introduce an extraneous influence upon deliberations?

1. *Juror No. 7's professional status.*

{87} Defendant knew of Juror No. 7's professional status and technical background prior to selecting him to serve on the jury. Indeed, the district court noted the "extensive voir dire" in issuing his ruling on Defendant's motion. During the voir dire, Juror No. 7 disclosed that he was an engineer and that he worked for Sandia National Laboratories. Furthermore, in his answers to the pre-voir dire questionnaire, he disclosed this technical background and training. Defendant made no objection—either for cause or peremptory—in light of these disclosures. Perhaps, Defendant overlooked the potential significance of what Juror No. 7 could bring to deliberations, or perhaps, he believed that someone of Juror No. 7's training could benefit his case; indeed, as Juror No. 7 stated during his in camera interview:

> [B]ased on what I heard from talking with the defense attorneys during this interim after the trial, the feedback I got from them is that yeah, Mr. Twohig in fact wanted me on the jury because I guess he thought that I was going to be the guy that would listen to his expert and then somewhat rubber stamp it and say, "Oh, yes, this is all correct, etc. etc."

We determine that Juror No. 7's professional training, without more, could not constitute an extraneous influence; indeed, Defendant's knowing acceptance of Juror No. 7 rendered his specialized training—as a general matter—intrinsic to the jury and the trial as a whole. *Cf. United States v. Costa*, 890 F.2d 480, 482 (1st Cir.1989) (commenting in analogous context that "[a]ny other rule would allow defendants to sandbag the court by remaining silent and gambling on a favorable verdict, knowing that if the verdict went against them, they could always obtain a new trial by later raising the issue of juror misconduct").

{88} The case of *Richards v. Overlake Hospital Medical Center*, 59 Wash.App. 266, 796 P.2d 737 (1990) is largely indistinguishable from the appeal at bar. In that case, a plaintiff, claiming medical malpractice upon birth defects in her new-born child, sought to reverse an adverse jury verdict upon claimed juror misconduct. *See id.* at 740. The plaintiff alleged that one of the jurors, an individual with medical expertise, had argued to her fellow jurors that plaintiff's medical records, which had been admitted into evidence, indicated a viral infection. *See id.* at 742. The plaintiff further alleged that this juror stated during deliberations her opinion that this infection, rather than any malpractice, is what likely caused the subject birth defects. *See id.* The Washington Court of Appeals found no misconduct, stating:

> The evidence of a viral infection at the 16– to 20–week stage of the pregnancy was before the jury from the testimony of one of the doctors and in the medical reports. Juror Geisler's background was known to the parties at the time of voir dire and her "medical" knowledge was something she naturally brought in with her to the deliberations, and this was known by all the parties after voir dire. The medical records were introduced into evidence and sent to the jury room with the jury for its use in the deliberations. There was no extrinsic evidence brought into the case and thus there was no misconduct.

Id. at 743. Implicit in this conclusion, the court considered the juror's disclosed and knowingly-accepted specialized knowledge to be intrinsic to the process.

{89} In the present case, Defendant knew of Juror No. 7's training and background, "something [he] naturally brought in with [him] to the deliberations." *Id.* Furthermore, Dr. Watts' testimony—that is, his testimony adduced on both direct and cross-

examinations—was before the jury. The probability of events occurring as Defendant posited was fundamental to the case; evidence upon it had been admitted and amply argued. *See State v. Chamberlain,* 112 N.M. 723, 733, 819 P.2d 673, 683 (1991) (concluding juror experiment with evidence was not improper when "the background information was all properly before the jury"). Upon this record, the district court did not abuse its discretion in concluding that Juror No. 7's training and profession did not constitute an extrinsic influence upon the deliberative process.

{90} As the Supreme Court of California has recognized, "[i]t is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial." *In re Malone,* 12 Cal.4th 935, 50 Cal.Rptr.2d 281, 911 P.2d 468, 486 (1996); *accord Titus v. State,* 963 P.2d 258, 262 (Alaska 1998) ("[J]urors can make intelligent decisions only by drawing upon their accumulated background knowledge and experience." (Internal quotation marks omitted)); *State v. Dascenzo,* 30 N.M. 34, 37, 226 P. 1099, 1100 (1924) ("In deciding every case, jurors must necessarily take into consideration their knowledge and impressions founded upon experience in their everyday walks of life, and the fact that these things affect them in reaching their verdict cannot be reversible error.").

{91} Similarly, we have consistently held that jurors are expected to rely upon their life experiences and background during deliberations. *See, e.g., Chamberlain,* 112 N.M. at 732, 819 P.2d at 682 ("[T]he jury must be allowed latitude to evaluate evidence and to use its experience to deliberate."). "Specialized knowledge"—of which professional training and educational background are certainly species—is a form of "life experience" and "background." *See In re Malone,* 50 Cal.Rptr.2d 281, 911 P.2d at 486 ("Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work."); *cf. Titus,* 963 P.2d at 262–64 (noting "familiarity with x-ray technology" as a type of general knowledge and discussing distinction between general and specific knowledge); *Wagner v. Doulton,* 112 Cal. App.3d 945, 169 Cal.Rptr. 550, 552 (1980) (concluding engineer-juror's taking it upon himself to draft diagram based upon evidence at trial did not introduce extrinsic influence upon deliberations).

{92} Furthermore, we believe that to hold otherwise—that is, to regulate separately the participation of jurors with specialized knowledge—would result in an unprecedented and unnecessary intrusion upon the deliberative process of juries, a curtailment of the constitutional right and duty every citizen has to serve on a jury, and establish a rule that would be nearly impossible to enforce without pro forma, post-verdict inquiry into the substance of each jury's deliberations. *Cf. Rideau v. Louisiana,* 373 U.S. 723, 733, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963) (Clark, J., dissenting) ("[I]t is an impossible standard to require that tribunal to be a laboratory, completely sterilized and freed from external factors."); *Dascenzo,* 30 N.M. at 37, 226 P. at 1100 ("[J]urors without possessing such knowledge and impressions could not be had."). We see no purpose served by such a formulaic "dumbing down" of our juries, that is, by treating as inherently suspect a juror's known possession of professional knowledge. *See* Robert D. Myers, *Complex Scientific Evidence and the Jury,* Judicature, Nov.-Dec.1999, at 150, 154 ("[L]awyers who believe in 'dumbing down' juries should . . . recognize the important role of jurors as fact finders and decision makers.").

{93} Rather than relying solely upon an individual juror's professional status or training, courts have found misconduct only upon a showing that something extra-record corrupted jury deliberations, that is, the introduction of extrajudicial facts, authority, or issues. For example, in *State v. Thacker,* 95 Nev. 500, 596 P.2d 508, 508 (1979) (per curiam), relied upon by our Supreme Court in *Sacoman* and by Defendant in this case, two defendants appealed their convictions for grand larceny of two calves and were granted, upon their initial motion, a new trial. *See id.* at 509. Their theory of defense was essentially one of mistaken identification; that is, they argued that the cattle the au-

thorities had seized from them were not the animals that had been stolen. *See id.* To support this contention, they argued that the seized cattle were smaller than the stolen cattle. The trial court admitted several photographs into evidence related to this point and permitted the jury to examine the impounded cattle. *See id.* No evidence, however, was "presented at trial concerning the weight of the cattle or what the animals had been fed during the impound." *Id.* After the jury convicted, the defendants alleged juror misconduct.

{94} As it turned out, one of the jurors—indeed, the jury foreman—was the "superintendent in charge of cattle operations at Nevada Nile Ranch," the facility where the allegedly stolen calves had been impounded upon their recovery. *Id.* This cattleman-juror, despite the lack of evidence on the subject, took it upon himself, in reliance upon his knowledge of livestock and feed, to "compute[ ] an estimate of what he thought the calves weighed ... and gave his information to the other jurors." *Id.* Upon this introduction of fact not in evidence, the Supreme Court of Nevada affirmed the trial court's order granting a new trial.

{95} This holding is consistent with the Supreme Court of California's opinion in *In re Malone,* noted above. Therein, the court denied the habeas corpus petition of a defendant convicted and sentenced to death, in part upon polygraph evidence, on a charge of first-degree murder. *See In re Malone,* 50 Cal.Rptr.2d 281, 911 P.2d at 472–74. The defendant alleged juror misconduct in light of the fact that one of the jurors, a professional psychologist, had argued to the other jurors as to the reliability of polygraph testing generally and as to the adequacy of the administration of the polygraph test specifically at issue. The court stated in this regard:

> It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources.

In re Malone, 50 Cal.Rptr.2d 281, 911 P.2d at 486.

{96} Applying this general rule, the court held that the psychologist-juror had committed misconduct, albeit without prejudice. Despite some of the California Supreme Court's broad language, a closer reading of the case demonstrates, as in *Thacker,* that it was not merely the psychologist-juror's specialized training that gave the court pause—indeed, she admitted to her fellow jurors as to not being "an expert on polygraphs." *Id.* at 476. Instead, it was the fact that she had specifically based her opinion "on her readings" and on "professional articles on the subject," that is, sources of authority not in evidence. *Id.* at 476, 486.

{97} This is perhaps a fine line to draw, but the distinction is nonetheless critical: The California court premised its conclusion of juror misconduct upon the psychologist-juror's telling of her "fellow jurors [that] her professional reading and course work made her doubt" the testimony presented at trial, *id.* at 475, that is, that the psychologist-juror "told the other jurors [her] beliefs were based on her readings," not the evidence adduced at trial, *id.* at 476. It was this communicated invocation of "specialized information obtained from outside sources" that the court held to cross the line between appropriate and inappropriate juror conduct. *Id.* at 486; *accord McDonald v. Southern Pac. Transp. Co.,* 71 Cal.App.4th 256, 83 Cal.Rptr.2d 734, 738 (Ct.App.1999) (reversing upon railwayman-juror's introduction and expansive discussion of the issue of "sensors," regarding which there had been no evidence presented or argument made at trial).

{98} These cases reinforce our conclusion that it is not merely a juror's possession of or reliance upon his or her education or professional training that is improper. *See In re Malone,* 911 P.2d at 476, 486. Instead, it is misconduct for a juror to invoke his or her expertise with the effect of introducing an extrajudicial influence, be it an extra-record fact, *see Thacker,* 596 P.2d at

509, source of authority, *see In re Malone,* 911 P.2d at 476, 486, or issue, *see McDonald,* 83 Cal.Rptr.2d at 738.

2. *Juror No. 7's statements during deliberation.*

{99} Turning to the facts before us: Juror No. 7 is a professional engineer who possesses pre-existing, technical knowledge of a general nature; he disclosed this background on voir dire and Defendant did not object to his impanelment; Juror No. 7 relied upon his professional background in formulating his subjective take on the evidence presented at trial; he shared his opinions with his fellow jurors, a presentation which his fellow jurors, not this Court, characterized as an expression of his "life experience," as "common sense," as "explaining his point of view on the testimony of Dr. Watts," as "on like a kindergartner level". In so sharing his view of the evidence, he specifically discussed the expert testimony at trial; and finally, in so examining this testimony, he noted, as emphasized by the State during its cross-examination of Dr. Watts, the questions he felt it had failed to address and what he felt to be the lack of any "logical tie" between it and Defendant's theory of defense.

{100} The record does not indicate that: Juror No. 7 referred to or relied upon any articles or extra-record authority in support of his view of the evidence; he brought into the jury room any physical object—be it notes or models—with which to assist in his presentation; he performed any "experiments" outside the jury room; he possessed any specific, pre-existing knowledge of the case he was to judge; or he introduced any fact to the jury's deliberations that was extrinsic to the record.

{101} Upon this record, we do not agree with Defendant that Juror No. 7 acted improperly by: (a) expressing his "professional opinion" as to Dr. Watts' expert testimony; (b) voicing his opinion as to what he felt were the limitations of Dr. Watts' testimony, that is, that he felt counsel "didn't ask the right questions"; and (c) offering a "formal presentation" to his fellow jurors that illustrated his subjective view of the evidence at trial. Instead, we conclude that the record supports the district court's ruling that no extraneous material corrupted the jury's deliberations.

{102} First, it was not improper for Juror No. 7 to have expressed his "professional opinion." As we have discussed, Juror No. 7 did not act improperly by bringing his profession and training into the jury room. *See In re Malone,* 50 Cal.Rptr.2d 281, 911 P.2d at 486; *cf. Chamberlain,* 112 N.M. at 732, 819 P.2d at 682. This is especially the case as Defendant knew of his profession and training on voir dire. *See Richards,* 796 P.2d at 743. Moreover, upon our review of the applicable law and the record before us, Juror No. 7's expression of his "professional opinion" appears to have been nothing more than the expression of his subjective take on the evidence in record. As his fellow jurors stated to the district court judge during the in camera interviews, Juror No. 7 did little more than express his opinion based on his "life experience"; indeed, despite Defendant's characterization of the record, it indicates that Juror No. 7 presented this opinion "on like a kindergartner level."

{103} Second, it was not improper for Juror No. 7 to have expressed what he felt were the questions Dr. Watts' testimony did not answer. In this regard, Juror No. 7 is guilty only of recognizing and sharing his view of the deficiencies and logical missteps of Defendant's presentation, much like Juror No. 9 did in noting the absence of any facial trauma to Noel after his alleged fall. Moreover, Juror No. 7 did not suggest deficiencies in Defendant's case out of whole cloth: His comments paralleled the questions the State asked Dr. Watts on cross-examination. A jury's recognition and discussion of the strengths and weaknesses of the cases presented at trial is not misconduct. *See Chamberlain,* 112 N.M. at 732, 819 P.2d at 682 ("The jury is not bound by expert opinion."). It is its function. *See id.* at 733, 819 P.2d at 683 ("The jury was required to evaluate these conflicting versions of the truth, and it properly used the evidence before it to perform its duty."); *cf.* Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later,* 80 Colum. L.Rev. 1197, 1237 (1980) ("The

major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny.").

{104} Taking this view, we do not agree with Defendant that Juror No. 7 acted as an unsworn witness, offering unchallenged expert testimony for the jury's consideration. *See McMann,* 435 F.2d at 818 ("The touchstone of decision in a case such as we have here is thus not the mere fact of infiltration of some molecules of extra-record matter, with the supposed consequences that the infiltrator becomes a 'witness' and the confrontation clause automatically applies, but the nature of what has been infiltrated and the probability of prejudice."). Instead, the record supports a conclusion that Juror No. 7 offered no new facts, *see Thacker,* 596 P.2d at 509; that he relied only upon his subjective view of the evidence and no outside authority, *see In re Malone,* 50 Cal.Rptr.2d 281, 911 P.2d at 476, 486; and that he introduced no subject to the deliberations that had not already been fully argued at trial, *see Thacker,* 596 P.2d at 509; *McDonald,* 83 Cal.Rptr.2d at 738.

{105} Similarly, the record supports a conclusion Juror No. 7 committed no misconduct in sharing his opinion and observation by means of a "formal presentation" complete with "calculations" drawn upon a court-provided dry-erase board. *Cf. McMann,* 435 F.2d at 817 ("To resort to the metaphor that the moment a juror passes a fraction of an inch beyond the record evidence he becomes 'an unsworn witness' is to ignore centuries of history and assume an answer rather than to provide the basis for one."). Simply, it is not the medium of his argument that matters; it is its substance.

{106} Juror No. 7's presentation of calculations based upon the evidence at trial was, at most, akin to juror experimentation. As a general matter, while juror experimentation is improper, juror experimentation with evidence is not, per se, misconduct. *See Chamberlain,* 112 N.M. at 732, 819 P.2d at 682 (holding jury experimentation with admitted evidence not to be misconduct despite experimentation expanding upon issues raised at trial); *see generally* Carroll J. Miller, Annotation, *Propriety Of Juror's Tests Or Experiments In Jury Room,* 31 A.L.R.4th 566 (1984). "The salient question is whether the experiment or investigation made by the jury . . . can be said to be within the scope or purview of the evidence introduced at the trial, or whether it amounts to the taking of evidence outside the presence of the parties." *Taylor v. REO Motors, Inc.,* 275 F.2d 699, 705 (10th Cir.1960). Defendant has adduced no evidence corroborating his claim that Juror No. 7 strayed beyond "the scope or purview of the evidence." *Id.*

{107} In short, Juror No. 7 engaged in rigorous scrutiny of trial testimony and articulate juror argument—argument informed by his particular and known professional training and life experience. Juror argument, no matter how persuasive or weighty, is not, in and of itself, misconduct. *See, e.g., Ertsgaard v. Beard,* 310 Or. 486, 800 P.2d 759, 766 (1990) ("In the relatively few cases in which this court has either permitted or required a new trial for juror misconduct that occurred during the deliberating process, we have found none in which the misconduct consisted solely of juror argument."); *cf.* Jay M. Zitter, Annotation, *Impeachment Of Verdict By Juror's Evidence That He Was Coerced Or Intimidated By Fellow Juror,* 39 A.L.R.4th 800, §§ 4, 6(b), 7 (1985) (noting cases where intrajuror intimidation and coercion have been deemed intrinsic to the deliberative process). We therefore conclude, based on all of these considerations, that the allegations of juror misconduct in the present case do not rise to the level of reversible error, as that threshold is suggested by decisions of our Supreme Court. *Compare Chamberlain,* 112 N.M. at 732, 819 P.2d at 682 (determining no misconduct had occurred despite juror experiments that arguably went beyond issues raised at trial) *with Duran,* 99 N.M. at 248, 656 P.2d at 911 (concluding independent extrajudicial experiments conducted by a subset of the jury outside of the jury room "*may* constitute extraneous evidence" (emphasis added)).

{108} We agree with our dissenting colleague that the juror misconduct question

presented turns largely upon a judgment call. The extraneousness of any influence upon a jury's deliberations is inherently a fact-bound question, a question upon which the district court—as having presided over the presentation of all evidence and argument—is ideally situated to rule in the first instance. We conclude on the record presented that the district court did not act contrary to logic and reason in ruling that the jury based its verdict solely upon the evidence adduced at trial and their own, individual consciences. In light of this holding, we need not reach the second prong of the analysis that addresses the possibility of prejudice to the Defendant.

CONCLUSION

{109} The district court did not abuse its discretion in denying Defendant's motion for a new trial. The denial of Defendant's motion for a new trial is affirmed.

{110} **IT IS SO ORDERED.**

WECHSLER, J., concurs.

11 P.3d 589

2000-NMCA-090

STATE of New Mexico,
Plaintiff–Appellee,

v.

Chris PADILLA, Defendant–Appellant.

No. 20,232.

Court of Appeals of New Mexico.

Aug. 9, 2000.

Certiorari Granted, No. 26,540,
Oct. 2, 2000.

Patricia A. Madrid, Attorney General, Patricia Gandert, Assistant Attorney General, Santa Fe, NM, for Appellee.

David Henderson, Santa Fe, NM, for Appellant.

OPINION

ALARID, Judge.

{1} This case requires us to decide whether the Rules of Criminal Procedure for the District Courts authorized the trial court to sever Defendant's trial from that of his co-defendant, and then, after jury selection was completed in the co-defendant's case, to reconsolidate the trials at Defendant's request. As we explain below, this procedure runs afoul of Rule 5-612 NMRA 2000 (1972, as amended through 1974), which prohibits the commencement of a criminal trial in the defendant's absence. Because a defendant's absence at the commencement of his trial is a non-waivable, structural defect, we reverse Defendant's convictions.

BACKGROUND

{2} Defendant, and a co-defendant, Miguel Gallegos, were each indicted on two counts of aggravated battery with a deadly weapon and a single count of concealing identity. Defendant and Gallegos were joined for trial. On the morning of July 6, 1998, Defendant and Gallegos' case and another unrelated case were called for jury selection. Defendant's attorney and the prosecutor were present, but Defendant, Gallegos, and Gallegos' attorney were absent. In response to questioning by the trial court, Defendant's counsel responded that he did not know Defendant's whereabouts and that he had unsuccessfully attempted to locate Defendant by telephone. The trial court issued a bench warrant for Defendant's arrest and cited Gallegos and Gallegos' counsel for contempt.

{3} A panel of prospective jurors was sworn and voir dire commenced in the unrelated case. As voir dire in the unrelated case

was proceeding, counsel for Gallegos appeared. He explained that he had been delayed because he had been waiting for Gallegos to fax him a written waiver of Gallegos' right to be present during jury selection. Counsel explained that he now had the written waiver and tendered it to the court.

{4} The trial court remarked that it had "a real problem with Mr. Padilla [Defendant] not being here and having the other co-defendant not present and going through [jury] questioning." The trial court expressed a preference for waiting until Defendant had been re-arrested and rescheduling "the whole thing together" rather than proceeding with a "de facto severance." The State responded that it preferred to accept a severance and proceed with Gallegos' trial. Counsel for Gallegos responded that he did not see a problem in continuing with jury selection in view of his client's signed waiver of his right to be present during jury selection. The trial court ruled that the parties would proceed with jury selection in Gallegos' case.

{5} Prior to the lunch recess, jury selection was completed in the unrelated case. Following the lunch recess, Defendant briefly appeared in the courtroom without counsel. The trial court addressed Defendant, explaining that the court had issued a bench warrant for Defendant's arrest due to his failure to appear when his case was called that morning. The trial court commented that "this afternoon we can't find your attorney." The trial court told Defendant that it would hold the bench warrant until the following morning and directed Defendant to appear at 8:30 a.m. the next day. The trial court then told Defendant that he was "free to go."

{6} The trial court called Gallegos' case for jury selection. The trial court explained to the jury array that Gallegos had waived his right to be present at jury selection. The trial court then read into the record Gallegos' waiver of his right to be present. The trial court explained the nature of the case to the jury array and reminded them that they were still under oath. The trial court explained that the selection process would be the same as it was in the morning except that it should be quicker because "many of the questions are the same." Jury selection proceeded in Gallegos' case, and by the end of the day a petit jury had been impaneled to try Gallegos.

{7} The next morning, both Defendant and counsel were present in court. The trial court informed Defendant and his counsel that Defendant's and Gallegos' cases had been severed for trial. Defendant's counsel explained that Defendant had been confused by conflicting information as to the date jury selection was to begin and had relied on a scheduling order listing July 7, 1998, as the date jury selection was to begin. Instead of accepting the severance of Defendant's and Gallegos' trials, Defendant's counsel offered to waive Defendant's presence during jury selection in view of his "faith" in the ability of Gallegos' counsel to pick a jury. The trial court cautioned Defendant's counsel that the Defendants' defenses could diverge at trial and that Defendant would then be tried in front of a jury picked by Gallegos' counsel. The trial court directed Defendant's counsel to file a written waiver by 5:00 p.m. that day.

{8} In furtherance of the procedure suggested by Defendant's counsel and adopted by the trial court, Defendant and his counsel signed a document titled "Waiver of Jury Selection Irregularities" containing the following recitals:

> COMES NOW Defendant CHRIS PADILLA and files this Waiver of Jury Irregularities, and in support of said waiver hereby states:
>
> 1) Defendant was not present for jury selection due to his uncertainty about the date of jury selection.
>
> 2) Defendant's counsel appeared initially for jury selection but did not return for completion of jury selection when Defendant failed to appear;
>
> 3) Co-defendant's attorney Mr. Dan Marlowe completed jury selection on behalf of his client;
>
> 4) Defendant Chris Padilla hereby waives his and his counsel's appearance at jury selection and requests to proceed to the evidentiary phase of trial with the jury as selected by co-defendant's counsel. Defendant Chris Padilla also waives any

issue on appeal regarding this irregularity in the selection of the jury in his case.

{9} The case proceeded to trial at which Defendant and Gallegos were each convicted of two counts of aggravated battery. Gallegos was also convicted of one count of concealing identity.

DISCUSSION

{10} At common law "'[i]n felonies, it is not in the province of the prisoner, either by himself or by his counsel, to waive the right to be personally present during the trial.'" *Territory v. Lopez,* 3 N.M. 156, 164, 2 P. 364, 367 (1884) (quoting 1 Bishop on Criminal Procedure § 686 (3d ed.)); *see also Crosby v. United States,* 506 U.S. 255, 259, 113 S.Ct. 748, 122 L.Ed.2d 25 (1993) (collecting authorities). In *Diaz v. United States,* 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500 (1912), the United States Supreme Court noted and applied a limited exception to the requirement that the defendant be present at all stages of trial:

> if, *after the trial has begun* in his presence, [defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

(Emphasis added). The *Diaz* exception is incorporated in Rule 43 of the Federal Rules of Criminal Procedure. *See Crosby,* 506 U.S. at 260–261, 113 S.Ct. 748. Federal Rule 43 provides as follows:

> (a) Presence Required. The defendant shall be present at . . . every stage of the trial including the impaneling of the jury and the return of the verdict . . . except as otherwise provided by this rule.
>
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict . . . will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, *initially present,* . . .
>
> (1) is voluntarily absent *after* the trial has commenced.

(1946, as amended through 1987) (emphasis added).

{11} Federal Rule 43 clearly is the model for the parallel New Mexico rule of criminal procedure in effect at the time of Defendant's trial:

> A. **Presence Required.** The defendant shall be present at . . . every stage of the trial including the impaneling of the jury and the return of the verdict . . . except as otherwise provided by this rule.
>
> B. **Continued Presence Not Required.** The further progress of the trial, including the return of the verdict, shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, *initially present:*
>
> (1) voluntarily absents himself *after* the trial has commenced.

Rule 5–612 (emphasis added).

{12} Although Rule 5–612 and subsequent cases have modified the common law as set out in *Lopez,* see *Hovey v. State,* 104 N.M. 667, 671–72, 726 P.2d 344, 349 (1986) (Walters, J., specially concurring; discussing retreat from "early and intractable" position of *Lopez*), *Lopez* has never been expressly overruled. In particular, no New Mexico case has held that a trial court has the authority *to begin* a criminal trial in the defendant's absence.

{13} The question of whether a trial may begin in the defendant's absence was addressed by the United States Supreme Court in the context of Federal Rule 43 in *Crosby.* *Crosby* involved a defendant facing federal mail fraud charges who fled the night before his trial was scheduled to begin. After unsuccessful efforts to locate the defendant, the trial court proceeded to trial over the objections of the absent defendant's counsel. The absent defendant and two co-defendants who were present were found guilty by the jury. Ultimately, the absent defendant was apprehended and sentenced. On appeal to the Eighth Circuit Court of Appeals, the defendant argued that Federal Rule 43 prohibits the trial in absentia of a defendant who is not

present at the beginning of trial. The Court of Appeals rejected this argument and affirmed. The Supreme Court granted certiorari and reversed.

{14} The Supreme Court emphasized that Federal Rule 43(a) expressly states that the defendant shall be present "except as otherwise provided by this rule." *Crosby,* 506 U.S. at 258–59, 113 S.Ct. 748. Thus, in view of the express language of Subsection (a), the defendant's trial could have proceeded in the defendant's absence only if authorized by Rule 43. However, the exceptions recognized in Subsection (b) could not apply because the defendant had not been "initially present" as required by Subsection (b). The Supreme Court held that "[t]he language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial." *Crosby,* 506 U.S. at 262, 113 S.Ct. 748. The Supreme Court emphasized that its holding was based on the language of Rule 43 and that therefore it was not reaching the issue of whether the same result would be required by the Constitution. *See id.*

{15} Subsequently, the Supreme Court has stated that *Crosby* is an exception to the general principle that the procedural requirements of the Federal Rules of Criminal Procedure are "presumptively waivable." *United States v. Mezzanatto,* 513 U.S. 196, 201, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995). According to the Supreme Court, the presumption of waivability can be overcome where an express waiver clause indicates that the drafters "intended to occupy the field and to preclude waiver under other, unstated circumstances." *Id.* at 201–02, 115 S.Ct. 797. Rule 43 presents a situation where "waiver is not appropriate [because] it is inconsistent with the provision creating the right sought to be secured." *New York v. Hill,* 528 U.S. 110, 116, 120 S.Ct. 659, 664–65, 145 L.Ed.2d 560 (2000) (distinguishing *Crosby*).

{16} We are persuaded by the Supreme Court's analysis of Federal Rule 43. As noted above, Rule 5–612 is closely patterned on Federal Rule 43. New Mexico common law establishing the non-waivability of the defendant's presence appears to be identical with federal common law discussed in *Crosby.* Compare *Lopez,* 3 N.M. at 163–165, 2 P. at 367, *with Crosby,* 506 U.S. at 259, 113 S.Ct. 748.

{17} We recognize that the present case is distinguishable from *Crosby* in that here, Defendant was absent from only a single phase of his trial—jury selection—and that Defendant and his counsel attempted to retroactively waive Rule 5–612's requirements. In contrast, in *Crosby,* the defendant was absent from his entire trial and the trial was conducted over the objections of defense counsel. We find these distinctions immaterial because under Rule 5–612(B), just as under Federal Rule 43, a defendant's presence can be waived only if he was "initially present." As we recently observed, a jury trial commences when jury selection begins. *See State v. Rackley,* 2000–NMCA–027, ¶ 4, 128 N.M. 761, 998 P.2d 1212. Considering that Defendant was not present when his case was called on the morning of July 6, 1998, when the jury array was sworn or during voir dire of the jury that ultimately tried him, he cannot be said to have been "initially present" within the spirit or the letter of Rule 5–612. *See United States v. Stratton,* 649 F.2d 1066, 1081 (5th Cir.1981) (noting that trial court's use of bifurcated trial procedure could not mask realities of trial and that defendant was "for all practical purposes" on trial despite severance; holding that severed defendant was denied his constitutional and Rule 43 right to be present at all stages of his trial); *State v. Crafton,* 72 Wash.App. 98, 863 P.2d 620 (1993) (applying *Crosby* as adopted by Washington Supreme Court in *State v. Hammond,* 121 Wash.2d 787, 854 P.2d 637 (1993); holding that for purposes of rule of criminal procedure allowing trial to continue where defendant has voluntarily absented himself, trial commences when jury panel is sworn for voir dire), *review denied,* 123 Wash.2d 1030, 877 P.2d 695 (1994).

{18} We hold that under these facts, Rule 5–612 did not authorize the trial court to accept a retroactive waiver of Rule 5–612's requirement that Defendant be present at the commencement of his trial. In the ab-

sence of a waiver expressly authorized by Rule 5–612, Defendant's case is governed by the common-law rule that in felony trials the defendant's presence is a mandatory, non-waivable requirement.[1] *See Pelaez v. United States,* 27 F.3d 219, 222 (6th Cir.1994) (Fed. Rule 43 "is the common law rule as modified by *Diaz.*"); *State v. Hunt,* 26 N.M. 160, 166, 189 P. 1111, 1113 (1920) (collecting authorities).

{19} Next, we consider whether Defendant's absence can be excused as harmless error. Generally, harmless error analysis requires this Court to determine whether there is a "reasonable possibility" that the error complained of contributed to the defendant's conviction. *See State v. Trujillo,* 95 N.M. 535, 541, 624 P.2d 44, 50 (1981). This mode of harmless error analysis is applied where the procedural requirement determined to have been violated is thought to contribute to the reliability of the truth-finding process. *See* 3 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 26.6(a) (1984). However, there are other errors that "loosely [may] be described as concerned with the structure of the proceeding." *Id.* at 259. In the case of these structural errors "[N]o evaluation of the bearing of the error on the jury's verdict is necessary. A violation of the substance of the right automatically requires a new trial, and the strength of the evidence supporting the conviction is therefore irrelevant." *Id.* at 259.

{20} n the present case, the specific requirement with which we are concerned is Rule 5–612's requirement that the defendant be initially present at the commencement of his or her trial. In our view, the requirement of the defendant's initial presence at trial is largely symbolic, reflecting our society's traditional distrust of in absentia proceedings. Justice Stevens has suggested that harmless-error analysis is inappropriate where the procedural right determined to have been violated serves "an independent value besides reliability of the outcome." *United States v. Lane,* 474 U.S. 438, 474, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986) (Stevens, J., concurring in part, dissenting in part). The requirement of the defendant's initial presence at trial serves "an independent value besides reliability of the outcome" and is akin to a structural defect. We therefore hold that a non-*de minimis* violation of Rule 5–612's requirement that the defendant be initially present constitutes reversible error without regard to whether the defendant's absence actually contributed to an unfavorable verdict.

{21} Defendant's convictions are reversed and this case is remanded for a new trial.

{22} **IT IS SO ORDERED.**

KENNEDY, Judge, concurs.

PICKARD, Chief Judge (Dissenting).

{23} I cannot agree with the majority's holding that a defendant can never waive the right to be present at the commencement of the trial, no matter what the circumstances. Under the particular circumstances of this case, it seems to me that a clear, knowing, and unequivocal waiver was made, and I would hold Defendant to it, at least on direct appeal. In addition to the issue upon which the majority reverses, Defendant raised a host of other related contentions, including ineffective assistance of counsel, that I believe are more appropriately resolved in habeas corpus proceedings. *See Duncan v. Kerby,* 115 N.M. 344, 346, 851 P.2d 466, 468 (1993). I would therefore affirm the convictions and leave Defendant to his post-conviction remedies.

{24} I have no quarrel with the majority's statement of the general rule concerning the presence of a defendant or with the majority's and other cited cases' application of that rule to defendants who were erroneously held by trial courts to have impliedly

1. We part company with the dissent on this point. In our view, the issue is not whether the requirement of the defendant's initial presence ought to be subject to waiver like many other trial rights; but rather, whether, given the language of Rule 5–612 and our common-law heritage of treating the defendant's presence as non-waivable, our Supreme Court has in fact authorized such waivers.

waived a right to presence by what appears to be simple absence. *See, e.g., Crosby v. United States,* 506 U.S. 255, 256–57, 113 S.Ct. 748, 122 L.Ed.2d 25 (1993) (reciting that Crosby was found to have voluntarily absented himself because he had notice of the trial date, had appeared for pretrial hearings, and was seen packing and leaving his house on the night before the trial). Nor do I quarrel with Defendant's cited authority, *State v. Harris,* 229 Wis.2d 832, 601 N.W.2d 682, 685 (1999), in which the trial court sought a defendant's waiver after telling him, erroneously, that nothing other than ministerial excusals occurred during his absence from the voir dire.

{25} The foregoing circumstances, however, are quite different from the circumstances in this case, circumstances which I believe support a holding that Defendant both waived his rights in connection with jury selection and affirmatively led the trial court into the error he is now claiming the trial court made. *See State v. Arellano,* 1998–NMSC–026, ¶¶ 14–20, 125 N.M. 709, 965 P.2d 293 (holding that a defendant can waive his right to a sworn jury by knowing that the jury is unsworn and waiting until after the trial to complain about it); *Cuoco v. United States,* 208 F.3d 27, 30–32 (2d Cir. 2000) (holding, in context of ineffective assistance of counsel claim, that federal court would not have reversed a defendant's conviction when that defendant made a clear and unequivocal waiver of his right to be present during his trial on the record during a pretrial hearing, and before the jury was summoned into the courtroom; further holding that *Crosby* did not require a different result).

{26} The circumstances of this case are not like those in *Crosby* or *Harris,* but are more like those in *Arellano* and *Cuoco.* In this case, as the majority notes, the trial court had severed Defendant's trial from that of his co-defendant and was prepared to go forward with the trial of the co-defendant only. It was only upon Defendant's specific request to waive his presence that the trial court changed its mind. Further, the trial court did not change its mind quickly. It needed to be persuaded by Defendant's counsel, after cautioning him on the record in Defendant's presence that the co-defendant's jury selection might not be advantageous to Defendant. In addition, the trial court required a written waiver to be filed by Defendant himself. Finally, the waiver was hardly perfunctory. It recited the irregularities in the jury selection process and expressly recited that Defendant not only waived those irregularities but also waived any issue on appeal based on them.

{27} Our jurisprudence is replete with cases permitting fundamental constitutional rights to be waived. *See, e.g., State v. Aragon,* 1999–NMCA–060, ¶ 11, 127 N.M. 393, 981 P.2d 1211. Even the right to counsel, the denial of which would otherwise amount to a structural defect, can be waived, as long as a defendant " 'knows what he is doing and his choice is made with eyes open.' " *State v. Lewis,* 104 N.M. 218, 220, 719 P.2d 445, 447 (Ct.App.1986) (quoting *Faretta v. California,* 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *see also State v. Rodriguez,* 114 N.M. 265, 268, 837 P.2d 459, 462 (Ct.App. 1992) (holding that deprivation of right to counsel may amount to structural defect).

{28} Under the circumstances of this case, it appears to me that Defendant and his attorney made a conscious and informed decision to try the case to a particular jury at a particular time. We need not speculate about whether they liked the particular jury or liked the circumstances of being tried together with a co-defendant. The important point is that we should not allow Defendant to have a second bite of the apple, at least not without making a factual showing that the record we have does not accurately reflect the knowing, tactical decision that it appears to reflect. Accordingly, I would affirm the convictions on this direct appeal and leave Defendant to his post-conviction remedies.

11 P.3d 596
2000-NMCA-092

Kathryn ACOSTA, Plaintiff–Appellant,

v.

The CITY OF SANTA FE, Defendant,

and

Wirtco, Inc., Defendant–Appellee.

No. 20,332.

Court of Appeals of New Mexico.

Aug. 18, 2000.

Certiorari Denied, No. 26,558,
Oct. 11, 2000.

Paul Mannick, Coppler & Mannick, P.C., Santa Fe, NM, for Appellant.

Scott Hatcher, Kristin Mckeever, Hatcher, Sullivan & Grand, P.A., Santa Fe, NM, for Appellee.

OPINION

PICKARD, Chief Judge.

{1} Kathryn Acosta (Pedestrian) appeals the trial court's decision to dismiss her "trip and fall" tort claims against Wirtco, Inc. (the Store). Pedestrian sued the Store and the City of Santa Fe for damages after she tripped and broke her elbow on a public sidewalk abutting the Store's property. Pedestrian's complaint against the City is typical—she requested damages from the City because it owns the sidewalk upon which she tripped. However, Pedestrian's complaint against the Store raises an issue of first impression because she alleges, among other things, that the Store is liable for her damages on the ground that it violated city ordinances requiring it to keep the sidewalk in a safe condition. Pedestrian recovered from the City; however, she was denied the opportunity to recover from the Store because the trial court dismissed her claims against the Store.

{2} On appeal, Pedestrian claims the trial court erred when it dismissed her tort claims against the Store. Pedestrian raises three issues: (1) whether the Store incurred tort liability on the ground that it allegedly failed to inspect, maintain, and repair the public sidewalk abutting its property, as required by a city ordinance; (2) whether the Store incurred tort liability on the ground that it allegedly exercised control over the public sidewalk upon which Pedestrian tripped; and (3) whether the Store incurred tort liability on the ground that it allegedly created or helped create the hazard posed by the uneven section of the public sidewalk abutting its property. For the reasons stated in this opinion, we affirm.

BACKGROUND

{3} Pedestrian was walking on a public sidewalk in front of a building owned by the Store, when she tripped and fell. The section of the sidewalk that she tripped upon was cracked, uplifted, and uneven. Pedestrian broke her elbow and suffered other injuries as a result of her fall. Pedestrian believed that both the Store and the City were responsible for her accident, so she sued them for damages.

{4} Pedestrian sued the City because it owns the sidewalk upon which she tripped. Pedestrian also sued the Store even though it does not own the public sidewalk. She

sought to impose tort liability upon the Store pursuant to a negligence per se theory and two common law theories (control and creation of a danger) that impose off-premises tort liability upon property owners when certain conditions are satisfied. Pedestrian's suit against the City is not at issue in this appeal, so we limit our discussion to the Store's alleged liability. Before addressing the legal issues presented by this appeal, we first set forth the procedural background underlying Pedestrian's claims.

A. *Ordinance*

{5} Pedestrian first claimed that the Store was liable because it violated Santa Fe City Code Ordinances. Ordinance 14–93.8 provides:

> **14–93.8 Maintenance of Public Parkways.** Maintenance of the public parkway, including the utility corridor and the sidewalk, shall be the responsibility of the person owning or in charge or control of any lot or property contiguous to the parkway exclusive of controlled access arterials. Maintenance shall be for the purpose of elimination of public nuisances and for insuring pedestrian and vehicular safety and visibility, and shall include, but not be limited to, weed eradication and trimming of trees and shrubs.

Ordinance 23–1.6 provides:

> A. No person owning or in charge or control of any lot or property within the city shall permit any footway or sidewalk contiguous thereto or running along the street line thereof to be out-of-repair, loose or broken or to be unsafe to pedestrians.
>
> B. The person owning or in charge or control of any lot or property within the city where there exists a footway or sidewalk contiguous thereto or running along the street line thereof which is out-of-repair, loose or broken or is unsafe to pedestrians, shall immediately notify the public works department of the city of the aforesaid need for repair of the sidewalk and when the repairs shall be promptly completed. In the event the person owning or in charge or control of any lot or property within the city where a sidewalk repair is necessary fails to immediately notify the city of the need for repair of the sidewalk and to repair the same in accord with this paragraph, then the governing body shall require the person owning or in charge or control of any lot property within the city to make such repairs as are deemed necessary to repair the sidewalk, as provided in subsection 23–1.7 SFCC 1987.

{6} Pedestrian asserted that Ordinance 23–1.6 imposes an affirmative duty upon abutting property owners like the Store to inspect, maintain, and repair public sidewalks. She then argued that the Store's alleged failure to fulfill these affirmative duties rendered the Store negligent per se.

{7} The Store filed a motion for summary judgment on this claim, which the trial court denied. The Store subsequently moved the trial court to reconsider its decision. In support for its motion, the Store contended that Ordinance 23–1.6 does not establish a duty to pedestrians, but rather operates for the benefit of the City. The Store claimed that another city ordinance, Santa Fe City Code Ordinance 23–1.7, establishes the limited circumstances under which an abutting property owner can be held liable for injuries sustained by pedestrians. This ordinance states in relevant part:

> If, within twenty (20) days of the receipt of the final order, the owner of the tract or parcel of land which is contiguous to the sidewalk fails to repair, improve or reconstruct the sidewalk as required in the notice, the owner of the tract or parcel of land contiguous to the sidewalk is liable for any injury received by any person which injury is proximately caused by the negligence of such owner pertaining to such faulty repair, construction or maintenance of the sidewalk, and the municipality is not liable.

{8} The Store asserted that Ordinance 23–1.7 sets forth certain due process requirements that must be satisfied before the City can impose tort liability upon an abutting property owner. The Store argued that it was therefore entitled to summary judgment because it was undisputed at trial that the due process requirements had not been fulfilled.

{9} Upon reconsideration, the trial court determined that the Store could not be held liable for pedestrian injuries unless the notice procedures set forth in Ordinance 23–1.7 had been followed. Pedestrian did not contend that the notice procedures had been satisfied, so the trial court granted the Store's motion for summary judgment.

B. *Control*

{10} Pedestrian next claimed that the Store was liable for her damages under our common law because it exercised control over the sidewalk. Pedestrian asserted that in addition to pulling weeds and clearing ice and snow on the sidewalk, the Store once removed a section of the public sidewalk in order to repair a leaking water pipe without asking for or receiving the City's permission. According to Pedestrian, the Store's actions demonstrated its control and authority over the sidewalk. Pedestrian argued that the Store's assumption of control over the sidewalk made it liable for her damages because it permitted the dangerous condition on the sidewalk to persist.

{11} The Store filed a motion for summary judgment on this claim. The Store contended that pulling weeds and clearing ice and snow did not exhibit an exercise of control because it was obligated to do those things by the city ordinances. The Store further contended that the single act of removing another section of the sidewalk for the limited purpose of repairing a water pipe did not amount to an exercise of control for purposes of tort liability.

{12} The trial court initially denied the Store's motion for summary judgment. However, upon reconsideration, the trial court determined that the Store's actions simply did not demonstrate control sufficient to create a duty to inspect, maintain, and repair the sidewalk for purposes of tort liability. The trial court then granted the Store's motion for summary judgment.

C. *Danger*

{13} Pedestrian ultimately claimed that the Store was liable for her damages under our common law because it created or helped create the discrepancy in the public sidewalk on which she tripped. In support of her claim, Pedestrian asserted that the Store had experienced a substantial water leak in one of its underground water pipes prior to the occurrence of her accident. She argued that the water leak caused a section of the sidewalk to settle, leaving the sidewalk uneven, and that the sidewalk's unevenness was a danger to pedestrians.

{14} The Store moved for a directed verdict on this claim at the close of Pedestrian's case in chief. The Store argued that Pedestrian had failed to present evidence that would create a reasonable inference that the Store's water leak had contributed in any way to the discrepancy in the section of the public sidewalk upon which she tripped. The trial court agreed with the Store and granted its motion for a directed verdict.

DISCUSSION

I. ORDINANCE

{15} The first issue we address is whether the Store incurred tort liability by allegedly violating Ordinance 23–1.6 (the ordinance). Ordinance 14–93.8 appears to be a general ordinance applying to public parkways, and not the specific ordinance applying to sidewalks. We therefore do not think that this ordinance applies to the Store. In order to prevail on her negligence per se theory, Pedestrian must prove that (1) the ordinance prescribes a standard of conduct, (2) the Store violated the ordinance, (3) she is in the class of persons sought to be protected by the ordinance, and (4) the harm or injury she sustained is generally of the type sought to be prevented by the ordinance. *See Archibeque v. Homrich,* 88 N.M. 527, 532, 543 P.2d 820, 825 (1975); *Roderick v. Lake,* 108 N.M. 696, 698, 778 P.2d 443, 445 (Ct.App.1989).

A. *Standard of Review*

{16} This issue presents a question of law because we must interpret the ordinance in order to determine if a legal duty exists. *See High Ridge Hinkle Joint Venture v. City of Albuquerque,* 1998–NMSC–050, ¶ 4, 126 N.M. 413, 970 P.2d 599 (ruling that the interpretation of an ordinance presents a question of law); *Davis v. Board of County Comm'rs,* 1999–NMCA–

110, ¶ 11, 127 N.M. 785, 987 P.2d 1172 (ruling that the existence of a legal duty is a question of law). We review questions of law de novo, and thereby give no deference to the trial court's decision. *See State v. Munoz,* 1998-NMCA-140, ¶ 12, 125 N.M. 765, 965 P.2d 349.

B. *Rules of Construction*

{17} In construing the ordinance, we must employ the same rules of construction that we use when construing statutes. *See Continental Oil Co. v. City of Santa Fe,* 25 N.M. 94, 101, 177 P. 742, 745 (1918). There are three rules of construction that will help us resolve this case on appeal. First, we must interpret the ordinance to mean what the City intended it to mean and to accomplish the ends sought to be accomplished. *See State ex rel. Sanchez v. Reese,* 79 N.M. 624, 625, 447 P.2d 504, 505 (1968). Second, we must read the entire ordinance and construe each part in connection with every other part in order to achieve a harmonious whole. *See Trujillo v. Romero,* 82 N.M. 301, 305, 481 P.2d 89, 93 (1971). And finally, we must not read into the ordinance language that is not there, especially if the ordinance makes sense as written. *See State ex rel. Barela v. New Mexico State Bd. of Educ.,* 80 N.M. 220, 222, 453 P.2d 583, 585 (1969). With these rules of construction in mind, we now address the question presented.

C. *Duty*

{18} Pedestrian claims that Ordinance 23-1.6 imposes an affirmative duty upon the Store to inspect, maintain, and repair the public sidewalk abutting its property. She then argues that the Store failed to fulfill its affirmative duties under Ordinance 23-1.6 and that its failure constitutes negligence per se. The Store contends, and we agree, that Pedestrian's argument is flawed because the duties imposed upon property owners by Ordinance 23-1.6 run in favor of the City; the duties so imposed do not run in favor of pedestrians.

{19} We acknowledge that Ordinance 23-1.6 requires property owners to keep public sidewalks abutting their property in a condition that is safe for use by pedestrians. *See* Ordinance 23-1.6(A). Critically, the ordinance also sets forth the limited consequence property owners face when they violate what the ordinance dictates. The ordinance provides in relevant part:

> In the event the person owning or in charge or control of any lot or property within the city where a sidewalk repair is necessary fails to immediately notify the city of the need for repair of the sidewalk and to repair the same in accord with this paragraph, then the governing body shall require the person owning or in charge or control of any lot property within the city to make such repairs as are deemed necessary to repair the sidewalk, as provided in subsection 23-1.7 SFCC 1987.

Ordinance 23-1.6(B).

{20} The consequence property owners face is to be responsible for the repairs to public sidewalks in need of repair. By limiting property owners' liability to repairs, we conclude that the City enacted Ordinance 23-1.6 for the primary benefit of the City. *See Reese,* 79 N.M. at 625, 447 P.2d at 505 (ruling that we must interpret the ordinance to mean what the City intended it to mean); *New Mexico State Bd. of Educ.,* 80 N.M. at 222, 453 P.2d at 585 (ruling that we must not read into the ordinance language that is not there, especially if the ordinance makes sense as written). Thus, the duties imposed by the ordinance are to the City, and not to pedestrians. We therefore hold that the Store did not incur tort liability even if it did violate Ordinance 23-1.6. *See Roderick,* 108 N.M. at 698, 778 P.2d at 445 (setting forth the requirements for negligence per se).

{21} We note that the rule we have announced today is the overwhelming majority rule. *See Carroll v. Jobe,* 638 N.E.2d 467, 470 (Ind.Ct.App.1994). In *Carroll,* the court considered whether a city ordinance that places responsibility for the maintenance of public sidewalks on the abutting landowners also creates a duty imposing liability for any pedestrians injured on the sidewalk. *See id.* at 468. The city ordinance the court had to interpret, an ordinance substantially equivalent to Ordinance 23-1.6, states in relevant part:

(A) The responsibility for care, maintenance, and repairs of sidewalks located within the city is hereby deemed that of landowners abutting any sidewalk.

(B) Landowners whose land abuts any sidewalk shall keep the sidewalk in reasonably safe condition, and shall maintain and repair the sidewalk at their own expense as and when needed, and also within 30 days after being notified by the Board of Public Works and Safety that the sidewalk is in need of repairs.

Id.

{22} The *Carroll* court answered the question presented in the negative, concluding that by enacting the ordinance the city intended to impose a duty upon the landowner in favor of the city, but not upon the landowner in favor of pedestrians. *See id.* at 469–70. The court reasoned that the city has the primary responsibility for maintaining public sidewalks, and that the ordinance was designed to assist the city in discharging its responsibility. *See id.* The ordinance was intended to benefit the city, and not pedestrians, and so the court dismissed the plaintiff's negligence per se claim. *See id.* In the absence of an express mandate from the legislature imposing tort liability, the court concluded that a statute requiring an abutting property owner to maintain a public sidewalk does not create a duty to pedestrians. *See id.* at 470.

{23} In support of its statement that the foregoing represented the majority rule, the court cited an A.L.R. annotation, the pertinent sections of both major legal encyclopedias, and cases from ten jurisdictions. *See id.* In contrast, three jurisdictions were cited for having an opposite rule, but only one of them actually ruled on the issue presented for us today. *See id.*

{24} In our view, the *Carroll* court correctly interpreted the city ordinance presented for its review, and its reasoning is persuasive. We agree with *Carroll* that city ordinances like Ordinance 23–1.6 do not impose any duties upon property owners for the primary benefit of pedestrians; these ordinances impose duties upon property owners for the primary benefit of discharging a city's municipal responsibilities. The Store is therefore not liable for Pedestrian's damages even if it did violate Ordinance 23–1.6.

II. CONTROL

{25} The second issue we address is whether the Store incurred tort liability on the ground that it allegedly exercised control over the public sidewalk upon which Pedestrian tripped. Under our common law, a property owner's tort liability does not always end at the property line. *See Monett v. Doña Ana County Sheriff's Posse,* 114 N.M. 452, 458, 840 P.2d 599, 605 (Ct.App.1992) ("[T]he duty to avoid creating or permitting an unsafe condition to exist on the premises is not limited by the physical boundaries of the land."). Instead, a property owner may incur off-premises tort liability if the owner exercised control of the area upon which a tort took place or was committed. *Cf. Stetz v. Skaggs Drug Ctrs., Inc.,* 114 N.M. 465, 468, 840 P.2d 612, 615 (Ct.App. 1992) (suggesting that a property owner may be held liable for torts committed on a public sidewalk if the owner exercises control over that area).

{26} At trial, Pedestrian claimed that the Store exercised control over the public sidewalk abutting its property. In support of her claim, Pedestrian pointed out that the Store cut weeds, cleared snow and ice, and on one occasion removed a section of the public sidewalk in order to repair a leaking underground water pipe without asking for or receiving the City's permission. Pedestrian argued that the Store's purported assumption of control over the public sidewalk made it liable in tort for her damages because it negligently permitted the dangerous condition on the public sidewalk to persist.

{27} The Store filed a motion for summary judgment on this claim, contending that it was simply complying with city ordinances when it pulled weeds and cleared ice and snow from the sidewalk. It further contended that the single act of removing a section of the sidewalk for the purpose of repairing a water pipe did not rise to the level of control contemplated by our common law before a property owner is held liable for off-premises torts. The trial court agreed

with the Store, as do we, and granted the Store's motion for summary judgment. *See id.* at 467, 840 P.2d at 614 (holding that defendant had no duty through its ownership or lease obligations).

{28} In *Stetz,* we considered whether a lessee was liable for faulty repairs on off-premises mall property near the lessee's entrance. Notwithstanding the fact that the lessee was authorized to make repairs under certain limited circumstances, we determined that the lessee did not exercise sufficient control over the property near its entrance to impose tort liability. In fact, we stated that "the lease provision, giving [the lessee] a limited right to make repairs under certain well-defined circumstances" acted as a limitation on the imposition of tort liability. *Id.* at 468, 840 P.2d at 615.

{29} In our view, as in *Stetz,* the ordinance requiring the Store to make repairs to the public sidewalk abutting its property under certain well-defined circumstances does not operate to transfer control of the sidewalk from the City to the Store. The Store, like the lessee in the *Stetz* case, was not at liberty to alter, destroy, or otherwise transform the sidewalk. Nor does the Store's single act of removing a section of the sidewalk to make repairs to a leaking underground water pipe establish its control over the public sidewalk sufficient to impose liability for any injuries, however caused. As we stated in *Stetz,* "[e]xtending a duty beyond the owner or possessor's premises for hazards not on the premises or arising on or from the premises makes the existence of duty entirely unpredictable." *Id.* at 468–69, 840 P.2d at 615–16. For the foregoing reasons, we hold that the trial court did not err when it granted the Store's motion for summary judgment. *See Gardner–Zemke Co.,* 109 N.M. at 732, 790 P.2d at 1013 (stating when it is appropriate to award summary judgment).

III. DANGER

{30} The last issue we address is whether the Store incurred tort liability on the ground that it allegedly created or helped create the hazard posed by the uneven section of the public sidewalk abutting its property. A property owner may incur off-premises tort liability if the owner has created a hazard on a public sidewalk that causes a tort. *See* UJI 13–1316 NMRA 2000 ("The [owner] [occupant] of property abutting a public sidewalk is under a duty to exercise ordinary care not to create an unsafe condition which would interfere with the customary and regular use of the sidewalk."); *Stetz,* 114 N.M. at 468, 840 P.2d at 615 (suggesting that a property owner may be held liable for torts committed on a public access way if the property owner actually created the hazard resulting in the tort).

{31} At trial, Pedestrian claimed that the Store was liable for her injuries because it created the discrepancy upon which she tripped. In support of her claim, Pedestrian averred that prior to her accident, there was a substantial water leak in one of the Store's underground water pipes. She argued that the water leak, which was approximately thirteen feet from the crack where she tripped, created or helped create the public sidewalk's unevenness. The trial court directed a verdict in favor of the Store on this claim on the ground that Pedestrian failed to present evidence that would create a reasonable inference that the Store's water leak contributed to the sidewalk's discrepancy.

{32} In our view, the trial court properly dismissed this claim. Pedestrian attempted to establish a causal link between the Store's water leak and the sidewalk discrepancy through the testimony of a city engineer. However, the city engineer was unable to establish such a relationship. The city engineer testified in relevant part:

> Q: Mr. Ortiz [the city engineer], what information would help you determine what are the factors that would go into a determination that a water leak contributed to the settling of a slab; what are the factors that would be involved in a case like that?
>
> A: One key factor, is there a void underneath some of the slab? In a situation like this, we don't know that. There wasn't any core sampling. There wasn't any core sampling through there. We don't know.

{33} Pedestrian was thus unable to establish that water, much less water leaked by

the Store's water pipe, had created or contributed to the discrepancy in the public sidewalk upon which she tripped. Accordingly, we hold that the trial court did not err when it directed a verdict in the Store's favor on this claim. *See Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 729, 749 P.2d 1105, 1108 (1988) (ruling that if the evidence fails to present or support an issue essential to the legal sufficiency of a legally recognized and enforceable claim, the moving party is entitled to a directed verdict).

CONCLUSION

{34} For the reasons stated, we affirm.

{35} **IT IS SO ORDERED.**

WECHSLER and SUTIN, JJ., concur.

11 P.3d 603

2000-NMCA-091

Arlene REED, Plaintiff–Appellant/Cross–Appellee,

v.

FURR'S SUPERMARKETS, INC., Defendant–Appellee/Cross–Appellant.

No. 19,993.

Court of Appeals of New Mexico.

Aug. 22, 2000.

Certiorari denied, No. 26,562, Oct. 11, 2000.

Alexander A. Wold, Jr., Wold & Hart, P.A., Albuquerque, NM for Appellant/Cross–Appellee.

Josh A. Harris, Beall & Biehler, P.A., Albuquerque, NM, for Appellee/Cross–Appellant.

WECHSLER, Judge.

OPINION

{1} Plaintiff Arlene Reed appeals the district court's order dismissing her lawsuit against Furr's Supermarkets, Inc. (FSI), with prejudice. The district court dismissed Plaintiff's lawsuit as a sanction for discovery violations. FSI cross-appeals the district court's order denying FSI its costs. We affirm.

Facts

{2} Plaintiff filed her complaint against FSI on April 2, 1996. In her complaint, Plaintiff alleged that she fell and sustained injuries while shopping at a Furr's supermarket in Albuquerque. FSI answered the complaint and the parties thereafter began the discovery phase of the lawsuit.

{3} FSI made several requests to depose Plaintiff, beginning February 18, 1997. FSI also sought answers to interrogatories. FSI's attempts to take the deposition were thwarted by Plaintiff's claims that she was unable to withstand the physical and emotional demands of a deposition. After several attempts to obtain answers to interrogatories and releases for Plaintiff's medical and other records and to make arrangements to take Plaintiff's deposition, FSI filed a motion to compel Plaintiff to produce documents and answer interrogatories. The district court held a hearing on the motion and entered an order compelling Plaintiff to comply with certain portions of FSI's discovery requests.

{4} FSI ultimately deposed Plaintiff and received applicable documents. It then moved the district court to dismiss Plaintiff's lawsuit as a sanction for her failure to comply with discovery. FSI alleged that Plaintiff had withheld information from FSI and had misrepresented the nature of her preexisting medical conditions. FSI specifically alleged that Plaintiff had misrepresented her past medical conditions by denying that she (1) kept a pain diary; (2) experienced daily headaches; (3) had prior incidents of fatigue; (4) was diagnosed with psychological disorders; (5) suffered from extreme stress; (6) suffered from lower back pain; (7) suffered from chronic illnesses and pain; (8) suffered from extreme anxiety; (9) had a history of fevers; (10) experienced pelvic and abdominal pain, heart palpitations, and dizziness; and (11) had difficulty walking and climbing stairs. FSI also alleged that Plaintiff misrepresented portions of her employment history; namely, that she denied having had employment privileges taken away.

{5} In response, Plaintiff filed an affidavit which stated her explanations for the apparent discrepancies between the answers she gave in her depositions and interrogatories and the information revealed in her medical and employment records. In her affidavit, Plaintiff explained that any differences between her answers and the information in her medical records and employment history were due to the fact that she interpreted the meaning of the questions more narrowly than FSI had expected. In general, Plaintiff's affidavit provided detailed explanations as to each allegation in FSI's motion. She explained, for instance, that when she was asked about a pain diary, she thought that her simple notes on paper did not qualify as a diary. Another example of the type of explanations Plaintiff submitted was that she interpreted the questions about past pelvic pain to exclude pelvic pain arising from "female problems."

{6} The district court held a hearing on FSI's motion to dismiss at which both FSI and Plaintiff presented arguments to the court. The district court granted the motion to dismiss, stating:

> I think what there's been here is an intentional pattern of deception with respect to past medical history. I don't think any one item standing alone would do it, but we have item after item after item, and then, in addition to that, there's a ten-page affidavit that gets quite specific as to times [and] dates . . . which explains or tries to explain away all of the previous misrepresentations.
>
> I just think that the whole process goes right to the integrity of the function of a trial court. If we can't have honesty in discovery, then we're not going to have an honest result. I'm going to grant the motion, with prejudice[,] for abuse of the discovery process.

Propriety of Dismissal

Sanctions for False Answers to Interrogatories or Deposition Questions

{7} Rule 1–037(D) NMRA 2000 authorizes the district court to impose sanctions upon a party for failure to attend a deposition or to answer interrogatories. The type of sanctions available to the district court are authorized by Rule 1–037(B)(2). Dismissal is among the sanctions available. *See id.* This

Court has previously held that false answers to interrogatories were equivalent to, if not worse than, failing to answer at all. *See Sandoval v. Martinez,* 109 N.M. 5, 8, 780 P.2d 1152, 1155 (Ct.App.1989). As a result, dismissal can be an appropriate sanction for false answers to interrogatories under Rule 1–037(D). *See Sandoval,* 109 N.M. at 11–12, 780 P.2d at 1158–59.

{8} Although we have held that false answers to interrogatories warrant the sanction of dismissal in appropriate circumstances, this Court has not specifically held that false answers to deposition questions may be subject to sanctions under Rule 1–037(D). *See Bustillos v. Construction Contracting,* 116 N.M. 673, 676–77, 866 P.2d 401, 404–05 (Ct.App.1993) ("[W]e leave to another day the issue of whether [dismissal as a sanction] applies to a false answer to a deposition question."). The premise for allowing the district courts to impose sanctions for false answers during depositions would follow the rationale allowing sanctions for false answers to interrogatories; that is, a false answer in a deposition is akin to a "[f]ailure . . . to attend [a] . . . deposition." Rule 1–037(D); *see also Sandoval,* 109 N.M. at 8, 780 P.2d at 1155 (a false answer to an interrogatory "is *worse* than no response"). Both forms of discovery abuse undermine the discovery process and demonstrate either "a willful, intentional and bad faith attempt to conceal evidence or [a] gross indifference to discovery obligations." *Medina v. Foundation Reserve Ins. Co.,* 117 N.M. 163, 166, 870 P.2d 125, 128 (1994). Thus, for the purpose of sanctions under Rule 1–037(D), we do not see any reason to distinguish false answers to deposition questions from false answers to interrogatories. *See Sandoval,* 109 N.M. at 9, 780 P.2d at 1156 ("District courts have a *duty* to enforce compliance with rules of discovery, and they should not shirk from imposition of the sanction of dismissal."). We will not analyze the answers to the deposition questions in this case differently from the answers to the interrogatories.

Standard for Dismissal

{9} Dismissal is an appropriate sanction for false answers during discovery when a party's misrepresentations are made willfully or in bad faith. *See Medina,* 117 N.M. at 166, 870 P.2d at 128. "A willful violation of [Rule] 1–037 occurs when there is a conscious or intentional failure to comply with the rule's requirements." *Id.* "When a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants." *United Nuclear Corp. v. General Atomic Co.,* 96 N.M. 155, 241, 629 P.2d 231, 317 (1980).

{10} We review a district court's dismissal of a plaintiff's case for discovery violations for abuse of discretion. *See Medina,* 117 N.M. at 166, 870 P.2d at 128; *see also United Nuclear Corp.,* 96 N.M. at 239, 629 P.2d at 315 (reviewing propriety of a default judgment against the defendant for discovery abuse). Dismissal is a severe sanction, but the district court is justified in imposing the sanction and does not abuse its discretion "when a party demonstrates flagrant bad faith and callous disregard for its [discovery] responsibilities." *Medina,* 117 N.M. at 166, 870 P.2d at 128. Furthermore, despite the severity of dismissal as a sanction, the district court is "not required to impose lesser sanctions before it imposes the sanction of dismissal." *Id.*

District Court's Application of the Standard in this Case

{11} FSI sought Plaintiff's answers to interrogatories and attendance at depositions on many occasions. Plaintiff continually rebuffed FSI's efforts. FSI then sought the district court's assistance in gaining Plaintiff's participation in the discovery process by filing a motion to compel. The district court granted the motion in part. FSI then sought dismissal after a comparison between Plaintiff's answers to deposition questions and interrogatories and her medical and employment records revealed discrepancies. FSI explained these discrepancies to the district court in its motion to dismiss. Plaintiff attempted to explain her discovery answers in the affidavit she submitted to the court.

{12} The district court was not persuaded by the explanations in Plaintiff's affidavit. Plaintiff's explanations did no more than describe her understanding of the questions and present her rationale for the inconsistencies between her answers and the information provided in her medical records. Her misperception of the depth of the questions was inadequate to refute FSI's allegations that she misrepresented her health and employment history.

{13} The design of the discovery process is to avoid surprise in trial preparation and promote the opposing party's ability to "obtain the evidence necessary to evaluate and resolve [the] dispute." 6 James Wm. Moore, *Moore's Federal Practice* § 26.02, at 26–25 (Daniel R. Coquillette et al. eds., 3d ed.1997). By continually shading her answers to discovery requests to mask her previous medical conditions, Plaintiff's deception undermined the discovery process.

{14} Plaintiff's discovery abuse, moreover, was not a situation of isolated instances of vague and unresponsive answers to a discovery request. Rather, Plaintiff repeatedly misrepresented her past medical history, demonstrating her "intentional failure to comply with the ... requirements [of Rule 1–037]." *Medina,* 117 N.M. at 166, 870 P.2d at 128. This type of behavior indicates a pattern of providing false and misleading answers and establishes willfulness and bad faith and opens the door to the sanction of dismissal. *See id.; see also* 8A Charles Alan Wright et al., *Federal Practice and Procedure* § 2281, at 595 (2d ed. 1994) ("[A]ny party or person who seeks to evade or thwart full and candid discovery incurs the risk of serious consequences."). As a result, the district court did not abuse its discretion in dismissing Plaintiff's case because Plaintiff willfully abused the discovery process. *See Medina,* 117 N.M. at 166, 870 P.2d at 128.

Plaintiff's Arguments

District Court as Fact Finder

{15} Plaintiff argues that the district court abused its discretion because it improperly sat as a fact finder at the hearing on FSI's motion to dismiss. Plaintiff essentially advances two arguments in this regard. First, Plaintiff challenges the district court's authority to decide facts that might be an issue at trial while the court is deciding whether Plaintiff abused the discovery process. Second, Plaintiff argues that the district court improperly determined her credibility and that only a jury should have been assigned that role.

1. *Plaintiff's Misrepresentations and Their Relationship to Facts at Trial*

{16} In making these arguments, Plaintiff attempts to distinguish the ultimate importance of the type of information she misrepresented. Plaintiff contends that her veracity concerning her medical history was a contested issue of fact to be disposed of at trial. She relies on *Bustillos,* in which we stated that "ordinarily the trial is the proper forum to determine whether a party has lied on the merits." *Bustillos,* 116 N.M. at 676, 866 P.2d at 404.

