SUPREME COURT
STATE OF NEW MEXICO
COMMEMORATIVE
APPELLATE OPINIONS

VOLUME 7

JUSTICE PATRICIO M. SERNA

1997–2012

FOREWORD

By Judge James J. Wechsler (ret.)
New Mexico Court of Appeals (1994-2017)

Born and raised as one of eight children in Reserve, New Mexico, Justice Patricio Serna's humble roots and New Mexico values shaped his life, including his approach to the law.

In the years before his election to the Supreme Court in 1996, Justice Serna developed a passion for justice and the law as he worked as a young probation and parole officer after discharge from the U.S. Army. He subsequently received his law degree from the University of Denver School of Law, serving as note editor of the law review, and a Master of Laws degree from Harvard University. His passion for justice and the law expanded as he pursued government service in Washington, D.C. and in New Mexico as deputy attorney general. It flourished in private practice and in the eleven years he served on the First Judicial District Court, hearing criminal, civil, and family dockets.

Justice Serna's background inevitably led him to understand the law as the fabric binding our personal, familial, business, and governmental interactions that, when properly applied, would advance societal interests. He strived to apply the law fairly and equitably, and, consistent with his roots, compassionately.

State v. Clark, 1999-NMSC-035, perhaps best reflects Justice Serna's unwavering respect for the law. In that highly-controversial case, Clark appealed his death sentence. No one had been executed in New Mexico in the twenty years the law in question had been in effect. Concomitant with his respect for the law, Justice Serna had the courage to enforce it. Although the death penalty was contrary to Justice Serna's personal, religious beliefs, he upheld Clark's death sentence, denying multiple constitutional and other challenges, including that excluding jurors because of their religious beliefs concerning the death penalty violated the religious protections of the New Mexico Constitution.

Justice Serna's opinions reflect his practical, meticulous approach to the law that balances the interests of the parties and considers future implications. *Jones v. Murdock*, 2009-NMSC-002, exemplifies this approach. In addressing the "delicate balance" of the independent powers of the grand jury, district attorney, and judiciary, the opinion established the procedure to be followed by the prosecutor and grand jury judge when a grand jury target wishes a prosecutor to provide evidence believed to be exculpatory to the grand jury. In *Progressive Northwest Ins. Co. v. Weed Warrior Services*, 2010-NMSC-050, a case of first impression, in balancing the statutory interests under an automobile insurance policy, Justice Serna concluded that while an insurer must offer UM/UIM coverage in the amount of the policy's liability limits, an insured's purchase of a lesser amount is a rejection of the maximum coverage.

His practicality enabled him to deviate from precedential cases that no longer served societal interests. In *Herrera v. Quality Pontiac*, 2003-NMSC-018, Justice Serna wrote that, despite precedent, someone who leaves the key in the ignition of an unattended and unlocked car owes a duty of ordinary care to a person injured by a thief who steals the car and negligently or criminally causes an accident. The opinion declined to follow the earlier case, decided before the Court adopted comparative fault, which did not recognize the more recently-developed connection between vehicle thefts and accidents. In *State of New Mexico ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, the Court overruled its earlier adoption of the pueblo rights doctrine that allowed certain municipalities to increase their diversions from adjacent water courses to accommodate population increases over time. In fairness to the City, however, the opinion adopted a limited prospective application of its ruling to enable the district court to balance the City's reasonable reliance on the overruled law with the interests of other river appropriators to achieve an equitable resolution of the City's water right.

Justice Serna had a long-standing interest in the principles of both the United States and New Mexico constitutions. In *Republican Party of NM v. NM Taxation & Revenue Department*, 2012-NMSC-026, the

Court faced the tension between governmental transparency and the need to protect certain inner workings of the executive branch. In adopting a broad view of the Inspection of Public Records Act, Justice Serna, consistent with his beliefs about the role of government, recognized the essential constitutional nature of government as derived from the people for their benefit. Always a student of the federal and state constitutions himself, Justice Serna loved speaking to student groups about constitutional law.

Justice Serna was also a diplomat on the Court. To him, the Court operated best with a single voice. He worked behind the scenes to achieve consensus rather than issue a dissenting opinion. Nevertheless, when he could not agree with the majority, his respectful dissenting opinions clearly described his reasoning in a manner to further an understanding of the case. Examples include *State v. Nunez*, 2000-NMSC-013 (dissenting from the majority's holding that the New Mexico double jeopardy clause prohibits separate proceedings for civil forfeiture and the underlying criminal charges) and *Hartford Ins. Co. v. Cline*, 2006-NMSC-033 (dissenting from the majority holding that the exclusion of domestic partners from the definition of family member in an automobile insurance policy is not contrary to New Mexico public policy).

This compilation of perhaps one third of Justice Serna's opinions is a worthy tribute to his thoughtful and compassionate contribution to New Mexico jurisprudence.

BIOGRAPHY

Justice Patricio M. Serna retired as a Justice of the New Mexico Supreme Court on August 24, 2012, after serving 16 years, and was Chief Justice from 2001-2002.

Justice Serna was born and raised in Catron County, New Mexico. He grew up in Reserve as one of eight children and was the first member of his family to attend college. As a student at the College of St. Joseph on the Rio Grande, Justice Serna worked in the college library and spent his summers fighting fires in the Gila National Forest with the U.S. Forest Service. He received a Bachelor of Science in Business Administration in 1962. After two years in the U.S. Army, he worked as a Probation and Parole Officer, in Las Cruces, preparing presentencing reports.

Justice Serna attended the University of Denver and he was awarded his Juris Doctor degree in 1970. During law school, Serna was Editor in Chief of what is now the *Denver Law Review*. After he passed the bar exam, Justice Serna began a fellowship and obtained a Master of Laws from Harvard Law School. Serna was also awarded an honorary degree (Doctor of Laws) from the University of Denver. In 1971, he moved to Washington, D.C. to work as a special assistant at the U.S. Equal Employment Opportunity Commission (EEOC). While there, Justice Serna also taught classes as an adjunct law professor at Georgetown University and the Catholic University of America.

Justice Serna returned to New Mexico in 1975 to serve as Deputy Attorney General under then- Governor Toney Anaya for four years. He also joined the New Mexico State Guard, eventually retiring at the rank of colonel. Justice Serna ran his own private practice until 1985, when he was appointed to be a judge at the First Judicial District Court in Santa Fe, where he served as Chief Judge from 1990 to 1992. In 1996, he was elected to the New Mexico Supreme Court, where he served as Chief Justice from 2001 to 2002.

Justice Serna received numerous awards and honors. In 2002, he was presented with the Judge of the Year award by the Hispanic National Bar Association. During his career, Justice Serna was president of both the New Mexico District Judges Association and the National Consortium on Racial and Ethnic Fairness in the Courts. In 2006 he was named one of Hispanic Magazine's 100 Most Influential Hispanics in America, and was also appointed to the Board of Advisors to the Institute for the Advancement of the American Legal System, University of Denver. He received the Justice Seth Montgomery Distinguished Judicial Service Award from the New Mexico State Bar in 2012, and shortly after he retired in 2012, a steering committee at the University of New Mexico School of Law established a scholarship in Justice Serna's name.

NEW MEXICO SUPREME COURT OFFICIAL CITATIONS

JUSTICE PATRICIO M. SERNA

Opinion No.	Case Name	Page No.
1997-NMSC-013	Garcia v. Coe Mfg. Co.	1
1998-NMSC-047	Lester v. Hall	9
1998-NMSC-052	State v. Torres	18
1999-NMSC-035	State v. Clark	30
1999-NMSC-044	ACLU v. City of Albuquerque	55
2000-NMSC-022	State v. Harrison	67
2001-NMSC-003	Garcia-Montoya v. State Treasurer's Office	83
2001-NMSC-032	Dep't of Health v. Compton	103
2002-NMSC-009	Cockrell v. Board of Regents	118
2002-NMSC-017	Baca v. N.M. Dep't of Pub. Safety	130
2002-NMSC-029	Aguilera v. Palm Harbor Homes, Inc.	135
2002-NMSC-030	State Farm Mut. Auto. Ins. Co. v. Ballard	138
2003-NMSC-011	Padilla v. State Farm Mut. Auto. Ins. Co.	144
2003-NMSC-018	Herrera v. Quality Pontiac	152
2004-NMSC-009	State v. City of Las Vegas	166
2004-NMSC-014	Government Employees Ins. Co. v. Welch	188
2004-NMSC-015	State v. Young	195
2005-NMSC-002	Spencer v. Health Force, Inc.	207
2005-NMSC-020	Tomlinson v. George	215
2006-NMSC-001	State v. Fry	225
2006-NMSC-034	Cobb v. N.M. State Canvassing Board	252
2007-NMSC-002	Montgomery v. Lomos Altos, Inc.	269
2007-NMSC-023	State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n	280
2007-NMSC-033	State v. Gutierrez	291
2007-NMSC-043	State v. Neal	302
2007-NMSC-046	Maes v. Audubon Indemnity Ins. Group	315
2008-NMSC-001	State v. Chavez	323
2008-NMSC-011	Blancett v. Dial Oil Co.	330
2008-NMSC-031	State v. Moreland	334
2008-NMSC-046	Fiser v. Dell Computer Corp.	339
2008-NMSC-053	State v. Sena	346
2009-NMSC-002	Jones v. Murdoch	352

Opinion No.	Case Name	Page No.
2009-NMSC-012	State v. Trujillo	366
2009-NMSC-046	State v. Garcia	375
2010-NMSC-006	City of Aztec v. Gurule	389
2010-NMSC-025	State v. Savedra	394
2010-NMSC-039	State v. Henley	398
2010-NMSC-050	Progressive Nw. Ins. Co. v. Weed Warrior Servs.	405
2011-NMSC-009	State v. Leyva	410
2011-NMSC-017	Summers v. Ardent Health Servs.	428
2011-NMSC-032	Rodriguez v. Permian Drilling Corp.	435
2012-NMSC-008	State v. Tollardo	443
2012-NMSC-009	Sais v. N.M. Dep't of Corrections	460
2012-NMSC-022	Diamond v. Diamond	466
2012-NMSC-026	Republican Party of N.M. v. N.M. Taxation & Revenue Dep't	478
2012-NMSC-032	United Nuclear Corp. v. Allstate Insurance Co.	494

NEW MEXICO SUPREME COURT CASES REPORTED

JUSTICE PATRICIO M. SERNA

CASE NAME	Page No.
ACLU v. City of Albuquerque, 1999-NMSC-044	55
Aguilera v. Palm Harbor Homes, Inc., 2002-NMSC-029	135
Baca v. N.M. Dep't of Pub. Safety, 2002-NMSC-017	130
Blancett v. Dial Oil Co., 2008-NMSC-011	330
City of Aztec v. Gurule, 2010-NMSC-006	389
Cobb v. N.M. State Canvassing Board, 2006-NMSC-034	252
Cockrell v. Board of Regents, 2002-NMSC-009	118
Dep't of Health v. Compton, 2001-NMSC-032	103
Diamond v. Diamond, 2012-NMSC-022	466
Fiser v. Dell Computer Corp., 2008-NMSC-046	339
Garcia v. Coe Mfg. Co., 1997-NMSC-013	1
Garcia-Montoya v. State Treasurer's Office, 2001-NMSC-003	83
Government Employees Ins. Co. v. Welch, 2004-NMSC-014	188
Herrera v. Quality Pontiac, 2003-NMSC-018	152
Jones v. Murdoch, 2009-NMSC-002	352
Lester v. Hall, 1998-NMSC-047	9
Maes v. Audubon Indemnity Ins. Group, 2007-NMSC-046	315
Montgomery v. Lomos Altos, Inc., 2007-NMSC-002	269
Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011	144
Progressive Nw. Ins. Co. v. Weed Warrior Servs., 2010-NMSC-050	405
Republican Party of N.M. v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026	443
Rodriguez v. Permian Drilling Corp., 2011-NMSC-032	435
Sais v. N.M. Dep't of Corrections, 2012-NMSC-009	460
Spencer v. Health Force, Inc., 2005-NMSC-002	207
State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n, 2007-NMSC-023	280
State Farm Mut. Auto. Ins. Co. v. Ballard, 2002-NMSC-030	138

CASE NAME **Page No.**

State v. Chavez, 2008-NMSC-001 323

State v. City of Las Vegas, 2004-NMSC-009 166

State v. Clark, 1999-NMSC-035 30

State v. Fry, 2006-NMSC-001 225

State v. Garcia, 2009-NMSC-046 375

State v. Gutierrez, 2007-NMSC-033 291

State v. Harrison, 2000-NMSC-022 67

State v. Henley, 2010-NMSC-039 398

State v. Leyva, 2011-NMSC-009 410

State v. Moreland, 2008-NMSC-031 334

State v. Neal, 2007-NMSC-043 302

State v. Savedra, 2010-NMSC-025 394

State v. Sena, 2008-NMSC-053 346

State v. Tollardo, 2012-NMSC-008 443

State v. Torres, 1998-NMSC-052 018

State v. Trujillo, 2009-NMSC-012 366

State v. Young, 2004-NMSC-015 195

Summers v. Ardent Health Servs., 2011-NMSC-017 428

Tomlinson v. George, 2005-NMSC-020 215

United Nuclear Corp. v. Allstate Insurance Co., 2012-NMSC-032 494

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1997-NMSC-013

Filing Date: January 28, 1997

Docket No. 23,697

ALTAGRACIA G. GARCIA, individually and as personal representative of THE ESTATE OF CURTIS GARCIA, deceased, and as parent on behalf of Alicia Garcia, a minor,

Plaintiff-Appellant,

v.

THE COE MANUFACTURING COMPANY,

Defendant-Appellee.

Certification from the New Mexico Court of Appeals
Jay G. Harris, District Judge

Gaddy & Hall,
Philip C. Gaddy, Albuquerque, NM,

for Appellant.

Hatch, Allen & Shepherd, P.A.,
Gerald G. Dixon, Albuquerque, NM,

for Appellee.

OPINION

SERNA, Justice.

{1} Altagracia Garcia, individually and as personal representative of the estate of her husband Curtis Garcia, sued the Coe Manufacturing Company ("Coe") in negligence and strict products liability for wrongful death. The trial court entered summary judgment in favor of Coe, ruling as a matter of law that Coe could not be held liable for injuries caused by a press and forming line manufactured by Coe's predecessor, Washington Iron Works, Inc ("WIW"). The court also ruled that Coe did not have an independent duty to warn of alleged design defects in this equipment. Garcia appealed, and the Court of Appeals certified this case to us.

{2} Under the current New Mexico rule, a successor corporation that purchases the assets of another corporation is, with four exceptions, not responsible for its predecessor's debts and liabilities. However, we today adopt for use in cases involving questions of tort liability an approach that balances the policies underlying products liability law and contract law, and hold that the general rule of nonliability is not controlling in this case. Accordingly, we reverse the summary judgment on Garcia's strict products liability claim and remand for further proceedings. We also hold that a genuine issue of material fact exists as to whether Coe had an independent duty to warn of alleged defects in the equipment. We therefore reverse summary judgment on that issue.

FACTS.

{3} In 1990, Medite was the owner of a fiberboard manufacturing plant outside of Las Vegas, New Mexico. This plant utilized press and forming line equipment [hereinafter "boardline" equipment] manufactured by WIW and purchased by Medite's predecessor, Montana de Fibra, to convert wood chips into medium-density fiberboard. Curtis Garcia was a laborer at the plant and generally worked outside shoveling wood chips; however, on December 17, 1990, he worked inside cleaning up fiber around the forming line, which is an elevated conveyor used to move the chips through the manufacturing process. While the conveyor was stopped for a brief period, Mr. Garcia inadvertently came into contact with it. Upon restarting, the conveyor pulled him underneath a roller, crushing

him to death. Montana de Fibra had contracted for the purchase of the boardline equipment in 1982, and WIW was required by the purchase agreement to assist Montana de Fibra in the installation and start-up of the equipment. The installation was not completed until the fall of 1984.

{4} On March 5, 1984, WIW sold to Coe all of its assets relating to the manufacture of boardline plants, equipment, and parts. However, it did not agree to assume any of WIW's debts or liabilities. The sale included patents, trade names, spare parts, design drawings, patterns, jigs, and fixtures, as well as the right to use the name "Washington Iron Works." WIW agreed to indemnify Coe against all claims arising in connection with the boardline plants, equipment, parts, and products manufactured and sold by it prior to March 5, 1984. As part of this indemnification agreement, WIW promised to carry insurance for a period of six years to cover expenses and losses arising from such claims.

{5} Following the sale, Coe mailed a notice to substantially all of WIW's customers, informing them that the latter's boardline division had joined Coe. Penner, who held the position of general manager with WIW and later with Coe, testified that this notice was intended to ensure that WIW customers stayed with Coe and to generate future business. He also testified that Coe wanted WIW's customers to know where they could obtain warranty service on their boardline equipment.

{6} Because installation and start-up of the boardline at the Montana de Fibra plant was in progress at the time Coe acquired WIW's boardline assets, Coe employees assisted in the process. Further, pursuant to a provision of the purchase agreement, Coe also promised to perform all warranty work for which WIW was obligated to its customers. As part of this commitment to Montana de Fibra, Coe rebuilt four loader trays and replaced a cooling unit for the precompressor. However, Coe did not modify, redesign, or refurbish the boardline equipment, and its warranty obligations at the plant expired in January 1985.

{7} After the warranty period expired, Coe employees continued to have contact with Montana de Fibra. Coe sold boardline parts to Montana de Fibra on at least two occasions. Further, Bird, a Coe employee previously employed by WIW, spent two days at the plant in April 1986, inspecting the line equipment and observing the line in operation. Penner, who was also an electrical engineer, observed the boardline in operation and knew that it was not equipped with a delayed start-up mechanism.[1] He also knew that the start-up switch was located at a point from which both sides of the forming line were not visible to the employee in charge of starting the boardline. Finally, Penner stated that prior to joining WIW he had designed control systems for boardline plants which incorporated delayed start-up mechanisms.

PROCEEDINGS.

{8} Garcia filed her complaint on December 14, 1993, alleging that Coe negligently designed, manufactured, sold, and installed the equipment that caused the death of Curtis Garcia. She also alleged that the equipment was in a defective and unreasonably dangerous condition because it lacked a shield or guard that would have prevented Mr. Garcia from being pulled underneath the roller and because it lacked a delayed start-up mechanism that would have warned him that the line was restarting in time for him to avoid being pulled to his death.

{9} Coe moved for summary judgment, essentially arguing that as a successor it could not be liable for the alleged defects in the equipment and that it had no duty to warn of alleged defects. The trial court granted the motion, holding that as a successor, Coe was shielded from liability and that it had no independent duty to warn.

[1] This is a mechanism that would have emitted audible and visible warnings prior to restarting of the conveyor.

Garcia appealed to the Court of Appeals which in its certification order stated:

> This appeal involves issues of first impression that require a review and reconsideration of Supreme Court holdings in **Southwest Distributing v. Olympia Brewing**, 90 N.M. 502, 565 P.2d 1019 (1977) and **Pankey v. Hot Springs Nat'l Bank**, 46 N.M. 10, 119 P.2d 636 (1941) and whether trends in product liability law require a modification of existing exceptions or additional exceptions to the general rule that a successor corporation is not liable for the liabilities of a transferor corporation.

{10} We accepted certification under Section 34-5-14(C)(2).

{11} The traditional successorship rule of nonliability for predecessor debts, and the "mere continuation" and "continuing enterprise" exceptions. When a corporation sells its assets to another corporation, both the seller and the purchaser may identify potential claims and debts against the seller and negotiate the price paid for the assets accordingly. Creditors may be able to obtain recourse from the selling corporation by attaching the proceeds of the sale, and, in the event of the seller's dissolution, statutes generally require satisfaction of creditors' claims before any distribution may be made to the shareholders. **See, e.g.**, NMSA 1978, § 53-16-6(B) (Repl. Pamp. 1993) (providing that after filing a statement of intent to dissolve, a corporation shall "pay, satisfy and discharge its liabilities . . . [and shall] distribute the remainder of its assets, either in cash or in kind, among its shareholders.") For these reasons, among others, the traditional rule evolved that a cash sale of assets is insufficient to impose responsibility on a successor corporation for the debts and liabilities of its predecessor. Stated otherwise, the successor corporation will not be liable for the predecessor's debts in the absence of a contractual provision assuming these obligations. **See Southwest Distributing Co. v. Olympia Brewing Co.**, 90 N.M. 502, 505, 565 P.2d 1019, 1022 (1977). Also important in the development of this rule was the desire to promote economic development by facilitating the free alienability of corporate assets. The courts therefore applied a rule of property law that a purchaser who gives adequate consideration without notice of prior claims against the property takes free of such claims. Janet B. Fierman, **Assumption of Products Liability in Corporate Acquisitions**, 55 B.U.L. Rev. 86, 93 (1975).

{12} This Court first adopted the general rule of nonliability and its four traditional exceptions in **Pankey v. Hot Springs Nat'l Bank**, 46 N.M. 10, 16, 119 P.2d 636, 640 (1941). There, we considered whether a judgment creditor of a predecessor bank could levy on the assets of the successor bank where "ledger liabilities" had been assumed. **Id.** While the president, a cashier, and the board of directors of both banks were identical, we prohibited the levy, reasoning that the judgment which furnished the basis for the levy was not a "ledger liability." **Id.** Similarly, in **Southwest Distributing**, we concluded that a successor brewing company which had acquired all the assets of its predecessor did not assume the obligation to perform an oral distributorship agreement entered into by its predecessor. 90 N.M. at 505-06, 565 P.2d at 1022-23. We also noted the four traditional exceptions to application of the rule precluding liability: "(1) where there is an agreement to assume those obligations; (2) where the transfer results in a consolidation or merger; (3) where there is a continuation of the transferor corporation; or (4) where the transfer is for the purpose of fraudulently avoiding liability." **Id.** at 505, 565 P.2d at 1022. We have not had the opportunity to analyze the application of the rule and its exceptions in the context of a tort claim against a successor corporation. Clearly, the only arguable exception that might be applicable is the third exception—a continuation of the transferor or predecessor corporation.

{13} Garcia argues that the evidence showed that Coe was a "mere continuation" of WIW, and therefore, her complaint should not have been dismissed. Generally, a continuation of the

transferor corporation occurs where there is (1) a continuity of directors, officers, and shareholders; (2) continued existence of only one corporation after sale of the assets; and (3) inadequate consideration for the sale of the assets. **McCarthy v. Litton Indus.**, 410 Mass. 15, 23, 570 N.E.2d 1008, 1013 (1991). The "key element of a 'continuation' is a common identity of officers, directors and stockholders in the selling and purchasing corporations." **Leannais v. Cincinnati, Inc.**, 565 F.2d 437, 440 (7th Cir. 1977). Thus, the mere continuation exception "has no application without proof of continuity of management and ownership between the predecessor and successor corporations." **Pancratz v. Monsanto Co.**, 547 N.W.2d 198, 201 (Iowa 1996). In this case, WIW and Coe did not share directors, officers or stockholders; therefore, Coe is not liable to Garcia under the mere continuation exception.

{14} Garcia alternatively asks that if we hold the "mere continuation" exception does not apply here, we adopt and apply the "continuing enterprise" exception. Under this exception, various factors are considered, such as whether the successor utilizes the same production and supervisory personnel, the same corporate officers and directors, the same managerial personnel, the same methods of production, and the same name. Thus, "[A] continuation of enterprise analysis seeks to establish whether there is a substantial continuity of pretransaction and posttransaction business activities resulting from the use of the acquired assets" to impose liability in the absence of a continuation of ownership. 1 Timothy E. Travers et al., **American Law of Products Liability** § 7:20, at 37 (3d ed. 1994); **see also Cyr v. B. Offen & Co.**, 501 F.2d 1145 (1st Cir. 1974); **Turner v. Bituminous Casualty Co.**, 397 Mich. 406, 244 N.W.2d 873 (Mich. 1976).

{15} The basis for the continuation of enterprise exception is largely one of public or social policy under which it has been determined that, irrespective of fault, a party should be held responsible for the acts of another. **American Law of Products Liability**, **supra**, § 7:20, at 37. In the event we do not adopt the continuing enterprise exception, Garcia asks this Court to adopt the "product-line" exception, which "seeks to establish whether there is a substantial continuity in the **products** resulting from the pretransaction and posttransaction use of the [predecessor's] assets." **American Law of Products Liability**, **supra**, § 7:20 at 37. We believe the rationale underlying both exceptions is the necessity of protecting an injured person who may be left without a remedy if the predecessor has dissolved, is defunct, or is otherwise unavailable to respond in damages. **See Turner**, 244 N.W.2d at 878. Whether this important policy consideration prevails depends on a judgment made after assessing the competing policies which underlie rules of contract and tort liability consistent with products liability analysis previously established by this Court. **See Brooks v. Beech Aircraft Corp.**, 120 N.M. 372, 377, 902 P.2d 54, 59 (1995) (holding that decision whether to apply strict liability principles to design defect claims depends upon a balancing of conflicting policy considerations); **cf. Turner**, 244 N.W.2d at 877 (stating that rules of law relevant to other issues such as privity and limitations of actions may not be appropriate in products liability analysis).

{16} Balancing the competing interests of the predecessor, successor, and injured person results in the adoption of the product-line exception. In **Brooks**, this Court considered whether to assess liability for injuries caused or enhanced by a design defect under the doctrine of strict products liability. We determined that such a decision required a balancing of competing policy considerations. On behalf of the injured person, we examined the onerous burden of proving negligence, the fairness in imposing the loss on the manufacturer who profited by placing the defective product in commerce, and the availability of chain of supply protection. On the other hand, we acknowledged the increased exposure of the manufacturer under strict liability principles given the conduct-dependent nature of design decisions. We also acknowledged the risk that the public could be deprived of useful and beneficial products and that manufacturers could suffer unfair consequences of generational changes in technology and attitudes about safety

because of this increased exposure. **Brooks**, 120 N.M. at 375-77, 902 P.2d at 57-59. A similar balancing analysis is required here.

{17} When a successor corporation continues to market many of the same products and represents to the public and its predecessor's customers that it is continuing the predecessor's enterprise, it essentially picks up where the predecessor left off. Whether liability should be imposed depends on whether the successor has the same ability as its predecessor to assess, control, and distribute the risks and costs of injuries caused by a product defect. If it does, we must still determine whether under the facts of a particular case this ability is nevertheless outweighed by the policies underlying the contract-law-based rule of successor corporation nonliability—chiefly, promoting the alienability of corporate assets. **See Cyr**, 501 F.2d at 1153; **Ray v. Alad Corp.**, 19 Cal. 3d 22, 560 P.2d 3, 9-11, 136 Cal. Rptr. 574 (Cal. 1977); **see also** Dale A. Stalf, Comment, **A Search for the Outer Limits to Successor Corporation Liability for Defective Products of Predecessors**, 51 U. Cin. L. Rev. 117, 126-30 (1982).

{18} In **Ray**, the California Supreme Court considered whether to impose liability on a successor that had acquired the plant, equipment, inventory, trade name and goodwill of a ladder manufacturer which continued to manufacture the same line of ladders. **Ray**, 560 P.2d at 4-5. In rejecting the general rule of nonliability, the court relied on the following policy considerations: (1) the unavailability of any other remedy to the plaintiff because of the predecessor corporation's liquidation, which was triggered by the successor's asset purchase; (2) the availability of information and knowledge to the successor necessary to assess the risks posed to consumers of previously manufactured ladders and the ability to pass on to current and potential customers the costs associated with those risks; and (3) the fact that while the predecessor's goodwill did enhance sales, it remained strictly liable for injury caused by defectively-produced ladders. **Id.** at 9. For these reasons, the court concluded that the successor had assumed strict products liability for defects in ladders of the same product line previously manufactured by the predecessor. **Id.** at 11.

{19} New Jersey followed California's lead in **Ramirez v. Amsted Indus.**, 86 N.J. 332, 431 A.2d 811 (N.J. 1981). There, the court considered whether to impose liability on a successor corporation when the agreement memorializing the sale of corporate assets expressly disclaimed any assumption by the successor of liability for contingent product defect claims. **Id.** at 332, 431 A.2d at 812. Noting that New Jersey had "long-recognized the significance of the social policy of risk-spreading in establishing the manufacturer's duty to the product user under the rapidly expanding principles of strict liability in tort," the New Jersey court concluded that the focus in such cases should be on "the successor's continuation of the actual manufacturing operation and not on commonality of ownership and management between the predecessor's and successor's corporate entities . . ." **Id.** at 350, 431 A.2d at 819-20. While the New Jersey court rejected **Cyr's** expansion of the mere continuation exception and instead adopted the product-line exception, the principles of enterprise liability upon which the New Jersey court relied were drawn in part from **Cyr** as follows:

> The very existence of strict liability for manufacturers implies a basic judgment that the hazards of predicting and insuring for risk from defective products are better borne by the manufacturer than by the consumer. The manufacturer's successor, carrying over the experience and expertise of the manufacturer, is likewise in a better position than the consumer to gauge the risks and the costs of meeting them. **The successor knows the product, is as able to calculate the risk of defects as the predecessor, is in position to insure therefor and reflect such cost in sale negotiations, and is the only entity capable of improving the quality of the product**.

Ramirez, 431 A.2d at 817 (quoting **Cyr**, 501 F.2d 1145 at 1154) (emphasis added).

Further, the New Jersey court noted, "that having received the substantial benefits of the continuing manufacturing enterprise, the successor corporation should also be made to bear the burden of the operating costs that other established business operations must ordinarily bear." 431 A.2d at 822.

{20} We note that both the continuing enterprise and product-line exceptions have been rejected by many courts that have considered them. **See American Law of Products Liability**, **supra**, § 7:27, at 44. Courts have criticized the exceptions on several fronts. **See Downtowner, Inc. v. Acrometal Prod., Inc.**, 347 N.W.2d 118, 123 (N.D. 1984) (stating that because successor did not design or manufacture the product, it has no connection with the risk posed by the product and therefore owes no duty); **Johnston v. Amsted Indus., Inc.**, 830 P.2d 1141, 1144 (Colo. Ct. App. 1992) (stating that no duty arose because successor didn't solicit the use of the defective product or make any representations as to its safety); **Jones v. Johnson Mach. & Press Co.**, 211 Neb. 724, 320 N.W.2d 481, 484 (Neb. 1982) (same); **see also Guzman v. MRM/Elgin**, 409 Mass. 563, 567 N.E.2d 929 (Mass. 1991) (stating that goodwill purchased from predecessor did not result in a benefit to successor as a matter of course); **Manh Hung Nguyen v. Johnson Mach. & Press Corp.**, 104 Ill. App. 3d 1141, 433 N.E.2d 1104, 1111, 60 Ill. Dec. 866 (Ill. App. Ct. 1982) (finding it problematic whether successor, especially small entrepreneur, can spread the costs); A. Schiff, **Products Liability and Successor Corporations: Protecting the Product User and the Small Manufacturer Through Increased Availability of Products Liability Insurance**, 13 U.C.D.L. Rev. 1000, 1003 (1980) (noting that most small companies are unable to obtain policies covering liability for injuries caused by a predecessor's products).

{21} We believe, however, that these concerns may be allayed by application of the principles established in **Ray** and **Brooks**, and we therefore adopt the product-line exception. We have long held that control over the design and manufacturing process of a particular product is not a requirement for strict products liability. **See, e.g.**, **Stang v. Hertz Corp.**, 83 N.M. 730, 733, 497 P.2d 732, 735 (1972) (holding the lessor of an automobile strictly liable for the death of passenger killed when a defective tire caused crash). The "knowledge of risk" consideration of **Ray** remedies the duty issue posed by **Downtowner** and similar cases. In short, the successor is positioned to assess the risks before purchasing the assets, and to then decide whether to assume the potential burden associated with its acceptance of the predecessor's goodwill by continuing to produce the same product line.

{22} In **Brooks** we rejected the argument that liability for injuries caused by product design defects should be limited to negligence. We reasoned that "as long as the price of a defective product line or **successive** product lines reflect some element of injury costs, the [strict liability] policy goal of cost distribution has been served." 120 N.M. at 378, 902 P.2d at 60 (emphasis added). Because "strict liability focuses on the **product**," and not on **conduct**, it is not unfair to assess liability to successor manufacturers who have purchased the right to benefit from selling and servicing that product. **Id.** When, as here, the successor continues to produce and market the same product, using the same designs, equipment, and name, the successor stands in a comparable position to the predecessor in terms of its ability to assess the risk of injury posed by the product. Further, because it continues to market the same product, it can adjust the price to reflect its risk assessment. Finally, when, as here, the successor corporation succeeds to a position of market prominence because of the goodwill developed by the predecessor, it is not unfair for the successor to assume the potential burden of responding in damages. Although it is true that Coe may suffer a loss in goodwill as a result of the injury produced by the forming line, applying the **Ray** analysis to Coe serves the policies of strict products liability expressed in **Brooks** and other strict products liability cases. Moreover, under the facts of this case the policy considerations supporting the imposition of strict products liability are not outweighed by those applicable to the general rule of successor nonliability.

In this regard we echo the observations of the First Circuit in **Cyr** :

> The dictates of freedom of business decision are less compelling when an ongoing business assumes all other benefits and liabilities of its predecessor, holds itself out to the world as the same enterprise, without notifying known customers, [and] continues to function in the same manner . . . with the same key employees, producing the same product.

501 F.2d at 1153. To these observations we add that, despite Coe's protestations to the contrary, it was able to insure itself against being ultimately liable for claims such as Garcia's by negotiating insurance and indemnification provisions as part of the purchase agreement with WIW. Simply because the six-year period for which it negotiated may have been too short does not lead to the conclusion that the alienability of corporate assets will be harmed.

{23} Having adopted the product-line exception and having determined that there may be genuine issues of material fact affecting its application, we reverse the summary judgment dismissing Garcia's strict liability claim.

{24} **There was a genuine issue of material fact as to whether Coe breached an independent duty to warn of alleged defects in the boardline.** A corporation that acquires the assets of another for adequate cash consideration does not automatically acquire a duty to warn of alleged defects in its predecessor's products. Such a duty arises only when there is a nexus between the successor corporation, its predecessor's customers, and the allegedly defective product. The key inquiry is whether there are sufficient facts to warrant an inference that the successor corporation had actual or constructive notice of the alleged defect. **See Serna v. Roche Lab.**, 101 N.M. 522, 524, 684 P.2d 1187, 1189 (stating that when dangers from use may be anticipated, manufacturer must provide adequate warning or the product is "defective", citing **Restatement (Second) of Torts**, § 402A cmt. h).

{25} In **Travis v. Harris Corp.**, 565 F.2d 443, 449 (7th Cir. 1977), the Seventh Circuit stated that

> succession to a predecessor's service contracts, coverage of the particular machine under a service contract, service of that machine by the purchaser corporation, a purchaser corporation's knowledge of defects and of the location or owner of that machine, are factors which may be considered in determining the presence of a nexus or relationship effective to create a duty to warn.

The court cautioned, however, that "the mere continuation of a name and acquisition of good will cannot of themselves create a duty to warn." **Id.** at 448. Rather, "a duty to warn arises when a relationship exists between him upon whom the duty falls and the dangerous situation to be warned against." **Id.**

{26} New York's highest court has held that a successor may be held liable for breaching an independent duty to warn of defects in its predecessor's products. **Schumacher v. Richards Shear Co.**, 59 N.Y.2d 239, 451 N.E.2d 195, 199, 464 N.Y.S.2d 437 (N.Y. 1983). New York adopted the list of factors set out in **Travis** as the relevant considerations in determining whether a duty to warn exists. **Id.** Applying these considerations in **Schumacher**, the court held that there was sufficient evidence to defeat a motion for summary judgment on the issue of failure to warn, stating:

> Other than the single service call (which, standing alone, might not be enough to create a duty to warn), [the successor] knew of the location and owner of the machine and actively offered to service it. Moreover, [the successor] held itself out on at least two occasions as having expertise in the product line it had acquired from [its predecessor]. Although [the successor] apparently did not formally assume [its predecessor's] service contracts, it did, in fact, offer to service the machine to the

> potential economic advantage of both parties.

451 N.E.2d at 200.

{27} Here, the record discloses that Coe did more than merely continue WIW's name and acquire its good will. Moreover, its relationship with Montana de Fibra consisted of more than "a single service call." Under the purchase agreement, Coe assumed WIW's service contract obligations. Coe knew that a WIW boardline was in operation at the Montana de Fibra plant. Coe's employee made a service call to the plant, and its employees observed the line in operation. Penner was familiar with delayed start-up mechanisms and knew the boardline at the Montana de Fibra plant did not have such a mechanism. Finally, Coe participated in the installation and start-up of the boardline at the Montana de Fibra plant and performed at least two items of warranty work thereon. Therefore, even though the president of Coe stated in his affidavit that Coe was not aware of any **accidents** involving similar boardline equipment, viewing the facts in a light most favorable to Garcia, this evidence was sufficient to create an issue of fact whether Coe breached its duty to warn of potential safety hazards. Accordingly, we reverse the summary judgment regarding Garcia's negligence claim and remand for further proceedings consistent with this opinion.

{28} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

GENE E. FRANCHINI,
Chief Justice

JOSEPH F. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1998-NMSC-047

Filing Date: November 23, 1998

Docket No. 24,653

BARBARA LESTER, by and through her guardian and conservator, LEO MAVROGENIS,

Plaintiff,

v.

E.B. HALL, M.D.,

Defendant.

Certification from the U.S. District Court for the District of New Mexico
James A. Parker, U.S. District Judge

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OPINION

SERNA, Justice.

{1} Plaintiff Barbara Lester, a third party non-patient, alleges that Defendant physician E.B. Hall's negligent treatment of his patient, Merlin Andersen, caused Andersen to injure Lester in an automobile accident. The United States District Court for the District of New Mexico certified the case to this Court pursuant to Rule 12-607 NMRA 1998 (certification from federal courts) on the question of whether Hall owes a legal duty to Lester. This Court has previously held that a physician owes a duty to "persons injured by patients driving automobiles from a doctor's office when the patient has just been injected with drugs known to affect judgment and driving ability" in **Wilschinsky v. Medina**, 108 N.M. 511, 515, 775 P.2d 713, 717 (1989). Because we do not extend the duty articulated in **Wilschinsky** to prescription cases under this fact pattern, we answer the certified question in the negative.

FACTS AND PROCEDURAL BACKGROUND

{2} The District Court certified the case to this Court on the following question of law:

> Does a physician owe a legal duty to a non-patient who is injured in a collision with a motor vehicle, operated by the physician's patient, who was last treated by the physician five days before the collision, and whose ability to drive a vehicle allegedly was impaired by medications prescribed by the physician, who (1) allegedly improperly monitored his patient's medication and (2) allegedly failed to warn his patient that the medication could impair the patient's driving ability?

The District Court included a statement of facts relevant to this case:

> [Hall] prescribed lithium, in addition to other medications, to his patient while treating him for a medical condition. Factual disputes exist[] as to whether [Hall] properly monitored his patient's lithium levels. Failure to do so allegedly could cause the patient to suffer toxicity with side effects that could impair one's driving ability. Factual disputes also exist as to whether [Hall] warned the patient concerning the side-effects of the lithium and the effects that lithium toxicity may have on the patient's ability to perform certain activities, including driving. Five days after [Hall] last treated him, the patient, allegedly in an impaired condition resulting from toxic levels of lithium in his system, drove a motor vehicle and caused an accident in which [Lester] was injured.

{3} The District Court noted that the facts in this case are outside the narrow factual scope of the duty we recognized in **Wilschinsky** and that the holding of that case should not be construed to create a general duty to the "entire public for any injuries suffered for which an argument of causation can be made." **Id.** at 515, 775 P.2d at 717. We narrowly drew our holding in order to emphasize that courts should consider with great caution whether the facts of particular cases are appropriate for recognizing physicians' duties to third parties under the principles articulated in **Wilschinsky**. **See id.**; **see also Turpie v. Southwest Cardiology Assocs.**, 1998-NMCA-42, P11, 124 N.M. 787, 955 P.2d 716 (noting that "the Court intended to limit **Wilschinsky** to its specific circumstance" and declining to "extend its rationale, as such, to the medical malpractice arena"). "We specifically declined to address the issue of whether under any facts, negligently prescribing drugs could give rise to third-party liability." **Wilschinsky** 108 N.M. at 514, 775 P.2d at 716. We conclude that, under the principles articulated in **Wilschinsky** and the public policy of New Mexico, Hall does not owe a duty to Lester on the facts of this case, and we therefore join a substantial number of jurisdictions declining to extend physicians' duties to non-patients for prescription-involved situations.

WILSCHINSKY V. MEDINA: PHYSICIANS' DUTY TO THIRD PERSONS IN NEW MEXICO

{4} "Whether a practicing physician in New Mexico owes a duty to third persons who foreseeably may be harmed by the physician's negligence in treatment of his [or her] patient" is addressed under very specific facts in **Wilschinsky**, 108 N.M. at 513, 775 P.2d at 715. In **Wilschinsky**, a physician injected two drugs, including a narcotic, into his patient, Medina, who had already ingested a third drug. **Id.** at 512, 775 P.2d at 714. These "drugs could cloud a person's judgment and physical abilities and create a risk to that person in driving a car." **Id.** Medina was involved in a serious car accident within a short time (approximately seventy minutes) of receiving the drugs, injuring Wilschinsky, a third party. **Id.** This Court framed the issue under those facts as "whether a doctor owes a duty to third parties from treatment of an outpatient when the doctor has given the patient an injection of drugs that could clearly impair the patient's ability to reason and to operate an automobile." **Id.** at 514, 775 P.2d at 716.

{5} Our determination that a duty existed involved a "careful balancing," taking "'into account the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant.'" **Id.** at 513, 775 P.2d at 715 (quoting **Kirk v. Michael Reese Hosp. & Med. Ctr.**, 117 Ill. 2d 507, 513 N.E.2d 387, 396, 111 Ill. Dec. 944 (Ill. 1987)). We then applied the balancing test of **Kirk** and concluded: (1) that the likelihood of a car accident "immediately following injection of a narcotic in combination with other drugs is high;" (2) that when the physician administers the narcotic in his or her office the burden of "guarding against that foreseeable danger is not unreasonable if the doctor is judged by standards of normal medical procedures, rather than subjected to after-the-fact speculative attack;" and (3) that "if the scope of the doctor's duty is limited to the professional standards of acceptable medical practice, the additional burden on the doctor's treatment decisions is negligible."

Wilschinsky, 108 N.M. at 515, 775 P.2d at 717. These principles, as applied with caution to cases involving defendant physicians and third party non-patients, establish a general framework under which a court may determine the existence of a duty.

APPLICATION OF THE *WILSCHINSKY* BALANCING TEST

{6} Based on the District Court's statement of relevant facts, we determine that the likelihood of injury to Lester is not foreseeable to the degree required in order to warrant a duty. The likelihood that a patient using prescription lithium will cause a car accident five days after contact with the doctor is considerably more remote in comparison to a patient who, injected with a narcotic, will cause an accident while driving away from the doctor's office. The effects of lithium on driving abilities is far less certain on this record than the effects of narcotics in **Wilschinsky**.

{7} Although it is not unreasonably burdensome for a physician to guard against injury to the patient or third parties when he or she injects a patient with medication in his or her office, based on this record, we determine that the magnitude of the burden a duty to third parties places upon a physician prescribing lithium is too high. As we stated in **Wilschinsky**, "**unlike the prescription cases**, the administration of [narcotic] drugs was within the doctor's presence, in the doctor's office under his direction and timing, making reasonable preventative measures of whatever type easier to implement, and, at the same time, creating a higher degree of patient reliance on the doctor's professional judgment." 108 N.M. at 514-15, 775 P.2d at 716-17 (emphasis added). In this prescription case, Andersen's taking of the drug outside of Hall's control made preventative measures more difficult and reliance on professional judgment more remote. This is a fundamental distinction between a physician medicating a patient in his or her office, where the physician is liable to third parties when he or she is directly aware of the effect of the medication, and here, where the patient takes the medication while not under the direct control and supervision of the physician. The physician in **Wilschinsky** had the opportunity to directly observe the effects of the medication which he was injecting into his patient. The involvement of the doctor in directly administering the medication and the amount of control he had over his office and the patient in **Wilschinsky** were much greater relative to this case, in which Hall last saw his patient five days earlier. Further, considering that lithium is not a narcotic (which has a clearer effect on driving) requiring injection (indicative of the doctor's control) but instead is a prescription non-narcotic medication, Hall had significantly less control over how the patient would take it.

{8} The consequences of placing upon Hall the burden of guarding against Lester's injury also militates against extension of the duty. To extend a duty from Hall to Lester under the circumstances presented by this case would have a potentially serious chilling effect on the use of prescription medication in medical care. Another consequence would be the potential intrusion upon the indispensable loyalty which physicians must maintain towards their patients regarding their medical care and treatment decisions. As we stated in **Wilschinsky**, doctors "should not be asked to weigh notions of liability in their already complex universe of patient care." 108 N.M. at 516, 775 P.2d at 718. In view of these conclusions, together with the other factors of the **Wilschinsky** analysis reviewed above and the public policy considerations that we discuss below, we reject the extension of Hall's duty.

PUBLIC POLICY CONSIDERATIONS

{9} Whether Hall owed a duty to Lester "is a question of law and is based upon policy considerations." **See Leyba v. Whitley**, 120 N.M. 768, 771, 907 P.2d 172, 175 (1995) (citation omitted). Even if we held that Lester is a foreseeable party to Hall's treatment of Andersen, this would not end the inquiry for the imposition of a duty. "By reference to existing statutes, rules of court, judicial precedent, and other principles comprising

the law, we must determine whether the public policy of New Mexico supports a duty that runs" from Hall to Lester. **Id.**

{10} "Policy determines duty." **Torres v. State**, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995).

> It is the particular domain of the legislature, as the voice of the people, to make public policy. . . . The judiciary, however, is not as directly and politically responsible to the people as are the legislative and executive branches of government. Courts should make policy in order to determine duty only when the body politic has not spoken and only with the understanding that any misperception of the public mind may be corrected shortly by the legislature.

Id.

{11} The Legislature has clearly demonstrated a concern for the health of the citizens of New Mexico as it is affected by the availability of practicing physicians and assured by the availability of malpractice insurance; thus, the Legislature has acted to limit health care providers' liability. **See** NMSA 1978, §§ 41-5-1 to -29 (1976, as amended through 1997); **see also Wilschinsky**, 108 N.M. at 516, 775 P.2d at 718 (discussing the purpose of the Medical Malpractice Act). The Legislature's stated "purpose of the Medical Malpractice Act is to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." NMSA 1978, § 41-5-2 (1976). The Legislature's determination that health care providers' liability must be limited in order to assure New Mexicans' access to medical care is demonstrated by damage caps, **see** NMSA 1978, § 41-5-6 (1992), a shorter statute of limitations, **compare** NMSA 1978, § 41-5-13 (1976) (three years), **with** NMSA 1978, § 37-1-4 (1880) (four years), and required evaluation and decision by the medical review commission, **see** NMSA 1978, § 41-5-15 (1976). The Legislature's judgment to circumscribe the malpractice liability of health care providers emphasizes the appropriateness of reserving for legislative consideration the expansion of providers' liability to third parties. Although, as with **Wilschinsky**, we have the authority to recognize a duty, we believe this authority must be exercised sparingly, especially when the Legislature has spoken in a manner inconsistent with the expansion of tort liability for health care providers. Thus, while the factual circumstances of **Wilschinsky** necessitated our recognition of a duty to third parties for that specific type of situation, the present case does not warrant expansion of that duty.

{12} Lester argues that a duty exists under these facts analogous to the duty of an attorney to a statutory beneficiary of wrongful death proceeds, **see Leyba**, 120 N.M. at 775-78, 907 P.2d at 179-82, or a contractor's duty to a subsequent owner of a home, **Steinberg v. Coda Roberson Constr. Co.**, 79 N.M. 123, 124-25, 440 P.2d 798, 799-800 (1968). Lester emphasizes foreseeability and pre-defined standards of conduct as applied to an "unknown but foreseeable third party" and argues that **Leyba** holds that when elements of foreseeability and a pre-defined standard of conduct are present, the court will allow liability. However, the test adopted in **Leyba**, if applied to these facts, is actually detrimental to Lester. This Court adopted a combined "threshold third-party-beneficiary test and [a] multi-factor balancing test" for "analyzing the duty owed to statutory beneficiaries by an attorney for the personal representative prosecuting a wrongful death claim." **Leyba**, 120 N.M. at 775, 907 P.2d at 179. "'Under the modified multi-factor balancing test, the threshold question is whether the plaintiff is an **intended beneficiary** of the transaction to which the advice pertained. While the answer to the threshold question does not totally resolve the issue, no further inquiry need be made unless such an intent exists.'" **Id.** (quoting **Trask v. Butler**, 123 Wash. 2d 835, 872 P.2d 1080, 1084 (Wash. 1994)) (emphasis added). In **Leyba**, we noted that "it is not, of course, the foreseeability of injury that gives rise to duty. It is the intent of attorney and client to benefit the third party that gives rise to a duty imposed by law." **Id.** at 773 n.2, 907 P.2d at 177 n.2. Here, Lester is clearly not the intended beneficiary

of Hall's advice to Andersen. Lester focuses only on the foreseeability and standard of conduct discussions of **Leyba**, but the holding and reasoning of that case fail to support her position. **Steinberg** is similarly unavailing to Lester, because that case involved an intended class of beneficiaries, i.e. "prospective home buyers." 79 N.M. at 125, 440 P.2d at 800.

{13} Lester argues that **Yount v. Johnson**, 121 N.M. 585, 915 P.2d 341, dispelled any inclination to favor physicians as a class or protect them for damage claims when their negligence injures others. Lester's reliance on **Yount** is misplaced because **Yount** did not concern medical malpractice; instead, **Yount** addressed holding minors to a standard of ordinary care. **See id.** at 586, 915 P.2d at 342 ("We are asked to decide whether, as a matter of policy, minors who engage in horseplay . . . have no duty of reasonable care to one another."). In any case, this Court's conclusion that Hall does not owe Lester a duty under the facts of this case does not favor or protect physicians any more than **Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.**, 106 N.M. 757, 761, 750 P.2d 118, 122 (1988) (holding that attorneys do not owe a duty to adverse parties), favored or protected attorneys. Instead, **Garcia** and this case are a recognition of the realities of practice in these two fields and the long-standing proposition that these professionals owe a duty to their clients and that only under particularly limited circumstances are exceptions created for expanding the duty beyond those clients.[1] **Leyba** and **Wilschinsky** are exceptions to the general rule articulated in **Garcia** and the present case. In **Garcia**, we stated:

> A majority of jurisdictions do not hold attorneys liable for professional negligence to third party non-clients. . . . A duty of care toward non-clients has been found to exist **only** in those situations where the non-client was an intended beneficiary of the attorney's services, or where it was reasonably foreseeable that negligent service or advice to or on behalf of the client could cause harm to others.

106 N.M. at 761, 750 P.2d at 122 (citations omitted). Similarly, in **Wilschinsky**, we stated that "courts have recognized two sources of duty for the medical profession to third parties: when a doctor exerts control over a patient, or when a doctor is aware of threats against specific, identifiable third parties." 108 N.M. at 513, 775 P.2d at 715. In **Wilschinsky**, we concluded that "liability under these facts must stem from the doctor's control over his offices and the administration of powerful drugs in those offices." **Id.** In other words, we made an exception from the general rule that a physician does not owe a duty to third party non-patients. We decline to extend this exception to prescription cases.

{14} Lester argues that this Court's judgment in **Lopez v. Maez**, 98 N.M. 625, 631, 651 P.2d 1269, 1275 (1982) (concluding that tavern-keepers have a duty to foreseeable third parties harmed when the tavern-keeper serves an intoxicated individual alcohol), supports a holding that there is a duty in the present case. As Lester notes, however, the duty of such servers stems from their violation of a regulation which prohibits the selling or serving of alcohol to an obviously intoxicated person. **See id.** at 631, 651 P.2d at 1275. Amicus New Mexico Trial Lawyer's Association (NMTLA) argues that our language regarding "the use of automobiles and the increasing frequency of accidents involving drunk drivers," **id.** at 632, 651 P.2d at 1275, applies to the problem of using automobiles under the influence of drugs. However, while driving under the influence of alcohol and resulting accidents is

[1] **Cf. Estate of Warner v. United States**, 669 F. Supp. 234, 237 (N.D. Ill. 1987) (noting that "a plaintiff cannot maintain a medical malpractice action absent [a] direct . . . patient-doctor relationship," with limited exceptions); **Werner v. Varner, Stafford & Seaman, P.A.**, 659 So. 2d 1308, 1309 (Fla. Dist. Ct. App. 1995) (noting that "generally, in Florida, in order to maintain a cause of action against a physician, privity must exist between the plaintiff and physician," except in limited circumstances); **Conboy v. Mogeloff**, 172 A.D.2d 912, 567 N.Y.S.2d 960, 961-62 (App. Div. 1991) (holding that a doctor had no duty to a non-patient because "a defendant has no legal duty to control the conduct of third persons so as to prevent them from harming others" except when the defendant has the ability and authority to control the third persons' conduct, and noting that privity or some reliance is necessary from the physician to the third party).

a well-documented problem which plagues New Mexico, it is evident that no similar problem exists with respect to lithium toxicity. Further, the results of individuals serving alcohol to an inebriated patron is much more similar to the situation in **Wilschinsky**, because of the degree of control and direct effects, than the present case, illustrating again the reasoning behind **Wilschinsky** and why this Court made an exception to the general rule that physicians are not liable to non-patients. It is not similar enough to the present case, however, to justify extending **Wilschinsky** beyond its facts.

{15} Under the test we articulated in **Wilschinsky**, we conclude that the injury to Lester was too remote in relation to Hall's actions to warrant extending a duty under these facts. We also conclude that the public policy of New Mexico, as expressed by the Legislature and our earlier cases, is inconsistent with the recognition of a duty in this case. Therefore, we determine as a matter of New Mexico law that Hall's duty to Andersen does not extend to Lester on the facts presented by the District Court.

THIRD PARTY LIABILITY: OTHER JURISDICTIONS

{16} Lester contends that we should recognize a duty in this case because "the jurisdictions which have addressed this question have almost unanimously found that such a duty does exist." NMTLA supports this assertion,[2] and further argues that jurisdictions which do not extend physicians' duties are either so different from New Mexico in terms of policy or "are so far out of the mainstream that they do not merit consideration." However, a review of foreign jurisdictions that have addressed the narrow question presented under these facts, whether a physician owes a duty to third party non-patients for negligently prescribing medication, reveal a split in authority.

{17} At least four courts have concluded that physicians owe a duty to injured third parties to warn their patients about side effects of prescription medication. **See Watkins v. United States**, 589 F.2d 214, 219 (5th Cir. 1979) (finding a physician owed a duty, based upon Alabama law, to a third party when prescribing Valium, in spite of the fact that the patient had a .16 blood alcohol level); **Zavalas v. State Dep't of Corrections**, 124 Ore. App. 166, 861 P.2d 1026, 1027-29 (Or. Ct. App. 1993) (finding physician who negligently prescribed Xanax to his heroin-addicted patient owed duty to third parties); **Kaiser v. Suburban Transp. Sys. Corp.**, 65 Wash. 2d 461, 398 P.2d 14, 16 (Wash. 1965) (concluding, without a discussion of duty, that physician who failed to warn bus driver of side effects of medication which may cause drowsiness owed a duty to injured bus passenger); **Schuster v. Altenberg**, 144 Wis. 2d 223, 424 N.W.2d 159, 161-63 (Wis. 1988). **Schuster** involved a psychiatric patient who was killed while driving in a single-car

[2] We note that some of the cases upon which NMTLA relies do not support the finding of a duty in this case. For example, in Appendix A of its amicus brief, NMTLA lists Mississippi among the jurisdictions which impose a duty on physicians to third parties for the negligent care and treatment of their patients. However, the cited case, **Meena v. Wilburn**, 603 So. 2d 866, 867-68 (Miss. 1992), involved a doctor and nurse who negligently performed a procedure on the incorrect patient, who then sued them; thus, the plaintiff was not a third party injured by a patient who was negligently treated by the doctor, but instead was a plaintiff directly injured by the actions of the defendant. NMTLA also relies upon **Pate v. Threlkel**, 661 So. 2d 278, 282 (Fla. 1995) even though that case found a duty "when the prevailing standard of care creates a duty that is obviously for the benefit of certain identified third parties and the physician knows of the existence of [them]." **See Hawkins v. Pizarro**, 713 So. 2d 1036, 1038 (Fla. Dist. Ct. App. 1998) (holding physician had no duty to third party in negligently advising a patient infected with hepatitis because the patient's husband met and married her after the testing, and he was thus not identified or known to the physician). Further, in **Krejci v. Akron Pediatric Neurology, Inc.**, 31 Ohio App. 3d 273, 511 N.E.2d 129, 131 (Ohio Ct. App. 1987), another case cited by NMTLA, although the court concluded that a physician owed a third party a duty, this conclusion was based upon a statute which the court decided was intended to protect the public, creating a special duty by doctors to use reasonable care in the certification of the driving ability of a patient suffering from epileptic seizures. The court stated that "it is well-established in Ohio that liability in negligence will not lie in the absence of a special duty owed by the defendant[,]" and noted that a physician cannot force a patient not to drive or to take medication properly. 511 N.E.2d at 130-31.

accident that paralyzed her daughter. 424 N.W.2d at 160-61. The court stated that a defendant therapist was negligent by failing to warn of a medication's side effects, failing to warn the patient's family, and failing to seek commitment of the patient. **Schuster**, 424 N.W.2d at 175. The Court held that "in Wisconsin, a psychotherapist may be held liable in negligence for failure to warn of the side effects of a medication if the side effects were such that a patient should have been cautioned against driving, because it was foreseeable that an accident could result, causing harm to the patient or third parties if the patient drove while using the medication." 424 N.W.2d at 163. Apparently, few courts have created as broad a duty as the Wisconsin court, and it did so based upon very few facts. 424 N.W.2d at 160 (noting that "the facts presented are sparse"). The allegations of the plaintiff in **Schuster** seem to indicate that the patient was in a psychotic state, placing this case in the category of a duty to warn identifiable third parties of a patient with known dangerous propensities rather than within categories of prescription cases with a duty to warn of side effects. **See id.**

{18} Lester also relies on **Gooden v. Tips**, 651 S.W.2d 364, 369-70 (Tex. App. 1983), in which the court held that a physician may be liable to third parties injured by the conduct of a patient when the physician failed to warn the patient about the effects of a drug that the doctor prescribed. However, recently, the Supreme Court of Texas significantly narrowed physicians' duties to third parties. In **Praesel v. Johnson**, 967 S.W.2d 391, 396 (Tex. 1998), the court noted that it had "generally limited the scope of the duty owed by physicians in providing medical care to their patients."[3] The court "declined to impose on physicians a duty to third parties to warn an epileptic patient not to drive." **Praesel**, 967 S.W.2d at 398. Somewhat similarly to our analysis, the court "weighed the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant," and also considered "whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm." 967 S.W.2d at 397-98 (citation omitted). Further, the court noted:

> In determining whether to erect a legal duty to warn, we must also consider the efficacy of that warning in preventing injury to third parties. We cannot simply assume that a person who is advised not to drive will actually respond and refrain from driving. The consequences of placing a legal duty on physicians to warn may subject them to substantial liability even though their warnings may not be effective to eliminate the risk in many cases. Unfortunately, many patients do not heed the admonitions of their physicians even though the consequences may be life-threatening to the patient or others.

967 S.W.2d at 398 (citation omitted). Although the court's language is somewhat ambiguous[4] as to whether or not **Gooden** is still good law, the recent trend in Texas has limited physicians' duties to third parties. Additionally, Justice Enoch, concurring, asserted that "when stripped of its duty-to-warn language, **Gooden** simply holds that a physician owes a duty to a third party to not negligently treat a patient. . . . **Gooden** cannot be good authority and we should make that clear to the courts of this state." 967 S.W.2d at 399.

{19} At least four courts have rejected the proposition that physicians owe a duty to third parties

[3] **See Edinburg Hosp. Auth. v. Trevino**, 941 S.W.2d 76, 79 (Tex. 1997) (declining to permit bystander recovery, holding that a physician did not owe a duty to a husband "to provide competent medical care to [his wife] or [her] fetus"); **Bird v. W.C.W.**, 868 S.W.2d 767, 770 (Tex. 1994) (holding that a psychologist who mistakenly concluded that a child had been molested by her father did not owe a duty to the third party father, who had been criminally charged as a result, in part because of the absence of a physician-patient relationship, even though it was foreseeable).

[4] **See Praesel**, 967 S.W.2d at 398 ("It does not necessarily follow that there is no duty to give a warning. As we observed in **Bird**, there is little utility in failing to warn patients about effects of a drug or condition that are known to the physician but are likely to be unknown to the patient.").

for the negligent prescription of drugs to their patients. **See Werner**, 659 So. 2d at 1309-10; **Webb v. Jarvis**, 575 N.E.2d 992, 995-97 (Ind. 1991); **Conboy**, 567 N.Y.S.2d at 961-62; **Kirk**, 513 N.E.2d at 395-99; **see also Estate of Warner**, 669 F. Supp. at 235-37; **Rebollal v. Payne**, 145 A.D.2d 617, 536 N.Y.S.2d 147, 148 (App. Div. 1988) (analogizing a county to a physician, finding no duty to a third party killed in an auto accident when the patient received methadone, reasoning that a physician "does not undertake a duty to the public at large"). In **Werner**, a third party motorist sued a physician, alleging that the doctor failed to warn the patient not to drive while under the influence of an epilepsy medication. **Werner**, 659 So. 2d at 1309. The court, relying upon **Pate**, 661 So. 2d at 282, noted that the Florida Supreme Court "specifically limited the physician's duty to known and identifiable third parties as [in **Pate**] the patient and plaintiff were mother and child," and also noted that even assuming a duty to warn, there was no allegation that the failure to warn the patient not to drive while medicated proximately caused the accident. 659 So. 2d at 1310-11. In **Conboy**, a mother sued her physician on behalf of her children, who were passengers in her car when she lost consciousness after taking prescription medication, alleging that he advised her that she could drive. 567 N.Y.S.2d at 961. The court held that the physician had no ability or authority to control his patient's conduct "to give rise to a duty on his part to protect the children." **Id.**

{20} The **Kirk** case, from which we adopted the test applied in **Wilschinsky**, involved a psychiatric patient using prescription drugs in combination with alcohol on the day he was discharged from a hospital. **See** 513 N.E.2d at 390-91. The plaintiff was a passenger injured in the patient's car when it collided with a tree. The court noted that "no patient-doctor relationship" between the defendant doctors and the plaintiff existed, and no "special relationship" (as in another case between a mother-patient and her baby) existed between the patient and the plaintiff. **Kirk**, 513 N.E.2d at 399. The court also observed that "other jurisdictions have limited the scope of the physician's duty to warn to situations in which there is, apart from the patient, a specifically identifiable potential victim, rather than holding that a duty exists to the public generally." 513 N.E.2d at 398.

{21} The court, in **Kirk**, held that "a plaintiff cannot maintain a medical malpractice action absent a direct physician-patient relationship between the doctor and plaintiff or a special relationship . . . between the patient and the plaintiff." 513 N.E.2d at 399. While the plaintiff contended that the doctor need only warn and advise the patient, the court observed that "the plaintiff overlooks that [a duty by doctors to warn] explicitly extends the duties of the doctors . . . beyond the patient to the general public." **Id.** Thus, the court held that a recognized duty, the "first essential" component of a negligence action, was not met by the plaintiff. **Id.**

{22} The court, in **Estate of Warner**, relied upon **Kirk**, and held that a physician who allegedly prematurely released a psychiatric patient that was experiencing barbiturate intoxication did not owe a duty to a third party non-patient because no patient-doctor or special relationship existed. 669 F. Supp. at 237. The court stated that "social and public policy considerations dictate that a duty by members of the medical profession not be expanded to the public in general where liability would be virtually limitless." **Id.**

{23} Finally, **Webb** involved a doctor prescribing anabolic steroids to a patient, who, without the doctor's knowledge, battered his wife. 575 N.E.2d at 994. The patient shot the plaintiff, a police officer. **Id.** The court discussed duty in terms of the relationship between the defendant and plaintiff, foreseeability, and public policy. 575 N.E.2d at 995. The court held that there was no contract, special relationship, privity or reliance between the plaintiff and the doctor, and thus no relationship, that the connection between steroids and violent behavior was not well established, and that on public policy grounds the doctor must be loyal to the patient. **Webb**, 575 N.E.2d at 995-97. The plaintiff, as does Lester, compared the situation to dram shop cases, but the court rejected this argument because the causal connection is much

greater between alcohol and its physical effects. 575 N.E.2d at 997. The court in **Webb** concluded, and we agree, that the "social utility derived from prescription medication can hardly be disputed and far outweighs the risk of harm to third parties." 575 N.E.2d at 997.

{24} The foregoing cases illustrate the numerous grounds upon which courts have rejected imposing on physicians a duty to third parties for negligently prescribing medication. While we find it unnecessary to adopt specific factors enumerated in these cases, we note that we find the policy considerations underlying these cases to be much more compelling than those cases that operate to extend a general duty from physicians to third parties in prescription cases. Under **Wilschinsky** and public policy considerations, we hold that Hall's duty to Andersen does not extend to Lester. **Conclusion**

{25} We developed an analysis as to whether a physician owes a duty to a non-patient third party in **Wilschinsky**. Our recognition of a duty in **Wilschinsky** is an exception to the general rule that a physician owes a duty to his or her patient, and not to third party non-patients. Even assuming, as we do here, that the facts presented by Lester are accurate, we conclude that the likelihood of injury to Lester is too remote from Hall's conduct towards Andersen to warrant expansion of the **Wilschinsky** duty. Further, public policy considerations, the legislative limitations upon malpractice by health care providers, and the reasoning of other jurisdictions argue against extending the duty which Lester advances. Hall clearly owes a duty to Andersen to act according to the professional standards of acceptable medical practice. However, we hold that under these facts, this duty does not extend to Lester. As a result, we answer the District Court's certified question in the negative.

{26} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

GENE E. FRANCHINI,
Chief Justice

JOSEPH F. BACA,
Justice

DAN A. McKINNON, III,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1998-NMSC-052

Filing Date: December 3, 1998

Docket No. 24,000

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JERRY TORRES,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
Alvin F. Jones, District Judge

Phyllis H. Subin, Chief Public Defender
Sara T. Harmon, Assistant Appellate Defender
Santa Fe, NM

for Appellant.

Hon. Tom Udall, Attorney General
M. Victoria Wilson, Assistant Attorney General
Santa Fe, NM

for Appellee.

OPINION

SERNA, Justice.

{1} Defendant Jerry Torres appeals his convictions of first degree depraved-mind murder, **see** NMSA 1978, § 30-2-1(A)(3) (1994), aggravated battery with a firearm (two counts), **see** NMSA 1978, § 30-3-5(C) (1969), aggravated assault with a firearm (three counts), **see** NMSA 1978, § 30-3-2(A) (1963), and shooting at a dwelling or occupied building, **see** NMSA 1978, § 30-3-8(A) (1993), each of which was obtained following a jury trial. Defendant Torres contends on appeal that the trial court erred in admitting the out-of-court statement of a prosecution witness. We affirm.

I. FACTS

{2} On the night of December 31, 1995, Defendant Torres attended a New Year's Eve party (the South Spruce party) in Roswell, New Mexico. Sometime before midnight, occupants of a passing car fired several gunshots in the direction of the South Spruce party. Shortly thereafter, several individuals from the South Spruce party drove to another party (the West Deming party) several blocks away, and two people, one with a shotgun and one with a nine-millimeter pistol, fired into a crowd standing in the front yard. The latter shooting resulted in the death of Robert Bonilla and injuries to Elizabeth Galindo and Billy Ray Castillo. Police later learned that a nine-millimeter gun caused the death and the injuries to these individuals. The State accused Defendant Torres of firing the nine-millimeter gun into the crowd and charged him with, inter alia, depraved-mind murder.

{3} At trial, the State introduced the testimony of several witnesses from the West Deming party. The witnesses identified the car and described the shooting, testifying that one of the assailants yelled, "Westside," which was allegedly a gang reference. The witnesses, however, were unable to identify the assailants. The State also introduced the testimony of Russell Lueras. Lueras testified that he attended the South Spruce party, which he described as being a Westside gang party and which was held at Jimmy Barela's house. At the time of the first shooting, Defendant Torres, Lueras, Earsley Chico Barnett, and Jimmy Barela were standing outside and heard the gunshots. After determining that the bullets had hit an acquaintance's van, Lueras shined the lights of his car on the van to get a closer look. At that time, unidentified individuals in a car drove

by to tell them where the other car had gone. After Defendant Torres and Chico Barnett got into his car, Lueras then drove to the West Deming party. Lueras testified that, when he stopped across the street from the party, Defendant Torres exited the driver's side door from the backseat, with Lueras leaning forward, and Chico Barnett exited the passenger side. Lueras testified that, even though he was armed, he remained in the car because another car in front of him had its lights shining into his car and made him nervous. A few seconds after Defendant Torres and Chico Barnett got out of the car, Lueras heard several gunshots. He testified that he did not see who was firing or what type of gun Defendant Torres or Chico Barnett had at the time. However, Lueras testified that, upon returning to the South Spruce party, he saw Chico Barnett get out of his car holding a shotgun and Defendant Torres holding a nine-millimeter gun.

{4} The State also called Chico Barnett to testify regarding the shooting at the West Deming party. At the time he testified, Barnett had already pleaded guilty to two counts of aggravated battery, one count of aggravated assault, and one count of shooting at a dwelling in connection with the shooting at the West Deming party and had been sentenced to twelve years imprisonment. Barnett testified that he had no agreement with the State for his sentencing or in return for his testimony against Defendant Torres. He testified that he attended the party at South Spruce, that he got into a car with other people, and that they then drove to the West Deming party. Barnett also testified that he had a shotgun and that he fired the shotgun one time at the West Deming party. However, when the prosecution asked whose car it was, who was driving, who else was in the car, whether Defendant Torres had been in the car, and whether anyone else had fired a gun, Barnett repeatedly responded that he did not remember.

{5} The State attempted to refresh Barnett's memory by showing him a transcript of an audio recording of his statement to the police made two days after the shooting and eventually, outside the presence of the jury, by playing the tape for him. Barnett testified that he gave the statement to the police, but he did not remember more detail about the shooting even after hearing the statement. After this failed attempt at refreshing Barnett's memory, the State sought to introduce the recording into evidence as a statement against Barnett's penal interest. **See generally** Rule 11-804(B)(3) NMRA 1998 (providing that statements against penal interests are not excluded by the hearsay rule if the witness is unavailable).

{6} In his statement to the police, Barnett gave a more detailed account of the shooting than he did at trial. He told the police that, while he was at the South Spruce party, a small white car drove past and someone inside the car fired a gun, hitting a nearby van. After someone ascertained that the car had gone to the West Deming party, Barnett and Defendant Torres got into Lueras's car, and all three of them drove to the West Deming party. Barnett stated that he was sitting in the passenger seat and that Defendant Torres was sitting in the backseat. Once they arrived at the West Deming party, Defendant Torres and Barnett got out of the car, with Barnett going around the back and Defendant Torres exiting the driver's side, which faced the party. Barnett told the police that he had a shotgun, which he described in some detail, and that he fired the shotgun one time into a crowd of about fifteen or twenty people outside at the party. He also told the police that Defendant Torres yelled, "Westside," and then fired a nine millimeter several times into the crowd. Finally, he told police that he did not learn that someone had been hit by the gunshots until hearing it on the news that night or the next day.

{7} Before introducing the recorded statement into evidence, the State offered the testimony of Detective John Wayne Davis, who had been present for Barnett's statement. Detective Davis testified that he issued Miranda warnings to Barnett and then took his statement. He identified the State's exhibit as the tape of the interview. He also testified that the police had not offered any leniency toward Barnett in exchange for his statement. He further testified that Barnett was not told which weapon had killed Bonilla and

that the type of weapon producing the fatal shot had not been publicized at the time of the statement.

{8} Defendant Torres's counsel objected to the admission of the audio recording on the grounds that it violated his right to cross-examine the witness, that the statement lacked sufficient reliability because it shifted blame to Defendant Torres, and that, because of his presence at trial, the witness was not unavailable as required by Rule 11-804(B). Defendant Torres contended that, even if Barnett did not know the type of weapon that had produced the fatal shot, Barnett would have known that more shots were fired from the nine-millimeter gun. As a result, Defendant Torres argued, Barnett attempted to shift blame by saying that Defendant Torres fired the nine millimeter, relying on the higher probability that a nine-millimeter bullet killed Bonilla. The trial court concluded that Barnett was unavailable, **see** Rule 11-804(A)(3) (defining "unavailability" as including situations in which the declarant "testifies to a lack of memory of the subject matter of the declarant's statement"), and, relying on **State v. Sanchez**, 112 N.M. 59, 62-65, 811 P.2d 92, 95-98, that admission of the recorded statement did not violate the Confrontation Clause of the Sixth Amendment to the United States Constitution. As the sole ground of his appeal, Defendant Torres attacks this ruling of the trial court on both evidentiary and constitutional grounds.

II. STATEMENTS AGAINST PENAL INTERESTS

{9} Torres contends that the trial court erroneously admitted Barnett's statement under Rule 11-804(B)(3). Specifically, he argues that Barnett's statement was not genuinely against his penal interest because it shifted blame from Barnett to Torres.[1] We disagree.

{10} Rule 11-804(B)(3) provides that a statement is not excluded by the hearsay rule

> if the declarant is unavailable as a witness . . . [and the] statement . . . was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Torres urges this Court to follow the United States Supreme Court's analysis of Rule 804(b)(3) of the Federal Rules of Evidence in **Williamson v. United States**, 512 U.S. 594, 129 L. Ed. 2d 476, 114 S. Ct. 2431 (1994).

{11} In **Williamson**, the Court reviewed the admissibility of a statement by a participant in a crime, made while in the custody of law enforcement officials following the declarant's arrest, which described the participant's and the defendant's respective involvement in the crime. 512 U.S. at 596-97. The Court first determined that the word "statement" in federal Rule 804(b)(3) did not mean an extended narrative but, instead, a single declaration. **Williamson**, 512 U.S. at 599. Further, the Court determined that the rule "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." **Williamson**, 512 U.S. at 600-01. The Court reached this decision based on the fact that "one of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." **Williamson**, 512 U.S. at 599-600. The Court emphasized that "self-exculpatory statements are exactly the ones

[1] The State contends on appeal that Torres failed to preserve this argument in the trial court. Torres objected to the admission of Barnett's statement on hearsay grounds. He asserted that Barnett's statement lacked sufficient indicia of reliability, due to the allegation that Barnett attempted to shift blame to Torres, and interfered with his right to cross-examine the witness. Even though these arguments were made within the context of a constitutional discussion, we believe the general hearsay objection and the basis for Torres's argument fairly invoked a ruling by the trial court concerning whether the statement was genuinely against Barnett's penal interest. **See** Rule 12-216(A) NMRA 1998 (setting out the requirements for preserving an argument for appeal).

which people are most likely to make even when they are false" and that even collateral statements that are non-self-exculpatory lack sufficient reliability to warrant exception from the hearsay rule. **Id.** at 600. As a result, the Court concluded that there must be a statement-by-statement inquiry to determine, utilizing the text of the rule, whether "'a reasonable person in the declarant's position would not have made the statement unless believing it to be true.'" **Williamson**, 512 U.S. at 603-04 (quoting Fed. R. Evid. 804(b)(3)).

{12} Of course, we are not bound in our interpretation of our Rules of Evidence by the United States Supreme Court's interpretation of analogous provisions in the Federal Rules of Evidence. At least three states have chosen to interpret their respective rules of evidence providing for the admission of out-of-court statements against penal interests differently than the Supreme Court in **Williamson**. **See People v. Newton**, 966 P.2d 563, 574, 1998 WL 643619, at *13-14 (Colo. 1998); **State v. Julian**, 129 Ohio App. 3d 828, 832, 719 N.E.2d 96, 98, 1998 WL 636975, at *4-5 (Ohio Ct. App. 1998); **Chandler v. Commonwealth**, 249 Va. 270, 455 S.E.2d 219, 224-25 (Va. 1995). In **Newton**, the Supreme Court of Colorado reviewed **Williamson** and determined that it was inconsistent with Colorado's incorporation of the common law into its rules of evidence. **Newton**, 966 P.2d at 572, 1998 WL 643619, at *13. In addition, the court concluded that the requirement in **Williamson** of "severing collaterally neutral statements from each precise self-inculpatory remark deprives the jury of important context surrounding that self-inculpatory remark." **Id.** "The surgical precision called for by **Williamson** is highly artificial and nearly impossible to apply." **Id.** Finally, the court noted that "a narrow interpretation of the rule would apply equally to statements offered by a defendant to exculpate the defendant . . . [,] thereby making it more difficult for a defendant to present relevant evidence supporting a theory of non-involvement in the alleged crime." **Id.** As a result, the court "delineated a broader approach to admitting statements against penal interest . . . than the Supreme Court's interpretation" in **Williamson**, under which

> a narrative's precise statement against penal interest and related, collaterally neutral statements are admissible subject to two limitations: 1) the trial court should exclude statements that are so self-serving as to be unreliable and 2) if the trial court determines that the declarant had a significant motivation to curry favorable treatment, then the entire narrative is inadmissible.

Id. at *7. Similarly, both the Supreme Court of Virginia and the Ohio Court of Appeals have declined to adopt the statement-by-statement analysis articulated in **Williamson**. **See Chandler**, 455 S.E.2d at 225 ("**Williamson** . . . concerned the interpretation of the Federal Rules of Evidence, not applicable here."); **Julian**, 129 Ohio App. 3d at 834, 719 N.E.2d at 99-100, 1998 WL 636975, at *4 (affirming the admission of a narrative against penal interest due to the "overall incriminating nature of [the declarant's] statements to the police").

{13} Despite the fact that **Williamson** is not controlling in our analysis of Rule 11-804(B)(3), New Mexico courts have found the United States Supreme Court's interpretation of the Federal Rules of Evidence to be instructive in the interpretation of identical provisions in our Rules of Evidence. **See, e.g., State v. Lopez**, 1997-NMCA-075, ¶10, 123 N.M. 599, 943 P.2d 1052, **cert. quashed**, No. 24,479 (1997). In fact, the Court of Appeals, interpreting Rule 11-804(B)(3), recently adopted the **Williamson** analysis. **See Chavez v. City of Albuquerque**, 1997-NMCA-111, ¶9, 124 N.M. 239, 947 P.2d 1059. Although we agree with other jurisdictions that the **Williamson** analysis contains some practical difficulties, we believe that **Williamson** supplies a framework that more closely fulfills the purposes of Rule 11-804(B)(3), and we join the Court of Appeals in adopting **Williamson** for the interpretation of New Mexico law.

{14} In **Williamson**, the Court held that collateral statements are not admissible as statements against penal interest under federal Rule 804(b)(3). **See** 512 U.S. at 600-01. As the Court

ultimately concluded in **Williamson**, we believe the determinative inquiry under Rule 11-804(B)(3) must be the text of the rule itself: whether the statement is so far contrary to the declarant's penal interest that "a reasonable person in the declarant's position would not have made the statement unless believing it to be true." We agree with the United States Supreme Court that the reliability of declarations against interest is best secured by a statement-by-statement analysis of the declarant's narrative. Nonetheless, even though some courts have interpreted **Williamson** narrowly, we believe that **Williamson** does not stand for the proposition that all narratives containing statements against penal interest must be dissected in such a way that they lose any contextual meaning. **See Williamson**, 512 U.S. at 603 ("Whether a statement is self-inculpatory or not can only be determined by viewing it in context."). The Court, in fact, specifically limited its holding with respect to facially neutral statements.

> Even statements that are on their face neutral may actually be against the declarant's interest. "I hid the gun in Joe's apartment" may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory. "Sam and I went to Joe's house" might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest.

Id. We believe this language in **Williamson** clarifies that plainly self-inculpatory remarks need not be introduced in the absence of necessary context. Under Rule 11-804(B)(3), we conclude that facially-neutral but contextually -incriminating details may be admitted if a reasonable person in the declarant's position would not have revealed them unless believing them to be true due to their strong tendency to subject the declarant to criminal liability.

{15} Within this analytical framework, we turn to the trial court's admission of Barnett's statement under Rule 11-804(B)(3). As a general matter, we review a trial court's admission of evidence under an exception to the hearsay rule only for an abuse of discretion. **State v. Ross**, 1996-NMSC-031, 122 N.M. 15, 20, 919 P.2d 1080, 1085; **State v. Johnson**, 99 N.M. 682, 687, 662 P.2d 1349, 1354 (1983). Nonetheless, we note that there has been some controversy in other jurisdictions regarding the proper standard of review for the admission of statements against penal interest. **See Crespin v. New Mexico**, 144 F.3d 641, 651 (10th Cir.) (Tacha, J., concurring) ("Whether the penal interest issue is one of fact-and therefore entitled to a presumption of correctness-or law is a close question."), **cert. denied**, 525 U.S. 950, 142 L. Ed. 2d 313, 119 S. Ct. 378 (1998). Many courts have treated statements against penal interests under the abuse of discretion standard of review applicable to the admissibility of evidence generally. **See, e.g.**, **United States v. Beydler**, 120 F.3d 985, 987 (9th Cir. 1997). By contrast, other courts have concluded that the determination whether a statement is actually against a penal interest represents a question of law reviewable de novo. **See, e.g.**, **United States v. Costa**, 31 F.3d 1073, 1077 (11th Cir. 1994). Because the analysis regarding statements against penal interests involves a fact-intensive inquiry that "can only be answered in light of all the surrounding circumstances," **Williamson**, 512 U.S. at 604, we see nothing sufficiently unique about Rule 11-804(B)(3) to convince us to depart from the deferential standard of review applicable to other exceptions to the hearsay rule. **See State v. Attaway**, 117 N.M. 141, 144, 870 P.2d 103, 106 (1994) ("'If the concerns of judicial administration-efficiency, accuracy, and precedential weight-make it more appropriate for a district judge to determine whether the established facts fall within the relevant legal definition, we should subject his [or her] determination to deferential, clearly erroneous review.'" (quoting **United States v. McConney**, 728 F.2d 1195, 1202 (9th Cir. 1984))). We therefore review the trial court's admission of Barnett's statement for an abuse of the trial court's discretion.

{16} Torres does not argue on appeal that Barnett was not unavailable as that term is defined in Rule 11-804(B)(3), so we deem that argument to be abandoned. **See State ex rel. Human Servs. Dep't v. Staples (In re Doe)**, 98 N.M. 540, 541, 650 P.2d 824, 825 (1982) (stating that courts should not consider arguments not raised by the parties); **cf. State v. Ramos**, 115 N.M. 718, 720, 858 P.2d 94, 96 ("Issues raised in the docketing statement but not briefed are deemed abandoned."). We must determine, then, whether the trial court erred in concluding that Barnett's statements were so contrary to his penal interests that a reasonable person would not have made them unless believing them to be true. Torres argues that Barnett's statement contains both neutral and self-exculpatory statements that are inadmissible because Barnett was attempting to shift blame to Torres. For example, Torres highlights Barnett's statement that Torres fired the nine-millimeter gun, as well as Barnett's description of Torres's actions during the shooting, as either self-exculpatory or collateral to his self-inculpatory remarks. We disagree.

{17} Barnett told the police that he got into a car with two other individuals, that he was armed with a loaded weapon, that he had the intention of shooting his gun once he got to the West Deming party, and that he and Torres fired into the crowd in unison. These statements to the police could have subjected Barnett to a number of criminal offenses, including shooting at an occupied building, **see** § 30-3-8(A), aggravated battery, **see** § 30-3-5(C), aggravated assault, **see** § 30-3-2(A), and conspiracy, **see** NMSA 1978, § 30-28-2 (1979). In addition, the degree of detail included in Barnett's statement, including the identity of his co-conspirators, would significantly aid law enforcement officials in securing criminal liability. In fact, Barnett ultimately pleaded guilty to two counts of aggravated battery, one count of aggravated assault, and one count of shooting at an occupied building. Although Torres argues that Barnett's statement can be seen as exculpating himself from murder charges, we believe a closer inspection of Barnett's statements describing the concerted actions of him and Torres reveals that Barnett actually inculpated himself for a charge of depraved-mind murder, either as a principal or under a theory of accessory liability, regardless of which weapon was responsible for the killing. **See State v. Baca**, 1997-NMSC-059, ¶15, 124 N.M. 333, 950 P.2d 776 (describing accessory liability for depraved-mind murder as helping, encouraging, or causing another to commit an act greatly dangerous to the lives of others indicating a depraved mind without regard for human life, in combination with a shared purpose or design between the principal and the accessory).

{18} Torres points out that, when asked if he had thought about talking to someone after learning that people at the party had been shot, Barnett responded, "I kinda wanted to but I was, I didn't know if I had hit someone or if [Torres] had hit someone. So I didn't really want to say nothing." This statement, Torres argues, could be interpreted to mean that Barnett had a subjective belief that the level of criminal liability would depend on which gun produced the fatal shot. While we agree that subjective beliefs are relevant in evaluating reliability and admissibility under Rule 11-804(B)(3), **see** 5 Jack B. Weinstein & Margaret A. Berger, **Weinstein's Federal Evidence** § 804.06[4][d][i], at 804-53 (Joseph M. McLaughlin ed., 2d ed. 1998), there is no indication in the record that Barnett decided to give his statement because he had learned of the type of gun responsible for the shooting in a way that would allow him to shift blame. In fact, the record supports the conclusion that Barnett did not have that information at the time he spoke to police. Barnett's statement indicates that he was originally reluctant to initiate discussions with the authorities for fear of criminal liability, and in fact, he did not give his statement until the police approached him. Additionally, Detective Davis testified that the police did not in any way offer leniency to Barnett for his statement, which Barnett supplemented by testifying that his trial testimony was not the subject of any agreement with the State. **See State v. Huerta**, 104 N.M. 340, 342-43, 721 P.2d 408, 410-11 (discussing the potential for unreliability if a declarant makes a superficially self-inculpatory remark in order to curry favor with authorities), **limited on**

other grounds by State v. Gutierrez, 119 N.M. 658, 662, 894 P.2d 1014, 1018 (Ct. App. 1995); **cf. Newton**, 966 P.2d at 572, 1998 WL 643619, at *7 (stating that an entire narrative is inadmissible if the declarant has a significant motive to curry favorable treatment with authorities). Detective Davis also testified that he had given Miranda warnings to Barnett. **Cf. State v. Sanchez**, 112 N.M. 59, 64, 811 P.2d 92, 97 (Ct. App. 1991) (relying on Miranda warnings and the declarant's indication that there was no offer of leniency in exchange for his statement in concluding that the statement was not given in order to curry favor with police). Finally, Detective Davis testified that the type of weapon responsible for the killing had not been released to the media or related to Barnett. When viewed in light of all of the circumstances surrounding Barnett's statement, we believe the record supports a conclusion that, at the time he made his statement, Barnett believed that he was incriminating himself and Torres equally for the shooting. We reject Torres's speculative assertion that Barnett attempted to shift blame by claiming he, Barnett, fired the gun that produced fewer bullets; a reasonable person would recognize that a single shotgun blast could likely be responsible for the death. Thus, we do not believe that the trial court acted in an irrational manner in concluding that Barnett did not attempt to shift blame to Torres.

{19} A careful examination of the narrative Barnett gave police demonstrates that each statement could be used to prove the necessary elements and provide the necessary context in securing his criminal liability for depraved-mind murder and other crimes in connection with the shooting at the West Deming party. **Cf. Newton**, 966 P.2d at 579, 1998 WL 643619, at *15 (relying on accessory liability as demonstrating that a statement is against penal interest); **Chandler**, 455 S.E.2d at 225 (relying on the fact that the declarant's statements demonstrated "knowledge of and complicity in the criminal act and exposed [the declarant] to liability as an accessory to the crimes"). We believe that reasonable persons in Barnett's position would not have subjected themselves to such severe criminal liability unless believing each of the statements to be true. Therefore, we conclude that the trial court did not abuse its discretion in admitting the statements.

III. RIGHT OF CONFRONTATION

{20} Torres also contends that the admission of Barnett's out-of-court statement violated his right of confrontation. The United States Constitution and the New Mexico Constitution provide that criminal defendants have a right "to be confronted with the witnesses against" them. U.S. Const. amend. VI;[2] N.M. Const. art. II, § 14. "The issue of whether admission of hearsay evidence violates a defendant's rights under the Confrontation Clause is a question of law" subject to de novo review. **Ross**, 122 N.M. at 22, 919 P.2d at 1087.

{21} "The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him [or her], and the right to conduct cross-examination." **Pennsylvania v. Ritchie**, 480 U.S. 39, 51, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1986) (plurality opinion). Because Barnett testified at trial, there is no question that Torres's right to face Barnett was sufficiently satisfied. Torres argues, however, that his right to cross-examine Barnett was violated because Barnett's lack of memory made any attempt at cross-examination fruitless. We disagree.

{22} The United States Supreme Court has made it clear that, under the Sixth Amendment, "the Confrontation Clause guarantees an **opportunity** for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." **Delaware v. Fensterer**, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 106 S. Ct. 292 (1985). In **California v. Green**, 399 U.S. 149, 153-64, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970), the United States

[2] "The Sixth Amendment's right of an accused to confront the witnesses against him [or her] is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." **Pointer v. Texas**, 380 U.S. 400, 403, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

Supreme Court evaluated under the Confrontation Clause the admission of a witness's prior statement incriminating the accused following the witness's inability to remember details about events discussed in the prior statement. The Court held that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." **Id.** at 158. The Court reasoned that the witness's presence on the stand sufficiently satisfies the protections afforded by confrontation: the witness testifying under oath, the defendant having the opportunity to cross-examine the witness, and the jury having the opportunity to observe the witness's demeanor. **Id.** Nevertheless, the Court remanded on the issue whether the witness's "apparent lapse of memory so affected [the defendant's] right to cross-examine as to make a critical difference in the application of the Confrontation Clause," **Green**, 399 U.S. at 168, seemingly leaving open the question presented by Torres.

{23} Since **Green**, however, the United States Supreme Court has definitively resolved this issue for purposes of the federal Confrontation Clause. In **United States v. Owens**, 484 U.S. 554, 556, 98 L. Ed. 2d 951, 108 S. Ct. 838 (1988), the accused attacked the use of a witness's out-of-court statement in response to the witness's failed memory. The Court held that "when a hearsay declarant is present at trial and subject to unrestricted cross-examination" then "the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness's demeanor satisfy the constitutional requirements." **Id.** at 560. The Court concluded that the witness's lack of memory, while changing the focus of cross-examination away from the foundation for the past belief, did not prevent the accused from using "other means of impugning the belief." **Id.** at 559. Thus, the admission of the out-of-court statement did not violate the Confrontation Clause of the Sixth Amendment. **Owens**, 484 U.S. at 564.

{24} In this case, Barnett testified at trial and was subject to unrestricted cross-examination by Torres. Torres had the opportunity to question Barnett concerning his testimony that he fired a shotgun, as well as concerning Barnett's lack of memory, but chose not to do so based on a claim of futility. In addition, the jury had the opportunity to observe Barnett's demeanor with respect to the substance of his testimony and with respect to his claim that he did not remember who accompanied him during the shooting. Under these circumstances, it is clear that Barnett's out-of-court statement did not infringe upon Torres's right of confrontation under the Sixth Amendment to the United States Constitution. **See Owens**, 484 U.S. at 557-561. Under **Owens**, further inquiry into the reliability of Barnett's statement for purposes of the federal Confrontation Clause is unnecessary. 484 U.S. at 560.

{25} Although the analysis in **Owens** resolves Torres's claim under the federal Confrontation Clause, we note that New Mexico has not previously addressed the declarant's presence on the witness stand and availability for unrestricted cross-examination in relation to the right of confrontation contained in Article II, Section 14 of the New Mexico Constitution. **See generally State v. Gomez**, 1997-NMSC-006, ¶19, 122 N.M. 777, 783, 932 P.2d 1, 7 (adopting the interstitial approach to state constitutional law under which the court first resolves whether the right being asserted is protected under the federal constitution and "if it is not, then the state constitution is examined"). Although we are inclined to follow **Green** and hold that the Confrontation Clause in the New Mexico Constitution is satisfied by an effective opportunity to cross-examine the declarant at trial, we decline to address the impact of a declarant's lack of memory on the effectiveness of a defendant's right to cross-examination as was discussed by the United States Supreme Court in **Owens**. The parties in this case did not brief this issue under the New Mexico Constitution, and the trial court did not address this issue in resolving Torres's Confrontation Clause claims. Thus, we instead assume, without deciding, that Barnett's lack of memory "so affected [Torres's] right to cross-examine [Barnett] as to make a critical difference in the application of the Confrontation Clause" of the

New Mexico Constitution. **Green**, 399 U.S. at 168. Even assuming that Torres did not have an effective opportunity to cross-examine Barnett, we nonetheless conclude that Barnett's statement bears adequate indicia of reliability to satisfy the dictates of the Confrontation Clause of the New Mexico Constitution.

{26} The ability to cross-examine adverse witnesses is the primary means of securing an accused's right of confrontation. As a result, the admission of an out-of-court statement generally survives constitutional scrutiny only if "the prosecution . . . either produces, or demonstrates the unavailability of, the declarant whose statement it wishes to use against the defendant," **Ohio v. Roberts**, 448 U.S. 56, 65, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), and the statement "bears 'adequate indicia of reliability,'" so as to neutralize any potential harm from the lack of cross-examination, **id.** at 66.[3] Torres contends that Barnett's statement is not sufficiently reliable to satisfy the Confrontation Clause. We disagree.

{27} The Confrontation Clause sometimes requires the exclusion of evidence that would otherwise be admissible under an exception to the hearsay rule, depending upon the degree of reliability generally secured by the particular exception at issue. **See Idaho v. Wright**, 497 U.S. 805, 814-15, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990). "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." **Roberts**, 448 U.S. at 66. In our analysis of the Confrontation Clause, we first distinguish earlier precedent that addresses hearsay statements of accomplices and that might tend to suggest that such statements are inherently unreliable. We then conclude that the hearsay exception for declarations against penal interests is firmly rooted.

{28} The United States Supreme Court has previously addressed the applicability of the Confrontation Clause to out-of-court statements implicating the accused made by an accomplice while in custody. "Over the years since **Douglas [v. Alabama**, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965)], the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." **Lee v. Illinois**, 476 U.S. 530, 541, 90 L. Ed. 2d 514, 106 S. Ct. 2056 (1986). In **Lee**, the trial court admitted a statement by an accomplice even though the statement was made while the declarant "not only had a theoretical motive to distort the facts to [the defendant's] detriment, but [while] he also was actively considering the possibility of becoming her adversary." **Id.** at 544. The Court deemed the portions of the statement inculpating the accused inherently unreliable "because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." **Id.** at 545. The Court concluded that admission of the statement violated the Confrontation Clause because there were not "sufficient 'indicia of reliability'" to rebut "the weighty presumption against the admission of such uncross-examined evidence." **Id.** at 546. In applying the Supreme Court's decision in **Lee**, we previously relied on four factors in determining that an accomplice's in-custody statement satisfied the Confrontation Clause: (1) the absence of any offer of leniency for the declarant's statement; (2) the statement was against the declarant's penal interest; (3) the statement did not attempt to shift responsibility away from the

[3] Although Torres argues on appeal that a "heightened level of protection under the New Mexico Constitution should apply" in this case, an argument Torres properly preserved in the trial court, **see Gomez**, 1997-NMSC-006, ¶22, 122 N.M. at 784, 932 P.2d at 8 (discussing preservation requirements if precedent exists construing state provision more broadly than federal); **State v. Lopez**, 1996-NMCA-101, ¶20, 122 N.M. 459, 926 P.2d 784 (construing Article II, Section 14 more broadly than federal precedent on the issue of unavailability), he offers no persuasive reasons to suggest that the federal requirement of "adequate indicia of reliability" fails to protect an accused's right of confrontation under Article II, Section 14. As a result, because we currently believe the federal standard provides adequate safeguards, we apply federal precedent in this case. **Cf. State v. Woodruff**, 1997-NMSC-061, ¶38, 124 N.M. 388, 951 P.2d 605 (declining to construe a state constitutional provision more broadly than its federal analog because the defendant failed to "provide a basis for divergence from federal precedent . . . and [the Court's] own research and analysis has identified none").

declarant; and (4) the statement was corroborated by independent evidence. **See State v. Earnest**, 106 N.M. 411, 412, 744 P.2d 539, 540 (1987); **see also Sanchez**, 112 N.M. at 63-65, 811 P.2d at 96-98 (relying on **Earnest**). We believe, however, that this analysis is no longer necessary in order to ensure that declarations against interest admissible under Rule 11-804(B)(3) satisfy the Confrontation Clause.

{29} The Court in **Lee** addressed a statement admitted pursuant to Illinois law. In response to a suggestion that the statement was a declaration against interest, the Court determined that "that concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." **Lee**, 476 U.S. at 544 n.5. By contrast, in our interpretation of Rule 11-804(B)(3), we have adopted the analysis articulated by the United States Supreme Court in **Williamson**. In that case, which involved the confession of an accomplice that was made while in custody and that incriminated the defendant, the Court stated that "the very fact that a statement is genuinely self-inculpatory-which our reading of Rule 804(b)(3) requires-is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." **Williamson**, 512 U.S. at 605 (citing **Lee**, 476 U.S. at 543-45). With the exception of the final factor articulated in **Earnest**,[4] we believe that the **Earnest** analysis has been subsumed within our interpretation of Rule 11-804(B)(3). In evaluating whether a declarant's statements satisfy Rule 11-804(B)(3) and whether a reasonable person would not have made the statements unless believing them to be true, the trial court should examine the statement in light of all surrounding circumstances, including to whom the statement was made, **see Gutierrez**, 119 N.M. at 661, 894 P.2d at 1017, whether the declarant attempted to curry favor with authorities, **see Huerta**, 104 N.M. at 342-43, 721 P.2d at 410-11, and whether the statement is collateral to the declarant's criminal liability or exculpatory of the declarant, **see Williamson**, 512 U.S. at 600. Thus, we believe that, given our interpretation of Rule 11-804(B)(3), the concerns expressed by the Court in **Lee** no longer apply in New Mexico. **See United States v. York**, 933 F.2d 1343, 1363 (7th Cir. 1991) ("The fear that inculpatory statements are unreliable stems largely from the presumption that such statements are self-serving, offered only to shift the blame from the declarant to another. But when, as here, the inculpatory portion of a statement is also against the declarant's interest, or when it is neutral because the declarant has not attempted to diminish his own role, there is little reason to suspect that portion of an otherwise reliable statement is untrustworthy. "); **United States v. Aldana**, 4 F. Supp. 2d 1325, 1328 n.2 (D. Utah 1998) ("New Mexico could interpret its own version of 804(b)(3) differently than that in **Williamson**. Many states have done so. . . . If a state has followed **Williamson**, no confrontation issue should exist. If not, an analysis under [**Lee**] and [**Roberts**] is required to show the requisite reliability."). **Compare United States v. Barone**, 114 F.3d 1284, 1302 (1st Cir.) ("We think that where, as here, it is

[4] The United States Supreme Court has clarified that the Confrontation Clause requires that statements be inherently trustworthy and that independent corroborative evidence is irrelevant to such an inquiry. **See Wright**, 497 U.S. at 822 ("Hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."); **see also Gutierrez**, 119 N.M. at 662, 894 P.2d at 1018 (discussing this requirement in **Wright**). We agree that independent evidence is irrelevant to the reliability of a statement incriminating the accused and that reliance on such evidence is better suited to a harmless error analysis. Therefore, we conclude that trial courts should not consider independent corroborative evidence in determining the admissibility of statements incriminating the accused under Rule 11-804(B)(3). **Cf. Newton**, 966 P.2d at 569-570, 1998 WL 643619, at *10 (limiting a corroboration inquiry pursuant to the hearsay exception for declarations against penal interest to the circumstances surrounding the making of the statement and excluding from the inquiry independent evidence introduced at trial in order to be consistent with the Confrontation Clause). The trial court, relying on **Sanchez**, 112 N.M. at 63, 811 P.2d at 96, considered independent corroborative evidence in admitting Barnett's statement; however, given the fact that the statement met all three of the remaining **Earnest** factors, we do not believe that the consideration of independent evidence affected the trial court's ultimate conclusion that the statement was sufficiently reliable to satisfy the Confrontation Clause.

clear that the statements inculpating both the declarant and the defendant were not made in order to limit the declarant's exposure to criminal liability, the declarations against interest exception is properly treated as firmly rooted for Confrontation Clause purposes."), **cert. denied**, 522 U.S. 1021, 118 S. Ct. 614, 139 L. Ed. 2d 500 (1997), **with Earnest v. Dorsey**, 87 F.3d 1123, 1131 (10th Cir.) (concluding that, under **Lee**, custodial confessions by an accomplice are presumptively unreliable and cannot be categorized simply as statements against interest), **cert. denied**, 519 U.S. 1016, 117 S. Ct. 527, 136 L. Ed. 2d 414 (1996). Therefore, we turn to the question of whether the exception for declarations against penal interests is firmly rooted for purposes of satisfying the Confrontation Clause.

{30} In determining whether an exception to the hearsay rule is firmly rooted for purposes of the Confrontation Clause, we "consider the exception's historical longevity and widespread acceptance," **Ross**, 122 N.M. at 24, 919 P.2d at 1089, and whether the exception is narrowly tailored in such a way as to limit admissibility to statements bearing adequate indicia of reliability. At common law, courts widely recognized that declarations against pecuniary interest constituted an exception to the hearsay rule. 2 Kenneth S. Broun et al., **McCormick on Evidence** § 316, at 336-37 (John William Strong ed., 4th ed. 1992) [hereinafter **McCormick on Evidence**]. Such declarations included acknowledgment of a debt, **id.** § 317, at 338, as well as "acknowledgment of facts which would give rise to a liability for unliquidated damages for tort or seemingly for breach of contract," **McCormick on Evidence** § 317, at 339 (footnote omitted). Common law courts routinely admitted these statements because the fact that individuals would be unlikely to damage their own interests gave such statements "the safeguard of special trustworthiness justifying most of the exceptions to the hearsay rule. " **Id.** § 316, at 336. As a result of this "longstanding judicial and legislative experience in assessing [its] trustworthiness," it is without question that the exception for declarations against pecuniary or proprietary interests is a firmly rooted exception to the hearsay rule and poses an insignificant risk of unreliability under the Confrontation Clause.

{31} Nonetheless, common law courts did not extend the application of this exception to declarations against penal interests. In rejecting this common law distinction, however, the drafters of the Federal Rules of Evidence recognized that the exclusion of statements against penal, as opposed to proprietary, interest "is inconsistent with the broad language originally employed in stating the reason and principle of the present exception." 5 John Henry Wigmore, **Evidence in Trials at Common Law** § 1477, at 358 (James H. Chadbourn rev. 1974); **see also Donnelly v. United States**, 228 U.S. 243, 278, 57 L. Ed. 820, 33 S. Ct. 449 (1913) (Holmes, J., dissenting) (relying on Wigmore and stating that "no other statement is so much against interest as a confession of murder"). This approach is now widely accepted in the United States. **See generally McCormick on Evidence**, § 318. In addition, the United States Supreme Court's interpretation of federal Rule 804(b)(3), which we adopt in this opinion, ensures that declarations against interest will be uniformly reliable. **See Aldana**, 4 F. Supp. 2d at 1329 (stating that "the rule is satisfactorily constitutionalized by **Williamson**"). Finally, we note that declarations against penal interests will often meet the criteria for the common law exception for declarations against propriety interest because the admission of criminal liability frequently translates into an admission of civil liability. **See McCormick on Evidence**, § 318, at 340 (stating that some common law courts relied on the connection between criminal and civil liability in admitting criminal confessions by unavailable witnesses). In this case, for example, while Barnett's statements genuinely inculpated him for criminal charges as severe as depraved-mind murder, those statements could also tend to subject Barnett to civil liability for wrongful death. **See** NMSA 1978, § 41-2-1 (1891) (declaring that an individual who causes another's death by wrongful act "although such death shall have been caused under such circumstances as amount in law to a felony . . . shall be liable to an action for damages"). **See generally GCM, Inc. v. Kentucky Cent. Life Ins.**

Co., 1997-NMSC-052, ¶15, 124 N.M. 186, 947 P.2d 143 ("It is clear that tort liability for aiding and abetting a tortious action exists in New Mexico.").

{32} For these reasons, we join a growing number of jurisdictions[5] and conclude that Rule 11-804(B)(3) is a firmly rooted hearsay exception for purposes of satisfying the indicia of reliability requirement of the Confrontation Clause. From this conclusion, we infer that Barnett's statement is sufficiently reliable to satisfy the Confrontation Clause of both the United States Constitution and the New Mexico Constitution. As a result, the trial court's admission of Barnett's statement did not violate Torres's right of confrontation.

IV. CONCLUSION

{33} We adopt the United States Supreme Court's interpretation of Rule 804(b)(3) of the Federal Rules of Evidence in our interpretation of Rule 11-804(B)(3). Under the Court's **Williamson** analysis, declarations against interest must be evaluated on a statement-by-statement basis. Collateral and self-exculpatory statements of the declarant are inadmissible, while facially and contextually self-inculpatory statements may be admitted if the declarant is unavailable. Having examined Barnett's narrative to the police, we conclude that each of his statements was either facially or contextually self-inculpatory. We also conclude that Barnett did not attempt to shift blame to Torres. Thus, the trial court did not abuse its discretion in admitting Barnett's statement pursuant to Rule 11-804(B)(3).

{34} The Confrontation Clause requires that defendants have a meaningful opportunity to confront the witnesses against them. We conclude that Barnett's presence on the witness stand and his availability for unrestricted cross-examination satisfied the Sixth and Fourteenth Amendments to the United States Constitution. Additionally, we conclude that the exception to the hearsay rule for statements against penal interest found in Rule 11-804(B)(3) is a firmly rooted exception. Thus, we conclude that Barnett's statement bore adequate indicia of reliability to satisfy the Confrontation Clause of both the United States Constitution and the New Mexico Constitution. Therefore, we affirm Torres's convictions.

{35} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

PAMELA B. MINZNER,
Justice

DAN A. McKINNON, III,
Justice

GENE E. FRANCHINI,
Chief Justice (dissenting)

DISSENT

{36} I DISSENT.

GENE E. FRANCHINI,
Chief Justice

[5] "The weight of authority, post **Lee v. Illinois** and **Williamson**, supports the conclusion that the exception to the hearsay rule for a statement against penal interest is a firmly rooted exception to the hearsay rule." **Aldana**, 4 F. Supp. 2d at 1329; **accord United States v. Keltner**, 147 F.3d 662, 671 (8th Cir.), **petition for cert. denied**, 525 U.S. 1032, 119 S. Ct. 574, 142 L. Ed. 2d 478, 67 U.S.L.W. 3363 (U.S. 1998); **Neuman v. Rivers**, 125 F.3d 315, 319 (6th Cir.), **cert. denied**, 522 U.S. 1030, 118 S. Ct. 631, 139 L. Ed. 2d 610 (1997); **United States v. Saccoccia**, 58 F.3d 754, 779 (1st Cir. 1995); **York**, 933 F.2d at 1363-64; **Lilly v. Commonwealth**, 255 Va. 558, 499 S.E.2d 522, 534 (Va.), **cert. granted**, 525 U.S. 981, 119 S. Ct. 443, 142 L. Ed. 2d 398, 1998 WL 596783 (U.S. 1998). **But see United States v. Flores**, 985 F.2d 770, 775-76 (5th Cir. 1993) (concluding the exception is not firmly rooted); **Franqui v. State**, 699 So. 2d 1312, 1319 (Fla. 1997) (stating that, due to recent origin in present form in Florida law, the exception was not firmly rooted), **cert. denied**, 523 U.S. 1040, 118 S. Ct. 1337, 140 L. Ed. 2d 499 (1998); **Simmons v. State**, 333 Md. 547, 636 A.2d 463, 469 (Md. 1994) (concluding the exception is not firmly rooted).

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1999-NMSC-035

Filing Date: July 8, 1999, Filed. As Corrected October 26, 1999

Docket No. 23,832

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

TERRY D. CLARK,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
David W. Bonem, District Judge

Gary C. Mitchell, P.C.
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for Appellant.

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for Appellee.

OPINION

SERNA, Justice.

{1} Defendant Terry Clark appeals his sentence of death for the murder of nine-year-old Dena Lynn Gore, pursuant to NMSA 1978, § 31-20A-4(A) (1979), which states that "the judgment of conviction and sentence of death shall be automatically reviewed by the Supreme Court of the state of New Mexico." Clark raises numerous issues regarding his death sentence: (1) whether the trial court erred by striking potential jurors because of their opposition to the death penalty; (2) whether removal for cause of potential jurors in capital cases based on their religious objection violates the religious protections of the New Mexico Constitution; (3) whether the trial court abused its discretion by allowing the prosecution to question potential jurors as to their ability to vote for the death penalty; (4) whether the trial court erred by denying his objection to the prosecution's use of peremptory challenges to remove potential jurors reluctant to consider a sentence of death; (5) whether the trial court erred by restricting his presentation of mitigating evidence; (6) whether the trial court erred by admitting evidence regarding the circumstances of the crime and victim impact testimony; (7) whether the trial court erred by admitting evidence regarding his prior conviction; (8) whether the trial court erred by denying his motion to restrict the scope of the prosecution's penalty phase closing arguments; (9) whether the tape record was so inaudible as to warrant a reversal; (10) whether the trial court erred by denying his motion for a new trial; (11) whether the Capital Felony Sentencing Act is constitutional; (12) whether his sentence withstands proportionality review; and (13) whether Clark may waive further appellate review of his case. We affirm his sentence.

FACTS AND BACKGROUND

{2} The Court of Appeals upheld Clark's conviction for kidnapping and first degree criminal sexual penetration of a six-year-old girl in **State v. Clark**, 104 N.M. 434, 722 P.2d 685, **denial of habeas corpus petition vacated by Clark v. Tansy**, 13 F.3d 1407 (10th Cir. 1993). He received a sentence of twenty-four years imprisonment for these crimes, and was released on bond pending appeal when he abducted and murdered Gore. **State v. Clark**, 108 N.M. 288, 290, 772 P.2d 322, 324 (1989). Clark pleaded guilty to kidnapping in the first degree and capital murder of Gore in 1986, in the hopes of taking

advantage of former Governor Toney Anaya's indication that he would commute a death sentence should Clark receive one before his term expired; however, he was not sentenced until after Anaya's term ended. **Id.** at 291, 772 P.2d at 325. A jury sentenced Clark to death in 1987, and this Court upheld the sentence on direct appeal in **Clark**, 108 N.M. 288, 772 P.2d 322. Clark filed a petition for writ of habeas corpus in the district court, which the court denied. After both this Court and the United States Supreme Court ruled that defendants in other capital felony sentencing proceedings were entitled to a jury instruction concerning their eligibility for parole, **see State v. Henderson**, 109 N.M. 655, 658-59, 789 P.2d 603, 606-07 (1990); **Simmons v. South Carolina**, 512 U.S. 154, 161-62, 129 L. Ed. 2d 133, 114 S. Ct. 2187 (1994), we reviewed the trial court's denial of Clark's petition for a writ of habeas corpus, vacated his death sentence, and remanded for resentencing because of the failure to provide such an instruction in his case, **see Clark v. Tansy**, 118 N.M. 486, 495, 882 P.2d 527, 536 (1994). In 1996, a jury again sentenced Clark to death, and this second direct appeal follows.

DISCUSSION

{3} Without authority or specificity, Clark attempts to preserve "all issues which had been raised in all docketing statements and in all cases prior to the re-sentencing. . . . In order to preserve any and all issues for future habeas relief, review by the Supreme Court of the state of New Mexico, and/or review by any United States District Court, and United States circuit Court of Appeals, and the United States Supreme Court, reference is made to those issues and by reference thereto they are respectfully made a part hereof." The Court of Appeals has previously held:

> Defendant appears to have made an effort to avoid abandonment of any of his issues by stating, in his brief-in-chief, that the brief incorporates all arguments and authority included in the docketing statement. This is not an acceptable briefing practice, and we hold that it does not operate to preserve any of the issues not specifically argued in the briefs.
>
> The appellate rule concerning briefing does not provide for incorporation of arguments contained in other pleadings. [Rule 12-213 NMRA 1999]. Allowing such a practice would force opposing counsel and this court to reexamine the docketing statement and other pleadings such as memoranda in opposition to ensure that all of the issues discussed in those documents have been addressed. In addition, it would force this court and opposing counsel to speculate as to which issues a party genuinely wishes to preserve and which the party feels have no merit. . . .
>
> . . . All issues raised in the docketing statement but not argued in the briefs have been abandoned.

State v. Aragon, 109 N.M. 632, 634, 788 P.2d 932, 934 (citations omitted). Similarly, we address only those issues properly before this Court within the briefs of the parties. **See Clark**, 108 N.M. at 311, 772 P.2d at 345 ("Twenty-three issues were initially raised in Clark's docketing statement. The issues not addressed here were not briefed and are, therefore, abandoned.").

1. The Trial Court's Rulings Regarding Prospective Jurors

{4} Clark argues that the trial court struck prospective jurors because they were opposed to the death penalty based upon religious reasons or because they would not consider capital punishment if Clark were to be imprisoned until age eighty-six, and that the trial court denied some of his motions to challenge potential jurors based on Clark's belief that they were predisposed towards the death penalty. Clark reasons that these actions violated his right to an impartial jury. **See** U.S. Const. amend. VI; N.M. Const. art. II, § 14. Clark also argues, without support, that seating jurors who lean towards the death penalty improperly shifts the burden of proof.

{5} This Court rejected similar arguments in prior cases, holding that "a juror is properly excludable for cause if the juror's views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" **State v. Sutphin**, 107 N.M. 126, 129, 753 P.2d 1314, 1317 (1988) (quoting **Wainwright v. Witt**, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985)). This Court held that the trial court is in the best position to "assess a juror's state of mind," based upon the juror's demeanor and credibility, and thus, it is "within the trial court's discretion as to whether a prospective juror should be excused," balanced by the trial court's protection of the rights of the defendant. **Id.** "We will not disturb the trial court's decision absent a clear abuse of discretion or a manifest error." **Id.** at 130, 753 P.2d at 1318. The United States Supreme Court also emphasized that "deference must be paid to the trial judge who sees and hears the juror." **Witt**, 469 U.S. at 426.

{6} The State notes that Clark stipulated in the trial court that several jurors were properly excluded, waiving his argument regarding these individuals on appeal. **Cf. State v. Campos**, 1996-NMSC-43, P47, 122 N.M. 148, 921 P.2d 1266 ("Acquiescence in the admission of evidence . . . constitutes waiver of the issue on appeal."). Clark specifies F. Torres, Ochoa, Cordova-Marquez, and M. Torres, as prospective jurors which the court improperly excluded. The record indicates that Clark stipulated that F. Torres was properly excluded under the **Witt** standard because she stated that she would not consider capital punishment as an alternative to a life sentence, although he did preserve his objection that she was excluded upon the basis of her religion, which we address below. Similarly, the record indicates that Clark agreed that Ochoa would automatically vote for a life sentence, indicating her inability to view the proceedings impartially, and agreed to her excusal. The record also indicates that Clark agreed that Cordova-Marquez too could be properly excluded. M. Torres also stated that, because of his religious ideology and because of his belief that life imprisonment is more severe than the death penalty, he would vote automatically for life imprisonment; thus, the prosecutor challenged him for cause, and Clark agreed. Clark's counsel apparently asserts that he realized, "later in the first day," that "jurors were eliminating themselves because they felt that if you were imprisoned to age eighty-six, that would be satisfactory mitigation and would not consider the death penalty, [and that he] objected to striking jurors for that reason." Even if Clark had properly objected in a timely manner, we conclude that the trial court did not abuse its discretion in removing these jurors under the **Witt** standard.

{7} Clark argues that if these prospective jurors are indicating that the consideration of the mitigating circumstance of imprisonment until at least age eighty-six would lead them to vote for a life sentence rather than the death penalty, then these jurors should not be excluded under **Witherspoon v. Illinois**, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968), or **Witt** because they are simply following the law and concluding that Clark should receive a life sentence. However, this reasoning by jurors indicates that they are basing their decision upon one factor, whether Clark will be imprisoned for life, before hearing any evidence, rather than considering all mitigating and aggravating circumstances before them, as required by their duty as jurors. The trial court may properly exclude prospective jurors who indicate that they could not vote to impose the death penalty under any circumstances. **See State v. Trujillo**, 99 N.M. 251, 252, 657 P.2d 107, 108 (1983).

{8} Additionally, Clark objected to the trial court's decision to strike Churchill from the jury, as he stated that he leaned towards voting for a life sentence, and Clark asserts that Churchill would have been willing to listen to and consider the case. The State argues that Churchill said that he had "a great reluctance" to vote for capital punishment, that he leaned strongly towards a life sentence, and that he requested that he not be picked for the jury. The trial court characterized this decision as its most difficult, and, based upon Churchill's demeanor and statements, found that

Churchill would find it difficult to follow the law and was thus significantly impaired in his ability to serve as a juror. Following a careful review of the record, we agree that this was a difficult decision; however, "absent manifest abuse of discretion, we will not disturb a trial court's determination of questions of juror bias." **See State v. McGuire**, 110 N.M. 304, 312, 795 P.2d 996, 1004 (1990). We conclude that the trial court did not abuse its discretion.

{9} The trial court denied Clark's motions to remove Rosales, Scullion, and Redford for cause. Clark states that Rosales indicated that he is against plea bargaining and was antagonistic during questioning, while Scullion indicated that he would lean more towards the death penalty. The State counters that Rosales expressed repeatedly that he had not made up his mind and would have to hear all of the evidence before he would make a decision. Scullion stated that he would consider both options after hearing all of the evidence, although he tended towards the death penalty, characterized as a six to seven on a scale of ten. Clark notes that Redford stated that the defense would have more difficulty in convincing him to vote for a life sentence because the victim was a child. Redford stated that he could consider both aggravating and mitigating circumstances, but noted that he had two daughters, and said that crimes against children are worse than crimes against adults. We conclude that the trial court did not abuse its discretion.[1] **See McGuire**, 110 N.M. at 312, 795 P.2d at 1004 (holding that trial court did not abuse its discretion by denying the defendant's motions to dismiss jurors for cause when they all proclaimed that they could be impartial even though one juror admitted to a "leaning" towards a guilty verdict based upon pretrial publicity); **Stamper v. Muncie**, 944 F.2d 170, 177 (4th Cir. 1991) (holding that leaning towards the death penalty is not the same as an automatic vote for the death penalty); **Isaacs v. State**, 259 Ga. 717, 386 S.E.2d 316, 328 (Ga. 1989) (holding that the trial court did not err in finding that jurors were qualified to serve despite the defendant's challenges on "reverse-**Witherspoon** grounds").

{10} The trial court may properly exclude a juror for cause if the juror's views would substantially impair the performance of the juror's duties in accordance with the instructions and oath. This Court has stated that the trial court is in the best position to assess a juror's state of mind, by taking into consideration the juror's demeanor and credibility. It is within the trial court's discretion as to whether a prospective juror should be excused. Because there was not a clear abuse of discretion or a manifest error in this case, we will not disturb the trial court's decision.

2. Jurors' Religious Opposition to Capital Punishment

{11} Clark asserts that removal for cause of jurors in capital cases based on their religious objection violates the religious protections of the New Mexico Constitution. He argues that the trial court struck "jurors who were opposed to the death penalty for religious reasons," in violation of Article VII, Section 3 of the New Mexico Constitution, which states in part that: "The right of any citizen of the State to . . . sit upon juries[] shall never be restricted, abridged or impaired on account of religion. . . ." Clark analogizes this issue, exclusion because of the jurors'

[1] The State notes that Rosales, Scullion, and Redford did not deliberate Clark's sentence: Rosales' name was not reached during the selection process, Scullion was peremptorily stricken by Clark, and Redford was chosen as an alternate after Clark exhausted his peremptory challenges. However, the State also notes that this Court held that prejudice is presumed when a defendant uses a peremptory challenge to remove a juror who should have been excused for cause, and exhausts all his or her peremptory challenges before jury selection is completed. **See Fuson v. State**, 105 N.M. 632, 634, 735 P.2d 1138, 1140 (1987). The State urges this Court to overrule **Fuson** because the federal precedent upon which it was based has been eliminated by the Supreme Court in **Ross v. Oklahoma**, 487 U.S. 81, 88, 101 L. Ed. 2d 80, 108 S. Ct. 2273 (1988), which held that: "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Because we conclude that the trial court did not abuse its discretion in denying Clark's motions for removal for cause, it is unnecessary to reach this argument.

religious beliefs, to the exclusion of jurors based upon their race. Further, Clark asserts that other provisions of the New Mexico Constitution support this notion. Clark states that "when a religiously scrupled juror is challenged successfully for cause, that juror's right to serve on a jury is impinged upon." Clark enumerates prospective jurors who described their inability to apply the capital punishment sentence to any defendant based upon religious convictions.

{12} Clark incorrectly relies upon **Lockhart v. McCree**, in which the Supreme Court held that "the exclusion from jury service of large groups of individuals **not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic** such as race, gender, or ethnic background, undeniably gave rise to an 'appearance of unfairness.'" 476 U.S. 162, 175, 106 S. Ct. 1758, 1766, 90 L. Ed. 2d 137 (1986) (emphasis added); **see also Batson v. Kentucky**, 476 U.S. 79, 87, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986) (concluding that "by denying a person participation in jury service on account of his [or her] race, the State unconstitutionally discriminated against the excluded juror"). Clark argues that religious belief should be included with race, gender, or ethnic background as an immutable characteristic. In the context of jury selection, however, the immutable characteristics of race and gender are clearly distinguishable from that of religious belief. The individuals excluded from Clark's jury stated that they would be unable to apply the law to this or any other capital punishment case because their religious ideology prohibits imposing a death penalty judgment. Thus, rather than the court excluding jurors because they are members of a particular religion, the court excluded jurors who were unable to apply the law.

{13} Clark argues that the State has no compelling interest in death qualified juries. He asserts that the death penalty is rarely used, that it is not a deterrent, and that life imprisonment provides a reasonable alternative. Clark makes frequent, unpersuasive comparisons to slavery and racial discrimination, implying that Hispanic Catholics in particular are suffering from the State's discrimination. There is no evidence, and Clark does not overtly assert, that any juror was removed based upon his or her race. Further, the State notes that six of the jurors who returned a sentence of death for Clark identified themselves as Catholic, supporting the notion that jurors were removed based upon their inability to be impartial, rather than their religious beliefs. **See State v. Eason**, 336 N.C. 730, 445 S.E.2d 917, 923 (N.C. 1994) (concluding that a prospective juror was removed because of her reservations about the death penalty rather than her religious affiliation, supported by the fact that another juror, who had the same religious affiliation but expressed no reservations about the death penalty, was chosen to sit on the jury).

{14} Clark observes that the United States Supreme Court has held that it is unconstitutional for city ordinances to single out a particular religion and prohibit its free exercise. **See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah**, 508 U.S. 520, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993). Clark then analogizes this reasoning to the "actions of the government in this case in discriminarily [sic] selecting a jury by striking those whose religious beliefs cause them to be opposed to the death penalty." Clark points to New Mexico's history of protected religious freedom as further support for his position that "New Mexicans have a specific right to participate on juries irrespective of their religious opinions."

{15} As discussed above, this Court addressed whether the trial court may remove prospective jurors for cause when the jurors are opposed to the death penalty in **Sutphin**, 107 N.M. at 129, 753 P.2d at 1317. The defendant in **Sutphin** argued that the removal of jurors denied his rights to due process and a fair and impartial jury. **Id.** A trial court may properly exclude a juror for cause if the juror's views would prevent or substantially impair the performance of the juror's duties. Although Clark argues that the State has no compelling interest in a death qualified jury, this Court "recognized the state's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them

to view the proceedings impartially, and who therefore might frustrate the administration of a state's death penalty scheme." **Id.**

{16} We hold that the trial court properly removed prospective jurors for cause, when those jurors opposed the death penalty, because the jurors were unable to view the proceedings impartially and perform their duties in accordance with the juror's oath, not because of their religious opinion or affiliation. **See State v. Willoughby**, 181 Ariz. 530, 892 P.2d 1319, 1335 (Ariz. 1995) (en banc) ("Although religious beliefs may motivate one's opinion about the death penalty, the beliefs themselves are not the basis for disqualification."); **Wolf v. Sundquist**, 955 S.W.2d 626, 631 (Tenn. Ct. App. 1997) (holding that "in light of the affirmative constitutional mandate to provide impartial juries in criminal cases, the State has an important interest in obtaining juries that do not contain members who, because of their religious beliefs, are unable to follow the law or the trial court's instructions"). "Religious freedom embodies two complementary concepts—the freedom to believe and the freedom to act. The freedom to believe is absolute; while the freedom to act is subject to reasonable control for the protection of others." **Wolf**, 955 S.W.2d at 630 (citing **Cantwell v. Connecticut**, 310 U.S. 296, 303-04, 84 L. Ed. 1213, 60 S. Ct. 900 (1940)) (citations omitted). Prospective jurors "were not excluded because of their religious beliefs but because they stated, in effect, that they could not be impartial and unbiased." **Wolf**, 955 S.W.2d at 631. "When a potential juror has convictions that would prevent him or her from voting to impose the death penalty, without regard to the evidence presented at trial, that juror is properly excused for cause." **Eason**, 445 S.E.2d at 921 ("The potential juror here was not stricken solely because she was a Jehovah's Witness, however. Rather, the prospective juror, because of her strong personal and religious convictions, expressed reservations about the death penalty and was stricken because of these reservations."). As the State asserts, jurors excluded from capital cases for this reason are not deprived of any constitutional right because they can serve on non-capital cases. **See Buchanan v. Kentucky**, 483 U.S. 402, 416, 97 L. Ed. 2d 336, 107 S. Ct. 2906 (1987) (noting that jurors excludable for cause because of their views on the death penalty "are not substantially deprived of their basic rights of citizenship, because they are not prevented from serving as jurors in other criminal cases" (internal quotation marks omitted)).

{17} The trial court's removal for cause of jurors in Clark's case was based on their inability to apply the law and follow the jury oath. The fact that the potential juror's inability to perform his or her duty is based upon religious objection and belief does not violate the religious protections of the New Mexico Constitution, because exclusion from the jury was not based upon religious affiliation.

3. Prosecution Questions Regarding Jurors' Ability to Vote for a Death Penalty

{18} Clark's third argument is that the trial court erred by allowing the State, during voir dire, to question prospective jurors whether they could impose the death penalty upon Clark, whether they could sign their name to a jury finding sentencing him to death, and whether the jurors could face Clark in court and acknowledge their vote for the death penalty. Clark argues that this error violated his right to a fair trial. Clark asserts that the jurors, under oath, promised the State that they would give the death penalty. **See, e.g.**, **Adams v. Texas**, 448 U.S. 38, 50, 65 L. Ed. 2d 581, 100 S. Ct. 2521 (1980) (reversing a death sentence because of improper questions regarding whether the imposition of the death penalty would "affect" jurors' performance of their duty). After Clark's objection, the prosecutor explained that he was asking whether each prospective juror could, not would, impose the death penalty if the juror found an aggravating circumstance beyond a reasonable doubt, and that this circumstance outweighed mitigation. Clark contends that, because the jury could find that the aggravating circumstances outweigh the mitigating circumstances and still sentence Clark to life imprisonment, the prosecutor's questions were improper.

{19} Clark relies on several distinguishable or inapplicable cases. For example, the Fifth Circuit reversed a death sentence because potential jurors were improperly excused for being unable to conclusively state that imposing the death penalty would not affect them or that a possibility of a death sentence would make them take their duties as jurors with "unusual seriousness." **Burns v. Estelle**, 626 F.2d 396, 397 (5th Cir. 1980) (en banc). The court noted that "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." **Id.**; **accord Adams**, 448 U.S. at 50. Similarly, without discussing the specific remarks the prosecution made, the Mississippi Supreme Court noted, in dicta, that "the prosecution and circuit judge should . . . avoid questions seeking a promise or commitment from the jury to convict if the state proves certain facts." **West v. State**, 485 So. 2d 681, 686 (Miss. 1986). Unlike these cases, the prosecutor did not attempt to extract promises by jurors, but was instead attempting to ascertain whether they could impose the death penalty if they found that the aggravating circumstances outweighed the mitigating circumstances. The questions were relevant to determine whether the jurors could impose the death penalty, to uncover bias or prejudice, and to assist both parties in exercising their peremptory challenges.

{20} "The district court has discretion in determining how voir dire should be conducted and reversal is available only where the discretion is abused." **Trujillo**, 99 N.M. at 252, 657 P.2d at 108. Because this questioning did not commit jurors to return a death sentence, the trial court did not abuse its discretion by allowing the prosecutor to question potential jurors whether they could sign a death verdict and announce this finding in court. **See Isaacs**, 386 S.E.2d at 328-29 (concluding that there was no error in questioning a potential juror whether she could say in open court that the defendant be sentenced to death because "agreeing to a sentencing verdict **is** a part of every juror's duty, since a poll of the jury is required at the sentencing phase of a death penalty trial"); **People v. Ganus**, 148 Ill. 2d 466, 594 N.E.2d 211, 215, 171 Ill. Dec. 359 (Ill. 1992) ("A venireman's professed inability to sign the death warrant forms and impose the death penalty has been held to indicate that that venireman would not meet the requisite standard for performance of his duties as a juror."); **State v. Kreutzer**, 928 S.W.2d 854, 866 (Mo. 1996) (en banc) (holding that the trial court did not abuse its discretion, noting that the "Court had previously and repeatedly rejected the claim that asking whether a prospective juror could sign a death verdict if selected as foreperson improperly seeks a commitment from the venireperson," and that "ability to assess the death penalty as jury foreperson is a proper basis for follow-up questioning directed to an equivocating venireperson"); **Commonwealth v. Holland**, 518 Pa. 405, 543 A.2d 1068, 1073-74 (Pa. 1988) (holding that the trial court did not err by allowing the prosecution to question prospective jurors regarding their ability to announce a death sentence in an appropriate case).

4. The State's Peremptory Challenges

{21} Clark's fourth argument is that the State's use of its peremptory challenges to strike jurors who were less inclined to consider the death penalty violated his right to a fair and impartial jury. Although Clark concedes that **Batson**, unlike his case, involved racial discrimination, he objected based upon **Batson**, arguing that the State used its challenges to deliberately attempt to deprive him of a fair jury. Clark admits that he is unable to submit a New Mexico case on point, and also does not offer any supportive cases from other jurisdictions.

{22} The State contends, and we agree, that there appears to be "universal agreement that no **Batson** violation results when jurors are peremptorily excused because of their reluctance to impose the death penalty." **State v. Bolton**, 182 Ariz. 290, 896 P.2d 830, 842 (Ariz. 1995) (en banc) (rejecting a similar argument and holding that "the **Batson** rule does not . . . apply to cases

where the state uses its peremptory strikes to remove potential jurors not excludable for cause who have expressed reservations about capital punishment"); **accord, e.g.**, **People v. Davis**, 794 P.2d 159, 208-09 (Colo. 1990) (en banc) (stating that "we agree that it is not inappropriate for a prosecutor to use his [or her] peremptory challenges to exclude jurors who, although they have indicated they can follow the law, have expressed reservations about their ability faithfully to do so or who have indicated that they disagree with the judgment of the people acting through their legislature that certain crimes are deserving of the ultimate penalty"); **State v. Brogden**, 329 N.C. 534, 407 S.E.2d 158, 166 (N.C. 1991) (holding that the trial court did not err under either the Federal or North Carolina Constitutions by allowing the state to exercise peremptory challenges to remove potential jurors based on their qualms regarding capital punishment); **State v. Bell**, 305 S.C. 11, 406 S.E.2d 165, 168 (S.C. 1991) (holding that a peremptory "challenge is proper even if the juror merely expresses scruples against the death penalty that would not be sufficient to excuse him or her for cause").

{23} The trial court did not err in denying Clark's objection to the State's use of peremptory challenges to remove potential jurors who are reluctant to impose capital punishment. The State's use of peremptory challenges in this fashion did not violate Clark's right to a fair and impartial jury.

5. Mitigating Evidence

{24} Clark's fifth point is that the trial court erred by restricting his presentation of mitigating evidence. Clark wanted his former lawyers to testify as to their personal opinions of Clark, capital punishment, and former Governor Anaya's grant of clemency to others on death row. Clark wanted Anaya to testify regarding the clemency he gave to others and whether he would have commuted Clark's death sentence, had he been sentenced prior to the end of his term. The trial court prohibited Clark from calling religious leaders to testify regarding capital punishment, religious doctrine, and their personal opinions of capital punishment. Finally, Clark attempted to present evidence that he was treated differently than others on death row whose sentences were commuted, and he attempted to have an expert testify about proportionality.

{25} Clark asserts that NMSA 1978, § 31-20A-6 (1979), does not limit mitigating evidence, which is further defined by UJI 14-7029 NMRA 1999, as "any conduct, circumstance or thing which would lead [the jury] to decide not to impose the death penalty." Clark also states that **State v. Compton**, 104 N.M. 683, 695, 726 P.2d 837, 849 (1986), supports the notion that the jury is given broad discretion to consider any factor in mitigation of the death penalty. However, the defendant in **Compton** argued that the trial court erred in refusing to give the jury his tendered instructions of specific non-statutory mitigating circumstances. **Id.** We held that "[the] instruction [which the jury actually received] gave the jury broad discretion to consider **any** factor in mitigation of the death penalty, in addition to any statutory mitigating circumstances." **Id.** In other words, this discussion in **Compton** stands for the proposition that a defendant is not entitled to a jury instruction which specifically lists non-statutory mitigating circumstances when a broad instruction informs the jury to consider all mitigating factors before it; it does not hold, as Clark infers, that a defendant has no limitation to the mitigating evidence the defendant wishes to submit.

{26} Clark also lists numerous cases from other jurisdictions which he contends support his assertion that there is no limitation on mitigation evidence, although, as he does note, such evidence must be relevant and material. Most of the examples Clark cites fall squarely within our statute and rule: a defendant's youth, family history, and likelihood of rehabilitation, circumstances of the crime which tend to justify, excuse, or reduce the crime, and a defendant's emotional or psychological history. **See, e.g.**, **McCampbell v. State**, 421 So. 2d 1072, 1075-76 (Fla. 1982) (discussing potential for rehabilitation as a mitigating circumstance). However, the evidence

which Clark wished to present to the jury does not fall within these examples; Anaya's religious and moral beliefs against the death penalty, church doctrine regarding the death penalty, and lawyers' personal opinions about the death penalty are not similar to the evidence at issue in the cases Clark cites. Clark does not offer cases which allowed this type of evidence. Clark's excluded evidence is also not similar to his examples of other cases which allow evidence not specifically listed in our statute or rule, such as polygraph evidence, the victim's daughter's anti-death penalty stance, and good prison conduct. **See, e.g.**, **Floyd v. State**, 497 So. 2d 1211, 1213-14 (Fla. 1986) (discussing non-statutory mitigation evidence regarding the murder victim's daughter's opposition to the death penalty).

{27} The State responds that the statute authorized Clark to present, for example, evidence regarding his character, background, circumstances of the offense, mental or emotional disturbances, and his prospects for rehabilitation. The State recognizes that mitigating evidence of this type is directly related to his personal culpability. **See Penry v. Lynaugh**, 492 U.S. 302, 328, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) (noting "that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense"). We agree with the State's contention that the trial court retains its authority to exclude as irrelevant evidence not regarding the defendant's character, his record, or circumstances of the offense. While concluding that the Eighth and Fourteenth Amendments require that the sentencing jury "not be precluded from considering, **as a mitigating factor**, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," a plurality of the Supreme Court noted that "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." **Lockett v. Ohio**, 438 U.S. 586, 604 & n.12, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) (plurality opinion). Thus, we hold that the trial court did not err by excluding evidence which was not relevant to Clark's character, record, or circumstances of his offense, including the personal beliefs of Anaya and religious doctrine.

{28} Additionally, the State argues that courts from other jurisdictions reject the type of evidence which Clark advances. **See Taylor v. State**, 666 So. 2d 36, 53 (Ala. Crim. App. 1994) ("It is the holding of this Court that the opinion of the friends or relatives of the defendant that the defendant should not be sentenced to death is not a relevant mitigating circumstance for the jury to consider at the penalty phase of a capital case."). The trial court expressed its concern that testimony of religious leaders and lawyers regarding the propriety of the death penalty was not relevant mitigating evidence, and it may urge jury nullification of state law. We agree. **See Glass v. Butler**, 820 F.2d 112, 115-16 (5th Cir. 1987) (concluding that a priest's testimony that the church is opposed to the death penalty is not relevant mitigation evidence); **Commonwealth v. Daniels**, 537 Pa. 464, 644 A.2d 1175, 1183 (Pa. 1994) (per curiam) (holding "that the trial judge properly restricted defense counsel's references to the Bible in support of his argument that the death penalty is morally wrong").

{29} Clark next asserts that proportionality evidence should be admissible as mitigation. The cases upon which Clark relies involve the sentences received by co-defendants and accomplices, which is clearly distinguishable from this case, where Clark acted alone. Proportionality evidence is not proper for the jury to consider as mitigation.

{30} "The death penalty shall not be imposed if . . . 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)(4). In discussing Section 31-20A-4(C), we held "that only this Court can decide if a sentence of death is excessive or disproportionate." **State v. Garcia**, 99 N.M. 771, 779, 664 P.2d 969, 977 (1983). We stated that "under the plain language of Section 31-20A-4, proportionality review is

conducted by this Court on appeal, after a conviction and death sentence is handed down by the district court." **State v. Wyrostek**, 117 N.M. 514, 518, 873 P.2d 260, 264 (1994). This Court noted that "the proportionality of a death sentence is not properly considered by the district court in a nonjury sentencing proceeding." **Id.** at 519, 873 P.2d at 265. This Court clearly rejected the argument "that a sentencing jury should perform the legal analysis of proportionality review when determining the sentence of a Defendant convicted of a capital felony," because we held that "the proportionality of a death sentence is a question of law" and "clearly a question for this Court." **Wyrostek**, 117 N.M. at 520 n.6, 873 P.2d at 266 n.6. Simply because Clark characterizes this argument as offering disproportionality evidence as mitigation to the jury does not subvert what this Court has previously decided: proportionality review is a function of this Court, not the jury. The trial court correctly concluded that only this Court should review proportionality, as this Court explicitly held in **Wyrostek**.

{31} Additionally, the State reasons that proportionality evidence has the same problems as evidence regarding a religious leader's testimony of church doctrine in that the focus does not directly concern Clark and his crime. **See State v. Smith**, 280 Mont. 158, 931 P.2d 1272, 1282 (Mont. 1996) (holding that the trial court did not err in refusing to consider defendant's offered proportionality evidence, because this type of evidence "does not relate to the specific defendant and the specific crime(s) before the sentencing judge, and therefore cannot be considered as a mitigating factor," and because the Montana Supreme Court reviews proportionality of death sentences). The State also notes that "receiving information as to the relative culpability of other defendants would involve a monumental trial within a trial, so that any probative value would be outweighed by the substantial danger of confusing the issues and consumption of time."

{32} The trial court did not err in restricting Clark's offer of proportionality evidence, because proportionality review is unquestionably a matter for this Court. Additionally, the trial court did not err by refusing to allow Clark to present evidence regarding particular individuals' opinions about the death penalty because such evidence does not bear upon Clark's character, prior record, or the circumstances of his crimes.

6. Circumstances of the Crime and Victim Impact Testimony

A. Circumstances of the Crime

{33} Clark argues that the trial court erred by allowing the State to introduce evidence regarding how and where the victim's body was found, pictures of her body, the type of grave in which she was buried, the autopsy, the cords on the body, the location of the gun shot wounds, and the determination of death. Clark notes that the autopsy results were not in dispute and that he had pleaded guilty to the capital murder of Gore. Clark objects to Gore's mother's testimony in which she described the last time she saw Gore, what Gore was wearing, and that she told her daughter to "be careful, come right back," as well as what she was thinking as she waited for Gore to return. She testified that she had her children fingerprinted, and that she did not see Gore again.

{34} We have previously rejected this precise argument from Clark. In **Clark**, 108 N.M. at 299, 772 P.2d at 333, this Court stated that

> Ms. Gore's testimony was admissible under NMSA 1978, [§] 31-20A-1(C) [(1979)] for two reasons. First, the testimony was relevant to show the aggravated circumstance of kidnapping. Despite Clark's plea of guilty, the State was still required to prove beyond a reasonable doubt that the murder was committed during the course of a kidnapping, and the State was not required to present its case in the abstract. Second, the testimony was directly related to the circumstances of the crime itself. While Clark had entered a guilty plea to all charges and he was willing to stipulate to the facts surrounding the girl's

> disappearance, guilty pleas and stipulated facts are no substitute for the evidence of a crime to be considered by a jury.

This portion of Ms. Gore's testimony, as well as the testimony of the pathologist and officers is not victim impact testimony, as it does not include "descriptions of the character and reputation of the victim; descriptions of the emotional impact of the crime upon the victim's family; and opinions of the victim's family characterizing the crime or the defendant." **Clark**, 108 N.M. at 299, 772 P.2d at 333. The trial court did not err in admitting testimony and evidence which related directly to the circumstances of Clark's crime.

B. Victim Impact Testimony

{35} Prior to trial, Clark moved to prohibit and restrict testimony of the victim's parents. The trial court allowed Gore's parents to make brief statements to the jury. Clark claims that the introduction of these statements to the jury violated his rights to due process and to a fair trial because evidence of Gore's personal characteristics is irrelevant to prove the existence of the aggravating circumstances of the crime and would inflame the passions of the jury. Further, relying upon **Payne v. Tennessee**, 501 U.S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991), Clark asserts that the statements violated the prohibition against cruel and unusual punishment.

{36} The Supreme Court, in **Payne**, held that

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no **per se** bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne, 501 U.S. at 827. "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." **Id.** at 824.

{37} Clark urges this Court to continue to follow **Booth v. Maryland**, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987), despite the fact that the Supreme Court overruled **Booth** in **Payne**, 501 U.S. at 830. Although we were bound by **Booth** 's restriction on victim impact evidence in **Clark**, 108 N.M. at 298-300, 772 P.2d at 332-34, we agree with Clark that the decision to admit or restrict this type of evidence now rests with the states, because the Supreme Court in **Payne** concluded that such evidence, brief and narrowly presented, does not violate the prohibition against cruel and unusual punishment or due process guarantees. **See Payne**, 501 U.S. at 825; **Payne**, 501 U.S. at 831 (O'Connor, J., concurring). We hold that victim impact evidence, brief and narrowly presented, is admissible during the penalty phase of death penalty cases.

{38} Further, we hold that victim impact testimony is consistent with the Capital Felony Sentencing Act following **Payne** because it constitutes additional evidence as to the circumstances of the crime under Section 31-20A-1(C) and NMSA 1978, § 31-20A-2(B) (1979). Through Section 31-20A-1(C), the Legislature requires the jury to consider evidence of the circumstance of the crime, and many other courts have also held that victim impact testimony is relevant for this purpose. **See United States v. McVeigh**, 153 F.3d 1166, 1219 (10th Cir. 1998) (holding that the effects of the victims' deaths upon the families is part of the circumstances of the crime and is properly presented to the jury at the penalty phase), **cert. denied**, 526 U.S. 1007, 143 L. Ed. 2d 215, 119 S. Ct. 1148 (1999); **State v. Bernard**, 608 So. 2d 966, 971 (La. 1992) (holding that the impact upon the victims is relevant to circumstances of the crime); **People v. Edwards**, 54 Cal. 3d 787, 819 P.2d 436, 467 (Cal. 1991) (in bank) (allowing "evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim"). **But see, e.g.**, **State v. Carter**, 888 P.2d 629, 653 (Utah

1995) (prohibiting the introduction of victim impact testimony under Utah's capital felony sentencing statute).

{39} We also conclude that admission of this testimony did not violate Clark's right to due process and a fair trial. "If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." **Payne**, 501 U.S. at 831 (O'Connor, J., concurring). Clark correctly recognizes that **Payne** emphasized the extremely brief nature of the testimony, narrow in scope and purpose, offering a "quick glimpse of the life which [the defendant] chose to extinguish," which lessened any potential inflammatory impact on the jury. **Payne**, 501 U.S. at 830 (internal quotation marks and citation omitted). Clark argues that the victim impact testimony in his case was lengthy, inflammatory, and unduly prejudicial, entitling him to a new penalty phase. However, the statements of Gore's parents, such as Mrs. Gore's testimony that she would not know what it's like to raise a daughter or enjoy activities with her, were brief and clearly not more inflammatory than the simple facts of Clark's crimes, which include kidnapping and shooting the nine-year-old child in the head. **See Payne**, 501 U.S. at 832 (noting that "surely [the] brief statement [by the victim's mother describing her grandson's sadness because of the murder of his mother and sister] did not inflame [the jury's] passions more than did the facts of the crime," in which the defendant stabbed the mother 41 times until she bled to death and stabbed his two-year-old sister to death).

{40} Clark argues that the victim impact testimony violates Section 31-20A-4(C)(3), which prohibits capital punishment if "imposed under the influence of passion, prejudice or any other arbitrary factor." The State counters, and we agree, that Section 31-20A-1(C) permits the jury to hear "additional evidence . . . as to the circumstances of the crime," and Section 31-20A-2(B) charges the jury to consider the crime in order to decide the appropriate punishment. The State asserts that victim impact statements convey the harm which Clark caused and is a circumstance of the crime, which the jury should consider when deciding the appropriate punishment. A majority of courts have concluded that victim impact evidence is admissible in death penalty sentencing proceedings, and follow **Payne**. **See State v. Muhammad**, 145 N.J. 23, 678 A.2d 164, 177 (N.J. 1996) (listing cases).

{41} The State lists fourteen witnesses that testified regarding Clark's character, balanced against the testimony of Gore's parents. As Clark is allowed to present witnesses regarding his character, the jury may consider the harm he caused. **See Payne**, 501 U.S. at 826 (concluding that "there is nothing unfair about allowing the jury to bear in mind [harm to the victims' family] at the same time as it considers the mitigating evidence introduced by the defendant"). "Murder is the ultimate act of depersonalization. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back." **Payne**, 501 U.S. at 832 (O'Connor, J., concurring) (citation and internal quotation marks omitted). We conclude that the trial court did not err in admitting the testimony of Gore's parents as victim impact evidence.

{42} As Clark notes, Article II, Section 24 of the New Mexico Constitution and NMSA 1978, § 31-26-4(G) (1994), both grant the representatives of a murder victim the right to make a statement to the court at sentencing and at any post-sentencing hearings for the accused, effective in 1992 and 1995, respectively. Clark argues that these provisions do not apply in his case, because he committed the crimes in 1986. Alternatively, he argues that these provisions only allow representatives to make a statement to the judge after a jury has rendered a sentence, not to the jury itself.

{43} The State argues, and we agree, that the application of these provisions to Clark's case would not violate Ex Post Facto prohibitions because introduction of this evidence does not

criminalize previously lawful behavior, increase or alter the punishment which Clark could have received, or otherwise affect any substantive right. **See State v. Muhammad**, 145 N.J. 23, 678 A.2d 164, 181 (N.J. 1996) ("Because [the victim impact statute] simply modified the scope of evidence that may be admitted during the penalty phase of a capital case and did not alter any substantive rights of defendant, the statute's application to defendant would not violate the State or Federal **Ex Post Facto Clauses**."); **Neill v. State**, 896 P.2d 537, 553 (Okla. Crim. App. 1994) ("[Victim impact statutes] did not increase the punishment which the [defendant] was to face, nor did they make criminal an act which was not criminal at the time of its commission; the new statutes were merely procedural."). We also note that Clark's case was not pending at the time the constitutional amendment became effective in 1992 because he exhausted his direct appeals with our opinion in **Clark** in 1989, and his case did not again become pending until this Court granted his habeas relief in 1994. **Cf. State v. Kirby**, 1996-NMSC-69, PP7-8, 122 N.M. 609, 930 P.2d 144 (discussing fundamental error in relation to finalization by direct appeal, noting that cases are generally finalized and no longer pending following conviction, sentence, and exhaustion of rights of appeal).

{44} A plain reading of Article II, Section 24 and Section 31-26-4(G) indicate that the victim's family or representatives have the right to make a statement both at sentencing and at any post-sentencing hearings for the defendant. We reject Clark's argument that these provisions prohibit the jury from hearing this type of evidence. To do so, we would have to interpret "at sentencing" to mean only before the judge and not before the sentencing authority, which would render the phrase "post-sentencing hearings" redundant. We believe the Legislature, by using the phrase "at sentencing," intended that the victim's representatives give statements before the sentencing authority as well as at post-sentencing hearings, in order to give effect and meaning to the entire provision. We also believe that the Legislature's use of the term "court" rather than "judge" indicates that these statements should be directed to the sentencing authority. Article II, Section 24 of the New Mexico Constitution and Section 31-26-4 reflect the will of the Legislature and the people of New Mexico, and we assume that the Legislature was aware of **Payne** when it enacted Section 31-26-4. **See State v. Gentry**, 125 Wash. 2d 570, 888 P.2d 1105, 1138 (Wash. 1995) (en banc) ("Although defendants in capital cases have always had substantial due process rights during the sentencing phase of the trial, **the victim also now has constitutional rights** and these must be harmonized with the Defendant's rights." (footnote omitted)).

{45} Victim impact testimony, brief in nature and narrow in scope and purpose, is admissible under Section 31-20A-1(C), as a circumstance of the crime. Thus, we join the majority of states in approving the admission of victim impact evidence in capital cases to the jury. **See e.g.**, **Gentry**, 888 P.2d at 1141 & n.93 (listing cases which have accepted the admission of victim impact testimony).

7. Clark's Prior Conviction and Facts of that Crime

{46} Clark's seventh objection is to the trial court's admission of the facts of his prior conviction. The State argues that the trial court properly admitted this evidence to prove the aggravating circumstances of kidnapping and murder of a witness, because the jury is required to unanimously find, beyond a reasonable doubt, at least one of the aggravating circumstances. **See** NMSA 1978, § 31-20A-3 (1979).

{47} The parties stipulated that Clark had been previously sentenced to twenty-four years imprisonment for the kidnapping and criminal sexual penetration of a six-year-old girl, in order to demonstrate that a life sentence for the present matter would require that Clark be incarcerated until at least age eighty-six. Clark reserved his opportunity to assert error only if this prior conviction was subsequently reversed for any reason. Clark also agreed to the second stipulation, which stated that Clark had abducted the victim

as she walked home from school, driven her to an isolated place, and penetrated her vagina with his finger, causing tearing and bleeding. He abandoned her, and she walked to a house for help. She identified Clark from a photo array and made an in-court identification, leading to his conviction. The stipulation instructed the jury that they were to consider this evidence only for the purpose of showing Clark's motive and intent regarding the murder of Gore.

{48} Clark objected to the prosecution presenting the testimony of a police officer which indicated that the victim in the prior case was bleeding from her pelvic area, arguing that the evidence was prejudicial, irrelevant, and inadmissible because he had pleaded guilty in the present case to kidnapping and murder, thus admitting the aggravating circumstance. The prosecution argued that Clark challenged evidence of trauma to Gore's pelvic area during cross-examination of the pathologist, which the prosecution claimed was relevant to show she had been held for sexual services. The trial court inquired whether Clark was willing to stipulate that Gore was held for sexual services, and Clark declined. The trial court ruled that the evidence was relevant to prove motive and that its probative value outweighed its prejudicial impact.

{49} The State contends that the evidence regarding the trauma to the victim in the prior case was relevant to show the motive for the kidnapping aggravating circumstance for the present case, because the State must show that Gore was held for service in order to prove kidnapping. **See State v. Vernon**, 116 N.M. 737, 739-40, 867 P.2d 407, 409-10 (1993). The State recounts that, in order to prove Gore was held for service, the prosecution produced the testimony of the pathologist, who opined that there was evidence of sexual activity on Gore's body. On cross-examination, Clark elicited an admission that factors other than injury could have caused the more advanced decay in Gore's pelvis. The State asserts that it was required to prove Clark held her for sexual services to demonstrate the aggravating circumstance of murder during a kidnapping; thus, evidence of Clark's criminal sexual penetration in the prior case was relevant and material because it serves to rebut the defense's evidence that the advanced decay of Gore's pelvic area might have been caused by factors other than a sexual assault. Certainly, the police officer's testimony that the previous victim was bleeding from her pelvic area was not more prejudicial than the facts to which Clark stipulated regarding that case, including that he kidnaped and sexually assaulted a six-year-old child. The State additionally argues that this evidence was admissible as proof of murder of a witness, the other aggravating circumstance, because Clark was convicted as a result of the information that the victim gave to the police, and the logical inference is that he killed Gore to prevent her from identifying him. We agree with the State's arguments, and conclude that the trial court did not err by allowing the State to present testimony regarding Clark's prior conviction. Thus, the trial court did not err by admitting the testimony of the police officer regarding the prior conviction.

{50} Clark, again emphasizing that he stipulated to murder and kidnapping, argues that the trial court should not have allowed the State to introduce evidence of the aggravating circumstances, and that the evidence inflamed the passions of the jury. Clark claims that the crime scene investigation and autopsy testimony and photographs were introduced to "make a jury mad enough to kill." The State notes that Clark did not stipulate that he murdered Gore to prevent her from being a witness against him, and that Clark disputed the evidence with respect to the essential element of kidnapping; in addition, the State relies on the requirement that it prove the two aggravating circumstances beyond a reasonable doubt. The State also asserts that it was allowed to introduce testimony and evidence relevant to the circumstances of the crime. We reject Clark's arguments. As noted in the previous section, we held in **Clark**, 108 N.M. at 298-99, 772 P.2d at 332-33, that the State was not required to present its case in the abstract, and that although Clark pleaded guilty, the State still had to prove beyond a reasonable doubt that the murder was committed in the course of a kidnapping.

8. The Prosecution's Closing Arguments

{51} Clark's eighth argument is that the trial court erred by denying his pre-trial motion to restrict the scope of the State's penalty phase arguments and by failing to sustain his objections to the State's closing argument. Clark believes the State's remarks had a substantial influence on the jury and thus warrants a new sentencing hearing.

{52} This Court has held that:

> The prosecution is allowed reasonable latitude in closing argument. The district court has wide discretion to control closing argument, and there is no error absent an abuse of discretion or prejudice to the defendant. If the defense argument raises certain issues, those issues can be discussed by the prosecution. The question on appeal is whether the argument served to deprive defendant of a fair trial.

State v. Chamberlain, 112 N.M. 723, 729, 819 P.2d 673, 679 (1991) (citations omitted).

{53} Clark maintains that the State asserted "religious dogma, . . . arguing the impact of death of the victim and an appeal to passion." Although Clark does not specify which of the State's statements inserted religious dogma into the proceeding, the State argues that it was responding to Clark's attorney's last statement: "If we . . . are to be more Christ-like, . . . I ask you: If Christ Jesus sat in this box[,] what do you think he would say?" The State responded, "If Christ Jesus sat in this box, what would he say? . . . better you tie a millstone around your neck and be drowned in the sea than to suffer harm to one of these. It's pretty clear what Christ thought about children, and anyone who would harm them." The State notes that Clark relied upon religious themes throughout the case, from his opening statement, through mitigation witnesses, and in his closing, and that the State's response was restrained. The State also notes another remark made in response to Clark's witness's testimony regarding a biblical story. We conclude that the prosecutor's closing statements did not deprive Clark of a fair trial. **See e.g.**, **People v. Mahaffey**, 166 Ill. 2d 1, 651 N.E.2d 1055, 1068-69, 209 Ill. Dec. 607 (Ill. 1995) (noting that the state's brief biblical quotation was invited by and made insignificant by defense's religious references in his argument), **habeas corpus relief conditionally granted on other grounds by Mahaffey v. Page**,162 F.3d 481, 486 (7th Cir. 1998), **cert. denied**, 143 L. Ed. 2d 814, 119 S. Ct. 1786 (1999).

{54} Clark asserts that the State improperly attacked his defense attorneys by asserting that they had a strategy to circumvent the judicial system and get the governor to pardon him. The State asserts that this remark was in reference to cross-examination testimony that reflected that Clark timed his guilty plea to attempt to take advantage of Governor Anaya's willingness to commute any outstanding death sentence. The State further argues that its remarks were in response to Clark's claims that he had cooperated with authorities by pleading guilty. **See Chamberlain**, 112 N.M. at 730, 819 P.2d at 680 (noting that prosecution's arguments directed at defense counsel "did not impugn the defense personally, but rather were directed at rebutting defense argument"). Again, we conclude that these remarks did not deprive Clark of a fair trial.

{55} Clark argues that the State implied that the death penalty was mandatory by stating that "There are certain crimes that we draw the line and say 'no more.' You have gone too far. Your life is now forfeited. One of those crimes is kidnapping somebody and murdering them." The State counters that the prosecutor told the jury that they must consider aggravating circumstances, mitigation, Clark, and the crime. **Cf. Compton**, 104 N.M. at 688-89, 726 P.2d at 842-43 (rejecting the defendant's argument that the prosecutor's remarks infringed on the jury's sentencing discretion, and holding that the jury clearly understood that it was their responsibility to determine the defendant's sentence). We reject Clark's argument that these remarks implied that the death penalty was mandatory, and we believe that the jury clearly understood that it must decide Clark's sentence based on the evidence regarding the aggravating and mitigating

circumstances, the crime, and Clark. The trial court did not err by denying Clark's pre-trial motion to restrict the scope of the State's penalty phase arguments and by failing to sustain his objections to the State's closing argument.

9. Inaudible Tape Record

{56} Clark's next argument is that the tape recorded record is inadequate, particularly with regard to bench conferences, denying him an adequate record in order to perfect his appeal and warranting a reversal. As the State notes, Clark does not specify any avenue of appeal which was lost because of the quality of the record. In **State v. Delgado**, 112 N.M. 335, 345-46, 815 P.2d 631, 641-42, the defendant apparently made a similarly broad argument as Clark does in the present case, which the Court of Appeals rejected. "Defendant makes no specific claim of prejudice [and] does not contend that the record fails to report prejudicial events and thereby prevents him from raising meritorious issues on appeal." **Id.** Clark makes no persuasive argument that flaws in the record warrant a reversal of his sentence.

10. Clark's Motion for a New Trial

{57} Clark's tenth argument is that the trial court erred by failing to grant his motion for a new sentencing hearing, or, in the alternative, failing to grant his motion for a judgment notwithstanding the verdict and for an extension of time. Clark filed the motions post-verdict, making many of the claims he now raises on appeal, including religious discrimination, improper exclusion of evidence regarding mitigating circumstances, improper influence of jurors by passion, prejudice, or other arbitrary factors, and disproportionality of the sentence. Clark also requested that the trial court take judicial notice of the amount of publicity his case received, and noted that other high-profile murder cases occurred in Albuquerque as well as Scotland. Clark also attempted to present affidavits of a defense investigator who allegedly spoke with jurors who were aware of public sentiment regarding his case, and of the unrelated murders.

{58} The State lists the various motions which Clark filed, and notes that he filed a notice of appeal, thus raising questions regarding the trial court's jurisdiction to rule on the earlier motions. Clark filed his motions prior to filing a notice of appeal. It is unnecessary for us to reach the jurisdictional question raised by the State. Even assuming that the trial court retained jurisdiction to rule on Clark's post-sentence motions, the motions were automatically denied thirty days after they were filed. **See** Rule 5-614(C) NMRA 1999. We determine that the trial court did not abuse its discretion in denying these motions. **See State v. Volpato**, 102 N.M. 383, 385, 696 P.2d 471, 473 (1985) ("An order denying a motion for a new trial will not be overturned except for an abuse of discretion.").

11. Constitutionality of the Capital Felony Sentencing Act

{59} Although Clark acknowledges that this Court has previously found the Capital Felony Sentencing Act constitutional, he again requests this Court to conclude that the Act is unconstitutional. As discussed below, we uphold the constitutionality of the Capital Felony Sentencing Act.

A. Cruel and Unusual Punishment

{60} Clark asserts that the Act, both on its face and as applied against Clark, violates the Eighth and Fourteenth Amendments to the United States Constitution and Article II, Section 13 of the New Mexico Constitution because it constitutes cruel and unusual punishment. Clark observes that the State has not executed anyone since the Act became effective in 1979, and that the penalty is rarely given, making it unusual. However, this Court has focused on the nature of the punishment under consideration, rather than the infrequency of its imposition, in assessing the meaning of "unusual." **State ex rel. Serna v. Hodges**, 89 N.M. 351, 355, 552 P.2d 787, 791 (1976), **overruled in part on other grounds by State v. Rondeau**, 89 N.M. 408, 412, 553 P.2d 688, 692 (1976).

Clark attempts to persuade this Court that the Act constitutes cruel and unusual punishment by simply asserting that the penalty is illogical, cruel, uncivilized, against the ideals of Christianity, and not utilized by many other countries. Although Clark argues that capital punishment is obviously "cruel," this Court has stated that "cruel" in this context "prohibits punishments which inflict unnecessary pain or cruelty, torture, or lingering death." **Hodges**, 89 N.M. at 354, 552 P.2d at 790.

{61} Capital punishment for the crime of murder "does not invariably violate the Constitution." **Gregg v. Georgia**, 428 U.S. 153, 169, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976). As Clark notes, this Court has also clearly held that capital punishment does not constitute cruel and unusual punishment. **Garcia**, 99 N.M. at 777, 664 P.2d at 975. Clark does not present any argument which convinces us to reconsider this holding.

B. Capital Punishment Efficacy as a Deterrent

{62} Clark, without support or authority, next argues that the death penalty is not a deterrent to future homicides, and asserts that the State failed to present any evidence that it is a deterrent. As Clark is challenging the constitutionality of the statute, he has the burden of demonstrating that the Act is unconstitutional. "A party challenging the constitutionality of a statute has the burden of proving it is unconstitutional beyond all reasonable doubt." **State v. Duran**, 1998-NMCA-153, P31, 126 N.M. 60, 966 P.2d 768, **cert. denied**, No. 25,353 (1998). Clark failed to satisfy this burden. As the State notes, the efficacy of the death penalty in deterring future crime is a matter of continuing debate, and is an issue best left to our Legislature. **See White v. State**, 322 Md. 738, 589 A.2d 969, 974 (Md. 1991) ("The General Assembly has made the decision to permit capital punishment under certain circumstances. Assuming the existence of statistical evidence that capital punishment does not serve as a general deterrent, that evidence is best presented to the legislature."). Clark has not demonstrated that the death penalty is not a deterrent to future crime, and, in any case, deterrence does not appear to be a constitutional prerequisite for a criminal penalty deemed appropriate by the Legislature.

C. Separation of Powers, Due Process and Equal Protection

{63} Section 31-20A-3 directs that if a jury unanimously specifies the death penalty, "the court shall sentence the defendant to death." Without authority, Clark asserts that by enacting Section 31-20A-3, which prohibits trial judges from setting aside a jury's sentence of death, the Legislature violated separation of powers doctrine and denied him due process and equal protection of the laws.

{64} Regarding Clark's separation of powers claim:

> It has long been recognized in this state that it is solely within the province of the Legislature to establish penalties for criminal behavior. It therefore follows as a necessary incident of this power that the Legislature has the right to regulate or restrict the circumstances in which courts may suspend sentences in order to ensure the efficacy of those criminal penalties.

State v. Mabry, 96 N.M. 317, 321, 630 P.2d 269, 273 (1981) (citations omitted) ("If the doctrine of separation of powers requires anything in this case, it is that the Legislature be allowed to place some restrictions on the ability of the judiciary to avoid imposing legislatively-mandated penalties for crimes by indefinitely suspending sentences").

> In a jury proceeding, the jury determines whether to impose the death penalty; the trial judge must abide by this determination. If the sentence is not properly imposed, it is up to the New Mexico Supreme Court to review the sentence. This Court, not the trial judge, automatically reviews the jury's decision to impose the death penalty.

State v. Guzman, 100 N.M. 756, 763, 676 P.2d 1321, 1328 (1984). This Court has previously

held that this restriction upon the trial judge does not deny a defendant in a capital case due process and equal protection of the law. **State v. Cheadle**, 102 N.M. 743, 744, 700 P.2d 646, 647 (1985). Section 31-20A-3 does not violate separation of powers doctrine and did not deny Clark due process and equal protection of the laws.

D. Whether the Statutory Definitions Regarding Mitigation are Constitutional

{65} Clark's next issue regarding the constitutionality of the Act challenges Section 31-20A-6 (mitigating circumstances); he argues that the Act fails to provide any definition for the mitigating circumstances, making the Act vague and indefinite. He further asserts that this section does not provide any standard for the jury to weigh aggravating circumstances against mitigating circumstances, such as requiring a reasonable doubt standard. Clark argues that Section 31-20A-2(B), which directs the jury to weigh aggravating and mitigating circumstances, consider the defendant and the crime, and then determine the sentence, is vague and indefinite, thus violating his due process and equal protection rights. Clark does not support any of these assertions with authority. **See In re Adoption of Doe**, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) ("Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal.").

{66} In any case, this Court clearly rejected these arguments by Clark during his first direct appeal: "Specific legal standards for balancing aggravating circumstances against mitigating circumstances in a capital sentencing proceeding are not constitutionally required." **Clark**, 108 N.M. at 307, 772 P.2d at 341. Further, this Court "recognized that a subjective standard must be used for this review." **Id.** "While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, the relative **weight** is not." **Ford v. Strickland**, 696 F.2d 804, 818 (11th Cir. 1983) (citations omitted), **quoted with approval in Clark**, 108 N.M. at 307, 772 P.2d at 341. Clark asserts that because the Act does not require that the evidence for death outweigh evidence for life beyond a reasonable doubt, it is defective and unconstitutional. Again, we previously rejected this argument. **Clark**, 108 N.M. at 308, 772 P.2d at 342 (rejecting Clark's argument that a capital jury find beyond a reasonable doubt that the penalty of death is the appropriate sentence).

{67} Clark also argues that the Act does not provide this Court with standards for review, and that it thus fails to provide safeguards against arbitrary and capricious results precluded by **Furman v. Georgia**, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (per curiam). Clark asserts that the Act fails to provide "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." **Woodson v. North Carolina**, 428 U.S. 280, 303, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) (plurality opinion). Clark, again without supporting authority, states that the Act fails to require a sufficient record for this Court to review whether the jury chose the death penalty under the influence of passion or prejudice, or whether the sentence is disproportionate. The State notes that the lack of express findings on mitigation does not lead to unfair or arbitrary results. In **Clemons v. Mississippi**, 494 U.S. 738, 750, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990), the Supreme Court concluded that:

> We . . . see nothing in appellate weighing or reweighing of the aggravating and mitigating circumstances that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence. Nor are we impressed with the claim that without written jury findings concerning mitigating circumstances, appellate courts cannot perform their proper role.