{17} Plaintiff's argument seems to rest on an apparent distinction in *Bustillos* between the type of information a party misrepresents and the appropriate sanction for such misrepresentation. In *Bustillos,* while applying this Court's holding in *Sandoval,* we distinguished between information that would be an issue at trial and information that would simply lead to additional avenues of discovery. *See Bustillos,* 116 N.M. at 677, 866 P.2d at 405. We explained that in a workers' compensation case, the worker's physical capacity would be an issue at trial, while his employment history would not. *See id.* On this basis, we held that the sanction of dismissal for false answers to interrogatories about physical capacity would not be appropriate, even though the same sanction for false answers to interrogatories about the worker's employment history could be justified.

{18} In *Bustillos,* we reasoned that the worker's answers to questions concerning his physical capacity did not inhibit the employer's ability to continue its discovery and its preparation for trial because the answers merely informed the employer of the worker's contentions on a matter "central to the merits of his case." *Id.* We stated that "ve-

racity on [the worker's physical capacity] ordinarily should be decided at trial." *Id.* We also reasoned that the worker's answers to questions concerning his employment history could be the basis for dismissal of his case because false answers about this subject could obstruct the employer's ability to prepare for trial by foreclosing the discovery of witnesses, as well as other possible avenues of discovery. *See id.* at 677–78, 866 P.2d at 405–06. Importantly, in *Bustillos* "[t]he only evidence [showing] that the interrogatory answer was deceitful was observation of [the][w]orker's landscaping work nine days after he served the interrogatory answer." *Id.* at 677, 866 P.2d at 405. Thus, in *Bustillos,* the party moving for dismissal did not demonstrate that the allegedly false answers to the interrogatories were made willfully or in bad faith because the possibility remained that the worker's physical capacity had improved and he had not started working until after he answered the interrogatories. *See id.*

{19} After *Bustillos,* our Supreme Court decided *Medina.* In *Medina* the Supreme Court construed the holding of this Court's opinion in *Sandoval,* which upheld the district court's dismissal of a tort suit for injuries arising out of a car accident in which the plaintiff gave false answers to interrogatories about previous car accidents and injuries. *See Sandoval,* 109 N.M. at 6–7, 780 P.2d at 1153–54. In *Sandoval,* this Court stated:

> In our view, two critical aspects of the falsehood in this case relate to the subject matter of the interrogatory answers. The answers (1) were not direct assertions of material elements of a claim or defense and (2) *did* deceive defendants about the existence of discoverable information that could be critical to preparation for trial.

Id. at 11, 780 P.2d at 1158. In *Medina,* our Supreme Court construed *Sandoval,* making clear that several factors that appeared in *Sandoval* to be prerequisites to the sanction of dismissal for discovery abuse, are in fact not prerequisites. *See Medina,* 117 N.M. at 166–67, 870 P.2d at 128–29. First, the Supreme Court stated that *Sandoval* did not hold that the party moving for dismissal was required to show that the misrepresentations deceived the moving party in fact or that the party relied on the false information. *See Medina,* 117 N.M. at 166, 870 P.2d at 128. Second, the Court construed *Sandoval* as not requiring, as a prerequisite to dismissal, that the information misrepresented be "critical to preparation for trial." *Id.* Finally, the Court stated that while dismissal is "guided by the extent to which preparation for trial has been obstructed," the ultimate importance of the information misrepresented is not a precondition to dismissal. *Id.* at 166–67, 870 P.2d at 128–29.

{20} Based on *Medina,* we conclude that when a plaintiff misrepresents information during discovery, dismissal is not dependent upon whether the information goes to the merits of the case or upon "the ultimate importance of the false or deceptive information." *Id.* at 166–67, 870 P.2d at 128–29. Instead, the degree to which a plaintiff's misrepresentations obstruct further discovery should guide the district court's decision to dismiss; however, such obstruction is not the only factor to consider. We emphasize that the touchstone to the propriety of dismissal is whether the deceitful party acted willfully, in bad faith, or in "callous disregard for its [discovery] responsibilities." *Id.* at 166, 870 P.2d at 128. Willfulness and bad faith are most certainly prerequisites for the severe sanction of dismissal, although the other considerations discussed in *Bustillos* and *Sandoval* may be additional factors to consider when analyzing the propriety of dismissal as a sanction for discovery abuse.

{21} The district court is vested with wide discretion to impose discovery sanctions. *See Medina,* 117 N.M. at 166, 870 P.2d at 128. The district court exercises its discretion based upon the type of false information and its overall impact on the non-deceiving party's ability to prepare for trial. However, before imposing dismissal as a sanction, the district court must find that the false information arose as a result of willfulness, bad faith, or callous disregard for the party's discovery obligations. *See id.* Of course, even in the face of a finding of willfulness, bad faith, or callous disregard for one's discovery obligations, a district court may

impose a lesser sanction in the exercise of its discretion. *Cf.* Rule 1–037(B).

{22} In this case, the district court specifically found that Plaintiff's misrepresentations concerning her medical history demonstrated "an intentional pattern of deception." The district court also found that one of Plaintiff's misrepresentations alone might not have been egregious enough to dismiss her case. However, the sheer volume of misrepresentations persuaded the court that dismissal was appropriate. The record supports this conclusion. The record reflects that Plaintiff gave false or misleading answers in at least twenty-one instances to either FSI's interrogatories or FSI's deposition questions. The volume of misleading information also persuades us that Plaintiff's misrepresentations were willful. The district court, therefore, did not abuse its discretion when it dismissed Plaintiff's case.

2. *Credibility*

{23} Plaintiff also argues that the district court improperly sat as a fact finder at the hearing on the motion to dismiss, which resulted in the court's improper evaluation of her credibility. But Plaintiff fails to account for the difference between a witness's credibility at trial, which determination is reserved for the fact finder, and the role of the district court during a motion hearing. *See Thomasson v. Johnson,* 120 N.M. 512, 514, 903 P.2d 254, 256 (Ct.App. 1995) (stating that in motion for modification of child support, district court can evaluate credibility); *State v. Anderson,* 107 N.M. 165, 167, 754 P.2d 542, 544 (Ct.App.1988) (stating that voluntariness of consent during a suppression hearing is a factual question to be resolved by the district court and that credibility of the witnesses can be determined); *State v. Boeglin,* 100 N.M. 127, 132, 666 P.2d 1274, 1279 (Ct.App.1983) (stating that in a motion to suppress, the district court is the trier of fact and that resolution of credibility is appropriate).

{24} We emphasize that the hearing arose from FSI's motion to dismiss for discovery abuse. The district court, as the arbiter of discovery, can determine whether a party has abused the discovery process. We do not empanel a jury for every pre-trial issue that arises in a case. Such a requirement would unduly burden pre-trial procedure.

{25} In this case, the motion alleged that Plaintiff had misrepresented the nature of her medical history and her employment history. Plaintiff responded to those allegations by filing an affidavit. The district court could properly decide whether Plaintiff had abused the discovery process on the record before it, based upon an evaluation of the truthfulness of Plaintiff's answers. *See Medina,* 117 N.M. at 165–66, 870 P.2d at 127–28 (upholding district court's finding that party had given false answers to discovery inquiries). The district court's determination that Plaintiff abused the discovery process did not usurp trial on the merits solely because such determination involved a consideration of Plaintiff's credibility as an affiant during discovery. The district court's assessment of credibility as it relates to abuse of the discovery process is merely a determination of whether the party was providing answers that obstructed the discovery process. This determination, while it does involve credibility and truthfulness, does not preempt trial on the merits because the district court is not deciding the truth of the merits or the ultimate facts of the case. As a result, insofar as Plaintiff's credibility was considered by the district court to determine whether she abused the discovery process, the court did not usurp the jury's function and did not err.

FSI's Failure to Demonstrate Prejudice to Either FSI or the Discovery Process

{26} Plaintiff further argues that FSI failed to demonstrate that it was hindered in its ability to gather information or that Plaintiff's actions prejudiced the discovery process. We interpret this argument as asserting that FSI had the burden to show such prejudice.

{27} Our Supreme Court's opinion in *Medina* does not address the lack of a demonstration of prejudice as a basis for reversing a district court's order dismissing a plaintiff's case, as discussed in *Bustillos,* 116 N.M. at 677–78, 866 P.2d at 405–06. We glean from *Medina,* however, that the party seek-

ing dismissal does not have to show prejudice to its trial preparation to be entitled to dismissal.

{28} As we have discussed, in *Medina*, the Supreme Court clarified that *Sandoval* does not require as a precondition to dismissal: (1) that the party seeking dismissal be deceived in fact or that the party relied on the misrepresentations; (2) that the information misrepresented be critical to preparation for trial; and (3) that dismissal be preconditioned upon the "ultimate importance of the false or deceptive information." *Medina*, 117 N.M. at 166–67, 870 P.2d at 128–29. If dismissal under *Medina* is not preconditioned on actual deception or reliance, the impact on trial preparation, or the ultimate importance of the information, it follows that the party seeking dismissal is not required to show prejudice as a precondition to dismissal, as *Bustillos* suggested was necessary. Nonetheless, prejudice may be a factor for the district court to consider when evaluating the propriety of dismissal for discovery abuse.

{29} Therefore, based upon our reading of *Medina*, FSI was not required to show that its trial preparation was prejudiced, or that it was prejudiced because of the ultimate importance of the misrepresentations at issue. *See Medina*, 117 N.M. at 166–67, 870 P.2d at 128–29. Nor was FSI required to show actual reliance or deception in fact. *See id.* at 166, 870 P.2d at 128 ("It would be ridiculous to allow a party who completely thwarts discovery to escape penalty simply because it could not be proven that other litigants were in fact deceived by such misconduct or actually relied upon it."). Rather, the overriding concern is abuse of the discovery process, and as a result, the non-deceiving party must show that the misrepresentations were significant to the discovery process. *See* 8 Wright, *supra*, § 2001, at 40 (explaining that the purpose of discovery is to "provide the means for determining the precise issues and obtaining the information that each party needs to prepare for trial").

{30} In addition, Plaintiff claims that the discovery process itself was not prejudiced, and that as a result, the district court erred when it dismissed her case. Again, *Bustillos* alluded to a requirement that the district court's order of dismissal include an explicit description of discovery abuses "that form the predicate for the sanction." *Bustillos*, 116 N.M. at 678, 866 P.2d at 406. In this case, the district court ruled that Plaintiff had abused the discovery process in a manner that affected the integrity of the process by engaging in "an intentional pattern of deception with respect to past medical history." The district court specifically found that Plaintiff had intentionally deceived FSI during discovery and that such conduct compromised the function of discovery and the integrity of the court. The district court sufficiently set forth the discovery violations that formed the predicate for dismissal. *See id.; see also* 8A Wright, *supra*, § 2284 at 618 ("Where the district court opts for severe sanctions, . . . it may behoove the court to provide a relatively full explanation of its choice.").

{31} The district court's ruling is faithful to the requirement that abuse of the discovery process is the justification for a court's imposition of sanctions. Sanctions protect the discovery process by protecting the due process rights of the non-deceiving party to a meaningful hearing, protecting the "truth-seeking function of the [district] court," and deterring future discovery abuse. *See United Nuclear Corp.*, 96 N.M. at 238, 241, 629 P.2d at 314, 317. The district court fulfilled all of these purposes by imposing the sanction of dismissal for Plaintiff's willful discovery abuse, and the district court adequately articulated the basis for its ruling.

Plaintiff's Explanations

{32} Plaintiff additionally argues that the circumstances of this case are different from the cases in which dismissals for discovery abuse have been upheld. Specifically, Plaintiff claims that her actions are distinguishable from those of the plaintiffs in *Sandoval* and *Medina* because in her affidavit she provided explanations for the discrepancies between her discovery answers and her medical records. Plaintiff asserts that the presence of her explanations prevents a

finding that she misrepresented information during discovery. We disagree.

{33} Plaintiff failed to persuade the district court in her submitted affidavit that she had not intentionally misrepresented her medical history. Because we review for abuse of discretion, Plaintiff's argument that she misunderstood the nature and extent of FSI's questions is an insufficient basis to reverse the district court's order of dismissal. *See Medina*, 117 N.M. at 165–66, 870 P.2d at 127–28 (holding that sanction of dismissal was appropriate applying abuse of discretion standard when the plaintiff argued on appeal that discovery responses were not false); *United Nuclear Corp.*, 96 N.M. at 214, 239, 629 P.2d at 290, 315 (explaining that one party's narrow construction of the other party's interrogatories was a "strained interpretation" which amounted to " 'an attempt at gamesmanship, contrary to the principle that the purpose of our rules of discovery is to minimize concealment and surprise in litigation' " (quoting *Hilmer v. Hezel*, 492 S.W.2d 395, 396 (Mo.Ct.App.1973))). Moreover, we are concerned with misrepresentations during discovery in the first instance, not the presence of explanations after the fact. Dismissal was appropriate in this case considering the fact that Plaintiff's continual misrepresentations circumvented discovery as a "mechanism for narrowing the issues and ascertaining the facts." 8 Wright, *supra*, § 2001, at 43. Plaintiff's discovery abuse also adversely affected the "integrity of the truth-seeking function of the [district] court." *United Nuclear Corp.*, 96 N.M. at 238, 629 P.2d at 314. Therefore, the district court did not abuse its discretion in dismissing Plaintiff's case, despite the presence of Plaintiff's explanations. *See id.* at 223, 629 P.2d at 299 (" 'Ultimately, the question of what constitutes satisfactory responses to interrogatories rests within the sound discretion of the Court.' " (quoting *Martin v. Easton Publ'g Co.*, 85 F.R.D. 312, 316 (E.D.Pa.1980))).

FSI's Cross–Appeal

{34} FSI cross-appeals the district court's order denying FSI its costs. FSI argues that the district court abused it discretion in denying costs based on the presumption that the prevailing party is entitled to costs. *See Marchman v. NCNB Tex. Nat'l Bank*, 120 N.M. 74, 94–95, 898 P.2d 709, 729–30 (1995); NMSA 1978, § 39–3–30 (1966); Rule 1–054(D) NMRA 2000. Section 39–3–30 provides that "[i]n all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party unless the court orders otherwise for good cause shown." *See also* Rule 1–054(D)(1) (stating that costs "shall be allowed as a matter of course . . . unless the court otherwise directs").

{35} FSI assumes that it is a "prevailing party." A " 'prevailing party is the party who wins the lawsuit—that is, a plaintiff who recovers a judgment or a defendant who avoids an adverse judgment.' " *Marchman*, 120 N.M. at 95, 898 P.2d at 730 (quoting *Dunleavy v. Miller*, 116 N.M. 353, 360, 862 P.2d 1212, 1219 (1993)). The merits of a dispute must ordinarily be reached in order to designate a prevailing party. *See Marchman*, 120 N.M. at 95, 898 P.2d at 730 (stating that a dismissal for forum non conveniens did not qualify as a decision on the merits). A dismissal with prejudice is an adjudication on the merits, and thus FSI is entitled to the presumption in favor of awarding costs to a prevailing party. *See Campos v. Brown Constr. Co.*, 85 N.M. 684, 686, 515 P.2d 1288, 1290 (Ct.App.1973) (stating that dismissal with prejudice is a judgment on the merits for purposes of res judicata). Denying costs to a prevailing party is within the district court's discretion; however, such discretion is not unlimited and the court must articulate the reasons for its ruling. *See Key v. Chrysler Motors Corp.*, 2000–NMSC–010, ¶¶ 7, 9, 128 N.M. 739, 998 P.2d 575.

{36} But Rule 1–054(F) also provides that Rule 1–054 does not apply to "claims for fees and expenses as sanctions." In its ruling at the hearing on the motion for costs, the district court viewed the imposition of costs as an additional sanction against Plaintiff. The district court stated: "[D]ismissing the case is the heaviest hammer I have. It's the biggest sanction I have. And on that basis, I'm not going to award any costs in

this case because I think the sanctions I've already imposed are great enough, frankly."

{37} The district court imposed the severe sanction of dismissal against Plaintiff in the underlying action. When sanctions are imposed, costs can be viewed as sanctions as well. In such circumstances, we cannot state that the district court abused its discretion in viewing the assessment of costs as an additional sanction and relying upon this articulated reasoning as the good cause for refusing to award FSI its costs. *See* Rule 1–054(D); *Key,* 2000–NMSC–010, ¶¶ 7, 9, 128 N.M. 739, 998 P.2d 575 (stating that the district court has discretion in assessing costs).

Conclusion

{38} For the reasons stated above, we affirm the orders of the district court dismissing Plaintiff's case with prejudice for discovery abuse and denying FSI its costs.

{39} **IT IS SO ORDERED.**

ALARID and BUSTAMANTE, JJ., concur.

11 P.3d 613

2000-NMCA-089

STATE of New Mexico, Plaintiff–Appellee,

v.

Richard Joseph MUNIZ, Defendant–Appellant.

No. 20,116.

Court of Appeals of New Mexico.

Aug. 29, 2000.

Certiorari Granted, No. 26,583, Oct. 19, 2000.

Patricia A. Madrid, Attorney General, Steven S Suttle, Assistant Attorney General, Albuquerque, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Lisabeth L. Occhialino, Assistant Appellate Defender, Jennifer A. Albright, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

SUTIN, Judge.

{1} In this appeal we consider whether the district court had authority to impose an adult sentence on a juvenile who was originally charged as a serious youthful offender in district court, but who subsequently pled guilty only to offenses that would not qualify for an adult sentence if brought independently. We also consider whether a juvenile can waive the right to appeal the imposition of a sentence to which he agreed in a plea agreement. We further consider whether the same individual is entitled to a remand for resentencing as a juvenile, or rather whether the entire plea agreement must fall as a unit. We set aside the sentence and remand this matter to the district court for further proceedings.

BACKGROUND

{2} Defendant was seventeen years old when he was indicted on one count of first degree murder, four counts of tampering with evidence, and one count of conspiracy to commit tampering with evidence. The first degree murder charge triggered the "serious youthful offender" provisions of the Children's Code, giving the district court jurisdiction to try the juvenile pursuant to procedural rules applicable to adults and to impose adult punishment for first degree murder. *See* NMSA 1978, § 32A–2–3(H) (1996). Defendant thereafter pled guilty to one count of tampering with evidence and one count of conspiracy to commit tampering with evidence. In exchange, the State dismissed the remaining charges, including the first degree murder charge that gave the district court jurisdiction in the first instance to treat the juvenile fully as an adult.

{3} The terms of the plea agreement included language typical of adult plea proceedings. There was a provision indicating that there was no agreement as to sentencing. Under the "Penalties" provision of the agreement, the charges were each listed as fourth degree felonies with a basic sentence of eighteen months and a $5000 fine, followed by one year of parole. The agreement also observed that any basic sentence for a felony

could be altered up to one-third if the court found aggravating or mitigating circumstances. It also noted that habitual offender proceedings could be brought if the State learned of any prior felony convictions. Finally, the agreement contained standard waiver language, including a specific waiver of Defendant's right to appeal.

{4} At the plea proceeding, the following colloquy took place:

> THE COURT: ... you're going to plead guilty to tampering with evidence and conspiracy to commit tampering with evidence; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Those are both fourth-degree felonies. They carry presumptive sentences of 18 months, no more than two years, less than one year, possible $5000 fine, and one year mandatory parole. Is that your understanding?
>
> THE DEFENDANT: Yes.

{5} Defendant was also informed, and again acknowledged, that he was waiving all rights to appeal. The plea hearing took place on April 15, 1997. For reasons that are not readily apparent from the record, the sentencing hearing was delayed until May 14, 1998. The sentencing hearing transcript indicates that during this time the parties had been disputing whether Defendant could be sentenced as an adult. At the hearing, the State took the position that, once the district court obtained jurisdiction by way of the serious youthful offender charge to treat a juvenile defendant fully as an adult on the first degree murder charge, it could sentence a defendant as an adult for any offense arising out of the same "transaction" as the originally charged offense. Defendant countered by arguing that the State's position was contrary to the statutory framework of the Children's Code in two respects: (1) an adult sentence was available only for very specific, enumerated crimes; and (2) the State failed to give notice of an intent to invoke an adult sentence.

{6} The district court entered findings of fact and conclusions of law on the sentencing issue, in which it agreed with the State that Defendant "should be sentenced as an adult for any convictions arising out of the charges set out in the indictment." Accordingly, the district court imposed an adult sentence based on the two fourth degree felonies contained in the plea agreement. This appeal followed.

DISCUSSION

A. Standard of Review

{7} The question of whether the district court has authority to impose an adult sentence when a child is originally charged as a serious youthful offender, but thereafter pleads guilty to lesser charges, involves interpretation of the Children's Code and is therefore subject to de novo review by this Court. *See In re Zac McV.*, 1998-NMCA-114, ¶ 5, 125 N.M. 583, 964 P.2d 144. Whether Defendant made a valid knowing, intelligent, and voluntary waiver of his constitutional right to appeal also " 'is a question of law which we review de novo.' " *State v. Martinez*, 1999-NMSC-018, ¶ 15, 127 N.M. 207, 979 P.2d 718 (quoting *United States v. Toro-Pelaez*, 107 F.3d 819, 826 (10th Cir. 1997)).

B. The Sentence is Illegal

{8} Defendant contends that we should reverse his adult sentence and remand this matter for disposition as a delinquent child pursuant to the Children's Code. The State has taken a number of conflicting positions. We note at the outset that we are not bound by any of the State's concessions on appeal. *See State v. Foster*, 1999-NMSC-007, ¶ 25, 126 N.M. 646, 974 P.2d 140. At the sentencing hearing it argued that individuals originally charged as serious youthful offenders would receive adult sentences irrespective of the specific crime or crimes for which they enter a plea or are convicted. In its brief on appeal the State conceded that the sentence is not authorized by statute and is therefore illegal; but it nevertheless argued that Defendant waived his right to challenge the sentence in this appeal when he entered into the plea agreement. At oral argument the State shifted its position again, arguing that the otherwise illegal sentence was "authorized" by Defendant's voluntary plea agreement.

{9} A district court may only impose a sentence authorized by statute. *See State v. Martinez,* 1998-NMSC-023, ¶ 12, 126 N.M. 39, 966 P.2d 747. This limitation on a court's authority is the result of the separation of powers directive that states only the legislative branch of government can define penalties for criminal behavior. *See id.* We therefore look to the Children's Code to determine the propriety of the sentence in this case.

{10} The Legislature has provided for two distinct procedures to address acts committed by children that may justify imposition of an adult sentence. First, a child who is between fifteen and eighteen years of age who is charged with and indicted or bound over for trial for first degree murder is defined as a "serious youthful offender," whose trial takes place in district court in a manner consistent with adult proceedings. *See* § 32A-2-3(H). The second procedural avenue for imposing an adult sentence exists exclusively in children's court. *See* NMSA 1978, §§ 32A-1-4(C), -5, -8, -20 (1993, as amended through 1999). If a child has been adjudicated guilty of at least one of the acts listed in Section 32A-2-3(I)(1), the child is termed a youthful offender and can be sentenced as an adult if the additional criteria set forth in NMSA 1978, § 32A-2-20(B) (1996), are satisfied. *See State v. Montaño,* 120 N.M. 218, 218-19, 900 P.2d 967, 967-68 (Ct.App.1995). In *Montaño,* we also recognized that crimes that do not fall within the youthful offender statute may nevertheless result in adult punishment at the same time the defendant is convicted of one of the offenses enumerated in Section 32A-2-3(I)(1). *See id.* at 219, 900 P.2d at 968. To hold otherwise would create the "anomaly of sentencing a defendant to be rehabilitated as a juvenile when there has been a determination that the defendant cannot be rehabilitated in available juvenile facilities." *Id.*

{11} Unlike *Montaño,* however, in the present case there is no underlying offense that would trigger youthful offender disposition. We therefore consider whether there is independent statutory authority for imposing an adult sentence in this case. There are two provisions in the Delinquency Act that might be read to provide such authority. Under Section 32A-2-3(H), "[a] 'serious youthful offender' is not a delinquent child as defined pursuant to the provisions of this section." This could be interpreted to mean that the State was correct when it made its initial argument that the district court had authority to impose an adult sentence based solely on the charging document, i.e., based solely on the fact that Defendant was indicted for first degree murder. We do not believe that this is what the Legislature intended. Instead, we believe that this language was intended to clarify that serious youthful offenders, unlike youthful offenders, should be treated as adults for purposes of their adjudication of guilt, and therefore the basic rights and procedural protections found in the Children's Code should not apply during the adjudication phase. *See, e.g.,* § 32A-2-14 (Basic rights), NMSA 1978, § 32A-2-15 (1993) (Time limitations on delinquency adjudicatory hearing), NMSA 1978, § 32A-2-16 (1993) (Conduct of hearings).

{12} A second potential source for sentencing authority in this case is found in NMSA 1978, § 32A-2-20(F) (1996):

> A fourteen to eighteen year old child charged with first degree murder, but convicted of an offense less than first degree murder, is subject to the dispositions set forth in this [disposition of a youthful offender] section.

{13} We instructed the parties to address the meaning of this section at oral argument. The State frankly admitted that the meaning of this section is "a mystery," but agreed with Defendant that it should not be read as a departure from the specific distinctions between adult and juvenile punishments found elsewhere in the Children's Code. In other words, it should not be interpreted to authorize an adult sentence in every case where an individual has originally been charged as a serious youthful offender. We likewise find this section perplexing. The "offense less than first degree murder" may have been intended to refer to lesser-included crimes of first degree murder, thereby making the section inapplicable to the offenses in the present case. We doubt, however, that the Legislature intended all lesser-included offenses,

such as the petty misdemeanor of battery for example, to result in an adult sentence. We decline to decide the precise meaning of Section 32A-2-20(F). It may have been inserted by the Legislature solely to obviate the notice otherwise required by Section 32A-2-20(A) when the children's court attorney seeks an adult sentence for a youthful offender. We are certain, however, that it is too ambiguous to provide the requisite adult sentencing authority in this case. *See Santillanes v. State*, 115 N.M. 215, 221, 849 P.2d 358, 364 (1993) (stating that criminal statutes are strictly construed).

{14} Notwithstanding the lack of statutory authority in the Children's Code to sentence Defendant as an adult on the tampering with evidence counts, the State maintains that this case does not technically involve an illegal sentence. Specifically, the State notes that the amount of time imposed reflects the statutory basic adult sentences for the underlying counts. *See* NMSA 1978, § 31-18-15(A)(6) (1999). As such, the State has argued, this is not a case where, for example, the death sentence has been imposed for a burglary. However, the State's argument ignores the critical and dispositive fact in this case: Defendant was a juvenile at the time the acts were committed. The court had no statutory authority to sentence Defendant as an adult where the sole crimes to which Defendant pled guilty and for which Defendant was sentenced were crimes subjecting Defendant only to juvenile sanctions as a delinquent offender. *See* § 32A-2-3; *see also* NMSA 1978, § 32A-2-19 (1996).

C. Waiver

{15} The State contends that Defendant has waived his status as a juvenile and right to challenge the validity of his sentence because he waived his right to appeal in his plea. We disagree.

{16} The State argues that, in light of the serious nature of the charges against him, Defendant ultimately benefitted from the plea. We do not disagree. However, we believe that the State has a strong burden to show that we should recognize a juvenile's waiver of his juvenile status for purposes of sentencing the juvenile as an adult when the crimes are fourth degree felonies that are nowhere enumerated in the Children's Code. *See State v. Boeglin*, 100 N.M. 127, 130-31, 666 P.2d 1274, 1277-78 (Ct.App.1983) (stating the usual heavy burden that the State bears to establish a waiver of constitutional rights). We should evaluate the totality of the circumstances, giving particular emphasis to the factors listed in the Children's Code. *See* § 32A-2-14(E); *Martinez*, 1999-NMSC-018, ¶ 18, 127 N.M. 207, 979 P.2d 718. That is, we must consider specific evidence surrounding Defendant's waiver, such as his age and education, whether he was in custody, the manner in which he was advised of his rights, his mental and physical condition, and whether he had the counsel of an attorney, friends, or relatives. *See id.* In our opinion, the State has not met this burden in this case.

{17} This is not, for example, a situation where an adult sentence is authorized by the facts of the case. *See State v. Jonathan B.*, 1998-NMSC-003, ¶ 15, 124 N.M. 620, 954 P.2d 52 (holding plea valid where child knew he could be sentenced as an adult because he was charged as youthful offender and notice of intent to seek adult sentence had been filed). The plea in the present case was not in compliance with Rule 5-304(G) NMRA 2000, because it lacked the requisite factual basis, i.e., adult status. In any event, the record fails to indicate that Defendant knew that he could not legally be subject to adult punishment for the offenses in the plea agreement.

{18} The State also argues that we should recognize the validity of the sentence because it reflects a common sense resolution to the proceedings in that the State should not be required to resort to the all-or-nothing approach of pursuing a first degree murder charge or having Defendant receive the now moot disposition as a delinquent child. As a matter of practice, this may be true. However, as we have noted, sentencing authority is vested with the Legislature. *See Martinez*, 1998-NMSC-023, ¶ 12, 126 N.M. 39, 966 P.2d 747. Therefore, in the absence of a valid waiver by the juvenile, the State's argument is more appropriately addressed to that forum.

D. Remedy

{19} Defendant requests that we remand for "resentencing" as a delinquent child pursuant to the Children's Code. However, it is clear from language of the plea agreement and the transcript of the plea proceedings that the parties contemplated an adult sentence when they entered into the plea. Both parties benefitted from the agreement. A plea agreement stands or falls as a whole unit. *See State v. Gibson,* 96 N.M. 742, 743, 634 P.2d 1294, 1295 (Ct.App. 1981). In *Gibson,* we affirmed the conviction and illegal sentence, but allowed for the possibility that the defendant would move to withdraw the plea. In this case, we believe it more appropriate to remand and permit Defendant, who is now an adult, to either withdraw his plea and stand trial on the original charges or now waive the matter of sentencing authority based on full knowledge regarding the legality of the sentence and the consequences of a plea withdrawal. We believe this result is consistent with the state of the record, which does not show the sort of full and knowing waiver that should be standard practice when a juvenile waives a right as important as a legal sentence. *See Martinez,* 1999–NMSC–018, ¶ 18, 127 N.M. 207, 979 P.2d 718 (stating factors to consider when evaluating waivers by juveniles); *cf. North Carolina v. Alford,* 400 U.S. 25, 38–39, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (holding that a defendant may voluntarily, knowingly, and intelligently plead guilty while maintaining his innocence).

CONCLUSION

{20} We hold that the sentence in this case is illegal, that Defendant did not waive his right to appeal, and that Defendant on remand has the choice of a withdrawal of his plea or a knowing waiver that permits his sentencing as an adult. We, therefore, reverse and remand for proceedings consistent with this opinion.

{21} IT IS SO ORDERED.

PICKARD, Chief Judge, concur.

KENNEDY, Judge, concurring in part and dissenting in part.

KENNEDY, Judge (concurring in part, dissenting in part).

{22} I agree with the majority that it is illegal to sentence Defendant as an adult for offenses that are not adult offenses. My concern is with the remedy we suggest. I disagree that Defendant should be allowed to waive what I perceive to be the lack of jurisdiction over remaining delinquent offenses in district court. When district court acquires jurisdiction under the Children's Code to hear delinquent offenses it sits as a children's court. I believe children's court has exclusive jurisdiction over the remaining offenses once Defendant is no longer charged with crimes that confer youthful offender status for adult sentencing in district court. Thus, I agree with every part of the opinion except the suggestion that upon remand to district court Defendant has the option of waiving his status and accepting an adult sentence. To the extent the majority's decision would allow a waiver by Defendant of status as a delinquent offender, I respectfully dissent.

{23} A party to a case cannot agree to jurisdiction where none exists. *See, e.g., Duran v. Transit Remanufacturing Corp.,* 73 N.M. 139, 141, 386 P.2d 237, 238 (1963). A person may not be punished for a crime without a sufficient charge even if he voluntarily submits himself to the jurisdiction of the court. *See Smith v. Abram,* 58 N.M. 404, 410, 271 P.2d 1010, 1015 (1954). "[W]here a defendant is not charged with a public offense, proceedings after a plea to that non-charge does [sic] not place a defendant in jeopardy." *State v. Mabrey,* 88 N.M. 227, 229, 539 P.2d 617, 619 (Ct.App.1975) (citing *State v. Ferguson,* 56 N.M. 398, 244 P.2d 783 (1952); *State v. Ardovino,* 55 N.M. 161, 228 P.2d 947 (1951); *State v. Valdez,* 51 N.M. 393, 185 P.2d 977 (1947)). Similarly, agreeing to be sentenced as an adult for a crime specifically defined as a delinquent act should be of no effect. The majority holds here that "in the absence of a valid waiver by the juvenile," the Legislature is who confers the power to treat a child as an adult for sentencing purposes. I agree. The Legislature has provided a statute that deals with the

disposition of delinquent acts under the Children's Code in a situation such as this:

> **Section 32A–2–6. Transfer of Jurisdiction over Child from other Tribunals to Court**
>
> If it appears to a tribunal in a criminal matter that the defendant was under the age of eighteen years at the time the offense charged was alleged to have been committed and the offense charged is a delinquent act pursuant to the provisions of the Delinquency Act [this article], the *tribunal shall promptly transfer jurisdiction of the matter and the defendant to the* [*Children's*] *court* together with a copy of the accusatory pleading and other papers, documents and transcripts of testimony relating to the case.

NMSA 1978, § 32A–2–6(A) (1993) [Emphasis added].

{24} I concur that the offenses of which Defendant stands convicted are illegally sentenced as adult offenses because Defendant was not an adult when he committed them. *See* § 32A–1–4(B) (defining "child"); Majority Opinion, ¶ 14. The problem is one of subject matter jurisdiction. "The [district] court has exclusive original jurisdiction of all proceedings under the Children's Code [this chapter] in which a person is eighteen years of age or older and was a child at the time the alleged act in question was committed or is a child alleged to be: (1) a delinquent child." Section 32A–1–8(A)(1).

{25} I also concur that the charge that conferred youthful offender status was no longer before the court for its consideration (as it was dismissed in the plea), and that the charges to which Defendant pled do not in and of themselves confer adult status. We called a sentence on those charges illegal because of our disinclination to extend *Montaño*. *See* Majority Opinion, ¶ 14. Allowing a child to include a crime in those enumerated by Section 32A–2–3(H) or (I) (youthful offender status) by stipulation is not a legal solution to the problem this case presents. We do not know if the case was pled from first degree murder to delinquent offenses because the State had no case or for other reasons. It is not our place to guess. We should limit our opinion to righting the wrong, not fashioning a doctrine allowing waivers of jurisdiction to solve a tactical problem.

{26} A district court can only sentence a child as an adult based on the child's consent when two things occur—first, the child must occupy the statutory legal class of 'youthful offender' or 'serious youthful offender,' and second, the child must waive the provisions of Section 32A–2–20(B) that otherwise require the children's court to hold a dispositional hearing and find the child is not amenable to treatment or rehabilitation in available facilities. *See State v. Timothy T.*, 1998–NMCA–053, ¶ 4, 125 N.M. 96, 957 P.2d 525. The first of these conditions is not satisfied here.

{27} Montaño hung its hat on the fact that the defendant was *convicted and sentenced* on offenses that rendered him a youthful offender. This enabled the sentencing court to sentence him as an adult for all the other offenses to which he pled. *See State v. Montaño,* 120 N.M. 218, 219, 900 P.2d 967, 968 (Ct.App.1995) ("[A]ny juvenile who is adjudicated for any of the offenses under Section 32A–2–d(I) [is] subject to adult sanctions under Section 32A–2–20 for *any offense* in the same case."). The court in *State v. Jonathan B.* had jurisdiction as conferred by statute in this fashion over all the charges to be sentenced. *See* 1998–NMSC–003, ¶ 15, 124 N.M. 620, 954 P.2d 52. In other words, the youthful offender charge still remained to be considered in the case, and it alone conferred the power to sentence on the other charges; that is not the case here.

{28} We should not allow jurisdiction to be created by a plea bargain. Where the adult status of the charges is established, the district court may act, but this case lacks that element. We should allow the withdrawal of the plea, but should not suggest that waiving one's status as a child under the Children's Code is an option.

{29} Based on the foregoing, I do not agree that just because the parties contemplated an adult sentence, that agreement

should be given effect if it is not proper to do so. *Gibson* stands for the proposition that the entire plea agreement is out the window. *See* 96 N.M. 742, 743, 634 P.2d 1294, 1295 (Ct.App.1981). I believe reversing the conviction, invalidating the plea agreement, and remanding for proceedings consistent with law is as far as this Court should have gone.

11 P.3d 1219

2000-NMCA-087

SONIC INDUSTRIES, INC., Plaintiff-Appellant/Cross-Appellee,

v.

STATE of New Mexico and John Chavez, Secretary of the New Mexico Taxation and Revenue Department, Defendants-Appellees/Cross-Appellants.

No. 20,676.

Court of Appeals of New Mexico.

July 3, 2000.

Certiorari Granted, No. 26,447, Oct. 6, 2000.

Daniel H. Friedman, Simons, Cuddy & Friedman, LLP, Santa Fe, NM for Appellant.

Patricia A. Madrid, Attorney General, Bridget A. Jacober, Special Assistant Attorney General, Santa Fe, NM, for Appellees.

Curtis W. Schwartz, Timothy C. Holm, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Santa Fe, NM, for Amicus Curiae–Long John Silver's, Inc.

OPINION

ALARID, Judge.

{1} This interlocutory appeal requires us to determine the effect of a 1991 amendment to Subsection 7–9–3(J) of the Gross Receipts and Compensating Tax Act, NMSA 1978, §§ 7–9–1 through 7–9–89 (1966, as amended through 2000) (the Act) on the New Mexico Taxation and Revenue Department's (the Department) authority to assess gross receipts tax on royalty fees paid by New Mexico franchisees to Sonic Industries, Inc., (Sonic) an out-of-state franchiser of a fast-food restaurant system. We also address the issues of whether Sonic's franchising activities are a separate taxable activity from the selling of food by franchisees; whether the Department's notice of assessment was timely; and whether Sonic is subject to a penalty for negligent failure to report and pay gross receipts taxes on royalty payments made by New Mexico franchisees.

BACKGROUND

{2} Sonic is an Oklahoma corporation with its principal place of business in Oklahoma City, Oklahoma. Sonic has developed a format for operating fast-food restaurants known as the "Sonic System." Sonic itself does not own or operate restaurants in New Mexico and has no office, warehouse, or resident salesperson in New Mexico. Sonic enters into standardized "License Agreements" with the owners of the restaurants, who agree to operate Sonic restaurants at specified locations in New Mexico according to the Sonic System. The License Agreement describes the Sonic System as "the distinctive and proprietary drive-in, food service system . . . under which food is sold to the public from drive-in restaurants operated under the trade name and federally registered trademark and service mark 'Sonic.'" Each owner pays Sonic a percentage of the restaurant's monthly gross sales as a royalty.

{3} The Department assessed Sonic $144,152.05 for gross receipts taxes for the period December 1988 through December 1994. The Department also assessed $88,789.62 in interest and penalty. Sonic paid the assessment and filed a claim for refund with the Department. The Department denied the claim. Sonic then filed a Complaint for Refund of Taxes Paid in the district court.

{4} In the district court, Sonic moved for partial summary judgment arguing that its franchising activities constitute non-taxable out-of-state sales of licenses and associated services. Since the Department did not dispute the factual basis of Sonic's motion, the motion raised a pure question of law. The Department filed a cross-motion for full summary judgment. In its response, Sonic argued that genuine issues of material fact precluded summary judgment in the Department's favor. The district court denied both motions for summary judgment, but certified both rulings for interlocutory appeal pursuant to NMSA 1978, § 39–3–4(A) (1999).

DISCUSSION

I. *Sonic's Motion for Partial Summary Judgment*

{5} Summary judgment is appropriate where, as here, the material facts are undisputed and the only matter to be resolved is the legal effect of those facts. *See Johnson v. Yates Petroleum Corp.*, 1999–NMCA–066,

¶ 3, 127 N.M. 355, 981 P.2d 288. In reviewing the grant or denial of a motion for summary judgment, we apply a de novo standard of review. *See id.*

{6} Under the Act, "gross receipts" include: "the total amount of money or the value of other consideration received from selling property in New Mexico [or] from leasing property employed in New Mexico." NMSA 1978, § 7–9–3(F) (1978, as amended 1989). In 1979, this Court applied a substantially-similar prior version of this statute in three cases upholding the assessment of gross receipts tax on franchise fees paid to out-of-state franchisers. *See AAMCO Transmissions, Inc. v. Taxation & Revenue Dep't,* 93 N.M. 389, 600 P.2d 841 (Ct.App. 1979); *Baskin–Robbins Ice Cream Co. v. Revenue Div.,* 93 N.M. 301, 599 P.2d 1098 (Ct.App.1979); *American Dairy Queen Corp. v. Taxation & Revenue Dep't,* 93 N.M. 743, 605 P.2d 251 (Ct.App.1979). In each case, we relied on the statutory definition of gross receipts as the total money or other consideration received by the taxpayer "from *leasing* property employed in New Mexico." Section 7–9–3(F) (emphasis added). We reasoned that the franchisers had property *employed in* New Mexico in the form of trademarks and other intangible rights licensed to and used by the in-state franchisees.

{7} As of 1979, when we decided *AAMCO, Baskin–Robbins,* and *American Dairy Queen,* the Act defined leasing as "any arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property." NMSA 1978, § 7–9–3(J) (1978). During the 1991 legislative session, the Fortieth Legislature amended Section 7–9–3(J) to read:

> "leasing" means any arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property, *except that the granting of a license to use property is the sale of a license and not a lease* [.]

1991 N.M. Laws, ch. 203, § 1 (emphasis added).

{8} Sonic argues that we must revisit the issue decided by our earlier cases because the 1991 amendment to Subsection 7–3–9(J) has overturned *AAMCO, Baskin–Robbins,* and *American Dairy Queen* to the extent they relied on the premise that licensing fees paid to a franchiser constitute receipts from "leasing property employed in New Mexico." Sonic points out that under the amended version of Subsection 7–9–3(J), the granting of a license to use the Sonic System now constitutes *selling,* not leasing as in 1979 when we decided *AAMCO, Baskin–Robbins,* and *American Dairy Queen.* Second, Sonic argues that license fees paid by New Mexico franchisees do not satisfy the alternative definition of gross receipts as receipts from "*selling* property *in* New Mexico" because Sonic structured the franchise transactions so that the License Agreements became effective in Oklahoma, not New Mexico. According to Sonic, we should apply a place-of-contracting rule and hold that to the extent Sonic was engaged in selling licenses to use the Sonic System, it was engaged in selling *in Oklahoma,* not in New Mexico.

{9} We agree with Sonic's first point. A Sonic franchise, as defined in the standard License Agreement, consists of a bundle of intangible, intellectual property rights and associated services. Pursuant to its standard License Agreement, Sonic grants a New Mexico franchisee the "right, license and privilege" to "adopt and use"the Sonic System at a specified location in New Mexico. Sonic retains ultimate ownership of all intellectual property used by the franchisee pursuant to the License Agreement. In our view, when Sonic enters into a Sonic License Agreement, Sonic clearly is engaging in the "granting of a license to use [the Sonic System]," and thus, by operation of the 1991 amendment to Subsection 7–9–3(J), this activity constitutes "selling." To the extent our decisions in *AAMCO, Baskin–Robbins,* and *American Dairy Queen* proceeded from the assumption that the licensing of a franchiser's system constituted "leasing property in New Mexico," that former analysis is foreclosed by the 1991 amendment to Subsection 7–9–3(J). Accordingly, subsequent to the July 1, 1991, effective date of the amended version of Subsection 7–9–3(J), neither this Court nor the Department may rely upon the definition of gross receipts as receipts from "leasing property employed in New Mexico"

to support the imposition of gross receipts tax on royalty fees paid to Sonic by New Mexico franchisees.

{10} We disagree, however, with Sonic's second point. As we explain below, the Legislature's reclassification of licensing as a subclass of selling does not affect the status of franchise fees paid as gross receipts.

{11} Our Legislature has taken the following approach: an exhaustive definition of gross receipts, which is then qualified by numerous exemptions and deductions. The Act imposes a tax on the privilege of "engaging in business in New Mexico." Section 7–9–4. As of 1979, when we decided *AAMCO, Baskin–Robbins,* and *American Dairy Queen,* the Act divided the universe of activities that constitute engaging in business in New Mexico into three categories: "selling property in New Mexico," "leasing property employed in New Mexico," and "performing services in New Mexico." 1969 N.M. Laws, ch. 144, § 1.

{12} In 1991, the Legislature chose to reclassify licensing as a form of selling. Sonic argues that this "seemingly small legislative amendment profoundly alters New Mexico's tax structure." The flaw in Sonic's argument is that it fails to acknowledge that for purposes of Subsection 7–9–3(F)'s definition of gross receipts, the 1991 amendment worked a zero-sum game: to the extent the reclassification of licensing results in fewer transactions that constitute "leasing," it results in correspondingly more transactions that constitute "selling." Thus, although the 1991 amendment requires us to alter our *analysis* of franchise fees under the Act, it does not change the *result* reached in the 1979 trilogy of franchise cases unless a Sonic franchise can be "in New Mexico" for purposes of the phrase "leasing property employed in New Mexico," but not be "in New Mexico" for purposes of the phrase "selling property in New Mexico."

{13} This brings us to Sonic's second point. Sonic argues that we should construe the phrase "selling property in New Mexico" so that selling occurs "in" New Mexico only if New Mexico is the place of contracting, the place where the last act necessary to form a binding contract occurred. Thus, according to Sonic, because Sonic carefully structures its franchise transactions so that the last act necessary to validate a License Agreement occurs out-of-state, no sale occurs "in New Mexico." Under Sonic's suggested interpretation, a New Mexico vendor and a New Mexico vendee involved in a sale of New Mexico real estate or of goods manufactured in New Mexico for use in New Mexico could evade the Act simply by stepping across the state line into a neighboring state to sign the sales agreement. We think it highly unlikely that the Legislature intended the phrase "selling in New Mexico" to have a meaning that would leave the Act vulnerable to evasion by such an obvious subterfuge.

{14} In our view, the Legislature used the phrase "in New Mexico" in Subsection 7–9–3(F), not in a formalistic sense as suggested by Sonic, but rather to reinforce the requirement that the activities generating receipts subject to taxation under the Act must have a sufficient nexus with New Mexico to support taxation by New Mexico. *See, e.g., Proficient Food Co. v. New Mexico Taxation & Revenue Dep't,* 107 N.M. 392, 395, 758 P.2d 806, 809 (Ct.App.1988) (noting relationship of taxpayer's in-state activities to establishing and holding a New Mexico market; upholding Department's determination that taxpayer was engaged in selling property in New Mexico despite facts that goods were stored in warehouse in Texas and invoices handled at out-of-state corporate offices of buyers and taxpayer-seller). The Legislature's inclusion of a "savings" provision providing a deduction "to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution," NMSA 1978, § 7–9–55(A) (1969), strongly suggests that the Legislature meant the term "in New Mexico" to extend the reach of the Act to its constitutional limits. *See* Michael S. Yesley, *Out of Sight But Not Out of Mind: New Mexico's Tax on Out–of–State Services,* 20 N.M. L.Rev. 501, 522 (1990). By 1969, when the Act was amended to add franchises to the Act's definition of property, it was well-settled that intangible property has a nexus with a state sufficient to support taxation when the taxpayer has

extended its activities with respect to its intangible property so as to invoke the protection and benefit of the taxing state's laws. *See, e.g., Curry v. McCanless,* 307 U.S. 357, 367, 59 S.Ct. 900, 83 L.Ed. 1339 (1939).

{15} We are unable to see how a franchiser's property could be "in" New Mexico so that it could be "*employed in* New Mexico" by the franchisees in *AAMCO, Baskin–Robbins,* and *American Dairy Queen,* yet not be "in New Mexico" in the present case merely because the Act now classifies the activity of licensing franchises as a form of selling instead of leasing. The 1991 amendment reclassifying licensing as selling did not alter whatever economic nexus exists between Sonic and commercial activity carried on within New Mexico by Sonic franchisees. We hold that fees paid to Sonic by New Mexico franchisees for the right to operate Sonic restaurants located in New Mexico constitute receipts from selling property *in* New Mexico and are gross receipts within the meaning of Subsection 7–9–3(F). Although the 1991 amendment to Subsection 7–9–3(J) requires us to modify the analysis we applied in *AAMCO, Baskin–Robbins,* and *American Dairy Queen,* ultimately it does not alter the result. Accordingly, we conclude that the district court properly denied Sonic's motion for partial summary judgment.

{16} We recognize that the Legislature must have intended the 1991 amendment to Subsection 7–9–3(J) to have some effect. *See State ex rel. Bird v. Apodaca,* 91 N.M. 279, 284, 573 P.2d 213, 218 (1977). If, as we have concluded, the 1991 amendment has no effect on the taxability of franchise fees, the Legislature must have had some other purpose in mind in amending Subsection 7–9–3(J). The fact that we have rejected Sonic's interpretation of the 1991 amendment to Subsection 7–9–3(J) does not mean that the amendment will not have an effect on other taxpayers in other circumstances. By way of example, the distinction between selling and leasing appears to have been crucial to the operation of many of the deductions contained in the 1991 version of the Act. *See, e.g.,* NMSA 1978, § 7–9–47 (1969) (providing deduction for receipts from sale for resale of tangible personal property); NMSA 1978, § 7–9–50 (1969, as amended through 1991) (providing deduction for receipts from lease for release of tangible personal property). We anticipate that there will be situations in which the reclassification of licensing as selling will be dispositive.

II. *The Department's Motion for Full Summary Judgment*

{17} In addition to opposing Sonic's motion for partial summary judgment, the Department filed its own motion for full summary judgment seeking determinations that (1) Sonic's franchising activities are a taxable activity under the Act, (2) Sonic's defense that the assessment was untimely is legally insufficient, and (3) Sonic is not entitled to abatement of penalty. Sonic filed a response in which it set forth what it viewed as additional material facts, which were grouped under four headings.

{18} Under the first heading, "Facts Relevant to Sonic's Performance of Services Outside New Mexico Under Its License Agreements for the Benefit of New Mexico Licensees, Receipts From Which Are Non–Taxable," Sonic set out various facts demonstrating that Sonic performs services for licensees, including assistance on building design and site location, "access to financial resources," "promotional campaigns and suggestions," advertising, purchasing cooperatives, revised operating procedures, new or modified products, and "a variety of other assistance." According to Sonic's statement of additional facts, these services are performed outside New Mexico, "typically in Oklahoma," and of themselves are "independently worth the portion of the gross revenues which Sonic licensees pay to Sonic Industries, Inc."

{19} Under the second heading, "Facts Relevant to Whether Sonic Industries, Inc.'s Revenues from New Mexico Licensees Consist of a Contractually Predetermined Percentage of the Licensee's Gross Revenues, on Which the Licensees Have Already Paid New Mexico Gross Receipts Tax," Sonic set out various facts in support of Sonic's argument that Sonic and its franchisees are collectively engaged in a single business—the

selling of food—which should be taxed only at the point of sale.

{20} Under the third heading, "Facts Relevant to Sonic's Entitlement to Abatement of the Portion of the Assessment Attributable to Periods Prior to December of 1989, Because of the Department's Failure to Serve the Assessment on it Prior to 1996," Sonic set out various facts demonstrating that the Department mailed its November 20, 1995, assessment to the wrong address with the result that Sonic did not receive a copy of the assessment until February 8, 1996.

{21} Under the fourth heading, "Facts Relevant to Sonic's Entitlement to Abatement of Penalty," Sonic set out various facts in an effort to demonstrate the reasonableness of its failure to pay gross receipts tax on franchise fees paid by New Mexico licensees.

{22} The Department argues that Sonic's facts should not have precluded the district court from granting summary judgment because, notwithstanding those facts, each of Sonic's defenses could be disposed of as a question of law. We understand the Department to be arguing that Sonic's facts were not material to the dispositive questions of law presented by its motion. As explained below, except as to the issue of the abatement of taxes accruing prior to December 1989, we agree with the Department that Sonic's facts do not establish genuine issues of *material* fact and that the Department therefore was entitled to judgment in its favor as a matter of law.

Taxability of Separate Components of a Sonic Franchise

{23} The rights conveyed by a Sonic License Agreement consist of a bundle of intangible, intellectual property rights typically associated with franchises, *see generally* David Gurnick, *Intellectual Property in Franchising: A Survey of Today's Domestic Issues,* 20 Okla. City U.L.Rev. 347 (1995), together with various support services. In our view, the interest transferred by a Sonic License Agreement meets the traditional definition of a franchise:

> In its simplest terms a franchise is a license from the owner of a trademark or trade name permitting another to sell a product or service under that name or mark. More broadly stated, the franchise has evolved into an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchiser and the franchiser undertakes to assist the franchisee through advertising, promotion and other advisory services.

H & R Block, Inc. v. Lovelace, 208 Kan. 538, 493 P.2d 205, 211–12 (1972) (quoted with approval in *Baskin–Robbins,* 93 N.M. at 303, 599 P.2d at 1100).

{24} By 1969, when the Legislature extended the Act's definition of property to "licenses, franchises, patents, trademarks and copyrights," the use of the term franchise to describe a prepackaged system for doing business appears to have been well established. *See, e.g.,* Harold Brown, *The Franchise Phenomenon,* 73 Case and Comment, July–August 1968, at 46; *Susser v. Carvel Corp.,* 332 F.2d 505 (2d Cir.1964). We may presume that the Legislature intended the term franchise to have its ordinary and usual meaning as a prepackaged form of doing business unless a different meaning clearly is indicated. *See Medina v. Original Hamburger Stand,* 105 N.M. 78, 80, 728 P.2d 488, 490 (Ct.App.1986). We find no such clear indicia suggesting that the Legislature used franchise in some unusual sense.

{25} Moreover, following the 1969 amendment to Subsection 7–9–3(I), the Department adopted the following regulation defining the term franchise:

> A "franchise" is an agreement in which the franchisee agrees to undertake certain business activities or to sell a particular type of product or service in accordance with methods and procedures prescribed by the franchiser, and *the franchiser agrees to assist the franchisee through advertising, promotion and other advisory services.* The franchise usually conveys to the franchisee a license to use the franchiser's trademark or trade name in the operation of the franchisee's business.

3 NMAC 2.1.7.5 (formerly GR 3(I)) (1969) (emphasis added). Under this regulation, a

franchise includes both a license to use the franchiser's trademark and a service component. The Legislature presumably was aware of this regulation when it re-enacted Subsection 7-9-3(I) without amendment in 1991, and we may infer from the Legislature's inaction in response to this longstanding administrative construction of the term franchise that this definition is consistent with the Legislature's intent. *See State ex rel. Stratton v. Roswell Indep. Schs,* 111 N.M. 495, 503, 806 P.2d 1085, 1093 (Ct.App. 1991).

{26} We reject Sonic's argument that the Department is required to break down a Sonic franchise into its components in determining the taxability of franchise fees. "In the field of taxation, more than in other fields, the legislature possesses the greatest freedom in classification...." *Michael J. Maloof & Co. v. Bureau of Revenue,* 80 N.M. 485, 486, 458 P.2d 89, 90 (1969). We believe that for no other reason than administrative convenience, it was well within the Legislature's authority to bundle together the various components of a franchise and to classify them collectively as a form of property for purposes of the Act.

{27} In addition to conflicting with the intent of the Legislature, Sonic's approach involves an unrealistically static view of the nature of the intangible property conveyed by a Sonic License Agreement. Sonic's standard License Agreement requires Sonic franchisees to comply with the entire Sonic System. As a consequence, franchisees must rely on the Sonic System itself to adapt to changes in the market and thereby maintain whatever competitive advantage inheres in being a Sonic franchisee. The Sonic License Agreement obligates Sonic to communicate to franchisees "improvements in areas of restaurant equipment, management, food preparation and service which are pertinent to the operation of a restaurant using the Sonic System." To the extent Sonic performs services in Oklahoma or elsewhere to develop or improve the Sonic System, those services result in an upgraded Sonic System which, as we have explained earlier in this opinion, is a form of property with a situs in New Mexico. In taxing franchise fees paid by Sonic franchisees, the Department is not required to unbundle costs associated with developing or improving the Sonic System.

{28} We hold that for purposes of the Act, a franchise is to be treated as a compound or "bundled" form of property, which typically includes a license to use the franchiser's trademark and a commitment by the franchiser to perform various services to assist the franchisee in the operation of the franchised business. Services that are required by the franchise agreement and any services provided by the franchiser to police, promote, maintain, or enhance the value of its franchise system, are part of the franchise for purposes of the Act, and this is so regardless of whether those services are performed in New Mexico or out-of-state (subject, of course, to any limitations imposed by the United States constitution under the standard of *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977)).

{29} Under this standard, the services described in Sonic's additional facts constituted part of a Sonic franchise as a matter of law and therefore Sonic's additional facts do not alter the taxability of the portion of franchise fee attributable to services provided to the franchisee.

Sonic's Claim of Double Taxation

{30} Sonic argues that evidence that Sonic receives a "predetermined split of a single revenue stream on which the licensees have already fully paid New Mexico tax" precluded summary judgment in favor of the Department. According to Sonic, the manner in which its royalty fee is calculated distinguishes the present case from our decisions in *House of Carpets, Inc. v. Bureau of Revenue,* 84 N.M. 747, 507 P.2d 1078 (Ct. App.1973) and *Co-Con, Inc. v. Bureau of Revenue,* 87 N.M. 118, 529 P.2d 1239 (Ct. App.1974).

{31} *House of Carpets* involved two corporations, a retailer of wall-to-wall carpet and an installer. The retailer sold carpet, and included in the price charged to its customers the cost of installing the carpet. The installer installed the carpet, billing the

retailer. The installer paid gross receipts tax on amounts received from the retailer for installing the carpet. We upheld the imposition of gross receipts tax on the entire contract price paid to the retailer by the consumer, notwithstanding the fact that the installer paid gross receipts tax on the services required to install the carpet. We rejected the retailer's argument that imposition of gross receipts tax on the entire contract price charged by the retailer amounted to "double assessment" on the cost of installation. We held that there were two separate transactions for purposes of the Act.

{32} *Co-Con* concerned two corporations, the second corporation being a wholly-owned subsidiary of the first. Each corporation used equipment owned by the other and accounted for this usage as rentals for purposes of federal corporate income tax. We upheld the imposition of gross receipts tax on these intercorporate transactions, relying on the Act's definition of gross receipts as money received from leasing property in New Mexico. We noted that even though the same shareholders owned all the construction equipment in question, the two corporations nevertheless were separate entities for taxation purposes. *See Co-Con*, 87 N.M. at 122, 529 P.2d at 1243.

{33} We find these two cases controlling. The fact that Sonic is paid a predetermined percentage of its franchisees' gross receipts is a distinction without a difference. Sonic and its franchisees are two separate taxpayers and the sale of a franchise by Sonic and the sale of fast-food by a Sonic franchisee are separate transactions for gross receipts tax purposes.

Effect of Misdirection of Notice of Assessment

{34} Pursuant to Subsection 7-1-18(D), the Department was authorized to assess taxes "at any time within six years from the end of the calendar year in which payment of the tax was due." The Department prepared a notice of assessment for unpaid taxes covering six years, from December 1994 back to December 1988. On the face of the notice of assessment there are two dates: (1) an "Assessment Date" of "11/17/95" is printed, apparently in a computer-generated typeface; and (2) a "Date of Mailing" of "11-20-95" appears in hand-written numerals. In its motion for summary judgment and supporting papers, the Department did not attempt to prove the date the notice of assessment was mailed out or otherwise establish the date from which the Department had calculated the six-year period provided by Subsection 7-1-18(D). Instead, the Department, citing Section 7-1-13, argued that the date of the written notice of assessment was immaterial because Sonic was under an independent duty of self-assessment.

{35} We disagree with the Department's assumption that a general duty of self-assessment overrides the express language of Subsection 7-1-18(D). The Legislature presumably was aware of the role of self-reporting in enforcing tax obligations, yet it nevertheless chose to enact Subsection 7-1-18(D), which cuts off civil liability in a manner analogous to a statute of limitations. Because the Department erroneously assumed that the effective date of the written assessment is immaterial, the Department did not offer any evidence establishing the effective date of notice of assessment. *See, e.g.*, NMSA 1978, § 7-1-17(B)(2) (1969, as amended through 1992). Due to the Department's failure to offer any evidence establishing the effective date of the assessment, the Department failed to make out a prima facie case of entitlement to summary judgment on the issue of the backward reach of the assessment. *See Knapp v. Fraternal Order of Eagles*, 106 N.M. 11, 13, 738 P.2d 129, 131 (Ct.App.1987). Accordingly, we affirm the district court's denial of summary judgment on this issue.

Abatement of Penalty

{36} Pursuant to NMSA 1978, § 7-1-69(A) (1965, as amended through 1997), the Department imposed a penalty for failure to pay tax when due. Subsection 7-1-69(A) provides:

> [I]n the case of failure due to negligence or disregard of rules and regulations, but without intent to evade or defeat any tax, to pay when due any amount of tax re-

quired to be paid ... there shall be added to the amount as penalty ... two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid....

{37} In response to the Department's motion for summary judgment as to the applicability of a penalty, Sonic submitted the affidavit of Curtis W. Schwartz, a New Mexico tax attorney who represents various clients which have resisted the imposition of gross receipts tax on grounds similar to the arguments made by Sonic. Mr. Schwartz stated his opinion that "these defenses by each of these taxpayers has a reasonable basis in both law and fact." Sonic also submitted the affidavit of Stephen C. Vaughn, a vice-president with Sonic Corp. Mr. Vaughn stated that Sonic did not pay gross receipts on "revenues attributable to payments under its license agreements" because the license agreements were executed outside New Mexico, Sonic licensees pay gross receipts on their revenues and Sonic's receipts arose in part from the performance of services outside New Mexico.

{38} A penalty may be assessed under Subsection 7-1-69(A) where the taxpayer's failure to pay gross receipts tax due and owing resulted from the taxpayer's "erroneous beliefs, inattention, inaction where action would be reasonably required, or a failure to exercise the degree of ordinary business care that similarly situated businesses would exercise." *Arco Materials, Inc. v. Taxation & Revenue Dep't*, 118 N.M. 12, 17, 878 P.2d 330, 335 (Ct.App.1994) *rev'd on other grounds by Blaze Const. Co., v. Taxation & Revenue Dep't*, 118 N.M. 647,647-48, 884 P.2d 803, 803-804 (1994). "However, where [a] taxpayer's failure to pay taxes is the result of a 'diligent protest,' and his decision to challenge the tax is based on informed consultation and advice (i.e. from his attorney or accountant), the taxpayer negates any inference of negligence and the application of the ... penalty provision is inappropriate." *C & D Trailer Sales v. Taxation & Revenue Dep't*, 93 N.M. 697, 699-700, 604 P.2d 835, 837-38 (Ct.App.1979) (citing *Stohr v. New Mexico Bureau of Revenue*, 90 N.M. 43, 559 P.2d 420 (Ct.App.1976)). Where the taxpayer ignores its tax obligations and consults with an attorney or accountant about its tax obligations only *after* an audit and assessment by the Department, such conduct is not evidence of a diligent protest and does not provide a basis for avoiding a penalty. *See Phillips Mercantile Co. v. Taxation & Revenue Dep't*, 109 N.M. 487, 491, 786 P.2d 1221, 1225 (Ct.App.1990).

{39} Here, there are two relevant periods: (1) the period prior to the July 1, 1991, effective date of the amendment to Subsection 7-9-3(J), and (2) the period subsequent to the effective date of the amendment to Subsection 7-9-3(J). In view of our decisions in *AAMCO, Baskin-Robbins,* and *American Dairy Queen,* to demonstrate that it had acted reasonably, Sonic was required to come forward with evidence showing that it had consulted with tax professionals and developed compelling arguments for overruling our prior cases. For tax-periods subsequent to July 1, 1991, Sonic was required to show that its failure to report and pay tax on franchisee fees resulted from consultation with Sonic's tax counsel who had advised Sonic in the exercise of their professional judgment of a reasonable likelihood that the 1991 amendment to Subsection 7-9-3(J) would be interpreted by New Mexico courts as relieving Sonic of the duty to pay gross receipts tax on franchise fees paid to Sonic by New Mexico franchisees. The fact that Sonic eventually contacted tax counsel and that counsel was able to base a plausible argument against taxation of franchise fees on the 1991 amendment does not retroactively excuse Sonic's disregard of our prior decisions construing the Act. There is no indication in the record as to when Sonic consulted tax counsel concerning the effect of the 1991 amendment on its tax liability or what advice Sonic received from tax counsel.

{40} Sonic faced a similar burden in demonstrating that it reasonably believed that its situation was distinguishable from that of the taxpayers in *Co-Con* and *House of Carpets.*

{41} We find the conclusory and self-serving statements in the Schwartz and Vaughn affidavits insufficient to give rise to a genuine

issue of material fact as to the existence of any acceptable ground for excusing Sonic's failure to report and pay gross receipts tax as required by the Act.

CONCLUSION

{42} As discussed under Part One, the district court properly denied Sonic's motion for summary judgment, and we therefore affirm the district court's order denying Sonic's motion for partial summary judgment. As discussed under Part Two, the district court erred by denying the Department's motion for summary judgment as to the issues of (1) the taxability of franchise fees paid by Sonic's New Mexico franchisees, and (2) the imposition of a penalty. We therefore reverse the district court's denial of the Department's motion as to these two issues. As to Sonic's entitlement to an abatement of the penalty for the period December 1988 to December 1989, there exists a genuine issue of material fact—when the notice was mailed to Sonic—and, therefore, the district court properly denied the Department's motion as to the issue of a partial abatement of the assessment. We therefore affirm the district court's denial of the Department's motion for summary judgment on the issue of abatement of assessment for the period December 1988 to December 1989.

{43} This case is remanded to the district court for further proceedings consistent with this opinion.

{44} **IT IS SO ORDERED.**

BOSSON and KENNEDY, JJ., concur.

11 P.3d 1229

2000-NMCA-093

Gary and Vickie ESKEW, Plaintiffs–Appellants,

v.

NATIONAL FARMERS UNION INSURANCE COMPANY and ENMR Telephone Cooperative, Intervenors–Appellees,

Michael A. Rowley, M.D. and Mario A. Gutierrez, M.D., Defendants (not parties to appeal).

No. 20,626.

Court of Appeals of New Mexico.

Sept. 18, 2000.

John R. Polk and Clara Ann Bowler, Albuquerque, NM, for Appellants.

David L. Skinner, Albuquerque, NM, for Appellees.

OPINION

WECHSLER, Judge.

{1} Plaintiffs–Appellants Gary and Vickie Eskew (collectively, Employee) and Intervenors–Appellees National Farmers Union Insurance Company and ENMR Telephone Cooperative (collectively, Insurer) dispute whether Insurer may be assessed costs when there was no net recovery for Employee in his lawsuit against alleged tortfeasors. The trial court ruled as a matter of law that Insurer could not be assessed any share of the costs. We reverse.