We agree, and we thus reject Clark's assertion on this point.

E. Whether Section 31-20A-6(A) is Unconstitutionally Vague

{68} Clark argues that Section 31-20A-6(A) of the Act, which lists "no significant history of

prior criminal activity" as a mitigating circumstance, is unconstitutionally vague and indefinite, and it fails to adequately channel and focus capital sentencing discretion. This Court previously clearly rejected this assertion in **State v. Gilbert**, 100 N.M. 392, 402, 671 P.2d 640, 650 (1983) ("We are not persuaded that the wording is vague and indefinite as to render Section 31-20A-6(A) unconstitutional."). We reaffirm that holding.

F. Whether Section 31-20A-6(H) is Constitutional

{69} Clark, without supporting authority, argues that Section 31-20A-6(H) (defendant's cooperation with authorities), as considered by the jury as a mitigating factor, violates Clark's right to counsel, right to remain silent, right to a fair trial, and due process of law. **BIC at 82.** Again, we rejected this argument in previous cases, **Guzman**, 100 N.M. at 763-64, 676 P.2d at 1328-29; **Compton**, 104 N.M. at 692, 726 P.2d at 846, and decline to reach a different conclusion in this case.

G. Whether the Proportionality Review is Constitutional

{70} Clark, without supporting authority, next argues that New Mexico's proportionality review, within Section 31-20A-4(C)(4) (requiring this Court to review whether the "sentence of death is excessive or disproportionate to the penalty imposed in similar cases") as supplemented in **Garcia**, 99 N.M. at 780, 664 P.2d at 978 (defining "similar cases" as New Mexico cases where the defendant is convicted of capital murder under the same aggravating circumstance and receives life imprisonment or the death penalty), makes the Act unconstitutional "when there is a danger that it may be wantonly or freakishly imposed." Clark concedes that the United States Supreme Court has held that proportionality review is not mandated by the Federal Constitution. **See Pulley v. Harris**, 465 U.S. 37, 50-51, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984). Clark argues that this proportionality review is inadequate because it does not allow the trial court to determine proportionality (addressed above) and also does not allow this Court to review proportionality in a meaningful manner, which Clark believes would include for review "all cases in New Mexico in which there was evidence of aggravating circumstances, whether or not aggravating circumstances were charged or found, whether or not death or life was imposed."

{71} The State, relying upon **Wyrostek**, 117 N.M. at 519, 873 P.2d at 265, persuasively argues that because proportionality review requires review of the trial record evidence of aggravation and mitigation, this Court cannot review proportionality until this type of evidence is fully developed at the death penalty sentencing hearing; thus, review cannot include cases in which the prosecution did not seek the death penalty. **See State v. Cobb**, 234 Conn. 735, 663 A.2d 948, 955 (Conn. 1995) (equally divided court); **Smith**, 931 P.2d at 1285 ("A further rationale for limiting proportionality review of other cases to cases in which the death penalty was proposed is that only when the death penalty is sought will a record exist concerning aggravating and mitigating circumstances."). We hold that proportionality review, as contemplated by Section 31-20A-4(C)(4) and **Garcia**, 99 N.M. at 780, 664 P.2d at 978, is not unconstitutional.

H. Prosecutorial Discretion

{72} Again without supporting authority, Clark argues that the death penalty violates Article II, Section 4 and Section 18 of the New Mexico Constitution because of the discretion of prosecutors in determining which cases warrant the death penalty. The State recognizes that many courts have rejected this argument, and that conscientiously exercised prosecutorial discretion is essential to the criminal justice system. **See Gregg**, 428 U.S. at 199. Although discussed in the now-unconstitutional context of a mandatory death penalty, the reasoning of this Court applies even more aptly for a discretionary death penalty; we noted that prosecutorial discretion, as carried out "by persons who would conscientiously perform their duties in a reasonable way," is necessary for the functioning of the justice system to achieve the "chief objectives [of] justice

and grant mercy where merited, by an exercise of judgment, discretion and conscience by a succession of persons or groups with differing skills, backgrounds and viewpoints." **Hodges**, 89 N.M. at 358, 552 P.2d at 794. In the context of proportionality review, the Supreme Court noted that

> the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or to go to trial. Witness availability, credibility, and memory also influence the results of prosecutions. Finally, sentencing in state courts is generally discretionary, so a defendant's ultimate sentence necessarily will vary according to the judgment of the sentencing authority. The foregoing factors necessarily exist in varying degrees throughout our criminal justice system.

McCleskey v. Kemp, 481 U.S. 279, 307 n.28, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987). Thus, we hold that the necessary and unavoidable discretion of prosecutors does not violate the New Mexico Constitution.

12. Proportionality Review

{73} Clark requests that this Court review his sentence in order to determine if capital punishment is excessive or disproportionate to the penalty imposed in similar cases, pursuant to Section 31-20A-4(C)(4). First, Clark asks us to reconsider the standards for proportionality review articulated in **Garcia**, 99 N.M. at 780, 664 P.2d at 978.

{74} "Proportionality review is a post-sentence inquiry, undertaken to identify disparities in capital sentencing and to prevent the death penalty from being administered in an arbitrary, capricious, or freakish manner." **Wyrostek**, 117 N.M. at 522, 873 P.2d at 268. Under Section 31-20A-4(C)(4), "the death penalty shall not be imposed if . . . the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This Court adopted the following guidelines, sometimes referred to as a precedent-seeking approach, regarding proportionality:

1. We will review this issue only when raised on appeal.
2. In our review, we will consider only New Mexico cases in which a defendant has been convicted of capital murder under the **same aggravating circumstance(s)**.
3. Only those New Mexico cases in which a defendant was convicted under the same aggravating circumstance(s) and then received **either** the death penalty **or** life imprisonment and whose conviction and sentence have been upheld previously by this Court, will be considered appropriate for comparison.
4. We will review the record and compare the facts of the offense and all other evidence presented by way of aggravation or mitigation to determine whether the sentence is excessive or disproportionate.

Garcia, 99 N.M. at 780, 664 P.2d at 978 (footnote omitted).

{75} Clark asks this Court to adopt New Jersey's statistical frequency procedure for review, articulated in **State v. Marshall**, 130 N.J. 109, 613 A.2d 1059, 1071 (N.J. 1992) (per curiam), which defined the "universe" of comparison cases as including all deliberate intent murders in which some evidence supports the allegation of an aggravating factor regardless of whether the case proceeds to capital sentencing. Clark then asks this Court to direct the State to compile data for comparison. Finally, Clark requests more detailed guidelines concerning how comparison cases are chosen.

{76} Clark fails to reveal that in **State v. DiFrisco**, 142 N.J. 148, 662 A.2d 442, 454-60 (N.J. 1995), the New Jersey Supreme Court concluded that the procedure used in **Marshall** produced unreliable results due to the small sample size of homicides that occurred in that state which

could have been death penalty eligible, and instead relied primarily upon a New Mexico-type review. **See State v. Cooper**, 159 N.J. 55, 70, 731 A.2d 1000, 1008, 1999 WL 350913, at *5 (N.J. 1999) ("In our prior proportionality review decisions we have found it appropriate to place greater reliance on precedent-seeking review than on frequency analysis, noting that the process of precedent-seeking review is one familiar to us as judges and is not vulnerable to the concerns about reliability that burden frequency analysis."). Apparently, no state employs the approach urged by Clark. **See State v. Bland**, 958 S.W.2d 651, 664 n.12 (Tenn. 1997) (noting that no state has only a frequency method approach; the two states that use some form of a frequency approach also engage in a precedent-seeking approach), **cert. denied**, 523 U.S. 1083, 118 S. Ct. 1536, 140 L. Ed. 2d 686 (1998). We reject Clark's request to adopt a frequency method approach, and continue to apply the guidelines set out in **Garcia**.

{77} Clark argues that the death sentence in his case is excessive and disproportionate. Clark notes that former Governor Anaya commuted the death sentences of five men during his term, and asserts that Anaya would have commuted Clark's sentence if he had been given the opportunity. Clark, without authority or supportable assertions from the record, asks this Court to consider this issue on equal protection grounds. In the context of proportionality review, we concluded that "because Defendant asserts no facts that indicate his equal protection rights are being violated, these issues are not properly presented for review and will not be addressed on appeal." **Wyrostek**, 117 N.M. at 523, 873 P.2d at 269; **see also State v. Lawson**, 310 N.C. 632, 314 S.E.2d 493, 500-01 (N.C. 1984) (determining that the defendant's equal protection arguments were without merit when the defendant failed to show that the prosecutor sought the death penalty based on "unjustifiable standards like 'race, religion or other arbitrary classification'"), **cited with approval in Wyrostek**, 117 N.M. at 523, 873 P.2d at 269. Because Clark does not indicate any factual support for discrimination on the basis of a suspect classification or irrational state action, we reject his argument.

{78} Clark has properly raised the issue of proportionality for appeal. Clark offers the affidavit of Appellate Public Defender Susan Gibbs in support of his assertion that his sentence is disproportionate. This Court must compare New Mexico cases in which a defendant was convicted under the same aggravating circumstances as Clark, murder during the course of a kidnapping and murder of a witness, and in which the comparison defendant received either the death penalty or life imprisonment and whose conviction and sentence have been upheld by this Court. The State inexplicably attempts to remove some comparison cases which the defendant presents, but, after reviewing prior cases from this Court which completed a proportionality review, these cases appear to be appropriate.

{79} The first comparison case is **Guzman**, 100 N.M. 756, 676 P.2d 1321. The defendant received a death sentence after the jury found the aggravating circumstances of murder committed during the commission of a kidnapping, murder during the commission of criminal sexual penetration, and murder of a witness to a crime. **Id.** at 760, 676 P.2d at 1325. In the second case, **Gilbert**, 100 N.M. at 395, 671 P.2d at 643, the defendant received the death sentence after the jury found the aggravating circumstances of two counts of murder committed during the commission of a kidnapping and murder of a witness to a crime, and this Court affirmed. A third case, **State v. Cheadle**, 101 N.M. 282, 681 P.2d 708 (1983), as the State points out, seems to be an unreliable comparison case because the sentence was later overturned due to ineffective assistance of counsel. **See State v. Cheadle**, 106 N.M. 391, 391, 744 P.2d 166, 166 (1987). Finally, in both **State v. Hutchinson**, 99 N.M. 616, 619 n.1, 625, 661 P.2d 1315, 1318 n.1, 1314 (1983), and **McGuire**, 110 N.M. at 306, 314, 795 P.2d at 998, 1006, the jury found the aggravated circumstances of murder in the commission of a kidnapping and murder of a witness, and this Court affirmed the life sentence of the respective defendants.

{80} Compared to these cases, we conclude that Clark's sentence was not administered in an arbitrary, capricious, or freakish manner. Both **Gilbert**

and **Guzman** involved similar aggravating circumstances: murder committed during the commission of a kidnapping and murder of a witness. **Guzman** involved an additional aggravating circumstance and **Gilbert** involved two victims. Although the respective defendants in **Hutchinson** and **McGuire** received life sentences for similar aggravating circumstances, that does not indicate that Clark's death sentence is freakish, arbitrary, or capricious. **See Bland**, 958 S.W.2d at 665 (noting that "it is clear that our function in performing comparative review is not to search for proof that a defendant's death sentence is perfectly symmetrical, but to identify and invalidate the aberrant death sentence"). One significant difference between Clark's crime and these other four cases, which involved adult victims, is the age of Gore. We hold that there is no disparity in Clark's sentence.

{81} This Court also reviews the record and compares the facts of the offense and all other evidence presented by way of aggravation or mitigation to determine whether the sentence is excessive or disproportionate. **See** § 31-20A-4(C); **Garcia**, 99 N.M. at 780, 664 P.2d at 978. Clark presented testimony of various individuals describing Clark as remorseful and describing their relationships with him, including Robert DeVoe, William Fry, Steve Aarons, Terry Kinney, John Southerland, Paul Collins, and Austin Bonner. Clark also made a statement to the jury in which he requested that it sentence him to life imprisonment, stated that he was sorry for his crimes, and asked that they consider the impact of a sentence of death on his children and fiancee.

{82} The State presented ample evidence supporting the aggravating circumstances in this case. The jury listened to Clark's guilty plea proceedings, in which Clark described how he kidnaped Gore, forcing her into his car, and struck her repeatedly. Clark recounted that he drove her to his brother's ranch and tied Gore's hands to restrain her. The State notes that Gore was nine years old at the time of her murder, and that the police discovered Gore's body naked, bound at the wrists and ankles, and shot three times in the back of the head at close range. The State informed the jury of Clark's prior conviction for kidnapping and criminal sexual penetration of a six-year-old child. These facts overwhelmingly support both the aggravating circumstances of murder committed during the commission of a kidnapping and murder of a witness. This evidence also supports the jury's findings that the aggravating circumstances outweighed the mitigating circumstances. The State argues, and we agree, that the facts are egregious in Clark's case. These circumstances unquestionably outweigh Clark's testimony and the testimony of his friends and relatives describing his remorse and positive characteristics.

{83} Although Clark observes that other high-profile murders occurred near the time of his sentencing, the simple details of his crimes provide ample basis for the jury's determination. Similarly, Clark again argues that the brief victim impact testimony of Gore's parents inflamed the jury, but, as Justice O'Connor expressed, "surely [the] brief statement did not inflame [the jury's] passions more than did the facts of the crime." **Payne**, 501 U.S. at 832 (O'Connor, J., concurring). The facts of Clark's case support the conclusion that the jury did not impose his death sentence under the influence of passion, prejudice, or any other arbitrary factor. Taking Clark, the circumstances of the crime, and other similar New Mexico cases into consideration, we conclude that Clark's sentence of death was neither excessive nor disproportionate.

13. Waiver

{84} Finally, Clark, pro se, requests this Court to consider whether he may waive appellate review of his case. Clark argues that the Supreme Court held that a defendant may waive representation of legal counsel in **Faretta v. California**, 422 U.S. 806, 819, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975) and that a defendant may waive his or her right to appeal if the waiver is knowing, voluntary, and intelligent, and made with full knowledge of his or her rights. **See Gilmore v. Utah**, 429 U.S. 1012, 50 L. Ed. 2d 632, 97 S. Ct. 436 (1976).

{85} The Legislature, pursuant to Section 31-20A-4(A), requires this Court to review

the judgment of conviction and sentence of death automatically. Thus, this Court must engage in a direct review of Clark's sentence.

{86} Similarly, many appellate courts have held that a capital defendant may not waive any aspect of direct appellate review of their sentences.[2] Other states have held that capital defendants may waive general appellate review, while still engaging in statutory review of the death sentence.[3] A minority of states have held that a capital defendant may waive appellate review, but still require review of the trial court's determination that the defendant made a knowing, voluntary, and intelligent decision.[4] We conclude that the Legislature intended to require meaningful review of a death sentence by this Court.

{87} However, following a competency hearing or other evidence of competency, we believe that Clark may knowingly, voluntarily, and intelligently waive his right to further review of his case beyond this Court's direct review of his sentence. **See Gilmore**, 429 U.S. at 1017 (Burger, C.J., concurring) (noting, in a habeas proceeding, that "Gilmore, duly found to be competent by the Utah courts, has had available meaningful access to this Court and has declined expressly to assert any claim here other than his explicit repudiation of [his mother's] efforts to speak for him"); **Whitmore v. Arkansas**, 495 U.S. 149, 165, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990) (rejecting fellow capital defendant's attempt to intervene, and noting that the state supreme court requires review of the trial court's determination, made following a hearing, that the defendant made a knowing, voluntary, and intelligent waiver of his right to appeal); **Franklin v. Francis**, 168 F.3d 261, 262 (6th Cir.) (per curiam) (denying stay of execution, noting that the Ohio Supreme Court had previously concluded that capital defendant was competent to waive collateral review, and thus, the federal district court did not have jurisdiction to hear the petition for writ of habeas corpus by the next friend of the defendant), **cert. denied**, 525 U.S. 1132, 142 L. Ed. 2d 973, 119 S. Ct. 1022 (1999); **Baal v. Godinez**, 737 F. Supp. 77, 78 (D. Nev. 1990) (noting that testimony and evidence established that the defendant was legally competent, and denying parents' application for stay, holding that the capital defendant, wishing to proceed pro se, made a knowing, intelligent, and voluntary waiver regarding his right to request a stay of execution), **stay vacated by Demosthenes v. Baal**, 495 U.S. 731, 109 L. Ed. 2d 762, 110 S. Ct. 2223 (1990).

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[2] **See State v. Brewer**, 170 Ariz. 486, 826 P.2d 783, 791 (Ariz. 1992) (en banc) (holding that the defendant may not restrict the mandatory appeal provided for him pursuant to the state's capital-sentencing procedures because doing so would be a renunciation of the court's duty imposed by the statutes and rules of criminal procedure); **Massie v. Sumner**, 624 F.2d 72, 74 (9th Cir. 1980) (holding that California has an important interest in accuracy and fairness in its criminal proceedings that outweighs the defendant's right to self-representation, where the defendant challenged the validity of California's statutory automatic appeal for death sentences by habeas petition, contending that his incarceration on death row pending determination of the forced and unwanted appeal constitutes cruel and unusual punishment and violates his right to refuse counsel); **Klokoc v. State**, 589 So. 2d 219, 221-22 (Fla. 1991) (per curiam) (holding that a capital defendant must receive a meaningful appeal, with the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence, but allowing the defendant to file a pro se supplemental brief setting forth his personal positions and interests with regard to the subject matter of this appeal).

[3] **See State v. Dodd**, 120 Wash. 2d 1, 838 P.2d 86, 95 (Wash. 1992) (en banc) (reviewing a defendant's wish to waive his general appeal with the understanding that he could not waive statutory review, following determination that he was competent and his decision to waive his general right of appeal was made knowingly and voluntarily); **see also State v. Sagastegui**, 135 Wash. 2d 67, 954 P.2d 1311, 1320 (Wash.) (en banc), **dismissal of post-conviction relief reversed by Vargas v. Lambert**, 159 F.3d 1161 (9th Cir), **stay vacated**, 119 S. Ct. 313, 142 L. Ed. 2d 274 (1998).

[4] **See State v. Berry**, 74 Ohio St. 3d 1504, 659 N.E.2d 796, 796 (Ohio 1996) (holding that "[a] capital defendant is mentally competent to abandon any and all challenges to his [or her] death sentence, including appeals, state post-conviction collateral review, and federal habeas corpus, if he [or she] has the mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue further remedies"); **Grasso v. State**, 857 P.2d 802, 806 (Okla. Crim. App. 1993) (noting that direct appellate review of capital cases is not mandated by statute); **Franz v. State**, 296 Ark. 181, 754 S.W.2d 839, 843-44 (Ark. 1988) (noting that an appeal is not mandated by statute, holding that following a finding that the capital defendant is competent, he or she may knowingly and intelligently waive any and all appeals; the state supreme court will then review the trial court's determination of whether the defendant competently, knowingly, and intelligently waived his or her right to appeal).

CONCLUSIONS

{88} The trial court, which is in the best position to assess a juror's demeanor and credibility, may properly exclude a juror for cause if the juror's views would substantially impair the performance of the juror's duties in accordance with the instructions and oath. Because there was not a clear abuse of discretion or a manifest error in this case, we will not disturb the trial court's decision. The trial court's removal for cause of jurors in Clark's case was based on their inability to apply the law and follow the jury oath. The fact that the potential juror's inability to perform his or her duty is based upon religious objection and belief does not violate the religious protections of the New Mexico Constitution, because exclusion from the jury was not based upon religious affiliation. The trial court did not abuse its discretion by allowing the State to question potential jurors whether they could sign a death verdict and announce this finding in court. Further, the trial court did not err in denying Clark's objection to the State's use of peremptory challenges to remove potential jurors who are reluctant to impose capital punishment.

{89} Proportionality review is clearly a matter for this Court; thus, the trial court did not err in restricting Clark's offer of proportionality evidence. Additionally, the trial court did not err by refusing to allow Clark to present evidence regarding particular individuals' opinions about the death penalty because such evidence does not bear upon Clark's character, prior record, or the circumstances of his crimes. The trial court did not err by admitting testimony and evidence which related directly to the circumstances of Clark's crime, the testimony of Gore's parents as victim impact evidence, and evidence of Clark's prior conviction.

{90} The trial court did not err by denying Clark's pre-trial motion to restrict the scope of the State's penalty phase arguments and by failing to sustain his objections to the State's closing argument. Clark makes no persuasive argument that flaws in the record warrant a reversal of his sentence. The trial court did not err by failing to grant Clark's motion for a new sentencing hearing, or by failing to grant his motion for a judgment notwithstanding the verdict and for an extension of time.

{91} We uphold the constitutionality of the Capital Felony Sentencing Act. The evidence supports the jury's findings of the aggravating factors charged. The evidence also supports the jury's findings that the aggravating circumstances outweighed the mitigating circumstances. The facts of Clark's case support the conclusion that the jury did not impose his death sentence under the influence of passion, prejudice, or any other arbitrary factor. Taking Clark, the circumstances of the crime, and other similar New Mexico cases into consideration, Clark's sentence of death was neither excessive nor disproportionate. We affirm Clark's sentence. Finally, we conclude that this Court is required to directly review Clark's sentence of death, though we believe that, if he is competent, he may knowingly, voluntarily, and intelligently waive his right to any further review of his case.

{92} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Chief Justice

JOSEPH F. BACA,
Justice

PETRA J. MAES,
Justice

GENE E. FRANCHINI,
Justice (specially concurring)

FRANCHINI,
Justice. (Special Concurrence)

CONCURRENCE

{93} I **CONCUR** in both the analysis and result reached in this opinion because it is legally correct. It is also solidly based on the precedents of this court as well as other federal and state courts.

{94} I write specially to state that I am opposed philosophically and practically to the death penalty. I personally believe it to be a bad public policy. However, public policy is solely within the legislature's domain and this court is powerless to change it unless the statutory law underlying the policy is declared unconstitutional.

{95} For the reasons set out in the opinion, the arguments advanced by the defendant do not convince me or the court that the death penalty statute in New Mexico is unconstitutional. However, those same arguments firmly convince me personally how truly flawed such a public policy is.

{96} Since it is the duty and responsibility of a judge to interpret and apply the law to the facts of a case free of any personal or philosophical leanings or beliefs, I specially concur.

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1999-NMSC-044

Filing Date: November 17, 1999

Docket No. 24,763

AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO, ERIN HARTSOCK, SAM CLARKE, ANGELINA CLARKE, JARRETT HINES-KAY, WILLY LUSK-CLAIBORNE, TERRY COTTLE, JAMIE SCOTT and YVETTE SCOTT,

Plaintiffs-Appellees and Cross-Appellants,

v.

CITY OF ALBUQUERQUE,

Defendant-Appellant and Cross-Appellee.

Certification from the New Mexico Court of Appeals
Robert L. Thompson, District Judge

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OPINION

SERNA, Justice.

{1} The City of Albuquerque (City) appeals from the district court's order, entered in response to the parties' cross-motions for summary judgment, holding that the City's juvenile Curfew Ordinance (Curfew) violates the New Mexico Constitution and is also preempted by the State Children's Code. The district court denied the City's motion for a stay pending appeal. The American Civil Liberties Union of New Mexico, children, parents, and a business owner (Plaintiffs) cross-appeal on the denial of other asserted grounds to strike the Curfew and on the denial of attorney's fees and expenses. We hold that the Children's Code preempts the Curfew and the Safe Teen Operation Program (STOP program), and thus affirm the district court.

FACTS AND BACKGROUND

Curfew Ordinance

{2} The City enacted the Curfew in order "to provide for the protection of minors from each other and from other persons, to provide for the enforcement of parental control over and responsibility for children, to protect the general public and reduce the incidence of juvenile criminal activities." Albuquerque, N.M., Revised Ordinances § 12-5-9(A)(2) (1994). The Curfew mandates that it is unlawful for any person under seventeen years of age to remain in a public place or on the premises of an establishment within Albuquerque during curfew hours, for a parent or guardian of a minor to knowingly permit, or by insufficient controls allow, a minor to violate the curfew, and for the owner or employee of an establishment to knowingly allow a minor to remain upon the premises of the establishment during curfew hours. Section 12-5-9(C). Violation of the Curfew is punishable by a maximum fine of $ 500 and imprisonment of up to ninety days. Albuquerque, N. M., Revised Ordinances § 12-1-99(I) (1994).

STOP PROGRAM

{3} The parties stipulated to the following facts. The City implemented the STOP program, a pilot initiative, from July 19 to September 30, 1996, during which the Curfew was enforced Friday through Sunday nights. During this program, 616 children were taken into custody for alleged curfew violations. Eighty-three of the police reports contain no narrative summary explaining the basis for the stop, and of the remaining children, 106 reports indicate that the stop occurred because of some other suspected criminal violation, most often a traffic violation. The vast majority of children stopped and taken into custody for alleged curfew violations were "talking or walking with others."

{4} Police officers took children into custody under Section 12-5-9 of the Curfew, handcuffed and patted them down at the scene of the curfew violation, and took them to Wells Park Community Center, where the handcuffs were removed. City personnel photographed the children, took physical descriptions, and questioned them. The officers also completed a police report. Information was noted on intake forms, and a copy of these forms was given to the Albuquerque Public Schools and the State of New Mexico Juvenile Probation and Parole Office. The children were held at the Center until they were released to either a parent or guardian, and if neither could be found, they were released to a probation officer or to a licensed child care shelter.

{5} The police officers did not inform the children of their constitutional right against self-incrimination prior to or after their arrival at Wells Park. Each child was then required to attend an educational session pertaining to the Curfew ordinance. Parents or guardians were invited, but not required, to attend this session.

PROCEEDINGS IN THE DISTRICT COURT

{6} Plaintiffs filed an action for declaratory and injunctive relief regarding the Curfew for facial constitutional violations in August of 1995, prior to the STOP program. None of the individual Plaintiffs were stopped, taken into custody, cited or prosecuted for violation of the Curfew. The district court held a hearing on the cross-motions for summary judgment in 1997, and issued its final order granting Plaintiffs' motion on September 25, 1997. The court concluded that: (1) the Curfew Ordinance violates the guarantees of Article II of the New Mexico Constitution because it does not provide a mechanism for judicial review of any arrest or detention of the children; and (2) the Curfew is preempted by the Children's Code in that a child may only be taken into custody pursuant to a court order, for the commission of a delinquent act, or by a Juvenile Probation and Parole Officer, under NMSA 1978, § 32A-2-9 (1993). The court denied Plaintiffs' motion on other issues because of the above findings, and denied the City's motion for summary judgment as a matter of law. Finally, the court denied Plaintiffs' request for attorney's fees and costs under the private attorneys general doctrine and the City's motion for a stay of the injunction pending appeal pursuant to Rule 1-062(C) NMRA 1999.

{7} The City appeals, and Plaintiffs cross-appeal. The parties filed a joint motion under NMSA 1978, § 34-5-14(C) (1972) (significant question of law under the state or U.S. Constitutions, or issue of substantial public interest) and Rule 12-606 NMRA 1999 (certification from the Court of Appeals), to certify the case to this Court.

DISCUSSION

Standing

{8} Plaintiffs argue that they have standing to challenge the Curfew because their "previously-lawful activities during curfew hours [were] curtailed by the Curfew Ordinance." Plaintiffs assert that their challenge to the Curfew includes the STOP program as an enforcement scheme. The City argues that Plaintiffs have no standing to challenge the STOP program, as none of them were arrested or charged during this program.

{9} We do not believe that our analysis of this case must be predicated upon the arrest and prosecution of the Plaintiffs before they may seek relief. **See Doe v. Bolton**, 410 U.S. 179, 188, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) (holding that plaintiffs in an abortion case had "standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution"). As the United States Supreme Court stated in **Babbitt v. United Farm Workers Nat'l Union**, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979) (citations and internal quotation marks omitted):

> When contesting the constitutionality of a criminal statute, it is not necessary that [the plaintiff] first expose himself [or herself] to actual arrest or prosecution to be entitled to challenge [the] statute that he [or she] claims deters the exercise of his [or her] constitutional rights. When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he [or she] should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

We agree with Plaintiffs that the Curfew curtails their previously legitimate late-night activities, and that the STOP program demonstrates the City's intention to apprehend individuals in violation of the Curfew. Therefore, Plaintiffs have standing to challenge the Curfew and the STOP program.

CHILDREN'S CODE PREEMPTION OF THE CURFEW

{10} Under Article X, Section 6(D) of the New Mexico Constitution, "[a] municipality . . . may exercise all legislative powers and perform all functions not expressly denied by general law or charter." This Court has held that "any New Mexico law that clearly intends to preempt a governmental area should be sufficient without necessarily stating that affected municipalities must comply and cannot operate to the contrary." **Casuse v. City of Gallup**, 106 N.M. 571, 573, 746 P.2d 1103, 1105 (1987). In this case, we determine that the Children's Code contains the "express statement of the authority or power denied" that is necessary to preempt a home-rule ordinance under the law articulated in **Apodaca v. Wilson**, 86 N.M. 516, 521, 525 P.2d 876, 881 (1974). For the reasons discussed below, we conclude that the Children's Code preempts the City from enacting this Curfew ordinance because the ordinance establishes criminal sanctions of incarceration and fines for juvenile activity which is not unlawful when committed by adults.

{11} Included in the Legislature's stated purposes of the Children's Code is "to provide for the care, protection and wholesome mental and physical development of children" as well as "to provide judicial and other procedures through which the provisions of the Children's Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced." NMSA 1978, § 32A-1-3 (1993). Further, under NMSA 1978, § 32A-1-8(A) (1995), the children's court has exclusive original jurisdiction of all proceedings under the Children's Code involving a child alleged to be delinquent, neglected, abused, or a child of a family in need of services. We conclude that, through these provisions, the Legislature clearly intended to protect and preserve the legal rights of children in New Mexico. While this language does not prohibit municipalities from drafting ordinances that proscribe specific conduct of children which is unlawful if committed by adults, the procedures within the Children's Code control the manner in which children may be taken into custody, taken into protective custody, or adjudicated. The Curfew, which attempts to criminalize behavior involving juveniles, and the STOP program, which purportedly took children into protective custody, implicate the Children's Code procedures and protections.

{12} The City argues that the Curfew does not fall within the Delinquency Act of the Children's

Code because the Legislature has, in NMSA 1978, § 32A-2-3(A) (1996), defined a "delinquent act" as "an act committed by a child that would be designated as a crime under the law if committed by an adult." While we agree that a violation of the City's Curfew is not a "delinquent act" because a curfew violation would not be designated as a crime if committed by an adult, we do not agree that the Delinquency Act leaves the City free to criminalize the otherwise lawful behavior of children. We believe the Legislature intended that this definition of a delinquent act in Section 32A-2-3(A) describe penal acts committed by juveniles that, due to the offenders' ages, the Legislature chose to label delinquent as opposed to criminal; thus, unless adult sentencing is expressly authorized by the Legislature, unlawful acts committed by juveniles are to be treated as delinquent instead of criminal.[1]

{13} The explicitly articulated purpose of the Delinquency Act is "to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable." NMSA 1978, § 32A-2-2(A)(1993). This language demonstrates that the Legislature intended to spare children the stigma of the criminal label and protect them from the adult consequences of the criminal justice system. **See** NMSA 1978, § 32A-2-18(A) (1996) ("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 impose any civil disabilities ordinarily resulting from conviction of a crime. . . ."); NMSA 1978, § 32A-2-19(D) (1996) ("No child found to be delinquent shall be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of crime."). **See generally In re Winship**, 397 U.S. 358, 376, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) (Burger, C.J., dissenting) (describing a juvenile justice system as "a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing [children] to a traditional criminal court"). To allow municipalities to criminalize the otherwise lawful behavior of children remaining on public streets during curfew hours, or to characterize any act of a child as criminal, as opposed to delinquent, would circumvent and thereby frustrate the Legislature's intent to protect children and uniformly enforce laws of a penal nature against them. The Delinquency Act comprehensively addresses behavior by children which could be described as criminal if not for the offender's age.

{14} The Curfew creates a penal offense by authorizing incarceration for up to ninety days and a fine of up to $ 500 for each occurrence of an individual under the age of seventeen who remains in any public place or on the premises of any establishment within Albuquerque during curfew hours. **See** Albuquerque, N.M., Revised Ordinances § 12-1-99(I) ("Each offense, upon conviction is punishable by a fine of not more than $ 500, or by imprisonment for not more than ninety days, or by both such fine and imprisonment."). The Curfew ordinance also authorizes a police officer to arrest children sixteen years of age or younger for violating the curfew, **see id.**, § 12-5-9(E), and the City has placed the curfew ordinance within its Criminal Code, **see** Albuquerque, N.M., Revised Ordinances § 12-1-1 ("This chapter may be cited as 'Criminal Code of Albuquerque.'"). Thus, with its terminology of "arrest," "conviction," "punishment," and "imprisonment," the City has created a criminal offense that can only be committed by children. Due to this criminal nature of the Curfew, and the fact that it criminalizes only the behavior of

[1] We acknowledge that the Children's Code expressly permits some categories of juvenile offenders to be subjected to an adult sentence for certain serious offenses, such as murder and aggravated battery. **See** §§ 32A-2-3(H), (I); NMSA 1978, § 32A-2-20 (1996). Violation of a juvenile curfew ordinance, however, is not listed among the serious offenses for which an adult sentence is authorized, and the Curfew's absence from the provisions in the Delinquency Act that allow for adult sentencing lends further support to our conclusion that the Delinquency Act preempts the City from subjecting juvenile curfew violators to an adult sentence as a criminal offender. **Cf. Cooper v. Albuquerque City Comm'n**, 85 N.M. 786, 792, 518 P.2d 275, 281) ("When a power, together with the express means of its execution, are constitutionally granted and determined, it is reasonable to infer therefrom that other means of exercising this power were intentionally excluded and should not be permitted or allowed.").

people sixteen years of age or younger, it conflicts with the Delinquency Act. We conclude that the Legislature, through the plain language of Section 32A-2-3(A) of the Delinquency Act, preempts the City from enacting and enforcing the Curfew because the ordinance authorizes criminal punishment of children for acts which would not be designated as a crime under the law if committed by an adult.

{15} The Curfew designates previously lawful behavior of young people as criminal in nature. **See City of Roswell v. Gallegos**, 77 N.M. 170, 172, 420 P.2d 438, 439 (1966) (noting that "prosecution for violation of a municipal ordinance is a quasi-criminal proceeding"); **City of Santa Fe v. Baker**, 95 N.M. 238, 241, 620 P.2d 892, 895 (same); **City of Clovis v. Curry**, 33 N.M. 222, 224-25, 264 P. 956, 957-58 (1928) (concluding that an ordinance in question authorized proceedings which were criminal in nature); **State v. Melendrez**, 91 N.M. 259, 261, 572 P.2d 1267, 1269 (Ct. App. 1977) (noting that the "violation of a municipal ordinance prohibiting shoplifting comes within the meaning of 'crime' "). Although the Curfew criminalizes this behavior for children, it is lawful for those seventeen and older. Again, the Legislature, through the Delinquency Act, exhaustively addresses the acts of children which would be unlawful if committed by an adult, and, instead of defining these acts as criminal for children, the Legislature designates these acts as delinquent. We believe that the Legislature has clearly expressed the view that behavior by children which could be considered criminal is encompassed within the Delinquency Act, and that the City is thus prohibited from criminalizing behavior by children which is lawful if committed by an adult.

{16} The City argues that the Delinquency Act does not preempt the Curfew because other provisions of the Children's Code authorize protective custody and alternative programs to divert children from the juvenile justice system.[2] However, in spite of how the City characterizes the STOP program's enforcement scheme, the Curfew expressly authorizes the police to arrest children, rather than take them into protective custody, for a Curfew violation. **Compare Ashton v. Brown**, 339 Md. 70, 660 A.2d 447, 452 (Md. 1995) (describing an ordinance which instructs a police officer who finds a child violating the curfew to take such child into custody as a child in need of supervision), **with** Section 12-5-9(E). Under Section 12-5-9(E) of the Curfew, "the officer shall not issue a citation or **make an arrest** under this section unless the officer reasonably believes that **an offense** has occurred and that, based on any response and other circumstances, no defense . . . is present." (Emphasis added). The only provision of the Children's Code to address children being taken into non-protective custody is within the Delinquency Act. Article II, Section 10 of the New Mexico Constitution allows a warrantless arrest only upon a showing of exigent circumstances. **See Campos v. State**, 117 N.M. 155, 159, 870 P.2d 117, 121 (1994). Similarly, under Section 32A-2-9, a child may be taken into custody pursuant to a court order, "pursuant to the laws of arrest for commission of a delinquent act," or by a juvenile probation and parole officer. **Cf. In re J.F.F.**, 164 Wis. 2d 10, 473 N.W.2d 546, 549 (Wis. Ct. App. 1991) ("By limiting the power to take juveniles into custody for ordinance violations that subject the juvenile to the possibility of a forfeiture, the legislature clearly wanted to reserve arrest to those circumstances that were deemed sufficiently serious by local authorities to warrant the imposition of a monetary penalty."). As violation of the Curfew is not a delinquent act, the Curfew's authorization of arrest is in conflict with the Children's Code, as the district judge concluded.

[2] The City, relying on its own characterization of the STOP program, repeatedly refers to "protective custody" rather than arrest, as articulated in the Curfew itself. However, because the STOP program was an initial, limited, pilot program which ended after three months, and because the City contemplates the potential for criminal prosecution of juveniles for violating the Curfew by, for example, noting the procedural consequences "if a criminal conviction is sought" pursuant to the Curfew, the City is acknowledging the criminal nature of the Curfew offense itself.

{17} The Children's Shelter Care Act, NMSA 1978, §§ 32A-9-1 to 32A-9-7 (1993), further supports the conclusion that the Children's Code preempts the Curfew because it criminalizes youthful behavior which, if committed by an adult, is not a crime. The Legislature

> finds and declares that appropriate and distinct programs of supervision and care for children are required to fulfill the purposes of the Children's Code . . . ; that **many children are needlessly detained in secured facilities on charges for acts that would not be criminal if they were committed by an adult**; that these children would benefit from either immediate return to the family or placement in shelter-care homes or nonsecured shelter-care facilities. . . .

NMSA 1978, § 32A-9-2 (1993) (emphasis added). We believe that the specific language of this section further indicates that the Children's Code preempts the authority of municipalities to enact or enforce curfew ordinances which subject minors to incarceration for activity which is lawful if committed by an adult.

{18} The Legislature has clearly expressed that acts committed by children which would not be unlawful if committed by adults are not delinquent. We believe that the Legislature has balanced the need to control the behavior of minors against the serious label of "delinquent" and the harsh sanction of incarceration, and chosen to reserve these penalties for behavior which is unlawful when committed by adults. The Legislature clearly wishes to treat children differently than delinquent offenders when they engage in misbehavior that is not unlawful for adults. The stated purposes of the Curfew are to protect minors from each other and others, to enforce parental control, and to protect the public from juvenile criminal activities. Section 12-5-9(A)(2). Incarceration of up to ninety days appears to be at odds with the purpose of protecting minors from each other and others. Our research reveals few other juvenile curfew ordinances which impose incarceration upon minors for a violation of a curfew.[3] **See, e.g.**, **Hutchins v. District of Columbia**, 188 F.3d 531, 1999 WL 397429 (D.C. Cir. 1999) (en banc) (noting that the penalty for a minor in violation of the act is twenty-five hours of community service and suspension of a driver's license for up to one year, and upholding the constitutionality of the curfew); **Schleifer ex rel. Schliefer v. City of Charlottesville**, 159 F.3d 843, 857-58 (4th Cir. 1998) (observing that the penalties for minors violating curfew include verbal warnings, written warnings, and a fine of up to $ 250, Va. Code Ann. § 18.2-11(d) (Michie 1996), and upholding the constitutionality of the curfew), **cert. denied**, 526 U.S. 1018, 143 L. Ed. 2d 349, 119 S. Ct. 1252 (1999); **Qutb v. Strauss**, 11 F.3d 488, 491, 496 (5th Cir. 1993) (noting that a minor in violation of the curfew is subject to a fine not to exceed $ 500, and concluding that the curfew is constitutional); **Village of Deerfield v. Greenberg**, 193 Ill. App. 3d 215, 550 N.E.2d 12, 14, 140 Ill. Dec. 530 (Ill. App. Ct. 1990) (upholding constitutionality of a curfew ordinance, and noting that a violation is a petty offense which results in a ten to 100 dollar fine). **But see Nunez v. City of San Diego**, 114 F.3d 935 (9th Cir. 1997) (noting that a minor convicted of a curfew violation commits a misdemeanor, and holding that the curfew is an unconstitutional burden on parents' fundamental rights and is not a reasonable time, place, and manner restriction under the First Amendment).

{19} We hold that the Curfew is preempted. However, this holding does not leave the City without other remedies to alleviate perceived and actual problems with juvenile misbehavior. Regardless of the time of day at which they occur, the specific examples of juvenile misbehavior

[3] We note that the City claims that in a "conscious effort to balance the constitutional rights of the children against the compelling governmental interests in the safety and welfare of children and of the public, the City Council modeled the Curfew Ordinance after the Dallas curfew upheld in **Qutb**." However, while the Dallas curfew is very similar to the Albuquerque Curfew, the Dallas curfew's penalty is merely a fine, and the Curfew in the present case additionally provides for imprisonment of up to ninety days. **Compare Qutb v. Strauss**, 11 F.3d 488, 496 (5th Cir. 1993) ("Each offense, upon conviction, is punishable by a fine not to exceed $ 500."), **with** Section 12-1-99(I).

which the City cites in its brief, such as unsupervised children under the influence of drugs or alcohol, and young girls at a motel in the company of unrelated adult men, seem to be illustrative of what is meant by "children endangered by their surroundings" under NMSA 1978, § 32A-3B-3(A)(4) (1993). Although we reject the City's attempt to characterize its STOP program enforcement scheme as one involving protective custody, we do not rule out the authority of law enforcement officers to take children into protective custody under Section 32A-3B-3(A)(4) when all requirements of the Children's Code and the New Mexico Constitution are satisfied.

THE STOP PROGRAM AND PROTECTIVE CUSTODY

{20} Plaintiffs argue that, under the STOP program, the children were arrested, questioned, and "punished" through mandatory re-education, without warnings of their constitutional right against self-incrimination, and without legal representation, a hearing, or a chance to present evidence. The City stresses that the children were not arrested during the STOP program, but simply taken into protective custody. The City declares that the STOP program falls under a different section of the Children's Code, noting that Section 32A-3B-3(A)(4) authorizes a law enforcement officer to take a child into protective custody without a court order when the officer has reasonable grounds to believe that the child is endangered by the child's surroundings and removal is necessary to ensure the child's safety. Even assuming that children apprehended during the STOP program were taken into protective custody rather than "arrested," we hold, for the following reasons, that the STOP program was inconsistent with express provisions of the Children's Code.

{21} The Delinquency Act includes the serious conduct of children which is criminal in nature for all citizens, while other sections of the Children's Code, such as the Families in Need of Court-Ordered Services article, NMSA 1978, §§ 32A-3B-1 to 22 (1993, as amended through 1995), address behavior which, while not criminal, is not in the best interests of the child, such as truancy and running away from home. **See State v. Julia S.**, 104 N.M. 222, 227, 719 P.2d 449, 450 (distinguishing treatment of delinquent children from that of children in need of supervision under a former version of the Children's code); **Winship**, 397 U.S. at 374 n.6 (Harlan, J., concurring) ("The [persons in need of supervision] category was established in order to avoid the stigma of finding someone to be a 'juvenile delinquent' unless he [or she] committed a criminal act."); **State ex rel. M.S.**, 73 N.J. 238, 374 A.2d 445, 447 (N.J. 1977) ("Under the statute a delinquent is one who is guilty of serious antisocial conduct which, depending on circumstances, may require detention. On the other hand a [juvenile in need of services] is one who has not really committed an offense against society but only against his or her own best interests."). Section 32A-3B-2 addresses situations in which a "child, subject to compulsory school attendance, is absent from school without an authorized excuse more than ten days during a school semester," a "child is absent from the child's place of residence for a time period of twenty-four hours or more without consent of the child's parent, guardian or custodian," or a "child refuses to return home." In other words, this section deals with certain behavior of children, such as truancy and running away from home, which does not amount to delinquent activity or activity which would be criminal if committed by an adult, and authorizes government involvement when such behavior places children in danger because of their surroundings. Certainly, had the City not created a criminal offense with the Curfew, restriction of night-time activities of children would seem more like truancy and running away than delinquent behavior.

{22} In order to take children into protective custody, the Family in Need of Services article requires, among other circumstances, that the officer has reasonable grounds to believe that "the child is endangered by his [of her] surroundings and removal from those surroundings is necessary to ensure the child's safety." Section 32A-3B-3(A)(4). As Plaintiffs observe, the police officers who took the children into custody under the STOP program did not note any particularized finding that these children were in

danger. The City argues that the lateness of the hour is inherently dangerous to children. We disagree.

{23} We conclude that the City cannot take children into protective custody without a fact-specific showing that one or more of the specific statutory conditions within Section 32A-3B-3 are met. We reject the City's attempt to create a bright-line rule which automatically defines a child in violation of the Curfew as a child endangered by his or her surroundings. Such a rule is clearly over-inclusive, penalizes innocent conduct, and presents too great a danger that the police or municipalities will use "protective custody" as a subterfuge to avoid constitutional protections that would otherwise apply to warrantless arrests. **See** Samuel M. Davis, **Rights of Juveniles: The Juvenile Justice System** § 3.2, at 3-9 (2d ed. 1999) (noting that the potential for abuse in this area is at least as great as it traditionally was in the handling of adults under vagrancy laws); **cf. City of Chicago v. Morales**, 527 U.S. 41, 144 L. Ed. 2d 67, 119 S. Ct. 1849, 1856 (1999) (holding that Chicago's gang-loitering ordinance is unconstitutionally vague in failing to provide fair notice of prohibited conduct or to establish minimal guidelines to govern law enforcement officers); **B.A.A. v. State**, 356 So. 2d 304, 306 (Fla. 1978) ("The [loitering and prowling] statute is not to be used as a 'catch-all' provision whereby citizens may be detained by police and charged by prosecutors when there is an insufficient basis to sustain a conviction on some other charge."); **J.F.F.**, 473 N.W.2d at 549 (concluding that a search incident to a child's arrest was invalid because police lacked statutory authority to arrest the child for violating a municipal curfew ordinance). Just as Article II, Section 10 of the New Mexico Constitution requires a particularized showing of exigent circumstances for a warrantless arrest, **see Campos**, 117 N.M. at 159, 870 P.2d at 121, we believe that the Legislature disapproves any local ordinance or enforcement scheme which would authorize police to take a child into protective custody without either a court order or a fact-specific showing that the conditions of Section 32A-3B-3(A)(4) are met. **See** Davis, § 3.3, at 3-12 ("The criminal justice system, by preferring the procurement of a warrant whenever practicable, deemphasizes the competence of the police to weigh evidence and make the on-the-street decision to arrest. The juvenile process should operate on no less a standard.").

{24} Further, although the City argues that it acted under the authority of Section 32A-3B-3, the STOP program violated other provisions within the same article. For example, under Section 32A-3B-8(F) (1993), a child taken into protective custody "shall not be fingerprinted or photographed for identification purposes, unless pursuant to a court order." During the STOP program, the children were photographed without a court order, in violation of this provision. Once law enforcement officers take a child into protective custody, the officers must contact the Children, Youth, and Families Department, **see** Section 32A-3B-4(A), deliver the child to his or her parents "with all reasonable speed," **see** Section 32A-4-7(A), or place the child in approved "community-based shelter-care facilities," **see** Section 32A-3B-6. The STOP program, as an enforcement scheme of the Curfew, is inconsistent with these requirements. We reject the City's attempt to validate the STOP program under particular sections of the Children's Code while ignoring other relevant sections within the same articles.

{25} We conclude that the Children's Code preempts the Curfew ordinance because the Curfew creates criminal sanctions against children for violating the Curfew when such behavior is not unlawful if committed by an adult. We further conclude that the STOP program is invalid under the Children's Code because the City failed to follow the procedures of the Code. Because we affirm the district court's ruling upon these grounds, we do not reach Plaintiffs' other claims.

PLAINTIFFS' EXPENSES AND ATTORNEY FEES

{26} Finally, Plaintiffs request attorney fees. Generally, absent statutory or other authority, each party is responsible for their own attorney fees. **See Montoya v. Villa Linda Mall, Ltd.**, 110 N.M. 128, 129, 793 P.2d 258, 259 (1990)

("New Mexico adheres to the so-called American rule that, absent statutory or other authority, litigants are responsible for their own attorney's fees."); **Martinez v. Martinez**, 101 N.M. 88, 93, 678 P.2d 1163, 1168 (1984) (stating that the rule for the award of attorney fees is "that each party to litigation must pay his [or her] own counsel fees"); **Norton v. Board of Educ.**, 89 N.M. 470, 472, 553 P.2d 1277, 1279 (1976) (denying attorneys fees in a claim challenging constitutionality of fee collection for public school students).

{27} Plaintiffs request this Court to award them discovery sanctions, relying on Rule 1-037 NMRA 1999 (failure to make discovery, allowing reasonable expenses, including attorney's fees), because Plaintiffs' "counsel and paralegal volunteers invested a large amount of time in discovery attempting to make sense of the City's raw data on juvenile crime and victimization, struggling with the numerous errors in the data which the City could not explain." The City contends that discovery rules compelled it to provide the requested data, but did not require the City to expend additional time and money "analyzing, compiling and creating new statistical reports solely for the benefit of the recipient." We agree with the City. We review whether the district court erred in denying attorney fees for an abuse of discretion. **See Gardner v. Gholson (In re Estate of Gardner)**, 114 N.M. 793, 845 P.2d 1247, 1258 . We conclude that the district court's decision was not contrary to logic and reason, and thus was not an abuse of discretion. **See New Mexico Right to Choose/ NARAL v. Johnson**, 1999-NMSC-28, P6, 986 P.2d 450, 452, 127 N.M. 654.

{28} Plaintiffs' second claim is based on the City's alleged bad faith. Plaintiffs argue that the City's reliance on **Qutb** was in bad faith because the curfew at issue in **Qutb** was based upon persuasive statistical evidence supporting their curfew and the "City knew it lacked a statistical basis for a night-time juvenile curfew." According to Plaintiffs, the City made the Curfew permanent even though the Chief of Police advised that he could not show a statistical correlation between the Curfew and juvenile crime. The City then allegedly implemented the Curfew through the STOP program without statutory or constitutional requirements. Again, we are unpersuaded. The bad-faith exception applies to conduct which occurs "before the court or in direct defiance of the court's authority." **State ex rel. New Mexico State Highway and Transp. Dep't v. Baca**, 120 N.M. 1, 6, 896 P.2d 1148, 1153 (1995). Because these allegations did not concern conduct before the court or in defiance of the court's authority, this argument is inapplicable. **Id.** at 7, 896 P.2d at 1155 (noting that a court cannot award attorneys fees as a sanction for pre-litigation conduct, "conduct that gave rise to the underlying cause of action").

{29} Plaintiffs request this Court to recognize the "private attorneys general doctrine, which permits an award of expenses and attorneys fees in cases where private enforcement has become necessary and the magnitude of the resulting burden is therefore borne by private litigants whose efforts vindicate important public policies." Similarly, Plaintiffs request this Court to recognize the substantial benefit doctrine, based on the principle that where a successful suit confers a substantial benefit on the members of an ascertainable class, the costs of the litigation should be borne proportionately by all those benefitted. Plaintiffs' argument is unsupported by New Mexico law. **See Johnson**, 1999-NMSC-28, PP28-32, 986 P.2d at 458-459 (rejecting similar arguments, and concluding that "application of the private attorney general doctrine would require the Court to look beyond the proceedings before it to determine which rights are of more societal importance than others, which classes of litigants have protected such rights, and which classes of people have benefitted from such protection"). We decline Plaintiffs' invitation in this case to expand the award of attorney fees.

CONCLUSION

{30} We affirm the district court. We conclude that the Children's Code preempts the City from drafting a Curfew ordinance which criminalizes behavior by children which is not unlawful if committed by adults. We also conclude that the

STOP program is inconsistent with the statutory requirements of the Children's Code for "protective custody" and is thus invalid. Plaintiffs are not entitled to attorney fees or other costs beyond those which the district court allowed.

{31} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Chief Justice

JOSEPH F. BACA,
Justice

GENE E. FRANCHINI,
Justice

PETRA J. MAES, Justice
(specially concurring)

CONCURRENCE

PETRA J. MAES, Justice.
(specially concurring)

{32} I am in agreement with the majority opinion that the STOP program is inconsistent with the Children's Code. However, I have quite a bit of difficulty, with the preemption rationale which forms the basis for the proposed opinion. I believe that the Children's Shelter Care Act, NMSA 1978, §§ 32A-9-1 to 7 (1993) does not preempt the curfew, since its purpose is to find shelter for children who have been detained in secured facilities on charges for acts that would not be crimes if committed by adults. While this may cover the field of juveniles who have been incarcerated, it does not deal with the exact problem of the arrest of the juvenile in the first place, which is the situation engendered by the curfew. Similarly, as to the Family In Need of Court Ordered Services Article, I believe the majority opinion is correct in likening the violation of curfew to truancy and running away rather than a crime, but these are the subjects of the article, not curfew. Finally, I believe logic demands that it be conceded to the City that the Delinquency Act, NMSA 1978, § 32A-2-1 et seq. covers the field of those acts committed by children which would be designated as crimes if committed by adult, which does not include violation of curfew, that such violations are not delinquent acts, and that the Act therefore does not preempt the field of acts which are crimes if committed by children but not by adults. I do not believe the spirit of the Act extends so far as to say that it preempts the City from criminalizing behavior by minors which is not unlawful if committed by adults.

{33} I would offer an alternative approach to that taken in the majority opinion. That is, I would address the issue on constitutional grounds. The analysis used by many courts begins with the proposition that the United States Supreme Court "has extolled the right to move about freely, not only as a necessary means to the exercise of other protected activities, but also as an end in itself." Note, **Assessing the Scope of Minors' Fundamental Rights: Curfews and the Constitution**, 97 Harvard L. Rev. 1163, 1174-75 (1984) (Note) citing **Papachristou v. City of Jacksonville**, 405 U.S. 156, 164, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972).

> Freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.

Aptheker v. Secretary of State, 378 U.S. 500, 520, 12 L. Ed. 2d 992, 84 S. Ct. 1659 (1964). The freedom of movement encompasses all artificial barriers to personal mobility. Note at 1174 citing Laurence Tribe, American Constitutional Law § 15-15 at 953-58 and n. 20 (1978). **See also** Tribe, § 15-14 at 1382-82 & n 23 (2d ed. 1988). Government restrictions that inhibit the fundamental rights of minors are valid only if the restrictions

serve a "significant state interest . . . that is not present in the case of an adult." **Planned Parenthood V. Danforth**, 428 U.S. 52, 75, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976) The test is less rigorous than the compelling state interest test applied to restrictions on the fundamental rights of adults, **Carey v. Population Serv. Int'l**, 431 U.S. 678, 693 n. 15, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977), and the test that is usually used is drawn from **Bellotti v. Baird**, 443 U.S. 622, 634, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979). **See Johnson v. City of Opelousas**, 658 F.2d 1065, 1073 (5th Cir. 1981); **Gaffney v. City of Allentown**, 1997 U.S. Dist., 1997 WL 597989 *4 (E.D. Pa.); **In re Spagnoletti**, 122 Ohio App. 3d 683, 702 N.E.2d 917, 919 (Ohio App. 1997); **State v. J.D.**, 86 Wn. App. 501, 937 P.2d 630, 634 (Wash. App. 1997); **Matter of Appeal in Maricopa County**, 181 Ariz. 69, 887 P.2d 599 (Ariz. App. 1994). Under **Bellotti**, there are three factors in determining whether a significant state interest exists: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing."

{34} There is heated debate among the cases in the application of the three factors to curfews. The majority seem to hold, as to the first factor, that the lack of evidence, as in this case, that minors tend to be the victims of nighttime crimes more than others belies the position that they are peculiarly vulnerable in the case of a curfew. **Johnson**, 658 F.2d at 1073; **Gaffney**, 1997 U.S. Dist., 1997 WL 597989 at *4; **Hutchins v. District of Columbia**, 942 F. Supp. 665, 673 (D.D.C. 1996); **J.D.**, 937 P.2d at 634. **But see Maricopa County**, 887 P.2d at 606 (plague of crime and drugs, "while not peculiar to minors, is more damaging to them because they are more vulnerable"). As to the second factor, **Bellotti** concerned a minor's right to an abortion, and it was said by the court in **Gaffney**, 1997 U.S. Dist., 1997 WL 597989 at *4 "'that the decision to either stay inside or roam at night simply does not present the type of profound decision which **Bellotti** would leave to the state.'" Quoting **Waters v. Barry**, 711 F. Supp. 1125, 1137 (D.D.C. 1989).

{35} The third **Bellotti** factor not only demonstrates that there is a fundamental right at stake, but is also a substantive basis for holding the curfew unconstitutional. "A long line of cases has established the Court's view that child-rearing is the role of parents, not impersonal political institutions." Note at 1178. In **McCollester v. City of Keene**, 586 F. Supp. 1381, 1386 (D.N.H. 1984), it was held a curfew worked unconstitutionally "by usurping parental discretion in supervising a child's activities and imposing parental liability even where the parent exercised reasonable control or supervision in authorizing a child's activities which violate the ordinance." The right to rear children without undue governmental interference is a fundamental component of due process, **Ginsberg v. New York**, 390 U.S. 629, 639, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968), and "family autonomy is as much a right of children as of their parents." Note at 1179. Custody, care, and nurture reside first in parents, **Stanley v. Illinois**, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972), though the right is not absolute and is subject to reasonable regulation and compelling state interests. **Runyon v. McCrary**, 427 U.S. 160, 178, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976). The ordinance in **Qutb v. Strauss**, 11 F.3d 488, 496 (5th Cir. 1993), apparently used as a model for the Albuquerque ordinance, contained broad exemptions allowing parents to make decisions in many areas, a feature missing from the present ordinance (containing exceptions for being accompanied by or on an errand "without any detour or stop" at the direction of a parent or guardian), which is overbroad because it "'does not aim at evils within the allowable area of [government] control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise' of protected expression or associational rights." **Johnson** at 1071, quoting **Thornhill v. Alabama**, 310 U.S. 88, 97, 84 L. Ed. 1093, 60 S. Ct. 736 (1940).

{36} Thus, because the curfew burdens fundamental rights, it must be narrowly tailored to serve compelling state interests. **Lukumi Babalu Aye, Inc. v. City of Hialeah**, 508 U.S. 520, 531-32, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993).

The instant ordinance is purportedly narrowly drawn because a defense to violation is that the defendant was "exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech, and the right of assembly." Alb. City Ords, § 12-5-9 (D) (1) (h). While this may be a way around overbreadth on First Amendment grounds, this ordinance is impermissibly vague, as I believe is intuitively obvious. The Court of Appeals said in **Old Abe Co. v. New Mexico Mining Comm'n**, 121 N.M. 83, 91, 908 P.2d 776 :

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an **ad hoc** and subjective basis, with the attendant dangers of arbitrary and discriminatory application. **Grayned v. City of Rockford**, [408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)]

{37} Under a curfew with such wording, "what are First Amendment rights? What is considered to be free speech? . . . What of expressive conduct that does not involve oral or written communication"? . . . What types of speech are protected by 'free speech'? . . . And what of the 'right of assembly'? Do two friends have the right to assemble at a coffeehouse?" **Schleifer by Schleifer v. City of Charlottesville**, 159 F.3d 843, 871 (4th Cir. 1998) (Michael, J., dissenting). These questions are

> difficult enough for courts, Congress, and constitutional scholars, let alone for someone with no legal training. And when the answers are given, they are often imprecise and turn on the specifics of a case and a balancing of many factors. Furthermore, First Amendment jurisprudence is a vast and complicated body of law that grows with each passing day. As a result, criminal conduct cannot be defined by simply referring to the title (First Amendment) or subtitle (speech or assembly) of a particular right.

Id. But see Ramos v. Town of Vernon, 48 F. Supp. 2d 176, 1999 WL 304694 *5-*7 (D. Conn.) (ordinance not vague despite "First Amendment exception" not describing or identifying specific rights; no chilling effect; no basis for excessive police interpretive discretion); **Qutb** at 494 (noting First Amendment exception to curfew ordinance).

{38} In sum, I believe this ordinance is both overbroad in the encroachment on parental rights, and vague in the attempt to define conduct by generalized reference to the First Amendment.

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2000-NMSC-022

Filing Date: July 18, 2000, Filed. As Corrected October 23, 2000

Docket No. 25,157

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

SHANE GLEN HARRISON,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Frank H. Allen, Jr., District Judge

D. Eric Hannum
Albuquerque, NM

for Appellant.

Patricia A. Madrid, Attorney General
Elizabeth Blaisdell, Assistant Attorney General
Santa Fe, NM

for Appellee.

OPINION

SERNA, Justice.

{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. Although 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-27, P37, 127 N.M. 426, 982 P.2d 477; **State v. Brown**, 1998-NMSC-37, P32, 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-37, P39, 126 N.M. at 349, 969 P.2d at 324.

{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 Lausell'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-31, PP17-20, 121 N.M. 481, 913 P.2d 669, and **Tome v. United States**, 513 U.S. 150, 156, 130 L. Ed. 2d 574, 115 S. Ct. 696 (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 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-37, P32, 126 N.M. at 348, 969 P.2d at 323. 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. **Brown**, 1998-NMSC-37, P34, 126 N.M. at 348, 969 P.2d at 323. 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-31, P19, 121 N.M. at 487, 913 P.2d at 675, 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. **Casaus**, 1996-NMCA-31, P20, 121 N.M. at 487, 913 P.2d at 675. 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

[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.

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-6, P14, 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-6, P29, 122 N.M. at 785, 932 P.2d at 9.

> It 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**.
>
> . . . .
>
> . . . She 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-37, P43, 126 N.M. at 350, 969 P.2d at 325:

> 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-37, P45, 126 N.M. at 351, 969 P.2d at 326. 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). **Brown**, 1998-NMSC-37, PP38-46, 126 N.M. at 349-352, 969 P.2d at 324-327. Rule 11-801(D)(1)(b) "deals only with the fourth theory on which prior consistent statements may be offered." **Brown**, 1998-NMSC-37, P43, 126 N.M. at 350, 969 P.2d at 325. Thus, similar to our holding in **Brown**, 1998-NMSC-37, P46, 126 N.M. at 351-352, 969 P.2d at 326-327, 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] defense 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, details, 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

[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' 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.

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 "he 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-38, P29, 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, protection 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.

> The 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. 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, "as 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 medical 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, "Oh, 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-1, P57, 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, "in 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-1, P57, 126 N.M. at 453, 971 P.2d at 844.

{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 (holding that the trial court did not abuse its discretion in denying a motion to reopen the case "in 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. **Hernandez**, 115 N.M. at 15-16, 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, 146 L. Ed. 2d 389, 120 S. Ct. 1495, 1512 (2000) (reaffirming this standard from **Strickland v. Washington**, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (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-59, P24, 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-59, P25, 124 N.M. at 339, 950 P.2d at 782 (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, **aff'd**, 113 N.M. 780, 833 P.2d 1146; **cf. Baca**, 1997-NMSC-59, P30, 124 N.M. at 340, 950 P.2d at 783 (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, after 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. . . . Do 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.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Chief Justice

JOSEPH F. BACA,
Justice

GENE E. FRANCHINI,
Justice

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2001-NMSC-003

Filing Date: January 18, 2001, Filed.
As Corrected March 23, 2001. As Corrected April 2, 2001

Docket No. 25,668

DONNA GARCIA-MONTOYA,

Plaintiff-Appellant,

v.

STATE OF NEW MEXICO STATE TREASURER'S OFFICE, MICHAEL MONTOYA, ROBERT ANDERMANN, and JOAN G. "JODY" HOOPER, each in their individual capacities,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Petra Jimenez Maes, District Judge

Sommer, Fox, Udall, Othmer, Hardwick & Wise, P.A.
Jack N. Hardwick
Santa Fe, NM

for Appellant.

Herrera, Long & Pound, P.A.
Judith C. Herrera
Mark E. Komer
Santa Fe, NM

for Appellees.

OPINION

SERNA, Chief Justice.

{1} Donna Garcia-Montoya appeals from the district court's grant of summary judgment in favor of Defendant the State Treasurer's Office (STO) on a claim of sex discrimination under the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2000), and in favor of Defendants State Treasurer Michael Montoya and Deputy State Treasurer Robert Andermann on claims of breach of Garcia-Montoya's constitutional rights, intentional infliction of emotional distress, and defamation. This Court has jurisdiction over this appeal pursuant to NMSA 1978, § 28-1-13(C) (1987). We affirm in part and remand for reconsideration in part.

I. FACTS

{2} Garcia-Montoya was an employee of the STO. During David King's term as State Treasurer, Garcia-Montoya held the position of deputy director of administrative services. For the 1994 Democratic Party primary election, Garcia-Montoya campaigned for King. Defendant Montoya prevailed in both the primary and general elections for the seat of State Treasurer. Once Montoya took office, Garcia-Montoya served as director of administrative services.

{3} In an affidavit, Garcia-Montoya described a pattern of politically motivated conduct from Montoya following the general election. Garcia-Montoya stated that Montoya, prior to taking office, asked her to call in sick for the last week of King's term in order to obstruct several last-minute promotions. Garcia-Montoya refused this request. After taking office, Montoya told Garcia-Montoya that he planned to "get his people in," that she had been too close to King, and that if she did not support Montoya she would regret his "wrath." Over the next few months, Garcia-Montoya questioned Montoya and his deputy treasurer, Defendant Andermann, about numerous personnel actions because she believed they violated personnel rules. She indicated to

Montoya that she believed his employment decisions were politically motivated.

{4} In September of 1995, Montoya and Andermann transferred Garcia-Montoya from the position of director of administrative services to a newly created position designated as acting director of the local government investment pool. According to Garcia-Montoya, one of her subordinates was assigned to monitor her while she transferred her belongings to a new office and to inspect her belongings before she left her former office. Additionally, a locksmith changed the door locks for her former office while she packed her belongings. Garcia-Montoya claimed in her affidavit that when she confronted Montoya about the basis for the transfer he told her that he did not "trust any of you." Garcia-Montoya understood the remark to mean any King supporters in the office. Garcia-Montoya alleged that she became emotionally distraught as a result of the circumstances surrounding the transfer and that she was unable to return to work.

{5} Following her transfer and inability to return to work, Garcia-Montoya filed suit in the district court against her former employer, the STO, as well as against Montoya and Andermann.[1] Appealing an order of nondetermination from the Human Rights Division, **see** NMSA 1978, § 28-1-10(D) (1995), Garcia-Montoya claimed that the STO engaged in unlawful discrimination on the basis of sex in violation of the Human Rights Act. **See** NMSA 1978, § 28-1-7(A) (1995) (providing that it is unlawful discrimination for "an employer, unless based on a bona fide occupational qualification, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of . . . sex"). Additionally, Garcia-Montoya alleged that Montoya and Andermann violated her constitutional rights to freedom of political association and free speech contrary to federal law, **see** 42 U.S.C. § 1983 (1994), **amended by** 42 U.S.C. § 1983 (Supp. IV 1998), and intentionally caused her to suffer extreme emotional distress. Garcia-Montoya also included a claim of defamation against Andermann.

{6} Montoya and Andermann denied Garcia-Montoya's allegations of politically motivated conduct. They filed a motion for summary judgment based on the affirmative defense of qualified immunity in response to Garcia-Montoya's claim under Section 1983 and based on immunity under the Tort Claims Act, NMSA 1978, §§ 41-4-1 to -29 (1976, as amended through 1995, prior to 1996, 1999, & 2000 amendments), with respect to her claims of intentional infliction of emotional distress and defamation, **see** NMSA 1978, § 41-4-4(A) (1989, prior to 1996, 1999, & 2000 amendments). The STO also moved for summary judgment on Garcia-Montoya's claim under the Human Rights Act, contending that she failed to provide any evidence of intentional sex discrimination. The district court granted Defendants' motion for summary judgment with respect to each of Garcia-Montoya's claims.

II. STANDARD OF REVIEW

{7} "Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." **Roth v. Thompson**, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992); **accord** Rule 1-056(C) NMRA 2000. In order to rule on a motion for summary judgment under Rule 1-056, courts must resolve all reasonable inferences in favor of the nonmovant and must view the pleadings, affidavits, depositions, answers to interrogatories and admissions in a light most favorable to a trial on the merits. **See Carrillo v. Rostro**, 114 N.M. 607, 615, 845 P.2d 130, 138 (1992). "If there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied." **Las Cruces Country Club, Inc. v. City of Las Cruces**, 81 N.M. 387, 387, 467 P.2d 403, 403 (1970). "Summary judgment is a

[1] Garcia-Montoya also sued the director of the State Personnel Office, Jody Hooper, under Section 1983 for violating her constitutional rights to freedom of political association and free speech. The district court granted Hooper's motion for summary judgment on the basis of qualified immunity, and Garcia-Montoya does not appeal from that judgment.

drastic remedy to be used with great caution," **Pharmaseal Lab., Inc. v. Goffe**, 90 N.M. 753, 756, 568 P.2d 589, 592 (1977), and because summary judgment involves a question of law, we review the district court's ruling de novo, **Phoenix Indem. Ins. Co. v. Pulis**, 2000-NMSC-23, P6, 129 N.M. 395, 9 P.3d 639.

III. FEDERAL CLAIMS UNDER SECTION 1983

{8} Section 1983 provides a cause of action for money damages against a state official in his or her individual capacity for the deprivation of federal constitutional or statutory rights. **See Will v. Mich. Dep't of State Police**, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989) (holding that Section 1983 does not extend to actions against States or state officials in their official capacity); **see also Kennedy v. Dexter Consol. Sch.**, 2000-NMSC-25, P9, 129 N.M. 436, 10 P.3d 115. Under Section 1983, a state official's individual liability is limited by qualified immunity. **See Harlow v. Fitzgerald**, 457 U.S. 800, 813-19 & n.30, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Qualified immunity "shields [government officials performing discretionary functions] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." **Id.** at 818. Qualified immunity is necessary to protect public officers "from undue interference with their duties and from potentially disabling threats of liability." **Id.** at 806.

{9} The United States Supreme Court has established the proper procedure in assessing a claim of qualified immunity. "A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." **Wilson v. Layne**, 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999) (quotation marks and quoted authority omitted). Applying this analytical guideline, we separately address Garcia-Montoya's Section 1983 claims, determining first whether there is a genuine issue of material fact as to whether Montoya and Andermann violated Garcia-Montoya's actual constitutional rights and second whether those rights, if violated, were clearly established at the time. "Deciding the constitutional question before addressing the qualified immunity question . . . promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." **Id.** For the reasons discussed below, we conclude that, although there are genuine issues of material fact concerning the violation of Garcia-Montoya's constitutional rights, Defendants are entitled to qualified immunity.

A. Freedom of Political Association

{10} In **Elrod v. Burns**, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), the United States Supreme Court addressed the constitutionality of the practice of political patronage in the context of the First Amendment. A plurality of the Court explained that "political belief and association constitute the core of those activities protected by the First Amendment." **Elrod**, 427 U.S. at 356 (plurality opinion). "Patronage, therefore, to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment." **Elrod**, 427 U.S. at 357 (quotation marks and quoted authority omitted).

{11} Despite the interference with the freedom of association, however, the plurality opined that political patronage would be permissible "for appropriate reasons." **Elrod**, 427 U.S. at 360. Specifically, under the standard of an exacting scrutiny, the governmental official accused of engaging in political patronage must show an interest of vital importance and must demonstrate that the means chosen to advance the vitally important interest are the least restrictive of the freedom of political belief and association. **Elrod**, 427 U.S. at 362-63. In the context of the present

case, the vitally important end of political loyalty of employees may be achieved by patronage dismissals of policymaking positions but may not extend to nonpolicymaking employees. **Id.** at 367. "No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical." **Id.** at 367. The Court subsequently emphasized that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." **Branti v. Finkel**, 445 U.S. 507, 518, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980). Because there is a "presumptive prohibition on infringement" of the First Amendment freedoms of political belief and association, **Elrod**, 427 U.S. at 360, the burden of demonstrating that a position is subject to political patronage rests with the hiring authority, and "cases of doubt [are] resolved in favor" of an employee who is dismissed for political reasons. **Elrod**, 427 U.S. at 368.

{12} Garcia-Montoya contends that Montoya and Andermann transferred her due to her support of their political opponent and ultimately replaced her with a political ally. The Supreme Court has provided that "promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." **Rutan v. Republican Party**, 497 U.S. 62, 75, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990). Resolving all reasonable inferences in favor of the opponent of summary judgment, we believe Garcia-Montoya adequately raised a presumption of an impermissible infringement of her First Amendment rights, and the burden falls on Montoya and Andermann to demonstrate that the position of director of administrative services is subject to political patronage. **See Laidley v. McClain**, 914 F.2d 1386, 1392 (10th Cir. 1990) (stating that a plaintiff satisfies the burden under **Elrod** and **Branti** by raising "a genuine issue of material fact as to whether [the] exercise of protected First Amendment activity was a substantial or motivating factor in" the adverse employment action), **overruled on other grounds by Shalala v. Schaefer**, 509 U.S. 292, 302-03, 125 L. Ed. 2d 239, 113 S. Ct. 2625 (1993). Montoya and Andermann claim that the political loyalty exception to the prohibition against political patronage applies to Garcia-Montoya's former position at the STO.

{13} In evaluating whether a particular position is subject to employment action, such as a transfer, based on political patronage, we examine the inherent duties of the position. **See Sanders v. Montoya**, 1999-NMCA-79, P17, 127 N.M. 465, 982 P.2d 1064. Nonetheless, a plaintiff's actual duties, as well as the duties performed by the plaintiff's replacement, may be considered as evidence of the inherent duties of the position as it is conceived by the public official accused of engaging in impermissible political patronage. **E.g.**, **Feeney v. Shipley**, 164 F.3d 311, 320 (6th Cir. 1999) (noting that actual duties accurately reflected the inherent duties of the position); **Faughender v. City of North Olmsted**, 927 F.2d 909, 913 (6th Cir. 1991) (considering both the inherent duties of the position and the planned duties of the new holder of the position); **Dickeson v. Quarberg**, 844 F.2d 1435, 1442 (10th Cir. 1988) (focusing on the inherent duties of the position as well as the actual duties performed), **applied in Jantzen v. Hawkins**, 188 F.3d 1247, 1253 & n.1 (10th Cir. 1999).

{14} The inquiry under **Elrod** and **Branti** is necessarily fact specific. Even though the test of appropriateness for effective performance identified in **Branti** is somewhat vague and difficult to apply, courts have articulated a number of factors that are useful in determining whether a particular position is subject to political patronage: the extent to which duties are clearly defined and nondiscretionary as opposed to vague and broad, relative pay, the need for technical expertise in carrying out the duties of the position, the extent of power to control others, the authority to speak with the public, other

entities, or elected officials on behalf of policymakers, the relative influence on important programs, the preparation of budgets, and the ability to hire and fire other employees. **See Assaf v. Fields**, 178 F.3d 170, 176 (3d Cir.), **cert. denied**, 528 U.S. 951, 120 S. Ct. 374, 145 L. Ed. 2d 292 (1999); **Fazio v. City of San Francisco**, 125 F.3d 1328, 1334 n.5 (9th Cir. 1997); **see also Jantzen**, 188 F.3d at 1256 (discussing whether employees "were such important communicators or were privy to confidential information to such an extent that political loyalty would be an appropriate job requirement"). Courts have also restated **Branti** 's test as a determination of whether the position permits meaningful input into issues for which there is room for principled disagreement on the nature and scope of policy goals. **See, e.g.**, **Boyle v. County of Allegheny Pa.**, 139 F.3d 386, 396-97 (3d Cir. 1998). As explained below, we conclude, based on these factors and viewing the evidence in a light most favorable to Garcia-Montoya, that Defendants have failed to demonstrate that Garcia-Montoya's former position is subject to political patronage. However, we believe that Defendants are entitled to qualified immunity because a reasonable official in 1995 could have believed that the political loyalty exception applied to Garcia-Montoya's position.

1. The Political Loyalty Exception

{15} In her affidavit, Garcia-Montoya averred that she "never had any authority to establish any policy decisions concerning personnel, budget or budget allocations, for the State Treasurer's Office." During her deposition, she described her duties generally as overseeing "the budget area, personnel, telecommunications, [and] information systems." Garcia-Montoya indicated that she formulated a budget under the Treasurer's direction, and she explained that her work on the budget included analyzing the reasonableness of the Treasurer's proposals and making recommendations based on applicable rules and regulations. Garcia-Montoya accepted defense counsel's characterization of the work as "basically seeing that the office budget stayed on track." Garcia-Montoya's work in the areas of telecommunications and information systems essentially consisted of the purchasing of supplies.

{16} Regarding her responsibilities in the area of personnel, Garcia-Montoya handled the paperwork for personnel actions. Although Garcia-Montoya indicated that she questioned certain personnel decisions made by Montoya and Andermann based on her familiarity with personnel rules, she did not indicate whether advice on personnel matters formed one of the inherent duties of her position. She stated that she was not asked directly whether a termination was appropriate under the personnel rules, but she said, "That's the kind of thing I should have been involved in." Garcia-Montoya was involved in only one interview of applicants for a position at the STO under David King, and she was not involved in any interviews as director of administrative services under Montoya. On one occasion, Andermann requested that Garcia-Montoya participate in a panel interview of applicants for a position, but she refused due to her belief that the applicants had been pre-selected contrary to personnel rules. Finally, she advised Montoya concerning the addition of positions that she believed would benefit the office. Garcia-Montoya was classified as a financial manager I, a classification which applies to a group of positions and which is defined as assisting or directing agency fiscal and budget analysis activities.

{17} Montoya and Andermann did not provide a detailed list of inherent duties for the position of director of administrative services. According to Andermann, the duties "included advising the Treasurer on personnel issues and ensuring that the budget complies with all legal and procedural requirements." For the most part, Montoya and Andermann relied on Garcia-Montoya's description of her duties in claiming that her position is subject to political patronage.

{18} Garcia-Montoya's job title is not dispositive. **See, e.g.**, **Milazzo v. O'Connell**, 108 F.3d 129, 133 n.1 (7th Cir. 1997) (stating that "merely being a supervisor/administrator is not sufficient" to create an exception to the prohibition against political patronage dismissals). Further,

it is clear from Garcia-Montoya's description of her position that her duties in relation to the areas of telecommunications and information systems were merely ministerial in nature. The purchasing of supplies does not implicate partisan issues. We more closely scrutinize Garcia-Montoya's responsibilities in the areas of personnel and the budget, however, because these duties, if sufficiently broad and discretionary, can result in a need for political affiliation for effective performance. **See, e.g.**, **Peters v. Del. River Port Auth.**, 16 F.3d 1346, 1358 (3d Cir. 1994) ("Preparing budgets and promoting projects are duties which count in favor of finding that the exception to **Branti-Elrod** applies."); **Flynn v. City of Boston**, 140 F.3d 42, 45 (1st Cir. 1998) (mentioning the relevance of "important personnel functions").

{19} Some of the facts highlighted by Montoya and Andermann indicate a substantial role in the areas of personnel and the budget. **See Elrod**, 427 U.S. at 368 (plurality opinion) (stating that "consideration should also be given to whether the employee acts as an adviser"). These facts tend to support the view that political affiliation is an appropriate requirement for Garcia-Montoya's position. **See Feeney**, 164 F.3d at 321 (stating that the expenditure of significant tax revenues is "one of the most important policymaking decisions in government"); **Bicanic v. McDermott**, 867 F.2d 391, 394 (7th Cir. 1989) (stating that "public officials must be able to count on the support of those who prepare budgets, negotiate and sign contracts, and generally run the show at a substantial component of the government").

{20} However, other facts alleged by Garcia-Montoya support a contrary inference. Garcia-Montoya stated that she basically tried to keep the budget on track. As a result, it is unclear whether her use of the term "formulation" actually referred to the implementation of a budget that was formulated by the Treasurer. **See Jantzen**, 188 F.3d at 1255 n.3 (distinguishing policy implementation from policy formulation for purposes of a political loyalty inquiry). Additionally, according to Garcia-Montoya, she filled out the paperwork for personnel actions, did not participate in interviews, was not consulted about personnel decisions, and had no power to hire or fire other employees. This description is supported by Montoya's deposition testimony that Garcia-Montoya's job consisted of "paying the bills and filing personnel matters and adding up the hours for everybody to get them their paycheck." Further, Andermann described the position as involving "internal support." **Cf. Assaf**, 178 F.3d at 178 (distinguishing positions "relating to the government's activity vis-a-vis the public" from those involving "a largely endogenous function of the state government and as such serve[] an internal and practical purpose").

{21} We also believe it is significant that Garcia-Montoya received an excellent performance evaluation after Montoya had been in office for approximately six months, despite the fact that she questioned several of his personnel decisions during that period. The relevant inquiry under **Branti** and **Elrod** is the effective performance of the duties of the public office, and we believe that a favorable performance evaluation completed after a significant period of time under the new administration "severely undermines [the] summary judgment argument that political affiliation and loyalty are as a matter of law indisputably valid justifications for" employment action based on political patronage. **Jantzen**, 188 F.3d at 1253-54 (relying on actual performance based on "ample proof that [the employees] did effectively perform their jobs despite political differences"). Finally, we note that there is no evidence that Garcia-Montoya was authorized to speak or act on behalf of Defendants, a compelling, though not necessarily critical, factor in determining the applicability of the political loyalty exception. **See, e.g.**, **Sanders**, 1999-NMCA-79, P15, 127 N.M. at 469, 982 P.2d at 1068; **Gordon v. County of Rockland**, 110 F.3d 886, 890 (2d Cir. 1997) (stating that acting or speaking on behalf of a policymaker is of "primary importance" in that circuit); **Peters**, 16 F.3d at 1358 ("Party affiliation is unquestionably significant to the . . . duties of maintaining good public relations and acting as a liaison with public officials.").

{22} These facts could be interpreted as placing some of the duties of the position highlighted by Montoya and Andermann, such as acting as an advisor, in context. As a result, we believe these facts could support Garcia-Montoya's contention that the director of administrative services does not have meaningful input into the substantive policy decisions of the Treasurer, does not serve as an important communicator on behalf of the STO, and is not privy to confidential information to such an extent as to require political loyalty. **Cf. Assaf**, 178 F.3d at 176-79 (concluding that summary judgment in favor of the public official was not appropriate in relation to a position that "did not have significant input into a major governmental program" and "did not involve significant contact with the public" because the generic duties of participating in meetings and controlling others "could just as well apply to any public employee with a measure of supervisory responsibility"); **Milazzo**, 108 F.3d at 130-33 (concluding that a human resources administrator who implemented hiring policies, worked on budget and payroll issues, provided information on job applicants, and administered a summer program was not, as a matter of law, subject to political patronage dismissal under **Branti** because the position was not autonomous or discretionary, did not include the power to hire or fire, and did not include the formulation of personnel policy). **But cf. Feeney**, 164 F.3d at 321 (discussing an employee with "extensive discretion over how the public fisc would be used to achieve the aims of [the] department").

{23} Based on the standard of review applicable at summary judgment, we must draw every reasonable inference in favor of the nonmovant. Additionally, we must bear in mind the Supreme Court's admonition that cases involving doubt must be resolved in favor of the First Amendment protection against political patronage. Montoya and Andermann have failed to provide a detailed list of inherent duties, or the duties of Garcia-Montoya's replacement, that would illuminate the extent of Garcia-Montoya's involvement in personnel and budgetary matters. Thus, viewing the facts in a light most favorable to a trial on the merits, we believe that there is a genuine issue of material fact as to whether "party affiliation is an appropriate requirement for the effective performance of" Garcia-Montoya's former position. **Branti**, 445 U.S. at 518. Defendants have therefore failed to demonstrate a vitally important interest sufficient to justify infringement on Garcia-Montoya's freedom of political belief.

2. Qualified Immunity

{24} As articulated above, a public official is entitled to qualified immunity in the performance of a discretionary function if the constitutional or statutory right alleged to have been violated was not "clearly established" at the time of the official's conduct. **Anderson v. Creighton**, 483 U.S. 635, 638-39, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). The Supreme Court has explained that, in order to be "clearly established," it is not necessary that "the very action in question has previously been held unlawful." **Id.** at 640. In order to allow officials to "know that they will not be held personally liable as long as their actions are reasonable in light of current American law," **id.** at 646, the Court has defined a "clearly established" right as one that has "sufficiently clear [contours] that a reasonable official would understand that what he [or she] is doing violates that right." **Id.** at 640. "In the light of pre-existing law the unlawfulness [of the governmental official's action] must be apparent." **Id.**

{25} At the time that Montoya and Andermann allegedly transferred Garcia-Montoya based on political affiliation in 1995, it was clearly established under **Branti** that the First Amendment prohibits political patronage unless political affiliation is an appropriate requirement for the effective performance of the public office involved. Further, by 1995, numerous courts had the opportunity to interpret, clarify, and apply **Branti** in the context of a number of different public offices. **See Roldan-Plumey v. Cerezo-Suarez**, 115 F.3d 58, 66 (1st Cir. 1997) (stating that the law concerning political patronage "grew much clearer in the late 1980s and early 1990s"). As a result, examining the right involved in this case, we believe that the contours of the right are generally well-defined and that reasonable officials

in the majority of cases will be aware of a violation of the freedom of political belief.[2]

{26} Nonetheless, with respect to the position involved in this case, we believe that the contours of the right are not "sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." **Anderson**, 483 U.S. at 640; **see Roldan-Plumey**, 115 F.3d at 66 ("To be sure, the law may still be blurred around the edges."). In **Elrod**, the plurality referred to the importance of political affiliation with respect to advisors, and several courts have listed involvement in personnel and budgetary matters as an important factor in determining the applicability of the **Branti/Elrod** exception to political patronage. In this case, it is clear that Garcia-Montoya had some significant level of involvement in these areas. **But cf. Assaf**, 178 F.3d at 179 (concluding that summary judgment on the issue of qualified immunity was inappropriate "in light of [the employee's] lack of any significant contact with the public and the **undisputed fact** that [the employee's] level of responsibility did not touch on politically sensitive issues, which would raise the likelihood of serious political embarrassment" (emphasis added)). Although we believe that ambiguities in the scope of these responsibilities prevent a conclusion of law that political affiliation is an appropriate requirement for effective performance, our determination on this issue has been largely informed by cases decided after 1995 distinguishing between policy formulation and policy implementation and between internal functions of a governmental agency and the agency's relations with the public and other governmental entities. **See, e.g.**, **Assaf**, 178 F.3d at 176-79; **Milazzo**, 108 F.3d at 130-33. Thus, while we believe there is a genuine issue of material fact as to whether the advice required of Garcia-Montoya's position concerned matters of policy or, instead, related solely to the internal workings of the STO and whether Garcia-Montoya's position entails meaningful input into a major governmental program, we also believe that a reasonable official in Montoya's or Andermann's position in 1995 could have concluded from case law and from the facts that her position was subject to the political loyalty exception of **Branti** and **Elrod**. In essence, we believe that the facts on summary judgment, even when viewed in a light most favorable to Garcia-Montoya, reveal a position that is marginal under **Branti**. The unlawfulness in transferring Garcia-Montoya due to political affiliation, assuming it to be unlawful, would not have been apparent in 1995. Under these limited circumstances, we believe Defendants are entitled to qualified immunity. We therefore affirm the district court's grant of Defendants' motion for summary judgment on this claim.

B. Freedom of Speech

{27} Garcia-Montoya claims that Montoya and Andermann violated her First Amendment right to freedom of speech by transferring her based on the expression of her belief that several of Montoya's personnel actions were politically motivated. "It is well established that a government employer may not discharge an employee for reasons that infringe his or her free-speech interests." **Martinez v. City of Grants**, 1996-NMSC-61, P15, 122 N.M. 507, 927 P.2d 1045. In this context, we apply a four-part test derived from **Pickering v. Board of Education**, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968) and **Connick v. Myers**, 461 U.S. 138, 142-43, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983) to determine whether a public employer has unconstitutionally abridged an employee's freedom of speech: (1) whether the speech forming the basis of the employment action involves a matter of public concern; (2) if so, whether the interests of

[2] Montoya and Andermann claim that the right in this case is not clearly established because Garcia-Montoya "has not provided any case that says that her job duties as the acting director of administrative services are protected by the First Amendment from politically-based decisionmaking." Although **Branti** requires a case-by-case inquiry into the inherent duties of a particular position, a requirement of case law specifically addressing the position at issue to defeat a claim of qualified immunity would "effectively eviscerate" the First Amendment protection against political patronage. **Carrillo**, 114 N.M. at 622, 845 P.2d at 145 (quotation marks and quoted authority omitted) (addressing a similar argument in relation to the termination of an employee because of the employee's speech).

the employee in speaking on the matter outweigh the interests of the employer in maintaining and promoting efficiency in the performance of its responsibilities to the public; (3) if so, whether the employee is able to show that the speech was a substantial factor in the employment decision; and (4) if so, whether the employer is able to rebut the employee's evidence by showing that it would have instituted the employment action regardless of the protected speech. **See Martinez**, 1996-NMSC-61, P20, 122 N.M. at 514, 927 P.2d at 1052; **Barker v. City of Del City**, 215 F.3d 1134, 1138-39 (10th Cir. 2000). The former two factors are questions of law to be decided by the court, while the latter two are issues of fact for the jury. **Martinez**, 1996-NMSC-61, P20, 122 N.M. at 514, 927 P.2d at 1052. Applying the first two factors, we believe that Garcia-Montoya's speech involves a matter of public concern and that Defendants have not demonstrated that the balance in this case tips in favor of the employer to restrict the speech. However, as with Garcia-Montoya's political affiliation claim, we conclude that a reasonable official in 1995 could have believed that Garcia-Montoya could be transferred on the basis of her speech, and Defendants are therefore entitled to qualified immunity.

1. The *Pickering* Balancing Test

{28} In determining whether an employee's speech involves a matter of public concern, we evaluate "the content, form, and context" of the speech to determine whether it can "be fairly considered as relating to any matter of political, social, or other concern to the community." **Connick**, 461 U.S. at 146-48. In this case, we do not believe there is any serious doubt that Garcia-Montoya's speech involved a matter of public concern.

{29} Montoya and Andermann claim that Garcia-Montoya's speech did not involve a matter of public concern because her comments were made in private, because the speech involved internal personnel matters for which Garcia-Montoya was responsible in the STO, and because Garcia-Montoya indicated that she spoke out about the personnel decisions as an employee and not to express herself politically. Defendants claim these facts indicate that Garcia-Montoya "was not assisting the public in its analysis of the performance of the office."

{30} As Defendants point out, it is not determinative in this case that Garcia-Montoya privately communicated her concerns to Montoya and Andermann rather than making her concerns public. In **Givhan v. Western Line Consolidated School District**, 439 U.S. 410, 411-13, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979), a teacher met privately with the school principal on two occasions to express her belief that the school's employment policies and practices were racially discriminatory. The employer contended that the teacher's remarks were not protected by the First Amendment because they were made in private. The Supreme Court held that "neither the Amendment itself nor our decisions indicate that [the freedom of speech] is lost to the public employee who arranges to communicate privately with his [or her] employer rather than to spread his [or her] views before the public." **Givhan**, 439 U.S. at 415-16. Additionally, "the fact that the employee statements were made as a part of the employee's official functions [is] only one of the relevant factors in" the First Amendment analysis. **Koch v. City of Hutchinson**, 847 F.2d 1436, 1442 (10th Cir. 1988).

{31} In **Connick**, an assistant district attorney who was dissatisfied with her employer's plan to transfer her circulated a questionnaire to fellow employees asking their opinion about the "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." **Connick**, 461 U.S. at 141. The Supreme Court elaborated on the proper focus of an inquiry into whether speech involves matters of public concern.

> We view [most of] the questions . . . as mere extensions of [the employee's] dispute over her transfer to another section. . . . We do not believe these questions are of public import in evaluating the

> performance of the District Attorney as an elected official. . . . While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of [the] questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors.

Connick, 461 U.S. at 148.

{32} In this case, it is true that Garcia-Montoya's statements involved matters that could be characterized as part of her official duties relating to personnel. If her statements had only concerned routine matters of personnel, we believe, based on **Connick**, that this case would present a close question. For example, Garcia-Montoya objected to the firing of two employees based on her interpretation of personnel rules without expressing her belief that the terminations were politically motivated. These statements could be interpreted as merely indicating a routine disagreement with personnel action and are therefore similar to the majority of questions posed of coworkers in **Connick** in that, if made public, they "would convey no information at all other than the fact that a single employee is upset with the status quo." **Connick**, 461 U.S. at 148; **cf. Koch**, 847 F.2d at 1447 (concluding that a matter of public concern was not involved in a "written report [that] was simply one of many routine official reports which are processed through the City's local governmental agencies on a daily basis"). "While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." **Connick**, 461 U.S. at 149. Thus, if these were the only statements made by Garcia-Montoya, it would be necessary to examine more closely whether Garcia-Montoya's speech implicated the efficiency and effectiveness of the STO during Montoya's term of office. **See Connick**, 461 U.S. at 148 & n.8; **Powell v. Basham**, 921 F.2d 165, 167 (8th Cir. 1990) (stating that an employee's "criticism of [the employer's] promotion system and practices went beyond his own dissatisfaction and involved concerns expressed by other department employees" and concluding that speech which informs superiors of "the adverse impact the department's promotion practices could have on its operations" and on the efficiency of the office involves matters of public concern).

{33} However, we need not engage in such an analysis because Garcia-Montoya's statements to Montoya and Andermann went well beyond routine personnel matters. Garcia-Montoya expressed her belief to Andermann that he had fired a different employee for political reasons, told Montoya on more than one occasion that she disagreed with the political nature in which he filled various positions, and refused Andermann's request to interview individuals on the ground that she believed they were illegally pre-selected. In **Connick**, while the Court determined that most of the questions posed to the plaintiff's coworkers did not involve matters of public concern, the Court reached a different conclusion with respect to the question of whether the coworkers felt pressured to work on political campaigns for members of the office. **Connick**, 461 U.S. at 149. The Court determined that the political campaign question implicated "a coercion of belief in violation of fundamental constitutional rights." **Id.** "There is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service." **Id.** Like the political campaign question in **Connick**, Garcia-Montoya's speech constituted an expression of belief that Montoya improperly based his personnel decisions on political affiliation instead of meritorious performance. In effect, Garcia-Montoya was asserting a violation of the First Amendment rights of others and voicing an objection to what she believed was unconstitutional and illegal action by an elected official. Garcia-Montoya therefore sought "to bring to light actual or potential wrongdoing or breach of public trust." **Connick**, 461 U.S. at 148. This type of speech is analogous to the complaints about sexual harassment and discrimination in **Martinez** and about racial discrimination in **Givhan** because it involves "a matter

inherently of public concern," **Connick**, 461 U.S. at 148 n.8. **See Martinez**, 1996-NMSC-61, P27, 122 N.M. at 515, 927 P.2d at 1053 ("Through . . . legislation society has voiced its concern with and condemnation of sexual discrimination and favoritism in the workplace."); **Connick**, 461 U.S. at 146 ("Although the subject matter of [the plaintiff's] statements were not the issue before the Court [in **Givhan**], it is clear that her statements concerning the School District's allegedly racially discriminatory policies involved a matter of public concern. "). The Supreme Court clearly considers it "apparent" that this type of information "is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal." **Connick**, 461 U.S. at 149. As a result, we again find it unnecessary to "decide . . . the degree of deference that must be accorded to the employer when the terminated employee's speech addresses only matters of internal office policy." **Martinez**, 1996-NMSC-61, P31, 122 N.M. at 516, 927 P.2d at 1054. We conclude that Garcia-Montoya's speech involves matters of public concern.

{34} With respect to the second factor in the four-part test, courts must attempt "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." **Pickering**, 391 U.S. at 568. **See generally Waters v. Churchill**, 511 U.S. 661, 672-75, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994) (plurality opinion). There are a number of factors to consider in performing the **Pickering** balancing, including "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." **Rankin v. McPherson**, 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987). "The State bears a burden of justifying the discharge on legitimate grounds," **Rankin**, 483 U.S. at 388, and "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." **Connick**, 461 U.S. at 150. The focus is "on the effective functioning of the public employer's enterprise." **Rankin**, 483 U.S. at 388. Thus, Montoya and Andermann must "produce evidence of an actual disruption in public services," **Martinez**, 1996-NMSC-61, P29, 122 N.M. at 516, 927 P.2d at 1054, or evidence sufficient to support a reasonable belief that the speech would disrupt the department, undermine their authority, or destroy close working relationships in the STO, **see Connick**, 461 U.S. at 154. **See generally Connick**, 461 U.S. at 152 ("We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.").

{35} Because this case involves both the freedom of political belief and the freedom of speech, we note as an initial matter that at least one federal Circuit Court of Appeals has held that the determination that an individual serves in a position subject to political patronage dismissal under **Elrod** and **Branti** renders the **Pickering** balancing test inapplicable to a Section 1983 claim based on freedom of speech. **See Biggs v. Best, Best & Krieger**, 189 F.3d 989, 994-95 (9th Cir. 1999). We do not agree with this approach. The political patronage inquiry under **Elrod** and **Branti** can involve many of the same considerations that inform the **Pickering** balancing test. Both analyses take into account the need for loyalty and confidence from a public employee and the extent to which activity protected by the First Amendment affects the performance of a public office. However, the United States Supreme Court has indicated in discussing **Elrod** and **Branti** that the Court's

> cases call for a different, though related, inquiry where a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from [**Pickering**]. . . . The inquiry is whether the affiliation requirement is a reasonable

> one, so it is inevitable that some case-by-case adjudication will be required even where political affiliation is the test the government has imposed. A reasonableness analysis will also accommodate those many cases . . . where specific instances of the employee's speech or expression, which require balancing in the **Pickering** context, are intermixed with a political affiliation requirement. In those cases, the balancing **Pickering** mandates will be inevitable.

O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 719, 135 L. Ed. 2d 874, 116 S. Ct. 2353 (1996).

{36} We believe that the distinction between an **Elrod -Branti** analysis and a **Pickering** balancing lies in the focus of the potential interference with performance; whereas the **Elrod -Branti** analysis focuses generally on the potential detrimental impact of an opposing political affiliation, **Pickering** focuses more specifically on the content, form, place, and manner of the speech at issue and requires a balancing of the importance of the speech with the functioning of the public office. Presumably, even employees holding policymaking positions should be entitled to speak out freely on matters of fundamental social and political importance, such as unlawful discrimination in a public workplace, as long as the manner, time, and place in which the speech is made does not unduly disrupt the functioning of the governmental entity. **See Barker**, 215 F.3d at 1139-40 (reversing the grant of summary judgment in favor of the employer on a claim of infringement of free speech, despite the employee's status as a policymaker, because, under **Pickering**, "no actual evidence indicates that the City experienced any disruption, that any such disruption was reasonably predicted, or that the City itself had any particular interest in limiting [the] speech"). As a result, we conclude that in cases involving a claim by a public employee of adverse employment action based on both the freedom of political belief and the freedom of speech we must separately address the **Elrod -Branti** analysis and the **Pickering** balancing test. **Barker**, 215 F.3d at 1139 (stating that "the two different analyses remain distinct and separate" and citing other cases following this approach).

{37} In this case, Montoya and Andermann do not contend at this stage that Garcia-Montoya's statements disrupted the office or undermined their authority. Garcia-Montoya made the statements privately to Andermann and Montoya, and there is no indication that the statements affected other employees in the office. **Cf. Rankin**, 483 U.S. at 388-89 & n.13 ("[A] purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee."). Additionally, similar to our political affiliation analysis in this case, we believe that Montoya and Andermann have failed to demonstrate sufficient facts to support a close working relationship requiring personal loyalty and confidence, and in any event, they have failed to show that Garcia-Montoya's speech "would seriously undermine the effectiveness of the working relationship between them." **Pickering**, 391 U.S. at 570 n.3. Indeed, Garcia-Montoya alleged that Andermann agreed with her on one occasion that a particular personnel decision was politically motivated but lamented that he was carrying out Montoya's instructions. Garcia-Montoya also alleged that Montoya listened to her criticisms, accepted the information, and "took whatever course of action he deemed appropriate." There is some evidence in the record that Garcia-Montoya's speech affected her ability to perform the duties of her position. For example, Garcia-Montoya declined to participate in interviews of applicants she believed were pre-selected on the basis of political affiliation. However, based on the limited facts provided by Montoya and Andermann and the important interests implicated by Garcia-Montoya's speech, we are unable to conclude as a matter of law that Defendants have carried their burden of justifying the employment action on legitimate grounds. **Cf. Connick**, 461 U.S. at 152 ("We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.");

Martinez, 1996-NMSC-61, P31, 122 N.M. at 516, 927 P.2d at 1054 (noting that "speech touching upon matters of public concern critical of a supervisor or other members of an office will invariably cause some disruption and that the relevant inquiry in the **Pickering** balance is the degree of disruption in relation to the importance of the speech"). Viewing the facts on summary judgment in a light most favorable to the nonmovant, we conclude that the **Pickering** balance weighs in favor of Garcia-Montoya.

2. Qualified Immunity

{38} We believe the district court properly granted summary judgment in favor of Defendants on the ground of qualified immunity for reasons similar to our decision that Defendants are entitled to qualified immunity for the alleged violation of Garcia-Montoya's freedom of political belief. In this opinion, we have rejected the proposition that the determination that a position is subject to political patronage dismissals obviates the need to apply the **Pickering** balancing test. However, this interpretation of **Pickering** and **Elrod** and **Branti** was not clearly established in 1995. **McEvoy v. Spencer**, 124 F.3d 92, 105 (2d Cir. 1997). Thus, a reasonable official in Montoya's or Andermann's position could have concluded that "an employee's policymaking status automatically immunized an employer's adverse action even in a pure **Pickering** case." **Id.** Because we have determined that a reasonable official acting in 1995 could have believed that Garcia-Montoya's position was subject to adverse action based on political patronage, we further determine that a reasonable official acting in 1995 could have believed that adverse employment action against the holder of that position could constitutionally stem from either political affiliation or instances of speech involving matters of public concern. **Cf. id.** (concluding that officials "did not violate a clearly established right of [the employee] when, reasonably believing that he was a policymaker, they demoted him . . . because of speech activities"). As a result, we affirm the summary judgment in favor of Montoya and Andermann on this claim.

IV. SEX DISCRIMINATION UNDER THE HUMAN RIGHTS ACT

{39} Garcia-Montoya alleged that she was transferred on the basis of her sex in violation of Section 28-1-7(A) of the Human Rights Act. In analyzing claims of unlawful discrimination under the Act, we have found guidance in the federal courts' interpretation of unlawful discrimination under Title VII, 42 U.S.C. § 2000e-2 (1994). **See Smith v. FDC Corp.**, 109 N.M. 514, 517, 787 P.2d 433, 436 (1990) ("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."). In particular, we have applied the evidentiary methodology articulated by the United States Supreme Court in **McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 802-05, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Under this 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." **Gonzales v. N.M. Dep't of Health**, 2000-NMSC-29, P21, 129 N.M. 586, 11 P.3d 550. One method of establishing a prima facie case under **McDonnell Douglas** is for a plaintiff to show that he or she "is a member of [a] protected group, that he [or she] was qualified to continue in his [or her] position," that the employer removed him or her from the position, and "that his [or her] position was filled by someone not a member of the protected class." **Smith**, 109 N.M. at 518, 787 P.2d at 437 (noting that "[a] prima facie case may also be made out through other means"). If a plaintiff establishes a prima facie case, there is "a presumption that the employer unlawfully discriminated against the employee." **Tex. Dep't of Community Affairs v. Burdine**, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). However, the presumption "drops from the case" if the defendant satisfies the burden of producing evidence of a legitimate, nondiscriminatory reason for the employment action. **Id.** at 255 & n.10. "The ultimate burden of persuading

the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." **Id.** at 253.

{40} In this case, the STO produced evidence of a legitimate, nondiscriminatory reason for its action. Specifically, the STO claimed that it transferred Garcia-Montoya based on the Table of Organizational Listings (TOOL), a document describing the organizational structure of the agency. According to the STO, Garcia-Montoya's TOOL number placed her within the investment division of the agency rather than the administrative services division. As a result, the STO claimed that it was necessary to reassign Garcia-Montoya to the proper division. Additionally, the STO asserted that Garcia-Montoya was reassigned to the position of acting director of the local government investment pool in order to oversee a program that was expanding due to new legislative mandates. In response to these claims, Garcia-Montoya introduced evidence suggesting that the STO's proffered reason was false. She stated in an affidavit that her State employment classification was not inconsistent with her former position and that administrative services was merely a subunit of a different division in the STO during Montoya's term of office. Garcia-Montoya also claimed that Montoya made numerous personnel decisions from January 1995 through September 1995 without regard to the TOOL and, even more specifically, that her replacement did not have the correct TOOL for the director of administrative services position. Despite Garcia-Montoya's contention that the proffered reason was false, the STO argued to the district court that it was entitled to judgment as a matter of law based on **St. Mary's Honor Center v. Hicks**, 509 U.S. 502, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).[3]

{41} In **St. Mary's**, the United States Supreme Court elaborated on the burden-shifting methodology of **McDonnell Douglas**. The plaintiff in **St. Mary's** established a prima facie case under **McDonnell Douglas**, and the employer then introduced evidence "of two legitimate, nondiscriminatory reasons for their actions: the severity and the accumulation of rules violations committed by" the plaintiff. **St. Mary's**, 509 U.S. at 506-07. However, based on a showing by the plaintiff, the trial court found at the close of a bench trial that the employer's proffered reasons "were not the real reasons for [the plaintiff's] demotion and discharge" because other employees in equivalent positions were not disciplined for committing similar or even more severe rules violations. **Id.** at 508. Despite the trial court's rejection of the employer's proffered reason, the trial court found that the plaintiff "failed to carry his ultimate burden of proving that **his race** was the determining factor in [the] decision first to demote and then to dismiss him," and entered judgment in favor of the employer. **Id.** The Eighth Circuit Court of Appeals reversed and held that proof that an employer's proffered reason is false entitles the plaintiff in a discrimination case to judgment as a matter of law. **Id.**

{42} The Supreme Court reversed and determined that the Eighth Circuit's interpretation of the **McDonnell Douglas** test would effectively "substitute . . . the required finding that the employer's action was the product of unlawful discrimination [with] the much different (and much lesser) finding that the employer's explanation of its action was not believable." **St. Mary's**, 509 U.S. at 514-15. "The Court of Appeals' holding that rejection of the defendant's proffered reasons **compels** judgment for the plaintiff . . . ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'" **Id.** at 511.

[3] By focusing on **St. Mary's**, the STO appears to have accepted that Garcia-Montoya established her prima facie case under **McDonnell Douglas**. Indeed, Garcia-Montoya introduced evidence that, as a female, she is a member of a protected class, that she was transferred from her position, and that the position was filled by a male. Additionally, Garcia-Montoya alleged that the male who replaced her received greater compensation in the position than she did, and she raised a genuine issue of material fact as to whether she was qualified for the position of director of administrative services. Although the STO disputed several of Garcia-Montoya's allegations, Garcia-Montoya introduced sufficient evidence to create a question of fact for the jury with respect to her prima facie case. **See St. Mary's**, 509 U.S. at 509-10.

{43} The STO argues that Garcia-Montoya's claim fails as a matter of law because, once the STO satisfied its burden of production, she did not introduce any additional evidence of discrimination beyond the evidence discrediting the STO's proffered reason for the employment action. The STO's argument is likely based on the Supreme Court's statement that "a reason cannot be proved to be 'a pretext **for discrimination**' unless it is shown **both** that the reason was false, **and** that discrimination was the real reason." **St. Mary's**, 509 U.S. at 515. In fact, a number of federal Courts of Appeals interpreted **St. Mary's** in accordance with the STO's position. **See generally Reeves v. Sanderson Plumbing Prods., Inc.**, 530 U.S. 133, 120 S. Ct. 2097, 2104-05, 147 L. Ed. 2d 105 (2000) (noting a conflict among the federal courts and listing cases). In granting the STO's motion for summary judgment, it appears that the district court accepted this construction of **St. Mary's** and determined that Garcia-Montoya's failure to introduce additional evidence of discrimination was fatal to her claim.

{44} Since the district court's ruling, the United States Supreme Court has specifically addressed the issue raised in the STO's motion for summary judgment and has resolved the conflicting applications of **St. Mary's** by the federal Courts of Appeals. In **Reeves**, the Supreme Court clarified "the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." 120 S. Ct. at 2108. The Court reviewed its decision in **St. Mary's** and determined that, under the holding of that case, "it is **permissible** for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." **Reeves**, 120 S. Ct. at 2108.

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it might be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Reeves, 120 S. Ct. at 2108-09 (citations, quotation marks, and quoted authority omitted).

{45} The Court's opinion in **Reeves** clarifies that, to avoid an adverse judgment as a matter of law, the plaintiff ordinarily need not introduce additional evidence of discrimination beyond evidence establishing a prima facie case and evidence of the falsity of the proffered reason for the employment action. The Court therefore rejected the interpretation of **St. Mary's** offered by the STO in this case. We believe the Supreme Court's interpretation of Title VII in **Reeves** is in accord with the intent of the Legislature with respect to Section 28-1-7(A). **See Smith**, 109 N.M. at 518, 787 P.2d at 437 ("The purpose of the [**McDonnell Douglas**] test is to allow discriminated-against plaintiffs, in the **absence** of direct proof of discrimination, to demonstrate an employer's discriminatory motives.").

{46} It appears that the district court, not having the benefit of the Supreme Court's opinion in **Reeves**, based its ruling on the STO's mistaken interpretation of the law. As a result, we believe it is prudent to vacate the grant of summary judgment in favor of the STO. We do not conclude, however, that the district court's ruling was necessarily erroneous. The Supreme Court also explained in **Reeves** that its interpretation of **St. Mary's** does not mean that evidence establishing a prima facie case and the falsity of the employer's proffered reason

> will **always** be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff

> has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves, 120 S. Ct. at 2109.

{47} In this case, we believe that Garcia-Montoya created more than just a "weak issue of fact" concerning the falsity of the STO's proffered reason. Garcia-Montoya's evidence, if believed by a factfinder, suggests that the STO may have been "dissembling to cover up" its true motive in transferring her. However, the record also suggests that, if the STO's proffered reason was false, the STO may have been concealing a motive other than discrimination on the basis of sex. Almost all of the material submitted by Garcia-Montoya on summary judgment focuses on political affiliation as the motivation for her transfer. Indeed, Garcia-Montoya averred that Montoya told her directly that he transferred her because he did not "trust any of you," which she interpreted as a comment about political affiliation. Additionally, Garcia-Montoya alleged that her replacement was a political ally of Montoya. Based on this evidence, it may be that the STO asserted a false justification for Garcia-Montoya's transfer in order to obscure a decision based on political affiliation.[4]

[4] Even if Defendant Montoya intended to transfer Garcia-Montoya based on political affiliation, his subjective intent would not change our conclusions with respect to Garcia-Montoya's Section 1983 claims. **See Crawford-El v. Britton**, 523 U.S. 574, 588, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998) (stating that "evidence concerning the defendant's subjective intent is simply irrelevant to [the] defense" of qualified immunity); **see also Sanders**, 1999-NMCA-79, P24, 127 N.M. at 471, 982 P.2d at 1070.

{48} Nonetheless, rather than this Court addressing the issue in the first instance, we believe it is more appropriate in this case to allow the district court to consider initially whether the record "conclusively reveals some other, nondiscriminatory reason for the employer's decision" and, if necessary, to permit the parties to develop more fully the facts relevant to the legal analysis established in **Reeves**. "On appeal, when the trial court's grant of summary judgment is grounded upon an error of law, the case may be remanded so that the issues may be determined under the correct principles of law." **Rummel v. Lexington Ins. Co.**, 1997-NMSC-41, P16, 123 N.M. 752, 945 P.2d 970. Accordingly, we vacate the grant of summary judgment in favor of the STO and remand for reconsideration of the motion based on **Reeves**.

V. IMMUNITY UNDER THE TORT CLAIMS ACT

{49} With respect to Garcia-Montoya's claims of intentional infliction of emotional distress and defamation, the district court granted Defendants' motion for summary judgment on the basis that Garcia-Montoya's claims were barred by the Tort Claims Act. Under the Tort Claims Act, "[a] governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived" by the provisions of the Act. Section 41-4-4(A). Garcia-Montoya claims that summary judgment was improper because Montoya and Andermann were not acting within the scope of duty. Garcia-Montoya contends simply that intentional torts are outside the scope of duties for the positions of State Treasurer and Deputy State Treasurer. Certainly, Garcia-Montoya's position oversimplifies the issue. Public employees are not directed to commit torts as a part of their official duties; thus, Garcia-Montoya's formulation of the scope of duty test would completely nullify the Legislature's intent to provide governmental immunity against tort claims. **See** NMSA 1978, § 41-4-2(A) (1976) ("The area within which the government has the power to act for the public good is almost without limit,

and therefore government should not have the duty to do everything that might be done.").

{50} The Legislature has specifically defined "scope of duties" to "mean[] 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." NMSA 1978, § 41-4-3(G) (1995). Garcia-Montoya fails to specify any actions by Montoya and Andermann which they were not requested, required, or authorized to perform. As a result, we do not believe that Garcia-Montoya has raised a genuine issue of material fact that Montoya's and Andermann's actions were outside the scope of their duties, and we affirm the summary judgment in Defendants' favor.

VI. CONCLUSION

{51} With respect to Garcia-Montoya's Section 1983 claims, we conclude that Montoya and Andermann are entitled to qualified immunity and therefore affirm the grant of summary judgment in their favor. We also affirm the grant of summary judgment in favor of Montoya and Andermann on Garcia-Montoya's tort claims based on immunity under the Tort Claims Act. We remand for reconsideration of the STO's motion for summary judgment on Garcia-Montoya's claim of unlawful discrimination based on a clarification of the legal standard applicable to a plaintiff's burden of proving discrimination through indirect evidence.

{52} IT IS SO ORDERED.

PATRICIO M. SERNA,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER, Justice (concurring in part and dissenting in part)

DISSENT

MINZNER,
Justice (concurring in part and dissenting in part).

{53} I concur in part and dissent in part. I concur in the First Amendment analysis, sex discrimination analysis, and Torts Claims Act analysis. I dissent in part, however, because I believe the district court erred by granting summary judgment in favor of Montoya and Andermann on the issue of qualified immunity with respect to Garcia-Montoya's First Amendment claims.[5]

{54} We review grants of summary judgment de novo, asking whether there is a genuine issue of material fact and whether the movant was entitled to judgment as a matter of law. **See Phoenix Indemnity Ins. Co. v. Pulis**, 2000-NMSC-23, P6, 129 N.M. 395, 9 P.3d 639. We use a two-part test to determine whether qualified immunity shields officials from individual liability under Section 1983. First, we ask "whether the official's alleged conduct violated a constitutional . . . right." **Kennedy v. Dexter Consolidated Schools**, 2000-NMSC-25, P10, 129 N.M. 436, 10 P.3d 115; **see Anderson v. Creighton**, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). I agree that there is a genuine issue of material fact as to whether Montoya and Andermann violated Garcia-Montoya's First Amendment rights. **See** Majority Opinion, P23.

{55} The next inquiry is whether the constitutional "right was clearly established at the time of the alleged conduct." **Kennedy**, 2000-NMSC-25, P10, 10 P.3d 115, 119; **see Anderson**, 483 U.S. at 640. "To be clearly established, 'the contours of the right must be sufficiently clear that a reasonable official understands that what he [or she] is doing violates that right.'" **Kennedy**,

[5] The majority holds that Montoya and Andermann enjoy qualified immunity with respect to all of Garcia-Montoya's First Amendment claims. The holding that the individual defendants are qualifiedly immune with respect to the free speech claim depends on its holding regarding the freedom of association claim. Because I do not join the holding on the freedom of association claim, I also dissent with respect to the free speech claim.

2000-NMSC-25, P10 (quoting **Anderson**, 483 U.S. at 639). Whether the official conduct violates a clearly established right "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." **Anderson**, 483 U.S. at 639; **see Kennedy**, 2000-NMSC-25, P14, 10 P.3d 115, 120.

{56} The level of generality used to define the right reflects a balancing of competing interests. The purposes of Section 1983, fully compensating victims of constitutional torts and protecting individual liberties by deterring future constitutional violations, are balanced against "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." **Anderson**, 483 U.S. at 638. Accordingly, the right must not be defined so generally that it converts qualified immunity into "virtually unqualified liability." **Anderson**, 483 U.S. at 639. However, relying on **Anderson**, this Court recently emphasized that we should not "require too specific a correlation between the misconduct and the established law." **Kennedy**, 2000-NMSC-25, P13. The requirement that the right be clearly established does not mean that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." **Anderson**, 483 U.S. at 640. Instead, the test is whether, under the law that existed at the time, a reasonable official would have understood that his or her conduct was unconstitutional. **See id.**

{57} In order to determine whether Montoya and Andermann are immune from liability with respect to Garcia-Montoya's First Amendment claims, it is necessary to determine, at the proper level of generality, what Garcia-Montoya's clearly established First Amendment rights were in 1995. As a general rule, the First Amendment prohibits political patronage in the context of public employment; it is generally unconstitutional to dismiss, demote, or transfer a public employee based on political affiliation or belief. **See Rutan v. Republican Party of Illinois**, 497 U.S. 62, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990); **Branti v. Finkel**, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980); **Elrod v. Burns**, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) (plurality opinion). However, there is an exception to the general rule; it is constitutionally permissible to use political affiliation or belief as the basis for dismissing, demoting, or transferring public employees who occupy "policymaking positions." **Elrod**, 427 U.S. at 367. This exception only applies if "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." **Branti**, 445 U.S. at 518. Only "certain **high-level** employees" are subject to the exception. **Rutan**, 497 U.S. at 74 (emphasis added). The exception is "narrow," **Burns v. County of Cambria**, 971 F.2d 1015, 1023 (3d Cir. 1992); **see Elrod**, 427 U.S. at 368, and "doubt should be resolved in favor of the public employee," **Dickeson v. Quarberg**, 844 F.2d 1435, 1442 (10th Cir. 1988).

{58} Cases decided prior to September of 1995 would not lead a reasonable official to conclude that Garcia-Montoya's position fell within the policymaking, or **Elrod-Branti**, exception. A public official who occupies a position that requires communication with the public, the press, and policymaking government bodies may be subject to the **Elrod-Branti** exception. **See Branti**, 445 U.S. at 518. Garcia-Montoya did not serve any such role. **See** Majority Opinion, P22. In addition, the exception applies to "employees with responsibilities that are not well defined or are of broad scope." **Elrod**, 427 U.S. at 368. Garcia-Montoya's responsibilities were well defined and not of such broad scope that particular political affiliations or beliefs were necessary for her to perform her duties effectively.

{59} The Court concludes that it was not clear in September of 1995 whether the **Elrod-Branti** exception applied to Garcia-Montoya because of her involvement in personnel and budgetary matters. **See** Majority Opinion, P26. According to the majority, the right to freedom of political belief and association was not defined clearly enough in this context. The Court states "that the contours of the right are generally well-defined and that reasonable officials in the majority of cases will be aware of a violation of the freedom

of political belief," Majority Opinion, P25, but concludes that "with respect to the position involved in this case, we believe that the contours of the right are not sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right," Majority Opinion, P26 (internal quotation marks and quoted authority omitted).

{60} I think the Court requires too much specificity in this case. Qualified immunity does not shield individual defendants whenever the right has not been defined precisely under the exact facts in question. **See Anderson**, 483 U.S. at 640. There may not have been any case decided prior to September of 1995 that was perfectly, or even very closely, analogous to this case, but the law was clear enough to allow a reasonable official to conclude that transferring Garcia-Montoya based on her political affiliation would violate her constitutional rights. The result of defining the right too specifically, as the majority has, is overly-expansive immunity for constitutional tortfeasors. **Anderson** and **Kennedy** warn against this, instructing us to define the right at an intermediate level of generality in order to strike a balance between the competing interests. **See Anderson**, 483 U.S. at 640; **Kennedy**, 2000-NMSC-25, P13.

{61} Garcia-Montoya's right not to be transferred based on her political associations was clearly established in September of 1995 despite her involvement in personnel and budgetary matters. Although involvement in budgetary matters may weigh in favor of finding that an employee is subject to the **Elrod-Branti** exception, Garcia-Montoya's involvement in implementing the budget of the State Treasurer's Office was not extensive enough to subject her to that exception. Cases decided before September of 1995 holding that a position falls within the exception based on involvement in budgetary matters seem to require a higher level of involvement and to rely on additional facts in reaching the conclusion that political affiliation or loyalty "is an appropriate requirement for the effective performance of the public office involved." **Branti**, 445 U.S. at 518. I think the precedent in September of 1995 would have led a reasonable official to believe that an employee's limited involvement in implementing a budget is insufficient constitutional justification for a transfer based on political affiliation or belief.

{62} For example, in **Peters v. Delaware River Port Authority of Pennsylvania and New Jersey**, 16 F.3d 1346 (3rd Cir. 1994), the court listed involvement in the **preparation** of a budget as one of several factors supporting its holding that the Secretary of the Delaware River Port Authority (DRPA) was subject to the **Elrod-Branti** exception. Garcia-Montoya had a more limited role in budgetary matters than the Secretary in **Peters**; political affiliation is more relevant to budget preparation than to budget implementation. Moreover, unlike Garcia-Montoya, the Secretary in **Peters** had many other duties that made party affiliation an appropriate requirement for the position he held. The Secretary was "assigned sensitive and important responsibilities on a variety of important policy matters." **Id.** at 1359. His duties included "participating in high-level DRPA matters" with other government agencies and bodies, "participating in all policy-forming discussions during executive sessions of the DRPA," "acting as liaison and maintaining good public relations with other agencies," "interpreting and executing DRPA policy," and recommending significant changes in the DRPA's organizational structure. **Peters**, 16 F.3d at 1358-59. It seems to me that **Peters** would not lead a reasonable official to believe that merely being involved in budgetary matters brings an official within the **Elrod-Branti** exception. On the contrary, based on **Peters**, a reasonable official would conclude that a high level of involvement in budgetary matters or additional policymaking duties are required for the **Elrod-Branti** exception to apply. This case presents neither scenario.

{63} Similarly, based on the cases decided before September of 1995, a reasonable official would not believe that Garcia-Montoya's involvement in personnel matters subjected her to the **Elrod-Branti** exception. The majority recognizes that political affiliation was not relevant to many of Garcia-Montoya's duties but

concludes that it might be relevant to her limited involvement in personnel matters. **See** Majority Opinion, PP18-22, 26. However, it was clear in 1995 that involvement in personnel matters does not subject an otherwise protected position to political patronage. **See Dickeson**, 844 F.2d at 1443-44 (holding that an official who supervised other employees was not subject to the **Elrod-Branti** exception). In 1995 there was nothing in the case law suggesting that a public employee's political beliefs or affiliations would adversely affect that employee's ability to perform limited duties in the area of personnel such as handling paperwork and advising a superior about adding new positions that might benefit the office.

{64} I think it would have been clear to a reasonable official in 1995 that particular political beliefs and associations were not necessary for the effective performance of Garcia-Montoya's duties as Deputy Director of Administrative Services for the State Treasurer's Office. It was clear in 1995 that Garcia-Montoya did not have broad power with respect to partisan political issues and was therefore "not in a position to thwart the goals of the in-party." **Elrod**, 427 U.S. at 367.

{65} For these reasons, I disagree with the Court's conclusion that Montoya and Andermann enjoy qualified immunity with respect to Garcia-Montoya's First Amendment claims and would reverse on this point and remand for trial. Accordingly, I respectfully concur in part and dissent in part.

PAMELA B. MINZNER
(In Part), Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2001-NMSC-032

Filing Date: October 16, 2001

Docket No. 26,419

NEW MEXICO DEPARTMENT OF HEALTH,

Petitioner-Respondent,

v.

FRED COMPTON,

Respondent-Petitioner.

Original Proceeding on Certiorari
Fred T. Hensley, District Judge

Protection and Advocacy System, Inc.
Michael C. Parks
V. Colleen Miller
Sandra L. Gomez
Albuquerque, NM

for Petitioner.

New Mexico Department of Health
Beth W. Schaefer, Assistant Attorney General
Santa Fe, NM

for Respondent.

OPINION

SERNA, Chief Justice.

{1} Respondent-Petitioner Fred Compton seeks review of an opinion of the Court of Appeals, arguing that the New Mexico Department of Health (the Department) failed to provide him with a civil commitment hearing within the time limits mandated by NMSA 1978, § 43-1-11(A) (1989) and NMSA 1978, § 43-1-15(B) (1993, prior to 1999 amendment). Compton requests that this Court hold that the statutory time periods should be strictly construed and enforced and that the petitions against him should have been dismissed. We affirm.

I. FACTS AND BACKGROUND

{2} Compton was involuntarily admitted to Las Vegas Medical Center (LVMC) on February 18, 1999, for an emergency mental health evaluation. Police initially encountered Compton as a result of threats he made to family members. The admitting psychiatrist at LVMC noted Compton's long history of mental illness, indicated that Compton suffered from a mental disorder as defined in NMSA 1978, § 43-1-3(O) (1993), and assigned a diagnosis of schizophrenia, paranoid type. On February 22, the Department filed two petitions in district court, one for a thirty-day commitment for mental health evaluation and treatment pursuant to Section 43-1-11(A), and another for appointment of a treatment guardian pursuant to Section 43-1-15(B). Following a determination of indigency, the district court, on February 23, appointed counsel to represent Compton in responding to the Department's two petitions.

{3} A hearing was scheduled for February 25. On that date, the district court postponed the hearing for one week due to illness of the assigned judge. The court held a hearing on March 4, fourteen calendar days after Compton's admission to LVMC and eight court days after the filing of the treatment guardian petition. During the hearing, Compton's attorney objected, for the first time, to the failure to hold the hearing within the statutorily mandated time and moved to dismiss both petitions. Compton argued that Section 43-1-11(A) and Section 43-1-15(B) mandated that the hearing be held on February 25.

{4} The district court rejected Compton's argument and found by clear and convincing

evidence that Compton presented a likelihood of serious harm to himself or to others as a result of a mental disorder. The court entered orders committing Compton to LVMC for evaluation and treatment not to exceed thirty days and appointing a treatment guardian for him. Compton was discharged on March 25, 1999, less than thirty days after the initially scheduled hearing.

{5} Compton appealed to the Court of Appeals on the sole ground that the postponement of the February 25 hearing violated his statutory rights and required dismissal of the petitions. Compton did not appeal the district court's determination that he presented a likelihood of serious harm to himself or to others as a result of a mental disorder. The Court of Appeals issued an opinion affirming the district court's orders. **N.M. Dep't of Health v. Compton**, 2000-NMCA-78, 129 N.M. 474, 10 P.3d 153. The Court determined that the statutory time limits asserted by Compton were mandatory, but not jurisdictional, and that Compton suffered no prejudice from the seven-day postponement. **Id.** 2000-NMCA-78 at PP19-20. This Court then granted Compton's petition for writ of certiorari to the Court of Appeals.

II. DISCUSSION

A. Due Process

{6} Compton does not directly assert a violation of his constitutional right to due process under the Fourteenth Amendment to the United States Constitution. However, he repeatedly refers to the "'massive curtailment of liberty'" implicated by involuntary civil commitment, relying on the United States Supreme Court's opinions in **Vitek v. Jones**, 445 U.S. 480, 491, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980) and **Addington v. Texas**, 441 U.S. 418, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979), and argues that the hearing rights at issue in this case have "constitutional underpinnings." Additionally, we note that the special concurrence in the Court of Appeals suggested that "liberty interests are implicated" by this case and expressed concern over the lack of protection "for these violated liberty interests." **Compton**, 2000-NMCA-78, P23, 129 N.M. 474 (Armijo, J., specially concurring). As a result, we believe it is necessary to address as a threshold matter the constitutional implications of the procedures used in this case in order to place the statutory time limitations in Section 43-1-11(A) and Section 43-1-15(B) in their proper context.

{7} The United States Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." **Addington**, 441 U.S. at 425. This Court has also recognized that confinement "impinges [on] the right to liberty." **State v. Rotherham**, 1996-NMSC-48, 122 N.M. 246, 255, 923 P.2d 1131, 1140 (1996). However, "the state has a legitimate interest under its **parens patriae** powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." **Addington**, 441 U.S. 418 at 426, 60 L. Ed. 2d 323, 99 S. Ct. 1804; **accord Rotherham**, 122 N.M. at 255, 923 P.2d at 1140 (stating that "as long as [individuals] remain dangerous, the State has an interest in committing them to protect [them] and the public"). "In a civil commitment state power is not exercised in a punitive sense." **Addington**, 441 U.S. at 428. Thus, in order to weigh Compton's liberty interest against the Department's **parens patriae** and police powers, while being "mindful that the function of legal process is to minimize the risk of erroneous decisions," **Addington**, 441 U.S. at 425, we apply the balancing test established by the Supreme Court in **Mathews v. Eldridge**, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), in order to assess the amount of process required by the Fourteenth Amendment. **See Rotherham**, 122 N.M. at 262, 923 P.2d at 1147 (applying **Mathews** to the question of whether criminal commitment requires proof beyond a reasonable doubt). Under **Mathews**, we rely on the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous depravation of such

> interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

{8} In New Mexico, involuntary civil commitment is governed by the Mental Health and Developmental Disabilities Code, NMSA 1978, §§ 43-1-1 to -25 (1977, as amended through 1998, prior to 1999 amendments). There are three stages of involuntary civil commitment contemplated by the Code, each with different procedural requirements. As a preliminary measure, the Legislature has created a method for involuntary commitment for emergency mental health evaluation and care. NMSA 1978, § 43-1-10 (1989). Under this provision, a peace officer may transport an individual to an evaluation facility if one of four factors are met: (1) the person is subject to lawful arrest; (2) there are reasonable grounds to believe the person has just attempted suicide; (3) there are reasonable grounds to believe the person presents a likelihood of serious harm to himself or herself or to others as a result of a mental disorder; or (4) a licensed physician or psychologist certifies that the person presents a likelihood of serious harm to himself or herself or to others as a result of a mental disorder. Section 43-1-10(A). A court order is not required to transport the person to an evaluation and treatment facility. Section 43-1-10(B). Upon arriving at the facility, the admitting physician or psychologist must conduct an evaluation to determine "whether reasonable grounds exist to detain the proposed client for evaluation and treatment," the outcome of which will be determinative of whether the person is detained for emergency evaluation and treatment. Section 43-1-10(E). If the individual is detained, he or she

> shall be informed orally and in writing by the evaluation facility of the purpose and possible consequences of the proceedings, the allegations in the petition, [the] right to a hearing within seven days, [the] right to counsel and [the] right to communicate with an attorney and an independent mental health professional of [the person's] own choosing, and shall have the right to receive necessary and appropriate treatment.

Section 43-1-10(F).

{9} The next stage of commitment contemplated by the Code is a thirty-day period of evaluation and treatment. Section 43-1-11. The Legislature has established a number of procedural protections to accompany this level of commitment. Unlike an emergency transport and detention, a thirty-day commitment must be authorized by a court order and only after a hearing at which "the client shall be represented by counsel and shall have the right to present evidence on [the client's] behalf, including testimony by an independent mental health professional of [the client's] own choosing, to cross-examine witnesses and to be present at the hearing." Section 43-1-11(B). The client "has the right to a hearing within seven days of admission unless waived after consultation with counsel." Section 43-1-11(A).

> Upon completion of the hearing, the court may order a commitment for evaluation and treatment not to exceed thirty days if the court finds by clear and convincing evidence that:
>
> (1) as a result of a mental disorder, the client presents a likelihood of serious harm to himself or others;
>
> (2) the client needs and is likely to benefit from the proposed treatment; and
>
> (3) the proposed commitment is consistent with the treatment needs of the client and with the least drastic means principle.

Section 43-1-11(C). The court must find "more likely than not that in the near future the person

will attempt to commit suicide or will cause serious bodily harm to himself [or herself] by violent or other self-destructive means," NMSA 1978, § 43-1-3(M) (1993), or "more likely than not that in the near future the person will inflict serious, unjustified bodily harm on another person or commit a criminal sexual offense, as evidenced by behavior causing, attempting or threatening such harm, which behavior gives rise to a reasonable fear of such harm from the person," Section 43-1-3(N).

{10} The final stage of commitment under the Code is an extended commitment of six months. NMSA 1978, § 43-1-12 (1978). In addition to the procedural protections available under Section 43-1-11, the client has the right to request a six-person jury at the hearing. Section 43-1-12(B). Moreover, regardless of the stage of the involuntary civil commitment proceeding, individuals may have alternative remedies outside of the Code. **See** § 43-1-12(E) ("Nothingin this section shall limit the right of a client to petition the court for a writ of habeas corpus."). Thus, the Legislature has enacted a scheme under which individuals are entitled to progressively greater procedural protection in response to increased periods of involuntary civil commitment.

{11} This case involves the intermediate stage of commitment for a thirty-day evaluation and presents two related due process questions: (1) whether the seven-day time limitation within Section 43-1-11(A) is constitutionally required; and (2) whether the delay of fourteen calendar days between Compton's admission and his hearing violated Compton's constitutional rights.[1] We believe both of these questions are answered by the **Mathews** balancing test.[2]

{12} Under the first factor of the **Mathews** test, we agree with Compton that he has a significant liberty interest in being free from involuntary commitment. Indeed, "we are acutely aware of the severe curtailment of liberty which involuntary commitment in a mental institution can entail." **Project Release v. Prevost**, 722 F.2d 960, 971 (2d Cir. 1983). The precise issue presented in this case, however, is not whether Compton is entitled to a particular procedure, a judicial hearing, as part of an involuntary civil commitment procedure, but whether that procedure must be provided within fourteen calendar days of his initial admission to LVMC. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" **Mathews**, 424 U.S. at 333 (quoting **Armstrong v. Manzo**, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965)). Thus, we must assess the risk of error from the absence of a judicial hearing in light of Compton's liberty interest in not being

[1] We do not believe it is necessary to address the procedure for the appointment of a treatment guardian pursuant to Section 43-1-15(B) under a **Mathews** test. The appointment of a treatment guardian does not infringe on the liberty interest of being free from involuntary commitment. Although it does infringe on the right to refuse medical treatment, the hearing to be held within three days of the filing of a petition to appoint a treatment guardian, unlike the hearing on the petition for a thirty-day commitment, is a pre-deprivation hearing, meaning that the individual retains the right to refuse treatment until the hearing. **See** § 43-1-15(A) ("If the client is capable of understanding the proposed nature of treatment and its consequences and is capable of informed consent, [the client's] consent shall be obtained before the treatment is performed."). **But see** § 43-1-15(F) (providing for emergency administration of psychotropic medication "necessary to protect the client from serious harm"). As a result, a delay in conducting the hearing does not cause the individual to suffer a deprivation of liberty.

[2] The dissent suggests that, by virtue of the clarity of the relevant statutes and the fact that the Legislature has defined the process that is due, "the Legislature has made unnecessary an inquiry into the length of time a person can be involuntarily confined in a mental institution without a hearing." However, it is the Due Process Clause of the Fourteenth Amendment, not the Legislature, that "determines the amount of process appropriate to protect a liberty or property interest as a matter of constitutional right." **State v. Woodruff**, 1997-NMSC-61, P27, 124 N.M. 388, 951 P.2d 605. To the extent that the dissent's position could be interpreted "to cede to [the legislative branch] so much of [the judiciary's] control over fundamental constitutional protections," **State v. Nunez**, 2000-NMSC-13, P47, 129 N.M. 63, 2 P.3d 264, we emphasize that it is the judiciary's responsibility to ensure that statutes enacted by the Legislature satisfy the minimum procedural requirements of the Fourteenth Amendment, both on their face and as applied. **See Marbury v. Madison**, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is."); **Nunez**, 2000-NMSC-13, P48, 129 N.M. 63 ("It is the role of the judiciary, and not the legislature, to interpret the constitution.").

involuntarily confined for a period of fourteen days. **See Addington**, 441 U.S. at 425 (assessing "the extent of the individual's interest in not being involuntarily confined **indefinitely** " (emphasis added)). We weigh this interest against the compelling governmental interest of exercising its **parens patriae** power to protect individuals from themselves and its police power to protect society from dangerous individuals. **See Rotherham**, 122 N.M. at 262, 923 P.2d at 1147 (discussing the "compelling interest" of the State). Assessing the risk of error, we note that, in order to justify emergency detention under Section 43-1-10, at least two individuals must determine whether reasonable grounds exist to believe that the person is a danger to himself or herself or to others, with one of these individuals most likely being a peace officer and the other being a neutral decision-maker who is highly trained in evaluating the psychological condition of the person. **Cf. Parham v. J.R.**, 442 U.S. 584, 613, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979) ("In general, we are satisfied that an independent medical decisionmaking process, which includes the thorough psychiatric investigation described earlier, followed by additional periodic review of a child's condition, will protect children who should not be admitted; we do not believe the risks of error in that process would be significantly reduced by a more formal, judicial-type hearing."). We also note that individuals who are involuntarily committed under the Code on an emergency basis have the right to counsel and the right to consult with the attorney and an independent mental health professional. With access to these resources, we are confident that any risk of erroneous deprivation of liberty prior to a judicial hearing can be eliminated through alternative means of relief. **See** Rule 5-802 NMRA 2001 (establishing procedures for filing a writ of habeas corpus). Under these circumstances, we do not believe that the risk of an erroneous deprivation of the liberty interest in not being involuntarily committed by mistake is sufficiently great to require a hearing within fourteen days of admission.

{13} The Court of Appeals reached a similar conclusion in **Garcia v. Las Vegas Medical Center**, 112 N.M. 441, 445-47, 816 P.2d 510, 514-16, holding that an involuntary civil commitment for a period of twenty days without a judicial hearing did not violate the Due Process Clause of the Fourteenth Amendment. The Court of Appeals noted that the United States Supreme Court has upheld a Connecticut statute which allowed for a commitment of fifteen days based on a physician's certificate of dangerousness due to mental illness, with an additional thirty days' confinement permitted without the requirement of a court order. **Id.** at 447, 816 P.2d at 516 (relying on **Briggs v. Arafeh**, 411 U.S. 911, 36 L. Ed. 2d 304, 93 S. Ct. 1556 (1973), **aff'g mem. Logan v. Arafeh**, 346 F. Supp. 1265 (D. Conn. 1972)). The Court of Appeals also noted that the Supreme Court of Colorado upheld an involuntary civil commitment statute which contained no mandatory probable-cause hearing but allowed for a hearing within ten days of a request by the patient or the patient's attorney. **Id.** (relying on **Curnow v. Yarbrough**, 676 P.2d 1177 (Colo. 1984) (en banc)). In addition, other courts have upheld similar statutes in response to due process challenges. **See, e.g.**, **Project Release**, 722 F.2d at 974-75 (upholding two New York statutes that permitted sixty-day and fifteen-day commitments without a judicial hearing unless requested by the individual due to other procedural protections, such as the right to counsel, afforded under the statutes). These cases recognize the emergency nature of an involuntary civil commitment and that "the threat of harm to the [individual] or others is of such a nature that confinement must take place immediately. When the choice is between a loss of life or health and a loss of liberty for a brief period of time, the preferable alternative is apparent." **Coll v. Hyland**, 411 F. Supp. 905, 910-11 (D.N.J. 1976) (per curiam) (holding that, in a general involuntary commitment situation, a preliminary commitment hearing is not constitutionally required because New Jersey law requires that a final hearing be held within twenty days). **See generally** Marybeth Walsh, Note, **Due Process Requirements for Emergency Civil Commitments: Safeguarding Patients' Liberty Without Jeopardizing Health and Safety**, 40 B.C. L. Rev. 673, 677-81 (1999). "It is obvious that the hospital authorities

must be allowed some time to conduct adequate testing and observation of the patient so that a diagnosis can be made. Consideration also must be given to the necessities of court administration and the opportunity for counsel to prepare for an effective hearing." **Coll**, 411 F. Supp. at 911.

{14} We conclude that the seven-day hearing requirement in Section 43-1-11 is constitutional on its face and that the procedures employed in the present case adequately protected Compton's constitutional right to due process and did not render the statute unconstitutional as applied. We therefore disagree with the assessment that this case involves "violated liberty interests," and we limit the remainder of this opinion to a discussion of statutory requirements and statutory remedies.

B. Statutory Time Mandates

{15} Compton contends that the time requirements in Section 43-1-11(A) and Section 43-1-15(B) are mandatory and that the appropriate remedy for a violation of the time requirements is dismissal of the petition. We first separately address the time requirements in each statute and then subsequently address the issue of remedies.

{16} Compton argues that Section 43-1-11(A) establishes a mandatory requirement for a hearing within seven days of admission. He asserts that the hearing in the present case exceeded this time limitation by seven days. We begin by correcting Compton's time calculation.

{17} "In computing a period of time prescribed or allowed by a statute or rule, . . . if the period is less than eleven days, a Saturday, Sunday or legal holiday is excluded from the computation." NMSA 1978, § 12-2A-7(E) (1997). Application of this statute yields the following results: Compton's right to a hearing under Section 43-1-11 accrued seven days, excluding weekends, from February 18, his date of admission, which would have been March 1. The district court conducted the hearing on March 4. Thus, under Section 43-1-11, the hearing was three days late, not seven days late. We consider whether a three-day postponement is permissible under Section 43-1-11(A).

{18} "In construing a particular statute, a reviewing court's central concern is to determine and give effect to the intent of the Legislature." **State ex rel. Klineline v. Blackhurst**, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). "The plain language of the statute [is] the primary indicator of legislative intent." **Whitely v. N.M. State Pers. Bd.**, 115 N.M. 308, 311, 850 P.2d 1011, 1014 (1993). Looking to the plain language of the statute, Section 43-1-11(A) provides that Compton had "the right to a hearing within seven days of admission unless waived after consultation with counsel." The Court of Appeals has previously interpreted this language to be silent on the issue of postponement of the hearing; the waiver language "furnishes a means by which an individual may waive [the] right to challenge [the] detention. By waiver [the individual] transforms an involuntary commitment into a voluntary one." **State v. Bunnell (In re Bunnell)**, 100 N.M. 242, 244, 668 P.2d 1119, 1121. We agree with this assessment of the statute. The Legislature has directed that a decision to forgo a hearing to contest a petition for a thirty-day commitment can only be made by an express knowing and voluntary waiver, but Section 43-1-11(A) is silent on the question of whether the district court may postpone the hearing beyond the seven-day requirement. Confronted with legislative silence on this issue, we must determine whether the Legislature intended to allow for postponement of the hearing by looking to the provisions of the Code as a whole and by assessing the purposes of the seven-day time limitation.[3] **See Sunwest Bank**

[3] We reject Compton's argument that the time requirements in Section 43-1-11(A) are jurisdictional. We agree with the Court of Appeals that "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." **Compton**, 2000-NMCA-78, P15, 129 N.M. 474. We also agree with the Court of Appeals that the waiver provision of Section 43-1-11(A) indicates that the Legislature did not intend to establish a jurisdictional requirement. **See id.** P 16; **see also Mitchell-Carr v. McLendon**, 1999-NMSC-25, P25, 127 N.M. 282, 980 P.2d 65 (discussing a time requirement in the Human Rights Act and

v. Nelson, 1998-NMSC-12, P14, 125 N.M. 170, 958 P.2d 740 (stating that it is necessary to resort "to other statutory construction aids in order to discern the intent of the Legislature" in the face of legislative silence on an issue); **Roberts v. Southwest Cmty. Health Servs.**, 114 N.M. 248, 251, 837 P.2d 442, 445 (1992) ("Statutes should be construed so as to facilitate their operation and the achievement of the goals as specified by the legislature.").

{19} The Legislature's decision to provide a right to a hearing within seven days of admission reflects a careful balance between the individual's liberty interests and the interest of the individual and society in proper care and treatment. The goal in establishing a seven-day time frame is, on one hand, to ensure that individuals are not erroneously committed against their will and, on the other hand, to ensure that there is a sufficient period of time after the initial commitment and prior to a hearing for the proper diagnosis and emergency treatment necessary to conduct a meaningful and effective judicial review. The time

> after initial commitment before judicial proceedings must be begun is not simply for the purpose of delay. It has a positive aspect as well. There is a compensating advantage to the committed person because in many cases during this period the medical staff at the hospital can adequately alleviate his [or her] mental illness or by use of non-emergency diagnostic procedures determine that he [or she] is not a "danger to himself [or herself] or others." In such cases, the stigma of court record is avoided and the length of confinement is shortened.

Logan, 346 F. Supp. at 1269.

{20} In response to these concerns, the Legislature has provided that, "if the division, physician or evaluation facility decides to seek commitment of the client for evaluation and treatment, a petition shall be filed with the court within five days of admission requesting the commitment." Section 43-1-11(A). This five-day period is, in the Legislature's judgment, a proper amount of time "to evaluate a patient appropriately and to make a determination of the need for continued involuntary hospitalization." Walsh, **supra**, at 690. "It must be remembered that commitment has not been undertaken for the sake of penal detention. The patient is committed for treatment and care, and some knowledge of his [or her] mental condition can be gained by visual observation and diagnostic tests. This takes time." **Logan**, 346 F. Supp. at 1269 (footnote omitted). If the Legislature had required that the filing of the petition and the hearing take place immediately upon admission, many clients might be needlessly detained beyond the initial seven-day evaluation period. **See** Walsh, **supra**, at 684 (discussing commentators' view that, because "many acute psychiatric episodes subside within one to four days, . . . many patients whose conditions would have improved sufficiently for discharge in a few days would be retained unnecessarily for long commitment periods"). An immediate hearing "may also harm the patient's clinical interest because it transforms the doctor-patient relationship from a therapeutic to an adversarial one." **Id.** In addition, in order to adequately protect the individual's right to counsel, there must be an adequate amount of time for counsel to review the case and prepare for the commitment hearing. **Coll**, 411 F. Supp. at 911. Any time limitation placed on the hearing requirement must also take into account the administrative burdens of a judicial hearing, including scheduling, availability of judicial staff, and the impact on treatment resources.[4] **See Parham**, 442 U.S. at 605-06 ("One

stating that "we cannot say that the Legislature intended the requirements of this section to be jurisdictional"); **Redman v. Bd. of Regents**, 102 N.M. 234, 239, 693 P.2d 1266, 1271 (discussing a time requirement for a de novo hearing by the State Board of Education following a teacher's dismissal and concluding that "the legislature did not intend a jurisdictional requirement in the sense that the right to a timely hearing could not be waived").

[4] Although Compton correctly argues that there is no requirement that the hearing be held at LVMC, the decision to do so stems from the notion that "holding the hearings at the hospital[] is less disruptive for patients and makes the process seem less criminal in nature. . . . It also reduces the amount of time that the commitment process takes away from physicians' clinical duties." Walsh, **supra**, at 695.

factor that must be considered is the utilization of the time of psychiatrists, psychologists, and other behavioral specialists in preparing for and participating in hearings rather than performing the task for which their special training has fitted them. Behavioral experts in courtrooms and hearings are of little help to patients."); **Coll**, 411 F. Supp. at 911.

{21} As can be seen, the Legislature's decision to establish a seven-day hearing requirement implicates a number of different factors. Given the Legislature's awareness of the complex relationship between these various factors and of the alternative remedy of filing a writ of habeas corpus, we do not believe that the Legislature intended to establish a rigid seven-day requirement in Section 43-1-11(A). Just as the constitutional right to due process necessarily requires flexibility, **see Morrissey v. Brewer**, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."), we believe the Legislature intended to provide enough flexibility in the procedural time requirement of Section 43-1-11(B) to respond to the particular demands of individual cases. For example, because the Legislature provided five days after admission to file a petition, it is conceivable that a full judicial hearing would be required to be held within two days of the filing of the petition. **See** § 43-1-11(B). Under these circumstances, it is highly foreseeable that a postponement might be necessary for either the parties or the court. **See** Walsh, **supra**, at 690-91 (discussing the conclusions of an ad hoc committee formed to evaluate Massachusetts' emergency commitment procedure and stating "all of the representatives of the judiciary on the Ad Hoc Committee stated that a minimum of five business days between the filing of the petition and the hearing was necessary for the courts to process the petition, prepare the case file and schedule a judge and other staff to travel to the petitioning hospital to hold a hearing"). In fact, the Court of Appeals has specifically faced a situation in which it was necessary to postpone the hearing required under Section 43-1-11(A). In **Bunnell**, an individual who was involuntarily committed pursuant to Section 43-1-10 argued that his Section 43-1-11 hearing should have been postponed in order to allow his counsel adequate time to prepare. 100 N.M. at 244, 668 P.2d at 1121. The Court of Appeals noted that the potentially short period of time between the filing of a petition and a judicial hearing might result in "little time to prepare" for appointed counsel. **Id.** at 244-45, 668 P.2d at 1121-22. The Court "balanced the need for a prompt hearing with the importance of a meaningful hearing before imposition of a thirty-day detention" and held that the district court "must grant a short continuance when counsel establishes that he [or she] has not had sufficient time to prepare his [or her] client's case." **Id.** at 245, 668 P.2d at 1122.[5] We believe the need for flexibility articulated in **Bunnell** demonstrates that the Legislature did not intend to establish a rigid time requirement and that a postponement is contemplated by Section 43-1-11(A).[6] For the

[5] We note that the Court of Appeals also stated in dicta in **Bunnell** that any postponement requires "an immediate preliminary hearing to determine whether the State can present sufficient evidence to justify holding the individual beyond the seven-day emergency period allowed under § 43-1-10." **Bunnell**, 100 N.M. at 245, 668 P.2d at 1122. However, given the procedural protections in Section 43-1-10, including a physician's or psychologist's determination that reasonable grounds exist to believe that the patient is a danger to himself or herself or to others, and the availability of alternative remedies, we do not believe that the Legislature intended to require a probable cause hearing as a precondition to postponement. We further note that the Court of Appeals stated that, "under current procedures, we do not find it inconceivable that the trial court could appoint counsel immediately before the hearing begins." **Bunnell**, 100 N.M. at 245, 668 P.2d at 1122. Under Section 43-1-10(F), the right to counsel, and the right to consult with counsel, attaches upon admission, and the Department and the district court should endeavor to ensure that counsel be appointed at the earliest opportunity. **See** NMSA 1978, § 43-1-4(A) (1978) ("All clients . . . shall be entitled to obtain advice of counsel **at any time** regarding their status under the code." (emphasis added)). **See generally** Walsh, **supra**, at 690 (discussing a committee's conclusion "that immediate appointment of counsel was the single most effective method of protecting a patient's rights"). We do not believe that the statute contemplates the appointment of counsel as late as the beginning of a Section 43-1-11 hearing.

[6] We respectfully believe that the dissent misreads **Bunnell**. While the Court in that case did hold that a continuance is appropriate, even mandatory, when the seven-day requirement would prevent a meaningful hearing, the Court did not

reasons discussed above, we conclude that the seven-day hearing requirement in Section 43-1-11(A) is subject to postponement for good cause.

{22} Our interpretation of Section 43-1-11(A) accords with the Court of Appeals' interpretation of a different statutory time requirement for an administrative hearing. In **Redman**, the Court of Appeals addressed a statute that provided that a de novo hearing on a teacher's dismissal "shall be held" by the State Board of Education within sixty days of receipt of a notice of appeal. 102 N.M. at 238, 693 P.2d at 1270 (internal quotation marks and quoted authority omitted). The Court determined that the sixty-day requirement was mandatory; however, this mandatory requirement did not prevent postponement. **Id.** at 239, 693 P.2d at 1271. "On showing of good cause, or with a written waiver, the State Board may extend the time." **Id.** at 240, 693 P.2d at 1272.[7]

{23} Our conclusion that the Legislature intended to permit postponements of a Section 43-1-11(A) hearing for good cause is also supported by the somewhat analogous requirement in Rule 5-604 NMRA 2001 for the commencement of trial in criminal cases. Even though this rule protects the important interest of the prompt adjudication and resolution of criminal cases, **State v. Wilson**, 1998-NMCA-84, P10, 125 N.M. 390, 962 P.2d 636, district courts may extend the six-month commencement requirement "for good cause shown." Rule 5-604(C). As reflected by the power to order postponement in Rule 5-604(C), "trial courts possess the inherent power to manage their dockets," **State v. Coffin**, 1999-NMSC-38, P65, 128 N.M. 192, 991 P.2d 477, and must have the ability to respond to exigencies that arise in individual cases. We do not believe that the Legislature, by establishing the seven-day hearing requirement in Section 43-1-11(A), intended to prevent the exercise of this power in response to good cause for postponement.

{24} Considering the number of factors at stake in establishing a seven-day hearing requirement and the number of variables that might necessitate a delay in particular cases, we believe that the Legislature intended to allow postponement of the seven-day hearing requirement in Section 43-1-11(A). We therefore hold that Section 43-1-11(A) imposes a mandatory requirement that a hearing be held within seven days of admission unless good cause exists to postpone the hearing. A determination of good cause should take into account any objection by the client, as well as the client's substantial interest in not being mistakenly confined against his or her will. Further, district courts must consider the Legislature's intent to require a prompt hearing on a thirty-day commitment petition in determining whether good cause exists for postponement. Any postponement should be narrowly prescribed and should be allowed only for so long as necessity demands, again taking into account the legislative intent for a prompt judicial hearing.

{25} In this case, the district court scheduled a timely hearing but postponed the hearing for three days beyond the seven-day requirement in Section 43-1-11(A) due to illness of the presiding

rule that a continuance was appropriate only under those circumstances. Indeed, the Court was not faced with the question of whether postponement could occur for other reasons, so **Bunnell** does not stand for the proposition that Section 43-1-11(A) precludes postponement "by the State," as suggested by the dissent, or by the court, as occurred in this case. **See Fernandez v. Farmers Ins. Co.**, 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) ("The general rule is that cases are not authority for propositions not considered." (quotation marks and quoted authority omitted)). Nor did the Court in **Bunnell** rely on the waiver language of Section 43-1-11(A) to permit a postponement. The Court determined that the waiver language in the statute concerned only a waiver of the hearing, not a waiver of the time requirement. **Bunnell**, 100 N.M. at 244, 668 P.2d at 1121. Thus, the Court determined that Section 43-1-11(A) implicitly allows postponement when it serves the underlying goals of the statute.

[7] The dissent's suggestion that if the Legislature intended to allow postponement for good cause it could have explicitly so provided would have been equally applicable to the statute at issue in **Redman**. It is worth noting that the Legislature could also have easily provided in Section 43-1-11(A) that postponements are impermissible. As with the statute in **Redman**, Section 43-1-11(A) does not expressly allow or disallow postponement, and "legislative 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). Our resort to "the objective the legislature has sought to accomplish," **id.**, in the face of legislative silence hardly can be said to amount to "judicial surgery."

judge. Compton did not object or make any demand for a hearing or for his release until the scheduled hearing on March 4. Under these circumstances, we believe that good cause existed for a postponement and that the postponement was sufficiently minimal so as not to infringe unduly on Compton's statutory right to a prompt hearing. **Cf. State v. Aaron**, 102 N.M. 187, 191-92, 692 P.2d 1336, 1340-41 (discussing the requirement of good cause for a continuance and referring to **People v. Watson**, 650 P.2d 1340, 1343 (Colo. Ct. App. 1982), in which "good cause was shown when the trial judge became ill"). In addition, as recognized by the Court of Appeals, the postponement did not affect the length of Compton's involuntary commitment because the district court based the thirty-day commitment period on the date of the originally scheduled hearing. **Compton**, 2000-NMCA-78, P20, 129 N.M. 474. We conclude that the district court did not err in postponing the Section 43-1-11 hearing.

{26} We now turn to the time requirement in Section 43-1-15(B). We begin by noting that the hearing contemplated by Section 43-1-15(B) serves a different purpose and protects different interests than a commitment hearing under Section 43-1-11. Section 43-1-15(A) governs the administration of "psychotropic medication, psychosurgery, convulsive therapy, experimental treatment or behavior modification program involving aversive stimuli or substantial deprivations." This statute provides that "if the client is capable of understanding the proposed nature of treatment and its consequences and is capable of informed consent, his [or her] consent shall be obtained before the treatment is performed." Section 43-1-15(A). This statute is intended to protect a client's right to refuse treatment. However, if the physician or mental health professional "believes that the client is incapable of informed consent, he [or she] may petition the court for the appointment of a treatment guardian to make a substitute decision for the client." Section 43-1-15(B). This provision is intended to protect clients' "right to receive necessary and appropriate treatment," Section 43-1-10(F), when they are unable to do so themselves. In order to protect a client's right to refuse treatment, however, there must be a hearing at which the client has the right to be present and the right to representation of counsel, and the court must "find that the client is not capable of making his [or her] own treatment decisions" before it is permitted to appoint a treatment guardian. Section 43-1-15(B). The "hearing on the petition shall be held within three court days." **Id.** Under Section 43-1-15(B), a hearing for appointment of the treatment guardian should have been held in this case three court days after the filing of the petition on February 22, which would have been February 25, the date of the original hearing. Thus, the hearing for appointment of the treatment guardian was five days late.

{27} Unlike Section 43-1-11, Section 43-1-15(B) does not implicate a client's liberty interest in being free from involuntary commitment. A hearing under Section 43-1-15(B) protects a client's right to refuse treatment and the right to necessary and appropriate treatment. The client retains the right to refuse treatment unless a court makes the appropriate finding following a hearing. Thus, for purposes of the right to refuse treatment, Section 43-1-15(B) provides for a predetermination hearing. As a result, we believe that the purpose of requiring a hearing within three days is to ensure that clients receive appropriate and necessary treatment at the earliest opportunity. **See** NMSA 1978, § 43-1-7 (1977) ("Each resident client receiving mental health services shall have the right to prompt treatment. . . ."). The short period of time between the filing of the petition and the hearing indicates the Legislature's view of the immediacy and importance of ensuring proper treatment. We assess whether the three-day requirement may be postponed for good cause in light of this purpose.

{28} As the Court of Appeals noted, the language in Section 43-1-15(B), with the use of "shall," is clear and unambiguous and creates a mandatory hearing deadline. **Compton**, 2000-NMCA-78, P11, 129 N.M. 474. However, we note that the filing of the petition itself is not mandatory even if the physician or mental

health professional believes that the client is incapable of informed consent. **See** § 43-1-15(B) (providing that the physician or mental health professional "**may** petition the court for the appointment of a treatment guardian" (emphasis added)); **see also** NMSA 1978, § 12-2A-4(B) (1997) ("'May' confers a power, authority, privilege or right."). In addition, Section 43-1-11(D) provides that a court which makes the appropriate findings for a thirty-day commitment "shall hear further evidence as to whether the client is capable of informed consent" for purposes of determining whether to appoint a treatment guardian, regardless of the filing of a petition pursuant to Section 43-1-15(B). Finally, Section 43-1-15(F) provides a mechanism for the emergency administration of psychotropic medication if it is "necessary to protect the client from serious harm" while a petition for appointment of a treatment guardian is pending. As a result, at least in the context of an emergency involuntary commitment under Section 43-1-10 and a thirty-day commitment petition under Section 43-1-11, we believe that a narrowly prescribed postponement of the three-day hearing requirement under Section 43-1-15(B) for good cause will not substantially interfere with the client's "right to prompt treatment," Section 43-1-7. While we caution the district court to make every effort to comply with the statutory time mandate in order to protect the client's right to treatment, we conclude that the court did not err in postponing the hearing for good cause.

C. Remedy

{29} Compton argues that the proper remedy for a violation of the statutory time limits would be the immediate dismissal of the petition. We disagree.

{30} The Legislature has expressly provided a remedy for a violation of the procedural protections contained in the Mental Health and Developmental Disabilities Code. "Any client who believes that his [or her] rights, as established by this code or by the constitution of the United States or of New Mexico, have been violated shall have a right to petition the court for redress. . . . The court shall grant relief as is appropriate, subject to the provisions of the Tort Claims Act." NMSA 1978, § 43-1-23 (1978). This statute distinguishes a violation of the time requirements in the Code from the violation of analogous time requirements in other statutes or rules. For example, Rule 5-604(F) expressly provides that upon a failure to comply with the time requirements for commencement of trial "the information or indictment filed against such person shall be dismissed with prejudice." Similarly, in addressing a statutory time requirement that "does not prescribe a result for failure to comply, " **Redman**, 102 N.M. at 238, 693 P.2d at 1270, the Court of Appeals has held that "the failure to commence and complete the hearing within sixty days is reversible error, unless the requirement is waived or unless the delay occurred for good cause." **Id.** at 239, 693 P.2d at 1271. In the absence of a statutory remedy, then, "the proper analysis for dismissal is whether the delay prejudiced [the individual.]" **Compton**, 2000-NMCA-78, P12, 129 N.M. 474; **accord State v. Budau**, 86 N.M. 21, 22-23, 518 P.2d 1225, 1226-27 (discussing the requirement of arraignment within fifteen days of the filing of the information or indictment). Given the Legislature's express provision of a remedy in Section 43-1-23, these approaches to analogous time requirements are inapposite. Based on the plain language of Section 43-1-23, we do not believe that the Legislature contemplated dismissal as a proper remedy for a violation of the procedural requirements of the Code.

{31} We also believe that the remedy of dismissal for a violation of the procedural requirements at issue in this case would be inconsistent with the purposes of the Code. First, as mentioned above, Section 43-1-15(B) does not implicate the liberty interest of not being improperly committed involuntarily; instead, it implicates the client's right to informed consent and the client's right to necessary and appropriate treatment. Because Section 43-1-15(B) contemplates a pre-determination hearing, the failure to hold the hearing within three court days affects only the right to necessary and appropriate treatment.

Thus, not only is the remedy of dismissal not contemplated by Section 43-1-15(B), but it would be entirely antagonistic to the purposes of this statute to order dismissal because such a remedy would prevent individuals from receiving necessary and appropriate treatment. Instead, in order to protect the client's right to necessary and appropriate treatment, and to protect the client from self-inflicted harm, there is a statutory remedy for a violation of Section 43-1-15(B). "If a licensed physician believes that the administration of psychotropic medication is necessary to protect the client from serious harm which would occur while the provisions of Subsection B of this section are being satisfied, he [or she] may administer the medication on an emergency basis." Section 43-1-15(F).

{32} Second, with respect to a violation of the time requirements in Section 43-1-11(A),

> it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

Addington, 441 U.S. at 429 (citations omitted). In the present case, for example, although Compton "disputes the notion that he was better off being involuntarily detained and subjected to involuntary mental health institutionalization," he does not dispute the district court's finding by clear and convincing evidence that he presented a danger to himself or others as a result of mental illness necessitating a thirty day commitment. The Court of Appeals noted that " the district court asked [Compton's] attorney to explain what remedy [Compton] had if grounds for commitment existed, and [Compton's] counsel replied, 'that he doesn't receive the treatment which he, in accordance with the doctor's testimony, requires.'" **Compton**, 2000-NMCA-78, P3, 129 N.M. 474. This remedy would clearly frustrate Section 43-1-11's purpose of ensuring that individuals who pose a danger to themselves or others as a result of mental illness receive proper care and treatment. Although in a different case a violation of Section 43-1-11(A) might prejudice an individual's right to be free from improper involuntary commitment due to an erroneous finding under Section 43-1-10, we believe that the alternative remedy of filing a petition for writ of habeas corpus provides an adequate safeguard. **See Logan**, 346 F. Supp. at 1269. In light of the urgent need for treatment in these cases, the potentially harmful consequences to either the individual or to others for an improper release, the express provision of a statutory remedy, and the availability of the alternative remedy of habeas corpus, we do not believe that the Legislature intended dismissal of the petition as a proper remedy for a violation of the time requirements in Section 43-1-11 or Section 43-1-15.[8]

III. CONCLUSION

{33} We conclude that the district court did not err in postponing the Section 43-1-11 hearing for three days due to good cause and the Section 43-1-15(B) hearing for five court days for good cause. We also conclude that dismissal of a petition is not a proper remedy for a violation of the procedural requirements of the Code. We therefore affirm.

{34} IT IS SO ORDERED.

PATRICIO M. SERNA,
Chief Justice

[8] The dissent suggests that the "only" proper relief in this case is dismissal. We do not rule out the possibility that the "relief" and "redress" to which the Legislature referred in Section 43-1-23 might include dismissal of a petition or release from custody under appropriate circumstances as determined by the district court. However, if the Legislature had intended to require a single remedy that applies uniformly in all cases in which there is a violation of rights, or even a violation of a particular right, it would not have vested the district court with discretion to select "appropriate" relief, and if the Legislature had intended for the relief to be automatic or immediate, it would not have explicitly required that the client petition the court for redress.

WE CONCUR:

JOSEPH F. BACA,
Justice

PETRA JIMENEZ MAES,
Justice

GENE E. FRANCHINI, Justice
(dissenting)

PAMELA B. MINZNER, Justice
(dissenting)

DISSENT

MINZNER, Justice. (dissenting)

{35} I respectfully dissent. I agree that the issues in this case are not moot, but I believe the statutory provisions at issue represent the clear judgment of the Legislature that Petitioner was entitled to release when he was not provided a hearing within seven days. NMSA 1978, §§ 43-1-10(F), -11(A) (1989). Thus, I believe that the relevant statutory provisions compel us to reverse the Court of Appeals and remand this case to the district court with directions to dismiss the district court's order.

{36} Petitioner has been released from the Las Vegas Medical Center, and we need not restore to him through the mandate of this court the liberty he sought from the district court. Indeed, we cannot restore to him the liberty of which he was deprived. Nevertheless, he represents a class of citizens for whose interests in liberty the Legislature has made specific provision. For other members of that class, the issues raised in this appeal remain undecided. There is the distinct possibility that those issues may recur but evade review. For these reasons, for these citizens, we ought to resolve the issues raised in this case. The Court of Appeals was right to address the issues raised, rather than to dismiss the appeal as moot. **See State v. Bunnell (In re Bunnell)**, 100 N.M. 242, 244, 668 P.2d 1119, 1121.

{37} Sections 43-1-10(F) and 43-1-11(A) are straightforward. The first provision, concerning emergency mental health evaluation and care, states that "upon arrival at an evaluation facility, the proposed client shall be informed orally and in writing by the evaluation facility of . . . his right to a hearing within seven days. . . ." The second provision, concerning the commitment of adults for a thirty-day period, begins "every adult client involuntarily admitted to an evaluation facility pursuant to Section 43-1-10 NMSA 1978 has the right to a hearing within seven days of admission unless waived after consultation with counsel."

{38} The Court of Appeals attempted to construe these provisions, with reference to our cases, as either jurisdictional requirements or mandatory preconditions. The Court of Appeals concluded that the statutes quoted above "do not affect the essential power of the district court to adjudicate the issue before it." **N.M. Dep't of Health v. Compton**, 2000-NMCA-78, P15, 129 N.M. 474, 10 P.3d 153. I respectfully submit that the Court of Appeals addressed the wrong issue. The jurisdictional-mandatory distinction is not applicable to instances of involuntary confinement for mental health purposes. The issue in such cases is not whether the failure to comply with the time limits deprives the district courts of jurisdiction. Rather, the issue is whether the time limits provide a protection or protections that the class of citizens the Legislature was attempting to protect can enforce in the district court. I see no reason to construe the text of the statutes to limit the protection they seem intended to provide.

{39} In addition to the text of the statutes, our case law indicates that the statutes do not contemplate routine continuances. In **Bunnell**, 100 N.M. at 244, 668 P.2d at 1121, the court reasoned that Section 43-1-11(A) "does not provide for postponement but instead furnishes a means by which an individual may waive his right to challenge his detention." The court ultimately held that the seven-day hearing mandated by Sections 43-1-10(F) and 43-1-11(A) could be continued, but only "when counsel [for the person being committed] establishes that he has not had sufficient time to prepare his client's case."

100 N.M. at 245, 668 P.2d at 1122. Moreover, the court noted that "if the trial court grants such a continuance, it must also hold an immediate preliminary hearing to determine whether the State can present sufficient evidence to justify holding the individual beyond the seven-day emergency period." **Id.**

{40} The majority construes **Bunnell** as authority for its conclusion that the Legislature has been silent "on the question of whether the district court may postpone the hearing beyond the seven-day requirement." Majority Opinion P 18. I respectfully disagree. I believe **Bunnell** supports the view that a continuance is only appropriate when: (1) it is requested by the individual being committed, and (2) it serves that person's interests; that is, when it does not violate his or her due process rights. It seems to me that **Bunnell** understood Section 43-1-11(A) to preclude postponement of the seven-day hearing by the State but to permit waiver by the individual being committed.

{41} Due to the clarity of our statutes, we need not decide whether the delay of fourteen calendar days between Compton's admission and his hearing violated his constitutional rights. Had the Legislature intended a "good cause" exception to the seven-day time frame of the statutes in question, it could easily have said so. The addition of the simple phrase "except for good cause shown" would have sufficed. Alternatively, the Legislature could have provided for a hearing "within a reasonable period of time." The Legislature took neither of these approaches. Rather, the Legislature has made unnecessary an inquiry into the length of time a person can be involuntarily confined in a mental institution without a hearing. The Legislature has defined the process that is due, Petitioner has not argued that the Legislature defined his rights too narrowly, and the Court need not address whether the Legislature has defined his rights too broadly.

{42} I conclude that the Legislature has provided a mandatory seven-day time limit for a hearing in involuntary commitment proceedings, although the right may be waived. I also conclude that the Legislature has provided an express remedy for violations of the statutory provisions at issue. NMSA 1978, § 43-1-23 (1978) states:

> Any client who believes that his rights, as established by this code or by the constitution of the United States or of New Mexico, have been violated shall have a right to petition the court for redress. The client shall be represented by counsel. The court shall grant relief as is appropriate, subject to the provisions of the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978].

{43} The Court of Appeals noted that "because there is no indication in the record that [Compton] 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." **Compton**, 2000-NMCA-78, P20, 129 N.M. 474. The emphasis, however, should not be on the actions taken by individuals to enforce their rights, but rather on ensuring that those rights are not violated in the first place. The waiver provision of Section 43-1-11(A) states that the right to a hearing can be "waived after consultation with counsel." This indicates that waiver is to be an affirmative act. The burden rests with the Department of Health and with the district court to ensure that the hearing takes place within the time limit proscribed by the Legislature. If the individual's rights are nonetheless violated, his or her objection becomes a practical necessity. The practical necessity does not justify treating the absence of an objection as a waiver of any protection the Legislature intended the hearing to ensure and the court to enforce.

{44} The statute speaks of "appropriate" relief being granted. The forgoing analysis leads me to conclude that the only appropriate relief for one who has not been given a mandatory hearing within seven days of his or her commitment is immediate release from the facility. The individual is certainly subject to future confinement, but only if one of the conditions of NMSA 1978, § 43-1-10(A) (1989) is met. Furthermore, the

determination that the individual meets one of these conditions must be based on evidence of the person's mental health status at the time of dismissal. To allow re-confinement based on previous evaluations and evidence would render the individual's release meaningless.

{45} The majority suggests that the remedy of dismissal would not serve the public health purposes of involuntary medical confinement. Majority Opinion P 31. I believe that the Legislature has taken into account those purposes in crafting the statutory scheme of which Sections 43-1-10(F) and 43-1-11(A) are part. Ultimately, the nature of the right protected by this statutory scheme compels dismissal when the Department of Health has not provided the district court the necessary evidence within the time limit set by the Legislature. As our courts have said on other occasions in a somewhat different context, legislative therapy, rather than judicial surgery, is required. **E.g.**, **Amoco Prod. Co. v. N.M. Taxation & Revenue Dep't**, 118 N.M. 72, 76, 878 P.2d 1021, 1025.

{46} For the foregoing reasons, I respectfully dissent.

PAMELA B. MINZNER,
Justice

I CONCUR:

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2002-NMSC-009

Filing Date: March 27, 2002

Docket No. 26,338

FLETCHER COCKRELL,

Plaintiff-Respondent,

v.

THE BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY and JIM PAUL,

Defendants-Petitioners.

Original Proceeding on Certiorari
Robert E. Robles, District Judge

Sandenaw, Carrillo & Piazza, P.C.
Thomas A. Sandenaw, Jr.
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for Petitioners.

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Las Cruces, NM

for Respondent.

OPINION

SERNA, Chief Justice.

{1} Plaintiff Fletcher Cockrell filed an action in district court against a political subdivision of the State of New Mexico seeking compensation for overtime wages pursuant to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (1994 & Supp. II 1996). This appeal presents the question whether the State of New Mexico has waived its sovereign immunity from FLSA claims in state court. We hold that the State has not waived sovereign immunity and that Cockrell's FLSA claim must therefore be dismissed.

I. PROCEDURAL BACKGROUND

{2} Cockrell was employed by New Mexico State University (NMSU) as an assistant men's basketball coach. NMSU terminated his employment in 1997, and Cockrell subsequently filed suit against NMSU's Board of Regents and its former athletic director, Jim Paul. Cockrell alleged that his termination violated his right to due process and sought relief under 42 U.S.C. § 1983 (1994). Cockrell also sought compensation for overtime wages under the FLSA. NMSU filed a motion to dismiss the FLSA claim on the basis of sovereign immunity.[1] Cockrell then amended his complaint to assert claims of equitable reinstatement under 42 U.S.C. § 1983 and breach of contract, the latter of which sought compensation for overtime wages based on a theory of implied contract. The district court denied the motion to dismiss the FLSA claim in an interlocutory order containing language that enabled NMSU to seek an immediate appeal. **See** NMSA 1978, § 39-3-4(A) (1971, prior to 1999 amendment). The district court did not address the breach of contract claim in its ruling, and this claim was not the subject of NMSU's subsequent appeal.

{3} The Court of Appeals accepted NMSU's application for interlocutory appeal. **See** Rule 12-203 NMRA 2002. In a memorandum opinion, the

[1] NMSU also moved to dismiss the Section 1983 claim. Cockrell voluntarily dismissed this claim against NMSU, but the district court denied the motion to dismiss the Section 1983 claim against Paul, finding that Paul was not protected by qualified immunity. Paul sought immediate review of the district court's ruling by writ of error, and the Court of Appeals reversed the district court on the question of qualified immunity. **Cockrell v. Bd. of Regents of N.M. State Univ.**, 1999- NMCA-073, 1999-NMCA-73, 127 N.M. 478, 983 P.2d 427. This ruling by the Court of Appeals is not before this Court.

Court of Appeals affirmed the denial of the motion to dismiss. Relying on its opinion in **Whittington v. State Department of Public Safety**, 1998- NMCA-156, PP11-16, 1998-NMCA-156, 126 N.M. 21, 966 P.2d 188, **vacated**, 527 U.S. 1031 (1999), which involved identical issues, the Court of Appeals concluded that neither sovereign immunity nor the Eleventh Amendment to the United States Constitution prevented Cockrell from pursuing an FLSA claim in state court. Following this Court's denial of NMSU's request for discretionary review, the United States Supreme Court granted Cockrell's petition for writ of certiorari to the Court of Appeals. **Bd. of Regents of N.M. State Univ. v. Cockrell**, 527 U.S. 1032, 144 L. Ed. 2d 791, 119 S. Ct. 2389 (1999). As in **Whittington**, the Supreme Court vacated the judgment of the Court of Appeals and remanded for further consideration in light of **Alden v. Maine**, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999). **Cockrell**, 527 U.S. at 1032.

II. THE SUPREME COURT'S OPINION IN *ALDEN V. MAINE*

{4} In **Alden**, a group of Maine probation officers filed FLSA claims for overtime wages and liquidated damages in state court. 527 U.S. at 711-12. The Supreme Court reviewed the determination by the courts of Maine that these FLSA claims were barred by sovereign immunity. **Id.** More specifically, the Court addressed whether Congress has the power under Article I of the United States Constitution to subject nonconsenting states to private suits for damages in state court. **Id.** In order to put the Supreme Court's analysis of this issue in its proper context, it is necessary to review two earlier opinions from the Court.

{5} In **Garcia v. San Antonio Metropolitan Transit Authority**, 469 U.S. 528, 555-56, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), the Court held that Congress has the power under the Commerce Clause of Article I, Section 8 of the United States Constitution to enforce the substantive requirements of the FLSA against the States. In reaching this conclusion, the Court overruled its earlier pronouncement in **National League of Cities v. Usery**, 426 U.S. 833, 852, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), that Congress could not, under the guise of the Commerce Clause, interfere with a state's ability to structure employment relationships between the state and its employees "in areas of traditional governmental functions." The Court in **Garcia** determined that the "traditional governmental function" test of **National League of Cities** "is not only unworkable but is also inconsistent with established principles of federalism." **Garcia**, 469 U.S. at 531. In place of the "traditional governmental function" test, the Court explained that the appropriate focus for a federalism inquiry in this context should be the express authorization of congressional power in the text of the Constitution. **Id.** at 549. Though the States retain significant sovereignty in the federalist system, "they do so . . . only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." **Id.** If the Constitution authorizes Congress to act, such as through the Commerce Clause, then the States are protected from congressional overreaching not by their inherent sovereignty but by the "structure of the Federal Government itself," **id.** at 550, and the States' significant role in "the federal political process." **Id.** at 552. The Court determined that "nothing in the overtime and minimum-wage requirements of the FLSA . . . is destructive of state sovereignty or violative of any constitutional provision." **Id.** at 554. Because "the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause," the Court upheld the application of the substantive provisions of the FLSA to the States. **Id.** at 555-56. As a valid exercise of Congress's constitutional power under Article I, Section 8, the substantive provisions of the FLSA are binding on the States pursuant to the Supremacy Clause of Article VI of the Constitution.

{6} In **Seminole Tribe v. Florida**, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), the Supreme Court addressed a related issue of

federalism: whether Congress has the power to abrogate the States' sovereign immunity from suit by providing a private remedy in federal court for a state's violation of a federal statute. The Court held that "the background principle of state sovereign immunity embodied in the Eleventh Amendment" precludes Congress from authorizing suits in federal court by private parties against a nonconsenting state, **id.** at 72, unless Congress acts pursuant to its powers under Section 5 of the Fourteenth Amendment, which "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." **Id.** at 65-66. "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." **Id.** at 72-73.

{7} As a logical progression, the Court addressed in **Alden** the inevitable question growing out of its opinions in **Garcia** and **Seminole Tribe**: given Congress's power to apply the substantive provisions of the FLSA against the States under **Garcia** but the Eleventh Amendment's restriction on private remedies against nonconsenting states in federal court under **Seminole Tribe**, does Congress have the power to provide for the enforcement of the private remedies in the FLSA against a state in the state's own courts without its consent? Specifically, the Court addressed the constitutionality of 29 U.S.C. § 216(b), which allows state employees to pursue an action against their employer in a "State court of competent jurisdiction" for damages "in the amount of . . . [the employees'] unpaid overtime compensation . . . and in an additional equal amount as liquidated damages," as well as reasonable attorney's fees and costs. The Court held in **Alden** "that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." **Alden**, 527 U.S. at 754. The Court, however, did not rely directly on the Eleventh Amendment, as in **Seminole Tribe**, or on a specific limitation on Congress's power in the Constitution, as outlined in **Garcia**. **See Alden**, 527 U.S. at 728 (discussing the "settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself"). Instead, the Court relied on "the States' immunity from suit [as] a fundamental aspect of [their] sovereignty." **Alden**, 527 U.S. at 713. Thus, despite the Court's earlier admonition in **Garcia** that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result," **Garcia**, 469 U.S. at 554, and its disbelief "that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on **a prior** definitions of state sovereignty," **id.** at 548, the Court returned to an analysis of the "fundamental attributes of state sovereignty," **id.** at 556, in order to review the availability of the FLSA's private remedies in state courts. **See Alden**, 527 U.S. at 729 ("The scope of the States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design.").

{8} The Court in **Alden** determined that state sovereign immunity "inheres in the system of federalism established by the Constitution." 527 U.S. at 730. In reaching this conclusion, the Court relied on four aspects of constitutional interpretation: (1) original understanding of the Constitution; (2) early congressional practice; (3) Supreme Court precedent; and (4) the structure of the Constitution. **Id.** at 741-54. Relying heavily on the structure of the document itself, the Court noted that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." **Id.** at 748. "The principle of sovereign immunity preserved by constitutional design thus accords the States the respect owed them as members of the federation." **Id.** at 748-49 (internal quotation marks and quoted authority omitted).

> A power to press a State's own courts into federal service to coerce the other branches

> of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.

Id. at 749 (citation omitted). Based on these principles, the Court determined that the remedial provisions of the FLSA cannot be enforced against a state in the state's courts without its consent. The Court further determined that the State of Maine had not waived its sovereign immunity from suit and therefore affirmed the dismissal of the FLSA claims. **Id.** at 758, 760. It is within this context that the Supreme Court remanded the present case to the Court of Appeals for further consideration.

III. THE COURT OF APPEALS' DISPOSITION ON REMAND FROM THE SUPREME COURT

{9} On remand from the Supreme Court, the Court of Appeals addressed whether the State had waived its sovereign immunity from suit under the FLSA. The Court determined, based on this Court's opinion in **Bernalillo County Deputy Sheriffs Ass'n v. County of Bernalillo**, 114 N.M. 695, 699, 845 P.2d 789, 793 (1992), that an FLSA claim sounds in contract and that "any consent to Plaintiff's FLSA claim must be inferred from [the] waiver of sovereign immunity [in NMSA 1978, § 37-1-23(A) (1976)] for 'actions based on a valid written contract.'" **Cockrell v. Bd. of Regents of N.M. State Univ.**, No. 19,346, slip op. at 3 (N.M. Ct. App. Apr. 28, 2000). The Court of Appeals remanded the matter for the district court to determine whether Cockrell's complaint alleged a valid written contract within the meaning of Section 37-1-23(A). "If Plaintiff establishes a contract within Section 37-1-23(A)'s waiver of immunity and that the contract incorporates the FLSA, then Plaintiff may assert FLSA claims arising out of that contract." **Cockrell**, slip op. at 4. NMSU then petitioned this Court to review the Court of Appeals' determination that Cockrell could pursue an FLSA claim if the provisions of the FLSA were incorporated, either by express or implied-in-fact agreement or by operation of law, into a valid written contract with NMSU. In the context of NMSU's petition, it is significant that the Court of Appeals, evaluating this identical issue, reached a different conclusion on remand from the Supreme Court in its published opinion in **Whittington v. State Department of Public Safety**, 2000- NMCA-055, 2000-NMCA-55, 129 N.M. 221, 4 P.3d 668, **cert. granted**, 129 N.M. 250, 4 P.3d 1241, No. 26,362 (2000). In that case, the Court of Appeals affirmed the district court's dismissal of the plaintiffs' direct FLSA claims on the basis of sovereign immunity. **Id.** 2000 NMAPD 55 P 5. Unlike the mandate in NMSU's interlocutory appeal in the present case, under which Cockrell could have pursued a direct FLSA claim if he was able to demonstrate an implied contract, the Court of Appeals did not remand the FLSA claims in **Whittington**. **See id.** The Court, instead, merely noted that the dismissal of the FLSA claims did not control the resolution of the plaintiffs' separate contract claim that was not a part of the plaintiffs' appeal. **Id.** The plaintiffs in **Whittington** then petitioned this Court for review of the Court of Appeals' dismissal of the FLSA claims. This Court granted NMSU's petition for writ of certiorari in this case in order to review the Court of Appeals' analysis of sovereign immunity in the wake of **Alden**. We also granted the petitions in both this case and **Whittington** in order to resolve the inconsistent holdings from the Court of Appeals in these two cases.

IV. THE EFFECT OF *HICKS V. STATE* ON SOVEREIGN IMMUNITY

{10} In **Hicks v. State**, 88 N.M. 588, 590-92, 544 P.2d 1153, 1155-57 (1975), this Court abolished common law sovereign immunity. Cockrell relies on **Hicks** for two related arguments in the present case. First, Cockrell contends that **Alden** was based on common law sovereign immunity and that, "because the doctrine of common

law sovereign immunity has been abolished in New Mexico, **Alden** has no application in claims against the State of New Mexico." **But see Hydro Conduit Corp. v. Kemble**, 110 N.M. 173, 178 n.2, 793 P.2d 855, 860 n.2 (1990) ("The common law now recognizes a constitutionally valid statutory imposition of sovereign immunity, and such immunity must be honored by the courts where the legislature has so mandated."). Alternatively, Cockrell relies on this Court's characterization of **Hicks** as "generally abolishing the common law doctrine of sovereign immunity in all its ramifications, whether in tort or contract or otherwise, except as implemented by statute or as might otherwise be interposed by judicial decision for sound policy reasons." **Torrance County Mental Health Program, Inc. v. N.M. Health & Evr't Dep't**, 113 N.M. 593, 597, 830 P.2d 145, 149 (1992). Based on this language, Cockrell argues that the State has waived immunity under **Hicks** because the Legislature has not enacted a statute reestablishing sovereign immunity as it pertains to federal statutory claims in general and FLSA claims in particular. Cockrell contends that the legislative response to **Hicks** through Section 37-1-23, which provides that the State is immune from contract actions that are not based on a valid written contract, and the Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2001), which provides "immunity for liability for any tort" except as otherwise waived, NMSA 1978, § 41-4-4(A) (2001), reestablished only a narrow immunity for the State that does not extend to FLSA claims. We believe both of these arguments are answered by the Supreme Court's opinion in **Alden**.

{11} Contrary to Cockrell's assertion, the Supreme Court did not rest its opinion in **Alden** on common law sovereign immunity. "Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." **Alden**, 527 U.S. at 733. Within the specific realm of federalism, the judicially created doctrine of sovereign immunity was transformed into a constitutional principle by the ratification of the United States Constitution. Thus, in the limited context of a private action for money damages authorized by a federal statute, "the States do retain a **constitutional immunity** from suit in their own courts." **Id.** 527 U.S. at 745 (emphasis added).

{12} In **Hicks**, this Court recognized that "the doctrine of sovereign immunity is one of common law, judicially created." 88 N.M. at 589, 544 P.2d at 1154. Because we addressed only the State's liability for damages in a common law tort action, we determined that "sovereign immunity has always been a judicial creation without statutory codification and, therefore, can also be put to rest by the judiciary." **Id.** 88 N.M. at 590, 544 P.2d at 1155. We had no need to address the statutory sovereign immunity that did not yet exist, nor could we have foreseen the constitutional significance attributed to sovereign immunity in the limited context of federalism by the Supreme Court in **Alden**. Our abrogation of sovereign immunity in **Hicks** was therefore limited to common law sovereign immunity from common law causes of action. For the simple reason that constitutional sovereign immunity was beyond the scope of the issue presented in **Hicks**, our holding in that case cannot be characterized as inconsistent with **Alden** 's recognition of a constitutional sovereign immunity or as effectuating a waiver of constitutional sovereign immunity. **See Torrance County**, 113 N.M. at 597, 830 P.2d at 149 ("We cannot agree . . . that **Hicks** 's sweeping abolition of sovereign immunity carried away all defenses of governmental entities, based on their role as state-created entities, regardless of the nature of the claims asserted or the relief sought.").

{13} Indeed, being presented with this issue for the first time, we do not believe that it is within this Court's province to decide whether the State should subject itself to liability for a federal claim filed in state court. Under the principle of separation of powers embodied in Article III, Section 1 of the New Mexico Constitution, we believe this is a matter for the Legislature. Unlike the decision "to do away with common law principles," **Hicks**, 88 N.M. at 590, 544 P.2d

at 1155, which is within this Court's power, the decision to waive this State's constitutional sovereign immunity would represent an alteration of the constitutional balance of power between the Federal Government and the State of New Mexico that was struck by the Supreme Court in **Alden**. In addition, this decision involves "the allocation of scarce resources among competing needs and interests [that] lies at the heart of the political process." **Alden**, 527 U.S. at 751. "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State. . . ." **Id.** The question in this circumstance is not the continued legitimacy of a court-made rule; it is instead the public policy in New Mexico of the proper relationship between the federal and state governments. We believe that a policy decision of this magnitude, going to New Mexico's "most fundamental political processes," **id.**, is particularly unsuited for judicial resolution as a matter of state constitutional law. As we have recognized, "it is the particular domain of the legislature, as the voice of the people, to make public policy." **Torres v. State**, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (noting that "the judiciary . . . is not as directly and politically responsible to the people as are the legislative and executive branches of government"). Thus, in order to refrain from unduly encroaching on a core function of the legislative branch of government under Article III, Section 1, State ex rel. Taylor v. Johnson, 1998- NMSC-015, P 23, 1998-NMSC-15, 125 N.M. 343, 961 P.2d 768, we conclude that it is within the sole province of the Legislature to waive the State's constitutional sovereign immunity. **See Alden**, 527 U.S. at 752 ("A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts. If Congress could displace a State's allocation of governmental power and responsibility, the judicial branch of the State, whose legitimacy derives from fidelity to the law, would be compelled to assume a role not only foreign to its experience but beyond its competence as defined by the very Constitution from which its existence derives.") (citation omitted).

{14} Based on his argument that **Alden** has no application in New Mexico, Cockrell also argues that **Hicks** ' abolition of common law sovereign immunity, when combined with the principle of federal supremacy, precludes the Legislature from asserting sovereign immunity. Cockrell contends that the Legislature cannot enact a statutory immunity that is inconsistent with federal law and that Congress's application of the remedial provisions of the FLSA, in 29 U.S.C. § 216(b), against the State as an employer is binding on New Mexico through the Supremacy Clause. We reject this argument based on the foregoing analysis of **Alden** and **Hicks**. We also reject Cockrell's reliance on federal supremacy. Under Article VI of the United States Constitution, as well as Article II, Section 1 of the New Mexico Constitution, the federal Constitution and federal laws are the "supreme Law of the Land." However, in order to be supreme, a federal law must be "made in Pursuance" of the United States Constitution. U.S. Const. art. VI. As the Supreme Court recognized in **Alden**, "the Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design." 527 U.S. at 731. Similarly, the state supremacy clause cannot confer on Congress the authority to exercise a power that is withheld by the United States Constitution. Congress's authority stems from the United States Constitution, not from the New Mexico Constitution. "We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States. When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." **Alden**, 527 U.S. at 732. Because "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals," **Kimel v. Fla. Bd. of Regents**, 528 U.S. 62, 80, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000), the private remedial provisions of the FLSA as applied against the States are constitutionally invalid and of no

force and effect unless and until a state waives its constitutional sovereign immunity.[2]

{15} We determine that **Hicks** does not render **Alden** inapplicable in New Mexico. The constitutional sovereign immunity created by the United States Constitution survived our opinion in **Hicks**, and therefore, the Legislature need not have enacted a statute to reestablish this immunity. **But see Hartman v. Regents of Univ. of Colo.**, 22 P.3d 524, 529 (Colo. Ct. App. 2000) (cert. granted Apr. 23, 2001) (concluding that an FLSA claim did not lie in tort and that the state legislature had created statutory immunity only for tort actions). This State, by virtue of its sovereign role in the Union, is constitutionally immune from private suits for damages under a federal statute. If the State is to consent to Congress's encroachment on this vital aspect of federalism, it must be a decision of the Legislature. Thus, we now consider Cockrell's argument that the Legislature has waived the constitutional sovereign immunity recognized by **Alden**.

V. THE WAIVER OF SOVEREIGN IMMUNITY IN SECTION 37-1-23

{16} Cockrell contends that Section 37-1-23, which waives immunity from "actions based on a valid written contract," waives the State's immunity from FLSA claims. To support his claim, Cockrell relies on this Court's opinion in **Bernalillo County**, which the Court of Appeals interpreted as holding that an FLSA claim sounds "only in contract." **Bernalillo County**, 114 N.M. at 699, 845 P.2d at 793. Based on this interpretation of **Bernalillo County**, Cockrell contends that an FLSA claim falls within the parameters of Section 37-1-23 and that sovereign immunity is waived as long as there is a valid written contract of employment. **See Archer v. Rockingham County**, 144 N.C. App. 550, 548 S.E.2d 788, 792-93 (N.C. Ct. App. 2001), **review denied**, 355 N.C. 210, 559 S.E.2d 796 (N.C. 2002); **see also West v. State ex rel. State Superintendent of Pub. Educ.**, 324 So. 2d 579, 581 (La. Ct. App. 1975); **Allen v. Fauver**, 167 N.J. 69, 768 A.2d 1055, 1061-62 (N.J. 2001) (Long, J., concurring in part, dissenting in part); **cf. King v. State**, 260 Neb. 14, 614 N.W.2d 341, 348 (Neb. 2000) (per curiam) (concluding that the statutory waiver of immunity for claims based on contract "does not waive the State's sovereign immunity from a suit brought against it for alleged FLSA violations when the FLSA claims are not founded upon or growing out of the contracts themselves"). The Court of Appeals held that Cockrell could assert his FLSA claim based on a waiver of immunity under Section 37-1-23 if he established a valid written contract incorporating the FLSA. We disagree.

{17} Initially, we believe that the Court of Appeals misconstrued our opinion in **Bernalillo County**. In that case, we addressed an issue of insurance coverage and an insurance company's duty to defend and indemnify. **Bernalillo County**, 114 N.M. at 697, 845 P.2d at 791. In order to resolve this issue, we analyzed "whether the injured party's complaint states facts that bring the case within the coverage of the policy." **Id.** The injured party's complaint contained three counts, the first of which alleged a violation of the FLSA and the second two of which alleged breach of contract. **Id.** 114 N.M. at 698-99, 845 P.2d at 792-93. We addressed each count separately. **Id.** The discussion referenced by the Court of Appeals concerned one of the breach of contract counts, not the count directly alleging a violation of the FLSA. **Id.** In the context of the contract claim, we determined that the breach of the contractual duty to pay overtime wages did not give rise to an independent action in tort. **Id.** 114 N.M. at 699, 845 P.2d at 793. Although we stated that "even the violation of the FLSA evolves from the contract of employment," this observation was made in the specific context of a breach of contract claim, not a claim for damages directly under the FLSA. **Id.** As a result, we do not believe that our conclusion in **Bernalillo County** that this specific count of the complaint was "properly viewed as existing only in

[2] Moreover, we disagree with the implication in Cockrell's argument that a waiver of the State's constitutional sovereign immunity would be irrevocable. We believe this argument is inconsistent with the Supreme Court's interpretation of constitutional sovereign immunity in **Alden**.

contract," **id.**, provides guidance on the question presented in this case.

{18} We determine that Cockrell's direct FLSA claim is not one based on contract. Cockrell's direct FLSA claim is statutory, not contractual. The FLSA claim is based on NMSU's alleged failure to comply with the substantive requirements of the FLSA as mandated by Congress, and Cockrell seeks the damages provided in 29 U.S.C. § 216(b), including liquidated damages and attorney's fees. Addressing a nearly identical argument, the Supreme Court of New Jersey recognized that "recharacterization of the claim cannot change the essential nature of the claim. Plaintiffs' complaint alleges a violation of the federal FLSA and seeks damages pursuant to rights created by that federal statute. We can see no reasonable conclusion other than that plaintiffs' claim is a statutory claim." **Allen**, 768 A.2d at 1059 (citations omitted). In fact, Cockrell amended his complaint to allege a separate breach of contract claim based on NMSU's failure to pay overtime wages. Because the FLSA claim is purely statutory, we reject the characterization of it as one "based on a valid written contract" within the meaning of Section 37-1-23. Thus, Section 37-1-23 does not provide an express waiver of immunity for the FLSA claim.

{19} Cockrell appears to contend in the alternative that Section 37-1-23 implicitly evidences a legislative intent to waive immunity from FLSA claims. **See Anthony v. State**, 632 N.W.2d 897, 902 (Iowa 2001) ("We are convinced that the statutory scheme for deriving pay plans has been implemented in a manner that includes FLSA overtime remuneration as compensation owed by an employer."). We are not persuaded.

{20} We have been reluctant to infer a waiver of sovereign immunity, even outside the context of constitutional sovereign immunity. In **Torrance County**, for example, we concluded that "our legislature's silence on punitive damages in Section 37-1-23 cannot be read as expressing an intention to waive immunity for punitive damages in contract actions." 113 N.M. at 598, 830 P.2d at 150. Similarly, the Supreme Court has indicated that in order to find a waiver of a state's constitutional sovereign immunity "the State's consent [must] be unequivocally expressed." **Pennhurst State Sch. & Hosp. v. Halderman**, 465 U.S. 89, 99, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984). "Our reluctance to infer that a State's immunity from suit . . . has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." **Id.**

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." **Murray v. Wilson Distilling Co.** , 213 U.S. 151, 171, 53 L. Ed. 742, 29 S. Ct. 458 (1909).

Edelman v. Jordan, 415 U.S. 651, 673, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) (alteration in original). Because the waiver in this case involves the State's constitutional right to sovereign immunity, "a right that goes to the essence of federalism," **Allen**, 768 A.2d at 1060, we require a clear and unambiguous expression of legislative intent to consent to suit for FLSA claims.

{21} In response to a similar argument that the legislative waiver of immunity for contract claims evidences an intent to waive immunity for FLSA claims, the Supreme Court of Virginia stated,

> This proposition ignores the basis underpinning the Commonwealth's assertion of sovereign immunity in this case.
>
> As the Commonwealth notes, the plea in bar was advanced in order to exercise the Commonwealth's prerogative not to be subject to suit in her own courts pursuant to an act of Congress. **The issue is not one of the avoidance of a just contract debt, but of the preservation of a right reserved to the states by the United States**

> **Constitution**. We see no reason to vitiate that right by a broad and unwarranted interpretation of the legislative intent behind the limited waiver of sovereign immunity [for contract debts], and nothing in our cases interpreting that statute suggests that it should be applied in circumstances other than in claims properly instituted under that statute and the scheme provided for pursuing such claims. . . .

Commonwealth v. Luzik, 259 Va. 198, 524 S.E.2d 871, 877 (Va. 2000) (emphasis added). We agree. We believe that the purposes behind the creation of immunity and the limited waiver of immunity in Section 37-1-23 do not support an inference of an intent to waive this State's constitutional sovereign immunity.

{22} We have recognized that the purpose of the legislative enactment containing Section 37-1-23 "was to reinstate the sovereign immunity which had been abolished by **Hicks v. State**, subject to certain exceptions." **Hydro Conduit**, 110 N.M. at 177, 793 P.2d at 859. The limited waiver of immunity for valid written contracts "encourages parties who contract with governmental entities to do so in writing" in order to facilitate clarity in contractual terms and obligations and to ensure that the "governmental entity is authorized to enter into [the] contract." **Garcia v. Middle Rio Grande Conservancy Dist.**, 1996- NMSC-029, PP16-17, 1996-NMSC-29, 121 N.M. 728, 918 P.2d 7. The State's constitutional sovereign immunity involves entirely different considerations than contract enforcement and proof of contractual terms. It involves "the proper balance between the supremacy of federal law and the separate sovereignty of the States." **Alden**, 527 U.S. at 757. We believe it would be contrary to the purposes of Section 37-1-23 to infer a waiver of an immunity that not only survived our opinion in **Hicks** but goes to the very heart of federalism. Thus, we conclude that Section 37-1-23 does not waive the State's constitutional sovereign immunity.

{23} Because the Legislature has not waived the State's constitutional sovereign immunity, NMSU could not do so on its own in a contract of employment. **See Connelly v. State**, 26 P.3d 1246, 1259 (Kan. 2001) ("The consent to suit or waiver of sovereign immunity must be based on State action which we deem to be legislative enactments expressing the will of elected officials and cannot be based on acts of agents."), **cert. denied**, 151 L. Ed. 2d 698, 122 S. Ct. 813 (2002). Thus, although Cockrell contends that NMSU agreed to be bound by the provisions of the FLSA by incorporating the federal act into a personnel manual, NMSU did not have the authority to waive the State's constitutional sovereign immunity. As indicated above, that power is reserved to the Legislature. Moreover, we disagree with the Court of Appeals' determination that the incorporation of the provisions of the FLSA into an employment contract by operation of law would entitle Cockrell to invoke the remedial provisions of the FLSA in state court. It is true that "the FLSA provisions are read into and become a part of every employment contract that is subject to the terms of the Act." **Bernalillo County**, 114 N.M. at 699, 845 P.2d at 793 (internal quotation marks and quoted authority omitted). "A contract incorporates the relevant law, whether or not it is referred to in the agreement." **State ex rel. Udall v. Colonial Penn Ins. Co.**, 112 N.M. 123, 130, 812 P.2d 777, 784 (1991). However, as we have described above, the Supreme Court has held that Congress is without authority under Article I of the federal Constitution to subject a nonconsenting state to private remedies in the state's own court for the violation of a federal statute. Because we conclude that the State of New Mexico has not consented to FLSA claims by state employees, 29 U.S.C. § 216(b) does not have the force of law as applied against the State and therefore cannot be incorporated into a state employment contract by operation of law. It would indeed be circular logic to allow a contract, by legal implication, to accomplish what the law otherwise prohibits. Thus, to the extent that NMSU might have had a contract with Cockrell incorporating the FLSA by operation of law, it would incorporate only those constitutionally valid substantive provisions of the federal act by which the State is bound under **Garcia** ; it would not incorporate the remedial provisions

that are beyond the scope of Congress's constitutional powers to enforce against the State under **Alden**.

{24} We conclude that any waiver of the State's constitutional sovereign immunity must be clear and unambiguous. **See generally Dick v. Merillat**, 139 Ohio App. 3d 716, 745 N.E.2d 507, 510 (Ohio Ct. App. 2000) (discussing a statute that expressly exempts from immunity "civil claims based upon alleged violations of the constitution or statutes of the United States"). We also conclude that the Legislature has not enacted a clear waiver of immunity from FLSA claims. In fact, we believe it is noteworthy that the Legislature has expressly provided that the provisions of the Minimum Wage Act, NMSA 1978, §§ 50-4-19 to -30 (1955, as amended through 1999), New Mexico's analog to the FLSA, shall not apply to "the state or any political subdivision thereof." NMSA 1978, § 50-4-21(B) (1983). For these reasons, we hold that Cockrell's FLSA claims must be dismissed on the basis of NMSU's constitutional immunity from suit.

VI. INDEPENDENT CONTRACT ACTIONS

{25} Although we conclude that the State has not waived sovereign immunity with respect to Cockrell's federal claims under the FLSA, we do not intend to dispose of Cockrell's separate cause of action for breach of contract under state law. In his amended complaint, Cockrell alleged that NMSU entered into a valid written contract with him for the payment of overtime wages by providing in a personnel manual that NMSU would comply with the terms of the FLSA. While we conclude that NMSU does not have authority to waive the State's constitutional sovereign immunity and to agree to be bound by the remedial provisions of the FLSA under 29 U.S.C. § 216(b), we do not mean to dispose of the question whether NMSU had the authority to enter into an employment contract with Cockrell and to determine the appropriate terms of compensation under that employment contract, including compensation for overtime wages, thereby possibly subjecting NMSU to a contract claim, and potential contract damages, rather than a direct FLSA claim.

{26} The waiver of sovereign immunity in Section 37-1-23 extends to the written terms of a personnel manual if the manual constitutes an implied-in-fact contract. **Garcia**, 1996-NMSC-029, PP14-15. "Under New Mexico law, a personnel manual gives rise to an implied contract if it controlled the employer-employee relationship and an employee could reasonably expect his employer to conform to the procedures it outlined." **Newberry v. Allied Stores, Inc.**, 108 N.M. 424, 427, 773 P.2d 1231, 1234 (1989). However, "'employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract. . . .'" **Lukoski v. Sandia Indian Mgmt. Co.**, 106 N.M. 664, 666, 748 P.2d 507, 509 (1988) (quoting **Leikvold v. Valley View Cmty. Hosp.**, 141 Ariz. 544, 688 P.2d 170, 174 (1984)). NMSU argues on appeal that its personnel manual could not have supported a reasonable expectation of conformity by NMSU with the terms of the manual. NMSU highlights that the manual expressly states that its provisions are merely general statements of policy and procedure, are not contractual commitments, and are subject to unilateral alteration by NMSU with or without notice to employees. **See Lukoski**, 106 N.M. at 666, 748 P.2d at 509 ("The language of the handbook does nothing to alert an employee against placing reliance on any statement contained therein or against viewing such discipline and termination policy as only a unilateral expression of [the employer's] intention that is subject to revocation or change at any time, in any manner, at the pleasure of [the employer]."). Nevertheless, because the district court did not reach Cockrell's breach of contract claim in its order of dismissal, we believe this issue is more appropriately resolved by the district court on remand. "Whether an employee handbook has modified the employment relationship is a question of fact to be discerned from the totality of the parties' statements and actions regarding the employment relationship." **Newberry**, 108 N.M. at 427, 773 P.2d at 1234.

VII. POLICY CONSIDERATIONS

{27} Although we hold the State has not waived its constitutional sovereign immunity from direct FLSA claims, we emphasize that the State is bound by the substantive provisions of the FLSA and is not free to disregard its obligations under federal law. Our holding in this case is certainly not intended to "legitimize political defiance of valid federal law." **Alden**, 527 U.S. at 803 n.36 (Souter, J., dissenting). We recognize the incongruity of the State's obligation to pay overtime wages in accordance with the FLSA without a concomitant method of enforcement for employees. After all, the FLSA is intended "to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce . . . due to the unequal bargaining power as between employer and employee." **Brooklyn Sav. Bank v. O'Neil**, 324 U.S. 697, 706, 89 L. Ed. 1296, 65 S. Ct. 895 (1945) (footnote omitted). Considering that this statutory scheme is designed "to aid the unprotected," **id.** 324 U.S. at 707 n.18, it seems questionable to rely largely on "the good faith of the States" for enforcement, **Alden**, 527 U.S. at 755. The seemingly inconsistent positions taken by the Supreme Court in **Garcia** as compared to **Alden** and **Seminole Tribe** appears to have resulted in a right without a remedy, or at least without the complete and direct remedy that was intended by Congress. **See Alden**, 527 U.S. at 711-14 (Souter, J., dissenting). The inherent unfairness of this dichotomy is not lost on this Court. It could be that this unfairness is more a by-product of the **Alden** majority's growing discomfort with the reach of federal power under **Garcia**, and the resulting interference on the States' self-governance, than it is a reflection of the importance of sovereign immunity as a matter of constitutional design and the underlying dignity of the States. **See Alden**, 527 U.S. at 750-51 ("A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens."); **id.** 527 U.S. at 751 ("When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."); **see also United States v. Morrison**, 529 U.S. 598, 616, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000) ("The limitation of congressional authority is not solely a matter of legislative grace."); **Garcia**, 469 U.S. at 580 (Rehnquist, J., dissenting) (discussing the general approach to federalism adopted in **National League of Cities** as "a principle that will, I am confident, in time again command the support of a majority of this Court"). Nevertheless, we are bound by the United States Supreme Court's interpretation of the United States Constitution, and we must endeavor to refrain from unduly encroaching on the functions of the legislative branch of this State.

{28} Despite the existence of the State's constitutional sovereign immunity, state employees who do not receive the benefits to which they are entitled under the FLSA are not without recourse. In addition to a possible independent state action as discussed above, employees are protected by the official enforcement provision of the FLSA, **see** 29 U.S.C. § 216 (c); **Alden**, 527 U.S. at 759-60, and constitutional sovereign immunity "does not bar certain actions against state officers for injunctive or declaratory relief," **Alden**, 527 U.S. at 757. However, as illustrated in this case by the limiting language in NMSU's personnel manual, we recognize that these potential alternative remedies might still fall short of assuring that the purposes of the FLSA are effectuated. To this end, we encourage the Legislature to consider responding to the void that has been created by the Supreme Court's opinion in **Alden**. The purpose of the FLSA's overtime requirements "is to provide a financial disincentive upon using employees beyond the work period deemed appropriate by Congress." **Nat'l League of Cities**, 426 U.S. at 849. This purpose is consistent with the constitutional policy of this State that "eight hours shall constitute a day's work in all cases of employment by and on behalf of the state or any county or municipality thereof." N.M. Const. art. XX, § 19. The Legislature has thus far not enacted the necessary enabling legislation for enforcement of this provision, and this provision does not, on its

own, entitle state employees to overtime wages. **Jaramillo v. City of Albuquerque**, 64 N.M. 427, 430, 329 P.2d 626, 628 (1958) ("We conclude that Article 20, Section 19 of our Constitution is not self-executing but is a declaration of principle or policy as to the number of hours employees of the class named should work to be entitled to a day's wages."); **accord Weston v. Mont. State Highway Comm'n**, 186 Mont. 46, 606 P.2d 150, 152-53 (Mont. 1980); **State v. Boykin**, 109 Ariz. 289, 508 P.2d 1151, 1154 (Ariz. 1973) (in banc). Nonetheless, a waiver of the State's constitutional immunity from FLSA claims would be consistent with the constitutional principle articulated in Article XX, Section 19, and would ensure that state employees receive the protection from excessive work hours to which they are entitled under federal law. **See Overnight Motor Transp. Co. v. Missel**, 316 U.S. 572, 583, 86 L. Ed. 1682, 62 S. Ct. 1216 (1942) (stating that the liquidated damages in 29 U.S.C. § 216(b) "are compensation, not a penalty or punishment by the Government"). We note that the Legislature would be free to respond to **Alden** with only a limited waiver of constitutional immunity. **See Raygor v. Regents of Univ. of Minn.**, 534 U.S. 533, 122 S. Ct. 999, 1006, 152 L. Ed. 2d 27 (2002) ("With respect to suits against a state sovereign in its own courts, we have explained that a State 'may prescribe the terms and conditions on which it consents to be sued. . . .'") (quoting **Beers v. Arkansas**, 61 U.S. (20 How.) 527, 529, 15 L. Ed. 991 (1858)); **Alston v. State**, 97 N.Y.2d 159, 762 N.E.2d 923, 926, 737 N.Y.S.2d 45 (N.Y. 2001) ("Nothing in **Alden** suggests that a waiver of sovereign immunity must be absolute, unconditional and applicable in all situations."). Therefore, the Legislature should not be deterred in its consideration of this issue by a disagreement or discomfort with particular remedial aspects of the FLSA.

VIII. CONCLUSION

{29} We hold that the State has not waived its constitutional sovereign immunity from private suits for damages based on a violation of federal law. We reverse the district court's denial of NMSU's motion to dismiss Cockrell's FLSA claims. We also reverse the Court of Appeals' memorandum opinion to the extent that it remanded Cockrell's FLSA claims to the district court for further proceedings. We remand to the district court with instructions to dismiss Cockrell's FLSA claims and to proceed with any remaining claims in the amended complaint.

{30} IT IS SO ORDERED.

PATRICIO M. SERNA,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2002-NMSC-017

Filing Date: June 4, 2002

Docket No. 27,149

JIM BACA,

Petitioner,

v.

NEW MEXICO DEPARTMENT OF PUBLIC SAFETY,

Respondent,

and

KEN McWETHY, HEATHER BARTELS, and PAUL LISLE,

Intervenors.

Original Proceeding

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OPINION

PER CURIAM.

{1} Petitioner Jim Baca, invoking this Court's constitutional power of original jurisdiction in mandamus, seeks a writ of mandamus prohibiting the Department of Public Safety from enforcing the provisions of the Concealed Handgun Carry Act, NMSA 1978, § 29-18-1 to -12 (2001). **See** N.M. Const. art. VI, § 3 (establishing this Court's original jurisdiction in mandamus). Petitioner contends that the Act violates Article II, Section 6 of the New Mexico Constitution because, he argues, this constitutional provision prohibits the carrying of concealed weapons. Alternatively, Petitioner argues that the Act is unconstitutional because it permits local governments to regulate an incident of the right to bear arms in conflict with Article II, Section 6. We conclude that the Act unconstitutionally allows municipalities and counties to regulate an incident of the right to bear arms and thus issue the writ of mandamus on this basis. As a result, we need not reach the argument that Article II, Section 6 prohibits the carrying of concealed weapons.

I. STANDING

{2} Petitioner initially filed his petition in his individual capacity as well as in his official capacity as Mayor of the City of Albuquerque. Following

oral argument, this Court directed the parties to brief several specific questions. During this additional briefing, Martin J. Chavez succeeded Petitioner as Mayor of Albuquerque. Mayor Chavez then moved to substitute himself as public officer pursuant to Rule 12-301(C) NMRA 2002 and to strike the petition on the ground that it no longer represented the position of the Mayor of Albuquerque. In response, Petitioner contended that we should not dismiss the petition because he has standing to pursue the matter in his individual capacity. We granted Mayor Chavez's motion to substitute based on Rule 12-301(C) and now permit him to withdraw as a party due to his rejection of the petition. However, we have denied Mayor Chavez's motion to strike the petition based on our decision to confer standing on Petitioner to maintain this action in his individual capacity due to the importance of the issues involved.

{3} Petitioner seeks to invoke this Court's original jurisdiction in mandamus. "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." **County of Bernalillo v. N.M. Pub. Regulation Comm'n (In re Adjustments to Franchise Fees)**, 2000-NMSC-35, P6, 129 N.M. 787, 14 P.3d 525. "We have recognized mandamus as a proper proceeding in which to question the constitutionality of legislative enactments." **State ex rel. Sego v. Kirkpatrick**, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974). In this context,

> it has been clearly and firmly established that even though a private party may not have standing to invoke the power of this Court to resolve constitutional questions and enforce constitutional compliance, this Court, in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance.

Id. This Court is not alone in its recognition of an exception to standing in cases involving questions of great public importance. **See** . . . **Pele Def. Fund v. Paty**, 73 Haw. 578, 837 P.2d 1247, 1268-69 (Haw. 1992) ("This court has repeatedly demonstrated its fundamental policy that Hawaii's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the 'needs of justice' would be best served by allowing a plaintiff to bring claims before the court.") (footnote omitted); **Nat'l Parks & Conservation Ass'n v. Bd. of State Lands**, 869 P.2d 909, 913 (Utah 1993) ("This standard recognizes the need to have issues of great public importance resolved in compliance with the law when a court can act within its institutional and constitutional limitations."). **See generally** . . . **Jolley v. State Loan & Inv. Bd.**, 2002 WY 7, 38 P.3d 1073, 1078 (Wyo. 2002) ("The doctrine of great public interest or importance should be applied cautiously. . . .").

{4} We believe that the validity of the Concealed Handgun Carry Act raises a constitutional question of fundamental importance to the people of New Mexico. Thus, "we simply elect to confer standing on the basis of the importance of the public issues involved." **Kirkpatrick**, 86 N.M. at 363, 524 P.2d at 979. Considering the importance of the questions raised in the petition, "more limited notions of standing are not acceptable" in the present case. **State ex rel. Clark v. Johnson**, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995). We therefore proceed to consider Petitioner's request for writ of mandamus.

II. CONSTITUTIONALITY OF THE CONCEALED HANDGUN CARRY ACT

{5} Petitioner contends that the Concealed Handgun Carry Act violates Article II, Section 6 of the New Mexico Constitution. This constitutional provision states:

> No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, **in**

> **any way**, an **incident** of the right to keep and bear arms.

N.M. Const. art. II, § 6 (as amended 1986) (emphasis added). Because the Act requires the Department of Public Safety to promulgate a rule providing "authority for a county or municipality to disallow the carrying of a concealed handgun within the limits of the county or municipality," NMSA 1978, § 29-18-11(D) (2001), Petitioner contends that the Act violates the last sentence of Article II, Section 6, as quoted above. We agree.

{6} The Act purports to allow municipalities and counties to prohibit the carrying of concealed weapons and, in so doing, delegates to them the power to regulate an incident of the right to keep and bear arms. The broad language in Article II, Section 6 of our Constitution prohibiting municipalities and counties from regulating an "incident" of the right to keep and bear arms "in any way" indicates an intent to preclude piecemeal administration at a local level and to ensure uniformity in the regulation of firearms throughout the State of New Mexico. Section 29-18-11(D) directly conflicts with the prohibition against local regulation in Article II, Section 6. Therefore, this provision is unconstitutional.

{7} The Department argues that the carrying of concealed weapons is not an incident of the right to bear arms because Article II, Section 6 specifically excludes the carrying of concealed weapons from its reach. Therefore, according to the Department, the Act's delegation of authority to the counties and municipalities is permissible. We are unpersuaded. The manner in which a person "bears" a weapon, whether concealed or in plain view, is an **incident** of the right to bear arms. "It must be presumed that the people know the meaning of the words they use in constitutional provisions, and that they use them according to their plain, natural and usual significance and import. . . ." **See** . . . **Flaska v. State**, 51 N.M. 13, 22, 177 P.2d 174, 179 (1946). We believe it is unnecessary to go beyond the common sense meaning of "bear." Our conclusion that the manner of carrying a weapon is an incident of the right to bear arms for purposes of the prohibition against local regulation in Article II, Section 6 shall not be construed as resolving in any way the meaning of the constitutional phrase, "but nothing herein shall be held to permit the carrying of concealed weapons."

{8} Alternatively, the Department argues that this unconstitutional provision can be severed from the remainder of the Act.

> It is well established in this jurisdiction that a part of a law may be invalid and the remainder valid, where the invalid part may be separated from the other portions, without impairing the force and effect of the remaining parts, and if the legislative purpose as expressed in the valid portion can be given force and effect, without the invalid part, and, when considering the entire act it cannot be said that the legislature would not have passed the remaining part if it had known that the objectionable part was invalid.

Bradbury & Stamm Constr. Co. v. Bureau of Revenue, 70 N.M. 226, 230-31, 372 P.2d 808, 811 (1962); **accord** 2 Norman J. Singer, **Statutes and Statutory Construction** § 44:3, at 552-53 (6th ed., rev. 2001) ("The problem is twofold: the legislature must have intended that the act be separable, and the act must be capable of separation in fact."). In this case, we are faced with competing presumptions. We must first "bear[] in mind that every presumption is to be indulged in favor of the validity and regularity of the legislative act." **Bradbury & Stamm**, 70 N.M. at 231, 372 P.2d at 812. However, this presumption is tempered by the fact that the Act does not contain a severability clause. "The presence or absence of a severability clause merely provides one rule of construction which may be considered and may sometimes aid in determining legislative intent, 'but it is an aid merely; not an inexorable command.'" **Id.** (quoting **Dorchy v. Kansas**, 264 U.S. 286, 290, 68 L. Ed. 686, 44 S. Ct. 323 (1924) (Brandeis, J.)). Therefore, the absence of a severability provision in the Act creates a weak presumption that the Legislature did not intend to allow severability. **See** Singer, **supra**, § 44:9, at 594.

{9} Relying on the test established in **Bradbury & Stamm**, we must first determine whether Section 29-18-11(D) can be separated from the Act in such a way as to give force and effect to the other provisions of the Act. The legislation allowing individuals to carry a concealed handgun could operate independently of the local opt-out provision. Thus, we conclude that the removal of Section 29-18-11(D) from the Act would not impair the force and effect of the remaining provisions.

{10} Because the Act is capable of severance in fact, we must next determine whether the Legislature intended to allow the Act to stand in the event that Section 29-18-11(D) was declared invalid. We determine legislative intent in the context of severability by referring to the purpose of an act and by determining whether "the legislature would not have passed the remaining part if it had known that the objectionable part was invalid." **Bradbury & Stamm**, 70 N.M. at 231, 372 P.2d at 811. Because the Legislature did not articulate a specific purpose in the Act, we look at the entire Act to ascertain whether the Legislature would have passed the Act if it had known that Section 29-18-11(D) violated Article II, Section 6. **See** . . . **United States Brewers Ass'n v. Dir. of N.M. Dep't of Alcoholic Beverage Control**, 100 N.M. 216, 219, 668 P.2d 1093, 1096 (1983) ("In New Mexico, legislative intent must be determined primarily by the **legislation itself**.").

{11} Considering the Act as a whole, we believe it is clear that the Legislature intended to enact a scheme of optional, as opposed to mandatory, implementation. Section 29-18-11(D) permits municipalities and counties to adopt a more restrictive approach to concealed weapons. In addition to this delegation of power to local governments in Section 29-18-11(D), the Legislature also provided that "[a] concealed handgun license shall not be valid on tribal land, unless authorized by the governing body of an Indian nation, tribe or pueblo," NMSA 1978, § 29-18-10 (2001), and provided "authority for a private property owner to disallow the carrying of a concealed handgun on his [or her] property," Section 29-18-11(C). Considering this overall design of optional implementation, we do not believe that the Legislature would have enacted the Act if it believed that all municipalities and counties throughout the State would be required to allow the carrying of concealed handguns. **See** Singer, **supra**, § 44:7, at 583 ("If by sustaining only a part of a statute, the purpose of the act is changed or altered, the entire act is invalid."). If we were to invalidate Section 29-18-11(D) and leave the remaining provisions intact, we would be transforming an optional scheme into a largely mandatory one, contrary to the Legislature's intent. **See id.** § 44:13, at 603 ("To extend the scope of an act's operation by invalidating a provision of limitation while allowing the remainder to continue in effect invites criticism on the ground that it amounts to judicial legislation."). We thus conclude that Section 29-18-11(D) is so connected in subject and purpose with the Act as a whole that the Legislature would not have enacted the remainder of the Act if it had known that Section 29-18-11(D) was invalid. **See** . . . **Bradbury & Stamm**, 70 N.M. at 234, 372 P.2d at 814. Section 29-18-11(D) cannot be severed without frustrating the Legislature's intent, and therefore, we determine that the Act as a whole is unconstitutional.

{12} With respect to Petitioner's remaining argument that Article II, Section 6 prohibits the carrying of concealed weapons and restricts the Legislature's ability to enact laws permitting the carrying of concealed handguns, we need not reach this issue. Having determined that the Act is unconstitutional on the narrow ground of local regulation, we refrain from reaching the broader constitutional question presented in the petition. **Cf**. . . . **Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n**, 149 F.3d 679, 688 n.5 (7th Cir. 1998) ("It is a proper exercise of judicial restraint for courts . . . to decide constitutional attacks on the narrowest possible grounds and to avoid reaching unnecessary constitutional issues.").

III. CONCLUSION

{13} We determine that the Legislature's delegation of authority to local governments to prohibit the carrying of concealed weapons in

Section 29-18-11(D) violates the constitutional proscription against municipal and county regulation of an incident of the right to keep and bear arms in Article II, Section 6 of the New Mexico Constitution. We also conclude that Section 29-18-11(D) is not severable from the remainder of the Concealed Handgun Carry Act and that the Act as a whole is therefore unconstitutional. We hereby issue a peremptory writ of mandamus prohibiting the Department of Public Safety from promulgating rules pursuant to Section 29-18-11, from issuing licenses to carry concealed handguns pursuant to NMSA 1978, § 29-18-3 (2001), and from otherwise enforcing the requirements of the Act.

{14} IT IS SO ORDERED.

PATRICIO M. SERNA,
Chief Justice

JOSEPH F. BACA,
Justice

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2002-NMSC-029

Filing Date: September 6, 2002

Docket No. 27,144

ROSALINA AGUILERA,

Petitioner-Respondent,

v.

PALM HARBOR HOMES, INC., d/b/a MASTERPIECE HOUSING, NEWCO HOMES L.P., d/b/a PALM HARBOR VILLAGE, NEWCO HOMES, d/b/a C & S MAGNAHOMES, PALM HARBOR HOMES, L.P., MASTERPIECE HOUSING and NEWCO HOMES,

Respondents-Petitioners.

Original Proceeding on Certiorari
Theresa M. Baca, District Judge

Stiff & Ford, P.C.
Thomas L. Murphy
Albuquerque, NM

for Petitioners.

Robinson, Quintero & Lopez, P.C.
H. R. Quintero
Silver City, NM

for Respondent.

OPINION

SERNA, Chief Justice.

{1} Rosalina Aguilera purchased a mobile home from Palm Harbor Homes, Inc. In response to a dispute over the sale of the mobile home, Aguilera and Palm Harbor stipulated to a court order requiring arbitration. The three-member arbitration panel ruled in favor of Aguilera and awarded compensatory damages, as well as $ 100,000 in punitive damages. Aguilera then filed an application with the district court to confirm the award or to modify the award by increasing the amount of compensatory and punitive damages. Palm Harbor filed an application to vacate the award of punitive damages as exceeding the arbitrators' authority under New Mexico law. The district court confirmed the award of compensatory damages, treated the award of punitive damages as advisory, and awarded punitive damages in the amount recommended by the arbitration panel. Palm Harbor appealed the award of punitive damages to the Court of Appeals, which affirmed on the ground that the arbitrators had authority to award punitive damages. **Aguilera v. Palm Harbor Homes, Inc.**, 2001-NMCA-91, P28, 131 N.M. 228, 34 P.3d 617, **cert. granted**, 131 N.M. 363, No. 27,144 (2001). On certiorari, Palm Harbor contends that the Court of Appeals improperly declined to follow precedent from this Court, that the punitive damages award was invalid because it exceeded the arbitrators' authority, and that the district court erred in treating the award as a recommendation.

I. DISCUSSION

{2} In **Shaw v. Kuhnel & Associates**, 102 N.M. 607, 609, 698 P.2d 880, 882 (1985), this Court determined that courts, rather than arbitrators, should award punitive damages. Relying on this Court's opinion in **Shaw**, Palm Harbor argued to the district court that the punitive damages award must be vacated because the arbitration panel lacked authority to award punitive damages. **See** NMSA 1978, § 44-7-12(A) (repealed 2001) ("Upon application of a party, the court shall vacate an award where . . . the arbitrators exceeded their powers. . . ."). In response to this argument, the district court determined that it reserved jurisdiction over punitive

damages and that the arbitrators' award meant that it was a recommendation. The district court ruled that the arbitrators' award of punitive damages was "considered advisory and adopted by the Court." Palm Harbor argues to this Court that the district court erred in treating the award as a recommendation. We disagree.

{3} In **Stewart v. State Farm Mutual Automobile Insurance Co.**, 104 N.M. 744, 747, 726 P.2d 1374, 1377 (1986), the arbitrators, instead of awarding punitive damages, "merely found the amount of damages that a 'proper court' should award, if the court were persuaded that punitive damages were warranted." The trial court in **Stewart** noted the advisory quality of the arbitrators' decision and agreed "with the assessment of the arbitrators-who were the factfinders-on the question and amount of punitive damages." **Id.** We determined that "this is not an issue of the panel's exceeding its authority; it concerns only a realistic appraisal of the language used in the arbitrators' decision . . . and an inescapable recognition that the trial court concurred in the amount suggested by the panel." **Id.** In accordance with **Shaw** and **Stewart**, an arbitration panel operating under the Uniform Arbitration Act effective in the present case, NMSA 1978, §§ 44-7-1 to -22 (repealed 2001),[1] can recommend an award of punitive damages but should not make the award itself.

{4} In this case, the district court recognized that, based on this authority, the arbitration panel inappropriately labeled its determination of punitive damages an award instead of a recommendation. However, the district court independently determined that punitive damages were warranted and agreed with the amount determined by the arbitration panel. In effect, then, the district court simply modified the award of punitive damages to become a recommendation due to an imperfection in form caused by the arbitrators' failure to label its decision properly. **See** NMSA 1978, § 44-7-13(A)(3) (repealed 2001). Because the district court did not consider the arbitrators' award of punitive damages to be binding, the arbitrators' use of a mistaken form in rendering a decision on punitive damages did not "affect[] the merits of the controversy." **Id.** Palm Harbor contends that the district court was limited to either confirming or vacating the award; however, we note that Palm Harbor's motion to vacate the award referenced both Section 44-7-12 and Section 44-7-13. **See** § 44-7-13(C) ("An application to modify or correct an award may be joined in the alternative with an application to vacate the award."). We conclude that the district court's modification of the award was a proper application of **Shaw** and **Stewart**. We believe that the district court properly ensured that the arbitration panel did not exceed its authority and cautiously modified the award in a manner that was designed "to effect its intent," Section 44-7-13(B).

{5} Palm Harbor also argues that, even if the arbitrators' award could be characterized as a recommendation, the district court lacked a sufficient basis upon which to award punitive damages. However, in **United Technology & Resources, Inc. v. Dar Al Islam**, 115 N.M. 1, 6, 846 P.2d 307, 312 (1993), we recognized that the district court, in adopting a recommendation by the arbitrators,

> had before it the recommendation of the arbitration panel that no punitive damages be awarded, as well as the panel's apparent finding that there was no basis for a claim of bad faith breach of contract. These facts were sufficient to support the court's ruling effectively dismissing [the] claim for punitive damages.

Id. In the present case, the district court had before it the arbitrators' finding that Palm Harbor "breached [the] contract and warranty with Ms.

[1] Effective July 1, 2001, the version of the Uniform Arbitration Act applicable in the present case was replaced by a new Uniform Arbitration Act, NMSA 1978, §§ 44-7A-1 to -32 (2001). Under the new Act, "an arbitrator may award punitive damages . . . if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." NMSA 1978, § 44-7A-22(a) (2001). Section 44-7A-22(a) supersedes **Shaw** for actions governed by the new Act, **see** NMSA 1978, §§ 44-7A-3(2001), -32 (2001).

Aguilera, thereby violating the Manufactured Housing Act[, NMSA 1978, §§ 60-14-1 to -20 (1975, as amended through 2000),] and entitling Ms. Aguilera to the remedies provided in the Unfair Trade Practices Act," NMSA 1978, §§ 57-12-1 to -22 (1967, as amended through 1999). The district court also had the arbitrators' findings of the amount of compensatory damages suffered by Aguilera and the amount of punitive damages that would be warranted as a result of Palm Harbor's actions. Thus, as in **United Technology**, the district court had adequate information in the record to assess punitive damages against Palm Harbor. **See** NMSA 1978, § 60-14-19(C) (1983) (stating that a manufacturer's or dealer's failure "to comply with the warranty provisions of the Manufactured Housing Act . . . is an unfair or deceptive trade practice in addition to those practices defined in the Unfair Practices Act and is actionable pursuant to the Unfair Practices Act," including "all remedies available in the Unfair Practices Act"); NMSA 1978, § 57-12-10(B) (1987) ("Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages . . . to the party complaining of the practice.").

{6} As noted above, the Court of Appeals did not affirm on the basis of the district court's rationale. Relying on the proposition that, "when we determine that our Supreme Court would conclude that the precedent is no longer good law and would overrule it given the opportunity, we will decline to follow the precedent," **Aguilera**, 2001-NMCA-91, P11, the Court of Appeals held that arbitrators have authority to award punitive damages. 2001-NMCA-91 at P23. In deference to and in recognition of the vital role the Court of Appeals serves in the New Mexico judiciary, we have held "that the Court of Appeals has authority to question uniform jury instructions in cases in which the instruction has not been challenged previously and to amend, modify, or abolish the instruction if it is erroneous." **State v. Wilson**, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994). Moreover, "this Court encourages the Court of Appeals to express its rationale for any reservations it might harbor over Supreme Court precedent." **Id.** However, as Chief Justice Ransom expressed in **Wilson**, "the Court of Appeals, nonetheless, remains bound by Supreme Court precedent." **Id.** Because we have determined that the district court's treatment of the arbitrators' award as a recommendation was a proper application of **Stewart**, it is unnecessary to the resolution of this case to assess whether, as the Court of Appeals has suggested, **Shaw** should be overruled. As a result, we refrain from reaching this question, especially considering that **Shaw** has been superseded by statute for actions governed by the new Uniform Arbitration Act. We also conclude that the Court of Appeals need not have addressed the issue whether **Shaw** should be overruled. For these reasons, we reverse that portion of the Court of Appeals' opinion discussing the continued validity of **Shaw**. Finally, based on our disposition in this case, we conclude that it is unnecessary for us to consider Aguilera's argument, raised for the first time in this Court, that **Shaw** conflicts with and is preempted by federal law.

II. CONCLUSION

{7} We affirm, as a proper application of this Court's opinion in **Stewart**, the district court's decision to treat the arbitrators' award of punitive damages as a recommendation. We also affirm the district court's award of punitive damages.

{8} IT IS SO ORDERED.

PATRICIO M. SERNA,
Chief Justice

WE CONCUR:

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2002-NMSC-030

Filing Date: September 6, 2002

Docket No. 27,252

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff,

v.

CAROL BALLARD, individually and as personal representative of the deceased, ERIKA BALLARD, and as mother, next friend, and natural guardian of CARLA and CHAZ BALLARD, minors; GEORGE EVANS, personal representative of the ESTATE OF ROBERT L. EVANS, deceased; and ERIC C. BALLARD, individually and as father, next friend and natural guardian of CARLA and CHAZ BALLARD,

Defendants.

Certification from the United States District Court for the District of New Mexico
Leslie C. Smith, United States Magistrate Judge

Sanders & Westbrook, P.C.
Maureen A. Sanders
Albuquerque, NM

for Defendants.

Miller, Stratvert & Torgerson, P.A.
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for Amicus Curiae New Mexico Trial Lawyers Association.

OPINION

SERNA, Chief Justice.

{1} This case involves a single vehicle accident that occurred within New Mexico. Plaintiff State Farm Insurance Company seeks a declaration in the United States District Court for the District of New Mexico that the Georgia policy it issued to Defendant Carol Ballard limits liability coverage to $ 50,000. This Court accepted certification from Judge Leslie C. Smith on the question of whether

> New Mexico law applies to interpret a step down provision in a Georgia automobile liability insurance policy . . . where the non-resident insureds are injured in a one-vehicle accident in New Mexico through no fault of any New Mexico citizen and where the insureds receive significant medical care in New Mexico paid for by the county Indigent Hospital and County Health Care Act.

See NMSA 1978, § 39-7-4 (1997) ("The supreme court of this state may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision or statute of this state."). We conclude that New Mexico law applies in this case and that, under New Mexico law, the family exclusion step down provision contained in the Georgia policy is invalid.

I. FACTS AND BACKGROUND

{2} Carol Ballard and two of her children, Carla and Chaz, were injured in a single vehicle

accident on August 11, 1998, in Luna County, New Mexico. Her third child, Erika Ballard, and the driver, Robert Evans, a family friend, died as a result of this accident. These individuals were not residents of this state, and no New Mexicans were involved in the accident.

{3} Carol and Eric Ballard, the parents of the three children, divorced in March of 1998 in California. Prior to the divorce, they purchased automobile insurance from State Farm. About one month after the divorce, Carol Ballard moved to Georgia with her two daughters while her son remained with Eric Ballard. She purchased automobile insurance from a State Farm agent in Georgia, stating that she wanted the same coverage which she had in California.

{4} The Georgia policy contained limits of $ 100,000/300,000 for liability and $ 100,000/300,000 for uninsured motorist coverage. The policy does not include a choice of law provision. The policy contains a family exclusion step down provision:

> THERE IS NO COVERAGE:
>
> . . .
>
> 2. FOR ANY BODILY INJURY TO:
>
> c. ANY INSURED OR ANY MEMBER OF AN INSURED'S FAMILY RESIDING IN THE INSURED'S HOUSEHOLD:
>
> (1) IF INTRA-FAMILIAL TORT IMMUNITY APPLIES; OR
>
> (2) TO THE EXTENT THE LIMITS OF LIABILITY OF THIS COVERAGE EXCEED THE LIMITS OF LIABILITY REQUIRED BY LAW IF INTRA FAMILIAL TORT IMMUNITY DOES NOT APPLY.

{5} The Ballards' son expressed his desire to join his mother in Georgia a few months later; as a result, Carol Ballard, her two daughters, and Robert Evans drove to California to bring the child to Georgia. While returning to Georgia, the accident occurred. Carla Ballard was seriously injured and required treatment for several months at a hospital in Las Cruces, New Mexico, as well as outpatient care until June of 2000. The hospital costs were apparently paid by the Dona Ana County indigent funds. Carol Ballard lived in Las Cruces from August 1998 until July 2000 for her daughter's care, while working as a medical transcriptionist for her Georgia employer. Plaintiff State Farm paid her approximately $ 17,000 for medical benefits as well as liability coverage of $ 50,000.

{6} Plaintiff argues that Georgia law applies and that its liability under the policy is limited to the $ 50,000 amount required under the New Mexico Mandatory Financial Responsibility Act, NMSA 1978, §§ 66-5-201 to -239 (1983, as amended through 2001) (NMMFRA), by operation of the step down provision contained in the policy exclusion. Defendants argue that New Mexico law applies and that coverage is not limited to $ 50,000 because the familial exclusion provision is invalid under New Mexico law.

II. DISCUSSION

{7} "The rights and liabilities of persons injured in automobile accidents are determined under the laws of the state where the accident happened." **State Farm Auto. Ins. Co. v. Ovitz**, 117 N.M. 547, 549, 873 P.2d 979, 981 (1994). The parties agree that New Mexico law therefore applies to the issues of tort liability and damages. Plaintiff recognizes that intra-familial tort immunity is invalid in New Mexico and thus argues that, under the step down provision, the coverage limits of $ 100,000/300,000 "should be reduced so as not to 'exceed the limits of liability required by law,'" or $ 25,000/50,000 of the NMMFRA. Defendants argue that the step down provision is unenforceable. "The policy of New Mexico is to interpret insurance contracts according to the law of the place where the contract was executed," which is referred to as lex loci contractus. **Shope v. State Farm Ins. Co.**, 1996-NMSC-52, P9, 122 N.M. 398, 925 P.2d 515; **accord** . . . **Ovitz**, 117 N.M. at 549, 873 P.2d at 981. Under the facts of this case, applying the lex loci contractus rule,

we would rely on Georgia law to interpret the policy.

{8} Defendants argue that Georgia law would not support enforcement of the provision based upon ambiguities in the policy and Carol Ballard's reasonable expectations. We disagree. Georgia appellate courts have held that step down provisions similar to the one at issue in this case are valid. **E.g.**, **Cotton States Mut. Ins. Co. v. Coleman**, 242 Ga. App. 531, 530 S.E.2d 229, 230-31 (Ga. Ct. App. 2000); **Ga. Farm Bureau Mut. Ins. Co. v. Burch**, 222 Ga. App. 749, 476 S.E.2d 62, 63 (Ga. Ct. App. 1996). However, our recognition of Georgia law regarding familial exclusion does not end the inquiry. Defendants argue that application of Georgia's law, which would limit their recovery under the step down provision, is precluded by New Mexico law.

{9} "To overcome the rule favoring the place where a contract is executed, there must be a countervailing interest that is fundamental and separate from general policies of contract interpretation." **Shope**, 1996-NMSC-52, P9. Application of the rule must result in a violation of "fundamental principles of justice" in order to apply New Mexico law rather than the law of the jurisdiction where the contract was signed. **Shope**, 1996-NMSC-52, P7; see **Reagan v. McGee Drilling Corp.**, 1997-NMCA-14, P9, 123 N.M. 68, 933 P.2d 867 ("The threshold . . . is whether giving effect to another state's policies would 'violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal' of the forum state.") (quoted authority omitted).

{10} In **Shope**, this Court addressed stacking of insurance coverage, which was specifically precluded under the insurance contract in accordance with Virginia law, where the policy was purchased. 1996-NMSC-52, PP3, 6. We explained that, "while New Mexico public policy does favor the stacking of coverage in underinsured motorist cases, our rationale in establishing this policy did not concern fundamental principles of justice, but focused on the expectations of the insured." **Id.** 1996-NMSC-52 at P7 (citation omitted). We concluded that, "while we interpret New Mexico insurance contracts to avoid repugnancy in clauses that prohibit stacking of coverages for which separate premiums have been paid, this rule is one of contract interpretation that does not rise to the level of a fundamental principle of justice." **Id.** 1996-NMSC-52 at P9. Thus, in the present case, we address whether giving effect to Plaintiff's step down provision limiting Defendants' recovery by applying Georgia's familial exclusion law violates fundamental principles of justice, warranting application of New Mexico law despite the fact that the contract at issue was executed in Georgia. In contrast to the issue presented in **Shope**, Plaintiff's step down provision is more than a matter of contract interpretation; we determine that the reduction in coverage for a discrete group of individuals in this context, based solely on their familial relationship to the insured, implicates a fundamental principle of justice.

{11} This Court has held that exclusion of coverage for insureds and family members violates the requirements of the NMMFRA as well as our precedent, and that such exclusions are thus contrary to New Mexico public policy. **Estep v. State Farm Mut. Auto. Ins. Co.**, 103 N.M. 105, 107-11, 703 P.2d 882, 884-88 (1985). In **Estep**, we reiterated the abandonment of the common law rule of interspousal immunity: "New Mexico has established that interspousal immunity is an 'archaic precept' out of tune with and contrary to public policy. **Maestas v. Overton**, 87 N.M. 213, 531 P.2d 947 (1975)." **Id.** 103 N.M at 108, 703 P.2d at 885.

> Since a wife in this jurisdiction has a cause of action for injuries suffered because of her husband's negligence, it is difficult to discern how a fundamental public policy purpose of the Financial Responsibility Act - **i.e.**, to provide financial protection to those who sustain injury through the negligence of motor vehicle owners or operators-is served, or how the requirement of the Act-**i.e.**, to provide proof of financial responsibility for losses from liability imposed by law which arise from the use

> of an insured motor vehicle-is observed, when the family exclusion clause in the policy specifically carves out from coverage a considerable segment of the

class of individuals the NMMFRA is designed to protect. **Id.** We held that "State Farm's inclusion of a restriction against coverage for household members is . . . a violation of the requirements of the [NMMFRA] and a repudiation of New Mexico's public policy." **Id.** 103 N.M. at 109, 703 P.2d at 886.

{12} Plaintiff argues that "the **Estep** Court did not find that the exclusion violated any public policy other than that expressed by the" NMMFRA. We disagree. While **Estep** discussed and rejected interspousal immunity in the context of the NMMFRA, the analysis was directed to familial exclusion as contrary to protecting innocent accident victims. See **id.** 103 N.M. at 109, 703 P.2d at 886. As this Court expressed in **Maestas**, "the rule [of interspousal immunity] is not one made or sanctioned by the legislature, but rather is one that depends for its origins and continued viability upon the common law." 87 N.M. at 214, 531 P.2d at 948 (quoted authority omitted). Familial exclusion, whether in relation to insurance contracts, as in **Estep**, or tort law, as in **Maestas**, is an anachronism, not simply because it conflicts with the NMMFRA, but because "the reasons for the rule are no longer valid." **Flores v. Flores**, 84 N.M. 601, 603, 506 P.2d 345, 347 (rejecting interspousal immunity for intentional torts), **cited with approval in** . . . **Maestas**, 87 N.M. at 214, 531 P.2d at 948.

{13} This Court, in **Estep**, rejected the insurer's argument that the potential for fraudulent or collusive claims justified a family exclusion clause: "denial of negligence actions to an entire class of persons-here, all family members-cannot be tolerated simply because some undefined portions of that class might instigate fraudulent lawsuits." 103 N.M. at 109, 703 P.2d at 886. We also rejected the insurer's argument that freedom of contract supported such exclusions, noting that

> the effect of the policy's exclusion on third parties who are or may be ignorant of the insurance arrangements and unable or incompetent to contract for coverage for themselves, illustrates the fragility of any assertion that the terms of this or similar insurance policies truly are the product of conscious bargaining between the parties.

Id. at 109-10, 703 P.2d at 886-87. "In either case, [whether a named insured or the family of the insured,] an innocent accident victim may suffer financial hardship if such clauses are validated. Consequently, we find that such an exclusion also violates public policy and the statutes, and is therefore void." **Id.** at 110, 703 P.2d at 887 (quoting **Hughes v. State Farm Mut. Auto. Ins. Co.**, 236 N.W.2d 870, 886 (N.D. 1975)). We take this opportunity to reaffirm that a restriction of this type limiting coverage for household members violates New Mexico law and is a repudiation of our public policy.

{14} Plaintiff asserts that the rationale of the step down clause in its policy "is that liability coverage is designed to protect insureds from liability they may incur to third parties, not to protect the insureds for their own injuries," thus resulting in an ability to provide liability coverage at a reduced cost. Plaintiff argues that the NMMFRA "requires a minimal amount of coverage to avoid catastrophic financial hardship and its purpose should not be extended," and that there is "no public policy in New Mexico that compels application of New Mexico law." We disagree. Carol Ballard did not purchase the minimum amount of insurance required by law; she purchased liability coverage of $ 100,000/$ 300,000. The step down provision and the fact that Carla Ballard is her daughter and resides with her limits her recovery under the policy to the $ 25,000/50,000 amount. As a matter of public policy, Carla Ballard is as much an "innocent victim" of the accident as an unrelated individual would be under the policy. Thus, while the step down provision does not implicate the policy underlying the minimum insurance required by law because it provides that minimum amount, it does implicate the NMMFRA's broader protection of innocent accident victims. Once Plaintiff sold Carol Ballard insurance that exceeded the

"limits required by law," this coverage applies equally to all accident victims, whether the victim is a family member or not, as a matter of New Mexico public policy.

{15} Plaintiff points out that Georgia has also rejected a familial exclusion provision that resulted in elimination of all coverage as against public policy. **See** . . . **Stepho v. Allstate Ins. Co.**, 259 Ga. 475, 383 S.E.2d 887, 888-89 (Ga. 1989). Plaintiff argues that **Estep** is distinguishable based on the fact that **Estep** addressed a provision which excluded all liability coverage, rather than limiting the recovery to the amount defined within the NMMFRA, as Plaintiff is attempting with the policy in the present case. We disagree. Our Court of Appeals has addressed an almost identical household exclusion provision that limited coverage which "exceeds the limits of liability required by the New Mexico Financial Responsibility law." **Martinez v. Allstate Ins. Co.**, 1997-NMCA-100, P17, 124 N.M. 36, 946 P.2d 240. In **Martinez**, 1997-NMCA-100, PP1, 18, the Court of Appeals concluded that this household exclusion provision, which the insurance company used to reduce benefits otherwise due for underinsured motorist coverage, was invalid. The Court of Appeals held that this limiting provision violated the policies underlying the uninsured motorist statute, despite the fact that the limiting provision applied only to amounts exceeding the statutory minimum of the NMMFRA. **See id.** Like **Martinez**, the policy of protecting innocent accident victims within the NMMFRA and the policy against familial exclusion or limitation extend beyond the minimum amount of coverage required by law. Thus, in New Mexico, family exclusion provisions such as Plaintiff's, whether limiting or completely excluding benefits based on familial status, violate public policy and fundamental principles of justice.

{16} Plaintiff argues that **Martinez** is inapplicable because it addressed an uninsured motorist policy rather than liability insurance, and that uninsured motorist coverage is distinguishable because it creates a legal entitlement to recovery. As support for its argument, Plaintiff relies upon **State Farm Mutual Automobile Insurance Co. v. Progressive Specialty Insurance Co.**, 2001-NMCA-101, P1, 131 N.M. 304, 35 P.3d 309, which held that the NMMFRA, as compared to the uninsured motorist statutes, does not require coverage for punitive damages. We reject Plaintiff's argument. **Progressive** is inapplicable; in the present case, Defendants are attempting to recover compensatory, not punitive, damages. See **id.** 2002-NMCA-101 at P13 ("'Financial hardship,' whether catastrophic or otherwise, is far less evident from unrequited punitive damages."); **Torres v. El Paso Elec. Co.**, 1999-NMSC-29, P30, 127 N.M. 729, 987 P.2d 386 (discussing the purposes of punitive damages as punishing a wrongdoer and deterring future tortious conduct). Unlike punitive damages, compensatory damages protect innocent accident victims consistent with the "fundamental public policy purpose of the Financial Responsibility Act." **Estep**, 103 N.M. at 108, 703 P.2d at 885.

{17} We note that Plaintiff's argument does have support from other jurisdictions. **See, e.g.**, **Allstate Ins. Co. v. Hart**, 327 Md. 526, 611 A.2d 100, 104 (Md. 1992) (holding that, "in light of the limited nature of Maryland's public policy against household exclusion clauses and the express statutory permissibility of household exclusion clauses under some circumstances, we cannot conclude that there is a sufficiently strong Maryland public policy against household exclusion clauses that would justify disregarding the **lex loci contractus** principle under the facts of this case") (citation omitted). However, in **Hart**, relied upon by Plaintiff, the Court of Appeals of Maryland noted that the state policy disapproving household exclusions was based solely on statutory interpretation and that household exclusions above the minimum statutory amount are valid in Maryland. **Id.** at 103. The court concluded that, "even if [the law of the state where the vehicle was registered] were not applied, under the circumstances of this case the household exclusion clause would appear to be valid under Maryland law." **Id.** at 103-04. As discussed above, our Court of Appeals has held that even household exclusions above a statutory minimum are invalid in this State. See **Martinez**, 1997-NMCA-100, P18.

{18} Based upon our established disapproval of family exclusion clauses, we conclude that it is inappropriate to apply the lex loci contractus rule under the facts of this case and instruct the United States District Court to apply New Mexico law rather than Georgia law. Because we answer the certified question on this basis, we need not address the parties' other contentions.

III. CONCLUSION

{19} We conclude that the lex loci contractus rule does not apply under the facts of this case, and thus, Georgia law does not determine whether the provision is valid. We reaffirm our rejection of family exclusion provisions as offensive to New Mexico public policy. Therefore, we answer the certified question affirmatively: New Mexico law should apply to interpret the step down provision in the Georgia automobile liability insurance policy.

{20} IT IS SO ORDERED.

PATRICIO M. SERNA,
Chief Justice

WE CONCUR:

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2003-NMSC-011

Filing Date: May 15, 2003

Docket No. 27,258

FRIEDA PADILLA,

Plaintiff-Respondent,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Petitioner.

Original Proceeding on Certiorari
Art Encinias, District Judge

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OPINION

SERNA, Justice.

{1} On respective motions for rehearing by the parties, the opinion previously filed in this matter is hereby withdrawn and the following substituted in its place. The parties' motions for rehearing are otherwise denied, as are the requests filed by amici.

{2} Plaintiff-Respondent Frieda Padilla purchased automobile insurance from Defendant-Petitioner State Farm Mutual Automobile Insurance Company. Padilla was involved in an automobile accident with a third party. Following a settlement with the third party's insurance company for the liability limit of $ 25,000, Padilla filed a claim against her own insurance company, State Farm, for uninsured motorist coverage under four separate policies, each of which provided for uninsured motorist coverage with limits of $ 25,000 per person and $ 50,000 per accident. Padilla's insurance contract with State Farm provided for mandatory arbitration, which would be binding on both parties for any award of damages that does not exceed the limits of the Mandatory Financial Responsibility Act, NMSA 1978, §§ 66-5-201 to -239 (1983, as amended through 2001) (MFRA). For awards over this amount, the contract provided that the arbitration was subject to de novo appeal by either party. Padilla sought a declaratory judgment in district court nullifying the de novo appeal language as contrary to New Mexico law. The district court determined that a case from this Court, **Bruch v. CNA Ins. Co.**, 117 N.M. 211, 870 P.2d 749 (1994), was controlling and ruled in favor of State Farm. The Court of Appeals reversed, determining that the contractual provision of a de novo appeal violates public policy and declaring the contract provision void. **Padilla v. State Farm Mut. Auto. Ins. Co.**, 2002-NMCA-1, P1, 131 N.M. 419, 38 P.3d 187, **cert. granted**, No. 27,258, 131 N.M. 563, 40 P.3d 1008 (2002). This Court then granted State Farm's petition

for writ of certiorari to the Court of Appeals. We address whether the "escape hatch" arbitration clause that allows either party to the contract a de novo appeal of awards in excess of the limits of the MFRA violates New Mexico public policy. We conclude that the clause is in violation of public policy, but we select a different remedy than the one selected by the Court of Appeals.

I. BRUCH AND THE COURT OF APPEALS' OPINION

{3} In **Bruch**, the insured filed a claim with her insurance company for uninsured motorist benefits. 117 N.M. at 212, 870 P.2d at 750. The insurance contract contained an arbitration provision that mirrors the provision at issue in this case, under which arbitration would be binding for amounts not exceeding the minimum limit provided by law and would be subject to a de novo appeal by either party for any higher amounts. **Id.** Like Padilla, the insured in **Bruch** argued "that the insurance clause that allows [the insurance company] to request a trial violates public policy." **Id.** at 213, 870 P.2d at 751. This Court unequivocally rejected that argument. The Court concluded that "our Legislature has not expressed its intent that an arbitration award should be final in cases in which the parties have provided to the contrary by contract; the [Uniform Arbitration] Act[, NMSA 1978, §§ 44-7-1 to -22 (repealed 2001),] is supportive of the parties' right to contract for arbitration." **Id.** We further held that the provision is not "repugnant to public policy." **Id.**

{4} The Court of Appeals concluded that **Bruch** was distinguishable from the present case because this Court had not considered the specific arguments and specific authority advanced by Padilla. **Padilla**, 2002-NMCA-1, PP1, 9. The Court of Appeals stated that in **Bruch**

> the Supreme Court made absolutely no mention of the arguments . . . that an arbitration provision providing for nonbinding arbitration where the insured recovers more than the minimum limit of uninsured motorist coverage violates the superintendent's regulations or the Unfair [Insurance] Practices Act[, NMSA 1978, §§ 59A-16-1 to -30 (1984, as amended through 2001)], or is otherwise contrary to the public policy manifested in the uninsured motorist statute[, NMSA 1978, § 66-5-301 (1983)].

Padilla, 2002-NMCA-1, P9. [1] The Court of Appeals concluded that **Bruch** is not authority for propositions not considered and "does not necessarily control the outcome of the present case." **Id.** 2002 MNCA 1, P10. We disagree.

{5} We believe that the principle that cases do not stand for propositions not considered is inapplicable in this context. This principle is intended to dissuade a later court from attributing meaning to an earlier opinion that was not contemplated by its drafters. **See Sangre de Cristo Dev. Corp. v. City of Santa Fe**, 84 N.M. 343, 347-48, 503 P.2d 323, 327-28 (1972) ("This Court, by mere inference or presumption, cannot logically be considered to have overruled the long

[1] We note that even though the Court of Appeals specified three new arguments made by Padilla, it rejected Padilla's arguments regarding insurance regulations and unfair claims practices under NMSA 1978, § 59A-16-20(K) (1997), **Padilla**, 2002-NMCA-1, PP14, 22, and relied only on the argument that the provision is contrary to the public policy contained in the uninsured motorist statute, **e.g.**, **id.** 2002-NMCA-1, P20 ("We conclude that public policy, as manifested in our uninsured motorist statute, distinguishes the present case from **Bruch**."). The Court of Appeals viewed **Bruch** as relying only on the public policy contained in the Uniform Arbitration Act and as having not considered the uninsured motorist statute. **Id.** 117 N.M. 211, P15. However, **Bruch** involved a claim for uninsured motorist coverage and discussed **Dairyland Insurance Co. v. Rose**, 92 N.M. 527, 591 P.2d 281 (1979), **Bruch**, 117 N.M. at 213, 870 P.2d at 751, which analyzed the relationship between the Uniform Arbitration Act and the uninsured motorist statute. While the policies underlying the uninsured motorist statute were not specifically discussed, we believe that the consideration of these policies is implicit in the conclusion that the provision is not "repugnant to public policy." **See Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.**, 19 Cal. 4th 1182, 969 P.2d 613, 620, 81 Cal. Rptr. 2d 521 (Cal. 1999) ("It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court."). Therefore, we do not believe that Padilla's argument concerning the uninsured motorist statute distinguishes this case from **Bruch**.

line of cases . . . which have expressly dealt with the subject of sovereign immunity."). We do not view this principle as applying to the mere citation to new authorities or even to advancing new reasons for reaching a different conclusion on an issue that was actually considered by this Court in the earlier case. **See Fernandez v. Farmers Ins. Co.**, 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) ("The question whether judicial review of questions of law raised by an arbitration award is permitted under the Arbitration Act was not argued or briefed in [two earlier decisions]. Thus, neither of those decisions discussed the **issue** decided here.") (emphasis added). Instead, we view arguments of this nature as a request to overrule the earlier decision. If the mere citation of new authority or even reliance on a different justification than was presented in a prior case were sufficient to strip a case of precedential value, the doctrine of stare decisis would virtually disappear.

{6} **Bruch** addressed the question raised in this case: whether an uninsured motorist clause in an insurance contract providing for a de novo appeal from arbitration awards over a specified amount violates public policy in New Mexico. The Court of Appeals did not determine that the present case involves a different issue than **Bruch** or facts that distinguish this case from the analysis in **Bruch**. Padilla's argument in this case is that **Bruch** was wrongly decided. Padilla relies on new cases and new arguments in order to undermine the rationale of **Bruch**, even devoting an entire section of her brief to an argument that State Farm's escape hatch provision violates the Uniform Arbitration Act. This argument directly contradicts the holding in **Bruch** that "the [Uniform Arbitration] Act is supportive of the parties' right to contract for arbitration." 117 N.M. at 213, 870 P.2d at 751. Even though the Court of Appeals concluded that **Bruch** was distinguishable, there is no question that, in order for the Court of Appeals' opinion to stand, the holding in **Bruch** that contract provisions of this nature do not violate public policy would have to be viewed as overruled. In other words, the holding by the Court of Appeals that this contractual provision violates public policy and cannot preclude an insured from enforcing an arbitration award to the extent of the minimum limits in effect overrules the holding in **Bruch** that the insurer is entitled to enforce the provision as written. Therefore, because the issue in the present case, whether the contract violated public policy, was addressed by this Court in **Bruch**, we conclude that **Bruch** is authority for this considered proposition and, as determined by the district court, is binding precedent in this case. **State v. Wilson**, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994) (stating that "the Court of Appeals . . . remains bound by Supreme Court precedent"). The question we must consider on certiorari, then, is whether Padilla has articulated a sufficient reason to overrule **Bruch**. Although we disagree with the Court of Appeals that this case is distinguishable from **Bruch**, we believe that the policy arguments made by Padilla, and adopted by the Court of Appeals, provide a compelling reason to overrule **Bruch** and conclude that the holding in **Bruch** is flawed. **See Wilson**, 116 N.M. at 796, 867 P.2d at 1178 ("This Court encourages the Court of Appeals to express its rationale for any reservations it might harbor over Supreme Court precedent.").

II. STARE DECISIS

{7} The principle of stare decisis dictates adherence to precedent. This doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." **Payne v. Tennessee**, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991). Therefore, "the doctrine of stare decisis is of fundamental importance to the rule of law," **Welch v. Tex. Dep't of Highways & Pub. Transp.**, 483 U.S. 468, 494, 97 L. Ed. 2d 389, 107 S. Ct. 2941 (1987), and "it lies at the very core of the judicial process of interpreting and announcing law." **Trujillo v. City of Albuquerque**, 1998-NMSC-31, P33, 125 N.M. 721, 965 P.2d 305. While "**stare decisis** is not an inexorable command," **Payne**, 501 U.S. at 828, we require a compelling reason to overrule one of our prior cases.

Trujillo, 1998-NMSC-31, P34; **accord Arizona v. Rumsey**, 467 U.S. 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984) ("Any departure from the doctrine of stare decisis demands special justification.").

> Particular questions must be considered before overturning precedent: 1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule "no more than a remnant of abandoned doctrine;" and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have "robbed the old rule" of justification.

Trujillo, 1998-NMSC-31, P34 (quoting **Planned Parenthood v. Casey**, 505 U.S. 833, 855, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)). "This Court always demonstrates the highest regard for stare decisis, but when one of the aforementioned circumstances convincingly demonstrates that a past decision is wrong, the Court has not hesitated to overrule even recent precedent." **Id.** 1998-NMSC-31, P35.

III. PUBLIC POLICY

{8} As stated previously, we determined in **Bruch** that a contractual provision like the one in the instant case, which provides for mandatory arbitration that is binding as long as the award does not exceed the limits of the MFRA and is subject to a de novo appeal by either party for higher awards, does not offend public policy. 117 N.M. at 213, 870 P.2d at 751. We did not believe that the contractual provision at issue violated public policy, despite the fact that it allowed de novo appeals only under the limited circumstance of an award exceeding statutory limits. **See id.** We now revisit this determination.

{9} We will not enforce a contractual provision that violates public policy. **Bruch**, 117 N.M. at 213, 870 P.2d at 751; **accord Phoenix Indem. Ins. Co. v. Pulis**, 2000-NMSC-23, P20, 129 N.M. 395, 9 P.3d 639. We agree with Padilla that the de novo appeal provision in this insurance contract contravenes the policies underlying the uninsured motorist statute. In New Mexico, insurers providing liability coverage must offer, subject to an insured's right of rejection, uninsured and underinsured motorist coverage for the minimum limits contained in NMSA 1978, § 66-5-215 (1983) 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(A). This statute

> embodies a public policy of New Mexico to make uninsured motorist coverage a part of every automobile liability insurance policy issued in this state, with certain limited exceptions. The statute was intended to expand insurance coverage and 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). "The legislative purpose of this law is to place the insured in the same position as to the recovery of damages that he [or she] would have been in had the tortfeasor had liability insurance." **State Farm Mut. Auto. Ins. Co. v. Maidment**, 107 N.M. 568, 572, 761 P.2d 446, 450. Relying on this important public policy, we interpreted Section 66-5-301 to provide for the stacking of multiple uninsured motorist policies purchased by the insured, **Schmick v. State Farm Mut. Auto. Ins. Co.**, 103 N.M. 216, 219, 704 P.2d 1092, 1095 (1985), and New Mexico courts have invalidated contract provisions in uninsured motorist policies that excluded coverage of punitive damages, **Stinbrink v. Farmers Ins. Co. of Ariz.**, 111 N.M. 179, 180-81, 803 P.2d 664, 665-66 (1990), that provided for the splitting of costs of arbitration, **id.** at 181-82, 803 P.2d at 666-67, that excluded coverage while occupying a vehicle other than the one insured, **Chavez v. State Farm Mut. Auto. Ins. Co.**, 87 N.M. 327, 329-30, 533 P.2d 100,

102-03 (1975), that prevented stacking through ambiguous language, **Schmick**, 103 N.M. at 220-21, 704 P.2d at 1096-97, or through clear and unambiguous language, **Jimenez v. Found. Reserve Ins. Co.**, 107 N.M. 322, 324-25, 757 P.2d 792, 794-95 (1988), and that excluded household members from coverage, **Martinez v. Allstate Ins. Co.**, 1997-NMCA-100, P18, 124 N.M. 36, 946 P.2d 240.

{10} On its face, the provision at issue in the present case creates an unfair limitation on an insured's access to a de novo appeal and creates an inequity in the certainty of an arbitration award. Under the contract provision, issues of both the liability of the uninsured motorist and damages are subject to arbitration.[2] In the event that an award exceeds the minimum limits of the MFRA, all issues decided by arbitration are subject to de novo appeal. As a result, a finding in favor of State Farm on the issue of liability, i.e., a finding that the uninsured driver is not liable, will never be subject to de novo appeal, while a finding in favor of an insured that the uninsured motorist is liable will be put at risk in the event that damages exceed the statutory minimum, because there could be a finding of no liability in the de novo appeal. In addition, with respect to findings on the issue of damages, although State Farm notes that the de novo appeal is available to both parties and correctly observes that an insured might wish to appeal an award that exceeds the statutory minimum but is lower than the damages requested, we believe that the provision unreasonably benefits the insurer over an insured.

> Although facially equal, such escape hatch clauses are not truly equal in their effect on the parties. This is true because both parties are bound by a low award, when an insurance company is unlikely to appeal, and not bound when there is a high award, when an insurance company is more likely to appeal. Thus, the benefits of the clause truly only favor the insurer, which can use the clause to escape the unwary claimant.

Parker v. Am. Family Ins. Co., 315 Ill. App. 3d 431, 734 N.E.2d 83, 85, 248 Ill. Dec. 375 (Ill. App. Ct. 2000) (citations omitted); **accord Schmidt v. Midwest Family Mut. Ins. Co.**, 426 N.W.2d 870, 873 (Minn. 1988) ("Though [the insured] was afforded a theoretical contract right to demand a trial de novo following arbitration, as a practical matter any benefit to him flowing from that right is in reality ephemeral. Rarely, if ever, would one in his position assert it."). We believe that this inequity only serves to exacerbate the already unequal bargaining position occupied by the insured, **see Sanchez v. Herrera**, 109 N.M. 155, 159, 783 P.2d 465, 469 (1989), and gives the insurer undue leverage to compel an insured to accept an unfavorable settlement.

{11} We also agree with the Court of Appeals that the de novo appeal provision interferes with the statutory goal of placing the insured in the same position for the recovery of damages as he or she would have been in had the tortfeasor carried liability insurance. **See Padilla**, 2002-NMCA-1, P17. The de novo appeal provision forces an insured to undergo costly sequential litigation in order to secure an award of damages, without also receiving the corresponding benefit of being able to seek relief from an unfavorable judgment. The provision thus "unreasonably diminishes the statutorily mandated coverage." **Dominguez v. Dairyland Ins. Co.**, 1997-NMCA-65, P10, 123 N.M. 448, 942 P.2d 191.

{12} We do not believe that the Legislature intended to allow insurers to impose financial disincentives on the recovery of damages to which the insured is entitled based on the insured's purchase of additional insurance that the insurer is statutorily mandated to offer. We believe that this provision creates an undue chilling effect on uninsured motorist claims. We are particularly disturbed by the potential chilling effect that the provision at issue in this case might have on an insured's right to stacking. In **Allstate**

[2] The contract explicitly provides that these two issues, liability and damages, are subject to arbitration. It is unnecessary for us to decide whether additional issues would also be subject to arbitration under this contract.

Insurance Co. v. Perea, 2000-NMCA-70, PP18-21, 129 N.M. 364, 8 P.3d 166, the Court of Appeals determined that, for purposes of a de novo appeal provision like the one at issue in this case, the contractual reference to the minimum limits of the MFRA does not include stacking, meaning that the de novo appeal provision applies to any award over $ 25,000. As a result, an insured who enforces the contractual and statutory right to stacking, thereby receiving greater than $ 25,000 in damages, is more likely to face the greater cost, delay, and risk of a trial de novo. We are unwilling to enforce a provision that undermines the public policy supporting stacking and that allows the insurer to accomplish indirectly what it is precluded from doing directly. **See Jimenez**, 107 N.M. at 325, 757 P.2d at 795 ("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.").

{13} Based on these considerations, we believe that this provision would frustrate the statutory goal of protecting the insured against financially irresponsible motorists and "would have a chilling effect on uninsured motorists' claims." **Stinbrink**, 111 N.M. at 182, 803 P.2d at 667. We conclude that the provision is "incompatible with New Mexico's announced public policies to encourage arbitration and to protect persons from uninsured drivers by placing injured parties in the same or similar position they would have been in had they been dealing with a person with liability insurance. " **Id.** at 182, 803 P.2d at 667.

{14} On reconsideration of this issue, we conclude that **Bruch** has revealed itself to be so unworkable as to be intolerable. We believe that **Bruch** interferes with the legislative objectives inherent in the uninsured motorist statute and that it was improvidently decided. **See Payne**, 501 U.S. at 827 (stating that departure from stare decisis is appropriate if "governing decisions are unworkable or are badly reasoned"); **Patterson v. McLean Credit Union**, 491 U.S. 164, 173, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989) ("Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law . . . because the decision poses a direct obstacle to the realization of important objectives embodied in other laws."). Therefore, **Bruch** and its progeny, **Perea**, 2000-NMCA-070, P 21, are hereby expressly overruled. **See First Fin. Trust Co. v. Scott**, 1996-NMSC-65, P17, 122 N.M. 572, 929 P.2d 263 ("The doctrine of stare decisis does not preclude us from overruling improvident precedent, even recent precedent."). We conclude that the limited de novo appeal provision in the insurance contract at issue in this case violates public policy and is void as substantively unconscionable. **See Guthmann v. La Vida Llena**, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985) ("Substantive unconscionability is concerned with contract terms that are illegal, contrary to public policy, or grossly unfair.").[3]

[3] Because we determine that this provision violates the uninsured motorist statute, we need not address Padilla's additional argument that the de novo appeal provision violates the policies underlying the Uniform Arbitration Act or reconsider the determination in **Bruch** that the Act's policy supporting a right to contract for arbitration includes the right to determine whether the arbitration will be binding on the parties. We also do not rely on Padilla's argument that the costs of sequential litigation are prohibitive. While the Court of Appeals correctly characterized the policy as a contract of adhesion, **Padilla**, 2002-NMCA-1, P19; **see Roberts Oil Co. v. Transam. Ins. Co.**, 113 N.M. 745, 753, 833 P.2d 222, 230 (1992) ("An insurance policy is a contract of adhesion. . . ."), we note that this fact alone is insufficient to invalidate the de novo appeal provision. **See Guthmann**, 103 N.M. at 509, 709 P.2d at 678 ("A court will refuse to enforce an adhesion contract or a provision thereof only when the contract or provision is unfair."); **see also Lytle v. CitiFinancial Servs., Inc.**, 2002 PA Super. 327, P 20, 810 A.2d 643, 658 ("Even where a contract is found to be a contract of adhesion, the terms of the contract must be analyzed to determine whether the contract as a whole, or specific provisions of it, are unconscionable."); **Graham v. State Farm Mut. Auto. Ins. Co.**, 565 A.2d 908, 912 (Del. 1989) ("The fact that a contract is adhesive does not give rise to a presumption of unenforceability."). If an insurance contract does not violate public policy, is not grossly unfair due to terms that unreasonably favor the insurer, and is unambiguous, "we must give effect to the contract and enforce it as written." **Ponder v. State Farm Mut. Auto. Ins. Co.**, 2000-NMSC-33, P11, 129 N.M. 698, 12 P.3d 960. A prevailing insured is entitled by statute to recover the costs of arbitration. **See Stinbrink v. Farmers Ins. Co. of Ariz.**, 111 N.M. 179, 181-82, 803 P.2d 664, 666-67 (1990). Padilla

{15} As a final matter, we must decide the proper remedy for the void provision.

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

State ex rel. State Highway & Transp. Dep't v. Garley, 111 N.M. 383, 389, 806 P.2d 32, 38 (1991) (quoting Restatement (Second) of Contracts § 208 (1979)). **Compare Parker**, 734 N.E.2d at 86 ("In order to preserve the parties' agreement to the greatest extent possible and because arbitration is an encouraged form of dispute resolution in Illinois, we hold that only the trial de novo clause is unenforceable and that the trial court properly entered a judgment confirming the arbitration panel's decision."), **with Schaefer v. Allstate Ins. Co.**, 63 Ohio St. 3d 708, 590 N.E.2d 1242, 1248 (Ohio 1992) (plurality opinion) (determining that an "escape hatch" arbitration provision did not qualify as "true arbitration" and holding that "the entire agreement to 'arbitrate' clause is unenforceable").

{16} The Court of Appeals determined,

> Should the arbitrators award Padilla damages in excess of $ 25,000, State Farm may exercise its contractual right to 'trial on all issues.' However, pursuant to NMSA 1978, § 44-7-11 (1971), Padilla may apply for judicial confirmation of the award to the extent of $ 25,000, together with such costs and fees as may be allowable, regardless of State Farm's decision to seek a trial de novo. Upon confirmation of the award, Padilla may enforce the judgment and may assert the judgment to collaterally estop State Farm from relitigating the uninsured/under-insured motorist's liability and Padilla's entitlement to $ 25,000 in damages.

Padilla, 2002-NMCA-1, P21. We are not persuaded that this is the proper remedy in this case.

{17} Although the provision in this case only applies to amounts above the statutory minimum, the policies of Section 66-5-301 extend beyond these limits. **See Martinez**, 1997-NMCA-100, P18 (holding that a household exclusion provision violated the policies of the uninsured motorist statute, despite the fact that the limiting provision applied only to amounts exceeding the statutory minimum of the MFRA); **cf. State Farm Mut. Auto. Ins. Co. v. Ballard**, 2002-NMSC-30, P15, 132 N.M. 696, 54 P.3d 537 (relying on **Martinez** and concluding that "the policy of protecting innocent accident victims within the [MFRA] and the policy against familial exclusion or limitation extend beyond the minimum amount of coverage required by law"). The policy of placing the insured in the same position as to the recovery of damages as if the tortfeasor had liability insurance applies beyond the minimum limits in Section 66-5-215 and extends to the full amount of uninsured or underinsured motorist coverage purchased by the insured under Section 66-5-301. **See Schmick**, 103 N.M. at 219, 704 P.2d at 1095 ("The intent of the Legislature was to put an injured insured in the same position he [or she] would have been in had the tortfeasor had liability coverage **in an amount equal to the uninsured/underinsured motorist protection purchased for the insured's benefit**.") (emphasis added). Therefore, to the extent that State Farm continues to enjoy the unfair advantage over an insured to a right to a de novo appeal for amounts in excess of $ 25,000 under the Court of Appeals' analysis, we believe that this relief is inadequate to remedy the violation of the policies underlying the uninsured motorist statute.

{18} In our effort to ensure that we limit the application of the unconscionable term in a manner that avoids the unconscionable result, we

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has not established adequate facts in the record to support a finding of unconscionability on this ground. **See Green Tree Fin. Corp.-Ala. v. Randolph**, 531 U.S. 79, 91, 148 L. Ed. 2d 373, 121 S. Ct. 513 (2000) (stating that the mere "'risk' that [a party] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement").

find guidance in the decisions of other jurisdictions. In **Zak v. Prudential Property & Casualty Insurance Co.**, 713 A.2d 681 (Pa. Super. Ct. 1998), the court considered a clause similar to the one at issue in the present case. The insurance contract in **Zak** provided that "[a] decision agreed to by two arbitrators will be binding if the award does not exceed the limits required under the Financial Responsibility Law of Pennsylvania. If an arbitration award exceeds these limits, either party has a right to trial on all issues in a court of competent jurisdiction." **Id.** at 683. As we conclude in this opinion, the court determined in **Zak** that this clause was against public policy and unconscionable. **Id.** at 684-85. The court determined that the most appropriate remedy would be striking the clause in the contract providing for a de novo appeal. **Id.** at 685.

> Declaring this clause void does not have the effect of voiding the provision calling for the parties to arbitrate disputes, which is entirely separate and distinct. By striking the clause, we make both parties subject to the same procedures. Thus, our holding has the effect of denying the insurer the right to a trial on all issues if an award is entered in favor of a claimant or insured. The parties however remain subject to the agreement to arbitrate, which is a separate clause and not against public policy. The effect of our holding is to make an arbitration award equally binding on both parties.

Id. ; **accord Fittante v. Palm Springs Motors, Inc.**, 105 Cal. App. 4th 708, 129 Cal.Rptr.2d 659, 674 ("The appeal clause affects only a post-award proceeding, not the general conduct of the arbitration itself. The appeal clause is thus severable from the remainder of the arbitration agreement."). To avoid the unconscionable result, we strike the de novo appeal provision in the contract and leave the remainder of the contract intact. Because the appeal provision is severable from the agreement to arbitrate, the insurance contract now contains a mutual agreement to binding arbitration.

{19} In the prior, now withdrawn, opinion filed in this case, we had invalidated the entire arbitration clause. We reasoned in part that this remedy was supported by our recent opinion in **Lisanti v. Alamo Title Insurance of Texas**, 2002-NMSC-32, PP15-16, 132 N.M. 750, 55 P.3d 962. Based on the severability of the provision, however, we view binding arbitration in this case to be a voluntary agreement. **See Bd. of Educ. v. Harrell**, 118 N.M. 470, 475-76, 882 P.2d 511, 516-17 (1994) (distinguishing between voluntary arbitration and "nonconsensual submission" to state-mandated arbitration). Consequently, **Lisanti** 's application to this case was not before this Court, and we do not decide that question in this opinion. Further, as we have articulated above, a different remedy is more consistent with the bases for concluding that the contract cannot be enforced as written. For these reasons, we have revised our prior opinion by modifying the mandate.

IV. CONCLUSION

{20} We conclude that the limited de novo appeal provision in the insurance contract violates public policy and is therefore void. We overrule our holding to the contrary in **Bruch**. We hold that the unequal access to an appeal is unenforceable and that the contract thus provides for voluntary binding arbitration.

{21} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PAMELA B. MINZNER,
Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHAVEZ,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2003-NMSC-018

Filing Date: May 16, 2003

Docket No. 26,946

KENNETH HERRERA, as personal representative of the Estate of Octavio Ruiz, deceased, and JOSE ENCINIAS,

Plaintiffs-Appellants,

v.

QUALITY PONTIAC,

Defendant-Appellee,

Consolidated with

ALMA ROSA de RUIZ,

Plaintiff-Appellant,

v.

QUALITY PONTIAC,

Defendant-Appellee.

Certification from The New Mexico Court of Appeals
W. Daniel Schneider, District Judge

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OPINION

SERNA, Justice.

{1} Plaintiffs-Appellants Kenneth Herrera, personal representative of Octavio Ruiz, and Jose Encinias filed a complaint for wrongful death and personal injury against Defendant-Appellee Quality Pontiac, a corporation doing business in Albuquerque, New Mexico, following a traffic accident caused by a thief who stole a car from Defendant's lot. The district court dismissed the case with prejudice for failure to state a claim for which relief can be granted. **See** Rule 1-012(B)(6) NMRA 2003. The Court of Appeals certified the matter to this Court. **See** NMSA 1978, § 34-5-14(C) (1972); Rule 12-606 NMRA 2003. We reverse the district court.

I. FACTS AND BACKGROUND

{2} "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for purposes of ruling on the motion, the court must accept as true." **Coleman v. Eddy Potash, Inc.**, 120 N.M. 645, 650, 905 P.2d 185, 190 (1995), **overruled on other grounds by Delgado v. Phelps Dodge Chino, Inc.**, 2001-NMSC-034, ¶ 23 & n.3, 131 N.M. 272, 34 P.3d 1148. Plaintiffs alleged the following facts in their complaint. On May 27, 1996, an individual took his car to Defendant for repairs. At Defendant's direction, the owner left the keys in the car and the doors unlocked. The lot was fenced, and the gate was unlocked. After 9:00 p.m., Billy Garcia entered the lot, apparently looking inside the cars for something to steal. Garcia stole the vehicle in question. The following day, at approximately 11:00 a.m., a Bernalillo County deputy sheriff observed Garcia driving quickly through a school zone and pursued him, engaging his emergency lights and sirens. Garcia drove at a speed of up to ninety miles per hour and collided head on with Plaintiffs' car, which had pulled over onto the shoulder after

hearing the sirens. One occupant was killed and the other seriously injured.

{3} Plaintiffs presented an affidavit of a sociologist to the district court that asserted that "[t]he Albuquerque metropolitan area's motor vehicle theft rate of 1,345.5 per 100,000 residents was the second highest rate in the nation in 1997."[1] The expert estimated that between forty-five and eighty percent of stolen cars had been left unlocked and that between nineteen and forty-seven percent of stolen cars had the ignition keys left inside. The expert claimed that a high proportion of thefts were for the purpose of joy-riding and short term transportation. The expert estimated that there is a high probability that a stolen car will be involved in traffic accidents, relying on a study which "found that nearly [seventeen percent] of all stolen cars are involved in accidents in a matter of hours or days after their theft," and another study which found "the accident rate for stolen cars [to be] approximately 200 times the accident rate for cars that have not been stolen." The expert relied on a study which found that "police pursuit was involved in [thirty-seven] percent of the motor vehicle theft cases examined [in a] national sample."

{4} As a result of Plaintiffs' inclusion of this affidavit, we treat the motion to dismiss as a motion for summary judgment. **See** Rule 1-012(B) ("If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment."). However, the standard of review effectively remains the same; this Court accepts as true the facts as alleged by Plaintiffs in their complaint as well as those in their affidavit to determine whether, as a matter of law, Defendant is entitled to judgment. **See GCM, Inc. v. Ky. Cent. Life Ins. Co.**, 1997-NMSC-052, ¶ 13, 124 N.M.186, 947 P.2d 143.

[1] Plaintiffs claim that "the neighborhood surrounding Quality Pontiac is known to be a high-crime area" based on their affidavit. We note that the affidavit does not support this statement and instead refers to Albuquerque as a whole, not individual neighborhoods; thus, we do not accept this unsupported conjecture in determining whether or not Plaintiffs have stated sufficient facts to support the element of duty.

{5} Defendant, relying on a series of New Mexico cases, argued that there is no liability on its part in this situation. New Mexico precedent clearly supports Defendant's position in this case. Plaintiffs ask this Court to overrule our prior cases and follow the minority position of other jurisdictions. For the reasons that follow, we agree with Plaintiffs' position.

II. DISCUSSION

A. Duty

1. Introduction

{6} Generally, a negligence claim requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff's damages. "In New Mexico, negligence encompasses the concepts of foreseeability of harm to the person injured and of a duty of care toward that person." **Ramirez v. Armstrong**, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983), **overruled on other grounds by Folz v. State**, 110 N.M. 457, 460, 797 P.2d 246, 249 (1990); **accord Calkins v. Cox Estates**, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990). "Negligence is generally a question of fact for the jury. A finding of negligence, however, is dependent upon the existence of a duty on the part of the defendant. Whether a duty exists is a question of law for the courts to decide." **Schear v. Bd. of County Comm'rs**, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984) (citations omitted); **accord Solon v. WEK Drilling Co.**, 113 N.M. 566, 571, 829 P.2d 645, 650 (1992) ("It is thoroughly settled in New Mexico, of course, that whether the defendant owes a duty to the plaintiff is a question of law."); **Calkins**, 110 N.M. at 61, 792 P.2d at 38 (stating that the question of duty "must be decided as a matter of law by the judge, using established legal policy").

{7} Thus, we analyze whether one in possession of a vehicle owes a duty to an individual injured as the result of an accident caused by the negligent or criminal acts of a third party who stole the car as a threshold question of law.

See Lester ex rel. Mavrogenis v. Hall, 1998-NMSC-047, ¶ 9, 126 N.M. 404, 970 P.2d 590; **Leyba v. Whitley**, 120 N.M. 768, 771, 907 P.2d 172, 175 (1995) ("Whether [defendant attorneys] owed a duty to [a plaintiff] is a question of law and is based upon policy considerations.") (citations omitted). "If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant." **Ramirez**, 100 N.M. at 541, 673 P.2d at 825. Foreseeability of a plaintiff alone, however, does "not end the inquiry for the imposition of a duty." **Lester**, 1998-NMSC-047, ¶ 9; **see also Leyba**, 120 N.M. at 771, 907 P.2d at 175. "Policy determines duty." **Torres v. State**, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995). "The existence of a tort duty is a policy question that is answered by reference to legal precedent, statutes, and other principles of law." **Ruiz v. Garcia**, 115 N.M. 269, 272, 850 P.2d 972, 975 (1993); **accord Leyba**, 120 N.M. at 771, 907 P.2d at 175; **Calkins**, 110 N.M. at 62, 792 P.2d at 39.

{8} On the other hand, proximate cause is generally a question of fact for the jury. **Calkins**, 110 N.M. at 61, 792 P.2d at 38 (noting that proximate cause is a question of fact). As this Court has frequently noted, questions of both proximate cause and duty are related to the concept of foreseeability. "Integral to both [duty and proximate cause] is a question of foreseeability." **Id.** "Both questions of foreseeability are distinct; the first must be decided as a matter of law by the judge, using established legal policy in determining whether a **duty** was owed petitioner, and the second, **proximate cause**, is a question of fact." **Calkins**, 110 N.M. at 61, 792 P.2d at 38. "Duty and foreseeability have been closely integrated concepts in tort law since the court in **Palsgraf v. Long Island Railroad Co.**, 162 N.E. 99 (N.Y. 1928) stated the issue of foreseeability in terms of duty." **Ramirez**, 100 N.M. at 541, 673 P.2d at 825.

> The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold **legal** requirement for opening the courthouse doors, whereas the latter is part of the much more specific **factual** requirement that must be proved to win the case once the courthouse doors are open.

McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992) (citation and footnote omitted); **see Calkins**, 110 N.M. at 61, 792 P.2d at 38.

{9} We have expressed that "there is nothing sacred about 'duty,' which is nothing more than a word, and a very indefinite one, with which we state our conclusion." **Ramirez**, 100 N.M. at 541, 673 P.2d at 825 (quoted authority and quotation marks omitted). Ultimately, a duty exists only if "the obligation of the defendant [is] one to which the law will give recognition and effect." **Id.** In other words, a duty "establishes the legally recognized obligation of the defendant to the plaintiff." **Id.** The Court of Appeals has similarly recognized that duty requires analysis of both foreseeability and policy.

> Our Supreme Court has long recognized, however, that the question of duty is not merely a matter of determining whether a particular plaintiff, a particular event, and a particular injury are foreseeable. In **Ramirez**, for example, the Supreme Court focused on foreseeability **and** whether the obligation of the defendant is one to which the law will give recognition and effect.

Madrid v. Lincoln County Med. Ctr., 121 N.M. 133, 139, 909 P.2d 14, 20 (quotation marks and quoted authority omitted), **aff'd**, 1996-NMSC-049, ¶ 31, 122 N.M. 269, 923 P.2d 1154 (affirming on the ground of "[s]ound public policy").

{10} In the present case, we determine whether, as a threshold question of law, one who leaves an unattended and unlocked vehicle with its ignition keys inside foreseeably creates a zone of risk and a general unreasonable threat of harm and thus

owes a duty of ordinary care to others injured in a resulting automobile accident caused by the criminal or negligent actions of a third party. For our duty analysis, "it must be determined that the injured party was a foreseeable plaintiff—that he [or she] was within the zone of danger created by [the defendant's] actions[—] . . . as a matter of law by the judge, using established legal policy. . . ." **Calkins**, 110 N.M. at 61, 792 P.2d at 38. We must analyze whether, as a matter of policy as well as foreseeability, one in such circumstances has an obligation to the injured party for which we will give legal effect and recognition.

2. Whether Defendant Owed Plaintiffs a Statutory Duty

{11} In analyzing whether Defendant owed a duty to Plaintiffs, we first address Plaintiffs' assertion that Defendant owed them a statutory duty. **See Ruiz**, 115 N.M. at 272, 850 P.2d at 975 (stating duty in terms of a policy question based upon statutes, precedent, or other principles of law). "With deference always to constitutional principles, it is the particular domain of the [L]egislature, as the voice of the people, to make public policy." **Torres**, 119 N.M. at 612, 894 P.2d at 389. Our Legislature has directed that

> [n]o person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key and effectively setting the brake, or placing the transmission in parking position, thereon and, when standing upon any grade, turning the front wheels in such manner that the vehicle will be held by the curb or will leave the highway if the brake fails. A violation of this section shall not mitigate the offense of stealing a motor vehicle, nor shall the provisions of this section or any violation thereof be admissible as evidence in a civil action for the recovery of a stolen vehicle, or in any other civil action arising out of the theft of a motor vehicle.

NMSA 1978, § 66-7-353 (1978).

{12} The purpose of Section 66-7-353 is to protect the welfare and safety of the public by requiring owners of cars to take reasonable measures "to prevent acts which could lead to an automobile inadvertently moving without intention that it should," **Bouldin v. Sategna**, 71 N.M. 329, 332, 378 P.2d 370, 372 (1963), and we believe that the provision, by requiring that one in possession of an automobile take reasonable measures to avoid leaving the keys in the ignition, implicitly contains a policy to deter theft. **See Richardson v. Carnegie Library Rest., Inc.**, 107 N.M. 688, 701, 763 P.2d 1153, 1166 (1988) (recognizing that preventing the theft of automobiles left unlocked and unattended with the keys in the ignition "would be conducive to promoting public safety"), **limited on other grounds by Trujillo v. City of Albuquerque**, 1998-NMSC-031, ¶¶ 19-30, 36, 125 N.M. 721, 965 P.2d 1153 (limiting **Richardson**'s application of intermediate scrutiny to non-governmental defendants). However, because, as Defendant asserts, violation of Section 66-7-353 is inadmissible as evidence in any civil action arising out of the theft of a vehicle, we cannot conclude that the statute demonstrates a legislative intent to create a duty. Further, the Legislature has explicitly limited application of this provision to the "operation of vehicles upon highways," NMSA 1978, § 66-7-2 (2001), and the thief stole the vehicle at issue in the present case from a fenced lot, not a highway.

{13} Although, as Plaintiffs note, a few jurisdictions have held that statutes similar to Section 66-7-353 create a duty, **see, e.g.**, **Vining v. Avis Rent-A-Car Sys., Inc.**, 354 So. 2d 54, 56 (Fla. 1977) (noting that "[t]he legislature recognized that an automobile placed in the hands of an unauthorized person was more likely to be operated in a manner hazardous to the well being of the general public"), the majority of jurisdictions have rejected the notion that this type of provision creates a statutory duty. **E.g.**, **Kim v. Budget Rent A Car Sys., Inc.**, 15 P.3d 1283, 1287-88 (Wash. 2001) (en banc). We agree with the majority position on this issue and thus reject Plaintiffs' reliance on the statute as the source of a duty in this case. Nevertheless, we do not

believe that the absence of a duty in Section 66-7-353 resolves the question in this case.

3. Whether Defendant Owed Plaintiffs a Common Law Duty

{14} Because we conclude that the Legislature has not articulated a statutory duty, we next determine whether a common law duty extends from Defendant to Plaintiffs. "Courts should make policy in order to determine duty only when the body politic has not spoken and only with the understanding that any misperception of the public mind may be corrected shortly by the [L]egislature." **Torres**, 119 N.M. at 612, 894 P.2d at 389.

(a) Stare Decisis

{15} As noted above, New Mexico precedent resolves this issue in Defendant's favor. **See Bouldin**, 71 N.M. at 333, 378 P.2d at 373. Plaintiffs ask this Court to overrule **Bouldin**.

> Stare decisis is the judicial obligation to follow precedent, and it lies at the very core of the judicial process of interpreting and announcing law. It promotes very important principles in the maintenance of a sound judicial system: 1) stability of the law; 2) fairness in assuring that like cases are treated similarly; and 3) judicial economy.
>
> However, the principle of stare decisis does not require that we always follow precedent and may never overrule it.

Trujillo, 1998-NMSC-031, ¶¶ 33-34 (citations omitted). We require special justification in order to depart from precedent. **Id.** ¶ 34.

> Particular questions must be considered before overturning precedent: 1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule "no more than a remnant of abandoned doctrine;" and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have "robbed the old rule" of justification.

Id. (quoting **Planned Parenthood v. Casey**, 505 U.S. 833, 855 (1992)).

> This Court always demonstrates the highest regard for stare decisis, but when one of the aforementioned circumstances convincingly demonstrates that a past decision is wrong, the Court has not hesitated to overrule even recent precedent. Furthermore, the application of stare decisis is less compelling in tort cases than in property or contract settings.

Id. ¶ 35 (citation omitted). As discussed below, we conclude that both the third and fourth **Trujillo** considerations are present in this case. The adoption of comparative fault is a significant development in the law that leaves the analysis in **Bouldin** a mere remnant of an abandoned doctrine. The fact that there is a high rate of automobile theft and that stolen vehicles are more frequently involved in accidents are factual changes in the interval from the old rule which have robbed the old rule of justification. We believe that these considerations merit departure from stare decisis.

(b) Bouldin

{16} In **Bouldin**, the plaintiff alleged that the defendant parked his vehicle at a lounge, left it unattended, "and negligently failed to remove the ignition keys" from the vehicle. **Bouldin**, 71 N.M. at 330, 378 P.2d at 371. An unknown individual or group of people "borrowed or stole the truck and later abandoned it in the middle of the highway," and the plaintiff collided with it. **Id.** In **Bouldin**, this Court addressed the question of whether "the owner of a car who leaves

it unattended and without removing the key . . . [is] liable for injuries to persons and property suffered when the car is hit after its having been abandoned on the highway by a thief who stole it." **Id.** at 331, 378 P.2d at 371.

{17} As an initial matter, we note that although **Bouldin** specifically addressed proximate cause in its analysis, 71 N.M. at 332, 378 P.2d at 372, it also addressed the concept of duty. As discussed above, it would be an unusual case which purely addressed duty or proximate cause. **See Calkins**, 110 N.M. at 61, 792 P.2d at 61 ("This case raises issues of duty and proximate cause."). Further, tort law in New Mexico has developed a finer distinction between foreseeability as the concept relates to duty and as it relates to proximate cause, which we do not believe was as clear in earlier cases such as **Bouldin**. Thus, despite the nomenclature used in **Bouldin**, the context of the entire case reveals that it addressed both what we now more specifically designate as duty and proximate cause. **Bouldin** addressed and rejected policy arguments advanced by the plaintiff:

> Plaintiff argues that with the transition from the horse and buggy age to that of the highspeed car and jet airplanes, and from the period of steam and gas powered energy to that of atom propulsion, we should keep pace with the times and apply new and modern principles, better suited for our changed and changing world. We answer the argument by pointing out that we are not convinced that the rule we are urged to adopt would better serve the legal needs of this new day, and even if we were we would be most hesitant to promulgate such rules to replace doctrine long established. This would seem to be more properly for the [L]egislature.

Id. at 334, 378 P.2d at 373-74. This is a classic example of a policy discussion, global and general in nature directed at a legal duty, rather than a proximate cause discussion of the specific facts of the case. **See Leyba**, 120 N.M. at 771, 907 P.2d at 175 (recognizing that policy determines duty); **Torres**, 119 N.M. at 612, 894 P.2d at 389 (same); **Ruiz**, 115 N.M. at 272, 850 P.2d at 975 (same). **Bouldin** also reviewed the plaintiffs' appeal of a judgment which sustained the defendant's motion to dismiss for failure to state a claim for which relief could be granted. 71 N.M. at 330, 378 P.2d at 371. "A motion to dismiss . . . merely tests the legal sufficiency of the complaint and is infrequently granted because its purpose is to test **the law of the claim, not the facts that support it**." **Envtl. Improvement Div. of N.M. Health & Env't Dep't v. Aguayo**, 99 N.M. 497, 499, 660 P.2d 587, 589 (1983) (emphasis added). Further, **Bouldin** addressed the same statute as we did above. 71 N.M. at 332, 378 P.2d at 372. Analysis of a statute in this context goes to duty, or possibly breach of duty, but not to proximate cause. **See Torres**, 119 N.M. at 612, 894 P.2d at 389 (concluding that, by statute, the Legislature imposed a duty upon police officers).

{18} **Bouldin** additionally quoted a commentator's proposition which "suggests that the problem is not in fact one of causation, and to so treat it is to avoid the real issue. . . . [A] conclusion that the act complained of was not the proximate cause of the injury really means that the actor was not negligent at all or that his [or her] negligence, if any, does not cover such a risk." 71 N.M. at 333, 378 P.2d at 373 (quoted authority and quotation marks omitted). "It is only where such misconduct was to be anticipated, and the risk of it was unreasonable, that liability will be imposed for such intervening acts." **Id.** at 333-34, 378 P.2d at 373 (quoted authority and quotation marks omitted). The Court apparently accepted this reasoning, concluding, "in our view, that theft of the defendant's car was not to be anticipated and that such theft and the subsequent negligent leaving of the car in the road was such a remote risk that liability should not be imposed." **Id.** at 334, 378 P.2d at 373. The concept of remoteness in this context is connected to duty. As noted above, the Court then concluded its discussion by expressing an unwillingness to adopt a new rule despite the plaintiffs' suggestion that it "should keep pace with the times and apply new and modern principles, better suited for our changed and changing world." **Id.** at 334, 378 P.2d at 374. Our review of **Bouldin** indicates

that the Court was hesitant to hold that a defendant who leaves his or her keys in an unattended car owes a duty to a plaintiff injured by the acts of a thief because, as a matter of policy, the theft and subsequent accident are too remote a risk. "The question is essentially one of the scope of the defendant's obligation, and far removed from causation." W. Page Keeton et al., **Prosser and Keeton on the Law of Torts** § 44, at 305 (5th ed. 1984). In other words, the question is "one of the policy as to imposing legal responsibility," which is a matter of duty, not proximate cause. **Id.** § 44, at 301. Thus, we believe it is clear that **Bouldin** involved both duty and proximate cause and focused principally on duty. As discussed below, we conclude that we must overrule **Bouldin** on its holding that there is no duty in such a case and that there is no proximate cause as a matter of law between leaving ignition keys in an unattended vehicle and an accident precipitated by a thief.

(c) The Foreseeability Component of Duty

{19} As an initial step in the establishment of a common law duty, along with the required component of policy, "a potential plaintiff must be reasonably foreseeable to the defendant because of defendant's actions." **Klopp v. Wackenhut Corp.**, 113 N.M. 153, 158, 824 P.2d 293, 298 (1992) (quoting **Calkins**, 110 N.M. at 62, 792 P.2d at 39). "If the harm was not willful, [the plaintiff] must show that the act as to [the plaintiff] had possibilities of danger so many and apparent as to entitle [the plaintiff] to be protected against the doing of it though the harm was unintended." **Palsgraf**, 162 N.E. at 101. In other words, in a negligence case, a plaintiff must demonstrate that the defendant's act created a foreseeable zone of danger of such a magnitude that the defendant owes a duty to the plaintiff to refrain from engaging in the act. **Calkins**, 110 N.M. at 61, 792 P.2d at 38.

{20} New Mexico has adopted and applied for decades the majority view of **Palsgraf**, that a negligent actor only owes a duty to those whose injuries are a foreseeable result of the negligence, rather than the dissenting **Palsgraf** view, that one owes a duty to the world, even if the plaintiff is outside of the zone of danger. **Compare Solon**, 113 N.M. at 569, 829 P.2d at 648 ("'[N]egligence in the air, so to speak, will not do.'") (quoted authority omitted) (alteration in original), **with Palsgraf**, 162 N.E. at 103 (Andrews, J., dissenting) ("Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he [or she] wronged to whom harm, might reasonably be expected to result, but he [or she] also who is in fact injured, even if he [or she] be outside what would generally be thought the danger zone."). This Court has consistently relied on the principle of foreseeability, along with policy concerns, to determine whether a defendant owed a duty to a particular plaintiff or class of plaintiffs.

> A plaintiff must show that defendant's actions constituted a wrong against [plaintiff], not merely that defendant acted beneath a required standard of care and that plaintiff was injured thereby. [Plaintiff] must show that a relationship existed by which defendant was legally obliged to protect the interest of plaintiff. This concept limits liability for negligent conduct—a potential plaintiff must be reasonably foreseeable to the defendant because of defendant's actions.

Calkins, 110 N.M. at 62, 792 P.2d at 39. Foreseeability is a critical and essential component of New Mexico's duty analysis because "no one is bound to guard against or take measures to avert that which he [or she] would not reasonably anticipate as likely to happen." **Bogart v. Hester**, 66 N.M. 311, 316, 347 P.2d 327, 330 (1959). "[T]here can be no duty in relation to another person **absent** foreseeability. . . ." **Solon**, 113 N.M. at 572, 829 P.2d at 651 (Ransom, C.J., specially concurring).[2]

[2] Through the concept of remoteness, the overarching question for the Court is whether issues of policy trump foreseeability and preclude imposing a duty in a particular case. **See Solon**, 113 N.M. at 572, 829 P.2d at 651 (Ransom, C.J., specially concurring). We note that some legal scholars continue

{21} The present case is complicated by the fact that Plaintiffs' injuries were directly caused by Garcia's criminal operation of the stolen vehicle. As Defendant notes, "[a]s a general rule, a person does not have a duty to protect another from harm caused by the criminal acts of third persons unless the person has a special relationship with the other giving rise to a duty." **Ciup v. Chevron U.S.A., Inc.**, 1996-NMSC-062, ¶ 5, 122 N.M. 537, 928 P.2d 263; **Rummel v. Edgemont Realty Partners, LTD.**, 116 N.M. 23, 26, 859 P.2d 491, 494. However, "the criminal acts of a third person will not relieve a negligent defendant of liability if the defendant should have recognized that his or her actions were likely to lead to that criminal activity." **Sarracino v. Martinez**, 117 N.M. 193, 195-96, 870 P.2d 155, 157-58 (Ct. App. 1994).

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his [or her] negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself [or herself] of the opportunity to commit such a tort or crime.

Id. at 195, 870 P.2d at 157 (quoted authority and emphasis omitted). Thus, the lack of a special relationship does not end our inquiry. Rather, under the facts of this case as alleged, we find persuasive an exception to the general rule other than a special relationship: whether Defendant realized or should have realized the likelihood that leaving an ignition key in an unlocked and unattended vehicle created a situation in which a third person might avail himself or herself of the opportunity to commit criminal acts such that Defendant reasonably could be said to have created or increased a risk of harm to Plaintiffs through the criminal conduct of the thief.

{22} The present case presents a claim whereby Defendant, arguably, knew or should have known that a theft was likely to occur, and Defendant's actions may have enhanced or increased the risk of such criminal conduct. According to Plaintiffs' affidavit, Albuquerque has a high auto theft rate, and thieves are much more likely to steal vehicles to which they have ready access, as when the cars are left unlocked and unattended with the key in the ignition. Stolen cars are much more likely to be involved in automobile accidents. In this context, Defendant's alleged conduct leaving the keys in the ignition of an unlocked and unattended vehicle arguably increased the likelihood that criminal acts would occur, which ultimately led to the accident in which Plaintiffs were injured, so that we impose a duty of ordinary care.

{23} In **Bouldin**, this Court considered the thief's actions to be an independent intervening cause of the accident which resulted in the plaintiffs' injuries. 71 N.M. at 333, 378 P.2d at 373. "An independent intervening cause is 'a cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable results of the original act or omission, and produces a different result, that could not have been reasonably foreseen.' " **Torres v. El Paso Elec. Co.**, 1999-NMSC-029, ¶ 12, 127 N.M. 729, 987 P.2d 386 (quoting **Thompson v. Anderman**, 59 N.M. 400, 411-12, 285 P.2d 507, 514 (1955)).[3] "Independent interven-

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the longstanding debate over the role of foreseeability in a duty analysis. **Compare** Restatement (Third) of Torts: Liability for Physical Harm, § 6 cmt. f (Tentative Draft No. 2, 2002) ("Modern scholars tend to classify the issue of the foreseeable plaintiff under the general heading of proximate cause, as does this Restatement in Chapter 6."), *with* John C. P. Goldberg & Benjamin C. Zipursky, **The Restatement (Third) and the Place of Duty in Negligence Law**, 54 Vand. L. Rev. 657, 727 (2001) ("Sometimes foreseeability is treated as an issue of law, sometimes as an issue of fact. . . . Foreseeability is in the language of duty, the language of breach, and the language of proximate cause. . . . [F]oreseeability plays a special role in the context of questions about obligation, but it is not the only question relating to duty in that sense.").

[3] Criminal acts by third parties are a classic example of an independent intervening cause. Both Defendant and Plaintiffs claim that this Court's recent opinion addressing independent

ing cause is a question of policy, foreseeability, and remoteness." **Torres**, 1999-NMSC-029, ¶ 14. "[T]he doctrine reflects traditional notions of proximate causation and the need to limit potentially limitless liability arising from mere cause in fact." **Id.** Although the doctrine is closely related to proximate cause, because independent intervening cause raises issues of policy, foreseeability, and remoteness, and purposefully functions to limit what could otherwise be boundless liability, it is more appropriately discussed in the context of duty, at least when it is applied as a matter of law, as it was in **Bouldin**. **Braun v. New Hope Township**, 646 N.W.2d 737, 740 (S.D. 2002) ("The intervening/superceding cause analysis questions the extent of the obligation, or duty, of the original actor who was negligent. Although the question is often expressed in terms of 'cause' or 'proximate cause,' those terms avoid the real issue.") (citation omitted).

{24} This Court, in **Bouldin,** concluded that it did "not perceive theft of a car as a natural event to be foreseen by a person who is negligent in leaving his [or her] car unattended with the key in the ignition." 71 N.M. at 333, 378 P.2d at 373. Plaintiffs presented an affidavit in the district court which alleged a high rate of car thefts and the proposition that stolen vehicles are more likely to be involved in accidents. Thus, Plaintiffs in the present case have persuaded us that the theft of a car left unattended and unlocked with the key in the ignition is a natural event which can be foreseen by the tortfeasor, as is the subsequent accident and resulting injuries. Defendant's acts foreseeably created a zone of danger, which included Plaintiffs.

{25} We cannot conclude that Plaintiffs' injuries were so unforeseeable that we must hold that Defendant did not owe Plaintiffs a duty as a matter of law. We conclude that **Bouldin** is no longer viable in its holding that such ensuing theft and subsequent negligent or criminal operation of the vehicle resulting in injury are not natural, foreseeable events attendant upon leaving one's keys in an unlocked, unattended vehicle. **Bouldin** was based on a set of facts and assumptions that no longer reflects our current situation, and we cannot ignore the connection between stolen vehicles and car accidents. However, as discussed above, foreseeability alone does not determine duty. We next address policy matters which bear upon the existence of a duty.

(d) The Policy Component of Duty: Adoption of Comparative Fault

{26} The recognition of a legal duty is dependent upon considerations of both foreseeability and policy. In addition to our conclusion that leaving an ignition key in an unlocked and unattended vehicle creates a foreseeable zone of danger which supports a duty, we must now decide whether, as a matter of policy, we should impose a duty. We conclude that a change in our law warrants the recognition of a legal duty. This Court decided **Bouldin** in 1963, prior to our adoption of comparative fault, as discussed below. The implicit fear in **Bouldin** may very well have been the clearly troublesome notion of holding a car owner completely responsible for the negligent or criminal actions of a third party because of joint and several liability; in other words, the defendant in **Bouldin** could have been liable for all of the injuries suffered by the plaintiffs, rather than in proportion to his fault. **See Torres**, 1999-NMSC-029, ¶ 13 ("As a natural corollary to the adoption of comparative negligence . . . , the

intervening cause in the context of comparative fault, **Torres**, 1999-NMSC-029, support their respective positions. Plaintiffs misinterpret the discussion in **Torres**; that case clearly stated that its analysis does not apply to criminal acts. 1999-NMSC-029, ¶ 15 n.2. We followed this statement with a citation to **Bouldin** and its holding, and thus, this Court cited with approval the holding in **Bouldin**. **Id.** However, because we overrule **Bouldin**, we also overrule this dicta in **Torres** to the extent that it reaffirmed **Bouldin**. By overruling **Torres**' discussion of **Bouldin**, we do not address or even reach the myriad number of scenarios in which a criminal act might be an independent intervening cause between a tortfeasor's actions and an unforeseeable injured plaintiff. **See** Restatement (Third) of Torts: Liability for Physical Harm, § 19 cmt. c (Tentative Draft No. 1, 2001) ("There can be unusual cases, however, in which the third party's misconduct takes a form quite different from the misconduct the foreseeability of which renders the defendant's original conduct negligent. For example, if the car thief uses the car deliberately to run down the thief's estranged spouse, a finding of proximate cause may be improper.").

Court of Appeals subsequently abolished joint and several liability, under which, among multiple defendants, each defendant regardless of proportion of fault, had been liable for one hundred percent of a plaintiff's damages."). However, this fear is alleviated by principles of comparative fault.

{27} In **Scott v. Rizzo**, 96 N.M. 682, 690, 634 P.2d 1234, 1242 (1981), this Court adopted comparative negligence in order to fairly distribute the burden of fault and "hold[] all parties fully responsible for their own respective acts to the degree that those acts have caused harm." Our statute addressing several liability clearly articulates that a defendant is only liable in proportion to his or her fault.

> [A]ny defendant who establishes that the fault of another is a proximate cause of a plaintiff's injury shall be liable only for that portion of the total dollar amount awarded as damages to the plaintiff that is equal to the ratio of such defendant's fault to the total fault attributed to all persons, including plaintiffs, defendants, and persons not party to the action.

NMSA 1978, § 41-3A-1(B) (1987). We hold that New Mexico's adoption of comparative negligence is a significant development in a principle of law that results in the analysis in **Bouldin** becoming a mere remnant of an abandoned doctrine. **See Richardson**, 107 N.M. at 701, 763 P.2d at 1166. As we observed in **Torres**, an overly broad use of the doctrine of independent intervening cause to limit liability, as a matter of law, based upon the disproportionate fault of a third party "is inconsistent with New Mexico's system of pure comparative fault." **Torres**, 1999-NMSC-029, ¶ 15.

{28} This Court has "rejected cases from other jurisdictions refusing to apportion fault between the negligent defendants and intentional tortfeasors under the principle that '[n]egligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent.'" **Barth v. Coleman**, 118 N.M. 1, 3, 878 P.2d 319, 321 (1994) (citation omitted; alteration in original). We rejected this principle "because it is inconsistent with New Mexico's adoption of comparative fault and abolition of joint and several liability." **Id.** at 4, 878 P.2d at 322. Thus, in New Mexico, "'each individual tortfeasor should be held responsible only for his or her percentage of the harm.'" **Id.** (quoting **Reichert v. Atler**, 117 N.M. 623, 624, 875 P.2d 379, 381 (1994)).

{29} Should Plaintiffs prevail in proving their negligence claim, Defendant is only liable to Plaintiffs for the damages the jury or judge determines Defendant caused. "[O]ne defendant may not be required to pay another defendant's share of the damages." **Ramirez**, 100 N.M. at 543, 673 P.2d at 827. "The total damages suffered by a plaintiff will be apportioned between all parties in proportion to their fault." **Id.** at 542, 673 P.2d at 826. Defendant is, therefore, not liable for the percentage of fault attributable to Garcia, any other tortfeasors, or any comparative fault on the part of Plaintiffs which may have contributed to the accident. **See Barth**, 118 N.M. at 4, 878 P.2d at 322. Thus, the district court shall instruct the jury regarding several liability, and, if applicable, comparative negligence. **See** UJI 13-2219 NMRA 2003. We believe that the analysis in **Bouldin** has become an anachronism in light of the apportionment of liability based on the percentage of fault in our current system of tort law.

{30} Defendant argues that factors used by other courts to determine the existence of a duty weigh against finding such a duty in this case. These factors address issues of foreseeability as well as policy. The factors include the foreseeability of harm, the certainty of injury from the wrongful act, the closeness of the connection between the wrongful acts and the plaintiff's injuries, the moral blameworthiness of the wrongful act, the policy of preventing future harm, the burden on potential defendants, the consequences to the community from the imposition of a new duty, and the availability and cost of insurance against the risk of harm. However, we believe that leaving an ignition key in an unlocked and unattended vehicle foreseeably may result in its

theft, and creates an unreasonable risk of harm from the thief's operation of the vehicle. Plaintiffs presented statistical data which indicates a high rate of car theft and that vehicles which are stolen are substantially more likely to be involved in accidents than vehicles operated by an authorized driver, supporting the foreseeability of harm and the certainty of injury. We also do not believe that the burden would be unreasonable; we could not reasonably require that all conceivable security measures be taken, but we do believe that those in possession of vehicles must take care, at a minimum, not to leave them unlocked and unattended with the key in the ignition. Whether Defendant did in fact take appropriate security precautions in the present case is, as discussed below, a question concerning breach of a duty of ordinary care for the finder of fact. We believe that the relatively simple act of removing the key from the vehicle or not leaving the vehicle unattended or unlocked while the key is in the ignition is not overly burdensome and would benefit both the owner and the general public by helping to deter theft and ensuing accidents.

{31} In the present case, we have concluded that the risk of harm to the class of persons typified by Plaintiffs was not unforeseeable and that a duty of ordinary care would be consistent with contemporary notions of public policy, most importantly, comparative fault. If one leaves a vehicle unlocked and unattended with the ignition key in the vehicle, it is not unforeseeable that a thief will steal the car, and the thief may operate the car in a negligent or criminal manner, including a high speed chase from pursuing police officers which results in injuries to bystanders. We are confident that public policy supports the imposition of a duty of care in this class of cases, especially considering the adoption of comparative fault. Defendant owes Plaintiffs a duty based upon foreseeability and public policy, and accordingly Plaintiffs should be allowed to present their claims to a jury. Our holding is not that Defendant owes an unlimited duty to the world or a duty to actually prevent the criminal actions of a third party; Defendant owes a duty of ordinary care to foreseeable plaintiffs.

{32} We hold that Defendant's actions in directing the owner to leave the keys in the vehicle and leaving the vehicle unlocked and unattended created a duty to exercise ordinary care. Without any of these factors, the foreseeability and likelihood of theft and the risk of harm would diminish so substantially that such a claim would fail. We conclude, based upon the adoption of comparative negligence as well as the fact that there is a high rate of vehicle theft and that stolen vehicles are more likely to be involved in accidents, that an owner or one in possession of a vehicle reasonably can foresee that the vehicle might be stolen if he or she leaves it unattended, unlocked, and with keys in its ignition, and that he or she reasonably could anticipate that the thief might drive negligently and injure another, creating a duty to that injured party.

B. Other Issues

1. Breach of Duty

{33} We recognize a duty in the present case. We do not address whether Defendant breached the duty of ordinary care.

> [T]he responsibility for determining whether the defendant has breached a duty owed to the plaintiff entails a determination of what a reasonably prudent person would foresee, what an unreasonable risk of injury would be, and what would constitute an exercise of ordinary care in light of all the surrounding circumstances. This is a factual determination or, perhaps, a mixed determination of law and fact, involving as it does the application of precepts of duty to the historical facts as found by the fact finder.

Bober v. N.M. State Fair, 111 N.M. 644, 650, 808 P.2d 614, 620 (1991). The finder of fact must determine whether Defendant breached the duty of ordinary care by considering what a reasonably prudent individual would foresee, what an unreasonable risk of injury would be, and what would constitute an exercise of ordinary care

in light of all surrounding circumstances of the present case, including whether Defendant acted reasonably or negligently by keeping an unlocked, unattended vehicle with the keys in the ignition on a fenced, gated lot.

2. Proximate Cause

{34} Defendant argues that its actions did not proximately cause Plaintiffs' injuries. The issue of proximate cause is also for the jury or fact-finder.

> A proximate cause of an injury is that which in a natural and continuous sequence [unbroken by an independent intervening cause] produces the injury, and without which the injury would not have occurred. It need not be the only cause, nor the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.

UJI 13-305 NMRA 2003. While we agree with Defendant that there is not great closeness in the connection between Defendant's wrongful acts and the resulting injuries, especially considering a gap in time of approximately fourteen hours and a distance of many miles, we do not believe that the connection is so tenuous that we must conclude, as a matter of law, that there is no proximate cause. We leave the fact that the accident occurred approximately fourteen hours after Garcia stole the car from Defendant's lot and the fact that the accident took place several miles away from its property for the jury's consideration on the issue of proximate cause. **See Calkins**, 110 N.M. at 65-66 & n.6, 792 P.2d at 42-43 & n.6. Thus, the finder of fact must determine whether Defendant's acts, which occurred many hours prior to the accident and many miles away, were a proximate cause of Plaintiffs' injuries.

{35} As discussed above, we conclude that Defendant, leaving the car unlocked, unattended, and with the key in the ignition, could have reasonably foreseen Garcia's intervening theft of the vehicle, as well as Garcia's subsequent criminal and negligent operation of it, and that Defendant's actions created an unreasonable risk of harm. The foreseeability of injury, plus the policy considerations discussed above, create the legal duty to Plaintiffs. Having made the necessary determination that Defendant owes Plaintiffs a duty, we cannot conclude as a matter of law based on these facts that no rational jury could find that Defendant's actions proximately caused Plaintiffs' injuries. This does not preclude a district court from reaching a different conclusion as a matter of law on the issue of proximate causation under a different set of facts. **See Calkins**, 110 N.M. at 65 n.6, 792 P.2d at 42 n.6 ("A court may decide questions of negligence and proximate cause, if no facts are presented that could allow a reasonable jury to find proximate cause. . . .").

> Nothing . . . stated hereinabove is intended to imply that a fact- finder could not reasonably return a verdict for the car owner in this case, or that the evidence in some comparable situation might not possibly justify even a judgment for the vehicle owner as a matter of law. Determinations in this regard must necessarily depend on the entire circumstantial spectrum, such as the position of the vehicle and the nature of the locality in which the vehicle is left, the extent of access thereto, operational condition of the vehicle, its proximity to surveillance, the time of day or night the vehicle is left unattended, and the length of time (and distance) elapsing from the theft to the accident.

McClenahan v. Cooley, 806 S.W.2d 767, 776 (Tenn. 1991) (alteration in original).

3. Loss of Consortium

{36} Finally, although Plaintiffs concede that Alma Rosa De Ruiz, wife to the decedent, must withdraw her wrongful death claim because she is not the decedent's personal representative, Plaintiffs contend that she has a viable loss of consortium claim based on a successful suit by

Plaintiffs. This dependent claim would not fail if Plaintiffs successfully complete their wrongful death action. **See Romero v. Byers**, 117 N.M. 422, 426, 872 P.2d 840, 844 (1994) (recognizing loss of consortium claims).

III. CONCLUSION

{37} We reverse the district court. We conclude that an owner or one in possession of a vehicle who leaves a key in the ignition of an unattended and unlocked car owes a duty of ordinary care to those individuals injured in an automobile accident involving the vehicle when a thief steals the car and negligently or criminally causes the accident. The jury or finder of fact must decide whether Defendant's actions breached this duty of ordinary care and are a proximate cause and cause in fact of injuries which Plaintiffs prove.

{38} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PAMELA B. MINZNER,
Justice

CONCURRENCE

RICHARD C. BOSSON, Justice (specially concurring).

{39} I fully concur in both the reasoning and the result of Justice Serna's majority opinion which correctly construes and applies, and perhaps extends, existing New Mexico law. I wish to raise one additional issue.

{40} New Mexico courts have been accused of using the foreseeable plaintiff "as a legal fiction for restricting or expanding liability." Nancy Desiderio, **Tort Law-Evolution of Duty in New Mexico:** Torres v. State, 26 N.M. L. Rev. 585, 585 (1996). Perhaps our critics are right. Justice Montgomery came close to reexamining the **Palsgraf** question of whether we should continue to use foreseeable injury to a particular plaintiff as a test of legal duty. Despite concluding that "we do not perceive this case to be a good one in which to reexamine the social policy that limits a tortfeasor's liability to the foreseeable plaintiff," Justice Montgomery's query lingers. **Solon v. WEK Drilling Co.**, 113 N.M. 566, 569, 829 P.2d 645, 648 (1992).

{41} Part of the confusion lies in our dual use of the term "foreseeability." It is used first by the judge as ascertaining whether the defendant owes a legal duty of care, and later by the jury in determining factual issues of breach and causation. Perhaps the better question for the court should be "unforeseeability;" that is, whether no reasonable jury could find the injury foreseeable with respect to the plaintiff. As Justice Ransom has repeatedly reminded us, the overarching question for any court is whether issues of sound legal and social policy trump foreseeability and preclude imposing a duty in a particular case. **Id.** at 572-73, 829 P.2d at 651-52 (Ransom, C.J., specially concurring); **see also Torres v. State**, 119 N.M. 609, 612-13, 894 P.2d 386, 389-90 (1995). Perhaps policy issues like remoteness, aided by indications of legislative intent, are the better tools for shaping duty, and we should leave the foreseeable plaintiff for the jury.

{42} UJI 13-1604 NMRA 2003 instructs: "Every person has a duty to exercise ordinary care for the safety of the person and the property of others." (Emphasis omitted.) That sounds more like Judge Andrews' dissent than Judge Cardozo's majority opinion in **Palsgraf**. When we attempt to define legal duty in terms of a foreseeable plaintiff, it is all too tempting to use "foreseeability" as a surrogate for result-oriented conclusions. As Dean Prosser said almost fifty years ago on the difficulties inherent in defining duty in terms of the foreseeable plaintiff: "These are shifting sands, and no fit foundation. There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it." William L. Prosser, **Palsgraf Revisited**, 52 Mich. L. Rev. 1- 32 (1953).

{43} The modern view seems more inclined to classify the issue of the foreseeable plaintiff under proximate cause, normally for the jury to resolve. Restatement (Third) of Torts: Liability for Physical Harm § 6 cmt. f (Tentative Draft No. 2, 2002) ("Whether this requirement of a 'foreseeable plaintiff' is an aspect of the doctrine of duty or instead of the doctrine of proximate cause is a point that the Comment to § 281(b) [Restatement (Second) of Torts] does not make clear. Modern scholars tend to classify the issue of the foreseeable plaintiff under the general heading of proximate cause, as does this Restatement [Third] in Chapter 6."); **see also id.** § 29 cmt. n (Scope of Liability).

{44} I hope we will hear more on this issue in the future as attitudes change toward **Palsgraf**.

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2004-NMSC-009

Filing Date: April 7, 2004

Docket No. 22,283

**STATE OF NEW MEXICO, ex rel.
ELUID L. MARTINEZ, State Engineer,**

Plaintiff-Respondent,

v.

CITY OF LAS VEGAS,

Defendant-Petitioner.

**Original Proceeding on Certiorari
Harl D. Byrd, District Judge**

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OPINION

SERNA, Justice.

{1} In *Cartwright v. Public Service Co. of New Mexico*, 66 N.M. 64, 79-85, 343 P.2d 654, 664-69 (1958), this Court adopted the pueblo rights doctrine. Under this doctrine, municipalities that are the successors-in-interest to colonization pueblos established by antecedent sovereigns possess a pueblo water right. This water right entitles a municipality to take as much water from an adjacent water course as necessary for municipal purposes and permits expansion of the right to accommodate increased municipal needs due to population increases. Upon reexamination, we conclude that the pueblo rights doctrine is inconsistent with New Mexico's system of prior appropriation. As a result, we overrule *Cartwright*. We conclude that municipal water rights must be determined by prior appropriation based on beneficial use regardless of a colonization grant from preceding sovereigns.

{2} The present case arose as a subfile proceeding in the course of a general adjudication of water rights in the Pecos River system. The State Engineer sought a declaration of the water rights of the City of Las Vegas on the Gallinas River. Specifically, the State Engineer challenged the existence of pueblo water rights in New Mexico. In the alternative to arguing that New Mexico should no longer recognize pueblo water rights in general, the State Engineer challenged the City's specific entitlement to a pueblo water right and disputed the application of the City's pueblo water right to groundwater, reservoirs, industrial uses, and water distribution outside the city limits. On the basis of stare decisis, the district court declined to rule

on the State Engineer's general challenge to the pueblo water rights doctrine, as well as the City's entitlement to a pueblo water right. However, the court found in favor of the State Engineer on the parameters of the City's pueblo right. On appeal, the Court of Appeals determined that this Court, if presented with the opportunity, would overrule our prior cases establishing the pueblo water rights doctrine, and the Court therefore declined to follow this established precedent. *State ex rel. Martinez v. City of Las Vegas*, 118 N.M. 257, 265, 880 P.2d 868, 876 (Ct. App. 1994). The Court of Appeals concluded that the City had no pueblo water right. *Id*. We granted the City's petition for writ of certiorari to the Court of Appeals. Although we conclude that stare decisis requires the Court of Appeals to follow this Court's cases, we independently determine that the pueblo rights doctrine is flawed and that the cases recognizing this doctrine must be overruled. However, we also conclude that reliance interests and concerns for the proper administration of justice require a limited prospective application of our overruling of prior case law to the City.

I. FACTS AND PROCEDURAL BACKGROUND

A. Early Developments

{3} The pueblo of Nuestra Senora de Las Dolores de Las Vegas was established on the Gallinas River by a colonization grant from the Republic of Mexico on March 23, 1835. *See Maese v. Herman*, 183 U.S. 572, 573-76 (1902). After settlement, the Town of Las Vegas became a part of the United States with the Treaty of Guadalupe Hidalgo in 1848. *See* Treaty of Peace Between the United States and Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922. Congress confirmed the grant to the Town in 1860, and the Town received a patent from the United States government in 1903. In addition, the Legislature established a board of trustees that would have the power of "control and management of the tract of land known as the Las Vegas land grant." NMSA 1978, § 49-6-2 (1909). The Legislature established the board as a separate legal entity from the Town of Las Vegas, *see City of Las Vegas v. Oman*, 110 N.M. 425, 428, 796 P.2d 1121, 1124 (Ct. App. 1990), which had only the authority specifically delegated by statute. Among other things, the Legislature authorized the board "to lease, sell or mortgage any part or parts of said tract of land," without prejudice to any vested rights to land within the grant. NMSA 1978, §§ 49-6-9 (1903), -10 (1909).

{4} Separately from the settlement under the 1835 colonization grant, a settlement on the east side of the Gallinas was established in 1841. This settlement, known as the City of Las Vegas, expanded dramatically after the arrival of the railroad in 1879. In 1880, San Miguel County issued a fifty-year franchise to Agua Pura Co. to provide municipal water to the inhabitants of the two settlements. *See Cartwright v. Pub. Serv. Co. of N.M.*, 66 N.M. 64, 72, 343 P.2d 654, 659-60 (1958). In 1970, a consolidation of the two separate settlements, the Town of Las Vegas and the City of Las Vegas, formed the current City of Las Vegas.

{5} Water rights on the Gallinas have been the subject of a number of judicial and administrative proceedings. While these proceedings are described in greater detail in *Oman*, 110 N.M. at 428-29, 796 P.2d at 1124-25, we will review some of the more important developments. In 1921, the district court of San Miguel County entered a decree, known as the Gallinas Decree, in a consolidated suit brought by various water users. The decree adjudicated a water right to the land grant board based on a permit issued by the State Engineer with a priority date of 1909. Agua Pura Co. was not a party to the Gallinas Decree. In 1933, in an attempt to adjudicate all surface water rights on the Gallinas, the federal district court entered a decree which is known as the Hope Decree. Among other water rights, the Hope Decree adjudicated the right of New Mexico Power Co., the successor of Agua Pura Co., to 2600 acre feet per year with an 1881 priority.

B. The Cartwright Litigation

{6} In 1955, a number of water users on the Gallinas filed an action in district court against

Public Service Co. of New Mexico (PNM), the successor to New Mexico Power Co., claiming that PNM had trespassed on their senior water rights as adjudicated in the Hope Decree. *Cartwright*, 66 N.M. at 66, 343 P.2d at 655. The water users sought an injunction and damages. *Id.* The Town intervened in the action and claimed as an affirmative defense that PNM lawfully appropriated water under a pueblo water right belonging to the Town by virtue of the 1835 colonization grant. *Id*. at 67, 343 P.2d at 656. The district court found in favor of the Town and PNM on the basis of this affirmative defense. *Id.* at 68, 343 P.2d at 657. The court recognized the existence of the pueblo rights doctrine in New Mexico. *Id.* The court further found that the Town of Las Vegas and City of Las Vegas were the successors to the Mexican colonization grant. *Id.* at 67-68, 343 P.2d at 656. The court concluded that the Town possessed a pueblo water right with a priority date of 1835 and that PNM's right to divert water pursuant to the Town's pueblo water right was prior and paramount to the rights of the water users who had initiated the claim. *Id.* at 70-71, 343 P.2d at 658-59.

{7} On appeal, this Court addressed three issues: (1) whether the Hope Decree was res judicata as to PNM and the Town for purposes of precluding their reliance on the pueblo rights doctrine; (2) whether the trial court correctly found that the Town possessed a valid and superior claim to the colonization grant; and (3) whether the pueblo rights doctrine, as recognized by the courts of California, applies in New Mexico. *Id.* at 71-72, 343 P.2d at 659. We determined that the Hope Decree was not res judicata with respect to the Town or the City of Las Vegas because neither had been a party to the federal action. *Id.* at 76, 343 P.2d at 662. We also determined that there was substantial evidence in the record to support the district court's determination of the validity of the 1835 community colonization grant by the government of Mexico, as well as the court's recognition of the Town's superior claim to the grant, consistent with the opinion of the United States Supreme Court in *Maese*, 183 U.S. at 580-81. *Cartwright*, 66 N.M. at 78-79, 343 P.2d at 664. The remainder of our opinion in *Cartwright* focused on the controversial question of whether New Mexico should recognize the pueblo rights doctrine. *Id.* at 79-85, 343 P.2d at 664-69.

{8} As reviewed by this Court in *Cartwright*, the pueblo rights doctrine recognizes the right of the inhabitants of Mexican or Spanish colonization pueblos to use as much of an adjoining river or stream as is necessary for municipal purposes. *Id.* at 82, 343 P.2d at 666-67. The doctrine contemplates the expansion of the pueblo's right to use water in response to increases in size and population, and if necessary, the right can encompass the entire flow of the adjoining water course. *Id.* We noted in *Cartwright* that the doctrine had been recognized by the Supreme Court of California in a series of cases dating from 1860. *Id.* at 84, 343 P.2d at 667-68; *see Hart v. Burnett*, 15 Cal. 530 (1860) (discussing pueblo rights in relation to land); *see also Lux v. Haggin*, 10 P. 674, 714-15 (Cal. 1886) (analogizing the principles from *Hart* to water rights).

{9} We attributed the historical basis of the doctrine to the Plan of Pitic. *Cartwright*, 66 N.M. at 81, 343 P.2d at 665-66. Prepared under the commandant-general of the internal provinces of the viceroyalty of New Spain, the Plan of Pitic served as the organizational design for the town of Pitic when it was founded in 1783. As ordered by the King of Spain, the Plan served as a model for the settlement of pueblos across the internal provinces, including New Mexico. *Cartwright*, 66 N.M. at 84, 343 P.2d at 668. The Plan conformed to the general principles established in the 1680 compilation of the laws governing New Spain, the Recopilación de Leyes de los Reynos de las Indias, which continued to be followed by the government of the Republic of Mexico, after independence, at the time of the Las Vegas grant in 1835. We observed in *Cartwright* that the Plan of Pitic "gave the settlement preferred rights to all available water." *Id.*

{10} In discussing the applicability of the pueblo rights doctrine in New Mexico, we recognized that this State applies the doctrine of prior appropriation based on beneficial use, as derived

from the civil law system of Spain and Mexico prior to the Treaty of Guadalupe Hidalgo. *Cartwright*, 66 N.M. at 80, 343 P.2d at 665. However, in response to an argument that the pueblo rights doctrine conflicts with New Mexico's system of prior appropriation, we explained that the pueblo rights doctrine is premised on the notion that colonization pueblos "were largely, if indeed, not always, established before there was any settlement of the surrounding area." *Id.* at 79-80, 343 P.2d at 665. As a result, we concluded that the paramount and superior nature of pueblo water rights conforms to the system of prior appropriation. *Id.* at 80, 343 P.2d at 665. "There were no questions of priority of use when a colonization pueblo was established because there were no such users." *Id.* at 85, 343 P.2d at 668. In addition, we concluded that the expanding nature of pueblo rights did not violate the principle of beneficial use.

> Water formed the life blood of the community or settlement, not only in its origin but as it grew and expanded. A group of fifty families at the founding of a colony found it no more so than when their number was multiplied to hundreds or even thousands in an orderly, progressive growth.
>
> And just as in the case of a private user, so long as he [or she] proceeds with due dispatch to reduce to beneficial use the larger area to which his [or her] permit entitles him [or her], enjoys a priority for the whole, so by analogy and under the rationale of the Pueblo Rights doctrine, the settlers who founded a colonization pueblo, in the process of growth and expansion, carried with them the torch of priority, so long as there was available water to supply the life blood of the expanded community.

Id. at 85, 343 P.2d at 668. Accordingly, the pueblo rights doctrine represented "the elevation of the public good over the claim of a private right." *Id.* at 85, 343 P.2d at 669. Based on our determination that the pueblo rights doctrine was not inconsistent with the doctrine of prior appropriation and beneficial use, we concluded that "the reasons which brought the Supreme Court of California to uphold and enforce the Pueblo Rights doctrine apply with as much force in New Mexico as they do in California." *Id.* at 85, 343 P.2d at 668.

{11} The dissenting opinion in *Cartwright* serves to highlight the most controversial aspects of the majority opinion. The dissent contains five primary criticisms of the majority opinion: (1) the actual language of the Plan of Pitic, as opposed to its interpretation by California courts, supports communal sharing of water inside and outside the pueblo's border rather than a paramount and superior right belonging exclusively to the pueblo; (2) the circumstances leading to the adoption of the pueblo rights doctrine in California, specifically a statutory basis for the doctrine and a communal theory of water law, do not exist in New Mexico; (3) the Treaty of Guadalupe Hidalgo does not protect a pueblo right as interpreted by the majority; (4) the premise of the pueblo rights doctrine that the pueblo precedes all other users on the stream does not apply to Las Vegas; and (5) the pueblo rights doctrine violates the fundamental principle of beneficial use. *Cartwright*, 66 N.M. at 94-105, 343 P.2d at 674-82 (Federici, D.J., dissenting). In response to a motion for rehearing, the dissent elaborated on the latter three of these reasons for disagreeing with the majority opinion. *Id.* at 106-19, 343 P.2d at 683-92. We discuss these points in greater detail below in the context of the State Engineer's arguments to this Court.

{12} Following our decision in *Cartwright*, the same plaintiffs filed a second claim for damages against PNM. *Cartwright v. Pub. Serv. Co. of N.M.*, 68 N.M. 418, 419, 362 P.2d 796, 796-97 (1961). The plaintiffs alleged that the colonization grant from Mexico belonged to the Town of Las Vegas Grant, meaning the board of trustees established by the Legislature, rather than to the Town of Las Vegas. *Id.*at 419, 362 P.2d at 797. We held this claim to be res judicata based on our opinion in the first *Cartwright.* "[T]he ownership of the waters of the Gallinas River and its tributaries was the ultimate question to be determined in the first case, and ownership thereof was adjudicated as belonging to the City and Town of

Las Vegas as successors to the original Mexican Pueblo." *Id.* at 420, 362 P.2d at 798.