Facts

{2} Employee was injured at work. Insurer paid benefits under the Workers' Compensation Act, NMSA 1978 §§ 52–1–1 to 52–10–1 (1929, as amended through 1999) (the Act). Employee brought suit against Defendants Michael A. Rowley, M.D. and Mario Gutierrez, M.D. for alleged medical malpractice for their treatment of his work-related injury. Employee settled with Rowley but went to trial with Gutierrez.

{3} Trial was scheduled for October 26, 1998. Insurer moved to intervene to protect its right to reimbursement on October 13, 1998, attaching a proposed complaint-in-intervention. The court granted the motion on October 30, 1998, after the case had gone to the jury. On the same day, the jury returned a verdict in favor of Gutierrez. Judgment was entered accordingly.

{4} The trial court awarded costs in favor of Gutierrez against Employee. It ruled that it could not assess costs against Insurer. This appeal followed.

Standard of Review

{5} Normally we review the trial court's award or denial of costs under Rule 1–054 NMRA 2000 for abuse of discretion. *See Dunleavy v. Miller*, 116 N.M. 353, 362, 862 P.2d 1212, 1221 (1993) (stating general rule that trial court has discretion to assess costs). The issue presented to us in this case, however, is a question of law which we review de novo. *Cf. State v. Roman*, 1998–NMCA–132, ¶ 8, 125 N.M. 688, 964 P.2d 852 (stating trial court's interpretation of the

Rules of Criminal Procedure is question of law which is reviewed de novo); *Stein v. Alpine Sports, Inc.*, 1998–NMSC–040, ¶ 6, 126 N.M. 258, 968 P.2d 769 ("Our review of denial of a Rule 1–060(B) motion is generally for an abuse of discretion, unless the issue is one of law.").

Application of Rule 1–054(D)(1)

{6} Rule 1–054(D)(1) provides that "costs, but not attorneys' fees, shall be allowed as a matter of course to the prevailing party unless the court otherwise directs." It is substantially similar to the federal rule. *Compare* Rule 1–054(D)(1) *with* Fed.R.Civ.P. 54(d)(1) (1993). "Cases decided under the federal rule [54(d)] are often persuasive to this Court if they are not in conflict with controlling New Mexico authority and are based on sound logic and policies consistent with the law of this state." *Gallegos v. Southwest Community Health Servs.*, 117 N.M. 481, 489, 872 P.2d 899, 907 (Ct.App. 1994).

{7} The general rule is that the trial court has sound discretion to award, deny, and/or apportion costs under Rule 1–054. *See id.* at 490, 872 P.2d at 908. Under federal law, this discretion includes the power to assess costs against those who intervene on the losing side. *See First Nat'l Bank v. Southern Cotton Oil Co.*, 86 F.2d 33, 35 (5th Cir.1936) ("[T]hose similarly situated with plaintiff as the losing parties, who came in and adopted plaintiff's bill and sought to participate in its benefits, should stand, in regard to such costs as may be taxed in favor of appellants, in like case with plaintiff."); *Nicolaus v. West Side Transp., Inc.*, 185 F.R.D. 608, 611 (D.Nev.1999) (" '[A]n intervenor is entitled to the same cost considerations as the original parties.' ") (quoting 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2667, at 224 (3d ed.1998)); *cf. Delta Air Lines, Inc. v. Civil Aeronautics Bd.*, 505 F.2d 386, 388 (D.C.Cir.1974) (acknowledging that intervenors could be awarded costs on appeal).

{8} Notwithstanding the general rule, the trial court ruled that, as a matter of law, Insurer could not be required to pay any costs. In its letter decision to the parties, it explained:

> The Intervenor [Insurer] will not be held liable for any portion of the costs based on the workers' compensation statutory scheme as well as the language of *Fernandez v. Ford Motor Company,* 118 N.M. 100, 879 P.2d 101 (Ct.App.1994). Although there are no New Mexico cases which directly reach this issue, the Texas Court of Appeals has held that an insurer which provided workers' compensation coverage and which intervened to enforce the statutory right of reimbursement was not liable to a defendant who prevailed at trial since the Workers' Compensation Act was silent as to costs when no recovery was paid. [*See*] *Steenbergen v. Ford [Motor Co.],* 814 S.W.2d 755 (Tex.1991).

{9} We believe it unwise to begin crafting exceptions to the general rule. Under the general application of Rule 1–054(D)(1), the trial court has discretion to decide whether to assess costs against an insurer which provided workers' compensation insurance coverage and has intervened in the worker's suit against an alleged tortfeasor. However, we must analyze the Act to determine whether it contemplates an exception to the general rule.

The Workers' Compensation Act

{10} The trial court's ruling was based in part upon the Act. The relevant portion of the Act provides:

> [T]he receipt of compensation from the employer shall operate as an assignment to the employer or his insurer . . . of any cause of action, to the extent of payment by the employer to or on behalf of the worker for compensation or any other benefits to which the worker was entitled under the Workers' Compensation Act . . . that the worker or his legal representative or others may have against any other party for the injury or disablement.

Section 52–5–17(B). Notably, the Act is silent as to an intervenor's responsibility for sharing in the costs and expenses of the lawsuit. In the face of such silence, we may use fundamental fairness as a guide to deter-

mine whether the assessment of costs under the Act is appropriate. *See Transport Indem. Co. v. Garcia,* 89 N.M. 342, 345, 552 P.2d 473, 476 (Ct.App.1976) (assessing proportionate share of costs of third-party action against tortfeasor against insurer and stating that in the absence of guidance from the Act, fundamental fairness is the guideline).

{11} Although the statute speaks of an "assignment," New Mexico appellate courts have held that Section 52–5–17(B) provides an employer or his insurance company with a right of reimbursement. *See St. Joseph Healthcare Sys. v. Travelers Cos.,* 119 N.M. 603, 606, 893 P.2d 1007, 1010 (Ct.App.1995). In order to protect this right of reimbursement, employers or their insurers may intervene in a worker's suit against an alleged tortfeasor. *See id.* at 607–08, 893 P.2d at 1011–12. We have previously held that when an insurer invokes its right of reimbursement from a worker who has recovered from a tortfeasor, it must pay its proportionate share of the expenses of the lawsuit. *See Transport Indem. Co.,* 89 N.M. at 345, 552 P.2d at 476. However, as the trial court correctly observed, no New Mexico case has yet decided the scope of the intervenor's responsibility for costs when the worker loses the worker's suit against the tortfeasor.

{12} According to Insurer, a worker's failure to prevail in the tort action mandates a different result from when the worker recovers. Insurer further argues that when an insurer intervenes solely to protect its statutory right of reimbursement, the insurer does not participate in or control the tort action. Consequently, Insurer contends that an insurer exercising its right of reimbursement necessarily cannot be liable for costs when the tort action is unsuccessful.

{13} In the absence of a definitive legislative statement, the Insurer's proposed blanket rule is inappropriate if only because it would preclude consideration of the equities in specific cases. Instead, we adhere to the general rule in applying Rule 1–054 that trial courts possess the discretion to require an intervening insurance carrier to pay an equitable share of the costs awarded to the prevailing party. Indeed, the facts that Insurer argues are relevant facts for the trial court to consider. In its informed discretion, the court may consider, among other things, whether the intervenor had the opportunity to participate in the lawsuit and if so, the extent of its participation. *See Carter v. General Motors Corp.,* 983 F.2d 40, 44 (5th Cir.1993) ("an intervenor's relative inactivity in a lawsuit may influence a court's exercise of its discretion" in awarding costs); *Kim v. Ford Motor Co.,* 170 Mich.App. 544, 429 N.W.2d 203, 205 (1988) (stating that despite intervenor's limited participation in trial and negotiation, the intervenor was "a party in interest for purposes of recovery, [and] it remain[ed] a party in interest for the purpose of taxation of costs"); *Rehn v. Bingaman,* 152 Neb. 171, 40 N.W.2d 673, 676 (1950) (holding that intervening employer who actively participated in trial was subject to share in payment of costs); *Ferguson v. Bole,* 168 Pa.Super. 305, 77 A.2d 711, 713 (1951) (affirming assessment of costs before and after intervention against intervenor who substituted in part for party of record); *cf. Schweich v. Ziegler, Inc.,* 463 N.W.2d 722, 734–35 (Minn.1990) (holding that intervenor, to protect its right of subrogation, was jointly liable with worker for costs associated with losing claims).

{14} Our holding is consistent with the policy behind Section 52–5–17. Our Supreme Court has held that the purpose of the statute is to encourage payment by those at fault, thereby easing the burden on the workers' compensation system. *See Gutierrez v. City of Albuquerque,* 1998–NMSC–027, ¶ 9, 125 N.M. 643, 964 P.2d 807. "The legislature intended Section 52–5–17 to facilitate, not chill, actions in tort against third parties." *Id.* A blanket rule that workers who lost suits against alleged tortfeasors could never look to employers or employers' insurers for help with costs might discourage such suits.

Fernandez v. Ford Motor Co.

{15} *Fernandez,* upon which the trial court relied, does not compel a different result. *Fernandez* held that an insurance carrier with a conflict of interest (insuring not only worker's employer but some of the defendants as well) should not be permitted to intervene "until the underlying case is ready

for judgment." *Fernandez*, 118 N.M. at 107, 879 P.2d at 108. *Fernandez* also held that delaying the insurer's intervention until the judgment was ready was appropriate to avoid prejudice to the plaintiff and because the insurer's right to reimbursement did not arise until worker recovered from the tortfeasor. *See id.*

{16} The propriety of the *Fernandez* rule, that an employer's insurer's intervention is proper only when the case is ready for judgment, is not before us. As a result, we do not decide whether *Fernandez* absolutely prohibits earlier or active intervention. *See Garcia v. General Elec.*, 1999–NMCA–139, ¶ 16, 128 N.M. 291, 992 P.2d 304 (suggesting that insurers, as parties in third-party tort actions, can litigate issues in their own interest, even if plaintiffs do not). Any conflict between the language in *Fernandez* and *Garcia* will have to be resolved in another case in which the issue is squarely presented to the trial court and litigated there before being raised on appeal. Furthermore, *Fernandez* did not consider responsibility for costs. We see no reason why a trial court cannot assess costs against an insurer joined at the last minute if the facts indicate that it is fair to do so.

Steenbergen v. Ford

{17} Insurer urges us to follow *Steenbergen*, upon which the trial court further relied in support of its ruling below. *Steenbergen* construed the Texas Worker's Compensation Act, which provided that the insurer should pay costs when the worker recovered but was silent as to the payment of costs when the worker did not recover. *See Steenbergen*, 814 S.W.2d at 762. The court refused to read authorization for such cost-sharing into the statute. "A court cannot judicially amend a statute, adding words not implicitly contained in the language of the statute." *Id.*

{18} Section 52–5–17 differs substantially from the Texas statute at issue in *Steenbergen* because New Mexico's statute is completely silent on the issue of assessing costs. *See Security Ins. Co. v. Chapman*, 88 N.M. 292, 298–99, 540 P.2d 222, 228–29 (1975) (stating that decisions regarding workers' compensation from other states may be persuasive if their statutes are comparable to New Mexico's). While Section 52–5–17 gives a right of recovery, it is our case law that holds that the employer-insurer must share in fees and costs if it participates in the worker's recovery. *See Transport Indem. Co.*, 89 N.M. at 345, 552 P.2d at 476. Hence, we are not construing statutory language as was the *Steenbergen* court. We hold that the trial court has the discretion to assess an equitable share of the costs against an intervening insurance company when a worker loses in an action against the tortfeasor.

Remaining Arguments

{19} Insurer argues that even if it is not exempt from costs as a matter of law, it should not be assessed costs in this case because all costs were incurred before it was allowed to intervene. It relies in part on California cases which we do not find persuasive because the California statutes for awarding costs differ from Rule 1–054(d)(1). *See Garcia v. Hyster Co.*, 28 Cal.App.4th 724, 34 Cal.Rptr.2d 283, 287–88 (1994) (holding that where detailed statutes did not expressly provide "for the award of costs in favor of a prevailing defendant against a plaintiff in intervention for any period preceding the filing of the complaint in intervention," such costs would not be allowed).

{20} The trial court, holding that Insurer was exempt from costs, did not address Insurer's contention. The parties stipulated on appeal to include the record proper and transcript that pertained only to the proceedings concerning costs. We are unable to ascertain what occurred in the trial court prior to such proceedings. Therefore, because of the procedural posture of this case and because we are unwilling to pronounce on an issue not decided by the trial court, we leave it to the informed discretion of the trial court to decide whether costs accruing before intervention should be assessed against Insurer in this particular situation. *Cf. Swiftships Freeport, Inc. v. M.V. "Cayman Endeavor"*, 692 F.Supp. 722, 723 (S.D.Tex.1988) (recognizing that costs accruing before intervention in admiralty action will be charged against intervenor if it is equitable to do so).

{21} Insurer also contends it never actually intervened because it did not file its complaint-in-intervention. Its failure to file its complaint is not dispositive. A copy of the complaint is in the record and the court had approved its filing shortly before the jury verdict was entered. Under these circumstances, we view filing the complaint as a ministerial act which Insurer lost all incentive to complete after entry of the verdict. Looking to substance rather than form, we believe Insurer's intervention was sufficiently complete for it to be treated as an intervenor with respect to costs.

Conclusion

{22} We hold that it is within the informed discretion of the trial court to assess costs against an insurer who intervenes in the worker's suit against an alleged tortfeasor. We remand for the trial court to determine whether it is proper to assess costs against Insurer in this case.

{23} **IT IS SO ORDERED.**

PICKARD, C.J., and BUSTAMANTE, J., concur.

11 P.3d 1234

2000-NMCA-095

John BARNCASTLE, Plaintiff–Appellee,

v.

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANIES d/b/a/ ANPAC, Defendant–Appellant.

No. 20,403.

Court of Appeals of New Mexico.

Oct. 2, 2000.

Alan M. Malott, Malott Law Offices, Albuquerque, NM, for Appellee.

Paul E. Houston, Nancy Augustus, Sturges, Houston & Johanson, P.C., Albuquerque, NM, for Appellant.

OPINION

SUTIN, Judge.

{1} This case and the related case of *Farmers Insurance Co. v. Sedillo,* 2000–NMCA–094, 129 N.M. 674, 11 P.3d 1236 (2000), provide us with the opportunity to explain when uninsured motorist coverage is available under circumstances in which the use of the vehicle is somewhat attenuated from the incident. Defendant American National Property and Casualty Companies (ANPAC) appeals from the district court's grant of summary judgment to Plaintiff John Barncastle on his claims for uninsured motorist coverage for injuries he suffered when

an unidentified passenger of an unidentified vehicle shot him as he sat in the driver's seat of a vehicle at an intersection late one evening. We affirm.

FACTS AND PROCEEDINGS

{2} At about 10:00 p.m. on November 30, 1995, Barncastle was driving a 1991 Toyota which was stopped at the intersection of Fourth Street and Alameda Road in Albuquerque, New Mexico. An unidentified vehicle pulled up next to Barncastle's car and an unidentified passenger (Assailant) got out, walked over to Barncastle's window, and shot him with a handgun. Immediately thereafter, Assailant returned to the unidentified vehicle. Then the unidentified vehicle left the scene at a high rate of speed with its headlights off. Barncastle suffered substantial personal injuries.

{3} Barncastle was the permissive user of the 1991 Toyota which was insured by an ANPAC policy that included uninsured motorist coverage. On March 19, 1998, he filed a complaint in district court alleging that he had notified ANPAC of his injuries and his intent to file a claim for uninsured motorist coverage. ANPAC's answer admitted its refusal to pay benefits to Barncastle on the ground that the ANPAC policy did not provide for uninsured motorist coverage given the facts of this case.

{4} The parties filed cross-motions for summary judgment. The district court granted Barncastle's motion by order dated March 18, 1999.

LAW

Standard of Review

{5} The standard of review on appeal from summary judgment is de novo. *See Martin v. West Am. Ins. Co.,* 1999–NMCA–158, ¶ 11, 128 N.M. 446, 993 P.2d 763. The parties have stipulated to the material facts. ANPAC does not contend that the district court erred in granting summary judgment when material facts were in dispute or conflicting inferences could be drawn. In fact, the district court specifically questioned the parties during the summary judgment hearing about the procedure used in this case because it did not "want to muddy up the decision with an argument about how I got to the ruling." Thus, he ascertained that both parties agreed to the material facts and agreed that further discovery would not produce anything material to the decision. The parties agreed to have the district court decide the matter on that basis. We resolve the question of law of whether Barncastle can recover under the stipulated facts. *See id.; cf. Alvarez v. Chavez,* 118 N.M. 732, 741, 886 P.2d 461, 470 (Ct.App.1994) (holding that when appellant does not rely on a factual conflict and asks the court to rule on the undisputed facts of the case, appellate court will do so), *overruled on other grounds by Trujillo v. City of Albuquerque,* 1998–NMSC–031, ¶ 32, 125 N.M. 721, 965 P.2d 305.

Insurance Policy Coverage

{6} As stated by the parties, the controlling authority here is *Britt v. Phoenix Indemnity Insurance Co.,* 120 N.M. 813, 907 P.2d 994 (1995). There, after a minor traffic accident involving two motor vehicles, a passenger from one got out and stabbed Britt, who was the passenger in the other vehicle. *See id.* at 814, 907 P.2d at 995. Britt was unable to learn the identity of either the driver of the other vehicle or of the assailant. *See id.*

{7} The *Britt* court determined that intentional torts may be covered by uninsured motorist insurance under proper circumstances. *See id.* at 818, 907 P.2d at 999. Using a three-part test, the trier of fact "first considers whether there is a sufficient causal nexus between the use of the uninsured vehicle and the resulting harm." *Id.* The causal nexus requires the vehicle to be an " 'active accessory' in causing the injury." *Id.* (quoting *Continental W. Ins. Co. v. Klug,* 415 N.W.2d 876, 878 (Minn.1987)).

{8} Second, if there is a sufficient causal nexus, the trier of fact next considers "whether an act of independent significance broke the causal link between the use of the vehicle and the harm suffered." *Britt,* 120 N.M. at 819, 907 P.2d at 1000. Finally, the trier of fact must "consider whether the 'use' to which the vehicle was put was a normal use of that vehicle." *Id.*

DISCUSSION

{9} Using the test enunciated in *Britt* and elucidated in *State Farm Mutual Automobile Insurance Co. v. Blystra*, 86 F.3d 1007 (10th Cir.1996), the uninsured motorist policies cover this assault. Assailant's vehicle was an "active accessory" in the attack. *Klug*, 415 N.W.2d at 878. The driver of that vehicle used it to get into a position where Assailant could get out and shoot Barncastle. "Whether it was passenger or driver who shot [the victim] cannot change the fact that the vehicle was an integral element of the ... shooting." *Blystra*, 86 F.3d at 1014. The vehicle was further used to escape the scene at a high rate of speed, with its headlights off.

{10} No act of independent significance broke the causal chain. As the district court's letter decision stated,

> the vehicle ... allowed the driver and the shooter to pull alongside Plaintiff's vehicle at the red light in an innocent manner which concealed the upcoming events. The vehicle was running at all times.... The running vehicle reasonably assisted in concealing the identity of the driver and shooter, as well as the presence of the gun.... This vehicle was the instrumentality which is perhaps the major component in the incident, clearly facilitating the attack. This is not a case of an intentional tort being committed simply after the tortfeasor exited the vehicle.

Assailant left the passenger seat, shot Barncastle, and returned to the vehicle. The vehicle left the scene before it or its occupants could be identified or apprehended. As stated in *Blystra*, the *Britt* court "recognized that, given the right facts, the causal chain might not be broken even though the assailant commits his assault after exiting the stopped vehicle." *Blystra*, 86 F.3d at 1014; *see also Klug*, 415 N.W.2d at 878 (noting that the car was used to keep up with plaintiff until the shooting).

{11} Lastly, the third part of the *Britt* test was fulfilled because the car in which Assailant was riding was put to its normal use. *See Britt*, 120 N.M. at 819, 907 P.2d at 1000. The car was used "to drive alongside [the victim] to assault him." *Klug*, 415 N.W.2d at 878.

CONCLUSION

{12} We affirm the district court's grant of summary judgment in favor of Barncastle.

{13} **IT IS SO ORDERED.**

PICKARD, C.J., and WECHSLER, J., concur.

11 P.3d 1236

2000-NMCA-094

FARMERS INSURANCE COMPANY OF ARIZONA, Plaintiff–Appellee,

v.

Zeke C. SEDILLO, Defendant–Appellant.

No. 20,876.

Court of Appeals of New Mexico.

Oct. 2, 2000.

Ruth Fuess, Miller, Stratvert & Torgerson, P.A. Albuquerque, NM for Appellee

Pedro G. Rael, Rael & Sanchez, Attorneys, Los Lunas, NM for Appellant

OPINION

SUTIN, Judge.

{1} This case and the related case of *Barncastle v. American National Property and Casualty Cos.*, 2000–NMCA–095, 129 N.M. 672, 11 P.3d 1234 (2000), provide us with the opportunity to explain when uninsured motorist coverage is available under circumstances in which the use of the vehicle is somewhat attenuated from the incident. Defendant Zeke C. Sedillo appeals from the district court's grant of summary judgment dismissing his claims seeking uninsured motorist coverage for injuries he suffered after a football game. We affirm.

FACTS AND PROCEEDINGS

{2} At about 9:30 on September 13, 1998, Sedillo was setting up grills with his friends and family for a tailgate party in the University of New Mexico stadium parking lot. An unknown driver (Driver) of a pick-up truck sped through the row of cars near Sedillo's group, particularly close to Sedillo's daughter. Sedillo and others in his party yelled at Driver to slow down. Driver responded with profanity and pulled into a parking space about 40 yards away.

{3} Sedillo followed the truck on foot. After Driver alighted from his truck, Sedillo asked him why he was driving so fast around the children. Again, Driver responded with profanity as he rummaged in the toolbox of his truck. By that time Driver's two passengers were approaching Sedillo quickly with their fists clenched in a threatening way. Turning toward the two, Sedillo punched one of them. Shortly thereafter, someone hit Sedillo from behind with a hammer. At that point, Sedillo was hit by a number of people with the hammer and bare fists until members of Sedillo's group broke it up. By the time the police arrived, Driver and truck were gone. Sedillo suffered substantial personal injuries.

{4} Farmers Insurance Company of Arizona (Farmers) provided automobile insurance to Sedillo under two policies which contained coverage for damages caused by uninsured motorists. In response to Sedillo's claims and request for arbitration under the uninsured motorist policies, Farmers filed a complaint for declaratory judgment in district court, claiming that the policies did not provide coverage for any damages resulting from the September 13, 1998, incident. After discovery as to how the incident occurred, both parties filed motions for summary judgment, and Sedillo filed a motion to dismiss the complaint. The district court granted summary judgment in favor of Farmers, ruling that the applicable policies of insurance did not provide uninsured motorist coverage under the circumstances in which Sedillo was injured.

LAW

Standard of Review

{5} The standard of review on appeal from summary judgment is de novo. *See Martin v. West Am. Ins. Co.*, 1999–NMCA–158, ¶ 11, 128 N.M. 446, 993 P.2d 763. Where no material facts are in dispute (the deposition of Sedillo comprises the entire evidence before the court), we are in as good a position as the district court to resolve questions of law. *See id.*

Insurance Policy Coverage

{6} We agree with the parties that the controlling authority here is *Britt v.*

Phoenix Indemnity Insurance Co., *120 N.M. 813, 907 P.2d 994 (1995). There, two motor vehicles were involved in a minor traffic accident.* See id. *at 814, 907 P.2d at 995. A passenger from one vehicle got out and stabbed Britt, who was the passenger in the other vehicle.* See id. *Britt was unable to learn the identity of either the driver of the other vehicle or of the assailant.* See id.

{7} The *Britt* court determined that intentional torts may be covered by uninsured motorist insurance under proper circumstances. *See id.* at 818, 907 P.2d at 999. Using a three-part test, the trier of fact "first considers whether there is a sufficient causal nexus between the use of the uninsured vehicle and the resulting harm." *Id.* The causal nexus requires the vehicle to be an " 'active accessory' in causing the injury." *Id.* (quoting *Continental W. Ins. Co. v. Klug,* 415 N.W.2d 876, 878 (Minn.1987)).

{8} Second, if the trier of fact concludes there is a sufficient causal nexus, then it next considers "whether an act of independent significance broke the causal link between the use of the vehicle and the harm suffered." *Britt,* 120 N.M. at 819, 907 P.2d at 1000. Finally, the trier of fact must "consider whether the 'use' to which the vehicle was put was a normal use of that vehicle." *Id.*

DISCUSSION

{9} Using the test enunciated in *Britt* and elucidated in *State Farm Mutual Automobile Insurance Co. v. Blystra,* 86 F.3d 1007 (10th Cir.1996), the uninsured motorist policies do not cover this assault. The truck was not an "active accessory" in the assault. Sedillo's claim therefore fails due to lack of sufficient causal nexus.

{10} Furthermore, although Driver's use of the truck precipitated Sedillo's reaction, an "act of independent significance" interrupted any causation of the assault. Sedillo walked over to Driver after he had parked his truck, continued criticizing Driver's driving in the parking lot, and threw the first punch. As stated in *Blystra,* the *Britt* court "merely recognized that, given the right facts, the causal chain might not be broken even though the assailant commits his assault after exiting the stopped vehicle." *Blystra,* 86 F.3d at 1014. The facts here do not permit a reasonable inference of an unbroken causal chain to be drawn.

CONCLUSION

{11} We affirm the district court's grant of summary judgment in favor of Farmers.

{12} **IT IS SO ORDERED.**

PICKARD, C.J., and WECHSLER, J., concur.

12 P.3d 431

2000-NMSC-030

MEMORIAL MEDICAL CENTER, INC., Plaintiff–Appellant,

v.

TATSCH CONSTRUCTION, INC., Wooten Construction Co., and Ray Ward & Sons, Inc., Defendants–Appellees,

and

New Mexico Department of Labor, Labor and Industrial Division, and State of New Mexico ex rel. Attorney General Patricia A. Madrid, Intervenors–Defendants–Appellees.

No. 26,082.

Supreme Court of New Mexico.

Oct. 16, 2000.

Reeves, Chavez, Greenfield & Walker, P.A., Barney James Reeves, CaraLyn Banks, Las Cruces, NM, Eaves, Bardacke, Baugh, Kierst & Kiernan, P.A., Paul Bardacke, Kerry Kiernan, Albuquerque, NM, for Appellant.

Law Offices of K. Lee Peifer, K. Lee Peifer, Angela Cornell, Albuquerque, NM, for Appellees.

Patricia A. Madrid, Attorney General, Patrick T. Simpson, Christopher D. Coppin, Elizabeth A. Glenn, Assistant Attorneys General, Santa Fe, NM, for Intervenors.

Sutin, Thayer & Browne, P.C., William R. Brancard, Santa Fe, NM, for Amicus Curiae Association of Commerce and Industry of New Mexico.

Youngdahl & Sadin, P.C., Shane Youtz, Albuquerque, NM, for Amici Curiae ACORN and AFL–CIO.

OPINION

MINZNER, Chief Justice.

{1} Appellant Memorial Medical Center Incorporated (MMCI), a private corporation,

challenges the district court's holding that it is subject to the Public Works Minimum Wage Act (PWMWA), NMSA 1978, §§ 13–4–10 to –17 (1963, as amended through 1999), and the Procurement Code (PC), NMSA 1978, §§ 13–1–28 to –199 (1984, as amended through 1999). MMCI argues the district court applied the wrong standard in determining the applicability of the PWMWA and the PC and contends that under the correct standard it is not subject to either the act or the code. The Court of Appeals certified this case pursuant to NMSA 1978, § 34–5–14(C)(2) (1972), which allows the Court of Appeals to certify matters that involve "an issue of substantial public interest that should be determined by the supreme court." This case requires us to identify the appropriate standard to be used in determining whether private non-profit corporations that lease hospitals from government entities meet the definition of "political subdivision," § 13–4–11, or "local public bod[y]," § 13–1–30, and are therefore subject to the above acts. We hold the standard to be applied when determining whether a private entity should be considered a "political subdivision," § 13–4–11, or "local public bod[y]," § 13–1–30, is whether under the totality of the circumstances the private entity is so intertwined with a public entity that the private entity becomes an alter ego of the public entity. Because the district court applied a different standard, we remand for further proceedings.

I.

{2} In the fall of 1995, the City of Las Cruces (City), Dona Ana County (County), and Memorial Medical Center (Hospital) initiated discussions in an attempt to insure the survival of the Hospital, which faced financial pressures. After extensive discussions among the City, the County, New Mexico State University, and the Hospital, the parties executed a long-term lease with MMCI. In April of 1998, MMCI began operating the Hospital.

{3} Prior to executing the lease, MMCI obtained approval from the State Board of Finance. In March 1998, the office of the Attorney General (AG) provided an advisory letter to a member of the state legislature concerning the applicability of the Open Meetings Act (OMA), the Inspection of Public Records Act (IPRA), and the PC to MMCI. The AG concluded that MMCI would not be subject to any of the above statutes unless the government's control of the corporation was sufficient to make the corporation the "alter ego" of the government. In September 1998, the AG provided a letter to the New Mexico Foundation for Open Government concerning the applicability of the OMA, IPRA, and "all other laws applicable to governmental entities;" that letter concluded these statutes were not applicable. Finally, the architect and project manager for the MMCI construction project spoke with an employee of the Department of Labor (DOL); after hearing a description of MMCI, the employee agreed that the PWMWA probably did not apply.

{4} In the fall of 1998, MMCI initiated a large construction project that involved renovating the main hospital facility and constructing a new outpatient facility. The unsuccessful bidders on MMCI's construction project challenged the award. They claimed MMCI was public and was required to comply with the PWMWA and the PC. In September 1998, MMCI filed an action for a declaratory judgment seeking a declaration that it was not subject to either the act or the code. The court allowed the DOL to intervene in its capacity as administrator of the PWMWA and subsequently allowed the AG to intervene as a separate party to the action to represent the public interest in the matter, particularly those issues related to the PC. The court also granted a request by the AG for a temporary restraining order that enjoined MMCI from proceeding with its construction projects. Before trial, the AG moved to exclude parol evidence of the parties' intent in executing the lease. The district court determined the lease was unambiguous on its face and granted the motion.

{5} Trial on the merits and a hearing on a permanent injunction were consolidated. At that hearing, the court again determined that the lease was unambiguous as a matter of law and concluded that MMCI had not rea-

sonably relied on communications by the State with third parties. Additionally, the court ruled that the standard to be applied when determining whether a private entity is a political subdivision or a local public body is whether there is substantial government involvement with the private entity. Finally, the court held that both the PWMWA and the PC are applicable to MMCI. The court entered judgment against MMCI and enjoined it from proceeding with construction at both sites until it had obtained a prevailing wage determination from the DOL. The court further enjoined MMCI from proceeding with the award of contracts for construction at the main hospital site and from awarding additional contracts for construction at the new outpatient facility until or unless contracts were awarded in compliance with the PC.

{6} This Court subsequently denied both a writ of superintending control and a writ of prohibition seeking a stay of the district court's order. The district court also denied a stay. The Court of Appeals, prior to certifying this case, granted a stay of the court's order with respect to the application of the PWMWA but denied a stay with respect to the application of the PC. On appeal, MMCI argues that: (1) it does not fall within the definition of a "political subdivision," § 13–4–11, or "local public bod[y]," § 13–1–30, and retains its status as a private corporation based upon established New Mexico law; (2) the district court erred by not admitting testimony to establish the ambiguity of the phrase "ultimate control" as used in the lease; and (3) MMCI detrimentally relied upon the opinion of the AG and the DOL, and therefore the State is equitably estopped from claims to the contrary.

{7} As amici, the Association of Community Organizations for Reform Now (ACORN) and the American Federation of Labor–Congress of Industrial Organizations (AFL–CIO) urge this Court to affirm the district court's application of the statutes at issue. The Association of Commerce and Industry of New Mexico (ACI) has filed an amicus brief in support of MMCI.

{8} We first address whether the State should be equitably estopped from claiming that MMCI is subject to the PWMWA and the PC. We then address the court's evidentiary ruling. Finally, we address the merits of the arguments for and against the district court's ruling.

II.

{9} MMCI contends it relied on statements from representatives of the AG and the DOL that it was not required to comply with the PC or the PWMWA before initiating construction.[1] As such, MMCI argues that the State should be equitably estopped from claiming that MMCI is subject to the acts. Since resolution of the estoppel issue in favor of MMCI would likely render the remaining issues moot, we address this issue first. In order to find equitable estoppel the following facts must be established as to the party estopped:

> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts.

Lopez v. State, 1996–NMSC–071, ¶ 18, 122 N.M. 611, 930 P.2d 146 (quoted authority omitted). The following elements must be shown as to the party claiming estoppel:

> (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based

1. Appellees assert that MMCI inappropriately raises the doctrine of estoppel in this case because the case does not stem from the assertion of any right by the AG or DOL since this is an action for declaratory judgment. The doctrine of equitable estoppel, however, is appropriately raised by the initiator of a declaratory judgment action. *See, e.g., Las Cruces Urban Renewal Agency v. El Paso Electric Co.*, 86 N.M. 305, 523 P.2d 549 (1974) (allowing the initiator of a declaratory judgment action to raise the claim of equitable estoppel against a public body corporation). MMCI, therefore, may raise the doctrine of equitable estoppel in this case.

thereon of such a character as to change his position prejudicially.

Id. (quoted authority omitted). In *Gonzales v. Public Employees Retirement Bd.*, 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct.App. 1992), the Court noted, "Misrepresentations contrary to the material facts to be relied on, even when made innocently or by mistake, will support application of the doctrine." Therefore, the good faith of the AG and the DOL is not dispositive.

{10} When determining whether to apply estoppel against the State, we must first consider that "[e]stoppel is rarely applied against the State and then only in exceptional circumstances where there is a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. Human Serv. Dep't*, 1998-NMSC-011, ¶ 17, 125 N.M. 140, 958 P.2d 98. Because the AG's conduct does not rise to the level of "a shocking degree of aggravated and overreaching conduct," estoppel in this case is only available against the State "where right and justice demand" it. *Id.*

{11} In support of the argument that "right and justice demand" estoppel, *id.*, MMCI cites *Gonzales*, a case in which state employees relying on the advice of the Public Employee Retirement Board (PERB) left their state jobs and took jobs with local governments in order to receive greater retirement benefits. 114 N.M. at 421, 839 P.2d at 631. Subsequently, the PERB changed its position and attempted to prevent the employees from receiving the benefits. The Court of Appeals found that the statements made by PERB officials regarding retirement benefits were mistaken statements of material fact on which the employees detrimentally relied. *See id.* at 426–27, 839 P.2d at 636–37. The Court remanded to the district court to determine if the other elements of equitable estoppel were met. *See id.* at 428, 839 P.2d at 638.

{12} MMCI's reliance on *Gonzales* is misplaced. Unlike *Gonzales*, which involved definite factual statements about the amounts of retirement benefits due certain public employees under PERA, this case involves equivocal legal opinions about whether the statutes would apply to MMCI. Moreover, unlike the employees in *Gonzales*, MMCI did not exclusively rely on the State's representations; it relied in part on the advice of national experts.

{13} As a general rule, "statements of opinion on a matter of law raise no estoppel where the facts are equally well known to both parties." *Rainaldi v. Public Employees Retirement Bd.*, 115 N.M. 650, 657, 857 P.2d 761, 768 (1993). In this case, the statements in the AG's letter were legal opinions, not statements of fact, and MMCI had equal or better knowledge of the facts than the State. However, there is an exception to the general rule if "the advisor has actual or professed special knowledge." *Id.* at 658, 857 P.2d at 769. That exception does not apply in this case. The AG did not have special knowledge about whether the PWMWA and PC would apply to MMCI. Even if we were convinced that the AG had special knowledge, MMCI failed to prove that the State intended or expected MMCI to rely on any of the statements it made. The State made no specific statements directly to MMCI or its agents about whether the statutes would apply to MMCI. Although an associate in charge of MMCI's construction project spoke directly with the DOL, his questions were too general to have put DOL on notice that MMCI would rely on its answers.

{14} In *City of Santa Rosa v. Jaramillo*, 85 N.M. 747, 750, 517 P.2d 69, 72 (1973), this Court held that the AG's opinions are not binding on the courts. MMCI must have been aware that the AG's letters, even assuming they should be treated in the same manner as opinions, had limited legal effect. For all of these reasons, we conclude the elements of estoppel have not been met and this is not one of those exceptional circumstances in which estoppel can be used to prevent the State from taking a position contrary to that which it had taken on a prior occasion. *See Wisznia*, 1998-NMSC-011, ¶ 17, 125 N.M. 140, 958 P.2d 98.

III.

{15} Before trial, the AG moved to exclude evidence regarding the intent of

the parties when executing the lease. The AG argued that this kind of testimony was parol evidence and was only admissible if used to clear up ambiguities in the lease. MMCI argued the lease was ambiguous and specifically pointed to the term "ultimate control," which was used in paragraph B of the recitals section of the lease. The relevant portion states:

> The City, County and Board of Trustees of Memorial have determined that it is in the best interest of providing quality health care delivery to residents of the Hospital's service area, . . . to transfer the operation of the Hospital by lease to a locally-controlled New Mexico nonprofit corporation, subject to the retained legal title and ultimate control of the Hospital by the City and County, as more specifically provided under the terms and conditions of this Lease.

{16} The parol evidence rule "bars admission of evidence extrinsic to the contract to contradict and perhaps even supplement the writing." *C.R. Anthony Co. v. Loretto Mall Partners,* 112 N.M. 504, 509, 817 P.2d 238, 243 (1991). The rule, however, allows evidence "of circumstances surrounding the transaction . . . to aid the court in determining whether chosen terms are clear." *Id.* at 508, 817 P.2d at 242. When "determining whether a term or expression to which the parties have agreed is unclear, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance." *Id.* at 508–09, 817 P.2d at 242–43. If a court reviewing the extrinsic evidence proffered by a party determines that the evidence does not show that a term is unclear, the court is not obliged to admit the evidence to interpret the contract. *See id.* at 508, 817 P.2d at 242.

{17} After a hearing, the district court ruled the lease was not ambiguous as a matter of law and therefore held it would not consider testimony regarding the intent of persons executing the lease. The court, however, did allow MMCI to proffer testimony as to this issue for the purposes of appeal.

{18} Whether ambiguity exists is a question of law; therefore, this Court reviews the district court's decision to exclude extrinsic evidence de novo. *See Allsup's Convenience Stores, Inc. v. North River Ins. Co.,* 1999–NMSC–006, ¶ 28, 127 N.M. 1, 976 P.2d 1. We conclude that the phrase "ultimate control" as used in the lease does not make the lease ambiguous. Recital B clearly states that the meaning of "ultimate control" is to be defined by the substantive provisions of the lease. The term is therefore only significant to the extent it is further explained by the specific terms of the lease. In fact, the district court did not rely on the term in its findings; the court relied instead on the specific provisions of the lease in determining the issue of control. Evidence contradicting a term, especially a term which explicitly states it is to be defined by the contract itself, is still prohibited under New Mexico's parol evidence rule. *See Mark V, Inc. v. Mellekas,* 114 N.M. 778, 782, 845 P.2d 1232,1236 (1993). We therefore affirm the district court's ruling excluding the evidence.

{19} We note, however, that the ruling we affirm was limited to evidence offered to show the intent of the parties when executing the lease. This holding does not limit introduction of evidence on actual relationships among the parties. For example, evidence that the parties did not intend, when executing the lease, to enforce certain provisions would not be admissible; on the other hand, evidence that the full extent of the control allowed under the lease is contingent on events that have not occurred would be relevant and admissible.

IV.

{20} Finally, we address Appellant's primary contention that the district court erred by determining that the PWMWA and the PC apply to MMCI and that substantial government involvement was the applicable legal standard under those statutes. When reviewing the decision of a district court, this Court must be deferential to findings of fact by the court, but we review conclusions of law de novo. *See Strata Prod. Co. v. Mercury Exploration Co.,* 121 N.M. 622, 627, 916 P.2d 822, 827 (1996). The district court's statutory construction is a conclusion of law we review de novo.

{21} MMCI argues that cities and counties have statutory authority to lease hospitals to private corporations under NMSA 1978, § 3–44–3 (1965). This is true, but not dispositive. The ability of the City and County to lease the Hospital to MMCI is undisputed. We agree that cities and counties are free to lease hospitals to private corporations. The issue, however, is whether the relationships among the parties are such that the PC and the PWMWA, properly construed, are applicable to MMCI.

{22} When answering this question, the district court properly looked to the purpose behind the PC and the PWMWA as well as the statutory language. *See Raton Pub. Serv. Co. v. Hobbes,* 76 N.M. 535, 539, 417 P.2d 32, 35 (1966). The court determined MMCI was under a duty to comply with both the PC and the PWMWA because the relationships among the parties met a standard of substantial government involvement, a standard which seems to have been adapted from the standard under Alaska law. *See Western Alaska Bldg. & Constr. Trades Council v. Inn–Vestment Assocs.,* 909 P.2d 330, 334 (Alaska 1996) (holding the standard to be applied when determining whether a project constitutes "public construction," thus making it subject to Alaska's Little Davis–Bacon Act, is significant state involvement). Both parties concede there is a lack of clarity in New Mexico case law on the appropriate standard to be applied. Each side relies on one or more cases to support its position. We agree with both parties that we do not need to look beyond New Mexico case law to find the answer. We also believe that the district court erred in its reliance on out-of-state authority.

{23} MMCI contends the appropriate standard is contained in *Akopiantz v. Board of Comm'rs,* 65 N.M. 125, 333 P.2d 611 (1958). *Akopiantz* analyzed the legal status of a private corporation that had leased a hospital from Otero County; the question was whether the corporation's personnel decision followed the appropriate process. *See id.* at 126, 333 P.2d at 611–12. The Court suggested that if the hospital was a public entity, the plaintiff was entitled to due process. *See id.* The Court in *Akopiantz* enunciated a standard that if, under the terms of a lease, a corporation is "invested with exclusive right of control and management," then it is a private entity. *Id.* at 127, 333 P.2d at 613. We believe that *Akopiantz*'s emphasis on the "right of control and management," *id.,* is informative but not dispositive; in that case, no statutory interpretation was required. The Court made a general distinction between private and public entities for the purpose of determining a worker's right to due process. The question of the meaning of a "political subdivision," § 13–4–11, or "local public bod[y]," § 13–1–30, under the PWMWA and the PC was not before this Court.

{24} We believe, as did the district court, that the question of whether MMCI must comply with the PWMWA and the PC is essentially one of legislative intent. Section 13–4–11 of the PWMWA states that the statute applies to certain contracts "to which *the state or any political subdivision* thereof is a party." (Emphasis added.) The PC applies to procurement actions by *local public bodies,* which are defined in Section 13–1–67 as including "every *political subdivision* of the state and the agencies, *instrumentalities* and institutions thereof." (Emphasis added.) In determining the applicability of the PWMWA and the PC, this Court must decide whether MMCI is a political subdivision within the meaning of the PWMWA or a local public body within the meaning of the PC.

{25} The stated purposes of the PC "are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity." NMSA 1978, § 13–1–29(C). The PC also protects "against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts." *Planning and Design Solutions v. City of Santa Fe,* 118 N.M. 707, 710, 885 P.2d 628, 631 (1994). The PC states that it "shall be liberally construed and applied to promote its purposes and policies." § 13–1–29(A).

{26} The PWMWA is modeled after the federal Bacon–Davis Act. *See City*

of Albuquerque v. Burrell, 64 N.M. 204, 208, 326 P.2d 1088, 1090 (1958). It applies to every contract in excess of $20,000 for construction, alteration, demolition, or repair of public building, public works, or public roads that includes the employment of mechanics or laborers. *See* § 13–4–11. If the PWMWA applies, the workers are entitled to wages, determined by the DOL, that correspond to the prevailing wage for similar work in the same locale. *See id.* This prevents foreign contractors from using itinerant workers to underbid local contractors. The purposes behind the act are remedial; generally, remedial statutes are to be read broadly. *See Rodman v. Employment Sec. Dep't.*, 107 N.M. 758, 761, 764 P.2d 1316, 1319 (1988); *cf. Armijo v. Department of Health & Env't*, 108 N.M. 616, 618, 775 P.2d 1333, 1335 (Ct.App.1989) (holding that remedial statutes must be interpreted in light of their intended purposes). It is therefore our obligation to read both statutes broadly so as to effectuate the intent of the legislature.

{27} The first rule of statutory construction is that "[t]he plain language of a statute is the primary indicator of legislative intent." *General Motors Acceptance Corp. v. Anaya*, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985). "[W]ords are presumed to have been used in their ordinary sense. . . ." *Madrid v. University of Cal.*, 105 N.M. 715, 716, 737 P.2d 74, 75 (1987). The plain language of neither statute necessarily supports its application to private corporations such as MMCI. This, however, does not end our inquiry because "[c]ases manifesting . . . a willingness to depart from the literal wording of a statute also appear frequently in the caselaw of this state." *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 351, 871 P.2d 1352, 1357 (1994). In interpreting statutes, we seek to give effect to the legislature's intent and "will not rest our conclusions upon the plain meaning of the language if the intention of the legislature suggests a meaning different from that suggested by the literal language of the law." *Cummings v. X–Ray Assocs.*, 1996–NMSC–035, ¶ 45, 121 N.M. 821, 918 P.2d 1321.

{28} In order to decide whether the district court applied the correct standard, we first examine the standards previously employed by New Mexico appellate courts in making similar determinations. We have indicated that *Akopiantz* is informative but not dispositive. Other cases are similarly informative but not dispositive. For example, the term "political subdivision" was defined in *Gibbany v. Ford*, 29 N.M. 621, 626, 225 P. 577, 579 (1924), for the purpose of understanding the limitations of Article V, Section 13 of the New Mexico Constitution, which states, "All district, county, precinct and municipal officers, shall be residents of the political subdivision for which they are elected or appointed." *Id.* at 624, 225 P. at 578. *Gibbany* held that "[i]n order to be political subdivisions, [the entities] must be formed or maintained for the more effectual or convenient exercise of political power within certain boundaries or localities." *Id.* at 626, 225 P. at 579.

{29} Our case law, however, also suggests a broader interpretation of political subdivision than that formulated in *Gibbany*, one which reflects the changing relationship between private corporations and government entities. For instance, in *Tompkins v. Carlsbad Irrigation Dist.*, the Court of Appeals found that an irrigation district was a political subdivision and therefore a local public body under the Tort Claims Act. 96 N.M. 368, 370, 630 P.2d 767, 769 (Ct.App.1981). In reaching its holding, the Court stated that irrigation is a public use and primarily relied on the fact that irrigation districts are organized for the purpose of exercising a public function and not for private gain. *See id.*

{30} In *Cole v. City of Las Cruces*, this Court was asked to determine whether a private corporation was a political subdivision or an instrumentality of a political subdivision under the Tort Claims Act. 99 N.M. 302, 657 P.2d 629 (1983). The Rio Grande Natural Gas Association had entered into an agreement, which provided that the City was " 'to solely operate and maintain the Association's entire natural gas transmission and distribution system.' " *Id.* at 305, 657 P.2d at 632. The agreement also provided that " 'the City shall have the right to supervise, direct and control the employees of the Association.' " *Id.* Nevertheless, the Court held that

the Association was not an instrumentality of the State "even though the City totally directed its operation," *Armijo,* 108 N.M. at 621, 775 P.2d at 1338, because the Association was "a private corporation and is not the type of 'instrumentality' contemplated within the context of the Act." *Cole,* 99 N.M. at 305, 657 P.2d at 632. In doing so, the Court recognized "[t]here may be situations where a private corporation may be so organized and controlled, and its affairs so conducted, as to make it merely an instrumentality or adjunct of a municipality." *Id.* (citing *Pacific Can Co. v. Hewes,* 95 F.2d 42 (9th Cir.1938) (deciding whether one corporation controls and operates another is enough to establish agency relationship)).

{31} In *Raton,* this Court considered whether a private utility system was "a governing body of a municipality, or a governmental board or commission of a subdivision of the state, supported by public funds" so as to be subject to the OMA. 76 N.M. at 537–38, 417 P.2d at 33. The Raton Public Service Company was incorporated in New Mexico and operated the electric utility system in the City of Raton. *See id.* at 537, 417 P.2d at 33. The stock was issued in the name of three trustees who held it for the sole benefit of the City of Raton. *See id.* The board of directors had five members: the mayor, the city commissioner, and three others elected by the trustees. *See id.* "The property making up the electric utility system [was] owned by the city." *Id.* The Court in *Raton* found that the company must comply with the statute. *See id.* at 540, 417 P.2d at 35–36. The Court held that "a thing which is within the object, spirit and meaning of the statute is as much within the statute as if it were within the letter." *Id.* at 539, 417 P.2d at 35 (quoting *Glick v. Trustees of Free Pub. Library,* 2 N.J. 579, 67 A.2d 463, 465 (1949) (internal quotation marks omitted)).

{32} In determining whether the PC and the PWMWA were applicable to MMCI, the district court applied a legal standard, that of substantial government involvement, never before used in this context in New Mexico. Appellees contend that the standard applied by the district court was essentially the same standard used in *Cole* when this Court stated, "There may be situations where a private corporation may be so organized and controlled, and its affairs so conducted, as to make it merely an instrumentality or adjunct of a municipality." 99 N.M. at 305, 657 P.2d at 632. We reject this premise. When determining whether the utility company was an instrumentality of the City, *Cole* relied on two cases: one involving the concept of "piercing the corporate veil" and the other involving agency liability. *See id.* Neither body of law is synonymous with the standard of substantial government involvement applied by the district court. Furthermore, in *Cole* the City "operate[d] and maintain[ed] the Association's entire natural gas transmission and distribution system" and had "the right to supervise, direct and control the employees of the Association." *Id.* These factors would surely amount to substantial government involvement, yet *Cole* found the Association was not subject to the New Mexico Tort Claims Act. *See id.*

{33} We conclude that the standard of substantial government involvement is not the appropriate standard under our case law. The standard formulated by the district court is so broad that substantial government involvement would apply to private entities that clearly do not fall within the purview of either the PC or the PWMWA. Moreover, existing New Mexico case law suggests a different standard. *See Cole,* 99 N.M. at 305, 657 P.2d at 632; *Raton,* 76 N.M. at 539, 417 P.2d at 35.

{34} *Raton* stands for two propositions. First, when necessary, substance should prevail over form in order to effectuate the legislature's intent. *See Raton,* 76 N.M. at 539, 417 P.2d at 35. Second, a private organization, despite its name or legal status, may have so many public attributes it can no longer be considered private. *See id.* *Cole* informs us that a private entity may be controlled, organized, and conducted in such a manner that it becomes an arm of a public entity. 99 N.M. at 305, 657 P.2d at 632. It is therefore our view that under current New Mexico law there are circumstances in which a private corporation must be deemed a political subdivision or a local public body because the private entity has so many public attrib-

utes, is so controlled and conducted, or otherwise is so affiliated with a public entity that as a matter of fairness it must be considered the same entity.

{35} Based on these cases, we conclude that the standard to be applied is whether under the totality of the circumstances the government entity is so intertwined with the private entity that the private entity has become an alter ego of the public entity. When conducting this inquiry, courts must keep in mind the Legislature's purpose in enacting the statutes. *See Raton,* 76 N.M. at 539, 417 P.2d at 35; *see also Lycoming County Nursing Home Ass'n, Inc. v. Commonwealth,* 156 Pa.Cmwlth. 280, 627 A.2d 238, 244 (1993) (concluding that "the public policy advanced by the [prevailing wage act] would be defeated if [the court allowed] the County to rely on the independence of the Association"). As discussed earlier, both the PWMWA and PC should be construed broadly to effectuate their purposes. Additionally, courts must not allow narrow definitions or legal fictions to prevail over the intent of the legislature. *See Raton,* 76 N.M. at 539, 417 P.2d at 35. In evaluating such claims, courts are free to consider such factors as those utilized by the district court [2] in applying the standard of substantial government involvement. On remand, however, the court must also examine both the potential relationship created by the legal contract that binds the entities and the actual day-to-day relationship among them. We will remand to permit the district court to make new findings of fact and enter new conclusions of law in light of this opinion.

{36} Regardless of how much authority a lease potentially gives a government entity to control a private entity, if the government entity does not exercise the authority so as to make the private entity a conduit through which the government acts, then the existing statutes governing public entities ought not apply. On the other hand, if the contract that creates the relationship provides for no control, but in fact the government exercises control, then the existing statutes governing public entities might apply. Under the standard we identify, form does not control over substance; substance must control over form. *Cf. Lycoming,* 627 A.2d at 244 (holding a private entity was an alter ego of a county and subject to Pennsylvania's Prevailing Wage Act because the county "controlled the project from its inception" and "attempts to disassociate the County from the Association did not overcome the fact that the Association was the instrumentality of the County.") We recognize that privatization creates risks that traditional protections for workers will not be available, but those risks can be avoided under existing statutes only insofar as the existing statutes apply. Until the existing statutes are revised, the relationships among the parties must be far closer than that identified by the standard the district court applied.

V.

{37} We affirm the district court's ruling that the State was not equitably estopped from participating in this action. We also affirm the district court's ruling excluding evidence of the intent of the parties when executing the lease. However, we reverse the court's ruling that the statutes apply and remand the matter to the district court so that the district court can render a decision under the legal standard we have identified in this opinion. On remand, the court shall permit the parties to present such additional evidence and in such a manner as seems most helpful in applying the standard we have identified. We therefore vacate the judgment entered by the district court, including the injunctive relief granted, lift the stay granted by the Court of Appeals, and

2. When applying the substantial government involvement standard, the district court examined nine factors: (a) government involvement in the promotion of the concept of a contract or project; (b) government participation in the funding of the project; (c) financial benefits inuring to a government entity; (d) the public purpose of the project; (e) continuing control over corporate governance, even if it is potential control; (f) continuing control over the current or final disposition of the assets that are or will be the product of the contract or project; (g) commingled public and private financing; (h) whether the activity of the private entity is conducted on publicly owned property; and (i) whether the private entity was created by the public entity. (R.P. 700–01); *see also Inn–Vestment Assocs.,* 909 P.2d at 334–37.

remand the matter to the district court for further proceedings consistent with this opinion, including temporary injunctive relief.

{38} **IT IS SO ORDERED.**

BACA, FRANCHINI, and SERNA, JJ., concur.

MAES, J., recusing.

12 P.3d 442

2000-NMSC-031

STATE of New Mexico, Plaintiff–Appellee,

v.

Lawrence NIETO, Defendant–Appellant.

No. 24,787.

Supreme Court of New Mexico.

Oct. 16, 2000.

[redacted]

[redacted]

[redacted]

Robert E. Tangora, L.L.C., Robert E. Tangora, Santa Fe, NM, for Appellant.

Patricia A. Madrid, Attorney General, Joel Jacobsen, Assistant Attorney General, for Appellee.

OPINION

FRANCHINI, Justice.

{1} After a jury trial, Lawrence Nieto was found guilty of four counts of felony murder in the first degree, armed robbery with a firearm enhancement, conspiracy to commit murder in the first degree, and tampering with evidence for his involvement in what has come to be known as the Torreón Cabin Murders. On appeal, Defendant asserts: (1) the jury was improperly instructed on the criminal intent necessary to sustain a felony murder conviction; (2) the trial court erred in rejecting Defendant's tendered jury instructions on mistake of fact and duress; (3) the court erroneously refused to suppress his confession on the grounds that Defendant had not received *Miranda* warnings; (4) evidence of Defendant's gang affiliation improperly suggested guilt by association; (5) there was insufficient evidence to support any of his convictions; and (6) the trial court's errors constituted cumulative error.

{2} We hold: (1) the jury was properly instructed on the intent element of felony murder; (2) the trial court properly rejected Defendant's instructions on mistake of fact and duress; (3) the court's refusal to suppress Defendant's confession was proper because the court determined that Defendant's statements were not part of a custodial interrogation; (4) evidence of Defendant's gang affiliation was admissible; (5) there was sufficient evidence to support each conviction; and (6) the trial court did not commit cumulative error. We affirm the convictions.

FACTS AND PROCEDURE

{3} On April 14, 1996, Ben Anaya Sr. drove to his cabin near Torreón, New Mexi-

co. Mr. Anaya had not seen his son, Ben Anaya Jr., since December 10, 1995, when Ben Jr. had left for the cabin. Upon arriving at the cabin, Mr. Anaya noticed that trash had been strewn across the yard and the security gate, which his son always locked prior to leaving, had been left wide open. Entering the cabin, Mr. Anaya observed more trash and found evidence of a small fire inside. After turning off the television, Mr. Anaya made his way to the bedroom where he discovered the corpse of a person who would later be identified as his son.

{4} Ben Jr. was not the only body found at the cabin. When Torrance County Deputy Sheriff Susan Encinias entered the cabin, she found the body of Cassandra Sedillo laying face up on the floor. One of Cassandra's children was on the floor, buried in clothes and a sleeping bag, while the other child lay on the top bunk of a bunk bed. The bodies were in various states of decomposition and infested, in varying degrees, with insects. According to the testimony of Medical Investigator, Dr. Patricia McFeeley, Ben's death was caused by a gunshot wound to the head. She also testified that two gunshot wounds, one to the left shoulder and another to the head, resulted in Cassandra's death. Cassandra's two young sons, Matthew Garcia and Johnny Ray Garcia, both died as a result of dehydration and starvation. Based on the bodies' respective degrees of decomposition as well as an entomologist's report, Dr. McFeeley concluded that the two adults died on or around December 12, 1995, and the children died sometime in early January 1996.

{5} Lawrence Nieto implicated himself in the murders during three separate statements to police on May 11, May 13, and May 15, 1996. At a suppression hearing, the trial court refused to grant Defendant's motions to suppress each of his statements. The Court concluded that although Defendant did not receive *Miranda* warnings prior to his first statement, such warnings were not required because the statement was not part of a custodial interrogation. The second and third statements were uttered during custodial interrogations, but the court found that Defendant had received *Miranda* warnings prior to both those statements. Accordingly, the trial court denied Defendant's motion to suppress admission of his statements.

{6} The State charged Defendant with four open counts of murder, aggravated burglary, armed robbery, two counts of tampering with evidence, and conspiracy. At trial in Torrance County, Defendant offered the following account of the night of the murders. He had been at home with his mother when fellow 18th Street gang members Shawn Wilkins and Roy Buckner came over and convinced him to accompany them to the cabin in Torreón. Defendant rode in the backseat of the car. In the front seat, Mr. Wilkins kept a gun on his lap and revealed that the purpose of the trip would be to kill another gang member, Shawn Popeleski.

{7} When they arrived at the cabin, Defendant, Mr. Wilkins, and Mr. Buckner joined Ben, Cassandra, Cassandra's two children, and Mr. Popeleski. Defendant drank beer and played with the children until Mr. Wilkins and Mr. Buckner took Defendant aside and divulged their plan to rob the others disguised with ski masks and wearing gloves. Defendant testified that he protested, but fear for his own life prevented him from refusing to cooperate. The three of them announced that they were leaving and left the immediate vicinity of the cabin only to hide in the car. While hiding in the car, Defendant, Mr. Wilkins and Mr. Buckner discussed the plan to rob Ben Jr. Defendant claims that he again objected to the plan at that time.

{8} Nevertheless, Defendant accompanied Mr. Wilkins and Mr. Buckner as the plan came to fruition. As the three crept back to the cabin, Defendant encountered Mr. Popeleski. With a shotgun given to him by Mr. Wilkins, Defendant held Mr. Popeleski's head to the ground, while Mr. Wilkins and Mr. Buckner continued into the cabin. Upon hearing seven to eight shots emanate from the cabin, Defendant fired the shotgun into the air and permitted Mr. Popeleski to escape. Mr. Popeleski's taped testimony from the preliminary hearings of Mr. Wilkins and Mr. Buckner corroborates this aspect of Defendant's testimony. Defendant also testified that the shots he heard indicated to him

that everyone in the cabin had been shot, including the children. He claimed that after releasing Mr. Popeleski, he too might have run away but he was in fear for his family. Instead, Defendant joined Mr. Wilkins and Mr. Buckner in the car.

{9} On the drive back to Albuquerque, Defendant testified that Mr. Wilkins and Mr. Buckner stopped to burn the gloves and masks in trash cans. Defendant testified that when Mr. Wilkins and Mr. Buckner returned to the car they laughed and rejoiced in the fact that they had left no witnesses. This apparently supported his belief that no one was left alive in the house. He also testified that he did not call the police because he feared for his life and for the lives of his family. Defendant claimed that he never planned to kill, rob, or otherwise hurt anyone, and reiterated that he did not know that the children were alive. During cross-examination, the State attacked Defendant's credibility based on the multiple contradictory accounts previously offered by him and insisted that Defendant's role in the murders was more significant than he indicated. The State theorized that Defendant's actions were deliberate and motivated by his desire to accommodate the 18th Street Gang, who had ordered a hit on Ben Jr.

{10} As part of its case in chief, the State called Detective Juan DeReyes of the Albuquerque Police Department's Metro Gang Unit to testify both as an investigating officer and as an expert on gangs. Overruling Defendant's objection, the trial judge qualified Detective DeReyes as an expert in gang subculture, but limited his testimony to matters such as specialized vocabulary, gang rituals and procedures, distinctive clothing, and gang symbolism. The judge further restricted Detective DeReyes from testifying to specific instances of Defendant's prior misconduct unless such evidence was gleaned from Defendant's own admissions.

{11} Detective DeReyes first defined the word "gang" and listed the criteria used by his unit to identify gangs. After identifying the 18th Street Gang as the largest gang in Albuquerque, Detective DeReyes testified that Defendant was one of its members. Detective DeReyes described the hierarchical structure of gangs, including the violent means of gang initiation and the procedures by which already initiated members rise in the ranks. When the witness began to suggest that the nature of the Torreón murders corresponded with typical gang "hits," the trial court terminated the testimony. The court refused, however, to grant Defendant's motions to declare a mistrial or to request that the jury set aside Detective DeReyes' testimony.

{12} Defendant was convicted of four counts of felony murder in the first degree, contrary to NMSA 1978, § 30-2-1(A)(2) (1994), armed robbery with a firearm enhancement, contrary to NMSA 1978, § 30-16-2 (1973), conspiracy to commit premeditated murder in the first degree, contrary to NMSA 1978, § 30-28-2 (1979), and one count of tampering with evidence, contrary to NMSA 1978, § 30-22-5 (1963). Defendant appeals his conviction on the following theories: (1) the jury instructions impermissibly allowed the jury to convict Defendant without finding that he acted with intent; (2) the trial court erred by denying Defendant's tendered jury instruction on mistake of fact; (3) the trial court erred by denying Defendant's tendered jury instruction on duress; (4) the court erroneously admitted Defendant's statements into evidence; (5) Detective DeReyes' testimony regarding gangs improperly allowed Defendant's convictions to be based on his association with the 18th Street Gang; (6) there was insufficient evidence to support the convictions for felony murder, armed robbery, conspiracy, and tampering with evidence; and (7) the trial court's errors, taken together constitute cumulative error.

THE FELONY MURDER INSTRUCTION

{13} Felony murder consists of a second-degree murder committed in the course of a dangerous felony. Section 30-2-1(A)(2); *see State v. Campos,* 1996-NMSC-043, ¶ 17, 122 N.M. 148, 921 P.2d 1266. In New Mexico, and a handful of other states, the legislature has elected to treat this species of second-degree murder as murder in the first degree. *Id.; see* Greg Bailey, *Death by Automobile as First Degree Murder Utilizing the Felony Murder Rule,* 101 W. Va.

L.Rev. 235, 249 (1998) (naming Alabama, Arizona, Georgia, and Texas as the only other states that treat felony murder as first degree murder). The trial court submitted to the jury an unmodified Uniform Jury Instruction on second-degree murder, which allows for a verdict of guilt provided that, among other things, the State has proven beyond a reasonable doubt that "[t]he defendant intended the killing to occur or knew that he was helping to create a strong probability of death or great bodily harm." UJI 14-210 NMRA 2000. Defendant argues that by failing to accompany this instruction with a general criminal intent instruction, which requires a higher level of criminal intent, the trial court allowed Defendant to be convicted without adequate proof of the intent element of felony murder. *Cf. Campos,* 1996-NMSC-043, ¶ 38 (describing general criminal intent as including conscious wrongdoing and purposefulness, but not including mere knowledge).

{14} A general criminal intent instruction is not appropriate unless the legislature has failed to state the intent element of a particular crime. *See Campos,* 1996-NMSC-043, ¶ 34. As Defendant correctly observes, the intent elements of second degree and felony murder are synonymous. *See Campos,* 1996-NMSC-043, ¶ 29. The legislature has mandated that the intent element of second-degree murder is satisfied when the defendant acts with knowledge that his actions create a strong probability of death or great bodily harm to an individual:

> Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

NMSA 1978, § 30-2-1(B) (1991); *see State v. Varela,* 199-NMSC-045, ¶ 21, 128 N.M. 454, 993 P.2d 1280 (holding that evidence supported a finding that the defendant acted with the necessary mens rea for felony murder when "the jury could have found [the defendant] knew shooting into a mobile home, in which several people lived, created a strong probability of death or great bodily harm"). The jury instructions administered by the trial court accurately represented this element. Furthermore, because the legislature has articulated the intent element of second degree murder, and, by extension, felony murder, Defendant's requested general criminal intent instruction was inappropriate.

MISTAKE OF FACT

{15} Defendant argues that the trial court's rejection of his tendered mistake of fact instruction constitutes reversible error. At trial, he sought the instruction to support his theory that his mistaken belief that the children had died at the same time as the other victims excused his failure to take action to save them from starvation. A defendant is entitled to have the jury instructed on his theory of the case if that theory is supported by the evidence. *State v. Bunce,* 116 N.M. 284, 287, 861 P.2d 965, 968 (1993). However, the trial court need not give a mistake of fact instruction "where the intent element of the crime is adequately defined by the other instructions given by the trial court." *Id.* As discussed above, we believe that the instruction requiring the State to prove that "[t]he defendant intended the killing to occur or knew that he was helping to create a strong probability of death or great bodily harm" adequately defined the intent element of felony murder. The question of whether or not Defendant made a significant mistake of fact is subsumed by this instruction; a jury finding that Defendant had made such a mistake would have negated the intent element. We therefore find no error in the trial court's refusal to submit Defendant's mistake of fact instruction to the jury.

DURESS

{16} Based on a defendant's entitlement to have a jury instruction on his theory of the case read to the jury if it is supported by the evidence, Defendant also argues that the trial court's refusal to provide the jury with his requested duress instruction constitutes reversible error. He insists that his

testimony shows that he acted out of fear for his safety and the well-being of Mr. Popeleski and supports his theory that he was acting under duress. Defendant's proposed instruction reads, in relevant part:

> Evidence has been presented that the defendant was forced to help in the crimes charged under threats. If the defendant feared immediate great bodily harm to himself or another person if he did not help commit the crimes charged and if a reasonable person would have acted in the same way under the circumstances, you must find the defendant not guilty.