C. Present Developments

{13} Water rights adjudication on the Gallinas culminated in the present action. During the course of a general adjudication of the Pecos River stream system, the State Engineer filed a supplemental complaint in 1985 requiring the City of Las Vegas to declare its asserted rights to the use of water in the system, which includes the Gallinas as a tributary of the Pecos River. *Oman*, 110 N.M. at 431, 796 P.2d at 1127. In a subfile adjudication between the City and the State, the City asserted its pueblo water right under *Cartwright*, as well as additional water rights that include the City's interest as successor to the 1881 priority right recognized by the Hope Decree as belonging to New Mexico Power Co. The State Engineer challenged the validity of the pueblo rights doctrine, the legitimacy of the City's claim to be the successor to the 1835 colonization grant, and, in the alternative, the application of the City's pueblo water right to groundwater, reservoirs, industrial uses, uses outside the city limits, and return flows from waste treatment facilities. After the district court denied cross motions for summary judgment by the State Engineer and the City, the Court of Appeals addressed a number of issues on interlocutory appeal. *Oman*, 110 N.M. at 427, 796 P.2d at 1123.

{14} In *Oman*, the Court of Appeals determined that neither *Cartwright* nor other judicial proceedings involving water rights on the Gallinas operated as res judicata with respect to the State Engineer's challenge of the City's entitlement to a pueblo water right. *Oman*, 110 N.M. at 432-33, 796 P.2d at 1128-29. Similarly, the Court determined that the Gallinas Decree did not, by operation of res judicata, preclude the City's assertion of a pueblo water right. *Id.* at 435-36, 796 P.2d at 1131-32. In addition, the Court recognized that stare decisis required that both the Court of Appeals and the district court adhere to the pronouncements made by this Court in *Cartwright. Oman*, 110 N.M. at 433, 435, 796 P.2d at 1129, 1131. However, the Court of Appeals noted that *Cartwright* "announced only general principles" and that factual questions, such as the types of municipal uses of water subsumed within the pueblo rights doctrine, remained unresolved. *Oman*, 110 N.M. at 433-34, 796 P.2d at 1129-30. Recognizing the controversial nature of the pueblo rights doctrine, *id.* at 434, 796 P.2d at 1130, the Court of Appeals also determined that the district court could "on remand permit an adequate record to be developed so that ultimately the [S]upreme [C]ourt will be in a position to overrule *Cartwright I* if it chooses to do so." *Id.* at 435, 796 P.2d at 1131. The Court of Appeals affirmed the district court's denial of the motions for summary judgment and remanded the case to the district court for further proceedings. *Id.* at 436, 796 P.2d at 1132.

{15} On remand, the district court established a bifurcated procedure. For the question of the continued validity of the pueblo rights doctrine in New Mexico, the court allowed a tender of proof by the parties. The court allowed a similar tender on the question of the proper successor to the 1835 colonization grant. However, based on the binding precedent of *Cartwright*, the court did not make any findings with respect to the tender and did not rule on either of these issues. The court formally refused the tender but accepted it into the record for this Court's ultimate review. For the remaining issues, which focused on the scope of the City's pueblo right, the court conducted a trial on the merits. The court found after the trial that the City's pueblo water right has a priority of March 23, 1835, and, based on a stipulation entered into by the parties, includes the right to an unquantified amount of water reasonably necessary to meet the City's present and future needs. The court further found that the pueblo right applies to ordinary municipal purposes within the city limits and does not extend to industrial uses, groundwater, except as contemplated by the doctrine adopted in *Templeton v. Pecos Valley Artesian Conservancy District*, 65 N.M. 59, 67-68, 332 P.2d 465, 470-71 (1958), reservoirs, or return flows from waste water treatment facilities. The district court noted that its judgment resolved all issues regarding the City's

pueblo water right and expressly determined that there was no just reason for delay in entering final judgment as to this claim. *See* Rule 1-054(B)(1) NMRA 2003 ("[T]he court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay."); *State ex rel. State Eng'r v. Parker Townsend Ranch Co.*, 118 N.M. 780, 782, 887 P.2d 1247, 1249 (1994) ("[S]hould a subfile order reserve for future determination some issues contested by the state and the applicant, such as priority date, then under [Rule 1-054(B)(1)] the trial court would be required to make an express determination that there is no just reason for delay in order to make the subfile order final and appealable."). Following the district court's denial of the City's motion for new trial, both parties appealed.

II. THE COURT OF APPEALS' OPINION AND STARE DECISIS

{16} In its docketing statement in the Court of Appeals, the City challenged each of the district court's findings limiting the scope of its pueblo water right. The City also challenged the admission of testimony by the State's expert witnesses and the district court's determination that there was no just reason for delay in entering final judgment.

{17} The State Engineer asserted in its appeal that the district court abused its discretion in denying the State's motion to withdraw from the stipulation with the City that the pueblo water right should be quantified as the amount of water reasonably necessary to satisfy the present and future needs of the City. The State Engineer also attacked the underlying validity of the pueblo rights doctrine. However, the State Engineer did not request that the Court of Appeals hold the pueblo rights doctrine to be invalid. On the contrary, the State Engineer recognized that, "[u]nder the doctrine of stare decisis and the holding in *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973), the district court and [the Court of Appeals] [are] bound to recognize the pueblo water right doctrine and neither court may overrule the opinion in the *Cartwright* case." As a result, the State Engineer requested only that the Court of Appeals determine whether reasonable grounds existed for overruling *Cartwright*, without actually overruling the case, in the event that this Court decided to reevaluate the pueblo rights doctrine. In response to the City's motion to strike this portion of the State Engineer's docketing statement, the State Engineer requested that the Court of Appeals certify the appeal to this Court as an issue of substantial public interest. *See* NMSA 1978, § 34-5-14(C) (1972). The Court of Appeals denied this request.

{18} Despite the posture presented by the State Engineer, the Court of Appeals chose to address the doctrine of stare decisis and the validity of the pueblo rights doctrine in New Mexico. The Court of Appeals concluded that it could decline to follow Supreme Court authority if, in its determination, this Court would overrule its own precedent when given the opportunity. *State ex rel. Martinez*, 118 N.M. at 259, 880 P.2d at 870. The Court determined that *State v. Wilson*, 116 N.M. 793, 795, 867 P.2d 1175, 1177 (1994), in which we recognized the authority of the Court of Appeals to question uniform jury instructions that had not yet been addressed by this Court, modified the rule that the Court of Appeals must follow Supreme Court precedent, as that rule had been previously stated in *Alexander*, 84 N.M. at 718, 507 P.2d at 779. *State ex rel. Martinez*, 118 N.M. at 258-59, 880 P.2d at 869-70. The Court of Appeals appears to have interpreted language in *Wilson* discussing the history of the legal doctrine at issue in *Alexander* as limiting the application of the *Alexander* rule to issues decided by a line of Supreme Court authority. *See State ex rel. Martinez*, 118 N.M. at 259, 880 P.2d at 870 (focusing on "the recurring opportunities our Supreme Court had to reconsider the legal doctrine in *Alexander*"). In addition, the Court of Appeals relied on *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262, 1272 (7th Cir. 1984), *disapproved on other grounds by Nw. Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 371 (1994), in which the Seventh Circuit indicated that federal intermediate appellate courts had the authority to decline to follow

precedent from the United States Supreme Court under limited circumstances. State ex rel. *Martinez*, 118 N.M. at 259, 880 P.2d at 870.

{19} Based on this analysis, the Court of Appeals declined to follow *Cartwright* because it had not been reaffirmed by this Court since it was decided in 1958 and because it had been uniformly criticized by scholars. *State ex rel. Martinez*, 118 N.M. at 259-60, 880 P.2d at 870-71. As a result, the Court of Appeals held that the City had no pueblo water right, *id.* at 265, 880 P.2d at 876, thereby making it unnecessary to address the City's claims on appeal. We then granted the City's petition for writ of certiorari to the Court of Appeals. However, at the parties request, we stayed the matter pending settlement negotiations and the adjudication of the City's other water rights. We address this case now on resubmission after a settlement could not be reached and the City's other water rights have been adjudicated.

{20} We take this opportunity to clarify that *Wilson* modified *Alexander* only to the extent that *Alexander* and its progeny prevented the Court of Appeals from reviewing uniform jury instructions that have not previously been ruled upon by this Court. We modified *Alexander* in this limited context "[i]n deference to and in recognition of the vital role the Court of Appeals serves in the New Mexico judiciary." *Aguilera v. Palm Harbor Homes, Inc.*, 2002-NMSC-029, ¶ 6, 132 N.M. 715, 54 P.3d 993. Outside this context, however, and as we recently noted in *Aguilera*, 2002-NMSC-029, ¶ 6, *Wilson* stands for the proposition that "[t]he Court of Appeals . . . remains bound by Supreme Court precedent." *Wilson*, 116 N.M. at 796, 867 P.2d at 1178. As with the principle of stare decisis generally, the *Alexander* rule remains a necessity in order to protect the fundamental interests of fairness, certainty, uniformity, and judicial economy, *see Wilson*, 116 N.M. at 795-96, 867 P.2d at 1177-78, and the rule is implicit in our power of superintending control and our power to issue writs of certiorari, *Alexander*, 84 N.M. at 718, 507 P.2d at 779.

{21} Consistent with our pronouncements in *Wilson* and *Alexander*, the principle of declining to follow precedent articulated in *Indianapolis Airport Authority* has been rejected by the United States Supreme Court. "Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *accord Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (rejecting an anticipatory overruling by the intermediate appellate court and stating that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). Contrary to its position in *Indianapolis Airport Authority*, the Seventh Circuit recently adhered to the rule announced by the Supreme Court. *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1018 (7th Cir. 2002) ("[W]e have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems."), *cert. denied*, 537 U.S. 1109 (2003).

{22} We clarify that the operative fact for the application of the *Alexander* rule is the existence of precedent from this Court on the matter, and it is not necessary for that precedent to have been reconsidered or reaffirmed. *See Wilson*, 116 N.M. at 795, 867 P.2d at 1177 (stating that the Court of Appeals "is precluded only from overruling those instructions that have been considered by this Court in actual cases and controversies that are controlling precedent"). Moreover, the existence of scholarly criticism of one of our opinions does not diminish its binding nature as precedent. *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 58 (1st Cir. 1999) ("Scholarly debate about the continuing viability of a Supreme Court opinion does not, of course, excuse the lower federal courts from applying that opinion."), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Nonetheless, we emphasize, as we did in *Wilson*, that while the Court of Appeals is bound

by Supreme Court precedent, the Court is invited to explain any reservations it might harbor over its application of our precedent so that we will be in a more informed position to decide whether to reassess prior case law either by way of certiorari or, preferably under such circumstances, certification. *See Wilson*, 116 N.M. at 796, 867 P.2d at 1178.

{23} Considering that the State Engineer did not ask the Court of Appeals to overrule *Cartwright* and that the Court of Appeals recognized the binding nature of *Cartwright* in *Oman*, we interpret the Court of Appeals' opinion in this case as expressing reservations over the doctrine adopted in *Cartwright*. Further, we agree with the State Engineer that this Court's granting of the City's petition renders harmless any attempt by the Court of Appeals to overrule *Cartwright*. As a result, we now independently consider whether *Cartwright* remains viable authority. *Cf. Alexander*, 84 N.M. at 719, 507 P.2d at 780 ("Even though we have disapproved of the manner in which the Court of Appeals proceeded, we will nevertheless consider whether unavoidable accident . . . should be abolished."). We reject the City's contention that we should not revisit *Cartwright* without an evidentiary hearing at which the State's expert witnesses may be subjected to cross-examination. Cartwright's continued viability is a question of law that is properly and adequately before this Court on the present record.

III. THE VALIDITY OF THE PUEBLO RIGHTS DOCTRINE IN NEW MEXICO

{24} The State Engineer urges us to overrule *Cartwright* and reject the pueblo rights doctrine in New Mexico for two primary reasons. First, contrary to the analysis in *Cartwright*, the State Engineer contends that there is no historical basis for the pueblo rights doctrine in Spanish and Mexican law. Second, the State Engineer argues that the pueblo rights doctrine is inconsistent with fundamental precepts of New Mexico water law. We do not believe that the State Engineer's first reason provides adequate grounds to overrule *Cartwright*, but we need not take a definitive position on the historical validity of the pueblo rights doctrine because we agree with the State Engineer that *Cartwright* is based on a flawed analysis of New Mexico water law. We more fully address each of these points below. We begin, however, by reiterating the importance of stare decisis.

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). Based on the importance of stare decisis, "we require a compelling reason to overrule one of our prior cases." *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 7, 133 N.M. 661, 68 P.3d 901. We consider the State Engineer's arguments with these principles in mind.

A. Historical Basis for the Pueblo Rights Doctrine

{25} In the district court, the State Engineer tendered the expert opinion of several witnesses discussing the question of whether the pueblo rights doctrine is supported by historical evidence: Professor G. Emlen Hall, a legal historian, Dr. Iris Engstrand, a historian, Professor Guillermo F. Margadant, an expert in Spanish and Mexican legal history, Professor Hans W. Baade, a legal historian, and Professor Daniel Tyler, a historian. Each of these experts concluded that the pueblo rights doctrine lacks a historical foundation in the law of either of the two antecedent sovereigns in New Mexico, Spain and Mexico.

The State Engineer's experts provided examples of other towns established by colonization grants in New Mexico and Texas for which there is no evidence of a prior and paramount right to water. *See, e.g.*, Daniel Tyler, *The Mythical Pueblo Rights Doctrine* 35-44 (1990). In response to these expert opinions, the City devoted its tender on the validity of the pueblo rights doctrine to *Cartwright* and its authorities, which primarily consisted of the California cases recognizing the pueblo rights doctrine, *see Vernon Irrigation Co. v. City of Los Angeles*, 39 P. 762 (Cal. 1895), *overruled on other grounds by Beckett v. City of Petaluma*, 153 P. 20, 23 (1915); *Lux*, 10 P. 674; see also City of Los Angeles v. City of San Fernando, 537 P.2d 1250, 1277 (Cal. 1975) (stating that *Lux* and *Vernon* "are the key decisions on the issue"), *disapproved on other grounds by City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 867-68 (Cal. 2000). Based on the scholarly criticism of the State Engineer's experts, the Court of Appeals concluded that the pueblo rights "doctrine is historically invalid." *State ex rel. Martinez*, 118 N.M. at 263, 880 P.2d at 874; *accord In re Contests of the City of Laredo to the Adjudication of Water Rights*, 675 S.W.2d 257, 259-69 (Tex. App. 1984).

{26} The State Engineer contends that the pueblo rights doctrine is historically invalid. However, because this Court adopted the pueblo rights doctrine in *Cartwright*, we do not treat the issue of the historical validity of the doctrine as we would if it were an issue of first impression. Thus, the question is not whether we agree with the State Engineer's historical view of the law of antecedent sovereigns but, instead, whether this Court's historical analysis in *Cartwright* is so clearly erroneous as to create a compelling reason for overruling *Cartwright*. Having reviewed the State Engineer's tender and the authorities upon which *Cartwright* relied, we do not believe that the historical evidence is sufficiently clear to justify overruling *Cartwright* on this basis.

{27} The State Engineer's primary attack on the historical validity of the pueblo rights doctrine is its inconsistency with the Spanish and Mexican practice of equitable apportionment and common use, as stated in the Plan of Pitic and the Recopilación. However, this Court was not unaware of this view of the law of antecedent sovereigns when adopting the pueblo rights doctrine. *See Cartwright*, 66 N.M. at 97, 343 P.2d 676-77 (Federici, D.J., dissenting) (quoting Section 7 of the Plan of Pitic, which states in relevant part that "`[t]he residents and natives shall enjoy equally . . . *water privileges . . . in common with the residents and natives of the adjoining and neighboring pueblos*' "). Moreover, the State Engineer's reliance on equitable apportionment conflicts with this Court's longstanding interpretation of water law applicable in New Mexico under Spanish and Mexican rule outside the context of the pueblo rights doctrine.

{28} Although "[t]he water in the public stream belongs to the public," *Snow v. Abalos*, 18 N.M. 681, 693, 140 P. 1044, 1048 (1914), unappropriated water is "subject to appropriation for beneficial use." N.M. Const. art. XVI, § 2. Once appropriated, "[p]riority of appropriation shall give the better right." N.M. Const. art. XVI, § 2. New Mexico water law, then, stands in contrast to the State Engineer's reliance on a theory of common use, under which reasonable use and equitable sharing would control. Although the State Engineer relies on Spanish and Mexican law in support of equitable distribution, the current system of water law in New Mexico is based on this Court's interpretation of the law of antecedent sovereigns.

> In New Mexico, the "Colorado doctrine," as it is termed, of prior appropriation prevails. Established or founded by the custom of the people, it grew out of the condition of the country and the necessities of its citizens. The common-law doctrine of riparian right was not suited to an arid region, and was never recognized by the people of this jurisdiction. When the question came before the courts for adjudication[, *Albuquerque Land & Irrigation Co. v. Gutierrez*, 10 N.M. 177, 240, 61 P. 357, 360-61 (1900), *aff'd*, 188 U.S. 545 (1903)], the doctrine of prior appropriation was recognized by the courts and became

> the settled law of the territory. The judicial declaration, however, did not make the law; it only recognized the law as it had been established and applied by the people, and as it had always existed from the first settlement of this portion of the country. This construction of the law by the courts has been consistently adhered to by the Legislature of the territory. . . .

Snow, 18 N.M. at 693, 140 P. at 1048; *accord State ex rel. State Game Comm'n v. Red River Valley Co.*, 51 N.M. 207, 226, 182 P.2d 421, 433 (1945) (stating that prior appropriation has been applied in New Mexico "for some two or three centuries"); *United States v. Rio Grande Dam & Irrigation Co.*, 9 N.M. 292, 306, 51 P. 674, 678 (1898) ("The law of prior appropriation existed under the Mexican republic at the time of the acquisition of New Mexico. . . ."), *rev'd on other grounds*, 174 U.S. 690 (1899).

{29} In fact, we have previously rejected equitable apportionment as inconsistent with New Mexico's system of prior appropriation. *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929). In *Yeo*, a landowner asserted rights to underlying groundwater by virtue of ownership of the land, either as absolute ownership of as much water as the landowner could capture or to "the right to reasonable use of such waters correlative with similar rights of other owners." *Id.* at 614, 286 P. at 971-72.

> According to the "correlative rights" doctrine, each overlying owner would have the same rightBthe right to use whenever he [or she] saw fit. The right does not arise from an appropriation to beneficial use, which develops the resources of the state. It is not lost or impaired by nonuse. Regardless of the improvements and investments of the pioneers, later comers and later developers may claim their rights. The exercise of those rights which have been in abeyance will frequently destroy or impair existing improvements, and may so reduce the rights of all that none are longer of practical value, and that the whole district is reduced to a condition of nonproductiveness. The preventive for such unfortunate and uneconomic results is found in the recognition of the superior rights of prior appropriators. Invested capital and improvements are thus protected. New appropriations may thus be made only from a supply not already in beneficial use. Nonuse involves forfeiture. A great natural public resource is thus both utilized and conserved.

Id. at 620, 286 P. at 974. We concluded that the doctrine of prior appropriation "is the rule best adapted to our condition and circumstances," *id.* at 621, 286 P. at 974, and that this rule applied in New Mexico under Spanish and Mexican sovereignty, *compare id.* at 617-18, 286 P. at 973, *with id.* at 630, 286 P. at 978 (Parker, J., dissenting on rehearing) (stating that Spanish and Mexican "civil law was the same as the common law in regard to percolating waters").

{30} Based on these authorities, we could not reject the pueblo rights doctrine through a recognition of equitable apportionment and common use without undermining the historical basis for New Mexico's adoption of the doctrine of prior appropriation as a legacy of antecedent sovereigns. In short, New Mexico does not recognize equitable distribution as the system of water law that survived the Treaty of Guadalupe Hidalgo. *But cf. Colorado v. New Mexico*, 459 U.S. 176, 183-88 (1982) (applying the federal common law doctrine of equitable apportionment to interstate water adjudications between prior appropriation states and rejecting priority as the sole criterion). We will not, in the limited context of the pueblo rights doctrine, reevaluate the entire historical basis for water law in this State. We thus reject the State Engineer's arguments relating to common use.

{31} Moreover, we are wary of undue reliance on scholarly opinions in re-evaluating a position previously adopted by this Court. As the record in this case demonstrates, historical opinion can fluctuate based on newly found historical evidence or novel interpretations of extant sources.

Unlike history as a matter of theory, however, the law, as reflected by the doctrine of stare decisis, requires a greater degree of certainty and predictability. For example, if we were to adopt the State Engineer's historical analysis, the discovery of new evidence supporting the existence of the pueblo rights doctrine in Spanish and Mexican law would remain a possibility, *see State ex rel. Martinez*, 118 N.M. at 265, 880 P.2d at 876 (Hartz, J., concurring in part and dissenting in part), which would undoubtedly lead to another dispute over the historical validity of this doctrine. For property rights in general and water rights in particular, we believe that defining these rights based on prevailing scholarship would create an intolerable degree of uncertainty. Thus, while we concede that, in light of presently available historical evidence, the pueblo rights doctrine "rests . . . on a very narrow foundation," Wells A. Hutchins, *Pueblo Water Rights in the West*, 38 Tex. L. Rev. 748, 757 (1960), we are not convinced that this Court's adoption of the pueblo rights doctrine in *Cartwright* represents an entirely untenable view of Spanish and Mexican law. *See* Hans W. Baade, The Historical *Background of Texas Water LawBA Tribute to Jack Pope*, 18 St. Mary's L.J. 1, 82 (1986) ("Given the high priority of [domestic and municipal] purposes, [the pueblo water right] claim seems neither implausible nor inequitable."). As a result, we do not believe that the State Engineer's tender provides the compelling reason to overrule *Cartwright* that we demand in order to depart from stare decisis.

{32} In any event, because we conclude, as discussed in detail below, that the pueblo rights doctrine is inconsistent with New Mexico law and not protected by the Treaty of Guadalupe Hidalgo, the historical validity of the pueblo rights doctrine is irrelevant to our determination that *Cartwright* must be overruled. Regardless of whether the pueblo rights doctrine has a valid historical basis in the law of antecedent sovereigns, New Mexico water law, following the Treaty, precludes its recognition. Thus, the doctrine's inconsistency with New Mexico law forecloses any future argument that the pueblo rights doctrine exists in New Mexico irrespective of its historical validity or invalidity.

B. The Pueblo Rights Doctrine's Relationship to General Principles of Water Law

{33} The State Engineer raises what we believe to be more vital concerns with the pueblo rights doctrine than its historical validity in the law of antecedent sovereigns. The State Engineer argues that the perpetually expanding nature of the pueblo right conflicts with the fundamental principle of beneficial use that lies at the heart of New Mexico water law. As a result, the State Engineer contends that the doctrine is incompatible with water law in New Mexico and violates public policy. We agree. While we are unwilling to second-guess the historical analysis in *Cartwright* based on the present record, we reject the notion in *Cartwright* that "nothing in the theory of Pueblo Rights [is] inconsistent with the doctrine of prior appropriation and beneficial use," 66 N.M. at 80, 343 P.2d at 665, and that the reasons supporting the "Pueblo Rights doctrine apply with as much force in New Mexico as they do in California," *id.* at 85, 343 P.2d at 668. We believe that these statements reflect a flawed analysis of New Mexico water law.

{34} In New Mexico, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, § 3. We have said that this fundamental principle "is applicable to all appropriations of public waters." *State ex rel. State Eng'r v. Crider*, 78 N.M. 312, 315, 431 P.2d 45, 48 (1967). "As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator can only acquire a perfected right to so much water as he [or she] applies to a beneficial use." *State ex rel. Cmty. Ditches v. Tularosa Cmty. Ditch*, 19 N.M. 352, 371, 143 P. 207, 213 (1914); *accord Snow*, 18 N.M. at 694, 140 P. at 1048 ("[I]t is the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives the appropriator the continued and continuous right to take the water."). The principle of beneficial use is based on "imperative necessity," *Hagerman Irrigation Co. v. McMurry*, 16 N.M. 172, 181, 113 P. 823,

825 (1911), and "aims fundamentally at definiteness and certainty." *Crider*, 78 N.M. at 315, 431 P.2d at 48 (quotation marks and quoted authority omitted). It promotes the economical use of water, while also protecting the important interest of conservation. *See Yeo*, 34 N.M. at 620, 286 P. at 974.

> [W]ater was placed in a unique category in our Constitution—something that cannot be said of lumbering, coal mining, or any other element or industry. The reason for this is of course too apparent to require elaboration. Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival. Recognition of these facts, as well as a conviction that the doctrine of prior appropriation was better suited to accomplishing the desired ends than was the common law riparian doctrine must have been the principal reason for the adoption in this state of the prior appropriation doctrine as the law applicable to water.

Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 417, 467 P.2d 986, 989 (1970).

{35} In applying these principles, we have recognized that water users have a reasonable time after an initial appropriation to put water to beneficial use, known as the doctrine of relation. *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 470-71, 362 P.2d 998, 1001 (1961); *Hagerman Irrigation Co.*, 16 N.M. at 180, 113 P. at 824-25. "If the application to beneficial use is made in proper time, it relates back and completes the appropriation as of the time when it was initiated." *Hagerman Irrigation Co.*, 16 N.M. at 180, 113 P. at 825. We have applied this principle to municipalities in order to allow for "normal increase in population within a reasonable period of time." *Crider*, 78 N.M. at 316, 431 P.2d at 49. In addition, a municipality may be given a more substantial "reasonable time" for its population growth than a typical water user would have to complete an appropriation. *Compare* NMSA 1978, § 72-1-9 (2003) (providing, based on public welfare and the conservation of water, that municipalities have forty years "to plan for the reasonable development and use of water resources" and that municipal water rights can be based on "reasonably projected additional needs within forty years"), *with* NMSA 1978, § 72-5-28(A) (2002) (providing for forfeiture of water rights one year after notice of four years of nonuse). *See generally* Hutchins, *supra*, at 756 ("Preferences in the application of water are granted to municipalities in various western jurisdictions."). However, even for municipalities, if the water is not applied to beneficial use within a reasonable time, "such right may be lost." *Crider*, 78 N.M. at 316, 431 P.2d at 49.

{36} The pueblo rights doctrine is inconsistent with these principles. Under the doctrine, pueblos are not limited by the reasonable time requirement for applying water to beneficial use. Instead, the pueblo right contemplates an indefinite expansion to meet the growing demands of an increased population, regardless of how small the population of the initial pueblo and how long it takes the pueblo to expand. This aspect of the pueblo water right intolerably interferes with the goals of definiteness and certainty contemplated by prior appropriation; it envisions either the total loss of use of any amount of water the pueblo might potentially use in the future or temporary appropriations by other users subject indefinitely to elimination of their rights by possible population growth or increased needs of the pueblo. This level of uncertainty could potentially paralyze others from legitimately making beneficial use of unappropriated waters on the same stream as a pueblo out of fear of potential future interference with the pueblo's expansion. Whereas, with the doctrine of relation, other water users "are on notice that the law is granting them water rights that are temporary only" pending a reasonable time for the senior appropriator to complete the initial appropriation, there is no reasonable notice to other water users of a pueblo's potential water needs in the future because the pueblo right neither limits the quantity of water available to the municipality nor the amount of time available to

complete its initial appropriation. Hutchins, *supra*, at 756 (discussing the differences between prior appropriation and the pueblo rights doctrine). Our water laws, however, are designed "to encourage use and discourage nonuse or waste." *State ex rel. Reynolds v. S. Springs Co.*, 80 N.M. 144, 148, 452 P.2d 478, 482 (1969). The pueblo rights doctrine interferes with the necessity of utilizing water for the maximum benefits.

{37} Additionally, unlike typical water rights, the pueblo right is not subject to forfeiture for nonuse. *See City of Los Angeles v. City of Glendale*, 142 P.2d 289, 293-94 (Cal. 1943). Forfeiture, however, is an essential punitive tool by which "the policy of our constitution and statutes is fostered, and the waters made to do the greatest good to the greatest number." *S. Springs Co.*, 80 N.M. at 147, 452 P.2d at 781 (citations omitted). Forfeiture "prevent[s] the waste of waterBour greatest natural resource." *State ex rel. Erickson v. McLean*, 62 N.M. 264, 272, 308 P.2d 983, 988 (1957). The pueblo right subverts these critical policies.

{38} By facilitating the underutilization of essential public waters, the pueblo right prevents the efficient, economic use of water that is necessary for survival in this arid region and upon which our entire system of water law is based. We therefore agree with the dissent in *Cartwright* that the ever-expanding quality of the pueblo water right "is as antithetical to the doctrine of prior appropriation as day is to night." *Cartwright*, 66 N.M. at 110, 343 P.2d at 686 (Federici, D.J., dissenting). We conclude that the pueblo rights doctrine is incompatible with New Mexico water law.

{39} Moreover, we disagree with the determination in *Cartwright* that pueblo water rights are protected by the Treaty of Guadalupe Hidalgo, at least with regard to the expanding nature of the right. As pointed out by the dissent in *Cartwright*, the Treaty did not protect inchoate rights. 66 N.M. at 113-17, 343 P.2d at 687-91 (Federici, D.J., dissenting). *See generally United States v. City of Santa Fe*, 165 U.S. 675, 713-16 (1897). To the extent that Spanish and Mexican law recognized a pueblo water right, the nature of the right that allowed increased water usage in response to growing needs of the pueblo would have been a matter of grace, not a matter of right; future expansion of water rights subsequent to the colonization grant would have been subject to the sovereign's power of reallocation according to a change in circumstances. *See* Stevens, *supra*, at 569 ("[E]ach grant petition occasioned an official reevaluation of the adequacy of water supplies in the particular vicinity."). Thus, the expanding quality of the pueblo right, being inchoate, was not guaranteed by the Treaty. Its recognition became a matter of discretion for the new sovereign. *See City of Santa Fe*, 165 U.S. at 714 (stating that an inchoate claim "was subject to the uncontrolled discretion of congress"); *see also United States v. Sandoval*, 167 U.S. 278, 293-94 (1897) ("To the extent only that congress has vested them with authority to determine and protect such rights can courts exercise jurisdiction."). By virtue of various acts of Congress, this discretion rested with New Mexico, through its control over public waters within its boundaries. *See Cal.-Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154-65 (1935); *see also Red River Valley Co.*, 51 N.M. at 224-25, 182 P.2d at 432 (stating that Congress's confirmation of Spanish or Mexican land grants did not restrict the State's regulation of public waters); *id.* at 269-74, 182 P.2d at 460-64 (on rehearing) (discussing *Cal.-Or. Power Co.*).

{40} We agree with the dissent in *Cartwright* that New Mexico has not recognized inchoate water rights granted by Mexico or Spain. *See Cartwright*, 66 N.M. at 117, 343 P.2d at 690-91 (Federici, D.J., dissenting). It is true that New Mexico has protected water rights in existence at the time of the Treaty and before the enactment of a comprehensive water code in 1907. *See* N.M. Const. art. XVI, § 1; NMSA 1978, §§ 72-1-2 (1907), -9-1 (1941). However, this protection has always been circumscribed by the principle of beneficial use and limited to vested rights. *See Tularosa Cmty. Ditch*, 19 N.M. at 371, 143 P. at 213 ("As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator

can only acquire a perfected right to so much water as he [or she] applies to a beneficial use."); *see also* N.M. Const. art. XVI, § 1; § 72-9-1 ("Nothing contained in this article shall be construed to impair existing *vested* rights. . . .") (emphasis added).

> All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use. The state as owner of water has the right to prescribe how it may be used. This the state has done by . . . provid[ing] that the beneficial use is the basis, the measure, and limit to the right to the use of water.

McLean, 62 N.M. at 271, 308 P.2d at 987 (citation omitted).

{41} As discussed above, the pueblo rights doctrine is inconsistent with the principle of beneficial use. Therefore, we conclude that the expanding nature of the pueblo right is not an existing right within the meaning of Article XVI, Section 1 of the New Mexico Constitution. Jefferson E. LeCates, *Water Law—The Effect of Acts of the Sovereign on the Pueblo Rights Doctrine in New Mexico*, 8 Nat. Resources J. 727, 736 (1968) ("The effect of the provisions in the New Mexico Constitution was the cancellation of any rights to increase the amount of water to be appropriated in the future to satisfy the expanding needs of the growing pueblos."). We also believe that the pueblo rights doctrine unduly interferes with the State's regulation of water rights, *see McLean*, 62 N.M. at 272, 308 P.2d at 988 ("The State is vitally concerned in every appropriation. The need for water is imperative, and often the supply is insufficient. Such conditions lead inevitably to many serious controversies, and demand from the state an exercise of its police power, not only to ascertain rights, but also to regulate and protect them."); NMSA 1978, § 72-14-3.1 (2003) (providing for the preparation and implementation of a comprehensive state water plan), with the important interest of conservation, *see* NMSA 1978, § 72-5-5.1 (1985) (recognizing "the importance of public welfare and conservation of water in administering [the State's] public waters"), and with this State's obligations under interstate compacts, *see* NMSA 1978, §§ 72-1-2.2 (1991) (recognizing a potential shortage of water on the Pecos River and declaring the shortage and the State's obligations to Texas pursuant to compact "a statewide problem affecting all the citizens of the state"), -14-3 (1935) (delegating to the interstate stream commission the power "to investigate water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state, interstate or otherwise"). We thus conclude that pueblo water rights are not otherwise protected by New Mexico law.

{42} The water right acquired by a municipality under a colonization grant from antecedent sovereigns is recognized in New Mexico in the same manner as other municipal water rights. The colonization grant establishes the date of priority, but the priority date applies only to the quantity of water put to beneficial use within a reasonable time of the initial appropriation. Thus, the City's 1835 colonization grant created a vested right only to the amount of water put to beneficial use within a reasonable time.[1] Any water not put to beneficial use within a reasonable time cannot be reserved by a municipality for future expansion; the unappropriated waters

[1] We reject the State Engineer's contention that any vested water rights from the 1835 grant belong to the board of trustees established by the Legislature and not to the City. We agree with the district court that this contention was resolved in the two *Cartwright* decisions, *see Cartwright*, 68 N.M. at 420, 362 P.2d at 797-98, and we believe our resolution at that time was correct. The City has a vested right to any water put to beneficial use within a reasonable time of the 1835 grant by virtue of the Treaty of Guadalupe Hidalgo and Article XVI, Section 1 of the New Mexico Constitution. Thus, aside from the question of whether the 1903 patent issued by the United States government included water rights, *see Cartwright*, 66 N.M. at 116, 343 P.2d at 690 (on rehearing) (Federici, D.J., dissenting), and the issue of the board's authority over water rights as opposed to land interests, *see* NMSA 1978, ' 49-6-9 (1903) (listing the board's powers), the Legislature's directive that the board has no power to affect vested rights, NMSA 1978, ' 49-6-10 (1909), fully resolves this argument.

remaining after a reasonable time has elapsed from the initial appropriation "belong to the public and [are] subject to appropriation for beneficial use." N.M. Const. art. XVI, § 2.

{43} Because the expanding water right recognized by this Court in *Cartwright* directly conflicts with the doctrine of prior appropriation, we conclude that the pueblo water right is a "doctrinal anachronism," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992), and that it represents a "positive detriment to coherence and consistency in the law." *Patterson v. McClean Credit Union*, 491 U.S. 164, 173 (1989). "[T]he decision poses a direct obstacle to the realization of important objectives embodied" in New Mexico water law. *Id.* As a result, we believe that there is a compelling reason to overrule *Cartwright*.

C. The Rule of Property and Stare Decisis

{44} Despite the existence of adequate grounds to overrule *Cartwright*, the City contends that we should nonetheless adhere to stare decisis because *Cartwright* established a rule of property that induced substantial detrimental reliance. We have said that precedent establishing property rights "should not be disturbed or departed from except for the most cogent reasons, certainly not because of doubts as to their soundness." *Duncan v. Brown*, 18 N.M. 579, 585, 139 P. 140, 141 (1914). We have applied this principle in the context of judicial pronouncements relating to water rights. *See State ex rel. Bliss v. Dority*, 55 N.M. 12, 31, 225 P.2d 1007, 1019 (1950).

> The especial importance of stare decisis in cases involving a rule of property is twofold. First, and more generally, the antimajoritarian nature of the judicial system makes adherence to precedent essential to promote public confidence in the law and its administration. Second, and more specific to rules affecting property or commercial transactions, adherence to precedent is necessary to the stability of land titles and commercial transactions entered into in reliance on the settled nature of the law.

Bogle Farms, Inc. v. Baca, 1996-NMSC-051, ¶ 30, 122 N.M. 422, 925 P.2d 1184 (citation omitted). In determining whether to defer to a rule of property, we assess the extent to which the rule announced in prior cases has become fixed or settled and the extent to which it has "induced persons to enter into transactions in actual or demonstrable reliance thereon." *Id.* ¶ 31.

{45} We reject the City's argument that *Cartwright* should be upheld as a rule of property. Regardless of whether the pueblo rights doctrine could be viewed as a settled, fixed, and stable principle, we conclude, based on the doctrine's inconsistency with the goals of prior appropriation, that "the evils of the principle laid down will be more injurious to the community than can possibly result from a change." *Bogle Farms*, 1996-NMSC-051, ¶ 29 (quoted authority omitted). This conclusion is influenced by the fact that *Cartwright* was not a general stream adjudication and the State Engineer, who exercises "general supervision of waters of the state and of the measurement, appropriation, [and] distribution thereof," NMSA 1978, § 72-2-1 (1982), was not a party. *Cf. Bogle Farms*, 1996-NMSC-051, ¶ 32 (noting that "there is a public-interest aspect to rejection of stare decisis").

{46} In addition, we are not convinced that *Cartwright* induced the type of reliance that is contemplated by the rule of property. *Cartwright* concerned the nature of a water right that had been granted by antecedent sovereigns. Necessarily, then, all pueblo water rights implicated by *Cartwright* had to be in existence at the time it was decided, and there could be no issuance of new pueblo water rights based on *Cartwright*. Because, under *Cartwright*, pueblo water rights could not be sold or transferred by the municipalities possessing them, *see Cartwright*, 66 N.M. at 86, 343 P.2d at 669, New Mexico's recognition of the pueblo rights doctrine could not have induced new water rights transactions, by either municipalities or other water users. While municipalities, including the City, may have expended resources to capture additional water based on this Court's decision in *Cartwright*, we do not believe that this type of reliance implicates the

rule of property. Instead, we believe that the rule of property is designed to protect "the stability of land titles and commercial transactions entered into in reliance on the settled nature of the law." *Bogle Farms*, 1996-NMSC-051, ¶ 30; *accord Duncan*, 18 N.M. at 585, 139 P. at 141 (stating that the rule of property applies to judicial decisions "affecting title to real estate presumptively acquired in reliance upon such decisions"); *see Dority*, 55 N.M. at 31, 225 P.2d at 1019 ("In the nineteen years since [an earlier] decision it may be assumed that many thousands of acres . . . have been sold to purchasers who relied on that decision as determining title to the right to use the water here involved. . . .").

{47} Moreover, we note that overruling *Cartwright* would not completely deprive the City of its water rights under the colonization grant. *Cf. Bogle Farms*, 1996-NMSC-051, ¶ 32 (discussing the consideration of whether overruling precedent would "deprive anyone of title entirely"). Under the doctrine of prior appropriation, the City's 1835 colonization grant created a vested water right to as much water as the pueblo put to beneficial use within a reasonable time of the initial appropriation, assuming an ability to prove such use.[2] For these reasons, we reject the City's reliance on the rule of property. *Cartwright* is hereby overruled.

IV. PROSPECTIVITY, RELIANCE INTERESTS OF THE CITY, AND THE PROPER ADMINISTRATION OF JUSTICE

{48} The City argues that we should apply our overruling of *Cartwright* only prospectively. While we disagree that our rejection of the pueblo rights doctrine should be given prospective application as a general matter, we agree with the City that its reliance interests are substantial. Therefore, as discussed further below, we hold that our overruling of *Cartwright* shall be given a limited prospective application with respect to the City. We hold that the City does not possess a pueblo water right, but we remand to the district court to determine the most appropriate equitable remedy that will balance the City's reliance on *Cartwright* with other water users' reliance on New Mexico's system of prior appropriation.

{49} We begin our prospectivity analysis by restating that there is "a presumption that a new rule adopted by a judicial decision in a civil case will operate retroactively." *Beavers v. Johnson Controls World Servs, Inc.*, 118 N.M. 391, 398, 881 P.2d 1376, 1383 (1994). Retroactive application of a ruling in a civil case means that the new rule of law applies to all cases not finally determined, including the case in which the new rule is adopted, regardless of whether the events in question occurred after or before the ruling is announced. *Id.* at 397 n.7, 881 P.2d at 1382 n.7. In the present case, a retroactive application of our rejection of the pueblo water rights doctrine would mean that no municipality in New Mexico would be entitled to claim a pueblo water right, and it would invalidate municipal appropriations of water premised on the expanding nature of the pueblo right rather than on rights properly acquired through prior appropriation. As applied to the City, its water rights from the 1835 colonization grant would be limited to the amount of water put to beneficial use within a reasonable time of its first appropriation, which has been determined in a separate proceeding.

{50} However, "[i]t is within the inherent power of a state's highest court to give a decision prospective or retrospective application without offending constitutional principles." *Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982). A ruling can be selectively prospective, under which the ruling applies to the litigants in the case adopting the new rule but otherwise only to conduct occurring after the announcement of the new rule, or purely prospective, under which it applies exclusively to conduct occurring after

[2] We recognize that in the separate proceeding that occurred while the present appeal was stayed the district court found that the City was unable to prove a quantifiable appropriation stemming from its 1835 colonization grant. Nonetheless, for purposes of the rule of property, the question is whether the overruling of precedent, and not a party's failure of proof, entirely deprives a party of title to the property. Even with our overruling of *Cartwright*, the City had the opportunity to demonstrate a water right from its colonization grant through the doctrine of prior appropriation.

the announcement of the rule such that it does not apply to the litigants in the case adopting the new rule. *Beavers*, 118 N.M. at 397 n.7, 881 P.2d at 1382 n.7. "Pure prospectivity is rare. . . ." *Id.* Because the City wishes to be exempted from our overruling of *Cartwright*, it presumably requests a purely prospective ruling.

{51} We note that the doctrine of prospectivity applies somewhat awkwardly to the rule of law at issue in this case. We have determined that the pueblo rights doctrine did not survive the Treaty of Guadalupe Hidalgo and is not recognized by New Mexico water law. This determination concerns events that occurred, documents that were issued, and laws that were promulgated only in the past and which are thus not readily susceptible to a prospectivity analysis. There will be no future grants of water rights to which our ruling could apply; our decision would be a nullity if it did not apply to existing pueblo grants. Presumably, the City's prospectivity argument refers not to our interpretation of the water right contained in its colonization grant but to the City's appropriations of water over time. We assume that the City requests that we only apply our ruling either to amounts of water that it has not yet put to beneficial use, thereby upholding the City's current water usage, or to future appropriations that exceed its rights acquired through prior appropriation, thereby insulating over-appropriations occurring before the announcement of our judgment.

{52} We consider three factors in determining whether a ruling should receive prospective application: (1) whether the ruling announces a new principle of law; (2) whether retroactive application will advance or hinder the purposes of the new rule; and (3) whether prospective application of the new rule is necessary to avoid an injustice or hardship due to the substantial inequity that would result from retroactive application. *Beavers*, 118 N.M. at 398, 881 P.2d at 1383. The presumption of retroactivity "may be overcome by a sufficiently weighty combination of one or more" of these factors. *Id.*

{53} Our decision in this case clearly announces a new rule of law because we are overruling our clear past precedent adopting the pueblo rights doctrine. In addition, our recognition of the pueblo rights doctrine was likely to induce reliance in the area of commercial transactions, particularly in a municipality's costs in acquisition of water and in the promotion of new development. "The reliance interest to be protected by a holding of nonretroactivity is strongest in commercial settings, in which rules of contract and property law may underlie the negotiations between or among parties to a transaction." *Beavers*, 118 N.M. at 399, 881 P.2d at 1384. The first factor in our analysis thus weighs in favor of prospectivity.

{54} However, we believe the second factor weighs, at least slightly, in favor of retroactivity. The pueblo rights doctrine is inconsistent with the doctrine of prior appropriation in a number of ways. A prospective application of our ruling would not necessarily conflict with some aspects of prior appropriation, such as certainty and beneficial use, because the current beneficial use of water can be determined for municipalities that would have had pueblo water rights under *Cartwright*. Other aspects of New Mexico water law, however, would be frustrated by prospective application of our ruling. In particular, the State has continually placed considerable reliance on the doctrine of prior appropriation, both in the State Engineer's regulation of water and in the State's various obligations under interstate compacts. This reliance preceded *Cartwright* and was necessarily based on priorities in existence at the time, without reference to possible future expansion by successors to colonization pueblos. Similarly, numerous water users have expended considerable resources in reliance on the doctrine of prior appropriation by making beneficial use of what had appeared to be unappropriated water prior to our ruling in *Cartwright*. *See Yeo*, 34 N.M. at 618, 286 P. at 973 ("Persons contemplating investment in lands might well have considered that in the public policy of this state water is regarded as essential to existence and progress, and that, where waters were to be found in bodies sufficient to influence agricultural development, the right to their use would be worked out along lines consistent with former declared policy, the

encouragement of use, and the discouragement of nonuse or waste."). Thus, if we were to acquiesce in the current water usage by successors to colonization pueblos through a prospective ruling, we would be causing considerable harm to those who, as we have determined, properly and reasonably relied on prior appropriation. As a result, we believe that the purposes of our rejection of the pueblo rights doctrine would be hindered by a prospective ruling.

{55} For similar reasons, we believe that the third factor, the inequity of retroactivity, is either neutral or only slightly in favor of prospectivity. The City argues that it "has relied on its Pueblo water right in planning, constructing, and operating its water system for decades." We do not doubt that successors to colonization pueblo grants may have relied on *Cartwright* to a certain extent in appropriations made since 1958, when this Court decided *Cartwright*. However, we believe that the potential inequity that retroactive application would cause from this reliance is no greater than the inequity that a prospective ruling would cause to those who relied on the doctrine of prior appropriation for an even longer period of time before our decision in *Cartwright*.

{56} Additionally, we note that *Cartwright* considered the pueblo rights doctrine in a limited context. *Cartwright* concerned a trespass action brought by numerous water users. 66 N.M. at 66, 343 P.2d at 655. The nature of the action required the Court to determine only whether the City's use of water at the time the action was filed violated the plaintiffs' water rights. Therefore, it was not necessary for the resolution of the claim to reach the issue of the future expansion of the City's water rights. This Court adopted the pueblo rights doctrine outside the context of a general stream adjudication and without the State Engineer involved as a party. Based on the State Engineer's participation in *Cartwright* as an amicus, municipalities claiming a pueblo water right had notice of the State Engineer's opposition to the pueblo rights doctrine and the likelihood that the pueblo rights doctrine would be contested in future proceedings. These considerations diminish the reliance interests of successors to colonization pueblos with respect to the expanding nature of the pueblo water right. We conclude that the City has failed to fully overcome the presumption of retroactivity.

{57} Nevertheless, this case presents a rather unique circumstance. We recognize, as did the dissent in the Court of Appeals, that "Las Vegas is the one community in the state to have the benefit of a Supreme Court pronouncement that it possesses a pueblo right." *State ex rel. Martinez*, 118 N.M. at 265, 880 P.2d at 876 (Hartz, J., concurring in part, dissenting in part). We have also held explicitly that the plaintiffs in *Cartwright* are precluded by res judicata from relitigating their claims of trespass against the City. *Cartwright*, 68 N.M. at 419-21, 362 P.2d at 796-98. In addition, applying our holding in the present case to invalidate appropriations by the City of the same amount of water used before *Cartwright* would result in inconsistent judgments, which the judiciary strives to prevent. This anomalous situation is an unfortunate product of the different actions available to determine water rights in New Mexico.

{58} Typically, "[i]n any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties." NMSA 1978, § 72-4-17 (1965). This system of general stream adjudications is designed to avoid piecemeal litigation. *See Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 233-34, 849 P.2d 372, 376-77 (Ct. App. 1993). "A comprehensive adjudication of water rights is highly important. . . . Waters cannot be apportioned according to conflicting decrees or decrees covering less than all claims." *El Paso & Rock Island Ry. Co. v. Dist Ct. of Fifth Judicial Dist.*, 36 N.M. 94, 100, 8 P.2d 1064, 1067 (1931). In such an adjudication, the State Engineer furnishes the court with "a complete hydrographic survey of such stream system . . . in order to obtain all data necessary to the determination of the rights involved." Section 72-4-17.

The adjudication may be initiated by the Attorney General, at the request of the State Engineer, NMSA 1978, § 72-4-15 (1907), or by private claimants, but in either case, all water users whose rights may be affected must be joined. *See State ex rel. Reynolds v. W.S. Ranch Co.*, 69 N.M. 169, 173-75, 364 P.2d 1036, 1039-40 (1961). The State Engineer has a regulatory interest in the litigation. *Elephant Butte*, 115 N.M. at 238, 849 P.2d at 381.

{59} Although Section 72-4-17 has been described as "`all-embracing,'" *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 194, 344 P.2d 943, 944 (1959) (quoting *El Paso & Rock Island Ry.*, 36 N.M. at 95, 8 P.2d at 1065), it does not preclude trespass actions between individual water users under certain circumstances. *Chavez v. Gutierrez*, 54 N.M. 76, 82, 213 P.2d 597, 601 (1950) ("To say the least, [the requirement of initiating a general stream adjudication] would impose an insuperable burden on one seeking to restrain a simple trespass."). However, a simple trespass claim cannot be initiated while a general stream adjudication is pending and cannot be used to challenge the results of a general stream adjudication in which the litigants to the trespass action had participated as parties. *El Paso & Rock Island Ry.*, 36 N.M. at 100, 8 P.2d at 1068 ("To have [a water right] upheld in the adjudication suit would be useless if it can be invalidated in the injunction suit. . . . [The] intended benefits of general adjudication are illusory if the results are open elsewhere to attack."). In addition, in order to avoid a conflict with Section 72-4-17 and to protect the legislative purpose of comprehensive stream adjudication, a trespass claim should not be entertained if it necessarily requires the determination of the rights of other water users who are not joined in the action. *See W.S. Ranch Co.*, 69 N.M. at 174-75, 364 P.2d at 1039-40; *see also La Madera Cmty. Ditch Assoc. v. Sandia Peak Ski Co.*, 119 N.M. 591, 593, 893 P.2d 487, 489 (Ct. App. 1995) ("Here, . . . La Madera seeks to determine the water rights only of the parties to the lawsuit, not those of third parties.").

{60} In light of these principles, *Cartwright* seems somewhat unusual. Although it dealt with a trespass action, it was instituted by numerous water users, approximately one hundred, on the Gallinas attempting to enforce their rights under the Hope Decree. Once it was determined that the Hope Decree was not binding on the City, the resolution of the trespass claim would not necessarily have been inconsistent with the system of general stream adjudication. However, the City's affirmative defense of the pueblo rights doctrine potentially implicated the water rights of virtually every water user on the Gallinas.

{61} We have on another occasion precluded the consideration of a claimed pueblo water right, in part because only the municipality and the State Engineer were parties to the action. *See City of Albuquerque v. Reynolds*, 71 N.M. 428, 433-34, 379 P.2d 73, 76-77 (1962); *see also La Madera Cmty. Ditch*, 119 N.M. at 593, 893 P.2d at 489 ("La Madera does not claim that it has a prior and paramount right to use the water in the La Madera stream system to the exclusion of all other appropriators."). In addition, we have required the State Engineer to join all affected water users when seeking an injunction against a water user for diverting water in violation of established water rights. *W.S. Ranch Co.*, 69 N.M. at 173-75, 364 P.2d at 1039-40.

> If [the state engineer] alone can maintain this action under his claimed supervisory authority it is conceivable that the state engineer might secure an order enjoining appellee from applying the water to its lands, but that appellee, in a separate action, might be adjudged a right by prescription against the claimants below the reservoir. A judgment between the parties to this action would not be res judicata between appellee and the lower water right claimants. Appellee could then be in the untenable position of having a judgment in one case decreeing it the water right it claims and in another case a judgment enjoining and prohibiting it from using the very water it has been decreed.

Id. at 173-74, 364 P.2d at 1039.

{62} In the present case, retroactive application of our holding would place the City in just such an "untenable position." *Id.* Based on the principles outlined above, we believe that the consideration of the pueblo rights doctrine in *Cartwright* potentially conflicted with the legislative scheme established by Section 72-4-17 and, especially considering that the State Engineer did not intervene as a party, was perhaps improvident. *Cf. W.S. Ranch Co.*, 69 N.M. at 175, 364 P.2d at 1040 ("A determination of [the] legal question [of whether a water right can be acquired by prescription,] . . . requires the presence of all persons who would be affected by the question being resolved."). The present action initiated by the State Engineer "well illustrates the unfortunate results which might follow a divided jurisdiction" in water rights cases. *El Paso & Rock Island Ry.*, 36 N.M. at 100, 8 P.2d at 1068. Nonetheless, having resolved the trespass claim in *Cartwright* on the merits, the parties, as between themselves, were entitled to rely on the holding that the City's water usage at the time the action was filed did not infringe on the water rights of the plaintiffs. In other words, the City had from this Court an adjudication indicating, at the very least, that it had a prior right to the water it was using in 1955, when the plaintiffs filed their claim in *Cartwright. See Whenry v. Whenry*, 98 N.M. 737, 740, 652 P.2d 1188, 1191 (1982) ("To permit and in fact encourage the relitigation of property interests long after the issues were supposedly settled would merely serve to reopen old wounds and create new ones."). In addition, the fact that the plaintiffs in *Cartwright* and their successors are precluded by res judicata from challenging this determination creates difficulties in enforcement if we were to apply our holding in the present case retroactively against the City, particularly since the State Engineer must join all affected parties if seeking an injunction against the City. The water users, including the City and the plaintiffs in *Cartwright*, "are the real parties in interest, insofar as the controversy between them is concerned." *W.S. Ranch Co.*, 69 N.M. at 175, 364 P.2d at 1040.

{63} To resolve this predicament, we believe that it is appropriate to exercise our discretion to apply our overruling of *Cartwright* on a limited prospective basis with respect to the City. We hold that the City can no longer claim a pueblo water right that expands indefinitely to meet growing needs. However, to reflect the City's reasonable reliance on *Cartwright*, and to ameliorate the potentially harsh impacts to the City of a purely retroactive application of our holding, we believe that an equitable remedy is appropriate. The appropriate equitable remedy will balance the reasonable reliance interests of the City with the interests of other appropriators along the Gallinas.

{64} In *Cartwright*, we declared that the City had a senior right to appropriate all the water of the Gallinas reasonably necessary to meet its growing needs. We now overrule the aspect of this holding that recognizes an expandable water right, but we do not decide whether the narrower holding that the City has a senior right to the amount of water it was applying to beneficial use in 1955 remains viable. Under a balancing of interests, it may be just to recognize an equitable right on the part of the City to this amount. This remedy would avoid inconsistent judgments and protect the City's reliance interests while still negating the expandable right recognized in *Cartwright*. Alternatively, a more appropriate remedy might be to require the City to exercise its right of condemnation for necessary amounts of water exceeding its adjudicated rights, consistent with NMSA 1978, § 3-27-2 (1994), but to allow the City to pay less than present-day market value for those rights, either based on the value of the water rights at the time we decided *Cartwright* or the time of initial appropriation by the City or based on some other equitable calculation. This more restricted equitable remedy would ensure that the City not be placed in a worse position than it would have been in had this Court ruled in favor of the trespass claimants in *Cartwright*. However, we do not believe that it would be appropriate for this Court to resolve the issue of an equitable remedy on the present record.

{65} The record before us is not sufficiently developed to allow us to fully consider all of

the factors, and multiple points of view, relevant to an equitable remedy. These factors include the reliance interests of the City, the interests of other appropriators, and the effect of the remedy on the State Engineer's regulatory responsibilities. We believe the district court is better situated to consider these matters in the first instance. As a result, we order a remand to determine the appropriate equitable remedy following a balancing of these interests. The participation of the parties and, consistent with Section 72-4-17, other affected appropriators will provide the district court with necessary information regarding the benefits and detriments of particular equitable solutions. We authorize, but do not require, an evidentiary hearing on this question. We also note that a remand will permit the parties the opportunity to resume settlement discussions with the understanding that the pueblo rights doctrine no longer exists in New Mexico.

{66} To further define the framework of our remand, we clarify that the equitable remedy issued by the district court will remain distinct from any other appropriative rights established in collateral adjudicative proceedings, including the amounts and priorities established in the Hope Decree. The equitable remedy achieved on remand will be based on the narrow scope of the *Cartwright* litigation itself, which was a trespass action, and our declaration that the City had a senior right to the amount of water appropriated in 1955, subject to indefinite expansion to meet the City's growing needs. Thus, the remedy will focus solely upon the City's interests in light of *Cartwright*, balanced with other interests within the Gallinas watershed. We instruct the district court to consider the reliance interests of the City, such as investments incurred or lost opportunities for acquiring water rights as a result of the City's reliance on its pueblo water right. However, we do not foreclose equitable relief in the event that the City is unable to demonstrate specific reliance on *Cartwright* independent of its separate adjudicated rights. As stated above, we believe that it is without question that the City relied on *Cartwright* to a certain degree. As a result, we believe that a showing of reliance is merely one factor for the district court to weigh in determining an appropriate equitable remedy. The district court should also attempt to minimize any detrimental impact on other water users, protect the State Engineer's regulatory interests, and secure any constitutional interests in adjudicated property rights. Finally, the district court should strive to protect the proper administration of justice by avoiding inconsistent judgments. *See Whenry*, 98 N.M. at 740, 652 P.2d at 1191.

{67} As part of our equitable remedy, we preclude any trespass claims against the City for appropriating more than its adjudicated rights between *Cartwright* and the date this opinion is filed. Expanded appropriations during this time were authorized by our opinion in *Cartwright* and thus cannot be said to be an unlawful intrusion into the rights of other water users.

{68} We emphasize that any equitable remedy issued by the district court will be based on this Court's inherent power to apply our overruling of *Cartwright* prospectively. The equitable remedy will be independent of water rights on the Gallinas that have been previously adjudicated and thus will not affect any parallel proceedings between the parties in this case concerning the City's adjudicative rights.

V. CONCLUSION

{69} We overrule *Cartwright* and hold that New Mexico does not recognize the pueblo rights doctrine. Water rights contained in colonization grants from antecedent sovereigns are limited by the principle of beneficial use and are to be quantified by the amount of water put to beneficial use by the pueblo within a reasonable time of the first appropriation. This holding is to be applied retroactively. However, in the interests of the proper administration of justice, we apply a limited prospective application of our overruling of *Cartwright* to the City. We remand this case to the district court to determine the specific aspects of the equitable remedy that would strike an appropriate balance between the reliance interests

of the City, the reliance interests of other water users, and the regulatory interests of the State Engineer.

{70} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2004-NMSC-014

Filing Date: April 21, 2004

Docket No. 28,336

GOVERNMENT EMPLOYEES INSURANCE COMPANY, a Maryland corporation,

Plaintiff,

v.

JAMES D. WELCH and SHIRLEY WELCH,

Defendants.

Consolidated with

VICKI PERRIGO HECKL, as Personal Representative of the Estate of Tyler Heckl,

Plaintiff-Appellee,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

Certification from The United States District Court for The District of New Mexico
Alan C. Torgerson, United States District Judge

Certification from The New Mexico Court of Appeals
William F. Lang, District Judge

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OPINION

SERNA, Justice.

{1} Plaintiff Government Employees Insurance Company (GEICO) filed a declaratory action in the United States District Court for the District of New Mexico requesting a declaration that a household exclusion in its personal umbrella liability insurance agreement is valid and enforceable in relation to Defendants James and Shirley Welch under New Mexico law. The court issued a certification order to this Court questioning whether the optional umbrella policy's household exclusion provision violates New Mexico public policy, thus rendering the provision void. *See* NMSA 1978, § 39-7-4 (1997) ("The supreme court of this state may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the

certifying court and there is no controlling appellate decision, constitutional provision or statute of this state.").

{2} In a similar, although not identical, case, Plaintiff-Appellee Vicki Heckl filed a complaint for a declaratory judgment in state district court against Defendant-Appellant State Farm Mutual Automobile Insurance Company requesting that the district court declare that the uninsured motorist endorsement to her personal liability umbrella policy cover her claim. State Farm counterclaimed, requesting a declaration that the household exclusion does not allow coverage, and both parties moved for summary judgment. The district court found that the policy was ambiguous with regard to the scope of the uninsured motorist coverage and that the umbrella policy's exclusion was unenforceable as a violation of New Mexico public policy. For these reasons, the district court granted Heckl's motion for summary judgment. State Farm appealed to the Court of Appeals, and the Court of Appeals certified the appeal to this Court because we had already accepted certification in GEICO's federal action.

{3} Because the issues are substantially similar in the two cases, we consolidate them. We conclude that household exclusions in umbrella policies related to liability and uninsured or underinsured automobile coverage are void as against public policy.

FACTS AND BACKGROUND

{4} On February 27, 2003, James Welch was involved in an automobile accident while driving in Santa Fe, New Mexico, seriously injuring his wife, Shirley, a passenger. The Welches were insured by GEICO, including a primary automobile policy with a liability limit of $300,000, which is not in dispute, as well as a personal umbrella liability insurance policy with a limit of $1,000,000. The umbrella policy contains a household exclusion which states in part: "We do not cover damages resulting from . . . [p]ersonal injury to any insured," and defines "insured" as "[y]ou and your spouse if a resident of your household" as well as "[r]elatives residing in your household." (Emphasis omitted.) GEICO filed a declaratory action and argued that Shirley's claim against the driver, her husband James, is excluded from the umbrella policy by this provision. The Welches filed a motion to dismiss and a motion to certify the question to this Court. Following the issuance of a certification order, this Court accepted certification.

{5} Heckl's daughter was driving Heckl's son to school; she turned in front of an oncoming car, resulting in a collision, and Heckl's son was killed. Heckl was covered by a State Farm primary automobile liability policy, from which State Farm paid the policy limits of $100,000. She owned seven vehicles, each of which carried uninsured motorist coverage of $100,000 per person, and State Farm paid the policy limits for each of those policies, stacked, after subtracting the offset for liability insurance proceeds received by Heckl. Heckl also purchased a personal liability umbrella policy as part of a homeowner's policy that provided liability coverage that was in excess of her homeowner's and automobile liability coverage. An endorsement to the umbrella policy provided additional coverage for injuries caused by owners or operators of uninsured and underinsured motor vehicles; the endorsement defined "uninsured motor vehicles" to exclude vehicles insured under the liability coverage of the umbrella policy, as well as vehicles furnished for the regular use of the insured, designated as the "owned vehicle" exclusion. Heckl argued that her daughter was underinsured and claimed benefits under the uninsured motorist endorsement.

DISCUSSION

{6} "Appellate courts review matters of law *de novo*." *Hasse Contracting Co. v. KBK Fin., Inc.*, 1999-NMSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641. The question of whether an optional umbrella policy's household exclusion provision is valid is a question of first impression in New Mexico.

{7} In 1985, we addressed a household exclusion in a primary automobile liability insurance policy. *Estep v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 105, 111, 703 P.2d 882, 888 (1985). We held that "the `insured' and `household' exclusions contained in motor vehicle liability policies issued or delivered in New Mexico were and are contrary to public policy and the statutes of this state, and they are therefore invalid exclusions." *Id.* Later, the Court of Appeals invalidated a family exclusion provision that the insurance company argued should reduce underinsured motorist coverage benefits. *Martinez v. Allstate Ins. Co.*, 1997-NMCA-100, ¶¶ 1, 18, 124 N.M. 36, 946 P.2d 240. Most recently, we have reiterated "that exclusion of coverage [in mandatory automobile liability policies] for insureds and family members violates the requirements of the [New Mexico Mandatory Financial Responsibility Act] NMMFRA as well as our precedent, and that such exclusions are thus contrary to New Mexico public policy." *State Farm Mut. Auto. Ins. Co. v. Ballard*, 2002-NMSC-030, ¶ 11, 132 N.M. 696, 54 P.3d 537.

{8} We concluded that the family exclusion provision contained in the insured's primary automobile liability coverage was "more than a matter of contract interpretation; we determine[d] that the reduction in coverage for a discrete group of individuals in this context, based solely on their familial relationship to the insured, implicates a fundamental principle of justice." *Id.* ¶ 10. State Farm is correct when it notes that this conclusion was made in the context of a conflict of laws question, and it is also correct when it argues that this conclusion does not mean that "household exclusions are inherently unjust in all contexts and in all policies." However, regarding motor vehicle accidents, we conclude that family exclusions in liability and uninsured or underinsured motorist coverage offered through umbrella policies implicate a fundamental principle of justice and are contrary to New Mexico public policy.

{9} GEICO and State Farm argue that our precedent was decided in the mandatory liability insurance and uninsured motorist contexts and should not be extended to optional umbrella liability policies. GEICO and State Farm contend that the critical and determinative difference between *Ballard* and *Estep* and the present matter is the mandatory nature of auto liability insurance. State Farm and GEICO argue that the present matter instead concerns excess, or optional, umbrella policies which are not mandated or required by law. We disagree that this distinction is determinative; *Ballard* went beyond the mandatory minimum amount of coverage required by statute.

{10} We rejected in *Ballard* the insurance company's argument that *Estep*'s invalidation of family exclusion provisions was based solely on the public policy expressed in our statutes. *Ballard*, 2002-NMSC-030, ¶ 12. We recognized that the analysis in *Estep* "was directed to familial exclusion as contrary to protecting innocent accident victims." *Id.* "Familial exclusion, whether in relation to insurance contracts, as in *Estep*, or tort law, as in *Maestes[v. Overton*, 87 N.M. 213, 531 P.2d 947 (1975)], is an anachronism, not simply because it conflicts with [our statutes], but because `the reasons for the rule are no longer valid.'" *Id.* (quoting *Flores v. Flores*, 84 N.M. 601, 603, 506 P.2d 345, 347 (Ct. App. 1973)). In *Ballard*, we also rejected the insurance company's argument that we should uphold the family exclusion to liability coverage beyond the amount of the statutory minimum, despite the fact that the insured had purchased greater liability coverage. *Id.* ¶ 14. "Once [the insurance company] sold [the insured] insurance that exceeded the `limits required by law,' this coverage applies equally to all accident victims, whether the victim is a family member or not, as a matter of New Mexico public policy." *Id.* We conclude that the same reasoning applies to the present case and is a logical, although limited, extension of *Ballard*. Once an insurance company offers insurance that is in excess of the limits required by law, whether it is primary vehicle coverage beyond that which is required by statute or umbrella policies which include coverage for motor vehicle accidents, the coverage applies equally to the victims of such accidents whether or not they are family members.

{11} GEICO asserts that New Mexico also

> has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals. "Great damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in a legal relationship voluntarily assumed by the parties."

State ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 126, 812 P.2d 777, 780 (1991) (quoted authority omitted). GEICO notes that the household exclusion in its policy was clear and unambiguous and argues that public policy considerations recognized for mandatory auto policies do not conflict with the freedom of contract for additional optional insurance coverage, such as its umbrella policy. State Farm similarly argues that umbrella policies are not governed by the operative uninsured motorist statute, leaving the parties free to contract for the excess insurance without the express or implied requirements of the statute. Although the Welches concede that umbrella coverage is optional and not statutorily required, they argue that freedom of contract principles involving insurance policies are still a "take-it-or-leave-it" situation rather than the product of true conscious bargaining between the parties. In response, GEICO argues that this concern is only relevant in the context of mandatory liability insurance where the consumer's bargaining power is limited due to the statutory requirement of carrying compulsory coverage. GEICO emphasizes the importance of freedom of contract where optional insurance coverage is at issue, noting that the insured has a choice whether to purchase the additional excess coverage and that such coverage is not mandated by law.

{12} We have previously rejected freedom of contract arguments regarding family exclusions in primary policies. In *Estep*, we concluded

> that to say there is freedom of contract regarding inclusion or exclusion of coverage for family members in these cases "is to ignore reality." The discussion . . . of the "take-it-or-leave-it" nature of obtaining automobile liability coverage, and the effect of the policy's exclusion on third parties who are or may be ignorant of the insurance arrangements and unable or incompetent to contract for coverage for themselves, illustrates the fragility of any assertion that the terms of this or similar insurance policies truly are the product of conscious bargaining between the parties. The argument might be more credibly made were there evidence that insureds had been, or traditionally are, offered the choice of including or excluding coverage for family members.

103 N.M. at 109-10, 703 P.2d at 886-87. We recounted this freedom of contract argument in *Ballard* and took the "opportunity to reaffirm that a restriction of this type limiting coverage for household members violates New Mexico law and is a repudiation of our public policy." 2002-NMSC-030, ¶ 13. Although the Welches and Heckl had the option of purchasing umbrella coverage and such coverage is not required by statute, we believe that this reasoning is still applicable.

{13} GEICO and State Farm ask this Court to follow the majority of other courts which have upheld similar optional umbrella liability policy household exclusions. *E.g.*, *Bogas v. Allstate Ins. Co.*, 562 N.W.2d 236, 237 (Mich. Ct. App. 1997) ("Because the umbrella policy at issue, an optional insurance policy that applied not only to liability arising from the use of an automobile but also other personal activities of the insured, does not conflict with any statutory provisions mandating the coverage that the household exclusion excludes, we hold that the exclusion in the policy is enforceable."). The Welches argue that this Court should not follow the jurisdictions which have enforced such exclusions because the precedent from these other jurisdictions is in conflict with our own.

{14} The Welches argue that we should instead follow the reasoning of the Washington

Court of Appeals, which has invalidated umbrella policy household exclusions. *Safeco Ins. Co. of Ill. v. Auto. Club Ins. Co.*, 31 P.3d 52, 55 (Wash. Ct. App. 2001). The Washington Court of Appeals held "that the household member exclusion clause in [the insurance company's] umbrella policy violates public policy as it relates to insurance coverage for automobile accident victims." *Id.* at 53. The court noted that this was an issue of first impression for Washington but relied on the fact that "the Washington Supreme Court has long held that the household member exclusion clause is void as against public policy in the context of automobile liability insurance." *Id.* at 54. The court recognized that, addressing family exclusions in primary automobile insurance policies liability coverage, the state's supreme court

> determined that unlike other exclusionary clauses in auto insurance policies, which focus on increased risks associated with the drivers of the insured vehicles, the household member exclusion denies insurance coverage to an innocent class of victims for no good reason. More disturbing to the court was the fact that the excluded class of victims was exposed to negligent operation of the covered vehicle more than included victims, because "[t]ypical family relations require family members to ride together on the way to work, church, school, social functions, or family outings." Thus, these individuals could not practically avoid exposure to the risk for which they were uninsured.

Id. at 55 (footnotes omitted) (alteration in original). We conclude that the reasoning of the Washington Court of Appeals is more appropriate for New Mexico and more consistent with our existing precedent than the authority relied upon by State Farm and GEICO and is thus more persuasive on this issue.

{15} State Farm argues that the Legislature did not intend to invalidate exclusions in umbrella policies for the purpose of maximizing automobile insurance coverage, relying on a Court of Appeals' opinion. *See Archunde v. Int'l Surplus Lines Ins. Co.*, 120 N.M. 724, 905 P.2d 1128 (Ct. App. 1995). State Farm contends that *Archunde* stands for the proposition that the Legislature did not intend to expand uninsured motorist coverage beyond a motorist's primary automobile insurance policy. State Farm argues that the Court of Appeals, in *Archunde*, followed the majority of jurisdictions and held that umbrella policies are not required to provide uninsured motorist coverage under our statutes. State Farm contends that, because *Archunde* equated excess insurance policies with umbrella policies, it should apply here and the exclusion should be upheld.

{16} In *Archunde*, 120 N.M. at 725, 905 P.2d at 1129, the plaintiff, a school bus driver employed by a company which provided service for Albuquerque Public Schools (APS) students, was injured in an accident when the bus she was driving was struck by a vehicle driven by an underinsured third party. APS acted as a self-insurer and also carried an excess liability policy for self-insurers, similar to an umbrella policy, that contained a rider expressly excluding uninsured motorist coverage. *Id.* The plaintiff argued that, as a matter of public policy and NMSA 1978, § 66-5-301(A) (1983), which requires vehicle insurance liability policies to provide uninsured and underinsured coverage, all automobile insurance policies are required to include uninsured and underinsured motorist coverage. *Archunde*, 120 N.M. at 726, 905 P.2d at 1130. The Court of Appeals concluded that the statute did not "indicate a legislative intent to extend the reach of the statute beyond a motorist's primary automobile insurance policy. Therefore, in an excess policy, there is no statutory requirement mandating the inclusion of such coverage." *Id.* We reject State Farm's argument that *Archunde* controls the present matter. As Heckl notes, even if *Archunde* does not require State Farm to offer uninsured motorist coverage as part of the umbrella policy, *Archunde* does not address the issue of a family exclusion provision once State Farm decided to offer uninsured and underinsured motorist coverage in that umbrella policy. The Washington Court of Appeals rejected a somewhat similar argument:

> In this case, we are not being asked to construe [the insurance company's] umbrella policy as including a type of coverage not already explicitly included therein. Rather, where excess auto coverage is explicitly provided, we must determine whether public policy prohibits excluding therefrom the arbitrarily designated class of household member victims for no legitimate reason. We hold that it does, and thus invalidate the exclusion in the context of recovery for vehicular accident injuries.

Safeco, 31 P.3d at 56. We agree. The Washington Court of Appeals explained that, "[i]n considering the validity of [an automobile liability insurance household] exclusion, the supreme court found its analytical genesis in [their] state's financial responsibility act." *Id.* & 54. The Court of Appeals understood its cases to have "determined that the act conveys a strong public policy in favor of assuring adequate monetary protection and compensation to those victims who suffer injuries through the negligent use of the state's highways by others." *Id.* at 54-55. When we describe "public policy" in this opinion, we describe a public policy grounded in our Legislature's provisions for mandatory automobile liability insurance and uninsured or underinsured motorist coverage benefits. Our Court has tried to decide the cases presented to us in light of the Legislature's apparent intent, as we understood it. For that reason, the Washington Court of Appeals opinion in *Safeco* is more persuasive than the authority in other states to which we have been directed.

{17} While GEICO concedes that New Mexico also recognizes a similar public policy regarding innocent victims of auto accidents, GEICO argues that *Safeco* did not address the countervailing public policy of freedom to contract. GEICO asserts that New Mexico's policy of protecting innocent accident victims is satisfied by the NMMFRA and precedent rejecting mandatory automobile liability policy household exclusions and that this Court should uphold the optional umbrella liability policy household exclusion to satisfy the public policy of freedom to contract. While we recognize the importance of parties' freedom to contract, we believe it does not overcome "our rejection of family exclusion provisions as offensive to New Mexico public policy," *Ballard*, 2002-NMSC-030, ¶ 19, as discussed above.

{18} GEICO argues that the family exclusion provision "supports the public policy of avoiding collusive claims." In the context of vehicular accidents, we reject this argument. In Ballard, we noted that *Estep* "rejected the insurer's argument that the potential for fraudulent or collusive claims justified a family exclusion clause: `denial of negligence actions to an entire class of personsBhere, all family membersBcannot be tolerated simply because some undefined portions of that class might instigate fraudulent lawsuits.'" 2002-NMSC-030, ¶ 13 (quoting *Estep*, 103 N.M. at 109, 703 P.2d at 886).

{19} The Welches argue that all household exclusions are contrary to New Mexico public policy, as supported by the broad language of *Ballard* and *Estep*, although they concede that it is unnecessary for this Court to address exclusions beyond those at issue in the present matter. GEICO argues that New Mexico would potentially face dire consequences if all household exclusions in optional umbrella policies are void. GEICO also contends that, contrary to the Welches' assertion, the Court of Appeals has recently upheld a homeowner's insurance household exclusion. *See Risk Mgmt. Div. ex rel. Apodaca v. Farmers Ins. Co. of Ariz.*, 2003-NMCA-095, 134 N.M. 188, 75 P.3d 404. The Court of Appeals recognized that "[p]ublic policy supports allowing the [household] exclusion as a means to prevent collusion. For example, insurance contracts will often exclude from coverage liability for bodily injury to residents of the insured household in order to prevent collusion in the filing of insurance claims." *Id.* ¶ 20. Because it is unnecessary to the disposition of this case, we expressly do not address household or family exclusions beyond automobile liability

and uninsured or underinsured coverage contained in umbrella policies.

CONCLUSION

{20} We conclude that the family exclusion provisions contained in State Farm and GEICO's umbrella policies, under the circumstances of these cases involving motor vehicle accidents, are unenforceable as a violation of New Mexico public policy. Therefore, we answer the federal district court's certified question affirmatively, and we affirm the state district court's grant of summary judgment in favor of Heckl.

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

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PAMELA B. MINZNER,
Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHAVEZ,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2004-NMSC-015

Filing Date: April 21, 2004

Docket No. 28,022

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ROBERT YOUNG and REIS B. LOPEZ,

Defendants-Appellants.

consolidated with

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DAVID SANCHEZ,

Defendant-Appellant.

Interlocutory Appeal from The District Court of Guadalupe County
Frank H. Allen, District Judge

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Gerald Baca
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for Appellant Robert Young.

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for Appellee.

OPINION

SERNA, Justice.

{1} Defendants David Sanchez, Robert Young, and Reis Lopez are charged by grand jury indictment with the first degree murder of Ralph Garcia, in addition to other charges. The killing took place on August 31, 1999, at the Guadalupe County Correctional Facility (GCCF), where Garcia was a correctional employee and Defendants were inmates. The State seeks the death penalty based on two aggravating factors, murder of a peace officer and murder by an inmate of one who is lawfully on the premises of a penal institution. *See* NMSA 1978, § 31-20A-5(A), (D) (1981). Defendants moved to dismiss both aggravating circumstances on several grounds. *See State v. Ogden*, 118 N.M. 234, 239, 880 P.2d 845, 850 (1994) ("A defendant who has been notified that the State will seek the death penalty may move to dismiss an aggravating circumstance before trial."). They argue that corrections officers are not peace officers, that Garcia was not a peace officer because he had not completed the appropriate training, that GCCF was not a penal institution within the meaning of the Capital Felony Sentencing Act, and that Garcia was not lawfully on the premises of GCCF. The district court denied the motions to dismiss, finding that the State had probable cause for both aggravating

circumstances. Reviewing the district court's ruling on interlocutory appeal, we affirm.

I. STANDARD OF REVIEW

{2} In *Ogden*, we established guidelines for the district court to follow in ruling on a motion to dismiss an aggravating circumstance. Aggravating circumstances are not elements of the crime of first degree murder, *see* NMSA 1978, § 30-2-1(A) (1994), and thus they "are not required to be formally charged in an indictment or ruled on by the grand jury for the existence of probable cause." *Ogden*, 118 N.M. at 241, 880 P.2d at 852. Once the State files a notice of intent to seek the death penalty, however, we endorsed a pretrial evaluation of a defendant's motion to dismiss aggravating circumstances through a circumscribed evidentiary hearing. *Ogden*, 118 N.M. at 239-40, 880 P.2d at 850-51. "Such a hearing should be summary in nature; we have no intention of allowing a trial within a trial on a pretrial challenge to aggravating circumstances." *Id.* at 240, 880 P.2d at 851. We noted that "[t]he burden of proof is on the State." *Id.* However, we also explained that it is important for courts not to interfere with the charging discretion of the prosecutor. *Id.* at 240-41, 880 P.2d at 851-52. As a result, a probable cause standard applies at the pretrial determination, and "the State will defeat the motion if it proves that there is probable cause to believe an aggravating circumstance is present." *Id.* at 240, 880 P.2d at 851. In order to establish probable cause, the State need not adduce evidence establishing a challenged aggravating circumstance beyond a reasonable doubt; the question instead is "whether there is that degree of evidence to bring within reasonable probabilities the fact that [an aggravating circumstance] was committed by the accused." *State v. Garcia*, 79 N.M. 367, 368-69, 443 P.2d 860, 861-62 (1968). "Pretrial review of aggravating circumstances is intended to screen out only those cases in which the State does not have any significant factual or legal basis for pursuing the death penalty, and the probable cause standard of review should reflect this objective." *Ogden*, 118 N.M. at 240, 880 P.2d at 851.

{3} We also explained in *Ogden* that "[p]retrial rulings on the support of aggravating circumstances can present questions of fact, law, or mixed fact and law, and this will affect the standard of review." *Id.* at 239, 880 P.2d at 850. "A motion to dismiss an aggravating circumstance that presents a purely legal question should be granted when the district court finds that the aggravating circumstance does not apply as a matter of law." *Id.* "When the applicability of an aggravating circumstance raises a question of fact or a mixed question of fact and law, the district court should grant the defendant's motion to dismiss the aggravating circumstance only when it finds that there is not probable cause to support the aggravating circumstance." *Id.* at 240, 880 P.2d at 851. For motions involving issues of fact or mixed issues of fact and law, "[t]he district court must not weigh the evidence or consider evidence of mitigating circumstances." *Id.* "[D]istrict courts should be aware of the potential for impeding prosecutorial charging discretion, and they should confine their review" as outlined in *Ogden*. *Id.* at 241, 880 P.2d at 852. "On appeal, we will review questions of law de novo, and we will review questions of fact to see whether the district court correctly evaluated probable cause to support the aggravating circumstance." *Id.* at 240, 880 P.2d at 851.

II. THE AGGRAVATING CIRCUMSTANCE OF MURDER BY AN INMATE AT A PENAL INSTITUTION

{4} In enumerating the aggravating circumstances that make a first degree murder eligible for the death penalty under the Capital Felony Sentencing Act, the Legislature has specified that it is an aggravating circumstance if, "while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico." Section 31-20A-5(D). The State alleged in its notice of intent to seek the death penalty that Defendants murdered Garcia with the intent to kill while he was lawfully on the premises of GCCF, a penal institution in New Mexico. Defendants claim that this aggravating circumstance should not apply in

this case because GCCF is not a "penal institution" within the meaning of Section 31-20A-5(D) or because Garcia was not lawfully on the premises. We reject both of these arguments.

{5} "The chief aim of statutory construction is to give effect to the intent of the legislature." *Roth v. Thompson*, 113 N.M. 331, 332, 825 P.2d 1241, 1242 (1992). "[T]he plain language of the statute [is] the primary indicator of legislative intent." *Whitely v. N.M. State Pers. Bd.*, 115 N.M. 308, 311, 850 P.2d 1011, 1014 (1993). The Legislature specifically instructed that "penal institution" in Section 31-20A-5(D) "includes facilities under the jurisdiction of the corrections and criminal rehabilitation department and county and municipal jails."[1] In a different provision, the Legislature provided that "local jail" includes facilities operated "by a private independent contractor pursuant to an agreement with a county, municipality or combination of such local governments." NMSA 1978, § 33-3-28(D)(2) (1985). *See generally Ogden*, 118 N.M. at 243, 880 P.2d at 854 ("Statutes on the same general subject should be construed by reference to each other. . . ."); *Roth*, 113 N.M. at 334, 825 P.2d at 1244 ("A fundamental rule of statutory construction is that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent."). In addition, the Legislature has stated that "[c]ontracts between local public bodies and private independent contractors for the operation, or provision and operation, of a jail are specifically authorized." NMSA 1978, § 33-3-1(B) (1984).

{6} In accordance with this statutory authority, Wackenhut Corrections Corp. had a contract with the County to operate GCCF as a correctional facility. Pursuant to a separate contract between the County and the Department of Corrections, which was incorporated into the County's contract with Wackenhut, GCCF housed inmates, including Defendants, who were committed to the supervision of the Department of Corrections. These inmates were subject to the typical consequences of incarceration in a public facility, such as receiving time served on their sentences and being subject to prosecution for escape or other crimes directed at inmates, *see* NMSA 1978, § 30-22-8 (1963) ("Escape from jail consists of any person who shall have been lawfully committed to *any* jail, escaping or attempting to escape from such jail.") (emphasis added), and the administrators of GCCF were obligated to comply with specific statutory duties, including the maintenance of a clean facility and the provision of food for the prisoners, NMSA 1978, §§ 33-3-5 (1984) (applying to "independent contractor[s]"), -6 (1984) (same). We believe it is clear that GCCF is a penal institution within the plain language of Section 31-20A-5. The fact that GCCF housed inmates from the Department rather than county inmates is immaterial both for the definition of "local jail" in Section 33-3-28 and the definition of "penal institution" in Section 31-20A-5(D). Thus, GCCF is a penal institution within the plain language of the statute.

{7} Defendants also claim that Garcia was not lawfully on the premises at the time of the killing because he had not completed his training as a corrections officer. The County's contracts with Wackenhut and the Department of Corrections provided that GCCF corrections officers receive training that complied with Department and County policies. The contracts further provided that the Department would train all corrections officers at its main training academy or at GCCF, which would be designated as a branch of the Department's training academy for this limited purpose. After being hired by Wackenhut in January 1999, Garcia attended a ten-week training program at the Department's main training academy. However, Garcia did not receive his certification from the Department because he did not pass an AR-15 rifle test. The Department issued a waiver of certification for Garcia's duties inside the facility pending Garcia's retaking of the rifle test and instructed Wackenhut not to allow Garcia to assume the duties of an armed post, meaning work patrol and transport. Although Garcia was scheduled to attend another rifle training session, he could not attend because of car problems, and the waiver from the Department expired on May 31,

[1] We note that, by using the word "includes," the Legislature did not intend to create an exhaustive list of penal institutions.

1999. Garcia was later trained in the use of a shotgun and pistol, but he did not attend another training session for the AR-15 rifle prior to his death and thus had not been certified as a corrections officer by the Department. Following Garcia's death, the Department notified Wackenhut that it was not to allow uncertified individuals to work on posts designated for correctional officers. From the time it began operating GCCF through the time of the alleged murder, Wackenhut had used only shotguns and pistols at the correctional facility and did not use the AR-15 rifle. The Department's training academy branch at GCCF did not require AR-15 rifle training, and the Wackenhut corrections officers who attended training at this branch, rather than the main training academy Garcia attended, received certification from the Department despite the absence of AR-15 rifle training.

{8} In arguing that Garcia's presence on the premises of GCCF was unlawful due to his lack of certification, we believe that Defendants overlook the plain language and purpose of the statute. Section 31-20A-5(D) applies to anyone lawfully on the premises of a penal institution, not just certified corrections officers. Thus, this provision includes other employees at the institution who are not certified corrections officers, as well as visitors and other inmates. The completeness of Garcia's training had no effect on Garcia's lawful presence at GCCF. Garcia was an employee of GCCF and was authorized by GCCF administrators to be on the premises at the time of the killing. In their motions to dismiss, Defendants challenged that Garcia was a peace officer within the meaning of Section 31-20A-5(A), which is discussed further below. However, Defendants did not challenge the State's allegation that Garcia was murdered while acting in the course of his duties as a GCCF employee, and Defendant Sanchez noted in his motion to dismiss that "it is undisputed that [Garcia] was employed by the Wackenhut Corporation and working as a correctional officer at the time of his death." Garcia was therefore lawfully present at the facility within the plain meaning of Section 31-20A-5(D).

{9} Further, the legislative purpose of this aggravating circumstance is to deter inmates from committing murder. *See Roberts v. Southwest Cmty. Health Servs.*, 114 N.M. 248, 251, 837 P.2d 442, 445 (1992) ("Statutes should be construed so as to facilitate their operation and the achievement of the goals as specified by the legislature."). We believe that Defendants' construction of the statute would frustrate this legislative purpose. We believe that the Legislature intended to deter inmates from murdering correctional officers with a technical deficiency in training to the same extent as the murder of other corrections employees, fellow inmates, and visitors. We conclude that this argument is without merit, *see Ogden*, 118 N.M. at 241 n.9, 880 P.2d at 852 n.9, and we affirm the district court's ruling that there was probable cause for this aggravating circumstance.

III. THE AGGRAVATING CIRCUMSTANCE OF MURDER OF A PEACE OFFICER

{10} As a separate aggravating circumstance, the Legislature included cases in which "the victim was a peace officer who was acting in the lawful discharge of an official duty when he [or she] was murdered." Section 31-20A-5(A). In its notice of intent to seek the death penalty, the State alleged that Garcia was a peace officer acting in the lawful discharge of an official duty when he was murdered. Defendants argue that this aggravating circumstance is inapplicable in this case for three reasons: (1) corrections officers and jailers are not peace officers within the meaning of Section 31-20A-5(A); (2) the employees of GCCF were neither corrections officers nor jailers; or (3) Garcia was not a corrections officer or jailer, and therefore not a peace officer, at the time of his alleged murder. For the reasons that follow, we conclude that there is probable cause to support this aggravating circumstance.

A. Whether Corrections Officers and Jailers are Peace Officers

{11} Defendants first claim that the Legislature did not intend to include corrections officers and jailers in its reference to "peace officers"

in Section 31-20A-5(A). Defendants contend that corrections officers, whose principal duty is to hold individuals in custody rather than to maintain public order, perform a different role than peace officers. Defendants argue that corrections officers only occasionally act in the role of peace officers, when making an arrest or enforcing laws on the premises of a New Mexico correctional facility. Defendants also argue that Section 31-20A-5 protects corrections officers in other ways, by establishing an inmate's murder of employees of the Department of Corrections as one aggravating circumstance, Section 31-20A-5(E), and an inmate's murder of anyone lawfully on the premises of a penal institution as another aggravating circumstance, Section 31-20A-5(D). Defendants contend based on these provisions that the Legislature would have expressly included corrections officers in Section 31-20A-5(A) if it had intended to provide them with additional protection as peace officers. We review de novo the district court's determination that corrections officers and jailers are peace officers for purposes of Section 31-20A-5(A). *See Ogden*, 118 N.M. at 240, 880 P.2d at 851; *see also State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) ("Interpretation of a statute is an issue of law. . . .").

{12} In *Ogden*, this Court noted that there is no directly applicable definition for "peace officer" in Section 31-20A-5(A). 118 N.M. at 241, 243, 880 P.2d at 852, 854. Relying on general rules of statutory construction, we focused on the purpose of the statute and noted that the strict construction of punitive statutes "should not be used to defeat the policy and purposes of a statute." *Id.* at 242, 880 P.2d at 853. "[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.* at 243, 880 P.2d at 854.

{13} The State in *Ogden* sought the death penalty for the murder of a community service officer (CSO). *Id.* at 237, 880 P.2d at 848. The CSO position in that case involved tasks that had, prior to the creation of the position, been performed by city police officers, including traffic control, investigation of private property accidents, close patrol of residences, service of subpoenas, and investigation of certain misdemeanors. *Id.* at 237-38, 880 P.2d at 848-49. CSOs were not trained in prisoner contact or control or dispatched to incidents in which suspect contact was anticipated. *Id.* at 238, 880 P.2d at 849. They did not carry guns, nor were they authorized to make arrests. *Id.* However, CSOs wore uniforms similar to those worn by city police officers and drove marked patrol cars. *Id.* In addition, CSOs received their assignments from the city chief of police and were supervised by sergeants in the city police department. *Id.*

{14} Based on these facts, the district court in that case had found that CSOs are not peace officers within the meaning of Section 31-20A-5(A) because they are not expressly recognized as peace officers by statute. *Id.* at 243, 880 P.2d at 854. We rejected this interpretation. "When a statutory term is not defined, it must be given its plain and ordinary meaning. The popularly understood meaning of `peace officer' is a police officer, sheriff, or other law enforcement official who keeps the peace by patrolling public areas and enforcing the law." *Id.* at 243-44, 880 P.2d at 854-55 (citations omitted). "The purpose of Section 31-20A-5(A) is to deter the killing of law enforcement officers by enhancing the penalty for committing that crime. . . . [T]he deterrent value of this penalty enhancement is thought to provide extra protection to law enforcement officers, thereby encouraging their service." *Id.* at 244, 880 P.2d at 855. "[B]y using the term `peace officer,' Section 31-20A-5(A) demonstrates the legislature's intention to protect a broader category of law enforcement officers than only police officers." *Id.* "[O]ur emphasis should focus on the maintenance of public order or peace requirement. . . ." *Id.* at 245, 880 P.2d at 856.

{15} Applying these principles, we concluded in *Ogden* that CSOs are peace officers within the meaning of Section 31-20A-5(A). *Id.* at 244-45, 880 P.2d at 855-56. We highlighted the fact that "CSOs are charged with the duty to maintain public peace or order." *Id.* at 245, 880 P.2d at 856. We also

noted that "CSOs are threatened in their positions in the same way that police officers are, except that CSOs have less frequent contact with suspects who are known to be dangerous." *Id.* at 244, 880 P.2d at 855. We use our analysis of CSOs in *Ogden* as a guide to our determination of whether corrections officers and jailers fall within the meaning of "peace officer" in Section 31-20A-5(A).

{16} Based on our analysis in *Ogden*, the question we must address in this case is whether corrections officers and jailers maintain public order or peace in such a way that the Legislature intended to provide them with extra protection to encourage their service and deter violent acts against them. We answer this question by turning to other statutes dealing with peace officers, including those specifically applying to jailers and corrections officers.

{17} The Legislature has defined "peace officer" for purposes of the Criminal Code as "any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes." NMSA 1978, § 30-1-12(C) (1963). This Court has held that jailers are included in this statute because "[a] jailer is an officer in the public domain, charged with the duty to maintain public order." *State v. Rhea*, 94 N.M. 168, 169, 608 P.2d 144, 145 (1980). Consistent with *Rhea*, the Legislature has specifically provided that

> [j]ailers and any employee of a local jail who has, at the particular time, the principal duty to hold in custody any person accused or convicted of a criminal offense or placed in the legal custody or supervision of a local jail shall have the power of a peace officer with respect to arrests and enforcement of laws when on the premises of a local jail, while transporting a person committed to or under the supervision of a local jail, while supervising any person committed to or under the supervision of a local jail anywhere within the state or when engaged in any effort to pursue or apprehend such a person.

Section 33-3-28(A). The Legislature further provided that "[c]rimes against a jailer, including those persons employed by an independent contractor, shall be deemed the same crimes and shall bear the same penalties as crimes against a peace officer." Section 33-3-28(C).

{18} Following our decision in *Rhea*, the Court of Appeals held that corrections officers were not "peace officers" within the meaning of Section 30-1-12(C) because, unlike jailers, the statute specifically governing corrections officers, NMSA 1978, § 33-1-10 (1984, prior to 1986 & 1987 amendments), did not at that time state that crimes against corrections officers are to be treated as crimes against peace officers, even though Section 33-1-10 did give corrections officers the power of a peace officer with respect to arrests and enforcement of laws when on the premises of a New Mexico correctional facility or while transporting a person committed to or under the supervision of the corrections department. *State v. Tabaha*, 103 N.M. 789, 790-91, 714 P.2d 1010, 1011-12 (Ct. App. 1986). However, in response to *Tabaha*, "[t]he legislature subsequently amended the correctional officers statute to provide that crimes against correctional officers and employees of the Corrections Department acting as peace officers were deemed crimes against peace officers." *State v. Gutierrez*, 115 N.M. 551, 552, 854 P.2d 878, 879 (Ct. App. 1993). Based on the Legislature's response to *Tabaha*, it is clear that the Legislature intended to treat corrections officers, like jailers, as peace officers for the purpose of crimes committed against them when they are making arrests or enforcing the laws. *See* NMSA 1978, § 33-1-10(B) (1987).

{19} The definition of "peace officer" in Section 30-1-12(C) is not directly applicable to Section 31-20A-5(A) because that definition applies only to the Criminal Code, *Ogden*, 118 N.M. at 243, 880 P.2d at 854; however, as a statute on the same general subject, this definition is a helpful guide in determining the Legislature's intent. *See id.* at 245, 880 P.2d at 856. In addition, we believe that Section 33-3-28 and Section 33-1-10 apply directly to our interpretation

of Section 31-20A-5(A). In contrast to Section 30-1-12(C), which expressly limits its application to uses of the term "peace officer" within the Criminal Code, the statutory provisions designating corrections officers and jailers as "peace officers" do not contain the same limitation. "Crimes against a correctional officer or an employee of the corrections department while in the lawful discharge of duties which confer peace officer status pursuant to this section shall be deemed the same crimes and *shall bear the same penalties* as crimes against a peace officer." Section 33-1-10(B) (emphasis added); *accord* § 33-3-28(C). Section 31-20A-5(A) concerns a penalty for a crime against a peace officer, and therefore, Section 33-1-10 and Section 33-3-28 serve as powerful indicators of the Legislature's intent in Section 31-20A-5(A). These statutes evince an intent on the part of the Legislature to treat corrections officers, jailers, and any employee of a local jail whose principal duty is to hold inmates in custody as peace officers for purposes of Section 31-20A-5(A) when these individuals are murdered during the discharge of duties conferring peace officer status.[2]

{20} Defendants speculate that this Court believed in *Ogden* that corrections officers are not peace officers because we cited a case from another jurisdiction, *People v. Perry*, 327 N.E.2d 167, 170-71 (Ill. App. Ct. 1975), which we parenthetically described as "concluding that private security guards and jailers are not `peace officers' because their duty to maintain public order is confined to a specific time and place." *Ogden*, 118 N.M. at 245, 880 P.2d at 856. However, Illinois' statutes with respect to jailers and corrections officers differ from those enacted by our Legislature. *See Perry*, 327 N.E.2d at 171 ("[W]e do not mean to suggest that the definition of a peace officer is absolutely rigid and cannot be expanded by the legislature. Other states have specifically expanded that definition to include such law enforcement personnel as . . . jail guards. . . ."). As compared to our citation to *Perry*, we believe it is more significant that we recited in *Ogden* the Legislature's amendment of Section 33-1-10 in response to *Tabaha* as "further evidence that the legislature intended [Section] 31-20A-5(A) to be interpreted broadly." *Ogden*, 118 N.M. at 244 n.11, 880 P.2d at 855 n.11. Based on this reference to juvenile corrections officers, as well as the context surrounding *Tabaha*, including this Court's determination in *Rhea* that jailers fall within the general Criminal Code definition of peace officers, we believe this Court understood in *Ogden*, as we hold in this opinion, that the Legislature intended to include corrections officers and jailers as peace officers in Section 31-20A-5(A).

{21} In *Ogden*, this Court emphasized the "peace-keeping nature" of the duties of CSOs and the dangerousness of their peace-keeping role. 118 N.M. at 245, 880 P.2d at 856. As the Legislature has expressly indicated, corrections officers and jailers also serve a peace-keeping role, and their position is even more potentially dangerous than that of CSOs, who "have less frequent contact with suspects who are known to be dangerous." *Id.* at 244, 880 P.2d at 855. Through Section 33-1-10 and Section 33-3-28, the Legislature has demonstrated its intent to protect corrections officers and jailers and to deter crimes against them during the course of their duties of maintaining order in penal facilities. Our application of Section 33-3-28 and Section 33-1-10

[2] Defendants rely on a case from the Court of Appeals, *Callaway v. N.M. Dep't of Corr.*, 117 N.M. 637, 641, 875 P.2d 393, 397 (Ct. App. 1994), which held that corrections officers are not law enforcement officers as that term is used in the Tort Claims Act, *see* NMSA 1978, § 41-4-3(D) (2003) (defining "law enforcement officer" as a "full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes"). We believe this authority is inapposite because it interpreted a different term in a different context. For crimes committed against jailers and corrections officers, and the associated penalties for such crimes, included capital sentencing, the Legislature made its intent explicit in Section 33-3-28 and Section 33-1-10. We also note that we have previously held, consistent with our interpretation of "peace officer" in *Rhea*, that jailers at county jails are law enforcement officers within the meaning of Section 41-4-3(D). *Methola v. County of Eddy*, 95 N.M. 329, 332, 622 P.2d 234, 237 (1980); *see Davis v. Bd. of County Comm'rs*, 1999-NMCA-110, ¶ 35, 127 N.M. 785, 987 P.2d 1172 (applying *Methola* to the director of a county detention center). We need not address in this opinion any potential conflict in the cases interpreting Section 41-4-3(D).

to the definition of "peace officer" in Section 31-20A-5(A) is consistent with our understanding in *Ogden* that the Legislature intended a broad interpretation of this aggravating circumstance to advance the purpose of protecting those who maintain order.

{22} We reject Defendants' argument that Section 31-20A-5(A) would be duplicative of Section 31-20A-5(E) by holding that "peace officer" includes corrections officers. While it is true that Section 31-20A-5(E) protects employees of the Department of Corrections, it does not protect jailers, including employees of independent contractors such as GCCF, whom the Legislature expressly designated as peace officers under certain circumstances. In addition, this provision applies not only to corrections officers employed by the Department but to all Department employees. Similarly, Section 31-20A-5(D) is not duplicative of Section 31-20A-5(A) because Section 31-20A-5(D) also applies to individuals other than corrections officers, including visitors and other inmates. As shown by the scope of these provisions, Section 31-20A-5(E) and Section 31-20A-5(D) are designed to deter murders committed by inmates. Unlike Section 31-20A-5(A), these provisions would not provide the same level of protection against murders committed by someone other than an inmate against a corrections officer who is carrying out an official duty, for example, a murder of a corrections officer by an individual attempting to help an inmate escape. By contrast to Section 31-20A-5(D) and Section 31-20A-5(E), "[t]he killing-of-a-peace-officer aggravating circumstance is designed to make criminals think twice before firing at a dark uniform." *Ogden*, 118 N.M. at 244, 880 P.2d at 855. By designating corrections officers and jailers as peace officers under certain circumstances, we believe the Legislature intended to provide them with the extra protection and added deterrent value of Section 31-20A-5(A). The three aggravating circumstances identified by Defendants serve different purposes and apply in different situations; these provisions do not become duplicative merely because there is probable cause to meet two of them under the facts of this case.

{23} We also reject Defendants' reliance on the rule of lenity. As we noted in *Ogden*, this rule applies only if traditional rules of statutory construction prove futile in ascertaining a statute's meaning. 118 N.M. at 242, 880 P.2d at 853. As our analysis above illustrates, the meaning of "peace officer" in Section 31-20A-5(A) can be discerned by traditional rules of statutory construction, such as reading the provision together with statutes in pari materia, and after applying these rules, we are not left with the insurmountable ambiguity that would trigger application of the rule of lenity. We conclude that "peace officer" in Section 31-20A-5(A) includes jailers and corrections officers while they are engaged in the duties for which the Legislature designated them to be peace officers in Section 33-3-28 and Section 33-1-10.

B. Whether GCCF Employees are Jailers or Corrections Officers

{24} Defendants argue that GCCF employees are not "jailers" within the meaning of Section 33-3-28 because the statute defines "jailer" as "any employee of a local jail who has inmate custodial responsibilities, including those persons employed by private independent contractors who have been designated as jailers by the sheriff," Section 33-3-28(D)(1). Defendants also contend that the requirement of designation by the sheriff is supported by NMSA 1978, § 29-1-9 (1979), which requires appointment in writing by state authorities in order to exercise the powers of a peace officer. Defendants argue that, because the employees of GCCF were not designated by the Guadalupe County Sheriff, as required of jailers in Section 33-3-28(D)(1), they do not have the peace officer powers stated in Section 33-3-28(A). We disagree.

{25} The Legislature expressly declared that "any employee of a local jail who has, at the particular time, the principal duty to hold in custody any person accused or convicted of a criminal offense or placed in the legal custody or supervision of a local jail shall have the power of a

peace officer" under the same circumstances empowering jailers as peace officers. Section 33-3-28(A). Therefore, the Legislature did not make designation as a jailer by the sheriff a necessary condition for peace officer status under this statute. For this reason, Defendants' reliance on Section 29-1-9 as a basis for requiring designation by the sheriff is misplaced. Section 33-3-28(D)(2) defines a "local jail" as "a facility operated by a county, municipality or combination of such local governments or *by a private independent contractor pursuant to an agreement with a county, municipality or combination of such local governments and used for the confinement of persons charged with or convicted of violation of a law or ordinance*." (Emphasis added.) GCCF is an independent contractor pursuant to a contract with the board of commissioners of Guadalupe County. It houses inmates who have been convicted of crimes based on a contract between Guadalupe County and the Department of Corrections. Therefore, GCCF is a local jail under Section 33-3-28(D), and its guards are "employees of a local jail" who have the powers of a peace officer under the circumstances specified in Section 33-3-28(A).

{26} In addition, although the definition of "jailer" includes designation by the sheriff, the Legislature has also provided that "[t]he common jails shall be under the control of the respective sheriffs, independent contractors or jail administrators hired by the board of county commissioners or other local public body or combination thereof." Section 33-3-1(A). In *Ogden*, this Court held that formal, specific legislative action was not necessary to confer peace officer status on CSOs:

> the fact that CSOs hold their public employment is what vests them by law with the duty to maintain public order. There is no need for specific legislation stating that the CSOs are vested by law to maintain public order. Such a judicial construction employs an artificial and unduly narrow definition of the term "vested by law," and it incorrectly deprives the legislature of the ability to enact broad, general statutes.

118 N.M. at 245, 880 P.2d at 856. Similarly, in this case, GCCF's contract with the board of commissioners of Guadalupe County, a contract which is specifically authorized by law, Section 33-3-1(B); NMSA 1978, § 33-3-26(A) (1984), vested GCCF's employees with the authority to act as jailers. By virtue of the contract, GCCF employees "are literally clothed with the authority of the State." *Ogden*, 118 N.M. at 245, 880 P.2d at 856. While the Legislature contemplated that the sheriff undertake the additional ministerial act of designating the guards of independent contractors as jailers, the plain language of Section 33-3-28(A) indicates that the Legislature did not intend for the failure to perform this ministerial act to strip the guards of local jails of the powers of a peace officer. Otherwise, this technical deficiency would deprive prison guards of the necessary ability to arrest and enforce laws against the inmates they are guarding, thereby preventing them from maintaining order. *Cf. Gutierrez*, 115 N.M. at 552, 854 P.2d at 879 ("To reach the result advocated by Defendant, we would have to hold that the legislature . . . intended to deprive [juvenile corrections officers] of the power to prevent violations of law on the grounds of the various juvenile facilities located in this state. This would be an absurd interpretation of the legislature's action. . . ."). This construction of Section 33-3-28 would frustrate the legislative purpose of maintaining order that prompted the Legislature to extend peace officer powers to guards at local jails.

{27} In *Ogden*, we determined that, "[r]ather than over-literalize the `vested by law' language in the statutory definitions, our emphasis should focus on the maintenance of public order or peace requirement, the more substantive and limiting language of the definitions." 118 N.M. at 245, 880 P.2d at 856. We again decline to "hobble statutory interpretation" with "an artificial and unduly narrow" construction of the statute. *Id.* at 244-45, 880 P.2d at 855-56. We believe that Section 33-3-28 confers peace officer powers, under enumerated circumstances, to the employees of GCCF whose principal duty is to hold in custody persons convicted of a criminal offense.

C. Whether Garcia was a Jailer or Corrections Officer at the time of the Alleged Murder

{28} Defendants argue that there is no evidence that Garcia was making an arrest or enforcing the laws at the time of his alleged murder and that the statutory designation of jailers and corrections officers thus does not apply. This factual argument was not raised in Defendants' motions to dismiss and was not a subject of the limited *Ogden* evidentiary hearing. As a result, this issue is not properly before this Court on interlocutory appeal. *See* Rule 12-216(A) NMRA 2004. In any event, we determine that the State established probable cause to believe that Garcia was murdered while in the lawful discharge of duties conferring peace officer status. Section 33-3-28(A). Based on this Court's holding in *Rhea* that jailers maintain the public order, we believe that the Legislature intended its reference to "enforcement of laws" in Section 33-3-28(A) and Section 33-1-10(A) to apply to the duty of corrections officers to maintain order in the correctional facility,[3] which was one of Garcia's primary duties at GCCF. Defendant Sanchez noted in his motion to dismiss that it was undisputed that Garcia was engaging in his duties as a corrections officer at the time of the killing. This fact is supported by references at the evidentiary hearing to a riot, as well as by the supplemental authority submitted to this Court by Defendants on appeal, which indicates that the United States Department of Justice denied federal death benefits to Garcia's widow and also recites that Garcia's death occurred while he was responding to a physical altercation between inmates. There is probable cause to believe that Garcia, while trying to maintain order, was enforcing the law at the time of his alleged murder and thus acting in his capacity as a peace officer.

{29} Finally, Defendants contend that Garcia was not a corrections officer because he had not completed training from the Department of Corrections. Defendants rely on the statutory requirement that "[m]embers of the corrections department correctional officer force, excluding correctional specialists, . . . successfully pass any physical and aptitude examination the department may require." NMSA 1978, § 33-1-11(E) (1986). As described above, Defendants introduced evidence that Garcia failed to successfully pass a rifle test and that the Department of Corrections notified GCCF, after Garcia's death, that those who had not been certified by the Department were not to serve as corrections officers.

{30} We do not believe that Garcia's failure to retake the rifle test nullifies his status as a peace officer under Section 33-3-28 as a matter of law. Section 33-1-11(E) does not apply to jailers and employees of local jails designated as peace officers. Section 33-3-28(B) specifically provides that "[j]ailers who are employees of an independent contractor shall not be required to attend the basic training program for law enforcement officers at the New Mexico law enforcement academy." In addition, the statute that allows the Department of Corrections to contract for correctional or jail services provides that "[w]hen the contractor begins operation of a facility for which private contractor operation is authorized, his [or her] employees performing the functions of correctional officers shall be deemed correctional officers for the purposes of Section[] 33-1-10," which empowers corrections officers to act as peace officers. NMSA 1978, § 33-1-17(E) (1995). Although this independent contractor provision does not apply in this case because GCCF had a contract with the County instead of with the Department of Corrections, it is noteworthy that this statute does not require individual officer compliance with training requirements in order for the independent contractor employee to be considered a peace officer. The Legislature deemed the key factors for peace officer status to be the performance of the functions of correctional officers and the existence of a contract between the employer and the public body responsible for the operation of a corrections facility. These factors were met in the present case.

{31} A defect in a guard's training might affect the independent contractor's compliance with

[3] Contrary to Defendant Sanchez's contention, nothing in *Gutierrez* contradicts this interpretation of the Legislature's intent or otherwise exempts custodial duties from the peace officer powers of corrections officers. *See Gutierrez*, 115 N.M. at 552, 854 P.2d at 879.

the government contract. *See* NMSA 1978, § 33-3-27(C) (providing that an agreement with a private independent contractor for the operation of jails "shall provide for the independent contractor to provide and pay for training for jailers to meet minimum training standards which shall be specified in the contract"), (F)(2) (2001) (providing for termination of the contract for cause if the independent contractor fails to meet a contract provision that "seriously affects the operation of the jail"). The County's contract with Wackenhut in this case, for example, required that its corrections officers be trained by the Department. Nonetheless, we believe that the Legislature did not intend to deprive employees of independent contractors of the authority necessary to carry out the important and dangerous functions of a corrections officer based on an independent contractor's failure to fully comply with contractual obligations. As in *Ogden*, we believe our focus should be on the maintenance of public order requirement. 118 N.M. at 245, 880 P.2d at 856. GCCF, pursuant to statutorily authorized public contracts, employed Garcia to hold inmates in custody and to maintain order. Garcia performed the duties of a jailer pursuant to GCCF's contract with the County, and he was responsible for maintaining order and holding in custody inmates of the Department of Corrections. As the district court noted, "Garcia's duties, training uniform and risks differed in no significant way from corrections officers or jailers in other state or private correctional institutions in New Mexico." The State established probable cause to believe that Garcia was acting in the lawful discharge of his duties conferring peace officer status. Under these circumstances, we believe the Legislature would have intended for Garcia to have the powers of a peace officer in order to fulfill his duties and would have intended to deter inmates and others from committing violent crimes against him and against the other guards at GCCF. As a result, we believe that there is probable cause for this aggravating circumstance.

{32} Moreover, unlike the question whether corrections officers or independent contractor jailers are, generally, peace officers within the meaning of Section 31-20A-5(A), which is clearly a question of law, we believe that the question whether, under the circumstances in this case, Garcia had the powers of a peace officer raises a mixed question of fact and law. "When the applicability of an aggravating circumstance raises a question of fact or a mixed question of fact and law, the district court should grant the defendant's motion to dismiss the aggravating circumstance only when it finds that there is not probable cause to support the aggravating circumstance." *Ogden*, 118 N.M. at 240, 880 P.2d at 851. "The district court must not weigh the evidence. . . ." *Id.* By establishing that GCCF had a contract with the County, that Garcia was employed by GCCF as a corrections officer, and that he was performing the duties of a corrections officer at the time of his death, we believe that the State established probable cause to believe that Garcia was a peace officer within the meaning of Section 31-20A-5(A). We leave for the jury the resolution of any disputed facts surrounding Garcia's status as a peace officer and his performance of duties conferring peace officer status at the time of his killing. *See* UJI 14-7014 NMRA 2004 (requiring the jury to find beyond a reasonable doubt that the victim was a peace officer and was performing the duties of a peace officer at the time of the murder in order to find the aggravating circumstance of murder of a peace officer). Under the facts and issues presented below, we believe these questions are not properly resolved by pretrial order. We hold that the State satisfied its burden of establishing probable cause for the aggravating circumstance of murder of a peace officer.

IV. CONCLUSION

{33} We conclude that the State established probable cause to believe that GCCF is a penal institution in New Mexico and that Garcia was lawfully on the premises of GCCF when he was allegedly murdered. As a result, we affirm the district court's denial of Defendants' motion to dismiss with respect to the aggravated circumstance listed in Section 31-20A-5(D). We further hold that jailers and corrections officers are peace officers within the meaning of Section 31-20A-5(A) and that the State established probable cause to believe that the guards at GCCF, and

Garcia in particular, had peace officer powers at the time of the killing. We therefore also affirm the district court's denial of Defendants' motion to dismiss with respect to the aggravated circumstance of murder of a peace officer. We remand to the district court for further proceedings.

{34} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PAMELA B. MINZNER,
Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2005-NMSC-002

Filing Date: January 31, 2005

Docket No. 28,532

JAMES SPENCER, Personal Representative of the ESTATE OF HOPE RIGOLOSI,

Plaintiff/Petitioner,

v.

HEALTH FORCE, INC., A New York Corporation doing business in the State of New Mexico,

Defendant/Respondent.

Original Proceeding on Certiorari
William F. Lang, District Judge

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OPINION

SERNA, Justice.

{1} Plaintiff-Petitioner James Spencer, the personal representative of the estate of Hope Rigolosi, filed a wrongful death claim against Defendant-Respondent Health Force, Inc., based on negligent hiring, supervision, training, and retention of a home care worker, Ben Williams. Respondent filed a motion for partial summary judgment, and the district court granted the motion. Petitioner appealed to the Court of Appeals. The Court of Appeals affirmed the district court by unanimous opinion. *Spencer v. Univ. of N.M. Hosp.*, 2004-NMCA-047, ¶ 2, 135 N.M. 554, 91 P.3d 73. The Court concluded that Respondent had no statutory duty to Rigolosi for the failure to perform a background check as required by the version of NMSA 1978, § 29-17-1 (repealed 1998) in effect at the relevant time because strict statutory compliance was not possible; because Respondent's violation of the statute was excusable under a "justifiable violation doctrine;" because Respondent had no common law duty of reasonable care due to the existence of the statute; and because, as a matter of law, Respondent's retention of Williams after he had allegedly stolen three narcotic pills from Rigolosi was not the proximate cause of her death. *Spencer*, 2004-NMCA-047, ¶¶ 16, 17, 23, 25. This Court granted Petitioner's petition for writ of certiorari. *See* NMSA 1978, § 34-5-14(B) (1972). We reverse the Court of Appeals and the district court.

I. FACTS AND BACKGROUND

{2} Rigolosi, a thirty-six-year-old quadriplegic, died of a drug overdose on April 23, 1998. She required twenty-four-hour long-term care services. Respondent provides long-term home care to disabled individuals. Respondent hired Williams as a care giver on March 20, 1998, and assigned him, along with two other employees, to provide companionship and housekeeping

care for Rigolosi in her home. Patricia Pendelton, the owner of Health Force, stated that Williams was hired based on Rigolosi's recommendation. Respondent asserts that it checked all references Williams provided and that the references informed Respondent that he was reliable and dependable. Respondent did not perform a criminal background check on Williams prior to his employment. Respondent contends that, on his employment application, Williams indicated that he had never been convicted of a felony. In fact, Williams had prior convictions for burglary, aggravated assault, armed robbery, credit card fraud, embezzlement, and shoplifting. Respondent recounts that Williams, as its employee, provided home care services to Rigolosi between March 20 and April 1, 1998.

{3} Petitioner presented evidence that Williams allegedly stole three of Rigolosi's narcotic prescription pills while working for Respondent and alleged that Respondent did not investigate or discipline Williams for this action. Kasey Whitley, Williams' Health Force coworker and one of Rigolosi's other care givers, stated that, prior to Rigolosi's admission to the hospital, some of her narcotic medication was missing and that Williams admitted that he took it. On March 31, 1998, Whitley noted on the Health Force log that some of Rigolosi's medication was missing during Williams' shift.

{4} On April 1, Rigolosi was admitted to University of New Mexico Hospital (UNMH) for pneumonia and was set to be discharged on April 23. Although Whitley stated that no one was assigned by Health Force to care for Rigolosi while she was hospitalized, Whitley also described her regular visits to Rigolosi while Rigolosi was hospitalized and stated that Williams also visited Rigolosi regularly during this time. Whitley stated that she believed that she, along with Williams, would again act as health care givers after Rigolosi was to be discharged from the hospital, based on Whitley's conversation with Pendleton. Petitioner presented evidence that UNMH employees identified Williams and Whitley as Rigolosi's care givers. Donna Mentillo, a UNMH employee, stated that Rigolosi introduced Williams to her as Rigolosi's "caregiver" and that Mentillo understood this to mean that he assisted with her home care. Pendelton stated that she was aware that Williams and the other care givers were going to the hospital to visit Rigolosi "at least a couple weeks after" Rigolosi was admitted. On April 23, Williams allegedly took Rigolosi out of her UNMH room and injected her with heroin, resulting in her death.

{5} Respondent contends that Williams resigned from Health Force at the end of March and that his last date of employment was April 18. Pendelton also stated that Health Force had given thirty days' notice to the State of New Mexico, terminating its contract for Rigolosi's care effective April 7. Pendelton stated that she did not inform the staff at UNMH or Rigolosi that the care givers would not be providing services for Rigolosi while she was hospitalized. Respondent argues that, at the time of Rigolosi's death, Williams was not its employee, not subject to its control, and had not received authorization to visit Rigolosi at UNMH. Petitioner argues that Respondent did not terminate Williams' employment prior to Rigolosi's death or warn her of Williams' criminal background, and that Respondent does not have documentation of Williams' resignation. Thus, while it is undisputed that Williams was an employee for Respondent, the parties dispute whether Williams was an employee at the time of Rigolosi's death.

{6} In support of Petitioner's assertion that Williams continued to be Respondent's employee, in addition to the statements of Williams' coworker, Whitley, Petitioner relies on a time-dated voice recording, made approximately eight hours after Rigolosi's death, seized by the Albuquerque Police Department at Williams' residence. On the recording, a voice stated, "Hey Ben, this is Rachel. I just wanted to go over your schedule for this coming weekend. Give me a call when you get a chance, 883-4900. Thanks. Bye-bye." Petitioner notes that this phone number is identical to Respondent's published number. Pendleton confirmed that an individual named "Rachel" was employed by Health Force to handle care givers'

work schedules. However, Respondent contends that the recording is not admissible because the message is hearsay and does not meet any exception to the hearsay rule.

II. DISCUSSION

A. Standard of Review

{7} "Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). "If the facts are not in dispute, and only their legal effects remain to be determined, summary judgment is proper." *Id.* at 335, 825 P.2d at 1245.

> A movant for summary judgment need only make a prima facie showing that there is no genuine issue of material fact, and that on the undisputed material facts, judgment is appropriate as a matter of law; the burden then shifts to the opponent to show at least a reasonable doubt, rather than a slight doubt, as to the existence of a genuine issue of fact.

Ciup v. Chevron U.S.A., Inc., 1996-NMSC-062, ¶ 7, 122 N.M. 537, 928 P.2d 263. "[T]he opponent must come forward and establish with admissible evidence that a genuine issue of fact exists." *Id.* This Court "view[s] the facts in a light most favorable to the party opposing the motion and draw[s] all reasonable inferences in support of a trial on the merits." *Handmaker v. Henney*, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879.

B. Duty

{8} This matter presents the central question of whether Respondent owes a duty to the disabled individuals that receive care services from Respondent's employees based on theories of negligent hiring and retention. "The existence of a tort duty is a policy question that is answered by reference to legal precedent, statutes, and other principles of law." *Ruiz v. Garcia*, 115 N.M. 269, 272, 850 P.2d 972, 975 (1993).

{9} The Legislature has recognized that agencies that employ care givers owe a duty to those disabled individuals who receive long-term care services. Section 29-17-1 requires health care agencies to perform a criminal background check on all applicants prior to employment. The statute in effect at the time relevant to the present matter required that employers submit fingerprints of applicants to the Federal Bureau Investigation (FBI) as well as the Department of Public Safety in order to obtain and verify the applicant's potential criminal history. Applicants with prior convictions could not be employed. This statute was enacted and became effective from April of 1997 until May 20, 1998, when it was repealed and a new version was enacted. Respondent contends that, at the time it hired Williams, the Legislature had already repealed the statute but that the new statutory procedure was phased in almost two years after Rigolosi's death, so there was no mechanism for an employer to carry out the specific requirements.

{10} As a matter of common law, "[l]iability for negligent hiring `flows from a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring.'" *Medina v. Graham's Cowboys, Inc.*, 113 N.M. 471, 473, 827 P.2d 859, 861 (Ct. App. 1992) (quoting *Valdez v. Warner*, 106 N.M. 305, 307, 742 P.2d 517, 519 (Ct. App. 1987)). Thus, New Mexico recognizes both an employer's common law duty for negligently hiring employees to those at risk of injury as a result of the hiring as well as an explicit statutory duty for agencies such as Health Force that provide home care services to the disabled.

{11} The Court of Appeals properly recognized that a duty may be established by statute or common law. *Spencer*, 2004-NMCA-047, ¶ 9. The Court of Appeals discussed the statutory duty imposed on health care agencies by the version of Section 28-17-1 in effect and observed

that "[i]t failed to identify the agency to receive the FBI information and therefore the FBI would not provide the information." *Id.* ¶ 11. The Court noted that expert opinion indicated that, at the time, "word came out" that the statute was going to be repealed and that the FBI would not accept the fingerprints. *Id.* The Court became "concerned about whether a duty to perform a criminal background check could be fairly based on a statute that required a specific process that could not be followed" and requested supplemental briefs on the issue. *Id.* ¶ 15. The Court of Appeals "conclude[d] that under the limited circumstances of this case, no statutory duty can be based on Health Force's failure to perform the background checks required by the 1997 statute in force when Williams was hired in March 1998 because it was not possible to comply with the statute." *Id.* ¶ 16. The Court of Appeals relied upon treatises and cases from other jurisdictions for the proposition "that an actor is not liable for negligence when violating a legislative enactment if the actor `is unable after reasonable diligence or care to comply.' Justification for noncompliance exists when compliance was impossible or caused by circumstances over which the actor had no control. . . ." *Id.* (quoted authority omitted).

{12} The Court of Appeals stated, "In addressing whether the 1997 statute provides a standard of care, we view the problem in terms of whether violation of a statute is negligence per se, or whether one can be excused from following the statute in certain circumstances." *Id.* ¶ 17. The Court discussed the justifiable violation doctrine that "recognizes that there are circumstances in which it is unfair to base negligence on the violation of a statute" so that "[a]n excused violation of a statute is not negligence." *Id.* The Court of Appeals further relied on *Jackson v. Southwestern Pub. Serv. Co.*, 66 N.M. 458, 471, 349 P.2d 1029, 1038 (1960), for a similar proposition. *Spencer*, 2004-NMCA-047, ¶ 18.

{13} The Court of Appeals rejected Petitioner's argument that the statutory process created a "lack of guidance," and instead characterized the problem as the statute giving "very specific guidance that could not be followed." *Id.* ¶ 19. The Court also rejected Petitioner's argument that Respondent could have complied with its duty to perform a criminal background check by obtaining information from the local police department, as was the case in another location, and thus should not be excused from statutory compliance. *Id.* The Court noted that Petitioner "did not introduce any evidence that the informal process that worked in [another location] would have worked in Albuquerque, where Health Force was located, or anywhere else," and that, "[m]ore significantly," "when the [L]egislature has required compliance with a statute by providing a specific method, one must use that method," because "[s]tatutes are to give fair notice of what is required to enable compliance with the law." *Id.* ¶ 20. The Court of Appeals concluded,

> Members of the public, in conducting their affairs, should be entitled to rely on the requirements expressed in statutes and must meet those requirements unless a valid excuse exists. With fair notice about the requirements of a statute, there is no unfairness in requiring compliance. However, when a statute cannot be followed because it is flawed, it is unfair to impose the statutory requirements as a standard of conduct. Consistent with this principle of fair notice, it would be unfair in this case to impose a statutory duty to perform an act that is not expressed in the statute. When compliance with the mandated method is not possible, one should not be forced to guess at an alternative, at peril of being held liable.

Id. "Negligence cannot be premised on a statute when the undisputed evidence is that the process required by the statute could not be accomplished." *Id.* ¶ 21.

{14} The Court of Appeals then addressed whether Respondent owed Petitioner a common law duty.

> [F]or this Court to examine whether there existed a common law duty, we would be

> required to speak on the matter of background checks at a time when the [L]egislature had already spoken, and then had spoken a second time, consistently and definitively expressing the manner in which it wanted background checks performed. Against these legislative proclamations, we are unwilling to analyze whether a care provider also had a common law duty to have performed some other type of background check when, as a result of a flawed statute, the care provider could not perform or obtain the check required by the statute. We are not a legislative body. In this case, it is not appropriate for us to declare that some other kind of criminal background investigation should have been conducted. We will not legislate a duty when the [L]egislature has specifically addressed the problem.

Id. ¶ 23.

{15} Finally, the Court of Appeals addressed the issue of proximate cause regarding negligent retention based on Petitioner's claim that Respondent was negligent in retaining Williams following allegations that he took narcotic pills from Rigolosi. Noting that the negligent retention must proximately cause the injury, the Court of Appeals compared the present matter to several other cases and concluded that the connection was too tenuous: "We do not believe that a jury could reasonably find that Health Force's retention of Williams, after he had allegedly stolen three narcotic pills, was the proximate cause of Rigolosi's death over three weeks later." *Spencer*, 2004-NMCA-047, ¶ 25.

{16} Petitioner argues that the public policy expressed in the statute in question demonstrates a legislative intent to protect care-dependent vulnerable members of the community that require special protection because they are particularly unable to protect their own interests and are uniquely vulnerable to others. Petitioner contends that the Court of Appeals failed to look to the legislative intent regarding the protection of individuals like Rigolosi, and that the Court of Appeals erred by absolving Respondent of any duty because statutory compliance was not possible. Petitioner also argues that Respondent made no attempt to comply with the statute and that Respondent could have performed a criminal background check on Williams, even if Respondent could not have performed the check exactly as the statute required. Petitioner argues that Respondent must have a duty to at least attempt to comply with the statute before impossibility can be an excuse for noncompliance.

{17} Respondent agrees with the analysis set out by the Court of Appeals. Respondent argues that, because it could not comply with the statutory requirements as set out in the repealed law, it was not required to attempt to determine other methods for a criminal background check other than the procedure set out by the Legislature. Because it could not comply with the statute, Respondent contends that it had no statutory duty to conduct a criminal background investigation on Williams. Respondent also argues, in agreement with the Court of Appeals, that it had no common law duty to conduct a criminal background check.

{18} Focusing first on the question of whether Respondent owed Rigolosi a duty for the actions of its employees based on negligent hiring or retention, we conclude that the Court of Appeals' duty analysis was erroneous. The Court of Appeals appears to have confused or merged the question of the existence of a duty with the question of breach of duty, as also argued by amicus curiae New Mexico Trial Lawyers Association. "[A] negligence claim requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff's damages." *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181. Although the Court of Appeals noted that the statutory requirement of a criminal background check was a "standard of conduct," it continued to equate this standard with a statutory duty by holding that, if Respondent could not achieve this standard, then Respondent had no duty to Rigolosi. *Spencer*, 2004-NMCA-047, ¶ 20.

{19} As noted above, duty is a question of policy based upon statutes, precedent, or other principles of law. The Legislature recognized a public policy in the version of Section 29-17-1 in effect at the time of Rigolosi's death to provide special protection for care-dependent individuals with regard to home care workers. This statutory duty is consistent with the common law duty of employers for liability for negligent hiring to "those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring." *Medina*, 113 N.M. at 473, 827 P.2d at 861 (quoted authority and quotation marks omitted). Rather than preempting the common law duty, the statutory duty is complementary. The common law duty of ordinary care is also consistent with *Jackson*, relied upon by the Court of Appeals: "[T]he correct test is whether the person who has violated a statute has sustained the burden of showing that he [or she] did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." *Jackson*, 66 N.M. at 472, 349 P.2d at 1038 (quoted authority and quotation marks omitted). Thus, Respondent owes a duty, based on statute and common law, to clients or patients who receive care from Respondent's employees.

{20} As noted above, however, because Respondent could not comply with the standard set out in the earlier version of Section 29-17-1, the Court of Appeals concluded that Respondent owed no duty to Petitioner. The questions of duty and the breach of that duty are distinct. The specific requirements of Section 29-17-1with which Respondent and other care providers apparently could not comply would have provided a more specific standard of care than ordinary diligence. However, inability to comply with the specific legislative requirements does not negate the existence of a duty grounded in both statute and common law. As noted above, based on the legislative public policy determination that the disabled warrant special protection, consistent with the common law recognition of a general duty from employers to those placed at risk of injury as a result of hiring employees, Respondent clearly has a duty with regard to hiring and retaining its employees for harm caused to clients such as Rigolosi. Breach of that duty cannot be based on the version of Section 29-17-1 in effect at the time of Rigolosi's death, however, as it was apparently not possible to comply with the requirements. While liability cannot be based on a failure to comply with the requirements in the statute, Respondent is not altogether relieved of its common law duty regarding hiring or retaining employees to those individuals that receive care from its employees. Thus, because the statute in effect at the time of Rigolosi's death could not provide the standard of care, a reasonable diligence standard is appropriate. *See Jackson*, 66 N.M. at 472, 349 P.2d at 1038 (describing a reasonable care standard).

> [T]he responsibility for determining whether the defendant has breached a duty owed to the plaintiff entails a determination of what a reasonably prudent person would foresee, what an unreasonable risk of injury would be, and what would constitute an exercise of ordinary care in light of all the surrounding circumstances. This is a factual determination or, perhaps, a mixed determination of law and fact, involving as it does the application of precepts of duty to the historical facts as found by the fact finder.

Bober v. N.M. State Fair, 111 N.M. 644, 650, 808 P.2d 614, 620 (1991).

{21} Respondent, apparently conceding that it had some duty, argues that it acted reasonably with regard to hiring Williams by calling his references and further asserts that Williams was no longer an employee when Rigolosi died. More specifically regarding the negligent retention issue, Respondent argued, and the Court of Appeals concluded, that there is no proximate causation between Williams' alleged theft of medication and Rigolosi's death. Respondent notes that there was no allegation that the missing medication was used by Williams to harm or kill Rigolosi and contends that even if it had notice that Williams stole the medication, the

notice does not alert Respondent that Williams may harm or kill Rigolosi. We reject these claims for purposes of the appropriateness of the district court's grant of summary judgment.

{22} "For an employer to be liable for negligent hiring and retention there must be a connection between the employer's business and the injured plaintiff." *Valdez*, 106 N.M. at 307, 742 P.2d at 519; *see Elliot v. Williams*, 807 N.E.2d 506, 511 (Ill. App. Ct. 2004) ("[I]n order for there to be a causal connection between the employer's negligence and the plaintiff's injuries, the employment itself must create the situation where the employee's violent propensities harm the third person."); *L.M. ex rel. S.M. v. Karlson*, 646 N.W.2d 537, 545 (Minn. Ct. App. 2002) ("Negligent retention occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his [or her] unfitness, and the employer fails to take further action such as investigating, discharge or reassignment."). The questions concerning whether Respondent breached its duty when it contacted Williams' references but did not perform any type of criminal background check, whether Williams was an employee at the time of Riogolsi's death, and whether Respondent negligently retained Williams following his theft of Rigolosi's medication are all disputed factual matters for the jury or factfinder and are not properly disposed of by summary judgment. *See Los Ranchitos v. Tierra Grande, Inc.*, 116 N.M. 222, 228, 861 P.2d 263, 269 (Ct. App. 1993) (concluding that "the question of whether [the tortfeasor] was acting as an employee of Defendant at the time of the alleged acts of embezzlement presents a factual issue to be determined by the fact finder").

{23} Although "[a] court may decide questions of negligence and proximate cause, if no facts are presented that could allow a reasonable jury to find proximate cause," *Calkins v. Cox Estates*, 110 N.M. 59, 65 n.6, 792 P.2d 36, 42 n.6 (1990), we do not believe the facts of this case foreclose a reasonable jury from finding proximate cause between Respondent's retention of Williams and Rigolosi's death. "Foreseeability does not require that the particular consequence should have been anticipated, but rather that some general harm or consequence be foreseeable." *Pittard v. Four Seasons Motor Inn, Inc.*, 101 N.M. 723, 730-31, 688 P.2d 333, 340-41 (Ct. App. 1984) (concluding that "[n]otice of an employee's alcoholism and tendency toward violent behavior may make sexual assault by that employee foreseeable to the employer"). Petitioner's evidence that Williams stole Rigolosi's medication is sufficient to entitle Petitioner to avoid summary judgment because, as an indication of Williams' lack of fitness for employment, it may very well serve as an indicator to the employer that Williams presented a foreseeable danger to a physically incapacitated client. *See Valdez*, 106 N.M. at 308, 742 P.2d at 520 (relying on *Pittard* for the proposition that the particular consequence is not required to be foreseen and rejecting the defendant's argument that its employee's conduct was not foreseeable because an employer could not anticipate the precise circumstances that occurred based on knowledge of the employee's previous violent behavior).

{24} Although Respondent argues that Petitioner has not demonstrated that Williams was an employee at the time of Rigolosi's death, this Court views the evidence in the light most favorable to the party opposing a summary judgment motion and draws all inferences in favor of a trial on the merits. *See Handmaker*, 1999-NMSC-043, ¶ 18. Respondent argues that the phone message is inadmissible and notes that it preserved its objection to the admission of the evidence. However, Respondent does not discuss whether the district court ruled on the admissibility of the evidence, and we find no such ruling. Thus, we will not address admissibility of this evidence for the first time on appeal and instead leave this issue for the district court to resolve on remand. *See State v. Worley*, 100 N.M. 720, 723, 676 P.2d 247, 250 (1984) ("Admission of evidence is entrusted to the discretion of the trial court. . . ."); *cf. Torres v. Plastech Corp.*, 1997-NMSC-053, ¶ 26, 124 N.M. 197, 947 P.2d 154 (concluding that the "initial resolution" of the question of whether a worker is entitled to scheduled injury benefits, a mixed question of law and fact, should be left to the workers' compensation judge based on the principle that

this "Court on appeal will not originally determine the questions of fact in a case since such function lies within the province of the trial court") (quotation marks and quoted authority omitted). Further, Petitioner presented evidence in addition to the phone message supporting an inference that Williams was an employee at the time of Rigolosi's death. Whitley, Respondent's former employee, stated that she believed that she and Williams would resume home care services for Rigolosi following her discharge from UNMH. Respondent answers this evidence with the bare assertion that "non-management employees" are not "individuals who are entitled to speak for the company," and that Whitley's testimony "is nothing more [than] supposition and conjecture" without argument or authority. We reject this contention; Whitley's statements regarding her belief as to Rigolosi's future care was based on a conversation Whitley stated she had with Pendleton, Health Force's owner. Petitioner also presented evidence by an employee of UNMH that Rigolosi had introduced Williams as her care giver. Viewed in a light most favorable to a trial on the merits, an inference may be drawn from Petitioner's evidence that Williams continued to be Respondent's employee at the time of Rigolosi's death, which precludes summary judgment.

{25} At trial, Petitioner has the burden of demonstrating every element of the tort claims at issue. Whether Williams was an employee, whether Respondent breached its duty to Rigolosi, and whether Respondent's actions were the cause in fact and proximate cause of Rigolosi's death are disputed issues of material fact that preclude summary judgment.

III. CONCLUSION

{26} We reverse the Court of Appeals and district court. The Court of Appeals appears to have confused the question of duty with the issue of breach of duty. As recognized by statute and common law, Respondent, an agency which provided home care workers to disabled individuals, owed, at the very least, a duty of ordinary care to those individuals with regard to the actions of the agency's employees, including the hiring and retention of its employees. An inability to comply with specific statutory requirements is relevant to a statutory breach of duty, or negligence per se, but does not negate a general duty recognized by both statute and common law. Genuine issues of material fact in this case preclude summary judgment. We remand this case to the district court for further proceedings consistent with this opinion.

{27} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

RICHARD C. BOSSON,
Chief Justice

PETRA JIMENEZ MAES,
Justice

EDWARD L. CHAVEZ,
Justice

PAMELA B. MINZNER,
Justice (recused).

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2005-NMSC-020

Filing Date: June 30, 2005

Docket No. 27,817

PATRICIA TOMLINSON,

Plaintiff-Petitioner,

v.

JACOB GEORGE, M.D.,

Defendant-Respondent.

Original Proceeding on Certiorari
Robert Brack, District Judge

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OPINION

SERNA, Justice.

{1} Plaintiff-Petitioner Patricia Tomlinson brought a medical malpractice action against Defendant-Respondent Dr. Jacob George. The district court granted George's motion for summary judgment based on the ground that Tomlinson failed to file within the three-year statute of repose period. The Court of Appeals affirmed the district court by unanimous opinion based on several cases from this Court, *Tomlinson v. George*, 2003-NMCA-004, ¶¶ 25, 27, 133 N.M. 69, 61 P.3d 195, and we granted Tomlinson's petition for writ of certiorari to the Court of Appeals.

{2} We address whether the fraudulent concealment doctrine equitably tolls the statute of repose, NMSA 1978, § 41-5-13 (1976), so as to permit Tomlinson to file a malpractice action more than three years after the alleged act of malpractice in light of the fact that she was aware of the act four months into the three-year period and thus had approximately two years and eight months within which to file her claim. Under a direct application of the fraudulent concealment doctrine set out in this Court's opinion in *Kern ex rel. Kern v. Saint Joseph Hospital, Inc.*, 102 N.M. 452, 455-56, 697 P.2d 135, 138-39 (1985), we conclude that the doctrine tolls the statute of repose only when the plaintiff does not discover the alleged malpractice within the statutory period as a result of the defendant's fraudulent concealment. Thus, because Tomlinson was aware of her claim within the statutory period, the statute of repose is not tolled by the doctrine of fraudulent concealment. We take this opportunity to clarify the fraudulent concealment doctrine and Section 41-5-13, as well as to resolve conflicting Court of Appeals' cases on this issue, *compare Tomlinson*, 2003-NMCA-004, ¶ 25 (concluding that Section 41-5-13 is not tolled by fraudulent concealment when the malpractice was discovered six weeks into the statutory period), *with Juarez v. Nelson*, 2003-NMCA-011, ¶¶ 22-25, 133 N.M. 168, 61 P.3d 877 (concluding that fraudulent concealment tolls Section 41-5-13 when the malpractice was discovered two weeks into the statutory period).

{3} Finally, we conclude that the district court properly found that Tomlinson had a constitutionally reasonable period of time under the statute of repose within which to file her claim under *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532,

536-37, 893 P.2d 428, 432-33 (1995) and *Cummings v. X-Ray Associates of New Mexico*, 1996-NMSC-035, ¶¶ 47-55, 121 N.M. 821, 918 P.2d 1321. We conclude that, under these cases, two years and eight months is not an unreasonably short period of time within which to file a claim so as to render Section 41-5-13 unconstitutional as applied. Thus, we affirm the district court and the Court of Appeals.

I. FACTS AND BACKGROUND

{4} Tomlinson fractured and dislocated her wrist in an automobile accident on August 20, 1996. George, an orthopedic surgeon, performed a closed external reduction of the fracture on the day of the injury and applied a cast. George x-rayed Tomlinson's wrist on August 27, October 1, and November 5, and believed that her wrist was healing properly. George did not treat Tomlinson after November 5, 1996. On December 24, 1996, Tomlinson obtained her original x-rays from George taken on the three dates and saw Dr. Alfred Blue, a Seattle-based reconstructive hand surgeon; Blue opined that George had negligently treated Tomlinson. Both Tomlinson and George agree that Tomlinson knew she had a potential medical malpractice claim against George on December 24, 1996. Between February of 1997 and July of 1999, Tomlinson had several surgeries and numerous treatments and evaluations by other physicians.

{5} Tomlinson filed an application with the New Mexico Medical Review Commission on December 13, 1999.[1] Tomlinson filed a complaint against George for medical malpractice on March 2, 2000. George filed a motion for summary judgment based on Tomlinson's failure to file within the three-year limitation period of Section 41-5-13. Tomlinson "accept[ed] that [Section 41-5-13] requires the filing of a claim within three years of an occurrence, and if there had not been [a] fraudulent concealment, the last date to file a claim would have been on November 5, 1999." Tomlinson argued to the district court that George's alleged fraudulent concealment should toll Section 41-5-13 on a day-for-day basis so that the three-year limitation did not run between November 5, 1996, and December 24, 1996. Although the parties, the district court, and the Court of Appeals assumed, for purposes of the fraudulent concealment discussion, that the last possible date of alleged malpractice was on November 5, 1996, Tomlinson contended at oral argument before this Court that the occurrence of alleged malpractice was on August 20, 1996, when George performed a closed external reduction of Tomlinson's wrist. For clarity of the issues, we agree that it is helpful to identify the actual occurrence date for Section 41-5-13 as August 20, 1996, rather than presume the last day that George saw Tomlinson constituted the date of occurrence. Thus, Section 41-5-13 began to run from this date, and Tomlinson had until August 20, 1999, to file her complaint.

{6} In her complaint, Tomlinson alleged that George failed to inform her on August 27, 1996, when he took a second set of x-rays, that her wrist was improperly set, and that his continued assurances that she was healing properly constituted fraudulent concealment. Tomlinson thus alleges that the period of concealment began on August 27 and ended on December 24, 1996, or approximately four months, when she was informed by Blue that she was, in his opinion, negligently treated by George.

{7} The district court noted that Tomlinson was aware of the alleged malpractice on December 24, 1996. The district court discussed *Kern*, *La Farge*, and *Cummings*, and decided that this Court's opinions in *Cummings* and *Kern* controlled the present case. The district court recognized that *Cummings*, 1996-NMSC-035, ¶ 54, stated "that only in very few exceptional circumstances may this strict three-year occurrence rule of Section 41-5-13 be relaxed," and that fraudulent concealment and a "due process argument" were two of the exceptions noted by *Cummings*. The district court noted that *Kern* "require[s] that

[1] NMSA 1978, § 41-5-22 (1976) provides that "[t]he running of the applicable limitation period in a malpractice claim shall be tolled upon submission of the case for the consideration of the panel and shall not commence to run again until thirty days after the panel's final decision is entered."

the patient not know of his [or her] cause of action within the statutory period," and decided that fraudulent concealment under *Kern* did not toll the statute because Tomlinson discovered the alleged malpractice within the statutory period. Applying the due process analysis of *Cummings* and *La Farge*, the district court judge decided, "Discovery having occurred on December 24, 1996, Ms. Tomlinson was only [six] weeks into a [three]-year period within which to file the claim. I can't determine that [two] years and [forty-six] weeks is `an unreasonably short period of time within which to bring an accrued cause of action.'" (Quoting *La Farge*, 119 N.M. at 541-42, 893 P.2d at 437-38.) For these reasons, the district court granted summary judgment in George's favor.

II. DISCUSSION

A. Section 41-5-13 and Fraudulent Concealment

{8} Section 41-5-13 provides that "[n]o claim for malpractice arising out of an act of malpractice . . . may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred." "The statute of repose of the Medical Malpractice Act forecloses any cause of action that does not accrue within three years of the act of malpractice." *Cummings*, 1996-NMSC-035, ¶ 33. "An unduly long statute of repose, or a limit based upon a discovery-based accrual date would place an unfair burden upon the medical profession." *Id.* ¶ 38. "The legislature's solutionBrationally related to alleviating [the problem of insurance carriers withdrawing from medical malpractice liability coverage in New Mexico]Bwas to preclude almost all malpractice claims from being brought more than three years after the act of malpractice." *Id.* ¶ 40. This Court has held that the time limitation of Section 41-5-13 is constitutional. *Id.* ¶ 9. We noted that "[t]he legislature provided a number of incentives to assure participation by health care providers in the burdens of qualification under the Medical Malpractice Act," *id.* ¶ 29, and recognized that a significant benefit of qualification "was the specific decision by the legislature `to insulate qualified health care providers from the much greater liability exposure that would flow from a discovery-based accrual date.'" *Id.* ¶ 29 (quoting *Roberts v. Sw. Cmty. Health Servs.*, 114 N.M. 248, 252, 837 P.2d 442, 446 (1992)).

> Two basic standards determine the beginning of the time period in which a patient must file a claim for medical malpractice. One is sometimes called the "discovery rule." The time period under this rule does not begin to run until the patient discovers, or reasonably should discover, the essential facts of his or her cause of action. This discovery date may be the patient's first subjective awareness that something is wrong B the first feelings of pain or discomfort. The discovery date may also be the first objective confirmation through medical diagnosis that previous medical care was improper. The other standard is sometimes called the "occurrence rule." This rule fixes the accrual date at the time of the act of medical malpractice even though the patient may be oblivious of any harm.

Id. ¶ 47. We recognized that the plain language of Section 41-5-13 requires a claim to be filed within three years of the occurrence of the negligent act and that Section 41-5-13 operates as a statute of repose rather than a statute of limitation. *Id.* ¶ 48. "[A] statute of repose terminates the right to any action after a specific time has elapsed, even though no injury has yet manifested itself." *Id.* ¶ 50.

{9} Section 41-5-13's statutorily determined triggering event is, under the occurrence rule, the act of medical malpractice "and does not entail whether the injury has been discovered." *Cummings*, 1996-NMSC-035, ¶ 50. "[I]f, four years after the occurrence of medical malpractice, a patient learns they have been injured, their claim is forever barred because Section 41-5-13 functions as a statute of repose." *Id.* "The plain language of Section 41-5-13 establishes the date of

the act of malpractice as the only relevant factor, without any reference to any subsequent harm." *Id.* ¶ 53. The Court noted that "New Mexico appellate courts have consistently construed Section 41-5-13 according to its plain meaning as an occurrence rule." *Id.* ¶ 51 (relying on *Roberts*, 114 N.M. at 250, 837 P.2d at 444, *Irvine v. St. Joseph Hosp., Inc.*, 102 N.M. 572, 698 P.2d 442 (Ct. App. 1984), *Kern*, 102 N.M. at 455, 697 P.2d at 138, and *Keithley v. St. Joseph's Hosp.*, 102 N.M. 565, 698 P.2d 435 (Ct. App. 1984)). This Court specifically rejected the plaintiff's argument that "occurrence" should be "a continuum encompassing both the act of malpractice and the resulting injury." *Id.* ¶ 52. We noted a few exceptions to this strict rule, as recognized by the district court in the present case, including the doctrine of fraudulent concealment: "Fraudulent conduct has always provided equitable grounds for relaxing a statutory time limit." *Id.* ¶ 54 (relying on *Kern*,102 N.M. at 456, 697 P.2d at 139).

{10} The date that George performed the closed reduction on Tomlinson's wrist, August 20, 1996, is the date that the alleged act of malpractice occurred. Direct application of Section 41-5-13 thus requires Tomlinson to file her suit on or before August 20, 1999. On December 24, 1996, Dr. Blue informed Tomlinson that he believed that George was negligent; thus, Tomlinson was aware of a potential claim for malpractice against George for approximately two years and eight months before the deadline under the statute of repose. Tomlinson filed her application on December 13, 1999, approximately three months and three weeks after the statute of repose deadline.

{11} In order to toll the statute of repose based on the physician's fraudulent concealment, the plaintiff "has the burden . . . of showing . . . that the physician knew of the alleged wrongful act and concealed it from the patient or had material information pertinent to its discovery which he [or she] failed to disclose." *Kern*, 102 N.M. at 456, 697 P.2d at 139. *See generally Earle v. Ratliff*, 998 S.W.2d 882, 888 (Tex. 1999) (recognizing that, to demonstrate fraudulent concealment, the plaintiff must show the health-care provider actually knew a wrong occurred, had a fixed purpose to conceal the wrong, and did conceal the wrong from the patient). In *Kern*, we concluded that the plaintiff "present[ed] sufficient evidence to raise an issue of material fact regarding [the defendant's] knowledge of excessive radiation having been administered to [the plaintiff]," including dose levels that were "greatly excessive," discontinuation of five additional treatments without explanation, and the defendant's refusal to respond to the plaintiff's question regarding the early termination of treatment. *Id.* at 454, 457, 697 P.2d at 137, 140. In an earlier case, the Court of Appeals addressed fraudulent concealment based on the defendant's and the hospital staff's refusal to answer the patient's question as to why a subsequent operation was necessary and the defendant's later statement that the subsequent operation "was occasioned by negligence of one of the hospital employees." *Garcia v. Presbyterian Hosp. Ctr.*, 92 N.M. 652, 653, 593 P.2d 487, 488 (Ct. App. 1979); *see Hardin v. Farris*, 87 N.M. 143, 144, 146, 530 P.2d 407, 408, 410 (Ct. App. 1974) (although decided before our Legislature adopted Section 41-5-13, recognizing that mere silence may constitute fraudulent concealment where the defendant negligently performed a tubal ligation and the plaintiffs supported their allegation that the defendant fraudulently concealed the injury with a surgical pathological report located in the patient's file which showed that the tubal ligation was not complete).

{12} In the present case, Tomlinson argues that her claim was timely because Section 41-5-13 was tolled by George's alleged fraudulent concealment based on his assurances that her wrist was healing properly when that was false. George disputed that there was fraudulent concealment on his part. The district court judge noted that Tomlinson based her allegation of fraudulent concealment on these assurances and stated that he did not "believe that this simple assertion is sufficient to establish a material fact on the question of fraudulent concealment;" however, he stated that the more important issue was his decision that the doctrine of fraudulent concealment did not apply when discovery occurred

within the statutory period. We agree with the district court that our precedent as discussed above as well as cases from other jurisdictions addressed allegations establishing fraudulent concealment much more clearly than George's mere assurance regarding Tomlinson's wrist. *See Earle*, 998 S.W.2d at 889 (concluding that the plaintiff's evidence that the physician "must have known that his recommendation of surgery was negligent because it was contraindicated by the objective test results" " shows a difference of opinion . . . and raises a question whether [the physician] was negligent, [but] it falls short of showing [the physician's] `actual knowledge of the fact that a wrong . . . occurred' necessary for fraudulent concealment"); *Skuffeeda v. St. Vincent Hosp. & Med. Ctr.*, 714 P.2d 235, 238 (Or. Ct. App. 1986) ("We think that deliberate deceptive statements differ from merely careless or innocent misleading representations in one important respect. Such an innocent contemporaneous representation must misrepresent something other than the careful performance or the success of the very treatment or operation whose failure is the basis of plaintiff's subsequent complaint." (quoting *Duncan v. Augter*, 596 P.2d 555, 564 (Or. 1978)). However, the Court of Appeals assumed that a genuine issue of material fact exists regarding whether George fraudulently concealed any negligence on his part, *Tomlinson*, 2003-NMCA-004, ¶ 4, and for purposes of this appeal, we also assume without deciding that a genuine issue of material facts exists regarding fraudulent concealment.

{13} *Kern* specifically addressed fraudulent concealment and Section 41-5-13 and controls the present matter. In *Kern*, this Court overturned a grant of summary judgment in favor of the defendant in relation to a plaintiff's claim, which was filed approximately two years and six months after the end of the three-year limitation, where there was a genuine issue of material fact that the defendant fraudulently concealed the act of malpractice for the entire three-year period. 102 N.M. at 454, 456-57, 697 P.2d at 137, 139-40. The Court rejected the plaintiff's discovery-based argument "that there is no malpractice until there is injury and that the statute, therefore, should not start to run until the injury has manifested itself in a physically objective manner and is ascertainable." *Id.* at 454, 697 P.2d at 137. However, "New Mexico recognizes the doctrine of fraudulent concealment in medical malpractice cases," which "is based not upon a construction of the statute, but rather upon the principle of equitable estoppel." *Id.* at 455, 697 P.2d at 138. "The theory is premised on the notion that the one who has prevented the plaintiff from bringing suit within the statutory period should be estopped from asserting the statute of limitation as a defense." *Id.* at 455-56, 697 P.2d at 138-39. In order for a patient to toll Section 41-5-13, he or she must demonstrate "that the patient did not know, or could not have known through the exercise of reasonable diligence, of his [or her] cause of action within the statutory period." *Id.* at 456, 697 P.2d at 139. Thus, we held that fraudulent concealment does not toll Section 41-5-13 "if the patient knew, or through the exercise of reasonable diligence should have known, of his [or her] cause of action within the statutory period." *Id.* "If tolled by fraudulent concealment, the statute commences to run again when the patient discovers, or through the exercise of reasonable diligence should have discovered, the malpractice." *Id.* The Court then applied this requirement to the facts presented in that case and held "that petitioner presented sufficient evidence on the issue of [the patient's] unawareness of the cause of action within the statutory period, to overcome a summary judgment motion." *Id.* Thus, not only did this Court, in *Kern*, emphasize that fraudulent concealment does not toll the statute of repose unless the defendant's actions prevented the plaintiff from filing the claim within the statutory period, we applied this requirement to the facts in *Kern*.

{14} Fraudulent concealment is based upon the principle that a defendant who has prevented the plaintiff from bringing suit within the statutory period should be estopped from asserting the statute of repose as a defense based on equitable estoppel. *Kern*, 102 N.M. 455-56, 697 P.2d at 138-39. However, if a plaintiff discovers the injury within the time limit, fraudulent concealment does not apply because the defendant's

actions have not prevented the plaintiff from filing the claim within the time period and the equitable remedy is not necessary. Stated another way, as a result of the plaintiff's discovery of the cause of action within the time period of Section 41-5-13, the defendant cannot be said to have prevented the plaintiff from bringing suit before the period has expired, and tolling is not required as a matter of equity.

{15} Applying *Kern* to this case, Tomlinson must show that she did not know of her cause of action within the statutory period in order to toll the statute of repose. Even assuming that George's assurances regarding Tomlinson's wrist constituted fraudulent concealment, these actions did not prevent Tomlinson from bringing suit within the statutory period. Thus, because George's actions did not prevent Tomlinson from filing her suit within the statutory period, George should not be estopped from asserting the statute of repose as a defense. As it is undisputed that Tomlinson knew of her cause of action for two years and eight months prior to the expiration of the statutory period, Section 41-5-13 is not tolled, and her claim is barred under *Kern*.

{16} Both the district court and the Court of Appeals in the present matter reached the same conclusion regarding *Kern*. The Court of Appeals concluded that "[i]mplicit in *Kern* is that tolling is not available when the fraudulent concealment of the act of malpractice is discovered within the three-year period." *Tomlinson*, 2003-NMCA-004, ¶ 12. We conclude that *Kern* in fact explicitly holds that the statue of repose is not tolled by fraudulent concealment when the plaintiff knew of his or her cause of action within the statutory period.

{17} The resolution of this case is somewhat complicated by another recent Court of Appeals' published opinion, which, although decided a short time after *Tomlinson*, directly conflicts with *Tomlinson*. *Juarez*, 2003-NMCA-011, n.4 ("We recognize that our understanding of *La Farge* and our approach to fraudulent concealment are in direct conflict with a recent decision[, *Tomlinson*,] of another panel of the Court."). In *Juarez*, the plaintiffs filed a wrongful death action on May 27, 1998, three years after the patient's heart attack but three years and three months after the alleged occurrence of malpractice, arguing that fraudulent concealment should toll the statute of repose. *Id.* ¶¶ 3-5. The Court in *Juarez*, along with Tomlinson in her arguments to this Court, relied on cases from the Court of Appeals which predate Section 41-5-13 and this Court's opinion in *Kern*. *Juarez*, 2003-NMCA-011, ¶¶ 19-21. Because both *Hardin*, 87 N.M. at 144, 530 P.2d at 408, and *Garcia*, 92 N.M. at 655, 593P.2d at 490, were decided under law involving a discovery-based statute of limitations prior to the Legislature's adoption of Section 41-5-13 and to our opinion in *Kern*, they are inapplicable with regard to tolling Section 41-5-13.[2] As this Court recognized in *Cummings*, the Legislature specifically chose an occurrence-based statute of repose rather than a discovery-based statute of limitations for medical malpractice actions. Section 41-5-13 provides for a statute of repose which begins to run when the malpractice occurs, not when the injury is discovered. *Compare Cummings*, 1996-NMSC-035, ¶ 38, *with Garcia*, 92 N.M. at 655, 593P.2d at 490 (noting that, at the time applicable to *Garcia* and in contrast to the occurrence-based statute of repose, "a cause of action for personal injuries for malpractice begins to run, not from the time of the malpractice, but from the time the injury manifests itself in a physically objective manner and is ascertainable") (Andrews, J., dissenting) (citation omitted). Thus, these cases cannot be considered a correct statement of New Mexico law regarding Section 41-5-13 and fraudulent concealment.

{18} Although the *Juarez* Court relied on portions of *Kern*, it stated that the requirement that a plaintiff not discover the malpractice within the statutory period in *Kern* was "non-binding dicta, which [has] been overtaken by the Supreme Court's more recent pronouncements in"

[2] Although *Garcia* was published in 1979, the act of malpractice occurred in 1972. 92 N.M. at 652, 593 P.2d at 487. The *Garcia* Court addressed NMSA 1978, § 37-1-8 (1976), *id.* at 655, 593 P.2d at 490, a general three year statute of limitation for tort claims that runs from the date of discovery rather than the date of malpractice.

La Farge. *Juarez*, 2003-NMCA-011, ¶ 17. We do not agree with the Court of Appeals' conclusion in *Juarez* that the *Kern* holding was non-binding dicta despite our implication otherwise in *La Farge*. *Kern* expressly addressed the statute of repose in the context of fraudulent concealment and applied the requirement of non-discovery within the statutory period in its analysis of the facts. Thus, requiring the plaintiff to demonstrate that he or she did not know of the malpractice within the statutory period was necessary to the holding in the case and not dicta. *La Farge*, on the other hand, specifically declined to address the fraudulent concealment claim; thus, we conclude that *La Farge*'s discussion of fraudulent concealment was dicta, and, as discussed below, in error. The *Juarez* Court expressed that it had to "choose between competing Supreme Court formulations of the doctrine of equitable estoppel" by following "the more recent statement in *La Farge*" rather than the holding of *Kern*. *Id.* ¶ 22. *La Farge*, however, did not apply an equitable estoppel analysis; it applied a constitutional analysis. Further, we later limited the *La Farge* due process analysis in *Cummings*, which clarified the Legislature's intent in Section 41-5-13 and held that a plaintiff's knowledge of malpractice for one and one-half years during the statutory period bars her cause of action. We recognize the confusion regarding *Kern* caused by *La Farge* and thus do not fault the Court of Appeals for this determination in *Juarez*; however, based on *Kern*, we conclude that it is necessary to overrule *Juarez*.

{19} Our opinion in *La Farge* has understandably created confusion for the application of *Kern*. For clarity, we emphasize that the fraudulent concealment analysis of *Kern* is distinct and separate from the due process analysis discussed in *La Farge* and *Cummings*. In *La Farge*, we expressly concluded that the fraudulent concealment issue was non-dispositive and moot in a case in which the malpractice was discovered eighty-five days before the running of the statutory time period because we held that such a short period was unconstitutional. 119 N.M. at 537, 893 P.2d at 433. Under a direct application of *Kern*, the plaintiff in *La Farge* would have been barred from bringing his claim because he discovered the malpractice within the statutory period. Rather than apply *Kern* explicitly, we instead noted that *Kern*'s phrase, "within the statutory period," was not dispositive because the patient in *Kern* did not discover the concealment until after the statutory period had expired. *Id.* at 537 n.1, 893 P.2d at 433 n.1. This observation was in error. As discussed above, the fact that the plaintiff in *Kern* did not discover the cause of action within the statutory period was dispositive; we held "that [the plaintiff] presented sufficient evidence on the issue of [the patient's] unawareness of the cause of action within the statutory period, to overcome a summary judgment motion." *Kern*, 102 N.M. at 456, 697 P.2d at 139. We note that *La Farge* did not overrule *Kern* and in fact specifically did not reach or apply any fraudulent concealment analysis. *See La Farge*, 119 N.M. at 537 & n.1, 893 P.2d at 433 & n.1. Further, because we specifically declined to address the fraudulent concealment issue in *La Farge*, the discussion regarding the issue was dicta. Thus, *Kern* and its analysis regarding fraudulent concealment continues to be good law, supported by this Court's reference to *Kern* in *Cummings*, which was decided after *La Farge*, and we reaffirm *Kern*. *See Cummings*, 1996-NMSC-035, ¶ 54.

B. *La Farge/Cummings* Substantive Due Process Analysis

{20} As we concluded above, Section 41-5-13 is not tolled by George's alleged fraudulent concealment because Tomlinson knew of her cause of action within the statutory period. Because the doctrine of fraudulent concealment does not allow Tomlinson's claim to go forward, we next address whether the district court properly applied the substantive due process analysis of *La Farge* and *Cummings*.

{21} In *La Farge*, we concluded, on constitutional substantive due process grounds, that the plaintiff's claim should be permitted because the negligent act was not discovered until eighty-five days before the statutory deadline. 119 N.M. at

541-42, 893 P.2d at 437-38. "[A] statute of repose that allows an unreasonably short period of time within which to bring an accrued cause of action violates the Due Process Clause of the New Mexico Constitution." *Id.* Thus, this Court concluded that an eighty-five day period was "unreasonably short" under the specific facts of the case so as to violate the plaintiff's due process rights. *La Farge*'s due process analysis and "unreasonably short period of time" standard is further delineated by this Court's holding in *Cummings*.

{22} Following *La Farge*, we again examined, at length, due process and Section 41-5-13 in *Cummings*. We addressed Section 41-5-13 in a case in which a defendant negligently missed a cancerous mass on x-rays and the plaintiff filed her claim after the three-year statute of repose expired. *Cummings*, 1996-NMSC-035, ¶¶ 4-9. Fraudulent concealment was not an issue under the facts of *Cummings*. *Id.* ¶¶ 54, 56. The plaintiff was last treated by the defendant on August 10, 1988, and "[s]he discovered that the masses in her lung and kidney were cancer on February 23, 1990," approximately a year and a half before the limitations period expired. *Id.* ¶ 57. The plaintiff argued that the occurrence rule of the statute of repose violated her due process rights of access to the courts, contending that "a patient may suffer a legitimate injury caused by a verifiable act of malpractice and would nevertheless be barred from legal recovery if the three-year limit runs before the injury becomes evident." *Id.* ¶ 32. We rejected this claim, concluding that "where there is no cause of action, a plaintiff cannot claim they have been denied access to the courts. And if they have no right of access to the courts, they cannot claim to have been denied due process." *Id.* ¶ 33. We determined that "[a] plaintiff has no expectancy of a cause of action that has been legitimately denied by the legislature before it accrues." *Id.* We also noted that we have allowed a claim to be filed in cases involving "peculiar facts" in which a case conflicts with the filing requirements, and "when a good faith effort has been made to comply with the Act." *Id.* ¶ 56. The Court in *Cummings* noted the holding in *La Farge* that an eighty-five day period of time was "unconstitutionally short." *Id.* ¶ 55. However, we concluded that the plaintiff's period of time, approximately one and one-half years, was not too short a time in which to file her claim. The Court concluded that "[t]he most determinative fact against [the plaintiff] is that she did not exercise diligence when she first learned she had been misinformed about the mass in her lung by [the defendant]." *Id.* ¶ 57. The Court relied on the fact that the plaintiff had approximately one and a half years to file her claim before the statute of repose ran; "[n]evertheless, she sat on her rights and did not file any claim for more than two years." *Id.* The plaintiff "lost her medical malpractice claim through her own lack of diligence." *Id.* "It is irrelevant that the patient loses his or her malpractice claim through blameless ignorance." *Id.* ¶ 59 (quotation marks and quoted authority omitted).

{23} *Cummings* thus demarcates the outer boundary of *La Farge*; we read these cases as complementary rather than conflicting. While *La Farge* holds that a plaintiff who discovers the injury or malpractice during the statutory period as it runs from the occurrence of the negligent act must have a reasonable period of time from the discovery to file his or her claim, *Cummings* concludes that one and one-half years is a constitutionally reasonable period of time within which to file a claim. *See Cummings*, 1996-NMSC-035, ¶ 57. Section 41-5-13 "forecloses any cause of action that does not accrue within three years of the act of malpractice." *Id.* ¶ 33. In other words, a plaintiff that discovers his or her cause of action after three years from the date of malpractice is barred by Section 41-5-13 from filing a claim; that is the nature of a statute of repose. Thus, we conclude that this precedent resolves that the *La Farge/Cummings* due process analysis must apply only to claims discovered within the statutory period; if a claim is discovered after the statute has run, Section 41-5-13 is an explicit bar. We have recognized "very few exceptional circumstances" to this "strict three-year occurrence rule," including fraudulent concealment. *Cummings*, 1996-NMSC-035, ¶ 54.

{24} Because the fraudulent concealment doctrine does not toll Section 41-5-13 for Tomlinson,

and because the district court ruled on the issue, we address whether the due process analysis excuses Tomlinson's late filing. In the present case, the district court determined that, under the substantive due process analysis of *LaFarge*, almost three years was not "an unreasonably short period of time within which to bring an accrued cause of action." We agree. Tomlinson had almost the entire statutory period within which to file her claim. In *LaFarge*, we concluded that eighty-five days was an unreasonably short period of time. On the other hand, *Cummings* holds that one and one-half years is not too short a time and that a plaintiff who does not file his or her claim in that period of time loses the claim through a lack of diligence. *Cummings*, 1996-NMSC-035, ¶ 57. Thus, under the *LaFarge/Cummings* due process analysis, Tomlinson's two years and eight months is a constitutionally reasonable period of time within which to file her claim.

C. Clarification of Tolling Section 41-5-13 Based on Fraudulent Concealment

{25} Section 41-5-13 requires plaintiffs to file their claims within three years from the date the malpractice occurs. With Section 41-5-13, the Legislature, in order to alleviate the "unfair burden upon the medical profession" created by a discovery rule, "preclude[s] almost all malpractice claims from being brought more than three years after the act of malpractice." *Cummings*, 1996-NMSC-035, ¶¶ 38, 40. Fraudulent concealment requires a plaintiff to demonstrate that the defendant physician knew of the alleged negligent act and concealed the negligent act from the patient or had material information pertinent to discovery of the negligent act which the defendant failed to disclose. Fraudulent concealment also requires that the plaintiff demonstrate that he or she did not know, and could not have discovered through the exercise of reasonable diligence, his or her cause of action during the statutory period. If a plaintiff demonstrates these requirements, then the equitable principle of fraudulent concealment tolls Section 41-5-13. We conclude that *Kern* provides authority for a day-for-day tolling of the statute of repose: "If tolled by fraudulent concealment, the statute commences to run again when the patient discovers, or through the exercise of reasonable diligence should have discovered, the malpractice." *Kern*, 102 N.M. at 456, 697 P.2d at 139.

{26} We also reaffirm, however, that the statute of repose is not tolled if the patient knew, or through the exercise of reasonable diligence should have known, of his or her claim within the statutory period. We cannot exercise the equitable principle of fraudulent concealment and deny the defendant's reliance upon Section 41-5-13 where the plaintiff knew of the cause of action within the statutory period. In such circumstances, the defendant's actions did not prevent the plaintiff from pursuing the claim. "The limitations period . . . encourages the patient, once the injury has been discovered, to diligently pursue his or her claim." *Cummings*, 1996-NMSC-035, ¶ 41. We believe this expresses the balance required in equity between not allowing a defendant to benefit from fraudulent concealment that prevents a plaintiff from filing a claim while continuing to require the plaintiff to exercise ordinary diligence in pursuit of his or her cause of action. The tolling of the statute based on equitable estoppel is meant to provide the plaintiff with a fair opportunity to pursue his or her cause of action set against the context of "the specific decision by the legislature to insulate qualified health care providers from the much greater liability exposure that would flow from a discovery-based accrual date," the "most notable benefit of qualification." *Cummings*, 1996-NMSC-035, ¶ 29 (quotation marks and quoted authority omitted). If the plaintiff is aware of his or her claim, or should have been aware through the exercise of reasonable diligence, within the statutory period, the equitable remedy is not applicable. To apply equitable tolling under such circumstances would frustrate the Legislature's intent by effectively replacing the Legislature's statute of repose with a discovery-based statute of limitations.

{27} When the plaintiff discovers the cause of action within three years of the date of

malpractice, thereby precluding equitable relief for fraudulent concealment under *Kern*, the plaintiff will necessarily, as a matter of due process, have a reasonable time within which to file a claim, either under the three year limitations period itself or under the *La Farge/Cummings* due process analysis. Thus, the *Kern* fraudulent concealment doctrine applies only to claims discovered after the statutory period has expired. Apart and independent from fraudulent concealment, if a plaintiff discovers the potential claim during the statutory period but has an unreasonably short period of time within which to file, a plaintiff may argue to the district court that Section 41-5-13 is unconstitutional as applied under the *La Farge/Cummings* due process analysis. We conclude that this flexibility provides district courts with some level of discretion to relax Section 41-5-13's strict three-year occurrence rule in unusual cases involving exceptional circumstances as a matter of fairness while upholding the legislative protection for physicians and assuring New Mexicans access to health care.

III. CONCLUSION

{28} Tomlinson's cause of action is barred by operation of Section 41-5-13. Applying the fraudulent concealment analysis of *Kern* to the present matter, and assuming that George fraudulently concealed his act of alleged malpractice, we conclude that the principle does not toll the statute of repose because Tomlinson discovered the alleged act of malpractice within the statutory period. Tomlinson's cause of action is barred by Section 41-5-13 because she knew of her cause of action and had over two years and eight months during the statutory period in which to file her claim. George's alleged fraudulent concealment did not prevent Tomlinson from filing her claim within three years from the date of alleged malpractice. Under our separate substantive due process analysis, we conclude that Section 41-5-13 as applied to Tomlinson is not unconstitutional because two years and eight months is an adequate period of time within which to file a claim.

{29} We conclude that the Court of Appeals and the district court did not err by determining that Tomlinson's claim should be dismissed by operation of Section 41-5-13. Thus, we affirm the district court's grant of summary judgment dismissing Plaintiff's claim.

{30} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

MICHAEL E. VIGIL,
Judge

New Mexico Court of Appeals
(sitting by designation)

JAMES HALL,
Judge

District Judge
(sitting by designation)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2006-NMSC-001

Filing Date: December 8, 2005

Docket No. 27,592

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ROBERT FRY,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
William C. Birdsall, District Judge

John Bigelow, Chief Public Defender
William A. O'Connell, Assistant Appellate Defender
Nancy M. Hewitt, Assistant Appellate Defender
Santa Fe, NM

for Appellant.

Patricia A. Madrid, Attorney General
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for Appellee.

OPINION

SERNA, Justice.

{1} A jury found Defendant Robert Fry guilty of first degree murder, *see* NMSA 1978, § 30-2-1 (1994), kidnapping, *see* NMSA 1978, § 30-4-1 (1995, prior to 2003 amendment), attempted criminal sexual penetration, *see* NMSA 1978, §§ 30-9-11 (1995, prior to 2001 & 2003 amendments), -28-1 (1963), and tampering with evidence, *see* NMSA 1978, § 30-22-5 (1963, prior to 2003 amendment), in relation to a killing in Farmington, New Mexico. The jury then specified a sentence of death, and the trial court sentenced Defendant to death. *See* NMSA 1978, §§ 31-18-14(A) (1993) ("When a defendant has been convicted of a capital felony, he [or she] shall be punished by life imprisonment or death."), -20A-3 (1979) ("In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in [NMSA 1978, § 31-20A-5 (1981)] . . . , and unanimously specifies the sentence of death . . . , the court shall sentence the defendant to death."). Defendant appeals his conviction and sentence to this Court on numerous grounds. *See* N.M. Const. art. VI, § 2 ("Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court."); NMSA 1978, § 31-20A-4(A) (1979) ("The judgment of conviction and sentence of death shall be automatically reviewed by the supreme court of the state of New Mexico."). We affirm.

I. FACTS

{2} Defendant and his companion, Leslie Engh, went to a bar in Farmington. After the bar closed, they met friends at a nearby restaurant. Defendant initiated an argument with another customer, and he subsequently went to his car and returned wearing a jacket. Witnesses described seeing a bulge underneath Defendant's jacket. He told one of his friends that he had an eight-inch Bowie knife and he was "going to stick somebody tonight." Defendant and Engh left the restaurant in Defendant's car and went to a convenience store for cigarettes.

{3} Defendant saw a woman, the victim,[1] at a pay phone. The woman was crying and stranded

[1] We do not refer to the victim by name out of respect for her dignity and privacy. *See State v. Allen*, 2000-NMSC-002, ¶ 2 n.1, 128 N.M. 482, 994 P.2d 728.

at the store. Defendant offered her a ride to her house in Shiprock. A clerk at the convenience store heard a man fitting Defendant's description offer a ride to a woman fitting the victim's description and also placed Engh in Defendant's car as it drove away with three people inside. Defendant drove down an isolated dirt road under the pretext that he needed to urinate. The victim got out of the car and began to walk away. Defendant convinced the victim to return to the car.

{4} After driving the car a short distance back down the dirt road, Defendant stopped the car, opened the passenger door, and pulled the victim out of the car by her hair. Defendant told Engh to hold the victim's legs while Defendant tried to disrobe her. When the victim struggled, Defendant stabbed her two inches deep in her chest with his eight-inch Bowie knife. The stab wound penetrated the breastbone and the heart sac but did not pierce the victim's heart. The victim removed the knife from her chest and threw it toward a ravine. She tried to run away, but Defendant and Engh caught her and removed her shirt and pants. Engh then went to look for the knife. When the victim tried to run again, Defendant retrieved a ten-pound sledgehammer from his car and hit the victim in the back of the head with the sledgehammer at least three and possibly five times, killing her. Blunt force trauma was the cause of death, and the stab wound was a contributing factor. Defendant and Engh then dragged the victim's body a significant distance to some bushes by the ravine. They also kicked articles of the victim's clothes off the road. As Defendant drove away, his car got stuck in soft sand on the dirt road and had to be towed out the next day. Defendant's parents picked up Defendant and Engh and drove them home.

{5} Police found the knife and the sledgehammer at the scene, along with tire tracks and shoe impressions. A witness recognized the knife at the scene as one that he had sharpened for Defendant a week before the killing. The tire tracks from the scene included three different treads and were determined to be consistent with the three different tire treads on Defendant's car. Police found a pair of boots in Defendant's home that was consistent with the shoe impressions at the scene. Police also found a black t-shirt in Defendant's home that matched the shirt witnesses described Defendant as having worn on the night of the killing, and they found one of the victim's earrings in Defendant's car. The boots and black t-shirt from Defendant's home had blood on them, and police also found blood in Defendant's car and on a flashlight in the car that Defendant had used to signal his parents after getting stuck. An expert testified that the blood on the knife and sledgehammer and on Defendant's car, shirt, shoes, and flashlight all matched DNA samples from the victim. In addition, the police seized a pair of black tennis shoes belonging to Engh, and the blood on those shoes also matched the victim's DNA. An expert testified that a blood spatter analysis of Defendant's shirt and shoes and Engh's shoes indicated that while many of the blood stains on Defendant's shirt and shoes were created by medium velocity impact spatter from a blunt instrument striking a blood source in front of the person wearing the shirt and shoes, Engh's shoes contained only low velocity transfer stains and no spatters or projection-type stains. Based on these blood stains, as well as spatter stains on the sledgehammer, the expert opined that the person wearing the clothing with spatter, that is, Defendant's black t-shirt and shoes, was leaning over the victim and repeatedly striking a source of blood with the sledgehammer, whereas the person wearing the shoes without spatter did not strike the victim with the sledgehammer. On the day after the murder, Defendant lied to the police about his activities the previous evening and what clothing he had been wearing, and he concealed his involvement in the crime.

{6} The State charged Defendant with first degree murder, kidnapping, attempted criminal sexual penetration, and tampering with evidence. Engh pleaded guilty to first degree murder and kidnapping and testified against Defendant at trial. The jury found Defendant guilty of all counts. Following further argument of counsel and additional instruction by the trial court, the jury then found the only submitted aggravating circumstance, murder committed with an intent to kill in the commission of kidnapping, beyond

a reasonable doubt. After Defendant presented evidence of mitigating circumstances, and following additional instruction by the trial court, the jury specified a sentence of death.

II. EXCUSAL OF PROSPECTIVE JURORS

{7} Defendant first argues that the trial court erred in excusing seven members of the venire for cause based on their religious opposition to the death penalty. He contends that the exclusion of these prospective jury members violated his constitutional right to an impartial jury, U.S. Const. amends. VI, XIV; N.M. Const. art. II, §§ 14 (amended 1994), 18 (amended 1972), and the veniremembers' state and federal constitutional protection of the free exercise of religion, U.S. Const. amends. I, XIV. *See State v. Singleton*, 2001-NMCA-054, ¶ 9, 130 N.M. 583, 28 P.3d 1124 ("[B]oth the state and the defendant in a criminal action can protect the rights of prospective jurors to be free from discriminatory exclusion."). Defendant relies on Article VII, Section 3 of the New Mexico Constitution, which provides that the right of citizens to sit on a jury shall not be hindered on the basis of religion, as well as various other protections of religious freedom in the state Constitution. Defendant also relies on the Treaty of Guadalupe Hidalgo. *See* Treaty of Peace, Friendship, Limits and Settlement, art. IX, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922, 930.[2]

{8} The United States Supreme Court has held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quotation marks omitted); *see Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968). Under this standard, "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him [or her] to do." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). "[B]ecause such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror[, and] a capital defendant may challenge for cause any prospective juror who maintains such views." *Id.* Similarly, "a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and *must* be removed for cause." *Id.* at 728 (emphasis added). Such jurors are sometimes referred to as *Witherspoon*-excludables. "[T]he quest is for jurors who will conscientiously apply the law and find the facts." *Witt*, 469 U.S. at 423.

{9} We have on numerous occasions applied this standard in addressing challenges to the exclusion of jurors who expressed religious opposition to the death penalty, whether the challenges were based on the defendant's right to an impartial jury, due process, or equal protection, or on prospective jurors' religious freedom as protected in Article VII, Section 3 and other provisions of the New Mexico Constitution. *Allen*, 2000-NMSC-002, ¶¶ 85-86; *State v. Clark*, 1999-NMSC-035, ¶¶ 4-17, 128 N.M. 119, 990 P.2d 793; *State v. Sutphin*, 107 N.M. 126, 129-30, 753 P.2d 1314, 1317-18 (1988); *State v. Gilbert*, 100 N.M. 392, 396, 671 P.2d 640, 644 (1983); *State v. Simonson*, 100 N.M. 297, 299-300, 669 P.2d 1092, 1094-95 (1983); *State v. Hutchinson*, 99 N.M. 616, 619-20, 661 P.2d 1315, 1318-19 (1983); *State v. Trujillo*, 99 N.M. 251, 252, 657 P.2d 107, 108 (1982); *State v. Trivitt*, 89 N.M. 162, 164-66, 548 P.2d 442, 444-46 (1976). We held that "[t]he trial court may properly exclude a juror for cause if the juror's views

[2] While we agree with the State that Defendant failed to preserve an argument based on the Treaty, we note that the Treaty does not contain any independent protection of religious freedom beyond the federal and state constitutions. Article IX of the Treaty, upon which Defendant relies and which protects the free exercise of religion "in the mean time," was designed only to address the interim period between the ratification of the Treaty and "the enjoyment of all the rights of citizens of the United States" once individuals were admitted as citizens following the one year allowed in Article VIII, 9 Stat. 922, for the election of citizenship.

would substantially impair the performance of the juror's duties in accordance with the instructions and oath." *Clark*, 1999-NMSC-035, ¶ 10. We explained that "[t]he fact that the potential juror's inability to perform his or her duty is based upon religious objection and belief does not violate the religious protections of the New Mexico Constitution, because exclusion from the jury was not based upon religious affiliation." *Id.* ¶ 17. "[R]ather than the court excluding jurors because they are members of a particular religion, the court excluded jurors who were unable to apply the law." *Id.* ¶ 12. "For purposes of disqualifying an individual from serving on a jury in a death penalty case, it is the fact that the individual's vote will be automatic, rather than the particular reasons he or she gives for casting such an automatic vote, that is dispositive." *Allen*, 2000-NMSC-002, ¶ 86.

{10} We have also discussed the appropriate standard of review in response to challenges of this nature. "This Court has stated that the trial court is in the best position to assess a juror's state of mind, by taking into consideration the juror's demeanor and credibility. It is within the trial court's discretion as to whether a prospective juror should be excused." *Clark*, 1999-NMSC-035, ¶ 10. "We will not disturb the trial court's decision absent a clear abuse of discretion or a manifest error." *Sutphin*, 107 N.M. at 130, 753 P.2d at 1318.

{11} Defendant does not challenge the trial court's discretionary ruling that all seven members of the venire highlighted on appeal were unable to impose the death penalty in any case so as to substantially interfere with their ability to perform the duties of a juror in accordance with the instructions and oath. Following our review of the record, we agree with this concession and conclude that the trial court did not abuse its discretion in determining that these prospective jurors satisfied the *Witt* standard and were properly excluded for cause. The record indicates that the trial court was appropriately focused throughout jury selection on the ability of veniremembers to follow the court's instructions. Instead, Defendant complains about the exclusion of these prospective jurors from the guilt-innocence phase of the trial. Defendant contends that these seven jurors should have been permitted to sit on the jury during the guilt-innocence phase of the trial and then, following a verdict, be excused and replaced by alternate jurors for the sentencing phase. He contends that such a procedure is authorized by Rule 5-704(A) NMRA 2004 (prior to Apr. 19, 2004 amendment) (current version at Rule 5-704(E) NMRA 2005). This rule provides that

> [i]f the defendant is charged with an offense which may be punished upon conviction by the penalty of death, alternate jurors shall not be discharged until the regular jurors are discharged. Such jurors may not attend or participate in the consideration of a verdict, but shall be treated in the same manner as other jurors and shall be called after a verdict is returned to act as alternate jurors to replace jurors who become or are found to be unable or disqualified to consider the sentence to be imposed.

Defendant argues that we should interpret this rule to allow for "extra non-*Witherspoon*-excludable jurors" to serve as alternates for members of the venire who would automatically vote against the death penalty in order to protect the right of citizens to serve on juries as protected by Article VII, Section 3. We reject this argument.

{12} We believe that Defendant misinterprets Rule 5-704(A). We did not promulgate this rule in order to permit members of the venire to participate in the guilt-innocence phase of the trial despite their inability to follow the juror's oath to impose a sentence "according to the evidence and the law as contained in the instructions of the court." UJI 14-123 NMRA 2005. Instead, we enacted this rule pursuant to the Legislature's direction to this Court to "promulgate rules . . . to regulate the practice and procedure in capital felony cases for the selection and utilization of alternate jurors and substitute trial judges caused by the disability of any juror or trial judge before whom a capital felony sentencing proceeding has commenced pursuant to the" Capital Felony Sentencing Act, NMSA 1978, §§ 31-20A-1 to -6

(1979, as amended through 1991). 1979 N.M. Laws, ch. 150, § 11. In other words, Rule 5-704(A) is designed to effectuate the provisions of the Capital Felony Sentencing Act, and the Legislature expressly provided in the Act that, "[i]n a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the *original trial jury*." NMSA 1978, § 31-20A-1(B) (1979) (emphasis added). It is clear from this language that the Legislature intended for the original jurors, that is, those jurors who determine a defendant's guilt or innocence, to determine the sentence. The Legislature's provision for alternate jurors was designed only as a necessary contingency in the event that a juror's disqualification or inability to serve becomes apparent after having been seated, and particularly after the jury reaches a verdict in the guilt-innocence phase, in order to avoid a second trial due to a juror's excusal. It is not a method of permitting individuals to serve on one part of a trial who, prior to the empanelling of the jury, have expressed a bias and an inability to follow the law with respect to another part of the trial. To conclude otherwise would judicially create a two-jury procedure that would frustrate the Legislature's policy decision that the "original jury" specify the sentence. *See Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) ("[I]t is the particular domain of the legislature, as the voice of the people, to make public policy.").

{13} Our Legislature is not alone in this policy choice. Courts have noted a number of reasons why legislatures have chosen to rely on a single jury to determine both guilt or innocence and the proper sentence in a capital case: (1) the questions before the jury at both phases are interwoven and require consideration of similar evidence, *Rector v. State*, 659 S.W.2d 168, 173 (Ark. 1983) ("[T]he possibility of a compromise in the jury room links the two issues inseparably together."); (2) the jury hearing the guilt-innocence phase may harbor residual doubts about the defendant's guilt, despite having been persuaded of guilt beyond a reasonable doubt, and may take those residual doubts into account in sentencing, *Lockhart v. McCree*, 476 U.S. 162, 181 (1986); and (3) the use of repetitive trials for the benefit of two juries is not likely to be fair to either party, *id.*; *Rector*, 659 S.W.2d at 173. The third of these reasons would not apply to Defendant's proposed procedure of seating additional alternate jurors, because alternates would observe the guilt phase, but the first two reasons would still apply because alternates "may not attend or participate in the consideration of a verdict." Rule 5-704(A). In *McCree*, the Supreme Court overturned an Eighth Circuit opinion that, similar to Defendant's argument, suggested the alternative of "selecting enough alternate jurors at the outset to replace [*Witherspoon*-excludables] at the penalty phase." *Grigsby v. Mabry*, 758 F.2d 226, 243 (8th Cir. 1985), *rev'd sub nom. McCree*, 476 U.S. at 184. The dissent in the Eight Circuit noted that

> [p]lacing the moral responsibility on the same group of jurors to decide both guilt and punishment is justified by the most significant policy considerations. When one jury hears both phases of the case, the jurors that comprise it cannot evade the heavy responsibility placed upon them of whether a convicted person should receive the death penalty. The court today would seem to require the replacement of some members of the guilt-phase jury with death-qualified jurors for the purpose of considering the death penalty. This division of responsibility between the two groups, even if only a few are replaced, would dilute accountability and disadvantage the accused.

Grigsby, 758 F.2d at 247 (Gibson, J., dissenting). For these reasons, "the removal for cause of '*Witherspoon*-excludables' serves the State's entirely proper interest in obtaining *a single jury* that could impartially decide all of the issues in [the defendant's] case." *McCree*, 476 U.S. at 180 (emphasis added). *See generally People v. Johnson*, 842 P.2d 1, 14 (Cal. 1992) (rejecting a similar proposal for using alternate jurors as an alternative to death qualification).

{14} Our interpretation of Rule 5-704(A) is supported by other rules relating to alternate

jurors and death penalty procedures. For example, Rule 5-605(B) NMRA 2005 provides that "[i]n 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." Under Defendant's proposed procedure, there is no provision for seating more than six alternates in order to have "extra non-*Witherspoon* excludable jurors" if, as in this case, there are more than six *Witherspoon*-excludables. *Cf. Hutchinson*, 99 N.M. at 620, 661 P.2d at 1319 (stating that death qualification of jurors pre-trial "is the only reasonable manner in which voir dire can be conducted [because,] [o]therwise, there is no way of knowing how many jurors should be impaneled"). In addition, Rule 5-606(C) NMRA 2005 provides that the trial court "may excuse any juror for good cause" and does not contemplate the excusal of prospective jurors for only one part of a trial if they have an inability to follow the court's instructions on a limited issue. Finally, UJI 14-121 NMRA 2005, which sets out appropriate voir dire questions in death penalty cases, states that "[t]he same jury is used for both phases" of a capital trial. In short, our rules, including Rule 5-704(A), reflect the Legislature's decision to have a single jury, composed of the same jurors, decide both the question of guilt or innocence and the appropriate sentence in a death penalty case.

{15} Defendant contends that the process of death qualification results in a jury that is conviction-prone, and he argues that the procedure he outlines would cure this problem. We are not persuaded. Defendant contends that Rule 5-704(A) permits individuals to be seated on the jury despite expressing an automatic vote with regard to the sentence. However, under this formulation of the rule, those members of the venire who express an automatic vote for the death sentence would also be eligible to participate in the guilt-innocence phase of the trial.[3] We believe it is significant that, in comparison to the seven veniremembers highlighted by Defendant, the trial court excused at least nineteen members of the venire who stated that they would automatically vote for the death penalty for all first degree murders accompanied by at least one aggravating circumstance. Thus, it would appear that in Defendant's case the *Witt* procedure of removing jurors who would automatically vote against the death penalty was offset by the *Witherspoon/Morgan* procedure for removing jurors who would automatically favor the death penalty. While "a state may not entrust the determination of whether a [person] should live or die to a tribunal organized to return a verdict of death," *Witherspoon*, 391 U.S. at 521, it is also true that a defendant is not "entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his [or her] favor" "simply because [the] defendant is being tried for a capital crime." *Witt*, 469 U.S. at 423. As the Supreme Court has stated, death qualified juries "represent[] a necessary balancing of the accused defendant's right to a jury panel drawn from a 'fair cross section of the community' . . . against the traditional right of a party to challenge a juror for bias." *Witt*, 469 U.S. at 424 n.5. Prospective jurors are excluded "in order to promote [the State's] interest in having a jury that could properly find the facts and apply the law at both the guilt and sentencing phases of the . . . trial." *Buchanan v. Kentucky*, 483 U.S. 402, 415 (1987). As shown by the exclusion of prospective jurors in this case

[3] Although Defendant frames the argument only in terms of members of the venire who express a religious opposition to the death penalty, there would be no basis within Rule 5-704(A) to distinguish such jurors from those who would automatically vote for the death penalty in terms of the prospective jurors' ability to follow the instructions of the court during the guilt-innocence phase. We also note that the seven prospective jurors highlighted by Defendant were not the only individuals to rely on religious beliefs; some prospective jurors expressed an automatic vote for the death penalty based on the tenet of an-eye-for-an-eye, while other veniremembers described an ambivalence that resulted from the theological teaching of an-eye-for-an-eye in the Old Testament being in conflict with the teachings of the New Testament. Moreover, considering that prospective jurors expressing an automatic vote with respect to sentencing, either in favor of the death penalty or opposed to it, would be similarly situated in terms of their ability to follow the law, we could not allow those religiously opposed to the death penalty to sit on the guilt-innocence phase while excluding other prospective jurors from this phase based on their sentencing views without raising concerns about equal protection or creating an impermissible religiously-based preference. *See* N.M. Const. art. II, ‘’ 11, 18.

with extreme views at both ends of the spectrum, we believe that the *Witt*/*Witherspoon* standard strikes the proper balance and assures a jury composed of individuals capable of applying the law to the facts and following the instructions of the court, without being predisposed in favor of either party. *Cf. Morgan*, 504 U.S. at 735 ("[T]he belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law. Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law.") (citation omitted). "[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *McCree*, 476 U.S. at 184.

{16} Additionally, we note that several members of the venire who expressed either an opposition to the death penalty or an automatic vote in favor of the death penalty, including one of the prospective jurors highlighted by Defendant on appeal, indicated that their views on sentencing would also affect their ability to be fair in the determination of guilt or innocence. Considering that *Witherspoon*-excludables possess such strong views on the death penalty that they "cannot and will not conscientiously obey the law with respect to one of the issues in a capital case," *McCree*, 476 U.S. at 176, our Legislature, in setting out a single jury system, might have concluded that such prospective jurors could not reasonably be expected to set aside their beliefs about the death penalty during the guilt-innocence phase knowing that the sentence they vehemently oppose could, based on their vote, be considered by other jurors. *See Rector*, 659 S.W.2d at 174 ("[W]hat is to prevent a juror strongly opposed to capital punishment, in an effort to avoid feeling *any* responsibility for a death sentence, from choosing to hang the guilt-innocence jury by a vote for acquittal?"). Certainly, given our current statutory scheme and precedent, the parties did not have a meaningful opportunity to explore this issue with all of the veniremembers excluded for cause. In fact, in rejecting an argument that *Witherspoon*-excludables should be allowed to sit on the jury during the guilt-innocence phase, we stated in *Simonson*,

> We are compelled to point out problems that may result by not excusing jurors pursuant to the questioning [set out in the Uniform Jury Instructions] and instead having a very large jury panel hearing all the evidence on the guilt phase only later to be excluded at the sentencing phase. If such a result occurred, [the Uniform Jury Instructions] would have to be changed to ask the jurors if they could convict a defendant knowing that some other person could then impose a penalty of death based upon that conviction. There would also have to be new guidelines adopted to establish the manner in selecting the jurors for the sentencing phase. In addition, the matter of challenges, now set by statute, would have to be changed by court rule. These are only some of the potential problems that would be raised by the procedure [the defendant] suggests. As we have done in previous opinions, we again emphatically and unequivocally reject [this] argument.

100 N.M. at 300, 669 P.2d at 1095.

{17} For the above reasons, we conclude that Rule 5-704(A) does not allow *Witherspoon*-excludables to sit on the guilt-innocence phase of a capital trial and that such a procedure is precluded by Section 31-20A-1(B)'s requirement that sentencing be conducted before the original jury. We reiterate that "[t]he trial court may properly exclude prospective jurors who indicate that they could not vote to impose the death penalty under any circumstances." *Clark*, 1999-NMSC-035, ¶ 7.

III. GENERAL VERDICT FORM FOR FIRST DEGREE MURDER

{18} Defendant next argues that the trial court erred in refusing to provide separate verdict

forms for two different theories of first degree murder, deliberate intent murder and felony murder. Defendant concedes that separate instructions were not required for a guilty verdict on the crime of first degree murder. This Court has previously held that first degree murder is a single crime, whether supported by a single theory or by multiple theories, and we have upheld a general verdict of first degree murder under two alternative theories on the basis that there is "no requirement that the jurors . . . unanimously agree on one of the alternative theories presented" and "[u]nanimity was only required with regard to the overall charge of first degree murder." *State v. Salazar*, 1997-NMSC-044, ¶¶ 41-42, 123 N.M. 778, 945 P.2d 996. We also concluded in *Salazar* that a general verdict of first degree murder did not violate the right to due process in the New Mexico Constitution, relying upon the Supreme Court's analysis in *Schad v. Arizona*, 501 U.S. 624, 641-44 (1991). *Salazar*, 1997-NMSC-044, ¶ 39. However, Defendant contends that this rule should be different for capital sentencing.

{19} Defendant first argues that, without a separate verdict form, it is possible that the jury convicted on a theory of felony murder. Defendant then makes two arguments based on this supposition. First, Defendant contends that felony murder is insufficient to support the death penalty. Defendant contends that "[r]eading New Mexico's murder statute together with the Capital Felony Sentencing Act, in fact, strongly suggests that the New Mexico legislature never intended the crime of felony murder to be death-eligible." Second, Defendant contends that a conviction of felony murder "allows the state to avoid proving every element of the crime" of deliberate intent murder.

{20} Defendant's argument, however, overlooks the plain language of the Legislature. Both felony murder and deliberate intent murder are different theories of a single crime, first degree murder. § 30-2-1(A). The Legislature has explicitly provided that "[w]hoever commits murder in the first degree is guilty of a capital felony." *Id.* The Legislature further expressly provided that "[w]hen a defendant has been convicted of a capital felony, he [or she] shall be punished by life imprisonment or death." § 31-18-14(A). It is the crime of first degree murder, and not any particular theory, that the Legislature has designated as eligible for capital sentencing when an aggravating circumstance is present. There is no ambiguity in this legislative scheme. Given this plain language, Defendant in fact acknowledges under a separate argument heading that "[f]elony murder is, by statute, a capital crime in New Mexico." Because the Legislature included felony murder as a capital offense, Defendant's missing elements argument is also without merit. When the State proves the elements of felony murder, it has proved all of the elements of the capital felony of first degree murder. There is no requirement that the State also prove the element of deliberate intent for the alternative theory of willful, deliberate, and premeditated murder in order for the jury to render a guilty verdict on the crime of first degree murder on the theory of felony murder.

{21} Defendant, relying on *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982), also contends that allowing the death penalty for felony murder, particularly under an accomplice theory, does not properly narrow the field of potential defendants exposed to capital punishment as required by the United States Supreme Court. Defendant contends that felony murder "holds the felon strictly responsible for the fatal consequences that he may not have foreseen, committed, or even desired." Defendant further argues that

> "[a] defendant may be found guilty of murder . . . if he participated in a crime that resulted in the killing of a person" and that "[w]hen a defendant is an accomplice, and the killing is a foreseeable consequence of the underlying crime, it is immaterial to his guilt whether he killed a person, attempted to kill a person, *or even intended or knew that a killing would take place*. As an accomplice, the killer's state of mind is imputed to the defendant. *See generally* UJI 14-2821 NMRA [2005]."

(emphasis added). However, Defendant misunderstands the crime of felony murder under New

Mexico law. As stated in the very jury instruction and cases cited by Defendant, New Mexico law requires a greater mens rea showing for both felony murder and accomplice liability.

{22} For felony murder, the State must prove that the defendant either intended to kill or knew that his or her acts created a strong probability of death or great bodily harm. *State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991). This Court has explained why New Mexico's felony murder statute is unique. "The primary distinction between New Mexico's felony-murder doctrine and those of other jurisdictions is that . . . this Court impose[s] a mens rea requirement for felony murder." *State v. Campos*, 1996-NMSC-043, ¶ 16, 122 N.M. 148, 921 P.2d 1266. "New Mexico does not abandon the mens rea requirement for murder, nor does it create a presumption that a defendant had intended to kill whenever a homicide occurs during the course of a felony." *Id.* ¶ 17. "Accordingly, unlike other jurisdictions, New Mexico's modernized felony-murder doctrine does not run the risk of circumventing the legislatively determined mens rea for murder." *Id.* ¶ 18.

{23} For accomplice liability, the State must show not only, as Defendant suggests, aiding in the commission of the killing but also that the defendant intended that the underlying felony be committed and "intended the killing to occur or knew that [he] [she] was helping to create a strong probability of death or great bodily harm." UJI 14-2821. New Mexico law therefore requires a significantly higher showing of mens rea for both accomplice liability and felony murder than described by Defendant. Because the United States Supreme Court has held that accomplices to felony murder may be subjected to capital punishment if the defendant actually killed, attempted to kill, intended to kill, knew that death was substantially certain to result, or had a culpable mental state of reckless indifference to life and was a major participant in the killing, *Tison*, 481 U.S. at 150-51, 157-58, Defendant's argument that accomplice liability for felony murder in New Mexico does not sufficiently narrow the class of defendants subjected to capital punishment is without merit.[4] Defendant's contention that "[t]he only class that is clearly narrow enough is the class of only those who commit first-degree premeditated murder with an intent to kill" is contrary to clearly established New Mexico and federal law.

{24} In any event, Defendant overlooks the fact that New Mexico also requires an aggravating circumstance, in addition to the commission of felony murder, in order to be eligible for the death penalty. § 31-20A-3 (requiring that "the jury unanimously find[] beyond a reasonable doubt and specif[y] at least one of the aggravating

[4] The State argues that we need not assess the validity of accomplice liability because the uncontroverted testimony supports a jury finding beyond a reasonable doubt that Defendant was the principal in the victim's killing and that, in comparison, there is little to support a finding of complicity by Defendant. In response to this argument, Defendant contends that, absent an indication in the record of the basis for the jury's verdict, we must assume that the jury relied on accomplice liability in order to ensure that this alternative of the crime is legally adequate. Defendant relies on *State v. Foster*, 1999-NMSC-007, & 28, 126 N.M. 646, 974 P.2d 140, in which we addressed whether verdicts on more than one offense violated the multiple punishment prong of double jeopardy. We stated in *Foster* that "the Double Jeopardy Clause does require a conviction under a general verdict to be reversed if one of the alternative bases for conviction provided in the jury instructions is 'legally inadequate' because it violates a defendant's constitutional right to be free from double jeopardy." *Id.* & 27. Defendant's reliance on *Foster*, however, is misplaced. Unlike our double jeopardy inquiry in that case, in which we evaluated the claim by assessing the essential elements found by the jury, the Supreme Court has expressly held that "the Eighth Amendment does not require that a jury make the findings required by *Enmund*." *Cabana v. Bullock*, 474 U.S. 376, 392 (1986), *overruled on other grounds by Pope v. Illinois*, 481 U.S. 497, 503 n.7 (1987). *Enmund* and *Tison* are based on the Eight Amendment's requirement that the death penalty not be excessive or disproportionate, and the Supreme Court recognized that a determination of proportionality "has long been viewed as one that a trial judge or an appellate court is fully competent to make." *Cabana*, 474 U.S. at 386. "[T]he rule [of *Enmund* and *Tison*] remains a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury." *Id.* Because the Supreme Court does not require that the *Tison*/*Enmund* finding be made by a jury, we are not bound by the instructions provided to the jury in assessing whether the evidence in this case satisfies the proportionality requirement in the Eighth Amendment. Nevertheless, because we conclude that the jury made the finding required by *Tison*, it is unnecessary for us to look beyond the instructions in this case in answering this argument.

circumstances enumerated in Section [31-20A-5]"). More particularly, Defendant overlooks the elements of the aggravating circumstance in this case. The aggravating circumstance of murder in the course of a kidnapping requires an "intent to kill." § 31-20A-5(B). Defendant received a jury instruction during the sentencing phase that included this element. Thus, the jury found that Defendant intended to kill the victim, and the Supreme Court has unequivocally stated that a death sentence for felony murder supported by an intent to kill is not disproportional and does not violate the Eighth Amendment. *Tison*, 481 U.S. at 150 (stating that in *Enmund* "[t]he Court clearly held that the equally small minority of jurisdictions that limited the death penalty to [felony murderers who actually killed, attempted to kill, or intended to kill] could continue to exact it in accordance with local law when the circumstances warranted"). In fact, based on Section 31-20A-5's requirement of an aggravating circumstance in addition to the commission of felony murder, and with almost all of the enumerated aggravating circumstances requiring an intent to kill, the Supreme Court has specifically characterized New Mexico as one of only eleven states authorizing capital punishment that "forbid imposition of the death penalty even though the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness." *Tison*, 481 U.S. at 154 ¶ n.10. Because New Mexico requires an intent to kill, the availability of the death penalty for felony murder in New Mexico is not disproportional and does not apply to an overly broad class of defendants.

{25} It is noteworthy that the case upon which we relied in *Salazar* to uphold a general verdict form, *Schad*, involved the presentation of the same two theories of first degree murder at issue in the present case, that is, felony murder and willful, deliberate, and premeditated murder. 501 U.S. at 630. The defendant in *Schad* was sentenced to death and, similar to Defendant's argument, contended that the federal Constitution required jury unanimity on a particular theory of first degree murder in capital cases even if it did not so require in cases involving lesser penalties. *Id.* For reasons substantially similar to those we articulated in *Salazar*, the Supreme Court rejected this argument. *Id.* at 644-45. Therefore, for the above reasons, we conclude that our holding in *Salazar* regarding general verdict forms on the crime of first degree murder applies equally in death penalty cases.

IV. THE AGGRAVATING CIRCUMSTANCE OF KIDNAPPING DURING THE COURSE OF THE MURDER

{26} Defendant raises a number of arguments relating to the aggravating circumstance of kidnapping during the course of a murder. Defendant argues that the felony of kidnapping cannot be used both as the underlying felony for felony murder and as the aggravating circumstance for capital sentencing. He contends that a sentencing scheme that permits the death penalty for "a broad range of felony murderers" creates too broad a class of death-eligible crimes to survive constitutional scrutiny. Defendant relies on *Zant v. Stephens*, 462 U.S. 862, 877 (1983), in which the Supreme Court stated that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.") (opinion of Stewart, J.). The Supreme Court has also indicated more recently that "the death penalty is reserved for a narrow category of crimes and offenders." *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005). "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Id.* at 1194.

{27} As with his previous argument, Defendant again fails to note the restricted application of felony murder in New Mexico and the substantial

narrowing of felony murders eligible for the death penalty achieved by the requirement of one or more of a limited number of aggravating circumstances. In order to establish felony murder, the State must prove the culpable mental state of an intent to kill or knowledge of a substantial certainty of death or great bodily harm. *Campos*, 1996-NMSC-043, ¶ 17 (stating that New Mexico does not employ "a presumption that a defendant had intended to kill whenever a homicide occurs during the course of a felony"). In addition, the State must demonstrate "the commission of a first-degree felony or a lesser-degree felony that is itself inherently dangerous or is committed under circumstances that are inherently dangerous," and the underlying felony cannot be a lesser-included offense of second degree murder. *Id.* ¶¶ 18-19.

{28} Beyond these limitations on the crime itself, not all felony murders are eligible for the death penalty, and not all underlying felonies constitute an aggravating circumstance. In fact, the only underlying felonies for felony murder that can serve as an aggravating circumstance for capital sentencing are kidnapping, criminal sexual contact of a minor, and criminal sexual penetration. § 31-20A-5(B). For the use of each of these three felonies as an aggravating circumstance, the Legislature imposed the additional requirement of demonstrating beyond a reasonable doubt that the defendant had an intent to kill. *Allen*, 2000-NMSC-002, ¶ 74 ("Even if the jury has found the defendant guilty of a felony murder in the commission of a kidnapping, it must also find that the murder was committed with an intent to kill in order to find this aggravating circumstance.") (quotation marks and quoted authority omitted). "[T]he aggravating circumstance of murder in the commission of kidnapping does not follow automatically from a guilty verdict on the underlying offenses of kidnapping and murder." *Id.* ¶ 73. This additional requirement distinguishes the aggravating circumstance from the crime of felony murder, which requires only knowledge of a strong probability of death or great bodily harm. *Compare* UJI 14-7015 NMRA 2005, *with* UJI 14-202 NMRA 2005. Aggravating circumstances

> are *not* elements of capital murder, but are instead intended to explain the kinds of circumstances that our legislature has determined warrant the most severe punishment for capital murder. . . . Where the legislature believed that intent was an appropriate criteria upon which a death sentence could be based, it included the specific requirement of intent to kill in the given aggravating circumstance.

State v. Compton, 104 N.M. 683, 693, 726 P.2d 837, 847 (1986). Because New Mexico requires a separate mens rea showing for felony murder and also requires an even greater mens rea of an intent to kill for the limited number of particularly dangerous felonies that can serve as an aggravating circumstance, the Legislature has genuinely narrowed the class of crimes and defendants eligible for the death penalty consistent with precedent from the Supreme Court. *See Lowenfield v. Phelps*, 484 U.S. 231, 242, 243 & n.6, 246 (1988) (upholding a sentencing scheme that relied on the commission of aggravated kidnapping both in creating a narrow definition of first degree murder and as an aggravating circumstance); *see also Berry v. State*, 703 So. 2d 269, 285-86 (Miss. 1997) (rejecting a similar claim based on the Supreme Court's holding in *Lowenfield*); *People v. Seaton*, 28 P.3d 175, 231 (Cal. 2001) (rejecting a similar argument regarding the underlying felony of robbery). Our statutory scheme ensures that capital sentencing in New Mexico is "limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Simmons*, 125 S. Ct. at 1194 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

{29} Defendant also argues that there was insufficient evidence to instruct the jury on the aggravating circumstance of kidnapping, relying on *State v. Henderson*, 109 N.M. 655, 661, 789 P.2d 603, 609 (1990), *overruled on other grounds by Clark v. Tansy*, 118 N.M. 486, 493, 882 P.2d 527, 534 (1994). Defendant's reliance on *Henderson* is misplaced. In that case, the trial court instructed the jury on three aggravating

circumstances, murder of a witness, murder during the course of a kidnapping and murder during the course of criminal sexual penetration. *Id.* at 657, 789 P.2d at 609. This Court held that the instruction on murder during the course of a kidnapping was improper because the State argued that "in raping his victim [the defendant] *simultaneously* kidnapped her." *Id.* at 661, 789 P.2d at 609 (emphasis added). The Court held that allowing aggravating factors for both the rape and the kidnapping would mean that "virtually every rape would be simultaneously a kidnapping, and . . . such reasoning does not suffice to establish the statutory aggravating circumstance." *Id.* In *Henderson*, there was no evidence that the defendant "intended to kill his victim during the commission of a kidnapping." *Id.* However, we were very careful to distinguish our analysis in *State v. Guzman*, 100 N.M. 756, 676 P.2d 1321 (1984). "[T]he kidnapping and rape in this case, unlike the kidnapping and rape in *Guzman*, are inseparable." *Henderson*, 109 N.M. at 661, 789 P.2d at 609. "In *Guzman* it was obvious that the defendant intended to kill his kidnapped victim during the course of the kidnapping." *Id.* "In *Guzman*, there was a separate and distinct kidnapping, which took place a definite period of time before the murder occurred. . . . [T]he kidnapping already had been completed before the CSP and murder occurred." *Id.* at 660 n.1, 789 P.2d at 608 n.1.

{30} In this case, there is no danger of multiplying a single aggravating factor into two aggravating factors. Although the State charged Defendant with attempted CSP, this case does not involve the aggravating circumstance of murder in the course of a CSP. The jury was instructed on a single aggravating circumstance. Further, as in *Guzman*, the kidnapping had already been completed, although continuing, before the attempted CSP and murder. The kidnapping was complete, though continuing, either at the convenience store or when the victim got out of the car on the dirt road and Defendant persuaded her to return to the vehicle. At both times, a rational jury could reasonably conclude from the evidence that Defendant lured the victim into his car by deception with the intent to inflict a sexual offense on the victim. *See Allen*, 2000-NMSC-002, ¶ 75; *see also* § 30-4-1(A)(4). When dealing with an already completed but continuing kidnapping, this Court has affirmed instructions on the aggravating circumstance of kidnapping on a number of occasions. *E.g., State v. Jacobs*, 2000-NMSC-026, ¶¶ 56-57, 129 N.M. 448, 10 P.3d 127; *Allen*, 2000-NMSC-002, ¶ 75. Applying "a degree of scrutiny that reflects 'the qualitative difference of death from all other punishments,'" *Allen*, 2000-NMSC-002, ¶ 61 (quoting *California v. Ramos*, 463 U.S. 992, 998 (1983)), we conclude on the basis of our prior cases that there was sufficient evidence for the instruction, and we also conclude that *Henderson* is inapposite.

{31} Defendant finally contends with respect to the aggravating circumstance that the jury was not instructed properly because the instructions did not distinguish between evidence of kidnapping and evidence of sexual assault and murder. However, the jury instruction for the aggravating circumstance required a finding that the victim was killed during the course of a kidnapping and that Defendant had an intent to kill. In rejecting a nearly identical argument in *Allen*, we were "satisfied that the jury understood the factual distinctions necessary to find the aggravating circumstance of murder in the commission of a kidnapping without more precise definition from the court." 2000-NMSC-002, ¶ 77. We reached a similar conclusion in *Jacobs*: "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." 2000-NMSC-026, ¶ 59. We conclude that this argument is without merit.[5]

[5] In the alternative, Defendant contends that his counsel was ineffective for not requesting an instruction that required the jury to find a kidnapping separate and distinct from the sexual assault and the murder. However, we believe, consistent with *Allen* and *Jacobs*, that the instructions given to the jury adequately set out the elements of the offenses and the elements of the aggravating circumstance. Defendant has failed to make a prima facie showing of ineffective assistance. *See State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61 (stating that an ineffective assistance of counsel claim

V. BALANCING THE AGGRAVATING CIRCUMSTANCES WITH THE MITIGATING CIRCUMSTANCES

{32} Under New Mexico's capital sentencing scheme, the jury is required to find an aggravating circumstance beyond a reasonable doubt. § 31-20A-3. If the jury does so, the Legislature has provided that the jury then determine whether any mitigating circumstances exist and specify the sentence only "[a]fter weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime." NMSA 1978, § 31-20A-2(B) (1979). The jury can sentence a defendant to death only if it unanimously determines that the aggravating circumstances outweigh the mitigating circumstances. UJI 14-7030 NMRA 2005. However, "[t]here is no requirement in the Capital Felony Sentencing Act or in the jury instructions which requires that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt." *State v. Finnell*, 101 N.M. 732, 736, 688 P.2d 769, 773 (1984). Defendant argues that recent decisions from the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) require the jury to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. On the basis of these cases, he contends that his rights to trial by jury and due process and the prohibition against cruel and unusual punishment require that his sentence be reversed due to the failure of the Capital Felony Sentencing Act to apply the standard of beyond a reasonable doubt to this balancing process. *See* U.S. Const. amends. VI, VIII, XIV; N.M. Const. art. II, §§ 13, 14, 18.

{33} In *Apprendi*, the Supreme Court overturned a sentencing scheme that contemplated an increased penalty for a hate crime upon a finding by a judge, by a preponderance of evidence, that the crime was committed with the purpose of intimidating particular classes of individuals. 530 U.S. at 468-69. Relying on the constitutional right to due process and to a trial by jury, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The Court deemed unconstitutional "a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he [or she] would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83. The Supreme Court applied this holding from *Apprendi* to a death penalty proceeding in *Ring*. In that case, the Court determined that *Apprendi* precluded Arizona's system of having the trial judge determine the presence or absence of aggravating factors following a jury verdict on the crime of first degree murder. *Ring*, 536 U.S. at 588-89. The Court observed that life imprisonment was the maximum punishment available for the crime of first degree felony murder based on the jury verdict alone because the existence of an aggravating circumstance was necessary to make a crime death-eligible. *Id.* at 597. As a result, the Court determined that "aggravating factors operate as 'the functional equivalent of an element of a greater offense' " and must therefore be found by a jury beyond a reasonable doubt. *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). The Court noted that the vast majority of states authorizing capital punishment, including New Mexico, already placed the responsibility of finding aggravating circumstances with the jury, while only five states, including Arizona, entrusted both capital sentencing factfinding and the ultimate sentencing decision to judges. *Ring*, 536 U.S. at 607-08 ¶ n.6.

{34} More recently, the Supreme Court has had further opportunities to explore its holding in *Apprendi*. In *Blakely v. Washington*, 542 U.S. 296,

is more properly brought on collateral review); *Lytle v. Jordan*, 2001-NMSC-016, ¶¶ 25-26, 130 N.M. 198, 22 P.3d 666 (applying the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984) requiring a showing that counsel's performance was deficient and that the deficiency prejudiced the defense and also applying the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance") (quoting *Strickland*, 466 U.S. at 689).

303-04 (2004), the Court overturned a sentence of ninety months based on a judicial finding of deliberate cruelty because the maximum sentence allowable by the defendant's guilty plea to the charged offense alone, absent additional factfinding, was fifty-three months. The Court held that such a sentence violates the rule announced in *Apprendi*. *Id.* at 305. In *United States v. Booker*, 125 S. Ct. 738, 746 (2005), the Court addressed the effect of *Apprendi* on the Federal Sentencing Guidelines. In a divided ruling, the Court held that the mandatory sentencing guidelines, based on judicial findings by a preponderance of the evidence and never submitted to the jury, violated the Sixth Amendment, *id.* at 749-51, and the Court reaffirmed its holding in *Apprendi* that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 756. However, rather than striking down the Sentencing Guidelines as a whole, a different majority of the Court took an intermediate remedial approach by invalidating only the mandatory provisions of the Guidelines, "mak[ing] the Guidelines effectively advisory." *Id.* at 757; *see id.* at 750 ("[E]veryone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted . . . the provisions that make the Guidelines binding on district judges. . . .").

{35} It is without question that these cases, and *Ring* in particular, require that an aggravating circumstance be found by a jury beyond a reasonable doubt. Even though, like the Arizona statute at issue in *Ring*, the Legislature has provided that the punishment for first degree murder is life imprisonment or death, § 31-18-14, "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494. As the Supreme Court determined with respect to Arizona's statutory scheme in *Ring*, the requirement of an aggravating circumstance for the imposition of the death penalty in Section 31-20A-3 effectively limits the punishment available upon a guilty verdict of first degree murder alone. *See Ring*, 536 U.S. 603-04. As we have indicated, however, the Capital Felony Sentencing Act satisfied the requirement that a jury find an aggravating circumstance beyond a reasonable doubt long before *Apprendi* and *Ring* were decided. The question then is whether, under these recent Supreme Court cases, the jury must also find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. We conclude that this standard of proof in the weighing process is neither constitutionally nor statutorily required.

{36} In *Ring*, the Court emphasized that the defendant did not "argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty" and noted that four states employ a hybrid system under which a jury recommends a sentence but a judge makes the ultimate sentencing determination. *Ring*, 536 U.S. at 597 n.4, 608 n.6. This limitation on the holding in *Ring* is important because it leaves intact the Court's prior holding that "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." *Stephens*, 462 U.S. at 890. We relied on this holding from *Stephens* to reject a similar argument about the standard of proof in the jury's weighing of aggravating and mitigating circumstances in *State v. Clark*, 108 N.M. 288, 307-08, 772 P.2d 322, 341-42 (1988), *overruled on other grounds by Henderson*, 109 N.M. at 664, 789 P.2d at 612. In addition, *Ring* did not overrule the Court's prior holding that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). Following *Ring*, states may continue to allow judges to make the ultimate sentencing determination as long as a jury has found the existence of an aggravating circumstance beyond a reasonable doubt. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so. . . ."). In *Harris v. Alabama*, 513 U.S. 504, 506, 515 (1995), the Supreme Court upheld a sentencing scheme under which a judge

determined the sentence by considering, much like the jury in New Mexico, whether the aggravating circumstances outweigh the mitigating circumstances, taking into account a jury's advisory verdict based on the jury's balancing of aggravating and mitigating factors. In reaching this decision, the Supreme Court noted that no "'specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.' Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." *Id.* at 512 (citation omitted) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988)). These observations remain unchanged by *Apprendi* and its progeny. Because the Supreme Court continues to allow judges to make the final sentencing determination, following the judge's consideration of aggravating and mitigating circumstances, it is clear that the Court did not intend to apply *Apprendi*'s requirement of a jury determination beyond a reasonable doubt to the balancing of aggravating and mitigating circumstances in capital cases.

{37} "[T]he pivotal inquiry under *Ring* and *Apprendi* is whether exposure to punishment is increased, not whether the punishment should or should not be imposed in a given case." *Ritchie v. State*, 809 N.E.2d 258, 265 (Ind. 2004. In New Mexico, once the jury finds an aggravating circumstance beyond a reasonable doubt, the jury is presented with two sentencing options, life imprisonment or death, and it must exercise its discretion, as guided by the Legislature and the instructions of the court, in choosing between these two statutorily authorized penalties. As part of this exercise of discretion, the jury considers the defendant and the crime and weighs the aggravating and mitigating circumstances. § 31-20A-2. Unlike the existence of an aggravating circumstance, the weighing of aggravating and mitigating circumstances is thus not a "fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. A jury's finding of guilt on the crime of first degree murder and the presence of at least one aggravating circumstance establishes "all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313. The process of weighing the aggravating and mitigating circumstances is designed to assist the jury in deciding which sentence is proper, not which sentence is available. *See Oken v. State*, 835 A.2d 1105, 1123 (Md. 2003) ("[U]nder the Supreme Court's post-*Furman* jurisprudence, in both weighing and non-weighing schemes, it is the finding of an aggravating circumstance which makes the defendant death-eligible."), *cert. denied*, 541 U.S. 1017 (2004). As a result, the balancing process is not a "fact necessary to constitute the crime with which [the defendant] is charged" such that it would invoke the constitutional requirement of proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Therefore, we agree with the State that the balancing of the aggravating and mitigating circumstances, much like the jury's consideration of "the defendant" in Section 31-20A-2(B), is not susceptible to an *Apprendi/Blakely* analysis. *Apprendi* rests on the notion that the "*truth of every accusation*" should be decided by the jury under a reasonable doubt standard. *Apprendi*, 530 U.S. at 477 (quotation marks and quoted authority omitted). However, there is no "truth" in the balancing of the proper sentence for the crime and the defendant. It is instead a matter of guided discretion and judgment within the range of permissible punishments of death and life imprisonment, which is the jury's ultimate purpose in capital sentencing in New Mexico. The balancing process does not contemplate the finding of a "fact" that increases a defendant's maximum possible sentence within the meaning of *Apprendi. See Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002) ("[T]he weighing process is not a factual determination. . . ."); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005) ("[B]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here."). The "fact" that makes a defendant eligible for the death penalty is the aggravating circumstance, combined with a guilty verdict on the crime of first degree murder. *See Ritchie*, 809 N.E.2d at 268 ("The outcome of weighing does not increase eligibility.").

{38} The jury's exercise of discretion in selecting the penalty is equivalent to "a judgment that

[aggravating circumstances] present a compelling ground for departure" from a basic sentence to which the Supreme Court referred in *Blakely*, 542 U.S. 305 n.8. While the Court required that the aggravating circumstances underlying this "judgment" be found by a jury beyond a reasonable doubt, it did not interfere with or impose a heightened standard on this traditional sentencing judgment by a sentencing authority:

> We should be clear that nothing in this history [of requiring juries to find all facts essential to a higher degree of punishment than the verdict alone would support] suggests that it is impermissible for judges to exercise discretionBtaking into consideration various factors relating both to offense and offenderBin imposing a judgment *within the range* prescribed by statute.

Apprendi, 530 U.S. at 481. As indicated by the direction to the jury in Section 31-20A-2 to consider both the defendant and the crime, in addition to weighing the aggravating and mitigating circumstances, it is precisely this type of guided sentencing discretion that is contemplated once the jury finds an aggravating circumstance beyond a reasonable doubt. Indeed, in *Booker*, the Court stressed that,

> [i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. . . . For when a trial judge exercises his [or her] discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

125 S. Ct. at 750. Under the Capital Felony Sentencing Act, the weighing of aggravating and mitigating circumstances is designed to assist the jury in "select[ing] a specific sentence within a defined range." *Id.*; *see Spaziano*, 468 U.S. at 459 ("[D]espite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceedingBa determination of the appropriate punishment to be imposed on an individual.").

{39} Moreover, it is significant following the Supreme Court's ruling in *Booker* that the jury's decision after the process of weighing is discretionary rather than mandatory. Even if the jury finds that the aggravating circumstances outweigh the mitigating circumstances, the jury "may still decide not to impose the death penalty." UJI 14-7030.

> [T]he jury is instructed that even if aggravating circumstances outweigh mitigating circumstances the jury is free to not impose the penalty of death. The jury is directed to consider both the defendant and the crime. We have recognized that a subjective standard must be used for this review. These instructions adequately focus[] the jury's attention on the particularized nature of the crime and the unique characteristics of the individual defendant, as required by the Constitution.

Clark, 108 N.M. at 307-08, 772 P.2d at 341-42 (citations omitted). As the Supreme Court held in *Booker*, *Apprendi*'s requirement of a jury finding beyond a reasonable doubt does not apply to a discretionary sentencing judgment between two statutory penalties that are available on the basis of an existing jury verdict, which in this case includes the verdict of guilt on the crime of first degree murder and the determination that an aggravating circumstance exists beyond a reasonable doubt. "[T]he federal constitution requires that eligibility for the death penalty be determined by the jury beyond a reasonable doubt, but it does not require that the decision whether to impose death be made by the jury, and it does not require the weighing, whether by judge or jury, to be under a reasonable doubt standard." *Ritchie*, 809 N.E.2d at 266; *accord Oken*, 835 A.2d at 1122 ("[W]hen taken in the context of the

Supreme Court's death penalty jurisprudence, *Ring* only implicates the finding of aggravating circumstances, and not the process of weighing aggravating against mitigating factors."); *Roney*, 866 A.2d at 36 ("[A]s evident in *Ring, Apprendi* narrowly focused on a jury's fact-finding responsibility and did not involve any question concerning whether the 'beyond a reasonable doubt' standard applies to a jury's **weighing** of the aggravating and mitigating circumstances **after** the defendant has been found eligible for the death penalty.").

{40} The Supreme Court's intention that *Apprendi* not apply to a discretionary sentencing judgment, such as the balancing of aggravating and mitigating factors, is further revealed by the Court's continued adherence to *Williams v. New York*, 337 U.S. 241 (1949), which was cited with approval in *Apprendi*, 530 U.S. at 481, and distinguished in *Blakely*, 542 U.S. at 304-05. In *Williams*, the Supreme Court allowed a judge to consider facts outside the record in a pre-sentence investigation report in determining whether to sentence a defendant to death under an indeterminate sentencing scheme. 337 U.S. at 242-43. The judge considered the defendant's criminal history and some material facts from a pre-sentence investigation concerning the defendant's background that he believed relevant to the question of punishment but that could not have been properly introduced during the guilt phase of the trial. *Id.* at 244. The Court stated,

> [T]ribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him [or her] in determining the kind and extent of punishment to be imposed within limits fixed by law.

Id. at 246 (footnote omitted). "Highly relevantBif not essentialBto [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Id.* at 247. These principles reflect "a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Id.* As with the information considered by the judge in *Williams*, the weighing of aggravating and mitigating circumstances assists the jury in its discretionary task of selecting between two sentences authorized by law in order to ensure that the penalty imposed fits both the offender and the crime. For the above reasons, we believe that the Supreme Court did not intend for its opinions in *Apprendi* and *Blakely* to apply to a decision of the type at issue in this case.

{41} Defendant alternatively argues that, in light of these Supreme Court cases, we should as a matter of statutory construction interpret Section 31-20A-2 to require that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. We have previously rejected this argument. "If the Legislature had intended for this burden to be beyond a reasonable doubt in death penalty cases, it would have so stated in the Capital Felony Sentencing Act." *Finnell*, 101 N.M. at 736, 688 P.2d at 773. This interpretation of Section 31-20A-2 has been in force without legislative change for over twenty years. We do not believe that there is a compelling reason to reconsider this precedent. *See State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, & 24, 135 N.M. 375, 89 P.3d 47 ("Based on the importance of stare decisis, we require a compelling reason to overrule one of our prior cases.") (quotation marks and quoted authority omitted); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."). We conclude that the jury is not required to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt in order to specify a sentence of death.

VI. PROPORTIONALITY

{42} Defendant next argues that his sentence is disproportionate to the penalty imposed in similar crimes. "[P]roportionality review is a post-sentence inquiry, undertaken to identify disparities in capital sentencing and to prevent the death penalty from being administered in an arbitrary, capricious, or freakish manner." *State v. Wyrostek*, 117 N.M. 514, 522, 873 P.2d 260, 268 (1994). In undertaking a proportionality review, this Court has long applied a "precedent-seeking approach." *Clark*, 1999-NMSC-035, & 74; *see State v. Garcia*, 99 N.M. 771, 780, 664 P.2d 969, 978 (1983). Under this approach, we compare the facts of the offense and all other aggravating or mitigating evidence with "only New Mexico cases in which a defendant has been convicted of capital murder under the *same aggravating circumstance(s)*" and "[o]nly those New Mexico cases in which a defendant was convicted under the same aggravating circumstance(s) and then received *either* the death penalty *or* life imprisonment and whose conviction and sentence have been upheld previously by this Court." *Garcia*, 99 N.M. at 780, 664 P.2d at 978.

{43} From our review of New Mexico capital cases, it appears that only one case fits this criteria exactly, *Gilbert*, 100 N.M. 392, 671 P.2d 640. In *Gilbert*, the defendant was convicted of two murders. *Id.* at 395, 671 P.2d at 643. For one murder, the jury found the aggravating circumstances of kidnapping and murder of a witness. *Id.* For the other murder, the jury found, as in the present case, only the aggravating circumstance of kidnapping. *Id.* The jury imposed a sentence of death for both murders, *id.*, and this Court, in affirming the sentences, held that the sentences were not disproportionate. *Id.* at 402-03. The second murder supported only by the aggravating circumstance of kidnapping is a proper comparison case under *Garcia*. Defendant relies on two cases in which the jury found two different aggravating circumstances, murder during the course of a kidnapping and murder of a witness, but imposed a life sentence, *State v. McGuire*, 110 N.M. 304, 306, 795 P.2d 996, 998 (1990), and *Hutchinson*, 99 N.M. at 619 n.1, 661 P.2d at 1318 n.1 (1983). Because these cases involved an additional aggravating circumstance, they do not strictly satisfy the *Garcia* criteria. However, we have previously considered factually similar cases in which the jury found the same aggravating circumstance or circumstances and either found an additional aggravating circumstance or found fewer aggravating circumstances. *Clark*, 1999-NMSC-035, ¶¶ 78-79 (comparing a case in which the jury found the aggravating circumstances of murder of a witness and murder in the course of a kidnapping to *Guzman*, 100 N.M. at 760-61, 676 P.2d at 1325-26, in which the jury found the same two aggravating circumstances as well as the aggravating circumstance of murder during the commission of criminal sexual penetration); *Guzman*, 100 N.M. at 762, 676 P.2d at 1327 (comparing three aggravating circumstances to several cases, including *Hutchinson* and *Gilbert*, in which the jury found only two of those three aggravating circumstances); *State v. Cheadle*, 101 N.M. 282, 288, 681 P.2d 708, 716 (1983) (comparing two aggravating circumstances to *Simonson*, 100 N.M. 297, 669 P.2d 1092, in which the jury found only one of the two aggravating circumstances). As a result, we will review *McGuire* and *Hutchinson*, as well as those cases in which the jury found the aggravating circumstance of murder during the commission of a kidnapping and in which we affirmed a sentence of death, *Allen*, 2000-NMSC-002, ¶ 111, *Clark*, 1999-NMSC-035, ¶¶ 79-80, *Guzman*, 100 N.M. at 762, 676 P.2d at 1327, and the second murder in *Gilbert*.[6]

{44} In conducting our review for proportionality, we also consider "both the crime and the defendant." § 31-20A-4(C)(4); *see Clark*, 1999-NMSC-035, ¶ 81; *Wyrostek*, 117 N.M. at 519, 873 P.2d at 265 ("The determination of whether a death sentence is excessive or disproportionate requires review of the facts in the trial record pertaining to the crime, including evidence

[6] We reject Defendant's reliance on *Jacobs*. In that case, a jury found a single aggravating circumstance of murder in the commission of a kidnapping and specified a sentence of death. 2000-NMSC-026, & 1. However, we reversed the sentence and remanded for a new sentencing proceeding on grounds other than proportionality. *Id.* && 67-69. As a result, *Jacobs* does not satisfy the *Garcia* test.

of aggravation and mitigation."). Comparing this case to those mentioned above, *Allen, Clark, McGuire, Gilbert, Guzman*, and *Hutchinson*, and considering the crime and Defendant, we do not believe that the jury's specification of the death penalty is freakish, capricious, or arbitrary. Defendant killed the victim in a particularly brutal fashion by striking her in the head three to five times with a sledgehammer. This occurred after Defendant kidnapped the victim by deception, chased her as she attempted to escape and stabbed her two inches deep in the chest with a knife when she struggled, and completely disrobed the victim in an attempt to rape her. Of the comparison cases, the facts in this case are most similar to those in *Allen*, 2000-NMSC-002, ¶¶ 2-14, a case in which we affirmed a sentence of death. We reiterate that "[p]roportionality *review* in New Mexico is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant." *Garcia*, 99 N.M. at 781, 664 P.2d at 979. We conclude that the sentence is not excessive or disproportionate.

{45} Defendant argues that this Court should overrule our earlier case law and compare his sentence to all first degree murder charges that were death-eligible, regardless of whether the death penalty was actually sought. Defendant, however, misunderstands the purpose of proportionality review. As this Court has explained, it is not to ensure perfect symmetry in sentencing but only to ensure that a death sentence is not "freakish, arbitrary, or capricious." *Clark*, 1999-NMSC-035, ¶ 80. The precedent-seeking approach is narrowly tailored for this purpose, and this Court has twice recently rejected similar claims to abandon this approach. *See Allen*, 2000-NMSC-002, ¶ 111; *Clark*, 1999-NMSC-035, ¶¶ 75-76. We adhere to the precedent-seeking approach from *Garcia*.

VII. REMAINING PENALTY-PHASE ISSUES

{46} Although not raised by Defendant, we also review the record to determine whether the evidence supports the finding that the mitigating circumstances outweighed the aggravating circumstances and whether the sentence was the product of passion, prejudice, or another arbitrary factor. *See* § 31-20A-4(C)(2), (3); *see also Allen*, 2000-NMSC-002, ¶ 81. At the sentencing hearing, Defendant presented the testimony of four witnesses. A psychologist testified that it was his opinion that there was less than a ten percent likelihood that Defendant would commit violence against other prisoners and a less than one percent likelihood of violence against prison guards while serving a life sentence in prison. A pastor testified that Defendant had grown spiritually while in prison and also read letters from two of Defendant's sisters describing Defendant's childhood. Defendant's mother and father also testified about Defendant's childhood and indicated a desire to continue seeing their son while he was in prison. Defendant's mother testified that he was a volunteer firefighter and had been in the Navy. Defendant also offered a videotape depicting the conditions in the maximum security section of the prison, and the trial judge informed the jury that, based on a life sentence for first degree murder and the sentences he received for the other crimes of which the jury found him guilty, Defendant would not be eligible for release from prison for sixty-seven years. Following our thorough review of the record, we conclude that the evidence from the trial and sentencing proceeding supports the jury's determination that the aggravating factor outweighs the evidence offered in mitigation.

{47} We also conclude that the sentence was not the product of passion, prejudice, or any other arbitrary factor. Although the State introduced victim impact evidence, its presentation was limited to only four witnesses, the victim's brother, two sisters, and daughter, and was "brief in nature and narrow in scope and purpose." *Clark*, 1999-NMSC-035, ¶ 45. We have explicitly allowed "'evidence about the victim and about the impact of the murder on the victim's family [that] is relevant to the jury's decision as to whether or not the death penalty should be imposed.'" *Allen*, 2000-NMSC-002, ¶ 55 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991));

accord Jacobs, 2000-NMSC-026, ¶ 64; *Clark*, 1999-NMSC-035, ¶¶ 35-45.

VIII. GUILT-PHASE ISSUES

{48} Defendant raises three guilt-phase issues: (1) prosecutorial misconduct in closing; (2) an improper comment by a witness on Defendant's character; and (3) erroneous admission of expert testimony. We address each of these claims in turn.

{49} Defendant first argues that the trial court erred in not granting a mistrial based on a comment by the prosecutor in closing argument. During the trial, the State sought to admit several photographs of the victim's body as reference material for the testimony of the medical investigator, and the prosecutor indicated an attempt to be "very conservative" in selecting the photographs for the jury, indicating that those offered were the "least bloody" available. In the course of an extended bench conference on the subject, the trial judge expressed concern about the graphic nature of some of the photographs and also about minimizing the amount of nudity shown in the photographs. The prosecutor offered to withdraw some pictures, either based on the availability of other means to demonstrate the wounds to the jury or out of respect for the victim and the victim's family, and the trial judge ordered that some of the photographs be cropped. After the prosecutor cut the photographs, the trial judge indicated that the prosecutor "actually . . . took out more than [he] had to," and the judge admitted two full photographs and three slivers of photographs that had been cropped. The trial judge warned the jury,

> [W]e're going to be dealing with some issues at this point that as far as the medical investigator's testimony, some is going to be a little like we've used the term graphic, okay. There will be some photographs and some diagrams but the photographs will only come at the end of [the witness's] testimony and then we're going to take a break, . . . and we have worked—we've been working on those photographs so that they will show what they are supposed to show and nothing more and we've tried to minimize the graphicness as much as possible.

The medical investigator testified in detail about the numerous wounds to the victim's body. During closing argument, the prosecutor referred to Defendant's statement to the police on the day following the murder that he had a great night up until the time that his car got stuck and described the sequence of events leading up to the victim's death to place that statement in context. In the course of this recitation, the prosecutor described the victim's physical state as "so grotesque you could not be allowed to see it." The judge denied defense counsel's oral motion for a mistrial following closing argument, and Defendant later filed a written motion for mistrial. The prosecutor informed the court that he did not show or describe the excised portions of the photographs, that the medical investigator's testimony had demonstrated the graphic nature of the injuries, that the statement in closing had resembled the judge's own explanation of the cropped photographs to the jury, and that the closing argument had been intended to show Defendant's demeanor following the crime rather than to evoke an emotional response by the jury. The trial court denied the motion.

{50} We review a trial court's denial of a motion for mistrial on the basis of remarks made in closing argument for an abuse of discretion. "The trial court has wide discretion in controlling counsel's argument to the jury. . . ." *State v. Sanchez*, 120 N.M. 247, 253, 901 P.2d 178, 183 (1995). An "[a]buse of discretion exists when the trial court acted in an obviously erroneous, arbitrary, or unwarranted manner." *State v. Stills*, 1998-NMSC-009, ¶ 33, 125 N.M. 66, 957 P.2d 51 (quotation marks and quoted authority omitted). "During closing argument, both the prosecution and defense are permitted wide latitude. . . ." *State v. Smith*, 2001-NMSC-004, ¶ 38, 130 N.M. 117, 19 P.3d 254. "The question on appeal is whether the argument served to deprive defendant of a fair trial." *State v. Chamberlain*,

112 N.M. 723, 729, 819 P.2d 673, 679 (1991). In order to answer this question, we review the comment in context with the closing argument as a whole and in the context of the remaining trial proceedings "so that we may gain a full understanding of the comments and their potential effect on the jury." *State v. Armendarez*, 113 N.M. 335, 338, 825 P.2d 1245, 1248 (1992).

{51} We agree with the State that the prosecutor did no more than repeat what the judge had already said to the jury, that is, that the photographs contained more graphic material than the jurors were allowed to see, and rely on reasonable inferences from the medical investigator's testimony about the graphic nature of the wounds. Thus, the prosecutor did not introduce any new information to the jury. Viewing this isolated remark in context with the judge's comments to the jury, with the testimony of the medical investigator, and with the overwhelming evidence of guilt, we conclude that the remark did not result in a verdict based on passion or prejudice or otherwise deprive Defendant of a fair trial.[7] "The general rule is that an isolated comment made during closing argument is not sufficient to warrant reversal." *State v. Brown*, 1997-NMSC-029, ¶ 23, 123 N.M. 413, 941 P.2d 494; *accord Smith*, 2001-NMSC-004, ¶ 38. *See generally State v. Sellers*, 117 N.M. 644, 650, 875 P.2d 400, 406 (Ct. App. 1994) ("Appellate review provides a very limited opportunity for relief from poorly worded remarks. . . ."). We conclude that the trial court did not abuse its discretion in denying the motion for mistrial.

{52} Defendant also argues that the judge should have granted a mistrial due to a witness's remark about Defendant's character of meanness. "We review a trial court's denial of a motion for mistrial under an abuse of discretion standard." *State v. Gonzales*, 2000-NMSC-028, ¶ 35, 129 N.M. 556, 11 P.3d 131. The witness's remark referenced by Defendant, that Defendant had always "seemed a little mean," was in response to a question about Defendant's behavior on the night of the murder, and the prosecutor promptly told the witness after the remark that he was asking only about the night in question. Thus, this remark was not elicited by the prosecutor. Defendant did not object to the remark at the time but moved for a mistrial at the end of the witness's testimony, following cross-examination. The judge denied the motion for mistrial but offered to give a curative instruction, which Defendant refused.

{53} "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." *Gonzales*, 2000-NMSC-028, ¶ 39. For an inadvertent remark of the type at issue in this case, we have held that the trial court's offer to give a curative instruction, even if refused by the defendant, is sufficient to cure any prejudicial effect. *See id.* ¶ 37; *State v. Simonson*, 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983). We conclude that Defendant has failed to show an abuse of discretion.

{54} Defendant finally argues that the trial court erred in admitting expert testimony on blood spatter analysis. Our Rules of Evidence provide, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." Rule 11-702 NMRA 2005. "The purpose of Rule 11-702 is to assist the trier of fact to understand the evidence and to determine the issues of fact." *Lee v. Martinez*, 2004-NMSC-027, ¶ 15, 136 N.M. 166, 96 P.3d 291 (quotation marks and quoted authority omitted). We have explained that Rule 11-702 creates three prerequisites for the admission of expert testimony: (1) the expert must be qualified; (2) the testimony must assist the trier of fact; and, "closely related" to the second requirement, (3) the expert may testify only as to "scientific, technical or other specialized knowledge." *State v. Alberico*, 116 N.M. 156,

[7] For similar reasons, we reject Defendant's argument that this remark in closing argument during the guilt-phase of the trial resulted in a sentence based on passion or prejudice. *Cf. Clark*, 1999-NMSC-035, && 51-55.

166, 861 P.2d 192, 202 (1993). With respect to the latter two prerequisites, we have rejected the overly restrictive test from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) that had required general acceptance in the field in order for opinion testimony to be considered scientific knowledge that will assist the trier of fact in favor of a more flexible test that focuses on "the validity and the soundness of the scientific method used to generate the evidence." *Alberico*, 116 N.M. at 167, 861 P.2d at 203. We relied on the analysis of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) to specify "[s]everal factors [that] could be considered by a trial court in assessing the validity of a particular technique to determine if it is 'scientific knowledge' under Rule [11-]702." *Alberico*, 116 N.M. at 168, 861 P.2d at 204. These factors include, but are not limited to, the following:

> (1) whether a theory or technique "can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known potential rate of error" in using a particular scientific technique "and the existence and maintenance of standards controlling the technique's operation"; . . . (4) whether the theory or technique has been generally accepted in the particular scientific field . . . [; and (5)] "whether the scientific technique is based upon well-recognized scientific principle and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture."

State v. Anderson, 118 N.M. 284, 291, 881 P.2d 29, 36 (1994) (quoting *Daubert*, 509 U.S. at 593-94, and *Alberico*, 116 N.M. at 167, 861 P.2d at 203).

{55} We review Defendant's claim in this case for an abuse of discretion. *See Alberico*, 116 N.M. at 169, 861 P.2d at 205 ("The rule in this State has consistently been that the admission of expert testimony or other scientific evidence is peculiarly within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion."). "Given the capabilities of jurors and the liberal thrust of the rules of evidence, we believe any doubt regarding the admissibility of scientific evidence should be resolved in favor of admission, rather than exclusion." *Lee*, 2004-NMSC-027, ¶ 16.

{56} Defendant filed a motion in limine to exclude the expert testimony prior to trial. During a hearing on the motion, the State's expert testified that he had been admitted as an expert on bloodstain pattern analysis in twenty-five jurisdictions and had testified approximately 300 times. He testified that bloodstain pattern analysis has existed since 1895 and is in widespread practice today throughout the world. He testified that blood spatter analysis has been tested for accuracy and can produce accurate results. He also testified that it is based on the underlying science of physics, as well as mathematics. He further testified that it is based upon a set of standards that are accepted across the nation and even worldwide. The expert indicated that there are a number of organizations that monitor the field and assist in the management of standards and in education. He also stated that there is a body of literature on the subject, including journals and treatises. Finally, he testified that bloodstain pattern analysis is generally accepted in the scientific community. The State also introduced the testimony of another expert who assisted the State's primary expert and who did not testify at trial. This expert also testified that blood spatter analysis is generally accepted in the scientific community and subjected to peer review. Following this testimony, defense counsel conceded that there were many aspects of blood spatter analysis that were beyond the common understanding of average jurors and that the testimony could be helpful to jurors, but requested that the trial court limit the testimony with respect to making conclusions about the specific evidence in the case or about Defendant's guilt. The trial court determined that blood spatter analysis is a discipline recognizable under this Court's prior cases and admissible under Rule 11-702, and the court determined that both of the State's witnesses at the hearing were qualified as experts in

blood spatter analysis. The court indicated that it would resolve the limits of the expert's testimony during the trial if necessary.

{57} Prior to hearing the experts' testimony at the hearing, the trial judge indicated that he had researched the issue and learned that approximately twenty-six states permit expert testimony on blood spatter analysis. Defendant highlights this remark by the trial judge and contends that it demonstrates that the court's ruling is inconsistent with our admonition that "[i]t is improper to look for scientific acceptance only from reported case law." *Alberico*, 116 N.M. at 167, 861 P.2d 203; *accord State v. Torres*, 1999-NMSC-010, ¶ 38, 127 N.M. 20, 976 P.2d 20. However, the trial court conducted a full *Daubert/Alberico* hearing and concluded that the evidence met the requirements of Rule 11-702 under *Alberico* and *Torres*. The trial court did not rely solely on the acceptance of the evidence in other jurisdictions but also on the testimony establishing that blood spatter analysis can be and has been tested, has been subjected to peer review and publication, is conducted under a set of standards that are maintained in order to control the technique's operation, is generally accepted in the particular scientific field, is based on well established scientific principles, and is capable of producing opinions based on reasonable probability rather than speculation or conjecture. In fact, Defendant also offered his own expert testimony on blood spatter evidence, which the trial court similarly admitted. The trial court's ruling fully satisfies the requirements we set out in *Alberico* and subsequent cases. Defendant thus fails to demonstrate an abuse of discretion by the trial court. Because Defendant has failed to demonstrate error, we also reject Defendant's cumulative error argument. *See State v. Nieto*, 2000-NMSC-031, ¶ 31, 129 N.M. 688, 12 P.3d 442.

IX. CONCLUSION

{58} This Court has previously rejected similar challenges to the excusal of jurors due to their religious opposition to the death penalty because the excusals were not based on the prospective jurors' religious beliefs but instead based on a lack of impartiality and a failure to follow the law. Death-qualified juries represent a necessary balance between the right to a jury panel composed of a fair cross-section of the community and the right of each party to challenge a juror for bias. In accordance with the Legislature's decision to have the original jury determine sentencing in capital cases, jurors who are biased with respect to one part of a case are properly excused from all parts of the case due to an inability to follow the court's instructions.

{59} The general verdict form did not prejudice the sentencing phase because the jury had to find an intent to kill as an element of the aggravating circumstance. This element, combined with New Mexico's strict construction of felony murder, properly narrows the class of defendants eligible for the death penalty, and the Legislature has explicitly provided that felony murder is a capital felony eligible for the death sentence if one of the aggravating circumstances is present.

{60} As in *Allen*, there was sufficient evidence of the aggravating circumstance of kidnapping as having been completed, though continuing, from the time that Defendant lured the victim into his car by deception with the intent to commit a sexual assault. Because the aggravating circumstance of kidnapping requires an intent to kill, there is no double use of kidnapping for both felony murder and an aggravating circumstance.

{61} *Apprendi, Ring*, and *Blakely* do not apply because a balancing of aggravating and mitigating circumstances, like consideration of the defendant and the crime, is a matter within the discretion and judgment of the jury in its decision of which of two prescribed penalties should be imposed. Unlike the fact of the existence of an aggravating circumstance, this balancing is not a fact that increases the possible maximum penalty.

{62} The death penalty is not disproportionate considering the comparison case of *State v. Gilbert* and the nature of the offense. Defendant brutally and repeatedly struck the victim in the

back of the head with a sledgehammer after kidnapping her, removed her to an isolated location and attempted to rape her.

{63} The isolated remark in closing argument did not inform the jury of any information that the jurors did not already know and did not, in the context of the argument as a whole, create reversible error. The trial court did not abuse its discretion in denying Defendant's motion for mistrial on the basis of the introduction of improper character evidence because the witness's remark was inadvertent and the trial court offered to cure the error with a curative instruction. Finally, the trial court properly applied *Daubert* and the rulings of this Court in its application of Rule 11-702 to admit the expert testimony, and Defendant has failed to show an abuse of discretion in the trial court's admission of the expert testimony.

{64} We conclude that Defendant's arguments are without merit. We therefore affirm Defendant's convictions and sentence.

{65} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

EDWARD L. CHÁVEZ,
Justice

RICHARD C. BOSSON, Chief Justice
(concurring in part and dissenting in part)

CONCURRENCE IN PART AND DISSENT IN PART

BOSSON, Chief Justice (concurring in part, dissenting in part).

{66} This case is not just about Robert Fry. It is also about the State and whether the State has to live up to its own rules when it sentences a man to death. Because I am convinced that the State did not do it right, I would remand for a new sentencing hearing before a properly instructed jury, fully informed in the law. I concur in the remainder of the majority opinion and concur particularly in the decision to uphold the guilty verdict.

{67} Before imposing the most severe sentence our society permits, death, the constitution requires us to limit the sentence to only the most egregious crimes under the most egregious circumstances. *See generally Zant v. Stephens,* 462 U.S. 862 (1983); *Furman v. Georgia*, 408 U.S. 238 (1972). To impose the death penalty, the United States Supreme Court requires the states to create a sentencing scheme that guides the discretion of the jury, insuring that the punishment of death is only applied to "materially more depraved" murderers, a narrowly tailored class of the worst offenders. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980). As Justice Stewart stated, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia,* 428 U.S. 153, 189 (1976) (Stewart, J., Powell, J., and Stevens, J., concurring). The narrowing factors are called aggravators, which must be scrupulously applied to determine whether a defendant falls within the narrow class of the worst offenders eligible for the death penalty.

{68} The United States Supreme Court has determined that to avoid the arbitrary imposition of capital punishment the State must ensure that the aggravating factors "justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant,* 462 U.S. at 877; *see also McCleskey v. Kemp,* 481 U.S. 279, 305 (1987); *Gregg,* 428 U.S. at 197. The Court has also found that, "[i]f a state uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it *cannot* use factors which as a practical matter fail to guide the sentencer's discretion." *Stringer v. Black*, 503 U.S. 222, 236 (1992) (emphasis added).

{69} In New Mexico, our Legislature has adopted statutory aggravating factors to aid the jury in discerning the worst types of homicide and in narrowing the class eligible for the death penalty. NMSA 1978, § 31-20A-5 (1981). At issue in this appeal is the statutory aggravating factor of a "murder . . . committed with intent to kill in the commission of or attempt to commit kidnapping." Section 31-20A-5(B). The State has the burden of persuasion and the jury must be adequately instructed on what it must find, in addition to first-degree murder, to sentence the defendant to death.

{70} Defendant Fry was convicted of first-degree murder under a general verdict not specifying upon which theory the jury based its decision. The State presented three different theories to support a finding of first-degree murder: felony murder during the commission of a kidnapping, felony murder during the attempt to commit criminal sexual penetration, and willful and deliberate murder. Because we do not know under which theory the jury based its decision, we must assume for constitutional purposes that the verdict could have been based upon a finding of felony murder during the commission of a kidnapping. *See State v. Foster*, 1999-NMSC-007, ¶¶ 26-28, 126 N.M. 646, 974 P.2d 140; *State v. Crain*, 1997-NMCA-101, 124 N.M. 84, 946 P.2d 1095; *State v. Rodriguez*, 113 N.M. 767, 772, 833 P.2d 244, 249 (Ct. App. 1992). Certainly, the evidence supports such a verdict.

{71} At the sentencing phase of the trial, the State used only one statutory aggravator, kidnapping. The language of the two uniform jury instructions are very similar. The instruction for felony murder requires that the jury find the following: (1) the defendant committed the crime of kidnapping, (2) the defendant caused the death of victim during the commission of kidnapping, and (3) the defendant intended to kill or knew that his acts created a strong probability of death or great bodily harm. *See* UJI 14-202 NMRA 2005. The Uniform Jury Instructions for the statutory aggravating factor of kidnapping are as follows: (1) the crime of kidnapping was committed, (2) the victim was murdered while the defendant was committing kidnapping, and (3) the defendant had the intent to kill. *See* UJI 14-7015 NMRA 2005.

{72} The jury instructions immediately reveal a problem. If the State used the same kidnapping, both to define first-degree felony murder and then to aggravate that same conviction to make it death eligible, how then has the State truly narrowed the death penalty to only those most heinous offenses? If the jury was not asked to find something significantly more about Defendant than what it had already found in convicting him, then we have a constitutional dilemma on our hands.

{73} The State acknowledges the problem but argues that the "intent to kill" in the statutory aggravating factor is different from, and more exacting than, the lesser intent required for felony murder. *See* UJI 14-7015(3) ("intended to kill or knew that his acts created a strong probability of death"). That may be so, but it is a subtle point at best. This Court has previously construed the felony murder statute, NSMA 1978, § 30-2-1(A)(2) (1994), as "requiring proof that the defendant intended to kill the victim (or was knowingly heedless that his or her acts created a strong probability of death or great bodily harm)." *State v. Ortega*, 112 N.M. 554, 562-63, 817 P.2d 1196, 1204-05 (1991). The jury instructions for felony murder contain the same language. *See* UJI 14-202 ("[Defendant] intended to kill or knew that his acts created a strong probability of death or great bodily harm."). The language of the statutory aggravating factor requires that "the Defendant had the intent to kill." UJI 14-7015(3).

{74} The language in both our case law and our jury instructions for felony murder utilize an intent to kill and a lesser form of second-degree-murder intent based on knowledge, while the instructions for aggravating circumstances that warrant the death penalty use solely the higher intent to kill standard. How can we be so confident the jury was aware or able to discern the difference between the two? More to the point, it does not appear from my reading of the two instructions that the jury was asked to find anything

significantly different between the intent necessary to convict Defendant and the intent necessary to execute him. And that omission goes to the heart of the constitutional problem.

{75} Notably, the jury instructions for felony murder include both the intent to kill and the lesser, second-degree-murder intent: "[Defendant] intended to kill or knew that his acts created a strong probability of death or great bodily harm." UJI 14-202; *see also Ortega*, 112 N.M. at 566, 817 P.2d at 1208. To survive *Furman/Zant* scrutiny, the majority opinion assumes that the jury did not find a clear intent to kill during the guilt phase, otherwise the aggravating factor would duplicate the elements of felony murder. *Compare* UJI 14-202 *with* UJI 14-7015(3).

{76} That assumption is fraught with risk. Because the jury instructions group the two intents together, without additional clarification it would be natural for the jury to assume the two intents are similar, if not the same. The distinction is a fine one that would not immediately be apparent to the average juror, unless brought to the jury's attention. Moreover, assuming, as we must, the jury found Defendant guilty of first-degree murder under a felony murder theory based on the lower of the two felony-murder intents, the risk the jury mistakenly believed this intent was consonant with the intent required to satisfy the aggravating circumstance is unacceptable when a person's life hangs in the balance. *Cf. State v. Allen*, 2000-NMSC-002, ¶ 75, 128 N.M. 482, 994 P.2d 728 (an intent to kill can be inferred from the same evidence upon which the jury relied to find the defendant guilty of the willful, deliberate variety of first-degree murder). And that segues into what I conclude to be the fatal error at trial.

{77} At trial, the prosecutor failed to point out this distinction to the jury. During argument to the jury at the sentencing phase, the State never distinguished between the aggravated intent for sentencing purposes ("intent to kill"), and the lesser felony-murder intent necessary for conviction ("knew that his acts created a strong probability of death"). Thus, the jury was never told that it had to find something different about Defendant than what it had already found during the conviction phase. The jury was never told it had to find a different, more aggravated form of intent before it could sentence Defendant to death. Essentially, the jury was left with the impression that it could decide to execute Defendant based on no more than what it had previously found, and in this instance that one fatal omission puts this proceeding squarely in conflict with *Furman* and *Zant*

{78} The State points to the jury instructions as adequately informing the jury, but the State's own performance at trial effectively confused any such distinction. The State presented no additional evidence during the sentencing phase, nor was the jury instructed to consider anything more, anything that would narrow the jury's focus as it considered the death penalty. Far from clarifying the distinction, the prosecutor told the jury nothing more than, "[t]here are three elements . . . [t]he kidnapping was committed. Betty Lee was murdered while Robert Fry was committing the kidnapping. And he had the intent to kill. There's no new evidence. You are to rely on the evidence that you have heard during the trial." In other words, the jury was led to believe it could sentence Defendant to death based on nothing more than what it had already heard and already decided.

{79} The State did discuss that Defendant's actions evinced an intent to kill, a point with which I wholeheartedly agree. Importantly, however, the State did not distinguish the intent to kill in the aggravating factor from the intent necessary for felony murder, or tell the jury that it must find anything different from what it had already found in the guilt phase. Not being informed that it had to find anything different about Defendant, it is purely conjectural to conclude that the jury in fact found anything different about Defendant.

{80} The failure to instruct the jury that it must find intent to kill separately and apart from the intent necessary to establish felony murder, combined with the prosecutor's misleading argument to the jury, contaminated what followed. In the

course of reviewing the most important decision any jury can render, life or death, the jury was left to guess at what it had to find. Absent a true narrowing instruction, and appropriate argument by counsel, we are left with the very tangible possibility that the jury sentenced Defendant to die based on factors that were "aggravating" in name only. Although academicians might understand the fine distinctions between possessing an intent to kill and knowing that certain actions create a strong probability of death or great bodily harm, a reasonable juror, left uninformed by an appropriate jury instruction, may easily confuse the two or consider them one in the same. It defies logic to assume that a jury, presented with many different jury instructions, levels of intent, and theories of the case over the course of capital trial, should be left to discern the intent to kill under the aggravating factor as being a different or higher standard than the intent necessary under felony murder, without proper instruction.

{81} This error is not resolved by this Court's decision in *Allen*. In that case, this Court stated the intent to kill for purposes of the kidnapping aggravating circumstance could be inferred from the same evidence the jury used to convict Allen of first-degree deliberate murder under Section 30-2-1(A)(1). *Allen*, 2000-NMSC-002, ¶ 75. By contrast, as discussed above, if the jury found Defendant guilty of felony murder under Section 30-2-1(A)(2), utilizing the lower, second-degree-murder type of intent, it cannot be said an intent to kill can be inferred. Further, the Legislature has made clear in felony murder cases where kidnapping serves as the predicate felony, the second-degree-murder type of intent is insufficient to establish an aggravating circumstance to warrant imposition of the death penalty. *See* ' 31-20A-5(B) (requiring murder in the commission of a kidnapping to have occurred "with intent to kill"). Thus, in this situation and unlike *Allen*, the jury must be further instructed on the distinctions between felony-murder intent and intent to kill for purposes of the aggravating circumstance. The jury was not so advised in this case.

{82} The narrowing function of the aggravating factor of kidnapping purports to limit the imposition of the death penalty to only the most heinous of crimes. However, when used with the felony murder statute, the elements overlap. It does not narrow the type of murders, nor does it genuinely distinguish all felony murders from only the felony murder deserving of the death penalty. Today's opinion undermines the very complaint the United States Supreme Court sought to remedy in *Furman*, which is to insure the death penalty is imposed fairly and reserved for only the worst crimes.

{83} We should remand for a new sentencing hearing so that the jury, properly instructed, can make an honest, fully informed decision, consistent with constitutional norms, as to whether to take Defendant's life. If a fully informed jury proceeds to sentence Defendant to death, then based on the record before us I would vote to concur for the reasons so ably discussed in the majority opinion.

RICHARD C. BOSSON,
Chief Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2006-NMSC-034

Filing Date: May 16, 2006

Docket No. 29,095

DAVID COBB and MICHAEL BADNARIK,

Petitioners-Appellants,

v.

STATE CANVASSING BOARD OF THE STATE OF NEW MEXICO, REBECCA VIGIL-GIRON, in her capacity as Secretary of State, BILL RICHARDSON, in his capacity as Governor, PETRA JIMENEZ MAES, in her capacity as Chief Justice,

Respondents-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Carol Vigil, District Judge.

Freedman Boyd Daniels Hollander & Goldberg, P.A.
John W. Boyd
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for Respondents.

OPINION

SERNA, Justice.

{1} Petitioners, two candidates in the 2004 presidential election, applied to the State Canvassing Board for a recount and recheck of certain ballots and deposited $114,400 for both procedures as required by NMSA 1978, Section 1-14-15(A), (B) (2001) (amended 2005). The State Canvassing Board conditioned beginning the recount and recheck procedures on Petitioners first depositing $1.4 million, the entire estimated cost, in advance. A lawsuit ensued challenging whether the State Canvassing Board had such authority. While this case was on appeal, the Legislature amended Section 1-14-15(B) to authorize the State Canvassing Board to condition any recount on a deposit of the full estimated costs of the recount or any portion thereof.

{2} The State Canvassing Board argues that the 2005 amendment to Section 1-14-15 makes this case moot for two reasons. First, because the Legislature amended Section 1-14-15(B), this case is incapable of repetition. Second, two years after the election a recount under NMSA 1978, Section 1-14-14 (1977) would have no effect on the winner of the 2004 presidential election. Petitioners contend that the Section 1-14-15(B) amendment is an unconstitutional delegation of legislative power, and as a result the 2001 version of Section 1-14-15(B) is still effective. Furthermore, Petitioners concede that a recount would not have an effect on who is President, but urge this Court to reach the merits of their claim because it is an issue of substantial public interest and the State Canvassing Board's requirement of an advance payment of the recount and recheck costs is capable of repetition yet evading review.

{3} We agree with Petitioners that the 2005 amendment to Section 1-14-15 is an unconstitutional delegation of legislative authority; consequently, the 2001 version of the statute is still effective. Under this earlier version of the

statute, we hold that the State Canvassing Board had no authority to require a deposit of the full estimated costs of the recount and recheck before starting the procedures. However, we do not remand and order a recount and recheck because a recount and recheck are no longer possible, and any change in New Mexico's 2004 presidential election results cannot change the ultimate result of the presidential election, which makes the remedy moot.

I. FACTS AND PROCEDURAL HISTORY

{4} The 2004 presidential election was conducted on November 2, 2004. New Mexico's candidates for President were incumbent President George W. Bush, Republican party; Senator John Kerry, Democratic party; Ralph Nader, Independent; Michael Badnarik, Libertarian party; David Cobb, Green party; and Michael Peroutka, Constitutional party. David Miles, *Results Certified at Last: Bush Beat Kerry in N.M.*, Albuquerque J., Nov. 24, 2004, at A1, A2. George W. Bush won reelection, *id.*, and New Mexico's five electoral college votes, Andy Lenderman, *Electoral College Members Cast Votes*, Albuquerque J., Dec. 14, 2004, at D3. President Bush edged out Senator Kerry by a margin of 5,988 votes. Miles, *supra*, at A1. Petitioners, David Cobb and Michael Badnarik, received 3,608 votes combined, 0.48 percent of the 756,304 total votes cast. *Id.* at A2.

{5} Due to the small margin between President Bush and Senator Kerry, Petitioners filed a request for a recount and recheck on November 29, 2004, with the Secretary of State under Section 1-14-14(A), which states:

> Whenever any candidate for any office for which the state canvassing board or county canvassing board issues a certificate of nomination or election believes that any error or fraud has been committed[1] by any precinct board in counting or tallying the emergency paper ballots or absentee ballots, in the verification of the votes cast on the voting machines or in the certifying of the results of any election whereby the results of the election in the precinct have not been correctly determined, declared or certified, the candidate, within six days after completion of the canvass by the proper canvassing board, may have a recount of the emergency paper ballots or absentee ballots, or a recheck of the votes shown on the voting machines, that were cast in the precinct.

(Footnote added.). On the same day, Petitioners made a deposit of $114,400 for a recount and recheck with the Secretary of State, more than statutorily required by Section 1-14-15(A). Section 1-14-15(A) provides:

> An applicant for a recount shall deposit with the proper canvassing board or, in the case of an office for which the state canvassing board issues a certificate of nomination or election, with the secretary of state fifty dollars ($50.00) in cash, or a sufficient surety bond in an amount equal to fifty dollars ($50.00), for each precinct for which a recount is demanded. An applicant for a recheck shall deposit with the proper canvassing board or, in the case of an office for which the state canvassing board issues a certificate of nomination or election, with the secretary of state ten dollars ($10.00) in cash, or a sufficient surety bond in an amount equal to ten dollars ($10.00), for each voting machine to be rechecked.

Petitioners requested a recount of 1,500 precincts and a recheck of 3,367 voting machines, requiring

[1] Neither party has raised an issue concerning Petitioners' allegations of fraud or error. We conclude no issue concerning those allegations is before us. We note, however, that following the 2004 election, the Legislature has put into place a procedure for a random check of a certain percentage of the voting systems used throughout the State. *See* NMSA 1978, § 1-14-13.1 (2005) (effective January 1, 2007). The check is to be done "within five days of the completion of the county canvass." Section 14-1-13.1(A). Under certain circumstances, the secretary of state must conduct a recount for the office of president or governor "in the precincts of the legislative district in which the discrepancy occurred." Section 1-14-13.1(B). This new provision may have been intended to address the issue of fraud or error Petitioners alleged.

a cash deposit or surety bond of $108,670 under the language of Section 1-14-15(A).

{6} Petitioners filed a petition for a writ of mandamus in the district court, *see* NMSA 1978, § 1-14-21 (1977), on December 10, 2004, to require the State Canvassing Board to issue summonses directing the precinct boards to appear and conduct the recount and recheck of all the precincts stated in Petitioners' application, *see* NMSA 1978, § 1-14-16 (1977). Each summons is forwarded to the county clerk of each county where the stated precincts are situated. Section 1-14-16(A). The county clerk (1) delivers the summons to the sheriff, who serves it on each precinct board member, and (2) sends notices by registered mail to the district judge of the county and the county chairperson of each political party that participated in the election in each precinct. Section 1-14-16(B). Section 1-14-16(C) commands the precinct board members, the district judge, and the county clerk to appear and conduct the recount and recheck no later than ten days after the filing of the application. On December 10, 2004, eleven days had already passed from Petitioners' original request with no action from the State Canvassing Board. At a December 13, 2004, hearing, the district court denied Petitioners' writ as premature because the State Canvassing Board was to meet and address Petitioners' request the following day, but the district court maintained jurisdiction over the case.

{7} On December 14, 2004, the State Canvassing Board issued an order granting Petitioners' application conditioned on Petitioners submitting an additional $1.4 million, far exceeding the $114,000 deposited by Petitioners. The $1.4 million reflected both the costs mentioned in Section 1-14-15(A) and the additional statutory costs associated with the recount and recheck. *See* NMSA 1978, § 1-14-15(D) (2005) ("Costs shall consist of any docket fees, mileage of the sheriff in serving summons [to members of the precinct board(s) named in the application] and fees and mileage of precinct board members, at the same rates allowed witnesses in civil actions."). The State Canvassing Board based its decision on statutory language stating "[t]he deposit or surety bond shall be *security* for the payment of the costs and expenses of the recount or recheck in case the results of the recount or recheck are not sufficient to change the results of the election." Section 1-14-15(B) (2001) (emphasis added). If the fraud or error alleged by Petitioners was not sufficient to change the result of the election, Petitioners would be responsible for the entire $1.4 million. Section 1-14-15(D). However, if the fraud or error was sufficient to change the winner, the State would pay the costs of the recount and recheck. Section 1-14-15(C). The State Canvassing Board found that "security" required the entire estimated cost of the recount and recheck to be paid up front to protect New Mexico taxpayers because the total cost of the recount and recheck far exceeded the amount Petitioners deposited. Additionally, in the Order Granting Application Conditioned on Additional Funds, the State Canvassing Board stated that Petitioners admitted that the error or fraud would not likely change the winner of the presidential election which meant that Petitioners would ultimately be financially responsible for the additional costs.

{8} Returning before the district court on December 15, 2004, Petitioners noted that the deposit they made was more than required under the plain language of Section 1-14-15(A) and that the State Canvassing Board had no statutory authority to condition a recount or recheck on an upfront payment of all estimated costs. Petitioners also contested the State Canvassing Board's finding in the Order Granting Application Conditioned on Additional Funds that Petitioners admitted the error or fraud would not change the winner of the presidential election. While conceding that the recount and recheck would not result in either Petitioner being declared the winner, Petitioners argued that the 5,998 vote differential between President Bush and Senator Kerry made it possible that a recount would result in Kerry being declared the winner. Petitioners asserted that nothing in Section 1-14-14(A) required that a petitioner for a recount or recheck be declared the winner of the election, and therefore, if Kerry were declared the winner, they would not be responsible for the costs of the recount or recheck. *Compare* § 1-14-14(A)

(allowing *any candidate* to request a recheck or recount if the candidate believes error or fraud occurred), *with* § 1-14-15(C) (requiring the State to pay the costs associated with a recount or recheck if either procedure results *in a change of the election winner*), and § 1-14-15(D) (requiring applicants to pay the costs if the recount or recheck does not result *in a change of the election winner*). The State Canvassing Board interpreted Section 1-14-15(B) differently and claimed that Petitioners should be responsible for covering the entire estimated cost of the recount and recheck because the recount and recheck would not result in either Petitioner winning the election. The State Canvassing Board further argued that it was authorized to condition the issuance of summonses on a deposit in the amount of the total estimated statutory costs as mentioned in Section 1-14-15(D) in order to provide sufficient "security" for the taxpayers of New Mexico.

{9} The district court affirmed the order of the State Canvassing Board requiring "security" in the amount of the entire estimated cost of the recount and recheck, noting that statutes dealing with recount and recheck "must be read as a whole and are clear that the State Canvassing Board has authority to require the entire estimated costs for Plaintiffs' application to be paid up front."

{10} On December 15, 2005, after the district court refused to issue the writ of mandamus, Petitioners, in their first appearance before this Court, petitioned for a writ of mandamus, prohibition, and/or superintending control requiring the State Canvassing Board to begin the recount and recheck procedure or, alternatively, to issue such a writ requiring the district court to issue a writ of mandamus to compel action by the State Canvassing Board. *See* § 1-14-21. This Court denied Petitioners' writ without addressing the merits of their case. Petitioners then directly appealed the district court's order to the Court of Appeals. The Court of Appeals found this Court to have proper jurisdiction pursuant to article VI, section 3 of the New Mexico Constitution ("The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions. . . ."), and transferred Petitioners' appeal to this Court.

{11} Petitioners specifically appealed the district court's finding that the State Canvassing Board had the authority to condition a recount and recheck on advance payment of the entire estimated costs stated in Section 1-14-15(D), instead of the statutory formula found in Section 1-14-15(A). The State Canvassing Board claimed that Petitioners' appeal was now moot because New Mexico's electoral college delegates had voted, a change in New Mexico's 2004 presidential results could not change who is President, and a recount and recheck was now impossible because the voting machines from the 2004 election had been cleared. While this case was pending before this Court, the Legislature explicitly gave the State Canvassing Board this authority by amending Section 1-14-15(B) as follows:

> The deposit or surety bond shall be security for the payment of the costs and expenses of the recount or recheck in case the results of the recount or recheck are not sufficient to change the results of the election. *The state canvassing board may condition the issuance of the summons on a receipt of a portion of or the full estimated costs of the recount or recheck to ensure sufficient security.*

2005 N.M. Laws, ch. 270, ' 77 (effective July 1, 2005) (emphasis added). As a result of the amendment, this Court requested supplemental briefing on the constitutionality of the 2005 amendment to Section 1-14-15(B).

II. OVERVIEW

{12} The two overarching issues in this case are: (1) whether Petitioners' case is properly within this Court's jurisdiction, and (2) whether the Election Code gives the State Canvassing Board the authority to condition a recount and recheck on an advance payment of the entire estimated cost.

{13} We address the issue of jurisdiction in two ways. First, we address whether our denial of Petitioners' writ of mandamus, prohibition, and/or superintending control over the State Canvassing Board, or alternatively over the district court, precludes Petitioners from appellate review of the district court's order denying Petitioners' petition pursuant to Section 1-14-21 for a writ of mandamus. We hold that Petitioners are entitled to appeal the district court's order to this Court.

{14} Second, we address whether Petitioners' case is moot. This Court must decide whether a recount and recheck would be appropriate because a recount and recheck of New Mexico's 2004 presidential election is now impossible, and any change in New Mexico's 2004 presidential election results would have no effect on who is President. We reach the merits of Petitioners' appeal on well-recognized exceptions to mootness. This Court may review moot cases that present issues of (1) substantial public interest or (2) which are capable of repetition yet evading review. Under the first exception, while recognizing that conducting a recount and recheck is moot at this point, the Court notes that clarifying the provisions of the Election Code is an issue of substantial public interest. This case also satisfies the second exception: whether this case is capable of repetition yet evading review because of the short time frame associated with elections generally, and because the 2001 version of Section 1-14-15(B) is still effective, as we explain in Sections IV(B) and (C)(1).

{15} We next address the State Canvassing Board's authority under the Election Code in two steps. The first step, the 2005 amendment to Section 1-14-15(B), while not essential to Petitioners' claim under the original version of the statute, also addresses whether this case is capable of repetition yet evading review. We note that the Legislature attempted, through the 2005 amendment of Section 1-14-15(B), to grant the State Canvassing Board the discretion to condition a recount and recheck on a payment of the entire estimated cost of such procedures. That the State Canvassing Board had such discretionary authority was unclear under the previous version of Section 1-14-15(B), and this amendment appears to clarify the Legislature's intent. However, the amendment provides no guidance to the State Canvassing Board and grants it unfettered discretion in requiring payment beyond the statutorily required amount in Section 1-14-15(A), and in deciding the amount of advance payment that will be required for each application.

{16} We hold that the Legislature's amendment does not make this case moot because the 2005 amendment, on its face, is an unconstitutional delegation of legislative power. Therefore, we strike the amendment. Consequently, the 2001 version of Section 1-14-15(B) is still in effect, and the State Canvassing Board's action, requiring payment of the entire estimated cost of the recount and recheck, is capable of repetition while evading review.

{17} The second step addresses the State Canvassing Board's requirement that Petitioners first pay the entire estimated costs of the recount and recheck in advance under the original version of the statute. Under the plain language of Section 1-14-15(A), which defines the term deposit and surety bond for the purposes of Section 1-14-15(B), and in reading Section 1-14-15 as a whole, we hold that the district court erred in not granting Petitioners relief. However, we decline to remand to the district court to order relief, because a recount and recheck is impossible at this point, and, even if a change in New Mexico's election results would occur, it would have no effect on who is the President of the United States.

III. THIS COURT'S JURISDICTION OVER PETITIONERS' CLAIM

A. Petitioners' Right to Appellate Review of the District Court's Order

{18} This Court denied Petitioners' December 16, 2004, petition for a writ of mandamus, prohibition and/or superintending control on December 22, 2004. The State Canvassing Board argues that because the right to both a recount and recheck

are exclusively statutory, this Court's denial of Petitioners' writ exhausted the only statutory remedy available to them. Petitioners claim that our denial of their writ does not preclude appellate review of the district court's December 15, 2004, order refusing to issue a writ of mandamus compelling action by the State Canvassing Board.

{19} Article VI, section 2 of the New Mexico Constitution guarantees an aggrieved party an absolute right to one appeal. Any aggrieved party in a civil action may appeal the final order of the district court to the New Mexico Supreme Court or Court of Appeals. NMSA 1978, § 39-3-2 (1966). The procedure to be followed by every appellant from a district court judgment is laid out in Rules 12-201 to 12-216 NMRA. Petitioners' writ of mandamus, prohibition and/or superintending control, which was denied by this Court, is a separate and distinct procedure from the appellate review Petitioners are now seeking. The narrow circumstances in which the issuance of such a writ is appropriate help explain why we denied Petitioners' December 15, 2004, writ petition.

{20} The Election Code allows an applicant for recount or recheck to petition the district court for writ of mandamus to compel performance of required acts, such as compelling the State Canvassing Board to issue summonses to the precinct boards. Section 1-14-21. Like all other extraordinary writs, "[m]andamus is an extraordinary remedy which is available only in cases wherein other remedies fail or are inadequate." *Ellinwood v. Morales*, 104 N.M. 243, 245, 719 P.2d 821, 823 (Ct. App. 1986). The Legislature has provided that the district court has "exclusive original jurisdiction in all cases of mandamus." *See* NMSA 1978, ' 44-2-3 (1884). Although this Court has exercised original jurisdiction in cases other than those provided by statute, *see State ex rel. Clark v. Johnson*, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995), we have done so when we were satisfied that exercising original jurisdiction was appropriate, *id.* Because a writ of mandamus from this Court is appropriate only in limited circumstances, the denial of Petitioners' petition for a writ "does not preclude appellate review of the trial court's action and does not necessarily reflect upon the merits of [Petitioners'] contentions for purposes of this appeal." *State v. House*, 1999-NMSC-014, ¶ 25, 127 N.M. 151, 978 P.2d 967. *See also State v. Ware*, 115 N.M. 339, 343, 850 P.2d 1042, 1046 (Ct. App. 1993) ("The denial of a writ of prohibition does not necessarily mean that the Supreme Court reached the merits of the issue argued in support of the writ, especially where there exists an adequate remedy at law."). Finally, "in all cases of proceedings by mandamus in any district court of this state, the final judgment of the court thereon shall be reviewable by appeal . . . in the same manner as now provided by law in other civil cases." NMSA 1978, § 44-2-14 (1899).

{21} In Petitioners' petition to this Court for extraordinary relief, they claimed they had no plain or speedy alternative remedy at law. Yet they did have a right of appeal, and as this appeal illustrates, the Court of Appeals may, under certain circumstances, transfer an appeal to this Court. This Court denied Petitioners' requested relief without comment. We are not persuaded that on direct appeal Petitioners should be denied appellate review of the relief they originally requested by way of an extraordinary writ, even though that relief cannot be ordered at this time. As a result, we reach the merits of Petitioners' claim.

B. Petitioners' Claim is Not Moot

{22} Having found that Petitioners are entitled to a direct review of the district court's order, we must now decide whether Petitioners are still entitled to any relief. The State Canvassing Board contends that Petitioners' claim is moot because a recount and recheck of the 2004 presidential election results are no longer possible, the result of the 2004 presidential election would not be affected by a change in results in New Mexico, and New Mexico's electoral college votes have already been cast and recorded. While both Petitioners and the State Canvassing Board acknowledge that the 2005 amendment to Section 1-14-15(B) does not apply to Petitioners' claim, the State Canvassing Board maintains Petitioners'

claim is also moot because the amendment clarifies legislative intent by explicitly conferring the authority that the State Canvassing Board implicitly held under the 2001 version of Section 1-14-15(B).

{23} "As a general rule, this Court does not decide moot cases." *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008; *see also Mowrer v. Rusk*, 95 N.M. 48, 51, 618 P.2d 886, 889 (1980). "A case is moot when no actual controversy exists, and the court cannot grant actual relief." *Gunaji*, 2001-NMSC-028, ¶ 9 (quoted authority omitted). Two mootness exceptions exist, however. We may review moot cases that (1) present issues of substantial public interest or (2) which are capable of repetition yet evading review. *Id.* ¶ 10. Petitioners claim that their case is entitled to review under both exceptions. We address each exception to mootness in turn.

1. Clarification of the Election Code is an Issue of Substantial Public Interest

{24} Petitioners argue the case is of substantial public interest because it implicates the guarantee of "free and open" elections under article II, section 8 of the New Mexico Constitution ("All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."). Based on the statutory language of either the pre-amendment or post-amendment version of Section 1-14-15, which entitles candidates to a recount or recheck, Petitioners argue the Legislature has given a statutory directive to ensure the transparency of election process. The State Canvassing Board generally claims that Petitioners' case is moot because the voting machines used in the 2004 election have been cleared and a change in New Mexico's election results cannot affect the national results in the 2004 presidential election, but the State Canvassing Board does not specifically address the issue of substantial public interest.

{25} In *Gunaji*, an election recount case, this Court found errors on election ballots cast on a single voting machine to be of substantial public interest. 2001-NMSC-028, & 10. In that case, the election ballots for a Senate seat and a County Commissioner seat cast on the voting machine failed to contain the correct names of the candidates for those positions. *Id.* ¶ 2. Before the error was discovered in the voting machine, sixty-six votes were cast. *Id.* ¶ 3. The results of both races were close enough for the error in these sixty-six votes to change the outcome of the election. *Id.* The Court found *Gunaji* to raise issues of substantial public interest because the case required the Court to determine the appropriate means to contest an election and what remedy was available when the error could change the outcome. *Id.* ¶ 10.

{26} Petitioners' appeal raises similar concerns about our Election Code and potential error in the 2004 presidential election. First, Petitioners claim error in this case has the ability to change the winner of New Mexico's presidential election from President Bush to Senator Kerry. Second, the State Canvassing Board is exercising authority to condition the issuance of summonses to precinct board members that it had not exercised previously. These issues raise concerns regarding how recounts will be handled in future elections and are of substantial public interest. The importance of recounts is clear when considered in the context of the last two presidential elections.

{27} Our country experienced very close and contentious presidential elections in both 2000 and 2004. In 2000, Americans witnessed a fury of legal protests to the Florida presidential election results from the nominees of both the Democratic and Republican parties that ended up before the United States Supreme Court. *See Bush v. Gore*, 531 U.S. 98 (2000). That litigation included Florida Supreme Court interpretation of Florida's election contest and recount statutes, and interaction between state and federal law in presidential election contests. *Id.* at 100-03. Then, in 2004, the presidential election again turned on the results in one state, and threats of legal challenges to the vote counting again loomed. *See generally* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1206 (2005) (noting the margin of victory in Ohio was large enough

to "overcome any legal challenges that might have arisen from uncounted provisional votes, ambiguously marked 'hanging chad' punch card ballots, and lengthy lines that may have discouraged many citizens from voting").

{28} With this background of close and contentious elections, it is undeniable that clarification of the recount and recheck provisions of the Election Code is a matter of substantial public interest. As a result, we reach the merits of Petitioners' appeal.

2. The State Canvassing Board's Requirement of an Advance of the Full Payment of Recount and Recheck Costs is Capable of Repetition Yet Evading Review

{29} While the substantial public interest in this issue allows us to reach the merits of this case, we choose to address the second exception to mootness, issues capable of repetition yet evading review, because of the Legislature's action in this case. The State Canvassing Board's act of conditioning a recount or recheck on the advance payment of the entire estimated costs of the recount and recheck is capable of repetition yet evading review for two reasons: (1) the short statutory time frame for election contests, recounts, and rechecks, as we saw in the 2000 presidential election, make judicial review of error or fraud difficult; and (2) the Legislature's amendment to Section 1-14-15(B) is unconstitutional and the 2001 version of the statute is still effective, therefore, the State Canvassing Board's actions under the 2001 version of Section 1-14-15(B) may be repeated. We squarely address the second reason in our review of the constitutionality of the 2005 amendment, in part IV(B) and (C)(1).

{30} In *Gunaji*, this Court found the human error in the election process was capable of repetition yet evading review because terms of office may expire before this Court could address whether errors had occurred. 2001-NMSC-028, ¶ 10. In this case, Section 1-14-14(A) allows "any candidate for any office for which the state canvassing board or county canvassing board issues a certificate of nomination or election" to petition for a recount and recheck. Therefore, any candidate could be a future applicant in the same position as Petitioners in this case. Because of the broad applicability of Section 1-14-14(A) and the State Canvassing Board's belief in its authority to condition a recount or recheck on the entire estimated costs of the recount or recheck, the State Canvassing Board's action is capable of repetition.

{31} The term of office has not expired, as it did in *Gunaji*, but the short time frame provided for election contests, recounts, and rechecks also make Petitioners' claim an issue capable of evading review. Unlike the 2000 presidential election contest, this Court is not faced with the pressure of a decision that will change the result of the election, as were the United States Supreme Court and the Florida Supreme Court. However, our Election Code also has numerous deadlines that future protestants to an election must meet that could place this Court in a situation where time would be of the essence. *See* NMSA 1978, § 1-13-13(A) (1979) (requiring county canvassing boards to declare results ten days from the election date); NMSA 1978, § 1-13-15 (1977) (requiring the state canvassing board to declare the results for elections on the third Tuesday after each election); NMSA 1978, § 1-14-3 (1971) (requiring that a complaint to contest an election must come no later than thirty days from the issuance of the certificate of election).

{32} As a result, we reach the merits of Petitioners' appeal because the State Canvassing Board's action of conditioning a future petitioner's application for a recount or recheck on the full estimated costs of the recount or recheck is capable of repetition yet evading review.

IV. STATE CANVASSING BOARD'S AUTHORITY UNDER THE ELECTION CODE TO CONDITION A RECOUNT AND RECHECK ON THE ADVANCE PAYMENT OF THE ENTIRE ESTIMATED COST

A. Standard of Review

{33} Both Petitioners and the State Canvassing Board agree that this is a case of statutory

interpretation. "We review questions of statutory interpretation de novo." *State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

{34} The parties disagree as to what interpretation the statute must be given. Petitioners ask us to rely on the plain language of the statute. "In construing a particular statute, a reviewing court's central concern is to determine and give effect to the intent of the legislature." *State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988).

> We will construe the entire statute as a whole so that all the provisions will be considered in relation to one another. Statutes must be construed so that no part of the statute is rendered surplusage or superfluous. The complement of the preceding rule is that we will not read into a statute or ordinance language which is not there, particularly if it makes sense as written. We will not depart from the plain wording of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions.

Regents of Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236 (quoted authority omitted). The State Canvassing Board argues that, as an administrative agency, it is entitled to deference in interpreting Section 1-14-15. This Court "will accord some deference to the agency's interpretation, especially if the legal question implicates agency expertise." *Id.* ¶ 17 (quoted authority omitted). We conclude, as discussed in detail later, that the State Canvassing Board's claim to deference lacks merit. We look to the intent of the Legislature as revealed by the text of Section 1-14-15 in resolving the issue on appeal.

B. The 2005 Amendment to Section 1-14-15(B) is an Unconstitutional Delegation of Legislative Power to the State Canvassing Board[2]

{35} Both Petitioners and the State Canvassing Board agree that Petitioners' claim is unaffected by the Legislature's amendment, but the question is whether future applicants for a recount or recheck would be subject to the State Canvassing Board's discretionary authority. On July 1, 2005, while this case was pending before this Court and before oral argument, the Legislature amended Section 1-14-15(B) as follows:

> The deposit or surety bond shall be security for the payment of the costs and expenses of the recount or recheck in case the results of the recount or recheck are not sufficient to change the results of the election. *The state canvassing board may condition the issuance of the summons on a receipt of a portion of or the full estimated costs of the recount or recheck to ensure sufficient security.*

(Emphasis added.).

{36} The Legislature's intent is clear in the plain language of the amendment: the State Canvassing Board has the authority to condition a recount or recheck on the full estimated costs of the recount or recheck for future applicants. The State Canvassing Board argues that this amendment settles the question of its authority to condition the issuance of summonses on payment of the entire estimated cost of the recount, both before and after the effective date of the amendment. Petitioners note that the amendment is unconstitutional on its face, and as a result, the pre-amended version of Section 1-14-15(B) is still in effect. Petitioners make three arguments with respect to the 2005 amendment's unconstitutionality: (1) it is an unconstitutional delegation of legislative power because the State Canvassing Board has no standards to guide its discretion in

[2] This issue also addresses whether the State Canvassing Board's authority to condition a recount and recheck on an advance payment of the entire estimated cost is capable of repetition yet evading review.

requiring advance payment of any costs; (2) it violates the Equal Protection Clause, because the amendment allows the State Canvassing Board to exercise authority to arbitrarily distinguish between similarly situated petitioners for a recount, implicating the fundamental right to vote; and (3) it violates substantive due process because petitioners are left without notice as to how much of a deposit they must provide in order for the State Canvassing Board to authorize a recount or recheck, unfairly prejudicing minor political party candidates. In holding the 2005 amendment to Section 1-14-15(B) unconstitutional, in the interest of judicial restraint, we choose to focus only on Petitioners' nondelegation argument: the Legislature's unconstitutional delegation of power in giving the State Canvassing Board arbitrary and unbridled authority.

{37} Preliminarily, we must address Petitioners' ability to challenge the constitutionality of the 2005 amendment. We acknowledge that Petitioners have brought their claim under the pre-amended 2001 version of Section 1-14-15(B), which means the claim is unaffected by the Legislature's 2005 amendment. The Uniform Statute and Rule Construction Act expressly prohibits an amended statute from having any effect on a pending action or proceeding. NMSA 1978, § 12-2A-16(A), (B) (1997). We reiterate that neither Petitioners nor the State Canvassing Board claim that the amendment affects the cause of action, but both parties address the amendment in terms of whether a claim such as Petitioners' is capable of repetition yet evading review. The State Canvassing Board has recognized the importance of the issues in this case and has chosen to waive its standing and mootness arguments only to Petitioners' ability to challenge the Section 1-14-15(B) 2005 amendment.

{38} While we have not previously recognized a private party's standing to invoke this Court's power to resolve questions of the constitutionality of a statutory amendment in appellate review, this Court has recognized its discretionary authority to "grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance." *Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 3, 132 N.M. 282, 47 P.3d 441 (per curiam) (quoted authority omitted). In *Baca*, a mayor of Albuquerque petitioned this Court for a writ of mandamus to prohibit the Department of Public Safety from enforcing certain provisions of the Concealed Handgun Carry Act. *Id.* ¶ 1. After oral argument, but while the case was still pending, the mayor was succeeded by a new mayor. *Id.* ¶ 2. The new mayor submitted a motion to replace the former mayor on the writ and to dismiss his predecessor's writ. *Id.* This Court refused the new mayor's motion to dismiss, granting standing to the former mayor, as a private individual, to "invoke [our] power . . . to resolve constitutional questions and enforce constitutional compliance [in order] to vindicate the public interest in cases presenting [an issue] of great public importance." *Id.* ¶ 3.

{39} As stated, the issue of clarifying our Election Code, especially in the current political climate, make this a case of great public importance. The 2005 amendment to Section 1-14-15(B) attempts to confer the very authority the State Canvassing Board claims to have had under the 2001 version of the statute, and that the district court agreed was implicit in Section 1-14-15. Consequently, Petitioners' argument challenging the State Canvassing Board's discretionary authority under the 2001 version of Section 1-14-15(B) would be the same under the 2005 amended version. Even though the 2005 amendment does not affect Petitioners' claim, because future applicants for recounts or rechecks would make an argument identical to Petitioners' claim, common sense demands review of the amendment. We acknowledge that cases conferring standing have generally arisen in the context of our original jurisdiction in mandamus. *See, e.g., Baca*, 2002-NMSC-017, ¶ 3; *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974). Nonetheless, the individual facts of this case and the great public interest involved in Petitioners' claim compel us to invoke our power to resolve the constitutionality of the 2005 amendment to Section 1-14-15(B).

{40} We now turn directly to the 2005 amendment's unconstitutionality under the

nondelegation doctrine. The New Mexico Constitution provides for the separation of powers.

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. Const. art. III, § 1. It is this principle of separation of powers and the limitations on the Legislature's ability to transfer its power to other departments that is the basis of the nondelegation doctrine. *See* Black's Law Dictionary 438 (7th ed. 1999) (delegation doctrine).

{41} The nondelgation doctrine limits, but does not completely prevent, the Legislature from vesting a large measure of discretionary authority in administrative officers and bodies. "There are many powers so far legislative that they may properly be exercised by the legislature, but which may nevertheless be delegated, since the legislature may delegate any technically nonlegislative power which it may itself lawfully exercise." *State v. Spears*, 57 N.M. 400, 405, 259 P.2d 356, 360 (1953) (quoted authority omitted). The Legislature may not vest unbridled or arbitrary authority in an administrative body, however, and must provide reasonable standards to guide it. *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 417, 389 P.2d 13, 18 (1964). In the past, this Court has found proper delegation of legislative authority in cases where administrative discretion occurs within a governmental scheme, policy, or purpose, *Spears*, 57 N.M. at 406, 259 P.2d at 360, but "[w]hen the scope increases to immense proportions . . . the standards must be correspondingly more precise." *State ex rel. Schwartz v. Johnson*, 120 N.M. 820, 825, 907 P.2d 1001, 1006 (1995) (quoted authority omitted). "The essential inquiry is whether the specified guidance sufficiently marks the field within which the administrator is to act so that it may be known whether [the administrator] has kept within it in compliance with the legislative will." *Id.* (quoted authority omitted). Also "the fact that [an agency acts] only under certain self-imposed restraints can in no way serve to supply what has been omitted. It is not what has been done but what can be done under a statute that determines its constitutionality." *State ex rel. Holmes v. State Bd. of Fin.*, 69 N.M. 430, 440, 367 P.2d 925, 932 (1961).

{42} In *Spears*, the defendant was charged with engaging in business as a real estate broker without a license. 57 N.M. at 403, 259 P.2d at 358. The defendant challenged the constitutionality of the Legislature's delegation to the New Mexico Real Estate Board to accept real estate licenses and to develop a qualifying examination to determine an applicant's qualifications. *Id.* at 403-04, 259 P.2d at 358-59. This Court, finding the Legislature's delegation of power to the New Mexico Real Estate Board constitutional, noted the law carried out a legislative scheme, policy, and purpose by its own terms. *See id.* at 406, 259 P.2d at 360. The law

> provide[d] for the appointment of a board, made up of persons experienced in the real estate business, . . . and to which is committed the power to make and enforce any and all rules and regulations to carry out the provisions of the act and of prescribing such reasonable written examinations of such scope as to determine the qualifications of applicants.

Id. at 405, 259 P.2d at 360. Because the Board's statutorily authorized actions did not "involve the exercise of primary and independent discretion, but only determin[ations] with[in] defined limits, and subject to review, [of] some fact upon which the law by its own terms operates, such regulation or action" was constitutional. *Id.* at 406, 259 P.2d at 360.

{43} In *Schwartz*, the issue was whether the Legislature, by statute, had intended to allow the governor to regulate the periodic allotment of funds to state agencies based on the recurring

needs of state agencies or give the executive the discretion to base allotments on fiscal policy. *Schwartz*, 120 N.M. at 821, 907 P.2d at 1002. The governor argued that the Legislature had delegated allotment authority to him, based on a statute that gave the state budget division authorization to provide regulations for the periodic allotment of funds expended by any state agency. *Id.* at 823, 907 P.2d at 1004. The governor believed such authority allowed him to consider fiscal policy when making allotment decisions, such as the maintenance of general-fund reserves. *Id.* at 824, 907 P.2d at 1005. The Court, questioning whether the statute explicitly authorized the governor to consider fiscal policy, found that the statute contained few if any standards to direct the governor's discretion in reducing allotments. *Id.* at 825, 907 P.2d at 1006. While the governor claimed self-restraint when determining allotments, the Court found that was insufficient to cure the unconstitutional legislative delegation of authority to the governor. *Id.*

{44} The State Canvassing Board argues that it is an administrative agency, and consequently this Court should give great deference to its decision to require full or partial payment of a recount. However, deference is not appropriate in this case. Unlike the real estate business experts who composed the New Mexico Real Estate Board in *Spears*, the State Canvassing Board is composed of the governor, the secretary of state, and the chief justice of the supreme court. N.M. Const. art. V, § 2. While all three are distinguished, high-ranking government officials, only the Secretary of State is an expert in the area of voting or elections. Also, as in *Spears*, while the Election Code does allow the Secretary of State to make rules and regulations to carry out the purposes of the Election Code, NMSA 1978, § 1-2-1(1979), the State Canvassing Board's actions are explicitly statutorily provided for by the Legislature. The State Canvassing Board meets to conduct the canvass, *see* NMSA 1978, § 1-13-15 (1977), issue certificates of elections or nominations, *see* NMSA 1978, § 1-13-16 (1979), and examine election returns and certificates issued by the county canvassing boards, *see* NMSA 1978, § 1-13-18 (1969). It also conducts a ministerial oversight function while checking for error and fraud when approving the canvass of votes. *See generally* §§ 1-13-15 to 1-13-17. The State Canvassing Board, however, is not legislatively directed to develop standards for elections.

{45} The Legislature's attempted delegation of authority to the State Canvassing Board is made more explicit than the delegation claimed by the governor in *Schwartz*, but, as we held in that case, the Legislature in this case has failed to provide the State Canvassing Board with adequate standards to guide its discretion. The State Canvassing Board argues that the Legislature's guiding scheme, policy, or purpose is the interest of protecting New Mexico's taxpayers from seemingly frivolous recounts and rechecks, implicit in the use of the term "security" in the amended version of Section 1-14-15. However, nowhere in the Election Code does the Legislature explicitly state an interest to protect New Mexico taxpayers or the state fisc. Any legislative guidance given to the State Canvassing Board under this "guiding" policy is attenuated at best. Even if we were to recognize a legislative directive, much like the authority claimed by the governor in *Schwartz*, the Legislature has not provided the State Canvassing Board with any standards to exercise its discretion. As written, the 2005 amendment is an unconstitutional delegation of legislative power to the State Canvassing Board.

{46} The State Canvassing Board also suggests that it has inherent authority to promulgate a rule to implement the language in Section 1-14-15(B) by considering the costs of a recount or recheck mentioned in Section 1-14-15(D). However, as in *Holmes* and *Schwartz*, no self-regulation by the State Canvassing Board can cure the unconstitutional delegation. *Holmes*, 69 N.M. at 440, 367 P.2d at 932; *Schwartz*, 120 N.M. at 825, 907 P.2d at 1006.

{47} As a result, we must conclude that the 2005 amendment to Section 1-14-15(B) is unconstitutional. The Legislature cannot give the State Canvassing Board unfettered discretion in determining which petitioners seeking a recount or recheck must pay for the full cost, and which must

pay only a percentage of that cost. The Legislature may certainly give the State Canvassing Board some discretion in weighing the competing policy interests, such as the interest of a fair election and the protection of the treasury from allegedly frivolous requests for recounts and rechecks at issue in this case. *Cf.* Or. Rev. Stat. § 258.150 (2003) (giving the secretary of state the responsibility for conducting an accurate recount in the "shortest time at the least expense"). The Legislature could also explicitly increase the deposit or surety bond amount required by Section 1-14-15(A) for a recount or recheck to reflect the entire cost of the procedures, or a set percentage thereof. *See* Colo. Rev. Stat. § 1-10.5-106(2) (2005) (mandating the election official who will conduct the recount to determine the entire cost and collect that amount before the recount is conducted). However, this type of discretion is so largely policy-based that it is best left to the Legislature to delineate specific standards for the State Canvassing Board to apply in exercising this discretion. The Legislature can weigh the policy concerns and determine what this standard should be.

C. The State Canvassing Board's Authority to Require Advance Payment of the Entire Estimated Costs of the Recount and Recheck Under the 2001 Pre-amended Version of Section 1-14-15(B)

1. The Effectiveness of the 2001 Version of Section 1-14-15(B)

{48} Because the 2005 amendment is unconstitutional, the 2001 version of Section 1-14-15(B) is still in effect. The Uniform Statute and Rule Construction Act allows the remainder of a statute to be effective in cases where provisions in that statute are held invalid. NMSA 1978, § 12-2A-9 (1997). The question is whether the 2001 version of Section 1-14-15(B) is severable from the 2005 amendment. The test to determine the severability of an invalid section from the rest of the statute is settled.

> It is well established in this jurisdiction that a part of a law may be invalid and the remainder valid, where the invalid part may be separated from the other portions, without impairing the force and effect of the remaining parts, and if the legislative purpose as expressed in the valid portion can be given force and effect, without the invalid part, and, when considering the entire act it cannot be said that the legislature would not have passed the remaining part if it had known that the objectionable part was invalid.

Baca, 2002-NMSC-017, & 8 (quoted authority omitted).

{49} Addressing the first prong, we note the remainder of Section 1-14-15(B) (2005) is identical to Section 1-14-15(B) (2001). The 2001 version of Section 1-14-15(B) was effective, independent of the 2005 amendment, for four years. *See* 2001 N.M. Laws, ch. 109, § 1. We address the second prong by acknowledging another section of the Uniform Statute and Rule Construction Act, which reads, "[a] statute or rule that is revised, whether by amendment or by repeal and reenactment, is a continuation of the previous statute or rule and not a new enactment to the extent that it contains substantially the same language as the previous statute or rule." NMSA 1978, § 12-2A-14 (1979). Because the 2005 amendment added only one sentence to the original version of the statute, under the Uniform Statute and Rule Construction Act, the remainder of Section 1-14-15(B) (2005) can be given the same effect as the 2001 version of the statute. With respect to the third prong, again noting that the 2005 amendment to Section 1-14-15(B) added only one sentence to the 2001 version of the statute, we infer the Legislature would choose to have the remainder of the Section 1-14-15 continue to be effective. Therefore, the 2001 version of Section 1-14-15(B) is still effective because its text and meaning remain substantively unaffected by both the 2005 amendment and our subsequent striking of the amendment on the basis of unconstitutionality.

{50} We now turn to whether the State Canvassing Board had the authority, under the 2001

version of Section 1-14-15(B), to condition the recount and recheck on advance payment of the entire estimated cost of the procedure.

2. Analysis of the State Canvassing Board's Authority Under the 2001 Version of Section 1-14-15(B)

{51} Section 1-14-15 (2001) states:

> A. An applicant for a recount shall *deposit* with the proper canvassing board or, in the case of an office for which the state canvassing board issues a certificate of nomination or election, with the secretary of state fifty dollars ($50.00) in cash, or a sufficient *surety bond* in an amount equal to fifty dollars ($50.00), for each precinct for which a recount is demanded. An applicant for a recheck shall *deposit* with the proper canvassing board or, in the case of an office for which the state canvassing board issues a certificate of nomination or election, with the secretary of state ten dollars ($10.00) in cash, or a sufficient *surety bond* in an amount equal to ten dollars ($10.00), for each voting machine to be rechecked.
>
> B. The *deposit or surety bond shall be security* for the payment of the costs and expenses of the recount or recheck in case the results of the recount or recheck are not sufficient to change the results of the election.
>
> C. *If it appears that error or fraud sufficient to change the winner of the election has been committed, the costs and expenses of the recount or recheck shall be paid by the state* upon warrant issued by the secretary of finance and administration supported by a voucher of the secretary of state, or shall be paid by the county upon warrant of the county clerk from the general fund of the county, as the case may be.
>
> D. *If no error or fraud appears to be sufficient to change the winner, the costs and expenses for the recount or recheck shall be paid by the applicant*. Costs shall consist of any docket fees, mileage of the sheriff in serving summons and fees and mileage of precinct board members, at the same rates allowed witnesses in civil actions. If error or fraud has been committed by a precinct board, the board members shall not be entitled to such mileage or fees.

(Emphasis added.).

{52} The State Canvassing Board asks this Court to give it deference in its interpretation of Section 1-14-15(B) to require advance payment of the entire estimated cost of the recount and recheck, not just the costs mentioned in Section 1-14-15(A), as reasonable because otherwise the State of New Mexico would need to incur a $1.4 million expense when neither Petitioner is likely to succeed as a result of the recount and recheck. The State Canvassing Board also argues that the $108,670 required for a statewide recount and recheck under Section 1-14-15(A) only entitles Petitioners to have their petition considered, not to have the summonses issued. Petitioners respond that the plain language of the statute, which defines "deposit" and "surety bond" in Section 1-14-15(A), is all that is required as "security" for purposes of Section 1-14-15(B). Additionally, Petitioners note that Section 1-14-15(C) only requires a change in the winner to result from the recount and recheck, not that either Petitioner be found the winner, for the state to incur the costs of the recount. Only if error or fraud does not result in a change of the winner after the recount, i.e., President Bush is still found the winner, would Petitioners be responsible for the cost of the recount and recheck. Section 1-14-15(D). Lastly, Petitioners state the plain language of Section 1-14-16(A) mandates that the State Canvassing Board issue the summonses to the respective precinct boards "immediately after the filing of the application."

{53} Section 1-14-15(A) defines "deposit" and "surety bond." We conclude that the definition in Section 1-14-15(A) applies to the term "deposit

or surety bond [that] shall be security" in Section 1-14-15(B). The plain language of the statute is the clearest indication of the Legislature's intent. *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 18, 128 N.M. 309, 992 P.2d 860. The plain language of Section 1-14-15(D) clearly states the applicant is only responsible for the costs of the recount or recheck if the error or fraud is not sufficient to change the winner. If a change in the winner does result, the State is liable for the costs. Section 1-14-15(C). Also, contrary to the State Canvassing Board's claim that Section 1-14-15(A) only entitles Petitioners to a review of their application, the plain language of Section 1-16-16(A) compels mandatory action by the State Canvassing Board to issue summonses to the precinct boards named in Petitioners' application. *See* NMSA 1978, § 1-1-3 (1969) (defining "shall" in the Election Code as mandatory).

{54} While the State Canvassing Board argues that the Legislature made its intent to provide the State Canvassing Board with discretionary authority explicit through the 2005 amendment, we disagree on the same grounds as stated in finding the amendment unconstitutional. The State Canvassing Board argues we should give deference to its interpretation as an administrative agency, but because this is exclusively a case of interpretation of the statute, we need not defer to the State Canvassing Board's interpretation. *See Regents of Univ. of N.M.*, 1998-NMSC-020, & 17. We decline to depart from the plain language of the Section 1-14-15 because there is no ambiguity within this statute. Petitioners have deposited the amount required under Section 1-14-15(A). This is the "security" the Legislature has mandated before a recount or recheck can begin. When reading Section 1-14-15 as a whole, the Legislature has intended for the State Canvassing Board to perform the recount or recheck when paid a deposit or surety bond as defined in Section 1-14-15(A). *See also* § 1-14-16(A) (ordering the State Canvassing Board to act "[i]mmediately after filing of the application for recount or recheck").

{55} Finally, the State Canvassing Board is concerned that holding for Petitioners in this case will overrule *Montoya v. McManus*, 68 N.M. 381, 362 P.2d 771 (1961), and *Reese v. Dempsey*, 48 N.M. 417, 152 P.2d 157 (1944). We disagree.

{56} In *Montoya*, a petitioner in an election contest filed a poverty affidavit instead of a $25,000 bond to cover the costs associated with the procedure as ordered by the district court. 68 N.M. at 383, 362 P.2d at 772. However, this Court, relying on the plain reading of the election contest statute, noted that the statute ordered the district court to require the petitioner to pay a deposit to cover the costs of the procedure, leaving no mention of the applicability of the poverty statute. *Id.* at 386-87, 362 P.2d at 774-75. Additionally, the *Montoya* court resolved an ambiguity with the term "bond," where petitioner claimed "bond" was merely a written promise to pay, *id.* at 388, 362 P.2d at 776, by stating "the 'bond' for the payment of costs required by § 3-9-10 . . . must be such a bond as affords security for the payment of costs," *id.* at 391, 362 P.2d at 777. The State Canvassing Board avers that Petitioners' payment of only the costs under Section 1-14-15(A), and not the entire cost of the recount, amounts to a mere promise to pay. The State Canvassing Board also urges this Court to adopt the *Montoya* court's analysis of Section 3-9-10 as requiring security for the entire cost of the recount and recheck.

{57} The case before us differs from *Montoya* because the amount required to provide "security" for the recount and recheck are explicitly defined in Section 1-14-15(A) and (B). The "deposit" and "surety bond" that provide security under Section 1-14-15(B) do not include the costs stated in Section 1-14-15(D). Petitioners are not just promising to pay, but have paid $114,400, which is more than what the Legislature has explicitly required them to pay. Finally, relying on the plain language of Section 1-14-15(B), as the *Montoya* court relied on the language of Section 3-9-10, we note the State Canvassing Board did not have the authority to require anything above the amount the Legislature statutorily required. Therefore *Montoya* is not overruled here.

{58} In *Reese*, a candidate in a primary election sought a writ of mandamus requiring the State Canvassing Board to perform duties in the

canvassing of a primary election. 48 N.M. at 420, 152 P.2d at 158. The Legislature explicitly authorized the State Canvassing Board to perform these duties in the canvassing of a general election. *Id.* The Court, noting a legislative intent that the statute apply to primary elections, granted the writ ordering the State Canvassing Board to perform such duties in the primary election. *Id.* at 427, 152 P.2d at 163. The Court added that it would be proper for the State Canvassing Board to issue a writ of mandamus itself, ordering county clerks to provide the information the State Canvassing Board required to conduct the canvass, *id.* at 430, 152 P.2d at 165, although such authority was not explicit in the statute. *Cf. id.* at 431-32, 152 P.2d at 165-66. The Court refused to narrow the powers and duties of the State Canvassing Board to not include this authority, finding the Legislature had manifested such purpose and policy. *Id.* The State Canvassing Board urges us to view *Reese* as a recognition of judicial deference to its administrative decisions.

{59} In the pending case, reiterating our arguments about the propriety of judicial deference to administrative agencies in statutory construction cases, we disagree that *Reese* mandates judicial deference to determinations of the State Canvassing Board as an administrative agency. A legislative directive granting authority to the State Canvassing Board to complete the canvass does not give them the authority to condition a recount and recheck on the advance payment of the procedures' full estimated cost. This Court reiterates that the plain language of Section 1-14-15, read as a whole, only requires the deposit of the costs stated in Section 1-14-15(A), and Section 1-14-16 orders the State Canvassing Board to begin the recount and recheck procedures upon such payment. Our holding does not affect *Reese* because, unlike *Reese*, there exists no legislative policy or purpose granting the State Canvassing Board such authority, and the Legislature's intent is clear in Section 1-14-15.

VI. REMEDY

{60} Petitioners ask this Court to issue a declaratory judgment that the State Canvassing Board was without authority under the 2001 version of Section 1-14-15(B) to condition the recount and recheck on the payment of costs above those stated in Section 1-14-15(A), declare the 2005 amendment to Section 1-14-15(B) unconstitutional, and reverse and remand the case to the district court to enter an order requiring a recount and recheck. While we grant the first two prayers for relief, we decline to remand this case to the district court to enter an order requiring a recount and recheck of the 2004 presidential election returns. As has been stated, a change in the results of the 2004 New Mexico presidential election would not change who is the President of the United States. Even without New Mexico's five electoral college votes, George W. Bush still received 281 electoral votes, more than the 270 required to take office. Federal Register - Archives, http://www.archives.gov/federal-register/electoral-college/votes/2000_2005.html#2004. We also note that because new elections have occurred since the November 2, 2004, election, *see* NMSA 1978, §§ 1-13-21 (ordering the clearing of all voting machines thirty days after the state canvassing board adjourns), and 1-12-69 (1981) (ordering the destruction of the contents of all ballot boxes forty-five days after the state canvassing board adjourns), a recount or recheck is impossible at this point.

VII. CONCLUSION

{61} We issue a declaratory judgment that the State Canvassing Board acted outside the plain language of Section 1-14-15(B) (2001) in requiring Petitioners' to pay $1.4 million for "security" when Section 1-14-15(A) expressly provided what was sufficient security. We hold the 2005 amendment to Section 1-14-15(B) to be an unconstitutional delegation of legislative authority, leaving the 2001 version in effect, but note that this opinion does not preclude the Legislature from conferring such authority as long as explicit standards and policy are provided to guide the State Canvassing Board's discretion. While our holdings would ordinarily entitle Petitioners to a recount or recheck, we

decline to order the district court to require a recount because it is now impossible to conduct a recount or recheck, and, even if a change in New Mexico's 2004 presidential election returns would result, this would have no effect on who is President.

{62} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

RICHARD C. BOSSON,
Chief Justice

PAMELA B. MINZNER,
Justice

MICHAEL D. BUSTAMANTE, Chief Judge
(sitting by designation)

JAMES J. WECHSLER, Judge
(sitting by designation)

Justice Patricio M. Serna

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2007-NMSC-002

Filing Date: December 5, 2006

Docket No. 29,202

LYNN MONTGOMERY, DR. ROBERT WESSELY, AND DR. CATHERINE HARRIS,

Protestants-Petitioners,

v.

LOMOS ALTOS, INC. AND GARDEN PATH ASSOCIATES,

Applicants-Respondents,

and

NEW MEXICO STATE ENGINEER,

Real Party in Interest.

Original Proceeding on Certiorari
Kenneth G. Brown, District Judge

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OPINION

SERNA, Justice.

{1} Applicants applied for permits from the State Engineer to change the point of diversion and the place and purpose of use of surface water rights in Valencia County (move-from location) to groundwater rights in Sandoval County (move-to location). Both the move-from location and move-to location are within the Rio Grande Underground Water Basin. Applicants, developers, sought the transfer to provide water to the Overlook Subdivision, a 106-lot residential development. Protestants, existing surface water users at the move-to location, objected to the applications based on three statutory grounds: the

transfer would (1) impair existing water rights at the move-to location, (2) be contrary to conservation of water within the state, and (3) be detrimental to the public welfare of the state. *See* NMSA 1978, §§ 72-5-23, 72-12-7(A) (1985). A State Engineer hearing examiner determined the Protestants' objections were without merit and approved the applications. Protestants appealed to the district court and, in a de novo proceeding, both Protestants and Applicants filed cross-motions for summary judgment. The district court adopted the hearing examiner's findings, granted Applicants' cross-motion for summary judgment, and denied Protestants' motion. Protestants appealed to the Court of Appeals, which affirmed in a split decision.

{2} Protestants appeal five issues to this Court: (1) Applicants' transfer applications should be considered new groundwater appropriations; (2) surface depletions at the move-to location caused by the applications should be considered per se impairment of existing rights; (3) the State Engineer should have considered all existing rights and not have impermissibly determined the validity of non-party declarants' water rights; (4) the district court should not have granted Applicants' cross-motion for summary judgment on the issue of impairment because material facts were in dispute; and (5) the Court of Appeals erred in holding that Protestants failed to preserve the issues of water conservation and detriment to the public welfare of the state. Applicants and the State Engineer urge us to affirm the Court of Appeals decision.

{3} We hold that (1) the Court of Appeals correctly determined that the applications were not for new appropriations of groundwater and (2) the surface depletions resulting from the granting of the applications are not per se impairment. However, we agree with Protestants that (3) the State Engineer should have either considered all existing water rights at the move-to location or extinguished those rights; (4) the district court erred by granting Applicants' cross-motion for summary judgment because there was a material fact dispute as to the extent of depletion at the move-to location; and (5) the district court erred in granting Applicants' cross-motion for summary judgment because the motion failed to provide Protestants notice that the issues of water conservation and detriment to the public welfare of the state were subject to summary judgment. This Opinion addresses (3) consideration of existing water rights and (4) the extent of depletion at the move-to location because both apply to the impairment analysis. Therefore, we remand to the district court for a de novo proceeding to determine the measure of existing rights and the extent of depletion at the move-to location, whether this depletion constitutes impairment of existing rights, and whether the applications are contrary to water conservation or detrimental to the public welfare of the state.

I. FACTUAL BACKGROUND

{4} Applicants Lomos Altos, Inc. and Garden Path Associates sought to provide water to a maximum of 106 residences that compose the Overlook Subdivision in Sandoval County near Placitas, New Mexico. As a result, Applicants filed three permit applications between June 30, 1997, and August 25, 1999, to change the diversion point[1] and the place and purpose of use[2] from surface to groundwater within the Rio Grande Underground Water Basin. The permits sought to transfer a total 15.05 acre feet per year (afy) in surface water rights from locations on the Rio Grande in Valencia County to groundwater pumping rights in Sandoval County, near Placitas.

{5} Applicants published a notice of the applications pursuant to NMSA 1978, Section 72-5-4 (1941, prior to 2001 amendment). *See also* NMSA 1978, § 72-12-3(D) (1985, prior to 2001 amendment) (containing the publication

[1] A diversion point is the place where the appropriator installs a device for removing water from the ground, such as wells, pumps, and canals. Charles T. DuMars & Michele Minnis, *New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation*, 31 Ariz. L. Rev. 817, 821 (1989).

[2] A water right is defined not only by its priority date, but also by how the water is used, e.g., agricultural, municipal, or industrial use. DuMars & Minnis, *supra* note 1, at 820.

requirement for groundwater transfers). Sections 72-5-23 and 72-12-7(A) govern surface water and groundwater transfers, respectively, and allow water rights to be transferred from one location to another, without losing priority,[3] if such transfer (1) can be made without detriment or impairment to existing water rights, (2) is not contrary to conservation of water within the state, and (3) is not detrimental to the public welfare of the state. The transfer must satisfy all three requirements before the State Engineer can approve it. *See* §§ 72-5-23, 72-12-7(A).

{6} Protestants Robert Wessely, Elizabeth Gardner, Lynn Montgomery, and Catherine Harris hold water rights at the move-to location. Protestants' water rights are taken from sources including Rosa de Castillo Spring,[4] San Francisco Springs, Harris Spring, Tunnel Spring, and Placitas Springs.[5] Protestants claimed that if Applicants' transfer applications were approved, then Protestants' respective water rights would be impaired by the resulting depletion at the water sources. Protestants also objected to the applications on the other two statutory grounds.

{7} The State Engineer hearing examiner held a hearing to discuss the three applications and to determine if they satisfied the three statutory requirements. The hearing examiner determined that the transfer applications met all three statutory criteria but focused his report and recommendation on whether the applications would impair existing rights at the move-to location. The impairment analysis concentrated on the proposed applications' effects on Rosa de Castillo Spring, San Francisco Springs, Harris Spring, Tunnel Spring, and Placitas Springs, the springs' estimated annual yields, and all existing water right declarations at each spring.

{8} At the hearing, Applicants, Protestants, and the State Engineer submitted simulations of the proposed applications' effects on existing wells and springs at the move-to location. Applicants' expert predicted drawdowns of less than 0.17 feet in neighboring wells of other ownership after 40 years of pumping and that the 15.05 afy retirement of surface water rights at the move-from location would offset[6] the proposed groundwater pumping impacts on the Rio Grande.[7] In other words, the applications would only slightly deplete the level in existing wells and springs and have no effect on the Rio Grande as whole. Protestants' expert's model, in contrast, showed more significant effects on the springs. The State Engineer Water Rights Division's (WRD) model yielded results similar to Applicants' model. The hearing examiner determined Protestants' model was less reliable than both Applicants' and WRD's models. The hearing examiner then listed the State Engineer's estimated annual yields of the springs at the move-to location. Rosa de Castillo Spring's annual yield is estimated at 161 afy, the San Francisco Springs annually yield approximately 129.6 afy, and Harris Spring yields an estimated 0.8 afy annually.

{9} Finally, the hearing examiner reviewed existing water right declarations[8] at each of the

[3] New Mexico water law is based on prior appropriation, i.e., A[p]riority in time shall give the better right.@ NMSA 1978, § 72-1-2 (1907).

[4] The Rosa de Castillo Spring was also identified as Rose de Castille Spring, Rosa de Castilla Spring, and Rosa de Costillo Spring in various reports and motions filed below.

[5] Wessely and Gardner own a surface water right used on 5.5 acres of land taken from the San Francisco Springs. Harris owns an underground water right taken from a well approximately 32 feet deep and 4 feet square that is on her property. Montgomery owns a water right to irrigate 8 acres of land taken from the Rosa de Castillo Spring.

[6] Offset and retirement are interrelated concepts. The Middle Rio Grande Administrative Area Guidelines require groundwater applicants to obtain valid surface water rights in an amount sufficient to offset the application's effect on the Rio Grande's surface flows. *Office of the N.M. State Eng'r*, *Middle Rio Grande Administrative Area Guidelines for Review of Water Right Applications* 2, 5 (2000), http://www.ose.state.nm.us/doing-business/mrgbasin/crit9-13.pdf. These surface water rights are then retired, *i.e.*, no longer used toward surface water uses. *See City of Albuquerque v. Reynolds*, 71 N.M. 428, 440, 379 P.2d 73, 81 (1962) ("[The requirement] that surface rights be retired to the extent necessary to protect prior stream appropriators as a condition of the granting of an application to appropriate from the basin, is within the lawful power and authority of the state engineer.").

[7] Different units of measurement are used in this opinion. Generally, the proposed pumping impacts were measured in afy, and water rights were measured by their use on individual acres of land.

[8] Any water right holder may make and file a declaration of beneficial use with the State Engineer. NMSA 1978, §§ 72-

springs at the move-to location. The hearing examiner observed that the depletion effects on Tunnel Springs and Placitas Springs would be de minimis and that there were no water rights associated with Harris Spring. Therefore, for purposes of this appeal, we look at all the water right declarations for Rosa de Castillo Spring and San Francisco Springs.

{10} Rosa de Castillo Spring is the source of three water right declarations: Protestant Montgomery's Declaration 03890 claims a right to irrigate 8 acres of land; Declaration 01644[9] describes an irrigation right used on a total of 83.92 acres of land; and Declaration 03420[10] claims a water right applied to 17 acres of land. A WRD resource master's memorandum relied on aerial photographs from 1935, 1954, 1962, 1967, and 1975 to conclude that most of these irrigation rights had been discontinued. The hearing examiner's report and recommendation listed only Declaration 03890's claim for irrigation of 8 acres, and concluded that the Rosa de Castillo Spring's yield of 161 afy far exceeded the amount required by the declaration and that no existing water rights would be impaired by the transfer applications' pumping impacts.

{11} San Francisco Springs is the source of two water right declarations: Protestants Wessely and Gardner's Declaration 04358, which claims water put to benefical use on 5.5 acres of land; and Declaration 02276,[11] which claims a water right to beneficially use water on a minimum of 29 acres. While the total amount of water from San Francisco Springs to be put to beneficial use was on at least 34.5 acres, the hearing examiner relied on four aerial photographs taken between 1935 and 1971 to conclude that only 15 acres of land were irrigated and that Applicants' proposed use would not impair the existing irrigation rights used on 15 acres from San Francisco Springs. In sum, the hearing examiner found no impairment of existing rights at either Rosa de Castillo Spring or San Francisco Springs because the annual estimated yields are sufficient to satisfy all existing water rights at each spring, even after the transfer applications are granted and the attendant depletion occurs.

{12} The State Engineer adopted the hearing examiner's recommendations in an August 28, 2001, Order. Protestants appealed the State Engineer's decision pursuant to NMSA 1978, Section 72-7-1(A) (1971), and raised issues including the same three statutory questions addressed by the hearing examiner. The district court reviews these appeals de novo. Section 72-7-1(E). Protestants named Applicants and the State Engineer as Defendants. Protestants moved for summary judgment on impairment of existing water rights based on the novel contention that in the fully-appropriated Rio Grande stream system, any new surface depletion is per se impairment. Protestants based their motion on undisputed facts. Applicants filed a cross-motion for summary judgment, which fully incorporated Protestants' statement of facts, but included five additional facts alleging that depletions caused by the proposed wells would be de minimis. Applicants also averred in a footnote that Protestants did not challenge the State Engineer's determination that the transfers were not contrary to the state's water conservation or that they would not be detrimental to the state's public welfare, but the motion did not include a statement of reasons why the transfer applications met these two statutory criteria. Protestants' response contested Applicants' claim that the depletions would be de minimis because the depletion amount was in dispute. However, Protestants failed to respond to Applicants' footnote that claimed Protestants did not challenge the State Engineer's conclusions

12-5 (1931) (groundwater right), 72-1-3 (1961) (surface water right vested pre-1907). These declarations are prima facie evidence of their contents, including the claimed water right. Sections 72-12-5, 72-1-3.

[9] Declaration 01644 is under the name Rumaldo T. Montoya. Montoya did not object to the transfer applications or participate in these proceedings. A WRD impairment analysis memorandum states Declaration 01644 contained three items, including a right to irrigate 3.5 acres and an irrigation right used on 80.42 acres.

[10] Declaration 03420 was filed under the name of several individuals who did not protest Applicants= transfer applications or participate in these proceedings.

[11] Declaration 02276 is under the name of Richard Illing. Illing did not object to the transfer applications or participate in these proceedings, but the hearing examiner considered this declaration in the examiner=s impairment analysis.

that the transfer applications were not contrary to the state's water conservation or the public welfare. After conducting a hearing on these motions, the district court denied Protestants' summary judgment motion, granted Applicants' summary judgment cross-motion, and approved the transfer applications in accordance with the State Engineer's order dated August 28, 2001.

{13} Protestants appealed the district court's decision to the Court of Appeals. The Court of Appeals affirmed the district court's reasoning and result. *See Montgomery v. State Engineer*, 2005-NMCA-071, 137 N.M. 659, 114 P.3d 339. Protestants filed a petition for writ of certiorari with this Court, and we granted the petition on June 2, 2005.

II. THE STATUTORY AND ADMINISTRATIVE FRAMEWORK FOR WATER RIGHT TRANSFERS IN THE MIDDLE RIO GRANDE ADMINISTRATIVE AREA

{14} We begin by reviewing the law surrounding surface water and groundwater transfers, *City of Albuquerque*, 71 N.M. at 437, 379 P.2d at 79, and the *Office of the New Mexico State Engineer*, *Middle Rio Grande Administrative Area Guidelines for Review of Water Right Applications* (2000), http://www.ose.state.nm.us/doing-business/mrgbasin/crit9-13.pdf [hereinafter *MRGAA Guidelines*]. Surface water and groundwater transfers are governed by Sections 72-5-23 and 72-12-7(A), respectively. These sections allow water right transfers from land in one area to another, without losing priority of the right when established, if such transfers (1) can be made without detriment or impairment to existing water rights, (2) are not contrary to conservation of water within the state, and (3) are not detrimental to the public welfare of the state. Sections 72-5-23, 72-12-7(A). The State Engineer has authority to approve an application for a water right transfer only when all three criteria are met. Sections 72-5-23, 72-12-7(A). Since there is a hydrologic connection between the Rio Grande and the underlying aquifer, described in *City of Albuquerque*, 71 N.M. at 437, 379 P.2d at 79, this Court recognized the State Engineer's authority to read surface and groundwater statutes in harmony when requiring an offset of a surface water right before allowing a new groundwater appropriation in the Rio Grande Underground Water Basin. *City of Albuquerque* specifically acknowledged that the State Engineer has the power to develop regulations and impose conditions on groundwater applications, such as the surface water right retirements, in order to prevent impairment of existing rights. *Id.* at 439, 379 P.2d at 80-81.

{15} Both the move-from location and the move-to location are located within the Middle Rio Grande Administrative Area (MRGAA). The State Engineer has developed the *MRGAA Guidelines* to review water right applications, ensure compliance with the Rio Grande Compact,[12] and prevent impairment of existing rights. *Id.* at 1. The *MRGAA Guidelines* recognize that the Rio Grande's surface waters are fully appropriated, *id.*, that new surface water appropriations are not allowed, *id.*, and that transfers of existing valid water rights are necessary before any surface water can be made available for new appropriations, *id.* at 2. The waters within the Rio Grande Underground Water Basin are considered to be hydrologically connected to the Rio Grande surface flows, so that any groundwater diversions in the system will eventually deplete the surface flows within the system in an equal amount. *Id.* at 1. Because of the hydrologic connection within the MRGAA, the guidelines require that groundwater applicants obtain and retire valid water rights within the MRGAA to offset the groundwater pumping effects. *Id.* at 2. The State Engineer's reply brief states that as a result of applicable case law, the *MRGAA Guidelines*,

[12] New Mexico, Colorado, and Texas entered into the Rio Grande Compact, NMSA 1978, §§ 72-15-23 to -25 (1939, as amended through 1945), to ensure equitable apportionment of the Rio Grande's waters and prevent future controversies among the states and their citizens regarding these waters. Under the Compact, New Mexico is obligated to deliver a certain amount of water to the Elephant Butte Dam for use by Texas. *See Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*,115 N.M. 229, 235, 849 P.2d 372, 378 (Ct. App. 1993).

and Section 7-5-23, Applicants' transfer application must not result in net depletions to the Rio Grande's surface water and must not impair existing water rights. Impairment of existing rights is evaluated in terms of the Rio Grande and the move-to location.

III. STANDARD OF REVIEW

{16} An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. "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." *Id.* Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. *Martinez v. Metzgar*, 97 N.M. 173, 174, 637 P.2d 1228, 1229 (1981). "All reasonable inferences are construed in favor of the non-moving party." *Portales Nat'l Bank v. Ribble*, 2003-NMCA-093, ¶ 3, 134 N.M. 238, 75 P.3d 838; *see also Gormley v. Coca-Cola Enters.*, 2005-NMSC-003, ¶ 8, 137 N.M. 192, 109 P.3d 280.

IV. APPLICANTS SOUGHT TO TRANSFER EXISTING SURFACE WATER RIGHTS, NOT TO MAKE NEW GROUNDWATER APPROPRIATIONS

{17} Applicants contend that this case is simply the transfer of 15 afy of surface water rights to groundwater rights and is governed by Sections 72-5-23 and 72-12-7. Protestants argue that the applications are for new groundwater uses and, therefore, are new groundwater appropriations.

{18} Protestants, Applicants, and the State Engineer agree that the *MRGAA Guidelines* apply in this case. The *MRGAA Guidelines* state that the Rio Grande's surface waters have been considered fully appropriated since the Rio Grande Compact was signed. *Id.* at 1. The *MRGAA Guidelines* embody the WRD's current practices, including how the State Engineer evaluates pending and future applications for groundwater permits. *Id.* "A permit to divert ground water shall be conditioned to limit the actual groundwater diversion to the valid consumptive use surface water rights held and designated for offset purposes. . . ." *Id.* at 4. The *MRGAA Guidelines* also explain that "the public welfare is best served by limiting actual groundwater diversions . . . to the amount of valid surface water rights *transferred* or otherwise held by the permittee." *Id.* at 3 (emphasis added). Therefore, the State Engineer treats new groundwater appropriations as surface water right transfers which change the surface water right's purpose of use and diversion point.

{19} Protestants depend on *City of Albuquerque*, 71 N.M. at 439, 379 P.2d at 80 (analyzing the State Engineer's authority to promulgate rules requiring surface water right retirements "as a condition to new appropriations of underground water from the Rio Grande"), and the *MRGAA Guidelines* at 1 ("These guidelines embody the [WRD's] current practice for evaluating pending and *future* applications for permits for groundwater use in the MRGAA. . . ." (emphasis added)), for the proposition that Applicants' water rights transfer applications are for new appropriations of water in the Rio Grande Underground Basin. Regardless of how Protestants wish to characterize Applicants' applications, the *MRGAA Guidelines* clearly state the applicable State Engineer's procedure: the applicant must obtain, designate, and retire a valid surface water right to offset the new groundwater diversion, *id.* at 5, and there should be no impairment to existing water right holders, *id.* at 6. The application must also meet the other two Section 72-5-23 requirements. *MRGAA Guidelines* at 6, 8.

{20} Protestants agree that the retirement of surface water rights at the move-from location will offset the groundwater pumping depletion impacts to the Rio Grande stream system as a whole, but argue that the surface right offset must come from the move-to location rather than anywhere in the MRGAA. Nothing in the *MRGAA Guidelines* or Sections 72-12-7 and 72-5-23 require offset to come from the move-to location.

In this case, it is uncontested that both the move-from and move-to locations are hydrologically connected within the MRGAA. As long as the net depletion from the groundwater pumping is offset by retirement of surface rights for the system as a whole, there is no *new* appropriation of basin water. As a result, the State Engineer, district court, and Court of Appeals were correct in finding that the applications are requests for transfers to change the diversion point and place and purpose of use from surface to groundwater and are not new appropriations.

V. DEPLETIONS AT THE MOVE-TO LOCATION DO NOT CONSTITUTE PER SE IMPAIRMENT OF EXISTING WATER RIGHTS

{21} It is uncontested that the Rio Grande's surface waters are fully appropriated. From this fact, Protestants urge this Court to find that, since it is uncontested that some depletion of surface waters will occur as a result of the Applicants' transfer applications, per se impairment of Protestants' surface water rights will occur. In other words, *any* depletion at the move-to location should be considered impairment. Applicants correctly state, however, that this Court has refused to make any bright-line rule regarding what constitutes impairment. "[T]he question of impairment of existing rights is one which must generally be decided upon the facts in each case, and . . . a definition of 'impairment of existing rights' is not only difficult, but an 'attempt to define the same would lead to severe complications.'" *Mathers v. Texaco, Inc.*, 77 N.M. 239, 245, 421 P.2d 771, 776 (1966).

{22} In *Mathers*, the protestants complained that granting a groundwater appropriation application in the Lea County Underground Water Basin would result in impairment of their existing water rights because the new appropriation would lower the water tables in the protestants' wells and increase their pumping costs. *Id.* at 242-43, 421 P.2d at 774. While we recognized that the Lea County Underground Water Basin is a non-rechargeable basin, *id.* at 242, 421 P.2d at 774, this Court refused to find impairment as a matter of law where a lower water level would result in increased pumping costs for the protestants, *id.* at 246, 421 P.2d at 776. We held the protestants' impairment theory would make any groundwater appropriation approval subsequent to the initial permit unlawful. *Id.* at 244-45, 421 P.2d at 775; *see also Application of Brown*, 65 N.M. 74, 78-79, 332 P.2d 475, 478 (1958) (upholding a non-impairment finding although there would be a decline in the protestant's water table); *Stokes v. Morgan*, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984) ("New withdrawals which cause a minimal acceleration in the rate of saltwater intrusion or a minimal increase in salinity do not constitute impairment as a matter of law. . . . The determination of whether there is impairment must be made on a case-by-case basis."). This Court has found impairment in other circumstances. *See City of Albuquerque*, 71 N.M. at 434-35, 379 P.2d at 77-78 (finding that if the city acquired and retired surface water rights to offset proposed groundwater appropriations there would be no impairment of existing surface rights). Likewise, we are not announcing that de minimis depletions can never result in impairment. In *Heine v. Reynolds*, 69 N.M. 398, 401-02, 367 P.2d 708, 710-11 (1962), we upheld the State Engineer's impairment determination when the facts showed granting an application would result in an increase, albeit small, in salt content in an underground basin. To the contrary, these findings were based on the individual facts of the cases and did not announce a bright-line impairment rule. *Id.* at 402, 367 P.2d at 711 ("We are of the view that the question of impairment of existing rights is a matter which must generally depend upon each application, and to attempt to define the same would lead to severe complications.").