This instruction differs from the uniform jury instructions in that it substitutes "help in the crimes charged" for a blank space left open in the uniform jury instruction intended for a description of the acts constituting the specific offense. *See* UJI 14–5130 NMRA 2000. Defendant's instruction also substitutes "help commit the crimes" for "commit the crime." *Id.* Thus, Defendant's instruction attempts to establish a global duress instruction applicable to all crimes with which Defendant was charged, rather than enumerating, as UJI 14–5130 prescribes, each specific offense.

{17} A trial court's refusal to submit a jury instruction is not error if the submission of the instruction would mislead the jury by promoting a misstatement of the law. *See State v. Salazar,* 1997–NMSC–044, ¶ 57, 123 N.M. 778, 945 P.2d 996 (stating that "[i]t is not error for a trial court to refuse instructions which are inaccurate"); *see also State v. Lara,* 110 N.M. 507, 515, 797 P.2d 296, 304 (Ct.App.1990) (holding that in order to premise error on a refused instruction, the defendant must have tendered a legally correct statement of the law). Thus, a defendant has no right to have a legally incorrect jury instruction read to the jury. Here, Defendant was charged with an open count of murder, including willful, deliberate, and premeditated murder. As Defendant concedes, duress is not a defense to an intentional killing. *See* UJI 14–5131 NMRA 2000; *State v. Finnell,* 101 N.M. 732, 736–37, 688 P.2d 769, 773–74 (1984) (affirming trial court's refusal of defendant's duress instruction in a first degree murder case). Because Defendant's instruction applied to all crimes with which Defendant was charged, the instruction, if submitted to the jury, would have misstated the law by suggesting that duress was available as a defense to the charge of intentional murder. The trial court's refusal to give this instruction to the jury was therefore appropriate and not erroneous.

ADMISSIBILITY OF THE DEFENDANT'S STATEMENTS

{18} Prior to trial, Defendant moved to suppress his May 11 statement as evidence obtained in violation of *Miranda v. Arizona,* and his May 13 and May 15 statements as fruits of the poisonous tree. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The trial court ruled that the interview between Defendant and Detective DeReyes was non-custodial, and that *Miranda* therefore did not apply. On appeal, Defendant asserts that the trial court erred in finding the May 11 interview non-custodial. According to Defendant, the fact that the interview was conducted in a small office with the door closed, with Detective DeReyes blocking the path to the doorway, and with Defendant's back to the wall, leads to the conclusion that the interview was a custodial interrogation. Because no *Miranda* warnings preceded what he contends was a custodial interrogation, Defendant now asks that we reverse the trial court.

{19} In reviewing a trial court's denial of a motion to suppress, we observe the "distinction between factual determinations which are subject to a substantial evidence standard of review and application of law to the facts[,] which is subject to de novo review." *State v. Munoz,* 1998–NMSC–048, ¶ 39, 126 N.M. 535, 972 P.2d 847 (quoting *State v. Juarez,* 120 N.M. 499, 502, 903 P.2d 241, 244 (Ct.App.1995).) Determining whether or not a police interview constitutes a custodial interrogation requires the application of law to the facts. We therefore apply de novo review.

{20} A suspect's *Miranda* rights attach only when he is the subject of a "custodial interrogation." *Miranda,* 384 U.S. at 445, 86 S.Ct. 1602; *see State v. Juarez,* 120 N.M. 499, 502, 903 P.2d 241, 244

(Ct.App.1995). Thus, an officer's obligation to administer *Miranda* warnings arises only when there has been such a restriction on a person's freedom as to render him in custody. *Oregon v. Mathiason,* 429 U.S. 492, 494–95, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam). Custody is determined objectively, not from the subjective perception of any of the members to the interview. *Stansbury v. California,* 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). The United States Supreme Court has held that whether or not an interview is custodial depends on whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.* at 495, 114 S.Ct. 1526 (quoting *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (per curiam)); *see also Munoz,* 126 N.M. 535, 972 P.2d 847, 1998–NMSC–048, ¶ 40. In *Beheler,* the defendant agreed to accompany the police to the station house where he was questioned about a murder without the benefit of *Miranda* warnings. *Beheler,* 463 U.S. at 1122, 103 S.Ct. 3517. The Court refused to require *Miranda* warnings "simply because the questioning takes place in the station house." *Id.* at 1125, 103 S.Ct. 3517 (quoting *Mathiason,* 429 U.S. at 495, 97 S.Ct. 711). The Court held that although the questioning occurred at the police station, the defendant's freedom "was not restricted in any way whatsoever." *Id.* at 1123. *Miranda* warnings were therefore unnecessary. *Id.* at 1126.

{21} Similarly, in *Munoz,* this Court questioned whether a defendant who had not received *Miranda* warnings prior to being interrogated was in custody. *Munoz,* 126 N.M. 535, 972 P.2d 847, 1998–NMSC–048, ¶¶ 39–44. We held that because there was no restraint on his freedom of movement, a one-hour-and-forty-minute interrogation conducted by FBI agents in the back of a police car was not a custodial interrogation. *Id.* at ¶ 43. In the present case, Defendant points to environmental aspects of the Detective's office to suggest that the arrest was custodial. However, the fact that the office was small, that Defendant's back was to the wall of the office, that an officer was situated between Defendant and the doorway, and that the door was closed do not, in and of themselves, indicate a formal arrest or suggest that Defendant's freedom of movement was restricted to an extent consistent with a formal arrest. Rather, these facts, as well as the trial court's findings that Defendant was asked and agreed to accompany police officers to the station, was free to leave or terminate the interview, and was provided transportation to and from the station, are consistent with routine, non-custodial police questioning. We affirm the trial court's ruling that the May 11 interview was non-custodial, and that the police officers were not constitutionally compelled to recite *Miranda* warnings to Defendant prior to the questioning.

{22} Defendant also raises the related claim that, independent of the lack of *Miranda* warnings, his Fifth Amendment right to an attorney was violated when his explicit request to see an attorney was ignored. When an accused has invoked his right to have counsel present during a custodial interrogation he cannot be subject to further interrogation until counsel has been made available to him or he himself initiates further communication. *Edwards v. Arizona,* 451 U.S. 477, 484–85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). As *Edwards* suggests, this right, like the general right to receive *Miranda* warnings, attaches only during custodial interrogations. Because the trial court correctly found that this interview was non-custodial, the investigating officer did not have a constitutional duty to refrain from questioning Defendant after Defendant requested an attorney.

GANG AFFILIATION EVIDENCE

{23} Defendant claims that Detective DeReyes' expert testimony regarding gang subculture contained evidence of association and bad acts. Without enumerating specific errors or citing rules of evidence, Defendant appears to raise two separate arguments: (1) Detective DeReyes' testimony constituted improper character evidence, and (2) the testimony was unfairly prejudicial. We review the admission of expert witness testimony for a showing that the trial court abused its discretion. *State v. Alberico,* 116

N.M. 156, 169–70, 861 P.2d 192, 205–06 (1993).

{24} Defendant argues that even if associating Defendant with the 18th Street Gang were admissible, "the bad acts of the gangs and of 18th Street were not." Defendant's brief fails to specify the source for the proposed inadmissibility, but we assume that by mentioning "bad acts," Defendant refers to inadmissible character evidence. Generally, "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 11–404(B) NMRA 2000. Such evidence may, however, be offered to prove, "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." *Id.*

{25} To be sure, evidence of gang affiliation could be used improperly as a backdoor means of introducing character evidence by associating the defendant with the gang and describing the gang's bad acts. As Rule 11–404(B) suggests, however, evidence of gang affiliation that might otherwise be inadmissible character evidence may be admissible to show other important elements of the crime. *See United States v. Robinson,* 978 F.2d 1554, 1563, (10th Cir.1992) (affirming admissibility of gang affiliation testimony and holding that "[gang] associational evidence may be directly relevant on the issues of formation, agreement and purpose of a conspiracy"); *State v. Mireles,* 119 N.M. 595, 597, 893 P.2d 491, 493 (Ct.App.1995) (affirming trial court's admission of evidence of a feud between two families where "prior violence between the two groups and Defendant's association with them provided a theory to jury with regard to why [victim's] death might have been intentional"). Detective DeReyes' testimony, both as to Defendant's affiliation with the 18th Street Gang and the specific rituals and procedures of that gang, was admissible to show Defendant's alleged motive (to rise up in the ranks of the gang by performing a hit on its behalf) and intent to murder the victims.

{26} Defendant also urges that evidence of Defendant's association with 18th Street Gang, and the bad acts of that particular gang, was unfairly prejudicial. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or if it confuses the issues or misleads the jury. Rule 11–403 NMRA 2000. Here, as evidence of Defendant's motive and intent, the testimony had considerable probative value. The fact that the trial court terminated the testimony when the questioning attempted to establish that the exact manner in which Ben was murdered was consistent with a gang execution suggests that the trial court was vigilant in its enforcement of Rule 11–403. In light of the probative value of this testimony, we hold that the trial court did not abuse its discretion by failing to terminate the testimony at an earlier time. *See State v. Coffin,* 1999–NMSC–038, ¶ 35, 128 N.M. 192, 991 P.2d 477 (holding that the trial court did not abuse its discretion by admitting testimony regarding the activities of the defendant's gang when gang involvement was part of the fabric of the case).

SUFFICIENCY OF EVIDENCE

{27} Defendant contends that there was insufficient evidence to support any of his convictions. The test for sufficiency of evidence requires an appellate court to ensure that a "rational jury could have found beyond a reasonable doubt the essential facts required for a conviction." *State v. Garcia,* 114 N.M. 269, 274, 837 P.2d 862, 867 (1992). Such review involves a two-step process, consisting of "deference to the resolution of factual conflicts and inferences derived therefrom, and a legal determination of whether the evidence viewed in this manner could support the conviction." *State v. Orgain,* 115 N.M. 123, 126, 847 P.2d 1377, 1380 (Ct.App. 1993).

{28} Defendant states that "[t]he only substantial factual dispute relevant to [his] convictions was whether he in some manner encouraged, planned or participated in the killings." He suggests that there exists a general rule that New Mexico requires an overt act by the defendant in order to support an inference of aiding or abetting. He argues that there was insufficient evidence to support such an inference because he "did nothing to manifest his alleged in-

tent, nor anything physical act [sic] to encourage Wilkins or Buckner." *See* UJI 14–2821 NMSA 2000. According to his own testimony, Defendant accompanied Mr. Wilkins and Mr. Buckner to the cabin. He spent time with the victims in their cabin until participating in a feigned departure. He waited in the car with Mr. Wilkins and Mr. Buckner as they discussed the plan to rob the victims, then carried a loaded shotgun toward the cabin and held Mr. Popeleski to the ground with the barrel aimed at his head while Mr. Wilkins and Mr. Buckner shot and killed Ben and Cassandra, leaving two small children to starve to death. These actions could have supported an inference of an intent to encourage Mr. Wilkins and Mr. Buckner. We find no merit to Defendant's argument that the jury lacked sufficient evidence upon which to base an inference that Defendant aided or abetted the commission of felony murder.

{29} This same evidence relied upon by the jury to support the felony murder conviction also could have led the jury to find, beyond a reasonable doubt, the essential facts necessary to support Defendant's conviction for conspiracy to commit first degree murder. Defendant's suggestion that "there is no evidence that [he] knew, understood or conspired with Wilkins and Buckner to commit first degree murder" is contradicted by his own testimony that he incapacitated Mr. Popeleski while Mr. Wilkins and Mr. Buckner murdered and robbed the victims. Defendant's incapacitation of Mr. Popeleski could have also led the jury to find him guilty of armed robbery based on the theory of accomplice liability with which the jury was instructed. *See, e.g., State v. Carrasco,* 1997–NMSC–047, ¶¶ 10–19, 124 N.M. 64, 946 P.2d 1075.

{30} Finally, Defendant asserts that there was insufficient evidence to support his conviction for tampering with evidence. Defendant again ignores the fact that the jury was instructed on accomplice liability. Such liability may support a conviction for tampering with evidence. *See State v. Casteneda,* 97 N.M. 670, 679, 642 P.2d 1129, 1138 (Ct.App.1982). Here, evidence of Defendant's participation in the use and removal of the ski mask and shotgun from the scene of the crime, combined with the later destruction or disposal of these objects, could have led the jury to conclude that he was liable as an accomplice for tampering with evidence.

CUMULATIVE ERROR

{31} Defendant claims that the proposed errors herein addressed, along with the trial court's refusal to change venue, amounts to cumulative error and requires reversal. *See State v. Woodward,* 121 N.M. 1, 10, 908 P.2d 231, 240 (1995). Since we have found no error in the trial court's disposition of this case, we find no merit to the cumulative error claim.

CONCLUSION

{32} Defendant's convictions for felony murder, conspiracy to commit first degree murder, armed robbery with a firearm enhancement, and tampering with evidence are affirmed.

{33} **IT IS SO ORDERED.**

MINZNER, C.J., BACA, SERNA, and MAES, JJ., concur.

12 P.3d 960

2000-NMSC-033

Nichelle PONDER, Plaintiff–Appellee,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al., Defendants–Appellants.

No. 26,254.

Supreme Court of New Mexico.

Oct. 23, 2000.

Charles W. Durrett, P.C., Charles W. Durrett, Lisa K. Durrett, Alamogordo, NM, for Appellants.

Gary C. Mitchell, P.C., Gary C. Mitchell, Ruidoso, NM, Kevin O.C. Green, Mankato, MN, for Appellee.

OPINION

BACA, Justice.

{1} On July 4, 1987, while driving her parents' Ford F100 pickup truck, Plaintiff–Appellee, Nichelle Ponder, was injured in an automobile accident with an unidentified and uninsured motorist leaving her quadriplegic and suffering from severe brain injuries. Defendant–Appellant, State Farm Mutual Automobile Insurance Company, paid Nichelle $50,000 in uninsured motorist benefits for the pickup truck, but denied her request to stack the uninsured motorist benefits on her parents' additional seven automobile insurance policies with State Farm. Nichelle subsequently initiated an action against State Farm to collect stacked uninsured motorist benefits. State Farm appeals a bench trial judgment awarding Nichelle $381,729.43, consisting of $225,000 in uninsured motorist benefits stacked from the additional seven vehicles insured by her parents and $156,729.43 in prejudgement interest. We accepted certification from the Court of Appeals to address an issue for which there is substantial public interest in New Mexico. *See* NMSA 1978, § 34–5–14(C) (1972) ("The supreme court has appellate jurisdiction ... if the court of appeals certifies to the supreme court that the matter involves ... an issue of substantial public interest."). Specifically, we consider whether the trial court properly determined that Nichelle was a Class I insured entitled to stack uninsured motorist coverage on her parents' eight vehicles, when before her accident, she married, moved away from the family home, and used a vehicle for which she had been rated by State Farm and for which an additional premium had been assessed. We believe that the trial court properly resolved these issues and therefore affirm the trial court's judgment.

I.

{2} Prior to the July 4, 1987 accident, Nichelle lived with her parents, Linda and Hart Ponder, and was listed as the principal driver of the Ford F100 pickup truck, which was insured by State Farm along with seven additional vehicles. Separate premiums were paid for each vehicle. After she was involved in a minor accident in 1985, shortly after receiving her driver's license, State Farm rated Nichelle and an additional premium was assessed for her use of the pickup truck. At that time, Linda Ponder understood Nichelle to be fully covered and under the terms of the policy, she in fact was fully covered for all the Ponder's vehicles as a Class I insured.

{3} In February 1986, Nichelle married Mike Taylor and both lived with Nichelle's parents until May 1987. Linda Ponder testified that she originally reported Nichelle's marriage, the birth of Nichelle's child, and their change of residence from the Ponder family home to the Diamond A Ranch to Marla Atkinson of Atkinson Agency, a State Farm agency the Ponders had relied upon exclusively for their insurance needs since 1982. Linda Ponder testified that on several occasions she inquired about the adequacy of her daughter's coverage and explained to Atkinson's agents that she wanted "full coverage" for her daughter. She expressed concern to the Atkinson Agency that because Nichelle would be moving out, she wanted to ensure that her daughter's full coverage continued. On these occasions, Linda Ponder was advised by the agency that her daughter was "fully covered," not to concern herself because they would look into it, and not to worry because Nichelle, "as far as they were concerned, was still fully covered." At no time did the Atkinson Agency communicate to Linda Ponder that the change in her daughter's residence would affect the extent of her uninsured/underinsured motorist coverage.

{4} The policies for all eight of the Ponders' vehicles were renewed on May 7, 1987, each for a six-month duration. Prior to issuing the renewal notices, State Farm had been provided with information that Ponder was married, had a child, and was no longer living

with her parents. In the renewal notices, Nichelle was still rated on the policy for the F100 pickup truck and an additional premium continued to be assessed and paid. The renewal notices for three of the vehicles contained the language, "Younger drivers included if rated on another vehicle insured by us."

{5} After the accident, Nichelle sought payment under the policy for $275,000 in uninsured motorist benefits, which reflected a stacking of uninsured motorist coverage under each of the Ponder's eight vehicles. State farm paid $50,000, claiming that she was only covered by uninsured motorist benefits for the Ford F100 pickup truck. Nichelle then filed suit to collect the uninsured motorist benefits on the remaining seven vehicles. Despite finding that Nichelle was not a Class I insured under the express provisions of the policy, the trial court concluded that because Nichelle was listed as the principal driver, and additional premiums were assessed, she was entitled to stack her parents' uninsured motorist coverage on the remaining seven vehicles as a Class I insured. The trial court also awarded Nichelle prejudgment interest. State Farm now appeals the trial court's judgment.

II.

{6} Nichelle and State Farm disagree about the appropriate standard of review. Nichelle suggests this Court need only determine whether substantial evidence exists in the record to support the decision of the trial court. *See Melton v. Lyon,* 108 N.M. 420, 422, 773 P.2d 732, 734 (1989) (using the substantial evidence standard, "the reviewing court must view the evidence in the light most favorable to support the finding, and all reasonable inferences in support of the court's decision will be indulged"). State Farm urges that we apply a de novo review of the trial court's legal conclusions with no formal deference paid to the trial court decision because this question is an important matter of public policy which involves creating a new category of Class I insureds in contravention of existing state law. *See Gabaldon v. Erisa Mortgage Co.,* 1997–NMCA–120, ¶ 7, 124 N.M. 296, 949 P.2d 1193, (stating, "[T]he legal consequences flowing from the historical facts will be subject to de novo review if the question involves matters of public policy with broad precedential value beyond the confines of the particular case."), *aff'd in part and rev'd in part on other grounds by Gabaldon v. Erisa Mortgage Co.,* 1999–NMSC–039, ¶ 7, 128 N.M. 84, 990 P.2d 197 (stating, "the legal consequences flowing from the historical facts will be subject to de novo review if the question involves matters of public policy with broad precedential value beyond the confines of the particular case").

{7} We conclude that our determination of whether the trial court erred in holding that Nichelle was a Class I insured, entitled to stack benefits under her parents' multi-vehicle automobile insurance policies, presents a mixed question of law and fact. As such, "we use the substantial evidence standard for review of the facts and then make a de novo review of the trial court's application of the law to those facts." *State v. Reynolds,* 119 N.M. 383, 384, 890 P.2d 1315, 1316 (1995). We review the whole record to determine whether substantial evidence exists to support the trial court's factual determinations. *See Bennett v. City Council for Las Cruces,* 1999–NMCA–015, ¶ 20, 126 N.M. 619, 973 P.2d 871; *see also Enriquez v. Cochran,* 1998–NMCA–157, ¶ 20, 126 N.M. 196, 967 P.2d 1136 ("Because the trial court's decision must be based on its conclusions about a party's conduct and intent, implicit in the standard of review is the question of whether the court's findings and decision are supported by substantial evidence."). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Landavazo v. Sanchez,* 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990) (citations omitted). We review de novo the trial court's application of the law to the facts in arriving at its legal conclusions. *See Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.,* 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991).

III.

{8} State Farm advances three arguments in its challenge of the trial court's determination that Nichelle was a Class I insured entitled to stack the uninsured mo-

torist benefits for the additional seven vehicles covered by her parents' policies. State Farm claims that under New Mexico law: (1) simply rating a driver for which payment of an additional premium is required does not confer Class I status; (2) the trial court's finding of fact that Nichelle was not a named insured under the express provisions of the policy should have the effect of denying her Class I status; and (3) if this Court finds that Nichelle was in fact a Class I insured, language in the renewal notices for three vehicles purporting to include younger rated drivers as insureds, should be read together with exclusions in the remaining vehicle notices so as to limit stacking to only those additional vehicles. State Farm urges this Court to reject the trial court's extension of the law of stacking and uninsured motorist coverage as a "derogation of the express language of the contract ... [and] public policy guidelines and considerations heretofore established by our appellate courts."

{9} Nichelle advances a number of arguments in defense of the judgment and the trial court's conclusion that she was a Class I insured. First, Nichelle claims that because she was rated as the principal driver for the F100 pickup truck and assessed additional premiums, and because the policy failed to define certain terms, her status was elevated above that of a mere permissive Class II insured. Second, Nichelle contends that the representations made by the Atkinson Agency to Linda Ponder regarding the extent of her coverage led Linda Ponder to believe that there was no change in coverage after Nichelle moved to the Diamond A Ranch from the Ponder family home. Finally, Nichelle argues that the language in the renewal notices containing the phrase, "Younger drivers included if insured on other vehicles by us" would cause a reasonable insured to believe that she was a Class I insured. We hold that these arguments, taken together, support the trial court's judgment.

A.

{10} Stacking refers to "an insured's attempt to recover damages in aggregate under more than one policy or one policy covering more than one vehicle until all damages either are satisfied or the total policy limits are exhausted." *Morro v. Farmers Ins. Co.*, 106 N.M. 669, 670, 748 P.2d 512, 513 (1988) (citing *Gamboa v. Allstate Ins. Co.*, 104 N.M. 756, 757, 726 P.2d 1386, 1387 (1986), and *Lopez v. Foundation Reserve Ins. Co.*, 98 N.M. 166, 168, 646 P.2d 1230, 1232 (1982)).

{11} We resolve questions regarding insurance policies by interpreting their terms and provisions in accordance with the "same principles which govern the interpretation of all contracts." *Rummel v. Lexington Ins. Co.*, 1997–NMSC–041, ¶ 18, 123 N.M. 752, 945 P.2d 970 (quoting 2 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 21:1 (1996), and citing *Jaramillo v. Providence Washington Ins. Co.*, 117 N.M. 337, 340, 871 P.2d 1343, 1346 (applying principles of contract interpretation to construe an automobile insurance policy)). Our analysis of the insurance policy proceeds with the primary goal of "ascertain[ing] the intentions of the contracting parties with respect to the challenged terms at the time they executed the contract." *Strata Prod. Co. v. Mercury Exploration Co.*, 1996–NMSC–016, ¶ 29, 121 N.M. 622, 916 P.2d 822. "When discerning the purpose, meaning, and intent of the parties to a contract, the court's duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the court may not alter or fabricate a new agreement for the parties." *CC Housing Corp. v. Ryder Truck Rental, Inc.*, 106 N.M. 577, 579, 746 P.2d 1109, 1111 (1987); *see also Montoya v. Villa Linda Mall, Ltd.*, 110 N.M. 128, 129, 793 P.2d 258, 259 (1990) ("It is black letter law that, absent an ambiguity, a court is bound to interpret and enforce a contract's clear language and cannot create a new agreement for the parties."). Thus, when the policy language is clear and unambiguous, we must give effect to the contract and enforce it as written. *See Estate of Griego v. Reliance Std. Life Ins. Co.*, 2000–NMCA–022, ¶ 19, 128 N.M. 676, 997 P.2d 150; *Richardson v. Farmers Ins. Co.*, 112 N.M. 73, 74, 811 P.2d 571, 572 (1991) ("Absent ambiguity, provisions of [a] contract need only be applied, rather than construed or interpreted."). In construing insurance

policy provisions, "[a]mbiguities arise when separate sections of a policy appear to conflict with one another, when the language of a provision is susceptible to more than one meaning, when the structure of the contract is illogical, or when a particular matter of coverage is not explicitly addressed by the policy." *Rummel*, 1997–NMSC–041, ¶ 19, 123 N.M. 752, 945 P.2d 970 (citations omitted).

{12} The express language of the State Farm policy is not ambiguous. For purposes of uninsured motorist coverage, the policy clearly includes relatives as insureds.[1] At the time of the accident, Nichelle did not meet the definition of a relative as defined by the policy. It defines a relative as "a person related to you or your spouse by blood, marriage or adoption who lives with you. It includes your unmarried and unemancipated child away at school." Substantial evidence exists to support the trial court's finding that Nichelle was not a Class I insured because she did not live with her parents and was married. Although there was testimony that Nichelle maintained dual residences at the Ponder family home and Diamond A Ranch and had announced her intention to move back to the Ponder family home and obtain a divorce from her husband, the trial court found that Nichelle did not live at the Ponder home. As such, we agree with the trial court's conclusion that "[a]t the time of the accident, Nichelle Ponder was not a Class I insured under any of the express definitions contained in the policy."

{13} Despite our finding that Nichelle was not a Class I insured under the express provisions of the State Farm policy, our inquiry does not end here. New Mexico has, since our decisions in *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 508–09, 817 P.2d 238, 242–43 (1991), and *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781–82, 845 P.2d 1232, 1235–36 (1993), no longer restricted contract interpretation to language found within the four corners of an insurance policy. The *Mark V, Inc.* Court recognized that "[w]ithout a full examination of the circumstances surrounding the making of the agreement, ambiguity or lack thereof often cannot properly be discerned." 114 N.M. at 781, 845 P.2d at 1235. In abandoning reliance only on the four-corners approach, courts are now allowed to consider extrinsic evidence in determining whether an ambiguity exists in the first instance, or to resolve any ambiguities that a court may discover. In *Jaramillo*, we stated that a court may consider extrinsic evidence to make its preliminary finding on questions of ambiguity. 117 N.M. at 340–41, 871 P.2d at 1346–47. *Rummel* not only recognized that a court could use extrinsic evidence to determine if an ambiguity existed, but also added that, "[i]f ambiguities cannot be resolved by examining the language of the insurance policy, courts may look to extrinsic evidence such as the premiums paid for insurance coverage, the circumstances surrounding the agreement, the conduct of the parties, and oral expressions of the parties' intentions." 1997–NMSC–041, ¶ 21, 123 N.M. 752, 945 P.2d 970.

{14} We note, however, that in examining extrinsic evidence we will not give effect to a party's undisclosed intentions. "As a matter of law, one party's subjective impressions, innermost thoughts, or private intentions, do not create an ambiguity." *Hoggard v. Carlsbad*, 1996–NMCA–003, ¶ 15, 121 N.M. 166, 909 P.2d 726. In *Hansen v. Ford Motor Co.*, 120 N.M. 203, 206, 900 P.2d 952, 955 (1995), we determined that a party's statements of unilateral, subjective intent, without more, are insufficient to establish ambiguity in light of clear contract language.

{15} Based on our review of the circumstances surrounding the agreement, the conduct of the parties, and their oral expressions of their intentions, we conclude that the Ponders' State Farm policy was ambiguous. Linda Ponder testified that her conversations with the Atkinson Agency be-

1. Section III of the State Farm policy, which outlines uninsured and unknown motorist coverage, defines an insured as:
   1. the first person named in the declarations;
   2. his or her spouse;
   3. their relatives; and
   4. any other person while occupying:
      a. your car ... [s]uch vehicle has to be used within the scope of the consent of you or your spouse....

   (Emphasis omitted).

tween 1986 and 1987, led her to believe that Nichelle's coverage was the same as it had been when she had been originally rated in 1985. She believed that the extent of Nichelle's coverage had not changed and that her offers to make changes to the policy were not necessary.

{16} As early as August 1986, Linda Ponder contacted the Atkinson Agency. During this conversation, Linda Ponder informed the agency that Nichelle Ponder had married, was expecting a baby, and was "moving in and out" of the Ponder family home. Linda Ponder testified that she wanted to know whether the change in her daughter's marital status limited her coverage so that, if necessary, she could take the necessary steps to obtain coverage that would also cover Nichelle on the other Ponder vehicles. Linda Ponder maintained that Atkinson repeatedly used the terms "fully covered" to describe Nichelle's coverage. The agency file partially corroborated Linda Ponder's testimony about Nichelle Ponder's marriage but failed to mention any change in living arrangements.

{17} During another conversation with the Atkinson Agency in May 1987, prior to the expiration of their automobile insurance policies, Linda Ponder testified that she asked about the status of her daughter's coverage because Nichelle was married and planning to move to the Diamond A Ranch, and she wanted to confirm that Nichelle still had insurance coverage. Furthermore, she indicated to Atkinson that she wanted "full coverage" for her daughter to continue and expressed concern that her change of residence would alter the scope of her coverage. She claims that Atkinson reassured her stating, "don't worry, everything's taken care of." We note that Linda Ponder, on cross examination, testified that she did not inquire what "full coverage" meant. Linda Ponder testified that her conversations with the Atkinson Agency between 1986 and 1987 led her to believe that Nichelle's coverage was the same as it had been in 1985 when she had been originally rated and that the extent of coverage did not change and that her offers to make any changes to the policy were not necessary.

{18} The Atkinson Agency maintains that they were never questioned by the Ponders as to what effect Nichelle's change in residence would have on her insured status, and challenges Linda Ponder's claim that the primary purpose of the several conversations with Atkinson was to ascertain the extent of Nichelle's coverage and to instruct Atkinson to ensure that her daughter's insurance coverage was maintained. As such, Herb Atkinson testified that he did not relay to the Ponders that a change in residence would affect the extent of their daughter's coverage.

{19} Examination of the extrinsic evidence in this case supports a finding that the policy was ambiguous. *See C.R. Anthony Co.*, 112 N.M. at 508–09, 817 P.2d at 242–43; *Mark V, Inc.*, 114 N.M. at 781–82, 845 P.2d at 1235–36. The evidence presented does more than express Ponder's "unilateral, subjective intent." *Hansen*, 120 N.M. at 206, 900 P.2d at 955. The affidavits and trial testimony provide evidence of the oral expressions and intentions of the parties in the formation of the contract.

{20} Herb Atkinson's testimony that a minor, like Nichelle Ponder, who moves out of the house and takes a vehicle would still enjoy full coverage under both the liability and uninsured motorist provisions of her parents' policies, does not alter the fact that there were significant changes in the scope of coverage with regard to Nichelle's ability to stack coverage. Despite Herb Atkinson's testimony that there was no way that he could write a policy that would allow an individual, like Nichelle, who does not own the vehicle, to stack coverage for the seven additional vehicles after she had moved out and no longer qualified as a named insured under the policy, the same conclusion would not be obvious to the typical insured. Had the Atkinson Agency informed the Ponders that because Nichelle was no longer living in the family home, she was no longer entitled to stacking and then followed up by suggesting that they compensate by increasing their uninsured motorist coverage for the F100 pickup truck, we would not be presented with the issues before us today.

B.

{21} In determining whether contractual ambiguities exist, we also examine the effect of State Farm's rating of Nichelle as the principal driver and charging an additional premium for her use of the Ford F100 pickup truck.

{22} New Mexico recognizes two classes of insureds, each with attendant rights for purposes of stacking uninsured motorist coverage benefits. "Class I insureds are the named insured, the spouse, and those relatives that reside in the household while Class II insureds are insured by virtue of their passenger status in an insured vehicle." *Tarango v. Farmers Ins. Co. of Arizona*, 115 N.M. 225, 226, 849 P.2d 368, 369 (1993). "First class insureds are covered by policies no matter where they are or in what circumstances they may be; coverage is not limited to a particular vehicle. On the other hand, second class insureds are covered only because they occupy an insured vehicle." *Gamboa*, 104 N.M. at 758, 726 P.2d at 1388 (citation omitted). Class I insureds may stack all uninsured motorist policies purchased by the named insured because those policies were purchased to benefit the named insured and his or her family, but Class II insureds may only recover under the policy on the car in which they rode because the purchaser only intended occupants to benefit from that particular policy. *Padilla v. Dairyland Ins. Co.*, 109 N.M. 555, 559, 787 P.2d 835, 839 (1990); *Morro v. Farmers Ins. Group*, 106 N.M. 669, 671, 748 P.2d 512, 513 (1988); *Schmick v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 216, 220, 704 P.2d 1092, 1096 (1985).

{23} In this case, the trial court concluded as a matter of law that, "when an additional premium was paid for Nichelle to be 'rated' on the one policy, she became a Class I insured on that vehicle." State Farm contends, however, that Nichelle was only a Class II permissive user not entitled to stacking benefits. State Farm argues that when it rated Nichelle after the May 1987 renewals, that it was not in consideration for her recent change in residence and marital status, but instead continued to be assessed in consideration for the additional risk created by Nichelle's 1985 accident and her status as an "unmarried female driver under age twenty-one."

{24} Our examination of the facts indicate that Nichelle was more than a mere permissive user of the F100 pickup truck. Here, State Farm's claim that the trial court may have believed that Nichelle was rated in consideration of her change in residence is not dispositive to the resolution of this issue. State Farm received valuable consideration both before and after the May 1987 renewal from the continued assessment of additional premiums in exchange for rating Nichelle as the principal driver of the Ford F100 pickup truck, despite having been informed of the changes in her living arrangements and marital status. Based on this, we believe that the rating of Nichelle on the F100 pickup truck after her change in living arrangements contributed to the ambiguity in the policy.

{25} The trial court found that contractual ambiguities existed in the State Farm policy. In its conclusions of law the trial court stated, "Any ambiguity in the insurance policy will be construed against the insurer so as to resolve any coverage issue in favor of the insured." We agree with this analysis, and based on our consideration of the express provisions of the policy, as well as the extrinsic evidence of the circumstances surrounding the formation of the contract, we conclude that the State Farm policy is ambiguous.

C.

{26} When interpreting insurance policies, as a matter of public policy, ambiguities are generally construed in favor of the insured and against the insurer. Thus, where the policy is found to be unclear and ambiguous, "[t]he court's construction of an insurance policy will be guided by the reasonable expectations of the insured." *Rummel*, 1997–NMSC–041, ¶ 22, 123 N.M. 752, 945 P.2d 970. The Court, in *Sanchez v. Herrera*, recognized the relative difference in bargaining power between insurance companies and the typical insured, stating,

> The typical insured does not bargain for individual terms within policy clauses; the insured makes only broad choices regarding general concepts of coverage, risk, and cost. Not only does the insurance company draft the documents, but it does so with far more knowledge than the typical insured of the consequences of particular words.

109 N.M. 155, 159, 783 P.2d 465, 469 (1989).

{27} In *Jaramillo,* however, we noted that while the general rule is to construe insurance policies in favor of the insured, "[the] general rule is not applicable to situations in which a third party who is not expressly named as the insured or who is not an acknowledged family member is seeking coverage under a policy that has not been purchased by the third party." 117 N.M. at 341, 871 P.2d at 1347. Although State Farm acknowledges that the trial court may have impliedly found the insurance policy was ambiguous, it contends that Ponder is a third party and therefore not entitled to the general rule favoring construction in favor of insureds. *Jaramillo* concluded that "if the ambiguity gives rise to the question whether a third party is or is not the intended beneficiary of specific stacking provisions, the third party is not entitled to the rule of construction that ambiguities must be decided against the insurer." 117 N.M. at 342, 871 P.2d at 1348.

{28} We do not dispute *Jaramillo*'s rule regarding third-party beneficiaries and burdens of proof. However, we conclude that Nichelle does not fall in the same category as the type of third-party beneficiaries identified in *Jaramillo.* This case is factually distinguishable from *Jaramillo.* In *Jaramillo,* an employee was seeking to stack benefits under a company automobile insurance policy. In contrast, the evidence in this case, which includes the express policy provisions of the State Farm policy, extrinsic evidence relating to the renewal notices, Linda Ponder's discussions, and contact with the Atkinson Agency, supports an interpretation that Nichelle was not a third-party beneficiary. Nichelle's name appeared in the policy, though as a driver rated for the use of the Ford F100 pickup truck, and according to the testimony of Linda Ponder, she expected her daughter's full coverage to continue with the policy renewals in May 1987. We recognize the rationale behind not permitting third persons, not a party to a contract, from enjoying the benefit of a construction of the policy in their favor. However, in this case, we cannot accept State Farm's suggestion that we apply the rule to Nichelle and characterize her as a third person seeking to benefit from stacking provisions. Given the trial court's findings of fact, we believe that Nichelle is not a third-party beneficiary as described in *Jaramillo.* As such, we conclude that the established principles by which New Mexico law "recognizes the special nature of insurance contracts and has developed principles of construction that favor both the insured and the avowed purpose of insurance, the provision of coverage" remain the proper means of analyzing and construing the insurance contract in this case. *Sanchez,* 109 N.M. at 159, 783 P.2d at 469.

D.

{29} Accordingly, we find that Linda Ponder had a reasonable expectation that her daughter would maintain the same type and extent of coverage that Nichelle enjoyed while living at the Ponder family home. *See Casias v. Continental Casualty Co.,* 1998–NMCA–083, 125 N.M. 297, 960 P.2d 839. Although the Atkinson Agency may have told Linda Ponder that her daughter was "fully covered" and "not to worry" and although Nichelle may have maintained liability and uninsured motorist coverage under the terms of the policy, we nonetheless believe that based on the oral expressions of the parties and the intentions communicated therein, that Linda Ponder had a reasonable expectation that Nichelle could stack coverage. We find it relevant to our disposition of this case that Nichelle had enjoyed Class I insured status under the express provisions of the policy, prior to her change in residence. Combined with Linda Ponder's attempts to maintain that coverage and the confusion that ensued, we find that based on the ambiguities we have identified in this case, Linda Ponder had a reasonable expectation that her daughter enjoyed the same Class I status she

did prior to her change in marital status and residence.[2]

{30} In this case, the trial court specifically found that Nichelle was not a Class I insured under the express terms and provisions of the policies issued to her parents. However, the trial court nonetheless concluded that Nichelle was a Class I insured based on the ambiguity in the policy. Applying *Jaramillo*'s rule that extrinsic evidence may be considered to determine if the terms and conditions of the policy were ambiguous, we conclude from the evidence adduced at trial that substantial evidence exists to support the trial court's decision that Nichelle was a Class I insured.

{31} In affirming the trial court, we are not adopting, at this time, a per se rule that in every circumstance a person, not otherwise a Class I insured under the policy, who is a rated driver, and for whom additional premiums are assessed, is by default a Class I insured. Based on the specific facts presented in this case, we hold that Nichelle had a reasonable expectation of coverage as a Class I insured. Rather than finding as a matter of law that rating a driver and assessing an additional premium automatically confers Class I status, our conclusion is based on our consideration of the extrinsic evidence and the policy language in this case. The fact that State Farm rated Nichelle was only one of many factors that led to the contractual ambiguity which we construed in favor of Nichelle. Despite unambiguous policy language which might have otherwise excluded Nichelle as a Class I insured, the context in which the policy was created and accepted demonstrate a clear intent and a reasonable expectation that Nichelle Ponder maintain her status as a Class I insured. Given the contractual ambiguities in this case, we construe the policy in favor of Nichelle.

IV.

{32} Having concluded that Nichelle is a Class I insured, we now address the question of whether she is permitted to stack the uninsured motorist benefits on all of her parents' vehicles or only the three vehicles which had renewal notices that contained the language, "Younger drivers included if insured on another vehicle by us." As we have noted, New Mexico has refused to enforce insurance policy provisions which purport to limit uninsured motorist coverage. As we have already determined that Ponder was, in this case, a Class I insured, we now consider the effect of the language in the renewal notices for the other remaining vehicles which contain clauses purportedly limiting coverage to certain drivers.[3]

{33} New Mexico has developed a strong policy favoring stacking for Class I insureds and "[t]his Court has consistently refused to enforce exclusions that attempt to limit uninsured motorist coverage to particular circumstances." *Loya v. State Farm Mut. Ins. Co.*, 119 N.M. 1, 6, 888 P.2d 447, 452 (1994). "Insurance policy clauses that prohibit stacking are particularly repugnant to public policy when the injured insured has paid separate premiums for underinsured/uninsured

2. We note that our disposition of this case might have been different if Nichelle had not been previously insured as a Class I insured for there may have been less credence to the argument that the Ponders had a reasonable expectation that their daughter was covered as a Class I insured.

3. Relevant language in the renewal policies is as follows:

1. 1986 Dodge motor home: "Your premium is based on the following: Principal driver is age 25 or older."
2. 1983 Harley Davidson motorcycle: "There are no principal male or unmarried female operators under age 25 unless rated on another motorcycle insured with us."
3. 1982 Honda motorcycle: "There are no principle male or unmarried female operators under age 25 unless rated on another motorcycle insured with us."
4. 1981 Ford F100: "Principle driver is an unmarried female under age 21."
5. 1985 Ford F250: "There are no unmarried male drivers under age 25. Younger drivers included if rated on another car insured with us."
6. 1986 Nissan 300ZX: "There are no male or unmarried female drivers under age 25. Younger drivers are included if rated on another car insured with us."
7. 1982 Ford F250: "There are no unmarried male drivers under age 25. Younger drivers included if rated on another car insured with us."
8. 1983 Peugeot: No language in record.

motorist coverage on each vehicle." *Jimenez v. Foundation Reserve Insurance Co., Inc.*, 107 N.M. 322, 324, 757 P.2d 792, 794 (1988). The underlying rationale is that if the damages an insured has suffered have exceeded the policy limits, the insured has a reasonable expectation of coverage under the policies he or she has purchased for their benefit. *Id.*

{34} State Farm correctly acknowledges that it stands on shaky ground when advancing arguments that urge this Court to limit the coverage of a Class I insured. In *Jimenez*, we stated that "an insurer's attempt by a limiting clause to preclude stacking of additional coverage separately paid for by the insured violates the clear policy of the uninsured motorist statute, which intends that an injured party be compensated to the extent of coverage obtained by or for the injured party." 107 N.M. at 325, 757 P.2d at 795; *see also Schmick*, 103 N.M. at 221, 704 P.2d at 1097 ("[The] only limitations to be placed on uninsured/underinsured motorist coverage are that the insured legally be entitled to recover damages and that the negligent driver be either uninsured or underinsured" and holding an exclusionary clause limiting plaintiff's recovery "void as against New Mexico's policy of compensating persons injured through no fault of their own."). In *Loya*, we held that an insurance policy containing an express exclusion limiting a spouse's coverage based on a definition of "spouse" limited to "your husband or wife while living with you" was void. 119 N.M. at 5–6, 888 P.2d at 451–52.

{35} While the notices for only three of the vehicles contains language that includes "younger drivers ... if rated on another car insured with us," the language in the notices for the other vehicles only contained language identifying the *principal* driver. There were no specific exclusions restricting Nichelle's use of the remaining vehicles. Accordingly, in this case, we conclude that the purported exclusions in the State Farm policy limiting Nichelle's ability to stack coverage to drivers not under 25 shall not be given effect so as to prohibit Nichelle Ponder from stacking coverage for all the vehicles in her parents' policies. Therefore, we hold that the trial court properly concluded that Nichelle is entitled to stack the benefits for all eight vehicles.

V.

{36} State Farm claims that the trial court's award of $156,729.43 in prejudgement interest under NMSA 1978, § 56–8–3(A) (1983) (stating that interest shall not exceed fifteen percent in cases where money is due by contract) constitutes a penalty and was therefore an abuse of discretion. Specifically, State Farm contends that because the trial court created a new class of Class I insureds, thereby extending the current law of stacking in New Mexico, no money was ever due on the contract—thus any interest due should have only accrued from the date of the judgment. *See* § 56–8–3(A). Finally, State Farm claims that the prejudgment interest award constituted a penalty because it amounted to almost seventy percent of the damage award.

{37} "The obligation to pay prejudgment interest under section 56–8–3 arises by operation of law and constitutes an obligation to pay damages to compensate a claimant for the lost opportunity to use money owed the claimant and retained by the obligor between the time the claimant's claim accrues and the time of judgment (the loss of use and earning power of the claimant's funds)." *Sunwest Bank v. Colucci*, 117 N.M. 373, 377, 872 P.2d 346, 350 (1994) (citation omitted). Even for those cases where prejudgment interest is required as a matter of right, "the trial court must consider the equities in each case before awarding prejudgment interest pursuant to Section 56–8–3." *Sunwest Bank*, 117 N.M. at 378, 872 P.2d at 351; *Ranch World of New Mexico, Inc. v. Berry Land & Cattle Co.*, 110 N.M. 402, 404, 796 P.2d 1098, 1100 (1990) (quoting *Shaeffer v. Kelton*, 95 N.M. 182, 188, 619 P.2d 1226, 1232 (1980), for the proposition that prejudgement interest awards should not be made "arbitrarily without regard for the equities of each particular situation").

{38} State Farm argues that because the trial court found that it had paid Nichelle all monies for which she was entitled under the express definitions of the policy, no breach of

contract existed," and that its "duty to pay did not become fixed until the court changed the law and extended the scope of uninsured motorist coverage." Because State Farm owed no additional monies and because the "additional coverage was created by the trial court" the prejudgment interest awarded by the trial court constitutes a penalty and an abuse of discretion. State Farm directs us to numerous cases standing for the proposition that prejudgment interest is due as a matter of right " 'only when a party has breached a duty to pay a definite sum of money or the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract, or by established market prices.' " *Sunwest Bank*, 117 N.M. at 378, 872 P.2d at 351 (quoted authority omitted).

{39} In this case, we hold that the trial court properly awarded Nichelle prejudgment interest under section 56-8-3(A) in the amount of $156,729.43. As indicated above, we do not today announce a per se rule that an insurance company creates a Class I insured by rating a driver and assessing additional premiums. Our holding is very fact-specific and conforms to established legal precedent in New Mexico regarding stacking insurance coverage. Nichelle had a reasonable expectation of coverage under the State Farm policy. As such, we hold that the trial court's application of section 56-8-3(A) and award of prejudgment interest for money due by contract was proper.

{40} Furthermore, the trial court concluded that its award of seven and one-half percent interest was "fair and reasonable, considering the earning power of money [the $225,000 damages award]; that it is a case of first impression; and that the [c]ontract between the parties is silent regarding the issues which were litigated." Under section 56-8-3(A), the trial court was permitted to assess a maximum prejudgment interest award of fifteen percent. Instead, the trial court's award constituted only seven and one-half percent. The trial court properly considered the equities of the case at hand and we find no abuse of discretion in its judgment.

{41} **IT IS SO ORDERED.**

MINZNER, C.J., FRANCHINI, SERNA, and MAES, JJ., concur.

13 P.3d 68

2000-NMCA-100

Jimmie T. COOPER, Individually and as Trustee for the Jimmie T. Cooper and Betty P. Cooper Revocable Trust and Betty P. Cooper, Individually and as Trustee for the Jimmie T. Cooper and Betty P. Cooper Revocable Trust, Plaintiffs–Appellants,

v.

AMERADA HESS CORPORATION; Chevron U.S.A., Inc.; Dynegy Corporation f/k/a NGC Corporation, f/k/a Warren Petroleum Corporation; Concho Resources, Inc.; Primero Operating Co., Ltd.; Rhombus Operating Co., Ltd.; Rhombus Energy Co.; Arch Petroleum, Inc.; and Rice Engineering Corporation, Defendants–Appellees.

No. 20,412.

Court of Appeals of New Mexico.

Sept. 15, 2000.

Certiorari Granted, No. 26,609, Nov. 20, 2000.

[redacted]

[redacted]

[redacted]

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OPINION

ALARID, Judge.

{1} This case requires us to decide where venue lies in a common-law environmental action involving multiple defendants. The trial court, believing that the action involved an interest in land located in Lea County, ruled that venue was improper in Santa Fe County and dismissed the entire case. As we explain more fully below, although Plaintiffs' claims arise out of alleged injury to real property, Plaintiffs' claims nevertheless are transitory claims for purposes of our general venue statute. Applying our general venue statute, we affirm in part, and reverse in part.

BACKGROUND

{2} The facts relevant to the issue of venue are straightforward and undisputed. Plaintiffs own and reside on the Monument Springs Ranch in Lea County. Plaintiffs allege that Defendants have engaged in, or are presently engaged in, oil and gas production, disposal, and transportation operations on the property. Plaintiffs allege that Defendants have spilled, leaked, and otherwise released hydrocarbons, salt water, and other substances dangerous to human life and wel-

fare onto portions of the property, and that Defendants' acts and omissions have facilitated migration of these substances through the surface and subsurface soils and into the underlying groundwater. Plaintiffs have asserted claims for negligence, trespass, nuisance, unjust enrichment, and infliction of emotional distress. Plaintiffs have requested money damages for the costs of investigating, assessing, and remedying the alleged pollution, or alternatively, an amount representing the diminished market value of Plaintiffs' property. Plaintiffs also requested injunctive relief, apparently to restrain Defendants from further tortious acts. Plaintiffs later moved to file an amended complaint omitting the request for injunctive relief. Plaintiffs' motion to amend was pending when the case was dismissed for improper venue.

{3} Defendants Amerada Hess Corporation (Amerada); Chevron, U.S.A., Inc. (Chevron); Dynegy Corporation (Dynegy); Concho Resources, Inc. (Concho); Rhombus Energy Co.(Rhombus Energy); Arch Petroleum, Inc. (Arch); and Rice Engineering, Inc. (Rice); are all foreign corporations. Defendant Rhombus Operating Co., Ltd. (Rhombus Operating) is a Texas limited partnership. Defendant Primero Operating Co., Ltd (Primero) is a New Mexico corporation, whose principal place of business is in Chaves County. Defendants Rhombus Energy and Rhombus Operating have appointed a Chaves County attorney as their registered agent for service. Defendants Amerada, Chevron, Dynegy, Concho, Arch, and Rice have designated either CT Corporation System, whose address is 123 East Marcy Street in Santa Fe, or Prentice Hall Corporation System, whose address is 121 E. Palace Avenue in Santa Fe, as their registered agents.

{4} Defendants[1] moved to dismiss for improper venue. The trial court dismissed the complaint without prejudice as to all Defendants based on the conclusion that the relief requested by Plaintiffs' complaint affected an interest in land within the meaning of NMSA 1978, § 38-3-1(D)(1), and that Santa Fe County therefore was an improper venue for an action affecting lands located in Lea County.

DISCUSSION

1. STANDARD OF REVIEW

{5} A motion to dismiss for improper venue raises a question of law, which this Court reviews de novo. *See Williams v. Board of County Comm'rs of San Juan County,* 1998-NMCA-090, ¶ 28, 125 N.M. 445, 963 P.2d 522. "In determining venue, the court must look to the complaint and the character of the judgment [that] may be rendered." *United Nuclear Corp. v. Fort,* 102 N.M. 756, 760, 700 P.2d 1005, 1009 (Ct. App.1985).

2. DOES THIS LAWSUIT INVOLVE LANDS OR AN INTEREST IN LANDS?

{6} New Mexico's general venue statute is codified at NMSA 1978, § 38-3-1 (1876, as amended through 1988). The principal question presented by this appeal is whether Plaintiffs' claims involve an interest in lands within the meaning of Section 38-3-1(D)(1). That statute provides as follows: "When lands or any interest in lands are the object of any suit in whole or in part, the suit shall be brought in the county where the land or any portion of the land is situate."

{7} We begin our analysis by reviewing the historical background of Section 38-3-1(D)(1). *See Munroe v. Wall,* 66 N.M. 15, 18, 340 P.2d 1069, 1070 (1959) ("One guide in the construction of a statute that has been found to be most useful to the courts is the consideration of the history and prior condition of a particular law."). The first statute regulating venue in civil actions became effective on September 22, 1846, as part of the Kearny Code of Laws. *Geck v. Shepherd,* 1 N.M. 346 (1859). That statute, 1846 N.M. Laws, Practice at Law in Civil Suits, § 4 (Kearny Code), provided as follows:

> Suits instituted by citation shall be brought in the county in which the defen-

1. For convenience, throughout we will refer to Defendants and Defendants' arguments collectively.

dant resides, or in the county in which the plaintiff resides, and the defendant may be found; in cases where the defendant is [not] [2] a resident of this territory such suit may be commenced in any county.

{8} In 1851, the Territorial Legislature enacted a new venue statute. 1865 Rev. Stat and Laws, art. XII, ch. XXVII, § 7 (1851) (the 1851 Act). The 1851 Act provided as follows:

Every person shall be sued in the county in which he lives, except in the following cases, that is to say:

1st. A married woman when liable to be sued, shall be sued in the county in which her husband resides.

2d. When a defendant has inherited an estate concerning which any one may wish to institute a suit, he shall be sued in the county in which the estate is situated.

3d. When a defendant has contracted to perform an obligation in a particular county, he shall be sued in the county in which he has engaged to perform the contract.

4th. When the defendant has committed some crime for which a civil action for damages may be maintained, in such case he may be sued in the county in which the crime was committed, or wherever he may be found.

5th. In case the defendant may be a transient person, he may be sued in whatever county he may be found.

6th. When suit is brought for the recovery of moveable property, it shall be brought in whatever county the property may be found.

7th. In cases against guardians, curators, executors and administrators, the parties may be sued in the county in which any such persons were appointed to any of said trusts, in the county in which the property in controversy may be found, or in the county in which the defendant may live; it being optionary with the plaintiff.

8th. In cases of delinquencies or frauds in public officers, they may be sued in the county in which the fraud or delinquency occurred, or in which the defendant may be found.

9th. When lands are the object of the suit, it shall be brought in the county in which the lands are situated.

10th. When two or more persons [are] liable to be made defendants in the same suit, if it be in the nature of a transitory action, the suit may be brought in the county in which either of the proposed defendants may reside.

{9} In 1853, the Legislature repealed the 1851 Act, apparently because the ten exceptions had proved "oppressive" to defendants and of "doubtful expediency." *Geck*, 1 N.M. at 353. In place of the 1851 Act, the Legislature enacted the following venue statute:

All suits, instituted in any of the courts of this Territory, shall be brought in the county in which the defendant resides, or in the county in which the plaintiff resides, and the defendant may be found; and in case the defendant is not a resident of this Territory, such suit may be brought in any county.

1853 N.M. Laws, ch. XXIX, § 4 (the 1853 Act).

{10} In 1876, the Legislature enacted a new venue statute, 1875–76 N.M. Laws, ch. II. (1876) (the 1876 Act). The 1876 Act provided as follows:

Section 1. That all civil actions which may hereafter be commenced in the district courts, shall be brought and shall be commenced in counties as follows, and not otherwise:

First, All transitory actions shall be brought in the county where either the plaintiff or defendant, or some one of them, in case there be more than one of either, resides.

Second, Or in the county where the contract sued on was made or is to be performed, or where the cause of action originated or indebtedness sued on was incurred.

2. The word "not" appears to have been inadvertently omitted from the English version of the Kearny Code. *Geck*, 1 N.M. at 349.

Third, Or in any county in which the defendant or either of them may be found in the Judicial District where the defendant resides....

Second, When the defendant has rendered himself liable to a civil action by any criminal act, suit may be instituted against such defendant in the county in which the offense was committed, or in which the defendant may be found or in the county where the plaintiff resides.

Third, When suit is brought for the recovery of personal property other than money, it may be brought as above provided, or in the county where the property may be found.

Fourth, When lands or any interest in lands are the object of any suit in whole or in part, such suit shall be brought in the county where the land or any portion thereof is situate.

Fifth, Suits for trespass on lands shall be brought as provided in the first section of this act, or in the county where the land or any portion thereof is situate.

Sixth, Suits may be brought against transient persons or non-residents in any county of this territory.

A comparison of Section 38–3–1 with the 1876 Act reveals that Section 38–3–1 is the direct descendant of the 1876 Act.

{11} Common-law courts traditionally maintained a distinction between "transitory" and "local" actions. *See Mostyn v. Fabrigas,* 98 Eng. Rep. 1021 (K.B.1774); *Livingston v. Jefferson,* 15 F. Cas. 660 (C.C.D.Va.1811) (No. 8,411); *see generally* 17 Daniel R. Coquillette, Gregory P. Joseph, Georgene M. Vairo, Sol Schreiber & Jerold S. Solovy, Moore's Federal Practice §§ 110.20, 110 App.104 (3d ed.) (Moore's); 77 Am.Jur.2d *Venue* § 2 (1997).

> A cause of action was transitory if the transaction on which it was founded might have taken place anywhere; an action was local if the transaction could have happened only in a particular place. When transitory in nature, the action could be brought wherever the defendant could be found and jurisdiction over his person obtained. On the other hand, if the action was local in nature, it could only be brought where the cause of action arose.

77 Am.Jur.2d *Venue* § 2; *see also Livingston,* 15 F. Cas. at 664. At common law, both suits to recover real property and suits to recover damages for injury to real property were deemed local in character. *See generally* XXII William M. McKinney, Encyclopedia of Pleading and Practice, *Venue* § II.b. (1902) (McKinney); 77 Am.Jur.2d *Venue* § 18. It is clear that Plaintiffs' claims for nuisance and trespass would have been treated as local claims under the common law. McKinney, § II.b., at 777–78.

{12} The common-law treatment of tort actions for injuries to land as local claims appears to have been as much a matter of tradition as of logic. For example, even though an action for damages for trespass to real property was considered local, actions for specific performance of a contract to sell real property or for breach of a lease of real property were considered transitory actions, which could be brought in any court with jurisdiction over the person of the defendant. McKinney, § II.b. text and notes at 783. In his celebrated opinion in *Livingston,* Chief Justice Marshall criticized the common-law rule as applied to trespass actions:

> It is admitted, that on a contract respecting lands, an action is sustainable wherever the defendant may be found: yet, in such a case, every difficulty may occur which presents itself in an action of trespass. An investigation of title may become necessary. A question of boundary may arise, and a survey may be essential to the full merits of the cause: yet these difficulties have not prevailed against the jurisdiction of the court. They have been countervailed, and more than countervailed by the opposing consideration, that if the action be disallowed, the injured party may have a clear right without a remedy in a case where the person who has done the wrong, and who ought to make the compensation, is within the power of the court. That this consideration should lose its influence, where the action pursues a thing not within the reach of the court, is of inevitable necessity; but for the loss of its influence where the remedy is against the person

> and can be afforded by the court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment.

Livingston, 15 F. Cas. at 664.

{13} Under the Kearny Code, there was no attempt to distinguish transitory and local actions as at common law; instead, in all actions, venue depended upon the residence of the parties.

{14} The 1851 Act appears to have codified a modified common-law approach. For example, the sixth exception limiting the venue of actions to recover moveable property to the county where the property is found, 1851 Act, § 7, ¶ 6, corresponds to the common-law characterization of replevin as a local action. *See* McKinney, § II.b. at 779. The ninth exception, applicable "[w]hen lands are the object of the suit" likewise is consistent with the common-law's characterization of suits to recover land as local actions. *See* McKinney, § II.b. at 777. It is less clear whether the Legislature intended the ninth exception to codify the common-law's characterization of suits to recover damages to real property as local.

{15} The 1853 Act reinstated the Kearney Code's approach to venue and once again abolished the common-law distinctions between transitory and local actions. The 1853 Act remained in effect for the next twenty-three years.

{16} The 1876 Act involved a substantial reworking of the general venue statute. The relationship of the 1876 Act to common-law venue rules is not entirely clear. Although the 1876 Act refers to "transitory actions," it does not employ the complementary common-law term "local actions." In the cases of trespass to land and recovery of moveable property, the 1876 Act is consistent with the common law in providing for venue to be laid in the county where the property is located, McKinney, § II.b. at 777–79, but the 1876 Act clearly departs from the common law in providing for venue in such actions to be laid in the alternative in the same manner as in transitory actions.

{17} In summary, our review of the predecessors to Section 38–3–1 satisfies us that New Mexico has never fully embraced the common-law transitory-local dichotomy. This conclusion is reinforced by a case interpreting the 1876 Act at a time when courts were thoroughly familiar with common-law pleading: *Jemez Land Co. v. Garcia*, 15 N.M. 316, 107 P. 683 (1910), *overruled on other grounds by Kalosha v. Novick*, 84 N.M. 502, 505 P.2d 845 (1973). In *Jemez Land Co.*, the plaintiff brought suit in the district court of Bernalillo County, alleging that the defendant had trespassed on land owned and possessed by plaintiff in Sandoval County by cutting many small growing trees and piling them into a brush fence around a sub-tract of land. The plaintiff further alleged that the defendant had threatened plaintiff's employees when they attempted to clear away the brush, which had created a fire hazard. The plaintiff sought one hundred dollars damages for the trees that had been cut and destroyed and a permanent injunction restraining defendant from further cutting of trees and from ever claiming any right, title or interest in plaintiff's land. The defendant answered, setting up as defenses: (1) his ownership of the sub-tract under color of an 1865 deed, and (2) improper venue.

{18} The trial court dismissed the action for improper venue (which at the time *Jemez Land Co.* was decided, was considered a jurisdictional defect, *see Kalosha*, 84 N.M. at 504, 505 P.2d at 847). On appeal, the plaintiff argued that the action was properly filed in Bernalillo County as a suit for trespass to land. *See* C.L. 1897, § 2950, ¶ 5 (1876) (now codified as NMSA 1978, § 38–3–1(E)). The defendant argued that the action involved "lands or any interest in lands" and therefore could only have been brought in Sandoval County. *See* C.L. 1897, § 2950, ¶ 4 (1876) (now codified as NMSA 1978, § 38–3–1(D)).

{19} The Supreme Court affirmed the dismissal, observing that plaintiff's position that venue was proper under the provision for suits alleging trespass to land "would, undoubtedly, be correct *if the claim for damages was the sole object of the suit.*" *Jemez Land Co.*, 15 N.M. at 321, 107 P. 683 (emphasis added). However, the Supreme Court emphasized that the complaint also included an equitable cause of action, and that if this

equitable claim for injunctive relief was granted, "the appellee would be perpetually restrained from asserting title or any interest whatever in or to the lands in dispute which he claims to be the absolute owner by deed." *Id.* at 322, 107 P. 683. The Supreme Court held that an interest in land was "necessarily involved" in the suit. *Id.*

{20} *Jemez Land Co.* establishes that a plaintiff may not evade a mandatory venue provision by artful pleading. In most common-law jurisdictions, an action for trespass *quare clausum fregit* was not a proper method for trying title to real estate. *See* 21 McKinney, *Trespass to Try Title* § I; 87 C.J.S. *Trespass* § 57 (1954) (trespass action not proper means for adjudicating title as between plaintiff and defendant). In a few jurisdictions, such as Texas, an action for trespass could be used to adjudicate title to real property as fully as could be done by an action to quiet title. *See* 21 McKinney, *Trespass to Try Title* § I. As noted by the Supreme Court in *Jemez Land Co.*, New Mexico was not among the jurisdictions recognizing trespass to try title as a form of action. *Jemez Land Co.*, 15 N.M. at 323, 107 P. 683.

{21} Although the plaintiff in *Jemez Land Co.* characterized its suit as a trespass action, the object of the plaintiff's lawsuit, as revealed by its claim for equitable relief, was not merely to recover damages for tortious interference with its property. Through its equitable claim the plaintiff clearly sought to pre-empt any assertion of title by the defendant under color of the 1865 deed. Looking to the substance of the relief requested by the plaintiff's equitable cause of action, which would have had the effect of settling title as between the plaintiff and defendant, the Supreme Court held that the plaintiff's complaint affected an interest in land within the meaning of the 1876 Act.

{22} *Jemez Land Co.* largely disposes of the argument that venue in the present case is limited to Lea County. Although the 1876 Act has been amended in the intervening decades, the basic structure of the 1876 Act has not been altered. *Jemez Land Co.*'s observation that a trespass action is not confined to the county where the property is located "if the claim for damages was the sole object of the suit" marks a clear departure from the common-law rule that actions seeking damages for injury to real property are local actions. *Jemez Land Co.* remains good law and is fully applicable to Section 38–3–1. *See Team Bank v. Meridian Oil Inc.*, 118 N.M. 147, 149, 879 P.2d 779, 781 (1994) (citing *Jemez Land Co.* for proposition that venue outside county where land located may be proper if claim for damages is sole object of suit).

{23} We note and reject Defendants' argument that Plaintiffs' request for injunctive relief converts this case into an action involving an interest in land. It was well-settled at the time of *Jemez Land Co.* that in appropriate cases an injunction might issue to restrain continuing trespasses and prevent irreparable harm to the plaintiff. *See, e.g., Kerlin v. West*, 4 N.J.Eq. 449 (N.J.Ch.1844); *see generally*, 75 Am.Jur.2d, *Trespass* § 113 (1991). The Supreme Court's observation in *Jemez Land Co.* that the plaintiff's trespass action would not have been confined to the county where the property is located "if the claim for damages was the sole object of the suit" was not intended to establish a damages-injunction dichotomy for venue purposes. Rather, the distinction the Supreme Court was making was between actions the object of which is to redress tortious injury to real property (whether through damages or injunctive relief) versus actions that adjudicate title to real property as between the parties. In this regard, we note that subsequent to *Jemez Land Co.*, the Supreme Court has stated that to come within Section 38–3–1(D), the suit must implicate title. *Team Bank*, 118 N.M. at 149, 879 P.2d at 781. In contrast to *Jemez Land Co.*, the pleadings in the present case do not put in issue title to the property on which the pollution allegedly has occurred.

{24} Defendants argue that an interest in lands is involved in the present case because judgment in Plaintiffs' favor will have the practical effect of limiting Defendants' use and enjoyment of their oil and gas rights inasmuch as Defendants must modify their prior manner of conducting oil and gas operations on Plaintiffs' land to avoid further

liability. *See* 75 Am.Jur.2d, *Trespass* § 114 (1991) (discussing remedies for continuing trespass). We have no doubt that the Legislature had the power to enact a venue statute under which the indirect effects a successful trespass or nuisance action has on a defendant-landowner's use and enjoyment of its property constitutes a suit affecting an interest in lands. *Jemez Land Co.* and *Team Bank* lead us to the conclusion that the Legislature rejected such an approach in enacting Section 38–3–1(D)(1).

{25} To summarize, the 1876 Act manifests a substantial departure from common-law rules of venue. Under the 1876 Act, as carried forward in Section 38–3–1, actions seeking damages or injunctive relief for tortious injury to land are transitory actions subject to the venue rules of Section 38–3–1(A). In the case of trespass, the Legislature has included the county in which the land is located as an additional alternative venue.

{26} Plaintiffs were not required by Section 38–3–1(D)(1) to file their action in Lea County.

3. VENUE OF DEFENDANTS WHO ARE FOREIGN CORPORATIONS

{27} Plaintiffs argue that as to Defendants Amerada, Chevron, Dynegy, Concho, Arch, and Rice, who are foreign corporations, venue lies in Santa Fe County pursuant to Section 38–3–1(F) (1955). Plaintiffs rely on the fact that each of these Defendants has appointed a statutory agent with a Santa Fe County address. Defendants respond that their statutory agents, CT Corporation System and Prentice Hall Corporation System, are themselves foreign corporations, and that under the holding of *Aetna Finance Co. v. Gutierrez,* 96 N.M. 538, 632 P.2d 1176 (1981), CT Corporation System and Prentice Hall Corporation System do not reside in New Mexico. Therefore, according to Defendants, their statutory agents do not reside in Santa Fe County or any other county within New Mexico.