{23} Protestants' claim in this case is very similar to the *Mathers* protestants' argument: impairment exists as a matter of law if there is any resulting surface depletion at the move-to location. Protestants attempt to distinguish this case by noting that the State Engineer does not allow new Rio Grande surface water appropriations. While this is true, we have already found

that Applicants seek to transfer surface water rights to groundwater rights. The State Engineer permits such surface water right to groundwater right transfers in the Middle Rio Grande Basin according to the *MRGAA Guidelines*. Protestants' attempt to distinguish this case is, therefore, unpersuasive.

{24} We reaffirm our holdings in *Mathers* and *Stokes* that the individual facts of each case may require different resolutions of impairment questions. This Court defers to the facts relating to impairment which will be presented to the trial court and refuses to adopt Protestants' argument that surface depletions in the fully-appropriated Rio Grande result in per se impairment. Therefore, we affirm the district court and Court of Appeals. *See Montgomery*, 2005-NMCA-071, ¶ 33.

{25} Protestants' motion for summary judgment relied exclusively on the argument that any depletion in a fully-appropriated water system is per se impairment. Having found no merit in that argument, we affirm the Court of Appeals' conclusion that the district court did not err in denying Protestants' motion for summary judgment. *Id.* ¶ 41.

VI. THE DISTRICT COURT IMPROPERLY GRANTED APPLICANTS' SUMMARY JUDGMENT CROSS-MOTION ON THE ISSUE OF IMPAIRMENT BECAUSE THERE ARE MATERIAL FACTS IN DISPUTE

{26} Protestants argue that Applicants' cross-motion for summary judgment was premised on the fact that the depletions at the move-to location were de minimis and that the existing water rights associated with Rosa de Castillo Spring and San Francisco Springs would be much less than the estimated yields at both sites, i.e., there was enough water to satisfy all existing water rights and any attendant depletion resulting from the transfer applications. Applicants counter that the State Engineer could validly find that no impairment would occur because the effect on certain springs would be de minimis. Applicants explain that this is not a new legal impairment standard, only a proper basis upon which to make an impairment determination because the impact on the existing water rights was immeasurable. In the Rosa de Castillo Spring and San Francisco Springs where the predicted depletion effect was measurable, Applicants claim the effect on existing water rights was still minimal and, therefore, the State Engineer's non-impairment determination was valid.

{27} In granting the transfer applications, the hearing examiner described the depletion impacts on Tunnel Spring and Placitas Springs as de minimis but made no similar finding as to the other springs. Instead, the hearing examiner found that the estimated annual yield of Rosa de Castillo Spring and San Francisco Springs would satisfy the current water uses at these springs, even after the transfer applications' attendant depletion would occur. Before the district court, Applicants relied on five facts for their cross-motion for summary judgment, which can be summed up in three statements: (1) the depletions to surrounding springs would be de minimis; (2) most of the water declarations filed at the move-to location springs had been discontinued and, therefore, overstated current irrigation water uses; and (3) the estimated annual yields of the Rosa de Castillo Spring and the San Francisco Springs were greater than the water rights associated with each spring. Protestants, the non-moving party, specifically contested these points in their response, arguing that the expected depletions at Rosa de Castillo Spring and San Francisco Springs were measurable and in dispute. Protestants also contested whether the water declarations filed at the move-to location had actually been discontinued. The district court's order denying Protestant's summary judgment motion and granting Applicants' cross-motion for summary judgment incorporated the hearing examiner's findings but did not include an independent de minimis finding.

A. The State Engineer Must Consider All Declared Water Rights at the Move-To Area in the Impairment Analysis or

Extinguish Non-Party Declarants' Water Rights

{28} The State Engineer has a statutory obligation to determine if existing water rights will be impaired when a transfer application is filed. *See* §§ 72-5-23, 72-12-7. In considering the issue of existing water rights at the Rosa de Castillo Spring, the State Engineer hearing examiner only included Protestant Montgomery's Declaration 03890, which claims a water right for irrigation of 8 acres. The hearing examiner did not mention Declaration 01644 or Declaration 03420, which claim rights to irrigate a total of 100.92 acres. A WRD water resource master utilized five aerial photographs taken between 1935 and 1975 to determine that most irrigation rights from Rosa de Castillo Spring were discontinued. For the San Francisco Springs, the hearing examiner listed Protestants Wessely and Gardner's Declaration 04358 and Declaration 02276, which claim water rights for irrigation on a total of at least 34.5 acres. The hearing examiner relied on aerial photographs taken between 1935 and 1971 to conclude that at the time of the hearing, irrigation water uses were limited to approximately 15 acres of land from San Francisco Springs. These conclusions led to the hearing examiner's finding that the estimated yields of the springs far exceeded the current water usage and the proposed pumping impacts at each spring. We hold that under the facts of this case, the hearing examiner had no authority to ignore the above-mentioned water rights declarations at these springs.

{29} We agree with Applicants and the State Engineer that beneficial use is the measure, basis, and limit of a water right, N.M. Const. art. XVI, § 3; Section 72-1-2; and that these pre-1907 declarations are only prima facie evidence of the claimed water right, Section 72-1-3. The Court of Appeals has recognized the State Engineer's authority to rebut presumptions created by pre-1907 declarations. *See State ex rel. Martinez v. Lewis*, 118 N.M. 446, 449, 882 P.2d 37, 40 (Ct. App. 1994) ("A 'prima facie' showing merely establishes the fact if not rebutted."); *see also Eldorado Utils., Inc. v. State ex rel. D'Antonio*, 2005-NMCA-041, ¶ 20, 137 N.M. 268, 110 P.3d 76 (upholding the State Engineer's refusal to accept amended declarations when the State Engineer's records contained information rebutting the declarations' claims), *cert. denied*, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111. In this case the State Engineer argues it is rebutting the contents of the non-party water right declarations but avers that this is not an attempt to adjudicate declared or undeclared rights. This Court disagrees because the State Engineer's failure to formally extinguish these rights leaves open the possibility that the non-party declarants may attempt to use these rights in the future. The hearing examiner saw evidence of use after several years of nonuse in this case. The WRD water resource master acknowledged that a 1975 aerial photograph of Rosa de Castillo Spring showed irrigation on 3 acres of land after a 1967 aerial photograph showed no irrigation for over 17 years. By not formally extinguishing these non-party declarants' water rights, the State Engineer risks overappropriation of surface water at the move-to location.

{30} *Eldorado Utilities* and *Lewis* state that the State Engineer has the authority to rebut the contents of pre-1907 declarations. Those cases are distinguishable. In both *Eldorado Utilities* and *Lewis*, the declarants wishing to enforce the contents of the declarations were parties to the proceeding and, therefore, in a position to respond to the State Engineer's rebuttal evidence. *Eldorado Utils.*, 2005-NMCA-041, ¶ 2; *Lewis*, 118 N.M. at 449, 882 P.2d at 40. In this case, the individuals who filed Declaration 01644, Declaration 03420, and Declaration 02276 are not parties to the proceeding. Consequently, these cases do not support the State Engineer's action in this case.

{31} For the impairment analysis, the State Engineer must either include the total amount of water rights contained in these non-party declarations or formally extinguish them. The State Engineer can extinguish these rights through various means, including a forfeiture proceeding or an abandonment action. NMSA 1978, Section 72-5-28(A) (1998, prior to 2002 amendment), states the applicable forfeiture procedure. *See also* NMSA 1978, § 72-12-8 (1998, prior to

2002 amendment) (applicable to groundwater rights). After four years of nonuse, the State Engineer provides a party with notice of impending water right forfeiture. Section 72-5-28(A). If nonuse persists for another year, the vested water right reverts to the public. *Id.* Our water law statutes recognize that a surface water right will not be forfeited when the reason for nonuse is beyond the water right owner's control. *Id.*; *see also Chavez v. Gutierrez*, 54 N.M. 76, 82, 213 P.2d 597, 600-01 (1950).

{32} This Court recognized common law abandonment and distinguished it from forfeiture in *State ex rel. Reynolds v. South Springs Co.*, 80 N.M. 144, 146-47, 452 P.2d 478, 480-81 (1969). Unlike forfeiture, abandonment requires an intent to abandon. *Id.* A presumption of an intent to abandon is created by "'evidence of the failure of the party charged to use the right, or the water, or to keep the works necessary for the utilization of the water in repair'" for an unreasonable period. *Id.* at 146, 452 P.2d at 480 (quoting 2 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights*, § 1116, at 2012 (2d ed. 1912)). Abandonment is also distinct from forfeiture because abandonment does not require a one-year waiting period after the State Engineer provides the nonuser notice. *See* Section 72-5-28(A). Either of these proceedings should assure that all existing water rights at the move-to location will be considered in the impairment analysis. We conclude that summary judgment on the issue of impairment was inappropriate because the State Engineer failed to consider the aggregate water rights of non-party declarants or, in the alternative, to formally extinguish these water rights.

B. The Magnitude of the Depletions is also a Material Fact in Dispute for Purposes of the Impairment Analysis

{33} Protestants also disputed the fact that the effects on some of the springs would be de minimis. In an exhibit attached to their response, Protestants projected a depletion of 3.572 afy on the Harris Spring, 3.352 afy on the Rosa de Castillo Spring, and 1.508 afy on the San Francisco Springs after 40 years. These numbers were significantly higher than the WRD's projected depletions of 0.152 afy on the Harris Spring, 0.299 afy on the Rosa de Castillo Spring, and 0.199 afy on the San Francisco Springs. Because Protestants disputed the irrigation uses at the Rosa de Castillo Spring and San Francisco Springs, as well as the transfer applications' depletion impacts at these springs, the hearing examiner's impairment determination, relied upon by the district court, could be flawed.

{34} Applicants did not meet their burden to show that they were entitled to judgment as a matter of law. As a result, this issue is remanded to the district court to properly determine the extent of existing water rights, the magnitude of the applications' depletions, and whether existing water rights will be impaired at each of the move-to location springs.

VII. APPLICANTS WERE NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUES OF CONSERVATION OF WATER AND PUBLIC WELFARE OF THE STATE

{35} Protestants aver that they preserved the issues of water conservation and public welfare for the state, contrary to the Court of Appeals holding. *See Montgomery*, 2005-NMCA-071, ¶¶ 39-40. Protestants argue that they had no notice that Applicants sought summary judgment on these issues in Applicants' cross-motion for summary judgment. Without such notice, Protestants claim that they were not given an opportunity to preserve these issues at this level. Applicants counter that their cross-motion asserted that the State Engineer had properly analyzed and considered all three statutory criteria: impairment, water conservation, and public welfare. They contend that Protestants failed to address these last two issues in their response to the cross-motion for summary judgment or at the June 24, 2003, motions hearing, thereby waiving appellate review.

{36} Rule 1-056 NMRA states New Mexico's summary judgment procedure: "The moving

party shall submit to the court a written memorandum containing a short, concise statement of the reasons in support of the motion with a list of authorities relied upon." The opposing party then has fifteen days to file a response. *Id.* The notice requirement and opportunity to respond "are designed to protect the rights of the party opposing the motion. When the opposing party has reasonable notice of the issues underlying a summary judgment, together with the opportunity to be heard, and makes no specific allegation of prejudice at that time, summary judgment is an appropriate procedure." *Aldridge v. Mims*, 118 N.M. 661, 664, 884 P.2d 817, 820 (Ct. App. 1994). Where the facts are insufficiently developed to make a legal determination, however, summary judgment is not appropriate. *Brown v. Taylor*, 120 N.M. 302, 307, 901 P.2d 720, 725 (1995).

{37} In this case, Protestants' motion for summary judgment specifically stated it only sought summary judgment on the issue of impairment. Applicants' response and cross-motion for summary judgment included facts and legal authority relating only to the issue of impairment. The cross-motion concluded, "[t]he approved applications will not cause impairment as a matter of law. The State Engineer properly assessed the application's impacts of the applications [sic] on existing rights as required by New Mexico law." Applicants' cross-motion referenced the other two statutory criteria in two sentences, including a footnote that stated, "[Protestants] do not challenge the State Engineer's determination that the applications are not detrimental to the public welfare or contrary to the conservation of water." Applicants' cross-motion failed to include any facts or explain how they were entitled to summary judgment on the issues of public welfare and conservation of water.

{38} We hold that Applicants did not provide Protestants with sufficient notice that the issues of public welfare or conservation of water were at issue in the summary judgment cross-motion and remand to the district court to determine whether the applications meet these two statutory requirements.

VIII. CONCLUSION

{39} We hold that Applicants' applications were properly considered transfers to change point of diversion and place and purpose of use from surface to groundwater, not new groundwater appropriations. We also hold that the State Engineer properly found that in a fully-appropriated stream system, new depletions should not automatically constitute impairment as a matter of law. However, the district court erred in granting Applicants' cross-motion for summary judgment because material facts are still in dispute. Therefore, we remand to the district court for a de novo proceeding to consider all existing water rights at the move-to location, or extinguish those rights, the extent of depletion at the move-to location, and determine whether this depletion constitutes impairment of existing rights. The district court must also determine whether the applications are contrary to water conservation or detrimental to the public welfare of the state.

{40} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

RICHARD C. BOSSON,
Chief Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

EDWARD L. CHÁVEZ,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2007-NMSC-023

Filing Date: May 18, 2007

Docket No. 30,254

**STATE OF NEW MEXICO, ex rel.,
BILL RICHARDSON, Governor
of the State of New Mexico,**

Petitioner,

v.

**FIFTH JUDICIAL DISTRICT
NOMINATING COMMISSION,**

Respondent.

Original Proceeding

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for Respondent.

OPINION

SERNA, Justice.

{1} A district judge position in the Fifth Judicial District sits vacant because of a perceived conflict between our Governor's constitutional authority to appoint judges from a list of qualified and recommended nominees and the Fifth Judicial District Nominating Commission's discretion in recommending qualified nominees to the Governor. We are thus confronted with two critically important competing interests, which we must reconcile in order to comply with both the spirit and letter of our Constitution. The suit comes to us as an original proceeding in mandamus, in which the Governor petitioned this Court for a Writ of Mandamus to issue against the Commission to require it to "convene . . . to actively solicit, accept and evaluate applications from qualified lawyers and send more than one nominee to the Governor for consideration for appointment to fill the vacancy" in the Fifth Judicial District.

{2} We hereby grant the Governor's Petition in part and remand to the Commission to expeditiously develop and implement guidelines for the active solicitation of additional qualified applicants to fill the vacancy in the Fifth Judicial District. We further direct the Commission to make a good faith effort to submit at least two names to the Governor, after utilizing the solicitation process, in order to discharge its intertwined constitutional duties to actively solicit qualified applicants and to recommend, in its discretion, additional names to the Governor so that the Governor has before him a bona fide choice.

I. FACTS

{3} The material facts in this case are undisputed. On November 7, 2006, Dean Suellyn Scarnecchia ("Dean"), Chair of the Judicial Nominating Commission, advised Governor Bill Richardson ("the Governor") that the Fifth Judicial District Nominating Commission ("the Commission") would meet on January 8, 2007, to consider applications to fill the judicial vacancy created by the retirement of Judge Jay Forbes ("Judge Forbes") of the Fifth Judicial District. On November 15, 2006, the Governor received

a letter from Judge Forbes, dated November 9, 2006, advising that he would retire effective December 31, 2006. On December 14, 2006, the Governor received from the Dean the applications of five attorneys for the judicial vacancy in the Fifth Judicial District. The five applicants were Denise A. Madrid Boyea, James Richard Brown, Matthew T. Byers, Bennie George Davis, and Raymond L. Romero.

{4} The Commission convened on January 8, 2007, in Carlsbad, to consider the five applicants. Following its meeting, the Dean sent a letter to the Governor, which he received on January 10, 2007, recommending "the following one (1) candidates (in alphabetical, unranked order) for this position: James Richard Brown." The Governor previously appointed James Richard Brown ("Brown") to a newly created district judge position in the Fifth Judicial District; however, Brown lost his subsequent general election. On January 11, 2007, the Governor sent a letter to the Dean requesting, pursuant to Article VI, Section 36 of the New Mexico Constitution, that the Commission reconvene and submit additional names.

{5} The Commission reconvened on January 29, 2007, in Carlsbad and met for less than forty-five minutes. The Dean informed the Governor that the Commission had reviewed the original list of five applicants to "determine if any additional names from that pool should be nominated" and that "[t]he Commission voted not to nominate any additional names from the applicant pool," as no other applicant garnered a majority vote.

{6} On January 30, 2007, the Governor wrote to the Dean stating "[t]he commission is unlawfully usurping the executive's constitutional authority to make judicial appointments" and that "[t]here is no legitimate basis for the commission to send me only one name." Therefore, the Governor "demand[ed] that the commission reconvene and send me more than one nominee for this judicial vacancy." The Dean responded on February 2, 2007, that she would "not be able to reconvene the Commission, as the constitution does not provide for additional requests or meetings," concluding "[b]ased on the constitution, the practice of past commissions and the applicable rules, there is no legal basis for me to require the Commission to recommend more than one name."

{7} The Governor responded on February 5, 2007, requesting "a detailed explanation of the . . . Commission's decision not to send me more names, including the specific criteria applied to evaluate each applicant, the interviewing process, and the specific reasons why *each* of the other four applicants were not recommended to me" as well as "a detailed description of the voting procedure you employed as you are relying on the fact that the Commission reached a majority vote for only one applicant on both occasions." The Dean responded on February 9, 2007, providing the information requested, including a description of the Commission's voting procedures, as well as the Minutes of both the January 8, 2007, and January 29, 2007, Commission meetings.

{8} On February 22, 2007, the Governor petitioned this Court for a Writ of Mandamus to issue against the Commission to require it to "convene . . . to actively solicit, accept and evaluate applications from qualified lawyers and send more than one nominee to the Governor for consideration for appointment to fill the vacancy created by the retirement of Judge Forbes."

II. ANALYSIS

{9} This Court exercises original jurisdiction in mandamus, pursuant to Article VI, Section 3 of our Constitution, which provides in pertinent part: "The supreme court shall have original jurisdiction in . . . mandamus against all state officers, boards and commissions . . . ; it shall also have power to issue writs of mandamus . . . and to hear and determine the same." *See State v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974). "'Mandamus is a drastic remedy to be invoked only in extraordinary circumstances.'" *State ex rel. Shell W. E&P, Inc. v. Chavez*, 2002-NMCA-005, ¶ 8, 131 N.M. 445,

38 P.3d 886 (quoting *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 12, 124 N.M. 698, 954 P.2d 763). Indeed, mandamus "'lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law.'" *Id*. (quoting *Brantley Farms*, 1998-NMCA-023, ¶ 16). We have long recognized that mandamus is ordinarily "'the proper remedy to compel the performance of an official act by a public officer.'" *Laumbach v. Bd. of County Comm'rs of San Miguel County*, 60 N.M. 226, 233, 290 P.2d 1067, 1070 (1955) (quoting *Heron v. Garcia*, 48 N.M. 507, 510, 153 P.2d 514, 515 (1944)).

{10} The issue before us is whether the Commission has a constitutional duty to actively solicit qualified applicants so as to make a good faith effort to provide the Governor with a list of more than one recommended nominee. If the Commission's actions at issue here are purely discretionary, mandamus will not lie "to correct or control the judgment or discretion of a public officer in matters committed to his care in the ordinary discharge of his duties." *State ex rel. Four Corners Exploration Co. v. Walker*, 60 N.M. 459, 463, 292 P.2d 329, 331 (1956). We are guided by the same standard we have employed since the very first days of our Statehood:

> [I]t is . . . well established that mandamus will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, even though the officer be required to exercise judgment before acting.

Id. at 463, 292 P.2d at 331-32 (citing *State ex rel. Walker v. Hinkle*, 37 N.M. 444, 24 P.2d 286 (1933); *State ex rel. Otto v. Field*, 31 N.M. 120, 241 P. 1027 (1925); *State ex rel. Evans v. Field*, 27 N.M. 384, 201 P. 1059 (1921); *State v. Marron*, 18 N.M. 426, 137 P. 845 (1913)).

> A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case.

Id. at 463, 292 P.2d at 332.

{11} We must construe our Constitution in order to determine whether mandamus properly lies. We begin with a description of the judicial nominating and appointment system set forth in our Constitution. Under our merit selection system, the governor fills judicial vacancies, defined in Article VI, Section 34 of our Constitution, by appointment, selecting from a list of names recommended by either the "Appellate judges nominating commission," N.M. Const. art. VI, § 35, the "District court judges nominating committee," N.M. Const. art. VI, § 36 (stating that "[e]ach and every provision of Section 35 of Article 6 of this constitution shall apply to the 'district judges nominating committee'" except those regarding the composition of the committee), or the "Metropolitan court judges nominating committee," N.M. Const. art. VI, § 37 (stating that "[e]ach and every provision of Section 35 of Article 6 of this constitution shall apply to the metropolitan court judicial nominating committee" except those regarding the composition of the committee).[1] The Constitution states in pertinent part:

> Upon the occurrence of an actual vacancy in the office of [district judge], the commission shall meet within thirty days and within that period submit to the governor *the names of persons* qualified for the judicial office and recommended for appointment to that office by a majority of the commission.

N.M. Const. art. VI, § 35 (emphasis added). In order to make its recommendation to the

[1] Although Sections 36 and 37 of Article VI of our Constitution refer to nominating "committees," for the sake of consistency, we refer to all judicial nominating bodies as "commissions."

governor, each commission has a constitutional duty to "actively solicit, accept and evaluate applications from qualified lawyers for the position of [district judge]." *Id*.

{12} After receiving the initial list, the Constitution authorizes the governor to request additional names from the commission:

> Immediately after receiving the commission nominations, the governor may make one request of the commission for submission of *additional names*, and the commission shall promptly submit such *additional names* if a majority of the commission finds that *additional persons* would be qualified and recommends *those persons* for appointment to the judicial office.

Id. (emphasis added).

{13} The Constitution then sets forth the time frame pursuant to which the governor must make his appointment: "The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of [district judge] within thirty days after receiving *final nominations* from the commission by appointing *one of the persons nominated* by the commission for appointment to that office." *Id*. (emphasis added). The Constitution further makes provision for circumstances under which "the governor fails to make the appointment within that period or from *those nominations*." *Id*. (emphasis added). In such cases, "the appointment shall be made from *those nominations* by the chief justice or the acting chief justice of the supreme court." *Id*. (emphasis added).

{14} In the instant case, the Commission submitted to the Governor one name, former Judge Brown, whereupon the Governor exercised his constitutional right to request "additional names." *See id*. The Commission reconvened, reviewed the five original applicants, and decided not to recommend any additional applicants to the Governor, as no other applicant garnered a majority vote of the Commission. The Governor, citing his constitutional prerogative to make the ultimate choice as to whom should fill judicial vacancies, demanded that the Commission reconvene and send him additional names. When the Dean, as Chair of the Commission, declined to reconvene the Commission, citing a lack of legal basis to do so, the Governor petitioned this Court that a Writ of Mandamus issue against the Commission to actively solicit and evaluate more applicants and to submit to the Governor more than one name.

{15} In interpreting Sections 35 and 36 of Article VI for the first time, we are faced with a question of constitutional proportions, in which the parties highlight the inherent conflict they perceive between the Governor's right to choose from a list of qualified and recommended applicants and the Commission's discretion in recommending qualified applicants to the Governor. We do not, however, believe this conflict is intractable, nor do we believe that it requires either the Governor or the Commission to compromise the critically important constitutional interests at stake. Our reading of Sections 35 and 36, in the context of their history and purpose, leads us to conclude that a solution is available in which both interests can be preserved and reconciled in such a way as to comply with both the spirit and letter of our Constitution. *See Bd. of County Comm'rs of Bernalillo County v. McCulloh*, 52 N.M. 210, 215-16, 195 P.2d 1005, 1008 (1948) ("'It is the duty of this court to interpret the various provisions of the Constitution to carry out the spirit of that instrument. We should not permit legal technicalities and subtle niceties to control and thereby destroy what the framers of the Constitution intended.'") (quoting *State ex. rel. Ward v. Romero*, 17 N.M. 88, 100, 125 P. 617, 621 (1912)).

{16} We address first the Governor's constitutional authority to fill judicial vacancies. For most of our state's history, our Constitution required partisan election of the entire judiciary, N.M. Const. art. VI, § 4, 12 (1911, prior to 1988 amendment); N.M. Const. art. VI, § 28 (1965, prior to 1988 amendment), with the governor filling judicial vacancies by appointment, N.M. Const. art. VI, § 28 (1965, prior to 1988

amendment); art. XX, § 4 (1911, prior to 1988 amendment). The governor's choice was virtually unconstrained, except for certain constitutional requirements such as age, education, and residency of appointees. N.M. Const. art. VI, §§ 8, 14 (1911, prior to 1988 amendment); N.M. Const. art. VI, § 28 (1965, prior to 1988 amendment). In 1988, the Constitution was amended to institute a merit selection system, in which the governor now fills judicial vacancies by appointment from a list of applicants who are evaluated on a variety of merit-based factors[2] and recommended by a judicial nominating commission. N.M. Const. art. VI, §§ 35-37. The appointed judge is then subject to one partisan election in the next general election, after which he or she is subject to nonpartisan retention election, requiring a fifty-seven percent supermajority to be retained in office. N.M. Const. art. VI, § 33. In designing the merit selection system, the drafters envisioned limiting the pool from which the governor could appoint based on the merit of the applicants. The drafters did not, however, envision nor intend to foreclose the governor's choice altogether. Indeed, the drafters were cognizant of populist concerns that moving away from partisan election to a merit selection system would divest voters almost entirely of their longstanding role in the judicial selection process. Therefore, the drafters vested the governor, as the elected representative of the people of the State of New Mexico, with ultimate authority in selecting the individual to fill a judicial vacancy. Our reading of Sections 35 and 36 strives to give effect to these populist concerns. *See In re Generic Investigation into Cable Television Servs.*, 103 N.M. 345, 348, 707 P.2d 1155, 1158 (1985) ("In construing the New Mexico Constitution, this Court must ascertain the intent and objectives of the framers."). If we allow the Commission's decision to prevail, in a very real sense, the Commission, and not the Governor would exercise the ultimate choice as to whom should serve the Fifth Judicial District as its judge. We cannot sanction such a result, which is at variance with the history and spirit of our Constitution.[3]

{17} Such a result would also be discordant with the constitutional text itself. Section 35, the provisions of which apply equally to Section 36, states clearly that the commission shall provide the governor with "the *names of persons* qualified for the judicial office and recommended for appointment" and, after receiving "the commission *nominations*," allows the governor to request "additional *names*." N.M. Const. art. VI, § 35 (emphasis added). Within thirty days of receiving the commission's "final *nominations*," the governor must "appoint[] *one of the persons nominated by the commission*." *Id*. (emphasis added). While rules of statutory construction, which apply equally to constitutional construction, establish that the use of plurals is without significance, NMSA 1978, § 12-2A-5(A) (1997); *see State v. Isaac M.*, 2001-NMCA-088, ¶ 5, 131 N.M. 235, 34 P.3d 624, Section 35 goes beyond the mere use of plurals to state with unambiguous specificity that the governor must "appoint[] *one of the persons nominated by the commission*." N.M. Const. art. VI, § 35 (emphasis added). In this way, Section 35 evinces a clear intent that the governor, as representative of the people, will have before him more than one name from which he can make a bona fide choice with respect to whom shall fill the judicial vacancy. *See McCulloh*, 52 N.M. at 215-216, 195 P.2d at 1008. This language is particularly telling in light of the Governor's historical power to appoint judges and the drafters' populist concerns in creating our merit selection system. We find inapposite the Commission's contention that if the Governor fails to appoint Brown, the Chief Justice of this Court must do so. Regardless of who makes the ultimate appointment, Section 35

[2] The Commission adopted the Rules Governing Nominating Commissions on April 19, 1997. Pursuant to Section 4 of the Rules, nominating commissions evaluate applicants based on the following criteria: physical and mental ability to perform the tasks required; impartiality; industry; integrity; professional skills; community involvement; social awareness; collegiality; writing ability; decisiveness; judicial temperament; and speaking ability. N.M. Const. art. VI, add. § 4.

[3] Indeed, the Rules recognize unequivocally that "the New Mexico Constitution vests the Governor with the authority to appoint judges and that the commission does not select the judges, [so] the commission should strive to recommend a list of two or more names for each position to the Governor." N.M. Const. art. VI, add. § 8(C).

envisions that person will have a list of names from which to make an actual choice.

{18} Parallel to the Governor's right to have a list of qualified and recommended applicants from which to exercise a bona fide choice, we are equally sensitive to the Commission's right to exercise its discretion in recommending such qualified applicants to the Governor. It is the Commission alone that decides who to recommend to the Governor. We will neither trammel upon, nor diminish in any way, that core function reposed in the Commission by our Constitution.

{19} The Commission does not, however, possess unbridled discretion but rather determines, based on a variety of factors and by a majority vote, *see* N.M. Const. art. VI, add. §§ 4, 8(B), which applicants are "qualified for the judicial office" and "submit[s] to the governor the names of [such] persons," both qualified and recommended. N.M. Const. art. VI, § 35. As an integral part of its exercise of discretion in recommending qualified applicants to the Governor, the Commission has a concomitant duty, imposed by the Constitution, to "actively solicit, accept and evaluate applications from qualified lawyers for the position of [district judge]." *Id*. This pivotal provision immediately follows the provision establishing the composition of the Commission and immediately precedes those provisions setting forth the details and time frame under which (i) the Commission must evaluate and recommend applicants; (ii) the Governor may request more names; and (iii) the Governor must appoint one of them. The placement of this pivotal provision demonstrates the overarching and ongoing nature of the Commission's duty.

{20} In this case, the Governor exercised his constitutional right to request more names from the Commission. Thereupon, the Commission reconvened but considered only the original list of five applicants, four of whom the Commission had already decided, in exercising its discretion, not to recommend for judicial office. The Commission did not renew its announcement of the judicial vacancy in the Fifth Judicial District, nor do anything else to discharge its duty to "actively solicit . . . qualified lawyers." We respectfully disagree with the Commission and the dissent that this duty applies only to the initial announcement that the judicial vacancy exists and does not apply to the Commission's duty to reconvene and consider submitting additional names to the Governor, if he so requests. Dissent ¶¶ 34-35. If we adopted such an interpretation, we would, in effect, be dictating the exercise of the Commission's discretion by requiring the Commission to recommend an applicant it already determined should not be recommended, thus sanctioning an unrealistic and irrational reading of the provision. *See State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) ("'[O]ur construction must not render the [Constitution's] application absurd, unreasonable, or unjust.'") (quoting *Aztec Well Servicing Co. v. Prop. & Cas. Ins. Guar. Ass'n*, 115 N.M. 475, 479, 853 P.2d 726, 730 (1993)).

{21} While the initial announcement, application, and evaluation process runs on a strict thirty-day time frame, Section 35 directs the Commission to act "promptly" in submitting "additional names" to the Governor. The Governor's deadline for appointment only begins to run once he receives "the final nominations" from the Commission. These distinct time frames evince an intent that the Commission has a reasonable time within which to complete the substantial process of soliciting and evaluating additional qualified applicants; reevaluating, in the Commission's discretion, the original applicants; and sending a final list of recommended applicants to the Governor. The Constitution thus envisions that the Commission will, in good faith, utilize such a process to allow the Governor to have before him a bona fide choice of qualified and recommended applicants.

{22} We acknowledge that the type of active solicitation of qualified applicants we describe here has not become part of the established custom of past commissions, nor of the Commission which is party to this suit. We intend no disparagement of past commissioners, nor of the present Commission, for following over fifteen years of custom. Nonetheless, this is the Court's first opportunity to address this question in a formal manner, and in doing so, we are bound to follow the letter and

spirit of the Constitution, whether or not consistent with custom. In interpreting Sections 35 and 36 for the first time, we conclude that the Commission failed to discharge its constitutional duty of active solicitation which is inextricably intertwined with its constitutional duty to make all reasonable efforts to provide the Governor with additional names upon request. We, therefore, respectfully disagree with the dissent's contention that the Governor "can identify within the text no express obligation that the Commission failed to perform." Dissent ¶ 30. When the Governor requested additional names so that he could discharge his constitutional authority to appoint a judge, from among a pool of qualified applicants recommended by the Commission, the Commission was constitutionally duty bound to actively solicit additional qualified applicants. Nevertheless, the Commission only considered the original five applicants at its second meeting and again determined that it could only recommend Brown. Because the Commission failed to discharge its constitutional duty of active solicitation, the Governor is left with no choice and is thus precluded from discharging his constitutional authority to select and appoint a qualified and recommended person to fill the vacancy in the Fifth Judicial District.

{23} Some may perceive this conflict as creating a constitutional impasse. However, our reading of Sections 35 and 36 reveals a system designed to deal with precisely the situation we confront here, and today we breathe life into that constitutional design. Based on the text, history, and purpose of Sections 35 and 36, we have a system in which the Governor's choice in judicial appointment is tempered and limited by the Commission's discretion in determining which qualified applicants should be recommended for judicial office. However, the Governor also has a constitutional right to request that the Commission expand that pool to other qualified persons. The only way the Commission can do so is by discharging its constitutional duty to actively solicit qualified applicants. Our reading of Sections 35 and 36, unlike that of the dissent, thus avoids rendering mere surplusage the constitutional provision mandating active solicitation by the Commission. *See Block v. Vigil-Giron*, 2004-NMSC-003, ¶ 9, 135 N.M. 24, 84 P.3d 72. The drafters never had in mind, nor can we sanction, a reading of Sections 35 and 36 in which the Commission would expand the pool only to applicants the Commission had already decided, by a majority vote, should not be recommended. *See Rowell*, 121 N.M. at 114, 908 P.2d at 1382. Ultimately, the fundamental purpose of Sections 35 and 36 was to create a judicial selection system based on the merit of the applicants. In the past, the importance of active solicitation, indeed the constitutional mandate to actively solicit qualified applicants, may have been overlooked, but this mandate shall henceforth require adherence thereto.[4]

III. CONCLUSION

{24} We, therefore, hold that mandamus lies and, accordingly, grant the Governor's Petition in part. We remand to the Commission to expeditiously develop and implement guidelines to discharge its constitutional duty to actively solicit additional qualified applicants to fill the vacancy in the Fifth Judicial District. We further direct the Commission to make a good faith effort to submit at least two names to the Governor, after utilizing the solicitation process, in order to discharge its intertwined constitutional duties to actively solicit qualified applicants and to recommend, in its discretion, additional names to the Governor so that the Governor has before him a bona fide choice.

{25} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

[4] The constitutional mandate that commissions actively solicit qualified applicants signals the urgency of creating standing commissions with terms, a responsibility reserved to the Legislature. Further, standing commissions may indeed avoid inconsistent voting on applicants, an issue alluded to in this suit.

CONCURRING IN PART AND DISSENTING IN PART OPINION

MINZNER, Justice (concurring in part and dissenting in part).

{26} I respectfully dissent from the proposed result and from much of the analysis in the majority opinion. I disagree with my colleagues that we have the authority to do what the Governor has requested. The Governor has asked us to order the Fifth Judicial District Nominating Commission to convene a third time and to send him an additional qualified nominee for the existing vacancy in the Fifth Judicial District. In addition, or perhaps alternatively, he asks us to direct the Commissioners to reconvene to satisfy their obligation to solicit additional applicants or make a further investigation "into the qualifications of pending candidates."

{27} The majority opinion appears to concede our inability to order the Commission to send more than one name. With that concession, for the reasons that follow, I agree. The majority, to its credit, seeks to identify a resolution to the conflict between the Governor's interpretation of his power and the Commission's interpretation of its responsibilities under the New Mexico Constitution. The majority would order the Commission to reconvene, because when the Governor requested additional names, the Commission was required by the constitution "to actively solicit additional qualified applicants." Maj. Op. ¶ 22. With this conclusion, I do, respectfully, disagree.

{28} Because the text of the constitution is important, I have included it as an appendix to this opinion. Other than those who have served on nominating commissions or applied for consideration by a nominating commission, few New Mexico citizens will have read the entire text of the relevant constitutional amendment, and the text as a whole is important. The Governor relies on our power to issue a writ of mandamus, which I believe is more limited than does the majority, and which in any event depends on the clarity of the obligations established by the constitution.

{29} "This Court exercises constitutionally invested original jurisdiction in mandamus against all State officers, boards and commissions." *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974); *accord* N.M. Const. art. VI, § 3. In the past, we have exercised our original jurisdiction in mandamus when one branch of government interferes with the authority of another branch of government. *See State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55.

> Such an exercise may be appropriate when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

Id. The Governor contends all these factors are present in this case. The Governor further asserts that mandamus is defined to include an order directing the restoration of rights or privileges of which the claimant asserts he has been illegally deprived. *See State ex rel. Bird v. Apodaca*, 91 N.M. 279, 282, 573 P.2d 213, 216 (1977). The Governor maintains this Court should "restore" his right to choose a judicial appointee. Ultimately, the Governor argues that the action of the Commission in sending only one name, if sustained in this proceeding, effectively precludes his having a choice of appointee and "eviscerate[s his] appointive authority."

He argues that:

> mandamus will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, even though the officer be required to exercise judgment before acting. A ministerial act, as applied to a public officer, is an act or thing which he is

> required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case.

State ex rel. Reynolds v. Bd. of County Comm'rs, 71 N.M. 194, 198-99, 376 P.2d 976, 979 (1962) (quoting *State ex rel. Four Corners Exploration Co. v. Walker*, 60 N.M. 459, 463, 292 P.2d 329, 331-32 (1956)) (internal citations omitted). The Governor contends the Commission's failure or refusal to reopen the application process and actively solicit additional candidates, or to reassess the additional four applicants not selected for recommendation when he exercised his constitutional right to request additional nominees, also infringes upon his appointment power.

{30} The Governor's reliance on his appointment power is misplaced. The Constitution provides that the Governor may request additional names, and the Commission shall submit "such additional names *if a majority of the commission finds that additional persons would be qualified and recommends* those persons for appointment" to the Governor. N.M. Const. art. VI, § 35 (emphasis added). The Commission did not make such a finding when it reconvened.

{31} The Commission was acting within the text of the amendment when it determined to recommend only one name initially and to send no additional name or names after the Commission reconvened. The Governor asks us to "compel the performance of an act which the law specially enjoins as a duty resulting from an office." NMSA 1978, § 44-2-4 (1884). Yet he can identify within the text no express obligation that the Commission failed to perform. The Commission performed its express constitutional obligation when its Chair announced the vacancy, initiated the application process, conducted interviews, evaluated the candidates, voted on who should be recommended to the Governor, and sent him the list. *See* N.M. Const. art. VI, add. §§ 2, 4, 6-9. In fact, the Commission's duty, as mandated by the Constitution, is to submit *only* "the names of persons qualified for the judicial office and recommended . . . to that office" which must be determined "by a *majority* of the commission." N.M. Const. art. VI, § 35 (emphasis added). I think a majority of this Court agrees that we cannot compel the Commission to send more than one name. At the heart of the Commission's obligations is the responsibility to provide the Governor a list from which he can choose without fear of choosing badly. That is what I believe the Legislature and the people of this State intended.

{32} According to Section 4 of the Judicial Nominating Commission Rules, the commissioners must evaluate candidates on the basis of the constitutional requirements and specifically enumerated evaluative criteria including physical and mental ability to perform the tasks required, impartiality, industry, integrity, professional skills, community involvement, social awareness, collegiality, writing ability, decisiveness, judicial temperament, and speaking ability. N.M. Const. art. VI, add. § 4. These factors indicate that the constitutional duty and authority of the Commission is discretionary and not ministerial, making mandamus inappropriate. In fact, the Commission would have been acting outside the bounds of its authority and duty had it simply sent the Governor additional names of candidates it had already determined, by a majority vote, were unqualified for appointment.

{33} The majority's decision to require the Commission to reconvene and solicit further candidates seems to me equally inappropriate. The delicate balance of power which the1988 amendment to the constitution tried to achieve, as expressed in the text, is not facilitated by the majority's decision. Prior to 1988, the Governor had virtually unfettered discretion to appoint whomever he chose for judicial vacancies. The Legislature chose when it enacted the 1988 amendment to limit the Governor's appointment power in the judicial nomination process, to strike a balance of power between a judicial nominating commission and the Governor, and it elected not to include a requisite number of names to be sent to the Governor from each commission.

{34} The majority offers three reasons for its decision to require the Fifth Judicial District

Nominating Commission to reconvene. First, it suggests we have an obligation to protect the Governor's power of appointment. Maj. Op. & 16. Second, the majority relies on the use of the plural within Section 35, in reference to the Commission's obligations, the Governor's power of appointment, and the obligation of the Chief Justice if the Governor does not appoint in a timely fashion. *Id*. ¶ 17. Finally, the majority opinion relies on placement of the obligation of the Commission to solicit applications within Section 35, in the second full paragraph, "demonstrating the overarching and ongoing nature of the Commission's duty." *Id.* ¶ 19.

{35} With respect, none of the three reasons offered by the majority seem compelling, and none of them justify diminishing the discretion of each nominating commission. As the majority acknowledges, *id.* ¶ 17, "the use of plurals is without significance." Further, the majority opinion relies on the "clear intent that the governor, as representative of the people, will have more than one name from which he can make a bona fide choice with respect to whom shall fill the judicial vacancy." *Id.* I think we must determine what the Legislature intended, and practices of the nominating commissions since 1988, as well as the text of Section 35 that make the scope of the Governor's power unclear. It is worth noting that the Governor has two appointments to the Commission who can argue for his preference(s) during the voting process, if he directs them to do so. Finally, the placement of the second paragraph of Section 35 seems to me to emphasize a duty of soliciting applicants prior to the date the Commission convenes. That language is not repeated after the reference, in the last paragraph, to the Governor's right to solicit more names.

{36} For these reasons, I do not think the majority has made a case for the result it reaches. One could say that the majority opinion grants half of the relief the Governor has requested, in an effort to support the greater likelihood that he will achieve the ultimate goal of receiving at least one additional name. Yet, we do not seem to have the power or authority to issue a writ of mandamus under our existing cases to compel the commissioners to act in accordance with the Governor's petition. I would deny the writ. My colleagues being of a different view, I respectfully dissent.

APPENDIX A

Sec. 35. [Appellate judges nominating commission.]

There is created the "appellate judges nominating commission", consisting of: the chief justice of the supreme court or the chief justice's designee from the supreme court; two judges of the court of appeals appointed by the chief judge of the court of appeals; the governor, the speaker of the house of representatives and the president pro tempore of the senate shall each appoint two persons, one of whom shall be an attorney licensed to practice law in this state and the other who shall be a citizen who is not licensed to practice law in any state; the dean of the university of New Mexico school of law, who shall serve as chairman of the commission and shall vote only in the event of a tie vote; four members of the state bar of New Mexico, representing civil and criminal prosecution and defense, appointed by the president of the state bar and the judges on this committee. The appointments shall be made in such manner that each of the two largest major political parties, as defined by the Election Code, shall be equally represented on the commission. If necessary, the president of the state bar and the judges on this committee shall make the minimum number of additional appointments of members of the state bar as is necessary to make each of the two largest major political parties be equally represented on the commission. These additional members of the state bar shall be appointed such that the diverse interests of the state bar are represented. The dean of the university of New Mexico school of law shall be the final arbiter of whether such diverse interests are represented. Members of the commission shall be appointed for terms as may be provided by law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner

as the original appointment was made and shall serve for the remainder of the term vacated.

The commission shall actively solicit, accept and evaluate applications from qualified lawyers for the position of justice of the supreme court or judge of the court of appeals and may require an applicant to submit any information it deems relevant to the consideration of his application.

Upon the occurrence of an actual vacancy in the office of justice of the supreme court or judge of the court of appeals, the commission shall meet within thirty days and within that period submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission.

Immediately after receiving the commission nominations, the governor may make one request of the commission for submission of additional names, and the commission shall promptly submit such additional names if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment to the judicial office. The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of justice of the supreme court or judge of the court of appeals within thirty days after receiving final nominations from the commission by appointing one of the persons nominated by the commission for appointment to that office. If the governor fails to make the appointment within that period or from those nominations, the appointment shall be made from those nominations by the chief justice or the acting chief justice of the supreme court. Any person appointed shall serve until the next general election. That person's successor shall be chosen at such election and shall hold the office until the expiration of the original term.

Sec. 36. [District court judges nominating committee.]

There is created the "district court judges nominating committee" for each judicial district. Each and every provision of Section 35 of Article 6 of this constitution shall apply to the "district judges nominating committee" except that: the chief judge of the district court of that judicial district or the chief judge's designee from that district court shall sit on the committee; there shall be only one appointment from the court of appeals; and the citizen members and state bar members shall be persons who reside in that judicial district.

Sec. 37. [Metropolitan court judges nominating committee.]

There is created the "metropolitan court judges nominating committee" for each metropolitan court. Each and every provision of Section 35 of Article 6 of this constitution shall apply to the metropolitan court judicial nominating committee except that: no judge of the court of appeals shall sit on the committee; the chief judge of the district court of the judicial district in which the metropolitan court is located or the chief judge's designee from that district court shall sit on the committee; the chief judge of that metropolitan court or the chief judge's designee from that metropolitan court shall sit on the committee only in the case of a vacancy in a metropolitan court; and the citizen members and state bar members shall be persons who reside in the judicial district in which that metropolitan court is located.

N.M. Const. art. 6, § 37.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2007-NMSC-033

Filing Date: June 13, 2007

Docket No. 29,286

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

PETER P. GUTIERREZ,

Defendant-Petitioner.

Original Proceeding on Certiorari
Robert C. Brack, District Judge

John Bigelow, Chief Public Defender
Trace L. Rabern, Assistant Appellate Defender
Santa Fe, NM

for Petitioner.

Gary K. King, Attorney General
Max Shepherd, Assistant Attorney General
Santa Fe, NM

for Respondent.

OPINION

SERNA, Justice.

{1} Peter Gutierrez ("Defendant") was charged with intimidation of a witness, contrary to NMSA 1978, § 30-24-3(A) (1997); aggravated stalking, contrary to NMSA 1978, § 30-3A-3.1(A) (1997); criminal damage to property over $1,000, contrary to NMSA 1978, § 30-15-1 (1963); telephone harassment, contrary to NMSA 1978, § 30-20-12 (1967); and evading and eluding an officer, contrary to NMSA 1978, § 30-22-1(B) (1981). Defendant was found guilty on all counts. Defendant appealed his convictions on two grounds, claiming (i) the prosecutor's comment on Defendant's refusal to submit to a polygraph examination during his opening statement constituted reversible error and (ii) insufficient evidence supported his conviction for evading or eluding an officer. The Court of Appeals concluded that while the prosecutor's comment was improper, it was harmless beyond a reasonable doubt. *State v. Gutierrez*, 2005-NMCA-093, ¶ 1, 138 N.M. 147, 117 P.3d 953. In addition, the Court of Appeals held that substantial evidence supported Defendant's conviction for evading and eluding an officer. *Id*.

{2} For the reasons that follow, we hold that the prosecutor's comment was not harmless error and thus reverse the Court of Appeals on that issue, vacate Defendant's convictions, and remand for a new trial. In addition, we hold that substantial evidence supports Defendant's conviction for evading and eluding an officer and thus affirm the Court of Appeals on that issue. Accordingly, Defendant may be retried on all counts.

I. FACTS

{3} Defendant and Victim dated on and off for approximately five years beginning in 1997. It was a rocky relationship, and in February 2000, Victim obtained a restraining order against Defendant. However, Defendant and Victim were still periodically together, including when Defendant's mother died in February 2002. Despite the restraining order, Victim alleged that Defendant engaged in a variety of jilted lover conduct, including harassing phone calls and letters. In addition, Defendant placed harassing signs around the neighborhood, including in Victim's father's yard. Indeed, even after Defendant was arrested and in jail, Defendant phoned Victim and said, "You're dead."

{4} The particular incidents resulting in the charges against Defendant occurred while Victim

was staying at a motel. Defendant phoned her at the motel and said, "Hello, whore." The next morning, May 2, 2002, Victim found that her car had been "keyed," with the word "whore" scratched into it. Victim drove from the motel to the police station and filed a report on the incident. Based on Victim's report, Officer Russell Gould of the Clovis Police Department was sent that same day to Victim's residence to investigate her allegations. While Officer Gould was making his report, Victim received a call from Defendant on her cell phone. Victim handed the phone to Officer Gould, after confirming that it was indeed Defendant calling, and Officer Gould heard the male caller say, "What do you think about last night?" several times, presumably in reference to Victim's stay at the motel. Officer Gould handed the phone back to Victim, so that she could try to get Defendant to say more, but, by the time she picked up, Defendant had hung up.

{5} Several hours after leaving Victim's house, Officer Gould was sent back because she reported to police that Defendant had called again and had driven by her house. Based on Victim's description of the vehicle, Officer Gould found the truck parked outside a house. Officer Gould was in police uniform and driving his patrol car. He stepped out of his car and told a man who walked out of the truck to stop because he needed to talk to him, in order to identify that the man was indeed Defendant. The man was walking into the house and said that he needed to use the bathroom. Officer Gould followed the man into the house, and as soon as the man saw him, he proceeded to walk out the back door. Once outside, the man looked at Officer Gould and then started running. Officer Gould gave chase, but the man had already jumped the fence. Officer Gould did not order the man to stop for the purpose of arresting him. Rather, he radioed dispatch that he was in a foot pursuit. By the time Officer Gould was off the radio, a second officer had arrived and was waiting for the man. After a brief struggle, the officers took the man, who was identified as Defendant, into custody.

{6} Detective Keith Bessette, who had previously questioned both Victim and Defendant, testified at trial that Defendant had denied making the signs and the phone calls but said that he might have written some letters when he was drunk. Detective Bessette spoke with Defendant again while he was in custody and testified that Defendant "kind of looked at me in a smug way, and in a joking manner, I said, 'Yeah, yeah, I know you didn't do it' and he told me 'I never said I didn't do it.'" Defendant also testified and admitted that although he might have written some letters to Victim while drunk, he denied having written the letters in question.

{7} At trial, the prosecutor made an opening statement, in which he referred to Defendant's refusal to submit to a polygraph test. Defendant immediately moved for a mistrial, arguing that the prosecutor's statement was an impermissible comment on silence that was highly prejudicial to Defendant, as the jury might inappropriately interpret his refusal as an acknowledgment of guilt. In a bench conference, the district judge noted that the jury might view the Defendant's refusal as relevant to Defendant's credibility and probative of guilt and admonished the prosecutor to refrain from any further reference to polygraph evidence. Nevertheless, the judge denied Defendant's motion, stating that he believed any prejudice to Defendant could be overcome by a curative instruction. The judge, therefore, instructed the jury to ignore the prosecutor's comment.

{8} At the close of Defendant's case, he moved for a directed verdict on the evading and eluding an officer charge. *See* § 30-22-1(B). Defendant argued that the State failed to present sufficient evidence to convict him of the charge because Officer Gould was only in the investigative stage when he approached Defendant and was not about to apprehend or arrest him. The district court denied the motion, finding there were facts from which the jury could infer that Defendant was aware of the attempt to apprehend him and that he chose to flee instead. Defendant was found guilty on all counts.

{9} Defendant appealed his convictions, claiming two reversible errors: (i) that the prosecutor's

comment regarding Defendant's refusal to submit to a polygraph test was an impermissible comment on silence which merited reversal and (ii) that Defendant was entitled to a directed verdict on the evading and eluding an officer charge due to the State's failure to put forth sufficient evidence. *Gutierrez*, 2005-NMCA-093, ¶ 1. The Court of Appeals held that while the prosecutor's comment was improper, it was harmless beyond a reasonable doubt. *Id*. ¶¶ 16-17. In addition, the Court of Appeals held that substantial evidence supported Defendant's conviction for evading and eluding an officer. *Id*. ¶ 21. Therefore, the Court of Appeals affirmed all of Defendant's convictions. *Id*. ¶ 22.

II. PROSECUTOR'S COMMENT ON DEFENDANT'S REFUSAL TO SUBMIT TO A POLYGRAPH TEST WAS AN IMPROPER COMMENT ON SILENCE AND CONSTITUTES REVERSIBLE ERROR

{10} The first issue with which we are presented is whether the prosecutor's reference in opening statement to Defendant's refusal to submit to a polygraph test was an impermissible comment on silence constituting reversible error. Where, as here, the facts are undisputed, we review this legal question, which raises substantial questions of constitutional law, de novo. *State v. DeGraff*, 2006-NMSC-011, ¶ 6, 139 N.M. 211, 131 P.3d 61; *State v. Foster*, 1998-NMCA-163, ¶ 8, 126 N.M. 177, 967 P.2d 852.

{11} We begin our analysis by emphasizing "the general rule forbidding a prosecutor from commenting on a defendant's silence or introducing evidence of silence." *Foster*, 1998-NMCA-163, ¶ 9. Following clear guidance from the United States Supreme Court, we have long held that prosecutorial comment on a defendant's exercise of his or her right to remain silent violates a defendant's rights under the Fifth Amendment to the federal Constitution, as applied to the states through the Fourteenth Amendment. *See State v. Miller*, 76 N.M. 62, 71-72, 412 P.2d 240, 245-246 (1966) (citing *Griffin v. California*, 380 U.S. 609 (1965); *Tehan v. United States, ex rel. Shott*, 382 U.S. 406 (1966)). In *Foster*, our Court of Appeals explained at length the "three independent underpinnings for the general rule: (1) the constitutional privilege against self-incrimination, (2) constitutional due process, and (3) the rules of evidence barring irrelevant evidence . . . and evidence whose probative value is substantially outweighed by the danger of unfair prejudice." 1998-NMCA-163, ¶ 9 (internal citations omitted). The first, the constitutional privilege against self-incrimination, prohibits prosecutorial comment on a defendant's failure to testify at trial. *Id*. ¶¶ 9, 10. Second, due process forbids prosecutorial comment on a defendant's post-*Miranda* silence for the purpose of incriminating the defendant. *Id*. ¶¶ 11, 14; *see Miranda v. Arizona*, 384 U.S. 436 (1966). In *Doyle v. Ohio*, the United States Supreme Court emphasized the *Miranda* warning's implicit assurance "that silence will carry no penalty" and the concomitant unfairness and "deprivation of due process [of] allow[ing] the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U.S. 610, 618 (1976). The *Doyle* Court relied on its reasoning in *Johnson v. United States*:

> An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one. . . . Elementary fairness requires that an accused should not be misled on that score.

Doyle, 426 U.S. at 618 n.9 (quoting *Johnson*, 318 U.S. 189, 197 (1943)).

{12} Finally, even if the Constitution erects no barrier against the prosecution's use of a defendant's silence in a certain case, "New Mexico has been very cautious about the use of silence at trial." *Foster*, 1998-NMCA-163, ¶ 12. "'Evidence of a defendant's postarrest silence is generally inadmissible because the probative value of the silence is substantially outweighed by the potential for unfair prejudice.'" *Id*. (quoting

State v. Garcia, 118 N.M. 773, 776, 887 P.2d 767, 770 (Ct. App. 1994)); *see* Rule 11-402 NMRA; Rule 11-403 NMRA. Indeed, the United States Supreme Court in *Doyle* emphasized the "dubious probative value" of silence at the time of arrest, given its ambiguous nature. 426 U.S. at 617 n.8. The Court reemphasized this point in *Wainwright v. Greenfield*, stating, "'just what induces post-arrest, post-*Miranda* silence remains as much a mystery today as it did at the time of the *Hale* decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt.'" 474 U.S. 284, 294 n.11 (1986) (quoting *State v. Burwick*, 442 So.2d 944, 948 (Fla. 1983)). For these reasons, we have made clear to prosecutors for over forty years the prohibition on comments regarding a defendant's silence. *See Miller*, 76 N.M. at 70-72, 412 P.2d at 245-46.

{13} The core issue before us, however, is whether the prosecutor's statement regarding Defendant's refusal to submit to a polygraph test constitutes such an impermissible comment on silence, a question of first impression for this Court. We must answer this threshold question in order to determine whether Defendant's federal constitutional rights are implicated.

{14} Defendant objected to the following portion of the prosecutor's opening statement:

> So at that point in time the Defendant is arrested. Detective Keith Bessette goes, reads the Defendant his rights, asks to talk to him. Defendant says he didn't do the signs, make any calls, he might have wrote [sic] the letters while he was drunk. More conversation comes out. etective asks him, "Okay, your side, you want to take a polygraph?" He says, "No.

Defendant immediately moved for a mistrial, arguing the prosecutor's statement was an impermissible comment on silence that was highly prejudicial to Defendant, as the jury might inappropriately interpret his refusal as an acknowledgment of guilt. The district court, however, denied the motion and instructed the jury to disregard the comment.

{15} In determining whether the prosecutor's statement constitutes an improper comment on Defendant's silence in contravention of the Fifth Amendment, we begin our analysis with a relevant observation made by our Court of Appeals in *State v. Casaus*, 1996-NMCA-031, 121 N.M. 481, 913 P.2d 669. In *Casaus*, the defendant argued that a State witness's reference to the defendant's *willingness* to submit to a polygraph test warranted a mistrial because it was an improper comment on his Fifth Amendment right to silence. *Id*. ¶ 34. The Court of Appeals disagreed, *id*., and noted that "[n]ot only was that information not prejudicial to [d]efendant, but it could reasonably have been perceived by the jury to help [d]efendant's case by making it appear as if he had nothing to hide." *Id*. ¶ 36. In actuality, the defendant never underwent a polygraph examination, and he indeed waived his *Miranda* rights and submitted to an interview. *Id*. ¶¶ 35, 37. The Court concluded there was no improper comment on silence. *Id*. ¶ 37. The instant case is distinguishable because the prosecutor referred to Defendant's *refusal* to submit to a polygraph test. With respect to such a situation, the *Casaus* Court observed that the mere mention of a polygraph exam might cause the jury to speculate as to why the defendant did not take the polygraph test and to wrongfully infer guilt from the refusal. *Id*. ¶ 36. The Court's observation reflects "[t]he essence of *Doyle* [which] is that it is fundamentally unfair to assure a suspect that silence will carry no penalty" and then to comment on that silence, by noting a defendant's refusal to submit to a polygraph test, as probative of his or her guilt. *See Garcia*, 118 N.M. at 778, 887 P.2d at 772. The comment at issue in the instant case thus reflects the same fundamental unfairness as prosecutorial comment on a defendant's failure to testify at trial or to make a statement to law enforcement.

{16} Many other jurisdictions have held the type of comment at issue in this case to be an improper comment on a defendant's right to silence in violation of the Fifth Amendment. *See*

United States v. Stackpole, 811 F.2d 689, 694-95 (1st Cir. 1987) (stating that admission of a tape and transcript indicating defendant refused to take a polygraph test was error but holding the error to be harmless); *United States v. Kiszewski*, 877 F.2d 210, 216-17 (2d Cir. 1989) (analyzing the prejudice of admission of a government witness's statement that the defendant refused to submit to a polygraph test but ultimately finding harmless error); *United States v. Murray*, 784 F.2d 188, 188-89 (6th Cir. 1986) (holding that deliberate "mention of a polygraph test introduced serious error into this record" and, therefore, remanding for a new trial because the error was not harmless beyond a reasonable doubt); *Bowen v. Eyman*, 324 F. Supp. 339, 341 (D. Ariz. 1970) (holding that testimony regarding the defendant's refusal to submit to a polygraph test was "constitutionally impermissible" as a violation of the defendant's right to silence under the Fifth Amendment); *see also Melvin v. State*, 606 A.2d 69, 71-72 (Del. 1992) (holding that "polygraph examinations are testimonial for purposes of the Fifth Amendment and, therefore, are subject to an individual's protection against self-incrimination" and noting that "[e]vidence that an individual refused to submit to a polygraph test is no more permissible than forcing an accused to submit to a polygraph examination and then using the results against him or her"); *State v. Driver*, 183 A.2d 655, 658-59 (N.J. 1962) (holding that prosecutor's repeated reference in opening statement to defendant's refusal to submit to a polygraph test "possess[ed] such horrendous capacity for prejudice against the defendant as to constitute plain error"); *Kugler v. State*, 902 S.W.2d 594, 597 (Tex. Ct. App. 1995) (reversing and remanding for a new trial where "the testimony that revealed appellant's refusal to submit to a polygraph examination was unduly persuasive and cannot be cured by an instruction to disregard").

{17} We now adopt this line of reasoning and hereby hold that prosecutorial comment on a defendant's refusal to submit to a polygraph test is an impermissible comment on a defendant's right to silence in violation of the Fifth Amendment. *See United States v. Walton*, 908 F.2d 1289, 1293 (6th Cir. 1990) (observing that "a statement suggesting that a criminal defendant either took and failed a polygraph examination or refused to take an examination directly relates to guilt and implicates a defendant's fifth amendment right not to incriminate himself").

III. PROSECUTOR'S COMMENT IN OPENING STATEMENT ON DEFENDANT'S REFUSAL TO SUBMIT TO A POLYGRAPH TEST WAS NOT HARMLESS ERROR BEYOND A REASONABLE DOUBT

{18} Having so held, we now determine the appropriate remedy for this violation of Defendant's constitutional rights. We recently observed that in cases in which a defendant has properly objected at trial, we review prosecutorial comment on silence to determine whether the error is harmless beyond a reasonable doubt. *DeGraff*, 2006-NMSC-011, ¶ 22. Indeed, our general rule is to review violations of federal constitutional rights under a harmless error standard. *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 25, 136 N.M. 309, 98 P.3d 699 (noting that whether violation of a federal constitutional right is harmless is a federal question). The State has the burden of establishing that the constitutional error was "'harmless beyond a reasonable doubt.'" *Id*. (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993)). "Federal constitutional error cannot be deemed harmless if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction."' *Id*. (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). We take care not "to focus our harmless error analysis exclusively on whether the trial record consisted of overwhelming evidence of the defendant's guilt," so as not to "risk inadvertently concluding that constitutional error was harmless simply because there was substantial evidence to support the conviction." *Id*. ¶ 30. We emphasize that "in a proper harmless error analysis, the appellate court defers to the jury verdict *only* when the State has established beyond a reasonable doubt that the jury verdict was not tainted by the constitutional error." *Id*. This is so because "even if conviction

appears inevitable, there is a point at which an error becomes too great to condone as a matter of constitutional integrity and prosecutorial deterrence." *Id*. ¶ 31 (quoted authority omitted). While "[t]he strength of the properly admitted evidence is a factor in evaluating the likely impact on the jury of the constitutional error," *id*. ¶ 32, "constitutional error cannot be deemed harmless simply because there is overwhelming evidence of defendant's guilt." *Id*. Rather, we focus "squarely on assessing the likely impact of the error on the jury's verdict." *Id*.

{19} We decline to adopt a rule of automatic reversal for every prosecutorial comment on silence, as urged by Defendant. Such a rule would represent a sharp departure from strong, existing precedent which requires application of a harmless error standard. We thus consider whether the State has met its burden of establishing that there is no reasonable probability that the prosecutor's reference to Defendant's refusal to submit to a polygraph test contributed to Defendant's convictions. For the following reasons, the State has failed to persuade us that the error was harmless beyond a reasonable doubt.

{20} In assessing the impact of the prosecutor's statement, we examine the context in which it was made. In the opening statement, the prosecutor should present an objective summary of the evidence the State reasonably expects to produce at trial and must not refer to "evidence of questionable admissibility or evidence unsupported at trial." *United States v. Novak*, 918 F.2d 107, 109 (10th Cir. 1990) (internal citation omitted). The opening statement holds a uniquely important place in the trial because it is the lens through which the jury views and evaluates the entire trial. Therefore, the prosecutor must take special care to refrain from improper comments, including comments on a defendant's silence. In the instant case and in general, the prosecutor should have been aware of the issues created by the mere mention of a polygraph test, especially where as here one was never administered, as well as the prejudice to the Defendant of such a statement. As the New Jersey Supreme Court very succinctly explained it decades ago:

> [T]o tell a jury of laymen at the very outset of the trial that defendant refused . . . to take a lie detector test . . . create[s] a probable aura of prejudice which . . . permeate[s] the proceeding to the very end. . . . In terms of degree of prejudice, the average jury . . . might very well be even more affected by proof of a defendant's refusal to take the test than by the evidence of results adverse to him coupled with proof of its scientific imperfection. A refusal might be regarded as indicating a consciousness of guiltBundoubtedly the reason here why the . . . Prosecutor placed such emphasis upon it in his opening.

Driver, 183 A.2d at 658.

{21} The record in the instant case contains strong evidence to support Defendant's convictions. Victim testified about the stalking and harassment, and Detective Bessette testified about his conversation with Defendant in which Defendant stated, "I never said I didn't do it." Indeed, Defendant himself testified at trial, and his only defense was denial. Notwithstanding this evidence upon which the jury could have relied to convict Defendant, we made clear in *Alvarez-Lopez* that our harmless error review is not simply a matter of weighing the evidence. 2004-NMSC-030, ¶¶ 29-32. Rather, we assess the likely impact of the constitutional violation on the verdict. Defendant's credibility was crucial since he testified at trial, and denial was his only defense. The prosecutor's mention of Defendant's refusal to submit to a polygraph test tainted the jury's view of the evidence from the very outset of trial in a way that could not be undone and denied Defendant a fair trial. Indeed, the trial judge acknowledged the prejudicial effect of the prosecutor's statement, in particular, during the bench conference, noting that Defendant's "statement that he wouldn't take [a polygraph test] because he would fail does go to consciousness of guilt whether he takes it or not" and that polygraph evidence is "so controversial" that he admonished the prosecutor to "just stay away from [it] all together." Nevertheless, the judge denied Defendant's motion for a mistrial, stating that he believed any prejudice to Defendant

could be overcome by a curative instruction. We disagree and address this issue shortly.

{22} Notwithstanding the district court's curative instruction, Defendant's refusal to take a polygraph test

> was indelibly implanted in the minds of the jurors and could not but have had a prejudicial effect. . . . The impact upon the minds of the jurors of a refusal to submit to something which they might well assume would effectively determine guilt or innocence, under these conditions, might well be more devastating than a disclosure of the results of such test, if given after a proper foundation had been laid showing how the apparatus functioned.

Driver, 183 A.2d at 659. We are not convinced that the improper comment on Defendant's silence, especially at this crucial juncture in trial, did not contribute to Defendant's convictions.

{23} The State argues that any error caused by the prosecutor's statement was effectively cured by the district court's instruction to the jury to disregard the prosecutor's comment. In determining whether error is harmless, we consider the curative instruction given by the district court. *Garcia*, 118 N.M. at 779, 887 P.2d at 773. In the instant case, the judge instructed the jury to ignore the prosecutor's comment, stating:

> Ladies and gentlemen, a moment ago [the prosecutor] made a reference to a polygraph and for purposes of the trial today, I don't want you to consider anything relating to a polygraph, whether there were questions asked about it or what the responses might have been. Please keep that just out of your minds. That won't play a part in the determination of the case. All right. Thank you. [Prosecutor], go ahead.

The instruction was so vague that it failed to inform the jury adequately of its duty to disregard the improper comment. *See Garcia*, 118 N.M. at 778, 887 P.2d at 772. "Indeed, the vagueness was probably intentional, because any direct comment on [d]efendant's postarrest silence posed the risk of emphasizing the matter to the jury." *Id.*; *see also Miller*, 76 N.M. at 71, 412 P.2d at 245-46 (holding that the curative instruction "d[id] not sufficiently remove the impression created by the prosecutor's comments [on defendant's silence] from the minds of the jury, and in fact may magnify any impression"). The profound unfairness and prejudice of a comment on a defendant's postarrest silence, no matter how seemingly innocuous, is difficult to cure. *See Garcia*, 118 N.M. at 778-79, 887 P.2d at 772-73; *see also Murray*, 784 F.2d at 188-89 (holding that a curative instruction given for deliberate introduction of a comment regarding a polygraph test was ineffective in curing the prejudicial error because "[s]uch an instruction . . . is very close to an instruction to unring a bell"); *Bowen*, 324 F. Supp. at 342 ("[E]ven when there is a clear instruction to disregard testimony referring to a defendant's refusal to submit to a lie detector test, the courts, in recognition of the highly prejudicial effect of such testimony, have held that the instruction does not cure the error."). This case is no exception. An opening statement is counsel's opportunity to make an indelible first impression on the jury. Prejudicial comment on silence, particularly at this stage, is inherently difficult to overcome. Neither the instruction given, nor a more explicit one, would have sufficed to cure the error introduced by the prosecutor's comment in this case.

{24} We take this opportunity to reiterate our caution to prosecutors that they risk reversal, including in cases in which the evidence supporting a conviction is very strong, if they make inappropriate and constitutionally violative mention of a defendant's postarrest silence, including his or her refusal to submit to a polygraph test. It is the timing and effect of such comments, not merely the weight of the evidence, that figures into our harmless error calculus. We conclude our analysis of this issue by repeating an observation this Court made many years ago:

> The zeal . . . of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence,

> or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty. . . . When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. . . . [T]he presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.

State v. Frank, 92 N.M. 456, 460, 589 P.2d 1047, 1051 (1979) (quoting *State v. Rowell*, 77 N.M. 124, 128-29, 419 P.2d 966, 970 (1966)). We, therefore, conclude that the error introduced by the prosecutor's improper comment on Defendant's refusal to submit to a polygraph test was not harmless beyond a reasonable doubt and, accordingly, reverse the Court of Appeals on that issue, vacate Defendant's convictions, and remand for a new trial.

IV. SUBSTANTIAL EVIDENCE SUPPORTS DEFENDANT'S CONVICTION FOR EVADING AND ELUDING AN OFFICER

{25} Defendant claims the State failed to put forth sufficient evidence to support his conviction for evading and eluding an officer, contrary to Section 30-22-1(B). In particular, Defendant contends he lacked the requisite knowledge that Officer Gould was attempting to apprehend or arrest him because Officer Gould was only in the investigative stage when he approached Defendant; and because he had not yet identified Defendant, Officer Gould was not about to apprehend or arrest him when Defendant fled. Although we vacate all of Defendant's convictions based on the prosecutor's improper comment on Defendant's refusal to submit to a polygraph test, we are still compelled to address the sufficiency of the evidence to support Defendant's conviction for evading and eluding an officer. If the evidence is found to be insufficient, the Double Jeopardy Clause, U.S. Const. amend. V, bars retrial of Defendant on this charge. *State v. Sanchez*, 2000-NMSC-021, ¶ 30, 129 N.M. 284, 6 P.3d 486.

{26} We apply a substantial evidence standard when reviewing convictions 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). We "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*. We do not weigh the evidence, nor do we "substitute [our] judgment for that of the fact finder so long as there is sufficient evidence to support the verdict." *Id*.

{27} Section 30-22-1(B) provides: "Resisting, evading or obstructing an officer consists of intentionally: fleeing, attempting to evade or evading an officer of this state when the person committing the act of fleeing, attempting to evade or evasion has knowledge that the officer is attempting to apprehend or arrest him." The State has the burden of proving two elements beyond a reasonable doubt. UJI 14-2215 NMRA. First, the State must prove that the officer was a peace officer in the lawful discharge of duty. *Id*. This element is not in dispute. Officer Gould was fully uniformed and driving a marked patrol car. Second, the State must prove that the defendant, with the knowledge that the officer was attempting to apprehend or arrest the defendant, fled, attempted to evade, or evaded the officer. *Id*.

{28} Our analysis of whether the State met its burden on the second element is an issue of first impression, as we have never addressed whether Section 30-22-1(B) applies to situations, such as the instant one, in which an officer is attempting a temporary seizure based upon reasonable suspicion. In other words, we must determine whether the Legislature intended the term "apprehend" to include such temporary seizures or whether

"apprehend" is synonymous with "arrest." One of the essential elements of Section 30-22-1(B) is that the defendant have "knowledge that the officer is attempting to apprehend or arrest him." In this case, Officer Gould was not attempting to *arrest* Defendant. When asked at trial whether he ordered Defendant to stop for the "purpose of arresting him or anything of that nature," Officer Gould responded, "Not at that time." If Officer Gould did not intend to arrest Defendant and only sought to question him, then Defendant could not have knowledge of his impending arrest. So, this case turns on whether Defendant knew Officer Gould was attempting to *apprehend* him. Thus, the question becomes whether "apprehend" was intended to include temporary, investigative seizures, such as the seizure Officer Gould attempted in this case.

{29} The Fourth Amendment to the United States Constitution requires that an officer have reasonable, articulable suspicion of criminal activity to justify a temporary seizure for the purpose of questioning, and the questioning must be limited to the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion). This type of detention for investigative purposes is often referred to as a "*Terry* stop" because it evolved from the United States Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). Although *Terry* stops must be brief, *Kolender v. Lawson*, 461 U.S. 352, 365 (1983), an officer may detain the person for a short time, during which the person is not free to walk away from the encounter. *See Royer*, 460 U.S. at 498 (stating that "reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop"). During a *Terry* stop, an "officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). However, the person being detained may decline to answer questions and is under no obligation to respond. *Id*.; *Kolender*, 461 U.S. at 365; *Terry*, 392 U.S. at 34 (White, J., concurring) ("[T]he person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest. . . ."). Additionally, if the answers do not provide the officer with probable cause justifying an arrest, the person being detained must be released. *Berkemer*, 468 U.S. at 439-40.

{30} In determining whether Section 30-22-1(B) applies to a *Terry*, stop, "[o]ur ultimate purpose . . . is to ascertain and give effect to the intent of the Legislature." *See State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 908 P.2d 23. The plain language of the statute is the primary indicator of legislative intent, so we look first to the words the Legislature used and their ordinary meaning. *Id*. The Legislature chose to use "apprehend or arrest" in Section 30-22-1(B), as opposed to "arrest" alone, thus indicating the Legislature recognized a difference between the two terms. "Arrest" refers to "the taking or keeping of a person in custody by legal authority," Black's Law Dictionary 104 (7th ed. 1999), and would necessarily also involve apprehending the person. The definition of "apprehend" is, however, broader and includes not only arrests, but also "seizure[s] in the name of the law." *Id*. at 97; *see also* Webster's Third New International Dictionary 106 (1971) (defining "apprehend" as "to take (a person) in legal process: ARREST, *SEIZE*") (emphasis added)). Because a *Terry* stop is a temporary seizure, *Royer*, 460 U.S. at 498, we conclude that the Legislature intended the term "apprehend" in Section 30-22-1(B) to include a situation in which an officer is attempting to briefly detain a person for questioning based on reasonable suspicion.

{31} We are guided in reaching this conclusion by the legislative purpose of Section 30-22-1(B) which is to deter people from fleeing from officers. *See State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (To give effect to the legislative intent, reference must be had "to the object the legislature sought to accomplish and the wrong it sought to remedy." (internal quotation marks and citations omitted)). Requiring that an officer be attempting a formal arrest, and not simply a *Terry* stop, would encourage a person to walk away from an officer who has a reasonable suspicion that the person was or is about to be involved in criminal activity. While a person has the constitutional right to walk away from an

officer who lacks reasonable suspicion and simply wants to question the person, a person who walks away from an officer attempting to detain that person based on reasonable suspicion can be charged with evading and eluding an officer under Section 30-22-1(B).

{32} Next, we address whether Officer Gould had reasonable suspicion that Defendant had committed or was about to commit a crime. *Royer*, 460 U.S. at 498. This issue is crucial to our determination of whether sufficient evidence supports Defendant's conviction because without reasonable suspicion, Officer Gould lacked the legal authority to detain Defendant. Courts have consistently recognized that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen." *Id*. at 497. "So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoted authority omitted). Of course, the corollary of this rule is that when an officer does not have reasonable suspicion, and a seizure does not occur,

> [t]he person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

Royer, 460 U.S. at 497-98 (internal citations omitted). Thus, if Officer Gould lacked reasonable suspicion, the encounter was not a seizure, and he would, therefore, have lacked legal authority to detain Defendant.

{33} Viewed in the light most favorable to the verdict, the facts of this case support the conclusion that Officer Gould had the authority to approach Defendant and briefly detain him based on his reasonable suspicion that Defendant was the man who had been stalking Victim. Victim gave a description of the vehicle Defendant was driving, a white truck, and Officer Gould located a vehicle matching that description. Defendant then got out of the vehicle and matched the description Victim had given the police. The officer also noticed that the passenger in the vehicle did not fit Victim's description of the suspect. The fact that Defendant and the vehicle he stepped out of matched Victim's descriptions demonstrates that Officer Gould had reasonable, articulable suspicion to support temporarily detaining Defendant for the purpose of determining his identity and investigating his involvement in stalking Victim.

{34} We must now determine whether Defendant had the right to walk away. This determination depends on whether there was a "show of authority" sufficient for a seizure, which is an objective test and depends on whether the officer's words or actions would have conveyed to a reasonable person that he was being ordered to "restrict his movement." *California v. Hodari D*., 499 U.S. 621, 628 (1991). In the instant case, Officer Gould "asked [Defendant] to stop" because he needed to talk to him. Additionally, after Defendant said he needed to use the bathroom, Officer Gould followed him into the house, but Defendant ran out the back door after he turned and saw the officer behind him. Officer Gould then chased Defendant through the house and out the back door. Officer Gould's words, as well as his actions in following Defendant into the house and chasing him, would indicate to a reasonable person that he was not free to leave and that the officer wanted to detain him for questioning.

{35} Therefore, because Officer Gould had reasonable suspicion to detain Defendant, and because a reasonable person would have known the officer was attempting to detain him, Defendant should have obeyed Officer Gould's request to stop and was not free to walk away. Defendant certainly had the right to not answer Officer Gould's questions, but he did not have the right to walk away immediately. However, we emphasize that had the officer in this case not articulated reasonable suspicion to support detaining

Defendant, or if a reasonable person would not have understood he was not free to leave, Defendant could not then be punished for evading and eluding an officer simply because he exercised his constitutional right to walk away from the officer and end the encounter.

{36} Our inquiry does not end with the determination that Officer Gould had reasonable suspicion and that a reasonable person would have understood the officer wanted to detain him. We must also address the essential element of Section 30-22-1(B) of whether Defendant subjectively knew the officer was attempting to apprehend him. The jury could have reasonably inferred Defendant's knowledge from many of the same facts which also support our conclusion that a reasonable person would have understood he was not free to walk away. *See State v. Gee*, 2004-NMCA-042, ¶ 24, 135 N.M. 408, 89 P.3d 80 (noting that "[i]ntent may be inferred from circumstantial evidence"). In particular, Defendant was subject to a restraining order for prior threatening behavior towards Victim, which Defendant should have been aware he was violating if he did the acts Victim alleges in this case. Defendant was being followed by Officer Gould, a fully uniformed police officer in a marked patrol car, based on Victim's allegations and descriptions of Defendant and his vehicle. Officer Gould stepped out of his car and asked Defendant to stop because he needed to talk to him. Defendant, however, ignored Officer Gould and went inside the house and then continued walking out the back door and fled running, after spotting the officer behind him. Defendant was apprehended after attempting to fight off Officer Gould and the other arresting officer who had arrived in the meantime. We have previously recognized that evidence of flight is admissible to show consciousness of guilt. *State v. Jacobs*, 2000-NMSC-026, ¶ 15, 129 N.M. 448, 10 P.3d 127. The evidence of Defendant's flight, coupled with the circumstantial evidence the State presented, was sufficient to give rise to fair inferences of fact that Defendant understood that Officer Gould was attempting to arrest or apprehend him. Even if Defendant did not know Officer Gould intended to apprehend him for questioning when he first approached Defendant, Defendant most certainly knew Officer Gould wanted to detain him when he started chasing him. Therefore, viewed in the light most favorable to the verdict, substantial evidence supports Defendant's subjective knowledge that Officer Gould was attempting to apprehend him or detain him for questioning. Accordingly, we affirm the Court of Appeals on this issue and hold that Defendant may be retried on the charge of evading and eluding an officer, contrary to Section 30-22-1(B).

V. CONCLUSION

{37} Prosecutorial comment on a defendant's refusal to submit to a polygraph test implicates a defendant's right to silence under the Fifth Amendment and constitutes reversible error. We hold that the prosecutor's comment on Defendant's refusal to submit to a polygraph test during opening statement constitutes error, which was not harmless beyond a reasonable doubt. In addition, we hold that Section 30-22-1(B) applies to situations in which an officer is attempting to temporarily detain a person through a *Terry* stop, not only to formal arrests and, therefore, conclude that substantial evidence supports Defendant's conviction for evading and eluding an officer. Accordingly, we vacate the Defendant's convictions and remand for a new trial in which Defendant may be retried on all counts.

{38} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2007-NMSC-043

Filing Date: June 27, 2007

Docket No. 30,005

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

DAVID NEAL,

Defendant-Petitioner.

Original Proceeding on Certiorari
Frank K. Wilson, District Judge

Gary K. King, Attorney General
Margaret McLean, Assistant Attorney General
Santa Fe, NM

for Respondent.

John Bigelow, Chief Public Defender
Kathleen T. Baldridge, Assistant Appellate Defender
Santa Fe, NM

for Petitioner.

OPINION

SERNA, Justice.

{1} Alamogordo Department of Public Safety Officer Neil LaSalle stopped David Neal ("Defendant") for a cracked windshield. Officer LaSalle asked for Defendant's consent to search the truck for drugs and weapons, but Defendant refused consent. Believing he had reasonable suspicion, Officer LaSalle detained Defendant's truck for approximately ten minutes to await a drug dog to perform a perimeter sniff of the truck, while allowing Defendant to leave the scene. Defendant called his father, James Neal ("Neal"), the owner of the truck, who arrived at the scene and subsequently gave written consent to search the truck. The search revealed a handgun and methamphetamine.

{2} Defendant moved to suppress the evidence as the fruit of an illegal search and seizure, claiming protection under both the Fourth Amendment to the United States Constitution and article II, section 10 of the New Mexico Constitution. The district court granted Defendant's motion, finding that reasonable suspicion supported the expansion of the traffic stop, but that the ten-minute detention of the truck was too long and required probable cause, which the court found lacking. The Court of Appeals reversed in a split memorandum opinion, concluding that Officer LaSalle had reasonable suspicion to expand the traffic stop to investigate drug activity, and that this reasonable suspicion supported the ten-minute detention of the truck to await the drug dog, based on the recent Court of Appeals case of *State v. Robbs*, 2006-NMCA-061, 139 N.M. 569, 136 P.3d 570, *cert. denied*, 2006-NMCERT-005, 139 N.M. 568, 136 P.3d 569. *State v. Neal*, No. 25,864, memorandum op. (Ct. App. Aug. 16, 2006).

{3} We conclude that the Court of Appeals erred in holding that Officer LaSalle had reasonable suspicion to detain Defendant's truck beyond that necessary to issue a citation for the cracked windshield and that Neal's subsequent consent to search the truck was tainted by the original police illegality. Accordingly, we reverse the Court of Appeals and hold that the evidence should have been suppressed.

I. FACTS

{4} At approximately 10:00 a.m. on July 31, 2004, Officer LaSalle, in uniform and driving a marked patrol car, observed a truck in front of

a house that was under investigation for drug activity. Defendant was in the driver's seat, and a man was leaning into the truck through the driver's side window. Although Officer LaSalle did not recognize either person when he first observed them, he was aware that the house was the subject of an ongoing drug investigation. Several individuals with criminal backgrounds, including Jeff Horton ("Horton"), were known to live at and frequent the house. Defendant, however, was not among the persons associated with the house.

{5} Based on the interaction at the truck, Officer LaSalle believed that he had observed a drug transaction, although he could not see the two individuals' hands, nor could he hear what they were saying. He, therefore, intended to approach the truck to talk to the two men, but before he could, the man leaning into the truck walked back into the house, and Defendant drove away. Officer LaSalle thus decided to follow the truck in his patrol car and observed that it had a cracked windshield. He then initiated a traffic stop for obstruction of driver's view/vehicle in unsafe condition. Upon approaching the truck, Officer LaSalle recognized Defendant, whom he knew had prior drug-related and assault convictions.

{6} Officer LaSalle obtained Defendant's driver's license, registration, and insurance. He ran a wants and warrants check and was advised to proceed with caution in dealing with Defendant because Defendant might be armed and dangerous. In addition, Officer LaSalle was informed that a back-up officer was on the way because of Defendant's prior criminal record.

{7} Officer LaSalle asked Defendant about the identity of the man with whom he was talking when parked in front of the house under investigation and learned that it was Horton. Horton was under investigation for drugs, and Officer LaSalle knew that Horton had been involved in other criminal activity. Officer LaSalle described Defendant as nervous and becoming agitated during this exchange. He said Defendant's hands were very fidgety, Defendant avoided eye contact and his questions, and Defendant appeared as though he wanted to leave. Officer LaSalle returned Defendant's documents and issued a citation for the cracked windshield.

{8} Officer LaSalle realized from examining the truck's registration that it belonged to James Neal, Defendant's father, and he did not know at that time whether Defendant had permission to drive the vehicle. Nevertheless, Officer LaSalle asked for Defendant's consent to search the truck for drugs and weapons, but Defendant denied consent. Officer LaSalle told Defendant that he was free to stay or leave, but that the truck would be held until a drug dog arrived to perform a perimeter sniff of it. Defendant left to find a pay phone.

{9} Officer LaSalle believed that he had reasonable suspicion to detain the truck to conduct the canine sniff based upon his observations of Defendant prior to and during the stop, including his observations of the two men at the truck; his belief that a drug transaction had taken place; Defendant's nervous, fidgety, and agitated demeanor; Defendant's desire to leave; and Officer LaSalle's prior personal knowledge of Defendant's and Horton's criminal history.

{10} Within approximately ten minutes, Border Patrol Officer Jimmy Ross arrived with his drug dog. The dog alerted to the presence of drugs without entering the vehicle but then jumped into the open window of the truck, without prompting, apparently due to the strong odor of drugs. Thereupon, Officer LaSalle left the truck under the observation of another officer and went to obtain a search warrant for the truck.

{11} Shortly after Officer LaSalle left the scene, Defendant's father, James Neal, the owner of the truck, arrived at the scene in response to a phone call from Defendant. According to Defendant's suppression motion and Officer Ross's and Neal's testimony at the suppression hearing, Neal consented to the search after having observed the drug-sniffing dog jump in and out of the truck, and after having been told that a search warrant was in progress. The State characterized

the events differently, i.e., that before Officer LaSalle could obtain the warrant, the officers still at the scene called and told him that he should return because Neal had given verbal consent to search the truck. The district court found that while Officer LaSalle was on his way to obtain the warrant, Neal arrived at the scene, gave his verbal consent to search the truck, and subsequently signed a written consent form. The subsequent search of the truck revealed a loaded firearm and a substance that tested as methamphetamine.

{12} The district court found that the truck had been illegally detained and thus granted Defendant's motion to suppress the evidence collected during the search. In explaining its decision, the court noted that it was "hesitant to put too much weight on the reputation/history of the people/residence involved in this case, although he knows they are important factors for the officer on the beat and probably properly so," and that "[i]t is not illegal to lean in a vehicle[,] and there may be innocent reasons for doing so." The court found that Officer LaSalle had reasonable suspicion to expand the scope of the traffic stop, request consent to search the vehicle, and investigate further. However, the court found that the ten-minute detention of the truck, while waiting for the drug dog to arrive, was too long and required probable cause. Therefore, the detention of the truck was illegal, and the court suppressed the evidence.

{13} In a split memorandum opinion, the Court of Appeals reversed the district court's grant of the motion to suppress and remanded the case. *Neal*, No. 25,864, memorandum op. at 1, 8. First, the Court of Appeals held that Defendant failed to preserve his argument under the New Mexico Constitution and thus only considered his rights under the Fourth Amendment to the federal Constitution. *Id*. at 3. The Court of Appeals then concluded that Officer LaSalle had reasonable suspicion to expand the duration of the traffic stop to investigate drug activity, and that this reasonable suspicion supported the ten-minute detention of the truck to await the drug dog, based on the recent Court of Appeals case, *State v. Robbs*, 2006-NMCA-061. *Neal*, No. 25,864, memorandum op. at 6-8. Judge Kennedy dissented, concluding that "more hunch and conjecture support[ed] the detention than we should allow" because "[t]he officer's knowledge that people were going in and out of the house and Defendant's stopping in front of it to talk with a resident does not support the individualized, articulable suspicion required to justify a detention." *Id*. at 9 (Kennedy, J., dissenting).

{14} The State urges us to affirm the Court of Appeals, contending that Officer LaSalle had reasonable suspicion to detain the truck, based on his observations of Defendant, which was sufficient to justify the detention. In addition, the State argues that Neal's subsequent consent justified the search of the truck and was purged of any taint. Defendant asks us to reverse the Court of Appeals, contending that Officer LaSalle lacked both probable cause and reasonable suspicion to expand the scope of the valid traffic stop into a drug investigation and to detain the truck and that Neal's subsequent consent was tainted by the illegal detention of the truck. We reverse the Court of Appeals for the reasons that follow.

II. STANDARD OF REVIEW

{15} We engage in a two-part review of a district court's decision regarding a motion to suppress: "The legality of a search questioned in a suppression hearing is generally tested as a mixed question of law and fact wherein we review any factual questions under a substantial evidence standard and we review the application of law to the facts de novo." *State v. Baca*, 2004-NMCA-049, ¶ 11, 135 N.M. 490, 90 P.3d 509 (citing *State v. Reynolds*, 119 N.M. 383, 384, 890 P.2d 1315, 1316 (1995); *State v. Werner*, 117 N.M. 315, 316-17, 871 P.2d 971, 972-73 (1994); *State v. Attaway*, 117 N.M. 141, 144-45, 870 P.2d 103, 106-07 (1994)). With respect to the factual review, we do not sit as trier of fact, recognizing that the district court has the best vantage from which to resolve questions of fact and to evaluate witness credibility. *State v. Vandenberg*, 2003-NMSC-030, ¶ 18, 134 N.M.

566, 81 P.3d 19 (quoting *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964). Therefore, we review the facts in the light most favorable to the prevailing party, deferring to the district court's factual findings so long as substantial evidence exists to support those findings. *Urioste*, 2002-NMSC-023, ¶ 6.

III. THE FOURTH AMENDMENT PROTECTS DEFENDANT, AND THUS WE DECLINE TO ADDRESS HIS CLAIM UNDER ARTICLE II, SECTION 10 OF THE NEW MEXICO CONSTITUTION

{16} The Fourth Amendment to the United States Constitution and article II, section 10 of the New Mexico Constitution make analogous provision for the protection of the people against unreasonable searches and seizures. For the past fifteen years, article II, section 10 has been construed to provide broader protections than the Fourth Amendment. *State v. Granville*, 2006-NMCA-098, ¶ 14, 140 N.M. 345, 142 P.3d 933 (citing the long line of New Mexico cases construing article II, section 10 more broadly than the Fourth Amendment in a variety of contexts), *cert. granted*, 2006-NMCERT-008, 140 N.M. 423, 143 P.3d 185. Indeed, in *State v. Gomez*, we reiterated our consistently expressed "strong preference for warrants," 1997-NMSC-006, ¶ 36, 122 N.M. 777, 932 P.2d 1, and expanded the protection afforded New Mexico motorists from unreasonable searches and seizures by announcing the rule that "a warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances," thus rejecting the federal rule. *Id*. ¶ 39; *see also State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15, 130 N.M. 386, 25 P.3d 225.

{17} The first issue Defendant raises is whether his claim under article II, section 10 of the New Mexico Constitution was properly preserved. The Court of Appeals held that Defendant failed to preserve it because he "d[id] not make any argument, other than in arguing that he preserved the issue, supporting his position that the New Mexico Constitution affords him greater protection than the Federal Constitution." *Neal*, No. 25,864, memorandum op. at 3. Inasmuch as we hold Officer LaSalle lacked reasonable suspicion to detain the truck following the valid traffic stop, we resolve this case based solely on the Fourth Amendment to the federal Constitution. *See Cardenas-Alvarez*, 2001-NMSC-017, ¶ 7 (declining to examine defendant's state constitutional claim "[i]f the federal Constitution affords [d]efendant the protection he seeks"). Therefore, we find it unnecessary to engage in a preservation analysis and proceed to analyze Defendant's claim under the Fourth Amendment alone. *See Robbs*, 2006-NMCA-061, ¶ 10 (deciding that the issue presented was one of reasonable suspicion and thus "analyz[ing] the circumstances here only under the Fourth Amendment of the United States Constitution," where "[d]efendant provide[d] no argument that the New Mexico Constitution provides greater protections for issues involving reasonable suspicion").

IV. OFFICER LASALLE LACKED REASONABLE SUSPICION TO DETAIN THE TRUCK FOLLOWING THE VALID TRAFFIC STOP

{18} The Fourth Amendment to the United States Constitution "prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *United States v. Cortez*, 449 U.S. 411, 417 (1981)); *see also Robbs*, 2006-NMCA-061, ¶ 11. Our central inquiry under the Fourth Amendment is reasonableness, which involves two questions: "'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Robbs*, 2006-NMCA-061 ¶ 11 (quoting *Terry*, 392 U.S. at 19-20).

{19} With respect to determinations of reasonable suspicion, we engage in a de novo review, as the decision of whether police conduct was

objectively reasonable "extends beyond fact-finding." *Vandenberg*, 2003-NMSC-030, ¶ 19. It is thus

> the duty of appellate courts to shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context. We conduct this review de novo along with our review of any inferences the district court may have drawn from its factual findings. In performing this de novo review, we look at the totality of the circumstances.

Id. (internal quotation marks and citations omitted).

{20} Under Fourth Amendment standards, a police officer making a lawful stop "may conduct an investigation reasonably related to the circumstances that gave rise to the officer's reasons for the stop." *State v. Williamson*, 2000-NMCA-068, ¶ 8, 129 N.M. 387, 9 P.3d 70.

> The officer may expand this investigation if the officer has reasonable and articulable suspicion that other criminal activity has been or may be afoot. . . . The officer's investigation, of course, is limited to a reasonable inquiry that is designed to satisfy the officer's reasonable suspicions. Moreover, the officer's investigation of any reasonable suspicion must proceed diligently.

Id. (internal quotation marks and citations omitted). Following a valid stop and reasonably related investigation, further detention requires reasonable suspicion of criminal activity. *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 20; *State v. Lowe*, 2004-NMCA-054, ¶ 12, 135 N.M. 520, 90 P.3d 539.

{21} It is well-established that "[r]easonable suspicion is measured by an objective standard, in which the court examines the totality of the surrounding circumstances, to determine whether the officer acted reasonably in expanding the scope of inquiry." *State v. Romero*, 2002-NMCA-064, ¶ 11, 132 N.M. 364, 48 P.3d 102; *see also State v. Cobbs*, 103 N.M. 623, 626, 711 P.2d 900, 903 (Ct. App. 1985). "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." *State v. Jason L.*, 2000-NMSC-018, ¶ 20, 129 N.M. 119, 2 P.3d 856 (emphasis added). By assessing the totality of the circumstances, we recognize that officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Arvizu*, 524 U.S. at 273 (quoting *Cortez*, 449 U.S. at 418). However, this does not mean that "[u]nsupported intuition and inarticulate hunches are . . . sufficient" to constitute reasonable suspicion justifying a detention. *Jason L.*, 2000-NMSC-018, ¶ 20 (quoting *Cobbs*, 103 N.M. at 626, 711 P.2d at 903); *see also Vandenberg*, 2003-NMSC-030, ¶ 21; *Urioste*, 2002-NMSC-023, ¶ 10.

{22} It is undisputed that Officer LaSalle's traffic stop of Defendant for a cracked windshield was valid. Thus, Officer LaSalle had the authority to investigate the cracked windshield and seek identification, registration, and insurance from Defendant, which he did. The core issue with which we are then confronted is whether Officer LaSalle had individual, particularized reasonable suspicion with respect to Defendant to detain the vehicle further to await a drug dog sniff. That is, did Officer LaSalle have reasonable suspicion that drugs would be found in the truck? The Court of Appeals found *Robbs*, 2006-NMCA-061, directly on point and applied its analysis to conclude that Officer LaSalle had reasonable suspicion both to expand the traffic stop into a drug investigation and to detain the vehicle. *Neal*, No. 25,864, memorandum op. at 4-8.

{23} However, as Judge Kennedy ably pointed out in his dissent, *Robbs* is readily distinguishable from the instant case. *Neal*, No. 25,864, memorandum op. at 9 (Kennedy, J., dissenting). *Robbs* involved a very specific tip to police about a drug transaction that would be taking place. 2006-NMCA-061, ¶ 2. Based on the tip,

police conducted surveillance of the identified residence, spotted the vehicle described, at approximately the time described, and stopped the vehicle. *Id*. ¶¶ 2-3. While the officers told the defendant she was free to leave, which she did, they detained the truck for thirty-five to forty minutes to wait for a drug dog to perform a sniff of the truck. *Id*. ¶ 4. The Court held that the officers had reasonable suspicion to make the stop based upon the tip and that it was reasonable to detain the truck in order to wait for the canine sniff. *Id*. ¶ 31; *see also State v. De Jesus-Santibanez*, 119 N.M. 578, 581-82, 893 P.2d 474, 477-78 (Ct. App. 1995) (finding reasonable suspicion to stop a vehicle that matched a specific and reliable "be-on-the-lookout" bulletin and detain the vehicle for approximately twenty minutes). In the instant case, the Court of Appeals, relying on *Robbs*, held that the much shorter ten-minute detention of Defendant's truck was equally reasonable. *Neal*, No. 25,864, memorandum op. at 7-8. However, unlike in *Robbs*, there was no specific tip with respect to Defendant. Indeed, the only legitimate basis for the stop was the cracked windshield. We, therefore, reject *Robbs* as controlling the instant case. The core issue is whether Officer LaSalle had specific and particularized information with respect to Defendant to constitute reasonable suspicion that drugs would be found in the vehicle and to, therefore, justify its detention beyond the time necessary to issue a citation for the cracked windshield. We are convinced that he did not. The following cases are illustrative.

{24} In *State v. Prince*, police had been investigating the defendant for possible drug involvement for several months, and, on the night he was stopped, police had received information from a drug task force agent that the defendant might be traveling into New Mexico from Texas and might be in possession of a controlled substance. 2004-NMCA-127, ¶ 2, 136 N.M. 521, 101 P.3d 332. However, the agent did not believe he had enough information to justify a stop, so he contacted the local police department to see if patrol deputies could develop probable cause to stop the defendant. *Id*. Police subsequently stopped the defendant for speeding and told him that he had been under investigation for manufacturing and trafficking methamphetamine. *Id*. ¶¶ 3-4. They frisked him for weapons and later obtained his consent to investigate for drugs. *Id*. ¶¶ 4-5.

{25} Even though the defendant was personally under investigation for drugs and despite the specific tip with respect to him and his movements, the Court of Appeals held reasonable suspicion was lacking to detain the vehicle beyond the valid traffic stop, stating:

> Guilt by association and generalized suspicions are insufficient grounds upon which to base an investigatory detention. In the absence of specific and particularized incriminating information about the criminal activity that defendant is or is about to engage in, generalized suspicions and mere corroboration of innocent activity, even if it is not readily available to the general public, is insufficient to create reasonable suspicion for an investigatory detention.

Id. ¶ 17; *see also State v. Eli L.*, 1997-NMCA-109, ¶ 13, 124 N.M. 205, 947 P.2d 162 (holding that a child-defendant's mere identification as a gang member and his making a "gang whistle" and "sagging" his pants in a manner associated with gang members was not sufficient to constitute individualized reasonable suspicion to search the child). The Court, therefore, held the investigatory detention for drugs following the traffic stop unlawful and further held that this police illegality tainted the defendant's subsequent consent and any evidence discovered thereafter. *Prince*, 2004-NMCA-127, ¶¶ 21-22.

{26} *State v. Graves* provides further guidance. 119 N.M. 89, 888 P.2d 971 (Ct. App. 1994). In *Graves*, the Court of Appeals held that "mere presence does not justify the arrest or detention of a person, other than the resident, at a residence lawfully being searched." *Id*. at 94, 888 P.2d at 976 (internal quotation marks omitted). The police were executing a valid search warrant that named to be searched "any persons and/or vehicles which can be shown to be involved in

drug dealing (purchasing or selling)." *Id*. at 91, 888 P.2d at 973. In addition to the residents of the house, police detained and handcuffed non-residents, including the defendant, for at least thirty minutes, despite any shown connection with the drugs and paraphernalia discovered on the premises or any other grounds to suspect such a connection. *Id*. at 91, 94, 888 P.2d at 973, 976.

{27} The Court concluded that no circumstances existed to give rise to reasonable suspicion to believe the defendant was involved in criminal activity and no articulable reason to detain him. *Id*. at 94, 888 P.2d at 976. In holding that mere presence was insufficient to establish reasonable suspicion to detain a non-resident, the Court reasoned that "recognizing presence alone as sufficient to detain a person found on premises subject to a search warrant would provide unlimited and unreviewable discretion. Such discretion, we believe, would betray the underlying principles of the Fourth Amendment." *Id*. *Contra State v. Sanchez*, 2005-NMCA-081, ¶¶ 3, 13, 137 N.M. 759, 114 P.3d 1075 (finding reasonable suspicion to detain and search all present at a fight/party/disturbance where a stabbing had occurred and drugs and weapons were found), *cert. denied*, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229. In the instant case, Defendant never entered the house under investigation, and Officer LaSalle could only see that an occupant of the house was leaning into Defendant's truck. He could not see what, if anything, they were doing, aside from talking, and could not hear what they were saying. If reasonable suspicion was found lacking in *Prince*, where the defendant himself was under investigation, and in *Graves*, where the defendant was actually present *inside* the house being searched, we are loath to find it here.

{28} As the Court of Appeals stated in *Prince*, "Officers may not use a lawful stop to fish for evidence of other crimes where there is insufficient reason to detain a defendant, beyond the purpose of the initial detention." 2004-NMCA-127, ¶ 19. Likewise, Officer LaSalle could not use his valid traffic stop of Defendant for a cracked windshield to detain the truck longer than necessary in order to fish for evidence of a drug transaction. We acknowledge that reasonable suspicion "'can arise from wholly lawful conduct.'" *Robbs*, 2006-NMCA-061, ¶ 26 (quoting *Urioste*, 2002-NMSC-023, ¶ 10). In addition, we recognize that our reasonable suspicion determination requires us to assess the totality of the circumstances and "precludes . . . [a] divide-and-conquer analysis" in which we view each individual factor or circumstance in a vacuum. *See Arvizu*, 534 U.S. at 274. However, we are still compelled to address the factors upon which Officer LaSalle based his assessment of reasonable suspicion that drugs would be found in the truck: Defendant's stopping in front of a house under investigation; talking to Horton, a convicted felon; becoming nervous when stopped by the police; wishing to leave; and denying consent to search the truck.

{29} We have never adopted "'a rule equating simple nervousness with reasonable suspicion.'" *Vandenberg*, 2003-NMSC-030, ¶ 31 (quoted authority omitted). Indeed, "'[i]t is common knowledge that most citizens . . . whether innocent or guilty, when confronted by a law enforcement officer who asks them potentially incriminating questions are likely to exhibit some signs of nervousness.'" *Id*. (quoting *United States v. Millan-Diaz*, 975 F.2d 720, 722 (10th Cir. 1992)). Thus, viewed in the context of Officer LaSalle's other observations, Defendant's fidgety and nervous demeanor and desire to leave did not suffice to create reasonable suspicion. *See id*. (noting that nervousness is to be expected when confronted with law enforcement and that it does not alone create reasonable suspicion); *State v. Van Dang*, 2005-NMSC-033, ¶ 16, 138 N.M. 408, 120 P.3d 830 (holding reasonable suspicion existed to expand valid traffic stop where defendant, driving a rental van, was not named in the rental contract, had a story inconsistent with passenger regarding their travel plans and defendant's alleged permissive use of the van, and defendant's nervousness).

{30} Likewise, Defendant's mere association with a convicted felon like Horton, who was under surveillance in an ongoing drug

investigation, was insufficient to create reasonable suspicion of Defendant, especially where as here, Officer LaSalle did not even know the identities of the two men when he observed them. *See State v. Harbison*, 2006-NMCA-016, ¶ 21, 139 N.M. 59, 128 P.3d 487, *aff'd*, 2007-NMSC-016, 141 N.M.392, 156 P.3d 30. Moreover, Defendant's denial of consent to search the truck "is not a probative fact of guilt, suspicion, or dangerousness." *Vandenberg*, 2003-NMSC-030, ¶ 46. We consider Defendant's refusal of consent to be "a neutral act which neither incriminated nor exculpated" him, and it does not figure into our reasonable suspicion calculus. *Id*. ¶ 47.

{31} Officer LaSalle was indeed "entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants." *See Arvizu*, 534 U.S. at 276. However, taking into account his training and experience, it was not reasonable for him to infer from the circumstances and his observations that Defendant had been involved in a drug transaction and that he, therefore, had reasonable suspicion to detain his vehicle, even for ten minutes, to await a drug dog sniff. Defendant's innocent conduct and the surrounding circumstances, viewed together and indulging the factual inferences drawn by Officer LaSalle, do not constitute the type of individualized, specific, articulable circumstances necessary to create reasonable suspicion that Defendant himself was involved in criminal activity and thus did not provide a basis upon which Officer LaSalle could lawfully detain Defendant's vehicle. Rather, as Judge Kennedy asserted in his dissent, these circumstances smack more of the type of conjecture and hunch we have rejected in the past as insufficient to constitute reasonable suspicion. *Neal*, No. 25,864, memorandum op. at 9 (Kennedy, J., dissenting); *see also Jason L.*, 2000-NMSC-018, ¶ 22; *Prince*, 2004-NMCA-127, ¶ 17; *Graves*, 119 N.M. at 94, 888 P.2d at 976. Any other conclusion would eviscerate the very protection of individual rights and liberties the Fourth Amendment was designed to create and which this Court has taken an oath to uphold.

{32} Based on the foregoing, we hold that Officer LaSalle lacked the requisite reasonable suspicion to detain Defendant's truck to await a canine sniff.

V. NEAL'S SUBSEQUENT WRITTEN CONSENT TO SEARCH THE TRUCK WAS TAINTED BY THE PRIOR ILLEGAL DETENTION OF THE TRUCK

{33} Having concluded that the expansion of the traffic stop into a drug investigation and the subsequent ten-minute detention of the truck violated Defendant's rights under the Fourth Amendment, we now consider whether, under the exclusionary rule, we must suppress the evidence obtained as a result of the consensual search of the truck. *See Prince*, 2004-NMCA-127, ¶ 20. "For evidence to be admissible, consent must be both voluntary and purged of all taint from a prior illegality." *Id*.; *see also State v. Taylor*, 1999-NMCA-022, ¶ 27, 126 N.M. 569, 973 P.2d 246. The voluntariness of Neal's consent is not at issue. We, therefore, turn to the Fourth Amendment taint analysis to determine whether Neal's consent was an exploitation of the prior police illegality. The State contends that any illegality in Officer LaSalle's conduct was vitiated by Neal's voluntary written consent to search the truck. Defendant counters that Neal's consent was tainted and, accordingly, cannot support the search.

{34} For evidence obtained following police illegality, but with voluntary consent, to be admissible:

> there must be a break in the causal chain from the [illegality] to the search. [T]he proper question in evaluating whether a consent was tainted by prior illegality is whether there was [sufficient] attenuation between the [illegality] and the consent to search. In deciding whether the consent is sufficiently attenuated from the Fourth Amendment violation, we consider the temporal proximity of the illegal act and the consent, the presence or absence of

> intervening circumstances, and the purpose and flagrancy of the official misconduct.

Taylor, 1999-NMCA-022, ¶ 28 (internal quotation marks and citations omitted).

{35} In the instant case, a direct causal relationship exists between the illegal expansion of the traffic stop and the subsequent detention of the truck and Neal's consent to search. *See Prince*, 2004-NMCA-127, ¶ 21. Neal, the truck's owner and Defendant's father, arrived at the scene in response to a call from Defendant immediately following Officer LaSalle's illegal detention of the truck. Neal's presence at the scene to give consent was thus a direct result of the original police illegality. Indeed, Neal testified at the suppression hearing that he personally witnessed some of the police illegality when he arrived to see the drug dog jumping in and out of the truck before he had even granted consent.[1] No attenuation, temporal or otherwise, existed between the police illegality and Neal's consent. *See id*. ¶ 21 (holding there was no attenuation and thus tainted consent where officer conducted an improper investigatory detention immediately before seeking consent to search); *State v. Bedolla*, 111 N.M. 448, 456, 806 P.2d 588, 596 (Ct. App. 1991) (holding there was no attenuation where defendants gave consent for search after being stopped based on uncorroborated tip that they were dealing cocaine). Therefore, we conclude that Neal's consent to search the truck flowed directly from, and was an exploitation of, the illegal expansion of the traffic stop and the subsequent detention of the truck. *See Prince*, 2004-NMCA-127, ¶ 21. Accordingly, we conclude that Neal's consent was tainted and was thus invalid to support the search of the truck, and all evidence collected as a result should have been suppressed.

[1] While the voluntariness of Neal's consent is not at issue, we, like Judge Kennedy, are troubled by the "legal issues apart from matters within the purview of the case before us" that were created by the fact that "[t]he truck was seized and the dog entered the truck before consent to search was given" and before "[t]he truck's owner . . . arrived and gave his consent." *Neal*, No. 25,864, memorandum op. at 9 (Kennedy, J., dissenting).

VI. CONCLUSION

{36} We hold, under the Fourth Amendment to the United States Constitution, that Officer LaSalle lacked reasonable suspicion to detain the truck beyond the time necessary to issue a citation for the cracked windshield. In addition, Neal's subsequent consent to search the truck was tainted by the original police illegality and was, therefore, insufficient to validate the search. The evidence obtained as a result was the fruit of an illegal search and seizure and, therefore, should have been suppressed. Accordingly, we reverse the Court of Appeals.

{37} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice (dissenting).

RICHARD C. BOSSON,
Justice (dissenting).

DISSENTING OPINION

BOSSON, Justice (dissenting).

{38} I respectfully dissent. The majority opinion concedes that the original traffic stop was legitimate. *Supra*, ¶ 22. The majority does not dispute that Officer LaSalle could ask Defendant questions once having made a lawful stop. *See id*. ¶¶ 28, 30. What the majority opinion does not abide is any further detention of the vehicle to await the drug dog. *Id*. ¶ 22 ("The core issue with which we are then confronted is whether Officer LaSalle had individual, particularized reasonable suspicion with respect to Defendant to detain the vehicle further to await a drug dog sniff.").

{39} Significantly, the majority does not appear to attack the specific length of the detention. *Supra*, ¶ 32. Without ever balancing "the government's justification for the detention, the character of the intrusion on the individual, the diligence of the police in conducting the investigation, and the length of the detention," *State v. Robbs*, 2006-NMCA-061, ¶ 21, 139 N.M. 569, 136 P.3d 570, the majority appears to conclude that no amount of investigatory detention for drugs, no matter how brief, could be justified based on what Officer LaSalle knew and had observed. Taken literally, I suppose that even if the officer had a drug sniffing canine in his car or if it were one block away, not even that amount of *de minimis* detention would be tolerable. I am compelled to this conclusion because of where the majority opinion takes its stand. It does not quibble with the reasonableness of this particular detention; it says that no amount of detention, not sixty minutes and not sixty seconds, can be justified because the officer lacked reasonable suspicion for any extra detention related to drugs. With respect, I do not agree. Under the federal constitution, as opposed to the New Mexico Constitution, such a minimal detention of a vehicle for the purpose of a drug dog sniff is justified when the officer has reasonable, articulable suspicion based on no more than what was known to Officer LaSalle here.

{40} I begin by examining the facts which do not appear to be in dispute. Officer LaSalle saw Defendant parked outside a house under investigation for drug activity. Defendant was talking with a man who came from that same house, and the two were participating in what looked like, in the officer's experience, a drug deal. His suspicion aroused, the officer wanted to talk to them both, but Defendant drove away. Officer LaSalle then followed Defendant's car and conducted his traffic stop, which all agree was legitimate. At that time he specifically recognized Defendant as a person with a criminal record, including drug transactions. In undertaking his customary wants and warrants computer check, the officer learned that Defendant may well be dangerous, dangerous enough that another officer was sent over to assist. Then, in the course of further questioning, the officer learned that the man seen talking to Defendant at the suspected drug house, Horton, with whom Defendant may have had a drug transaction, was, to no surprise, one of the very men specifically under investigation for drug activity. Mr. Horton also had a criminal history related to drugs. Parenthetically, Defendant was also acting nervous and agitated throughout the stop.

{41} Based on all these facts and observations, the officer was in fact suspicious of Defendant, that his car contained drugs. He believed that a drug dog, conducting a sniff of the car's exterior, would confirm his suspicions and give him the probable cause he needed for a search warrant. Accordingly, he released Defendant, kept the car, waited ten minutes for the drug dog to arrive, and, upon the drug dog alerting, obtained the consent of the owner to conduct an interior search which produced contraband.

{42} In my mind, I cannot think that any reasonably well-trained police officer would not be suspicious under the totality of these circumstances. Remember that we are not being asked to approve a full-fledged search, or any further detention of Defendant who was free to go and did leave the scene. This makes a difference. As our Court of Appeals noted in *Robbs*, 2006-NMCA-061, ¶ 21, we must "balance the government's interest in preventing the use and distribution of methamphetamine against Defendant's right to be free from official investigation through the use of a drug dog." The majority opinion makes no mention that under established federal law, "the government's interest in deterring methamphetamine use . . . substantially outweighs the minimal intrusion on Defendant's liberty through the use of a drug dog." *Id*. ¶ 22 (citing *United States v. Place*, 462 U.S. 696, 707 (1983); *Illinois v. Caballes*, 543 U.S. 405, 409 (2005)). Moreover, the length of the detention and the degree the defendant's freedom of movement is restricted are both important factors in determining whether the seizure complies with Fourth Amendment requirements. *See State v. Werner*, 117 N.M. 315, 318-19, 871 P.2d 971, 974-75 (1994) (holding that the detention violated

the Fourth Amendment based on its length and because defendant's freedom of movement was severely limited).

{43} Based, in part, on this careful balance, we repeatedly tell the police to investigate first before jumping to a search and an arrest, to proceed incrementally with caution so as to confirm or deny suspicions before proceeding to the next step. It seems to me that is exactly what Officer LaSalle did under these circumstances. We have encouraged the use of drug dogs because they do not intrude into the privacy of the interior; they detect the air outside in the public domain, just not detectable to humans. Drug dogs employed in the manner of this case are a cautious, incremental step in terms of their impact upon the Fourth Amendment. They require only a small amount of time, and if they fail to alert, the vehicle is free to go. *See Robbs*, 2006-NMCA-016, ¶ 29. But it may take some time to transport the dog to the scene, in this case ten minutes. That amount of time is not unreasonable, and the majority does not disagree. *See id*. ¶ 30 (citing state and federal cases that have upheld similar detentions while awaiting a drug dog).

{44} The Court of Appeals majority found this short detention amply supported by reasonable suspicion, citing *Robbs*. It is difficult to say what the district court thought, since the judge incorrectly applied a standard of probable cause instead of reasonable suspicion. Perhaps we, as an appellate court, should remand to that judge to determine, in the first instance, whether Officer LaSalle had reasonable suspicion, as opposed to probable cause, for that ten-minute detention. If all we do here is insert our view of the evidence for that of the Court of Appeals, then I doubt we have advanced the law on such an important subject as the Fourth Amendment.

{45} My disagreement with the majority, however, is not just over our collective view of the evidence. I am concerned that we are not following the law of the Fourth Amendment, as articulated by the United States Supreme Court over the past several years and then more recently by federal courts, particularly the Tenth Circuit. Here, we are not articulating the meaning of our New Mexico Constitution where we are free to diverge. This is the same Fourth Amendment for us all. I fear we risk being criticized for inserting our own view of what we think Fourth Amendment case law ought to be, when our role is to follow and apply what the Supreme Court and others have already said about the Fourth Amendment under similar circumstances, and indeed what the Supreme Court would very likely say in this very instance.

{46} The majority opinion makes reference to *United States v. Arvizu*, 534 U.S. 266, 274 (2002), for the proposition that we will not engage in a "'divide-and-conquer analysis,'" *supra*, ¶ 28, but then the opinion seems to go on to do just that. In *Arvizu*, the Supreme Court made clear that we must do more than analyze each individual component of what the officer observed to see whether each component is equally capable of a benign explanation as a suspicious one. 534 U.S. at 274 (stating that the Ninth Circuit erred by examining each factor viewed in isolation, even though each may have been "'innocent in itself,' . . . taken together, they 'warranted further investigation'" (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). We are to examine the totality of the circumstances, as seen through the eyes of a reasonable, well-trained police officer and giving due deference to how a reasonable police officer, not five private citizens or even five judges, might objectively interpret the totality of the circumstances, whether or not each individual component is capable of an innocent explanation. *Id*. at 277 (noting that the test is to consider "the totality of the circumstances" while giving "due weight to factual inferences drawn by the law enforcement officer").

{47} Rather than undertaking this form of analysis, the majority addresses each factor individually, noting how each one can be seen as lawful conduct. *Supra*, ¶¶ 29-32. It is fine to view each factor individually to determine the weight to be given to each factor. However, in the end, the question is not whether the defendant was engaging in lawful conduct, but rather whether under the totality of the circumstances

the "*detaining officer* has a 'particularized' and objective basis for suspecting legal wrongdoing." *United States v. Santos*, 403 F.3d 1120, 1134 (10th Cir. 2005) (quoting *Arvizu*, 534 U.S. at 273) (emphasis added); *see also id*. (holding that reasonable suspicion existed under the totality of the circumstances test even though "[t]his set of facts, taken individually, might not mean much to ordinary observers"). In doing so the court must "defer to the 'ability of a trained law enforcement officer to distinguish between innocent and suspicious actions.'" *Id*. at 1124 (quoted authority omitted). The court does not do so blindly, of course; such deference is always subject to a standard of objective reasonableness. But neither do we get to substitute our version of suspicion for that of the officer. *See Arvizu*, 534 U.S. at 276 ("To the extent that a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise, it is the nature of the totality rule.").

{48} Aside from its passing reference to *Arvizu*, the majority opinion does not discuss recent opinions from our own Tenth Circuit which factually are more on point with our own case and which uphold a drug dog detention similar to what occurred in this case. In employing Fourth Amendment analysis, the Tenth Circuit gives much greater weight than the majority opinion to officer observation. *See, e.g., United States v. Bradford*, 423 F.3d 1149, 1157-58 (10th Cir. 2005); *Santos*, 403 F.3d at 1133-34. Other circuits are similar. *See United States v. Davis*, 430 F.3d 345, 354-55 (6th Cir. 2005) (holding, based largely on police observation regarding drug investigation, the initial seizure while awaiting a drug dog was reasonable); *United States v. Yang*, 345 F.3d 650 (8th Cir. 2003) (holding that detention while awaiting drug dog was reasonable based primarily on officer observation). The analysis in *Santos* is particularly helpful as there, like here, a traffic stop was made and the officer detained the defendant's vehicle until a dog arrived to sniff the vehicle. 403 F.3d at 1122-24. The Tenth Circuit found that reasonable suspicion existed, even though it all began with a mere traffic stop, based on the officer's observations, the answers produced by the defendant when questioned, and the fact that the defendant had a prior criminal history. *Id*. at 1133-34. The court's holding was based in large part on its deference to the "'ability of a trained law enforcement officer to distinguish between innocent and suspicious actions.'" *Id*. at 1124 (quoting *United States v. McRae*, 81 F.3d 1528, 1534 (10th Cir. 1996)). *Santos* is an excellent example of a court affirming a brief drug dog detention, though somewhat reluctantly, perhaps being of a mind to decide differently if they could speak their own mind, but nonetheless following applicable Fourth Amendment precedent, principally *Arvizu*, to uphold the detention as not unreasonable. *Santos*, 403 F.3d. at 1124-25 (laying out the Supreme Court's standard of reviewing, then noting how it is that standard that must be applied in Fourth Amendment cases).

{49} Just as in *Santos*, the reasonable suspicion in this case arose from officer observation and a past criminal history. Officer LaSalle was not observing any two people talking on a street; he was observing two men, later determined to have drug-related criminal records, conversing outside a suspected drug house and engaging in what he thought was a drug deal. *See Santos*, 403 F.3d at 1132 (noting that "in conjunction with other factors, criminal history contributes powerfully to the reasonable suspicion calculus"). The point is not whether there might be a benign explanation for this behavior. Obviously, it is not illegal to converse on a street corner even if one has a criminal record. According to the Supreme Court, however, the principal question we are to ask is whether it would be unreasonable for any well-trained police officer merely to be suspicious and initiate a criminal investigation for drugs, taking into account all of the officer's observations, considered cumulatively, and giving due deference to the officer's training and experience. This opinion does not give officer training and experience its due. *See Arvizu*, 534 U.S. at 273 ("This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" (quoted authority omitted)). I believe most well-trained,

conscientious officers would be suspicious of drug activity under these circumstances, and appropriately so. But it is not my opinion that counts; it is what the federal constitution, as presently interpreted by the Supreme Court, appears to require.

{50} Instead of discussing federal precedent on this topic, the majority relies primarily on our own New Mexico case law interpreting the same Fourth Amendment. But I do not think it does so correctly.

{51} *Robbs,* of course, is closely on point as the Court of Appeals majority determined in this very case, reasoning that if a thirty-five minute detention of the vehicle while awaiting the drug dog was reasonable, so too would be a ten-minute detention for the same purpose. *Robbs* was preceded by a specific tip that the driver would be carrying drugs, a point which is absent from our case. But to be reliable, tips must carry such detailed corroborating evidence. *See Robbs*, 2006-NMCA-061, ¶¶ 13-15. Our case is based not on a mere tip, but the officer's observations. The majority opinion does not explain why the personal observations of a trained officer would be less reliable than a tip, anonymous or otherwise.

{52} The *Robbs* analysis is helpful because of the federal analysis it engages in as discussed above. *Supra*, ¶ 42. However, instead of applying a similar analysis the majority draws an analogy to *State v. Prince*, 2004-NMCA-127, 136 N.M. 521, 101 P.3d 332, and *State v. Graves*, 119 N.M. 89, 888 P.2d 971 (Ct. App. 1994). *Supra*, ¶¶ 24-27. *Graves* involved the detention of an individual, not a vehicle, who was present at a house that was being lawfully searched. 119 N.M. at 94, 888 P.2d at 976. The Court of Appeals held that mere presence without any other circumstances giving rise to reasonable suspicion was not enough to justify the detention under the Fourth Amendment. *Id*. I agree. But in the case before us Officer LaSalle articulated far more reasons than mere "presence" for wanting to investigate Defendant's car for drugs. Additionally, I do not find *Graves* on point because, as noted above, in the traditional Fourth Amendment balance of the government interest versus the level of intrusion there are significant differences between this case and *Graves*. In *Graves* the individual was detained and handcuffed, while here only the *vehicle* was detained for a short period of time to await a canine sniff. *See Robbs*, 2006-NMCA-061, ¶ 29 ("Defendant's freedom of movement was not severely restricted. . . . Defendant was told she was free to leave, and she did so.").

{53} I also do not find much help in *Prince*, 2004-NMCA-127, ¶ 2. There, the police were acting on an anonymous tip and had not seen anything on their own, unlike Officer LaSalle in this case who based everything on his own observations. The police in *Prince* did not simply expand the stop by detaining the vehicle briefly to await a canine sniff. Instead, the police immediately removed the defendant from the car and performed a full search, despite his cooperation, which is a far cry from the incremental actions of Officer LaSalle here. *See id*. ¶ 4. The court held, appropriately, that there was no firm basis to expand the traffic stop into a drug investigation. *Id*. ¶ 19.

{54} These New Mexico cases are not as helpful as the majority opinion finds them to be. More importantly, the majority fails to undertake the proper federal analysis necessary when we are to determine whether the Fourth Amendment's protections were violated.

{55} For these reasons I respectfully dissent.

RICHARD C. BOSSON,
Justice

I CONCUR

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2007-NMSC-046

Filing Date: June 15, 2007

Docket No. 29,624

CORA MAES,

Plaintiff-Petitioner,

v.

AUDUBON INDEMNITY INSURANCE GROUP,

Defendant-Respondent.

Original Proceeding on Certiorari
Sam B. Sanchez, District Judge

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OPINION

SERNA, Justice.

{1} Cora Maes ("Maes") sued her property insurer, Audubon Indemnity Insurance Group ("Audubon"), after it originally denied her insurance claim for destroyed property. Audubon asserted immunity from suit on the basis that Maes obtained her insurance with Audubon through the New Mexico Fair Access to Insurance Requirements Plan Act ("FAIR Plan Act" or "the Act"), NMSA 1978, §§ 59A-29-1 to -9 (1985, as amended through 1999), which provides statutory immunity from suit for certain parties with respect to certain actions taken pursuant to the FAIR Plan Act. Section 59A-29-7 (or "immunity provision"). We issued a writ of certiorari to the Court of Appeals to review its opinion, which held that Audubon was statutorily immune from suit. *Maes v. Audubon Indem. Ins. Group*, 2006-NMCA-021, 139 N.M. 39, 127 P.3d 1126. For the reasons discussed below, we hold that the FAIR Plan Act's immunity provision does not apply to Audubon; and, therefore, Audubon is not immune from Maes's suit. Accordingly, we reverse the Court of Appeals and remand to the district court.

I. BACKGROUND

A. Statewide Plans to Assure Fair Access to Insurance Requirements

{2} The Legislature passed the New Mexico FAIR Plan Act in 1985 under the framework of the federal Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), *see* 12 U.S.C. §§ 1749bbb to 1749bbb-21 (1970) (repealed 1985-1996), which Congress promulgated following inner city rioting in the late 1960s. 1 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 4:6 (3d ed. 2005). The UPPRA provided for federal reinsurance against riot and civil unrest losses to insurance companies. 12 U.S.C.

§ 1749bbb to § 1749bbb-21; *see* Russ & Segalla, *supra*, § 4:6. To be eligible for such reinsurance, the UPPRA required insurers to cooperate with their state insurance authorities to establish fair access to insurance requirements ("FAIR") plans "designed to make essential property insurance more readily available." 12 U.S.C. § 1749bbb(3)(a) to (b). FAIR plans are intended to create a means for high-risk property owners to obtain essential property insurance coverage, where they would not otherwise be able to do so on the normal insurance market because their risks would be unprofitable for insurance companies to assume on a voluntary basis. *See* Russ & Segalla, *supra*, §§ 1:27; 4:6.

B. The New Mexico FAIR Plan Act

{3} The New Mexico FAIR Plan Act authorizes all insurers licensed to write essential property insurance in New Mexico to establish and maintain a FAIR plan to provide essential property insurance to responsible and qualified applicants unable to obtain insurance on the open market. Section 59A-29-2; NMPIP Bylaws, introduction, at 1, http://www.nmprc.state.nm.us/insurance/pdf/nmfairplanbylaws.pdf [hereinafter NMPIP Bylaws]. The Act further authorizes insurers to form the nonprofit underwriting association known as the New Mexico Property Insurance Program ("NMPIP"). *Id*. In order to transact property insurance business in New Mexico, all insurers licensed to write essential property insurance in the state are required to become and remain members of the FAIR Plan and the NMPIP and to subscribe to the NMPIP Articles of Association. Section 59A-29-3.

{4} The NMPIP is not itself an insurance company. NMPIP Bylaws, introduction, at 1. However, the Act authorizes the NMPIP, "on behalf of its members[,] to cause to be issued property insurance policies." Section 59A-29-4. The program operates as follows. Applicants or their representatives or insurance agents apply directly to the NMPIP for coverage. NMPIP Bylaws, introduction, at 1. If the NMPIP decides the property is eligible for insurance, it forwards the application to a "Servicing Insurer." *Id*. § IV.1, at 3. Audubon is a Servicing Insurer for the NMPIP, which means that it has contracted with the NMPIP "to issue and service policies on risks referred to it by the [NMPIP]." *Id*. § III.8, at 2. The Servicing Insurer then issues and delivers the actual policy directly to the applicant and services the policy, remitting the premium to the NMPIP. *Id*. § V.1, at 3. The NMPIP is authorized to provide reimbursement for all of the Servicing Insurer's costs and expenses. NMPIP Bylaws, § XII.6, at 8.

{5} The FAIR Plan Act also provides a remedy for aggrieved insureds. They may appeal the actions and decisions of the FAIR Plan administrators, the NMPIP, or any insurer as a result of its participation in the FAIR Plan and the NMPIP to the New Mexico Superintendent of Insurance. Section 59A-29-6(A). Thereafter, all final orders and decisions of the Superintendent of Insurance are subject to review in district court. Section 59A-29-6(B).

{6} Finally, the Act provides immunity to certain parties for certain actions taken with respect to the FAIR Plan:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

Section 59A-29-7.

{7} The NMPIP reinsures all insurance policies issued by the Servicing Insurer pursuant to the FAIR Plan. Section 59A-29-4 (authorizing the NMPIP "to reinsure in whole or in part any such policies and to cede any such reinsurance"); NMPIP Bylaws, § VI.1, at 4. Reinsurance refers to:

> the ceding by one insurance company to another of all or a portion of its risks for

> a stipulated portion of the premium. In a true reinsurance transaction, the liability of the reinsurer is solely to the reinsured, which retains all contact with the original insured, and handles all matters prior to and subsequent to loss.

14 Eric Mills Holmes & L. Anthony Sutin, Holmes' *Appleman on Insurance*, § 102.1 (2d Ed. 2000) (quoted authority omitted). We adopted an almost identical definition of reinsurance in 1973. *Sierra Life Ins. Co. v. First Nat'l Life Ins. Co.*, 85 N.M. 409, 412, 512 P.2d 1245, 1248 (N.M. 1973) (quoting similar section from an earlier edition of *Appleman Insurance Law and Practice*). Reinsurance essentially "operates to shift part of the risk of loss under an insurance policy from the original insurer to the reinsurer, with the original insurer remaining in privity with the insured." Holmes & Sutin, *supra*, § 102.1 (internal quotation marks omitted). Indeed, one of the fundamental principles of reinsurance is that "the reinsurer ordinarily has no liability to the policyholder of the ceding insurer." *Id*. § 106.7. Our reinsurance statute reflects this principle: "No person shall have any rights against the reinsurer which are not expressly stated in the reinsurance contract or in a written agreement between such person and the reinsurer." NMSA 1978, § 59A-7-11(G) (1993).

II. FACTUAL AND PROCEDURAL HISTORY

{8} Maes's Arroyo Seco property was completely destroyed by fire on May 2, 2000. The property was insured by Audubon through the New Mexico FAIR Plan, under a policy effective March 20, 2000 to March 20, 2001. Maes filed a claim under her policy on May 3, 2000. Audubon denied liability for the loss on August 3, 2000. Maes then appealed to the New Mexico Superintendent of Insurance pursuant to the mechanism provided for in the New Mexico FAIR Plan Act. Section 59A-29-6(A). On October 19, 2001, the Superintendent of Insurance ruled in favor of Maes, finding that she was entitled to recover under her Audubon policy for the fire damage to her property. Audubon appealed the decision in district court, pursuant to the FAIR Plan Act, and the district court affirmed the Superintendent's decision on February 13, 2003. On March 6, 2003, Audubon paid Maes the policy limits of $150,000 for her loss.

{9} Thereafter, in an initial Complaint on September 17, 2003, and a Second Amended Complaint on February 5, 2004, Maes sued Audubon in district court for (i) pre- and post-judgment interest on the $150,000 judgment; (ii) breach of the implied covenant of good faith and fair dealing; and (iii) bad faith insurance practices. On June 14, 2004, Audubon moved to dismiss Maes's claims on the ground that Audubon had statutory immunity from suit because it issued the policy as Servicing Insurer of the NMPIP. *See* ' 59A-29-7. The district court denied the Motion to Dismiss on October 1, 2004.

{10} Audubon appealed to the Court of Appeals, which, in a split decision, reversed the district court, concluding that Audubon was statutorily immune from suit. *Maes*, 2006-NMCA-021, ¶¶ 1, 7. The Court of Appeals declared the immunity provision "clear and unambiguous" and held that Audubon is an agent of the NMPIP because of its status as the NMPIP's Servicing Insurer and is thus immune from suit. *See Maes*, 2006-NMCA-021, ¶¶ 11, 16. Audubon urges the same reading on appeal. Maes, however, contends that Audubon's action in insuring her property was not taken as an agent of the NMPIP and that such an interpretation would produce results wholly incongruous to the legislative purpose of the FAIR Plan Act.

III. SECTION 59A-29-7 DOES NOT APPLY TO AUDUBON

A. Standard of Review and Rules of Statutory Construction

{11} In this case, we must decide whether the immunity provision of the New Mexico FAIR Plan Act, Section 59A-29-7, shields Audubon, in its role as the Servicing Insurer of the NMPIP,

from Maes's suit.[1] Statutory interpretation is an issue of law, which we review de novo. *State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (N.M. 1995). Our primary purpose in interpreting a statute is "to ascertain and give effect to legislative intent." *Kahrs v. Sanchez*, 1998-NMCA-037, ¶ 11, 125 N.M. 1, 956 P.2d 132. In so doing, "we are mindful that statutes are to be interpreted in order to facilitate their operation and the achievement of their goals." *Lopez v. Employment Sec. Div.*, 111 N.M. 104, 105, 802 P.2d 9, 11 (1990). In ascertaining legislative intent, we examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish. *See Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69; *N.M. State Bd. of Educ. v. Bd. of Educ.*, 95 N.M. 588, 591, 624 P.2d 530, 533 (1981). We give effect to the legislative intent "by adopting a construction which will not render the statute's application absurd or unreasonable and will not lead to injustice or contradiction." *N.M. State Bd. of Educ.*, 95 N.M. at 591, 624 P.2d at 533.

B. Section 59A-29-7 Does Not Apply to Audubon as a Servicing Insurer of the NMPIP

{12} Our resolution of this issue of first impression hinges on one two-prong question. First, we must determine whether Section 59A-29-7 applies to Audubon. In making that determination, we must also decide whether Audubon's actions were the types of actions, which the Legislature contemplated should be immune from suit. As we analyze the issue, the first and second prongs are related. For the following reasons, we hold that Section 59A-29-7 does not apply to Audubon.

{13} In determining whether the immunity provision of the New Mexico FAIR Plan Act applies to Audubon, we commence with an examination of the plain language of the statute. *See State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23. The Act provides in pertinent part:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

Section 59A-29-7. The immunity provision does not specifically name Servicing Insurers, which indicates a legislative intent that Servicing Insurers were to be treated distinctly from Member Insurers. Our interpretation of the immunity provision is supported by the NMPIP Articles of Association, as Judge Robinson ably pointed out in his dissent below. *Maes*, 2006-NMCA-021, ¶¶ 33-38 (Robinson, J., dissenting). As he explained:

> The NMPIP [Articles of Association Article VIII][2] provide indemnification to member insurers only as to their status as a member, or by reason of the insurer having personal representatives or employees serving on the governing committee, other committee or subcommittee, or officer or employee of the NMPIP.

Even the indemnification for officers and employees of the NMPIP is limited to actions taken in connection with the administration, management, conduct, or affairs of the Program or the Committee. Nowhere in the Articles or Bylaws is there a provision to provide indemnification to the member insurers for actions taken in their capacity as servicing [insurer]s. That failure to provide indemnification is consistent with the notion that the Program is not liable for the servicing

[1] We agree with the Court of Appeals that Audubon is not immune from Maes's suit as a result of its status as a Member Insurer of the NMPIP, *Maes*, 2006-NMCA-021, & 10, and thus only analyze Audubon's status as a Servicing Insurer of the NMPIP.

[2] NMPIP Articles of Association, Article VIII, http://www.nmprc.state.nm.us/insurance/pdf/nmfairplanarticlesofassoc.pdf.

[insurer]'s liability arising from the contracts it enters into with its insureds.

Id. ¶¶ 33-34 (Robinson, J., dissenting). In addition, the *indemnification* provision further supports a narrow reading of the *immunity* provision because indemnification would be wholly unnecessary if all parties and all actions were immune from suit pursuant to Section 59A-29-7.

{14} Therefore, where as here the Legislature has not specifically indicated an intent to immunize Servicing Insurers from suit, we will not presume one. We find unpersuasive the reasoning of the Court of Appeals that the immunity provision represents a legislative compromise wherein property owners who would otherwise be unable to obtain insurance are able to do so in exchange for being deprived of the right to sue their insurer for bad faith. *Id*. ¶ 22. The Legislature never indicated that, by virtue of obtaining insurance through the NMPIP, insureds would submit themselves to the unfettered whims of the Servicing Insurer. Adopting such a construction would render the FAIR Plan Act's application irrational by leading to the contradiction and injustice of holding some insurers to a good faith standard, while exempting others, merely because of the manner in which the insurance was obtained. Thus, with the legislative intent of the FAIR Plan Act as our polestar, we hold that Section 59A-29-7 does not apply to Audubon as a Servicing Insurer of the NMPIP. *See State v. Herrera*, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974).

C. Audubon Is Not an Agent of the NMPIP

{15} The immunity provision specifically immunizes "the association," i.e., the NMPIP, and "its agents." Section 59A-29-7. Having determined that Audubon is not immune as a Servicing Insurer of the NMPIP, the sole issue before us is whether Audubon is an agent of the NMPIP. We are unable to determine, based on the plain language alone, whether Audubon is an agent of the NMPIP for purposes of the immunity provision. Therefore, we must construe Section 59A-29-7, in the context of its legislative purpose and history, to determine whether Audubon is an agent of the NMPIP and thus immune from suit on that basis. *See In re Extradition of Martinez*, 2001-NMSC-009, ¶ 14, 130 N.M. 144, 20 P.3d 126; *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 411, 962 P.2d 1236, 1246 (citing *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 351-52, 871 P.2d 1352, 1357-58 (1994)).

{16} The Court of Appeals held that Audubon, as the Servicing Insurer of the NMPIP, is an agent of the NMPIP and, on that basis, is entitled to statutory immunity pursuant to Section 59A-29-7. *Maes*, 2006-NMCA-021, ¶¶ 11, 13. We decline to so hold. The Court of Appeals based this determination on the definition of "agent" contained in UJI 13-401 NMRA:

> An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation. The agreement may be oral or written.

The Court of Appeals reasoned that because "Audubon has an agreement with the FAIR Plan to service the policies underwritten by the Plan, and Audubon is paid a fee for doing so[,] . . . Audubon is an agent of the FAIR Plan because it both 'manages some affair' and 'does some service for' the Plan." *Maes*, 2006-NMCA-021, ¶ 11. Audubon urges us to adopt the agency analysis of the Court of Appeals and, on that basis, hold it immune from Maes's suit.

{17} The parties agree on this definition of "agent," but we are not persuaded that it provides the full picture of the nature and formation of the agency relationship for all purposes. The common law emphasizes the fiduciary nature of the agency relationship, which does not arise until "one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the

principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006). While Audubon and the NMPIP agreed that Audubon, as the Servicing Insurer of the NMPIP, would issue policies to persons referred by the NMPIP, and in return the NMPIP would reinsure all such policies and provide reimbursement for Audubon's related costs and expenses, this agreement does not evince the control necessary to form or constitute an agency relationship.

{18} Audubon attempts to demonstrate that the NMPIP has "ultimate control . . . over the decisions and actions of its Servicing Insurer" by focusing our attention on Sections VIII and IX of the NMPIP Bylaws. Section VIII grants the NMPIP control over cancelling policies issued pursuant to the FAIR Plan Act. NMPIP Bylaws, § VIII, at 4-6. Section IX provides for an appeal by "[a]ny applicant for insurance and any person insured under the Plan or any affected Insurer [to] appeal to the Governing Committee within fifteen (15) days after any final ruling, action or decision of the Program." *Id*. § IX, at 6. Audubon would have us read this provision as demonstrating that

> any ruling, action or decision affecting a person 'insured under the Plan' is a ruling, action or decision of the Program. . . . [and as] further demonstrat[ing] that the ruling, action, or decision of the Program (in this case through its agent the Servicing Insurer), is subject to review by the Governing Committee of the NMPIP.

{19} Audubon misconstrues the NMPIP Bylaws in urging us to find the requisite control. These provisions, taken together, do not demonstrate that "anything and everything done in relation to a policy of insurance issued under the FAIR Plan Act, is done by the NMPIP, or by the Servicing Insurer subject to the review and authority of NMPIP," as Audubon contends. The reasonable construction of these provisions, read in the context of the Bylaws as a whole, is that the NMPIP has control over certain aspects of the FAIR Plan insurance policies, e.g., whether property is eligible for insurance under the FAIR Plan, *Id*. § IV.1, at 3, and whether to cancel a policy issued under the FAIR Plan, *id*. § VIII, at 4-6, and that the NMPIP Governing Committee has authority over administration and budgeting of the FAIR Plan, *id*. § XII.6-7, at 8. The Bylaws also make specific provision for the types of relationships into which the NMPIP Governing Committee may enter:

> The Governing Committee shall be empowered to contract with Servicing Insurers and provide reimbursement for all costs and expenses incurred by such Servicing Insurers; to appoint or otherwise contract for the services of a manager, employees or independent contractors which are reasonably necessary to carry on the business of the Program and Plan.

Id. § XII.6, at 8. However, the reasonable reading of these provisions, and the reading which we adopt, is that the requisite control does not exist nor does any textual basis from which we can imply a principal-agent relationship between the NMPIP and Audubon.

{20} We find guidance in the analogous reasoning applied to cases construing the immunity available under the Tort Claims Act. In one such case, our Court of Appeals determined that a community mental health facility was not an agent of the state for purposes of the Tort Claims Act and thus was not immune from suit. *Armijo v. Dept. of Health and Env't*, 108 N.M. 616, 775 P.2d 1333 (Ct. App. 1989). The Court of Appeals came to this conclusion despite an extensive state regulatory scheme to which Border Area, the mental health facility, was subject, including "safety, building standards, client eligibility, and extensive requirements of case documentation." *Id*. at 618, 775 P.2d at 1335. However, "[t]he actual clinical decisions about which plaintiff complain[ed], as well as who w[ould] make those decisions, were reserved by [sic] Border Area." *Id*. The Court of Appeals found it "clear that [the Health and Environment Department] did not regulate what [wa]s alleged to have caused plaintiff's injuries" because, among other reasons, "the type of regulation at issue in this case d[id] not give the state the

right to control the *details* of the work of Border Area." *Id*. (emphasis added). In reaching this conclusion, the Court of Appeals found persuasive *United States v. Orleans*, 425 U.S. 807 (1976), in which the United States Supreme Court "distinguished actions taken to insure [sic] compliance with the voluminous regulations from the actual supervision of the day-to-day affairs of the [community action] program, and held that the program was not an agency of the United States" for purposes of the Federal Tort Claims Act. *Armijo*, 108 N.M. at 620, 775 P.2d at 1337.

{21} Indeed, we similarly held in *Cole v. City of Las Cruces* that notwithstanding the agreement between the City of Las Cruces and the Rio Grande Natural Gas Association which provided that "the City shall have the right to supervise, direct and control the employees of the Association" and that "the City was 'to solely operate and maintain the Association's system,'" the Association was not an agent or instrumentality of the City for purposes of the Tort Claims Act and thus was not immune from suit. 99 N.M. 302, 305, 657 P.2d 629, 632 (1983).

{22} The NMPIP indeed regulates Audubon, as its Servicing Insurer, much like the Department of Health and Environment regulated Border Area and the City of Las Cruces regulated the Rio Grande Natural Gas Association. Notwithstanding this regulation, we hold that the NMPIP does not have the requisite control over Audubon needed to establish a principal-agent relationship, just as Border Area was not an agent of the Department of Health and Environment, and the Rio Grande Natural Gas Association was not an agent of the City of Las Cruces. The decisions of which Maes complains, i.e., whether or not to pay her claim, were reserved to Audubon, not to the NMPIP, in the same way as the decisions at issue in *Armijo* and *Cole* were reserved to Border Area and the Rio Grande Natural Gas Association, respectively.

{23} Any other interpretation under the facts of this case would strain the reasonable bounds of the definition of the agency relationship. Audubon, as an insurer writing essential property insurance in the State of New Mexico, is required by law to be a member of the New Mexico FAIR Plan and the NMPIP and is so. *See §* 59A-29-3. However, if we adopt the agency analysis of the Court of Appeals and that urged by Audubon, we overlook the more critical relationship between NMPIP and Audubon, which represents the paradigmatic reinsurance relationship. The Court of Appeals may have been led to its conclusion by its misconstrual of the reinsurance relationship, which it characterized as follows: "[O]nce claims have been approved, the money paid to insureds comes from the Plan itself. Thus, the Plan completely 'reinsures' all policies issued by the servicing insurer, and the servicing insurer acts in an essentially administrative capacity, bearing no actual risk." *Maes*, 2006-NMCA-021, ¶ 4.

{24} While the NMPIP reinsures Audubon, the original or ceding insurer, Audubon remains in privity with Maes, the insured. *See* Holmes & Sutin, *supra*, §§ 102.1, 106.7. Therefore, the fact that the NMPIP reinsures Audubon provides "no direct benefit to the insured," i.e., Maes. *See id*. § 102.1 (quoting *Epland v. Meade Ins. Agency Assoc.*, 564 N.W.2d 203, 205 n.1 (Minn. 1997)). As the reinsurer, the NMPIP protects Audubon, the reinsured, from the risks it undertakes with respect to insuring Maes, but Maes, the original insured, has no interest in the reinsurance relationship between the NMPIP and Audubon. *See id*.

{25} Therefore, the reinsurer, the NMPIP, has a relationship only with Audubon, not with Maes. Maes's relationship with Audubon is not affected by the NMPIP's reinsurance relationship with Audubon, which further reinforces our conclusion that Audubon is not an agent of the NMPIP, and the FAIR Plan Act's immunity provision does not apply to Audubon as such. In the same way that privity does not run between the reinsurer and the insured, likewise no principal-agent relationship exists between the reinsurer and the original insurer. As one commentator explains:

> It has been urged . . . that an agency relationship exists between the insurer and its reinsurer, with the reinsurer being the principal directly responsible for the acts or omissions of the insolvent insurer. . . . However, since

> the right of a principal to control the behavior of an agent is an essential element of an agency relationship, courts are unwilling to bind a reinsurer for the acts of the reinsured company unless it is clear from the reinsurance agreement that the reinsurer has control over the relationship that the original insurer has with its policyholders.

Holmes & Sutin, *supra*, § 106.7; *accord* § 59A-7-11(G). No such control exists here. Therefore, Audubon, the original insurer, is not the agent of the NMPIP, the reinsurer, for the purposes of negotiating and settling claims. *Cf*. Holmes & Sutin, *supra*, § 106.7 (noting that "[e]ven when a reinsurer has become actively involved in settlement negotiations between reinsured insurer and its policyholders, courts have refused to find liability under an agency or joint enterprise theory"). The fiduciary relationship runs between Maes and Audubon, as her direct insurer, and that relationship does not change, as amicus New Mexico Property and Casualty Insurance Guaranty Association contends, merely because the policy was issued under the auspices of the FAIR Plan.

IV. CONCLUSION

{26} Based on the foregoing analysis, we hold that the FAIR Plan Act's immunity provision, Section 59A-29-7, does not apply to Audubon as a Servicing Insurer of the NMPIP. We further hold that Audubon, as a Servicing Insurer of the NMPIP, is not an agent of the NMPIP and, accordingly, is not immune from Maes's suit on that basis. Having held that the FAIR Plan Act's immunity provision does not apply to Audubon as Servicing Insurer nor as an agent of the NMPIP, we do not separately address whether Audubon's actions were "in the performance of . . . powers and duties under the FAIR Plan Act." *See* § 59A-29-7. Accordingly, we reverse the Court of Appeals and remand to the district court.

{27} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2008-NMSC-001

Filing Date: December 3, 2007

Docket No. 30,567

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

ELIAS CHAVEZ,

Defendant-Appellee.

Interlocutory Appeal from the District Court of Valencia County
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OPINION

SERNA, Justice.

{1} Elias Chavez (Defendant) was indicted on various charges. The question of his competency to stand trial was raised, and he was found incompetent by stipulation of the parties. He was ordered committed to State custody for treatment to competency. Approximately nine months later, the State moved to criminally commit Defendant for the period of time equal to the maximum sentence for the offenses with which he is charged. Pursuant to statute, the district court held a hearing to redetermine Defendant's competency to stand trial. The district court eventually entered an order finding that Defendant was competent by a preponderance of the evidence standard but not by a clear and convincing evidence standard. The district court noted uncertainty with respect to the state of the law regarding the requisite standard of proof for a redetermination of competency because the pertinent case law had been decided under predecessor provisions to the current statute governing competency proceedings, the New Mexico Mental Illness and Competency Code ("NMMIC"), NMSA 1978, §§ 31-9-1 to -1.5 (1988, as amended through 1999). The district court found Defendant incompetent to stand trial and suggested immediate interlocutory appeal to answer this "controlling question of law as to which there is substantial ground for difference of opinion." The State appealed.

{2} For the reasons that follow, we reaffirm the continued viability, under the NMMIC, of the longstanding rule, established by our case law, that upon a redetermination of competency, the State must prove the defendant's competency by a preponderance of the evidence. Accordingly, we reverse the district court and remand for proceedings in accordance with this Opinion.

I. FACTS AND COURSE OF PROCEEDINGS

{3} On April 9, 2003, Defendant was indicted by the Grand Jury of Valencia County on two open counts of murder, alternatively charged as felony murder; attempted first degree murder; aggravated stalking; two counts of child abuse; and tampering with evidence. On January 28, 2004, defense counsel filed a motion to determine Defendant's competency. On February 18, 2004, by stipulation of the parties, the district court entered an order finding that Defendant

was not presently competent to stand trial and that he was dangerous, as defined in Section 31-9-1.2(D), for purposes of treatment to competency. Accordingly, Defendant was committed to the forensic division of the Las Vegas Medical Center ("LVMC") for treatment to attain competency to stand trial, not to exceed nine months. The court further required the LVMC to report on Defendant's amenability and progress toward competency. *See* § 31-9-1.2. In addition, the court ordered a hearing to review Defendant's competency within ninety days of entry of the order, known as a Section 1.3 hearing, which the defendant may waive. *See* § 31-9-1.3.

{4} On June 30, 2004, approximately four and one-half months after Defendant was committed to the LVMC, he entered a motion to waive the Section 1.3 hearing, based on the LVMC's determination that he was still incompetent. Defendant's motion noted that, pursuant to Section 31-9-1.3(D), he could remain committed to the LVMC for up to nine months from the original determination of incompetency to continue treatment to competency. The court granted Defendant's motion to vacate the Section 1.3 hearing, noting that a hearing would be set, pursuant to Section 31-9-1.5, upon receipt of the final, nine-month report from the LVMC.

{5} On December 14, 2004, the State entered a motion to criminally commit Defendant for the period of time equal to the maximum sentence for the offenses with which he is charged. *See* § 31-9-1.5. In order to criminally commit a defendant, Section 31-9-1.5 requires the State to prove by clear and convincing evidence that the defendant committed the crimes charged. The court held an evidentiary hearing, pursuant to Section 31-9-1.5, on April 14, 2005, for the purpose of determining Defendan's competency to stand trial. The court heard testimony from a forensic neuropsychologist, a clinical psychologist, a clinical neurologist, and an LVMC contract employee, who evaluated Defendant's competency as part of her employment at the LVMC. Based on the evidence presented during the hearing and the court's observations of Defendant during the hearing, the court found Defendant competent by a preponderance of the evidence, observing that it could not make this finding under a clear and convincing evidence standard.

{6} On May 26, 2005, Defendant filed a motion to reconsider the district court's finding of competency, arguing that the State must prove by clear and convincing evidence that Defendant is competent to stand trial. Defendant argued that the clear and convincing standard is required by *State v. Rotherham*, 122 N.M. 246, 923 P.2d 1131 (1996). On August 9, 2005, the State filed an opposition to Defendant's motion and filed proposed findings of fact and conclusions of law. The State contended in part that *State v. Santillanes*, 91 N.M. 721, 580 P.2d 489 (Ct. App. 1978), forecloses Defendant's argument regarding the standard of proof because therein the Court of Appeals "expressly rejected the argument that the State should be held to any higher burden of proof." Moreover, the State contended that *Rotherham* is inapplicable to the instant case, as it dealt with "the constitutionality of that portion of Sec. 31-9-1.5 which pertains to lifelong commitment to a mental institution" and "did not . . . address the burden of proof for finding competency, rather . . . the burden of proof for committing a defendant after finding that he could not be treated to competency."

{7} The court held a hearing on the motion on November 28, 2005, during which defense counsel "agreed that the evidence supports the finding, by a preponderance of the evidence, that the defendant is competent to stand trial, but argue[d] that, after a defendant has been found incompetent, a clear and convincing standard applies to the re-determination of competency." The court affirmed its factual finding that "by a preponderance of the evidence, . . . the defendant is now competent to stand trial, but the evidence of competency is not clear and convincing." The court then reconsidered its earlier determination of the proper standard of proof and stated, "*Santillanes* . . . held that, once the court has made a finding of incompetence, the standard of proof for finding that defendant has been treated to competence is a preponderance of the evidence." The court noted Defendant's argument "that the

legislature repealed and reenacted the statutes pertaining to competency and criminal commitment in 1988 and that *Santillanes* was decided prior to the enactment of the current [NMMIC]." The court further stated that "*Rotherham* . . . which was decided subsequently to the statutory revisions, held that a clear and convincing standard applies to proceedings for criminal commitment after a finding that the defendant cannot be treated to competency." The court went on to state that "[t]here has been no decision following the 1988 revisions to [the NMMIC], which squarely addresses the standard which the court is to apply in finding that the defendant has been treated to competency." Noting that "[t]he standard in finding that the defendant has been treated to competency involves a controlling question of law as to which there is substantial ground for difference of opinion," the court ordered that "the Defendant is hereby found to be incompetent to stand trial, and that [a]n immediate appea[l] from this Order will materially advance the termination of this case.

{8} The Court of Appeals granted the State's application for interlocutory appeal and assigned the case to the general calendar. The case was transferred to this Court from the Court of Appeals pursuant to *State v. Smallwood*, in which we held that this Court has exclusive jurisdiction over interlocutory appeals in a criminal case "where a sentence of life imprisonment or death *could be* imposed." 2007-NMSC-005, ¶ 10, 141 N.M. 178, 152 P.3d 821. We granted the application for interlocutory appeal on July 31, 2007.

II. DISCUSSION

{9} The sole issue before us is the proper standard of proof for a redetermination of competency, following a prior determination that a defendant is incompetent to stand trial. This is a question of law, involving interpretation of the New Mexico Mental Illness and Competency Code, §§ 31-9-1 to -1.5, which we review de novo. *State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

{10} The NMMIC is the statutory framework which presently governs competency and commitment proceedings in New Mexico. However, prior to the NMMIC, similar, but much less detailed, statutory provisions were in place, under which the pertinent case law was decided. To wit, in 1967, the Legislature enacted a new statute, NMSA 1953, § 41-13-3.1 (1967), providing for the determination and redetermination of competency. 1967 N.M. Laws, ch. 231, § 2. In 1972, Section 41-13-3.1 was amended. 1972 N.M. Laws, ch. 71, § 15. Section 41-13-3.1 was renumbered to Section 31-9-1 in the 1978 recompilation, but remained materially consistent until 1988, when it was repealed. 1988 N.M. Laws, ch. 108, § 1. It read as follows:

> Whenever it appears, by motion or upon the courts own motion, at any stage of a criminal proceeding that there is a question as to the mental competency of a defendant to stand trial, any further proceeding in the cause shall be suspended until the court, without a jury, determines this issue. If the question is raised in a court other than the district court, the proceeding shall be suspended and the cause transferred to the district court. When the determination is made that a defendant does not have mental capacity to stand trial, the court shall further determine whether the defendant should be committed in accordance with the provisions of law governing proceedings for the involuntary hospitalization of the mentally ill. Defendants so committed shall be treated as other patients committed involuntarily except that they may not be released from custody without an order of the court. Defendants determined to be incompetent under this section shall have the question of their mental capacity to stand trial redetermined by the court whenever the medical authorities of the institution to which the defendant was committed or any medical authority appointed by the court, report to the court that, in their opinion, the defendant is mentally competent to stand trial.

NMSA 1978, § 31-9-1 (1967, as amended through 1972) (repealed 1988 N.M. Laws, ch. 108, § 1).[1]

{11} As the plain language reveals, the Legislature did not address or define the appropriate standard of proof for the initial determination of competency or for the redetermination of competency, the issue we confront herein. However, our case law, decided under these provisions, has established clear rules for both situations. With respect to the initial determination of competency, it is well established that the defendant in a criminal case bears the initial burden of proving his or her incompetence by a preponderance of the evidence standard. *State v. Chapman*, 104 N.M. 324, 327, 721 P.2d 392, 395 (1986); *State v. Armstrong*, 82 N.M. 358, 359, 482 P.2d 61, 62 (1971) (citing *State v. Garcia*, 80 N.M. 466, 457 P.2d 985 (1969)); *State v. Ortega*, 77 N.M. 7, 19, 419 P.2d 219, 228 (1966) (citing *In re Smith*, 25 N.M. 48, 176 P. 819 (1918)); *State v. Sena*, 92 N.M. 676, 679, 594 P.2d 336, 339 (Ct. App. 1979). It has also been long held that, once there is a finding of incompetence, the burden shifts to the State on the redetermination of competency "to overcome a presumption of incompetency by *a preponderance of the evidence*." *State v. Chapman*, 101 N.M. 478, 479, 684 P.2d 1143, 1144 (1984) [hereinafter *Chapman I*] (citing *Santillanes*, 91 N.M. 721, 580 P.2d 489) (emphasis added); *see also State v. Baca*, 95 N.M. 205, 206, 619 P.2d 1249, 1250 (Ct. App. 1980) (agreeing "that the quantum of proof required in redetermining competency is 'preponderance of the evidence'") (citing *Santillanes*, 91 N.M. 721, 580 P.2d 489).

{12} The Court of Appeals set forth this rule in the 1978 case of *State v. Santillanes*, addressing the same issue we confront in the instant case, however under the predecessor to the NMMIC. 91 N.M. at 723, 580 P.2d at 491. The Court of Appeals framed the issue as whether the redetermination of competency puts the State to a higher burden of proof than the initial burden on the defendant to prove incompetency. *Id*. The Court answered in the negative, stating, "The proof required for incompetency has consistently been held to be proof by a preponderance of the evidence. This same quantum of proof applies to a redetermination of competency." *Id*. (internal citations omitted). We addressed the issue in 1984 in *Chapman I*, wherein we cited *Santillanes* approvingly, in stating that "[t]he competency of an accused must be proven by *a preponderance of the evidence* rather than beyond a reasonable doubt." 101 N.M. at 479, 684 P.2d at 1144 (emphasis added).

{13} Despite these long-established rules, the district court in the instant case was uncertain of the appropriate standard of proof to be applied to the redetermination of Defendant's competency because, as it stated, "[t]here has been no decision following the 1988 revisions to [the NMMIC], which squarely addresses the standard which the court is to apply in finding that the defendant has been treated to competency." Defendant relied in the district court on *State v. Rotherham*, 122 N.M. 246, 923 P.2d 1131, for his contention that, upon the redetermination of competency, the State must prove his competency by clear and convincing evidence. The district court also relied on *Rotherham* in its determination that Defendant was incompetent to stand trial because his competency could not be established by clear and convincing evidence.

[1] The original 1967 version of Section 41-13-3.1 is not materially different from the amended 1972 version; however, we include the text herein for ease of comparison:

Whenever it appears, by motion or upon the court's own motion, at any stage of a criminal proceeding that there is a question as to the mental competency of a defendant to stand trial, any further proceeding in the cause shall be suspended until the court, without a jury, determines this issue. If the question is raised in a court other than the district court, the proceeding shall be suspended and the cause transferred to the district court. When the determination is made that a defendant does not have mental capacity to stand trial, the court shall commit him to the New Mexico state hospital until such time as the court finds him to have mental capacity to stand trial. Defendants committed under this section shall be treated as other patients committed involuntarily to the New Mexico state hospital except that they may not be released from custody without an order of the court. Defendants committed under this section shall have the question of their mental capacity to stand trial redetermined by the court whenever the medical authorities of the New Mexico state hospital or any medical authority appointed by the court, report to the court that, in their opinion, the defendant . . . [is] mentally competent to stand trial.

NMSA 1953, § 41-13-3.1 (1967) (repealed 1988 N.M. Laws, ch. 108, § 1).

However, due to its uncertainty regarding the appropriate standard, the district court suggested immediate interlocutory review on the issue.

{14} We conclude that *Rotherham* is inapposite to our resolution of the issue presented in the instant case and that *Santillanes* and *Chapman I* foreclose Defendant's argument. *Rotherham* addressed not the standard of proof for determination or redetermination of competency, but rather the constitutionality of the NMMIC, which we upheld. 122 N.M. at 249, 923 P.2d at 1134. Defendant and the district court seized upon our discussion in *Rotherham* regarding the appellants' argument "that a defendant's right to procedural due process is violated because criminal commitment under Section 31-9-1.5 requires only clear and convincing evidence rather than proof beyond a reasonable doubt." *Id*. at 261, 923 P.2d at 1146. However, we agree with the State that *Rotherham* did not address the determination or redetermination of competency and "cannot be interpreted as modifying or altering the standard of proof established in *Chapman* [*I*], *Santillanes*, and *Baca* for a redetermination of competency and in even more numerous cases for an initial competency determination." In *Rotherham*, our discussion of the procedural due process issue centered solely upon the standard of proof for the commission of the crime charged for purposes of criminal commitment. *Id*. at 261-63, 923 P.2d at 1146-48. We ultimately upheld the clear and convincing evidence standard for the criminal commitment determination, concluding that it "strikes a fair balance" in the limited context of Section 31-9-1.5. *Id*. at 263, 923 P.2d at 1148. The issues in *Rotherham* did not implicate, nor did we make any reference to, the well-established standard of proof for the determination or redetermination of competency. Accordingly, *Rotherham* did not affect those rules, and the district court erred in applying a clear and convincing standard in the instant case.

{15} Although the district court was correct that the issue has not been squarely addressed since enactment of the NMMIC, the case law decided under the predecessor provisions remains good law because the NMMIC is consistent with its predecessors in that it neither addresses nor defines the appropriate standard of proof for the determination or redetermination of competency. Thus, enactment of the NMMIC did not affect, much less abrogate, the pertinent case law. This is so because the Legislature had a specific purpose in enacting the NMMIC. *See* 1988 N.M. Laws, ch. 108, § 1. And our goal in interpreting and applying statutes is to determine and effectuate the Legislature's intent, the plain language of the statute guiding our analysis. *V.P. Clarence Co. v. Colgate*, 115 N.M. 471, 473, 853 P.2d 722, 724 (1993). Indeed, as we noted in *Rotherham*, the Legislature enacted the NMMIC in response to *Jackson v. Indiana*, 406 U.S. 715 (1972), in which the United States Supreme Court held that "indefinite commitment of a person, for reasons based solely on his incompetence to stand trial, violates the Fourteenth Amendment guarantee of due process and equal protection." *Rotherham*, 122 N.M. at 252-53, 923 P.2d at 1137-38 (citing *Jackson*, 406 U.S. at 731). Thus, the Supreme Court concluded, "'[w]ithout a finding of dangerousness, one committed . . . can be held only for a "reasonable period of time" necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future.'" *Id*. at 253, 923 P.2d at 1138 (quoting *Jackson*, 406 U.S. at 733). Accordingly, the Legislature "revised [New Mexico's] statutes governing the *confinement and treatment of persons found to be incompetent* to stand trial." *Id*. (emphasis added). The Legislature remained silent on the appropriate standards of proof for determination or redetermination of competency, which we have already concluded were not at issue in *Rotherham*.

{16} Comparing the NMMIC with its predecessor provisions, it is evident that the guiding tenets of the predecessor provisions continue to create the foundation for the NMMIC. However, in order to avoid the constitutional infirmities identified by the United States Supreme Court in the Indiana law challenged in *Jackson*, the Legislature fleshed out and filled in concrete procedures and timelines to the skeletal framework it originally established in 1967 and which remained in effect through enactment of the NMMIC in 1988.

{17} The first of those tenets, reflected in the first two sentences of the predecessor provisions, is that upon raising the issue of the defendant's competency, criminal proceedings are suspended until the issue is determined, and the cause is transferred to district court, if the issue is raised in a different court. Section 31-9-1 of the NMMIC virtually mirrors the predecessor provisions in that regard. The NMMIC then adds that a psychologist or psychiatrist must professionally evaluate the defendant's competency, and the district court must hold a hearing on the issue. Section 31-9-1.1.

{18} The second tenet, reflected in the third and fourth sentences of the predecessor provisions, regards situations in which a defendant is determined to be incompetent and whether he or she should be committed for treatment to competency. Section 31-9-1.2 of the NMMIC fills in the details. If the court determines that the defendant is not competent, it must then determine whether or not he or she is dangerous, as defined by statute. If, as in the instant case, the court finds that the defendant is dangerous, "the district court may commit the defendant as provided in this section for treatment to attain competency to proceed in a criminal case." Section 31-9-1.2(B). Like its predecessors, Section 31-9-1.2(B)(2) provides that once committed, the defendant cannot be released without a court order.

{19} The final tenet, reflected in the fifth sentence of the predecessor provisions, provides for the redetermination of a defendant's competency, following an initial determination of incompetency which results in the defendant's commitment. In enacting the NMMIC, the Legislature provided a series of detailed procedures and timelines to flesh out this tenet, presumably because the predecessor provisions could have been read to allow for indefinite confinement based solely on a defendant's incompetence to stand trial, the very constitutional infirmity the United States Supreme Court identified in *Jackson*. *See Rotherham*, 122 N.M. at 252-53, 923 P.2d at 1137-38 (citing *Jackson*, 406 U.S. at 731). Thus, the NMMIC provides that within ninety days of entering an order to commit an incompetent defendant to treatment, the district court, without a jury, must conduct a hearing to determine whether the defendant is competent to proceed and, if not, whether the defendant is making progress toward attaining competency, and whether the defendant remains dangerous as defined by statute. Section 31-9-1.3(A). If the district court finds that the defendant is competent, the case is set for trial, although the defendant may continue to receive treatment, if necessary. Section 31-9-1.3(C). On the other hand, "[i]f the district court finds that the defendant is still not competent to proceed in a criminal case but that he is making progress toward attaining competency, the district court may continue or modify its original treatment order," subject to review no later than nine months from the original determination of incompetency. Section 31-9-1.3(D). The defendant may waive this hearing. Section 31-9-1.3(A).

{20} Furthering the purpose of avoiding the problems identified in *Jackson*, the NMMIC also provides for situations in which a defendant does not attain competency. *See* §§ 31-9-1.3(E), 31-9-1.4, 31-9-1.5. In such cases, the court may criminally commit the defendant, pursuant to Sections 31-9-1.4(A) and 31-9-1.5; release the defendant and dismiss the charges with prejudice, pursuant to Section 31-9-1.4(B); or dismiss the charges without prejudice for the purpose of civil commitment, pursuant to Section 31-9-1.4(C). Section 31-9-1.5 sets forth detailed procedures for criminal commitment. The district court must hold a hearing, without a jury, to determine the sufficiency of the evidence against the defendant with respect to each of the crimes charged, if they are felonies involving *inter alia* the infliction of great bodily harm or the use of a firearm. Section 31-9-1.5(A). The State and the defendant may introduce evidence relevant to the question of the defendant's guilt, *id*., and the court must find clear and convincing evidence that the defendant committed such a felony, Section 31-9-1.5(B), (D). If the court finds by clear and convincing evidence that the defendant committed such a felony and that the defendant remains incompetent and dangerous, the defendant remains detained by the Department of Health in a secured, locked facility, until he attains competency or is no longer dangerous, or the maximum sentence to which he

would have been subject had he been convicted expires. Section 31-9-1.5(D). Once committed, the district court must monitor the defendant, conducting a hearing on the issues of the defendant's competency and dangerousness at least every two years. Section 31-9-1.5(D)(4).

{21} Our comparison of the NMMIC to its predecessor provisions demonstrates that the NMMIC did not effect a complete sea change with regard to competency proceedings and policy and, indeed, made no changes with respect to the standards of proof applicable to the determination or redetermination of competency. In fact, the NMMIC assigns a standard of proof, clear and convincing evidence, *only* for the issue of whether the defendant committed a crime for purposes of a criminal commitment. *See* § 31-9-1.5. The Legislature's continuing silence on the issue we confront herein is further evidence that it was both aware of and approved of the existing case law which long ago established the appropriate standards of proof for the initial determination as well as the redetermination of competency—*a preponderance of the evidence*. This Court presumes that the Legislature is aware of existing case law and acts with knowledge of it. *See Sims v. Sims*, 1996-NMSC-078, ¶ 24, 122 N.M. 618, 930 P.2d 153 ("[W]e presume the legislature was well informed about the existing common law before the statute was enacted and did not intend to enact a statute that conflicted with the common law."); *Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003, ¶ 21, 121 N.M. 205, 910 P.2d 281 ("[W]e presume that the legislature was aware of existing statutory and common law and did not intend to enact a law inconsistent with existing law."). If the Legislature had intended to modify or clarify those rules, it would have done so expressly, as it did in assigning the clear and convincing evidence standard to criminal commitment proceedings. In the absence of such legislative expression, this Court will not presume it. *See Sims*, 1996-NMSC-078, ¶ 22 ("[N]o innovation upon the common law that is not clearly expressed by the legislature will be presumed."). Therefore, the rule remains that the defendant initially bears the burden of proving by a preponderance of the evidence that he is incompetent to stand trial, whereupon the burden shifts to the State to prove by the same standard, *a preponderance of the evidence*, that the defendant is competent to stand trial.

{22} Having concluded that the issue herein appealed can be resolved on the basis of existing precedent, we decline to address Defendant's due process argument, which we find unavailing, other than to agree with the State that "[b]ecause New Mexico provides greater protection to defendants by imposing the burden of proof on the State, it is without question that New Mexico's procedure is consistent with the Fourteenth Amendment."

III. CONCLUSION

{23} Based on the foregoing analysis, we reaffirm the longstanding rule, established by our case law, that a criminal defendant initially bears the burden of proving by a preponderance of the evidence that he or she is incompetent to stand trial, whereupon the burden shifts to the State to prove by the same standard, *a preponderance of the evidence*, that the defendant is competent to stand trial. Accordingly, we reverse the district court's finding that Defendant is not competent to stand trial because the court did not apply the appropriate standard of proof in determining Defendant's competency to stand trial. We, therefore, remand for proceedings in accordance with this Opinion.

{24} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

RICHARD E. RANSOM
(Pro Tem)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2008-NMSC-011

Filing Date: January 16, 2008

Docket No. 30,035

LIN R. BLANCETT, et al.,

Plaintiffs-Respondents,

v.

DIAL OIL COMPANY, et al.,

Defendants-Petitioners.

Original Proceeding on Certiorari
James A. Hall, District Judge

Rodey, Dickason, Sloan, Akin & Robb, P.A.
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for Respondents.

OPINION

SERNA, Justice.

{1} In this case, we decide whether a domestic corporation resides in a county for venue purposes solely because its registered agent for service of process resides in that county. Resolution of the issue requires us to interpret the meaning of "resides" as it occurs in Section 38-3-1(A) of our venue statute, 1978 NMSA, Section 38-3-1 (1875-76, as amended through 1988). Based on the plain language of Section 38-3-1(A), we hold that a domestic corporation does not reside in a county solely because its registered agent resides therein.

I. BACKGROUND

{2} The Blancetts (Plaintiffs), residents of San Juan County, filed this action in Santa Fe County against Ron Dial, Dick Dial, Sue Dial, and the Dial Oil Company (Defendants), seeking to recover damages allegedly caused by their actions in San Juan County.[1] Plaintiffs based venue in Santa Fe County on the ground that the Dial Oil Company (Dial Oil), a domestic corporation, had a registered agent residing in Santa Fe County. In response, Defendants filed a motion to dismiss Plaintiffs' case for improper venue, arguing that San Juan County was the proper venue because the parties resided there and the underlying incident had occurred there. Defendants asserted that Dial Oil's principal place of business, rather than the residence of its registered agent, established its residence for venue purposes.

{3} The district court denied the motion to dismiss. Noting that the case presented an "interesting issue" and "close question," which was both dispositive and undecided by New Mexico's appellate courts, the district court granted leave to seek interlocutory appeal. The Court of Appeals denied Defendants' application for interlocutory appeal, and we granted certiorari, *Blancett v. Dial Oil Co.*, 2006-NMCERT-010, 140 N.M. 675, 146 P.3d 810, to determine whether a domestic corporation resides in a county for venue purposes solely by virtue of its registered agent for service of process residing in that county. Holding that a domestic corporation does not reside in a county simply because its registered

[1] Plaintiffs also named Conoco/Phillips, Inc. and Federated Insurance Co. as co-defendants in their initial complaint. Neither Conoco/Phillips nor Federated Insurance is involved in the instant appeal.

agent resides therein, we reverse the district court's denial of Defendants' motion to dismiss.

II. DISCUSSION

{4} "A motion to dismiss for improper venue based on the meaning of the venue statute involves questions of law, which we review de novo." *Baker v. BP Am. Prod. Co.*, 2005-NMSC-011, ¶ 6, 137 N.M. 334, 110 P.3d 1071.

{5} Plaintiffs initiating an action in New Mexico must look to the venue statute to determine the proper county in which to bring their suit. Section 38-3-1. Our "venue statute is expansive and provides plaintiffs with broad discretion in choosing where to bring an action." *Baker*, 2005-NMSC-011, ¶ 6. Nonetheless, plaintiffs do not enjoy an unfettered right to bring an action wherever they please. *See* § 38-3-1 (limiting choice of venue). Instead, their choice of forum is limited by our venue rules, which "reflect an attempt to balance the common-law right of a defendant to be sued in [the] most convenient forum (usually the county of [defendant's] residence) with the right of the plaintiff to choose the forum in which to sue." *Team Bank v. Meridian Oil Inc.*, 118 N.M. 147, 150, 879 P.2d 779, 782 (1994).

{6} New Mexico case law has long recognized that, for venue purposes, a domestic corporation resides at the location of its principal place of business. *See Sunwest Bank of Albuquerque, N.M. v. Nelson*, 1998-NMSC-012, ¶ 17, 125 N.M. 170, 958 P.2d 740 (treating national banking association as domestic corporation and concluding that venue was proper where it had its principal place of business); *First Fin. Trust Co. v. Scott*, 1996-NMSC-065, ¶ 4, 122 N.M. 572, 929 P.2d 263 (concluding that venue was proper where domestic corporation had its principal place of business); *Rito Cebolla Invs., Ltd. v. Golden West Land Corp.*, 94 N.M. 121, 123, 607 P.2d 659, 661 (Ct. App. 1980) (deeming plaintiff and defendant domestic corporations to reside at principal place of business). "[W]hen a defendant resides in New Mexico, the plaintiff's right to choose the forum in which to sue is limited by Section 38-3-1(A) to those forums that the Legislature has determined will not unduly inconvenience the defendant." *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 18, 132 N.M. 382, 49 P.3d 61. Section 38-3-1(A) reads:

> First, except as provided in Subsection F of this section relating to foreign corporations, all transitory actions shall be brought in the county where either the plaintiff or defendant, or any one of them in case there is more than one of either, resides; or second, 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; or third, in any county in which the defendant or either of them may be found in the judicial district where the defendant resides.

{7} The parties agree that Dial Oil resides in San Juan County because its principal place of business is located there, and it is undisputed that Defendants are each San Juan County residents. The dispute in the instant case centers on whether Dial Oil also resides in Santa Fe County because its registered agent resides therein. Defendants argue that venue is not proper in Santa Fe County because Section 38-3-1(A) does not expressly place venue at the residence of a domestic corporation's registered agent. They rely on Section 38-3-1(F) to make their point. It reads:

> Suits may be brought against transient persons or non-residents in any county of this state, except that suits against foreign corporations admitted to do business and which designate and maintain a statutory agent in this state upon whom service of process may be had shall only be brought in the county where the plaintiff, or any one of them in case there is more than one, resides 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 or *in the county where the statutory agent designated by the foreign corporation resides*.

Section 38-3-1(F) (emphasis added). Defendants contend that the absence of equivalent language regarding statutory agents in Section 38-3-1(A) shows that the Legislature did not intend for a domestic corporation's registered agent to establish corporate residence for venue purposes. By contrast, Plaintiffs claim that the Legislature included language about statutory agents in Section 38-3-1(F) because so doing was necessary to limit the counties in which a foreign corporation with a statutory agent could be sued, whereas such language was unnecessary in Section 38-3-1(A) because the section limits venue to those counties in which a domestic corporation resides and the Legislature intended that a domestic corporation reside where its registered agent does.

{8} Our primary goal when interpreting a statute is to effectuate the Legislature's intent in enacting it. *Sunwest Bank*, 1998-NMSC-012, ¶ 14. The first step in discerning legislative intent is to examine the language used by the Legislature. *State v. Davis*, 2003-NMSC-022, & 6, 134 N.M. 172, 74 P.3d 1064. The Legislature's different treatment of domestic and foreign corporations in Section 38-3-1 answers the question presented in this case.

{9} Domestic corporations are New Mexico residents subject to suit where their principal place of business is located, *see Sunwest Bank*, 1998-NMSC-012, ¶ 17, and Section 38-3-1(A) is silent as to whether they may be sued where their registered agent resides. Foreign corporations are not New Mexico residents and, generally, are subject to suit in any county within the state. *See* Section 38-3-1(F). However, Section 38-3-1(F) contains exceptions to that general principle, which expressly limit the counties in which a foreign corporation with a statutory agent may be sued. One such limitation requires a plaintiff to bring suit in the county where the foreign corporation's statutory agent resides. Section 38-3-1(F). By including language about statutory agents in Section 38-3-1(F), the Legislature showed its intent to limit the counties in which certain foreign corporations are subject to suit. *See Cooper*, 2002-NMSC-020, ¶ 18 ("[T]he Legislature passed Section 38-3-1(F) in order to 'give foreign corporations that are admitted to do business and that have designated and maintained a statutory agent in this state the same "weight" in the venue balance as resident defendants.'" (quoting *Team Bank*, 118 N.M. at 150, 879 P.2d at 782)).

{10} Although "the [venue] statute limits venue for foreign corporations with statutory agents to the county where the statutory agent resides, it does not so limit venue for resident defendants." *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 12, 142 N.M. 544, 168 P.3d 116. Had the Legislature similarly intended to make an exception to the general principle that domestic corporations are subject to suit at the location of their principal place of business, it would have done so. Namely, the Legislature would have included in Section 38-3-1(A) a provision similar to the one found in Section 38-3-1(F), which makes venue proper at the statutory agent's residence.

{11} When a statute's meaning is clear from its plain language, we must apply the statute as written by the Legislature. *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994). We "cannot read into an act something that is not within the manifest intention of the Legislature as gathered from the statute itself." *Burch v. Foy*, 62 N.M. 219, 224, 308 P.2d 199, 202 (1957). The Legislature's choice not to include language about statutory agents in Section 38-3-1(A), while including such language in Section 38-3-1(F), shows that it did not intend for the residence of a domestic corporation's registered agent to establish corporate residence for venue purposes. Thus, Section 38-3-1(A) is unambiguous regarding the issue presented in this case, and its plain language persuades us that a domestic corporation does not reside in a county solely because its registered agent resides therein.

{12} Plaintiffs would have us consider NMSA 1978, Sections 53-11-11 and 53-11-14 (1967) of the Business Corporation Act (BCA) to construe the meaning of "resides" as it occurs in Section 38-3-1(A). Although we have concluded that the venue statute's plain language is dispositive of the issue before us, we assume that the statute is ambiguous for the purpose of discussing Plaintiffs' argument. They explain that the purpose of

designating a registered agent under Section 53-11-11 is to identify an individual or entity in a particular location where the domestic corporation can be served with process, pursuant to Section 53-11-14. They thus argue that the venue statute and the cited BCA sections should be read together because service of process is a component of litigation and the venue statute governs where litigation may occur. Based on that construction, Plaintiffs contend that the venue statute and cited BCA sections together establish that a registered agent's residence also creates a domestic corporation's residence for venue purposes.

{13} When seeking to understand the legislative intent of an unclear statute, we will construe "[s]tatutes on the same general subject . . . by reference to each other, the theory being that the court can discern legislative intent behind an unclear statute by reference to similar statutes where legislative intent is more clear." *State v. Ogden*, 118 N.M. 234, 243, 880 P.2d 845, 854 (1994) (internal citation omitted). "[S]tatutes which relate to the same class of things are considered to be in pari materia, and, if possible by reasonable construction, both are to be so construed that effect is to be given to every provision of each." *State v. Flores*, 2004-NMSC-021, ¶ 10, 135 N.M. 759, 93 P.3d 1264 (internal quotation marks and citations omitted) (alteration in original). "These rules . . . promote consistency in judicial interpretation of similar statutes." *Ogden*, 118 N.M. at 243, 880 P.2d at 854.

{14} The venue statute sets forth the requirements that must be met before a lawsuit may proceed in a particular county in this state. Section 38-3-1. The cited BCA sections require a corporation to establish a registered agent, Section 53-11-11, and to allow service of process upon that agent, Section 53-11-14; they do not contain any explicit language relating to venue. For those three statutory sections to be in pari materia, the language of the BCA sections would have to contain more specific language regarding venue.

{15} Were we to accept Plaintiffs' argument that "resides," as it occurs in Section 38-3-1(A), should be interpreted by reference to Sections 53-11-11 and 53-11-14, our "rule [would] undermine[] the venue statute by allowing a party to pick a forum convenient to no one, a result contrary to the limited venues the venue statute authorizes for residents and foreign corporations with a statutory agent." *Baker*, 2005-NMSC-011, ¶ 18. When effectuating the legislative intent behind the venue statute, we are mindful of the balance the statute seeks to find between the defendant's right to a convenient forum and the plaintiff's right to choose where to bring suit. *Gardiner*, 2007-NMSC-052, ¶ 4. Our conclusion that a domestic corporation does not reside in a county solely because its registered agent resides in that county properly weighs the defendant's right to be sued in the most convenient forum against the plaintiff's right to choose where to sue, and therefore best effectuates the Legislature's intent to balance those interests. For those reasons, we are not persuaded that the BCA should inform our understanding of "resides" as it occurs in Section 38-3-1(A).

III. CONCLUSION

{16} Based on the plain language of Section 38-3-1(A), we hold that a domestic corporation does not reside in a county for venue purposes solely because its registered agent for the service of process is located therein. In so holding, we reverse the district court's denial of Defendants' motion to dismiss and remand for proceedings consistent with this opinion.

{17} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

MICHAEL E. VIGIL, Judge
(sitting by designation)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2008-NMSC-031

Filing Date: May 9, 2008

Docket No. 30,301

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

STEVEN R. MORELAND,

Defendant-Respondent.

Original Proceeding on Certiorari
Stephen K. Quinn, District Judge

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for Petitioner.

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for Respondent.

OPINION

SERNA, Justice.

{1} Today we consider whether the trial court erred when it granted Defendant's motion for new trial (1) fourteen months after it was filed and (2) based on newly-discovered evidence. We hold that, based on the unusual facts and circumstances of this case, Defendant has presented newly-discovered evidence upon which he was properly granted a new trial. We therefore affirm the Court of Appeals.

I. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

{2} On January 28, 2003, Defendant and his live-in fiancée were high on methamphetamine. She subsequently accused him of attacking her on that day in a variety of ways, including threatening and hitting her with a hatchet, attempting to drown her in the toilet and bathtub, trying to pull off her finger, dragging her around the house with a chain, trying to choke her with toothpaste, and tearing off some of her clothes. Defendant allegedly did all of this with masking tape over his mouth, upon which he had drawn the Joker's smile (a reference to Batman). Defendant was subsequently located by the police and hospitalized for a drug overdose. At the hospital, a physical confrontation arose between Defendant and the police.

{3} The jury convicted Defendant of first degree kidnapping, possession of a controlled substance, use or possession of drug paraphernalia, assault with intent to commit a violent felony on a household member, battery on a peace officer, assault on a peace officer, disorderly conduct, and resisting, evading, or obstructing an officer. He was acquitted of two counts of aggravated battery with a deadly weapon against a household member.

{4} After the verdicts were returned but before sentencing, the trial court committed Defendant to a sixty-day diagnostic evaluation at the Department of Corrections. The state psychologist who evaluated Defendant reported that "when he is under the influence of illicit substances, he experiences an idiosyncratic type of intoxication and engages in hostile behavior, which he would not normally display, if he were not under the influence of an illicit substance." Armed with this information, and represented by new counsel, Defendant underwent a more extensive psychological evaluation by a private psychologist, Dr. Roll.

{5} At the sentencing hearing on February 25, 2004, subsequent to Dr. Roll's evaluation,

defense counsel moved for a continuance and stated that he would be filing a motion for new trial based on the two psychological evaluations once he received Dr. Roll's formal report. The trial court vacated the sentencing hearing and ordered Defendant to have it reset upon receipt of Dr. Roll's report.

{6} In his report dated June 18, 2004, Dr. Roll stated that, "[g]iven his background, personality, [and] his history of increasingly disruptive thought process with the use of methamphetamines," there was a strong probability that Defendant, at the time of the incident, "was suffering from diminished capacity which would have interfered with ability for correct perception, intact reality testing, understanding the consequences of his actions, and reasonable capacities to plan and execute meaningfully determined behavior."

{7} The motion for new trial was heard on January 20, 2005. At the hearing, the court and the parties realized that Defendant's motion for new trial had mistakenly been placed in the back of the court file and not file stamped. Defense counsel said he thought the motion was filed in open court at the original sentencing hearing on February 25, 2004. The State agreed, and the trial court certified that Defendant's motion for new trial was filed as of February 25, 2004. The hearing proceeded with Defendant putting on evidence that he had a mental defect that was not discoverable prior to trial. The trial court then issued a letter on April 20, 2005, stating that it was granting Defendant's motion for new trial. The final order was issued May 25, 2005.

{8} The State appealed on two grounds. First, it argued that the trial court had no jurisdiction to grant Defendant's motion for new trial fourteen months after it was filed. The State argued in the alternative that the trial court abused its discretion in granting the new trial because Defendant had not met his burden in presenting newly-discovered evidence. The Court of Appeals, in a published opinion, held for Defendant on both grounds. *State v. Moreland*, 2007-NMCA-047, ¶ 1, 141 N.M. 549, 157 P.3d 728. For the reasons outlined below, we affirm.

II. DISCUSSION

A. Standard of Review

{9} "Because the trial judge has observed the demeanor of the witnesses and has heard all the evidence, . . . the function of passing on motions for new trial belongs naturally and peculiarly to the trial court." *State v. Smith*, 104 N.M. 329, 333, 721 P.2d 397, 401 (1986), *overruled on other grounds by Gallegos v. Citizens Ins. Agency*, 108 N.M. 722, 779 P.2d 99 (1989). "[W]e will not disturb a trial court's exercise of discretion in denying or granting a motion for a new trial unless there is a manifest abuse of discretion." *State v. Garcia*, 2005-NMSC-038, ¶ 7, 138 N.M. 659, 125 P.3d 638. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (quoted authority omitted). "When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion." *State v. Flores*, 2005-NMCA-135, ¶ 35, 138 N.M. 636, 124 P.3d 1175 (quoted authority omitted).

B. The Trial Court Did Not Abuse Its Discretion When It Granted Defendant's Motion for New Trial Fourteen Months After It Was Filed

{10} Rule 5-614(C) governs the time limits for motions for new trial in criminal cases. *See* Rule 5- 614(C) NMRA. It states, in pertinent part, "[i]f a motion for new trial is not granted within thirty (30) days from the date it is filed, the motion is automatically denied." *Id.* The parties agree that Defendant's motion for new trial was filed on February 25, 2004, and was granted on April 20, 2005. It is thus undisputed that fourteen months

elapsed from the time the motion was filed until it was granted.

{11} The State originally argued that Rule 5-614's time limit was jurisdictional. Analogizing to Rule 5- 614's civil counterpart, Rule 1-059, as interpreted by *Martinez v. Friede*, the State argued before the Court of Appeals that the trial court lost jurisdiction after thirty days and that the motion was automatically denied if not ruled upon within that time. *See* Rule 1-059(D) NMRA (prior to 2006 amendment); *Martinez v. Friede*, 2004-NMSC-006, ¶¶ 11-13, 135 N.M. 171, 86 P.3d 596; *Moreland*, 2007- NMCA-047, ¶ 11. However, since the time that briefing was completed in the Court of Appeals, the automatic denial provision of Rule 1-059(D) has been eliminated. *See* Rule 1-059(D) (committee comment). Further, the 2006 amendment to Rule 1-054.1, providing that civil courts have sixty days to enter a judgment or order after submission, superseded that portion of Section 39-1-1 which stated that many post-judgment motions were automatically denied if not granted within thirty days of filing. *See* NMSA 1978, § 39-1-1 (1897, as amended through 1953); Rule 1-054.1 NMRA. The State concedes that *Martinez* has been abrogated and withdraws its argument that the trial court lost jurisdiction after thirty days by virtue of Rule 5-614's time limit. *See Martinez*, 2004-NMSC-006, ¶¶ 11-13.

{12} The State now argues that the trial court abused its discretion by failing to act within a reasonable time after Defendant's motion for new trial was filed. In this effort, the State correctly points out that there is a "public interest in prompt justice." 3B Charles Alan Wright et al., Federal Practice and Procedure § 831 (3d ed. 2004); *see also State v. Salazar*, 2007-NMSC-004, ¶ 15, 141 N.M. 148, 152 P.3d 135 (citing the "public's interest in the efficient administration of justice without unnecessary delay" as a factor to be weighed in considering a motion for continuance). We agree with the State that this Court has a policy of expeditious resolution of post-trial motions. *See, e.g.*, Rule 1-059(B) (mandating a ten-day limit for service of post-judgment motions for new trial); Rule 12-404(A) NMRA (providing that motions for rehearing must be filed within fifteen days after disposition absent an order otherwise); *Hayes v. State*, 106 N.M. 806, 808, 751 P.2d 186, 188 (1988) (declaring that ninety days is a reasonable time for a court to decide a motion for modification of sentence). We further agree that courts are required to rule on motions for new trial within a reasonable time. However, given the unusual facts of this case, the fourteen-month delay between the time Defendant filed his motion for new trial and the time that it was granted was not unreasonable.

{13} A review of the pertinent dates reveals no unreasonable delay. At the sentencing hearing on February 25, 2004, defense counsel informed the court that he was filing a motion for new trial based on the evaluations of the state psychologist and Dr. Roll. Since defense counsel had not yet received the report of Dr. Roll (who was in turn awaiting data from the State), he moved for a continuance of the sentencing hearing. The trial court, wanting to consider Dr. Roll's report, granted the continuance and ordered defense counsel to have the hearing reset upon receipt of Dr. Roll's report. Dr. Roll issued a report dated June 18, 2004. On September 7, 2004, the trial court set the motion for new trial to be heard. The court heard the motion on January 20, 2005. On April 20, 2005, the trial court issued a letter stating that it would grant the motion. The final order was issued on May 25, 2005.

{14} Although fourteen months might be an unreasonable delay in another case, we are faced with unusual circumstances here. The particular circumstances of this case are akin to a series of small delays, each necessary to serve the interests of justice. We note that although fourteen months elapsed between the certified date of filing and the ruling on the motion, only ninety days passed between the time the motion was heard and the trial court's letter granting it. Given the complex matter before the trial court, we conclude that ninety days was not an unreasonable length of time to decide the motion. Although we emphasize that a reasonableness standard does not serve to abolish time limits altogether, we conclude that, in the unusual circumstances of the

instant case, the trial court did not abuse its discretion in granting the motion for new trial fourteen months after it was filed.

C. The Trial Court Did Not Abuse Its Discretion When It Granted Defendant's Motion for New Trial Based on Newly-Discovered Evidence

{15} Defendant's motion for new trial is premised on the alleged newly-discovered evidence, gleaned from the post-trial reports of the state psychologist and Dr. Roll, that Defendant has a mental condition which causes him to have a diminished capacity to reason on a day-to-day basis and which is greatly exacerbated by methamphetamine. Dr. Roll believes that Defendant has serious deficits of internal processes, including peculiar thoughts, bad reasoning, poor planning, and lack of impulse control. It is Dr. Roll's opinion that Defendant perpetually has diminished mental capacity and that his use of methamphetamines creates severe diminished capacity where he cannot be expected to think, reason, perceive, or assess reality correctly. Dr. Roll testified that Defendant has a "coping deficit index" by which he is "characteristically incapable . . . of dealing with new stimulation and . . . overstimulation. . . . [He has a] capacity to be overwhelmed."

{16} There was no evidence presented at trial of Defendant's alleged mental deficiency. However, Defendant correctly maintains that, had he presented this evidence during trial, he would have been entitled to a jury instruction for diminished capacity for the charges requiring specific intent. *See* UJI 14-5111 NMRA; *State v. Balderama*, 2004-NMSC-008, ¶ 38, 135 N.M. 329, 88 P.3d 845 ("[T]he diminished capacity instruction is proper only when there is evidence that reasonably tends to show that the defendant's claimed mental disease or disorder rendered the defendant incapable of forming specific intent at the time of the offense.").

{17} A motion for new trial in New Mexico on the basis of newly-discovered evidence is governed by the rule established in territorial days and enunciated more recently in *State v. Volpato* ("the Volpato factors"). *State v. Volpato*, 102 N.M. 383, 384-85, 696 P.2d 471, 472-73 (1985); *see also Territory v. Claypool*, 11 N.M. 568, 585, 71 P. 463, 468 (1903) (establishing the rule). A new trial is warranted if

> the newly-discovered evidence is such that . . . (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it could not have been discovered before the trial by the exercise of due diligence; (4) it must be material; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory.

Volpato, 102 N.M. at 384-85, 696 P.2d at 472-73.

{18} The State contends that Defendant's motion fails to meet the second and third *Volpato* factors because the evidence of Defendant's mental capacity was discovered before trial and was in fact discoverable before trial by the exercise of due diligence. The State's position is that diagnostic testing of Defendant could have been done before trial and that there were sufficient indications which would have put defense counsel on notice that inquiry into Defendant's mental condition was warranted, namely Defendant's violent and bizarre behavior, including that underlying the charges.

{19} The trial court, having "observed the demeanor of the witnesses and heard all the evidence," found that evidence of Defendant's mental deficits was discovered since the time of trial and was not discoverable prior to trial with due diligence. *See Smith*, 104 N.M. at 333, 721 P.2d at 401. There is evidence to support those findings. As to the evidence being discovered since trial, the evidence was in fact discovered only because the trial court ordered a diagnostic evaluation of Defendant *after* trial, the results of which led Defendant to undergo further diagnostic testing by Dr. Roll.

{20} Regarding the related question of whether the evidence was discoverable before trial by due

diligence, there is evidence to support the trial court's finding in the negative. Dr. Roll testified that Defendant's mental deficits typically have no outward manifestation. Rather, the doctor reported, it is only when Defendant is overstimulated by methamphetamines that his faulty inner processes become evident in bad behavior. Further, Dr. Roll testified that Defendant's defects were unknowable to lay people and that even trained professionals would be unable to diagnose Defendant without the help of formal psychological tests, "just like a doctor might look at [a patient] and not know that [the patient has] pneumonia without doing some tests."

{21} Dr. Roll's characterization of the covert nature of Defendant's defects is supported by the state psychologist's report and testimony from the hearing on the motion for new trial. According to Dr. Roll's interpretation, the state psychologist's report betrayed knowledge that "something . . . didn't fit" or "something [was] fishy" vis-à-vis Defendant's mental capacities, but that there was difficulty in pinpointing it. Sargent Dees, a guard at the facility where Defendant has been held for two years, testified that Defendant is a model prisoner who has never given Dees reason to think that he may have a mental defect. In light of the foregoing, we conclude that the trial court's finding that Defendant's condition was not discoverable prior to trial with the exercise of due diligence was not "against the logic and effect of the facts and circumstances of the case." *Rojo*, 1999-NMSC-001, ¶ 41 (quoted authority omitted).

III. CONCLUSION

{22} For the above reasons, under the highly unusual circumstances of this case, we defer to the trial court's grant of Defendant's motion for new trial. The trial court was in the best position to decide on the motion for new trial. Having found no abuse of discretion, we affirm.

{23} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

RICHARD E. RANSOM (Pro Tem)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2008-NMSC-046

Filing Date: June 27, 2008

Docket No. 30,424

ROBERT FISER, individually, and as a representative of a class of persons within the State of New Mexico,

Plaintiff-Petitioner,

v.

DELL COMPUTER CORPORATION, a/k/a DELL, INC.,

Defendant-Respondent.

Original Proceeding on Certiorari
Robert L. Thompson, District Judge

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OPINION

SERNA, Justice.

{1} We granted certiorari to review whether Defendant Dell Computer Corporation's Motion to Stay and Compel Arbitration pursuant to the Federal Arbitration Act was properly granted. We hold that, in the context of small consumer claims that would be prohibitively costly to bring on an individual basis, contractual prohibitions on class relief are contrary to New Mexico's fundamental public policy of encouraging the resolution of small consumer claims and are therefore unenforceable in this state. We reverse.

I. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

{2} Plaintiff Robert Fiser purchased a computer from Defendant via the company's website. He subsequently filed a putative class action lawsuit contending that Defendant systematically misrepresents the memory size of its computers. He alleges violations of the New Mexico Unfair Practices Act (UPA), NMSA 1978, Sections 57-12-1

to -26 (1967, as amended through 2003), the New Mexico False Advertising Act, NMSA 1978, Sections 57-15-1 to -10 (1965), the New Mexico Uniform Commercial Code (UCC), NMSA 1978, Sections 55-1-101 to -12-111 (1961, as amended), and common law concepts of breach of contract, breach of warranty, misrepresentation, violations of the covenants of good faith and fair dealing, bad faith, and unjust enrichment.

{3} Central to the issue presented is the scant amount of damages alleged: Plaintiff estimates that Defendant's alleged misrepresentation results in a monetary loss to its customers of just ten to twenty dollars per computer.

{4} Defendant filed a Motion to Stay and Compel Arbitration pursuant to the Federal Arbitration Act (FAA). *See* 9 U.S.C. §§ 3, 4 (2000). Defendant argued that, pursuant to the "terms and conditions" on its website at the time of the purchase, Plaintiff is required to individually arbitrate his claims and is precluded from proceeding on a classwide basis either in litigation or arbitration. The "terms and conditions" included an arbitration clause mandating that "any claim, dispute, or controversy . . . against Dell . . . [was subject to] binding arbitration administered by the National Arbitration Forum (NAF)." The terms also included a clause (hereinafter referred to as the class action ban) which directed that the arbitration was "limited solely to the dispute or controversy between [Plaintiff] and Dell."[1] Finally, the "terms and conditions" contained a choice-of-law provision declaring Texas law to be controlling. Although the parties disagree over whether Plaintiff assented to Defendant's "terms and conditions," we do not reach that issue. We assume without deciding, for the purpose of our analysis, that he assented to the terms.

{5} The district court agreed with Defendant that Plaintiff was bound by the arbitration provision and thus granted Defendant's motion. The Court of Appeals affirmed. *Fiser v. Dell*, 2007-NMCA-087, ¶ 1, 142 N.M. 331, 165 P.3d 328. Plaintiff petitioned for a writ of certiorari; both the New Mexico Attorney General and Public Justice filed amicus briefs in support of Plaintiff. Because we conclude that the class action ban is contrary to fundamental New Mexico public policy, we reverse.

II. DISCUSSION

A. Application of Texas Law Would Violate New Mexico Public Policy

1. New Mexico Respects Choice-of-Law Provisions Unless Application of the Chosen Law Would Contravene New Mexico Public Policy

{6} The threshold question in determining the validity of the class action ban is which state's law must be applied to this potentially multi-state class action that was filed in New Mexico by a New Mexico resident against a defendant that maintains its principal place of business in Texas for damages relating to a contract that contains a choice-of-law clause directing that Texas law be applied.

{7} New Mexico respects party autonomy; the law to be applied to a particular dispute may be chosen by the parties through a contractual choice-of-law provision. Section 55-1-301 (A); *see also United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 108 N.M. 467, 470, 775 P.2d 233, 236 (1987). However, when application of the law chosen by the parties offends New Mexico public policy, our courts may decline to enforce the choice-of-law provision and apply New Mexico law instead. *United Wholesale Liquor*, 108 N.M. at 470, 775 P.2d at 236; *Sandoval v. Valdez*, 91 N.M. 705, 707, 580 P.2d 131, 133 (Ct. App. 1978). New Mexico courts will not give effect to another state's laws where those laws would "violate some fundamental principle of justice." *Reagan v. McGee Drilling Corp.*, 1997- NMCA-014, ¶ 9, 123 N.M. 68, 933 P.2d 867 (quoted authority omitted).

[1] Although, in the past, the procedural rules of the NAF also did not allow for classwide arbitration, the rules have apparently been amended to provide for such a procedure since briefing was completed. *See* http://www.arb-forum.com /default.aspx and proceed through the links as follows: "programs and rules," "arbitration," "the code of procedure," "arbitration class procedures."

{8} Application of Texas law to the instant matter would likely require enforcing the class action ban. *See AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 199-201 (Tex. App. 2003) (contractual prohibition of class actions not fundamentally unfair or violative of public policy). Unless enforcement of the class action ban would run afoul of fundamental New Mexico public policy, our conflict of law rules counsel respecting the choice-of-law provision and applying Texas law.

2. It is Fundamental New Mexico Policy that Consumers Have a Viable Mechanism for Dispute Resolution, No Matter the Size of the Claim

{9} New Mexico policy strongly supports the resolution of consumer claims, regardless of the amount of damages alleged. That policy is demonstrated by several of our statutes. For example, the New Mexico legislature enacted the UPA, which is unequivocal: "[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." Section 57-12-3. The UPA was clearly drafted to include a remedy for small claims: a party need not show any monetary damage to be entitled to an injunction, Section 57-12-10(A), and "[a]ny person who suffers *any* loss of money . . . [may] recover actual damages or the sum of one hundred dollars ($100), whichever is greater." Section 57-12-10(B) (emphasis added).

{10} The fundamental New Mexico policy of providing consumers a mechanism for dispute resolution is also seen in the False Advertising Act, which specifically empowers private individuals to bring rights of action in the name of the state and for "all others similarly situated." Section 57-15-5.

{11} Yet another example of New Mexico's fundamental public policy in ensuring that consumers have an opportunity to redress their harm is the Consumer Protection Division of the Attorney General's Office, which is charged with protecting New Mexico citizens from unfair and deceptive trade practices. In this effort, the Consumer Protection Division is authorized and funded to investigate suspicious business activities, informally resolve the complaints of dissatisfied consumers, educate citizens about their consumer rights, and file lawsuits on behalf of the public.

3. The Class Action Device is Critical to Enforcement of Consumer Rights in New Mexico

{12} The opportunity to seek class relief is of particular importance to the enforcement of consumer rights because it provides a mechanism for the spreading of costs. The class action device allows claimants with individually small claims the opportunity for relief that would otherwise be economically infeasible because they may collectively share the otherwise prohibitive costs of bringing and maintaining the claim. *See, e.g.*, 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1.6, at 26 (4th ed. 2002). "In many cases, the availability of class action relief is a *sine qua non* to permit the adequate vindication of consumer rights." *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278 (W. Va. 2002). "The class action is one of the few legal remedies the small claimant has against those who command the status quo." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting in part).

{13} The opportunity for class relief and its importance to consumer rights is enshrined in the fundamental policy of New Mexico and evidenced by our statutory scheme. *See, e.g.*, Rule 1- 023 NMRA (setting forth the rules of civil procedure governing class actions). Notably, the UPA specifically references class actions as a private remedy available under the act. Section 57-12-10(E). Further, the New Mexico Uniform Arbitration Act declares that arbitration clauses that require consumers to decline participation in class actions are unenforceable and voidable. *See* NMSA 1978, §§ 44-7A-1(b)(4)(f), 44-7A-5 (2001). While this provision may be preempted by the FAA, *see Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the FAA]."), it is clear evidence of the fundamental New Mexico policy of

allowing consumers a means to redress their injuries via the class action device.

{14} In New Mexico, we recognize that the class action was devised for "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Romero v. Phillip Morris, Inc.*, 2005-NMCA-035, ¶ 36, 137 N.M. 229, 109 P.3d 768 (quoted authority omitted). A purpose of the class action is to conserve party resources. *Id.* As the United States Supreme Court recognized,

> [t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoted authority omitted). "Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980). The Federal Rules Advisory Committee recognized the critical nature of the class action to individuals with small claims when it directed that one of the grounds on which class certification may be appropriate is where "the amounts at stake for individuals [are] so small that separate suits would be impracticable." Fed. R. Civ. P. 23(b)(3), advisory committee note (1966 amendment).

{15} Thus, beyond merely a procedural tool, the class action functions as a gatekeeper to relief when the cost of bringing a single claim is greater than the damages alleged. When viewed in this light, a contractual provision that purports to ban class actions for small claims implicates not just the opportunity for a class action but the more fundamental right to a meaningful remedy for one's claims. This Court has recognized that the right of access to the courts is part of the right to petition for redress of grievances guaranteed by both the United States and New Mexico constitutions. *Jiron v. Mahlab,* 99 N.M. 425, 426, 659 P.2d 311, 312 (1983); *see also* U.S. Const. amends. I, XIV; N.M. const., art. II, § 18. While the class action ban may or may not rise to the level of a constitutional violation, a prohibition on class relief where there is no meaningful alternative for redress of injury certainly does not provide for effective vindication of rights. *See Mitsubishi Motors Corp., v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, [a] statute will continue to serve both its remedial and deterrent function.").

{16} In view of the fact that Plaintiff's alleged damages are just ten to twenty dollars, by attempting to prevent him from seeking class relief, Defendant has essentially foreclosed the possibility that Plaintiff may obtain *any* relief. Thus, we conclude that Defendant's prohibition on class action relief, when applied to small claims plaintiffs, is contrary to New Mexico's fundamental public policy to provide a forum for relief for small consumer claims. The words of the California Supreme Court are apropos:

> By imposing this clause on its customers, [Defendant] has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be . . . without an effective method of redress cannot be ignored.

Discover Bank v. Super. Ct., 113 P.3d 1100, 1108 (Cal. 2005).

{17} Defendant contends that Plaintiff has not met the evidentiary burden of proving that his

damages are outweighed by the cost of bringing an individual claim. While we recognize that, in some cases, more extensive factfinding will be required, we emphasize that Plaintiff only alleges his damages to be between *ten and twenty dollars*. We do not find it necessary to engage in an exhaustive analysis regarding whether the economic and opportunity costs of bringing a ten to twenty dollar claim are prohibitive. In light of attorney's fees, the costs of gathering evidence and preparing the case, and the time spent educating himself on the issues and organizing and presenting the claim, the likelihood that Plaintiff's actual costs will exceed ten to twenty dollars is certain. The economic realities of the present case are clearly more tangible than the mere "risk" that Plaintiff will be faced with prohibitive costs. *Cf. Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-91 (2000) (holding that arbitration agreement's failure to address how parties would allocate arbitration costs does not render it per se unenforceable on the grounds that the claimant may be subjected to steep costs where claimant did not present evidence that she would be subjected to such high costs). Suffice it to say that "only a lunatic or a fanatic sues for [ten to twenty dollars.]" *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

{18} For all of the foregoing reasons, New Mexico's fundamental public policy requires that consumers with small claims have a mechanism for dispute resolution via the class action. Therefore, application of Texas law, that would allow the class action ban, is contrary to New Mexico public policy. *See AutoNation*, 105 S.W.3d at 199-201. Accordingly, we invoke the public policy exception and apply New Mexico law rather than Texas law to analyze the validity of the class action ban.

B. Under New Mexico Law, the Class Action Ban is Invalid Because It is Contrary to Public Policy and Therefore Unconscionable

{19} Plaintiff contends that the class action ban is unconscionable. This determination is a matter of law and is reviewed de novo. *Bowlin's, Inc. v. Ramsey Oil Co.*, 99 N.M. 660, 666, 662 P.2d 661, 667 (Ct. App. 1983). We agree.

{20} The classic articulation of unconscionability is that it is comprised of two prongs: substantive unconscionability and procedural unconscionability. Joseph M. Perillo, 7 *Corbin on Contracts* § 29.4, at 388 (2002 ed.). Substantive unconscionability relates to the content of the contract terms and whether they are illegal, contrary to public policy, or grossly unfair. *Padilla v. State Farm Mut. Auto Ins. Co.*, 2003-NMSC-011, ¶ 14, 133 N.M. 661, 68 P.3d 901; *Guthmann v. La Vida Llena*, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985). Procedural unconscionability is determined by analyzing the circumstances surrounding the contract's formation, such as whether it was an adhesive contract and the relative bargaining power of the parties. *Guthmann*, 103 N.M. at 510, 709 P.2d at 679 (quoted authority omitted). "The weight given to procedural and substantive considerations varies with the circumstances of each case." *Id.*

{21} As set forth above, we concluded in the course of our conflict analysis that the class action ban violates New Mexico public policy. By preventing customers with small claims from attempting class relief and thereby circumscribing their only economically efficient means for redress, Defendant's class action ban exculpates the company from wrongdoing. "Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to retain the benefits of its wrongful conduct." *Discover Bank*, 113 P.3d at 1106 (quoted authority omitted). On these facts, enforcing the class action ban would be tantamount to allowing Defendant to unilaterally exempt itself from New Mexico consumer protection laws. It is not hyperbole or exaggeration to say that it is a fundamental principle of justice in New Mexico that corporations may not tailor the laws that our legislature has enacted in order to shield themselves from the potential claims of consumers. Because it violates public policy by depriving small claims consumers of a meaningful remedy and exculpating Defendant from potential wrongdoing, the class action ban meets the test for substantive unconscionability.

{22} In the instant case, the nature of the "terms and conditions" may or may not rise to the level of an adhesive or procedurally unconscionable contract. When a court makes an analysis into whether a particular contract is adhesive, it typically inquires into three factors: (1) whether it was prepared entirely by one party for the acceptance of the other; (2) whether the party proffering the contract enjoyed superior bargaining power because the weaker party could not avoid doing business under the particular terms; and whether the contract was offered to the weaker party without an opportunity for bargaining on a take-it-or-leave-it basis. *Guthmann*, 103 N.M. at 509, 709 P.2d at 678. The Court of Appeals held that the terms did not constitute a contract of adhesion because there was no evidence that Plaintiff could not avoid doing business under the particular terms mandated by Defendant. *Fiser*, 2007-NMCA-087, ¶ 35. While we agree that Defendant's "terms and conditions" may not rise to the level of an adhesive contract, we nevertheless conclude that the terms are unenforceable because there has been such an overwhelming showing of substantive unconscionability. For these reasons, the agreement is unconscionable under New Mexico law and will not be enforced in this state.

2We note that numerous other jurisdictions have also concluded that class action bans are unconscionable. *See, e.g.*, *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 984 (9th Cir. 2007); *Skirchak v. Dynamics Research Corp.*, 432 F. Supp. 2d 175, 180-81 (D. Mass. 2006); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002); *Kinkel v. Cingular Wireless*, LLC, 857 N.E.2d 250, 274-75 (Ill. 2006).

C. Invalidation of the Arbitration Agreement and Embedded Exculpatory Class Action Ban is Not Preempted by the FAA

{23} Having held that the class action ban is unenforceable in New Mexico, we turn to an examination of whether the FAA preempts our ruling. Congress enacted the FAA to counteract judicial hostility to arbitration. *See* Sections 1-16; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). The Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." Section 2. While the FAA prevents "[s]tates from singling out arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), it does not give arbitration provisions special protection either. It only requires that they be placed "upon the same footing as other contracts." *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoted authority omitted). "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs.*, 517 U.S. at 687. Because our invalidation of the ban on class relief rests on the doctrine of unconscionability, a doctrine that exists for the revocation of any contract, the FAA does not preempt our holding. Class action bans that effectively deny consumer plaintiffs relief are invalid in New Mexico, regardless of the contracts in which they are found.

D. The Class Action Ban is Not Severable

{24} When a provision of a contract is determined to be unconscionable, we "may refuse to enforce the contract, or [we] may enforce the remainder of the contract without the unconscionable clause, or [we] may so limit the application of any unconscionable clause as to avoid any unconscionable result." Section 55-2-302; *accord State ex rel. State Highway & Transp. Dep't. v. Garley*, 111 N.M. 383, 389-90, 806 P.2d 32, 38-39 (1991). Here, the class action ban is part of the arbitration provision and is central to the mechanism for resolving the dispute between the parties; therefore, it cannot be severed. We decline to enforce the arbitration provision.

III. CONCLUSION

{25} Contractual prohibition of class relief, as applied to claims that would be economically inefficient to bring on an individual basis, is contrary to the fundamental public policy of New Mexico to provide a forum for the resolution of all consumer claims and is therefore unenforceable in this state. The arbitration provision is invalid and the Court of Appeals reversed. We remand for proceedings consistent with this opinion.

{26} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2008-NMSC-053

Filing Date: August 26, 2008

Docket No. 30,540

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ERNEST SENA,

Defendant-Respondent.

Original Proceeding on Certiorari
Camille Martinez Olguin, District Judge

Gary K. King, Attorney General
James W. Grayson, Assistant Attorney General
Santa Fe, NM

for Petitioner.

Hugh W. Dangler, Chief Public Defender
William A. O'Connell, Assistant Appellate Defender
Santa Fe, NM

for Respondent.

OPINION

SERNA, Justice.

{1} Defendant Ernest Sena was convicted of two counts of criminal sexual contact of a minor (CSCM), contrary to NMSA 1978, Section 30-9-13(A)(1) (1991, prior to amendments through 2003). He appealed his convictions, citing numerous grounds for error. The Court of Appeals vacated his convictions and remanded for a new trial on the grounds that (1) there was insufficient evidence to support one of his convictions and (2) the trial court had improperly admitted other-acts evidence. The State petitioned this Court to review both issues. We reverse the Court of Appeals and remand to that court to consider the issues that it did not previously reach.

I. BACKGROUND

{2} Defendant was indicted on five counts of criminal sexual penetration of a minor (CSPM), contrary to NMSA 1978, Section 30-9-11(C)(1) (1995, prior to amendments through 2007), and seven counts of CSCM. The victim (Child) is Defendant's granddaughter. During the summer of 2000, which is the time of the incidents in question, Child would occasionally spend time at her grandparents' house under the supervision of her grandmother and Defendant. One of the couple's responsibilities while taking care of Child was to treat an eczematous rash that covered her body from the back of her waist to the back of her knees; importantly, the rash never appeared on Child's vagina. Part of the treatment regimen required the application of medicinal ointment to Child's rash—a procedure done by both grandmother and Defendant. Child later alleged that Defendant had inappropriately touched her "private area" during at least one of those treatments.

{3} As part of its case against Defendant, the State sought to introduce evidence that he walked around naked in front of Child; that he showed her a pornographic video; that he showed her his wife's thong underwear; and that he showered naked with her (hereinafter collectively referred to as "the grooming evidence"). Before trial, Defendant filed a motion in limine, seeking to exclude the grooming evidence. At a hearing on the motion, the State argued that the grooming evidence showed Defendant's attempt to gain Child's trust and to make her comfortable with things of a sexual nature so that she would become comfortable with his sexual behavior. The State also claimed that the evidence was admissible because it showed Defendant's intent. Defendant argued

that the evidence should not be admitted because he was not claiming lack of sexual intent, but instead was denying that any illegal touching had ever occurred. The trial court admitted the grooming evidence pursuant to Rule 11-404(B) NMRA (providing that evidence of other crimes, wrongs, or acts, while inadmissible to show action in conformity with character, may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

{4} At trial, Child had difficulty identifying the exact dates on which Defendant had purportedly committed his illegal acts. To help Child locate the events in time, the State utilized two benchmarks that Child could more easily remember and could rely on when testifying about the details of Defendant's alleged offenses. Thus, all of the crimes with which Defendant was charged were alleged to have occurred between a family trip to Colorado, beginning June 11, 2000, and Child's eighth birthday, on July 8, 2000.

{5} When Child testified at trial, she was inconsistent as to the number of times that Defendant had allegedly touched her during the charging period. When the prosecutor asked Child how many times Defendant had touched her subsequent to the family trip to Colorado, Child responded, "I think it was about five[;] I am not sure." Immediately thereafter, the prosecutor asked, "So did some of it happen before Colorado?" Child said, "Most happened before Colorado and once after." The prosecutor followed up, "Once after Colorado and before your birthday?" Child answered, "Yes." She then proceeded to describe two incidents during which Defendant allegedly touched her inappropriately. First, she explained that once while she was attempting to put lotion on her rash, Defendant intervened to help apply the lotion and then touched her "privates." Second, she testified that Defendant touched her "privates" another time while she was falling asleep.

{6} At the close of the State's case, Defendant moved for a directed verdict. He argued that the evidence was insufficient to support more than one instance of illegal touching and construed Child's testimony as establishing that Defendant touched her only once during the charging period. The trial court denied the motion, ruling that Child's testimony supported two counts of CSPM or, in the alternative, two counts of CSCM. So instructed, the jury found Defendant guilty of both counts of CSCM.

{7} A majority of the Court of Appeals disagreed with the trial court's ruling on the directed verdict motion. *State v. Sena*, 2007-NMCA-115, ¶¶ 8-10, 142 N.M. 677, 168 P.3d 1101. It held that the evidence supported only one CSCM conviction because Child's testimony could not reasonably be interpreted as establishing that Defendant had touched her more than once during the charging period. *See id.* ¶ 10. The dissent, however, argued that a reasonable jury could have resolved the inconsistencies in Child's testimony to support the trial court's ruling, and thus concluded the trial court had reached the proper result. *Id.* ¶ 35 (Fry, J., dissenting).

{8} The majority also held that the trial court erred in admitting the grooming evidence. *Id.* ¶ 23. Stating that the grooming evidence was improper character evidence purposed on "show[ing] the jury that Defendant acted like a pervert on occasion" in an attempt to "imply that Defendant was acting in conformity with that trait," the majority concluded that the grooming evidence was inadmissible under Rule 11-404(B). *Id.* Again, the dissent disagreed. It countered that our precedent supported admission of the grooming evidence and that the trial court's ruling should have been upheld. *Id.* at ¶¶ 36-38 (Fry, J., dissenting).

{9} On the State's petition, we review each issue in turn, beginning with the directed verdict motion.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A DIRECTED VERDICT

{10} Our review of the denial of a directed verdict motion asks whether sufficient evidence was adduced to support the underlying charge. *See State v. Robinson*, 94 N.M. 693, 696, 616

P.2d 406, 409 (1980). "The test for sufficiency of the evidence 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. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). When considering the sufficiency of the evidence, this Court "does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence." *State v. Graham*, 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285 (internal quotation marks and citation omitted). Instead, "[w]e view the evidence as a whole and indulge all reasonable inferences in favor of the jury's verdict," *id.*, while at the same time asking whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *id.* ¶ 7 (alteration in original) (internal quotation marks and citation omitted).

{11} Child's testimony in this case was ambiguous as to the number of times that Defendant touched her during the charging period. She told the jury about two separate instances of inappropriate touching, the first occurring while she was putting lotion on her rash and the second happening while she was falling asleep. However, that testimony came after Child had first stated that Defendant had touched her five times subsequent to the Colorado trip, only to then answer that the touching had occurred just once after Colorado. Thus, Child's testimony was inconsistent. When parts of a witness's testimony are "conflicting and ambiguous[,] . . . [i]t is the exclusive province of the jury to resolve [the] factual inconsistencies in [that] testimony." *State v. Morales*, 2000-NMCA-046, ¶ 8, 129 N.M. 141, 2 P.3d 878 (internal quotation marks and citation omitted). In the instant case, the record supports the inference that Defendant touched Child multiple times during the charging period, as well as the inference that he touched her only once during that time. However, the applicable standard of review does not contemplate our "pars[ing] the testimony and view[ing] the verdict only in light of the probative value of individual pieces of evidence." *Graham*, 2005-NMSC-004, ¶ 13. Instead, "[a]ppellate courts faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the [prevailing party], and must defer to that resolution." *Id.* (internal quotation marks and citation omitted). Given that presumption and the record before us, we conclude that the jury acted rationally in resolving the factual inconsistencies present in Child's testimony in favor of the conclusion that Defendant touched Child twice during the charging period. We defer to that resolution, and thus agree with Judge Fry's conclusion in dissent that the trial court properly denied Defendant's directed verdict motion. *See Sena*, 2007-NMCA-115, ¶ 35 (Fry, J., dissenting).

III. THE TRIAL COURT PROPERLY ADMITTED THE GROOMING EVIDENCE

A. The Grooming Evidence was Admissible under Rule 11-404(B)

{12} "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 . . . intent . . . or absence of mistake or accident." Rule 11-404(B). Accordingly, "evidence of other acts is admissible under Rule 11-404(B) if relevant to a material issue other than the [d]efendant's character or propensity to commit a crime." *State v. Kerby*, 2007-NMSC-014, ¶ 25, 141 N.M. 413, 156 P.3d 704. We review a trial court's decision to admit evidence under Rule 11-404(B) for abuse of discretion, which occurs when the court's ruling is "clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted).

{13} In this case, the grooming evidence was admissible to prove Defendant's intent.

See Kerby, 2007-NMSC-014, ¶ 26. To prove CSCM, the State must establish that the defendant's touch was "unlawful," and it may do so by showing that the "defendant's behavior was done to arouse or gratify sexual desire." *Kerby*, 2007-NMSC-014, ¶ 26 (internal quotation marks and citation omitted). In *Kerby*, the defendant created a peephole into the victim's bathroom. *Id.* We affirmed the trial court's admission of that other-act evidence to counter the defendant's assertion that he had touched the victim's buttocks merely as a fatherly pat. *Id.* The peephole evidence, we reasoned, supported the inference that the defendant had touched his victim with a sexual intent, and thus was relevant to prove the unlawfulness element of CSCM. *Id.*

{14} In the instant case, the State elicited testimony from several witnesses that Defendant had admitted to touching Child's "privates" while putting the ointment on her rash. It also cross-examined Defendant with his statement to an investigating officer that he had touched Child's vagina while putting medicine on her rash but had not done so sexually. Thus, evidence offered at trial supported the inference that, when Defendant touched Child during his application of medicinal ointment to her rash, he did so without a sexual intent. The grooming evidence counters that inference because it suggests that Defendant was attempting to familiarize Child with sexuality and thereby to create an atmosphere in which she would be less resistant to his sexual advances. As "evidence of Defendant's sexually fraught conduct with the Child," the grooming evidence was properly admitted to "refute[] the evidence that Defendant touched the Child strictly for medical reasons." *Sena*, 2007-NMCA-115, ¶ 37 (Fry, J., dissenting). Thus, while the Court of Appeals correctly asserted that the grooming evidence could not be offered to show Defendant's propensity to "act[] like a pervert on occasion," *id.* ¶ 23, it erred in rejecting the evidence as proof of Defendant's intent, *see id.* ¶ 22.

{15} For those reasons, we cannot characterize the trial court's admission of the grooming evidence as clearly untenable or not justified by reason, and thus hold that it was properly admitted under Rule 11-404(B).

B. The Grooming Evidence was Admissible under Rule 11-403 NMRA

{16} Defendant argues that, even if the grooming evidence was admissible under Rule 11-404(B), it should have been excluded under Rule 11-403 as unfairly prejudicial. Rule 11-403 states that otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Other-act evidence that proves only character or propensity is unfairly prejudicial and properly excluded under Rule 11-403. *State v. Otto*, 2007-NMSC-012, ¶ 16, 141 N.M. 443, 157 P.2d 8. However, as we concluded above, the grooming evidence was offered for a legitimate, non-character purpose. Thus, its admissibility under Rule 11-403 depends on the balance of its probative value against any prejudicial effect that it may have had. *See State v. Gallegos*, 2007-NMSC-007, ¶ 22, 141 N.M. 185, 152 P.3d 828. "Determining whether the prejudicial impact of evidence outweighs its probative value is left to the discretion of the trial court." *Rojo*, 1999-NMSC-001, ¶ 48 (internal quotation marks and citation omitted). We review such determinations for abuse of discretion and give much leeway to "trial judges who must fairly weigh probative value against probable dangers." *Otto*, 2007-NMSC-012, ¶ 14 (internal quotation marks and citation omitted).

{17} In the instant case, the grooming evidence was probative of the fact that Defendant acted with a sexual intent. Without hearing the grooming evidence, the jury was more likely to believe that Defendant touched Child simply for medicinal purposes and less likely to believe that he did so with a sexual intent. Given the probative value of the grooming evidence when offered to show Defendant's intent, we cannot characterize the trial court's admission of it as clearly untenable or unjustified by reason. Thus, we hold that the trial court did not abuse its discretion in admitting the grooming evidence under Rule 11-403.

C. Expert Testimony was not Required to Submit the Grooming Evidence to the Jury

{18} While holding that the grooming evidence was inadmissible, the Court of Appeals majority stated that testimony regarding a defendant's grooming behavior is "best left to an expert witness." *Sena*, 2007-NMCA-115, ¶ 25. While we agree with the dissent that the propriety of lay testimony on the subject of grooming was not raised at trial or on appeal, and thus should not have been addressed by the majority, *id.* ¶ 40 (Fry, J., dissenting), we are compelled to briefly address the issue.

{19} Rule 11-404(B)'s list of exceptions to the general prohibition against character evidence is not exhaustive; it is merely illustrative. *Gallegos*, 2007-NMSC-007, ¶ 22. Apparently in recognition of this, the majority opinion characterized the trial court's ruling as having admitted the grooming evidence under an unlisted exception to Rule 11-404(B). *Sena*, 2007-NMCA-115, ¶¶ 14, 19. Namely, the majority opined that the trial court admitted the grooming evidence to prove the fact that Defendant had engaged in "'[t]he process of manipulation often utilized by child molesters, intended to reduce a victim's or potential victim's resistance to sexual abuse,'" also known as "'[g]rooming.'" *Id.* ¶ 15 (quoting *Ctr. for Sex Offender Mgmt., Glossary of Terms Used in the Mgmt. & Trtmt. of Sexual Offenders* 11 (1999), http://www.csom.org/pubs/glossary.pdf). So viewing the trial court's ruling, the majority proceeded to analyze the evidentiary requirements necessary to offer evidence of a defendant's grooming behavior to prove the fact that grooming actually occurred. *See id.* ¶¶ 16-27.

{20} While an expert witness is needed when details of a scientific or specialized theory and its application to the facts of a particular case are being introduced to the jury, *see* Rule 11-701 NMRA (preventing lay witnesses from testifying "based on scientific, technical or other specialized knowledge within the scope of [the rule governing testimony by experts]"), we do not agree that the grooming evidence in the instant case needed an expert witness to explain to the jury how Defendant's behavior showed his sexual intent or his lack of mistake or accident, *cf. State v. Boyett*, 2008-NMSC-030, ¶ 28, 144 N.M. 184, 185 P.3d 355 (explaining that nonexperts can testify about a defendant's intent so long as their testimony addresses matters within the realm of common knowledge and experience). Although the factual question of whether certain behavior constitutes grooming—as the term is scientifically or specially understood—begs an answer laced with details from the theory of grooming, the question of whether certain behavior shows a sexual intent does not. Lay persons are well-aware of what it means to act with a sexual intent, and therefore can identify behavior as exhibiting that trait without the aid of an expert witness.

{21} Thus, in this case, the lay witnesses and lay persons on the jury were well-equipped to understand how Defendant's behavior proved his sexual intent, even though they may have been ill-equipped to decide whether Defendant had groomed Child, according to a scientific or specialized definition of that term. Had the grooming evidence been offered and admitted solely as proof of the fact that Defendant had groomed Child, an expert would likely have been necessary to expound upon the theory of grooming and to explain how that theory applied in this case. However, as detailed above, the grooming evidence was properly admitted to prove intent; creating a new exception to Rule 11-404(B) for grooming, as suggested by the majority opinion, was unnecessary.

{22} We conclude that the grooming evidence, as used in this case, was not based in scientific, technical, or other specialized knowledge and was thus within the realm of lay testimony. We reject any reading of the majority opinion that would be inconsistent with the discussion above.

IV. CONCLUSION

{23} Based on the foregoing analysis, we reverse the Court of Appeals and remand to that court to consider the issues not previously addressed.

{24} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2009-NMSC-002

Filing Date: January 22, 2009

Docket No. 30,977

IN RE GRAND JURY PRESENTATION CONCERNING JAMES BORT JONES
JAMES BORT JONES,

Petitioner,

v.

HON. ALBERT S. "PAT" MURDOCH, District Court Judge,

Respondent,

and

Second Judicial District Attorney's Office,

Real Party in Interest.

Original Proceeding

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OPINION

SERNA, Justice.

{1} In this extraordinary writ proceeding, we are called upon to clarify how the target of a grand jury investigation may alert the grand jury to the existence of exculpatory evidence. In doing so, we are mindful of the delicate balance we must strike between the constitutionally independent powers of the grand jury, district attorney, and judiciary. And in striking that balance, our ruling today recognizes that each entity has an equally important role to play in ensuring that the rights of the target are observed without compromising the purpose or integrity of the grand jury investigation.

{2} As New Mexico's grand jury statutes—including the Legislature's most recent enactment, NMSA 1978, Section 31-6-11(B) (1969, as amended through 2003)—recognize, fundamental to a reliable indictment is a fair presentation of the evidence upon which the State asks the grand jury to indict, and the withholding of potentially exculpatory evidence strikes at the very heart of the grand jury's assessment of probable cause to indict. While some irregularities in a grand jury proceeding are subject to judicial review after the grand jury returns an indictment, a post-indictment remedy

may be inadequate to cure the very real damage that an ill-advised indictment may inflict on a target's reputation even if the indictment is later dismissed or if the accused is innocent. Moreover, prosecutorial interference with the grand jury's fact-finding function also threatens the structural integrity of the grand jury process by undermining the grand jury's ability to accurately and independently assess the government's evidence of probable cause. Unless the grand jury is empowered to consider all lawful, relevant, and competent evidence bearing on the issue of probable cause, the grand jury cannot perform its historical role of determining whether those accused of wrongdoing by the government should suffer the burdens of a criminal prosecution. We therefore take the opportunity presented by this case to ensure that our grand jury system operates in an informed and efficient manner that is consistent with the constitutional and statutory provisions governing grand jury proceedings in New Mexico.

THE FACTUAL AND PROCEDURAL BACKGROUND OF THIS CASE DEMONSTRATES THE NEED FOR PRE-INDICTMENT PROCEDURES TO ALERT THE GRAND JURY TO THE EXISTENCE OF TARGET-OFFERED EVIDENCE

{3} Petitioner is the target of a grand jury investigation who asked the prosecuting attorney assisting the grand jury to forward a letter from Petitioner to the grand jury. Petitioner sent the letter under the provisions of Section 31-6-11(B), which permits the target or the target's attorney to "alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence." However, a dispute arose between Petitioner and the prosecutor concerning the extent to which the information in the letter was appropriate for consideration by the grand jury under Section 31-6-11(B). Ultimately, Petitioner filed a petition for a writ of mandamus in the district court asking the grand jury judge to require the prosecutor to give the letter to the grand jury for its consideration. After several months passed without action by the judge, Petitioner then petitioned this Court for a writ of mandamus to compel the prosecutor to forward the letter to the grand jury. During the course of the first oral argument before this Court on the petition, Petitioner abandoned his request for mandamus relief against the prosecutor and instead asked this Court to construe his request for relief as a petition for a writ of superintending control to compel the grand jury judge to resolve the dispute between the target and the prosecutor.

{4} At the conclusion of the first oral argument before this Court, we issued an order for simultaneous briefing, which directed the parties to explore alternatives for effectuating the Legislature's intent in enacting the 2003 amendments to Section 31-6-11(B). To provide the parties with guidance, our briefing order advised the parties that the Court's request for further briefing was premised on our conclusion that the 2003 amendments to Section 31-6-11(B) were intended to give the grand jury more information about evidence bearing on the issue of probable cause. We also directed the parties to proceed on the premise that any information about evidence that a target wants to bring to the attention of the grand jury must be submitted through the prosecuting attorney and that it is the prosecuting attorney's responsibility to screen the offer of evidence from the target to ensure that it meets the evidentiary requirements of Section 31-6-11. Within those confines, we asked the parties to focus on the extent to which the courts should be involved in reviewing a prosecutor's decision to reject a target's offer of evidence for the grand jury's consideration. Because of the far-reaching implications for grand jury practice in New Mexico, we also asked for simultaneous amicus curiae briefs from the Attorney General of New Mexico and the New Mexico Criminal Defense Lawyers Association (NMCDLA). Before proceeding further, we take this opportunity to express our appreciation to amici curiae for their invaluable assistance during the briefing and argument of this case.

{5} For the reasons that follow, we conclude that the integrity of the grand jury system requires a pre-indictment procedure for resolving disputes between the target and prosecuting attorney concerning whether to alert the grand jury to the existence of evidence the target wants the grand jury to consider. But before discussing the particulars of that pre-indictment procedure, we address a series of related arguments raised by the district attorney and attorney general challenging this Court's authority to act under the procedural posture of this case.

THE EXISTING DISPUTES BETWEEN THE PARTIES PRESENT CONTESTED ISSUES FOR THIS COURT TO RESOLVE

{6} The district attorney argues that there are no contested issues before this Court because during the first oral argument before this Court Petitioner effectively withdrew the letter he sent to the prosecutor under Section 31-6-11(B). The district attorney further argues that there is no dispute before the Court because "the District Attorney has consented to submitting much of Petitioner's evidence to the grand jury . . . [and] Petitioner has not alleged that the District Attorney refused to present any evidence that he has requested to the grand jury." The district attorney, therefore, argues that this Court would, in effect, be rendering an advisory opinion. *See City of Las Cruces v. El Paso Electric Co.*, 1998-NMSC-006, ¶ 18, 124 N.M. 640, 954 P.2d 72 (quashing certification from federal court because question was moot and the Court avoids issuing advisory opinions); *see also Williams v. Sanders*, 80 N.M. 619, 621, 459 P.2d 145, 147 (1969) (Watson, J., dissenting) (noting that a writ of superintending control should not be used for advisory opinions).

{7} Although there are instances when this Court may choose to render an advisory opinion, *see City of Las Cruces*, 1998-NMSC-006, ¶ 18 (noting that the Court may choose to address a moot issue if it is likely to recur or raises an issue of substantial public importance), we need not decide whether this case presents an exception to the prohibition against advisory opinions because there is an actual controversy between the parties. Even though the district attorney maintains that Petitioner withdrew his letter during the first oral argument before this Court, the record of the first oral argument reveals that Petitioner's counsel only indicated that he was "happy to redraft the letter in the form of simple questions as to the evidence if there [was] a problem with the tone of the letter." Because counsel conditioned his offer to redraft the letter on whether "there [was] a problem with the tone of the letter", and because this Court never definitively ruled that there was a "problem with the tone of the letter", we disagree with the district attorney's characterization of the statements of Petitioner's counsel as an actual withdrawal of the letter. Nonetheless, during the second oral argument before this Court, Petitioner's counsel indicated that he had redrafted the letter to excise objectionable argumentative language and had forwarded the letter to the district attorney twenty-four hours before the second oral argument before this Court. Despite the fact that Petitioner has now apparently substituted his original letter for a redrafted letter that purportedly contains no argumentative language, it still appears that a dispute exists between the parties regarding whether the grand jury should be alerted to some of the specific evidence offered by Petitioner irrespective of whether notification of that evidence comes through the first letter or the second.

{8} In particular, although the district attorney claims there is no dispute before the Court because she "has consented to submitting much of Petitioner's evidence to the grand jury", during the first oral argument before this Court the district attorney indicated that she did not subpoena at least one witness offered by Petitioner (a victim of domestic violence in another case purportedly committed by the victim in this case). The district attorney also indicated that she would not be inquiring into allegations of prior instances of domestic violence, drug dealing, and bribery allegedly perpetrated by the victim in this case, although she would subpoena some of the witnesses suggested by Petitioner in this regard. Despite the apparent submission

of the redrafted letter, there is no indication that the district attorney has changed her position regarding the propriety of some of the actual evidence that Petitioner wants to bring to the attention of the grand jury. Moreover, the petition before this Court does not ask us to resolve the evidentiary dispute between the parties but instead asks us to clarify whether the district court must resolve the dispute in the first instance and, if so, under what procedures. As such, we conclude that contested issues remain for resolution by this Court.

{9} Because the petition before this Court only asks us to formulate the procedure by which the grand jury judge may resolve the dispute between the parties, we do not delve into the substantive issue. Thus, our ruling does not purport to pass judgment on the propriety of the evidence Petitioner wants the grand jury to consider. Nor do we express an opinion on the merit of the prosecuting attorney's apparent objection to alerting the grand jury to at least some of the evidence offered by Petitioner. However, as discussed below, before the grand jury judge can definitely resolve any outstanding disputes, both parties will need to clarify their respective positions in accordance with the procedures we outline more fully at the conclusion of this opinion.

UNDER THE PROCEDURAL POSTURE OF THIS CASE A WRIT OF SUPERINTENDING CONTROL IS AN APPROPRIATE PROCEDURE FOR ADDRESSING PETITIONER'S CLAIMS

{10} The Attorney General raises two related challenges to the propriety of addressing Petitioner's claims through a writ of superintending control. First, the Attorney General claims that this Court lacks the authority to exercise superintending control over the grand jury because it is an independent institution separate and apart from the judiciary. The Attorney General acknowledges that a writ issued by this Court would be directed to the grand jury judge rather than the grand jury itself. However, because the Attorney General maintains that the district court lacks supervisory control over the grand jury for the same reason that this Court does, the Attorney General reasons that this Court cannot attempt to assert control over the grand jury by simply ordering the grand jury judge to assert control over the grand jury. In short, the Attorney General contends that the judiciary (whether this Court or the district court) cannot constitutionally exercise supervisory control over the grand jury.

{11} We begin by pointing out that the Attorney General's argument seems to assume that any ruling by this Court would purport to assert control over the grand jury. The assumption is incorrect. To the extent that this Court or the grand jury judge intervenes to resolve the dispute between a target and prosecuting attorney, that resolution would either uphold or overrule the prosecutor's desire to withhold information from the grand jury. But in no circumstance would judicial review of the prosecutor's decision require the grand jury to consider the evidence tendered by the target. Assuming that the target's offer of evidence meets the evidentiary standards set forth by statute, Section 31-6-11(B) only requires that the grand jury be alerted to its existence. We contemplate requiring nothing more.

{12} Even if the grand jury judge determines that the grand jury should be alerted to the existence of the evidence, the grand jury remains free to decide not to hear the evidence offered by the target or to hear the evidence and weigh it as it sees fit. To suggest that judicial oversight of the prosecutor's screening function is an improper invasion into the proper independence of the grand jury is to misunderstand the role of the court and conflate the role of the prosecuting attorney as an aide to the grand jury with the role of the grand jury itself. *See United States v. Fisher*, 455 F.2d 1101, 1105 (2d Cir. 1972) ("[T]he grand jury is not meant to be the private tool of a prosecutor."); *State v. Haberski*, 449 A.2d 373, 378 (Me. 1982) ("The grand jury does not function as an arm of the prosecution."); *In re Nat'l Window Glass Workers*, 287 F. 219, 225 (N.D. Ohio 1922) ("The process by which witnesses are

compelled to attend a grand jury investigation is the court's process and not the process of the grand jury, nor of the district attorney.").

{13} That said, we recognize that any judicial ruling that requires the prosecuting attorney to alert the grand jury to the existence of potentially exculpatory evidence necessarily impacts the grand jury process. But to assert that such a ruling is an improper invasion of the grand jury's independence is a distortion of the relationship between the grand jury and the court that convenes it. The true relationship between the grand jury and the court is an interdependent one that enjoys long-standing and widely-held recognition among the states:

> A grand jury has no existence aside from the court which calls it into existence and upon which it is attending. A grand jury does not become, after it is summoned, impaneled, and sworn, an independent planet, as it were, in the judicial system, but still remains an appendage of the court on which it is attending. . . . All indictments or presentments of a grand jury become effective only when presented in court and a record is made of such action. A grand jury is not, therefore, and cannot become, an independent, self-functioning, uncontrollable agency. It is and remains a grand jury attending on the court, and does not, after it is organized, become an independent body, functioning at its uncontrolled will, or the will of the district attorney or special assistant. . . . It can therefore never become an immaterial matter to the court what may be done with its process or with its grand jury. A court would not be justified, even if it were so inclined, to create or call into existence a grand jury, and then go off and leave it. A supervisory duty, not only exists, but is imposed upon the court, to see that its grand jury and its process are not abused, or used for purposes of oppression and injustice.

In re Nat'l Window Glass Workers, 287 F. at 225; *accord Application of Texas Co.*, 27 F. Supp. 847, 850 (E.D. Ill. 1939) ("A grand jury is a party of the court machinery [and] is under control by the court to the extent that it is organized and the legality of its proceedings determined by the court in accord with the statutes."); *Application of Iaconi*, 120 F. Supp. 589, 590 (D. Mass. 1954) ("[A]ny court . . . can exercise over a grand jury sitting in that court supervisory power to prevent the process of that grand jury from being used abusively."); *People v. Sears*, 273 N.E.2d 380, 388 (Ill. 1971) ("The grand jury is an arm of the court and its in camera proceedings constitute a judicial inquiry.") (internal quotation marks and citation omitted); *People v. Ianniello*, 235 N.E.2d 439, 443 (N.Y. 1968) ("Courts have a particular responsibility to prevent unfairness in Grand Jury proceedings, for the Grand Jury is an arm of the court.") (internal quotation marks and citation omitted).

{14} Although the Attorney General appears to recognize that the courts have some valid supervisory control over the grand jury, the Attorney General relies on the United States Supreme Court opinion in *United States v. Williams*, 504 U.S. 36 (1992), to support his position that this Court cannot exercise supervisory control under the circumstances of this case. As an initial matter, it should be noted that *Williams* dealt with the relationship between the federal judiciary and the federal grand jury. Nonetheless, New Mexico case law recognizes that our grand jury structure as it relates to the judiciary is very similar to the federal system. *See Buzbee v. Donnelly*, 96 N.M. 692, 695-98, 634 P.2d 1244, 1247-50 (1981) (recognizing that New Mexico law "places our grand jury in much the same position as those in the federal system" and noting the importance of federal case law in this area). Therefore, while not directly binding on this Court, the *Williams* opinion does provide useful guidance for assessing the Attorney General's argument.

{15} Although the Supreme Court in *Williams* ultimately concluded that the federal court lacked supervisory control over the grand jury, it is important to note two distinctions. First, *Williams* was addressing a post-indictment decision by a federal judge to quash the indictment

because the government failed to disclose to the grand jury what the judge believed was significant exculpatory evidence. As a result, the focus in *Williams* was necessarily on whether the court's decision to quash the indictment improperly invaded on the grand jury's constitutional and common law independence by overturning an indictment that the grand jury had already determined was supported by the evidence it had before it. *See Williams*, 504 U.S. at 53-54 (discussing why it would be contrary to the "common law of the Fifth Amendment grand jury" to quash an indictment based on sufficient evidence because the prosecutor failed to present exculpatory evidence to the grand jury). In contrast, in this case the grand jury has not yet acted, and this Court therefore is not asked to second-guess what the grand jury might have done if it had other exculpatory evidence before it. Instead, we are only asked to decide what procedures should be in place to address instances when the prosecutor does not want to alert the grand jury to the existence of ostensibly exculpatory evidence offered by the target. As such, any procedures this Court puts in place would not interfere with the independence of the grand jury itself but rather would provide a mechanism to resolve disputes between the prosecution and defense since both have been statutorily authorized to submit evidence for the grand jury's consideration. *See* NMSA 1978, § 31-6-7(A) (1969, as amended through 2003) (requiring the district attorney to examine witnesses before the grand jury); § 31-6-11(B) (permitting the target or his attorney to alert the grand jury to exculpatory evidence).

{16} A second distinguishing feature in *Williams* is that the district court was acting in the absence of any preexisting prosecutorial standards set forth in a specific statute or Court rule. *See Williams*, 504 U.S. at 46 (noting that federal courts cannot exercise their supervisory control over the grand jury to prescribe "standards of prosecutorial conduct in the first instance"). If the court had been acting based on an existing statute or court rule, *Williams* implies that there would have been an adequate basis for the court to exercise supervisory control over the grand jury. *Id*. (recognizing that supervisory power over the grand jury "can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions") (internal quotation marks and citation omitted). In light of the fact that this Court is asked to formulate a procedure to implement the target's right to alert the grand jury to potentially exculpatory evidence under Section 31-6-11(B), *Williams* actually supports our conclusion that this Court and, by extension, the grand jury judge have supervisory control over the grand jury proceedings under the circumstances of this case.

{17} In addition to arguing that this Court (and the grand jury judge) lack supervisory control over the grand jury, the Attorney General also argues that Petitioner cannot meet the formal requirements for relief by way of a writ of superintending control. Specifically, the Attorney General maintains that extraordinary relief is inappropriate in this case because Petitioner has several adequate remedies at law. *See generally State v. Zinn*, 80 N.M. 710, 712, 460 P.2d 240, 242 (1969) (recognizing that the Court exercises its power of superintending control when "there is no plain, speedy, and adequate remedy"). In this regard, the Attorney General suggests that a dissatisfied target could file a motion to dismiss the indictment under Section 31-6-11(A) for prosecutorial bad faith, could seek an interlocutory appeal if the motion to dismiss were denied, or could file a direct appeal at the conclusion of the criminal proceeding if ultimately convicted.

{18} While these options could provide a measure of relief for a prosecutor's wrongful withholding of exculpatory evidence from the grand jury, *see Kerpan v. Sandoval County Dist. Att'y's Office*, 106 N.M. 764, 767, 750 P.2d 464, 467 (Ct. App. 1988) (providing that writ of mandamus to require prosecutor to present evidence to the grand jury would be inappropriate because a later motion to dismiss the indictment would provide an adequate remedy), there are a number

of reasons why the alternatives identified by the Attorney General will often be inadequate remedies. First and foremost, even if a target could successfully pursue the remedies suggested by the Attorney General, they would all be post-indictment remedies and, as such, could not remedy the harm flowing from an unjustified indictment itself. To suggest otherwise would be:

> an astonishingly callous argument which ignores the obvious. For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal. Prosecutors have an immense discretion in instituting criminal proceedings which may lastingly besmirch reputations. That discretion is almost completely unfettered. It should surely not extend so far as to preclude judicial interference with a prosecutor's aim to induce an indictment by offering to a grand jury evidence which is the product of illegal acts of federal officers.

In re Fried, 161 F.2d 453, 458-59 (2d Cir. 1947) (footnotes omitted); *accord United States v. Briggs*, 514 F.2d 794, 798-99 (5th Cir. 1975) (noting that "[i]t would be unrealistic to deny that an accusation, even if unfounded, that one has committed a serious felony may impinge upon employment opportunities" and recognizing that "acquittal of a named defendant is not wholly curative of the reputational injury suffered by having been charged and tried"); *Menard v. Mitchell*, 430 F.2d 486, 490-91 (D.C. Cir. 1970) (recognizing that even "the mere fact of an arrest" may result in substantial reputational injury and subject the accused to serious economic losses and lost opportunities for schooling and employment "even if followed by acquittal or complete exoneration of the charges involved").

{19} Aside from the undeniable damage inflicted by the mere issuance of an unjustified indictment, delaying the target's right to seek relief until after the indictment is issued also puts the target at a procedural disadvantage. In particular, the target will have to meet a higher burden to secure post-indictment relief because a request for post-indictment relief would necessarily challenge the sufficiency of the evidence upon which the grand jury's indictment is based. As such, the target-turned-defendant must establish bad faith on the part of the prosecutor as a prerequisite to obtaining a dismissal of the indictment. *See* § 31-6-11(A) ("The sufficiency of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury."); *see also State v. Romero*, 2006-NMCA-2006-NMCA-105, ¶ 9, 140 N.M. 281, 142 P.3d 362 (concluding that a defendant cannot challenge the sufficiency of an indictment on the basis that the grand jury did not consider exculpatory evidence because Section 31-6-11(B) "contains no express or implied authorization for judicial review of the evidence to insure that the grand jury considered evidence that disproves or reduces a charge or that makes an indictment unjustified").

{20} In contrast, the pre-indictment remedy that Petitioner now seeks is not dependent on establishing prosecutorial motive but instead focuses on whether the evidence the target wants before the grand jury meets the appropriate evidentiary standard. Moreover, pre-indictment review eliminates any potential deference the court must give to an existing grand jury indictment that is otherwise valid on its face. In short, while Petitioner may have other procedural avenues he can pursue besides his current petition before this Court, we reject the notion that Petitioner currently has any other adequate remedy at law to address the specific harm he is trying to avoid—the taint of an unjustified yet virtually unimpeachable indictment. *See In re Eastburn*, 121 N.M. 531, 537, 914 P.2d 1028, 1029 (1996) (recognizing that the availability of an appeal in an individual case does not necessarily preclude

relief by writ of superintending control if the appeal is inadequate to address the harm).

THE LEGISLATURE'S ENACTMENT OF SECTION 31-6-11(B) IS A PROPER EXERCISE OF ITS PLENARY POWER TO LEGISLATE

{21} In addition to questioning this Court's supervisory control over the grand jury, the district attorney and the Attorney General also question the Legislature's ability to enact statutes to control the functions of the grand jury. The implication is that Section 31-6-11(B) has the potential for exceeding the scope of the Legislature's constitutional authority depending on how this Court interprets it. Also implicit in this argument is the assumption that the actions of the prosecutor are the actions of the grand jury.

{22} To the extent that the district attorney and the Attorney General question the Legislature's authority to pass laws affecting the operations of the grand jury, their argument is undercut by the plenary power of the Legislature. *See State ex rel. Clark v. Johnson*, 120 N.M. 562, 575, 904 P.2d 11, 24 (1995) ("The state legislature, directly representative of the people, has broad plenary powers. If a state constitution is silent on a particular issue, the legislature should be the body of government to address the issue."). The district attorney and the Attorney General suggest, however, that the Legislature's broad power is limited by the fact that the grand jury is an independently created body within the Constitution. *See Buzbee*, 96 N.M. at 695, 634 P.2d at 124 (noting the significance of creating "the grand jury under the Bill of Rights, instead of placing it under the Executive Department or the Judiciary). They also stress that within the constitutional provision recognizing the existence of the grand jury, the Constitution specifically identifies those matters pertaining to the grand jury that the Legislature may control by enacting laws. *See* N.M. Const. art. 2, § 14 (providing that the Legislature may prescribe by law the size of the grand jury, the manner of convening and qualifying grand jurors, and the number of grand juror votes needed to indict). Beyond those specifically enumerated matters, the district attorney and the Attorney General maintain that the Legislature cannot legislate.

{23} We disagree with the notion that the Legislature's power to legislate in matters affecting the grand jury is limited in nature. In this regard, we note that Article II, Section 14 does not expressly limit the Legislature's power to legislate to those enumerated items pertaining to the grand jury. *See Varney v. Albuquerque*, 40 N.M. 90, 94, 55 P.2d 40, 43 (1936) (recognizing that "when an act of the Legislature is assailed, the court looks to the state Constitution only to ascertain whether any limitations have been imposed upon such power") (internal quotation marks and citation omitted); *cf. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly*, 39 N.M. 312, 321, 46 P.2d 1097, 1102 (1935) (ruling that "the enumeration of subjects of taxation contained in article 8, § 2, as originally adopted, was merely confirmatory of the Legislature's inherent power to tax, and not a limitation thereon"). Moreover, any attempt to invalidate Section 31-6-11(B) by suggesting that the Legislature improperly invaded the legitimate independence of the grand jury is a mischaracterization of what the statute seeks to accomplish.

{24} The heart of this case involves the statutorily-created right of the target to alert the grand jury to exculpatory evidence. The provision at issue does not purport to command the grand jury to accept the target's evidence. Instead, the provision simply identifies the prosecutor as the conduit by which a target may alert the grand jury to pertinent evidence. As such, the provision at issue in this case does not diminish the grand jury's prerogative to weigh the evidence before it as it sees fit in making an independent decision whether to indict. Indeed, the grand jury is not even required to hear the evidence once it is made aware of its existence. But the grand jury cannot choose to ignore what it does not know.

{25} Even though the grand jury has long been considered an independent body whose

procedures have developed through the common law well before our state or federal constitutions were adopted, *see generally Buzbee*, 96 N.M. at 695-96, 634 P.2d at 1247-48, we disagree with the notion that the common law independence of the grand jury precludes the Legislature from enacting statutes to improve the grand jury system. We have long recognized that the Legislature may exercise its plenary power to alter the common law. *See Ickes v. Brimhall*, 42 N.M. 412, 415, 79 P.2d 942, 943 (1938) (recognizing that "the common law remains the rule of practice and decision" in New Mexico "except as superceded or abrogated by statute or constitution"). While the procedures set forth in Section 31-6-11(B) may not have been known at common law, we fail to see how the Legislature's attempt to give the grand jury greater access to pertinent evidence somehow diminishes the grand jury's independence. Any suggestion to the contrary misconstrues what the Legislature sought to accomplish by enacting Section 31-6-11(B). That said, the independence of the grand jury is certainly implicated when the prosecutor wrongfully refuses to alert the grand jury to target-offered evidence contemplated by Section 31-6-11(B). To address such situations, this Court must balance a number of competing interests to ensure that Section 31-6-11(B) is interpreted in a manner that effectuates the Legislature's intent, recognizes the state's legitimate prosecutorial function, and preserves the independence of the grand jury.

IMPLEMENTATION OF A PRE-INDICTMENT MECHANISM FOR RESOLVING DISPUTES ARISING UNDER SECTION 31-6-11(B) WILL EFFECTUATE THE LEGISLATURE'S INTENT AND IS CONSISTENT WITH THIS COURT'S SUPERVISORY CONTROL OVER THE GRAND JURY SYSTEM

{26} Because Section 31-6-11(B) does not expressly provide a mechanism for resolving disputes when the prosecutor declines to present target-offered evidence for the grand jury's consideration, the district attorney and Attorney General both insist that this Court should not read an enforcement mechanism into the statute. *See N.M. Indus. Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105 (recognizing that in determining legislative intent the courts "look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended"); *State v. Maestas*, 2007-NMSC-001, ¶ 15, 140 N.M. 836, 149 P.3d 933 ("We may only add words to a statute where it is necessary to make the statute conform to the legislature's clear intent, or to prevent the statute from being absurd."). However, Petitioner and the NMCDLA point to the totality of the 2003 amendments to the grand jury statutes as evidence that the Legislature wanted to improve the reliability of grand jury decisions and restore the grand jury's protective function. In that light, they argue, it would make no sense to leave a target with no recourse when a prosecutor refuses to notify the grand jury of the existence of pertinent evidence under Section 31-6-11(B). *See GTE S.W., Inc. v. Taxation and Revenue Dep't*, 113 N.M. 610, 624, 830 P.2d 162, 176 (Ct. App. 1992) (recognizing that "there is also a presumption that in enacting laws, the legislature does not use surplus language or enact useless laws").

{27} While New Mexico has little in the way of legislative history that can shed light on legislative intent, one of the final changes to the bill amending subsection B before it was passed by the Legislature was the addition of the introductory clause to the last sentence of Section 31-6-11(B) that requires the target or the target's attorney to alert the grand jury "[a]t least twenty-four hours before grand jury proceedings begin". *See* House Floor Amendment Number 1 to page 3, line 17 of House Judiciary Committee Substitute for House Bill 109, An Act Relating to Grand Juries, 46th Leg., 1st Sess. (N.M. 2003); *see also Martinez v. Jaramillo*, 86 N.M. 506, 509, 525 P.2d 866, 869 (1974) (describing legislative history to include changes to originally introduced bill during the legislative process leading to its final passage); *accord State ex rel. Helman v. Gallegos*, 117 N.M. 346, 355-56, 871 P.2d 1352,

1361-62 (1994); *State v. Alderete*, 88 N.M. 150, 152, 538 P.2d 422, 424 (Ct. App. 1975). With that change, the Legislature clearly intended to give the prosecutor time to screen the target's tendered evidence before the commencement of the grand jury proceeding. And as noted above, in our briefing order we already acknowledged the screening function the prosecuting attorney must perform to avoid the presentation of inappropriate information to the grand jury.

{28} Because the Legislature would certainly foresee that conflicts would inevitably arise because of the prosecutor's screening function, we are also confident that the Legislature intended to provide the parties with a small window of time to identify evidentiary disputes before the commencement of the grand jury proceeding. Moreover, given the Legislature's clear intent to give the grand jury access to more information from the target, we see no basis for concluding that the Legislature intended to give the prosecutor unbridled discretion during the screening process. After all, the target has always been able to bring exculpatory evidence to the attention of the prosecutor, and the prosecutor could always simply ignore it unless it directly negated guilt. Thus, in light of past practice, it would be unreasonable to conclude that the Legislature decided to explicitly give the target the right to alert the grand jury to the existence of exculpatory evidence while nevertheless allowing the prosecutor to reject such offers without a check, particularly since the 2003 amendments to Section 31-6-11(B) also eliminated the prosecutor's duty to present evidence that directly negates guilt. *See State v. Herbstman*, 1999-NMCA-014, ¶ 20, 126 N.M. 683, 974 P.2d 177 (noting that the courts "will reject an interpretation of a statute that makes parts of it mere surplusage or meaningless").

{29} By accommodating the need for time to identify evidentiary disputes between the prosecutor and target, the Legislature surely anticipated that the grand jury judge would be called upon to resolve such disputes. That said, involving the grand jury judge in resolving disputes between the target and prosecutor over what the grand jury should be made aware of has the potential for putting a significant strain on the resources that the judiciary must devote to grand jury proceedings. Because of the potential burden on the judiciary flowing from evidentiary disputes arising under the 2003 version of Section 31-6-11(B), we construe the Legislature's silence on the procedures to be used for resolving such disputes as a recognition that this Court is in the best position to formulate the procedural framework for its lower courts to use when resolving these types of pre- indictment disputes. *See Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 340-41, 805 P.2d 603, 608-09 (1991) (recognizing the "consistent intention on the part of the legislature and this Court that legislative rules relating to pleading, practice and procedure in the courts, particularly where those rules relate to court management or housekeeping functions, may be modified by a subsequent rule promulgated by the Supreme Court").

{30} Given the long-standing recognition that the judiciary has the power and obligation to assist the grand jury in carrying out its functions, *see Davis v. Traub*, 90 N.M. 498, 500, 565 P.2d 1015, 1020 (1977) (recognizing that New Mexico "statutes specify certain procedures and authorize specific persons to aid the grand jury's investigation of criminal activity . . . [and this Court] will not permit anyone to circumvent the letter or the spirit of those laws"), we conclude it is incumbent on this Court to fashion a mechanism to resolve disputes under Section 31-6-11(B). Even the restrictive view of the judiciary's supervisory control over the grand jury articulated by the United States Supreme Court in *Williams* supports our decision to create a mechanism for resolving pre-indictment evidentiary disputes based on our own inherent power of superintending control over the grand jury. *See Williams*, 504 U.S. at 46 (recognizing the power of the Court and Congress to adopt "clear rules which were carefully drafted . . . to ensure the integrity of the grand jury's functions").

{31} Before discussing the particular procedures to employ, we pause to acknowledge the relative novelty of the task that confronts us.

To date, only a handful of states have opted to provide an explicit pre-indictment mechanism to resolve disputes between the prosecutor and the target regarding evidence that should go before the grand jury. *See, e.g.*, Colo. Rev. Stat. Ann. § 16-5-204(4)(l) (allowing any person to request to testify by approaching the prosecutor or grand jury and giving the court discretion to grant a hearing on denied requests); Me. Rev. Stat. Ann. tit. 15, § 1256 (allowing evidence to be offered to the grand jury by prosecutor and "such other persons as said presiding justice may permit"); N.C. Gen. Stat. § 15A-626(a) (giving judge and district attorney discretion to grant requests to testify before grand jury); N.Y. Crim. Pro. Law § 190.50(6) (giving grand jury discretion to grant requests from target to have witnesses called before the grand jury); Tenn. Code. Ann. § 40-12-104(a) (allowing any person who has knowledge or proof of a crime to testify before the grand jury); *People v. Sears*, 273 N.E.2d 380 (Ill. 1971) (recognizing limited authority of the court to direct witnesses to appear before the grand jury over objection of the prosecutor). Ordinarily, courts only become involved in pre-indictment evidentiary disputes when a witness subpoenaed by the grand jury seeks to have the subpoena quashed. *See* Ronald F. Chase, Annotation, *Power of court to control evidence or witnesses going before grand jury*, 52 A.L.R.3d 1316, § 3 (1973).

{32} To the extent that courts have taken on the role of deciding whether evidence should be submitted to the grand jury that the prosecutor does not want submitted, there is some suggestion that such an approach has not been adopted by more states because of the potential for extensive pre-indictment litigation. *See, e.g.*, 4 Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, *Criminal Procedure* § 15.2(c), at 465-66 (3d ed. 2007). Nonetheless, we are firmly convinced that the pre-indictment procedures we outline here today will improve the reliability of the grand jury system. Moreover, the availability of an enforceable pre-indictment procedure for bringing evidence to the attention of the grand jury will likely reduce the number of post-indictment requests for relief that often prove more cumbersome to resolve and more invasive of the grand jury's legitimate prerogative to indict.

AN EFFECTIVE PRE-INDICTMENT PROCEDURE MUST BE INITIATED WITH CLARITY AND RESOLVED QUICKLY

{33} As written, Section 31-6-11(B) simply provides that the target may alert the grand jury to the existence of exculpatory evidence by notifying the prosecutor. Presumably, if the evidence offered by the target meets the standard in the statute, namely, evidence that is "lawful, competent, and relevant" and "that would disprove or reduce an accusation or that would make an indictment unjustified", then the prosecutor would be obligated to alert the grand jury to the evidence. *See* NMSA 1978, § 31-6-7(D) (1969, as amended through 2003) (requiring prosecutor to be fair and impartial at all times during grand jury proceedings); *State v. Cruz*, 99 N.M. 690, 692, 662 P.2d 1357, 1359 (1983) ("In dealing with the grand jury, the prosecutor's duty is to protect both the public's interest and the rights of the accused."). But despite the apparent simplicity of the language in the statute, the statute leaves ample room for disagreement regarding how the target is to notify the prosecutor of exculpatory evidence and how the prosecutor is to proceed when he or she does not want to "alert" the grand jury to the evidence offered by the target.

{34} The letter sent by the target's attorney in this case demonstrates the importance of a clear procedure for notifying the prosecutor. Even Petitioner now concedes that some of what was in the letter, such as legal conclusions and argument about the inferences to draw from the evidence, would not be appropriate for direct forwarding to the grand jury. Since Petitioner appears willing to rely on his redrafted letter if this case is remanded for a hearing before the grand jury judge, we find it unnecessary to explicitly rule on what is or is not appropriate about Petitioner's original letter. However, to avoid

disputes regarding what is argument and what is evidence, a letter from a target intended for delivery to the grand jury generally should focus on simply providing the grand jury with a factual and nonargumentative description of the nature of any tangible evidence and the substance of the potential testimony of any suggested witnesses, along with the names and contact information of the necessary witnesses who could provide the exculpatory information.

{35} To give both the prosecutor and the reviewing grand jury judge the necessary information to evaluate why the requested evidence in the nonargumentative grand jury letter qualifies for submission to the grand jury under Section 31-6-11(B), the communication to the prosecutor which contains the grand jury's letter should also be accompanied by a separate cover letter or memorandum, which will not go to the grand jury, expressing any necessary contextual information, arguments as to the propriety or significance of the requested evidence, the proposed questions as contemplated by NMSA 1978, Section 31-6-4(D) (1969, as amended through 2003), and any other matters that may be helpful to communicate to the prosecutor or judge. Whether the prosecutor uses the questions proposed by the target seems to us a matter that is committed to the discretion of the prosecutor provided that the prosecutor does alert the grand jury to the existence of the evidence and, if the proposed witness is called before the grand jury, elicits the general information contemplated by the target. But if the prosecutor does not want to alert the grand jury to the existence of the witness or does not want to elicit the information from the witness that the target deems worthy of submission to the grand jury, the prosecutor must file a motion with the grand jury judge, with notice to the target, seeking confirmation of the prosecutor's decision not to call the witness or not to inquire into the subject matter proposed by the target.

{36} Without notice to the target, there would likely be no way to remedy, pre-indictment, the wrongful withholding of evidence by the prosecutor because the secrecy of grand jury proceedings would prevent the target from definitively knowing before an indictment is issued whether the grand jury was alerted to the existence of the target-offered evidence. *See* § 31-6-4(C) and (D) (precluding presence of target before grand jury other than to testify and limiting presence of target's attorney to time when target is testifying); NMSA 1978, § 31-6-8 (1969, as amended through 1983) (limiting preparation of transcript of grand jury proceedings to case where an indictment is returned). In the motion filed with the grand jury judge, the prosecutor should provide the grand jury judge with the target's letter submitting the proposed evidence, and the prosecutor's motion should state why the prosecutor believes the grand jury should not be alerted to the existence of the target-offered evidence. The grand jury judge can then decide whether to ask for a written response from the target and whether to hold a short hearing to allow the parties to argue the matter. In any event, the grand jury judge should resolve the matter quickly, by written order in the judge's discretion if needed to preserve the record, giving the parties clear direction on how to proceed before the grand jury.

{37} Assuming that the grand jury does call a target's proposed witness, we find it imprudent to fashion a pre-indictment mechanism to ensure that the prosecutor questions the witness in the manner proposed by the target or otherwise elicits the evidence in the way that the target intended. To begin with, the grand jury very well might decline to hear the target-offered evidence upon learning of its existence. And even if the grand jury does ask the prosecutor to call the target-offered witnesses, to require the grand jury judge to formulate the script by which the prosecutor must question the witness would be highly impractical and most likely ineffective since the questioning of the witness will invariably depend on how the witness answers, on what additional questions the grand jury itself might want asked, and on what other evidence has been brought out during the proceedings. To some extent, such an attempt also runs the risk of usurping the prosecutor's rightful role before the grand jury.

{38} That said, we recognize the possibility that an overzealous prosecutor could call a witness

as requested by the target but then intentionally question the witness in a manner intended to keep the witness from providing the grand jury with information that the target wanted before the grand jury. In such instances, the only practical recourse for the target must come post-indictment after the target has the opportunity to review the transcript of the grand jury proceedings to evaluate the fairness of the prosecutor's actions. *See* § 31-6-4(C) and (D) (precluding the presence of the target before the grand jury other than to testify and limiting the presence of the target's attorney to when the target is testifying); § 31-6-8 (limiting preparation of the transcripts of grand jury proceedings to cases in which an indictment is returned). But even then, as discussed above, the target would most likely need to demonstrate prosecutorial bad faith.

{39} By adopting a pre-indictment procedure that requires the involvement of the grand jury judge when a prosecutor does not want to alert the grand jury to the existence of target-offered evidence, the judge's ruling will simultaneously serve as the means for enforcing Section 31-6-11(B) and the remedy for a prosecutor's unjustified reluctance to alert the grand jury to the existence of target-offered evidence. Because the Legislature intended to give the grand jury access to more evidence, not less, the prosecution carries the burden of persuading the grand jury judge that the grand jury should not be alerted to target-offered evidence. In determining whether to require the prosecutor to alert the grand jury to evidence offered by the target, the grand jury judge should be guided by the applicable evidentiary standards set forth in Section 31-6-11 that limit the grand jury to considering "lawful, competent, and relevant" evidence, including evidence "that would disprove or reduce an accusation or otherwise make an indictment unjustified". The ostensible simplicity of these statutory evidentiary standards may belie the potential difficulty in applying them to the particular circumstances in any given case. Nonetheless, we are confident of the ability of our district court judges to make these evidentiary determinations in the same accurate and efficient manner that they do in other contexts on a daily basis. Finally, evenly balanced argument should favor disclosure of the evidence to the grand jury for that body to decide what consideration to give it.

{40} And yet, despite the best efforts of our district court judges, there will undoubtedly be instances when the target or the prosecutor will be dissatisfied with the ruling of the grand jury judge and want further appellate review. Of course, any provision for appellate review has the potential for adding a significant delay to the prosecution's ability to obtain timely indictments. Moreover, without any explicit provision for judicial intervention to resolve disputes arising under Section 31-6-11(B), let alone any mention of appellate review, we are unwilling to recognize a right of appeal from a decision of the grand jury judge under Section 31-6-11(B). *See* NMSA 1978, § 39-3-3(B) (1972) (limiting the state's right to appeal in criminal cases to dismissals and orders suppressing or excluding evidence); *State v. Augustin M.*, 2003-NMCA-065, ¶ 41, 133 N.M. 636, 68 P.3d 182 (ruling that a defendant does not have an immediate right to appeal from the denial of a motion to dismiss an indictment); *see also State v. Smallwood*, 2007-NMSC-005, ¶ 6, 141 N.M. 178, 152 P.3d 821 (recognizing that the Court cannot create appellate jurisdiction through its rule-making authority).

{41} Although we conclude there is no pre-indictment right of appeal from the decision of a grand jury judge under Section 31-6-11(B), we are not foreclosing the possibility that, in an extreme case, a party may still seek review in this Court through an extraordinary writ proceeding. We emphasize, however, the high standard and discretionary nature associated with granting such relief. Therefore, in the absence of appellate review, we anticipate the prompt commencement of grand jury proceedings following any determinations required by the grand jury judge under Section 31-11-6(B).

CONCLUSION

{42} In light of the Legislature's clear intent to provide the grand jury with more information from the target of a grand jury investigation, and

in light of the judiciary's responsibility to ensure the equitable and efficient operation of the grand jury system, we conclude that the grand jury judge has a role to play when the prosecutor does not want to alert the grand jury to the existence of the target-offered evidence. To allow the prosecutor's screening function to proceed unchecked pre-indictment invites post-indictment inefficiencies into the system. And to assume that all damage flowing from an unjustified indictment can be cured post-indictment is to ignore the lasting injury that even an unsuccessful indictment can inflict.

{43} We therefore remand this matter to the district court to resolve the outstanding disputes between the parties regarding the extent to which the grand jury should be alerted to evidence offered by Petitioner. Because Petitioner has apparently submitted a redrafted letter to the district attorney requesting that the grand jury be alerted to specific evidence, the district attorney should file a motion with the grand jury judge if the district attorney believes that any of the target-offered evidence is inappropriate for submission to the grand jury. The grand jury judge shall then proceed to rule on the motion in a manner consistent with this opinion. Although we endeavor in this opinion to provide the grand jury judge with a workable framework for resolving the disputes in this case, we also request that our Rules of Criminal Procedure for the District Courts Committee consider whether rule amendments are needed based upon the procedure we have outlined here today.

{44} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2009-NMSC-012

Filing Date: February 26, 2009

Docket No. 30,318

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

DANIEL BEN TRUJILLO,

Defendant-Respondent.

Original Proceeding on Certiorari
Ross C. Sanchez, District Judge

Gary K. King, Attorney General
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OPINION

SERNA, Justice.

{1} We are faced with the unenviable task of interpreting the statutory labyrinth created by the intersection of the New Mexico Mental Illness and Competency Code ("NMMIC"), NMSA 1978, §§ 31-9-1 to -1.5 (1988), NMSA 1978, Section 31-9-1.6 (1997, as amended through 1999), and the Mental Health and Developmental Disabilities Code ("MHDDC"), NMSA 1978, §§ 43-1-1 to -25 (1976). First, we are asked whether the definition of mental retardation in Section 31-9-1.6 tracks that of the Diagnostic and Statistical Manual of Mental Disorders. *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders-IV-TR* 41 (2000) ("DSM"). We hold that the New Mexico definition of mental retardation in Section 31-9-1.6 is not equivalent to that of the DSM in that it does not contain an age of onset requirement.

{2} Second, we consider whether defendants with mental retardation who are dangerous, incompetent, and without a substantial probability of gaining competence may be criminally committed per the NMMIC or whether Section 31-9-1.6 precludes such commitment. We hold that Section 31-9-1.6 mandates that defendants with mental retardation who are dangerous, incompetent, and without a substantial probability of gaining competence may not be criminally committed, though they may be civilly committed at the discretion of the district court and the district attorney. We therefore affirm the Court of Appeals.

I. FACTS AND PROCEEDINGS BELOW

{3} Defendant, Daniel Ben Trujillo, stands accused of attempted first degree murder, aggravated burglary, aggravated battery, and tampering with evidence. The State alleges that he broke into the home of his employer and tried

to kill him with a steel bar because of allegations that the employer had raped Defendant's girlfriend. Defendant has an extreme mental condition resulting from self-inflicted carbon monoxide poisoning that occurred over twenty years ago when Defendant was twenty-six years old. As a result of this suicide attempt, Defendant's IQ is estimated to be in the high fifties to low sixties. This score puts him in the first percentile, meaning that ninety-nine per cent of the population has a higher IQ than he does.

{4} Upon a pretrial defense motion to determine competency, the district court stayed Defendant's trial and ordered him to undergo a psychological evaluation. Defendant was examined by Dr. Eric Mason Westfried, a clinical psychologist, who determined that Defendant was incompetent to stand trial. Both parties stipulated to Dr. Westfried's evaluation and the district court entered a finding that Defendant was incompetent to stand trial.

{5} The defense subsequently filed a notice of mental retardation, whereupon a hearing was held and the district court ordered Defendant committed for a determination of competency based on mental retardation. A second clinical psychologist, Dr. Renee H. Wilkins, again found that Defendant was incompetent and unlikely to be treated to competency. This expert further found that Defendant was dangerous. However, Dr. Wilkins reported that Defendant did not meet the medical or psychiatric definition of mental retardation for the sole reason that his difficulties did not commence prior to his attaining the age of eighteen, as required by the DSM. *See* DSM at 41. Rather, Dr. Wilkins diagnosed Defendant with dementia, a dysfunction that has a medical definition comparable to mental retardation but without the age of onset requirement.

{6} Despite Dr. Wilkins' failure to diagnose Defendant with mental retardation, the district court found that Defendant had mental retardation per the definition in Section 31-9-1.6(E). The district court issued factual findings to the effect that Defendant is dangerous, incompetent, and without a substantial probability of gaining competence pursuant to Section 31-9-1.6(B). The court determined that, because Defendant was not charged with one of the enumerated crimes in Section 31-9-1.6(C), he was not subject to civil commitment by the Department of Health ("DOH") under the MHDDC. *See* § 31-9-1.6(C) ("[T]he [DOH] shall commence [civil commitment] if the defendant was charged with murder in the first degree, first degree criminal sexual penetration, criminal sexual contact of a minor or arson."); § 43-1-1 to -25. Instead, the district court concluded, because he was not accused of any of the felonies enumerated in Section 31-9-1.6(C), Defendant could only be criminally committed under the NMMIC. *See* § 31-9-1 to -1.5; § 31-9-1.6(C).

{7} Because of the "substantial ground for difference of opinion" regarding the correct interpretation of Section 31-9-1.6, the district court granted Defendant leave to file an application for interlocutory appeal to the Court of Appeals. *See* Rule 12-203 NMRA (outlining the procedure for interlocutory appeals). In a published opinion, the Court of Appeals affirmed in part and reversed in part. *See State v. Trujillo*, 2007-NMCA-056, ¶ 3, 141 N.M. 668, 160 P.3d 577. It upheld the district court's determination that Defendant has mental retardation. *See id.* However, in a split opinion, it reversed the district court's order allowing Defendant to be criminally committed under the NMMIC. *See id.* ¶ 24. The majority held that, while before the enactment of Section 31-9-1.6, the NMMIC applied to all incompetent defendants, Section 31-9-1.6 operated as a special carve-out for those defendants who are incompetent due to mental retardation. *See id.* ¶ 25. Thus, it held, in enacting Section 31-9-1.6, the Legislature created a distinct procedure for defendants who have been found incompetent due to mental retardation and precluded criminal commitment for such defendants under the NMMIC. *See id.* ¶¶ 25, 26. However, the Court of Appeals also held that the district court could still detain Defendant by referring the matter to the district attorney for civil commitment proceedings under the MHDDC. *Id.* ¶ 32; *see* § 43-1-1(E).

{8} The Court of Appeals' dissent concluded that, rather than supplanting the NMMIC for mentally retarded defendants, Section 31-9-1.6 only supplements those sections. *Trujillo*, 2007-NMCA-056, ¶ 40 (Wechsler, J., dissenting). The dissent pointed out that the Legislature did not explicitly amend the NMMIC so that it no longer applied to defendants with mental retardation. *Id.* ¶ 41. Further, the dissent reasoned that Section 31-9-1.6 is not itself a comprehensive scheme for dealing with incompetent mentally retarded defendants; it does not include the procedural guarantees included in the NMMIC such as a method for transfer to the district court, a hearing to ensure sufficient evidence of guilt, or periodic review of a defendant's case. *Id.* ¶¶ 42-43; *see* §§ 31-9-1 to -1.3. Finally, the dissent also thought it problematic that Section 31-9-1.6 would be interpreted to withdraw all defendants incompetent due to mental retardation from the NMMIC regime while only explicitly providing a resolution for a sub-category of those individuals: namely, those who are dangerous, incompetent, without a substantial probability of gaining competence, and accused of one of the listed felonies. *Id.*; *see* § 31-9-1.6(C).

{9} We granted certiorari on two issues: whether the Court of Appeals erred in determining that Defendant has mental retardation under New Mexico law and whether it erred in holding that he may not be criminally committed under the NMMIC. Both of these questions involve statutory interpretation, which is a matter of law and is reviewed de novo. *State v. Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 768, 82 P.3d 939. We address each issue in turn.

II. DISCUSSION

A. Defendant Has Mental Retardation Under New Mexico Law

{10} Mental retardation is defined by Section 31-9-1.6(E) as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior." Thus, there are two prongs to the New Mexico statutory definition of mental retardation: (1) significantly subaverage general intellectual functioning and (2) deficits in adaptive behavior. This language closely tracks the definition of mental retardation found in the DSM but the DSM adds a third prong. *See* DSM at 41. Under the DSM, one's symptoms must have begun before age eighteen in order to be classified as mental retardation. *Id.* The State urges us to read in the age of onset requirement so that the definition in Section 31-9-1.6 would mirror the DSM definition. Under this formulation, Defendant, whose disorder did not begin until his mid-twenties, would not be classified as having mental retardation.

{11} In interpreting a statute, our primary objective is to give effect to the Legislature's intent. *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. In discerning legislative intent, we look first to the language used and the plain meaning of that language. *Id.* Under the plain meaning rule, when a statute contains clear and unambiguous language, we will heed that language and refrain from further statutory interpretation. *State v. Rivera*, 2004-NMSC-001, ¶ 10. We will not read into a statute any words that are not there, particularly when the statute is complete and makes sense as written. *Burroughs v. Bd. of County Comm'rs of Bernalillo County*, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975).

{12} Because the language used in Section 31-9-1.6(E) to define mental retardation is strikingly similar to that of the DSM, we can infer that the Legislature was aware of the DSM definition, and the critical third prong, and declined to adopt it. The Legislature's decision to exclude the age of onset factor is logical given that what is legally relevant are the symptoms probative of culpability at the time of the alleged crime and coherence at the time of trial, not the age at which those symptoms started to affect the individual.

{13} To be sure, we have previously recognized the differing purposes of the legal and medical definitions of insanity: "through the legal definition, the law seeks to assess accountability, whereas psychiatry's purpose is to diagnose and cure mental illnesses." *State v. Neely*,

112 N.M. 702, 707, 819 P.2d 249, 254 (1991) (internal quotation marks and citation omitted). Even the DSM itself warns of the "significant risks" of importing its categories and criteria to the legal setting: "dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." DSM at xxxii-xxxiii. Because the Legislature's omission of the age of onset requirement is clear and unambiguous and, further, because the age of onset of one's symptoms is not legally relevant, we affirm the Court of Appeals and hold that the New Mexico statutory definition of mental retardation does not contain such a requirement. *See Rivera*, 2004-NMSC-001, ¶ 10. Defendant has mental retardation under New Mexico law. We now turn to the more opaque issue: what the State may do when faced with a defendant who is dangerous, incompetent due to mental retardation, and without a substantial probability of gaining competence.

B. Defendant May Not be Criminally Committed

1. Background

{14} At the heart of the matter presented is the intended relationship between the NMMIC and Section 31-9-1.6. The NMMIC was enacted in 1988 in response to *Jackson v. Indiana*, in which the United States Supreme Court held that indefinite commitment of a defendant based solely on his incompetency to stand trial violated due process and equal protection. *State v. Gallegos*, 111 N.M. 110, 114, 802 P.2d 15, 19 (Ct. App. 1990); *see Jackson v. Indiana*, 406 U.S. 715, 729-30, 731 (1972). The NMMIC instituted a comprehensive system for processing incompetent defendants through the criminal justice system in New Mexico.

{15} The purposes of the NMMIC are to provide for: (1) dismissal of the charges when the State cannot prove its case, thereby eliminating the prospect of an indeterminate detention on meritless charges; (2) confinement of dangerous, incompetent defendants; and (3) "an orderly and progressive method of evaluating and treating defendants who can be returned to competency within a reasonable amount of time and a fair method of detaining incompetent, dangerous defendants who cannot." *Gallegos*, 111 N.M. at 114-15, 802 P.2d at 19-20.

{16} Section 31-9-1.6 was enacted nearly ten years subsequent to the NMMIC. Its scope and procedural guarantees are much narrower than the NMMIC; it is virtually skeletal in comparison. It applies to a discrete group of incompetent defendants, those who are incompetent because they have mental retardation. *See* § 31-9-1.6(B).

{17} As pertinent here, Section 31-9-1.6 provides that, if a court finds, by a preponderance of the evidence, that an incompetent defendant has mental retardation and does not have a substantial probability of becoming competent, the DOH shall evaluate the defendant for dangerousness. Section 31-9-1.6(B). It continues,

> [i]f the [DOH] evaluation results in a finding that the defendant presents a likelihood of serious harm to himself or a likelihood of serious harm to others, within sixty days of the [DOH]'s evaluation the [DOH] shall commence proceedings pursuant to [the MHDDC] *if the defendant was charged with* murder in the first degree, first degree criminal sexual penetration, criminal sexual contact of a minor or arson in the initial proceedings. . . .

Section 31-9-1.6(C) (emphasis added). The final relevant subsection requires dismissal of the charges after the civil commitment hearing or fourteen months after the initial determination of incompetence. *See* § 31-9-1.6(D).

{18} Thus, while the statute requires civil commitment for those defendants who are dangerous, incompetent due to mental retardation, without a substantial probability of gaining competence, and accused of one of the four enumerated crimes, it does not speak explicitly to the outcome for defendants who are dangerous, incompetent due to mental retardation, without a

substantial probability of gaining competence, and *not accused* of one of the four enumerated crimes. This is the predicament in which we find ourselves: the plain language of Section 31-9-1.6 provides no explicit indication of what the Legislature intended regarding individuals such as Defendant.

{19} The State advocates that Defendant must be criminally committed. Its argument basically proceeds on four grounds: the plain language of Section 31-9-1.6 does not contemplate the civil commitment of Defendant; the 1999 amendment to Section 31-9-1.6 nullified the authority the State had to civilly commit Defendant under that section; there is no authority in the MHDDC to civilly commit Defendant, absent initiation of proceedings by a guardian; and civil commitment is inadequate to ensure the public safety.

{20} Defendant and amicus New Mexico Criminal Defense Lawyers Association maintain that Section 31-9-1.6 precludes Defendant from being criminally committed and that he may only be civilly committed. They maintain, *inter alia*, that requiring Defendant to be criminally committed would lead to an absurd result; that Section 31-9-1.6 was enacted to treat incompetent people with mental retardation differently than those with mental illness; and that cycling permanently incompetent people with mental retardation through the NMMIC's criminal commitment and review cycle is unwise and unconstitutional.

{21} Our ultimate goal in statutory construction is to "ascertain and give effect to the intent of the Legislature." *State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23. Though we begin our inquiry into legislative intent with the plain meaning of the language, such plain meaning does not trump common sense. Rather, if the language is "doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction," *Davis*, 2003-NMSC-022, ¶ 6, we will reject the plain meaning in favor of an interpretation driven by the statute's "obvious spirit or reason." *Id.* Thus, we are not bound by a "formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute." *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022.

{22} In addition to looking at the language, we also consider the statute's history, background, and function in the comprehensive legislative scheme. *Id.* (internal quotation marks and citation omitted). A statute or subsection need not be considered independently or "in a vacuum," but alongside statutes dealing with the same subject matter. *Id.* (internal quotation marks and citation omitted). "Whenever possible, . . . we must read different legislative enactments as harmonious instead of as contradicting one another." *State v. Muniz*, 2003-NMSC-021, ¶ 14, 134 N.M. 152, 74 P.3d 86 (internal quotation marks and citation omitted).

2. A Mechanical Application of Section 31-9-1.6 Leads to an Absurd and Unreasonable Result

{23} The State argues that Defendant must be criminally committed because Section 31-9-1.6 does not explicitly require that he be civilly committed. It contends that, in the absence of a clear statutory directive to the contrary, the previous regime, criminal commitment under the NMMIC, should remain in place.

{24} However, interpreting Section 31-9-1.6 to require the criminal commitment of defendants who are dangerous, incompetent because of mental retardation, without a substantial probability of gaining competence, and accused of a crime other than those enumerated leads to an absurd and inequitable result. Namely, defendants incompetent due to mental retardation who are charged with one of the four felonies enumerated in Section 31-9-1.6(C) would automatically be civilly committed under that subsection while those who are charged with any other less serious crime would continue to be subject to criminal commitment under the NMMIC.

{25} In other words, if we held that Section 31-9-1.6 did not preclude the possibility of criminal commitment under the NMMIC for *all*

defendants incompetent due to mental retardation, we would be leaving the defendants incompetent due to mental retardation who are accused of lesser crimes, and are thus more deserving, subject to criminal commitment while those accused of greater crimes would be automatically civilly committed per the plain language of Section 31-9-1.6. While this approach may represent the most straightforward and mechanical application of the words of Section 31-9-1.6, we are doubtful whether this contradiction captures the intention of the Legislature. Rather, it is a result that is "absurd, unreasonable, [and] contrary to the spirit of [Section 31-9-1.6]." *See Smith*, 2004-NMSC-032, ¶ 10. Therefore, we conclude that, in this case, the failure of Section 31-9-1.6 to explicitly require that Defendant be civilly committed is not conclusive of the Legislature's intent on the point.

3. The 1999 Deletion to Section 31-9-1.6 Did Not Negate the State's Authority to Civilly Commit Defendant

{26} The State next argues that the 1999 amendment of Section 31-9-1.6 evinces the Legislature's intent to divest the State of the authority to civilly commit defendants that are dangerous, incompetent because of mental retardation, without a substantial probability of gaining competence, and accused of a crime other than the four enumerated in Section 31-9-1.6(C). However, when the 1999 amendment is considered not "in a vacuum," *see id.*, but in reference to the contemporaneous amendments to the NMMIC, it supports our conclusion that the Legislature did not intend to restrict the power of the State to civilly commit individuals like Defendant.

{27} The State belabors the 1999 deletion of the provision from Section 31-9-1.6 which read, "the [DOH] may commence proceedings pursuant to [the MHDDC] if the defendant was charged with any crime other than [the enumerated four]." *See* § 31-9-1.6(C) (1998). We agree that, when considered in the absence of the other contemporaneous amendments, the 1999 deletion appears to belie our conclusion that the State has the authority to civilly commit individuals like Defendant. However, during the same session in which the Legislature deleted this provision from Section 31-9-1.6(C), it added nearly identical language to Section 31-9-1.4(C). That section now provides that, where the district court determines that there is not a substantial probability of the defendant attaining competency and accordingly dismisses the charges, "[i]f the treatment supervisor has issued a report finding that the defendant satisfies the criteria for involuntary commitment contained in the [MHDDC], the [DOH] shall commence proceedings pursuant to [the MHDDC] . . . ." Section 31-9-1.4(C). Thus, when considered alongside the addition of language to Section 31-9-1.4(C), the Section 31-9-1.6 deletion is not dispositive of legislative intent and may only represent a housekeeping deletion of a provision the Legislature deemed superfluous.

{28} Apart from the addition of language to Section 31-9-1.4(C), our conclusion that the amendment to Section 31-9-1.6 was not intended to limit the State's authority to civilly commit defendants incompetent due to mental retardation is supported by the numerous references to that authority throughout the NMMIC and the MHDDC. For example, Section 31-9-1.4(C) has always contained a provision allowing the district court to refer the defendant to the district attorney for possible civil commitment in cases where the defendant is determined to be without a substantial probability of gaining competence and the charges have been dismissed. Section 31-9-1.2(A) provides that, where the defendant is incompetent and not dangerous, the court may advise the district attorney to proceed with civil commitment. In Section 31-9-1.3(B)(3), the Legislature made reference to the fact that a treatment supervisor's report may include a finding as to whether the defendant satisfies the criteria for civil commitment under the MHDDC. Section 31-9-1.5(B), (C), and (D)(4)(b) all include civil commitment as an option available to the district court. Section 31-9-1.5(B) reads, "nothing in this section shall prevent the state from initiating proceedings under the provisions of the [MHDDC]." Finally, under the MHDDC, the district court may refer the defendant to the

district attorney to consider civil commitment. Section 43-1-1(E). In light of the 1999 addition to Section 31-9-1.4(C), as well as the various other statutory references to the State's authority to civilly commit incompetent defendants, it cannot be said that the Legislature intended to restrict the State from civilly committing defendants that are dangerous, incompetent because of mental retardation, without a substantial probability of gaining competence, and accused of a crime other than the four enumerated in Section 31-9-1.6(C), in spite of the amendment to Section 31-9-1.6.

4. The State Has the Authority Under the MHDDC to Civilly Commit Defendant

{29} The State's third and fourth arguments are interconnected. It maintains that, because it has no authority to civilly commit Defendant per the terms of the MHDDC, without criminally committing Defendant, the public safety will be compromised. We conclude that the State's authority under the MHDDC remains undiminished and the public safety is therefore not at issue.

{30} The State contends that it has no authority under the MHDDC to initiate civil commitment proceedings against Defendant because only a guardian may commit an individual with mental retardation to habilitation under that statute. *See* § 43-1-3(H) (classifying mental retardation as a developmental disability); § 43-1-13(A) (establishing that the commitment of developmentally disabled adults to residential habilitation shall be by petition of a guardian). While it is true that only guardians may commit those with mental retardation to habilitation under the MHDDC, habilitation is not at issue in the instant case; habilitation is altogether different from civil commitment. The MHDDC defines habilitation as:

> the process by which professional persons and their staff assist the developmentally disabled client in acquiring and maintaining those skills and behaviors that enable the person to cope more effectively with the demands of the person's self and environment and to raise the level of the person's physical, mental and social efficiency.

Section 43-1-3(L). Habilitation is akin to the teaching of basic life skills. *Youngberg v. Romeo*, 457 U.S. 307, 309 n.1 (1982).

{31} Contrary to habilitation, civil commitment is purposed not just on the betterment of the individual, but on the public safety. Because there is a public interest in civilly committing dangerous individuals, the right to initiate the process is not as limited as with habilitation. The MHDDC clearly states that "[a]fter an evaluation and upon reasonable notice, the district court may commit a dangerous defendant charged with a felony pursuant to [the NMMIC] or may dismiss the charges without prejudice and refer the defendant to the district attorney for possible initiation of proceedings under [the MHDDC]." Section 43-1-1(E).

{32} In arguing about habilitation, the State apparently misapprehends the fact that Defendant is subject to civil commitment for his dangerousness, not his mental retardation. *See id*. The power of the State to civilly commit Defendant has its origin in the police power, the authority to provide the citizenry with a safe community in which to reside. *See State v. Rotherham*, 122 N.M. 246, 262, 923 P.2d 1131, 1147 (1996) (recognizing that the State has a compelling interest in committing dangerous incompetent defendants); *see also* § 43-1-12(C) ("If . . . the factfinder determines by clear and convincing evidence that *the client presents a likelihood of harm to himself or others*, that extended treatment is likely to improve the client's condition and that the proposed . . . commitment is consistent with the least drastic means principle, the court shall order commitment. . . .") (emphasis added). A dangerous incompetent defendant may be detained by the State without regard to the circumstance that makes him or her incompetent, whether it be mental retardation or any other disability or illness.

{33} The State's authority—and responsibility—to protect society from dangerous

individuals under the MHDDC is unaffected by the Legislature's statement in Section 31-9-1.6 as to the manner in which those individuals should be detained. Further, society is equally protected from the danger of individuals like Defendant whether they are civilly or criminally committed. The State's third and fourth arguments are therefore without merit.

5. Precluding Defendant From Being Criminally Committed is Sound Policy

{34} Construing Section 31-9-1.6 as an expression of legislative intent that individuals that are dangerous, incompetent due to mental retardation, and without a substantial probability of gaining competence no longer be subject to criminal commitment under the NMMIC and instead only be civilly committed is consistent with the distinction between mental retardation and mental illness and society's evolving understanding of the nature of mental retardation.

{35} The distinction between mental retardation and mental illness has long been incorporated into the Anglo-American legal system: differing treatment of "idiots" and "lunatics" is seen at least as far back as the thirteenth century. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 416 (1985). Mental retardation is not a mental illness. *Id.* at 423. While "[m]entally ill people encounter disturbances in their thought processes and emotions[,] mentally retarded people have limited abilities to learn." *Id.* at 424. Another distinction is that mental retardation is largely immutable while mental illness is often episodic. *Id.* The practical significance of the permanence of mental retardation is that defendants incompetent due to mental retardation are less likely to be treated to competency than those incompetent due to mental illness, though there are cases where those with mild mental retardation may be treated to competency. Because mental retardation is inherently different than mental illness, the Legislature made a sound policy decision when it created a distinct mechanism for defendants incompetent due to mental retardation.

{36} Society's understanding of mental retardation and its effect on criminal culpability is evolving. When the United States Supreme Court first addressed mental retardation in 1927, it did so in the context of rejecting equal protection and due process challenges to the involuntary sterilization of a woman with mental retardation. *See Buck v. Bell*, 274 U.S. 200, 205 (1927). The language in *Buck* is striking for its contempt of those with mental retardation, as well as its presumption of their criminality: "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." *Id.* at 207.

{37} Since the time of *Buck*, the treatment of individuals with mental retardation by the legal system has demonstrated a maturing understanding of the disability and a concomitant recognition of the diminished culpability of criminal defendants with mental retardation. For example, in the landmark case of *Atkins v. Virginia*, the United States Supreme Court held that executing defendants with mental retardation violated the Eighth Amendment prohibition against cruel and unusual punishment. 536 U.S. 304, 321 (2002); *see also* NMSA 1978, § 31-20A-2.1(B) (1991) ("The penalty of death shall not be imposed on any person who is mentally retarded."); *State v. Flores*, 2004-NMSC-021, 135 N.M. 759, 93 P.3d 1264 (outlining the procedure by which to best effectuate Section 31-20A-2.1). The *Atkins* Court critically recognized that, "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . [individuals with mental retardation] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306. It quoted with approval the dissenting opinion of the lower court: "it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population." *Id.* at 310.

{38} Commentators and experts agree that "the presence of mental retardation creates substantive

differences in causation [and] culpability. . . ." John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, *in* The Criminal Justice System and Mental Retardation 55, 55 (Ronald W. Conley ed., 1991). In this light, Section 31-9-1.6's requirement that Defendant be civilly and not criminally committed is a sound policy decision that reflects both the distinction between mental retardation and mental illness and the modern understanding of mental retardation. Section 31-9-1.6 is an incorporation of the "evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 312.

{39} As a final point, we wish to address the fact that Section 31-9-1.6 is, by itself, not a comprehensive legislative scheme. It is critical that, where Section 31-9-1.6 is silent, the previously applicable law, the NMMIC, applies. For example, before the procedures envisaged by Section 31-9-1.6 may be executed, it is necessary to first proceed through the mechanism of Sections 31-9-1.1 to -1.3 to allow for, *inter alia*, an evaluation, a hearing, a determination of competency, and an inquiry into whether there is a substantial probability of attaining competency. This procedure is the optimal mechanism for treating the NMMIC and Section 31-9-1.6 as harmonious instead of contradictory. *See Muniz*, 2003-NMSC-021, ¶ 14. Our Opinion shall not be read to reduce the procedural protections available to defendants incompetent due to mental retardation to fewer than what is guaranteed those defendants incompetent for other reasons. Our holding is limited to the conclusion that Section 31-9-1.6 was intended to preclude the criminal commitment of defendants that are dangerous, incompetent due to mental retardation, without a substantial probability of gaining competence, and accused of a crime other than those listed in Section 31-9-1.6(C).

III. CONCLUSION

{40} For all of the above reasons, we conclude that Defendant has mental retardation under New Mexico law and that he may not be criminally committed but may be civilly committed.

{41} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

Justice Patricio M. Serna

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2009-NMSC-046

Filing Date: September 1, 2009

Docket No. 30,937

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

JOSHUA GARCIA,

Defendant-Petitioner.

Original Proceeding on Certiorari
Joe Parker, District Judge

Hugh W. Dangler, Chief Public Defender
Joseph P. Walsh, Assistant Appellate Defender
Santa Fe, NM

for Petitioner.

Gary K. King, Attorney General
James W. Grayson, Assistant Attorney General
Santa Fe, NM

for Respondent.

OPINION

SERNA, Justice.

{1} Defendant Joshua Garcia appeals his convictions for possession of a controlled substance, contrary to NMSA 1978, Section 30-31-23(A) (1972, as amended through 2005), and resisting, evading, or obstructing an officer, contrary to NMSA 1978, Section 30-22-1(B) (1963, as amended through 1981). He maintains that the evidence obtained against him was the fruit of an unreasonable seizure. We granted certiorari to consider whether Defendant was seized under Article II, Section 10 of the New Mexico Constitution. After applying our interstitial analysis of the federal constitution and concluding that Defendant may not be protected under the Fourth Amendment, we hold that the standard for a seizure under Article II, Section 10 is whether a reasonable person would feel free to leave. Therefore, Defendant was seized when the officer stopped his patrol car in the intersection near where Defendant was walking, shone his spotlight on Defendant, and told him to stop. Because there was no reasonable suspicion to support seizing Defendant, the evidence obtained against him was the fruit of an unreasonable seizure under Article II, Section 10 and must be suppressed. We reverse.

I. BACKGROUND AND PROCEEDINGS BELOW

{2} The following account of the events on the evening of Defendant's arrest comes from Officer Lyndell Stansell, Jr.'s narrative of his encounter with Defendant. Neither side contests the narrative; the facts are not in dispute and it contains the only evidence on point. On January 17, 2005, at approximately seven o'clock p.m., the officer was called to a "possible domestic in progress" at an address in Clovis. The dispatcher told the officer that the caller wished to have a man named Joshua Garcia removed from the residence. When the officer arrived at the intersection nearest the address, he saw Defendant walking across the street. There is no evidence that the officer had been acquainted with Defendant, had any prior contact with him, had received a description of him from dispatch, or knew by any other means that Defendant was the man to which the caller was referring.

{3} Immediately upon seeing Defendant, the officer stopped his patrol car in the intersection near Defendant, shone his spotlight on Defendant, exited the patrol car, and "told [Defendant] to stop." Defendant continued walking past the

patrol car and the officer "again ordered" Defendant to stop walking. Defendant told the officer that he was "just going to [his] cousin's house." Defendant had his hands in his jacket pockets and was fumbling with something. The officer thought Defendant was about to run, so he shone his flashlight on him, tried to get in front of him, and "yelled at [him] again" to stop. Defendant kept on his way, still fumbling in his pockets.

{4} Fearing that Defendant had a weapon, the officer pulled out his gun and twice ordered Defendant to remove his hands from his pockets. Defendant did not take his hands out of his pockets and continued to try to walk around the officer. Because he continued to fear that Defendant had a weapon and because Defendant had not obeyed his orders, the officer "realized [he] was going to have to physically stop" Defendant.

{5} The officer sprayed Defendant with a one-second burst of pepper spray. Defendant turned to his right and kept walking, still with his hands in his pockets. As Defendant passed in front of a car, the officer saw something fall to the ground. The officer then tackled Defendant and handcuffed him.

{6} The item that fell to the ground appeared to be, and was subsequently confirmed to be, crack cocaine. Another officer searched Defendant incident to his arrest and found marijuana on his person.

{7} Defendant was charged with possession of cocaine, marijuana, and drug paraphernalia and resisting, evading or obstructing an officer. He moved to suppress any evidence obtained against him as the result of an illegal seizure under either the United States or New Mexico Constitutions. The district court denied the motion, apparently concluding that Defendant had been seized but that there was reasonable suspicion to support the seizure. The district court did not specify whether it considered the issue under both constitutions or the federal constitution alone. Defendant pled guilty to possession of a controlled substance and resisting, evading or obstructing an officer, but reserved his right to appeal the suppression ruling. In a published opinion, the Court of Appeals affirmed the district court on different grounds. *See State v. Garcia,* 2008-NMCA-044, ¶¶ 1, 13, 143 N.M. 765, 182 P.3d 146. It held that, under the Fourth Amendment, Defendant had not been seized and that there was thus no reason to inquire into reasonable suspicion. *See id.* ¶ 1. In opposition to this alternative basis for affirming the district court, Defendant argued that under the Article II, Section 10 of the New Mexico Constitution, he had been seized. The Court of Appeals did not reach Defendant's Article II, Section 10 claim, concluding that he failed to preserve it at the district court. See id. We granted certiorari to consider whether Defendant was seized under Article II, Section 10 of the New Mexico Constitution.[1]

{8} On appeal to this Court, Defendant argues that he was seized under Article II, Section 10 of the New Mexico Constitution and that the seizure was unlawful because the officer did not have reasonable suspicion to stop him. Therefore, Defendant argues, the cocaine that he dropped and the marijuana that was on his person were fruits of an illegal seizure and must be suppressed. We agree with Defendant and hold that he was seized under the New Mexico Constitution when the officer stopped his marked patrol car in the intersection

[1] We denied certiorari on the question of whether the Fourth Amendment of the United States Constitution protects Defendant. However, in this opinion, we do consider the protection provided to Defendant under the federal constitution because, as we discuss below, this preliminary step is mandated under the interstitial approach to state constitutional interpretation propounded in *State v. Gomez*, 1997-NMSC-006, ¶¶ 19-20, 122 N.M. 777, 932 P.2d 1. We recognize that our denial of certiorari on the federal issue may have failed to alert the parties to discuss the issue in their briefing to this court. However, because the scope of federal protection is integral to our determination of the scope of the New Mexico Constitution under *Gomez*, there is no jurisdictional bar to our reaching it. *See State v. Javier M.*, 2001-NMSC-030, ¶ 10, 131 N.M. 1, 33 P.3d 1 (reaching an issue that the appellant did not specifically seek certiorari to review because "it [was] a foundational issue which [was] integral to a complete and thorough analysis of the specific question presented in the petition for writ of certiorari"). Further, because the parties were aware that the federal issue was important and because we can review their full briefing to the Court of Appeals, we believe it is not unfair to consider the protections provided by the Fourth Amendment.

near Defendant, shone his flashlight on him, and told him to stop. The officer did not have reasonable suspicion to seize Defendant, and the evidence obtained against him was therefore the fruit of an illegal seizure and must be suppressed.

II. DISCUSSION

A. Standard of Review

{9} The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing the facts in the manner most favorable to the prevailing party. *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856. Factual determinations are reviewed for substantial evidence and the application of the law to the facts is reviewed de novo. *State v. Nieto*, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442. Determinations of reasonable suspicion are reviewed de novo. *State v. Harbison*, 2007-NMSC-016, ¶ 8, 141 N.M. 392, 156 P.3d 30.

B. Preservation and the Interstitial Approach

{10} The State argues that Defendant did not preserve his state constitutional argument in accordance with *Gomez*, 1997-NMSC-006, ¶¶ 22-23, and that it is therefore not properly before this Court. We conclude that we may properly address it.

{11} A close examination of the record reveals that whether Defendant was seized in the first instance was not a contentious issue before the district court. Rather, it appears that it was tacitly agreed that Defendant was seized at some point during his encounter with the officer. For example, the State's response to Defendant's motion to suppress did not argue that Defendant had not been seized, but rather spoke in terms of reasonable suspicion:

> An officer's reasonable belief that a suspect is armed and dangerous may follow from a reasonable suspicion that the suspect has committed, is committing, or will commit an 'inherently dangerous crime.' A domestic violence case is an inherently dangerous crime. . . . Consequently, the actions of [the officer] in this case were completely appropriate and led to admissible evidence against [Defendant].

Similarly, the argument at the hearing concerned not whether there was a seizure, but whether reasonable suspicion existed to seize Defendant. To that end, defense counsel stated, "The issue here, Judge, is whether the officer had an articulable suspicion that the person he saw walking across the street at 7 p.m. was committing any crime."

{12} It was not until the case reached the Court of Appeals that the issue of whether there had been a seizure became contentious. *See Garcia*, 2008-NMCA-044, ¶¶ 23-28. The State proposed in its briefing to the Court of Appeals that the district court be affirmed on the alternative grounds that Defendant was never seized. Defendant's state constitutional claim was a *response* to the State's argument for affirmance on what amounted to right-for-any-reason grounds. *See State v. Granville*, 2006-NMCA-098, ¶ 12, 140 N.M. 345, 142 P.3d 933 ("[W]e affirm if the trial court decision was right for any reason. . . ."). Given such a posture, we will not impose any preservation requirement on Defendant's response. In this context, it was not incumbent on Defendant to anticipate such a holding by the Court of Appeals and preserve his argument when it was not at issue before the district court. We will review his state constitutional claim.

{13} However, before we can reach that claim, our interstitial approach to state constitutional interpretation mandates that we consider whether Defendant was protected under the federal constitution. In *Gomez*, 1997-NMSC-006, ¶ 19, we held that "[u]nder 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."

C. The Fourth Amendment

{14} We believe that in light of recent changes in Fourth Amendment jurisprudence, there is serious uncertainty as to whether the Fourth Amendment protects Defendant by mandating the suppression of the cocaine and marijuana. Although it is clear that evidence that is tainted by an illegal seizure must be suppressed, *see Wong Sun v. United States*, 371 U.S. 471, 488 (1963), the Court of Appeals' opinion in this case reflects how statements in *California v. Hodari D.*, 499 U.S. 621, 626 (1991) cast some uncertainty on the sorts of police actions that will be considered seizures under the Fourth Amendment and the likelihood that evidence taken following an illegal seizure will be suppressible.

{15} *Hodari D.* marked a shift in the Supreme Court's search and seizure jurisprudence. Decades before *Hodari D.*, in *Terry v. Ohio*, the United States Supreme Court held that a seizure occurs under the Fourth Amendment when a police officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen. . . ." 392 U.S. 1, 20 n.16 (1968). For some time, the Supreme Court tested whether such restraint had occurred under the analysis first announced by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980): "the police can be said to have seized an individual 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." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (internal quotation marks and citation omitted). However, the Supreme Court has since modified the *Mendenhall* standard for cases involving the assertion of authority by a police officer without the use of physical force, and now employs a test that requires a suspect to *submit* to a show of authority by law enforcement to be protected under the Fourth Amendment. *See Hodari D.*, 499 U.S. at 626.

{16} In *Hodari D.*, two officers in an unmarked car were on patrol late one evening when they came around a corner and saw a group of youths, which included the defendant, huddled together. *Id.* at 622. When the youths saw the officers approaching, they "took flight." *Id.* at 622-23. As one of the officers chased the defendant on foot, the defendant discarded a small rock. *Id.* at 623. The officer tackled the defendant, handcuffed him, and recovered the discarded rock, which was later found to be crack cocaine. *Id.*

{17} The defendant in *Hodari D.* moved to suppress the crack as the fruit of an illegal seizure under the Fourth Amendment but was denied by the district court. *Id.* The California Court of Appeals reversed, holding that, under *Mendenhall*, the defendant had been seized at the moment that he saw the officer running toward him, the seizure was unreasonable under the Fourth Amendment, and the crack was the fruit of the illegal seizure. *Id.* The United States Supreme Court reversed and held that, for the purposes of the Fourth Amendment, a seizure requires either physical force or submission to an assertion of authority. *Id.* at 626. Because the defendant had not submitted to the officer's assertion of authority, i.e. pursuit, he had not been seized when he discarded the crack and it was thus abandoned and admissible against him. *Id.* at 625-27. Thus, whether a reasonable person would feel free to leave–the test under *Mendenhall*–is now a condition precedent, but is not necessarily itself sufficient, for a seizure by assertion of authority to occur under the Fourth Amendment. *Id.* at 628.

{18} Though *Hodari D.* presented an instance of assertion of authority, the Court also discussed, in dicta, what it took to be the standard for seizure by physical force:

> To constitute an arrest . . . the quintessential seizure of a person under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient. . . .

Id. at 625 (internal quotation marks and citation omitted). Thus, no submission would seem to be required in cases involving the application of physical force. However, the Court went on to explain an exception to this theory:

> To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity. If, for example, [the officer] had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest.

Id.

{19} Applying *Hodari D.* to the instant case, our Court of Appeals held that Defendant was not seized and that, even if the officer had seized Defendant by pepper spraying him, the drugs were not suppressible because the seizure ended before Defendant dropped the cocaine. *See Garcia*, 2008-NMCA-044, ¶¶ 23, 28. We first address whether there was a seizure and then address, under *Hodari D.*, whether the seizure terminated and what effect this conclusion might have on the suppression of the evidence.

{20} The Court of Appeals concluded that Defendant had not been seized under the Fourth Amendment because "there [was] no indication that Defendant was affected or even deterred to the slightest degree from his voluntary actions" by the pepper spray. *Id.*¶ 23. We disagree. To ascertain whether the officer's application of pepper spray to Defendant's body was physical force sufficient to constitute a seizure, it is irrelevant whether Defendant's movement was restrained, affected, or deterred. Unlike assertion-of-authority cases, there is no need for a defendant to demonstrate submission in cases of physical force. *See, e.g.*, *Carr v. Tatangelo*, 338 F.3d 1259, 1268 (11th Cir. 2003) (holding that the suspect was seized under the Fourth Amendment when he was struck by a police bullet, though he was still able to run across the street and take refuge in his home); *Tom v. Voida*, 963 F.2d 952, 955, 957 (7th Cir. 1992) (holding that an individual was seized when, after a chase, an officer attempted to handcuff and then fought with him, after which he continued to flee); *Yelverton v. Vargo*, 386 F.Supp.2d 1224, 1228 (M.D.Ala.2005) (finding that an individual was seized after being pepper sprayed by an officer, despite his subsequent flight). Rather, Defendant demonstrated that he was seized by showing that he was pepper sprayed, regardless of his subjective reaction.

{21} Since Defendant established that he was seized by virtue of the pepper spray, the next issue is the effect of the *Hodari D.* language quoted above that advises that a Fourth Amendment seizure ends when the suspect escapes or breaks away from the police. The Court of Appeals evidently drew two conclusions from this passage: first, that a seizure effected by physical force is terminated the moment physical contact is broken; and second, that if the suspect is not seized at the moment that he or she discloses the evidence, such evidence may not be suppressed as the fruit of the illegal seizure. *See Garcia*, 2008-NMCA-044, ¶¶ 24, 28 ("Because Defendant walked away from the attempted seizure before he cast away the drugs and was tackled, we conclude that Defendant was not seized under the Fourth Amendment; rather, he voluntarily abandoned the drugs."). We disagree with both conclusions, but we acknowledge that *Hodari D.* does not clearly rule out the possibility that the officer's seizure of Defendant terminated the moment that Defendant moved away from the officer and that the evidence gleaned subsequently is not suppressible.

{22} First, we cannot agree that under the Fourth Amendment Defendant's seizure ended the moment the officer stopped spraying him with mace. The *Hodari D.* Court's hypothetical example of a discontinued seizure seems to contemplate something more than the limited motion that Defendant took away from the officer in the present case. 499 U.S. at 625. For example, in describing the type of action by a suspect that would discontinue his or her seizure, the Court used the terms "escape," "period of fugitivity," and "br[eak] away." *Id.* These words connote a complete, even extended, separation between the suspect and the officer that is lacking in the facts before us. After being pepper sprayed, Defendant

only took several strides before he dropped the cocaine and was tackled. During this time, Defendant continued to be under the effects of the pepper spray as evidenced by the fact that he later had to be allowed to decontaminate. It seems irrational to us that the Fourth Amendment would parse into multiple seizures the separate moments of physical contact making up an officer's brief, forceful submission of a suspect. This being said, we must acknowledge that the United States Supreme Court has not explained what constitutes having "broken away" from an officer, and as such we cannot be certain that under the Fourth Amendment, Defendant was seized at the moment he disclosed the cocaine.

{23} Our second disagreement with the Court of Appeals concerns whether, if the cocaine was dropped after Defendant's seizure had terminated, it should nevertheless be suppressed. As we previously noted, the Supreme Court in *Hodari D*. wrote:

> If, for example, [the officer] had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, *it would hardly be realistic to say that that disclosure had been made during the course of an arrest*.

499 U.S. at 625 (second emphasis added). We infer that the Court of Appeals read this passage to suggest that any abandoned evidence not disclosed during the course of an arrest is not subject to suppression. Again, we disagree. To hold otherwise would be to substantially limit the well-established fruit of the poisonous tree doctrine on the basis of rather obscure dicta. In *Wong Sun,* the United States Supreme Court held that in determining whether evidence was tainted by illegal police conduct, the question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." 371 U.S. at 488 (internal quotation marks and citation omitted). The exclusionary rule operates to suppress evidence that is obtained not only "during" but "as a direct result of" an unlawful seizure. *Id.* at 485; *see also Brown v. Illinois*, 422 U.S. 590, 603-04 (1975) (analyzing attenuation with reference to "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct" (citation and footnotes omitted)).

{24} In the case at bar, where only several strides on Defendant's part intervened between the officer's pepper spraying of Defendant and the dropping of the cocaine, we do not believe the link to the illegal seizure was attenuated, if indeed that seizure had ended at all. Further, because the exclusionary rule is designed to deter unlawful police conduct, such as the unconstitutional application of physical force resulting in the discovery of evidence, we believe the policies of the fruit of the poisonous tree doctrine weigh heavily in favor of suppression. We note that other courts confronting similar situations have excluded evidence on this basis. *See e.g., United States v. Wilson*, 953 F.2d 116, 127 (4th Cir. 1991) (distinguishing *Hodari D.* and suppressing cocaine dropped by the defendant while fleeing from an unlawful seizure because the dropping occurred after the illegal seizure and was the "direct result" of the illegal seizure); *United States v. Newman*, 490 F.2d 993, 995 (10th Cir. 1974) (holding that marijuana that fell out of a truck as the defendants fled an illegal seizure was not abandoned because "[e]verything was triggered by the original illegal intrusion"); *State v. Ingram*, 1998-NMCA-177, ¶¶ 16-17, 126 N.M. 426, 970 P.2d 1151 (suppressing evidence abandoned while the defendant was fleeing from an illegal search because it was "a direct result" of the illegal search). Again, however, we must acknowledge that the statements in *Hodari D*. seem to be in conflict with our interpretation of Fourth Amendment case law.

{25} In light of the foregoing, there is serious uncertainty regarding whether the United States Supreme Court would suppress the evidence in this case under the Fourth Amendment's protections against unreasonable searches and seizures. Because, under our interstitial analysis, we will

consider preserved state constitutional claims if the defendant is not protected under the federal constitution, we now proceed to determine whether the evidence against Defendant was unlawfully acquired as the fruit of an unreasonable seizure under Article II, Section 10. *See State v. Paul T.*, 1999-NMSC-037, ¶ 12, 128 N.M. 360, 993 P.2d 74 ("Because of th[e] gap in Fourth Amendment jurisprudence, together with the possibility that the Fourth Amendment does not protect [the defendant] in the circumstances of this case, we turn to Article II, Section 10 to resolve the issue. . . .").

D. Article II, Section 10

1. An Individual is Seized Under Article II, Section 10 When a Reasonable Person Would Not Feel Free To Leave

{26} In analyzing whether Defendant was seized at or before the time that the police obtained the evidence against him, we must address the proper measure of a seizure under the New Mexico Constitution. We are faced with the question of whether we will follow the United States Supreme Court's lead in modifying *Mendenhall*'s reasonable person standard as articulated in *Hodari D.* or whether, consonant with our power as a sovereign state to interpret our own constitution, we will recognize broader protection under Article II, Section 10.

{27} Under our interstitial approach to interpreting the New Mexico Constitution, we may diverge from federal precedent where the federal analysis is flawed, where there are structural differences between the state and federal governments, or because of distinctive New Mexico characteristics. *Gomez*, 1997-NMSC-006, ¶ 19. Defendant urges that *Hodari D.* is flawed and that we should reject its holding on that basis. While we accept Defendant's invitation to depart from *Hodari D.*, we do so because *Hodari D.* does not comport with the distinctive New Mexico protection against unreasonable searches and seizures.

{28} In the seminal opinion of *State v. Cordova*, this Court diverged from Fourth Amendment jurisprudence for the first time on the basis of the distinct character and nature of Article II, Section 10. 109 N.M. 211, 216-17, 784 P.2d 30, 35-36 (1989). In concluding that the *Aguilar-Spinelli* test, a two-pronged test formulated by the United States Supreme Court in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), was better suited to the guarantees embedded in the New Mexico Constitution, we noted this Court's "close acquaintance with the problems and traditions of our state," *Cordova*, 109 N.M. at 216 n.8, 784 P.2d at 35 n.8, and determined that the principles underlying the *Aguilar-Spinelli* test were the same "principles . . . firmly and deeply rooted in the fundamental precepts of the [New Mexico] [C]onstitution[] . . . ." *Id.* at 216, 784 P.2d at 35.

{29} Likewise, in *State v. Gutierrez*, we rejected the good faith exception to the warrant requirement as "incompatible with the guarantees of the New Mexico Constitution. . . ." 116 N.M. 431, 432, 863 P.2d 1052, 1053 (1993). Specifically, we held that, while the United States Supreme Court had enunciated that the exclusionary rule, in the context of the Fourth Amendment, was purposed solely on deterring police misconduct, *see United States v. Leon*, 468 U.S. 897, 916 (1984), our search and seizure provision was also directed at protecting the constitutional right to be free from unreasonable search and seizure, whether or not it resulted from police misconduct. *Gutierrez*, 116 N.M. at 446, 863 P.2d at 1067. We recognized that "Article II, Section 10 expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions," *id.* at 444, 863 P.2d at 1065, and thus identified a broader protection to individual privacy under the New Mexico Constitution. *See, e.g.*, *Campos v. State*, 117 N.M. 155, 158-59, 870 P.2d 117, 120-21 (1994) (basing its rejection of the "blanket federal rule" that all warrantless arrests of felons, which are based on probable cause and occur in public places, are constitutionally permissible on the right to be free from unwarranted governmental intrusion under Article II, Section 10); *Granville*, 2006-NMCA-098, ¶ 33 (citing the distinct state characteristic of greater privacy protection under Article II, Section 10 and concluding that, in New Mexico, it is

reasonable to have an expectation of privacy in one's garbage placed for collection, contrary to federal law).

{30} The distinct and strong New Mexico protection from unreasonable search and seizure is apparent in various other applications. *See, e.g.*, *Gomez*, 1997-NMSC-006, ¶¶ 36, 39 (recognizing New Mexico's strong preference for warrants and concluding that the federal automobile exception to the warrant requirement is inconsistent with that distinct state characteristic); *State v. Ochoa*, 2009-NMCA-002, ¶¶ 24, 26, 146 N.M. 32, 206 P.3d 143, *cert. granted*, 2008-NMCERT-012, 145 N.M. 572, 203 P.3d 103 (citing the distinct New Mexico characteristic of a preference for a reasonableness analysis over the bright line rules used by the federal courts in the context of search and seizure and concluding that the blanket federal rule allowing pretextual traffic stops as an exception to the warrant requirement is inconsistent with the New Mexico preference for reasonableness).

{31} As the above cases demonstrate, Article II, Section 10 is calibrated slightly differently than the Fourth Amendment. It is a foundation of both personal privacy and the integrity of the criminal justice system, as well as the ultimate regulator of police conduct. While all three of these purposes overlap and intertwine, it is the regulation of police conduct with which the instant case is most concerned. We must thus ask whether adopting *Hodari D.* under Article II, Section 10 will serve the robust character and honored history of that constitutional provision with special attention to its purpose of police regulation. *Cf. Gutierrez*, 116 N.M. at 446, 863 P.2d at 1067 ("[t]he primary responsibility for enforcing the Constitution's limits on government, at least since the time of *Marbury v. Madison*, has been vested in the judicial branch.") (internal quotation marks and citation omitted). We conclude that it will not.

{32} Rather than maintaining *Mendenhall*'s focus on the nature of police conduct, *Hodari D.* makes the applicability of the Fourth Amendment contingent upon the suspect's reaction. As a result, a suspect submitting to an officer's assertion of authority will be seized at the time of the assertion, where a non-submitting suspect will not be seized until there is either physical force or subsequent submission to the assertion. Thus, *Hodari D.* defines the nature of the government action, i.e. whether a police action is a seizure or not, only in relation to the subjective reaction of the suspect. This indeterminacy is cause for concern in that it fails to provide law enforcement with a useful framework with which to predict when its actions will trigger constitutional scrutiny. *Cf. Chesternut*, 486 U.S. at 574 (counting among the benefits of the then-controlling *Mendenhall* reasonable person standard the facts that it "calls for consistent application from one police encounter to the next," "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment[,]" and does not vary the scope of Fourth Amendment protection according to the suspect's state of mind).

{33} As Defendant points out, numerous states have rejected *Hodari D.* as inconsistent with their state constitutions. *See, e.g.*, *Joseph v. State*, 145 P.3d 595, 604 (Alaska Ct. App. 2006); *State v. Oquendo*, 613 A.2d 1300, 1309-10 (Conn. 1992); *Flonnory v. State*, 805 A.2d 854, 857 (Del. 2001); *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999); *Commonwealth v. Stoute*, 665 N.E.2d 93, 97-98 (Mass. 1996); *State v. Clayton*, 45 P.3d 30, 34 (Mont. 2002); *State v. Beauchesne*, 868 A.2d 972, 980 (N.H. 2005); *State v. Young*, 957 P.2d 681, 687 (Wash. 1998) (en banc). The opinion has been widely criticized as unprincipled, a departure from Supreme Court precedent, and unwise policy. *See, e.g.*, *Hodari D.*, 499 U.S. at 637, 642 (Stevens, J., dissenting) (calling the analysis of the majority "seriously flawed" and the opinion "creative lawmaking"); *State v. Quino*, 840 P.2d 358, 365 (Haw. 1992) (Levinson, J., concurring) (stating that the case is part of a trend which has left the Fourth Amendment "atrophied to the condition of a vestigial organ"); 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.4(d) (4th ed. 2004), at 456 (calling the opinion's propositions alternatively

"flawed," "irrelevant," and insufficient to support the holding); Ronald J. Bacigal, *The Right of the People to Be Secure*, 82 Ky. L.J. 145, 146 (1994) (characterizing the case as "the latest manifestation of the Court's surreal and Orwellian view of personal security in contemporary America") (internal quotation marks and citation omitted)).

{34} We agree with the other states that *Hodari D.*'s modification of the reasonable person standard weakens the right to be secure from unreasonable searches and seizures beyond a point which may be countenanced under our state constitution. If the right to be free from unreasonable searches and seizures is to include the "right to be let alone," *see Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967), then allowing the police to assert their authority by pursuing suspects or brandishing weapons without reasonable suspicion, as long as the suspects do not submit, is "anathema to our constitutional freedoms." *See Quino*, 840 P.2d at 365.

{35} *Hodari D.* is discordant with Article II, Section 10's robust protection against police misconduct and its protection of personal privacy and the integrity of the criminal justice system. We therefore reject *Hodari D.* and instead maintain *Mendenhall*'s free-to-leave test as the proper measure of a seizure under Article II, Section 10.

2. Defendant was Seized under Article II, Section 10 of The New Mexico Constitution

{36} Having clarified that a seizure occurs under Article II, Section 10 with reference only to *Mendenhall*'s reasonable person standard, we now apply that standard to the case at bar to determine whether and at what point Defendant was placed in such a position.

{37} "[A] person has been 'seized' . . . 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." *Mendenhall*, 446 U.S. at 554 (footnote omitted); *accord State v. Affsprung*, 2004-NMCA-038, ¶ 12, 135 N.M. 306, 87 P.3d 1088. The reasonable person would not feel free to leave when his or her freedom of movement is restrained, *Mendenhall*, 446 U.S. at 554, or when the facts show accosting and restraint, *State v. Lopez*, 109 N.M. 169, 170, 783 P.2d 479, 480 (Ct. App. 1989), *modified on other grounds by Jason L.*, 2000-NMSC-018, ¶ 19 (quoting *Terry*, 392 U.S. at 16). Conversely, "[a]s long as the person to whom [the officer's] questions are put remains free to disregard the questions and walk away," no seizure has occurred. *Mendenhall*, 446 U.S. at 554.

{38} An otherwise consensual encounter becomes a seizure under the reasonable person standard when an officer "engag[es] in conduct significantly beyond that accepted in social intercourse." 4 LaFave, *supra*, § 9.4(a), at 425 (footnote omitted).

> "The critical factor is whether the policeman, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens." *Id.* at 425-26 (footnotes omitted).

{39} Possible indicators of a seizure are: "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." *Lopez*, 109 N.M. at 170, 783 P.2d at 480 (quoting *Mendenhall*, 446 U.S. at 554). While police are free to engage people consensually to gather information, when they "convey a message that compliance with their requests is required[,]" the reasonable person would not feel free to leave and a seizure has occurred. *Jason L.*, 2000-NMSC-018, ¶ 14 (quoting *Florida v. Bostick*, 501 U.S. 429, 435 (1991)).

{40} To determine whether a reasonable person would feel free to leave, our courts examine "(1) the conduct of the police, (2) the person of the individual citizen, and (3) the physical

surroundings of the encounter." *Jason L.*, 2000-NMSC-018, ¶ 15 (internal quotation marks and citation omitted).

{41} Immediately upon seeing Defendant walking across the street, the officer stopped his marked car in the intersection within close proximity to Defendant and shone his spotlight on him. He then "told," "ordered," or "yelled at" Defendant to stop, in a manner clearly indicating that compliance was required. *See id.* ¶ 14. A reasonable person would not have felt free to terminate the encounter and walk away. To be sure, when Defendant attempted to walk away, the officer pursued him and incrementally escalated the intrusion as Defendant declined to engage. While the officer's conduct grew more and more coercive, even his initial actions demonstrated accosting and restraint. *See Lopez*, 109 N.M. at 170, 783 P.2d at 480. Defendant was thus seized under Article II, Section 10 when the officer stopped his marked car in the intersection near Defendant, shone his spotlight on him, and told, ordered, or yelled at Defendant to stop.[2]

3. There was no Reasonable Suspicion to Seize Defendant

{42} Having held that Defendant was seized under Article II, Section 10 when the officer stopped his marked car in the intersection near him, shone his spotlight on him, and told him to stop, we must next consider whether the officer had reasonable suspicion to seize Defendant at that time.

{43} "Investigatory detention is permissible when there is a reasonable and articulable suspicion that the law is being or has been broken." *Jason L.*, 2000-NMSC-018, ¶ 20 (internal quotation marks and citation omitted). 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." *Id.* "Unsupported intuition and inarticulate hunches are not sufficient." *Id.* (internal quotation marks and citation omitted). "Reasonable suspicion must exist at the inception of the seizure. The officer cannot rely on facts which arise as a result of the encounter." *Id.* (internal citation omitted).

{44} As outlined above, Defendant was seized under Article II, Section 10 when the officer stopped his marked patrol car in the intersection where Defendant was walking, shone his spotlight on him, and told or ordered him to stop. The officer presumably focused on Defendant because of his knowledge of the "possible domestic in progress" and the caller's desire to have a man named Joshua Garcia removed from his or her residence, as well as Defendant's proximity to the residence in question. However, seizing Defendant because he was near the address where the yet-uninvestigated "possible domestic" had occurred was unreasonable because the officer had no articulable, particularized suspicion that Defendant was breaking or had broken the law. *See id.*; *cf. State v. Cobbs*, 103 N.M. 623, 626-27, 711 P.2d 900, 903-04 (Ct. App. 1985) (concluding that reasonable suspicion existed to stop individuals where the officer who was dispatched to investigate a possible residential burglary was told by dispatch that the suspects were repeatedly seen walking from the rear of the residence to a car parked behind the residence and were presently in the car; when the officer arrived at the scene, two individuals were seated in a car parked at the rear of the residence).

{45} First, the officer had no information that a crime had been or was being committed: while the caller's desire to have a man named Joshua Garcia removed from his or her residence *may* have been the result of Joshua Garcia perpetrating some crime, the officer had no knowledge of such crime. Mere speculation that Joshua Garcia may have committed an unspecified crime does not satisfy the constitutional requirement of reasonable suspicion. While an officer may

[2] By our holding that Defendant was seized, we do not mean to suggest that it was unjustified for the officer to attempt to speak with Defendant to inquire into any connection he may have had to the residence or the domestic incident. *See Mendenhall*, 446 U.S. at 553 ("The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry. . . ."); *Jason L.*, 2000-NMSC-018, ¶ 14 ("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 [his or her] requests is required.'") (quoting *Bostick*, 501 U.S. at 435).

still form reasonable suspicion without knowing, with some degree of certainty, that a crime had occurred, the facts in the present case indicate that the officer did not have enough information to conclude that Defendant was involved in the possible domestic disturbance.

{46} Further, even had the officer known that a crime had been committed, the fact that Defendant was merely walking in the vicinity was not necessarily sufficient to support a reasonable suspicion that Defendant was the responsible party. The officer did not have a description of Joshua Garcia and had no prior contact with him or any other means to independently establish that Defendant was Joshua Garcia. As a result, the officer did not observe Defendant on the property of the address to which the officer was called; he was merely on the same block. It was seven o'clock p.m., not an unusual time for people to be walking in the streets. The connection between Defendant and any crime that may have been in progress was too attenuated to constitute reasonable suspicion.

III. CONCLUSION

{47} For the foregoing reasons, we hold that Defendant was seized under Article II, Section 10 when the officer stopped his patrol car in the intersection near where Defendant was walking, shone his spotlight on him, and told him to stop. The seizure was not supported by reasonable suspicion. The evidence against Defendant flowed from the seizure and must be suppressed under Article II, Section 10. We reverse.

{48} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PETRA JIMENEZ MAES,
Justice

CHARLES W. DANIELS,
Justice

RICHARD C. BOSSON,
Justice (specially concurring)

SPECIALLY CONCURRING OPINION

BOSSON, Justice (specially concurring).

{49} I concur in the opinion of the majority. I write separately solely on the issue of preservation.

{50} In addressing any claim under our state Constitution, the threshold issue is always preservation. Given the unusual posture of this particular case, I agree with the majority that Defendant need not have preserved such a claim at the trial level. However, the Court of Appeals took a different view, and held that Defendant did not do enough to preserve his state constitutional argument. For its part, the State spent much of its brief arguing that Defendant did not preserve his argument in accordance with *State v. Gomez*, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932 P.2d 1. I disagree with both the State and the Court of Appeals on this point. I write separately to stimulate (hopefully) a dialogue regarding what we reasonably should continue to demand today—over 12 years after *Gomez*—to preserve a search and seizure argument under Article II, Section 10 of the New Mexico Constitution.

{51} In *Gomez*, this Court set forth a bifurcated framework—now familiar to us all—for preservation of a state constitutional claim with a federal analog. 1997-NMSC-006, ¶¶ 22-23. "[T]he requirements for preserving the claim for appellate review depend on current New Mexico precedent construing [the] state constitutional provision." *Id.* ¶ 22. Where established precedent construes the provision more broadly than its federal counterpart, the claim is preserved by "(1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed for the trial court to rule on the issue." *Id.* Where there is no precedent interpreting

a state constitutional right differently than its federal equivalent, a litigant must meet a higher burden. *Id.* ¶ 23. In these cases, "a party also must assert in the trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision." *Id.* (emphases omitted) (footnote omitted).

{52} In our state jurisprudence, a plethora of precedent already interprets Article II, Section 10 more expansively than the Fourth Amendment. *See, e.g.*, *Gomez*, 1997-NMSC-006, ¶¶ 33-40 (requiring exigent circumstances to justify the warrantless search of an automobile, contrary to *United States v. Ross*, 456 U.S. 798, 800 (1982), *modified by Arizona v. Gant*, No. 07-542, slip op. (April 21, 2009)); *Campos v. State*, 117 N.M. 155, 158, 870 P.2d 117, 120 (1994) (declining to adopt the "blanket federal rule" that all warrantless arrests of felons where based on probable cause and in public places are constitutionally permissible); *State v. Gutierrez*, 116 N.M. 431, 432, 863 P.2d 1052, 1053 (1993) (rejecting the good faith exception to the exclusionary rule)). Thus, according to the plain language of *Gomez*, to preserve his claim Defendant needed only to "assert[] the constitutional principle that provides the protection sought under the New Mexico Constitution" and "show[] the factual basis needed for the trial court to rule on the issue." 1997-NMSC-006, ¶ 22; *see also State v. Granville*, 2006-NMCA-098, ¶ 13, 140 N.M. 345, 142 P.3d 933 ("When existing precedent construes a state constitutional provision as providing broader protection than its federal counterpart, the preservation of the state constitutional claim requires no more than preservation of any other claim for appellate review."). He was not required to persuade the court why Article II, Section 10 should be interpreted more expansively or otherwise "provide reasons."