{28} Section 38–3–1(F) provides both "a carrot and a stick." The "stick" is amenability of a foreign corporation to suit in any county, however inconvenient, in the absence of a statutory agent who resides in New Mexico. The "carrot" is the ability of the foreign corporation to avoid statewide amenability to suit by designating a statutory agent who resides in a given county.

{29} Two circumstances convince us that the Legislature did not contemplate the appointment of a foreign corporation as a statutory agent when it enacted Section 38–3–1(F). First, a statutory agent with a definable residence within New Mexico is central to the statutory scheme enacted by Section 38–3–1(F). The appointment of a foreign corporation as statutory agent frustrates the statutory scheme envisioned by the Legislature when it enacted Section 38–3–1(F) in 1955, because a foreign corporation is a nonresident, and, therefore, has no residence within New Mexico. *See Aetna Finance Co.,* 96 N.M. at 540–41, 632 P.2d at 1178–79 (citing *Seaboard Rice Milling Co. v. Chicago, Rock Island & Pacific Ry. Co.,* 270 U.S. 363, 46 S.Ct. 247, 70 L.Ed. 633 (1926); noting traditional general rule that a corporation is considered a resident only of its state of incorporation). Second, Section 38–3–1(F) was enacted on March 28, 1955, as part of 1955 N.M. Laws, ch. 258. As of that date, New Mexico law required that the statutory agent for a foreign corporation be "a domestic corporation or a natural person of full age actually resident in this state. . . ." NMSA 1953, § 51–10–4 (1905, as amended through 1951). It was not until 1967, in the course of a general reworking of corporation law, that the Legislature provided that a domestic or foreign corporation's registered agent could be a foreign corporation. 1967 N.M. Laws, ch. 81, §§ 11, 110 (now codified as NMSA 1978, §§ 53–11–8, 53–17–9). Thus, as of the date of enactment of Section 38–3–1(F), New Mexico law did not provide for a foreign corporation to appoint another foreign corporation as its statutory agent.

{30} We recognize that in some circumstances we have found it feasible to harmonize apparent inconsistencies among statutes. *See Barela v. Midcon of New Mexico, Inc.,* 109 N.M. 360, 364, 785 P.2d 271, 275 (Ct.App.1989) (reading reference to AMA guidelines for evaluation of permanent im-

pairment contained in partial disability provision of Interim Workers' Compensation Act into related total disability provision). In *Barela*, we were satisfied that the Legislature intended to "establish certain benchmarks and to leave to the courts the task of 'rationalizing' the provisions of the statute." *Id.* Here, we find no clear basis for assuming that the Legislature intended to establish benchmarks, leaving it to the courts to harmonize any apparent gaps or inconsistencies between the 1967 amendments to corporation law and the general venue statute. Moreover, even if we were to attempt to put ourselves into the shoes of the 1967 Legislature, we would find ourselves facing not one, but several equally plausible alternative methods of coordinating the 1967 amendments of corporation law with the venue statute. Because venue has been regulated by statute, rather than by the common law, for over a century, we believe it was, and is, the Legislature's prerogative to harmonize the general venue statute with the 1967 changes in corporation law.

{31} Construing Subsection 38–3–1(F) consistent with what we have determined to be the original legislative intent, *see Hamby v. Gonzales*, 105 N.M. 778, 780, 737 P.2d 559, 560 (Ct.App.1987), we hold that a foreign corporation must appoint a domestic corporation or an individual actually residing in New Mexico in order to receive the benefit of the special venue provisions of Section 38–3–1(F). We therefore reject Plaintiffs' argument that the statutory agents of Defendants Amerada, Chevron, Dynegy, Concho, Arch and Rice reside in Santa Fe County within the meaning of Section 38–3–1(F). However, because these non-resident Defendants have failed to appoint a statutory agent who resides in New Mexico, they remain subject to suit in any county in New Mexico, including Santa Fe County.

4. DOES VENUE AS TO ONE DEFENDANT DETERMINE VENUE AS TO ALL?

{32} Citing *Teaver v. Miller*, 53 N.M. 345, 208 P.2d 156 (1949) and *Hamby*, 105 N.M. at 778, 737 P.2d at 559, Plaintiffs argue that if venue is proper in Santa Fe County as to any one defendant, then venue is proper as to all. We disagree with this reading of *Teaver* and *Hamby*. The actual holding of *Teaver* is that under Section 38–3–1(A) (codified at the time of *Teaver* as NMSA 1941, § 19–501(2)), the *residence* of one of the defendants determines venue as to the remaining defendants, assuming that the defendant whose residence determines venue is a necessary party. *Teaver*, 53 N.M. at 349, 208 P.2d at 160 (quoting 56 Am.Jur., *Venue*, § 30). *Teaver's* holding follows from the following language in Section 19–501(2): "[A]ll transitory actions shall be brought in the country where either the plaintiff or defendant or some one of them, in case there be more than one (1) of either, *resides*. . . ." *Teaver*, 53 N.M. at 349, 208 P.2d at 159 (original emphasis deleted; emphasis added). We recognize that *Hamby* contains the statement that "the legislature provided that in the event there were multiple defendants, proper venue for one defendant would determine proper venue for all defendants." *Hamby*, 105 N.M. at 780, 737 P.2d at 561 (citing *Teaver*). However, when this statement is considered in context, it is apparent that this statement was simply a broad paraphrase of *Teaver* and does not mark an expansion of *Teaver*'s express holding.

{33} Under *Aetna Finance Co.*, Defendants Amerada, Chevron, Dynegy, Concho, Arch, Rice and Rhombus Energy do not reside anywhere in New Mexico because they are foreign corporations. It is undisputed that neither Plaintiffs, nor the remaining Defendants, Rhombus Operating and Primero, are residents of Santa Fe County. *Teaver* is inapplicable because under these facts no party resides in Santa Fe County. Because *Teaver-Hamby* was the only basis urged by Plaintiffs to support venue in Santa Fe County as to Defendants Rhombus Energy, Rhombus Operating [3] and Primero, our conclusion that *Teaver* does not apply requires us to affirm the trial court's dismissal of these three Defendants.

3. Plaintiffs did not address the issue of how a foreign limited partnership such as Rhombus Operating should be treated for venue purposes. We express no opinion on the issue at this time.

5. DOES IMPROPER VENUE AS TO ONE OR MORE DEFENDANTS REQUIRE DISMISSAL AS TO ALL?

{34} Defendants, citing *Naumburg v. Cummins*, 98 N.M. 274, 648 P.2d 313 (1982), argue that improper venue requiring dismissal of one or more defendants requires the dismissal as to the remaining defendants. We disagree with this reading of *Naumburg*. In *Naumburg*, the plaintiff brought suit in Bernalillo County against the Cumminses, residents of Bernalillo County and Buena Vista Estates, a domestic corporation having its principal place of business in Bernalillo County. The relief requested by the plaintiff included rescission of a real estate contract for the purchase of land located in Santa Fe County and an injunction prohibiting the escrow agent from delivering the deed to the property to the defendants. The Cumminses moved to dismiss, citing Section 38–3–1(D). The trial court denied the motion and the Cumminses appealed. The Supreme Court held that the action involved an interest in land under Section 38–3–1(D) and reversed, dismissing the action as to all defendants, notwithstanding the fact that Buena Vista Estates had not objected to venue in Bernalillo County.

{35} *Naumburg* involved defendants whom the Supreme Court believed were "necessary and indispensable parties." *Id.* at 275, 648 P.2d at 314. We believe that *Naumburg* is best explained as a sua sponte application of the then-current, but subsequently rejected, principle that the absence of an indispensable party is a non-waivable, jurisdictional defect. *See C.E. Alexander & Sons, Inc. v. DEC Internat'l, Inc.*, 112 N.M. 89, 811 P.2d 899 (1991) (overruling prior cases holding that absence of indispensable party is jurisdictional defect). Under the then-prevailing view of indispensability, dismissal of the complaint as to the Cumminses required dismissal as to Buena Vista Estates due to a lack of jurisdiction in the district court of Bernalillo County. We decline to apply *Naumburg* outside its particular facts and its historical context.

CONCLUSION

{36} We affirm in part and reverse in part. The trial court's order of dismissal is reversed as to Defendants Amerada, Chevron, Dynegy, Concho, Arch and Rice. The trial court's order of dismissal is affirmed as to Defendants Rhombus Energy, Rhombus Operating and Primero.

{37} **IT IS SO ORDERED.**

ARMIJO and ELLINGTON, JJ., concur.

13 P.3d 77

2000-NMCA-097

Robert Wayne BEVERLY, Petitioner–Appellant,

v.

Debbi F. BEVERLY, Respondent–Appellee,

and

Tina Boradiansky, Intervenor.

No. 20,102.

Court of Appeals of New Mexico.

Oct. 10, 2000.

Phyllis H. Subin, Chief Public Defender, Christopher Bulman, Appellate Defender, Santa Fe, NM, for Appellant.

Patricia A. Madrid, Attorney General, Steven S Suttle, Assistant Attorney General, Albuquerque, NM, for State of New Mexico.

OPINION

SUTIN, Judge.

{1} Robert Wayne Beverly (Wayne) appeals his criminal contempt conviction in his divorce proceeding. We reverse.

FACTS AND PROCEEDINGS

{2} The district court entered an interim order in December 1995 allocating income and expenses. Wayne was required to pay his wife (Debbi) more than $1400 per month to equalize income, $100 of which was assigned for payment of her attorney fees from the divorce proceeding. In April 1998, the district court made an $18,917 attorney fee award, which Wayne did not pay. In May, Debbi's original lawyer withdrew her representation of Debbi.

{3} On June 15, 1998, Wayne withdrew approximately $42,000 in cash from a bank account. Ostensibly, $20,000 in small bills was specifically for payment of Debbi's attorney fees. On June 18, he reported $38,000 as stolen from his truck.

{4} On June 19, 1998, Debbi filed a verified motion for order to show cause why Wayne should not be held in contempt for failure to obey the court's attorney fee order. On the same day, she assigned all her rights and interests in the April order to her first lawyer, who then intervened in the show cause matter. On September 17, 1998, the district court issued an amended order to show cause which was served on Wayne in Texas four days later. On November 2, new counsel entered his appearance for Debbi.

{5} On November 30, 1998, the district court held a hearing on the order to show cause. Wayne did not appear, though his lawyer was present. Debbi's original lawyer testified that no one had paid her the attorney fees awarded by the April order. Debbi testified that Wayne told her that the money, with which he intended to pay the award, was stolen. A state police agent detailed the investigation of the alleged larceny from Wayne's truck.

{6} On the testimony of the three witnesses and argument of counsel, the district court adjudged Wayne beyond a reasonable doubt to be in criminal contempt and sentenced him to 179 days in jail. The court also issued a bench warrant for Wayne's arrest.

{7} Wayne argues that his conviction and sentence are improper. We agree.

DISCUSSION

{8} Where a contempt sanction is punitive, not remedial, "the proceeding is one of criminal contempt." *Rhinehart v. Nowlin*, 111 N.M. 319, 326, 805 P.2d 88, 95 (Ct.App. 1990). The contempt here is "criminal" because the trial court sentenced Wayne to an

unconditional, determinate 179 days in jail. *See State v. Helms,* 108 N.M. 772, 773, 779 P.2d 550, 551 (Ct.App.1989). Wayne had no ability to "avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order." *Hicks v. Feiock,* 485 U.S. 624, 635 n. 7, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988).

{9} The court had the authority to hold Wayne in criminal contempt for ignoring a direct order. *See State v. Bailey,* 118 N.M. 466, 467–68, 882 P.2d 57, 58–59 (Ct.App.1994). Charged with indirect criminal contempt, i.e., disobedience outside the presence of the court, Wayne was entitled to all procedural rights afforded defendants in criminal proceedings. *See Attorney General v. Montoya,* 1998–NMCA–149, ¶ 5, 126 N.M. 273, 968 P.2d 784. Thus, the New Mexico Rules of Criminal Procedure governed these criminal contempt proceedings. *See Lindsey v. Martinez,* 90 N.M. 737, 739, 568 P.2d 263, 265 (Ct.App.1977).

{10} Rule 5–612(A) NMRA 2000, states that "[t]he defendant shall be present . . . at every stage of the trial . . . except as otherwise provided by this rule." *See State v. Padilla,* 2000–NMCA–090, ¶¶ 17–20, 129 N.M. 625, 11 P.3d 589 (holding a defendant cannot waive his right to be present at the beginning of his own criminal trial). The proceedings should not have begun without Wayne's presence. *See* Rule 5–612(B). *Cf. Padilla,*2000–NMCA–090, ¶ 17, 129 N.M. 625, 11 P.3d 589.

{11} Wayne was convicted of indirect criminal contempt completely in absentia. He was present during no stage of the contempt trial against him, even though his lawyer alerted the district court to this procedural defect several times. Appearance by counsel did not suffice. *See Lindsey,* 90 N.M. at 741, 568 P.2d at 267.

{12} The district court was authorized to issue an arrest warrant when Wayne failed to respond to the show cause order. *See id.* at 740, 568 P.2d at 266. Instead, the court improperly commenced and completed the criminal contempt hearing though Wayne was not present.

CONCLUSION

{13} We vacate the district court's order adjudicating Wayne in criminal contempt.

{14} **IT IS SO ORDERED.**

ALARID and WECHSLER, JJ., concur.

13 P.3d 79

2000-NMCA-096

Lisa HERMOSILLO, Plaintiff–Appellant,

v.

Lin S. LEADINGHAM and Greg Leadingham, Defendants–Appellees.

No. 19,915.

Court of Appeals of New Mexico.

Oct. 12, 2000.

Tandy L. Hunt, Roswell, NM, for Appellant.

Gregory V. Pelton, Pelton & Associates, P.A., Albuquerque, NM, for Appellees.

OPINION

BUSTAMANTE, Judge.

{1} Plaintiff appeals from a district court order granting summary judgment dismissing several claims against Defendant Greg Leadingham (Greg) for personal injuries arising out of an automobile collision involving a vehicle driven by Defendant Lin Lead-

ingham (Lin). At the time of the accident, Greg and Lin were married but had been living separately for approximately two months. Their divorce action was pending. In the district court and on appeal, Plaintiff has attempted to predicate Greg's independent liability for the collision on three grounds: (1) common law negligence principles, (2) negligent entrustment, and (3) the family purpose doctrine. We affirm.

FACTS

{2} Greg and Lin were married in November 1993. Prior to the marriage Lin owned a 1989 Toyota automobile. She retained ownership of this vehicle throughout the marriage, although community funds were used to pay for a single insurance policy that covered the Toyota and Greg's vehicle. The Leadinghams separated in July 1996, and Lin filed a petition for divorce on August 20, 1996. On September 23, 1996, Lin was driving with the couple's young daughter in the car when Lin's vehicle struck Plaintiff's vehicle. A police investigation at the scene revealed a half empty bottle of wine in Lin's vehicle; she was arrested for driving while intoxicated. Lin's blood alcohol content after the crash measured .25%, which is more than three times the legal limit. *See* NMSA 1978, § 66-8-102(C) (1999).

{3} Plaintiff filed a complaint for personal injuries against both Lin and Greg, claiming that Lin's negligence constituted a community tort. Plaintiff's complaint also alleged that Greg "negligently permitted [D]efendant Lin Leadingham to drive the 1989 Toyota while knowing that Lin Leadingham would drink alcoholic beverages and then drive." Plaintiff attempted to establish Greg's independent liability in several different ways, including his own negligence in either facilitating Lin's past drinking or failing to prevent her from drinking and driving once they were separated. Plaintiff also claimed that Greg had negligently entrusted the Toyota to Lin, and that the Toyota was a "family purpose vehicle."

{4} Greg filed a motion for summary judgment relying on his own affidavit, which sets forth several of the undisputed facts described above. Specifically, Greg noted that the Toyota was Lin's separate property before the marriage, that he was never on the title of the vehicle, and that he had not even seen his wife from the end of July 1996 until after the September 23, 1996, accident.

{5} Plaintiff's initial response to the summary judgment motion focused on the fact that Greg and Lin were still married at the time of the accident. In her supplemental response, however, Plaintiff focused on Greg's deposition in an effort to establish that there were grounds for holding Greg liable independent of the community tort claim. In his deposition, Greg described Lin's drinking pattern during the course of their marriage. Greg would purchase wine for Lin "pretty much all the time because she wanted it." Lin would start drinking in the morning and would drink approximately a half gallon of wine over a six to twelve hour period. Lin had apparently admitted to having a drinking problem and had briefly attended Alcoholics Anonymous. Notwithstanding Lin's drinking, Greg stated that he was not concerned that Lin would be involved in an automobile accident during their marriage because it was very rare for her to drive in the afternoon or evening.

{6} After considering the parties' briefs and arguments, the district court entered an order dismissing Plaintiff's claims against Greg for common law negligence, negligent entrustment, and family purpose. In a letter decision to the parties, and at a later presentment hearing, the district court indicated that Plaintiff's community debt claim could await resolution until the collection stage, if necessary. This appeal followed.

DISCUSSION

A. Jurisdiction

{7} After reviewing the parties' briefs and the district court's order, we were concerned about the finality of the order being appealed, insofar as it did not dispose of all of the claims against Greg that Plaintiff stated in her complaint. *See Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992). We remanded the case to the district court for the limited purpose of seeking clarification of the court's order of dismissal. *See Khalsa v. Levinson,* 1998-NMCA-110, ¶ 16, 125 N.M. 680, 964 P.2d

844. In response, the district court entered an order directing the entry of judgment in favor of Greg on the issues of common law negligence, negligent entrustment, and the family purpose doctrine and specifically finding that "there is no just reason to delay an appeal." *See id.* ¶ 18; Rule 1-054(B)(1) NMRA 2000. We therefore exercise jurisdiction over the appeal.

B. Standard of Review

{8} "The standard of review for a motion for summary judgment is whether there are any genuine issues of material fact and whether the moving party is entitled to summary judgment as a matter of law." *Williams v. Central Consol. Sch. Dist.*, 1998-NMCA-006, ¶ 7, 124 N.M. 488, 952 P.2d 978; *see also* Rule 1-056(C) NMRA 2000. We consider the facts in the light most favorable to the party opposing summary judgment. *See Gillin v. Carrows Restaurants, Inc.*, 118 N.M. 120, 122, 879 P.2d 121, 123 (Ct.App. 1994). If, however, the facts are not in dispute, and only a legal interpretation of the facts remains, summary judgment is appropriate. *See Garrity v. Overland Sheepskin Co.*, 1996-NMSC-032, ¶ 29, 121 N.M. 710, 917 P.2d 1382.

C. Common Law Negligence

{9} In her brief, Plaintiff states the essential question in this appeal as follows: "Does the husband of an alcoholic wife who knows that her driving poses a danger to herself, to their daughter and to others using the highways have a duty of reasonable care to prevent the foreseeable harm from occurring?" Plaintiff answers this question in the affirmative by referring us to well-established New Mexico case law discussing duty. *See, e.g., Torres v. State*, 119 N.M. 609, 612-13, 894 P.2d 386, 389-90 (1995); *Calkins v. Cox Estates*, 110 N.M. 59, 61-62, 792 P.2d 36, 38-39 (1990).

{10} Plaintiff's approach might be viable were we restricted to a consideration of any facts provable under the broadly worded language in the complaint. Such was the case in *Torres*, 119 N.M. at 612-13, 894 P.2d at 390-91, analyzing duty in the context of a motion to dismiss for failure to state a claim. However, analyzing a complaint in light of a motion for summary judgment rather than a motion to dismiss, "can eliminate scenarios consistent with the pleadings but inconsistent with uncontradicted facts presented to the court for consideration of the summary judgment motion." *Dunn v. McFeeley*, 1999-NMCA-084, ¶ 13, 127 N.M. 513, 984 P.2d 760. Such is the case here. Applying New Mexico case law to the undisputed facts developed in this case, we hold that the district court properly granted the motion for summary judgment.

{11} In *Davis v. Board of County Commissioners*, 1999-NMCA-110, ¶¶ 14-15, 127 N.M. 785, 987 P.2d 1172, this Court recently had the opportunity to discuss the current state of "duty" analysis as articulated by our Supreme Court. As noted in *Davis*, we are guided by our Supreme Court's pronouncement that "[p]olicy determines duty." *Torres*, 119 N.M. at 612, 894 P.2d at 389. The general rule is that an individual does not have a duty to control the acts of a third party in the absence of a duty imposed by statute or recognized as a result of a special relationship that exists between a defendant and the tortfeasor. *See Davis*, 1999-NMCA-110, ¶ 15, 127 N.M. 785, 987 P.2d 1172; Restatement (Second) of Torts § 315 (1965). Unlike the situation considered in *Torres*, there is no statute applicable in the present case. *See Torres*, 119 N.M. at 612, 894 P.2d at 389. Thus, our focus is whether there is a "special relationship" which supports imposition of a duty.

{12} There are several examples of "special relationships" that give rise to an exception to the general rule that a person has no duty to control the actions of a third party. *See* Restatement (Second) of Torts §§ 314A, 316-319 (1965); *see also, e.g., Chavez v. Torres*, 1999-NMCA-133, ¶ 20, 128 N.M. 171, 991 P.2d 1 (discussing landowner exception). None of the recognized "special relationships" is applicable in this case. The Restatement does include a caveat indicating that the authors express no opinion as to whether other relations may impose a duty where it might otherwise not exist, but it also indicates that, while there had apparently not yet, at the time of publication, been any cases

imposing a heightened "special relationship" duty on husbands and wives, the law was moving toward recognizing a duty where there is a dependence or mutual dependence. *See* Restatement, *supra*, § 314A caveat, cmt. b, at 119. The general trend, however, appears to be that the marital relationship, without more, does not trigger an independent duty to control the behavior of one's spouse. *See, e.g., Wise v. Superior Court*, 222 Cal.App.3d 1008, 272 Cal.Rptr. 222, 224–25 (1990); *Touchette v. Ganal*, 82 Hawai'i 293, 922 P.2d 347, 355 (1996).

{13} We do not deem it necessary to consider whether or under what circumstances the marital relationship might constitute a "special relationship" to trigger a duty under Sections 314A or 315 of the Restatement. The undisputed facts here are that, by the time of the accident, Greg's and Lin's estrangement was permanent and the dissolution of their marriage was imminent. Under the circumstances, it would be inappropriate to impose a "special relationship" duty upon them simply because they were technically still married. Any duty on the part of Greg must be predicated on conduct independent of his marital status at the time of the accident. We note, however, that Greg's and Lin's relationship is not irrelevant to our duty analysis. It simply does not, in and of itself, trigger a duty in this case.

{14} As we discussed in *Davis*, duty may also exist under the following circumstances:

> Assuming other policy considerations are satisfied, a duty to exercise ordinary care, where one otherwise would not exist, may arise when a person voluntarily undertakes a course of conduct which, in the absence of due care, may foreseeably injure others as a natural and probable consequence of the person's conduct.

1999–NMCA–110, ¶ 15, 127 N.M. 785, 987 P.2d 1172; *see also* Restatement (Second) of Torts § 876 (1979).

{15} We believe that Plaintiff may be attempting to establish duty on this latter theory. Specifically, Plaintiff maintains that Greg's conduct led to a foreseeable result, and that public policy considerations not only permit but compel recognition of Greg's duty to her under the facts of this case. She begins with foreseeability. She claims that Greg should have foreseen that a member of the driving public could have been injured as a result of his failure to (1) exercise reasonable care in controlling Lin's drinking, (2) assist Lin in finding programs for problem drinkers, (3) persuade her to stop drinking, and (4) preclude her from driving by canceling her insurance. In her reply brief, however, Plaintiff essentially concedes that Greg is correct in arguing that cancellation of insurance should not be considered as part of this analysis. We agree. Plaintiff presented no evidence to suggest that Lin would have stopped driving if Greg had cut off the insurance. More importantly, it does not make sense as a matter of policy to expose the public to an uninsured driver.

{16} Turning to Plaintiff's other grounds, we agree with Plaintiff that it is foreseeable that an individual with a drinking problem could injure a member of the public as a result of the drinking. The focus here, however, is on Greg's conduct. Although Plaintiff is correct that time and place factors are generally left to the jury, *see Torres*, 119 N.M. at 614, 894 P.2d at 391, we believe that Greg's conduct is simply too attenuated from the date of the accident to impose liability. It is undisputed that Greg neither had contemporaneous knowledge of nor provided contemporaneous assistance for the drinking which resulted in the collision. *Cf. GCM, Inc. v. Kentucky Cent. Life Ins. Co.*, 1997–NMSC–052, ¶ 15, 124 N.M. 186, 947 P.2d 143 (discussing duty to refrain from causing or assisting another to violate a duty owed to a third person); *Rael v. Cadena*, 93 N.M. 684, 685, 604 P.2d 822, 823 (Ct.App.1979) (affirming finding of tort liability for defendant who yelled encouragement while battery was being committed).

{17} Plaintiff's position would require us to impose a duty with open-ended time and place limits on anyone who might be able, as Plaintiff says, to "prevent the driver from getting drunk or from freely driving while in an intoxicated state." That is, by imposing an independent duty on Greg to correct or prevent the potentially tortious behavior of his estranged spouse after two months of

complete separation and upon imminent divorce, we could open up an arena of limitless potential for liability. We find no basis to do so.

{18} In light of what we believe are clear public policy considerations against creating or expanding a duty under the circumstances in this case, we agree with the district court that summary judgment was properly granted on Plaintiff's negligence claim.

D. Negligent Entrustment

{19} Plaintiff argues that summary judgment should not have been granted on the negligent entrustment claim because there were material factual disputes with respect to whether Greg had sufficient control over the Toyota to trigger a duty to prevent Lin from driving. This Court has previously adopted the following definition of negligent entrustment:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

McCarson v. Foreman, 102 N.M. 151, 156, 692 P.2d 537, 542 (Ct.App.1984) (quoting Restatement (Second) of Torts § 308 (1965)). To establish a claim for injuries caused by the negligent entrustment of an automobile, the plaintiff must show that the defendant entrusted his automobile to another whom the defendant knew or should have known was an incompetent driver, and whose incompetence caused the plaintiff's injuries. *See DeMatteo v. Simon,* 112 N.M. 112, 114, 812 P.2d 361, 363 (Ct.App.1991); *Spencer v. Gamboa,* 102 N.M. 692, 693, 699 P.2d 623, 624 (Ct.App.1985).

{20} In their briefs, the parties debate whether Greg was entitled to summary judgment based on the undisputed fact that Lin was the owner of the vehicle. We do not need to reach the issue of whether there may be situations in which a non-owner would have sufficient control over an object to trigger liability under a negligent entrustment theory if the non-owner relinquishes control to an owner who foreseeably could cause harm. The undisputed facts here show that Greg lacked any control over the vehicle. He was not in possession of the vehicle at any time during the months preceding the accident. Moreover, he lacked legal authority over the vehicle, and had no consensual basis for exerting any degree of control over the vehicle. As such, Plaintiff's negligent entrustment claim must fail. *Cf. DeMatteo,* 112 N.M. at 114–15, 812 P.2d at 363–64 (suggesting negligent entrustment claim could lie against defendant construction company because company's representative knew or should have known of poor driving record of the driver to whom it had entrusted its vehicle); *McCarson,* 102 N.M. at 156–57, 692 P.2d at 542–43 (affirming jury's finding of negligent entrustment where evidence showed father knew of son's prior conviction for driving while intoxicated and plea agreement for possession of cocaine yet still allowed son to drive company's vehicle).

E. Family Purpose Doctrine

{21} Like Plaintiff's negligent entrustment claim, the family purpose doctrine is simply inapplicable to the facts of this case. As set forth in the elements of UJI 13–1210 NMRA 2000, the family purpose doctrine imposes liability on the head of a household for the negligent operation of a vehicle by a member of the household to whom the head of household has furnished the vehicle. As Plaintiff points out, the Supreme Court has articulated the public policy behind this doctrine as an effort to "require a responsible person to answer for damages caused by the user of the family car." *Madrid v. Shryock,* 106 N.M. 467, 469, 745 P.2d 375, 377 (1987). The goal is to encourage owners to exercise a greater degree of care when deciding whether to permit a financially irresponsible driver to use the family car. *See id.* at 470, 745 P.2d at 378.

{22} Plaintiff fails on practically every element of a family purpose doctrine claim. First, the doctrine is inapplicable because it is undisputed that Lin was insured and was therefore not a "financially irresponsible" driver. *See id.; see also Ramirez v. Ramirez,* 1996–NMCA–116, ¶ 10, 122 N.M. 590, 929 P.2d 982. Second, as in *Madrid,* 106 N.M. at 471, 745 P.2d at 379, and consistent

with our negligent entrustment discussion, Plaintiff failed to come forward with any facts establishing that Greg furnished the vehicle to Lin or otherwise had sufficient control over the vehicle to suggest that he had made the vehicle available in his capacity as the head of the household. Finally, Lin and Greg were not living together at the time of the accident and, while technically still married, could not be considered a "household" for purposes of invoking liability. *See Ramirez,* 1996–NMCA–116, ¶ 11, 122 N.M. 590, 929 P.2d 982.

CONCLUSION

{23} For the reasons discussed above, we conclude that the district court properly granted summary judgment on Plaintiff's claims alleging common law negligence, negligent entrustment, and liability under the family purpose doctrine.

{24} **IT IS SO ORDERED.**

WECHSLER and SUTIN, JJ., concur.

13 P.3d 460

2000-NMSC-032

STATE of New Mexico, Plaintiff–Appellee,

v.

Richard E. SANDERS a/k/a Eddie Sanders, Defendant–Appellant.

No. 25,569.

Supreme Court of New Mexico.

Oct. 19, 2000.

Law Systems of Las Cruces, P.A., Anthony F. Avallone, Radium Springs, NM, for Appellant.

Patricia A. Madrid, Attorney General, James O. Bell, Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

BACA, Justice.

{1} Defendant, Richard Eddie Sanders, was convicted of willful and deliberate first degree murder contrary to NMSA 1978, § 30–2–1(A)(1) (1994) and numerous other crimes [1] stemming from his involvement in a drug trafficking ring that operated in southern New Mexico. Sanders' sentence to life imprisonment vests this Court with jurisdiction. *See* N.M. Const. art. VI, § 2 (as amended 1965); *see also* Rule 12–102(A)(1) NMRA 2000. Sanders appeals his conviction on three grounds. He alleges that the district court: (1) improperly admitted his confession in violation of the Due Process Clause of the Fourteenth Amendment's prohibition against coerced confessions; (2) committed reversible error by improperly rejecting his proffered jury instructions regarding the voluntariness of his confession; and (3) improperly denied his motion to monitor the jury culling process. Finding no error in the rulings of the trial court, we affirm Sanders' convictions.

I.

{2} Sanders' conviction resulted from a Federal Bureau of Investigation (FBI) probe into a suspected drug organization operating in southern New Mexico. In conjunction with its drug investigation, the FBI was also investigating the disappearance of Darrett McCauley, a purported member of the drug organization. During the course of their investigation, the FBI learned of a threat on Sanders' life and that members of the drug organization considered him a "loose end that had to be taken care of." The FBI has a policy of alerting intended victims of threats on their lives which they have learned of during the course of an investigation. Accordingly, two agents, Mr. Colbridge and Mr. Pittman, visited Sanders' father's feed store in Alamogordo on July 27, 1994, in an attempt to contact Sanders. Because Sanders was not available, the agents spoke with his father, advised him of the threat, and left a contact number for Sanders to reach them. The next day, Sanders called the FBI and left a cellular telephone number where he could be reached. FBI Special Agent Pittman returned Sanders' call. Statements made during this initial conversation between Special Agent Pittman and Sanders provide the basis for Sanders' Due Process challenge. The conversation occurred as follows:

SA Pittman:	Well, we, we ... ah ... talked to your father, Jim?
Eddie Sanders:	Yeah.
SA Pittman:	Yesterday, um ... we ... like we told him ... we needed to contact you and advise you that ... ah ...

1. Sanders was also convicted of the following: conspiracy to commit first degree murder contrary to NMSA 1978, § 30–28–2 (1979) and Section 30–2–1; false imprisonment contrary to NMSA 1978, § 30–4–3 (1963); conspiracy to commit false imprisonment contrary to Section 30–28–2 and Section 30–4–3; and accessory to aggravated battery contrary to NMSA 1978, § 30–3–5(C) (1969) and NMSA 1978, § 30–1–13 (1972).

Eddie Sanders:	I've got problems.
SA Pittman:	Well, not that you've got problems that ... ah ... during the investigation of our we've recently received information ... ah ... that your life might be in danger.
Eddie Sanders:	Okay, would it help you all in the investigation if I cooperated any at all?
SA Pittman:	It's ... it certainly would and ... and may in fact help yourself.
Eddie Sanders:	Well, I'm ready.
SA Pittman:	Okay, you need to understand that I can't promise you anything.
Eddie Sanders:	Yeah, I realize that.
SA Pittman:	But what I can do is I can ... um ... communicate to the U.S. Attorney with whom I, I work on a daily basis about your cooperation.
Eddie Sanders:	Okay.
SA Pittman:	Okay, now ... um ... when would you like to get together?
Eddie Sanders:	Ah ... what would be convenient for you all cause I really kind of hate to get back in Alamogordo for a little while because I've got some other problems there.
SA Pittman:	Okay.
Eddie Sanders:	My girlfriend got beat up a couple of nights ago and raped and that's one of the reasons that we're out of town.

(Agent Pittman and Sanders then arranged a tentative time to meet in Las Cruces.).

Eddie Sanders:	I should get over there ... ah ... I just call you sometime in the morning and let you know where I'm at and everything.
SA Pittman:	Okay.
Eddie Sanders:	Cause ... ah ... I'd like for you all to go ahead and keep track of me.
SA Pittman:	Okay.
Eddie Sanders:	You know ... cause ... ah....I don't know what the investigation is about but I have a sneaking suspicion about how it's originated.
SA Pittman:	Okay.
Eddie Sanders:	And ... ah ... I've.
SA Pittman:	Now if we ... I'm gonna be frank with you Eddie, if we get together I don't, I don't wanna dance around. I want, I would like to get to the point and get to the bottom of this.
Eddie Sanders:	Me too. No problem at all.
SA Pittman:	Okay.
Eddie Sanders:	Ah, you know I've been ... this has been kind of in the back of my head, bugging me for probably a year.
SA Pittman:	Okay.

(Conversation ends with confirmation that Defendant should call in the morning to arrange meeting with Special Agent Pittman.).

{3} Following this conversation, Sanders met Special Agent Pittman and Agent Colbridge at a Super 8 Motel in Las Cruces, New Mexico. Sanders was driven to the Super 8 by his girlfriend and his father. During this meeting, Sanders gave what was to be the first of a number of detailed confessions in which he described the killing of Darrett McCauley and provided information that led to the discovery of McCauley's remains in the forest of Catron County. At the conclusion of the initial interview on July 28, 1994, Sanders signed an FBI Advice of Rights interrogation form which contained his rights under *Miranda* and the following statements: "I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me." He again signed advice of rights forms when he met with the FBI on August 9, 1994, and August 15, 1994.

{4} Sanders was subsequently charged with the murder of Darrett McCauley. Sanders filed a motion to suppress the contents of his confession, alleging that it was coerced by Special Agent Pittman's indication that he would communicate his cooperation to the United States Attorney's office. Sanders also maintained that the FBI coerced his confession by informing him of the threat on his life. The district court conducted a suppression hearing at which Sanders and the FBI agents testified. In addition to the transcript of the conversation, the trial court also considered a number of other relevant factors. The trial court detailed those findings of fact after the suppression hearing: (1) Defendant, an adult male born March 1953, completed high school and reads and understands the English language; (2) Defendant was having some "problems" in 1994 which included the suspicious destruction of both his truck and home and the rape of his girlfriend; (3) In May of

1994, Defendant sought treatment for depression, was prescribed Prozac, but was not taking his medication at the time of his confession; (4) In May of 1994, while fighting forest fires, Defendant became seriously depressed and started using marijuana, but during a subsequent fire in June of 1994, he worked hard for 20 days without incident; (5) On the day of his confession, Defendant appeared in good health and did not appear to be under the influence of alcohol or drugs. After reviewing all of the relevant factors, the district judge ruled, based on the totality of the circumstances, that Sanders' statement was "completely voluntary." Sanders seeks review of this conclusion. He also alleges that the district court committed reversible error by refusing to give his proffered jury instructions with regard to the voluntariness of his confession. Finally, he asserts that he should have been allowed to participate in the jury qualification or culling process.

II.

{5} Sanders was not in custody and was free to leave when he gave his initial confession and therefore he does not assert that his confession was taken in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Instead, Sanders asserts that his confession was improperly induced by police coercion and that the use of the confession at trial was in contradiction of the Due Process Clause of the Fourteenth Amendment. *See State v. Cooper*, 1997–NMSC–058, ¶ 31, 124 N.M. 277, 949 P.2d 660 (detailing the analytical distinction between a *Miranda* analysis and a voluntariness analysis); *see also Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936) (seminal case holding that a confession obtained by brutality and violence was constitutionally invalid under the Due Process Clause of Fourteenth Amendment).

{6} We review the voluntariness of a defendant's confession based on the totality of the circumstances. *See Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (reaffirming the "totality of the circumstances" as the proper inquiry); *Cooper*, 1997–NMSC–058, ¶ 26, 124 N.M. 277, 949 P.2d 660. "Voluntariness means 'freedom from official coercion.'" *State v. Munoz*, 1998–NMSC–048, ¶ 21, 126 N.M. 535, 972 P.2d 847 (quoting *Miller v. Dugger*, 838 F.2d 1530, 1538 (11th Cir.1988)). However, not all confessions obtained by police violate the Due Process Clause. "The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation." *Culombe v. Connecticut*, 367 U.S. 568, 576, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). Therefore, it is the duty of this Court to determine whether Sanders' "will has been overborne and his capacity for self-determination critically impaired" in such a way as to render his confession the product of official coercion. *Munoz*, 1998–NMSC–048, ¶ 20, 126 N.M. 535, 972 P.2d 847 (quoting *Culombe*, 367 U.S. at 602), 81 S.Ct. 1860. "[W]e review the entire record and the circumstances under which the statement or confession was made in order to make an independent determination of whether a defendant's confession was voluntary." *State v. Fekete*, 120 N.M. 290, 298, 901 P.2d 708, 716 (1995).

{7} Sanders finds support for his contention that his confession was coerced in *State v. Aguirre:* "For a confession to be voluntary, it must not have been extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exercise of any improper influence." 91 N.M. 672, 675, 579 P.2d 798, 801 (Ct.App.1978). Sanders contends that the language "however slight" means that the FBI's warning him about the threat on his life and offering to speak to the United States's Attorney on his behalf were improper inducements. However, the Court of Appeals, in *Aguirre*, analyzed the police officer's promise not to prosecute on other charges in the context of the totality of the circumstances. The Court in *Aguirre* expressly states, "[the] promise was no more than an additional factor for the trial court to consider, as a part of the totality of the circumstances, in deciding whether the confession was voluntary." 91 N.M. at 675, 579 P.2d at 801. Therefore, contrary to creating a per se rule as advanced by Sanders, the existence of promises or threats of violence is but one

factor to be considered in analyzing the totality of the circumstances.

{8} Additionally, the expansive language relied on by Sanders from *Aguirre* originated in *Bram v. United States,* 168 U.S. 532, 542–43, 18 S.Ct. 183, 42 L.Ed. 568 (1897).[2] The United States Supreme Court has expressly departed from the standard set forth in *Bram,* stating, "it is clear that this passage from *Bram,* ... under current precedent does not state the standard for determining the voluntariness of a confession...." *Fulminante,* 499 U.S. at 285, 111 S.Ct. 1246; *see also State v. Broadaway,* 133 Wash.2d 118, 942 P.2d 363, 371 (1997) (recognizing that the test from *Bram* "is not the correct test of voluntariness"); *Commonwealth v. Nester,* 551 Pa. 157, 709 A.2d 879, 883 (1998) ("The United States Supreme Court has explicitly declared that the quoted passage from Bram is not the correct standard for determining the voluntariness of a confession, instead the totality of the circumstances determine voluntariness."). Moreover, other pre-*Fulminante* cases citing this broad language from *Bram* have generally applied it in the context of the totality of circumstances, as the Court of Appeals did in *Aguirre. See, e.g., United States v. Jackson,* 918 F.2d 236, 242 (1st Cir.1990) (recognizing that although *Bram* has not been overruled, it has been modified; any threats or promises are reviewed as part of the totality of the circumstances); *United States v. Long,* 852 F.2d 975, 977 (7th Cir. 1988) ("[*Bram*] does not establish a per se rule; a review of the totality of the circumstances is still required[.]"); *Miller v. Fenton,* 796 F.2d 598, 608 (3rd.Cir.1986) (stating that the *Bram* test "has not been interpreted as a *per se* proscription against promises made during interrogation"); *United States v. Ferrara,* 377 F.2d 16, 17 (2d. Cir.1967) (relying upon totality of the circumstances and observing that the *Bram* "language has never been applied with the wooden literalness urged upon us by appellant.").

{9} Therefore, Sanders' reliance on *Aguirre* for proposition that "any sort of threats or violence" or "any direct or implied promises, however slight" operates to render a confession involuntary is not a proper articulation of the applicable law. 91 N.M. at 675, 579 P.2d at 801. Because Sanders asserts that both a promise and a threat of violence induced his confession, for clarity of analysis, we will discuss each factor independently and then evaluate the totality of the circumstances.

A.

{10} Sanders claims that Special Agent Pittman's promise to inform the United States Attorney about his cooperation with the FBI investigation was sufficient to induce his confession. However, numerous courts have held that merely promising to bring a defendant's cooperation to the attention of the prosecutor is not objectionable. *See United States v. Lewis,* 24 F.3d 79, 82 (10th Cir.1994) ("That type of limited assurance [informing U.S. Attorney of cooperation] does not taint ensuing statements as involuntary."); *United States v. Guerrero,* 847 F.2d 1363, 1366 (9th Cir.1988) ("An interrogating agent's promise to inform the government prosecutor about a suspect's cooperation does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency or by speculation that cooperation will have a positive effect."); *United States v. Brandon,* 633 F.2d 773, 777 (9th Cir.1980) ("We reject the defendant's contention that the agents' promise to bring the fact of Bracelin's cooperation to the attention of the United States Attorney and to recommend leniency, and Bracelin's expectation of it, constituted coercion."); *United States v. Ballard,* 586 F.2d 1060, 1063 (5th Cir.1978) ("Neither is a statement that the accused's cooperation will be made known to the court a sufficient inducement so as to render a subsequent incriminating statement involuntary."); *see also* 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.2(c), at 454 (1999) ("Merely promising to bring defendant's cooperation to the attention of the prosecutor is not objectionable, nor is a promise that if

2. *Aguirre* cites to *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), which in turn cites to *Bram.*

defendant confessed the prosecutor would discuss leniency.") (footnote and emphasis omitted). Based on this reasoning, we hold that the mere offer to communicate a defendant's cooperation to the prosecutor, absent other coercive conduct, is not objectionable.

B.

{11} Sanders also asserts that the threat on his life induced his confession. However, the FBI did not originate the threat, but merely communicated it to Sanders. Accordingly, we must consider whether the mere communication of a threat made by a third person can constitute sufficient state coercion to render the resulting confession involuntary.

{12} Sanders relies on *State v. Foster*, 25 N.M. 361, 183 P. 397 (1919), and *State v. Benavidez*, 87 N.M. 223, 531 P.2d 957 (Ct. App.1975), for the proposition that the threat need not originate with the state actor. Neither *Foster* nor *Benavidez* can be read to support Sanders' contention. Neither *Foster* nor *Benavidez* concerned threats made by third persons and whether those threats could constitute police coercion. Instead, the issue in both *Foster* and *Benavidez* was whether the individual making a promise of leniency appeared to have the authority to make that promise, and whether the promise expressed by that person could constitute sufficient coercion to render the confession involuntary. *See Foster*, 25 N.M. at 364, 183 P. at 398; *Benavidez*, 87 N.M. at 226, 531 P.2d at 960. Both *Foster* and *Benavidez* dealt with promises of leniency, not threats, made by third parties. *Id.* As such, we conclude that neither *Foster* nor *Benavidez* support Sanders' claim.

{13} Despite Sanders' misguided citations to *Foster* and *Benavidez*, we have found some support for his contention in Federal jurisprudence. The United States Supreme Court indirectly addressed the issue of whether the threat need originate with government officials in *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958). In *Payne*, the defendant was suspected in the brutal killing of a local businessman. 356 U.S. at 562–63, 78 S.Ct. 844. The defendant was arrested without a warrant and in addition to numerous other improprieties,[3] he was also told by the chief of police that there was an angry mob outside waiting for him. The Supreme Court found the communication of the mob threat particularly relevant, stating: "It seems obvious from the totality of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice.'" *Id.* at 567, 78 S.Ct. 844 (footnote and quoted authority omitted). Therefore, the Supreme Court held that the communication of that threat, combined with the other circumstances, was sufficient to hold the confession involuntary.

{14} The United States Supreme Court directly addressed the issue of whether the threats of violence need to originate from the government officials in *Arizona v. Fulminante*. 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). In *Fulminante* the defendant was incarcerated in a federal prison in New York. *Id.* at 282, 111 S.Ct. 1246. During his incarceration, he was receiving "tough treatment and whatnot" from the other inmates because of a rumor that he had killed his stepdaughter in Arizona. *Id.* at 283, 111 S.Ct. 1246. Another inmate and a paid informer for the FBI, offered protection from the other inmates if Fulminante told him about the murder in Arizona. Fulminante confessed, and that confession was used against him at his trial in Arizona for

3. The United States Supreme Court described the defendant and the circumstances of his confession as "a mentally dull 19-year-old youth [who], (1) was arrested without a warrant, (2) was denied a hearing before a magistrate at which he would have been advised of his right to remain silent and of his right to counsel, as required by Arkansas statutes, (3) was not advised of his right to remain silent or of his right to counsel, (4) was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, (5) was denied food for long periods, and, finally, (6) was told by the chief of police 'that there would be 30 or 40 people there in a few minutes that wanted to get him,' which statement created such fear in petitioner as immediately produced the 'confession.'" *Payne*, 356 U.S. at 567, 78 S.Ct. 844.

the murder of his stepdaughter. *Id.* at 284, 111 S.Ct. 1246. In ruling that the confession was involuntary, the United States Supreme Court stated, "Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient." *Fulminante,* 499 U.S. at 287, 111 S.Ct. 1246 (footnote omitted). The Supreme Court found that the "credible threat" from the prison population, when combined with the offer of protection, was sufficient to overbear Fulminante's will and render his confession the product of official coercion. *See id.* Therefore, in *Fulminante* the United States Supreme Court found the confession coerced even where the state did not originate the threat, but merely capitalized on it to induce Fulminante's confession.

{15} Other courts have followed *Fulminante's* pronouncement that the communication of a credible threat is sufficient to operate as official coercion. *See United States v. McCullah,* 76 F.3d 1087, 1101 (10th Cir.1996) (finding a "credible threat" of violence from drug organization); *United States v. Heatley,* 994 F.Supp. 477, 483 (S.D.N.Y.1998) (recognizing that "a confession induced by a credible threat of physical violence to the suspect, combined with a government promise of protection conditioned upon the suspect's confession, can be considered involuntary"); *Haak v. State,* 695 N.E.2d 944, 948 (Ind.Sup.Ct. 1998) ("It was irrelevant whether the threat came from a government agent or a third party" but deciding that confession was not coerced); *State v. Carroll,* 138 N.H. 687, 645 A.2d 82, 86 (1994) ("Admittedly, some courts have found confessions involuntary in cases where state agents said they would not protect the defendant from a credible threat of imminent harm from a third person unless the defendant confessed.").

{16} Based on this precedent, we conclude that a finding of coercion need not depend upon actual violence by a government agent, and we follow the United States Supreme Court's determination that a credible threat of physical violence from a third party may be sufficient to render a confession involuntary. However, we hold that the communication of a credible threat of violence to a defendant is but one factor to be considered when conducting an examination into the totality of the circumstances surrounding the confession.

C.

{17} In this case, based on the totality of the circumstances, we find that Special Agent Pittman communicated a credible threat to Sanders of violence from the drug organization. However, where the FBI made no offer of protection in exchange for Sanders' cooperation and all of the other circumstances support the voluntariness of the confession, we hold that Sanders' confession was voluntary and properly admitted by the district court.

{18} There is nothing in the record which indicates that Sanders did not fully understand what he was doing when he gave his confession. He is a middle-aged individual with a high school education. There is nothing in the record to suggest that his mental faculties were in any way impaired on the day he gave his confession. Sanders makes no showing that his depression rose to a debilitating level, such that he was unable to make an informed, knowing decision. *Cf. Colorado v. Connelly,* 479 U.S. 157, 164, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (citing *Spano v. New York,* 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959), for the proposition that as interrogators have turned to psychological persuasion, "courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus."). Although Sanders may have been depressed, this did not inhibit his ability to carry on with day-to-day activities or to hold down employment, as evidenced by his ability to fight the fire in June with no problems.

{19} We also can find no wrongdoing in the conduct of the FBI agents in this case. *See Connelly,* 479 U.S. at 167, 107 S.Ct. 515 (holding that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' "); *see also State v. Fekete,* 120 N.M. 290, 299, 901 P.2d 708, 717 (1995) (adopting *Colorado v. Connelly* and holding the "totality of circumstances test includes an element of police overreaching"). Special Agent Pittman clearly

identified himself as a law enforcement officer both during his initial visit to the feed store and in all subsequent conversations with Sanders. Therefore, Special Agent Pittman's status and role were clearly known to Sanders. There is no allegation that the agents invented the threat on Sanders' life as a pretext for communication or otherwise used trickery or deceit. Special Agent Pittman did not make an offer of protection contingent on Sanders' confession. There was no quid pro quo in this case.

{20} We also find no wrongdoing on the part of the agents in offering to inform the U.S. Attorney of Sanders' cooperation. This is especially true considering that Special Agent Pittman clearly communicated to Sanders that he was unable to make any promises to Sanders, and Sanders responded that he "realized that."

{21} We find it significant that Sanders initiated the telephone conversation to which he now objects. He was under no obligation to return Special Agent Pittman's call, and he was free to terminate the conversation at any time. Furthermore, it is significant that during the initial conversation, it was Sanders who volunteered his cooperation by stating, "Okay, would it help you all in the investigation if I cooperated any at all?" Sanders was not taken into custody and the interview took place at a neutral location. Sanders was under no obligation to meet the officers at the Super 8 Motel. He was not picked up by the officers but was driven there by his father and girlfriend. *See e.g. Munoz,* 1998-NMSC-048, ¶¶ 28-32, 126 N.M. 535, 972 P.2d 847, (discussing coercive effect of atmosphere of the interview). There is also no allegation that Sanders was mistreated in any way.

{22} It is impossible for this Court to fully understand what convinced Sanders to cooperate with the FBI, but based on a totality of the circumstances, we do not believe that the officers coerced Sanders' confession. In this case, it appears that Sanders was motivated to cooperate for reasons that had nothing to do with any improper police conduct. Sanders stated during the initial conversation with Agent Pittman that, "this has been in the back of my head, bugging me for probably a year." After reviewing the totality of the circumstances, we hold that Sanders' confession was voluntary and properly admitted in the district court.

III.

{23} Sanders claims that the district court's failure to submit his proffered instructions regarding the voluntariness of his confession constitutes reversible error. However, we believe that the jury was properly instructed on the voluntariness of Sanders' confession. The jury was instructed regarding the admission of a confession according to UJI 14-5040 NMRA 2000:

> Evidence has been admitted concerning a statement allegedly made by Richard Sanders. Before you consider any such statement for any purpose, you must determine that the statement was given voluntarily. In determining whether a statement was voluntarily given, you should consider if it was freely made and not induced by promise or threat.

At Sanders' request, the jury also received an instruction that defined both "promise" and "threat." The instructions given in this case were not erroneous, vague, nor contradictory. *See State v. Parish,* 118 N.M. 39, 41-42, 878 P.2d 988, 990-91 (1994). The four other instructions proffered by Sanders regarding the voluntariness of the confession were cumulative and would have given undue emphasis to the Defendant's theory of the case. *See State v. Sparks,* 102 N.M. 317, 324, 694 P.2d 1382, 1389 (Ct.App.1985). We hold that the jury was properly instructed in this case.

IV.

{24} Sanders alleges the trial court erred by denying his motion to monitor the jury culling process. The culling process is the stage in which the judge or designee disqualifies or exempts prospective jurors pursuant to the statutory exemptions contained in NMSA 1978, § 38-5-1 (1991) and NMSA 1978, § 38-5-11(B) (1991). A defendant's right to be present during this process was recently addressed by the New Mexico Court of Appeals in *State v. Huff,* 1998-

NMCA–075, 125 N.M. 254, 960 P.2d 342. We are persuaded by the Court of Appeals' reasoning in *Huff*:

> Defendant's presence would not impact the process. Defendant has no statutory authority to participate in this process, and, unlike the process of challenging potential jurors where Defendant may be able to discern some bias or prejudice, defendant can provide no special insight into the removal of jurors from the pool who are disqualified or excused on statutory grounds. *See* NMSA 1978, § 38–5–1 (1991).

Id. at ¶ 31; *see also* § 38–5–11(B) (setting forth the statutory exemptions available for prospective jurors.). The reasoning in *Huff* is particularly convincing when viewed with Section 38–5–11(C), which allows the inspection and copying of both the certified list and the questionnaires of the panel members. *See* § 38–5–11(C) ("The certified list of jurors and the questionnaires obtained from jurors shall be made available for inspection and copying by any party to any pending proceeding or their attorney or to any person having good cause for access to the list and the questionnaires."). Access to these records coupled with the ability to voir dire the potential jury members for his trial on the information contained therein is all that is statutorily required and all that we think is appropriate.

V.

{25} We hold that the district judge properly denied the motion to suppress Sanders' confession and the motion to monitor the jury culling process. We also hold that the jury was properly instructed on the voluntariness of Sanders' confession. Therefore, we affirm.

{26} **IT IS SO ORDERED.**

MINZNER, C.J., FRANCHINI, SERNA, and MAES, JJ., concur.

13 P.3d 468

2000-NMCA-098

STATE of New Mexico, Plaintiff–Appellee,

v.

Michael ASTORGA, Defendant–Appellant.

No. 21,414.

Court of Appeals of New Mexico.

Sept. 28, 2000.

Certiorari Denied, No. 26,622, Nov. 9, 2000.

Patricia A. Madrid, Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Samantha J. Fenrow, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

BOSSON, Judge.

{1} Defendant appeals from a district court order denying his motion to dismiss on double jeopardy grounds. *See State v. Apodaca*, 1997–NMCA–051, ¶ 17, 123 N.M. 372, 940 P.2d 478 (holding that such orders are immediately appealable). We issued a calendar notice proposing to affirm. Defendant has responded with a memorandum in opposition. We affirm.

{2} Defendant continues to argue that the district court should have dismissed the criminal information charging him with assault by prisoner and conspiracy. Defendant argues that the criminal information violated his rights to be free from double jeopardy because, as a prison inmate, he had previously been subjected to disciplinary action, including the forfeiture of good time credit, as a result of this same incident. Defendant refers us to *State v. Nunez*, 2000–NMSC–013, ¶ 36, 129 N.M. 63, 2 P.3d 264, and *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 626, 904 P.2d 1044, 1051 (1995), which set out a three part test for deciding the issue. Our calendar notice proposed to affirm, observing that it is well settled that good time credit is an administrative scheme that does not implicate double jeopardy protections. *See Enright v. State*, 104 N.M. 672, 673, 726 P.2d 349, 350 (1986); *State v. Millican*, 84 N.M. 256, 501 P.2d 1076 (Ct.App.1972); *Washington v. Rodriguez*, 82 N.M. 428, 430, 483 P.2d 309, 311 (Ct.App.1971).

{3} In his memorandum in opposition, Defendant argues that *Nunez* and *Kennedy* have implicitly overruled our case law because the forfeiture of good time credit constitutes punitive, as opposed to remedial, action. We are unpersuaded that our Supreme Court intended to overrule its existing case law on this issue, and we believe that we should not expand *Nunez* in the face of such preexisting authority. *See State v. Wilson*, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994) (holding that Supreme Court precedent controls, but encouraging the expression of any reservations this Court might harbor). This is particularly true in light of this Court's own case law characterizing the forfeiture of good time credit as a rehabilitative, remedial measure. In *Washington*, 82 N.M. at 430, 483 P.2d at 311, this Court rejected a similar claim after noting with approval *People v. Eggleston*, 255 Cal.App.2d 337, 63 Cal.Rptr. 104, 106 (1967), a case that relied on the United States Supreme Court's definition of remedial to include the revocation of a privilege voluntarily granted. Accordingly, although we agree with Defendant that *Nunez* and *Schwartz* have clarified our double jeopardy analysis, we hold that our preexisting case law is still controlling and the forfeiture of good time credit does not implicate double jeopardy protections.

{4} Defendant's argument that *Nunez* controls relies primarily on the discussion of deterrence in that opinion as a characteristic of a punitive, rather than remedial, statutory scheme. *See Nunez*, 2000–NMSC–013, ¶¶ 85–86, 129 N.M. 63, 2 P.3d 264. Defendant views the forfeiture of good time credit in the setting of prison discipline solely as a deterrent designed to punish, to set an example to the other inmates, and thereby to maintain order. However, the punitive/remedial analysis in *Nunez* is far more complex than just the question of deterrence. *See id.* ¶¶ 61–94. An administrative sanction may have incidental deterrent attributes while being primarily a remedial measure.

{5} Defendant's argument overlooks this complexity. For example, Defendant's argument overlooks the importance our Supreme Court placed on the protection of property rights which were the subject of the punitive forfeiture actions in *Nunez*, and which are not present here. *See id.* ¶¶ 75, 93. Defendant also overlooks the extensive discussion in *Nunez* about a correlation between the sanction imposed and the harm to be remedied and when there is a correlation, the sanction is more likely remedial in nature. *See id.* ¶¶ 87–90. Defendant also ignores the discussion in *Nunez* about the remedial goal of

removing an offender from society for the protection of all, as opposed to punishment of the individual. *See id.* ¶ 68.

{6} In our view, all of these areas of inquiry from *Nunez* mitigate against Defendant in this case because they reveal attributes of the sanction that predominate over incidental deterrence. Prisons are special places with self-evident management problems in maintaining order. Sanctions such as administrative segregation and the loss of good time credit have the remedial purpose of "removing harm from society," and "social betterment and not individual punishment," that speak more to the administrative challenge of effective prison management and less to the goal of individual punishment. *Id.* ¶ 68. Moreover, according to *Nunez,* "[i]f it is clear that the sanction greatly exceeds the quantum of harm, then it is punitive." *Id.* ¶ 89. Here, the administrative sanction of loss of good time credit seems to correlate evenly with the particular infraction, more like a temporary loss of privileges than a goal of deterrence by punishment. If anything, it is clear that the sanction does *not* "greatly exceed the quantum of harm." Indeed, the harm to society from criminal violations, even within a prison system, may not be adequately addressed by the expedited and remedial prison disciplinary process. Thus, when circumstances justify it, the state may need to address punishment specifically in a separate criminal proceeding, like the one under consideration here, regardless of what remedial sanctions prison management may or may not have imposed for its own ends.

{7} Given these significant differences from *Nunez,* we are confident our Supreme Court would conclude, as we do, that *Nunez* does not pertain, and that the administrative sanction of loss of good time credit does not implicate double jeopardy protections under our state constitution. We note in passing that the federal circuit of which New Mexico is a part has long held that criminal judicial proceedings following administrative punishments imposed by prison officials do not violate the double jeopardy clause. *See United States v. Rising,* 867 F.2d 1255, 1259 (10th Cir.1989) (citing *United States v. Boomer,* 571 F.2d 543 (10th Cir.1978); *United States v. Acosta,* 495 F.2d 60 (10th Cir. 1974); *United States v. Hedges,* 458 F.2d 188 (10th Cir.1972); *Hutchison v. United States,* 450 F.2d 930 (10th Cir.1971)).

CONCLUSION

{8} For the reasons set forth above, we hold that the administrative sanctions imposed against Defendant in this matter, including the loss of good time credit, do not implicate double jeopardy protections under the state constitution, and therefore those sanctions do not bar the subsequent prosecution of Defendant for crimes arising out of that incident. We affirm the judgment of the district court.

{9} **IT IS SO ORDERED.**

PICKARD, C.J., and BUSTAMANTE, J., concur.

13 P.3d 470

2000-NMCA-101

STATE of New Mexico, Plaintiff–Appellee,

v.

Jack Brian SMITH, Defendant–Appellant.

No. 20,446.

Court of Appeals of New Mexico.

Oct. 23, 2000.

Patricia A. Madrid, Attorney General, James O. Bell, Assistant Attorney General, Santa Fe, NM,. for Appellee

Phyllis H. Subin, Chief Public Defender, Lisabeth L. Occhialino, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

KENNEDY, Judge.

{1} Defendant Jack Brian Smith pled guilty to possession of a stolen vehicle and was sentenced by the trial court. He appeals the trial court's use of a 1985 South Carolina conviction to enhance his sentence by one year, claiming it was not a valid prior felony conviction that could serve as the basis for enhancing his underlying sentence under the New Mexico Habitual Offender Statute, NMSA 1978, § 31–18–17 (1993). We agree and reverse the one-year enhancement of Defendant's sentence.

FACTS AND PROCEDURAL HISTORY

{2} Defendant was convicted in 1985 in South Carolina's Court of General Sessions of burglary and larceny. At the time, he was seventeen years old. The burglary was classified by South Carolina as a third degree, class F felony punishable by up to five years' imprisonment and the larceny was a misdemeanor. Defendant was sentenced to the Youthful Offender Division of the South Carolina Department of Corrections for an indefinite period of time up to six years, and this sentence was suspended in lieu of probation. In 1998 Defendant pled guilty in New Mexico to possession of a stolen vehicle. The trial court sentenced him to one year for the habitual offender enhancement and suspended the sentence on the underlying felony. This appeal followed.

PRESERVATION AND STANDARD OF REVIEW

{3} Defendant preserved his right to appeal the question of whether his 1985 South Carolina conviction was a valid prior felony conviction that could serve as the basis for enhancing his underlying sentence under the New Mexico Habitual Offender Statute in the explicit terms of his plea agreement. *See* Rule 12–216(A) NMRA 2000; *State v. Hodge,* 118 N.M. 410, 414, 882 P.2d 1, 5 (1994)

(acknowledging that a voluntary guilty plea ordinarily waives a defendant's right to appeal on any grounds other than jurisdictional unless a conditional plea agreement reserves the issue for appeal).

{4} Whether Defendant's 1985 South Carolina conviction is an effective prior felony for purposes of sentence enhancement under the New Mexico Habitual Offender Statute is a question of statutory construction, and is therefore a question of law subject to de novo review. *See State v. Adam M.*, 1998–NMCA–014, ¶ 15, 124 N.M. 505, 953 P.2d 40; *State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

DISCUSSION

{5} According to New Mexico's Habitual Offender Statute, a "prior felony conviction" for acts committed outside New Mexico that may be used to enhance a defendant's sentence for subsequent criminal acts committed in New Mexico includes:

> (2) any prior felony for which the person was convicted other than an offense triable by court martial if:
>
> (a) the conviction was rendered by a court of another state, the United States, a territory of the United States or the commonwealth of Puerto Rico;
>
> (b) the offense was punishable, at the time of conviction, by death or a maximum term of imprisonment of more than one year; or
>
> (c) the offense would have been classified as a felony in this state at the time of conviction.

{6} We have previously held that Subsection (A)(2) of Section 31–18–17 should be read as though the word "and" was inserted between subparagraphs (a) and (b). *See State v. Harris*, 101 N.M. 12, 19, 677 P.2d 625, 632 (Ct.App.1984).

Part (b) of New Mexico's Habitual Offender Statute

{7} First, we must determine whether "the offense[s] [were] punishable, at the time of conviction, by death or a maximum term of imprisonment of more than one year ." Section 31–18–17(A)(2)(b).

{8} Defendant was convicted and sentenced in accordance with the provisions of Chapter 19 of South Carolina's 1976 Code of Laws, addressing " 'Correction and Treatment of Youthful Offenders.' " South Carolina defined "youthful offenders" as offenders between the ages of seventeen and twenty-five. Under the Youthful Offender Act, a youthful offender under the age of twenty-one could be sentenced to the custody of the department "for treatment and supervision pursuant to this chapter until discharged by the [Youthful Offender] Division, the period of such custody not to be in excess of six years." S.C.Code Ann., § 24–19–50(c) (1977). Youthful offenders under the age of twenty-one could also be given a suspended sentence like the one Defendant received, or "[i]f the court shall find that the youthful offender will not derive benefit from treatment" he could be given a sentence under any other "applicable penalty provision." S.C.Code Ann., § 24–19–50(d). The purpose of South Carolina's Youthful Offender Act was "to provide treatment and supervision designed to correct the antisocial tendencies of youthful offenders so as to protect the public." *Craft v. State*, 281 S.C. 205, 314 S.E.2d 330, 331 (1984); *see also* S.C.Code Ann., § 24–19–10(e) (1977) (providing identical definition of "treatment" for purposes of Youthful Offender Act). As the South Carolina Supreme Court stated in 1981:

> The legislature has determined that society's interest, the public safety and welfare, is best protected by extending the cloak of the [Youthful Offender] [A]ct to these offenders it deems most likely to profit from the act's rehabilitative purpose.

State v. Johnson, 276 S.C. 444, 279 S.E.2d 606, 607 (1981). In furtherance of this policy, South Carolina chose to exclude convictions under the Youthful Offender Act from subsequent habitual offender proceedings.

{9} For the South Carolina court to have imposed a criminal adult sentence of imprisonment, as opposed to a youthful offender sentence, it would have had to determine that Defendant was not amenable to treatment. Because the South Carolina court found Defendant amenable to treat-

ment, the 1985 order placing him on probation was a "youthful offender" sentence whose goal was rehabilitative in nature. Therefore, we hold that Defendant's conviction does not satisfy the provisions of part (b) of New Mexico's Habitual Offender Statute.

Part (c) of New Mexico's Habitual Offender Statute

{10} Next, we analyze whether Defendant's South Carolina offenses satisfy part (c) of New Mexico's Habitual Offender Statute. To satisfy part (c), the offenses "would have [to have] been classified as [ ] felon[ies] in this state at the time of conviction." Section 31–18–17(A)(2)(c). On the contrary, we find that Defendant's offenses would not have been felonies in New Mexico at the time he was convicted in South Carolina. The 1985 Children's Code defined a child as anyone under eighteen years old. *See* § 32–1–3(A). It defined a delinquent child as a child who had committed a delinquent act, which was an act generally designated as a crime if committed by an adult. *See* § 32–1–3(O) and (P). Had Defendant been convicted of burglary and larceny in New Mexico at the age of seventeen, both charges would have resulted in the sentencing of Defendant as a delinquent offender. *See* § 32–1–3(O) and (P). Delinquent offenders were subject only to juvenile sanctions under the New Mexico Children's Code. *See id.* Only when a person under eighteen was sentenced as an adult did "the determination of guilt at trial become[ ] a conviction for purposes of the Criminal Code" which would include the Habitual Offender Statute. *See* NMSA 1978, § 32A–2–18(B) and (C) (1996). According to the 1985 Children's Code, Defendant could only have been treated as an adult if the children's court had transferred the proceedings to an adult district court after a hearing determining that Defendant was not amenable to treatment or rehabilitation as a child. *See* NMSA 1978, § 32–1–29 (1975).

{11} A child sentenced as a delinquent offender under the 1985 New Mexico Children's Code was specifically deemed not to have been "convicted" of a crime, and his disposition as a delinquent was generally inadmissible in subsequent proceedings. *See* NMSA 1978, § 32–1–33 (1972). As an aside, we note that the legislative directive that juvenile dispositions not be treated as "convictions" for all purposes including habitual offender enhancement remains in effect, and thus the same result would occur under the version of the New Mexico Children's Code in effect today.

> A judgment in proceedings on a petition under the Delinquency Act . . . resulting in a juvenile disposition shall not be deemed a conviction of crime . . . nor shall it operate to disqualify the child in any civil service application or appointment. The juvenile disposition of a child and any evidence given in a hearing in . . . court shall not be admissible as evidence against the child in any case or proceeding in any other tribunal whether before or after reaching the age of majority, except in sentencing proceedings after conviction of a felony and then only for the purpose of a presentence study and report.

NMSA 1978, § 32A–2–18(A) (1993). Because Defendant's offenses would not have been treated as felonies if they had been committed in New Mexico, they do not satisfy part (c) of New Mexico's Habitual Offender Statute.

CONCLUSION

{12} For the reasons stated above, we reverse the one-year enhancement of Defendant's underlying sentence under the New Mexico Habitual Offender's Statute.

{13} **IT IS SO ORDERED.**

BUSTAMANTE and ARMIJO, JJ., concur.

13 P.3d 960

2000-NMCA-099

Robert SANCHEZ and Eleanor Sanchez, husband and wife, R & E Sanchez Family Third Limited Partnership, and R & E Sanchez Fourth Family Limited Partnership, Plaintiffs/Appellees/Cross–Appellants,

v.

Richard B. SAYLOR and Susan J. Saylor, a/k/a Susan J. Scarborough, husband and wife, Defendants/Appellants/Cross–Appellees,

v.

Coors Ltd., R.R.G., Additional Defendant/Counterclaimant/Appellant/Cross–Appellee.

No. 19,470.

Court of Appeals of New Mexico.

Aug. 1, 2000.

Certiorari Denied, No. 26,616, Nov. 9, 2000.

Esteban Aguilar, Aguilar Law Offices, P.C., Albuquerque, NM, Elizabeth Losee, Law Office of Elizabeth Losee, Corrales, NM, for Appellees/Cross–Appellants.

Victor R. Marshall, Victor R. Marshall & Associates, P.C., Albuquerque, NM, for Appellants/Cross–Appellees.

OPINION

SUTIN, Judge.

{1} This case involves business and court battles between business partners Robert Sanchez and Robert Saylor. Both appeal. We get the flavor of the case in the court's opening finding of fact:

> The above-captioned cause involves two partners, both energetic, dynamic, intelligent businessmen, entrepreneurs and risk-takers. They amassed a multi-million dollar investment portfolio through a relationship which contained virtually no formal agreements or legal documents. Rather, these partners conducted their affairs through the use of informal luncheons and late-night telephone conversations. Their

conduct was governed by their respective assumptions and personal financial objectives. The Court enters this background because ... the testimony of both Dr. Sanchez and Mr. Saylor is, at best, self-serving, speculative and vague. Neither intentionally misrepresents the truth; however, both partners can only see the issues before the Court from a disturbingly myopic point of view.

{2} The two limited partnerships at issue in this lawsuit were Fidelity Limited, R.S.R.S. (RSRS), and Coors, Ltd., R.R.G. (Coors). Saylor appeals the court's determination that he converted partnership promissory notes worth $500,000 and therefore owed Sanchez $250,000. Sanchez cross-appeals the court's fee and expense reimbursement award of $351,739 in favor of Saylor and against Coors; the court's award of $522,488 in favor of Coors and against Sanchez for breaches of contract and fiduciary duty; and the court's refusal to award Sanchez damages in the form of profits derived by Saylor from Saylor's conversion of partnership notes. On the Saylor appeal, we affirm the judgment in favor of Sanchez against Saylor. On the Sanchez cross-appeal, we reverse the judgment of $522,488 in favor of Coors against Sanchez, and we affirm the judgment of $351,739 in favor of Saylor against Coors.

FACTS AND PROCEEDINGS

{3} Sanchez and his wife sued Saylor and his wife. The Saylors counterclaimed. The wives were ultimately dismissed. Neither RSRS nor Coors were named parties. Two family limited partnerships into which certain of the Sanchez assets were placed, the R & E Sanchez Third Family Limited Partnership and the R & E Sanchez Fourth Family Limited Partnership, were added as plaintiffs. We refer to Sanchez and his family limited partnerships as "Sanchez."

{4} Sanchez and Saylor were the general partners of RSRS, which was formed to purchase the Fidelity Square Shopping Center (the shopping center). RSRS sold the shopping center to Fidelity Square Limited (Fidelity–Arizona), an Arizona Limited Partnership, and received two unguaranteed promissory notes secured by a mortgage as partial consideration for the sale. Fidelity–Arizona defaulted on the notes. In a refinancing, Fidelity–Arizona received funds from Golddome Credit Corporation (Golddome), and RSRS subordinated its mortgage to a Golddome first mortgage. Fidelity–Arizona then defaulted on its obligations to RSRS and Golddome. After RSRS filed a foreclosure action, Fidelity–Arizona filed bankruptcy in Arizona.

{5} The primary issue in Sanchez's appeal arises out of Saylor's purchase on his own behalf of the shopping center out of the bankruptcy by using, as partial consideration, the release and forgiveness of the RSRS promissory notes. The court held Saylor liable in conversion.

{6} Sanchez and Saylor also were the general partners in Coors. Saylor managed this partnership, which owned commercial rental property (the Coors property). The primary issues in Saylor's appeal arise out of services rendered and funds advanced for the benefit of Coors for which Saylor felt entitled to be reimbursed or paid, and the loss by Coors of a financially beneficial refinancing opportunity due to Sanchez's refusal to provide his financial statements to the prospective lender.

{7} Interwoven into these partners' relationships were Sanchez's personal financial difficulties. Sanchez did not join Saylor in buying the shopping center out of bankruptcy, due primarily to a United New Mexico Bank (United) judgment against Sanchez for $2,364,533 and United's collection efforts which included a fraudulent-conveyance action against Sanchez. Sanchez feared that United ultimately might levy against the shopping center. This affected his relief below. The court denied Sanchez any profits derived from Saylor's conversion of the RSRS notes because of Sanchez's "own unclean hands in attempting to deceive United," and the court refused to impose a constructive trust on the shopping center in Sanchez's favor, because "to do so would ... consummate the attempt to defraud United...."

{8} In addition, Sanchez refused to provide personal financial statements to obtain a

refinancing for Coors because Sanchez feared that United would discover them and seek execution against his assets. The court found this refusal to be part of Sanchez's "ongoing efforts to deceive his creditors about his assets."

{9} Other threads of Sanchez's inappropriate conduct running through the partnership fabric are noted in findings that his "refusal to provide his personal financial statements [for the Coors refinance] was tortious, intentional, willful, and in bad faith"; that he repeatedly failed to inform himself about the affairs of Coors; that he failed and refused to contribute funds needed by Coors; and that he failed and refused to bear the risks and losses of the partnership while he demanded profits. The court concluded that this conduct constituted breaches by Sanchez of his fiduciary duties to Coors.

{10} After several days of trial, the court entered a Final Order and Judgment (the judgment). After post-judgment motions, the court entered an order joining Coors, as a defendant and counterclaimant (the order), and an amended final order and judgment (the amended judgment). With this summary backdrop, we address the issues.

DISCUSSION

I. *Rule 12–213(A)(3) and Substantial Evidence Arguments*

{11} Each party accuses the other of failing to adhere to Rule 12–213(A)(3) NMRA 2000, requiring an appellant to set out the substance of the evidence bearing upon a crucial proposition. We deny Saylor's motion to dismiss Sanchez's entire cross-appeal for failure to comply with that rule because the entire cross-appeal does not suffer from a failure to comply. However, as will be seen, we do decline to entertain certain issues for failure to comply with Rule 12–213(A).

{12} We reiterate the standards of review:

> If there is substantial evidence to support the trial court's decision, we will not disturb that decision on appeal. Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion. In reviewing a claim that the trial court's decision was not supported by substantial evidence, the appellate court views the evidence in the light most favorable to the decision below, resolving all conflicts in the evidence in favor of that decision and disregarding evidence to the contrary. We will reverse only when the evidence, or reasonable inferences from the evidence, cannot support the trial court's findings and conclusions.

Insure New Mexico, LLC v. Robert McGonigle, 2000–NMCA–018, ¶ 8, 128 N.M. 611, 995 P.2d 1053 (internal quotation marks and citations omitted). We indulge every presumption in favor of the correctness of the findings, conclusions, and judgment of the district court. *See Esquibel v. Hallmark*, 92 N.M. 254, 256, 586 P.2d 1083, 1085 (1978). When we review a substantial evidence claim, "[t]he question is not whether substantial evidence would have supported an opposite result; it is whether [the] evidence supports the result reached." *Hernandez v. Mead Foods, Inc.*, 104 N.M. 67, 71, 716 P.2d 645, 649 (Ct.App.1986). There may be other facts that, if believed, might support a different result, but we disregard them. *See Salter v. Jameson*, 105 N.M. 711, 713, 736 P.2d 989, 991 (Ct.App.1987). "It is for the trial court to weigh the testimony, determine the credibility of witnesses, reconcile inconsistent statements, and determine where the truth lies." *Lopez v. Adams*, 116 N.M. 757, 758, 867 P.2d 427, 428 (Ct.App.1993). "The appellate court may not reweigh the evidence [or] substitute its judgment for that of the trier of fact." *Sanchez v. Homestake Mining Co.*, 102 N.M. 473, 476, 697 P.2d 156, 159 (Ct.App.1985) (citation omitted). If a finding is made against the party with the burden of proof, we can affirm if it was rational for the district court to disbelieve the evidence offered by that party. *See Sosa v. Empire Roofing* Co., 110 N.M. 614, 616, 798 P.2d 215, 217 (Ct.App.1990). Applying these standards of review in the case before us, we determine that substantial evidence supports the district court's findings of fact and conclusions of law in all instances in which lack of substantial evidence was argued by either party in this appeal.

II. *Saylor's Appeal*

{13} Saylor appeals from an adverse judgment holding him liable in conversion and awarding $250,000 to Sanchez. He attacks the sufficiency of the evidence and contends that the bankruptcy sale approval by the federal court ended any question of the propriety of his purchase.

A. *Substantial Evidence Exists to Support a $500,000 Value*

{14} Saylor argues that the court erred in finding the value of the partnership promissory notes to be $500,000. He points to evidence that supports his view that the notes were worthless. But other evidence exists to support the district court's determination of value. The shopping center had been appraised at $1,600,000, and the cash paid by Fidelity–Arizona was only $1,150,000. The consideration for the sale to Saylor included RSRS's forgiving and releasing the notes, without which Fidelity–Arizona would not have sold the property to Saylor. The balance of the notes, including interest, was $500,000. Saylor paid $1,150,000 for the property, listed the property for sale at $1,950,000, and then sold the property. Although the sale price was sealed, Saylor must have profited from the purchase and sale because Sanchez sued to recover those profits and we do not see anything in the record indicating that Saylor denied receiving a profit.

{15} Representatives of the two corporate general partners of Fidelity–Arizona supported the court's finding of value. One testified, "In effect, we [Fidelity–Arizona] actually got the million, six because the indebtedness of the second mortgage combined with the million, one-fifty was close to that amount . . . so by selling it, we really actually got that amount, or more." The other testified that Fidelity–Arizona would not have sold the property if RSRS had refused to forgive the notes, because the two corporate general partners still would have owed the $500,000, and the notes were collectable from those partners at the time they were forgiven.

{16} This is substantial evidence to support the court's finding of a $500,000 value. The amount due, at the very least, is prima facie evidence of value. That Fidelity–Arizona required the notes to be forgiven and released as a condition of sale is a strong indication that the property owner believed the notes had some value. Saylor presented no evidence that Fidelity–Arizona held any belief to the contrary and did not show that the notes could not be collected from Fidelity–Arizona's general partners.

{17} For his contention that the amount due is nothing more than a starting point for the determination of actual value and alone cannot overcome his evidence of the uncollectability of the notes, Saylor cites several cases: *Martinez v. Eight N. Indian Pueblo Council, Inc.*, 1997–NMCA–078, ¶ 20, 123 N.M. 677, 944 P.2d 906 (Hartz, C.J., dissenting); *First Southwestern Fin. Servs. v. Pulliam*, 1996–NMCA–032, ¶ 3, 121 N.M. 436, 912 P.2d 828; *Lewis v. Lewis*, 106 N.M. 105, 112, 739 P.2d 974, 981 (Ct.App.1987); and *George v. Caton*, 93 N.M. 370, 378, 600 P.2d 822, 830 (Ct.App.1979). Although they give credence to Saylor's theory that the collectability of a note can be considered in determining the actual value of the note, none of these cases is determinative of the issues here. None is a conversion case, and none discusses the evidentiary value of the amount due under promissory notes. Furthermore, in the case before us, there exists evidence in addition to collectability that materially bears on the issue and supports the court's determination.

{18} Saylor also contends that damages cannot be awarded for the conversion of an asset in the absence of evidence that the asset had market value, citing *Security Pac. Fin. Servs. v. Signfilled Corp.*, 1998–NMCA–046, ¶¶ 15–18, 125 N.M. 38, 956 P.2d 837. The district court's decision, however, is not inconsistent with the law that Saylor argues. The court found a value of $500,000 based in part on a market transaction in which the consideration included $1,150,000 and the forgiving and release of the promissory notes. The evidence of the amount due, of collectability from the general partners of Fidelity–Arizona, of the $1,600,000 appraisal, and of Saylor's conversion and resale of the property was enough to establish market value.

The court was not persuaded by Saylor's evidence and did not err in finding the $500,000 value by a preponderance of the evidence.

B. *Saylor Was Not Entitled to Judgment on the Ground Sanchez Suffered No Damages as a Matter of Law*

{19} Saylor contends that he was entitled to dismissal on the ground that Sanchez suffered no damages as a matter of law. He argues that Sanchez is pursuing an award against him for something Sanchez never would or could have pursued against Fidelity–Arizona and its general partners.

{20} Saylor relies heavily on *First National Bank v. Garrett,* 80 N.M. 239, 240–41, 453 P.2d 759, 760–61 (1969) (a first mortgagee's bid to purchase in an amount less than its full judgment can be credited against its judgment instead of cash changing hands and a second mortgagee cannot complain). He cites *Garrett* for the point that junior lienholders are not prejudiced when a first mortgagee bids its judgment with a resulting deficiency, unless the junior lienholders can show that the bid price was inadequate or that the sale was unfair. Saylor argues that Sanchez suffered no damages as a result of the bankruptcy sale for $1,150,000 because that amount only partially satisfied the first mortgage debt of $1,922,000 to Golddome and because the bid price and any deficiency to which Golddome would have been entitled far exceeded the value of the property.

{21} Saylor also points to 1993 Sanchez deposition testimony that RSRS's interest in Fidelity–Arizona was worthless, that RSRS was defunct, and that pursuit of the notes would be an utter waste of money, even if RSRS were solvent. Saylor mentions that he and Sanchez did discuss the possibility of pursuing the corporate general partners of Fidelity–Arizona but decided against it because it was "good money after bad."

{22} Saylor's contentions are directed to the sufficiency of the evidence, although he argues them as questions of law. Sanchez presented evidence that the Fidelity–Arizona general partners wanted the notes forgiven in the sale because the notes had value and may have been collectible from them. This was sufficient evidence of value and collectability to support the court's determinations, and arguments to the contrary are arguments directed to the weight of the evidence or credibility, which are for the finder of fact. Without a record of undisputed fact or findings to the contrary, we will not speculate about possible collection, foreclosure, or bankruptcy. Substantial evidence exists to support the court's determination of value.

{23} Saylor nevertheless argues that conflicting findings of the court require a determination of uncollectability as a matter of law. We do not accept Saylor's invitation that we take the district court's place as weigher of facts and judge of credibility. The underlying historical facts are sufficient to support the court's finding of a $500,000 value. Having made that determination we need not consider evidence favorable to Saylor, even if found in findings of fact. *See Hernandez,* 104 N.M. at 72, 716 P.2d at 650. Furthermore, we indulge every presumption in favor of upholding the court's judgment when faced with uncertain, inconsistent, doubtful, or ambiguous findings. *See Ledbetter v. Webb,* 103 N.M. 597, 602, 711 P.2d 874, 879 (1985). We will resolve seeming inconsistencies, if possible, to justify the judgment based on a fair construction of the findings. *See id.* We presume that the court did not make inconsistent findings. *See Jacobs v. Meister,* 108 N.M. 488, 492, 775 P.2d 254, 258 (Ct.App.1989). We easily reconcile the court's findings with its conclusion that the notes had a $500,000 value.

C. *Sanchez Was Not Barred by the Bankruptcy Court Approval and Sale*

{24} Saylor contends that the approval by the United States Bankruptcy Court of his purchase, after notice and hearing in the Fidelity–Arizona bankruptcy proceeding, is a federal judgment entitled to full faith and credit and cannot be collaterally attacked or set aside. We disagree. Sanchez has not sought to set the federal court order aside, and Sanchez's action is not a collateral attack on that judgment. *See Sanders v. Estate of Sanders,* 1996–NMCA–102, ¶ 23, 122 N.M. 468, 927 P.2d 23. While

Saylor's contention may be a correct statement of the law, it does not apply to bar Sanchez's claim for conversion.

{25} The issue of Sanchez's right to relief against Saylor for conversion was not litigated in the Fidelity–Arizona bankruptcy proceeding. Saylor has provided us with no basis, and we know of none, on which to hold that the bankruptcy sale approval is a bar to Sanchez's action to recover the value of the RSRS notes converted by Saylor.

D. *Conclusion—Saylor's Appeal*

{26} We affirm the court's award of $250,000 in favor of Sanchez and against Saylor, holding that there was sufficient evidence to support a $500,000 value of the notes and that Saylor was not entitled to a dismissal on the ground that Sanchez suffered no damages as a matter of law. Further, Sanchez's conversion claim was not barred by the bankruptcy court approval and sale.

III. *Sanchez's Appeal*

{27} Sanchez appeals from adverse determinations awarding Saylor $351,739 against Coors, awarding Coors $522,488 against Sanchez, and denying his claims for recovery of Saylor's profits. Sanchez argues that the court lacked jurisdiction to enter the amended judgment, and attacks the court's order adding Coors as a defendant and counterclaimant by post-trial order.

A. *The Court's Amended Judgment Should Not Be Set Aside for Lack of Jurisdiction*

{28} Sanchez contends that the court lacked jurisdiction on May 21 to enter the order adding Coors as a party and to enter an amended judgment conforming the judgment to that order. We hold that the court had subject matter jurisdiction on May 21 to enter the order and the amended judgment. Sanchez makes this contention because the original judgment was entered on March 2; post-judgment Rule 1–052(B)(2) NMRA 2000 and Rule 1–059 NMRA 2000 motions were made on March 9 and March 11; neither post-judgment motion was ruled on within 30 days, making the appeal deadline May 11; and a notice of appeal was filed on May 1. Thus, Sanchez contends that the filing of the notice of appeal divested the court of jurisdiction, citing *Luboyeski v. Hill*, 117 N.M. 380, 382, 872 P.2d 353, 355 (1994), and that the court lost jurisdiction to do anything after 30 days had passed in any event, citing NMSA 1978, § 39–1–1 (1917).

{29} However, the critical facts that Sanchez ignores are that on March 27, well within the time of district court jurisdiction, Saylor filed a motion under Rule 1–015(B) NMRA 2000 to add Coors as a party and to conform the judgment accordingly and that this motion was granted by the court at a hearing held on April 1, again well within the time of district court jurisdiction. The issue, therefore, is whether the district court lacked jurisdiction on May 21 to enter the order and amended judgment conforming to its oral order of April 1. Our cases firmly support the notion that the court did not lack jurisdiction. *See State v. Ratchford*, 115 N.M. 567, 572, 855 P.2d 556, 561 (1993) (holding that district court's verbal grant of a motion for a new trial was effective notwithstanding that a written order embodying the verbal one was not filed within 30 days after the motion was deemed denied); *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 241, 824 P.2d 1033, 1043 (1992) (indicating that appellate courts should approach jurisdictional issues arising out of notices of appeal pragmatically, not inflexibly, and that usual rule is that district court loses jurisdiction upon the filing of a notice of appeal except for purposes of perfecting the appeal or passing on motions directed at the judgment pending at the time); *State v. Herbstman*, 1999–NMCA–014, ¶ 14, 126 N.M. 683, 974 P.2d 177 (indicating that, even in cases of lack of technical jurisdiction, where it would accomplish little and cause added expense and delay, this Court will give effect to district court orders entered during the pendency of an appeal); *Gonzales v. City of Albuquerque*, 90 N.M. 785, 786, 568 P.2d 621, 622 (Ct.App.1977) (determining that a court may not enter a *nunc pro tunc* order to supply an omitted action, and indicating that it may enter an order to formally accomplish something that was actually earlier done).

B. *The Court's Post-Trial Addition of Coors Was Not an Abuse of Discretion*

{30} Sanchez contends that even if jurisdiction existed to grant the motion adding Coors as a party, the district court abused its discretion in doing so. We review the district court's grant of a motion to amend for abuse of discretion. *See Bellet v. Grynberg,* 114 N.M. 690, 692, 845 P.2d 784, 786 (1992). "Granting a motion to amend is an abuse of discretion if the opposing party is prejudiced by the amendment." *Wirtz v. State Educ. Retirement Bd.,* 1996-NMCA-085, ¶ 8, 122 N.M. 292, 923 P.2d 1177 (citing *Bellet,* 114 N.M. at 692, 845 P.2d at 786). Prejudice occurs to a party that does not have a fair opportunity to defend itself or offer evidence. *See Bellet,* 114 N.M. at 692, 845 P.2d at 786.

{31} Sanchez argues several substantive points in support of his abuse of discretion contention. Because he did not expressly consent to any evidence on the issue of relief regarding Coors, he asserts that any evidence at trial that may have related to that issue was relevant to Saylor's claims against Sanchez and therefore not tried by implied consent as to Coors. Sanchez also argues that the addition of Coors a month after the judgment was entered was prejudicial, in that he did not have a fair opportunity to defend against the Coors claim, and, further, it denied Coors due process because Coors did not have a fair opportunity to defend itself. In addition, Sanchez argues prejudice because he did not have the opportunity to offer additional evidence or raise possible defenses (e.g., the statute of limitations) with respect to Saylor's claims against Coors for reimbursement of expenses. Sanchez further contends that, absent implied consent, the amendment could be granted only if no prejudice would result. *See Camp v. Bernalillo County Med. Ctr.,* 96 N.M. 611, 613-14, 633 P.2d 719, 721-23 (Ct.App.1981) (stating that district court erred in allowing amendment while excluding essential defense evidence). *See also Wirtz,* 1996-NMCA-085, ¶ 20, 122 N.M. 292, 923 P.2d 1177 (deciding that defendant added after trial has no opportunity to defend itself on the merits and will suffer prejudice); *Bellet,* 114 N.M. at 692, 845 P.2d at 786.

{32} The law is settled that parties may try issues not raised in the pleadings when those issues are tried by express or implied consent. *See* Rule 1-015(B); *Lightsey v. Marshall,* 1999-NMCA-147, ¶ 12, 128 N.M. 353, 992 P.2d 904. By the nature of the arguments and the evidence presented to the court, the issues of partner obligations, accounting, and dissolution included the determination of obligations of partners to the partnership and vice versa. *Cf. Levy v. Disharoon,* 106 N.M. 699, 702-03, 749 P.2d 84, 87-88 (1988). The trail of court documents in this case makes it abundantly clear that Sanchez knew and understood that this action in the district court involved partnership accounting and equitable relief that necessarily involved Coors directly. Sanchez's complaint alleged that Saylor breached his fiduciary duty to Coors as well as to Sanchez and that Saylor converted Coors' assets. Sanchez sought a partnership accounting and damages for Saylor's wrongful appropriation of partnership assets or opportunities for Saylor's own use and profit.

{33} Saylor's counterclaim alleged that Sanchez breached his fiduciary duties to Coors as well as to Saylor. Saylor sought an accounting of benefits received and amounts owed by Sanchez and termination of Sanchez's interests in Coors. Sanchez acknowledged in a pretrial motion that Saylor's counterclaims sought "a general accounting and ... a judicially ordered dissolution of ... Coors ...." and that the "counterclaims are equitable in nature." In fact, the pretrial order said that Saylor was seeking a full and complete accounting of amounts due Saylor from the Coors partnership, and dissolution of Coors. A very detailed proposed accounting is attached to the pretrial order.

{34} The parties stipulated that the New Mexico Uniform Partnership Act (UPA), NMSA 1978, §§ 54-1-1 to 54-1-46 (1947, as amended through 1997) and the Uniform Limited Partnership Act (ULPA), NMSA 1978, §§ 54-2-1 to 54-2-30 (1988, as amended through 1993) governed the duties of partners *inter se* and to the partnership and that the right to a partnership accounting de-

manded by Saylor arose under Section 54–1–22. At trial, it was clear from the exhibits that one focus was a partnership accounting of what Sanchez owed Coors and what Coors owed Saylor. One Saylor exhibit actually showed what he alleged were partnership losses and amounts that the partnership owed to Saylor. Saylor testified that Sanchez owed money to the partnership, not Saylor, and that the partnership owed money to Saylor.

{35} At the conclusion of the trial, the court determined that, indeed, Saylor was entitled to reimbursement from the partnership, and the court entered judgment in favor of Saylor and against Coors. The court further determined that the partnership suffered losses, two-thirds of which Sanchez would be required to pay Saylor, although the court proceeded to enter judgment in favor of Coors. The court also determined that both the Coors partnership and Saylor were entitled to an accounting as to their capital accounts and damages.

{36} Two clear images emerge from the presentation of the claims. First, the court was given the basis in equity and law to resolve the liabilities among the partners and the partnership. Second, Sanchez was on notice that Saylor was seeking recovery *of partnership losses* and seeking reimbursement *from the partnership,* and Sanchez permitted Saylor's claims and positions regarding Coors to continue through trial without objection or even clarification as to whether Saylor had the right to seek reimbursement from the partnership or whether a liability of Sanchez to the partnership could be properly adjudicated.

{37} In actions by a partner against another partner or against the partnership, some partnership accounting ordinarily will be necessary. *See Levy,* 106 N.M. at 704, 749 P.2d at 89 (citing *Willey v. Renner,* 8 N.M. 641, 646, 45 P. 1132, 1134 (1896)); *Durham v. Southwest Developers Joint Venture,* 2000–NMCA–010, ¶¶ 31, 32, 128 N.M. 648, 996 P.2d 911. This action involved partnership accounting and dissolution.

{38} We, therefore, are not persuaded by Sanchez's arguments that he was prejudiced by the granting of relief both in favor of and against Coors, by the addition of Coors as a defendant and counterclaimant, and by entry of the amended judgment. Sanchez does not explain what he would have done differently in this case had Coors actually been a named party. We see nothing to support Sanchez's claim of prejudice. "Even if the party has not consented to amendment, a trial court is required to allow it freely if the objecting party fails to show he will be prejudiced thereby." *Schmitz v. Smentowski,* 109 N.M. 386, 390, 785 P.2d 726, 730 (1990). An assertion of prejudice is not a showing of prejudice. *See In re Ernesto M., Jr.,* 1996–NMCA–039, ¶ 10, 121 N.M. 562, 915 P.2d 318. *Cf. Teague–Strebeck Motors, Inc. v. Chrysler Ins. Co.,* 1999–NMCA–109, ¶ 11, 127 N.M. 603, 985 P.2d 1183 (failure to name plaintiff was honest mistake arising from course of dealings among the parties, and addition of party caused no prejudice to defendant's ability to defend).

{39} We determine that the parties tried the issues as though Coors was a party. The district court did not abuse its discretion in entertaining and deciding the issues of the liabilities and accounts of Coors and the partners, or in making Coors a formal party in order to effect the relief the court granted in the judgment. The trial judge did not err in entering the amended judgment granting the same relief for and against Coors as granted in the original judgment.

{40} We note *Nelson v. Adams USA, Inc.,* 529 U.S. 460, 120 S.Ct. 1579, 146 L.Ed.2d 530 (2000), holding that a post-judgment amendment to impose liability simultaneously with an amendment adding a party violated both the rules of civil procedure and due process of law. *See id.* at 1584. *Nelson* does not require a different result. In *Nelson,* two separate parties were adversaries. No partnership accounting was involved. The issue at hand was not one tried, either implicitly or explicitly, during trial, but rather one of costs and attorney fees after the case was dismissed. *See id.* at 1582. Here, rather than "swift passage from pleading to judgment," *id.* at 1581, the partnership and partner liabilities were tried, and the two sole partners had every opportunity to assert

their positions in prosecution and defense. We therefore do not think that either the rules of civil procedure or due process of law were violated.

C. *The Court Had Jurisdiction Over Coors*

{41} Sanchez contends that the court had no jurisdiction to enter the judgment against Coors because at the time of judgment Coors had not been served with process and joined as a party to the action. Sanchez relies on cases that state the general principle that judgment may not be entered against one not a party. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 110, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) (parent of counterdefendant corporation named in counterclaim but not served; judgment invalid against parent even though counterdefendant stipulated that for purposes of the litigation it would be considered liable for the acts of its parent); *Wirtz,* 1996–NMCA–085, ¶¶ 7–8, 122 N.M. 292, 923 P.2d 1177 (adding members of an Educational Retirement Board as parties); *Lava Shadows, Ltd. v. Johnson,* 121 N.M. 575, 915 P.2d 331 (Ct.App.1996) (motion for judgment against non-party general partner); *Barber v. Emporium Partnership,* 800 P.2d 795, 797 (Utah 1990) (creditor's action where service on defendant individually and not as agent of partnership).

{42} By this argument Sanchez simply tries to sidestep the fact that the action unquestionably was tried as though Coors was a party. None of Sanchez's cases, for example, is an action for a partnership accounting and dissolution in which the parties are the only partners, clearly involving claims and liabilities as between those partners and the partnership itself. Furthermore, Sanchez did not contest the motion to add Coors on the ground that Coors was never independently served with summons and complaint. He was unquestionably on notice of the relief sought and its likely effect on the partnership, and he had a fair opportunity throughout trial to question and clarify the procedural status and oppose the relief sought or Saylor's right to pursue the relief, whether on his own behalf or on behalf of Coors.

{43} The circumstances detailed above that countenance the court's discretion to add Coors as a party post-judgment also support the court's jurisdiction to enter judgment for and against Coors. We hold that the court had jurisdiction to enter the judgment against Coors.

D. *The Court Did Not Err in Awarding Damages to Saylor*

{44} Sanchez attacks on several fronts the district court's award against Coors of fees and expenses incurred by Saylor for the benefit of Coors, namely, management fees of $173,577, repairs and maintenance expenses of $121,162, and bookkeeping fees of $57,000.

1. *Specificity of Evidence of Unreimbursed Expenses and Bookkeeping Fees*

{45} Sanchez argues that Saylor's evidence of unreimbursed expenses and bookkeeping fees was speculative and insufficient to prove damages because accurate documentary evidence such as canceled checks and receipts should have been available, but were neither produced nor proven. The court admitted a "tally" or recap of the repair and maintenance expenses "that [Saylor] or [his] entities made on the property." Saylor testified that he had personal knowledge of each repair: who did it and what it was. The court admitted the tabulation without objection as a summary under Rule 11–1006 NMRA 2000 and found that "Dr. Sanchez quarrels with the items of repair and maintenance, as well as the costs of the same, however offers no testimony or evidence in opposition other than his own personal opinion." Further, the district court found that Saylor was owed $121,162 for actual expenses for repairs and maintenance of partnership real property and $57,000 reimbursement for costs of partnership bookkeeping. Saylor met his burden of proof in establishing these damages, and the findings are supported by substantial evidence.

{46} Sanchez complains he was frustrated in his discovery attempts to obtain Saylor's canceled checks and other records to prove the expenses. He appears to argue that certain evidence should not be considered because of Saylor's pretrial discovery conduct. Sanchez nowhere demonstrates where he raised this in the district court or sought relief below to correct any unresponsive or unfair discovery conduct. We, therefore, decline to address the issue on appeal. Moreover, Sanchez had the right to inspect partnership books and records, including all documentation reflecting repairs, maintenance, and bookkeeping fees. Had Saylor deprived him access to those materials, Sanchez could have obtained judicial relief. He did not. In fact, the court specifically found that "Dr. and Mrs. Sanchez repeatedly failed and refused to inform themselves about the affairs of the Coors partnership, although they had the opportunity to do so at any time."

{47} Sanchez also attacks the award of bookkeeping fees of $57,000 on the grounds that the evidence was speculative and the award contravened the partnership agreement and the statute of frauds. We do not agree. Saylor testified that his oral agreement with Sanchez encompassed the bookkeeping fees; specifically, they would settle up at some point when the property was sold. His tabulation contained a computation that broke down the bookkeeping fees per year from 1981 through 1996, for a total of $57,000 plus accrued interest. By way of footnote only, Sanchez mentions that the court made no finding of an oral agreement that Saylor was entitled to bookkeeping fees. The court found that "[t]hroughout the term of the partnership Richard Saylor provided bookkeeping services on behalf of the partnership, without compensation, and is entitled to reimbursement for the bookkeeping costs." Sanchez did not object to the tabulation. He does not object to the court's finding. He cannot complain on appeal.

{48} Moreover, substantial evidence exists to support the court's finding. Saylor testified that reimbursement for advanced expenses was to occur in the future, when the property was sold. Further, Saylor explained that they had an oral agreement:

> [H]e would say, "Rick, I'm sorry. Right now I just can't put any money in. The bank's watching me like a hawk. I'm just paying huge attorney fees. I'm fighting all of these wars. At some point I'll get past this and we can work it all out on the back side and adjust it up, but I'll make it up to you. We'll make it right."

{49} Sanchez has not shown us how the court erred in failing to find that the reimbursement of the cost of bookkeeping services violated the terms of the partnership agreement barring receipt of salaries or Section 54–1–18(F), forbidding "remuneration for acting in the partnership business." On this point, as on several others in this case, we defer to the district court's assessment where, under the circumstances and facts, "we believe the trial court arrived at a correct result." *Citizens Bank,* 96 N.M. at 376, 630 P.2d at 1231 ("Based upon a cold record on appeal and absent an erroneous application of the law, we will not interfere with the trial court's decision."). The court did not err in awarding $57,000 to Saylor as reimbursement for the cost of bookkeeping fees.

2. *Duty of Partner to Keep Correct Books; Clear and Convincing Standard*

{50} As an extension of his argument that Saylor's evidence of unreimbursed expenses was speculative, Sanchez argues that Saylor breached his duty as managing partner to keep true and correct books of account and to render a complete account of all transactions relating to partnership affairs. Sanchez cites *Rogers v. Stacy,* 63 N.M. 317, 320, 318 P.2d 1116, 1118 (1957) (holding that managing partner committed constructive fraud by failing to make a record of and disclose to other partner every partnership transaction that would affect financial audit prepared in connection with sale of managing partner's partnership interest), and *Dale v. Dale,* 57 N.M. 593, 596, 261 P.2d 438, 439 (1953) (one partner's claim that other partner should pay auditor's compensation because of audit necessity allegedly caused by other partner's failure to keep accurate records).

{51} Sanchez then argues that Saylor did not sustain his burden of proving by clear and convincing evidence that he did not breach this fiduciary duty and thus is not entitled to reimbursement. Sanchez relies on *Oakhill Assocs. v. D'Amato,* 228 Conn. 723, 638 A.2d 31, 33 (1994), and *Cronin v. McCarthy,* 264 Ill.App.3d 514, 202 Ill.Dec. 129, 637 N.E.2d 668, 675 (1994), which hold that a partner sued for breach of fiduciary duty of fair and open dealing and full disclosure must defend with facts proven by clear and convincing evidence.

{52} Sanchez misses the mark. He cannot complain about the expenses, because he did not object to the tabulation containing testimony and regarding the expenses. More importantly, however, Saylor was not sued here to impose liability for damages arising out of a failure to keep accurate records of unreimbursed expenses. Saylor has sued to collect those expenses, and Sanchez attempts to defeat that claim by asserting what appears to be an affirmative defense that Saylor has the burden to prove by clear and convincing evidence that he did not breach his duty to keep accurate records. We find no merit in Sanchez's position. We do not accept his implicit assertion nor must we decide that an affirmative defense of breach of fiduciary duty for failure to keep adequate records exists to bar a partner from recovery of unreimbursed expenses. In this case, the district court determined that Saylor proved his claim for expenses, and we have determined that the court's determination is supported by substantial evidence. For these reasons, Sanchez's purported defense fails.

3. *Express Terms of Partnership Agreement and Statute of Frauds*

{53} Sanchez attacks Saylor's recovery of management fees on the grounds that the award of those fees contravened the express terms of the partnership agreement, that Saylor failed to prove an oral contract by clear and convincing evidence, and that the oral contract found by the court violated the statute of frauds.

{54} The court found:

> There was an oral agreement between Dr. Sanchez and Richard Saylor, ratified by their respective conduct, with respect to both partnerships, which allowed a reasonable and necessary management fee to be paid to Saylor of 6% of the gross rents received annually for his work in managing the properties owned by the partnerships. These management fees were paid when the partnerships had the funds to do so, and when they did not, Richard Saylor deferred collection until funds would become available. The management fees due Mr. Saylor total $173,577.00

a. *Statute of Frauds*

{55} In reading Sanchez's answer to Saylor's counterclaim and the pretrial order, we do not find a defense of the statute of frauds. By his requested findings of fact and conclusions of law, Sanchez sought a finding that NMSA 1978, § 47–1–45 (1949) barred an oral agreement for management fees and real estate commissions. Sanchez, however, abandons that position on appeal and substitutes a contention not raised below, namely, that the oral agreement to pay management fees is barred by the statute of frauds because it constitutes an agreement not to be performed within one year. Sanchez has not shown us where this issue was preserved below, and we decline to address it.

b. *Oral Contract*

{56} The district court found the existence of an "oral agreement between Dr. Sanchez and Richard Saylor, ratified by their respective conduct, . . . which allowed a reasonable and necessary management fee to be paid to Saylor." Sanchez contends that the partnership agreement and Section 54–1–18(F) preclude any subsequent oral agreement contradicting the express terms of the written agreement. We find no merit in Sanchez's contention.

{57} The partnership agreement provided that the partners were not to receive salaries. Section 54–1–18(F) provides that

> [t]he rights and duties of the partners . . . shall be determined, subject to any agreement between them, by the following rules:

. . .

F. no partner is entitled to remuneration for acting in the partnership business.

It is black-letter law that, barring an enforceable agreement to the contrary, an oral agreement modifying the terms of a prior written agreement is enforceable. *See Citizens Bank,* 96 N.M. at 375, 630 P.2d at 1230 ("[T]he New Mexico Uniform Partnership Act applies only when the partners have not made a contrary agreement. *See generally* § 54–1–18."). Moreover, the general rights and duties of partners are "subject to any agreement between them." Section 54–1–18.

{58} Sanchez then contends that the district court failed to apply a clear and convincing standard of proof in arriving at its finding of an oral contract. He cites *Alvarez v. Alvarez,* 72 N.M. 336, 341, 383 P.2d 581, 584 (1963) (oral contract to convey land removed from operation of statute of frauds by part performance must be proved by clear, cogent and convincing evidence), and *Cox v. Hanlen,* 1998–NMCA–015, ¶ 26, 124 N.M. 529, 953 P.2d 294 (holding that an agreement must be shown by clear, cogent, and convincing evidence to meet the burden of avoiding the statute of frauds with regard to an agreement to reserve an easement that was not contained in a deed). We also reject this contention. *Alvarez* and *Cox* require a higher degree of proof only with regard to oral agreements involving interests in land that for some reason escape the statute of frauds. These cases do not require a clear and convincing burden to prove the oral contract here, because it relates to a partnership agreement, not real estate.

4. *Statute of Limitation as to Pre–November 1991 Expenses*

{59} Sanchez claims that the four-year statute of limitation in NMSA 1978, § 37–1–4 (1880), barred Saylor's recovery of expenses, bookkeeping and management fees before November 2, 1991, in that Saylor's counterclaim seeking damages was filed in November 1995. Saylor's counterclaim sought "a full and complete accounting" and dissolution of the partnership. *See* §§ 54–1–22, 54–1–32(A). Under the UPA applicable to the parties, Saylor's right to an accounting accrued at the date of dissolution. *See* § 54–1–43.

{60} The district court appointed a Rule 11–706 NMRA 2000 expert to complete an accounting of Coors and to take into consideration the effect of the court's findings and conclusions including those regarding Saylor's right to reimbursement. The court concluded that the partners were unable to operate together as partners, and Coors "should thus be dissolved and its affairs promptly wound up."

{61} We are not persuaded that the specific four-year statute of limitations applies. The life of Saylor's reimbursement claim in this action should be measured by the limitation period for an action for an accounting, rather than that for a specific claim outside of the partnership accounting action. We therefore hold that Saylor's reimbursement claim was not barred under Section 37–1–4.

E. *The Court Erred in Awarding Damages to Coors*

{62} Sanchez attacks on several fronts the court's award of damages of $522,488 in favor of Coors and against Sanchez because Sanchez refused to provide personal financial statements. This issue arises from a proposed restructuring of partnership debt. Sunwest Bank was to provide financing to Coors so that Coors could restructure its real estate debt to a third party primarily by paying off one or two notes at a substantial discount with a reduction of its monthly payment on remaining debt.

{63} The documentary evidence on this issue showed the proposed bank financing and included an accounting by Saylor to show damages to Coors because the proposed financing fell through. Trial exhibits set out for the district court the various principal and interest rate reductions and increases contemplated in this debt restructure.

{64} Saylor contended and the court found that the refinancing fell through because Sanchez refused to provide his financial statements to Sunwest. Saylor testified that Sanchez declined to provide his financial statements because he was in trouble with his bank, that his bank was "coming after

him hard," that he was "worried about trying to keep them from getting everything he had worked for his whole life," and that he was advised by his attorneys not to give anyone his financial statements because they would disclose his assets. Sanchez would not give a reason at trial why he did not want to proceed with the debt restructure. Nevertheless, Sanchez admitted that he did view the proposed debt restructuring to be in the best interest of Coors.

{65} The court found that

> [Sanchez's] refusal to provide his personal financial statements was tortious, intentional, willful, and in bad faith, and in breach of his agreement as a general partner to provide personal financial statements when necessary. His refusal was also part of his ongoing efforts to deceive his creditors about his assets.

The court made similar conclusions of law and concluded that Sanchez breached his fiduciary duty to the partnership.

{66} Sanchez contends that the court erred in determining that he had or breached a duty to provide his personal financial statements for the benefit of the partnership. More specifically, he argues that the partnership agreement does not require that he provide financial statements, that one partner cannot force another to provide personal financial statements for a loan application by the partnership, and that the answer to a serious and unresolvable partner disagreement is dissolution. Based on these arguments, Sanchez urges that the $522,488 damages award to Coors against Sanchez for failure to provide financial statements was erroneous. We agree.

{67} The partnership agreement is silent on whether a partner has a duty to provide financial statements, or even whether a partner must cooperate in transactions clearly beneficial to the partnership in a manner that would require the partner to furnish financial statements. Indeed, only one provision in the partnership agreement obligates the partners to act for the benefit of the partnership, namely, paragraph 9: "[e]ach partner ... shall make additional contributions to the capital ... in cash or property ... as may from time to time be agreed upon by the partners." This provision, however, not only is silent on the furnishing of financial statements, but also only requires a partner to contribute capital as "agreed upon by the partners," hardly an obligatory provision when one partner does not agree.

{68} Neither the UPA nor the ULPA applicable to the parties contained a provision placing either a "partnership" duty, or a "fiduciary" duty upon Sanchez to provide his financial statements. To the contrary, UPA Section 54–1–18(E) stated that "all partners have equal rights in the management and conduct of the partnership business." Section 54–1–18(H) stated that "any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners."

{69} The record shows no express oral agreement or particular course of dealing that created a contractual obligation on Sanchez's part to furnish his financial statements. Furthermore, it reflects no agreement or understanding between the parties that the obligation to contribute capital included an obligation to provide any financial statements required to obtain financing from third party sources. In fact, the record contains no testimony of even a discussion in that regard. Further, the district court found no express oral agreement or any course of dealing regarding the financial statements. Our review of the record reflects none.

{70} Saylor asserts the existence of an implied contract. He bases his theory of implied contract on Sanchez's concessions that banks normally require general partners to provide financial statements for financing, that general partners in real estate partnerships expect to have to provide their financial statements in order to obtain partnership financing, that Sanchez never told Saylor that he was reserving the right to refuse to provide his financial statements even if the partnership needed it, and that before his refusal to do so, Sanchez had in the past provided his financial statements. This proof falls short.

{71} No evidence exists in the record that Saylor entered the Coors partnership in reliance upon a statement by Sanchez that Sanchez would furnish his financial statements under any circumstances in which Saylor or the partnership needed him to do so. Nor is there evidence that Saylor ever made the unfailing furnishing of Sanchez's financial statements a condition of his entering the partnership relationship.

{72} That the partnership is one dealing in the buying, selling, and development of real estate, and that the partners have been able to agree on obtaining loans and providing financing statements in the past, do not translate into an implied contractual duty to provide financial statements for every future deal, even if it appears that the deal will benefit the partnership's financial position. Partners may want the flexibility to choose, for whatever reason, not to agree to a particular financing proposal or to provide their financial statements for a loan. They may prefer in a two-partner partnership to leave this option open.

{73} We turn to *Covalt v. High*, 100 N.M. 700, 675 P.2d 999 (Ct.App.1983), the sole New Mexico case on this issue. Covalt and High formed an oral partnership which owned and rented an office to a corporation, CSI, in which Covalt owned 25 percent of the corporate stock and High owned 75 percent. *See id.* at 701, 675 P.2d at 1000. After resigning from CSI, Covalt demanded that the partnership increase CSI's rent, but High took no action. *See id.* The increase in rent would benefit the partnership, but it was detrimental to High. The district court found that CSI could afford the rent increase and High had breached his fiduciary duty. *See id.*

{74} In reversing, this Court stated that "all partners have equal rights in the management and conduct of the business of the partnership," that Covalt therefore "was legally invested with an equal voice in the management of the partnership affairs," and that "neither partner had the right to impose his will or decision concerning the operation of the partnership business upon the other." *Id.* at 703, 675 P.2d at 1002. The fact that a proposal benefitted the partnership did not require High to agree. *See id.* As authority for its decision, *Covalt* cited UPA, Section 54–1–18(H), stating "any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners." Further, the Court relied on the interpretation of the UPA language by the Idaho Supreme Court in *Summers v. Dooley*, 94 Idaho 87, 481 P.2d 318 (1971) that the language is mandatory rather than permissive in nature and means that business differences must be decided by a majority, not by one of two equal partners when the other objects. *See Summers*, 481 P.2d at 320–21.

{75} Simply stated, *Covalt* says that, absent an enforceable agreement covering such circumstances of disagreement, when both partners in a two-partner partnership disagree on an advantageous prospective business transaction, it is dissolution, not an action for breach of fiduciary duty, that is the appropriate avenue of relief. While the court's decision to award damages against Sanchez is understandable from its perception of Sanchez's improper conduct obtained from the trial testimony, something more was required in order to impose liability in this case.

{76} The issue of Sanchez's failure to contribute capital is unrelated to that of his failure to provide financial statements. The district court, considering years of a business relationship based on verbal understandings, relied on vague statements and a course of dealing in finding:

> Richard Saylor and Dr. Sanchez agreed, with respect to both partnerships, that because the partnerships were severely undercapitalized and highly leveraged, the partners would each contribute their share of cash as needed to keep the partnerships afloat.

The court, however, related the Coors refinancing opportunity loss solely to Sanchez's failure to provide his financial statements and not to a failure to provide capital or cash as needed.

{77} We still must consider, however, the court's finding that Sanchez's refusal to provide his personal financial state-

ments was tortious, intentional, willful, and in bad faith. Sanchez's improper conduct clearly influenced the court's thinking and was a backdrop to some of its findings and conclusions. For example, as discussed below in this opinion, the court tied Sanchez's conduct toward his creditors to the court's denial to Sanchez of profits he sought from Saylor's tortious conversion. However, Sanchez's open strategy to assure that his creditors did not discover the extent of his assets does not translate into a tort cause of action against him because that strategy denied the partnership a favorable refinance opportunity.

{78} The record reflects no intent on Sanchez's part to harm or damage the partnership or Saylor. Saylor fails to point to any specific evidence that would support a reasonable inference of intentional, tortious conduct by Sanchez aimed at Saylor or the partnership. While Sanchez's conduct may not have been justifiable vis-à-vis his creditors, we are not prepared to transpose his failure to produce financial statements into an intentional, bad faith, or unjustifiable act in breach of a partnership duty. Nor will we extend the partner's general obligation of good faith to the specific duty sought to be imposed on Sanchez in this case, no matter how tempting it may be in light of the clarity of the lost benefit to the partnership combined with the district court's view of Sanchez's motive.

{79} The partnership law policy issue here is the extent to which an affirmance will do damage to the well-reasoned *Covalt* rule. Without that rule, virtually each instance in which one partner for personal reasons does not agree with a proposed transaction that will benefit the partnership can result in a claim for breach of his or her partnership or fiduciary duty. Absent an enforceable contractual duty to agree, if the two partners cannot agree and do not want to (or cannot) continue their partnership, under *Covalt* the remedy is dissolution.

{80} In sum, the evidence does not support an agreement, express or implied, to provide financial statements. Sanchez had no legal duty as a partner to provide his financial statements. Saylor neither pled nor argued, nor did the court find, the commission of a tortious act by Sanchez that would give rise to liability and damages for Sanchez's refusal to provide financial statements.

{81} Because we reverse the court's award of $522,488 in favor of Coors and against Sanchez, we need not address Sanchez's other points related to this issue.

F. *The Court's Findings Related to Sanchez's Conversion Claim Are Supported by Substantial Evidence*

{82} Sanchez attacks as unsupported by substantial evidence the district court's findings that the bingo business was not a Coors asset that Saylor converted. Sanchez contends that he and Saylor were partners in a bingo business that was carried on in the Coors property. At trial Sanchez unsuccessfully sought profits of the bingo business on the ground that the bingo business was the partnership's business. He requested findings that the original bingo hall business conducted in the Coors property was owned by and was an asset of Coors; that Saylor caused the lease of the Coors property to the bingo operator, Bingoman, Ltd.; and that Saylor then proceeded to take over Bingoman, Ltd., thereby converting what had been the Coors bingo operation to his own use and benefit.

{83} On appeal, Sanchez sets out historical facts to support his proposed findings, including Saylor's ownership of Bingoman, Ltd. In addition, he challenges eight findings of the court. In clear and significant violation of Rule 12–213(A)(3), Sanchez completely fails to identify in the record any evidence that might support the court's findings. He primarily argues with inferences that the court drew from the evidence, while Saylor sets out evidence that supports the court. Neither party, however, ties the evidence to the court's findings in a manner remotely helpful to this Court.

{84} We are not going to do the parties' jobs for them. Because Sanchez ignored Rule 12–213(A)(3) and Saylor discusses some material evidence on the issue, we determine that the court's findings relating to Sanchez's bingo-conversion claim are supported by substantial evidence.

G. *The Court Did Not Err in Denying Sanchez Relief on His Breach of Fiduciary Duty Claim Against Saylor*

{85} Finally, Sanchez also sought to recover profits received by Saylor as a result of the conversion of the shopping center. Sanchez claimed that Saylor breached a fiduciary duty to Sanchez and the partnership by wrongfully acting for his own benefit and gaining an unfair advantage as a partner to the detriment of the partnership, when Saylor used promissory notes payable to RSRS as consideration for his purchase of the shopping center. The facts underlying Saylor's actions are more fully set out above in this opinion.

{86} Sanchez argues that under Section 54–1–21 the court should have ordered Saylor to account for any profits he received as a result of the conversion. Section 54–1–21(A) reads: "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property."

{87} Although the court found that Saylor converted the assets, the court concluded that Sanchez should not recover, based on his own "unclean hands" and "attempt to defraud ... creditors." Sanchez argues that "[t]he court's conclusion that [Sanchez's] 'unclean hands' bar him from the equitable remedy sought to redress Saylor's breach of fiduciary duty is erroneous" as a matter of law. He contends that the key element under the unclean hands doctrine, namely, "that the misconduct must be related to the transaction giving rise to the claim involved ...," is missing. The missing link, in Sanchez's view, is that his attempts to avoid United's collection efforts were completely unrelated to Saylor's conversion of the notes or the purchase and resale of the shopping center property. Therefore, Sanchez contends, the court erred in concluding that Sanchez's claim is barred by the unclean hands doctrine.

{88} It is clear partnership and fiduciary law that a partner must account to the partnership for profits derived without the consent of other partners from a transaction in which the partner converts partnership assets for his own benefit and use. *See* § 54–1–21. Generally, if the partner who is harmed by this breach himself has dirty hands, the test of recovery is whether " 'he dirtied them in acquiring the right he now asserts.' " *Mechem v. City of Santa Fe*, 96 N.M. 668, 670, 634 P.2d 690, 692 (1981) (quoting *Republic Molding Corp. v. B.W. Photo Utils.*, 319 F.2d 347, 349 (9th Cir.1963)). Sanchez argues that his attempts to hide his assets from creditors had no relationship to Saylor's conversion and cannot be a bar to his recovery of Saylor's unlawful profiteering.

{89} The district court concluded that Sanchez and his attorney knew of and did not object to the terms of the sale to Saylor and that Sanchez tried to use his own refusal to consent to Saylor's purchase to coerce Saylor into granting Sanchez a dishonest hidden option on the shopping center property. This conclusion of law appears not to square with the court's finding of fact that Saylor never told Sanchez that he agreed to release and discharge the two notes and that Saylor did not advise Sanchez that the shopping center was going to be sold to Saylor individually, free and clear of liens. The court found that Sanchez did not consent to the sale free and clear of liens, after also finding that Saylor did not tell him that the sale was free and clear of liens.

{90} As with other ambiguous or possibly inconsistent findings, however, we resolve them in favor of upholding the court's judgment, if possible. *See Ledbetter*, 103 N.M. at 602, 711 P.2d at 879. We presume that the court did not make inconsistent findings. *See Jacobs*, 108 N.M. at 492, 775 P.2d at 258. The court viewed Sanchez's conduct "as a weapon to extort unfair concessions." Based on this and the conclusion that Sanchez refused to bear any of the risks and burdens of the proposed purchase, the court determined that Sanchez "cannot claim" an interest in profits that were "due entirely to Richard Saylor's investment, skill, and risk taking."

{91} The evidence of Sanchez's misconduct and failure to take advantage of

the purchase opportunity was sufficient to give the district court the basis in equity to determine that Sanchez's conduct prevented his recovery of profits. As discussed in *Homestake Mining Co. v. Mid-Continent Exploration Co.*, 282 F.2d 787, 801 (10th Cir.1960), a constructive trust is "a remedial device employed to accomplish equity.... It is ... injustice ... to permit a person to withhold a claim ... and then to reward him with the profits made possible by the action of another." Here, Sanchez "waited until the enterprise was successful and then swarmed in to recover the windfall." *Id.* The court did not err in failing to grant the damages sought by Sanchez on his claim for profits resulting from Saylor's purchase and resale of the shopping center.

H. *Conclusion–Sanchez's Appeal*

{92} We hold that the district court had jurisdiction to enter and did not abuse its discretion in entering the May 21 order and May 21 amended judgment and did not err in awarding damages to Saylor, individually, against Coors; that the court erred in awarding damages to Coors against Sanchez; and that the court did not err in denying damages to Sanchez.

CONCLUSION

{93} We affirm the district court's award in the amended judgment of $250,000 in favor of Sanchez against Saylor. We affirm the district court's denial of other damages to Sanchez. We reverse the district court's award in the amended judgment of $522,488 in favor of Coors against Sanchez. We affirm the district court's award in the amended judgment of $351,739 in favor of Saylor against Coors. We award no costs on appeal.

{94} **IT IS SO ORDERED.**

PICKARD, C.J., and WECHSLER, J., concur.

13 P.3d 980

2000-NMCA-102

STATE of New Mexico, Plaintiff–Appellant,

v.

Byron PEARSON, Defendant–Appellee.

No. 19,877.

Court of Appeals of New Mexico.

Oct. 27, 2000.

Patricia A. Madrid, Attorney General, Elizabeth Blaisdell, Assistant Attorney General, Santa Fe, NM, for Appellant.

Phyllis H. Subin, Chief Public Defender, Donna M. Bevacqua, Assistant Appellate Defender, Santa Fe, NM, for Appellee.

OPINION

ARMIJO, Judge.

{1} After sentencing Byron Pearson (Defendant) to a one-year prison term, the district court allowed him a period of three months to attend to his personal affairs prior to the commencement of the prison term. At the expiration of this three-month period, Defendant failed to surrender himself, as ordered, to the Department of Corrections (Department). This appeal-the State's from the district court's quashing of an indictment alleging escape-presents a straightforward question: Did Defendant's failure to appear on a date and time certain constitute escape? For the reasons discussed below, we affirm the district court's dismissal of the escape charge.

FACTUAL BACKGROUND

{2} The stipulated facts are few. On October 16, 1996, District Judge "Woody" Smith of the Second Judicial District entered judgment against Defendant, upon a drug-related charge, and committed him to the state penitentiary for a term of one year. Judge Smith, however, provided Defendant a period of time before he was to serve his sentence; that is, he did not order him to present himself to the Bernalillo County Detention Center until 3:00 p.m. on January 6, 1997. January 6 came and went, however, and Defendant never surrendered himself to corrections officials. He remained at large until police apprehended him on October 10, 1997, more than ten months after he was to commence service of his twelve-month sentence.

{3} During his truancy, the Bernalillo County District Attorney secured an indictment, accusing Defendant of escaping from a state penitentiary contrary to NMSA 1978, § 30–22–9 (1963). In May 1998, Defendant moved to dismiss the indictment, arguing that he could not be convicted of escaping from a penitentiary in which he had never been held. The district court, presided over by the Honorable Diane Dal Santo, agreed, noting: "[e]ven though a Judgment and Sentence has been entered committing [Defendant] to a period of custody, and although [Defendant] was obliged to turn himself in, the question remains as to how can he escape from a place that he has not yet been?" The State now appeals.

DISCUSSION

{4} Defendant's position is straightforward. He posits that one cannot escape from a place he has never been. His argument emphasizes a concept of place from which one departs. Accordingly, "escape," as contemplated by Defendant, could be rea-

sonably construed as a physical departure from a place of imprisonment. Since he was never imprisoned, he could not escape. It was upon this reasoning that the district court dismissed the indictment. While we recognize a certain logical appeal to this argument, our task is to determine whether the conduct presented is punishable as "escape" under Section 30–22–9.

{5} The Legislature has not defined escape to encompass a person's failure to appear for the commencement of a lawfully entered prison sentence. While this is probably due to legislative oversight, the absence of such provisions turns our focus to the rules of statutory construction. Matters of statutory construction and interpretation are reviewed de novo. *See State v. Shaulis–Powell,* 1999–NMCA–090, ¶ 17, 127 N.M. 667, 986 P.2d 463. Fundamentally, our role is to effectuate the Legislature's intent as evidenced by the statute's plain terms and avoid strained or absurd constructions. *See State v. Foster,* 1998–NMCA–147, ¶ 9, 125 N.M. 830, 965 P.2d 949; *see also State v. Ogden,* 118 N.M. 234, 242, 880 P.2d 845, 853 (1994). "The words of a statute, including terms not statutorily defined, should be given their ordinary meaning absent clear and express legislative intention to the contrary." *Id.*

{6} We thus turn our attention to what constitutes an "[e]scape from [the] penitentiary." Section 30–22–9. The statute provides:

> Escape from penitentiary consists of any person who shall have been lawfully committed to the state penitentiary:
>
> A. escaping or attempting to escape from such penitentiary; or
>
> B. escaping or attempting to escape from any other lawful place of custody or confinement and although not actually within the confines of the penitentiary.
>
> Whoever commits escape from penitentiary is guilty of a second degree felony.

Id. The statute outlines two elements: (1) a lawful committal and (2) an escape from custody or confinement. *See id.; see also* UJI 14–2222 NMRA 2000. Defendant does not dispute that he was lawfully committed to the penitentiary. He argues that his escape charge was not premised upon his failure to return to prison, but upon his failure even to report to the detention center in the first instance. He correctly points out that he has never been booked, processed into any correctional facility, or subjected to actual confinement. Upon these facts, which distinguish his case from any previously brought before this Court, he contends that he cannot be said to have escaped from any penitentiary. The dispute therefore turns on the second element-that is, an escape from custody or confinement.

{7} This Court has previously recognized that one can escape from constructive, as well as actual, custody; that is, one can be guilty of escape without bending bars or breaking walls. *See, e.g., State v. Martinez,* 1998–NMCA–047, ¶ 4, 125 N.M. 83, 957 P.2d 68 ("We have repeatedly held that a prisoner can violate the [escape from jail] statute without breaking out from the confines of the jail itself."). We have applied the theory of escape from constructive custody solely under our unadorned escape-from-jail statute, NMSA 1978, Section 30–22–8 (1963), which in pertinent part provides: "Escape from jail consists of any person who shall have been lawfully committed to any jail, escaping or attempting to escape from such jail." *See State v. Hill,* 117 N.M. 807, 808, 877 P.2d 1110, 1111 (Ct.App.1994). In *Hill,* we construed "escape" under the escape-from-jail statute to include a person's failure to surrender to State officials after participation in work-release programs or expiration of a temporary furlough. *See id.; State v. Alderette,* 111 N.M. 297, 298, 804 P.2d 1116, 1117 (Ct.App.1990) (work-release program); *State v. Coleman,* 101 N.M. 252, 253, 680 P.2d 633, 634 (Ct.App.1984) (same). As we observed in *Hill,* 117 N.M. at 808, 877 P.2d at 1111, "the dispositive issue [in these cases] is whether Defendant was *lawfully committed* to jail and thereafter failed to return." That is, the analysis turned upon whether the person has evaded the State's post-committal custody, albeit constructive and nonphysical. *See Martinez,* 1998–NMCA–047, ¶ 5, 125 N.M. 83, 957 P.2d 68 (stating that statute did not address the defendant's conduct because she was not then committed to jail and did not escape from jail when she failed to return

home during house arrest); *Hill*, 117 N.M. at 808, 877 P.2d at 1111 (stating that escape-from-jail statute evinced a legislative intent to proscribe the act of failing to return to jail from furlough because the defendant had been lawfully committed to jail). As a body, these cases make clear that the critical issue is not that there exist some actual physical place from which a person departs; rather, it is significant that "the defendant failed to return to jail when he was required to be there." *Martinez*, 1998–NMCA–047, ¶ 4, 125 N.M. 83, 957 P.2d 68.

{8} Similarly, the escape-from-penitentiary statute appears to also cover escape from both actual and constructive custody because it used the term "custody *or* confinement." Section 30–22–9; *see also State v. Doe*, 90 N.M. 776, 777, 568 P.2d 612, 613 (Ct.App. 1977) ("The legislature is presumed not to have used any surplus words and each word has a meaning."). "Confinement," in the present context, has a clear meaning, connoting actual and physical restraint. *See Black's* at 294 ("The act of imprisoning or restraining someone; the state of being imprisoned or restrained....") On the other hand, "custody" connotes some degree of abstraction, encompassing both the actual, physical restraint of another, or a constructive form of deferred or indirect control. *See* Black's Law Dictionary 390 (7th ed.1999) (defining both constructive and physical custody); *cf. State v. Pichon*, 15 Kan.App.2d 527, 811 P.2d 517, 524 (1991) ("[C]ustody contemplates an intent on the part of prison officials to exercise actual or constructive control of the prisoner.... The key factor is that prison officials have not evidenced an intent to abandon or give up their prisoner, leaving him free to go on his way." (Internal quotation marks and citations omitted)).

{9} The question is thus presented: Was Defendant in the custody of the Department of Corrections-either actual or constructive-such that he could have committed escape when he failed to turn himself in? We hold that he was not. Although Defendant was lawfully committed to the custody of the Department by means of the district court's mittimus, by the power of that order, the Department's custody could vest at a date and time certain, that is, at 3:00 p.m. on January 6, 1997, only upon Defendant actually presenting himself to the Department for booking or intake or incarceration. Absent such receipt into the custody of the Department, there were heretofore no limitations upon Defendant's liberty. Had the Defendant first been received into the custody of the Department, his subsequent failure to surrender would have satisfied the act of escape.

{10} Having considered the language of Section 30–22–9, the absence of any separate statutory provision addressing the open defiance of a lawful sentence imposed for a date and time certain, and this Court's prior interpretations of escape statutes, we determine Defendant's conduct is not included within Section 32–22–9. *See Martinez*, 1998–NMCA–047, ¶ 5, 125 N.M. 83, 957 P.2d 68 ("Penal statutes should not be construed contrary to their plain meaning.").

{11} In so concluding, we note with interest two statutes in which the Legislature addressed, with particularity, acts constituting escape, albeit in different factual contexts. *See* NMSA 1978, § 30–22–10 (1963); NMSA 1978, § 31–3–9 (1999).

30–22–10. Escape from custody of a peace officer.

Escape from custody of a peace officer consists of any person who shall have been placed under lawful arrest for the commission or alleged commission of any felony, unlawfully escaping or attempting to escape from the custody or control of any peace officer.

Whoever commits escape from custody of a peace officer is guilty of a fourth degree felony.

31–3–9. Failure to appear; penalty.

A person released pending any proceeding related to the prosecution or appeal of a criminal offense or a probation revocation proceeding who willfully fails to appear before any court or judicial officer as required:

A. is guilty of a fourth degree felony, if he was released in connection with a felony proceeding; or

B. is guilty of a petty misdemeanor, if he was released in connection with a misdemeanor or a petty misdemeanor proceeding.

{12} Neither of these statutes contemplates the actions of Defendant in the present case. However, the statutes speak with some degree of specificity the Legislature's intention to criminalize escape where one escapes from the custody of an officer and where one fails to appear at a pending proceeding. The absence of such clarity in Section 30–22–9 persuades us that Defendant's action cannot be punished under existing statutes and is a matter best addressed by the Legislature.

CONCLUSION

{13} In order to sustain a charge of escape under Section 30–22–9, a person who has been convicted and sentenced must first have undergone some moment of actual custody, either through an administrative booking or in-take processing with the Department of Corrections. Absent such custody, a person cannot be said to have committed escape from the penitentiary within the meaning of Section 30–22–9.

{14} For the reasons discussed above, we affirm the district court's quashing of Defendant's indictment for escape from the penitentiary.

{15} **IT IS SO ORDERED.**

WECHSLER and BUSTAMANTE, JJ., concur.

14 P.3d 32
2000-NMSC-036

STATE of New Mexico,
Plaintiff–Appellee,

v.

Daniel SOSA, Defendant–Appellant.

No. 26,047.

Supreme Court of New Mexico.

Nov. 15, 2000.

Liane Kerr, Albuquerque, NM, for Appellant.

Patricia A. Madrid, Attorney General, Steven S. Suttle, Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

SERNA, Justice.

{1} Defendant Daniel Sosa appeals his conviction for first degree deliberate intent murder contrary to NMSA 1978, § 30–2–1(A)(1) (1994). *See* Rule 12–102(A)(1) NMRA 2000 (appeals from sentence of life imprisonment taken to the Supreme Court). Defendant asserts on appeal that there is insufficient evidence to support the verdict, that the State failed to prove deliberate intent for first degree willful and deliberate intent murder, and that the State failed to prove the corpus delicti. We affirm Defendant's conviction.

I. Facts and Background

{2} At approximately 6:30 p.m. on January 11, 1999, Ronnie Barela was shot in the face while standing on his front porch. During the investigation, police found a trail of teeth, bone fragments, and blood between Barela's house and the house of one of Barela's neighbors, Daniel Madison. The location and trajectories of the wounds as well as the presence of blood and tissue at the crime scene indicated that Barela was shot several more times as he attempted to escape from his assailant. Daniel Madison testified that he was standing on his front porch and saw the victim drive home at about 6:30. Madison testified that a minute or two later, he heard five or six gunshots; Madison then discovered and assisted Barela. Madison tried to stop Barela's bleeding while Madison's wife called 911. Madison asked Barela who shot him, and Barela replied, "Daniel Sosa." Barela repeated the name numerous times, and motioned with his fingers to describe a gun. Barela repeated his identification of "Daniel Sosa" to a police officer who subsequently arrived. Barela did not specifically identify "Daniel Sosa, Senior" (Defendant) or refer to Defendant's nickname, "Three-finger Sosa." Barela sustained a total of four gunshot wounds, in the face, right arm, left buttocks, and the back of the upper portion of his leg, and subsequently died from his wounds.

{3} A police officer noted that a holstered hand gun was near the front door of Barela's house, as was the victim's wallet. The officer testified that there was no blood or other evidence within the house to indicate that an altercation took place inside.

{4} Sylvia Sosa, Defendant's sister, testified that Defendant arrived at their mother's house on January 11th between 8:30 and 9:00 p.m. Sylvia testified that Defendant had shaved his beard and head. A surveillance tape from a convenience store dated January 10, 1999, showed Defendant with a graying beard wearing a black hat. Sylvia stated that he was not behaving in a typical manner and demanded that she take him to the military base. She testified that she confronted Defendant after hearing from others that Defendant was trying to get his son, Daniel Chris Sosa, to take the blame for the murder. Sylvia testified that Defendant admitted to her that he killed Barela. She also made a statement to the police regarding this admission.

{5} Following a jury trial, Defendant was convicted of first degree murder for the

death of Ronnie Barela. The trial court sentenced Defendant to life imprisonment.

II. Discussion

A. Sufficiency of the Evidence

[redacted] {6} "[T]he test to determine the sufficiency of evidence in New Mexico . . . is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). "A reviewing court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." *Id.; accord State v. Sanders,* 117 N.M. 452, 456, 872 P.2d 870, 874 (1994). "This court does not weigh the evidence and may not substitute its judgment for that of the fact finder so long as there is sufficient evidence to support the verdict." *Sutphin,* 107 N.M. at 131, 753 P.2d at 1319.

[redacted] {7} Defendant argues that there was insufficient evidence for a rational jury to find that he murdered Ronnie Barela. Defendant argues that no physical evidence connects him to the crime, and that there were no eyewitnesses who could identify him as the shooter. Defendant further suggests that some evidence more strongly connected his son to the murder. Finally, Defendant calls Sylvia Sosa's credibility into question. We reject Defendant's arguments.

[redacted] {8} "An appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence." *Sutphin,* 107 N.M. at 130–31, 753 P.2d at 1318–19. Additionally, we note that credibility of witnesses is for the jury. *State v. Riggs,* 114 N.M. 358, 362–63, 838 P.2d 975, 979–80 (1992) (rejecting the defendant's argument that a witness was not credible, stating "[t]he jury, and not this court, however, resolves questions of credibility and the weight to be given to testimony"). Daniel Chris Sosa, Defendant's son, testified that he did not shoot the victim. The victim identified the shooter as "Daniel Sosa," and Sylvia Sosa testified that Defendant admitted to her that he shot the victim. We believe there is substantial evidence from which a rational jury could find beyond a reasonable doubt that Defendant was the assailant.

[redacted] {9} Defendant argues that there was no evidence to support deliberate intent necessary to sustain his first degree murder conviction. As this Court has noted, " '[d]eliberate intention' is defined as, 'arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action.' " *State v. Cunningham,* 2000-NMSC-009, ¶ 25, 128 N.M. 711, 998 P.2d 176 (quoting UJI 14-201 NMRA 2000). "Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence." *State v. Vigil,* 110 N.M. 254, 255, 794 P.2d 728, 729 (1990) (quoted authority and quotation marks omitted).

{10} Defendant relies upon *State v. Garcia,* 114 N.M. 269, 837 P.2d 862 (1992), arguing that his sister's testimony regarding Defendant's admission is insufficient to form the foundation for deliberate intent. In *Garcia,* this Court discussed at length the parameters of deliberate intention and concluded that the evidence in that case did not support an inference that the defendant committed first degree murder. *Id.* at 271–75, 837 P.2d at 864–68. *Garcia* is plainly distinguishable on its facts, however. The Court described evidence that the defendant was intoxicated, drinking beer "throughout the morning and the night before" the killing and consuming "at least ten beers and three shots of whiskey that afternoon," prior to stabbing the victim around 3:30 p.m. *Id.* at 270, 837 P.2d at 863. We concluded that the evidence regarding the defendant's state of mind demonstrated that he quarreled and reconciled with the victim twice, and then they fought a short time later, punching and shoving each other, before the defendant cut the victim in the face and stabbed him in the chest, consistent with a rash, impulsive killing rather than one of deliberate intent. *Id.* at 274–75, 837 P.2d at 867–68. This Court noted that the defendant stated, "Remove [the victim] away from me or you're not going to be seeing him for

the rest of the day," suggesting an intent to fight, not an intent to kill. *Id.* at 275, 837 P.2d at 868. Thus, because all of the facts in *Garcia* pointed away from careful thought and weighing of consideration for and against killing the victim, thereby negating any possible reasonable inference of deliberation, *Garcia* does not assist Defendant in the present case. *See State v. Begay,* 1998–NMSC–029, ¶ 46, 125 N.M. 541, 964 P.2d 102 (noting that, in *Garcia,* "the evidence was consistent with a rash and impulsive killing").

{11} Defendant also relies on *Cunningham,* in which the defendant, a few months prior to the murder, told the victim, " 'I'll kill you, I'll shoot you, I don't care,' " arguing that there is no evidence that he made a statement that he intended to kill the victim. 2000–NMSC–009, ¶ 4, 128 N.M. 711, 998 P.2d 176. In *Cunningham,* this Court noted that there was evidence that the defendant was the aggressor who caused the armed conflict and that a reasonable juror could believe that the defendant fired the last bullet with deliberate intent after the victim was incapacitated and defenseless, in addition to the threat the defendant made to the victim. *Id.* ¶¶ 27–28. We concluded that the jury could reasonably find that the act of firing a fatal shot at an incapacitated victim was "an act of a man who had decided as a result of careful thought and the weighing of the consideration that he was going to take the life of the [victim]." *Id.* (quoted authority and quotation marks omitted). The absence of a similar threatening statement in the present case does not require the Court to conclude that there was insufficient evidence.

{12} This case is somewhat similar to *State v. Garcia,* 95 N.M. 260, 620 P.2d 1285 (1980). In *Garcia,* this Court noted that the evidence demonstrated that the defendant "was the aggressor in the altercation with the deceased," and that "the deceased started running away when [the defendant] pulled out a gun." *Id.* at 261, 620 P.2d at 1286. The defendant argued that "only a few seconds elapsed between the time he pulled the gun and shot the deceased; he therefore did not have the opportunity to weigh or consider the reasons for or against his course of conduct." *Id.* In the present case, Defendant also contends that a jury could not reasonably find that Defendant had time to form the requisite intent. We have repeatedly recognized that deliberation may be achieved in a short period of time. *Id.* at 262, 620 P.2d at 1287 (concluding that "the issue of deliberate intent was a question for the [jury]"); *accord Garcia,* 114 N.M. at 275, 837 P.2d at 868 ("We do not dispute the State's contention that [defendant] had sufficient time to form a deliberate intention to kill. . . . [A] defendant can form the requisite intent for first degree murder in a short period of time.").

{13} Barela's gunshot wounds support the inferences that he was shot in the face while standing on his porch, and that he fled from his attacker, who continued to fire upon him. He was apparently unarmed and attempting to escape, indicating that he was defenseless against an attacker armed with a gun. The facts of the present case are comparable to the factual situations of several first degree murder cases involving deliberate intent. As noted above, the defendant in *Garcia,* 95 N.M. at 261, 620 P.2d at 1286, was the aggressor who shot the victim as the victim was running away. In *Cunningham,* 2000–NMSC–009, ¶ 28, 128 N.M. 711, 998 P.2d 176, the defendant fired the fatal shot at an incapacitated and defenseless victim. Finally, in *State v. Coffin,* 1999–NMSC–038, ¶ 76, 128 N.M. 192, 991 P.2d 477, the evidence demonstrated that the defendant shot the victim four times in the back and in the back of the head as the victim was walking away from him, supporting the jury's finding of deliberate intent. *See State v. Lucero,* 88 N.M. 441, 443, 541 P.2d 430, 432 (1975) (reviewing evidence that the defendant went to the location of the victim armed with a loaded gun, accused the victim of being an informant, exchanged unpleasant words with the victim, and then shot the victim, and concluding that sufficient evidence supported deliberate intention); *see also State v. Salazar,* 1997–NMSC–044, ¶ 46, 123 N.M. 778, 945 P.2d 996 (concluding that "testimony alleging that the Defendant pursued [the victim], pointed the gun, and fired provides an adequate source of direct evidence that the Defendant acted with deliberation, intending to kill [the victim]").

{14} Ronnie Barela arrived home a few minutes before he was shot. He received a gunshot wound to his face while standing, unarmed, on his porch. He attempted to escape his attacker, who continued to fire upon him. Prior to his death, Barela identified the shooter as "Daniel Sosa." Defendant's sister, Sylvia Sosa, testified that Defendant admitted that he killed the victim. Based upon the evidence, a reasonable jury could determine that Defendant intended to kill Barela when he went to Barela's home armed with a gun, waited for him to arrive, and then shot the unarmed victim numerous times. A reasonable jury also could have found that Defendant formed the deliberate intent to kill Barela during the time between shooting him in the face on his porch and pursuing the wounded and defenseless victim into the street and shooting him from behind. Both theories are supported by sufficient evidence, and it is for the jury to determine which situation occurred. *See State v. Motes,* 118 N.M. 727, 730, 885 P.2d 648, 651 (1994). Viewed in the light most favorable to upholding the verdict, we conclude that the evidence is sufficient to support the jury's finding of deliberate intent and to support the jury's verdict.

B. Corpus Delicti

{15} "In homicide cases the corpus delicti is established upon proof of the death of the person charged in the information or indictment, and that the death was caused by the criminal act or agency of another." *State v. Armstrong,* 61 N.M. 258, 259, 298 P.2d 941, 941 (1956). "The corpus delicti of a particular offense is established simply by proof that the crime was committed; the identity of the perpetrator is not material." *State v. Nance,* 77 N.M. 39, 44, 419 P.2d 242, 246 (1966). Contrary to these clearly articulated principles, Defendant mischaracterizes the corpus delicti rule as established by proof that the *defendant* committed the crime charged, erroneously relying on *Nance.*

{16} "It is well settled that the corpus delicti of the crime charged in the information cannot be established solely by the extra-judicial confession of the accused." *Id.* at 44, 419 P.2d at 245–46. In other words, if there is no independent evidence that a victim is dead as the result of a criminal act of another, an out-of-court confession is insufficient to establish the corpus delicti of a homicide. Based on this rule, Defendant argues that nothing connected him to Barela's murder other than his admission to his sister and that, as a result, the State did not establish the corpus delicti in this case. Defendant misstates the appropriate inquiry for corpus delicti. Here, the State introduced independent evidence establishing Barela's death by the criminal actions of another. Thus, Defendant's admission to his sister is nonessential to the State's evidence concerning corpus delecti. "When there is, in addition to a confession, proof of the corpus delicti established by independent evidence, the defendant's voluntary confession will support a conviction." *Id.* at 44–45, 419 P.2d at 246.

{17} This Court, in *Nance,* concluded:

> The *corpus delicti* in a prosecution for armed robbery, is in the instant case, sufficiently proven by the testimony of the complaining witness that he was the *victim of a robbery by some person* armed with a dangerous weapon. As the record discloses substantial proof of the corpus delicti in this instance, we find no error....

77 N.M. at 45, 419 P.2d at 246 (citations omitted) (emphasis added). Other cases relied upon by Defendant are either consistent with *Nance,* unsupportive of Defendant's argument, or inapplicable. *See State v. Jones,* 52 N.M. 118, 121, 192 P.2d 559, 561 (1948) ("We have examined the record and find that it had been established at the time of the introduction of the confessions that [the victim] was in fact dead, and that his death had been criminally caused by another. This sufficiently proved the corpus [delicti]."). In *State v. Chaves,* 27 N.M. 504, 506, 202 P. 694, 695 (1921), the Court observed:

> It is trite to observe that in every criminal prosecution the first step must be to prove that the crime charged has been committed by some one. This proof may or may not primarily connect the defendant with the offense. In homicide cases it must be shown that the person whose death is al-

leged in the indictment is in fact dead, and that his [or her] death was criminally caused. If these facts are shown the corpus delicti is sufficiently proven.

{18} Defendant also relies on *State v. Vallo,* 81 N.M. 148, 464 P.2d 567 (Ct.App. 1970), mistakenly arguing that *Vallo* held that the corpus delicti required the identity of the accused. This Court of Appeals case involved a question of the identity of the victim, not the accused, and is thus inapplicable to the present case. *Id.* at 149, 464 P.2d at 568 ("In New Mexico, proof that the person killed is the same person as the one charged in the indictment to have been killed is part of the corpus delicti."). The Court of Appeals noted that its result was not inconsistent with this Court's holding in *Nance* that the identity of the perpetrator is not material to corpus delicti. *Id.* Defendant also relies on *State v. Romero,* 69 N.M. 187, 189–90, 365 P.2d 58, 60 (1961), which, similarly, stated, "In homicide cases, the corpus delicti is established when it is shown that the person whose death is alleged in the information is in fact dead and that the death was criminally caused."

{19} Defendant's confusion may result from *State v. McKenzie,* 47 N.M. 449, 144 P.2d 161 (1943), in which this Court quoted two out-of-state cases, one of which stated that "[t]he term 'corpus delicti' is made up of two elements: It must be shown, first, that a certain result has been produced, . . . [and] second, that some one is criminally responsible therefor." *Id.* at 453, 144 P.2d at 164 (quoted authority and quotation marks omitted). The second quotation stated that "[t]here must be clear and unequivocal proof of the corpus delicti. Every criminal charge involves two things: First, that an offense has been committed; and, secondly, that the accused is the author, or one of the authors, of it." *Id.* (quoted authority and quotation marks omitted). This second quotation is inconsistent with the first and is merely dicta, as identity of the perpetrator was not at issue; instead, the issue concerned whether the property in question, a calf, had been stolen. More importantly, this Court, in *Nance,* referred to *McKenzie* but clarified the issue by directly addressing whether the identity of the perpetrator is relevant to establish the corpus delicti. *Nance,* 77 N.M. at 44, 419 P.2d at 246.

{20} Thus, as this Court has held repeatedly, the corpus delicti of an offense is established by proof that the crime was committed, and the identity of the perpetrator is not material. *Nance,* 77 N.M. at 44, 419 P.2d at 246. We reject Defendant's application of this concept to the present case; his argument is without merit. There was no question regarding Ronnie Barela's identity. *See Chaves,* 27 N.M. at 506, 202 P. at 695 ("The body was found and fully identified."). Testimony of the medical examiner established that Barela's death was the result of the gunshot wounds he received. *See id.* (noting "the fact that death was criminally caused was likewise shown," and that "[t]here was a wound on the head sufficient to cause death"). There is no evidence that Barela committed suicide or died as the result of an accident. *See id.* ("There is nothing to indicate suicide or accident."). "The conclusion that he met death at the hands of some human being who is criminally responsible for it is irresistible." *Id.* Therefore, the State clearly established the corpus delicti in this case.

III. Conclusion

{21} Sufficient evidence supports the jury's finding that Defendant possessed the deliberate intent required to sustain a conviction for first degree murder, and sufficient evidence supports Defendant's conviction. Defendant misunderstands the corpus delicti rule; the State established the corpus delicti. We affirm Defendant's conviction.

{22} **IT IS SO ORDERED.**

MINZNER, C.J., BACA, FRANCHINI, and MAES, JJ., concur.

14 P.3d 38
2000-NMCA-105

STATE of New Mexico,
Plaintiff-Appellee,

v.

Robert DAVIS, Defendant-Appellant.

No. 20,256.

Court of Appeals of New Mexico.

Sept. 28, 2000.

Certiorari Denied, No. 26,629,
Nov. 17, 2000.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, NM, For Appellee.

Phyllis H. Subin, Chief Public Defender, Christopher Bulman, Appellate Defender, Santa Fe, NM, For Appellant.

OPINION

ELLINGTON, Judge.

{1} Defendant appeals his conviction of one count of larceny over $250, a fourth degree felony under NMSA 1978, § 30–16–1 (1987). As part of a conditional plea, Defendant reserved the right to argue on appeal that he should have been charged instead with the more specific offense of cheating a machine or device, a petty misdemeanor under NMSA 1978, § 30–16–13 (1963). Defendant raises two issues on appeal. First, Defendant argues that his conviction for larceny over $250 must be reversed because the specific offense of cheating a machine or device applied to his unitary conduct and, under the general-specific rule, prevented his prosecution for the general offense of larceny. Second, Defendant argues that cumulative pretrial irregularities combined to violate his right to due process of law and as a result of that the charges should either be dismissed or he should be allowed to withdraw his plea. Because Defendant failed to reserve his second issue for appeal, we do not discuss it. *See State v. Hodge,* 118 N.M. 410, 416, 882 P.2d 1, 7 (1994) (holding that defendant may

plead guilty and reserve the right to appellate review of specific issues).

BACKGROUND

{2} Defendant pled guilty to larceny over $250 under Section 30–16–1 and reserved for appeal the issue we address today. Defendant was alleged to have stolen approximately $400 in quarters from the change machine at the Blast Off Car Wash by using a rigged five dollar bill. Defendant would insert a five dollar bill with tape on it into the change machine enabling him to retain the five dollar bill and still trigger the machine to release the change (quarters) within. At the trial level Defendant filed a motion to dismiss or amend the indictment, arguing that the general-specific rule applied to the facts of his case acting to limit the prosecutor's charging discretion and necessitating his being charged with the misdemeanor offense of cheating a machine or device rather than the felony of larceny. The trial court denied Defendant's motion, distinguishing Defendant's act of theft of quarters from the machine from one of cheating the car wash machine to obtain free car washes. We are not persuaded by Defendant's argument and affirm.

DISCUSSION

{3} Under the general-specific rule, if one statute deals with a subject in general and comprehensive terms, and another statute addresses part of the same subject matter in a more specific manner, the latter controls. *See State v. Cleve,* 1999 NMSC 017, ¶ 17, 127 N.M. 240, 980 P.2d 23. In the context of criminal law, the general-specific rule operates to compel the state to prosecute under the more specific statute. *See id.* There are two distinct rationales, with corresponding modes of analysis, underlying the general-specific rule. *See State v. Guilez,* 2000–NMSC–020, ¶ 7, 129 N.M. 240, 4 P.3d 1231.

{4} The first, applicable in criminal cases, is an offshoot of the constitutional prohibition against double jeopardy. *See id.* Under this rationale where there is unitary conduct, two statutes (one general and one specific) punishing the same conduct, and a determination that the Legislature did not intend multiple punishment, then the general-specific rule will require prosecution under the specific statute. *See id.* The "quasi-double-jeopardy" mode of analysis requires a many tiered system of inquiry. *See id.* ¶ 9. First, was there unitary conduct? *See id.* ¶ 12. If not, then the quasi-double-jeopardy analysis ends and only the preemption analysis remains. *See id.* ¶ 14. If there was unitary conduct, then are the elements of the two offenses the same or different? *See id.* ¶ 9. If the elements are the same, then the general-specific rule applies and the prosecution is limited to charging the more specific offense. *See id.* If the elements are different, then a rebuttable presumption of multiple charges attaches and the inquiry must be whether there was nonetheless a legislative intent to limit prosecution. *See Cleve,* 1999–NMSC–017, ¶ 24, 127 N.M. 240, 980 P.2d 23. If there was not legislative intent to limit charging discretion, then the general-specific rule does not apply. *See id.* ¶ 26. If there was legislative intent to limit, then the general-specific rule applies and limits the prosecution to charging the more specific offense. *See id.*

{5} The second rationale for the general-specific rule rests upon the concept of preemption of one statute by another or by a statutory scheme. *See Guilez,* 2000–NMSC–020, ¶ 7, 129 N.M. 240, 4 P.3d 1231. Under this rationale, application of the general-specific rule depends on a determination of whether one statute preempts the other. *See id.* Again, this mode of inquiry has several tiers. Is there a conflict between two statutes or one statute and an overall statutory scheme? *See id.* ¶ 15. A conflict can be found where two statutes prohibit the same matter. *See id.* If there is a conflict, then is it irreconcilable? *See id.* If the conflict is irreconcilable, then the general-specific rule applies. *See id.* If the conflict is not irreconcilable, then was there legislative intent to repeal one through enactment of the other? *See id.* If not, then both statutes apply. *See id.* If there was intent to repeal one by enactment of the other, then the general-specific rule applies and limits prosecution to the non-repealed statute. *See id.*

{6} We begin our review of the present case with the quasi-double-jeopardy analysis. Defendant is alleged to have rigged a five dollar bill with tape to trigger a change machine at a car wash to release its coins and then carried those coins away. Defendant was subject to criminal liability for both larceny, *see* § 30–16–1, and cheating a machine or device, *see* § 30–16–13. The first inquiry is whether the Defendant's conduct using the rigged bill and then carrying away the coins was unitary. The test for unity is whether two events are sufficiently separated by time or space, or whether the quality and nature of the acts, objects, and results can be distinguished. *See Swafford v. State,* 112 N.M. 3, 13–14, 810 P.2d 1223, 1233–34 (1991). Here Defendant's conduct was unitary because Defendant's use of the rigged five dollar bill and the carrying away of the contents of the coin machine occurred close in time and space; the object of the use of the rigged bill was to obtain the coins. The result of the use of the rigged bill was approximately $400 in coins, and the quality and nature of the acts were not distinguishable from the mentioned object and results of the acts. *See Guilez,* 2000–NMSC–020, ¶ 14, 129 N.M. 240, 4 P.3d 1231 (holding defendant's conduct, although overlapping, was not unitary and provided independent factual bases for the charged offenses). The conduct in this case being unitary, we turn to whether the elements of the two statutes, Sections 30–16–1 and 30–16–13, are the same. After review, we find that they are not. The larceny statute requires the actual taking and carrying away of property of a certain value; the cheating statute can be satisfied by a mere attempt and requires the performance of certain actions with regard to machines or devices. Given the differing elements of the applicable statutes in this case, we turn to whether, despite a presumption of permissible multiple charging, the Legislature nonetheless might have intended to limit the prosecutor's charging discretion. In keeping with *Cleve,* we ask whether the violation of one statute will normally result in violation of the other. *See Cleve,* 1999–NMSC–017, ¶ 31, 127 N.M. 240, 980 P.2d 23. Larceny involves the carrying away of the property of another with the requisite intent; a typical example would be a theft of property from a house during a burglary. A charge of larceny would not normally implicate the cheating of a machine or device. Further, because Section 30–16–13 punishes attempts, it is applicable in a variety of circumstances in which larceny would not be. In this particular case, as the trial judge pointed out, had Defendant obtained a car wash by inserting the rigged bill the circumstances would have been different and Defendant would likely not have been charged with larceny. Thus, violation of one of the statutes would not normally result in the violation of the other.

{7} Looking to the plain language of the statutes, the purposes behind the statutes, and their histories, we find no indication of legislative intent to limit prosecutorial discretion in charging. A plain reading of the statutes demonstrates that the legislature sought to criminalize two forms of criminal conduct. It just so happens that in Defendant's case, his conduct was such that he was potentially subject to charging under both. The implied purposes behind the statutes and the interests protected are different. The larceny statute focuses on the material item taken while Section 30–16–13 focuses on the fraudulent operation of a machine. The valuation breakdown in the larceny statute correlates to the value of the item taken and potentially the violation and harm to the victim by the unauthorized carrying away of property. Further, the history behind the statutes does not evidence an intent to limit prosecutorial discretion. Since its enactment, the larceny statute has been amended three times. The net effect of those amendments, however, has simply been to alter the relative penalties for the theft of items of differing values. *Compare* 1963 N.M. Laws, ch. 303, § 16–1, *with* 1969 N.M. Laws, ch. 171, § 1, *and* 1979 N.M. Laws, ch. 118, § 1, *and* 1987 N.M. Laws, ch. 121, § 1. The cheating a machine or device statute has been unaltered since its enactment. *See* § 30–16–13 history. Both the larceny and cheating a machine or device statutes were enacted at the same time as part of the major overhaul of New Mexico's criminal laws that occurred in 1963. As indicated by the elements analysis and by a plain reading of the statutes, the

Legislature obviously perceived them to be designed to protect different interests. The larceny statute protects people's interest in not having any property actually stolen and the cheating statute protects people's interest in not having machines or devices operated or attempted to be operated except with lawful money to get the property or service provided by the machine or device.

{8} Taking into account these statutory factors, we find that the presumption of permissible multiple charging has not been overcome. Therefore, the quasi-double-jeopardy rationale of the general-specific rule does not apply in Defendant's case and would not limit prosecution to the arguably more specific statute of cheating a machine or device.

[redacted] {9} We next turn to a preemption analysis. Here, the two statutes come into conflict because the larceny statute, standing alone, criminalizes some of the same conduct as the more specific cheating of a machine or device statute. *See State v. Blevins,* 40 N.M. 367, 368, 60 P.2d 208, 209 (1936). However, this conflict is not irreconcilable. There is no evidence the Legislature sought to repeal one statute with the enactment of the other. As discussed above, the plain language of the statutes, their purposes, and the histories behind them do not evidence a legislative intent to repeal one statute by the enactment of the other. Thus, both statutes apply to the conduct of Defendant and the preemption rationale of the general-specific rule does not preclude prosecution under either or both of the statutes. Therefore, we find that the general-specific rule does not apply to the facts in Defendant's case and did not limit the prosecutor's charging discretion.

[redacted] {10} Defendant also briefly and equivocally asserts an equal protection argument. Defendant argues that the general-specific rule must apply in his case or else to allow the State to prosecute under the arguably more general statute of larceny would constitute an equal protection violation. Defendant argues that if the general-specific rule does not apply in his case and others like it, the State would be free to charge defendants with the general larceny statute simply to seek a higher penalty. He argues that to thus charge similarly situated defendants differently would constitute a violation of equal protection. We would note that Defendant fails to fully enunciate and brief his argument and fails to specify whether his claim implicates federal or state constitutional protections. The State fails to respond to Defendant's argument in its answer brief. The Defendant's failure to fully discuss the issue leaves us in a precarious position. Similar to the situation in *State v. Arellano,* 1997–NMCA–074, ¶ 16, 123 N.M. 589, 943 P.2d 1042, we find the elements of the two statutes to be different, and are not convinced that *State v. Chavez,* 77 N.M. 79, 82, 419 P.2d 456 (1966), applies to Defendant's case. In *Chavez,* our Supreme Court stated that it "no longer subscribe[d] to th[e] view which would permit the law enforcement authorities to subject one person to the possibility of a greater punishment than another who has committed an identical act. This would do violence to the equal protection clauses of our state and federal constitutions." *Id.* at 82, 419 P.2d at 458 (overruling in part *Aragon v. Cox,* 75 N.M. 537, 541, 407 P.2d 673, 676 (1965) (per curiam)). But *Chavez* is distinguishable in that it involved two virtually identical statutes, *see id.,* which we have indicated is not true here. Thus, for guidance we look to *State v. Wilson,* 116 N.M. 793, 799, 867 P.2d 1175, 1181 (1994) (observing that in the context of arguing discriminatory charging by prosecution defendant had not demonstrated that discriminatory enforcement had actually occurred); *Arellano,* 1997–NMCA–074, ¶ 20, 123 N.M. 589, 943 P.2d 1042 (holding that to support allegation of equal protection violation defendant must make showing discrimination in prosecution); and *Incorporated County of Los Alamos v. Montoya,* 108 N.M. 361, 366–67, 772 P.2d 891, 896–97 (Ct.App.1989) (finding that defendant had failed to allege facts indicating that decision to prosecute under city ordinance rather than state statute was based on any constitutionally impermissible factor). In this case, Defendant does neither clearly allege nor make a showing that prosecutorial discretion was exercised based on constitutionally impermissible grounds in the selection of charges in his case. Absent such a showing, we find that Defendant has not

demonstrated that his federal or state constitutional rights have been violated. *See Arellano,* 1997–NMCA–074, ¶ 20, 123 N.M. 589, 943 P.2d 1042.

CONCLUSION

{11} For the reasons discussed above, we affirm the trial court's denial of Defendant's motion to dismiss or amend the indictment, and Defendant's conviction for larceny stands.

{12} **IT IS SO ORDERED.**

PICKARD, C.J., and BUSTAMANTE, J., concur.

14 P.3d 43

2000–NMCA–104

RISK MANAGEMENT DIVISION, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE of New Mexico, Plaintiff–Appellee,

v.

Jennifer McBRAYER and Eduardo Araiza, Defendants–Appellants.

Nos. 20,193, 20,237.

Court of Appeals of New Mexico.

Oct. 5, 2000.

Certiorari Denied, No. 26,637, Nov. 29, 2000.

Leonard J. Piazza, Sandenaw, Carrillo & Piazza, P.C., Las Cruces, NM, for Appellee.

Rita Neumann, Attorney at Law, Las Cruces, NM, for Appellant McBrayer.

Garnett R. Burks, Jr., Sage and Burks, P.C., Las Cruces, NM, for Appellant Araiza.

OPINION

BOSSON, Judge.

{1} The opinion heretofore filed in this case is withdrawn and the following substituted therefor. The motion for rehearing (reconsideration) is denied.

{2} An instructor at New Mexico State University (NMSU) brutally attacked one of his students, sexually assaulted and tortured her, and then tried to kill her. When the victim filed a civil rights lawsuit against the instructor, the State of New Mexico, through its Risk Management Division (RMD), filed

this action seeking a declaratory judgment that it did not owe a legal duty to defend the instructor or pay any resulting judgment under the Tort Claims Act (TCA), NMSA 1978, §§ 41–4–1 to –29 (1976, as amended through 1999). RMD's responsibilities under the TCA turn on whether the instructor was acting within the scope of his duties as a university employee during the events surrounding the assault. Interpreting the language of the TCA, we hold, as a matter of first impression, that the phrase "scope of duties" in the TCA differs from the common law term "scope of employment." We conclude that the fact finder could determine, based on all the evidence, that the instructor was acting within the scope of his duties. Accordingly, we reverse the summary judgment entered in favor of RMD and remand for further proceedings.

BACKGROUND

{3} Jennifer McBrayer, a NMSU student, had missed several of her honors English class assignments because she was pregnant. McBrayer wrote a note to her English instructor, Eduardo Araiza, explaining that she wanted to make up her assignments and complete the course. The following day, Araiza suggested that if McBrayer had the time they could get the assignments from his car and have them copied. McBrayer agreed. When they looked in his car, however, Araiza informed McBrayer that the assignments were not there, but were instead at his apartment. He then asked McBrayer if she would mind stopping by his apartment on the way to the copy store, and again McBrayer agreed.

{4} When they reached his off-campus apartment, McBrayer waited in the front doorway while Araiza looked for the assignments. Once he found the assignments, he returned to where she was standing to have her look them over. At this point, Araiza grabbed McBrayer, held a stun gun to her neck, and tried to incapacitate her with it. After a fierce struggle, Araiza forced McBrayer inside the apartment and finally subdued her. There, he forcibly subjected McBrayer to various acts of sexual assault and torture, after which he attempted to kill her. McBrayer eventually escaped, went to the authorities, and Araiza was arrested, charged, and tried for numerous felonies. A jury convicted Araiza of kidnaping, criminal sexual penetration, attempted murder, and criminal sexual contact. He was sentenced to fifty-nine-and-one-half years of imprisonment.

{5} After the criminal case, McBrayer filed a civil rights lawsuit in state court against Araiza under 42 U.S.C. § 1983 (1994). Her lawsuit, which is pending, alleges that Araiza, while acting under color of state law as a university instructor, violated McBrayer's constitutionally protected liberty right under the due process clause to be free from intrusion into her bodily integrity, and she seeks substantial damages. In reaction to the lawsuit, RMD filed a petition for a declaratory judgment questioning whether it had to defend or pay damages in McBrayer's lawsuit against Araiza, listing both as defendants. The petition specifically addressed whether Araiza's sexual assault fell within his scope of duties as a university instructor. After the defendants answered the petition, RMD moved for summary judgment based upon the asserted, uncontested facts of the case. We note, parenthetically, that the parties do contest the materiality accorded to individual facts. The district court granted summary judgment and entered a declaratory judgment that RMD had no duty to defend or pay damages. Both defendants appeal the declaratory judgment, Araiza seeking a legal defense, and McBrayer trying to obligate RMD to pay any settlement or judgment that may ensue from her civil rights lawsuit against Araiza.

DISCUSSION

{6} Under the TCA, a public employee is entitled to a legal defense provided by his or her employer or the state when a plaintiff alleges that, while acting within the scope of duties, the employee committed certain enumerated torts or violated the plaintiff's constitutional rights. *See* § 41–4–4(B). Likewise, the TCA compels a state employer to pay a judgment or a settlement entered against a public employee if the employee acted within the scope of his duties. *See* § 41–4–4(D). Together, these provisions of the TCA operate as a kind of statutory insur-

ance policy. *See* § 41–4–20 (coverage of risks; insurance).

{7} McBrayer's lawsuit alleges a violation of federally protected civil rights under 42 U.S.C. § 1983, and does not implicate the state's immunity from tort actions. *See* § 41–4–4(A) (discussing the state's immunity from tort liability and its limitations). Legal defenses for public employees accused of federal civil rights violations are addressed under Section 41–4–4(B) of the TCA, as follows:

> [A] governmental entity shall provide a defense, including costs and attorneys' fees, for any public employee when liability is sought for:
>
> . . .
>
> (2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States . . . when alleged to have been committed by the public employee while acting within the scope of his duty.

Payment of a judgment for federal civil rights violations is discussed in similar language under Section 41–4–4(D):

> A governmental entity shall pay any settlement or any final judgment entered against a public employee for:
>
> . . .
>
> (2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States . . . that occurred while the public employee was acting within the scope of his duty.

Governmental entities are defined to include NMSU, Araiza's employer. *See* § 41–4–3(B), (H). Both subsections (B) and (D) of Section 41–4–4 condition the financial responsibility of the state upon an employee acting "within the scope of his duty." [1]

Scope of Duty

{8} Initially, we observe that when the legislature adopted the phrase "scope of duty" in the TCA, it created and defined a unique standard to be applied to TCA claims based upon acts of public employees. By predicating the state's obligation to insure public employees upon acts being within the scope of duty, our legislature departed from a well-developed standard, the scope of employment. *See Stull v. City of Tucumcari*, 88 N.M. 320, 322, 540 P.2d 250, 252 (Ct.App. 1975) (discussing scope of employment); *see also Lang v. Cruz*, 74 N.M. 473, 478–81, 394 P.2d 988, 991–94 (1964) (same). The creation of a new standard was consistent with the legislative decision to abandon other common law precepts, such as governmental or proprietary functions and discretionary or ministerial acts, formerly used to determine the state's liability. *See* § 41–4–2; *Narney v. Daniels*, 115 N.M. 41, 48, 846 P.2d 347, 354 (Ct.App.1992) ("[W]e presume that, when the legislature enacted [the TCA], it intended to change the existing law."). In *Medina v. Fuller*, 1999–NMCA–011, ¶ 10, 126 N.M. 460, 971 P.2d 851, we acknowledged that this new standard stands apart from its scope of employment counterpart, observing that "our legislature chose the phrase 'scope of duties' and then further defined that phrase in a particular way."

{9} New Mexico courts have yet to flesh out the dimensions of this unique standard. Although several opinions have considered the phrase, none has stated with precision how it fits within the legal landscape governing the state's obligations under the TCA. *See id.* (holding that because the result would be the same under either a scope of duty or scope of employment analysis, there was no need to discuss the difference between the two); *see also Rivera v. New Mexico Highway & Transp. Dep't*, 115 N.M. 562, 564, 855 P.2d 136, 138 (Ct.App.1993) (holding that because acts did not fall within the scope of employment, the court did not have to consider the definition of scope of duties). In *Weinstein v. City of Santa Fe*, 121 N.M. 646, 650–51, 916 P.2d 1313, 1317–18 (1996), our Supreme Court indicated, in dicta, that scope

1. Under Section 41–4–4(B), the duty to defend arises when it is merely "alleged" that the public employee was acting within the scope of duties, and therefore appropriate pleading will usually cause the state, at a minimum, to provide a defense, whether or not it must eventually pay a judgment. Here, however, McBrayer's pleadings failed to make the necessary allegation regarding scope of duty, and thus, for purposes of this opinion, we treat the scope of duty question the same for the duty to defend as for the duty to pay.

of duties under Section 41–4–12 of the TCA (applying to law enforcement officers) is synonymous with common law scope of employment. However, that opinion also acknowledged that neither standard was factually at issue there, and thus, what the Supreme Court said in passing about scope of duties, does not settle the present dispute in which the standard is very much at issue. *See State v. Wenger*, 1999–NMCA–092, ¶¶ 10, 13, 127 N.M. 625, 985 P.2d 1205 (finding that cases are not authority for propositions unnecessary to reach their holdings).

{10} Our analysis of scope of duty begins with the plain language of the statutory definition. As defined by the TCA, scope of duty "means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance." Section 41–4–3(G). Relying on this definition, RMD argues that scope of duty cannot include criminal acts, or even intentional ones, because "[i]t is uncontroverted that NMSU never requested, required, or authorized Araiza to torture, rape, assault, batter, and attempt to murder Ms. McBrayer." According to RMD, criminal acts, such as the ones suffered by McBrayer, would almost always fall outside an employee's scope of duty because such acts rarely, if ever, are legitimately "requested, required or authorized" by a government employer. *Id.; cf. Salazar v. Town of Bernalillo*, 62 N.M. 199, 201–02, 307 P.2d 186, 188 (1956) (holding that a mayor exceeded his executive authority to act on behalf of the town when he ordered a deputy marshal to shoot plaintiff with a tear gas gun).

{11} However, in determining what conduct the legislature intended to bring within the scope of duty, we read not just the one definitional section of the statute in the abstract; we read all the sections of the TCA together, including their amendments, so that each section is given its proper effect and placed in the appropriate context. *See High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998–NMSC–050, ¶ 5, 126 N.M. 413, 970 P.2d 599; *Methola v. County of Eddy*, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980). Considering the TCA as a whole, we must reconcile the definition of the scope of duty in Section 41–4–4(G), with the statute's indemnification provisions in Sections 41–4–4(E) and 41–4–17(A), to which we now turn.

{12} Section 41–4–4(E) affords the state the right to recover from its employee what it expends on providing a legal defense and paying a settlement or a judgment under certain, prescribed conditions:

> A governmental entity shall have the right to recover from a public employee the amount expended by the public entity to provide a defense and pay a settlement agreed to by the public employee or to pay a final judgment if it is shown that, *while acting within the scope of his duty, the public employee acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage* resulting in the settlement or final judgment.

(Emphasis added.) Using similar language, Section 41–4–17(A) exempts public employees from indemnification actions by the state "unless the public employee has been found to have acted fraudulently or with actual intentional malice causing the bodily injury . . . or violation of rights, privileges or immunities secured by the constitution and laws of the United States or laws of New Mexico resulting in the settlement or final judgment." It follows from these provisions that even when a public employee acts "fraudulently or with actual intentional malice" to injure another, or deprive another of constitutionally protected civil rights, the state must still defend the employee and pay any damages that result. *Id.* Recovery through indemnification merely provides an avenue for the state to recoup against its employee when the conduct is particularly egregious.

{13} The language of these indemnification sections does not exclude criminal conduct from an employee's scope of duty. For example, an employee whose intentional malice causes bodily injury may be guilty of battery, *see* NMSA 1978, § 30–3–4 (1963); an employee whose intentional malice results in property damage may be guilty of trespass, *see* NMSA 1978, § 30–14–1(D) (1995); and, conceivably, an employee whose intentional malice results in a wrongful death may be

guilty of murder, *see State v. DeSantos,* 89 N.M. 458, 461, 553 P.2d 1265, 1268 (1976) (equating express malice with deliberate murder).[2] Criminal conduct would likely cause an employer to demand indemnification from an employee, but under the wording of the indemnification sections, criminal conduct would not bar an employee from receiving a legal defense or a victim from ultimately recovering a judgment from the state.

{14} If, as RMD argues, the state could never be liable for the criminal act of an employee because criminal acts would never be "requested, required or authorized," the question then becomes: Why would the legislature have empowered the state, not once but twice, to recover its defense and liability costs from the employee for having committed those very same, criminal acts? Logically, the state would only need to be indemnified if the state had first provided a defense under Section 41–4–4(B) and paid a judgment under Section 41–4–4(D).

{15} The common law of indemnification, incorporated as modified into the TCA's right of recovery, belies RMD's claim that the wrongful acts of an employee must be requested, required or authorized by an employer before the state is obligated to defend and pay a judgment. Indemnification generally grants recovery only to parties innocent of wrongdoing. *See Dessauer v. Memorial Gen. Hosp.,* 96 N.M. 92, 97–98, 628 P.2d 337, 342–43 (Ct.App.1981); *see also In re Consol. Vista Hills Retaining Wall Litig.,* 119 N.M. 542, 545–46, 893 P.2d 438, 441–42 (1995) (equating the right to recovery with traditional indemnification and concluding that indemnification rights can arise through express or implied contract).

{16} The purpose of indemnification is to allow a party without fault to shift liability for damages to the party actually at fault. *See In re Consol. Vista Hills Retaining Wall Litig.,* 119 N.M. at 546, 893 P.2d at 442. In practice, when a party without fault is called upon to satisfy damages suffered by an injured person, and does so, that party is, in turn, allowed to recover its losses from the party at fault. *See Dessauer,* 96 N.M. at 97–98, 628 P.2d at 342–43. A party primarily at fault is never entitled to indemnification, *see id.,* nor is indemnification allowed when parties legally liable for an injury are equally at fault. *See Trujillo v. Berry,* 106 N.M. 86, 88, 738 P.2d 1331, 1333 (Ct.App.1987). We presume that the legislature contemplated the use of indemnification in light of then-existing law. *See Buzbee v. Donnelly,* 96 N.M. 692, 700, 634 P.2d 1244, 1252 (1981) ("When a statute uses terms of art, we interpret these terms in accordance with case law interpretation . . . ."); *see also Rio Grande Gas Co. v. Stahmann Farms, Inc.,* 80 N.M. 432, 436–37, 457 P.2d 364, 368–69 (1969) (discussing the legal theory of the right to recovery granted through indemnification). Under the law of indemnification, the state would have a right to recover its expenditures only when it was free from fault. Conversely, the state could not become indemnified against its employee, if it actually requested, required or authorized the performance of intentional, malicious, even criminal acts. Thus, the state's right to indemnification, premised on its innocent behavior, is incompatible with RMD's notion that the state must first participate in the wrongdoing by authorizing an employee's wrongful acts before there can be coverage under the TCA.

{17} Therefore, the reasonable inference drawn from Sections 41–4–4(E) and 41–4–17(A), the one that gives these sections their full meaning, is that the legislature likely foresaw the possibility that a public employee could abuse the *duties* actually requested, required or authorized by his state employer and thereby commit malicious, even criminal *acts* that were unauthorized, yet incidental to the performance of those duties. And it is equally likely that the legislature intended that those unauthorized acts would fall within the scope of duties as defined in the TCA. On the other hand, under RMD's view of the scope of duty, the legislature would require the state to request or authorize criminal

2. We also observe that Section 41–4–4(C) provides coverage for "punitive or exemplary damages" for civil rights cases when the public employee acts within the scope of duty. Punitive damages can only be awarded when the public employee's conduct is malicious, willful, reckless, wanton, fraudulent, or in bad faith. *See* UJI 13–1827 NMRA 2000.

acts as a prerequisite to providing a defense and paying a judgment, which is an absurdity in our view.

{18} At least one prior opinion of this Court has discussed an argument similar to that which RMD makes in this appeal. In *Narney,* 115 N.M. at 48, 846 P.2d at 354, a lawsuit based on the unlawful, unauthorized acts of a psychotic police officer, we rejected the state's contention that scope of duty turned on the prior authorization or lawfulness of the underlying acts. We observed in *Narney* that if unlawful acts "were always beyond the scope of officers' duties, and thus unauthorized, there could be no waiver of immunity for them." *Id.* Such a result, we concluded, would be "incorrect under current governmental liability law," referring specifically to the TCA. *Id.*

{19} Based on the foregoing, we reject RMD's narrow focus. We have determined as a matter of law that, under the TCA's unique scope of duty standard, Araiza's *acts* are not excluded simply because they are criminal. It is then for the fact finder to decide whether the criminal acts were done while Araiza was acting within his scope of duty: while performing a *duty* that he was requested, required or authorized to perform by NMSU. Here, the issue of scope of duty centers on what NMSU requested, required or authorized as it related either generally or specifically to Araiza's duty as an instructor to help a student obtain her homework assignments.

{20} By examining only the aberrant behavior of Araiza, RMD overlooks how this sexual assault came about-through Araiza's *duty* as a university instructor to distribute homework assignments. Because it appears that Araiza used this authorized duty as a subterfuge to accomplish his assault, we find that a reasonable fact finder could determine that his actions were within the scope of the duties that NMSU requested, required or authorized him to perform. After all, the TCA defines scope of duties as "performing any *duties* [, not acts,] that a public employee is requested, required or authorized to perform." Section 41–4–3(G) (emphasis added). It is the duty, not the tortious or criminal act, that triggers the state's obligations under Sections 41–4–4(B) and 41–4–4(D).

{21} The legislature could have made the employee bear sole responsibility for civil rights violations and other forms of intentional, malicious conduct, and the legislature could have left the victim uncompensated if the employee were judgment proof. Indeed, federal law creates the cause of action for civil rights violations and prescribes the remedy as against a public employee, individually. *See Wheaton v. Webb–Petett,* 931 F.2d 613, 620 (9th Cir.1991) (holding that a § 1983 plaintiff "may obtain damages only from the personal estates of the defendant state officials, not from the state treasury"). No federal law requires the state to stand behind the employee financially. *See Graham v. Sauk Prairie Police Comm'n,* 915 F.2d 1085, 1091 (7th Cir.1990) (pointing out that a state may statutorily waive immunity for damage awards, stating that the purpose of waiver is "gratuitously to shield state employees from monetary loss"). Notwithstanding, our legislature chose another course.

{22} The legislature's first effort at drafting the TCA left public employees, with the exception of law enforcement officers, personally responsible for torts committed with malice or fraud. *See* 1976 N.M. Laws, ch. 58, § 4(B). At that time, employees such as Araiza were without any state insurance. Civil rights violations were not even addressed in the TCA. But the following year, 1977, the legislature did bring federal civil rights actions within TCA coverage, which became Section 41–4–4(B) and (D). *See* 1977 N.M. Laws, ch. 386, § 3(C). The year after that, 1978, the legislature repealed the state's immunity from malicious acts, and replaced it with a provision granting the state the right to recover its expenditures for lawsuits resulting from the fraudulent or malicious acts of a public employee when committed within the scope of duties. *See* 1978 N.M. Laws, ch. 166, § 1(D). Currently codified as Section 41–4–4(E), this latter amendment is significant for at least three reasons.

{23} First, it does not limit coverage based on the kind of conduct involved (i.e., only torts), thereby including within it federal civil rights actions. Second, it does not

limit coverage for "actual intentional malice" based on the identity of the wrongdoer (i.e., only law enforcement officers). Third, coming as it did in tandem with the repeal and adoption of these other amendments, it creates a fair inference that the legislature did not arrive capriciously at its decision (1) to assume the burden of compensating victims for civil rights damages caused by public employees, and (2) to allocate the risk of loss between the state and its employees, not the state and victims. Section 41–4–4(E) has remained essentially intact since 1978.

RMD's Remaining Arguments Are Unpersuasive

{24} RMD suggests that the indemnification language in Section 41–4–4(E) applies only to law enforcement officers because they are vested with a broad authority over the public and have greater potential to abuse their office in a fraudulent or malicious manner. As we have already indicated, the legislative history of the TCA discredits this claim, and therefore we dismiss it as meritless.

{25} RMD offers a novel theory, centered on the law of Wyoming, to argue that the TCA phrase "scope of duty" is actually narrower, not broader, than the common law scope of employment. *See Jung–Leonczynska v. Steup*, 782 P.2d 578, 582 (Wyo.1989) (construing *Milton v. Mitchell*, 762 P.2d 372 (Wyo.1988) to hold that "an actor may well be within the scope of his employment, but still not acting within the scope of his duties"). RMD points out that the Wyoming statute defines scope of duty in a manner nearly identical to New Mexico. *Compare* § 41–4–3(G) *with* Wyo.Stat.Ann. § 1–39–103(a)(v) (1999) ("'Scope of duties' means performing any duties which a governmental entity requests, requires or authorizes a public employee to perform regardless of the time and place of performance."). Therefore, according to RMD, we should adopt Wyoming's case law as a model for New Mexico. RMD contends that if scope of duty is construed more narrowly than scope of employment, as it is under similar language in Wyoming, then a sexual assault cannot be actionable under scope of duty, because under the common law standard an employee's sexual assault is generally not within the scope of employment. *Cf. John R. v. Oakland Unified Sch. Dist.*, 48 Cal.3d 438, 256 Cal.Rptr. 766, 773, 769 P.2d 948 (1989) (in banc) (declining for policy reasons to hold that a rape was within a teacher's scope of employment).

{26} We are not persuaded to look to Wyoming's construction of the scope of duty. On close analysis, Wyoming's version of the TCA deviates substantially from our own. Significantly, Wyoming has not adopted the equivalent of Sections 41–4–4(E) and 41–4–17(A). Therefore, under the Wyoming statute, a victim similarly situated to McBrayer does not have the benefit of indemnification provisions that show a clear legislative intent to cover criminal acts. *See Graham*, 915 F.2d at 1090 (recognizing that some states cover liability arising from their employee's intentional, malicious acts, while others do not). Moreover, irrespective of Wyoming's statutory language, we note that even Wyoming courts have held that a university instructor's intentional assault upon a student could *not* be resolved on summary judgment, leaving it to the jury to decide whether the assault was within the instructor's duties. *See Jung–Leonczynska*, 782 P.2d at 582–83. Accordingly, we are not persuaded that Wyoming's tort claims statute is parallel to the New Mexico TCA.

{27} Finally, RMD asserts that both NMSU's internal policies against sexual harassment and the terms of its certificate of coverage for all public employees prohibit a finding that the state has an obligation to defend or pay for Araiza's assault. These secondary arrangements, however, cannot be construed to control the state's obligations under the TCA. *Cf. Silva v. State*, 106 N.M. 472, 478, 745 P.2d 380, 386 (1987) (finding that the adoption of the Duran consent decree did not alter the standard for negligence). The standard governing the state's obligations to its employees is dictated by statutory law, which does not necessarily yield to secondary agreements or contracts created by state agencies. *See In re Application of PNM Elec. Servs.*, 1998 NMSC 017, ¶ 10, 125 N.M. 302, 961 P.2d 147 ("Statutes

create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute."). With regard to NMSU policies about fraternizing with students off campus, the definition of the scope of duty expressly exempts time and place from the court's consideration. *See* § 41–4–3(G). Further, as we recently recognized in *Davis v. Board of County Comm'rs,* 1999–NMCA–110, ¶ 38, 127 N.M. 785, 987 P.2d 1172, the policies of a governmental entity do not as a matter of law determine the scope of duty; they are merely evidence for a jury to consider in resolving the question.

{28} Nor can RMD's certificate of coverage exclude intentional acts in derogation of the TCA. The TCA directs RMD to insure state agencies, including NMSU, and requires coverage for "all such liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including . . . the United States of America." Section 41–4–20(A)(2). The laws of the United States impose liability for the sexual assaults of state employees under 42 U.S.C. § 1983. *See Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 451 (5th Cir.1994) (holding that sexual assaults violate constitutional liberty interests). The TCA created a public liability fund that holds money for RMD to use "to defend, save harmless and indemnify any state agency or employee of a state agency . . . for any claim." Section 41–4–23(B)(3). As with its other argument, RMD's assertion that the certificate of coverage limits its obligations is outdated. *See* 1976 N.M. Laws, ch. 58, §§ 17–18 (assuming liability under the original TCA only to the extent there existed valid insurance coverage; since repealed). To the contrary, under Section 41–4–20(A), the TCA mandates that the state "cover every risk for which immunity has been waived," which includes liability for intentional misconduct arising under 42 U.S.C. § 1983, when it falls within a public employee's scope of duty.

{29} For the reasons discussed above, we reverse the entry of summary judgment because genuine issues of material fact exist, and more than one reasonable conclusion can be drawn. *See Narney,* 115 N.M. at 47, 846 P.2d at 353. We remand for the fact finder to decide whether Araiza's criminal acts were within the scope of duties he was "requested, required or authorized to perform by [NMSU], regardless of the time and place of performance." Section 41–4–3(G). Because that question cannot be determined on appeal, we hold that RMD must continue to provide a legal defense for Araiza under Section 41–4–4(B), unless and until it is relieved from paying a judgment or settlement under Section 41–4–4(D). *Cf. Lopez v. New Mexico Pub. Sch. Ins. Auth.,* 117 N.M. 207, 210, 870 P.2d 745, 748 (1994). RMD is, of course, free to seek recovery from Araiza, assuming RMD can demonstrate that Araiza acted with "actual intentional malice" as described in Section 41–4–4(E).

CONCLUSION

{30} We reverse and remand for proceedings consistent with this opinion. We award McBrayer her costs on appeal.

{31} **IT IS SO ORDERED.**

WECHSLER and SUTIN, JJ., concur.

14 P.3d 525

2000-NMSC-035

In the Matter of ADJUSTMENTS TO FRANCHISE FEES REQUIRED BY the ELECTRICAL UTILITY INDUSTRY RESTRUCTURING ACT OF 1999.

County of Bernalillo, New Mexico, Appellant,

v.

New Mexico Public Regulation Commission, Appellee,

and

El Paso Electric Company, Public Service Company of New Mexico, Texas–New Mexico Power Company, New Mexico Industrial Energy Consumers, Southwestern Public Service Company, and New Mexico Attorney General, Intervenors.

No. 25,893.

Supreme Court of New Mexico.

Nov. 15, 2000.

Sheehan, Sheehan & Stelzner, P.A., Timothy M. Sheehan, Kim A. Griffith, Albuquerque, NM, for Appellant.

Stacey J. Goodwin, Associate General Counsel, Santa Fe, NM, for Appellee.

Keleher & McLeod, P.A., Clyde F. Worthem, Sarah D. Smith, Bill R. Garcia, Albuquerque, NM, Hinkle, Cox, Eaton, Coffield & Hensley, Jeffrey L. Fornaciari, Gary W. Larson, Rubin, Katz, Salazar, Alley & Rouse, Donald M. Salazar, Santa Fe, NM, for Intervenors.

OPINION

SERNA, Justice.

{1} The County of Bernalillo appeals pursuant to NMSA 1978, § 62–11–1 (1993), challenging the New Mexico Public Regulation Commission's final order in NMPRC Case 3071 with regard to the Electric Utility Industry Restructuring Act of 1999, NMSA 1978, §§ 62–3A–1 to –23 (1999, as amended through 2000) (Restructuring Act). In Case 3071, the Commission, on its own motion, granted utilities a delay in the implementation of franchise fee adjustments. The County asserts that this order was contrary to NMSA 1978, § 62–3A–18(A) (1999). The County argues that this section took effect immediately on April 8, 1999, under the Restructuring Act's emergency clause, 1999 N.M. Laws, ch. 294, § 24, and that the Commission unlawfully extended compliance by investor-owned utilities until December 31, 1999, and until March 31, 2000, for rural electric cooperatives. El Paso Electric Company, Public Service Company of New Mexico (PNM), Texas–New Mexico Power Company, New Mexico Industrial Energy Consumers, Southwestern Public Service Company and the New Mexico Attorney General intervened. We review only the County's contention that the Commission's action violated the principle of separation of powers. We do not disturb the Commission's order.

I. Facts and Background

{2} In *City of Albuquerque v. New Mexico Public Service Commission,* 115 N.M. 521, 533, 854 P.2d 348, 360 (1993) (citation omitted), this Court described franchise fees in relation to utilities:

> In exchange for granting a franchise, a municipality may exact consideration from the utility, usually in the form of a franchise fee. This may equal some percentage of the utility's gross revenues or net earnings, or it may equal some other proportion of the utility's income derived from providing service in the municipality.

The cost of the franchise fee may then be passed on by the utility to its customers. *See GTE Southwest Inc. v. Taxation & Revenue Dep't,* 113 N.M. 610, 617, 830 P.2d 162, 169 (Ct.App.1992). The Legislature, through Section 62–3A–18(A), directs that "[a] franchise fee charge shall be stated as a separate line entry on a public utility's or distribution cooperative utility's bills and shall only be recovered from customers located within the jurisdiction of the government authority imposing the franchise fee." The Commission opened Case 3071 on its own motion without any parties before it. In its final order, the Commission found that utilities could not comply with Section 62–3A–18(A) without making rate adjustments because many of the utilities include franchise fees in their base rates. The Commission relied on NMSA 1978, § 62–3A–4(D) (1999), to grant a delay. Section 62–3A–4(D) states that "[t]he commission may delay customer choice and other dates established in the Electric Utility Industry Restructuring Act of 1999 by up to one year upon finding that an orderly implementation of customer choice cannot be accomplished without the delay." In its final order for Case 3071, the Commission found:

> Most electric utilities regulated by the Commission have included franchise fees in base rates in the past; therefore, a majority of the electric utilities' billing practices do not conform with the new statutory requirements. Because conformance with the new law may require differing rate adjustments for each electric utility, in accordance with Section [62–3A–]4(D) the Commission finds that it is in the public interest to grant a variance and extension of time for implementation of Section [62–3A–18(A)]. The Commission further finds that this delay will allow for the orderly and proper implementation of line item franchise fee charges on utility bills as part of the transition to customer choice.

{3} The County filed a motion to intervene to amend, vacate or suspend the final order of Case 3071. This motion was deemed denied by operation of law. The County argues that the Legislature, through Section 62–3A–18(A), mandated that, as of April 8, 1999, utilities may no longer recover franchise fee charges from customers outside the jurisdiction of government authorities imposing such fees. The County further argues that the Commission improperly contravened this directive in the final order without providing for refunds or credits. The County asserts that this action is beyond the scope of the Commission's authority and encroaches on the province of the Legislature in violation of separation of powers doctrine as articulated by Article III, Section 1 of the New Mexico Constitution. Further, the County maintains that the final order was arbitrary and capricious because the Commission did not give proper notice or allow a hearing. Finally, the County asserts that the Commission lacked evidence to support its findings. The County contends that this Court must compel the Commission to order the utilities to refund franchise fees which they improperly collected.

{4} Previously, the County, as an intervenor, raised the same issue in an unrelated rate matter, Case 2761, before the Commission. This Court vacated the Commission's final order for Case 2761 in *State ex rel. Sandel v. New Mexico Public Utility Commission,* 1999–NMSC–019, ¶ 30, 127 N.M. 272, 980 P.2d 55. On remand, the parties negotiated a proposed settlement of Case 2761 which they presented to the Commission for approval. The County objected to paragraph eight of the stipulation, which gave PNM an open-ended time frame to comply with Section 62–3A–18(A). The Commission found that this issue should instead be raised on a case-by-case basis and

informed the County that it could file a separate proceeding to this end. Subsequently, the Commission opened and closed Case 3071 on its own motion, granting all regulated utilities an extension of time regarding Section 62–3A–18(A). The County notes that the Commission did not provide for a refund or credit of franchise fees recovered from customers outside franchise fee jurisdictions between April 8, 1999, and the deadlines imposed by the Commission.

II. Discussion

A. Appellate Jurisdiction

{5} The County relies upon Section 62–11–1 for our jurisdiction to review this matter, which provides that "[a]ny party to any proceeding before the commission" may appeal to this Court for review of final orders. However, the Commission opened Case 3071 on it own motion without the complaint of any party; thus, the County is not a party to Case 3071. We also conclude that the County's rights are not "directly affected" by the order within the meaning of Section 62–11–1 so as to allow this Court to designate it as a party.[1] However, NMSA 1978, § 62–12–2 (1941) provides in part:

> In case the commission or its members shall undertake to act in excess of its jurisdiction and authority conferred under this act, or without jurisdiction; or in case the said commission or its members shall undertake to exercise rights or privileges not conferred upon it by this act or by law; or in case the said commission or its members shall fail or refuse in the performance of any duties or obligations imposed upon it by the terms of this act, then the person interested or whose rights are affected may bring suit by mandamus, prohibition, injunction or other appropriate remedy against the said commission in its statutory name in this act provided, to compel performance of the duties and obligations imposed upon said commission by this act, or to restrain said commission and its members from the exercise of jurisdiction not by this act conferred.

Although not directly affected, the County, on behalf of its affected citizens, is "interested" in the Commission's order for purposes of Section 62–12–2. We conclude that the County's proper remedy is under Section 62–12–2. Nonetheless, under Section 62–12–2, "[a]ny such action shall be brought against said [C]ommission in the district court of Santa Fe county, New Mexico, or in the district court of the county in which the complaint or controversy arose." The County did not bring this action before the district court, as provided in Section 62–12–2, but instead brought an appeal before this Court. Because we conclude that the County has no right of appeal under Section 62–11–1, we treat the County's notice of appeal as a petition for writ of mandamus. *See United Water N.M., Inc. v. New Mexico Pub. Util. Comm'n,* 1996–NMSC–007, 121 N.M. 272, 274, 910 P.2d 906, 908 (treating a petition for writ of mandamus as a notice of appeal from a Commission decision); *see also, e.g., Phinney v. Wentworth Douglas Hosp.,* 199 F.3d 1,

1. As the County points out, this Court concluded that the language "any party to any proceeding" of Section 62–11–1 "is broad and requires liberal application." *Community Pub. Serv. Co. v. New Mexico Pub. Serv. Comm'n,* 99 N.M. 493, 494–95, 660 P.2d 583, 584–85 (1983). While we do not retreat from our interpretation of Section 62–11–1, we believe that our holding in *Community* is best explained by reference to the plain language of the statute. Section 62–11–1 provides that "any party" may seek an appeal from a Commission order. However, the statute also allows "[a]ny person whose rights may be directly affected by the appeal [to] appear and become a party." Section 62–11–1. In *Community,* although there were no parties to the proceeding, the appealing utility companies' rights were directly affected by the Commission's actions regarding the utilities' rates and the Commission's direction to the utilities to submit related expenditures. *See id.* at 494, 660 P.2d at 584. We believe that our interpretation of the phrase "any party" in *Community* is consistent with the Legislature's expansion of "party" as one whose rights are directly affected by the appeal. By contrast, the County itself, as an entity, is not directly affected by the Commission's order, but is instead asserting itself indirectly on behalf of unnamed County residents who live in unincorporated areas. Under these circumstances, considering other remedies available under the Public Utility Act, we are unwilling to expand the meaning of the term "party" beyond that contemplated by the Legislature. Otherwise, the Legislature's discussion of those "directly affected" in Section 62–11–1 becomes mere surplusage.

3 (1st Cir.1999) ("Generally speaking, we have the power to treat a notice of appeal as a request for a writ of mandamus."). Thus, the threshold question, one which we answer in the negative, is whether it is appropriate for this Court to exercise its original jurisdiction in mandamus under Article VI, Section 3 of the New Mexico Constitution. *See Sandel,* 1999 NMSC 019, ¶ 10, 127 N.M. 272, 980 P.2d 55 (stating that Section 62–12–2 provides additional, statutory authority for issuance of mandamus by the district courts).

{6} Mandamus is appropriate "to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law." *Lovato v. City of Albuquerque,* 106 N.M. 287, 289, 742 P.2d 499, 501 (1987); *accord Rainaldi v. Public Employees Retirement Bd.,* 115 N.M. 650, 653–54, 857 P.2d 761, 764–65 (1993). "'This Court on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action.'" *Sandel,* 1999–NMSC–019, ¶ 11, 127 N.M. 272, 980 P.2d 55, (quoting *State ex rel. Clark v. Johnson,* 120 N.M. 562, 570, 904 P.2d 11, 19 (1995)). Assuming mandamus would otherwise lie, we exercise our power of original jurisdiction in mandamus if the case presents a purely legal issue that is a fundamental constitutional question of great public importance. *Clark,* 120 N.M. 562, 570, 904 P.2d 11, 19; *see* Rule 12–504(B)(1)(b) NMRA 2000 (requiring petitioners to set forth "the circumstances making it necessary or proper to seek the writ in the Supreme Court if the petition might lawfully have been made to some other court in the first instance"); Charles T. DuMars & Michael B. Browde, *Mandamus in New Mexico,* 4 N.M.L.Rev. 155, 157 (1974) ("The standard applied in exercising original jurisdiction under the Rule has been whether the particular case is of such public importance to the state as to require original consideration by the high court.").

{7} We conclude that the question which the County presents, whether the Commission has statutory authority to grant an extension to utilities regarding franchise fees, is purely a question of law. *See State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) ("Interpretation of a statute is an issue of law, not a question of fact."). In *Sandel,* 1999–NMSC–019, ¶¶ 26–28, 127 N.M. 272, 980 P.2d 55, we concluded that the Commission attempted to deregulate the electric power industry beyond the legislative grant of authority. We deemed this issue to be a fundamental constitutional question of great public importance because it implicated the doctrine of separation of powers. *See id.* ¶¶ 11, 30. The County similarly argues here that the Commission acted in excess of its jurisdiction and authority conferred by the Legislature, in violation of the doctrine of separation of powers. Thus, whereas on direct appeal this Court determines whether the Commission's "order is supported by substantial evidence, is neither arbitrary nor capricious, and is within the Commission's scope of authority," *El Vadito de los Cerrillos Water Ass'n v. New Mexico Pub. Serv. Comm'n,* 115 N.M. 784, 787, 858 P.2d 1263, 1266 (1993); *accord Attorney Gen. v. New Mexico Pub. Serv. Comm'n,* 101 N.M. 549, 553, 685 P.2d 957, 961 (1984), we limit our review in this case to the single question of whether the Commission violated the principle of separation of powers in order to determine whether to exercise our power of original jurisdiction in mandamus because we treat the County's appeal as a petition for writ of mandamus. *Cf. Sandel,* 1999–NMSC–019, ¶ 11, 127 N.M. 272, 980 P.2d 55, (similarly limiting the issues presented to this Court). Because, for the reasons that follow, we conclude that this case does not involve a fundamental constitutional question of great public importance, we need not address the general mandamus question regarding the need for expeditious resolution and the availability of alternative remedies. *Cf. id.* (listing factors considered in the exercise of original mandamus jurisdiction).

B. Legislative Authority

{8} The County asserts that only the Legislature possesses the authority to mandate that utilities may no longer collect franchise fees from customers outside the government jurisdiction imposing the fees, and that the Legislature, through Section 62–3A–

18(A), has pronounced that utilities may only collect fees from customers within the jurisdiction, effective April 8, 1999. The County maintains that the Commission modified the express terms of the Restructuring Act, unlawfully intruding upon the province of the Legislature in violation of Article III, Section 1 of the New Mexico Constitution. The Commission argues that it acted under express statutory authority.

{9} "'In construing a particular statute, a reviewing court's central concern is to determine and give effect to the intent of the legislature.'" *Public Serv. Co. v. New Mexico Pub. Util. Comm'n,* 1999-NMSC-040, ¶ 18, 128 N.M. 309, 992 P.2d 860 (quoting *State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988)). In order to determine legislative intent, this Court looks primarily to the plain language of the statute, giving ordinary meaning to the words used. *See Public Serv. Co.,* 1999-NMSC-040, ¶ 18, 128 N.M. 309, 992 P.2d 860; *Wilson v. Denver,* 1998-NMSC-016, ¶ 16, 125 N.M. 308, 961 P.2d 153; *United Water,* 121 N.M. at 276, 910 P.2d at 910.

> {10} When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation. The court will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function. However, the court is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law.

Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) (citations, quoted authority, and quotation marks omitted).

{11} The Legislature has granted the Commission

> general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations and in respect to its securities, all in accordance with the provisions and subject to the reservations of the Public Utility Act, and to do all things necessary and convenient in the exercise of its power and jurisdiction.

NMSA 1978, § 62-6-4(A) (2000). The Public Utility Act, NMSA 1978, §§ 62-1-1 to 62-13-14 (1887, as amended through 2000), "shall be liberally construed to carry out its purposes." NMSA 1978, § 62-3-2(B) (1985). Included in the Legislature's stated purpose of the Restructuring Act is to "provide a framework and time schedule for the restructuring of the electric industry to prepare for full competition in the energy supply and services segments of the electric industry." NMSA 1978, § 62-3A-2(B)(1) (1999). As described above, Section 62-3A-4(D) authorizes the Commission to delay customer choice and other dates established in the Restructuring Act by up to one year upon a Commission finding that an orderly implementation of customer choice cannot be accomplished without such a delay.

{12} The Commission asserts that these provisions provide it express authority to extend the implementation date for franchise fee billing and that the language is unambiguous, requiring application of the literal meaning of the words. The Commission notes that the Legislature included the provision regarding franchise fees within the Restructuring Act, and thus argues that any date of enforcement in relation to Section 62-3A-18(A) falls within the Commission's authority to delay implementation under Section 62-3A-4(D).

{13} It is the position of the County that Section 62-3A-4(D) does not authorize the Commission to grant the extension of time regarding franchise fees. The County argues that because franchise fees do not relate to customer choice, Section 62-3A-4(D) is inapplicable. The County asserts that "[r]eading the [Restructuring] Act as a whole, it is clear that the limitation on franchise fee recovery in Section [62-3A-]18(A) is separate and apart from the major subject of the Act—that is, restructuring of the electric utility industry in New Mexico to allow for the implementation of 'customer choice' in a competitive electricity supply market."

{14} To limit Section 62-3A-18(A) as the County argues would require the

Commission to disregard the Legislature's language authorizing the Commission to delay "other dates established in the Electric Utility Industry Restructuring Act." Section 62–3A–4(D). Generally, statutory language is not regarded as superfluous. *See City of Albuquerque*, 115 N.M. at 529, 854 P.2d at 356 (rejecting an argument which resulted in a superfluous provision); *Western Investors Life Ins. Co. v. New Mexico Life Ins. Guar. Ass'n (In re Rehabilitation of W. Investors Life Ins. Co.)*, 100 N.M. 370, 373, 671 P.2d 31, 34 (1983) ("Statutes must be construed so that no part of the statute is rendered surplusage or superfluous."). Contrary to the County's assertion that Section 62–3A–18(A) is separate from the Restructuring Act, the section is located within and is thus part of the Restructuring Act.

{15} Section 62–3A–4(D) requires a Commission "finding that an orderly implementation of customer choice cannot be accomplished without the delay" prior to a Commission order granting an extension of time. The County argues that the Commission did not make this requisite finding because it had no evidence before it.

{16} The Commission counters that it properly relied on its expertise in making procedural decisions. The Commission relied upon the finding that most utilities collect franchise fees as part of their base rates, that the Commission must approve rate changes, and that the Commission is familiar with scheduling. Based on these findings, the Commission asserts that it properly determined that the orderly implementation of customer choice could not be accomplished without an extension of time for utilities to comply with the requirements of Section 62–3A–18(A).

{17} Intervenors PNM, Southwestern Public Service Company and Texas–New Mexico Power Company also argue that if the Legislature intended for the implementation of Section 62–3A–18(A) on the effective date of April 8, 1999, then the electric utilities were automatically in violation of this provision. The Commission asserts that without the time extension, the utilities would have had to charge rates which were unapproved by the Commission in order to comply with the Section. The Commission contends that this would lead to a result contrary to the primary purpose of the Restructuring Act, which provides for a transition period to full competition.

{18} Public utilities may not modify an established rate without Commission approval. *See* NMSA 1978, § 62–8–7(B) (1999) (listing requirements for public utilities to change rates). Under the County's argument that Section 62–3A–18(A) immediately required a change in rate collecting, the provision prohibiting utilities from changing their rates without Commission approval and Section 62–3A–18(A) would conflict. Thus, we conclude that the Commission reasonably found that the utilities could not alter franchise fee billing without modifying rates.

{19} With respect to the principle of separation of powers, "an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own." *Sandel*, 1999–NMSC–019, ¶ 12, 127 N.M. 272, 980 P.2d 55. In this case, the Commission has not modified or created new law on its own; rather, the Commission was presented with an apparent conflict between two statutes, Section 62–8–7(B) and Section 62–3A–18(A), and has attempted to interpret the statutes in a harmonious manner, giving effect to each, by relying on statutory language appearing in a third statute, Section 62–3A–4(D). *See* NMSA 1978, § 12–2A–10(A) (1997) ("If statutes appear to conflict, they must be construed, if possible, to give effect to each."). *See generally Public Serv. Co.*, 1999–NMSC–040, ¶ 24, 128 N.M. 309, 992 P.2d 860. The County therefore fails to demonstrate an infringement by the Commission on "'the essence of legislative authority-the making of law.'" *Sandel*, 1999–NMSC–019, ¶ 28, 127 N.M. 272, 980 P.2d 55 (quoting *Clark*, 120 N.M. at 573, 904 P.2d at 22). Under these circumstances, we believe this case does not involve a fundamental constitutional question of great public importance, and we decline to exercise our constitutional power of original jurisdiction in mandamus to vacate the Commission's order.

III. Conclusions

{20} We conclude that the Commission's extension of implementation dates for fran-

chise fee charges does not intrude upon the province of the Legislature and thus does not implicate a fundamental constitutional question of great public importance necessary for this Court to exercise original mandamus jurisdiction. Section 62–3A–4(D) contains express language authorizing the Commission to delay dates established within the Restructuring Act. The Commission "[found] that an orderly implementation of customer choice cannot be accomplished without the delay," as required by Section 62–3A–4(D). Based on the Commission's finding that utilities would have been in violation of Section 62–3A–18(A) automatically on April 8, 1999, unless the utilities altered their rates, we believe the Commission reasonably attempted to resolve a potential conflict between two statutory provisions. Such action is not properly the subject of mandamus and does not justify our exercise of original jurisdiction under Article VI, Section 3 of the New Mexico Constitution. We therefore deny the County's petition for writ of mandamus.

{21} **IT IS SO ORDERED.**

MINZNER, C.J., BACA, FRANCHINI, and MAES, JJ., concur.

14 P.3d 532

2000-NMSC-034

Phil CHAVEZ, Worker–Respondent,

v.

S.E.D. LABORATORIES and United States Fidelity & Guaranty Company, Employer–Insurer–Petitioners.

Phil Chavez, Worker–Petitioner,

v.

S.E.D. Laboratories and United States Fidelity & Guaranty Company, Employer–Insurer–Respondents.

Nos. 26,227, 26,231.

Supreme Court of New Mexico.

Nov. 20, 2000.

Robert L. Pidcock, Albuquerque, NM, for Worker.

Silva, Rieder & Maestas, P.C., Paul Maestas, Wayne R. Suggett, Albuquerque, NM, for Employer–Insurer.

OPINION

MINZNER, Chief Justice.

{1} S.E.D. Laboratories (SED) and United States Fidelity & Guaranty Company (USF & G) (jointly, SED/USF & G) appeal from an opinion of the Court of Appeals holding that an employer's right of reimbursement is equal to the amount of an injured worker's duplicative recovery from uninsured motorist benefits and workers' compensation benefits and directing reconsideration of an order requiring Phil Chavez to pay all of his attorney's fees. We affirm these holdings of the Court of Appeals. Chavez appeals from the Court of Appeals' holding that he waived appellate review of the determination that he had returned to work at a wage equal to or greater than his pre-injury wage. We vacate the wage rate determination and remand to the workers' compensation judge (WCJ) for entry of an amended order.

I.

{2} On October 15, 1993, Chavez, a courier for SED, was involved in an automobile accident with a third-party uninsured motorist. The parties have stipulated that the accident arose from and occurred during Chavez's

employment. As a result of the accident, Chavez suffered two lumbar disk herniations and his resulting disability.

{3} Chavez requested findings of fact that he had suffered between $187,000 and $335,000 in damages including loss of access to the labor market, loss in earning capacity, loss in ability to perform household services, and lost wages. Chavez received workers' compensation benefits under SED's workers' compensation insurance policy with USF & G in the amount of $150.61 per week from October 16, 1993 to June 23, 1994 and $28.65 per week since June 24, 1994. Chavez also received $50,000 in benefits under his mother's uninsured motorist policy with Allstate Company and $60,000 in benefits under SED's uninsured motorist policy with Fireman's Fund Insurance Company.

{4} SED/USF & G instituted an action before the Workers' Compensation Administration (WCA) seeking reimbursement under NMSA 1978, § 52–5–17 (1991) for workers' compensation benefits paid to Chavez on a dollar-for-dollar basis and a determination as to what additional workers' compensation benefits were due and owing Chavez as a result of his accident.[1] The WCJ decided that SED/USF & G was entitled to dollar-for-dollar reimbursement for workers' compensation benefits paid as well as a credit against future payments subject to the agreement to reduce the reimbursement entered into by the parties. The WCJ also determined that Chavez had a permanent impairment rating of seventeen percent and that his permanent partial disability rating is equal to his impairment rating because he returned to work at a wage equal to or greater than his pre-injury wage, *see* NMSA 1978, § 52–1–26(D) (1991), and denied his petition for attorney's fees and sanctions.

{5} Chavez appealed the determinations that SED/USF & G was entitled to dollar-for-dollar reimbursement for workers' compensation benefits paid and that he had returned to work at a wage equal to or greater than his pre-injury wage. The Court of Appeals reversed in part and affirmed in part, holding that SED/USF & G was only entitled to reimbursement for duplicative recovery received by Chavez and deeming his challenge to the wage rate determination waived due to his failure to cite any evidence that supports the determination. *See Chavez v. S.E.D. Lab.*, 2000–NMCA–034, ¶¶ 27, 29, 128 N.M. 768, 999 P.2d 412. The Court of Appeals declined to reach the attorney's fees issue. *Id.* ¶ 28.

II.

{6} Section 52–5–17 defines the rights of employers to reimbursement of workers' compensation benefits paid to injured workers who receive compensation for their injuries from other sources. As this Court has long recognized, "[t]he statute plainly intends to prevent dual recovery" by the employee. *Brown v. Arapahoe Drilling Co.*, 70 N.M. 99, 104, 370 P.2d 816, 820 (1962) (referring to 1951 N.M. Laws, ch. 205, § 3, a predecessor of the current Section 52–5–17); *see Montoya v. AKAL Sec., Inc.*, 114 N.M. 354, 355, 838 P.2d 971, 972 (1992) (finding that the primary purposes of Section 52–5–17 are "(1) prohibition against double recovery, and (2) protection of the employer's right to reimbursement from the proceeds of the third-party action"); *Gutierrez v. City of Albuquerque*, 1998–NMSC–027, ¶ 10, 125 N.M. 643, 964 P.2d 807 (stating *Montoya* recognized "that the employer's reimbursement is bottomed on the principle that a worker must not receive a windfall").

{7} In order to prevent a worker from receiving such a windfall, we have held that "an employer is entitled to recoup the amount of a worker's duplicative recovery." *Gutierrez*, 1998–NMSC–027, ¶ 28, 125 N.M. 643, 964 P.2d 807. To determine the amount of a worker's duplicative recovery, we have held that a WCJ must do an element-by-element comparison of the amounts recovered by the worker from third parties and those benefits paid by the employer. *Id.* ¶ 14.

1. SED/USF & G's claim for reimbursement is based solely upon Chavez's recovery of $60,000 under the Fireman's Fund uninsured motorist policy. SED/USF & G does not base any claim upon Chavez's $50,000 recovery under the Allstate uninsured motorist policy.

{8} Applying *Gutierrez,* the Court of Appeals held SED/USF & G was entitled solely to reimbursement and potential future offset credit for those uninsured motorist benefits that duplicated the workers' compensation benefits paid or to be paid to Chavez. *Chavez,* 2000–NMCA–034, ¶ 24, 128 N.M. 768, 999 P.2d 412. The case was then remanded for an element-by-element analysis in order to determine the amount of duplicative recovery. *Id.*

{9} SED/USF & G contends that the Court of Appeals erred in requiring the application of the *Gutierrez* element-by-element analysis because subsection (C) of Section 52–5–17 has a different goal than subsections (A) and (B). SED/USF & G argue that the goal of Section 52–5–17(C) is the prevention of a worker's double recovery from his or her employer. SED/USF & G reasons that when a worker collects both workers' compensation benefits from his or her employer and uninsured motorist benefits from an insurance policy paid for by the employer, under Section 52–5–17(C) the worker must reimburse the employer the workers' compensation benefits paid on a dollar-for-dollar basis.

{10} We reject the argument that the concern of subsection (C) of Section 52–5–17 is substantively different than that of subsections (A) and (B) and conclude that the Court of Appeals was correct in requiring application of the *Gutierrez* element-by-element analysis in order to determine the amount of duplicative recovery. We reach this result on the basis of a brief review of the history of Section 52–5–17(C) and its predecessor, the purposes of the uninsured motorist statute, NMSA 1978, § 66–5–301 (1983), and the governing canons of statutory construction.

{11} New Mexico's first subrogation statute, 1929 N.M. Laws, ch. 113, § 24, created a right in employers to obtain reimbursement for workers' compensation benefits paid where the injured employee received compensation for his or her injuries in tort. As a successor of 1929 N.M. Laws, ch. 113, § 24, Section 52–5–17 maintained this right of employers and adopted language that is substantially similar to its predecessor.

{12} We first addressed the issue of whether the subrogation statute covered uninsured motorist benefits stemming from a policy paid for by an employer in *Continental Insurance Co. v. Fahey,* 106 N.M. 603, 747 P.2d 249 (1987). We held that a worker's receipt of uninsured motorist benefits was not the same as a recovery from a tortfeasor and was not covered by the subrogation statute. *Id.* at 606, 747 P.2d at 252. In reaching this result, we noted that granting a right of reimbursement to an employer where an injured employee has received uninsured motorist benefits would "penalize[ ] the insured for his or her providence in purchasing uninsured motorist coverage." *Id.*

{13} In response to our decision in *Continental Insurance,* the Legislature amended Section 52–5–17 to create a right of reimbursement in employers for workers' compensation benefits paid when the injured worker has received uninsured motorist benefits from a policy paid for by the employer. *See* § 52–5–17(C). The new subsection (C) provides:

> The worker or [the worker's] legal representative may retain any compensation due under the uninsured motorist coverage provided in Section 66–5–301 NMSA 1978 if the worker paid the premium for that coverage. If the employer paid the premium, the worker or [the worker's] legal representative may not retain any compensation due under Section 66–5–301 NMSA 1978, and that amount shall be due to the employer. For the purposes of this section, the employer shall not be deemed to pay the premium for uninsured motorist coverage in a lease arrangement in which the employer pays the worker an expense or mileage reimbursement amount that may include as one factor an allowance for insurance coverage.

The Legislature specifically exempted uninsured motorist policies purchased by employees from the subrogation statute so as to continue to encourage employees to purchase their own uninsured motorist coverage.

{14} In *Draper v. Mountain States Mutual Casualty Co.,* 116 N.M. 775, 867 P.2d 1157 (1994), we first examined the right of reimbursement created by Section 52–5–

17(C). Literal application of the terms of Section 52–5–17(C) would have yielded the nonsensical result that "the employer receive more money than it is paying its employee in workers' compensation benefits when it is the employee who suffered the injury." *Id.* at 778, 867 P.2d at 1160. It also would have placed Section 52–5–17 in conflict with the goals of the uninsured motorist statute, *see* § 66–5–301, under which "[t]he legislature intended that an injured person be compensated to the extent of insurance liability coverage purchased for his or her benefit." *Jimenez v. Foundation Reserve Ins. Co.,* 107 N.M. 322, 324, 757 P.2d 792, 794 (1988). Our holding rested on the consequences of literal application of Section 52–5–17(C) and two longstanding canons of statutory construction. First, "the intention of the lawmaker will prevail over the literal sense of the terms, and [the statute's] reason and intention will prevail over the strict letter." *Martinez v. Research Park, Inc.,* 75 N.M. 672, 677, 410 P.2d 200, 203 (1965), *overruled on other grounds by Lakeview Invs., Inc. v. Alamogordo Lake Village, Inc.,* 86 N.M. 151, 155, 520 P.2d 1096, 1100 (1974); *accord Roth v. Thompson,* 113 N.M. 331, 332, 825 P.2d 1241, 1242 (1992) ("The chief aim of statutory construction is to give effect to the intent of the legislature."). Second, we "read the act in its entirety and construe each part in connection with every other part to produce a harmonious whole." *State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). We held that "[t]he plain language of the post-*Continental Insurance* statute is evidence that the legislature intended to *prevent an employee's double recovery* from discrete and independent insurance coverage provided by the employer." *Draper,* 116 N.M. at 778, 867 P.2d at 1160 (emphasis added).

{15} After *Draper,* it is clear that the focus of all subsections of Section 52–5–17 is on preventing an employee's double recovery of benefits. Correspondingly, an employer is entitled to all monies that duplicate workers' compensation benefits paid. In order to prevent an employee's double recovery and provide an employer its due reimbursement, a court first must determine the amount of duplicative recovery. In *Gutierrez,* we held that an element-by-element comparison of the tort recovery received and the workers' compensation benefits received was the proper method for determining an employee's duplicative recovery. We agree with the Court of Appeals that the *Gutierrez* methodology is applicable to the receipt of uninsured motorist benefits under Section 52–5–17(C).

{16} Our decision to apply *Gutierrez* to uninsured motorist benefits under Section 52–5–17(C) is supported by reference to the aims of the uninsured motorist statute. Uninsured motorist statutes are designed to place the injured party in the same position he or she would have been in had the tortfeasor had liability coverage in an amount equal to the uninsured motorist protection purchased for the insured's benefit. *See Schmick v. State Farm Mut. Auto. Ins. Co.,* 103 N.M. 216, 219, 704 P.2d 1092, 1095 (1985). The dollar-for-dollar method of reimbursement urged by SED/USF & G would not put injured workers in the same position they would have been in had the tortfeasor had liability coverage in an amount equal to the uninsured motorist protection purchased for the insured's benefit. Application of the dollar-for-dollar method of reimbursement would yield the inevitable and illogical result that workers injured by tortfeasors who have insurance would receive more complete compensation than workers injured by tortfeasors who do not have insurance. This result would occur because workers injured by insured tortfeasors would only be required to reimburse employers the amount of duplicative recovery, while workers injured by uninsured tortfeasors would be required to reimburse employers on a dollar-for-dollar basis. Such a result cannot be reconciled with the aims of the uninsured motorist statute. Accordingly, we affirm the Court of Appeals' decision to apply *Gutierrez* to the receipt of uninsured motorist benefits.

III.

{17} Chavez argues that on appeal the Court of Appeals erred in holding he waived his challenge to the determination that he returned to work at a wage equal to or greater than his pre-injury wage. The

Court of Appeals, *Chavez*, 2000–NMCA–034, ¶ 27, 128 N.M. 768, 999 P.2d 412 based its holding on Chavez's failure to cite any evidence that supported the determination. *See* Rule 12–213(A)(3) NMRA 2000 ("A contention that a verdict, judgment, or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition[.]"). Based on the findings of fact in the compensation order, Chavez argues no evidence exists that could be cited in support of the determination. We do not find merit in Chavez's contention.

{18} Chavez testified that he receives $44.00 per hour for work performed using his tractor. Though the record is silent as to the percentage of Chavez's work that is performed using the tractor, this evidence could support the determination of the WCJ that Chavez had returned to work at a wage rate equal to or greater than his pre-injury wage rate. Chavez's failure to cite this evidence to the Court of Appeals provides an adequate ground for the decision by that Court to deem Chavez to have waived his challenge to the sufficiency of the evidence under Rule 12–213(A)(3). Rule 12–213(A)(3) is designed to promote judicial economy by requiring appellants challenging the sufficiency of the evidence to provide an appellate court with a summary of all relevant evidence instead of relying upon the court to review the record independently and prepare its own summary. Chavez has failed to comply with his obligation to present "the substance of the evidence bearing upon the proposition." *Id.* Accordingly, we affirm the Court of Appeals' decision to waive Chavez's challenge to the sufficiency of the evidence supporting the determination of the WCJ that Chavez returned to work at a wage equal to or greater than his pre-injury wage.

{19} Although we will not address the merits of Chavez's sufficiency of the evidence argument, we will address the more limited question of whether the findings of fact support the conclusion of law that Chavez's permanent partial disability rating is equal to his impairment rating because he returned to work at a wage equal to or greater than his pre-injury wage. *See Thompson v. H.B. Zachry Co.*, 75 N.M. 715, 716, 410 P.2d 740, 741–42 (1966) (stating that implicit in an argument that a conclusion of law is not supported by substantial evidence is a contention that the conclusion of law is not supported by the necessary finding of fact). A conclusion of law cannot be sustained unless it finds support in one or more findings of fact. *Id.* at 716, 410 P.2d at 742. Findings are sufficient if, taken together and construed in support of the judgment, they justify that judgment. *See H.T. Coker Constr. Co. v. Whitfield Transp., Inc.*, 85 N.M. 802, 804, 518 P.2d 782, 784 (Ct.App.1974). In this case, the ultimate findings do not support the conclusion of law and in fact conflict with that conclusion.

{20} The compensation order contains a finding that Chavez's average weekly wage was $226.21. Over the course of a fifty-two-week year, Chavez's yearly pre-injury wage would be $11,762.92. Chavez returned to work for his own small business sometime after August 1, 1995, performing yard work and landscaping. The WCJ found that Chavez had a gross income of $3137.00 in 1995 and a net income of $13.00. The WCJ further found that Chavez had a gross income of $4684.33 through September of 1996 and that while no net income had been calculated Chavez's 1996 expenses were estimated to be approximately the same as in 1995. Assuming Chavez's income over the last three months of 1996 to be proportionate to his income over the first nine months of 1996, Chavez would have had a gross income of $6245.77 in 1996 and a net income of $3121.77. Comparing Chavez's pre-injury yearly net income of $11,726.92 to his post-injury net income of $3121.77 in 1996, we do not understand how the WCJ reached the determination that Chavez's post-injury wage was equal to or greater than his pre-injury wage.

{21} Apart from these numbers, the WCJ noted her determination was based in significant part on the fact that Chavez's business was seasonal and that he was self-employed. Chavez's testimony at trial was that his business was steady from February through November and that it slowed some in the winter months of December and January. Even

assuming that the characterization of Chavez's business as seasonal is correct, it is unclear how the WCJ could have determined that Chavez had earned more than $8500 during his two-month slowdown.

{22} The findings of fact in the compensation order do not logically lead to, and in fact conflict with, the determination that Chavez returned to work at a wage equal to or greater than his pre-injury wage. We believe that when a determination is unsupported, justice requires a remand for entry of proper findings and conclusions. *See Prater v. Holloway,* 49 N.M. 353, 356, 164 P.2d 378, 380 (1945); *see also Kruskal v. Moss,* 1998–NMCA–073, ¶ 10, 125 N.M. 262, 960 P.2d 350 (stating that justice required a remand where "the trial court's findings and conclusions fail to adequately disclose how it arrived at its decision"). Accordingly, we affirm the Court of Appeals' holding that Chavez waived his right to challenge the wage rate determination by failing to cite facts that support the determination, but we vacate the compensation order containing that determination. We remand the matter for entry of amended findings and conclusions and an amended compensation order.

IV.

{23} The WCJ also ruled that Chavez was not entitled to have his attorney's fees paid in part by his employer because he had rejected SED/USF & G's pretrial offer of judgment, which the WCJ concluded was more favorable to Chavez than the results at trial. *See* NMSA 1978, § 52–1–54(F)(3) (1991). The Court of Appeals declined to reach the issue of whether SED/USF & G's offer of judgment was more or less favorable to Chavez than the results at trial because of its decision to remand the case for recalculation of SED/USF & G's right to reimbursement. We agree that the WCJ should reconsider the issue of attorney's fees on remand after recalculating the right to reimbursement. We therefore also affirm the Court of Appeals' holding on this issue.

V.

{24} Based on the foregoing analysis, we affirm the Court of Appeals on the issues of reimbursement, attorney's fees, and the sufficiency of the evidence challenge to the wage rate determination. We vacate the compensation order entered in this case, however, because the evidentiary findings of fact do not support, and in fact conflict with, the conclusion of law that Chavez returned to work at a wage equal to or greater than his pre-injury wage. We also vacate the subsequent orders detailing the amount of reimbursement and ruling on Chavez's petition for attorney's fees and sanctions. We remand the matter for determination of the amount of Chavez's duplicative recovery, reconsideration of whether Chavez returned to work at a wage equal to or greater than his pre-injury wage, as well as for reconsideration of his petition for attorney's fees, and entry of an amended order or orders. In reconsidering the attorney's fees issue, the WCJ should consider the efforts of Chavez's attorney on appeal. *See* § 52–1–54(I).

{25} **IT IS SO ORDERED.**

BACA, FRANCHINI, SERNA, and MAES, JJ., concur.

14 P.3d 538

2000-NMCA-103

STATE OF NEW MEXICO TAXATION & REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION, Respondent–Appellant,

v.

Joseph BARGAS, Petitioner–Appellee.

No. 20,236.

Court of Appeals of New Mexico.

Nov. 9, 2000.

Patricia A. Madrid, Attorney General, Judith Mellow, Special Assistant Attorney General, Santa Fe, NM, for Appellant.

Robert G. Marcotte, Albuquerque, NM, for Appellee.

OPINION

BUSTAMANTE, Judge.

{1} Joseph Bargas's driver's license was revoked pursuant to the Implied Consent Act, NMSA 1978, §§ 66–8–105 to –112 (1978, as amended through 1993) (the Act). The district court reversed, holding that the Motor Vehicle Division (MVD) did not hold the revocation hearing within ninety days as required by the Act. MVD appeals, arguing Bargas had waived the time limit. We hold that the ninety-day time limit of the Act is mandatory and cannot be waived. The judgment of the district court is affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

{2} Bargas was arrested for driving while intoxicated (DWI) on January 18, 1998. He was administered a breath test consisting of two samples. Each sample showed an alcohol concentration of .17. The arresting officer served Bargas with a notice of revocation under the Act on the day of arrest. Bargas requested a hearing within the ten days allowed him, and a hearing was set by MVD for April 8, 1998—eighty days after the notice of revocation. Bargas's attorney requested a continuance because of a scheduling conflict. As part of the request for continuance, he included the following language:

> I stipulate that the hearing officer at any new hearing may make the statutorily-required finding that the hearing has been held within 90 days of the date of notice of revocation and exclude that time which runs as a result of my requesting a continuance.
>
> I understand the hearing will be rescheduled at the earliest possible time, but I do not object and will not object, if the date of the hearing is more than 90 days from today, due to that delay caused by my requesting this continuance.

{3} On April 22, 1998, MVD scheduled another hearing for May 20, 1998. On May 4, 1998, Bargas requested another continuance, using the same language as above in his request. MVD rescheduled the hearing for May 22, 1998, which is 124 days after the date of the notice.

{4} During the May 22 hearing, Bargas's attorney cross-examined the arresting officer at length and made a number of objections for the administrative record. After an hour and forty-five minutes, the hearing officer interrupted the hearing and asked Bargas's attorney "if [he] want[ed] to wrap this up in

five minutes," stating he believed the hearing had run too long. Bargas's attorney replied he could not. The hearing officer then halted the hearing and rescheduled the matter for July 1, 1998, without objection from Bargas.

{5} The hearing reconvened on July 1. Immediately prior to the hearing, the Albuquerque Police Department notified the hearing officer that the arresting officer was sick and would not be available. The hearing officer informed Bargas and his attorney that the hearing would again be continued. At this point, Bargas's attorney objected, stating that continuing the hearing would carry it beyond ninety days without his consent. This objection was taken under advisement and the hearing was reset without a ruling on it.

{6} MVD reset the hearing for August 12, 1998. Bargas's attorney finished the examination and arguments that he had begun in May, while again arguing that because the hearing had occurred more than ninety days out, MVD had lost jurisdiction. The hearing officer again took all objections under advisement and overruled them in his final decision.

{7} MVD issued its findings on August 17, 1998. Finding No. 3 stated that "the hearing was held no later than ninety (90) days after the Notice of Revocation." In the notice of decision, the MVD hearing officer discussed at length his finding about Bargas's waiver of the ninety-day time period. The hearing officer found that Bargas's attorney was aware MVD hearings are scheduled for an hour and nevertheless went on for an hour and forty-five minutes. He also found that "but for counsel's continuances, the hearing would have been held within the 90 days." Further, the hearing officer found that "but for counsel's continuances, the officer's being ill on July 1 would not have required another delay."

DISCUSSION

Standard of Review

{8} Whether a driver can waive the statutory ninety-day limit for conducting a revocation hearing is a question of law which we consider de novo. *See Medrow v. State Taxation & Rev. Dep't*, 1998-NMCA-173, ¶ 6, 126 N.M. 332, 968 P.2d 1195; *cf. Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995).

Applicable Implied Consent Statutes

{9} The pertinent provisions of the Act controlling the conduct of license revocation hearings, Section 66-8-112(B), (C), (E), and (F), follow:

> B. Within ten days after receipt of notice of revocation pursuant to Subsection A of this section, a person whose license or privilege to drive is revoked or denied or the person's agent may request a hearing.... A date for the hearing shall be set by the department, if practical, within thirty days after receipt of notice of revocation....
>
> C. The department may postpone or continue any hearing on its own motion or upon application from the person and for good cause shown for a period not to exceed ninety days from the date of notice of revocation and provided that the department extends the validity of the temporary license for the period of the postponement or continuation.
>
> E. The hearing shall be limited to the issues:
>
> (1) whether the law enforcement officer had reasonable grounds to believe that the person had been driving a motor vehicle within this state while under the influence of intoxicating liquor;
>
> (2) whether the person was arrested;
>
> (3) whether this hearing is held no later than ninety days after notice of revocation; and either
>
> (4) (a) whether the person refused to submit to a test upon request of the law enforcement officer; and
>
> (b) whether the law enforcement officer advised that the failure to submit to a test could result in revocation of the person's privilege to drive; or
>
> (5) (a) whether the chemical test was administered pursuant to the provisions of the Implied Consent Act [66-8-105 to 66-8-112 NMSA 1978]; and

(b) the test results indicated an alcohol concentration of eight one-hundredths or more in the person's blood or breath if the person is twenty-one years of age or older or an alcohol concentration of two one-hundredths or more in the person's blood or breath if the person is less than twenty-one years of age.

F. The department shall enter an order sustaining the revocation or denial of the person's license or privilege to drive if the department finds that:

(1) the law enforcement officer had reasonable grounds to believe the driver was driving a motor vehicle while under the influence of intoxicating liquor or drug;

(2) the person was arrested;

(3) this hearing is held no later than ninety days after notice of revocation; and

(4) the person either refused to submit to the test upon request of the law enforcement officer after the law enforcement officer advised him that his failure to submit to the test could result in the revocation of his privilege to drive or that a chemical test was administered pursuant to the provisions of the Implied Consent Act and the test results indicated an alcohol concentration of eight one-hundredths or more if the person is twenty-one years of age or older or an alcohol concentration of two one-hundredths or more if the person is less than twenty-one years of age.

If one or more of the elements set forth in Paragraphs (1) through (4) of this subsection are not found by the department, the person's license shall not be revoked.

{10} The revocation hearing is expressly limited to specific issues. *See* § 66–8–112(E). After a notice of revocation is issued to a motorist, MVD is allowed thirty days within which to set a hearing. *See* § 66–8–112(B). The thirty-day requirement is modified by the practicality of granting a setting in that period. *See Rodarte v. State Taxation & Rev. Dep't,* 120 N.M. 229, 231, 900 P.2d 978, 980 (Ct.App.1995) (clarifying that the words "if practical" modify "shall" in requirement of setting prompt hearing). We do not believe this flexibility extends to the requirement of holding the hearing within ninety days.

{11} "Where a statute is clear and unambiguous, it must be applied as written." *Id.* The provisions concerning the timing of the revocation hearing are clear and emphatic. MVD is only allowed to extend the time for a hearing to a date within ninety days of the date of the notice. *See* § 66–8–112(C). That the hearing is held within ninety days is an issue required to be proven in the revocation hearing itself. *See* § 66–8–112(E)(3). Furthermore, Section 66–8–112(F)(3) requires that any revocation be based on a finding that the hearing was held within ninety days of the notice of revocation. Not only is the finding required, but "[i]f one or more of the elements set forth in Paragraphs (1) through (4) [of Section 66–8–112(F)] are not found by [MVD], the person's license shall not be revoked." Section 66–8–112(F). The Act is clear that the revocation must be held within ninety days, and if it is not, MVD cannot revoke the motorist's license to drive. MVD argues that the strictures of the Act can be avoided by a valid driver waiver. We disagree.

{12} In *Weber v. Department of Motor Vehicles,* 112 N.M. 697, 699–700, 818 P.2d 1221, 1223–24 (Ct.App.1991), we held that the time limit is mandatory and cannot be extended by MVD of its own volition for its convenience. Characterizing the ninety-day rule as rigid, we noted that "[s]ubsection C requires [MVD] to get its work done, but for the final decision, within ninety days. Subsection F assures compliance with the subsection C rule...." *Id.* at 699, 818 P.2d at 1223.

{13} We have addressed driver waiver of the ninety-day limit twice, though we have never had the issue squarely before us. In *Weber,* for purposes of argument, we assumed without deciding that a driver could waive the limit. We did not test our assumption in *Weber* because we found no indication as a matter of fact that the driver intended or attempted to waive the limit.

{14} We addressed driver waiver in a different context in *Dente v. State Taxation & Rev. Dep't*, 1997–NMCA–099, 124 N.M. 93, 946 P.2d 1104. In *Dente*, the driver appealed the revocation of his license, raising primarily due process arguments. As an alternative, the driver sought to limit the effectiveness of what we characterized as a "full, express, and unconditional waiver of the ninety-day time period." *Id.* ¶ 13. Without citation to authority-clearly assuming that motorist waivers can be effective-we rejected the driver's "after-the-fact attempt" to limit his actions in waiving the ninety-day time frame.

{15} Faced with the question directly, we hold that drivers may not waive the time limits of the Act. To the extent *Weber* and *Dente* indicate otherwise, they are overruled. We base our decision on the language of the Act and the remedial aim of the legislature manifest in the design of the Act.

{16} As we have already noted, the language of the Act is clear and unambiguous. It requires the hearing to be held within ninety days from the notice of revocation. This provision by itself would not necessarily rule out driver waiver. When combined with the requirement that MVD make a finding of fact that the hearing was held within ninety days, driver waiver becomes problematic. When the statutory limitation of Section 66–8–112(F) that a "person's license shall not be revoked" if one or more of the factual findings required is not found by MVD is factored in, the notion of driver waiver becomes untenable.

{17} First, if the time for hearing is extended beyond ninety days, a clear requirement of the Act is necessarily not met. Second, and more importantly, if continuances are granted beyond ninety days, the MVD hearing officer cannot accurately record the procedural history of the case and still comply with the Act. In fact, as here, to meet the specific statutory requirements of Section 66–8–112(F)(3) the hearing officer must record a fiction. This practice is reminiscent of the erstwhile practice of "stopping the clock" just before the end of the constitutionally-mandated legislative session. *See Dillon v. King*, 87 N.M. 79, 85, 529 P.2d 745, 751 (1974) (disapproving of the practice and noting that the constitutional time frame for legislative sessions limits the time during which the legislature may meet and exercise law-making authority).

{18} Similarly, the ninety-day limit for holding hearings is a limit on MVD's power and authority to act to revoke a driver's license. Allowing extension of the ninety-day limit on the basis of a driver's waiver has the effect of expanding the time MVD may exercise authority beyond that clearly set by the Act. We previously explained in *Weber* why MVD cannot extend the time for its own convenience. *See Weber*, 112 N.M. at 698–99, 818 P.2d at 1222–23. The same provisions and considerations apply to disallow extensions at the request or with the acquiescence of a driver.

{19} Finally, extensions do not further the remedial aims of the Act. The New Mexico legislature established "a summary administrative proceeding designed to handle license revocation matters quickly." *State v. Bishop*, 113 N.M. 732, 735, 832 P.2d 793, 796 (Ct.App.1992). Our Supreme Court has noted that "[s]pecific to the New Mexico Implied Consent Act are certain provisions designed to promote efficiency" including limiting the findings of the hearing to five issues, one of which is whether the hearing is held within ninety days. *In re Suazo*, 117 N.M. 785, 788–89, 877 P.2d 1088, 1091–92 (1994). "To make it possible for the MVD to conduct the numerous necessary hearings within the time constraints of the Implied Consent Act, the legislature could reasonably decide to limit the issues to be considered at such a hearing." *Bierner v. State Taxation & Rev. Dep't*, 113 N.M. 696, 699, 831 P.2d 995, 998 (Ct.App.1992).

{20} The statutory scheme places great importance on the time limit for holding the revocation hearing. We found the language of Section 66–8–112 "compelling," noting that "license-revocation proceedings are intended to be greatly expedited" and that "[t]he purpose of this speed is to protect the public by promptly removing from the highways those who drive while intoxicated." *Bierner*, 113 N.M. at 699, 831 P.2d at 998; *see also Weber*, 112 N.M. at 699, 818 P.2d at 1223. Indeed, as stated in *Bierner*, the promptness of the

administrative license revocation scheme in removing drivers from the highways has been held to be an essential characteristic of the "remedial" nature of the Act, *e.g.*, " '[t]he summary suspension scheme serves the rational remedial purpose of protecting public safety by quickly removing potentially dangerous drivers from the roads.' " *State ex rel. Schwartz v. Kennedy,* 120 N.M. 619, 632–33, 904 P.2d 1044, 1057–58 (1995) (quoting *State v. Strong,* 158 Vt. 56, 605 A.2d 510, 513 (1992)).

{21} We are fully aware that enforcing the rigid deadlines of the Act may pose difficulties for MVD and driver alike. Entirely aside from cynical manipulation of the time limits, there are occasions when rigid time frames simply cannot be met. In some cases this may result in dismissal of proceedings when revocation is appropriate. At other times, it may mean revocation when a driver has a legitimate defense. These failures are inevitable when rigidity and expedition are chosen over reasonable discretion. Given the structure of the Act, however, we as a court are bound and the solution, if one is required, lies with the legislature.

CONCLUSION

{22} The judgment of the district court is affirmed.

{23} **IT IS SO ORDERED.**

SUTIN and KENNEDY, JJ., concur.

14 P.3d 1282

2000-NMSC-038

STATE of New Mexico, Plaintiff–Appellee,

v.

Paul Richard LASNER, Defendant–Appellant.

No. 25,391.

Supreme Court of New Mexico.

Dec. 7, 2000.

Phyllis H. Subin, Chief Public Defender, Nancy M. Hewitt, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

Patricia A. Madrid, Attorney General, Arthur W. Pepin, Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

MAES, Justice.

{1} This is an appeal under Article VI, § 2 of the New Mexico Constitution of the convictions of Paul Lasner for one count of first degree murder of Johnny Joe Lucero, contrary to NMSA 1978, § 30–2–1(A) (1994), one count of aggravated battery on German Ibarra, and one count of aggravated battery on Noe Torres, contrary to NMSA 1978, § 30–3–5(C) (1969). The Defendant sets forth

three grounds on which he asks this Court to reverse his convictions. First, he argues the trial court erred in not suppressing statements the Defendant made to police following his apprehension shortly after the shooting of the victims. Second, he argues his constitutional right to confront witnesses against him was violated when the trial court limited his cross-examination of Ibarra and Torres concerning their criminal records. Third, he argues the trial court erred in denying his motion for change of venue. We affirm the Defendant's convictions.

PRELIMINARY FACTS

{2} A shooting occurred in the early morning hours of August 6, 1997 on Chama Street in Clovis, New Mexico. Injured in the shooting were Johnny Joe Lucero, German Ibarra, and Noe Torres. Lucero died later of the wounds he received. On the evening of August 5, Augustine Gonzales went to a house on Chama Street looking for his cousin. There, he testified, he was badly beaten by several individuals with boards. In response, Gonzales left to get his friend, the Defendant, and they returned with two others to the house on Chama Street sometime around midnight. Gonzales was driving and the Defendant was in the back seat of the vehicle behind the driver's seat. When they arrived at the house, Gonzales honked the car horn and four or five individuals ran out from the backyard. Gonzales heard a gunshot coming from the back of his car and saw sparks. He believed the Defendant had fired a shotgun. Lucero, Ibarra, and Torres were struck by the blast.

{3} The Defendant became a suspect in the shooting. At approximately 3:00 a.m., the Defendant was located at his girlfriend's house, and was transported to the police station where he was taken to the office of Detective Sergeant Doug Miller. The Defendant was handcuffed. Miller, who was alone with Defendant throughout the interview, testified that the Defendant was awake and alert and that he read the Defendant his rights from a form. Miller stated that he uses more than one type of form—he has one for adults, one for juveniles (the Defendant was 17 years old), and one in Spanish. He tries to use the correct form, but he did not use a juvenile form for the Defendant, nor was the Defendant informed of his right to have his mother present during questioning. Miller said his usual procedure is to read the rights line by line, and ask the suspect whether he understands each line. The Defendant stated he had completed eleventh grade and was specifically asked whether he agreed to give up his rights and talk to the Detective. Detective Miller testified that the Defendant indicated that he understood his rights and was willing to cooperate. Miller then had the Defendant sign a waiver of his rights.

{4} The Detective then turned on a tape recorder and began to read the Defendant his rights again. The Defendant's responses are clear until he was asked whether he was willing to make a statement, at which time the Defendant seems to mumble. The tape is then turned off, because, Miller testified, there was a knock on the door and another detective came in to ask him a question. When the taping was resumed, the Defendant admitted to the shooting. At no time during the interrogation of the Defendant was his mother or attorney present. Later it was shown that the Defendant had been involved in juvenile criminal matters previously.

{5} Before trial, the State filed motions in limine to prevent the Defendant from cross-examining witnesses Ibarra and Torres as to certain of their past crimes. The Defendant filed a motion to suppress his statements to the police and a motion for change of venue, both of which were denied.

SUPPRESSION OF STATEMENTS TO POLICE

{6} The Defendant claims that he was not accorded his Fifth Amendment right against self-incrimination in giving his confession to police. Specifically, under *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the police must advise one under custodial interrogation "that he has a right to remain silent, that any

statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Before proceeding to question the individual, the police must obtain a knowing, intelligent, and voluntary waiver of these rights. *Id.* When a Defendant attempts to suppress a statement given to the police, the State bears the burden of demonstrating by a preponderance of the evidence that the Defendant knowingly, intelligently, and voluntarily waived his rights against self-incrimination. *State v. Martinez,* 1999–NMSC–018, ¶ 14, 127 N.M. 207, 979 P.2d 718. The reviewing court must evaluate the totality of the circumstances, including the mental and physical condition, background, experience and conduct of the accused, as well as the conduct of the police, in determining whether the State has successfully carried its burden. *Id.* (quoting *State v. Salazar,* 1997–NMSC–044, ¶ 62, 123 N.M. 778, 945 P.2d 996). The test for reviewing a juvenile's waiver of rights is identical to that of an adult's and is based on the totality of the circumstances. *Fare v. Michael C.,* 442 U.S. 707, 724–25, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979).[1] In *Martinez* we noted that the legal question of whether or not a "valid waiver of Fifth Amendment rights" has occurred is reviewed de novo. *Martinez,* 1999–NMSC–018, ¶ 15, 127 N.M. 207, 979 P.2d 718,.

{7} The Defendant first argues generally that the rights guaranteed under the Children's Code, NMSA 1978, § 32A–2–14(E) (1993), must apply because at the time he made his statements to Detective Miller, he was a juvenile and had not yet been charged with any crime which would qualify him as a serious youthful offender because Lucero had not yet died. *See* NMSA 1978, § 32A–2–3(H) (1996) (" '[S]erious youthful offender' means an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder.") In *Martinez* we applied the provisions of Section 32A–2–14(E) to an interrogation conducted before Martinez had been charged or indicted for first degree murder. *Martinez,* 1999–NMSC–018, ¶ 17, 127 N.M. 207, 979 P.2d 718. Thus, we examine the Defendant's waiver of his constitutional rights under Section 32A–2–14(E). *Id.* In both *State v. Niewiadowski,* 120 N.M. 361, 365, 901 P.2d 779, 783 (Ct.App.1995) and *State v. Setser,* 1997–NMSC–004, ¶ 13, 122 N.M. 794, 932 P.2d 484, the defendants were sixteen years old at the time of their interviews, but were subsequently tried for murder as adults. The Court of Appeals and this Court, respectively, in *Niewiadowski,* 120 N.M. at 366, 901 P.2d at 784, and *Setser,* 1997–NMSC–004, ¶ 13, 122 N.M. 794, 932 P.2d 484, utilized the Children's Code, Section 32A–2–14(E), to determine whether their statements were voluntary and therefore admissible. That section provides:

> In determining whether the child knowingly, intelligently and voluntarily waived the child's rights, the court shall consider the following factors:
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> (1) the age and education of the respondent;
>
> (2) whether or not the respondent is in custody;
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> (3) the manner in which the respondent was advised of his rights;
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> (4) the length of questioning and circumstances under which the respondent was questioned;
>
> (5) the condition of the quarters where the respondent was being kept at the time he was questioned;
>
> (6) the time of day and the treatment of the respondent at the time that he was questioned;
>
> (7) the mental and physical condition of the respondent at the time that he was questioned; and

1. The Defendant does not specifically claim that the New Mexico Constitution should be interpreted more liberally than the federal constitution and applied to this case, *see* N.M. Const. art. II, § 15; we therefore discuss his self-incrimination claims as arising under the federal constitution. *See State v. Gomez,* 1997–NMSC–006, ¶¶ 22 23, 122 N.M. 777, 932 P.2d 1 (discussing preservation requirements for a claim based on state constitutional law); *see also State v. Woodruff,* 1997–NMSC–061, ¶ 11, 124 N.M. 388, 951 P.2d 605 (same).

(8) whether or not the respondent had the counsel of an attorney, friends or relatives at the time of being questioned.

In *Martinez* we summarized this list as a codification of the totality-of-the-circumstances test. *Martinez,* 1999–NMSC–018, ¶ 18, 127 N.M. 207, 979 P.2d 718. We examine the totality of the circumstances to determine whether the Defendant knowingly, intelligently, and voluntarily waived his constitutional rights "giving particular emphasis to the factors listed" in the statute. *Id.*

{8} On this basis, we analyze the Defendant's specific complaints about the circumstances of his giving his waiver. He emphasizes that he was a minor, that a special form used to advise juveniles of their rights was not used in his case, that he was not informed that he may have had the right to have a parent present during questioning, that the interrogation took place at approximately 3:00 a.m. in a police station while he was in handcuffs, and that the tape recorder was turned off at a point during the interrogation when he might have vacillated in understanding or waiving his rights.

{9} The Defendant, who was associated with gangs, had numerous previous contacts with law enforcement. In view of his previous experience with the court system and the fact that he had been questioned by police officers and represented by attorneys in the past, a minor such as the Defendant was capable of a knowing, intelligent, and voluntary waiver. *Id.* ¶ 24. In any event, regardless of his previous experience with law enforcement, "[a]t the time of questioning, [the defendant] was seventeen and a half years of age and was, thus, old enough to comprehend *Miranda* warnings and the consequences of waiving his rights." *Id.* ¶ 22 (citing *State v. Jonathan M.,* 109 N.M. 789, 791, 791 P.2d 64, 66 (1990)); *Cf. Setser*, 1997–NMSC–004, ¶ 14, 122 N.M. 794, 932 P.2d 484 (holding that although the defendant had some cognitive disabilities, there was no evidence that she lacked sufficient intelligence to understand her rights and the repercussions of waiving those rights).

{10} It is also well-established that "the question whether the accused waived his rights 'is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.'" *Fare,* 442 U.S. at 724, 99 S.Ct. 2560 (quoting *North Carolina v. Butler,* 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979) (emphasis added)).[2] There is a complete lack of evidence to the effect that the Defendant needed to be provided with a special form in order to understand his rights or knowingly waive them. The evidence rather suggests convincingly that the Defendant was told of each of his rights and that he understood them, and further, that his waiver was knowing, intelligent, and voluntary.

{11} The only potential defect in the procedure used in the Defendant's case is that a parent was not present at his interrogation. It appears that during this time, his mother knew he was in trouble with the police and was attempting to contact an attorney. In any event, as was emphasized in *Martinez,* 1999–NMSC–018, ¶ 20, 127 N.M. 207, 979 P.2d 718, the "Legislature has not established a requirement that parents be notified about a custodial interrogation of their juvenile child." In view of the Defendant's age and eleventh-grade education, his alert condition at the time of the interrogation, and the manner in which his rights were explained to him, we conclude that he was more likely than not to understand and knowingly waive them, even without his parent present. *See Id.* ¶ 23 (citing *Conner v. State,* 334 Ark. 457, 982 S.W.2d 655, 660 (1998)).

{12} The Defendant recites the fact that the interrogation took place at 3:00 a.m. as a fact mitigating the validity of the waiver, but there is no allegation of anything connected with the lateness of the hour which would give it meaning as a fact detracting from voluntariness. In *State v. Hallman,* 391

2. *But see People v. Rivera,* 41 Cal.3d 388, 221 Cal.Rptr. 562, 710 P.2d 362, 366 (1985) (discussing California's divergence from *Fare* on state constitutional grounds).

N.W.2d 191, 196 (S.D.1986), the South Dakota Supreme Court was troubled by the extensive questioning of a defendant from 10:30 p.m. until 3:00 a.m., but relied on substantial evidence that the defendant "displayed few signs of weariness, never complained or expressed discomfort, and never indicated a wish or desire to terminate the interrogation." Additionally, *State v. Evans,* 701 S.W.2d 569, 575–76 (Mo.Ct.App.1985), involved a 3:00 a.m. arrest and a confession given after the defendant had been given his rights. The court said, "[w]e find no coercion or impaired mental state existing at the time the defendant made the inculpatory statements." *Id.* at 576. Also, in *Russell v. State,* 739 So.2d 58, 67 (Ala.Crim.App.1999), as here, "[t]here was no evidence whatsoever regarding the [effects] of the late hour on [defendant's] free will to give a statement. There was no evidence suggesting that [defendant] was fatigued, that his will was overborne, or that he was sleepy at the time of the interrogation." The Defendant here was awake and alert at the time he was questioned, and does not set out any factors applying to him which might be associated with the mere lateness of the hour so as to contribute to the asserted involuntariness of his statement. *State v. Davis,* 98 Or.App. 752, 780 P.2d 807, 808 (1989) ("[A]lthough the hour of the interrogation was late [2:00 a.m.], it was not coercive in the sense that, combined with the other circumstances, it resulted in defendant's will being overborne.").

{13} The Defendant also points to the taping of his statement made by Detective Miller where, at the time he is asked whether he would be willing to make a statement, he utters something unintelligible but according to the testimony of the detective, nods his head up and down. We note that, in general, statements made to the police while in custody need not be tape-recorded in order to be admissible. *See United States v. Short,* 947 F.2d 1445, 1451 (10th Cir.1991); *State v. Rhoades,* 120 Idaho 795, 820 P.2d 665, 674–75 (1991). Once again in this instance, there is no evidence that affirmatively establishes any fact in favor of the Defendant's proposition that he demonstrated the lack of a desire to speak. There is merely the suggestion that for some reason, the Defendant's confession might have been involuntary. The Defendant has confronted the totality of the circumstances test with various facts surrounding the giving of his statement, and claims that these, considered together, carry through to conclusiveness the presumption against waiver. *See State v. Boeglin,* 100 N.M. 127, 132, 666 P.2d 1274, 1279 (Ct.App. 1983) ("On appeal, there is a presumption against waiver of a constitutional right."). The facts marshaled by the Defendant, however, when examined in the light of the controlling law, do not vindicate his claim.

{14} In conclusion, we have considered the specific factual points raised by the Defendant using a totality of the circumstances analysis and bearing in mind the factors in Section § 32A–2–14(E). We find that although the interrogation took place at a police station while the Defendant was in handcuffs, the effect on voluntariness of other factors suggested by the Defendant was superficial. The motion to suppress the Defendant's statement was therefore properly denied.

EXCLUSION OF EVIDENCE CONCERNING IBARRA AND TORRES

{15} The defense theory of this case is that it involved, in part, the conflicting accounts of the witnesses Ibarra, Torres and Gonzales concerning what occurred on Chama Street earlier on the evening of August 5, 1997 and at the time of the shooting. The defense considered impeachment of these witnesses to be crucial. On cross-examination, Defendant attempted to impeach them on specific instances of conduct from their juvenile records. Although a prior shoplifting charge of Gonzales was put in evidence, the Defendant's right to cross-examine the other two witnesses, Ibarra and Torres, was restricted by the trial court. The Defendant alleges the restrictions rose to the level of denial of his constitutional rights. The Defendant alleges a violation of his constitutional right to confront witnesses against him under the Sixth and the Fourteenth Amend-

ments to the federal constitution. *See State v. Sanders,* 117 N.M. 452, 459, 872 P.2d 870, 877 (1994) (discussing a defendant's constitutional right to cross-examine); *see also State v. Lopez,* 1996–NMCA–101, ¶ 14, 122 N.M. 459, 926 P.2d 784 (examining state and federal constitutional right to cross-examine). Defendant failed to preserve his state constitutional claim. The State argues that these restrictions were proper under the rules of evidence and the federal constitution.

{16} The State contends that these exclusions of evidence should be reviewed for abuse of discretion. The Defendant questions the correct standard of review, alleging that a constitutional error occurred and therefore de novo review is indicated. Alternatively, the Defendant contends the restrictions on cross-examination were an abuse of discretion. We initially review whether or not the trial court has abused its discretion in its evidentiary rulings. *See State v. Worley,* 100 N.M. 720, 723, 676 P.2d 247, 250 (1984) (holding that admission or exclusion of evidence is within discretion of trial court and that such determination will not be disturbed on appeal in the absence of clear abuse of discretion); *see also State v. Brown,* 1998–NMSC–037, ¶ 25, 126 N.M. 338, 969 P.2d 313 (noting abuse of discretion is standard of review for limitations on cross-examination). A trial court abuses its discretion when a ruling is "clearly against the logic and effect of the facts and circumstances of the case." *State v. Simonson,* 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983).

{17} Ibarra and Torres testified that only one shot was fired from the car which pulled up to the house where the beating had occurred earlier. They testified that no gun had been fired from the house and that no one else at the scene was armed. There was also evidence from Gonzales and two neighbors that only one shot was fired.

{18} In response to the State's Motion in Limine to prohibit the defense from inquiring into the juvenile records of Ibarra, Torres and Gonzales, the defense argued that the witnesses' records should be allowed in evidence as bad acts under Rule 11–608(B)(1) NMRA 2000 or alternatively as convictions under Rule 11–609(D) NMRA 2000, concerning prior adjudications. The State argued and the trial court found Rule 11–609(D), concerning admission of juvenile adjudications, to be the applicable rule. We agree. Rule 11–609(D) provides:

> Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

The rule sets out hurdles the defense would have had to overcome before admission of the evidence in question would have been proper. First, the evidence would have to be necessary for a fair determination of guilt or innocence. Second, the evidence would have to be admissible to attack the credibility of an adult, under subsection (A) of Rule 609. That subsection provides:

> For the purpose of attacking the credibility of a witness:
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 11–403, if the crime was punishable by death or imprisonment in excess of one (1) year under the law under which the witness was convicted. . . .
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

{19} Ibarra was twenty years old at the time of trial. Ibarra had previous juvenile adjudications for criminal damage, no insurance, no driver's license, defective equipment, resisting arrest, minor in possession of alcohol, battery on a police officer, concealing identity, resisting or eluding a police officer, and escape from custody. It is undisputed

that all the crimes in question are misdemeanors, except battery on a peace officer. Thus, the misdemeanors cannot be admitted under Rule 609(A)(1).

{20} Under subsections (D) and (A)(2) of Rule 609, read together, evidence of a witness' convictions must be analyzed for its dishonesty or false statements. That is, it must be determined whether any of the crimes could be used to attack the credibility of an adult under subsection (A)(2). The New Mexico approach to what constitutes "dishonesty or false statement" follows the federal approach. *State v. Bobbin,* 103 N.M. 375, 381, 707 P.2d 1185, 1191 (Ct.App.1985) (allowing impeachment with crimes of dishonesty or false statement or crimes committed through fraud or deceit); *see generally,* Christopher B. Mueller and Laird C. Kirkpatrick, 3 *Federal Evidence* § 277, at 258–69 (2d ed.1994).

{21} Of Ibarra's three crimes brought in issue by the Defendant, only the crime of concealing his identity involves dishonesty or false statement. The trial court here had two opportunities to exclude the evidence—under Rule 11–403 NMRA 2000 as applied to Rule 11–609 subsection (A)(2)and Subsection (D). *See Lenz v. Chalamidas,* 109 N.M. 113, 117, 782 P.2d 85, 89 (1989). Exclusion of the evidence was not an abuse of discretion.

{22} The Defendant also seeks review of the trial court's rulings on the admissibility of the prior adjudications of witness Torres. When Torres testified at trial, the Defendant asked to be allowed to cross examine him about juvenile offenses, including a 1995 probation violation for possession of a deadly weapon, as well as prior shoplifting and larceny charges. The court allowed Torres to be examined about the shoplifting offense and the larceny, but refused to allow questions about his possession of a firearm in 1995. During a bench conference, defense counsel asked to be allowed to introduce evidence of Torres' juvenile crime of violation of probation due to possession of a firearm, and another crime not here in issue, in order to prove the Defendant's theory of self-defense.

{23} The Defendant now argues that the evidence of probation violation was admissible under Rule 404(B) NMRA 2000, which provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

This is a rule of inclusion allowing the use of other bad acts for other reasons. *See State v. Williams,* 117 N.M. 551, 557, 874 P.2d 12, 18 (1994). The Defendant argued that possession of a gun by Torres on another date was relevant to the Defendant's claim of self-defense. The trial court ruled that even if the evidence were relevant, Torres' probation revocation for possession of a gun was not admissible under Rule 11–403 because its potential prejudice outweighed its probative value. We conclude that this was a proper exercise of the trial court's discretion.

{24} Next we discuss the Defendant's claim under the federal constitution. The Defendant argues that the trial court's refusal to allow him to cross-examine these complaining witnesses concerning certain of their prior juvenile adjudications effectively denied him due process of law and the right to confront witnesses against him. *See* U.S. Const. amends. VI, XIV; *see also Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (stating that an accused has the right to confront witnesses against him and to cross-examine those witnesses regarding possible bias). We review this claim under a de novo standard. *State v. Martinez,* 1996–NMCA–109, ¶ 14, 122 N.M. 476, 927 P.2d 31 ("While the scope of cross-examination usually lies within the sound discretion of the district court, Confrontation Clause claims are issues of law that we review de novo.") "A defendant's right of confrontation—with its protection of the right to cross-examine, test credibility, detect bias, and otherwise challenge an opposing version of facts—is a critical limitation

on the trial court's discretion to exclude evidence a defendant wishes to admit." *State v. Johnson,* 1997–NMSC–036, ¶ 23, 123 N.M. 640, 944 P.2d 869 (balancing a defendant's constitutional rights to a full and fair defense with the State's interest to determine whether exclusion of evidence under rape shield law is constitutional). We acknowledge "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (internal quotations omitted). The Defendant sought to inquire into the witnesses' past adjudications, concerning acts not bearing on honesty. These adjudications were tangential and had little bearing on the truthfulness of the witnesses, but the potential prejudice to the state was great. *See State v. Meadors,* 121 N.M. 38, 48, 908 P.2d 731, 741 (holding that a portion of defendant's cross-examination was properly excluded because its potential for unfair prejudice was greater than its slight or nonexistent probative value). We conclude that the trial court's limitations on the Defendant's cross-examinations were proper and not a violation of the Defendant's constitutional rights.

CHANGE OF VENUE

{25} Defense counsel filed a motion for change of venue asserting that the Defendant was not able to obtain a fair trial in either Curry, Roosevelt, or De Baca Counties due to pre-trial publicity through television, radio, and newspapers. The Defendant presented eleven newspaper articles for the record. Also, the District Attorney had made a comment to the media. The State opposed the motion arguing that there had been no showing of prejudice. During jury selection, fifty-eight prospective jurors were called. Thirty-six members of the venire were subjected to individual voir dire in chambers. At least thirteen of the prospective jurors had heard details of the case. The trial court allowed defense counsel to challenge for cause all of the individuals he wanted to excuse because of their exposure to the case. Defense motions for change of venue, made both before and after the jury was selected, were denied.

{26} The standard of review on a ruling regarding a motion for change of venue is whether or not the trial court abused its discretion. *See State v. House,* 1999–NMSC–014, ¶ 31, 127 N.M. 151, 978 P.2d 967 ("Under our venue statutes, those changes of venue that are not mandatory take place at the discretion of the trial court."); *see also State v. Hargrove,* 108 N.M. 233, 239, 771 P.2d 166, 172 (1989) (holding a trial court's refusal to grant a change of venue will be reviewed for abuse of discretion). The Defendant's argument for change of venue is based on the requirement of the New Mexico constitution that an accused be tried before "an impartial jury of the county or district in which the offense is alleged to have been committed." N.M. Const. art. II, § 14. NMSA 1978, § 30–1–14 (1963) provides "trials of crime shall be had in the county in which they were committed" and where death results, in the county in which the death occurred. The Defendant argues that public excitement or local prejudice prevented him from obtaining an impartial jury. In support of this argument the Defendant cites *State v. Alaniz,* 55 N.M. 312, 318, 232 P.2d 982, 986 (1951), which held "it is sufficient to show a reasonable apprehension that the defendant will not secure a fair and impartial trial." The Defendant also argues that "it is not necessary that the party moving for change of venue conclusively prove that it is impossible to have a fair trial." Defendant contends he may merely "demonstrate a reasonable apprehension that he will not obtain a fair trial." In *House,* 1999–NMSC–014, ¶ 43, 127 N.M. 151, 978 P.2d 967, we concluded that if the motion for change of venue is opposed the moving party has the burden of establishing through "*clear and convincing evidence* that a fair trial in that district is a practical impossibility." (Emphasis in original.) "Potential jurors' exposure to pre-trial publicity, by itself, does not require a change of venue and does not raise a presumption of prejudice." *State v. Hernandez,* 115 N.M. 6,

21, 846 P.2d 312, 327 (1993); *see also House,* 1999–NMSC–014, ¶ 43, 127 N.M. 151, 978 P.2d 967.

{27} *State v. Hernandez,* 115 N.M. 6, 21, 846 P.2d 312, 327 (1993) is closely on point. The *Hernandez* Court found that the defendant "did not introduce evidence that he was deprived of a fair and impartial jury." *Id.* Hernandez, like the Defendant here, "was able to question" those jurors who had heard about the case and "was able to challenge those who indicated partiality." *Id.* at 22, 846 P.2d at 328. The Defendant did not prove the "practical impossibility" of a fair trial by clear and convincing evidence. *House,* 1999–NMSC–014, ¶ 43, 127 N.M. 151, 978 P.2d 967. We will affirm a determination of venue if the trial court, in exercising its discretion, was "guided by law, caution, and prudence." *Alaniz* at 318, 232 P.2d at 985. The trial court, which has wide latitude in such decisions, did not abuse its discretion in denying the Defendant's motions for change of venue. *House,* 1999–NMSC–014, ¶ 111, 127 N.M. 151, 978 P.2d 967.

CONCLUSION

{28} We conclude that the trial court committed no error on the points raised by the Defendant on appeal. Looking at the totality of the circumstances, it was proper for the trial court to deny the Defendant's motion to suppress his statements to police. There was no abuse of discretion in the trial court's decision to exclude the evidence of the past crimes of Ibarra or Torres, nor in its decision to deny the Defendant's motion for change of venue. The judgment of the trial court is therefore affirmed.

{29} **IT IS SO ORDERED.**

MINZNER, C.J., BACA, FRANCHINI, and SERNA, JJ., concur.

[redacted]