{53} Defendant asserted the constitutional principle at issue when he moved to suppress all evidence seized and cited specifically to both the Fourth Amendment *and Article II, Section 10* of the New Mexico Constitution. Defendant also showed the factual basis for his claim: the officer's narrative was in evidence before the trial court. Thus, Defendant satisfied both of the *Gomez* criteria: he specifically invoked the state constitutional provision at issue and showed the factual basis for his claim. Because our more expansive interpretation of search and seizure under the state Constitution is well-known, then under *Gomez* Defendant need not have done more to preserve his claim.

{54} However, both the State and our Court of Appeals disagree, reading *Gomez* too narrowly, in my view. Rather than looking at the relevant constitutional *provision*, as mandated by *Gomez*, they focus on the particular claim or principle asserted by Defendant. For example, in framing the issue, the Court of Appeals stated that "[o]ur courts have not yet decided whether our state constitution affords greater protection than the Fourth Amendment in determining when a person who does not comply with police orders is seized." *State v. Garcia*, 2008-NMCA-044, ¶ 9, 143 N.M. 765, 182 P.3d 146. In other words, Defendant did not make a specific argument below to distinguish *Hodari D.* from our state Constitution. While I recognize that this confusion may stem from *Gomez* employing both the term "provision" and "principle" in its analysis, *compare* Gomez, 1997-NMSC-006, ¶ 2 *with* ¶ 22, I believe that *Gomez* should properly be interpreted as turning on the prior treatment of the constitutional *provision* at issue.

{55} The reading given *Gomez* by the State and the Court of Appeals is unnecessarily restrictive. In practical effect, it could require litigants to meet the higher *Gomez* burden each time a new argument or fact pattern under search and seizure is brought before a state court. The party would have to remind the court that Article II, Section 10 is interpreted more expansively and provide reasons for the court to do so. This is unduly burdensome in the context of search and seizure, and for the reasons that follow, unnecessary. That reading also conflicts with at least some of our precedent which, admittedly, is at times inconsistent. *See State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 13, 130 N.M. 386,

25 P.3d 225 ("While Defendant failed to specify the article and section number of the relevant constitutional provision, he clearly alerted the court to the constitutional principle (the prohibition against unreasonable searches and seizures) under which he sought protection [under the state Constitution]."). Perhaps we should clarify that confusion.

{56} I recognize this is not the only way to interpret *Gomez,* and *Gomez* itself is capable of more than one meaning on this subject. Perhaps it is time for a new look. After all, *Gomez* is not inscribed in granite; it is not part of the state Constitution. It is merely a means to an end. In its text, *Gomez* overturned a prior iteration of preservation under the state Constitution on which the Court of Appeals had correctly relied when it rejected the search and seizure argument for lack of preservation. *See State v. Sutton*, 112 N.M. 449, 454, 816 P.2d 518, 523 (Ct. App. 1991). Just as by 1997, *Sutton* no longer served the purposes of justice and an independent development of our state Constitution, so too we should probably take a fresh look every decade or so at whether the preservation requirements of *Gomez* continue to serve us as well.

{57} To begin the analysis of the State's position, it is worth noting what should be obvious to everyone. We cannot allow the development of our state Constitution to be retarded by overly burdensome, hyper-technical, and impractical preservation requirements. As New Mexico's highest court, it is our duty and privilege to interpret and develop the New Mexico Constitution. In a government of dual sovereigns, it is imperative that our state Constitution develop to its full potential and protect the rights of our citizens where we deem federal law lacking. *Cf. Granville*, 2006-NMCA-098, ¶ 19 ("New Mexico courts independently analyze state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees." (Internal quotation marks and citation omitted.)). A heightened preservation requirement for the state Constitution would impede us from addressing legitimate state constitutional concerns. We should reject any "super preservation requirement" or highly technical construction that would, in effect, hold our state Constitution hostage to the vagaries of trial counsel competency. I note, for example, that Defendant's bare citation to the Fourth Amendment, without more, adequately preserved his search and seizure claim under the United States Constitution. Why impose a higher burden on our state litigants to invoke our own Constitution?

{58} Further, nearly twenty years have passed since we first breathed independent life into Article II, Section 10 in *State v. Cordova,* and many similar holdings have followed in its wake. 109 N.M. 211, 217, 784 P.2d 30, 36 (1989) (retaining the *Aguilar-Spinelli* test for analyzing the reliability of informant information providing the basis for probable cause despite the federal courts' abandonment of the test in favor of an inquiry into the totality of the circumstances). It is now common knowledge that our own protection against unreasonable searches and seizures is more robust than its federal analog. Because we charge our judges with knowledge of the law, a simple invocation of Article II, Section 10, alongside a sufficient presentation of the facts, suffices to alert the mind of the trial court that a litigant is seeking broader protection from unreasonable searches and seizures under the New Mexico Constitution.

{59} For example, in this case, Defendant's motion to suppress invoked Article II, Section 10 without elaboration. Reading the motion, a trial court should be aware that defense counsel has in mind a separate argument under a provision of the state Constitution that often, but not always, is asserted more expansively than its federal equivalent. For what other purpose would one assert Article II, Section 10 than to tell the court, in a kind of litigator's shorthand, that, "[i]f my Fourth Amendment argument does not persuade you, then let's move on to the state constitution and its added protections for the rights of my client?"

{60} What is not clear from the bare motion to suppress is the specific ground or argument; in this case, the reasoning of *Hodari D.* and why we

should break with that case under our state Constitution. Clearly, the better practice is for an attorney to make a specific argument to buttress a claim under the state Constitution. In a case like ours, for example, if *Hodari D.* were the obstacle under the Fourth Amendment, then a sound argument from defense counsel would explain the shortcomings of that opinion and why the principles that animate our state Constitution lead to a better result. A good attorney would never leave that argument to chance.

{61} However, the harsh reality of trial practice does not make it practicable in every case for counsel to be so thorough. This Court has seen far too many instances in which trial counsel simply overlooked the need for argument to explain the theory of the case. Yet, preservation has never been synonymous with the higher standard of best practices in the profession. I cannot say it better than *Gomez*, 122 N.M. at 786, 932 P.2d at 10:

> Although we expect trial counsel to be well-advised of state constitutional law on a particular subject affecting his or her client's interests, we also recognize that the arguments a trial lawyer reasonably can be expected to articulate on an issue arising in the heat of trial are far different from what an appellate lawyer may develop after reflection, research, and substantial briefing. It is impractical to require trial counsel to develop the arguments, articulate rationale, and cite authorities that may appear in an appellate brief.

In other words, on the appellate bench, we get to review in the cool of the night what trial counsel and the trial court must do in the heat of the day.

{62} It does not seem fair to place the burden entirely upon the shoulders of overburdened trial counsel. Under these circumstances, it would not ask too much of the trial court to inquire of counsel the nature of the argument asserted under Article II, Section 10. If, for example, *Hodari D.* were the problem for Defendant, then the court could ask counsel directly to explain why that case should not be followed under Article II, Section 10. This would not take much effort. We recently wrote extensively about *Hodari D.* and the Fourth Amendment, while simultaneously flagging our own concern about "the possibility that Article II, Section 10 may require different standards than those set forth in . . . Hodari D." *State v. Harbison*, 2007-NMSC-016, ¶ 16 n.3, 141 N.M. 392, 156 P.3d 30.

{63} Finally, preservation is not an end in itself, but a means to a fair outcome. In the absence of manifest unfairness to either side, such as an incomplete factual record, citation of Article II, Section 10 in a search and seizure case should suffice; it should alert the trial court to the need to address both the state and the federal constitutions before it rejects a motion to suppress. And even if the court is not alerted, of what real import is that to the resolution of a pure question of law? The factual record here is not subject to any material dispute. This Court can decide the *Hodari D.* issue whether or not the trial court addressed it. While in a perfect world the trial court should address each issue first, that aspiration should not be determinative. The statewide interest in development of our state Constitution tips the balance in favor of proceeding, and we should not hesitate to do so.

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2010-NMSC-006

Filing Date: January 25, 2010

Docket No. 31,480

CITY OF AZTEC,

Plaintiff-Respondent,

v.

ANTHONY GURULE,

Defendant-Petitioner.

Original Proceeding on Certiorari
William C. Birdsall, District Judge

Hugh W. Dangler, Chief Public Defender
Adrianne R. Turner, Assistant Appellate Defender
Santa Fe, NM

for Petitioner.

Thrower Law Firm, P.C.
Larry T. Thrower
Farmington, NM

for Respondent.

OPINION

SERNA, Justice.

{1} This case permits us to reconsider a long-standing procedural requirement that has lost its usefulness in the twenty-first century. We hold that municipal ordinances are properly considered law, and thus need no longer be proven as facts necessary for a prima facie case, and we apply this rule to affirm Anthony Gurule's ("Defendant") conviction of aggravated driving while intoxicated ("DWI"), contrary to the City Code of Aztec, New Mexico. Aztec, N.M., City Code § 24-21.1 (2007) ("Except as otherwise provided in this article, the following sections of the New Mexico Motor Vehicle Code . . . are adopted by reference[:] . . . Sections 66-8-1 to 66-8-140[.]"), http://www.aztecnm.gov/citycode/chapter24-traffic.pdf.[1]

I. PROCEDURAL HISTORY

{2} Defendant was found guilty of aggravated DWI in the City of Aztec Municipal Court. He appealed to the Eleventh Judicial District Court, and again was found guilty after a trial de novo. At the close of evidence in the trial de novo, Defendant objected that the city had not met its evidentiary burden, as it failed to introduce the relevant ordinance into evidence. The City of Aztec ("City") admitted that it had not introduced the ordinance, but argued that the ordinance was presented by reference because Aztec adopted the state statute, to which the judge had ready access. The City acknowledged that it could not rely on the record for an element of proof. The district court did not rule on the objection. No mention was made on the record as to whether or not the district court did, or could, take judicial notice of the city ordinance. Defendant filed a motion to dismiss after the trial, renewing the argument that the City did not prove its case because it failed to introduce the relevant ordinance. The motion was denied.

{3} The Court of Appeals upheld the conviction in a Memorandum Opinion by concluding that the district court took judicial notice of the city ordinance under which Defendant was convicted, thereby finding the City proved the prima facie elements of its case. *City of Aztec v. Gurule*, No. 28,705, slip op. at 4 (N.M. Ct. App. Dec. 2,

[1] We note that the record in this case indicates Defendant was charged under Section 12-1/66-8-102 of the Aztec City Code. However, we located the municipal ordinance under the citation stated in the text.

2008). We now affirm the opinion of the Court of Appeals on grounds other than those set forth in the Memorandum Opinion and write to clarify the purpose and method of taking judicial notice of a municipal ordinance, which we now recognize as law.

II. DISCUSSION

{4} Judicial notice is familiar to the legal community as a tool of evidence. We often neglect to recognize, however, that courts take notice of law on a daily basis; indeed, we could not succeed in our work if we were not free to consult the great body of local, state, national, and international law that exists and, thanks to modern research techniques, is accessible to legal researchers in any locale. We take this opportunity first to review judicial notice of adjudicative facts, then to discuss judicial notice of law and why municipal ordinances henceforth will be treated as law.

A. Standard of Review

{5} This case requires us to rule on an issue of law, and therefore our review is de novo. *See Boradiansky v. State Farm Mut. Auto. Ins. Co.*, 2007-NMSC-015, ¶ 5, 141 N.M. 387, 156 P.3d 25.

B. Judicial Notice of Facts

{6} Our rules of evidence permit trial courts to take judicial notice of "adjudicative facts," Rule 11-201(A) NMRA, which are "simply the facts of the particular case." Fed. R. Evid. 201 (1972 Advisory Committee note to subdivision (a)). Judicial notice of fact alleviates the evidentiary burden on a party and is taken pursuant to the rules of evidence. *See Personnel Dep't, Inc. v. Prof'l Staff Leasing Corp.*, 297 Fed. Appx. 773, 785 n.10 (10th Cir. 2008). Our rules of evidence permit courts to take judicial notice of facts "not subject to reasonable dispute," including facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 11-201(B)(2). A court has discretion to take judicial notice sua sponte, Rule 11-201(C), but must take judicial notice if requested by a party and that party has furnished the court with the information necessary. Rule 11-201(D). Judicial notice may be taken at any time during the proceeding. Rule 11-201(F).

{7} When a court takes judicial notice of a fact, it must be done on the record. There are two main reasons trial courts should make a clear record when taking judicial notice of a fact: (1) to facilitate appellate review, *see Frost v. Markham*, 86 N.M. 261, 263, 522 P.2d 808, 810 (1974), and (2) to provide notice, as required by due process, to the opposing party. *See Garner v. Louisiana*, 368 U.S. 157, 173 (1961). Our trial courts should be explicit when taking judicial notice, for the benefit of the parties and the reviewing courts.

{8} At the time of Defendant's trial de novo, our law treated a municipal ordinance that was the applicable law as a fact which had to be pled and proven as part of a party's prima facie case. *Muller v. City of Albuquerque*, 92 N.M. 264, 265, 587 P.2d 42, 43 (1978). The reason for the rule requiring proof of municipal ordinances dates to a time when discovering the content of an ordinance was difficult, if not impossible, for any court not located in that municipality. *See Getty Petroleum Mktg., Inc. v. Capital Terminal Co.*, 391 F.3d 312, 323-24 (1st Cir. 2004) (Lipez, J., concurring) (providing a thorough discussion of the historical reasons for not permitting judicial notice of local laws, and why these reasons are no longer valid). Municipal ordinances historically have been treated in the same manner as foreign law, and thus were part of that body of law treated as fact to be proven by the parties. *See* 2 George E. Dix et al., *McCormick on Evidence* § 328 (6th ed. 2006) (stating that foreign law was treated as a question of fact, "but a peculiar one which only the judge came to decide"); 1 Clifford S. Fishman, *Jones on Evidence* § 2.85 (7th ed. 1992) (noting that courts traditionally refused to take judicial notice of municipal ordinances because ordinances were "neither common knowledge within the state, nor readily verifiable").

{9} A magistrate judge may take judicial notice of an ordinance from the same municipality in which the magistrate sits. *See* 9A Eugene McQuillan, *McQuillan: The Law of Municipal Corporations* § 27:51 (3d ed. 2007). This is for the same reason that our state courts may take judicial notice of state statutes: it is presumed magistrate courts have ready access to a current copy of the local ordinances. *See Town of Forks v. Fletcher*, 652 P.2d 16, 17 (Wash. Ct. App. 1982) ("The rationale for this rule is that the ordinances are the particular law of the forum and, therefore, known to the local court.").

{10} Likewise, we permit a district court conducting a trial de novo to take judicial notice of a municipal ordinance that controls the case. *City of Albuquerque v. Leatherman*, 74 N.M. 780, 781, 399 P.2d 108, 109 (1965). This rule, known as the *Leatherman* exception, exists because the district court hearing a case de novo may "take notice of whatever facts the [municipal court] could have noticed judicially[.]" *Id.* at 782, 399 P.2d at 110 (internal quotation marks and citation omitted). While we agree with the Court of Appeals that the district court was permitted to take judicial notice of the municipal ordinance under the *Leatherman* exception, because of our holding today, we need not rule whether judicial notice was properly taken by the district court in this case.[2]

{11} Our appellate courts do not take judicial notice of municipal ordinances. *See Muller*, 92 N.M. at 265, 587 P.2d at 43 ("An appellate court will not take judicial notice of municipal ordinances."); *Coe v. City of Albuquerque*, 81 N.M. 361, 364, 467 P.2d 27, 30 (1970); *Gen. Servs. Corp. v. Bd. of Comm'rs of Bernalillo County*, 75 N.M. 550, 552, 408 P.2d 51, 52 (1965). This is because we have treated municipal ordinances as facts, and we do not consider new facts when conducting appellate review. *See Gen. Servs. Corp.*, 75 N.M. at 552, 408 P.2d at 53 ("[O]ur scope of appellate review is limited to a consideration of those facts disclosed by the record.").

[2] A district court may take judicial notice, sua sponte, of its own records in the case, *see In re Bruno R.*, 2003-NMCA-057, ¶ 22, 133 N.M. 566, 66 P.3d 339, which, in this case, included the criminal complaint setting forth the ordinance number under which Defendant was charged. *See Gurule*, No. 28,705, slip op. at 4. However, the district court below should have made a clear record that judicial notice was being taken of the complaint.

C. Judicial Notice of Law

{12} "Judicial notice of fact is distinct from judicial notice of law." *Personnel Dep't*, 297 Fed. Appx. at 785 n.10. Judicial notice of fact is simply an "evidentiary shortcut," while judicial notice of law is "the commonsense doctrine that the rules of evidence governing admissibility and proof of documents generally do not make sense to apply to statutes or judicial opinions—which are technically documents—because they are presented to the court as law, not to the jury as evidence." *Getty Petroleum*, 391 F.3d at 321-22. Although we do not do so explicitly, "courts take judicial notice of law every time they cite a statute or judicial decision." *Id.* at 324. It is permissible, indeed required, therefore, for our trial and appellate courts to take judicial notice of the law necessary for the resolution of all cases in front of the courts.

D. Municipal Ordinances are Law

{13} The rule requiring proof of municipal ordinances as fact is not consistent with the role of courts with respect to law and fact. "[D]etermination of the applicable law is an issue of law, not of fact." *City of Cedar Rapids v. Cach*, 299 N.W.2d 656, 660 (Iowa 1980). We agree that

> [a]s all law has become increasingly accessible and judges have tended to assume the duty to rule on the tenor of all law, the notion that [the process of treating law as fact and] part of judicial notice has become increasingly an anachronism. Evidence, after all, involves the proof of facts. How the law is fed into the judicial machine is more appropriately an aspect of the law pertaining to procedure.

Dix, *supra*, § 335.

{14} The reasons for distinguishing municipal ordinances as adjudicative facts, not law, are no longer compelling. *See*, *e.g.*, *id.* ("[A]s these [ordinances] become more accessible, the tendency is toward permitting the judges to do what perhaps they should have done in the beginning, that is, to rely on the diligence of counsel to provide the necessary materials, and accordingly to take notice of *all* law."); Fishman, *supra*, § 2.72 (stating that not judicially noticing municipal ordinances "was understandable when trustworthy copies of such laws were hard to come by, but is difficult to justify today"). The Hawai'i Supreme Court succinctly stated the two main reasons for the trend towards permitting judicial notice of foreign law, including municipal ordinances: accessibility and verifiability. *State v. West*, 18 P.3d 884, 888 n.10 (Haw. 2001). The reasons for the trend in treating municipal ordinances as law are interconnected: "the increased accessibility of foreign law makes it more easily verifiable; in turn, like the [i]nternet, the usefulness of this ready availability is predicated on its trustworthiness. Factors affecting these dual justifications include: (1) publication, (2) codification, and (3) compilation." *Id.* (internal citations omitted).

{15} These exact reasons have eroded the justification in our precedent for treating municipal ordinances as adjudicative facts which may not be judicially noticed by our courts on appeal. Municipal ordinances are no longer impossible to find outside of the municipality. It is true that they are not gathered in one uniform compilation, as are our state statutes. However, learning the contents of an ordinance no longer requires a trip to the government offices of a far-off town. The City of Aztec, for example, publishes its City Code online. Municipalities that do not publish their ordinances online still have easy means of complying with a request by court or counsel for a copy of an ordinance, and can send the same by fax or email in a reasonably brief time. *See Getty Petroleum*, 391 F.3d at 324 ("If there is no doubt that a document accurately states the law, there is no reason to eschew judicial notice of that law." (footnote omitted)).

{16} We hold that municipal ordinances are law and may be judicially noticed as such, and thus lay to rest the practice of treating municipal ordinances as facts. Municipal ordinances should be treated as law, and "be placed into a case via the mechanism of judicial notice of law, not proof to the jury." *Id.* at 330. We agree with the Court of Appeals in *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 46 n.3, 134 N.M. 77, 73 P.3d 215, that there is "no sound reason to deny an appellate court access to the law when it is reviewing a case de novo," and, as discussed above, conclude that there is no sound reason to deny our appellate courts the right to consult municipal ordinances, the laws that govern the myriad municipalities of New Mexico. Our rule of evidence governing judicial notice, therefore, is no longer applicable to the introduction of municipal ordinances into a case, as our holding means that municipal ordinances are no longer considered adjudicative facts.

{17} This conclusion requires us to overrule certain cases to the extent that they hold a municipal ordinance must be pled and proven as any other fact, including *Muller*, 92 N.M. at 265, 587 P.2d at 43; *Coe*, 81 N.M. at 364, 467 P.2d at 30; and *Gen. Servs. Corp.*, 75 N.M. at 552, 408 P.2d at 53. The factors we consider before overruling a prior decision are:

> 1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule no more than a remnant of abandoned doctrine; and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have robbed the old rule of justification.

Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, ¶ 7, 133 N.M. 661, 68 P.3d 901 (internal quotation marks and citations omitted). In this instance, the first three factors are not determinant. However, the ease of legal research and the resources available to our courts,

as well as to our litigants, have greatly increased, and thus "[t]he rationale for requiring [municipal ordinances] to be offered into evidence and proven—the practical difficulty of obtaining the necessary materials—has been undermined by developments in technology and open government practices that often make it easier to find the relevant law." *Getty Petroleum*, 391 F.3d at 329. Our principle of stare decisis therefore is not offended by overruling the above-cited cases.

{18} The important reasons why we require judicial notice on the record are not harmed by this change. Appellate review will be enhanced, not hindered, by treating municipal ordinances as laws which may be judicially noticed. In this case, the due process rights of Defendant are not implicated because Defendant had notice of the ordinance under which he was being tried, as this was a trial de novo. *See United States v. Garcia*, 672 F.2d 1349, 1356 n.9 (11th Cir. 1982). Furthermore, the municipal ordinance under which Defendant was convicted is not in dispute. *See Simes v. Simes*, 895 A.2d 852, 861 (Conn. App. Ct. 2006). For these reasons, Defendant is not prejudiced by this change in the City's burden to prosecute under municipal ordinances.

{19} Although we are holding that the parties no longer must plead and prove a municipal ordinance as a fact, if counsel knows the particular ordinance at issue is difficult to obtain, or an old version of the ordinance is at issue, counsel should take reasonable steps to ensure the court has a copy of the correct law. *See Novak v. Craven*, 195 P.3d 1115, 1119 (Colo. Ct. App. 2008) (noting that "a trial court is not expected to be omniscient: the party must provide the trial court with at least some notice of the existence of the municipal provision"). When the existence of a municipal ordinance is at issue, and therefore must be proven to the court, the methods of proof set forth in NMSA 1978, Section 3-17-5(D) (1965), remain the proper way to prove the ordinance. We find no evidence that the Legislature passed this statute with the intention of statutorily enacting the rule treating municipal ordinances as facts that must be pled and proven.

{20} We affirm the decision of the Court of Appeals by applying the rule announced today, and Defendant's conviction for DWI contrary to the Aztec City Code is affirmed. This new rule applies to pending and future cases only. *See State v. Frawley*, 2007-NMSC-057, ¶ 41, 143 N.M. 7, 172 P.3d 144.

III. CONCLUSION

{21} We hold that municipal ordinances are properly categorized as law which may be judicially noticed by all courts in New Mexico. Defendant's conviction is affirmed.

{22} IT IS SO ORDERED.

PATRICIO M. SERNA
Justice

WE CONCUR:

EDWARD L. CHÁVEZ,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2010-NMSC-025

Filing Date: May 12, 2010

Docket No. 31,288

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ALBERTO SAVEDRA,
JOSE LOZANO, SR.,
and SCOTT YATES,

Defendants-Respondents.

Original Proceeding on Certiorari
Freddie Joseph Romero,
District Judge

Gary K. King, Attorney General
Max Shepherd, Assistant Attorney General
Santa Fe, NM

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Thomas E. Lilley, P.C.
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Trace L. Rabern, Attorney and Counselor at Law, L.L.C.
Trace L. Rabern
Santa Fe, NM

for Respondent Alberto Savedra.

Gary C. Mitchell, P.C.
Gary C. Mitchell
Ruidoso, NM

for Respondents Jose Lozano, Sr., and Scott Yates.

OPINION

SERNA, Justice.

{1} In this appeal, we are presented with the recurring issue of how our six-month rules should be administered when the State dismisses charges in magistrate court and subsequently refiles the same charges in district court. On separate occasions, Defendants Savedra, Lozano, and Yates were charged with misdemeanor Driving While Intoxicated (DWI) in magistrate court, and did not reach a plea agreement. In each case, the State dismissed the charges in magistrate court and refiled the cases in district court pursuant to a prosecutorial policy of the district attorney in the Fifth Judicial District, the purpose of which is to avoid duplicative trials. After more than six months had elapsed from the arraignment or waiver of arraignment in magistrate court, each of the Defendants moved to dismiss their cases on the basis of a six-month rule violation. The district court granted each of the motions. The State appealed the dismissals, and the Court of Appeals affirmed in a consolidated case. *State v. Yates*, 2008-NMCA-129, ¶ 16, 144 N.M. 859, 192 P.3d 1236. We granted the State's petition for certiorari to address whether the Court of Appeals erred when it affirmed the district court's orders dismissing the three cases. We affirm.

DISCUSSION

{2} The six-month rules that we have established for our trial courts "provide the courts and parties with a rudimentary warning of when speedy trial problems may arise." *State v. Garza*, 2009-NMSC-038, ¶ 46, 146 N.M. 499, 212 P.3d 387. The time limits for the commencement of trial in magistrate courts are governed by Rule 6-506 NMRA. The rule provides in pertinent part: "The trial of a criminal citation or complaint shall be commenced within one hundred eighty-two (182) days after whichever of the following events occurs latest: (1) the date of arraignment or

the filing of a waiver of arraignment of the defendant[.]" Rule 6-506(B); *see also State v. Carreon*, 2006-NMCA-145, ¶ 6, 140 N.M. 779, 149 P.3d 95 ("Commencement of trial within the stated period, while not jurisdictional, is mandatory."). In district court, the time in which a trial must be commenced is governed by Rule 5-604 NMRA, providing in pertinent part: "The trial of a criminal case or habitual criminal proceeding shall be commenced six (6) months after whichever of the following events occurs latest: (1) the date of arraignment, or waiver of arraignment, *in the district court* of any defendant[.]" Rule 5-604(B)(1) (emphasis added). However, there is no district court or magistrate court rule to address the interplay between the six-month rule provisions for each court when a complaint is dismissed in magistrate court and later refiled in district court.

{3} Because of this gap in the rules, a long line of appellate court opinions have sought to preserve the protections of the six-month rule by requiring the State to demonstrate that its decision to dismiss and refile was not done in bad faith to circumvent the protections of the six-month rule. *See Carreon*, 2006-NMCA-145, ¶ 7 (reiterating that "the State cannot escape the effect of the six-month rule if the dismissal and re-filing are done for a bad reason, including doing so for the purpose of circumventing the six-month rule"); *accord State ex rel. Delgado v. Stanley*, 83 N.M. 626, 495 P.2d 1073 (1972); *State v. Ahasteen*, 1998-NMCA-158, 126 N.M. 238, 968 P.2d 328; *State v. Bolton*, 1997-NMCA-007, 122 N.M. 831, 932 P.2d 1075. Accordingly, in the present appeals, the Court of Appeals majority reasoned that it was "inclined to adhere to [its] conclusion in *Carreon* [, 2006-NMCA-145, ¶ 11] that the mere existence of the prosecutorial policy of dismissing every magistrate court case that is not settled before the six-month deadline is insufficient to sustain the State's burden." *Yates*, 2008-NMCA-129, ¶ 11 (internal quotation marks omitted). We agree that *Carreon* is directly on point and dictates that we affirm the district court's dismissals.

{4} As in *Carreon*, the State in these cases dismissed Defendants' magistrate charges and refiled the same charges in district court pursuant to a policy in which the prosecutor would dismiss a case in magistrate court once it became apparent that there would be no plea agreement and then refile the same charges in district court. The State offered no other reason for the dismissals and subsequent refilings. The facts in these cases are such that the *Carreon* holding—that the mere existence of such a policy is insufficient to meet the State's burden—directly applies to Defendants' cases. Since the State did not meet its burden to show why its dismissal and refiling was done for reasons other than to circumvent the six-month rule, Defendants' six-month rule time periods commenced with either the arraignment or waiver of arraignment in magistrate court and continued to run until they expired; a new six-month rule time period did not commence once the cases were refiled in district court.

{5} We agree with the Court of Appeals that a literal application of Rule 5-604(B)(1), which would grant the State a new six-month time period in which to bring the case to trial upon refiling in district court, "violate[s] the spirit of the six-month rule[.]" *Yates*, 2008-NMCA-129, ¶ 4. This Court has adopted the six-month rules in order to effectuate a criminal defendant's right to a speedy trial and to "assure prompt disposition of criminal cases." *Garza*, 2009-NMSC-038, ¶ 43 ("As a case management tool, the six-month rule accounts for the amount of delay considered reasonable in bringing cases to trial."). Thus, the right protected by the six-month rules belongs to a *criminal defendant*, not the State, the courts, or any other party. To allow the State a new six-month time period in which to bring a case to trial after refiling would permit the State to cause delay in bringing defendant to trial after he or she was charged in magistrate court. *See Carreon*, 2006-NMCA-145, ¶ 6 (noting that the six-month rules "guard against lack of preparedness on the part of the State"). The focus of administration of the six-month rule should be on the defendant and his or her right to have a prompt disposition of his or her criminal charges. Thus, when charges are dismissed in the courts of limited jurisdiction, which include magistrate, metropolitan, and municipal courts, and later

refiled in district court, the triggering event for six-month rule purposes is the triggering event that occurred in *the court of limited jurisdiction*, and the six-month time period is not automatically reset upon the refiling. In light of the existing case law in this area, the prosecution should have known that its policy of dismissing and refiling in district court was an insufficient basis for restarting the six-month rule period in district court. Accordingly, the dismissals of Defendants' cases are affirmed because they were not brought to trial within the time period required under the magistrate court six-month rule and there was no basis for restarting the six-month rule period under the district court's rule.

{6} While affirmance is warranted in these cases, we do take note of Judge Castillo's special concurrence in these appeals, suggesting that we re-examine the six-month rules for district and magistrate courts. In particular, Judge Castillo suggested that:

> Perhaps it would be helpful for the Supreme Court to consider amending the Rules of Criminal Procedure for district courts and magistrate courts in order to explain under what circumstances the arraignment in magistrate court would remain the triggering event for application of the district court six-month rule and under what circumstances a new six-month rule would begin.

Yates, 2008-NMCA-129, ¶ 28 (Castillo, J., specially concurring). As the Court of Appeals noted in its Opinion, the six-month rules in magistrate and district court do not address the procedural posture presented in Defendants' cases—there is no provision in either set of rules governing a situation when a case is dismissed in magistrate court and then later refiled in district court. *Id.* ¶ 13; *see also State v. Heinsen*, 2005-NMSC-035, ¶ 26, 138 N.M. 441, 121 P.3d 1040 (noting that Rule 5-604 "is silent on the effect of a dismissal in magistrate court and refiling in the district court").

{7} The Court of Appeals also expressed concerns

> that [the classifications of the State's reasons for dismissing a case as "good" or "bad"] has unnecessarily judgmental connotations, suggesting that the focus of our analysis is whether the State has acted with a culpable state of mind and that six-month rule consequences attach only when the State has acted in bad faith or engaged in gamesmanship.

Yates, 2008-NMCA-129, ¶ 9. We share these concerns. The six-month rules were primarily created to effectuate a criminal defendant's right to a speedy trial. But as it stands, the "good faith-bad faith" analysis developed through the *Delgado* line of cases renders a defendant's right to be promptly tried as a contingent right, one that may provide protection only if the State had "bad" reasons for dismissing and refiling. We find this impermissible.

{8} As we have previously stated, the right protected by the six-month rules is a criminal defendant's right, not that of the State, the courts, or any other party; it is not a tool to punish the State for dismissing and refiling cases in bad faith, nor should its diminution be a reward for the State's good behavior. Viewed in that light, the cases in which courts have conducted a "good faith-bad faith" analysis regarding the State's reasons for dismissing and refiling a case in order to determine if a new six-month time period should be granted are misguided. Instead, any inquiry into the State's reasons for dismissing and refiling in district court should be done within the context of any speedy trial challenge the defendant may raise after the case is refiled in district court. *See Garza*, 2009-NMSC-038, ¶¶ 28, 48 (providing new time frames for engaging in the four-factor *Barker v. Wingo*, 407 U.S. 514 (1972) speedy trial balancing test and noting that delay resulting from dismissal and refiling should be weighed against the State); *see also State v. Maddox*, 2008-NMSC-062, ¶ 13, 145 N.M. 242, 195 P.3d 1254 ("The reasons for a period of the delay may either heighten or temper the prejudice to the defendant caused by the length of the delay.").

{9} In light of the foregoing, we recognize the need to revise our six-month rules to incorporate

our decision set forth in this Opinion. Within the context of criminal proceedings in our courts of limited jurisdiction, our six-month rules continue to serve a useful purpose. But in our district courts, the six-month rule has become an unnecessary and sometimes counterproductive method for protecting a defendant's right to a speedy trial. Therefore, effective for all cases pending as of the date this Opinion is filed, we withdraw the six-month rule provisions set forth in Rule 5-604(B)-(E). *See State v. Pieri*, 2009-NMSC-019, ¶¶ 19-20, 146 N.M. 155, 207 P.3d 1132 (recognizing the Court's authority to make rule changes applicable to pending cases). In its place, defendants may rely upon and assert their right to a speedy trial whenever they believe impermissible delay has occurred; whether that delay is the result of a dismissal and refiling or any other cause. We therefore request that our Rules of Criminal Procedure for District Courts Committee, Rules for Courts of Limited Jurisdiction Committee, and Metropolitan Courts Rules Committee consider how best to revise their rules to allow for the dismissal of cases from a limited jurisdiction court and refiling in district court in a manner that is consistent with the principles set forth in this Opinion and that protects the defendant's right to a speedy trial.

CONCLUSION

{10} The State failed to meet its burden to show why its dismissals and refilings were not done to circumvent the six-month rule. Thus, Defendants' six-month rule time periods commenced with either the arraignment or waiver of arraignment in magistrate court and continued to run until they expired; new six-month time periods were not given to the State once the cases were refiled in district court. Accordingly, the dismissals of Defendants' cases are affirmed.

{11} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2010-NMSC-039

Filing Date: July 13, 2010

Docket No. 31,218

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

OMAR HENLEY,

Defendant-Respondent.

Original Proceeding on Certiorari
Camille Martinez-Olguin, District Judge

Gary K. King, Attorney General
Joel Jacobsen, Assistant Attorney General
Santa Fe, NM

for Petitioner.

Hugh W. Dangler, Chief Public Defender
Susan Roth, Assistant Appellate Defender
Santa Fe, NM

for Respondent.

OPINION

SERNA, Justice.

{1} In our criminal justice system, the right to trial by jury is enshrined in the Sixth Amendment of the United States Constitution and Article II, Section 12 of the New Mexico Constitution. "[I]t is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence." *Sparf v. United States*, 156 U.S. 51, 102 (1895). In order for the jury to perform this duty, the court must instruct the jury on the law contained in our criminal statutes when the evidence presented at trial supports all the elements of the crime as defined by our Legislature.

{2} In this case, the jury convicted Omar Henley **(**Defendant**)** of voluntary manslaughter, contrary to NMSA 1978, § 30-2-3(A) (1994), for the death of Mark Grey (Victim). Defendant appealed his conviction, and the Court of Appeals reversed in a Memorandum Opinion, holding that the jury should have been instructed on involuntary manslaughter. *State v. Henley*, No. 27,925, slip op. (N.M. Ct. App. Apr. 16, 2008). We granted the State's petition for writ of certiorari, 2008-NMCERT-007, 144 N.M. 594, 189 P.3d 1216, and exercise jurisdiction over this appeal under Article VI, Section 2 of the New Mexico Constitution and NMSA 1978, Section 34-5-14(B) (1972).

{3} We conclude that the district court did not err by refusing to instruct the jury on involuntary manslaughter. An involuntary manslaughter jury instruction is proper only when the evidence presented at trial permits the jury to find the defendant had a mental state of criminal negligence. No such evidence was presented here, and thus instructing the jury on involuntary manslaughter would have been improper. Consequently, we reverse the Court of Appeals and reinstate Defendant's conviction for voluntary manslaughter.

I. BACKGROUND

{4} On February 6, 2006, Defendant and Victim happened upon each other on a residential street in Milan, New Mexico. The encounter quickly became violent: three shots were fired, resulting in Victim's death from a single bullet to his abdomen. Testimony at trial failed to establish which of the three shots was fatal.

{5} At trial, Defendant testified as to his account of the incident. Defendant was sitting in his car when Victim approached the passenger

side window; Defendant lowered the window to talk and realized Victim was trying to rob him when Victim put a gun to Defendant's head. A struggle ensued, and, afraid for his own life, Defendant "reached as fast as [he] could to grab and [he] pushed the gun and a flash of light came out [of] the weapon[.]" Defendant then "put [his] level hand . . . on the barrel" of the gun and, after gaining control of the gun, fired it at Victim. Defendant "fired at [Victim] one more time" and drove away, unaware that Victim had died until so informed by the police. Defendant acknowledged that no blood was found in his vehicle.

{6} Two eyewitnesses provided different accounts of the crime. An individual who lived on the street where Victim was shot testified that he had a clear view of the encounter and saw Defendant shoot at Victim two times while Victim was walking towards Defendant's car. The driver of the vehicle in which Victim was riding testified that Victim was unarmed and walked up to Defendant's car, where an argument ensued and Defendant shot Victim twice as Victim was trying to open the door.

{7} Defendant requested the jury be instructed on involuntary manslaughter. The State objected, arguing that no evidence was presented supporting the involuntary manslaughter instruction because the evidence failed to show that Defendant had committed "a lawful act done through a negligent behavior." The district court, reading from *State v. Romero*, 2005-NMCA-060, ¶ 17, 137 N.M. 456, 112 P.3d 1113, articulated three situations in which evidence warrants an involuntary manslaughter instruction: "killing of a human being . . . [(1)] in the commission of an unlawful act not amounting to a felony . . . [; (2)] in the commission of a lawful act that might produce death in an unlawful manner . . . [; or (3)] in the commission of a lawful act that might produce death without due caution or circumspection." The district court noted that the evidence presented did not appear to satisfy any of the categories. Defendant argued that his testimony established the first gun shot was fired accidentally during the course of a struggle with Victim, placing the facts within the third category. Defendant also argued that an involuntary manslaughter instruction was appropriate due to evidence of imperfect self-defense.

{8} Defendant submitted the following involuntary manslaughter jury instruction:

> For you to find the defendant guilty of involuntary manslaughter, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [Defendant] struggled with [Victim] over a gun and a discharged bullet struck [Victim] in the abdomen killing him;
> 2. [Defendant] should have known of the danger involved by [Defendant's] actions;
> 3. [Defendant] acted in willful disregard for the safety of others;
> 4. [Defendant's] act caused the death of [Victim];
> 5. This happened in New Mexico on or about the 6th day of February, 2006.

The district court did not issue the instruction because Defendant was unable to proffer evidence satisfying one of the categories of the involuntary manslaughter statute.

{9} The jury was instructed on second-degree murder, voluntary manslaughter, self-defense, and tampering with evidence. After deliberation, the jury returned a guilty verdict on the voluntary manslaughter charge, rejecting the theory that Defendant acted in self-defense, and not guilty of second-degree murder and tampering with evidence. Defendant appealed his conviction on the ground that the district court erred in not issuing the involuntary manslaughter instruction.

{10} The Court of Appeals reversed Defendant's conviction. *Henley*, No. 27,925, slip op. at 5. The Court noted that "jury instructions on involuntary manslaughter are not typically warranted in cases involving fatal shootings, when theories of self-defense and imperfect

self-defense are at issue." *Id.* at 2 (citing *State v. Abeyta*, 120 N.M. 233, 240-42, 901 P.2d 164, 171-73 (1995), *abrogated on other grounds by State v. Campos*, 122 N.M. 148, 158 n.4, 921 P.2d 1266, 1276 n.4 (1996)). Referencing a "clear pronouncement" in *Abeyta*, *id.* at 4, the Court of Appeals identified an exception "where a claim of accidental shooting is involved," *id.* at 2-3 (citing *Abeyta*, 120 N.M. at 242, 901 P.2d at 173; *Romero*, 2005-NMCA-060, ¶¶ 2, 15; and *State v. Gallegos*, 2001-NMCA-021, ¶¶ 12-15, 130 N.M. 221, 22 P.3d 689), and concluded that the "confluence of evidence of imperfect self-defense with evidence of an accidental shooting . . . supports instruction on the offense of involuntary manslaughter." *Id.* at 4 (citing *Abeyta*, 120 N.M. at 242, 901 P.2d at 173). Holding that the district court's failure to issue an involuntary manslaughter jury instruction was not harmless error, the Court of Appeals reversed and remanded for further proceedings. *Id.* at 5.

II. ANALYSIS

{11} We granted certiorari on two questions: (1) Whether the offense of involuntary manslaughter requires a showing of criminal negligence, and, if so, whether the Court of Appeals erred in holding that the confluence of evidence of imperfect self-defense and accident was an adequate substitute for criminal negligence; and (2) whether Defendant preserved his right to a "confluence" jury instruction. We answer both parts of the first question in the affirmative; as a result, we do not reach the second question.

{12} Our review of this appeal is de novo, because "[t]he propriety of jury instructions given or denied is a mixed question of law and fact." *State v. Salazar*, 1997-NMSC-044, ¶ 49, 123 N.M. 778, 945 P.2d 996; *accord State v. Gaitan*, 2002-NMSC-007, ¶ 10, 131 N.M. 758, 42 P.3d 1207. We start by discussing the mental state required for conviction under our involuntary manslaughter statute, then consider whether the Court of Appeals' "confluence" theory is a correct articulation of the elements of involuntary manslaughter, and conclude by reviewing the evidence to determine whether the district court erred in not issuing Defendant's requested instruction.

A. The Mens Rea for Involuntary Manslaughter is Criminal Negligence

{13} Our Legislature has defined involuntary manslaughter as "the unlawful killing of a human being without malice . . . committed in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection." Section 30-2-3(B). Defendant argues that the evidence presented at trial satisfies the definition of involuntary manslaughter because Victim died as a result of a lawful act exercised without due caution or circumspection.

{14} A defendant may be convicted of involuntary manslaughter when a convergence of the proper act and state of mind requirements result in the death of an individual. *See State v. Padilla*, 2008-NMSC-006, ¶ 12, 143 N.M. 310, 176 P.3d 299. Involuntary manslaughter occurs only when the killing is unintentional. *See State v. Pruett*, 27 N.M. 576, 579, 203 P. 840, 841 (1921). Our case law has made clear, and the district court in this case recognized, that a jury will be issued an involuntary manslaughter instruction if the evidence of the homicide fits one of three categories: "1) the commission of an unlawful act not amounting to a felony; 2) the commission of a lawful act that might produce death, in an unlawful manner; or 3) the commission of a lawful act that might produce death without due caution and circumspection." *Salazar*, 1997-NMSC-044, ¶ 54 (citing *State v. Yarborough*, 1996-NMSC-068, ¶ 8, 122 N.M. 596, 930 P.2d 131). The act causing the victim's death must fit one of those categories; the death itself must be unintentional.

{15} The required mens rea for a conviction of involuntary manslaughter is criminal negligence. *State v. Lucero*, 2010-NMSC-011, ¶ 14, 147 N.M. 747, 228 P.3d 1167 ("[I]n the absence of criminal negligence, the defendant cannot be

found guilty of involuntary manslaughter."); *Yarborough*, 1996-NMSC-068, ¶ 20 (holding that "the State must show at least criminal negligence to convict a criminal defendant of involuntary manslaughter"). This standard is reflected in the statutory language permitting a charge of involuntary manslaughter when an otherwise lawful act is conducted "without due caution or circumspection." Section 30-2-3(B).

{16} The showing of criminal negligence required for an involuntary manslaughter jury instruction includes the concept of recklessness, in which a defendant "consciously disregards a substantial and unjustifiable risk" that harm will result from his conduct. Model Penal Code § 2.02(c) (Official Draft and Revised Comments 1962). The uniform jury instruction on criminal negligence incorporates this definition, defining criminal negligence as existing when a person "act[s] with willful disregard of the rights or safety of others and in a manner which endanger[s] any person or property." UJI 14-133 NMRA. Likewise, the instruction on involuntary manslaughter states that the defendant "should have known of the danger involved by [his or her] actions." UJI 14-231 NMRA. To be convicted of involuntary manslaughter, a defendant must have been aware of the risk caused by his or her conduct and continued to act.

{17} Our case law has long integrated the requirement of subjective knowledge into the showing of criminal negligence required by our involuntary manslaughter statute. *See State v. Harris*, 41 N.M. 426, 428, 70 P.2d 757, 758 (1937) (defining criminal negligence required for involuntary manslaughter as "so reckless, wanton, and willful as to show an utter disregard for the safety of [others]"); *see also Yarborough*, 1996-NMSC-068, ¶ 20 (noting, in a vehicular homicide case, that to find criminal negligence, "[the jury] must find that [the defendant] drove with willful disregard of the rights or safety of others and in a manner which endangered any person or property" (quoting NMRA 14-241 (1996))); *Romero*, 2005-NMCA-060, ¶ 17 (finding that an involuntary manslaughter jury instruction should have been given where the defendant presented evidence that he was acting lawfully in self- defense but "without due caution or circumspection due to" the victim's medical condition, of which the defendant was aware); *cf. Lucero*, 2010-NMSC-011, ¶ 14 (stating that a jury instructed on involuntary manslaughter is not also instructed on accident, as accident requires proof of "usual and ordinary caution and without any unlawful intent," in contrast to the required showing of criminal negligence for an involuntary manslaughter instruction (internal quotation marks and citation omitted) (emphasis omitted)). Criminal negligence in the context of involuntary manslaughter requires subjective knowledge by the defendant of the danger or risk to others posed by his or her actions. A jury may not be instructed on involuntary manslaughter unless the evidence presented at trial shows the defendant could be found criminally negligent when engaging in the act causing the victim's death.

B. The "Confluence" of Defenses that Do Not Require a Criminally Culpable Mental State Is Not a Substitute for Criminal Negligence

{18} The Court of Appeals' opinion does not identify evidence of criminal negligence to show that the district court erred by refusing to issue the requested involuntary manslaughter jury instruction, but rather bases its conclusion on Defendant's theories of accident and imperfect self-defense. *Henley*, No. 27,925, slip op. at 3-4. We now review the requirements of accident and imperfect self-defense to determine whether evidence of those defenses provides a valid substitute for criminal negligence.

{19} An accidental killing "is excusable because it is an unintended homicide which occurs in the course of performing a lawful act, without criminal negligence." *Lucero*, 2010-NMSC-011, ¶ 13 (internal quotation marks and citation omitted) (emphasis omitted). It is "unintentional and non-negligent in nature." *Id.* ¶ 14. While both involuntary manslaughter and accident relate to unintentional killings, an involuntary manslaughter jury instruction is proper

when evidence of criminal negligence exists. *Id.* Although instructions on alternative and inconsistent theories may be issued in the same case, *see*, *e.g.*, *Stevenson v. United States*, 162 U.S. 313, 322-23 (1896) (recognizing that jury instructions on inconsistent theories are not improper if supported by the evidence), the mens rea of accident and involuntary manslaughter are irreconcilably distinct, and the evidence of one does not support instructing the jury on the other.

{20} Self-defense, unlike accident, is an intentional act. *See Lucero*, 2010-NMSC-011, ¶ 15. To justify a killing as self-defense, the evidence must establish that the defendant acted "intentionally and purposefully . . . out of fear of immediate death or great bodily harm." *Id.* ¶ 15. Imperfect self-defense occurs when an individual uses excessive force while otherwise lawfully engaging in self-defense. *Abeyta*, 120 N.M. at 241, 901 P.2d at 172.

{21} In *Abeyta* we held that the district court did not err in refusing the defendant's tendered involuntary manslaughter instruction when the defendant argued that he had killed two of his victims in imperfect self-defense. *Id.* at 242, 901 P.2d at 173. We analyzed the propriety of that instruction under the act and mental state requirements of the involuntary manslaughter statute's three categories. We stated that, when a defendant argues imperfect self-defense, an involuntary manslaughter instruction is "inappropriate" because the "use of excessive force in self-defense renders the entire action unlawful[]" and shooting at a person would be a felony, thus precluding a conviction of involuntary manslaughter for failure to satisfy the act requirement of either of the first two categories of the statute. *Id.* at 241-42, 901 P.2d at 172-73. We then noted that "it is possible for an accidental shooting to occur in the process of imperfect self-defense." *Id.* at 242, 901 P.2d at 173. In *Abeyta*, however, this observation had no bearing on our holding, as we found that the evidence presented at trial established either that the victim pulled the trigger on herself during a struggle, in which case the defendant would not be legally responsible, or that the defendant controlled the weapon and intended to kill the victim, making an involuntary manslaughter instruction inappropriate because the killing was not unintentional. *Id.* at 242-43, 901 P.2d at 173-74. The facts of *Abeyta* did not establish that the defendant acted with the mens rea requisite for involuntary manslaughter based on the third category of the statute, performing an otherwise lawful action without due caution or circumspection and therefore the instruction would have been inappropriate.

{22} The Court of Appeals relied on *Abeyta* for the conclusion, that evidence of an accidental escalation of self-defense into imperfect self-defense permits an involuntary manslaughter instruction. *Henley*, No. 27,925 slip op. at 4 (citing *Abeyta*, 120 N.M. at 242, 901 P.2d at 173). The difference between the mental states required for the two distinct defenses, however, demonstrates the Court of Appeals' analysis' erroneous reliance on our dicta in *Abeyta*. If a homicide is accidental, the defendant acted without a criminally culpable state of mind in performing a lawful act, unintentionally killing the victim. If a homicide occurs as a result of imperfect self-defense, however, the defendant acted intentionally in self-defense and the use of excess force rendered the killing unlawful. An involuntary manslaughter instruction is proper only where there is evidence of an unintentional killing and a mens rea of criminal negligence; evidence of supporting alternative, and incompatible, theories may not be substituted for the act and mental state requirements of the involuntary manslaughter statute.

{23} Other jurisdictions that have encountered this question have reached a similar conclusion. The Supreme Court of Georgia has held that evidence supporting theories of both accident and self-defense preclude a jury instruction on involuntary manslaughter due to the conflicting mental states. In *Finley v. State*, the Georgia Court found no error when the jury was not instructed on involuntary manslaughter as the defendant had argued accident and self-defense. 685 S.E.2d 258, 261 (Ga. 2009). The self-defense theory meant the defendant had acted intentionally, while the accident theory meant no crime occurred, and therefore the defendant could not be convicted of involuntary

manslaughter because the evidence did not show that the killing resulted from an act other than a felony. *Id.* (also noting that the defendant could not be convicted of manslaughter by unintended consequence in the course of unlawful act other than a felony because the defendant was a felon in possession of a firearm); *see also Brown v. State*, 586 S.E.2d 323, 325 (Ga. 2003) ("[T]he evidence relied upon by [the defendant] established either that the pistol discharged accidentally when the victim wrestled [the defendant] over its control or that [the defendant] intentionally fired the weapon. The charge on involuntary manslaughter thus was not required."). Texas courts have taken a similar approach to find that evidence of accident and self-defense cannot combine to show criminal negligence. In *Gonzales v. State*, the defendant argued that the fatal shots were fired accidentally when he was acting in self-defense. 632 S.W.2d 899, 902-03 (Tex. App. 1982). The court reasoned that "[t]he evidence, taken as a whole, shows that appellant was either guilty of murder or was guilty of no offense at all because the shooting was an accident or justifiable self-defense[,]" and thus did not show the requisite criminally negligent mental state. *Id.* at 903-04 (discussing the mental state for criminally negligent homicide).

{24} We continue to adhere to our statement in *Abeyta* that "where a defendant shoots someone in imperfect self-defense, the charge of murder can only be mitigated to voluntary manslaughter and an instruction on involuntary manslaughter is inappropriate." 120 N.M. at 242, 901 P.2d at 173; *see also State v. Sosa*, 1997-NMSC-032, ¶ 32, 123 N.M. 564, 943 P.2d 1017 (characterizing *Abeyta* as establishing that "voluntary manslaughter is the lowest degree of homicide that can be charged where there is imperfect self-defense" and holding that the district court committed fundamental error by issuing an involuntary manslaughter jury instruction when the evidence permitted an instruction on imperfect self-defense); *cf. Gallegos*, 2001-NMCA-021, ¶¶ 13, 16 (holding that "self-defense, imperfect or otherwise, can be raised as a defense to an initial charge of involuntary manslaughter"). As a result, the Court of Appeals erred in concluding that "the confluence of evidence of imperfect self-defense with evidence of an accidental shooting[,]" *Henley*, No. 27,925, slip op. at 3-4, is a substitute for evidence of the criminal negligence mental state required for an involuntary manslaughter conviction.

C. THE EVIDENCE PRESENTED DOES NOT SUPPORT A JURY INSTRUCTION ON INVOLUNTARY MANSLAUGHTER

{25} Our remaining task is to determine whether Defendant should have received an involuntary manslaughter jury instruction based on the evidence presented at trial. "When evidence at trial supports the giving of an instruction on a defendant's theory of the case, failure to so instruct is reversible error." *State v. Brown*, 1996-NMSC-073, ¶ 34, 122 N.M. 724, 931 P.2d 69. A party is entitled to submit instructions to the jury when the instruction is supported by the evidence. *Abeyta*, 120 N.M. at 239, 901 P.2d at 170. As jury instructions on lesser included offenses are given only when there is "some view of the evidence that could sustain a finding that the lesser offense was the highest degree of crime committed[,]" *Romero*, 2005-NMCA-060, ¶ 8; *see also State v. Rudolfo*, 2008-NMSC-036, ¶ 27, 144 N.M. 305, 187 P.3d 170 ("If any reasonable minds could differ, the instruction should be given."), we now review the evidence presented "in the light most favorable to the giving of the requested instruction." *Romero*, 2005-NMCA-060, ¶ 18.

{26} The most favorable version of the evidence in support of Defendant was his own testimony. Defendant admitted that three shots were fired, and that he fired the second and third shots at Victim. Defendant testified that the first shot was fired as a result of a struggle between himself and Victim after Victim held a gun to Defendant's head. Defendant claimed that the struggle ended when "[he] reached as fast as [he] could to grab and [he] pushed the gun and a flash of light came out [of] the weapon[.]" Even viewing the evidence in the light most favorable to Defendant, the testimony that he "reached" for, "grabbed," and "pushed" the gun are not demonstrative of a mental state of criminal negligence. *Compare Salazar*, 1997-NMSC-044, ¶

57 (finding that the requested involuntary manslaughter jury instruction was properly denied, in part because it described an intentional act by the defendant); *and Pruett*, 27 N.M. at 577-78, 203 P. at 840-41 (finding that the jury was improperly instructed on involuntary manslaughter when the evidence established that the defendant fired intentionally in self-defense); *with Lucero*, 2010-NMSC-011, ¶ 15 (holding that the jury was properly instructed on involuntary manslaughter, and not self-defense, because the defendant produced no evidence that he fired the gun intentionally); *and Romero*, 2005-NMCA-060, ¶ 17 (finding that an involuntary manslaughter jury instruction should have been given where the defendant presented evidence of criminal negligence in his exercise of self-defense). Defendant's testimony would establish either that the shooting was accidental, and the trigger may have been pulled by Victim, in which case Defendant was not criminally negligent, or that Defendant reached for the gun and intentionally pulled the trigger, in which case Defendant did not act unintentionally. In neither view of the evidence did Defendant act with criminal negligence, that is, with a willful disregard of the risk created by his actions that resulted in the unintentional killing of Victim. Nor did Defendant act with criminal negligence in firing the second or third shots, on which he testified firing at Victim. *See Salazar*, 1997-NMSC-044, ¶ 57 (stating that the defendant's testimony that he was "[s]hooting at" the victim "suggests, to a certain degree, an intentional act, and wrongly describes the mens rea associated with involuntary manslaughter"); *Abeyta*, 120 N.M. at 242-43, 901 P.2d at 173-74. Trial testimony did not establish which shot was fatal; the crucial point here, however, is that it also did not support the claim that Defendant's actions were criminally negligent at the moment he fired any of the three shots.

{27} We conclude that the district court did not err in denying the involuntary manslaughter jury instruction because the evidence viewed in the light most favorable to Defendant fails to demonstrate that Defendant had the requisite mens rea of criminal negligence when the three shots, of which one was fatal, were fired at Victim. *See Gaitan*, 2002-NMSC-007, ¶ 17 (holding that the district court did not err by refusing to issue a jury instruction that was not supported by the evidence); *see also State v. Hayes*, 77 N.M. 225, 226, 421 P.2d 439, 439 (1966) (reversing an involuntary manslaughter conviction because evidence did not show requisite state of mind, defined by the court as "heedlessness or reckless disregard of the right of others").

III. CONCLUSION

{28} The evidence presented at trial did not support issuing Defendant's proposed involuntary manslaughter jury instruction. The Court of Appeals Memorandum Opinion is reversed and Defendant's conviction is reinstated.

{29} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2010-NMSC-050

Filing Date: October 18, 2010

Docket No. 32,220

PROGRESSIVE NORTHWESTERN INSURANCE COMPANY,

Plaintiff-Appellee,

v.

WEED WARRIOR SERVICES and BRENDA ETCHEVERRY,

Defendants-Appellants.

Certification from the United States Court of Appeals for the Tenth Circuit Robert H. Henry, Deanell Reece Tacha, and Harris Hartz, Circuit Judges

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OPINION

SERNA, Justice.

{1} In this case we consider the duty imposed on insurers to offer uninsured/underinsured motorist (UM/UIM) coverage under NMSA 1978, Section 66-5-301 (1983). We answer in the affirmative the question, certified to us by the United States Court of Appeals for the Tenth Circuit, of whether the election by an insured to purchase UM/UIM coverage in an amount less than the policy liability limits constitutes a rejection of the maximum amount of UM/UIM coverage permitted under Section 66-5-301. This Opinion responds to the certified question only; application is discussed in the consolidated cases of *Jordan v. Allstate Insurance Co.,* No. 32,063, *Romero v. Progressive Northwestern Insurance Co.*, No. 32,065, and *Lucero v. Trujillo*, No. 32,203, filed this same day. *See Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, 149 N.M. 162, 245 P.3d 1214 (No. 32,063, Oct. 18, 2010).

FACTUAL AND PROCEDURAL BACKGROUND

{2} Brenda Etcheverry was injured in a car accident and settled her claim against the tortfeasor for his policy limits of $100,000. *Progressive Nw. Ins. Co. v. Weed Warrior Servs.*, 588 F. Supp. 2d 1281, 1282 (D.N.M. 2008). Mrs. Etcheverry filed a claim with Progressive Northwestern Insurance Company (Progressive), with whom her husband's company, Weed Warrior Services, insured their vehicles. *Id.* The Progressive policy included liability limits of $1,000,000 and UM/UIM coverage of $100,000 for each accident. *Id.* The United States District Court for the District of New Mexico entered a declaratory judgment in favor of Progressive, because the amount of UM/UIM coverage available under the Progressive policy was offset by the settlement with the tortfeasor. *Id.* Mrs. Etcheverry was permitted to amend her complaint and argued that the

Progressive policy should be reformed to provide UM/UIM coverage equal to the liability limits of $1,000,000, rather than $100,000, because the purchase of UM/UIM coverage at an amount lower than the liability limits was not evidenced with a written rejection. *Id.* at 1282, 1284.

{3} The district court predicted that this Court would interpret New Mexico law to provide that "the affirmative selection of a level of UM/UIM coverage in an amount less than full liability coverage [does not] constitute[] a 'rejection' of coverage such that an insurer must obtain a written waiver of coverage and include it in the policy." *Id.* at 1288. Mrs. Etcheverry and Weed Warrior Services appealed the district court's ruling to the Tenth Circuit Court of Appeals, which certified the following question pursuant to Rule 12-607 NMRA and NMSA 1978, Section 39-7-4 (1997):

> Does the election to take UM/UIM coverage for less than the general policy liability limits constitute a rejection under the New Mexico uninsured motorist statute, [Section] 66-5-301[]?

{4} Although an issue of first impression for this Court, it is not the first time the question has arisen in the federal or state courts of New Mexico. Our Court of Appeals considered the offer and rejection requirements of UM/UIM coverage in *Romero v. Progressive Northwestern Insurance Co.*, 2010-NMCA-024, 148 N.M. 97, 230 P.3d 844, *cert. denied*, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055, *and reh'g granted*, 2010-NMCERT-003, 148 N.M. 560, 240 P.3d 15 (No. 32,065, Mar. 1, 2010). *See also Farmers Ins. Co. of Ariz. v. Chen*, 2010-NMCA-031, 148 N.M. 151, 231 P.3d 607, *cert. granted*, 2010-NMCERT-004, 148 N.M. 573, 240 P.3d 660 (No. 32,243, Apr. 1, 2010)[1]; *Lucero v. Trujillo*, No. 29,859, slip op. (N.M. Ct. App. Jan. 7, 2010), *cert. granted*, 2010-NMCERT-003, 148 N.M. 560, 240 P.3d 15 (No. 32,203, Mar. 1, 2010); *Jordan v. Allstate Ins. Co.*, No. 28,638, slip op. (N.M. Ct. App. Oct. 29, 2009), *cert. denied*, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055, *and reh'g granted*, 2010-NMCERT-003, 148 N.M. 560, 240 P.3d 15 (No. 32,063, Mar. 1, 2010). The question also was addressed by a federal district court in *Farm Bureau Mutual Insurance Co. v. Jameson*, 472 F. Supp. 2d 1272 (D.N.M. 2006). With the exception of the district court in Mrs. Etcheverry's case, the courts determined that the purchase of UM/UIM coverage in an amount less than the policy's liability limits constitutes a rejection of the maximum amount of UM/UIM coverage statutorily available. *Farm Bureau Mut.*, 472 F. Supp. 2d at 1280-81; *Romero*, 2010-NMCA-024, ¶ 24. We agree with that conclusion.

ANALYSIS

{5} Section 66-5-301 of the New Mexico statutes governs uninsured and underinsured motorist coverage. The UM/UIM statute is "intended to expand insurance coverage and 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). Subsection A of Section 66-5-301 mandates uninsured motorist coverage:

> 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 and for injury to or destruction of property of others . . . shall be delivered or issued for delivery in New Mexico . . . *unless coverage is provided therein or supplemental thereto in minimum limits for bodily injury or death and for injury to or destruction of property . . . 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, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. . . .

[1] *Chen* was held in abeyance pending the outcome of this case and *Jordan*, 2010-NMSC-051.

(Emphasis added.) The minimum limits are defined in the Mandatory Financial Responsibility Act as $25,000 per person, $50,000 per accident, and $10,000 for property damage. NMSA 1978, § 66-5-215(A)(2)-(3) (1983). Underinsured motorist coverage is addressed in Subsection B of Section 66-5-301:

> The uninsured motorist coverage described in Subsection A . . . shall include underinsured motorist coverage for persons protected by an insured's policy. . . . "[U]nderinsured motorist" means an operator of a motor vehicle . . . which the sum of the limits of liability under all bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured's uninsured motorist coverage.

The ability of the insured to reject UM/UIM coverage is set forth in Subsection C: "The named insured shall have the right to reject uninsured motorist coverage as described in Subsections A and B. . . ."

{6} Our analysis of whether the election to purchase UM/UIM coverage in an amount less than the policy liability limits is a rejection under our insurance laws requires us to construe our UM/UIM statute, a task we undertake de novo. *See Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 13, 147 N.M. 678, 228 P.3d 462.

> When deciding a statute's meaning, our goal is to determine and give effect to legislative intent. We do not depart from the plain language of a statute unless we must resolve an ambiguity, correct a mistake or absurdity, or deal with a conflict between different statutory provisions. . . . [I]n light of the purpose of New Mexico's UM/UIM statute to expand coverage to protect members of the public against uninsured motorists, the statute is interpreted liberally to implement that remedial purpose, and any exception will be strictly construed.

Id. ¶ 14 (internal quotation marks, citations, brackets and ellipsis omitted).

{7} This Court in *Marckstadt* interpreted Section 66-5-301 to determine how a valid rejection of UM/UIM coverage is made. We stated that "the insurer may not exclude UM/UIM coverage from an automobile liability policy unless it has offered it to the insured and the insured has exercised the right to reject the coverage through some positive act." *Marckstadt*, 2010-NMSC-001, ¶ 15 (internal citation omitted). We discussed the importance of offering UM/UIM coverage to the realization of the statute's purpose: "[I]n order for the offer and rejection requirements of Section 66-5-301 to effectuate the policy of expanding UM/UIM coverage, the insurer is required to *meaningfully offer* such coverage and the insured must *knowingly and intelligently act* to reject it before it can be excluded from a policy." *Id.* ¶ 16.

{8} Our task is to determine whether the statute imposes the offer and rejection requirements on all levels of UM/UIM coverage: Must insurers "meaningfully offer" the maximum amount of UM/UIM coverage permitted by the statute, e.g., the liability limits of the policy, or does our statute merely require insurers to offer the minimum amount, e.g., $25,000 per person per accident? The only New Mexico case to affirmatively define Section 66-5-301 in terms of its offer requirements is *Pielhau v. RLI Insurance Co.*, 2008-NMCA-099, 144 N.M. 554, 189 P.3d 687. In *Pielhau*, the Court of Appeals construed the UM/UIM statute in the process of holding that an insurer had no duty to offer UM/UIM coverage as part of an umbrella policy. *Id.* ¶ 19. *Pielhau* stated that New Mexico's UM/UIM statute is a "minimum liability" statute because "[UM/UIM] coverage is statutorily required only to the minimum amounts set by the legislature. Accordingly, the policy purpose of the statute is met when the insured's underlying automobile coverage provides minimum UM/UIM coverage." *Id.* ¶ 12 (internal quotation marks and citation omitted).

{9} In reaching this conclusion, *Pielhau* relied on *Archunde v. International Surplus Lines Insurance Co.*, 120 N.M. 724, 905 P.2d 1128 (Ct. App. 1995). In *Archunde*, the Court of Appeals held

that Section 66-5-301(A) applied only to automobile insurance policies, and "in an excess policy, there is no statutory requirement mandating the inclusion of such coverage." *Id.* at 726, 905 P.2d at 1130. *Pielhau*'s conclusion, that an umbrella policy need not include UM/UIM coverage, was supported by *Archunde*, and we do not disturb that holding today. Pursuant to the discussion that follows, however, to the extent that *Pielhau* may be read as holding that our UM/UIM statute directs insurers to offer only the minimum amount of UM/UIM coverage, it is overruled.

{10} The requirement that insurers offer UM/UIM coverage in an amount greater than the minimum is apparent from the language of Section 66-5-301. In the Mandatory Financial Responsibility Act, the Legislature determined that $25,000 insurance coverage for injury or death per accident is an adequate amount of coverage. *See* § 66-5-215(A)(1). Section 66-5-301(A) requires that same amount of coverage for UM coverage. Read together, an uninsured motorist is one who does not carry the statutory minimum for liability coverage, or $25,000, and injury caused by such a driver would be covered by the injured individual's UM coverage. Section 66-5-301(B) defines UIM coverage as part of UM coverage. If the tortfeasor carried the statutory minimum of liability insurance and the injured driver carried the statutory minimum of UM/UIM coverage, the injured driver would have no recourse for injuries suffered over the minimum amount of $25,000. The injured driver, though in theory having purchased UIM coverage, would in fact have purchased only UM coverage—rendering the inclusion of "UIM" in the statute superfluous. *See State ex rel. ENMU Regents v. Baca*, 2008-NMSC-047, ¶ 10, 144 N.M. 530, 189 P.3d 663 (per curiam) ("[W]e refrain from reading statutes in a way that renders provisions superfluous."). An insured carries UIM coverage only if the UM/UIM limits on her or his policy are greater than the statutory minimum of $25,000.

{11} In interpreting statutes, we presume that the Legislature intends the application of the words it uses. *See State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. With Section 66-5-301, the Legislature intended to expand UM/UIM coverage, a goal accomplished through the meaningful offer of UM/UIM coverage to insureds. *Marckstadt*, 2010-NMSC-001, ¶ 16. As in our example above, the inclusion of UIM coverage in Section 66-5-301 would be meaningless if insurers were not required to offer UM/UIM coverage in an amount more than the statutory minimum, which presumes a certain amount of coverage by the tortfeasor. Subsection C explicitly permits the rejection of UIM coverage; this cannot be done if only the minimum limits of UM coverage are offered by the insurer.

{12} The policy behind our UM/UIM statute is consistent with the requirement that the insurer offer the maximum amount of UM/UIM coverage to the insured. The requirement that UM/UIM coverage be offered by insurers is "to encourage insureds to purchase such coverage." *Montano v. Allstate Indem. Co.*, 2004-NMSC-020, ¶ 16, 135 N.M. 681, 92 P.3d 1255. In *Montano* we discussed the importance of insureds being able to choose the amount of stacking to carry in their auto insurance policies; we stated that mandatory stacking, and thus increased premiums, "could result in some lower-income insureds who own multiple vehicles being effectively 'priced out' of UM[/UIM] coverage." *Id.* "The legislature intended that an injured person be compensated to the extent of liability coverage purchased for his or her benefit." *Found. Reserve Ins. Co. v. Marin*, 109 N.M. 533, 535, 787 P.2d 452, 454 (1990). From these cases we draw the conclusion that the Legislature intended for drivers to have the option of carrying UM/UIM coverage equal to their policy limits, but that lower levels of UM/UIM coverage are preferred to none at all for those who affirmatively choose not to carry equal levels of coverage.

{13} We reject outright any suggestion that Section 66-5-301 places a burden on the insured to request UM/UIM coverage. *See Montano*, 2004-NMSC-020, ¶ 16 (stating that 66-5-301 "requir[es] insurers to offer UM[/UIM] coverage"). The "right to reject" UM/UIM coverage in amounts equal to liability limits, *Marckstadt*, 2010-NMSC-001, ¶ 15, cannot be meaningfully

exercised without an offer of those amounts. The courts of New Mexico assume the average purchaser of automobile insurance "will have limited knowledge of insurance law," and we will not impose on the consumer an expectation that she or he will be able to make an informed decision as to the amount of UM/UIM coverage desired or required without first receiving information from the insurance company. *Computer Corner, Inc. v. Fireman's Fund Ins. Co.*, 2002-NMCA-054, ¶ 7, 132 N.M. 264, 46 P.3d 1264.

{14} Recalling that Section 66-5-301 is a remedial statute that must be construed liberally, we hold that the offer of UM/UIM coverage must include the maximum amount statutorily available in order to effectuate the policy of the Legislature. As Section 66-5-301 requires insurers to offer UM/UIM coverage up to the liability limits of the policy, it follows that the choice by the insured to purchase any lower amount is a rejection. Adding to what we stated in *Marckstadt*, we hold that the insurer may not exclude the maximum possible level of UM/UIM coverage in an auto liability policy "unless it has offered it to the insured and the insured has exercised the right to reject the coverage through some positive act." 2010-NMSC-001, ¶ 15 (internal citation omitted).

CONCLUSION

{15} We conclude that Section 66-5-301 requires an insurer to offer UM/UIM coverage in an amount equal to the liability limits of the policy and that the choice of the insured to purchase any lower amount functions as a rejection of that maximum amount of coverage statutorily possible. Accordingly, we answer the certified question from the Tenth Circuit Court of Appeals in the affirmative.

{16} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMSC-009

Filing Date: February 17, 2011

Docket No. 32,067

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

RAUL LEYVA,

Defendant-Appellant.

Certification from The New Mexico Court of Appeals
Stephen Bridgforth, District Judge

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Santa Fe, NM

for Appellant.

Gary K. King, Attorney General
Anita Carlson, Assistant Attorney General
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for Appellee.

OPINION

SERNA, Justice.

{1} The right of the people to be free from unreasonable searches and seizures is protected by both the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution. While the protections of the Fourth Amendment have been incorporated against the states, under New Mexico's interstitial approach to state constitutional interpretation, the rights provided under the two constitutions are not necessarily coextensive. In order to receive greater protections that may be conferred by the state constitution, however, a criminal defendant must properly preserve his or her state constitutional argument.

{2} Defendant Raul Leyva asserts that his rights under both the United States and New Mexico Constitutions were violated when he was stopped for a traffic law infraction and the questions of the investigating officer were not justified by the initial reason for the stop, and that the district court erred in denying his motion to suppress evidence gathered as a result of the questioning. In *State v. Duran*, we employed a two-part test under the Fourth Amendment for questioning during traffic stops, using the analysis set forth in *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968), requiring all questions to be reasonably related to the initial reason for the stop or supported by independent and articulable reasonable suspicion. 2005-NMSC-034, ¶¶ 23, 35, 138 N.M. 414, 120 P.3d 836. This rule is in conflict, however, with three more recent cases from the United States Supreme Court, *Illinois v. Caballes*, 543 U.S. 405 (2005), *Muehler v. Mena*, 544 U.S. 93 (2005), and *Arizona v. Johnson*, ___ U.S. ___, 129 S.Ct. 781 (2009), which together created a temporal bright-line rule under the Fourth Amendment for questioning during traffic stops.

{3} We accepted this case on certification from the Court of Appeals to address the continued vitality of the rule we set forth in *Duran* and exercise jurisdiction under NMSA 1978, Section 34-5-14(C)(1) (1972). We hold that, in light of recent United States Supreme Court Fourth Amendment cases, *Duran*'s Fourth Amendment analysis is no longer valid. Analyzing the seizure under the Fourth Amendment, we conclude that Leyva's rights under the Fourth Amendment were not violated. We then review our preservation requirements for rights asserted under the New Mexico Constitution, and find that Leyva preserved his argument under Article

II, Section 10. Because Article II, Section 10 provides greater protections against unreasonable searches and seizures than does the Fourth Amendment, we maintain the *Duran* standard for reviewing searches and seizures under the New Mexico Constitution. After considering Leyva's rights under Article II, Section 10, we affirm the Third Judicial District Court's denial of Leyva's motion to suppress.

I. BACKGROUND

{4} On January 21, 2007, Officer Jeremy Hash of the Mesilla Marshals Department clocked Leyva traveling at a speed in excess of the posted speed limit. Officer Hash activated his emergency lights and Leyva stopped a short way down the road, a distance Officer Hash described as normal due to the road's narrow width at the point where he initiated the stop. Before Leyva stopped, Officer Hash observed Leyva remove one hand from the steering wheel and lean to the right for about ten seconds, with the appearance of "stuffing something under the [passenger] seat," an action the officer found consistent with concealing a weapon or contraband and raising safety concerns. Officer Hash asked for and received Leyva's license, which was reported to be suspended. Following department policy, Officer Hash informed Leyva he could telephone someone to retrieve the car within ten minutes or the car would be impounded. Leyva arranged for someone to pick up the car. Officer Hash did not observe any suspicious activity during the stop, other than Leyva's movement before he pulled over.

{5} Officer Hash completed his traffic investigation and issued three citations within approximately ten minutes after the stop was initiated. He then asked Leyva, "Before I turn this vehicle over to anyone else is there anything in it that I need to know about? . . . [Are there] any knives, needles, guns, or drugs[?]" Leyva responded that there was marijuana in the car, and, when asked, consented to a search of the car. Beginning by searching in the area where he had observed Leyva's movement prior to stopping, Officer Hash discovered a tin containing what he suspected to be marijuana underneath the passenger seat; Leyva confirmed that it was marijuana. Continuing to search the passenger compartment of the car, Officer Hash found what he suspected to be, and what later tested positive as, methamphetamine. Leyva was arrested and transported to the police station. He was charged with possession of marijuana, methamphetamine, and drug paraphernalia.

{6} Leyva filed a motion to suppress the evidence discovered as a result of Officer Hash's questioning after the traffic citations had been issued. Leyva argued that the initial stop had been completed when Officer Hash initiated further questioning without justification, constituting an unreasonable seizure under the Fourth Amendment and Article II, Section 10. At the hearing on the motion to suppress, Officer Hash was the only witness. In addition to testifying to the facts set forth above, he testified that in his experience of eight years as an officer, individuals who appeared to be hiding something when a stop was initiated often were discovered to be in possession of contraband. The district court denied the motion to suppress, making the following findings:

1. Deputy Officer Hash was reasonable in his belief that he observed the Defendant hiding something under the front passenger seat after the deputy activated his emergency equipment.
2. This action by the Defendant provided sufficient reasonable suspicion of hiding contraband to warrant Deputy Officer Hash to ask if there was anything in the car that he should know about such as contraband.
3. Deputy Officer Hash only inquired about possible contraband after he had completed the citations and returned all of the Defendant's documents.
4. The Defendant was not under arrest, and was not going to be arrested, so Miranda does not apply.
5. The Defendant voluntarily told the Deputy that he had marijuana in his vehicle and allowed the Deputy to search the vehicle.

6. There was no coercion in the form of the Deputy's question or his conduct.

Leyva subsequently pled guilty to possession of a controlled substance, drug paraphernalia, and marijuana, conditioned upon the right to appeal the denial of his motion to suppress. He appealed to the Court of Appeals, and we accepted certification from that Court.

II. ANALYSIS

A. The Fourth Amendment

{7} "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV.

1. The effect of recent United States Supreme Court opinions on our Fourth Amendment analysis developed in *Duran.*

{8} The Fourth Amendment guarantees the right of the people to be free from unreasonable searches and seizures. *See United States v. Sharpe*, 470 U.S. 675, 682 (1985). In this section we review our most recent pronouncement on the limitations of police questioning during a traffic stop, subsequent cases from the United States Supreme Court, and the effect of those cases on the Fourth Amendment analysis to be employed by the courts of New Mexico.

{9} The Fourth Amendment, incorporated against state actors via the Fourteenth Amendment, *see Wolf v. Colorado*, 338 U.S. 25, 28 (1949), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643, 653 (1961), requires that all searches and seizures be reasonable in their execution, *see Terry*, 392 U.S. at 9. The test for whether a search or seizure was reasonable is objective. *See Whren v. United States*, 517 U.S. 806, 814 (1996). "Reasonableness, of course, depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (per curiam) (internal quotation marks omitted).

{10} A law enforcement officer who stops a vehicle to investigate a traffic violation seizes the occupants. *See State v. Funderburg*, 2008-NMSC-026, ¶ 13, 144 N.M. 37, 183 P.3d 922. Although traffic stops often are made when the officer has probable cause to believe that a law has been violated, *see United States v. Shabazz*, 993 F.2d 431, 434-35 (5th Cir. 1993), courts generally analyze traffic stops under *Terry*, because they "resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*," *Johnson*, ___ U.S. at ___, 129 S.Ct. at 786 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 n.29 (1984)); *see also Duran*, 2005-NMSC-034, ¶ 23 (stating that New Mexico courts apply the *Terry* analysis to traffic stops). The two-part *Terry* analysis looks at "'[1] whether the officer's action was justified at its inception, and [2] whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Duran*, 2005-NMSC-034, ¶ 23 (quoting *Terry*, 392 U.S. at 20). The scope of the investigation may be expanded "'where the officer has reasonable and articulable suspicion that other criminal activity has been or may be afoot.'" *Id.* (quoting *State v. Taylor*, 1999-NMCA-022, ¶ 20, 126 N.M. 569, 973 P.2d 246). Unrelated questions may also be posed where the stop has ended and a consensual encounter has developed. *See*, *e.g.*, *United States v. Chavira*, 467 F.3d 1286, 1290-91 (10th Cir. 2006) (stating that a traffic stop may become a consensual encounter after the officer has returned the driver's documents and the driver reasonably understands that the stop is over). Where evidence has been obtained as a result of questions not justified under the Fourth Amendment, suppression of that evidence is the proper remedy. *See State v. Rivera*, 2010-NMSC-046, ¶ 28, 148 N.M. 659, 241 P.3d 1099.

a. *State v. Duran*

{11} In *Duran*, we applied the *Terry* analysis to determine when questions posed about travel plans during traffic stops are reasonable under the Fourth Amendment. The defendant was stopped for failure to display a license plate. 2005-NMSC-034, ¶ 3. During the stop,

the police officer questioned the defendant and her passenger about their travel plans and made observations leading him to believe drugs were concealed in the car. *Id.* ¶¶ 4-14. After completing the traffic citations, the officer continued to question the defendant and requested consent to search her vehicle, which was granted. *Id.* ¶¶ 14-16. Marijuana was discovered in the gas tank, and the defendant was arrested. *Id.* ¶ 16.

{12} Employing the two-part *Terry* analysis, we framed the question on appeal in *Duran* as whether "a police officer impermissibly expands the scope of the search or seizure beyond the justification for the initial stop by inquiring into a motorist's travel plans or whether such questions are reasonably related to the initial justification for a traffic stop." *Id.* ¶ 26. Reviewing cases from the federal courts of appeal, we noted a split of authority in the reasoning but a "definite consensus that inquiries into a motorist's travel plans are permissible. . . ." *Id.* The Eighth, Ninth, and Tenth Circuits conducted a case-by-case analysis, concluding that questions about travel plans generally were permissible because they are "usually related to the purpose of the stop and further valid governmental law enforcement interests" and because "the intrusion to the public is normally minimal." *Id.* ¶¶ 28-29. In contrast, the Fifth and Seventh Circuits applied a bright-line test, under which, "if the questions asked do not lengthen the stop, the questions are valid." *Id.* ¶ 31.

{13} We adopted the former analysis, relying specifically on *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001), and *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001), because "[o]ur case law has consistently disfavored a bight-line test in analyzing Fourth Amendment questions." *Duran*, 2005-NMSC-034, ¶ 34. We rejected the latter approach "because it ignores the scope requirement of the second[] prong of the *Terry* test, which our case law has consistently recognized as appropriate to analyze traffic stops." *Id.* ¶ 33. *Duran* articulated the Fourth Amendment analysis to be applied in our courts:

> [A]ll questions asked by police officers during a traffic stop must be analyzed to ensure they are reasonably related to the initial justification for the stop or are supported by reasonable suspicion. . . . [T]his determination must also include an examination of both the length of the detention and the manner in which it is carried out. The length of the detention should be reasonably limited to the time it takes to complete the underlying justification for the stop. Further, the scope of the questioning should be limited, as well.

Id. ¶ 35 (internal quotation marks and citation omitted).

{14} Although *Duran* concluded that the Fourth Amendment contained a subject-matter scope limitation, that analysis was not determinative to the Court's holding. *Duran* determined that the questions asked of the defendant and her passenger while the officer was completing the tasks necessary to issue the citations "resulted in no additional delay." *Id.* ¶ 37. The responses to the officer's questions, as well as the officer's observations during the stop, then gave the officer "reasonable suspicion that criminal activity may have been afoot. Thus, [the officer] permissibly expanded the scope of the stop by asking about drugs or large amounts of currency, and then requesting consent to search the vehicle." *Id.* ¶ 38. *Duran* concluded that the district court did not err by denying the suppression motion. *Id.* ¶ 42.

b. *Caballes*, *Muehler*, and *Johnson* overrule *Duran*'s subject-matter limitation on questions during traffic stops.

{15} Subsequent to *Duran*, the United States Supreme Court issued three opinions that together adopted the approach to questioning during traffic stops that *Duran* rejected. In 2005, *Caballes* held that a dog sniff, conducted during the time necessary to complete an otherwise lawful stop, revealing no information other than the presence of contraband, did not violate the defendant's Fourth Amendment rights. 543 U.S. at 409. The same term, the Court held in *Muehler* that Fourth Amendment rights are not violated

by investigative questioning unrelated to the reason for the initial seizure so long as the questioning does not prolong the length of the detention, as "mere police questioning does not constitute a seizure." 544 U.S. at 100-01 (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). Neither case cited to *Terry*. More recently, in *Johnson* the Court applied *Terry* and *Muehler* to a traffic stop, during which a passenger was frisked, and held that when the initial stop is lawful and the passenger is not free to leave during the duration of the stop, unrelated questions are permitted so long as they "do not measurably extend" the length of the stop. *Johnson*, ___ U.S. at ___, 129 S.Ct. at 788 (citing *Muehler*, 544 U.S. at 100-01).

{16} The cases *Duran* relied upon in rejecting a bright-line approach to police questioning are no longer valid in light of *Caballes*, *Muehler*, and *Johnson*. The Ninth and Tenth Circuits have concluded that *Murillo* and *Holt*, respectively, were overruled by the United States Supreme Court's explicit adoption in *Muehler* of a bright-line analysis in determining limits on the scope of police questioning during a lawful stop. In *United States v. Mendez*, the Ninth Circuit held that the defendant's Fourth Amendment rights were not violated by police questioning that, though unrelated to the initial justification of the stop, did not unnecessarily prolong the length of the stop. 476 F.3d 1077, 1080-81 (9th Cir. 2007). Likewise, in *United States v. Stewart*, the Tenth Circuit concluded that, after *Muehler*, "[t]he correct Fourth Amendment inquiry (assuming the detention is legitimate) is whether an officer's traffic stop questions extended the time that a driver was detained, regardless of the questions' content." 473 F.3d 1265, 1269 (10th Cir. 2007) (internal quotation marks and citations omitted). In *Stewart*, the Tenth Circuit held that a question about weapons in the car was permissible because the question "did not extend the length of the detention." *Id*.

{17} The creation by the United States Supreme Court of a bright-line rule for permissible questioning during traffic stops under the Fourth Amendment is incompatible with the approach we adopted in *Duran*. To the extent that *Duran* rejected the bright-line approach and adopted a case-by-case approach to determine whether police questioning during an otherwise legal traffic stop violates the Fourth Amendment, it is overruled.[1] The proper Fourth Amendment inquiry, as stated by the Tenth Circuit, "'is whether an officer's traffic stop questions extended the time that a driver was detained, regardless of the questions' content.'" *Stewart*, 473 F.3d at 1269 (quoting *Muehler*, 544 U.S. at 101).

c. The *Terry* scope analysis considers the reasonableness of the length of the detention during a traffic stop.

{18} The *Terry* analysis remains applicable to traffic stops. While even members of the United States Supreme Court initially viewed the bright-line rule as effectively discarding the scope requirement of a *Terry* stop, *see Caballes*, 543 U.S. at 421 (Ginsburg, J., dissenting) ("In my view, the Court diminishes the Fourth Amendment's force by abandoning the second *Terry* inquiry (was the police action reasonably related in scope to the circumstances justifying the initial interference)." (internal quotation marks, citation, and brackets omitted)), application of *Caballes*, *Muehler*, and *Johnson* by lower courts underscores that those cases modified, rather than abandoned, the second prong of the *Terry* test. The temporal limitations on *Terry* stops continue to define the limits of the reasonableness of the scope of the investigation. *See United States v. Everett*, 601 F.3d 484, 488 (6th Cir. 2010) ("Under *Terry*'s duration prong, a stop must last no longer than is necessary to effectuate the purpose of the stop." (internal quotation marks, citation, and ellipses omitted)). The questions posed during a traffic stop no longer need to be reasonably related to the initial justification of the stop in order to be permissible under the Fourth Amendment; the length of the stop, however, is limited by the time required to conduct

[1] The New Mexico Court of Appeals cases *Duran* explicitly characterized as "continu[ing] to be good law[,]" 2005-NMSC-034, ¶ 41, *Taylor*, 1999-NMCA-022, and *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, also are overruled to the extent they are inconsistent with this Opinion.

a reasonable investigation into the initial justification for the stop. *See id.* at 488-89; *Shabazz*, 993 F.2d at 438; *State v. Jenkins*, 3 A.3d 806, 828-29 (Conn. 2010).

{19} In sum, after an officer has made a stop based on at least reasonable suspicion of criminal activity, "[a]n officer's subsequent actions are not reasonably related in scope to the circumstances that caused him to stop the vehicle if he detains its occupants beyond the time needed to investigate the circumstances that caused the stop, unless he develops reasonable suspicion of additional criminal activity in the meantime." *United States v. Pack*, 612 F.3d 341, 350 (5th Cir. 2010). Whether a detention becomes unreasonably prolonged depends on "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Sharpe*, 470 U.S. at 686. "The length of the detention should be reasonably limited to the time it takes to complete the underlying justification for the stop." *Duran*, 2005-NMSC-034, ¶ 35.

{20} While the temporal limitations of a *Terry* stop generally require an investigating officer return a driver's documents and permit the driver to depart as soon as the reason for the traffic stop has been completed (unless, of course, the officer has developed reasonable suspicion to conduct an investigation into other criminal activity), most courts have found that a de minimis detention caused by questioning after the completion of the traffic stop is not unreasonable under the Fourth Amendment. This is because reasonableness is the touchstone of any Fourth Amendment analysis. *See Everett*, 601 F.3d at 492; *see also United States v. Olivera-Mendez*, 484 F.3d 505, 510 (8th Cir. 2007) ("Whether a particular detention is reasonable in length is a fact-intensive question, and there is no *per se* time limit on all traffic stops."). *But see United States v. Pruitt*, 174 F.3d 1215, 1220-21 (11th Cir. 1999) (finding that the traffic stop should have been completed as soon as the questions related to the initial investigation were completed); 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.3 (4th ed. 2004 & Supp. 2010-11) (noting that because the United States Supreme Court essentially removed the subject matter scope limitation of *Terry* questioning, "that is all the more reason for holding firm on the matter of temporal limits"). The rationale for permitting de minimis extensions of time also is based in *Johnson*'s modification of the *Muehler* Court's "*no* extension" standard to permitting question so long as there is "*no measurable* extension" of the detention. *Accord State v. Morlock*, 218 P.3d 801, 807-08 (Kan. 2009).

{21} This Court also has "refuse[d] to draw a bright-line, temporal cut-off point" for an officer's actions during a traffic stop under the Fourth Amendment. *State v. Vandenberg*, 2003-NMSC-030, ¶ 36, 134 N.M. 566, 81 P.3d 19; *see also State v. Neal*, 2007-NMSC-043, ¶ 39, 142 N.M. 176, 164 P.3d 57 (Bosson, J., dissenting) (stating that a de minimis detention to conduct an investigation for reasons unrelated to the initial stop does not violate the Fourth Amendment). Whether an officer's questioning measurably extends the length of a traffic stop remains the proper analysis under the Fourth Amendment. We agree with the Sixth Circuit that a categorical ban on questions that extend the time of a stop is unwarranted because "a police officer intent on asking extraneous questions could easily evade [a bright- line rule] by delegating the standard traffic-stop routine to a backup officer, leaving himself free to conduct unrelated questioning all the while, or simply by learning to write and ask questions at the same time." *Everett*, 601 F.3d at 492.[2]

{22} Extended detentions caused by questioning unrelated to the initial purpose of the stop

[2] *Everett* distinguished a prior Sixth Circuit case, *United States v. Urrieta*, 520 F.3d 569 (6th Cir. 2008), which held that questions asked in the twelve minutes the defendant was detained after the traffic investigation was a complete violation of the Fourth Amendment as they were not supported by reasonable suspicion, by stating that the questioning in *Everett* occurred before the stop was completed. 601 F.3d at 492 n.2. We do not find this distinction bars our reliance on *Everett* due to its focus on the fallacies of a non-prolongation rule, and do not find *Urrieta*, which addressed the prolongation of the stop only briefly, to be a more persuasive authority than *Everett* or the other authorities discussed above.

continue to violate the Fourth Amendment. *See United States v. Peralez*, 526 F.3d 1115, 1121 (8th Cir. 2008). To determine whether questioning creates an unreasonable detention, the pertinent inquiry is whether the officer conducted the investigation *diligently*. *See Everett*, 601 F.3d at 492 ("[W]e join our sister circuits in declining to construe *Muehler* and *Johnson* as imposing a categorical ban on suspicionless unrelated questioning that may minimally prolong a traffic stop."). We adopt the Sixth Circuit's articulation of the diligence analysis:

> [B]ecause the touchstone of any Fourth Amendment analysis is reasonableness, we must conduct a fact-bound, context-dependent inquiry in each case. Furthermore, we conclude that it would be inappropriate merely to evaluate the reasonableness of *the interval of prolongation* in isolation. Instead, the proper inquiry is whether the totality of the circumstances surrounding the stop indicates that the duration of *the stop as a whole*–including any prolongation due to suspicionless unrelated questioning–was reasonable.

Id. at 493-94 (internal quotation marks and citations omitted).

d. Unrelated questions permitted when supported by reasonable suspicion, including for police safety, or during consensual encounter.

{23} Even if a court determines that questioning unreasonably prolonged the length of the stop, the questioning still may be constitutionally permissible. "An officer may expand the scope of a traffic stop beyond the initial reason for the stop and prolong the detention if the driver's responses and the circumstances give rise to a reasonable suspicion that criminal activity unrelated to the stop is afoot." *United States v. Chavez Loya*, 528 F.3d 546, 553 (8th Cir. 2008). Reasonable suspicion must consist of more than an officer's hunch that something is amiss; it requires objectively reasonable indications of criminal activity. *See*, *e.g.*, *United States v. Washington*, 559 F.3d 573, 576-77 (D.C. Cir. 2009) (finding reasonable suspicion to conduct a protective frisk and car search existed based on the defendant's furtive movement under the car seat, unlikely explanation of the movement, and nervousness in a high crime area). Courts defer to "the training and experience of the officer" when determining whether "particularized and objective indicia of criminal activity" existed. *State v. Van Dang*, 2005-NMSC-033, ¶ 16, 138 N.M. 408, 120 P.3d 830. Suspicion of criminal activity need not necessarily be of a specific crime. *See Pack*, 612 F.3d at 355-56 (holding, and compiling cases in support of, the reasonable suspicion required to expand an investigation is that a criminal activity is afoot and that the suspicion need not be directed to a "specific crime requirement").

{24} Although the scope of a stop may be expanded without violating the Fourth Amendment when an officer has a reasonable suspicion that an individual is armed and dangerous or that other criminal activity is afoot, we underscore that the requirement of reasonable suspicion demands objective and articulable observations that indicate further police action is necessary. This does not mean that an officer must be certain that weapons are present, but rather that "a reasonable, well-trained officer would have made the [same] judgment. . . ." *Vandenberg*, 2003-NMSC-030, ¶ 23 (internal quotation marks and citations omitted). Courts must require articulable facts indicating reasonable suspicion. We find instructive the caution of Judge Richard Posner, describing the testimony of the arresting officer in a suppression hearing:

> Gilding the lily, the officer testified that he was additionally suspicious because when he drove by [the defendant] . . . he noticed that [the defendant] was "staring straight ahead." Had [the defendant] instead glanced around him, the officer would doubtless have testified that [the defendant] seemed nervous or, the preferred term because of its vagueness, "furtive." Whether you stand still or move, drive above, below, or at the speed limit, you

> will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited.

United States v. Broomfield, 417 F.3d 654, 655 (7th Cir. 2005) (original bracket omitted) (holding that reasonable suspicion to stop the defendant existed); *see also Neal*, 2007-NMSC-043, ¶ 31 (rejecting an argument that reasonable suspicion existed when the "circumstances smack more of the type of conjecture and hunch we have rejected in the past as insufficient to constitute reasonable suspicion").

{25} An officer may conduct a protective search of a stopped vehicle for reasons of officer safety during a traffic stop because "traffic stops are 'especially fraught with danger to police officers.'" *Johnson*, ___ U.S. at ___, 129 S.Ct. at 786 (quoting *Michigan v. Long*, 463 U.S. 1032, 1047 (1983)). A protective search is not a search for evidence. *See Vandenberg*, 2003-NMSC-030, ¶ 33. Such a search must be based upon the objectively reasonable belief that the individuals stopped pose a threat to officer safety, and the search must be limited to its purpose of protecting the officers, and the public, during the stop. *See id.* ¶ 22; *Holt*, 264 F.3d at 1225 ("We emphasize also that the balance does not depend on whether the officer subjectively fears the motorist. Subjective intentions rarely play a role in Fourth Amendment analysis." (footnote omitted)). During traffic stops, movements by the vehicle's occupants, consistent with hiding an object, generally give rise to reasonable safety concerns. *See*, *e.g.*, *United States v. Nash*, 876 F.2d 1359, 1361 (7th Cir. 1989) (finding that a limited search for weapons in the car was permitted because the officer could reasonably be concerned about his safety after noticing a "furtive gesture" by the defendant as the officer approached and the defendant had a jacket awkwardly arranged over his lap and the floor); *People v. Altman*, 938 P.2d 142, 146-47 (Colo. 1997) (en banc) (finding that the officers acted reasonably in searching the stopped vehicle for weapons after observing the defendant "bend over in his seat and make motions toward the bottom of his seat" and limiting the search to the area near the seat); *State v. Ashbrook*, 586 N.W.2d 503, 508-09 (S.D. 1998) (holding that a protective sweep for weapons of a car during a legitimate traffic stop was permitted when the officer observed the defendant make furtive movements during the time between the activation of the emergency lights and pulling over).[3]

{26} Questions asked for purposes of ensuring officer safety during a stop generally are proper because "[w]hen these measures are not too intrusive, the government's strong interest in officer safety outweighs the motorist's interests." *Holt*, 264 F.3d at 1221. "Questions directed toward officer safety, therefore, do not bespeak a lack of diligence." *Everett*, 601 F.3d at 495.

{27} A police officer may also pose questions after the time needed to reasonably conduct the investigation into the initial reason for the stop if the stop has ended and a consensual encounter developed. "A detention for a traffic citation can turn into a consensual encounter after the trooper has returned the driver his documentation so long as a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." *United States v. Guerrero-Espinoza*, 462 F.3d 1302, 1308 (10th Cir. 2006) (internal quotation marks and citation omitted). If the police officer has reasonably conveyed to the citizen that the stop has ended, any further questioning does not constitute a seizure under the Fourth Amendment. *Id.* (finding that questioning of a passenger who was unaware that the stop of the driver had been terminated was an unreasonable detention and the

[3] We note, without passing on its propriety, that the Tenth Circuit permits questions about the presence of weapons for reasons of officer safety. *See United States v. Valenzuela*, 494 F.3d 886, 890 (10th Cir. 2007); *Holt*, 264 F.3d at 1221-22. In *Valenzuela*, after finding the officer's question to the defendant about the presence of weapons in the vehicle "was permissible, if not adviseable[,]" the court held that asking about "other illegal items" likewise was permissible because the inclusion of a few extra words did not "appreciably prolong the length of the stop." 494 F.3d at 890. The *Valenzuela* court applied the same analysis to the request for consent to search, holding that the request for search likewise did not unreasonably delay the stop and thus did not violate the Fourth Amendment. *Id.* at 891, n2.

evidence discovered as a result of those questions must be suppressed).[4]

{28} Under these rationales, the holdings of cases we have decided under *Duran*, and *Duran* itself, remain valid. The questions posed by the officer in *Duran* either were asked during the time it took to reasonably complete the initial traffic investigation, were a de minimis extension thereof, or were supported by independent reasonable suspicion. 2005-NMSC-034, ¶¶ 37-38; *accord Morlock*, 218 P.3d at 807, 811 (finding questions asked constitutionally permissible because they either occurred during the legitimate stop or were supported by reasonable suspicion). In *Funderburg*, we held that the officer's "minimal detention" of the defendant "based on the presence of reasonable suspicion about the contents of the car, to ask a single question about other criminal activity in the car before asking for consent to search, was reasonable." 2008-NMSC-026, ¶ 33; *see also Van Dang*, 2005-NMSC-033, ¶ 16 ("Because the detention took no longer than necessary and because the officer's questions arose from a reasonable suspicion, we hold that both the duration and scope of the detention were reasonable under the circumstances.").

{29} Based on the preceding discussion, our Fourth Amendment analysis requires us to determine whether the contraband and consent questions were asked of Leyva during the time it took to complete the initial lawful investigation. If the questions measurably extended Leyva's detention, Officer Hash was required to have had reasonable suspicion of criminal activity or concern for police safety to support further questioning, or the interaction must have evolved into a consensual encounter.

2. Under the Fourth Amendment, the defendant's rights were not violated.

{30} We now review the district court's denial of Leyva's motion to suppress, a mixed question of fact and law. *Funderburg*, 2008-NMSC-026, ¶ 10. Typically, this review is a two-step process: we first look for substantial evidence to support the trial court's factual finding, with deference to the district court's review of the testimony and other evidence presented, and we then review de novo the trial court's application of law to the facts to determine whether the search or seizure were reasonable. *Neal*, 2007-NMSC-043, ¶ 15; *Vandenberg*, 2003-NMSC-030, ¶ 17. The burden to show reasonableness is on the State. *State v. Rowell*, 2008-NMSC-041, ¶ 10, 144 N.M. 371, 188 P.3d 95. Our review of a district court's determination of whether reasonable suspicion existed is de novo based on the totality of the circumstances. *Neal*, 2007-NMSC-043, ¶ 19.

{31} The first inquiry of the *Terry* analysis, whether the initial stop was lawful, is not at issue in this case, because Leyva does not contest the legality of the initial stop for speeding. Nor does Leyva contest that Officer Hash was authorized to request Leyva's license, registration, and proof of insurance, and have dispatch confirm all were valid. *See Duran*, 2005-NMSC-034, ¶ 24. The focus of our Fourth Amendment inquiry, limited to the second part of the *Terry* analysis, is whether Officer Hash's question about weapons or drugs did not measurably extend the length of the valid stop; that

[4] Leyva was not free to leave *in his car* because his license was suspended; he had to wait until another individual arrived to pick the car up. *See United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (setting forth what is commonly known as the "free to leave" test). The district court did not address, nor will we, whether this fact meant that Leyva was not free to leave *the scene*, meaning his lawful detention had not yet ended when Officer Hash inquired about weapons or drugs. *Compare Florida v. Bostick*, 501 U.S. 429, 436-37 (1991) (stating that an individual is not seized for Fourth Amendment purposes when police conduct plays no role in that individuals inability to leave the scene); *Chavira*, 467 F.3d at 1291 (holding that the defendant was free to leave, and thus his consent to search was not the product of an unlawful detention, when "path to his vehicle was unobstructed and the trooper was separated from him by the open patrol car door"); *and State v. Snell*, 99 P.3d 191, 195 (Mont. 2004) (applying the *Mendenhall* test under the state constitution to conclude that "a reasonable person would have felt free to leave [the] patrol car" after receiving a ticket and thus the officer's subsequent request for consent to search the car was valid); *with Meghoo v. Commonwealth*, 245 S.W.3d 752, 756 (Ky. 2008) (finding that the required detention of the defendant's truck pursuant to state law "mitigates any claim of unreasonableness as to the length of the detention, since this is not a case in which [the defendant] could have driven away but for the officers' actions").

is, whether the questioning exceeded the temporal limitations on the scope of the investigation.

{32} The district court found that Officer Hash had completed his investigation into the traffic violation and issued Leyva the citations before inquiring into the presence of contraband in the vehicle. In making this finding, the district court determined that the initial stop had come to an end. Because this is supported by both Officer Hash's testimony at the suppression hearing and the incident report, we defer to the district court's factual finding that the initial investigation was concluded when the officer asked Leyva about the presence of guns and drugs in the car.

{33} As discussed above, a de minimis extension of a stop, particularly to ask questions related to officer safety, is not unreasonable under the Fourth Amendment.[5] *See supra* ¶¶ 20-21. Approximately ten minutes passed between the time Leyva came to a stop and Officer Hash returned to Leyva his documents. Posing the subsequent question, "Before I turn this vehicle over to anyone else is there anything in it that I need to know about? . . . [Are there] any knives, needles, guns, or drugs[?]," could not have taken more than ten seconds. It would be nonsensical if we were to hold Officer Hash violated Leyva's Fourth Amendment rights by asking the question *immediately after* handing him the citation, when the questions undoubtedly would have been permitted if Officer Hash had asked while he was writing the citation or running the records check. *See Everett*, 601 F.3d at 492; *United States v. Canipe*, 569 F.3d 597, 602 (6th Cir. 2009); *Jenkins*, 3 A.3d at 831-32.

{34} Furthermore, officer safety concerns strongly support the reasonableness of Officer Hash's questions. Although Officer Hash had returned Leyva's information and handed him the citation, Officer Hash's "need to control the scene," *see Johnson*, ___ U.S. at ___, 129 S.Ct. at 788, had not yet come to an end—the deputy was waiting at the scene until a third party arrived to remove the car Leyva was not permitted to drive, *see Washington*, 559 F.3d at 577 ("[T]he police's concern for safety during a traffic stop ordinarily does not terminate until the officers allow the driver to depart."). Officer Hash reasonably would have been concerned about the possibility of the person retrieving the car accessing a hidden weapon, particularly when the officer was unaware of the identity of the person arriving to retrieve the car. *Cf. Vandenberg*, 2003-NMSC-030, ¶ 36 (finding that a frisk for officer safety conducted after tickets completed, though not yet handed to the defendant, was permissible because the officer had become nervous for his safety during the course of the investigation). The weighty concerns of officer safety that are present in a situation such as this outweigh the minimal intrusion to Leyva of having a single question, in which the word "drugs" was but a small part, asked of him as he awaited a ride.

{35} We hold that, under the Fourth Amendment, the question Officer Hash asked Leyva about the presence of weapons or drugs in the car was a permissible de minimis extension of a valid stop posed for reasons of officer safety. After receiving Leyva's answer that drugs were present in the car, Officer Hash had reasonable suspicion to believe contraband was in the car and thus expand his investigation as necessary. *Cf. Vandenberg*, 2003-NMSC-030, ¶¶ 66-67 (Minzner, J., dissenting) (stating that the preferable way for officers to investigate suspicions that arise during traffic stops is incrementally). Leyva's Fourth Amendment rights were not violated and the motion to suppress was properly denied under the Fourth Amendment.

B. Preservation Requirements of State Constitutional Argument and Interstitial Analysis.

{36} Having clarified our Fourth Amendment analysis and determined that the district court did not err in denying the suppression motion under

[5] Leyva argues that we should remand to the district court to consider whether the stop was extended, a point the State apparently did not argue below. This is unnecessary because we have access to the full record and we may uphold the district court if it is right for any reason. *See State v. Macias*, 2009-NMSC-028, ¶ 17, 146 N.M. 378, 210 P.3d 804.

the standards of the Fourth Amendment, we now consider *Duran*'s vitality under the New Mexico Constitution. In order for us to address Leyva's rights under the state constitution, however, he must have complied with the preservation requirements of Rule 12-216(A) NMRA. Rule 12-216(A) states: "To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required. . . ."

> 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.

State v. Gomez, 1997-NMSC-006, ¶ 29, 122 N.M. 777, 932 P.2d 1.

{37} In his motion to suppress, Leyva cited both the Fourth Amendment and Article II, Section 10, and stated that the New Mexico Constitution provides him with greater protections from unreasonable searches and seizures. Leyva's motion did not cite any cases discussing greater protections provided by Article II, Section 10, nor did he discuss any such cases during the suppression hearing. We now turn to the applicable law to determine whether Leyva preserved his Article II, Section 10 argument.

1. *State v. Gomez*' requirements for preserving arguments under the New Mexico Constitution.

{38} The preservation requirements effective when Leyva filed his appeal were set forth by this Court in *Gomez* over fourteen years ago. Since that time, *Gomez* often has been construed more strictly than intended. Although it has been suggested that the *Gomez* rule should be altered to encourage development of our state constitutional jurisprudence, *see State v. Garcia*, 2009-NMSC-046, ¶ 56, 147 N.M. 134, 217 P.3d 1032 (Bosson, J., specially concurring); J. Thomas Sullivan, *Developing a State Constitutional Strategy in New Mexico Criminal Prosecutions*, 39 N.M. L. Rev. 407, 420-22 (2009), we conclude that *Gomez*' rule is sound—but that some opinions have strayed by imposing a higher standard, unwarranted by Rule 12-216.

{39} The defendant in *Gomez* filed a motion to suppress evidence found during a car search conducted in the absence of a warrant or exigent circumstances, stating that the search violated his rights under the Fourth Amendment and Article II, Section 10; he cited cases interpreting Article II, Section 10 more expansively than the Fourth Amendment during argument on the motion. 1997-NMSC-006, ¶¶ 3, 10. The Court of Appeals found the defendant did not preserve his state constitutional argument because he "not only failed to articulate why the New Mexico Constitution affords greater protection under these circumstances, but failed to even mention the state constitution." *Id.* ¶ 12. On appeal the defendant argued that "the fundamental goals underlying Rule 12-216 were met because the facts needed for a ruling on the existence of exigent circumstances were developed adequately and the trial court ruled on that issue." *Id.* ¶ 13. The defendant characterized the Court of Appeals' preservation ruling as one that treated the New Mexico Constitution as the "poor cousin" of the federal constitution, and that the preservation requirements should be the same. *Id.*

{40} This Court agreed with the defendant and ruled that his state constitutional argument was preserved. *Id.* ¶ 31. After explicitly adopting the interstitial approach to state constitutional analysis, in which the appellate courts review reasons for departure from the federal standard, *id.* ¶ 20, we set forth the preservation requirements for assignments of error under the state constitution.

> When a litigant asserts protection under a New Mexico Constitutional provision that has a parallel or analogous provision in the United States Constitution, the requirements for preserving the claim for appellate review depend on current New

> Mexico precedent construing that state constitutional provision. If established precedent construes the provision to provide more protection than its federal counterpart, the claim may be preserved by (1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed for the trial court to rule on the issue. This is no more than is required of litigants asserting a right under the federal constitution, a federal statute, a state statute, or common law. That is, Rule 12-216 requires that litigants "fairly invoke" a ruling by the trial court in order to raise that question on appeal. Assertion of the legal principle and development of the facts are generally the only requirement to assert a claim on appeal.
>
> However, when a party asserts a state constitutional right that has *not* been interpreted differently than its federal analog, a party also must assert *in the trial court* that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart *and* provide reasons for interpreting the state provision differently from the federal provision. This will enable the trial court to tailor proceedings and to effectuate an appropriate ruling on the issue.

Id. ¶¶ 22-23 (footnote and headings omitted).[6]

{41} *Gomez* concluded that the defendant preserved his claim of error under the state constitution by arguing in his motion to suppress, in which he set forth the facts necessary for a ruling, that his rights were violated under Article II, Section 10, because "[t]here is established New Mexico law interpreting Article II, Section 10 more expansively than the Fourth Amendment." *Id.* ¶¶ 24, 27. In addition, the defendant cited a case discussing exigent circumstances, *id.* ¶ 25, and the district court ruled directly on the issue of the presence of exigent circumstances in denying the motion to suppress, *id.* ¶ 28. *Gomez* held that, although the defendant did not cite cases interpreting Article II, Section 10 more expansively, this "did not operate to prejudice the State in any way" because the district court "is charged with knowing and correctly applying established New Mexico precedent interpreting the state constitution." *Id.* ¶ 30.

> Where New Mexico courts have taken a different path than federal courts, our precedent governs regardless of whether a party cites specific cases in support of a constitutional principle, so long as the party has asserted the principle recognized in the cases and has developed the facts adequately to give the opposing party an opportunity to respond and to give the court an opportunity to rule.

Id.

{42} *Gomez*' preservation requirements were articulated so that arguments made under the New Mexico Constitution were preserved under Rule 12-216 in the same manner as any other argument; only where a state constitutional provision had never been interpreted to provide greater protection than its federal analog are parties required to alert the trial court and articulate reasons for departure. The reason for this slightly greater burden flows from our adoption of the interstitial approach: in order for a court to consider whether the state constitution provides greater protection than the federal constitution, the court must be persuaded that there are reasons to depart from the federal analysis. Thus, providing the court with reasons for departure is part of trial counsel's duty to present the district court with facts necessary to make a ruling and create a record for appellate review.[7]

[6] If a state constitutional argument has been preserved, the role of the appellate court is to conduct the interstitial analysis if necessary, reviewing the reasons for departure and determining whether departure is warranted under the particular provision. *Id.* ¶ 19 (setting forth examples of reason for departure: "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics").

[7] This Court is not bound by the reasons for departure presented by trial or appellate counsel—whether a state constitutional provision should be interpreted more broadly is a ques-

{43} Since this Court decided *Gomez*, New Mexico's appellate courts have purported fidelity to its preservation requirements. *See*, *e.g.*, *Garcia*, 2009-NMSC-046, ¶¶ 10-13; *Montoya v. Ulibarri*, 2007-NMSC-035, ¶¶ 18-19, 142 N.M. 89, 163 P.3d 476; *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶¶ 11-13, 130 N.M. 386, 25 P.3d 225; *State v. Ochoa*, 2009-NMCA-002, ¶¶ 9-11, 146 N.M. 32, 206 P.3d 143. At times, however, the discussion of preservation requirements has been blended with the interstitial analysis in a manner that has resulted in the articulation of a preservation standard that exceeds that set forth in and intended by *Gomez*. *See*, *e.g.*, *State v. Muñoz*, 2008-NMCA-090, ¶ 24, 144 N.M. 350, 187 P.3d 696 (referring to *Gomez*' teaching of "the interstitial approach for preserving state constitutional arguments"). A review of the cases often cited for their discussion of preservation requirements will assist us in distilling the principles of *Gomez*.

{44} In *Cardenas-Alvarez*, we held that the defendant preserved his argument that a border checkpoint stop violated Article II, Section 10. 2001-NMSC-017, ¶¶ 1, 13. Noting the many cases that had interpreted Article II, Section 10 to provide broader protection than the Fourth Amendment, we found that the defendant "asserted the state constitutional principle that provides the protection he seeks and . . . he provided a factual basis upon which the trial court could rule on the issue." *Id.* ¶ 12. Although the defendant did not explicitly cite Article II, Section 10, the argument that the state constitution provided protection against unreasonable searches and seizures, made during closing arguments, was held to be sufficient to satisfy the requirements of Rule 12-216. *Id.* ¶ 13. We then concluded that an "extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law." *Id.* ¶ 15. *Cardenas-Alvarez* correctly applied our teachings from *Gomez*: the defendant alerted the district court to the Article II, Section 10 argument and set forth the facts necessary for the court to rule on that argument, and the appellate court determined that departure from the federal standard was necessary. *Id.*

{45} Other cases also have executed *Gomez*' preservation requirements properly. In *Montoya*, this Court found a state constitutional argument had been preserved where the defendant asserted that the applicable state constitutional provision provided greater protection than the federal analog and set forth the facts necessary for the trial court to rule on the issue. 2007-NMSC-035, ¶ 18; *see also State v. Paul T.*, 1999-NMSC-037, ¶¶ 13, 26, 128 N.M. 360, 993 P.2d 74 (finding the state constitutional argument was preserved where the defendant argued that Article II, Section 10 provides greater protection than the Fourth Amendment and provided the factual basis necessary for a ruling because "*Gomez* requires no more"); *State v. Granville*, 2006-NMCA-098, ¶ 14, 140 N.M. 345, 142 P.3d 933 (compiling cases in which Article II, Section 10 has been construed more broadly than the Fourth Amendment and noting that "[the d]efendant need only to have alerted the trial court to the legal issue and to have developed the facts necessary to rule on that issue" in order to preserve his Article II, Section 10 argument).

{46} In contrast, some cases have imposed a higher preservation standard. *Duran* did not address Article II, Section 10 because the defendant "did not address how the New Mexico Constitution may afford her greater protection than the federal Constitution. . . ." 2005-NMSC-034, ¶ 22. In *Ochoa*, the Court of Appeals determined the defendant had met the preservation standard because he had asserted that the exact issue of the case (pretextual stops) had not been considered under Article II, Section 10. 2009-NMCA-002, ¶ 9; *see also Funderburg*, 2008-NMSC-026, ¶ 12 (not reviewing the defendant's state constitutional argument on appeal because "[the d]efendant did not argue below, and does not argue to this Court, that the New Mexico Constitution provides any greater protection than the Federal Constitution in the context of this case").

tion of law we review de novo. *Cf. Garcia* 2009-NMSC-046, ¶ 57 (Bosson, J., specially concurring) ("In a government of dual sovereigns, it is imperative that our state Constitution develop to its full potential and protect the rights of our citizens where we deem federal law lacking.").

{47} Other cases have created exceptions to the preservation requirements. In *Garcia*, this Court excepted the defendant from *Gomez*' preservation requirements because the question of whether the defendant was seized under Article II, Section 10 was raised in the suppression motion but not argued until the State asserted it as a "right for any reason" argument to the Court of Appeals. *Garcia*, 2009-NMSC-046, ¶¶ 7, 12; *see also Rivera*, 2010-NMSC-046, ¶ 14 ("Because [the d]efendant prevailed at the district court level, her citation to the New Mexico Constitution was adequate to preserve the state constitutional claim." (citing *Garcia*, 2009-NMSC-046, ¶ 12)). These cases, though reaching the right result, did so in a way unnecessarily restrictive of *Gomez*' rule.

{48} Justice Bosson, in his special concurrence in *Garcia*, drew attention to the higher standard courts were setting for preserving arguments under the state constitution and encouraged a "new look" at the preservation requirements. 2009-NMSC-046, ¶ 56 (Bosson, J., specially concurring). In particular, Justice Bosson highlighted the confusion that has developed in application of *Gomez*' preservation standard when a state constitutional provision has already been interpreted, with courts requiring previous discussion of "the particular claim or principle" rather than the provision. *Id.* ¶¶ 54-55 ("In practical effect, it could require litigants to meet the higher *Gomez* burden each time a new argument or fact pattern under search and seizure is brought before a state court. . . . This is unduly burdensome in the context of search and seizure, and . . . unnecessary."). We agree that the proper inquiry under *Gomez* is whether the *provision* of the state constitution has previously been construed to provide broader protection than its federal counterpart, and disavow any prior statements to the contrary. *See*, *e.g.*, *State v. Ochoa*, 2004-NMSC-023, ¶ 6, 135 N.M. 781, 93 P.3d 1286 ("Thus, we assume without deciding that both constitutions afford equal protection to individuals against unreasonable seizures *in this context*, and we analyze the constitutionality of the seizure under one uniform standard." (emphasis added)). Preserving a state constitutional argument continues to follow the steps set forth in *Gomez*.

2. Preservation requirements restated.

{49} Rule 12-216 (A)'s preservation requirements are straightforward: "To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked. . . ." Where a state constitutional *provision* has previously been interpreted more expansively than its federal counterpart, trial counsel must develop the necessary factual base and raise the applicable constitutional provision in trial court. Where the *provision* has never before been addressed under our interstitial analysis, trial counsel additionally must argue that the state constitutional provision should provide greater protection, and suggest reasons as to why, for example, "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Gomez*, 1997-NMSC-006, ¶ 19.[8]

3. The defendant's preservation of his Article II, Section 10 argument.

{50} Leyva was required to meet the less stringent of *Gomez*' preservation requirements because "a plethora of precedent already interprets Article II, Section 10 more expansively than the Fourth Amendment." *Garcia*, 2009-NMSC-046, ¶ 52 (Bosson, J., specially concurring). Leyva met this requirement by pleading that his right to be free from an unreasonable search and seizure was violated under both the Fourth Amendment and Article II, Section 10 and developing a factual record in his motion and at the suppression hearing. Leyva's Article II, Section 10 argument was preserved.

4. Interstitial analysis

{51} It is well-established that Article II, Section 10 provides more protection against unreasonable searches and seizures than the Fourth

[8] The exceptions to the preservation requirement contained in Rule 12-216(B) apply to state constitutional arguments as they do to any other. *See Gomez*, 1997-NMSC-006, ¶ 31 n.4 (noting the possibility of appellate courts considering unpreserved state constitutional claims under the exceptions to preservation requirements contained in Rule 12-216(B)).

Amendment. *See*, *e.g.*, *Neal*, 2007-NMSC-043, ¶ 16 ("For the past fifteen years, [A]rticle II, [S]ection 10 has been construed to provide broader protections than the Fourth Amendment."); *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15 ("The extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law"); *State v. Pittman*, 2006-NMCA-006, ¶ 14, 139 N.M. 29, 127 P.3d 1116 ("New Mexico law expresses a strong preference for a warrant."); Sullivan, *supra*, at 427-39 (discussing cases in which this Court and the Court of Appeals have departed from Fourth Amendment analysis in construing Article II, Section 10). As such, we need not be confined by Fourth Amendment law in determining whether Leyva's rights were violated under the New Mexico Constitution. The fact that we have departed from the analysis used to determine whether a violation of the Fourth Amendment occurred in certain contexts, however, does not require us to do so in all contexts. It remains necessary to conduct our de novo review of the law, as "this Court has demonstrated a willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees." *State v. Gutierrez*, 116 N.M. 431, 440, 863 P.2d 1052, 1061 (1993).

C. Article II, Section 10

{52} "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures. . . ." N.M. Const. art. II, § 10.

1. *Duran*'s two-prong analysis remains the test for reasonableness of police questioning during traffic stops under Article II, Section 10.

{53} We have consistently said that "'Article II, Section 10 expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions,' and thus identified a broader protection to individual privacy under the New Mexico Constitution" than under the Fourth Amendment. *Garcia*, 2009-NMSC-046, ¶ 29 (quoting *Gutierrez*, 116 N.M. at 444, 863 P.2d at 1065). "Article II, Section 10 is calibrated slightly differently than the Fourth Amendment. It is a foundation of both personal privacy and the integrity of the criminal justice system, as well as the ultimate regulator of police conduct." *Id.* ¶ 31. As in *Garcia*, in this case we primarily are concerned with regulating police conduct. *See id.* ¶ 26. We must now determine whether the Fourth Amendment's bright-line rule or *Duran*'s case-by-case analysis is better calibrated to protect the rights of individuals on New Mexico's roadways from unwarranted police intrusions under the New Mexico Constitution.

{54} "New Mexico courts have consistently rejected federal bright-line rules in favor of an examination into the reasonableness of officers' actions under the circumstances of each case." *Ochoa*, 2009-NMCA-002, ¶ 24. This opposition to bright-line rules greatly influenced our adoption in *Duran* of a two-part test, tracking the *Terry* analysis, to questions during traffic stops. *See supra* ¶¶ 13-14. *Duran* rejected the approach later adopted by the United States Supreme Court in *Caballes*, *Muehler*, and *Johnson* because "[w]e have continually used a fact-based, case-by-case approach to determine what questions are reasonably related to the initial justification for the stop and whether an officer had reasonable suspicion to expand the scope of his or her search or seizure during an investigatory stop." 2005-NMSC-034, ¶ 34. Since *Duran* was decided, our cases construing Article II, Section 10 have persisted in rejecting bright-line rules. *See*, *e.g.*, *Rivera*, 2010-NMSC-046, ¶ 23 (declining to adopt the Fourth Amendment private search doctrine under Article II, Section 10 due to our constitution's "strong preference for a warrant"); *Garcia*, 2009-NMSC-046, ¶ 37 (retaining the totality of the circumstances free-to-leave test for seizures under Article II, Section 10); *Rowell*, 2008-NMSC-041, ¶ 20 (rejecting a bright-line rule for car searches incident to arrest in favor of a case-by-case approach); *State v. Bomboy*, 2008-NMSC-029, ¶¶ 5, 8, 144 N.M. 151, 184 P.3d 1045 ("applying the fact-specific reasonableness inquiry" rather than the bright-line rule sanctioned under the Fourth Amendment).

{55} *Duran's* analysis, requiring a reasonable justification for the initial stop and that all questions asked during the stop be reasonably related to the reason for the stop or otherwise supported by reasonable suspicion, *see supra* ¶ 13, ensures that investigating officers do not engage in "fishing expeditions" during traffic stops. *See Neal*, 2007-NMSC-043, ¶ 28. This approach comports better with the broader protections provided under Article II, Section 10, which we have determined are best analyzed under a case-by-case approach rather than bright-line temporal tests developed under the Fourth Amendment. We conclude that *Duran*'s two-part analysis, adhering to the scope and duration requirements set forth in *Terry*, best protects the right against unreasonable searches and seizures under Article II, Section 10 of the New Mexico Constitution. Article II, Section 10 requires that all questions asked during the investigation of a traffic stop be reasonably related to the initial reason for the stop. Unrelated questions are permissible when supported by independent reasonable suspicion, for reasons of officer safety, or if the interaction has developed into a consensual encounter. *See Duran*, 2005-NMSC-034, ¶ 35. The overall reasonableness of the stop continues to be "determined by balancing the public interest in the enforcement of traffic laws against an individual's right to liberty, privacy, and freedom from arbitrary police interference." *Id.* ¶ 22 (citing *Mimms*, 434 U.S. at 109).

{56} While our rejection of the Supreme Court's bright-line rule for traffic stop questioning is firmly rooted in Article II, Section 10, we note that the rule has come under criticism from scholars and courts alike. Professor LaFave, discussing the bright-line rule later adopted, called it "dead wrong[,]" and

> totally at odds with the *Terry* line of Supreme Court decisions on the limits applicable to temporary detentions, and amount[s] to nothing more than an encouragement to police to engage in pretextual traffic stops so that they may engage in interrogation about drugs in a custodial setting (albeit not custodial enough to bring even the protections of *Miranda* into play). The correct rule is that followed by some other courts: that in strict accordance with *Terry* and its progeny, questioning during a traffic stop must be limited to the purpose of the traffic stop and thus may not be extended to the subject of drugs.

Wayne R. LaFave, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 Mich. L. Rev. 1843, 1887 (2004) (footnotes omitted); *see also State v. Washington*, 898 N.E. 2d 1200, 1205-06 (Ind. 2008) (applying a distinct analysis to a state constitutional claim after determining that questions asked of a driver about contraband did not violate the Fourth Amendment pursuant to *Muehler* because "[t]he Indiana Constitution may protect searches that the federal Constitution does not"); *Brown v. State*, 182 P.3d 624, 626 (Alaska Ct. App. 2008) (interpreting the search and seizure protections provided by the state constitution as more protective than the Fourth Amendment because "the Fourth Amendment rules governing traffic stops create the potential risk that law enforcement officers will compromise the privacy of many citizens"); *cf. Jenkins*, 3 A.3d at 852 (holding that protections provided under the Connecticut constitution are coextensive with those provided by the Fourth Amendment because "[o]ur own constitutional language, precedents and history do not support a ready departure from the federal case law in this area, particularly because the recent United States Supreme Court decisions do not represent a sea change from prior Connecticut precedent").

2. Under Article II, Section 10, the defendant's rights were not violated.

{57} Our final task in this Opinion is to determine whether Leyva was subjected to an unreasonable search and seizure under Article II, Section 10. The standard of review for motions to suppress is the same under Article II, Section 10 as it is for the Fourth Amendment. *See supra* ¶ 30.

{58} As under the Fourth Amendment analysis, we need not discuss whether Officer Hash's

initial stop of Leyva was reasonable, as Leyva concedes this point. We may proceed directly to determine whether the questions relating to contraband and for consent to search were reasonably related to the initial reason for the stop, or if they were permitted otherwise. The district court did not make an explicit ruling on whether the questions were permissible under the second *Duran* prong, but concluded that Officer Hash had independent reasonable suspicion to ask the question about contraband. In doing so, the district court implicitly ruled that questioning Leyva about the presence of weapons or drugs in the car was not reasonably related to the initial speeding stop, or to the discovery that Leyva was driving without proof of insurance, and we will not disturb this conclusion.

{59} Because the questions were not permitted under the *Duran* test as reasonably related to the initial stop, we must determine whether the district court properly concluded that Officer Hash possessed independent and articulable reasonable suspicion to expand his questioning of Leyva. A law enforcement officer must have "reasonable and articulable suspicion that other criminal activity has been or may be afoot" in order to expand an investigation. *Neal*, 2007-NMSC-043, ¶ 20 (quoting *State v. Williamson*, 2000-NMCA-068, ¶ 8, 129 N.M. 387, 9 P.3d 70); *see also supra* ¶¶ 23-24. Reasonable suspicion is measured by an objective standard based on the totality of the circumstances. *Neal*, 2007-NMSC-043, ¶ 21.

{60} The district court found that Officer Hash possessed reasonable independent suspicion that Leyva was engaged in illegal activity based on Leyva's furtive movements in the car—appearing to hide something under the passenger seat—before stopping. The district court's conclusion is supported by the incident report and the deputy's testimony, giving weight to Officer Hash's eight years of experience and training as a law enforcement officer, *see Van Dang*, 2005-NMSC-033, ¶ 16 (discussing importance of officer training and experience to forming reasonable suspicion of criminal activity), and considerations of officer safety, *see Johnson*, ___ U.S. at ___, 129 S.Ct. at 786 (stating that "legitimate and weighty interest in officer safety" outweighs additional minor intrusions (internal quotation marks and citation omitted)). In contrast, in *Paul T.*, we found that the circumstances of the seizure, viewed objectively, did not "rise to a level necessitating a full search analogous to a search incident to arrest" under Article II, Section 10. 1999-NMSC-037, ¶ 14. In that case, the defendant was taken into custody for a curfew violation and none of the circumstances indicated that the officer reasonably was concerned about his safety in transporting the youth. *Id.* We also concluded that the need to preserve evidence did not justify a search where the crime was curfew violation. *Id.* ¶ 15.

{61} Based on the totality of the circumstances, we cannot say that it was unreasonable for Officer Hash to inquire into the presence of weapons or other contraband in the vehicle. Officer Hash was intending to permit an unknown third party to remove the vehicle from the premises and Officer Hash possessed a reasonable suspicion that Leyva had hid an item in the car.[9] Based on the facts presented in this case we conclude that the State met its burden of showing that Officer Hash's questioning was not unreasonable under Article II, Section 10. Officer Hash was justified in asking Leyva about weapons and other contraband in the vehicle, and the response to this question gave him further justification to expand his search by asking for consent to search the

[9] While the State argues that Leyva's failure to immediately pull over is a factor contributing to Officer Hash's development of reasonable suspicion, Officer Hash's testimony and report indicate that this activity was entirely normal for the road and thus should not be given weight. Even if Officer Hash himself had not discredited any attempt to include Leyva's delay in pulling over after the emergency lights had been activated, we would not find this factor especially weighty in the reasonable suspicion analysis. *See*, *e.g.*, *United States v. Jenson*, 462 F.3d 399, 405-06 (5th Cir. 2006) (giving "great respect" to the arresting officer's testimony that, in his experience, it was unusual for the defendant's car not to come to an immediate stop but finding that "thirty seconds to a minute was a reasonable amount of time for [the defendant] to respond to the flashing of the emergency lights" and in itself could not support reasonable suspicion that the defendant possessed contraband).

vehicle. Leyva's argument that his consent was tainted by an unreasonable seizure fails.

III. CONCLUSION

{62} *Duran*'s subject matter and duration *Terry* analysis for questioning during traffic stops is no longer valid under the Fourth Amendment, but is retained for analysis under Article II, Section 10 of the New Mexico Constitution. Leyva's Fourth Amendment rights were not violated by police questioning that occurred after the traffic investigation was completed because the questions were a de minimis extension of the detention and reasonable under the circumstances. Leyva preserved his Article II, Section 10 argument, and the State carried its burden to show that questions asked after the traffic stop had been concluded were not unreasonable under the New Mexico Constitution. The district court's order denying the motion to suppress is affirmed.

{63} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMSC-017

Filing Date: April 12, 2011

Docket No. 32,202

WILLIAM K. SUMMERS, M.D.,

Plaintiff-Respondent,

v.

ARDENT HEALTH SERVICES, L.L.C., AND LOVELACE HEALTH SYSTEM, INC.,

Defendants-Petitioners.

Original Proceedings on Certiorari
Nan G. Nash, District Judge

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OPINION

SERNA, Justice.

{1} Defendants Ardent Health Services, L.L.C. and Lovelace Health Systems, Inc. terminated the medical privileges of Plaintiff William K. Summers, M.D. following a formal professional review. Plaintiff subsequently filed a lawsuit for damages. Defendants moved for summary judgment under the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101-11152 (1986), which provides immunity from damages for participants of professional peer review actions if four requirements are satisfied. The district court denied Defendants' motion for summary judgment, and the Court of Appeals affirmed. We granted certiorari to consider whether the Court of Appeals properly construed the immunity provisions of the HCQIA, and now reverse and remand.

I. BACKGROUND

{2} Plaintiff held medical privileges at the Lovelace Sandia Health System (hospital) to practice psychiatry and internal medicine. His affiliation with the hospital began in 1995. In May 2005, Plaintiff's medical privileges were permanently suspended following a multi-step review and appeal process performed under the hospital's internal bylaws, which are designed to be consistent with the HCQIA.

{3} The peer review process commenced in 2002, in response to a complaint by one of Plaintiff's female patients (Patient A) that Plaintiff used sexually explicit and offensive language during a psychiatric consultation. Defendants' Medical Executive Committee (MEC) appointed an ad hoc committee to investigate Patient A's complaint as well as complaints that Plaintiff was selling memory pills in violation of hospital policies. The ad hoc committee conducted three meetings over the course of a month; Plaintiff

was present at the second and third meetings and was given an opportunity to respond to the information presented about him. Plaintiff admitted to the veracity of Patient A's complaints and to delivering memory pills to patients. The ad hoc committee recommended that Plaintiff be instructed to improve his chart documentation and that Plaintiff's admissions and consultations be reviewed for a six-month period. The MEC adopted these recommendations.

{4} In 2003, a second female patient (Patient B) complained that Plaintiff used sexually explicit and inappropriate language during a consultation. The incident was reported by a caseworker who contacted Patient B after her discharge from the hospital. Following a request by the hospital's Chief Medical Officer, the MEC appointed a second ad hoc committee to investigate Patient B's complaint and reports that Plaintiff was discharging patients to the nursing facility where he was the physician, contrary to directives by the patients' primary care physicians. In addition to reviewing Patient B's medical file, the second ad hoc committee reviewed the records of eleven of Plaintiff's patients. The committee found "a relatively high incidence of questionable medical decisions or treatments rendered" by Plaintiff, and identified seven problems specific to individual patients and three general problems. Plaintiff was not interviewed by the second ad hoc committee, contrary to the hospital's bylaws. Based on the second ad hoc committee's findings and recommendations, the MEC suspended Plaintiff's internal medicine privileges, placed Plaintiff's psychiatric privileges on probation for two years, and prohibited Plaintiff from discussing any sexual issues with patients. The MEC reported this action in an adverse action report to the National Practitioner Data Bank (NPDB).

{5} Plaintiff appealed the MEC's decision. A two-day hearing was held in front of a Professional Review Committee (PRC), composed of medical practitioners "selected to exclude any individuals in direct competition" with Plaintiff, to determine if the MEC had acted unreasonably or arbitrarily and capriciously. Both the MEC and Plaintiff were represented by counsel, and afforded the opportunity to call witnesses (the MEC called four; Plaintiff testified on his own behalf) and conduct cross-examination during the hearing. Plaintiff again admitted to the conduct relating to Patient A, but denied the allegations of Patient B, arguing that neither the story of Patient B nor the notes of the caseworker were credible. Following the hearing, both Plaintiff and the MEC submitted written statements with requested findings of facts and recommendations.

{6} The PRC concluded that some of the specific issues raised by the ad hoc committee were unfounded, but credited testimony by members of the committee that they remained concerned with the general standard of care provided by Plaintiff. Finding Plaintiff's use of explicit sexual language during consultations with female patients to be "[o]f primary importance" and evidence of a pattern of sexually inappropriate language with female patients, the PRC recommended that Plaintiff's internal medicine privileges remain suspended and his psychiatric privileges be suspended. The MEC unanimously adopted the PRC's recommendations.

{7} Plaintiff again appealed the MEC's decision, and a hearing was held before the Board of Trustees Appellate Review Committee (ARC), composed of hospital executives. Prior to the hearing, the ARC members were provided with statements and exhibits from Plaintiff and the MEC, both represented by counsel; each party was permitted thirty minutes for argument. After the hearing, the ARC requested, with Plaintiff's consent, that the PRC submit additional findings of fact and clarify its issues of concern. The PRC submitted a report stating that its concerns were related to Plaintiff's "treatment of his female patients in all areas of his practice." The ARC ultimately recommended that the Board of Trustees uphold the permanent suspension of Plaintiff's privileges. The Board of Trustees adopted the ARC's recommendation. A revised adverse action report was submitted to the NPDB.

{8} Following the Board of Trustees' suspension of his privileges, Plaintiff filed suit for

damages in the Second Judicial District Court, claiming defamation, breach of contract, prima facie tort, and tortious interference with prospective contracts. Plaintiff alleged that the investigations were retaliatory, conducted as a result of his reporting questionable practices of Defendants' hospital administrators, and that the ad hoc committees and the MEC failed to conduct investigations into the allegations against Plaintiff before suspending him. Defendants filed a motion for summary judgment, asserting immunity under the HCQIA.[1] Plaintiff responded to the motion for summary judgment and submitted an affidavit stating the Defendants had proceeded in bad faith and were unreasonable in the peer review process. After a hearing on all four of the requirements for HCQIA immunity, the district court denied Defendants' motion for summary judgment, ruling that "[a] genuine issue of material fact exists regarding the reasonableness of the efforts taken by Defendant[s] to obtain the facts of the matter during the professional review action." The district court's order did not address the other three immunity requirements.

{9} The district court certified the order denying summary judgment for interlocutory appeal to the Court of Appeals. The Court of Appeals limited its review to the second requirement of the HCQIA immunity standard. *Summers v. Ardent Health Services, L.L.C.*, 2010-NMCA-026, ¶ 11, 147 N.M. 506, 226 P.3d 20. Although the Court acknowledged that the reasonableness of the fact-finding process depended on the totality of the circumstances, *id.* ¶ 14, it focused its discussion on the fact-finding relating to Patient B, *id.* ¶ 15. The Court concluded that the reliance by the peer reviewers on the caseworker's notes, particularly when Plaintiff disputed the content of those notes, "raise[d] a question as to the reasonableness of the peer reviewers' efforts to find and verify the facts supporting their action." *Id.* ¶ 16. Based on this conclusion, the Court of Appeals upheld the district court's denial of Defendants' motion for summary judgment. *Id.* ¶ 18.

II. ANALYSIS

A. Standard of Review

{10} Appellate review of orders granting or denying summary judgment are reviewed de novo. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. A motion for summary judgment under Rule 1-056 NMRA is granted only when there are no issues of material fact, with the facts viewed in the light most favorable to the non- moving party. *Romero*, 2010-NMSC-035, ¶ 7. The movant has the burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Id.* ¶ 10 (internal quotation marks and citation omitted). The non-moving party then must "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* (internal quotation marks and citation omitted). In addition to being specific, these facts must be material to the dispute, and the applicable substantive law determines whether a fact is material. *Id.* ¶ 11 (using federal antitrust law as the "filter" through which the state summary judgment standard is applied).

{11} The burden-shifting provision of HCQIA immunity provides a twist on the typical summary judgment standard. "The HCQIA creates a rebuttable presumption in favor of immunity, and the plaintiff has the burden of proving by a preponderance of the evidence that the peer review process was not reasonable." *N. Colo. Med. Ctr., Inc. v. Nicholas*, 27 P.3d 828, 838 (Colo. 2001) (en banc); *accord Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1333 (11th Cir. 1994). Immunity should be granted unless the district court can answer the following question in the affirmative: "Might a reasonable jury, viewing the facts in the best light for [the plaintiff], conclude that [the plaintiff] has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?" *Bryan*, 33 F.3d at 1333-34 (first

[1] Defendants also raised the defense of immunity under the New Mexico Review Organization Immunity Act (ROIA), NMSA 1978, §§ 41-9-1 to -7 (1979). The district court concluded that the HCQIA was determinative of Defendants' motion for summary judgment and thus did not address the application of the ROIA.

alteration in original) (quoting *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992)).[2]

{12} Whether a professional review action was taken after a reasonable effort to obtain the facts is determined by a review of the totality of the circumstances. *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 841 (3d Cir. 1999). Courts do not reweigh the evidence considered during the professional review process. *Bryan*, 33 F.3d at 1337. The HCQIA "does not require that the professional review result is an actual improvement of the quality of health care, nor does it require that the conclusions reached by the reviewers were in fact correct. . . . [T]he good or bad faith of the reviewers is irrelevant." *Poliner v. Tex. Health Sys.*, 537 F.3d 368, 378 (5th Cir. 2008) (internal quotation marks and footnotes omitted). The role of the appellate court is to consider whether the professional review action was objectively reasonable. *Id.* at 379-80 ("Our sister circuits have roundly rejected the argument that . . . subjective motivations overcome HCQIA immunity, as do we." (footnote omitted)).

B. HCQIA Immunity Applies When the Fact-Finding Process is Objectively Reasonable.

{13} While this Opinion marks the first opportunity this Court has had to consider the immunity provisions of the HCQIA, we previously have discussed the policy of utilizing professional peer review actions to assure quality health care. In *Southwest Community Health Services v. Smith*, we described the ROIA as "promot[ing] the improvement of health care in New Mexico." 107 N.M. 196, 198, 755 P.2d 40, 42 (1988). "[The ROIA] recognizes that candor and objectivity in the critical evaluation of medical professionals by medical professionals is necessary for the efficacy of the review process." *Id.* Likewise, the goal of the HCQIA immunity provision is to promote professional peer review to prevent the practice of medicine by incompetent medical professionals. 42 U.S.C. § 11101 (2). The HCQIA provides immunity from damages, the threat of which "unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101 (4).[3] Any consideration of the immunity provided by the HCQIA, therefore, must be conducted in light of the goal of promoting physician participation in professional peer review activities.

{14} Immunity applies when a professional review action, as defined at 42 U.S.C. § 11151(9), is taken in compliance with the standards of Section 11112(a):

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
> (2) after a reasonable effort to obtain the facts of the matter,
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

The statute presumes compliance, and thus immunity, unless "the presumption is rebutted by a preponderance of the evidence." *Id.* At issue in this appeal is the second of the immunity requirements, whether Defendants permanently

[2] For an interesting discussion of the role of the jury in deciding whether immunity under the HCQIA is proper in a given case, a question we need not address in this Opinion, see *Bryan*, 33 F.3d at 1332-33, and *Singh v. Blue Cross/Blue Shield of Mass., Inc.*, 308 F.3d 25, 33, 36 (1st Cir. 2002).

[3] We note that Plaintiff filed suit for damages only, though the HCQIA does not provide immunity from suits for injunctive or declaratory relief. *See Poliner*, 537 F.3d at 381 ("The immunity from money damages may work harsh outcomes in certain circumstances, but that results from Congress' decision that the system-wide benefit of robust peer review in rooting out incompetent physicians, protecting patients, and preventing malpractice outweighs those occasional harsh results; that giving physicians access to the courts to assure procedural protections while denying a remedy of money damages strikes the balance of remedies essential to Congress' objective of vigorous peer review.").

suspended Plaintiff's internal medicine and psychiatry privileges "after a reasonable effort to obtain the facts of the matter." 42 U.S.C. § 11112(a)(2). In order to rebut the presumption of reasonableness, Plaintiff must produce evidence showing that the fact-finding process conducted by Defendants was *not* objectively reasonable. *See Poliner*, 537 F.3d at 379-80.

{15} Under the HCQIA, a physician is entitled only to a reasonable investigation. *See Poliner*, 537 F.3d at 380 (noting that a physician is "entitled to a *reasonable* effort, not a perfect effort"); *Singh*, 308 F.3d at 43 (same). The HCQIA does not require participants at every level of a peer review action to perform an independent investigation of the facts. Participants in later stages of the review process are entitled to rely on information gathered in earlier stages; reliance on the information provided by other doctors is presumptively reasonable. *See Poliner*, 537 F.3d at 380 (stating that peer reviewers were "entitled to rely on the information provided . . . by the other doctors, and there is nothing to suggest that the information was facially flawed or otherwise so obviously deficient as to render [the d]efendants' reliance 'unreasonable'" (footnote omitted)); *Gabaldoni v. Wash. Cnty. Hosp. Ass'n*, 250 F.3d 255, 261-62 (4th Cir. 2001) (finding it reasonable for the ultimate decision maker to rely on reports of various committees because "[a]lthough the summaries [of the investigations] did not—and indeed could not—include every single fact and finding from every committee report, there is no evidence to suggest that the summaries provided to the Board were materially insufficient or misleading"); *Bryan*, 33 F.3d at 1335 (concluding that the plaintiff did not overcome the presumption that reasonable effort was used to gather facts when three separate panels submitted reports to the board, "which made its decision based upon the documentary record developed during the various peer review proceedings and after [the plaintiff] had the opportunity to make a presentation"); *N. Colo. Med. Ctr.*, 27 P.3d at 840 (holding that the board of directors acted reasonably to obtain the facts when it suspended the physician "only after a lengthy investigation by a number of committees and independent parties").

{16} The presumption of reasonableness is not overcome by simply identifying one piece of factually questionable evidence upon which the peer review committees relied. *See Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 469 (6th Cir. 2003) (concluding a physician did not meet his burden by only making "conclusory statements attacking individual items of evidence considered by the reviewers"); *Brader*, 167 F.3d at 841 (holding the fact-finding process reasonable despite the plaintiff's argument that one study was flawed and his views were not heard when the ultimate decision was based on an initial review, first hand observations, testimony before an impartial panel, written submissions, and two levels of appellate review). To overcome the presumption of reasonableness, the physician must show that the fact-finding process is unreasonable in its totality.

{17} Nor can the physician challenge the fact-finding process by questioning the integrity or motivations of the individuals conducting the professional peer review. *See Matthews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 637 (3d Cir. 1996) (stating that a challenge to the integrity of one of the investigating committees did not rebut the presumption that the defendants had "engaged in a reasonable effort to obtain the facts"); *Reyes v. Wilson Mem'l Hosp.*, 102 F. Supp. 2d 798, 818-19 (S.D. Ohio 1998) (finding that the plaintiff did not rebut the presumption of reasonableness when the "only evidentiary rejoinder . . . consists of testimony impugning the motives of the [d]efendants" and an argument that additional evidence could have been discovered). Because HCQIA immunity applies when the fact-finding process is objectively reasonable, an inquiry into the subjective intent of the individual members of the various review committees is inappropriate.

{18} Additionally, the failure of a professional peer review to comply in full with applicable bylaws does not render the fact-finding process unreasonable. "Provided that a peer review action as defined by the statute complies with those standards, a failure to comply with hospital bylaws does not defeat a peer reviewer's right to

HCQIA immunity from damages." *Poliner*, 537 F.3d at 381. Compliance with the bylaws is a good measure of the reasonableness of the peer review process, but doing so is not required by the HCQIA.

{19} To rebut the presumption of reasonableness in the fact-finding efforts of the peer review action, a plaintiff must point to specific and material facts demonstrating that the fact-finding efforts were unreasonable. *See Goodwich v. Sinai Hosp. of Baltimore, Inc.*, 653 A.2d 541, 546 (Md. Ct. Spec. App. 1995) (concluding that the plaintiff did not meet his burden by "present[ing] no evidence, absent his own bare allegations, that a reasonable effort was not made to obtain the facts"). In *Brown v. Presbyterian Healthcare Services*, the Tenth Circuit held that the plaintiff successfully rebutted the presumption that the fact-finding process was reasonable by demonstrating, through expert testimony, that the peer review process consisted of one meeting, two chart reviews, and two hours of deliberation before the plaintiff's privileges were revoked. 101 F.3d 1324, 1333-34 (10th Cir. 1996). Unlike the cases cited above, the *Brown* plaintiff presented sufficient evidence from which "a reasonable jury could have found the panel's review to be unreasonably restrictive and not taken after a 'reasonable effort to obtain the facts.'" *Id.* at 1334.

C. Plaintiff Did Not Rebut the Presumption That Defendants Made a Reasonable Effort to Obtain the Facts of the Matter.

{20} The Court of Appeals determined that Plaintiff rebutted the presumption of reasonableness by presenting facts material to the question of the reasonableness of the fact-finding process. *Summers,* 2010-NMCA-026, ¶¶ 14-16. Focusing its analysis on the allegations of Patient B, the Court of Appeals found that Plaintiff had met his burden by articulating the following "concerns: that Patient B's allegation was based on notes taken by a case manager during a phone conversation, that neither the case manager nor [Patient B] was ever contacted or questioned regarding the incident, and that [Plaintiff] vigorously disputed the allegation throughout the process." *Id.* ¶ 14. We cannot agree that Plaintiff rebutted the presumption of HCQIA immunity in this case.

{21} In order to rebut the presumption that Defendants were reasonable in their fact-finding efforts, Plaintiff must do more than identify one part of the investigation—the failure of the ad hoc committee to interview Patient B and the caseworker—that could have been more thorough, *see Brader*, 167 F.3d at 841; *Bryan*, 33 F.3d at 1335, or argue that the peer review action was taken in bad faith, *see Bryan*, 33 F.3d at 1335. Although the second ad hoc committee failed to interview Plaintiff, as required by the hospital bylaws, this fault is not fatal. *See Poliner*, 537 F.3d at 381. Plaintiff must identify fallacies in the fact-finding process that render it unreasonable as a whole. *See Goodwich*, 653 A.2d at 546-47. Plaintiff's privileges were permanently suspended after two investigations by separate ad hoc committees; reviews of the ad hoc committees' reports by the MEC; an appeal to the PRC, at which Plaintiff was represented by counsel, presented evidence, cross-examined witnesses, and was provided the opportunity to call witnesses; a final appeal to the ARC; and a review by the Board of Trustees of the entire record. Plaintiff's allegations of bad faith and the failure of the ad hoc committee to interview the caseworker or Patient B were not sufficient to meet the required burden on summary judgment. *Cf. Brown*, 101 F.3d at 1334.

{22} The Court of Appeals erred by not considering the totality of the fact-finding process, but instead focusing on the peer reviewer's reliance on the caseworker's notes relating to Patient B. *Summers*, 2010-NMCA-026, ¶ 14. Although our review of the proceedings indicates that the incidents involving Patients A and B were of primary concern to the peer reviewers, the final action suspending Plaintiff's medical privileges was taken after a fact-finding process that involved a broad and thorough investigation of Plaintiff's care regarding a number of patients. We conclude that the fact-finding process conducted by Defendants was reasonable as a matter of law.

III. CONCLUSION

{23} For the foregoing reasons, we reverse the opinion of the Court of Appeals. Because the district court did not consider the remaining three immunity requirements of the HCQIA summary judgment standard, we remand for further proceedings.

{24} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

Justice Patricio M. Serna

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMSC-032

Filing Date: July 19, 2011

Docket No. 32,311

PETE RODRIGUEZ, JOSE TURRUBIATES, BILL and NORMA CORSAUT, as guardians of minor children, DRAVEN C. and DEVAN W., natural children of ELOY DOPORTO, JR., deceased, and MIKE LUCAS,

Workers-Petitioners,

v.

PERMIAN DRILLING CORPORATION and AMERICAN HOME ASSURANCE,

Employer-Insurer-Respondents.

Original Proceeding on Certiorari
Helen L. Stirling, Workers' Compensation Judge

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OPINION

SERNA, Justice.

{1} This Opinion addresses an exception in the Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1987) (as amended through 2006) (the Act), that permits compensation for injuries incurred in travel by employees when those injuries "aris[e] out of and in the course of employment." Section 52-1-19. Eloy Doporto, Jr.,[1] Mike Lucas, Jose Turrubiates, and Pete Rodriguez (collectively, Workers), oilfield workers employed by Permian Drilling Corporation (Permian), insured by American Home Assurance, were involved in an automobile accident while traveling to their work site, resulting in the death of Doporto and injuries to the others. We conclude that the injuries suffered by Workers arose out of and in the course of their employment because the travel was mutually beneficial to employees and employer and Workers encountered special hazards unique to their employment while traveling, thus rendering Workers "traveling employees" whose injuries are compensable under the Act.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Our review of the whole record developed before the Workers' Compensation Judge (WCJ) supports the following statement of the factual background. Permian operates mobile drilling rigs throughout southeastern New Mexico and western Texas. The rigs are mobile and are moved to a new location after the drilling of a well is complete, generally every seven to eight days. The drill sites typically are located in rural areas, far from any town, making travel necessary. Crews travel to and from the drill site daily; if the site is extremely remote, however, the drilling company provides lodging. The rigs, operated twenty-four

[1] Petitioners concerned with Doporto's claim are Bill and Norma Corsaut as guardians of Doporto's minor children.

hours a day, are staffed by three crews working eight-hour shifts and a relief crew that replaces the others on their respective days off.

{3} Each crew consists of a driller and three to four crew members. The driller is responsible for hiring and supervising his crew, subject to Permian's approval. The driller is obligated to have a full crew present at the drilling site at the beginning of the shift; an insufficient number of crew members results in an idle rig and imposes a significant financial burden on the company. To meet this responsibility, the industry practice is for drillers to transport their crews to the rig site, though Permian has no written policy requiring such. Permian requires drillers to maintain a valid driver's license and automobile insurance, and compensates the drillers at the rate of twenty-five cents for each mile traveled to a rig site. Individual crew members are not compensated for their travel time, even if they choose to travel individually; they are paid hourly once they begin their scheduled shift. Permian's crews may travel up to 4000 miles per month, or as much as 200 miles per day, to reach the mobile drilling rigs to which they are assigned, though Permian does not dictate the route they must travel nor the mode of transportation.

{4} Workers were members of an oil well drilling crew employed by Permian. Rodriguez, the driller, customarily picked up the members of his crew—Doporto, Lucas, and Turrubiates—at their homes in Hobbs to transport them to the rig site in his vehicle. Rodriguez led weekly safety meetings with his crew on topics that included travel safety. The crew had been working extra shifts in the days prior to the accident. In the early morning of November 10, 2006, Rodriguez picked up his crew at their homes, and they set forth from Hobbs to the rig site, a distance of approximately sixty to seventy miles. The crew stopped at a gas station to fill their water cooler. A short time later, the vehicle was involved in a single-car accident in which Doporto was killed and the others were injured.

{5} Workers filed workers' compensation claims under the Act, arguing that they were traveling employees injured in the course of their employment. Their claims were consolidated before a WCJ. The WCJ bifurcated the trial to decide the issue of compensability before determining benefit entitlements. After a trial on the merits and the submission of proposed findings of fact by each party, the WCJ entered written findings of fact, conclusions of law, and a compensation order. The WCJ concluded that Workers were commuters, that the mileage payments to Rodriguez did not make him a traveling employee, and that the travel to the rig site was "not an incidental or integral part of Workers' employment." As a result, Workers' claims were dismissed because their injuries did not occur within the course and scope of their employment and thus the injuries were not compensable under the Act.

{6} Workers appealed to the Court of Appeals, which, in a memorandum opinion, upheld the WCJ's dismissal of Workers' claims. *Rodriguez v. Permian Drilling Corp.*, No. 29,435, slip op. at 13 (N.M. Ct. App. Mar. 18, 2010). The Court of Appeals concluded that substantial evidence supported the WCJ's conclusion that Rodriguez was not fulfilling a duty of his employment in transporting his crew, *id.*, and that Workers were not traveling employees under the Act when the accident occurred, *id.* at 12-13.

II. STANDARD OF REVIEW

{7} "All workers' compensation cases are reviewed under a whole record standard of review." *Moya v. City of Albuquerque*, 2008-NMSC-004, ¶ 6, 143 N.M. 258, 175 P.3d 926. As a general matter, we defer to the expertise of the administrative judge and "[w]e will not . . . substitute our judgment for that of the agency; although the evidence may support inconsistent findings, we will not disturb the agency's finding if supported by substantial evidence on the record as a whole." *Herman v. Miners' Hosp.*, 111 N.M. 550, 552, 807 P.2d 734, 736 (1991).

{8} If the facts are largely undisputed, as in this case, whether Workers' injuries are compensable under the Act is a question of law. *See Edens v.*

N.M. Health and Soc. Servs. Dep't, 89 N.M. 60, 62, 547 P.2d 65, 67 (1976); *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 14, 128 N.M. 601, 995 P.2d 1043. "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." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995). The court, however, "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." *Id.* Because our review of this case requires us to construe the Act, our primary goal is to give effect to legislative intent. *See El Paso Elec. Co. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-048, ¶ 7, 149 N.M. 174, 246 P.3d 443; *see also State v. Smith*, 2004-NMSC-032, ¶¶ 9-10, 136 N.M. 372, 98 P.3d 1022 (summarizing our canon of statutory construction).

III. ANALYSIS

{9} New Mexico's workers' compensation scheme, codified in the Act, is designed "to compensate workers for injury arising out of and in the course of employment." *Flores v. McKay Oil Corp.*, 2008-NMCA-123, ¶ 9, 144 N.M. 782, 192 P.3d 777. Claims under the Act are to be resolved with due consideration for the rights of both employees and employers. NMSA 1978, § 52-5-1 (1990). The Act provides the exclusive remedy for an employee to receive compensation for an injury "arising out of and in the course of his employment." Section 52-1-9(B). This includes

> accidental injuries to workers and death resulting from accidental injury as a result of their employment and while at work in any place where their employer's business requires their presence but shall not include injuries to any worker occurring while on his way to assume the duties of his employment or after leaving such duties.

Section 52-1-19. An injury arises out of and in the course of employment if the injury was sustained "during the commission of an activity that is reasonable and foreseeable both as to its nature and manner of commission." *Ramirez*, 2000-NMCA-011, ¶ 17; *see* § 52-1-28 (A)(1) & (2) (requiring proof that the injury was "arising out of and in the course of [the] employment" and "reasonably incident to [the] employment").

{10} The Act excludes injuries incurred by an employee "while on [the] way to assume the duties of . . . employment or after leaving such duties," *Ramirez*, 2000-NMCA-011, ¶ 7, commonly referred to as the "going and coming" rule. *See*, *e.g.*, *id.*; *Garcia v. Phil Garcia's Elec. Contractor, Inc.*, 99 N.M. 374, 376, 658 P.2d 449, 451 (Ct. App. 1982). "This rule arises from the recognition that, while admittedly the employment is the cause of the workman's journey between his home and the factory, it is generally taken for granted that workmen's compensation was not intended to protect him against all the perils of that journey." *Ramirez*, 2000-NMCA-011, ¶ 7 (internal quotation marks and citation omitted). That is, injuries incurred during a commute are not covered under workers' compensation law.

{11} Recognized exceptions to the going and coming rule are numerous; we limit our discussion, however, to the single exception at issue in this appeal, that of the traveling employee. This exception was adopted, and thoroughly explained, by the Court of Appeals in *Ramirez*. *Id.* ¶ 11. *Ramirez* defined traveling employees as "employees for whom travel is an integral part of their jobs, such as those who travel to different locations to perform their duties, as differentiated from employees who commute daily from home to a single workplace." *Id.* (internal quotation marks and citation omitted).

{12} Traveling employees are distinct from "mere commuters" whose injuries are excluded from compensation under the Act. *See Flores*, 2008-NMCA-123, ¶ 27. We imagine a commuter as one who chooses to live in Albuquerque or Tesuque but works in Santa Fe. The commuter has the option of living and working in the same city, but for any number of reasons chooses to travel some distance between home and work.

In *Flores*, the Court of Appeals concluded that the oil rig workers injured while traveling to the rig site were commuters, not traveling employees. The Court of Appeals found that the injuries did not arise out of the employment because the rig was in a fixed location, relatively close to the workers' residences, and because the employer did not provide any reimbursement or per diem specifically for transportation costs nor require any of the workers to maintain valid licenses or insurance. *Id.* ¶¶ 22-24, 27. Traveling employees, in contrast, are those who encounter special hazards on the road that could be avoided were travel not a necessary component of the employment. Anyone for whom travel is an integral, avoidable part of the job is a traveling employee. *See Chavez v. ABF Freight Systems, Inc.*, 2001-NMCA-039, ¶ 15, 130 N.M. 524, 27 P.3d 1011 (noting that the truck driver "was on the road, serving his employer's interests, and it was the fact that he was on the road that exposed him to hazards he would not have faced at home").

{13} The primary reason for the distinction between a commuter and a traveling employee is that travel undertaken by a traveling employee provides substantial benefit to both employee and employer. "[T]he activity giving rise to the injury must confer some benefit on the employer." *Ramirez*, 2000-NMCA-011, ¶ 16; *see also* Kurtis A. Kemper, *Application of the "Mutual Benefit" Doctrine to Workers' Compensation Cases*, 11 A.L.R.6th 351 Table (2006) (compiling cases). "The benefit to the employer need not be pecuniary, and may be as intangible as a well-fed and well-rested employee." *Ramirez*, 2000-NMCA-011, ¶ 17. The rationale behind the traveling employee rule is that an employee who is required to travel away from home is furthering the business of his employer as he eats, sleeps, and performs other acts necessary to his health and comfort during his travels. In addition, where the employment requires travel, the employee is consequently exposed to hazards she would otherwise have the option of avoiding. Thus the hazards of the route become the hazards of employment. But, it is not merely travel on a highway that creates a risk of compensable injury; if that were so, every ordinary commuter would be covered under the Act. Rather, it is the job's requirement of travel and the employer's authority and control in assigning its employees to different work sites that increase the normal risk and render compensable injuries suffered during such travel.

Id. ¶ 12 (internal quotation marks, citation, and alterations omitted).

{14} To determine whether an injury incurred while en route to the place of employment falls within the traveling employee exception to the going and coming rule, the Court of Appeals has utilized various factors. *Ramirez* set forth certain considerations relevant to determining whether an employee is a traveling employee for purposes of the Act. These considerations include "that an injury . . . takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the duties of employment or doing something incidental to it." *Id.* ¶ 16 (internal quotation marks and citation omitted). In *Flores*, the Court of Appeals quoted as persuasive authority certain factors used by the Colorado Supreme Court to determine if an injury falls within the traveling employee exception:

> (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose. Whether meeting one of the variables is sufficient, by itself, to create a special circumstance warranting recovery depends upon whether the evidence supporting that variable demonstrates a causal connection between the employment and the injury such that the travel to and from work arises out of and in the course of employment.

2008-NMCA-123, ¶ 14 (quoting *Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866, 868 (Colo. 1999)

(en banc)).[2] All of the considerations listed in *Ramirez* and *Flores* are sound guideposts for analyzing whether a worker was a traveling employee at the time of the injury, which, in turn will determine whether an injury arose out of and in the course of employment.

{15} A review of New Mexico caselaw reveals that our appellate courts have used two of the above-listed factors in particular to decide whether the traveling employee exception to the going and coming rule applies: the express or implied employment contract terms and the zone of special danger created by the required travel. In *Barrington v. Johnn Drilling Co.*, we stated that the going and coming rule did not apply "where hazards of the journey may fairly be regarded as hazards of the service to be performed and are dependent on the nature and the circumstances of the particular employment; also where the employer contracts to and does furnish transportation to and from work." 51 N.M. 172, 177, 181 P.2d 166, 169-70 (1947). The decedent in *Barrington* was a driller who transported his crew sixty-five miles round-trip daily between Hobbs and the oil rig, where no lodging was available, and was compensated at the rate of seven cents per mile; he died in a car accident between Hobbs and the rig site. 51 N.M. at 174-75, 181 P.2d at 167-68. The Court determined that the decedent was killed in the course of his employment because the employer had agreed to provide transportation by an "express agreement or . . . course of dealing," and paid for the cost of transportation. *Id.* at 177-78, 181 P.2d at 169-70 (emphasis omitted) (quoting *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 480 (1947)). The decedent's travel to the rig site "was not a case of employees traveling in the same city between home and work. Extended cross-country transportation was necessary. And it was transportation of a type that an employer might fairly be expected to furnish." *Id.* at 179, 181 P.2d at 171 (quoting *Cardillo*, 330 U.S. at 484); *see also Wilson v. Rowan Drilling Co.*, 55 N.M. 81, 87, 227 P.2d 365, 368-69 (1950) (concluding that an injury incurred by a driller while transporting his crew arose out of and in the course of employment because the driller was contractually required to ensure he had a fully staffed crew when his shift commenced and throughout the shift).

{16} *Ramirez*' analysis focused on the terms of the employment contract, although its definition of a traveling employee indicated the special hazards faced by oil rig workers were given due consideration. The three plaintiffs in *Ramirez* were oil field workers assigned to a job site in western Texas, approximately 90 miles from Hobbs. 2000-NMCA-011, ¶ 2. As a condition of their employment, they were provided with per diem for lodging near the job site and travel between the hotel and the site, and initially were provided with transportation between the site and Hobbs on their days off. *Id.* ¶ 3. Later, however, the employer provided an extra crew member in exchange for the employees providing their own transportation between the work site and Hobbs. *Id.* ¶ 4. The three plaintiffs were injured while traveling to Hobbs from the work site. *Id.* ¶ 5. *Ramirez* concluded that two workers were covered: the worker who took the trip to transport a colleague who was scheduled to begin his time off and to transport dirty uniforms for laundering at the request of the site supervisor, *id.* ¶ 18, and the worker who was scheduled to take time off and arranged to travel in his colleague's vehicle, *id.* ¶ 19. The third worker, however, took the trip to keep his colleague company and thus "conferred no benefit" upon the employer and did not qualify for benefits. *Id.* ¶ 20; *see also Martinez v. Fidel*, 61 N.M. 6, 9, 293 P.2d 654, 656 (1956) (concluding that slipping on ice while taking one of many possible routes between the office and the employer's parking lot was not an accident incurred in travel "peculiar to [plaintiff's] work"); *Brown v. Arapahoe Drilling Co.*, 70 N.M. 99, 101, 370 P.2d 816, 818 (1962) (finding that the fact that a driller participated in a car

[2] The Colorado Supreme Court articulated these factors in *Madden v. Mountain West Fabricators*, noting that contractual travel requirements could be express or implied, but that a key factor is "when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work." 977 P.2d 861, 864-65 (Colo. 1999) (en banc) (citing, *inter alia*, *Loffland Bros. v. Baca*, 651 P.2d 431, 432-33 (Colo. App.1982)).

pool with his crew, occasionally using company gas, was not enough to bring the deceased driller within the traveling employee exception); *Arias v. AAA Landscaping*, 115 N.M. 239, 240, 849 P.2d 382, 383 (Ct. App. 1993) (holding that the worker was not entitled to workers' compensation because, although the employer typically provided transportation for the employees and paid them during the travel time, on the date of the injury the worker had received permission to leave early, was not paid for the rest of the day, and traveled in a private vehicle).

{17} Other jurisdictions likewise review the circumstances of employment when determining whether an injury incurred en route to an oil rig falls within the traveling employee exception to the going and coming rule. *See Loffland Bros.*, 651 P.2d at 433 ("[W]here the employer required the employees to travel a considerable distance to their job, where there was a benefit to the employer in having a full crew on hand, and where they had made arrangements to pay the driller to collect the crew and bring them to the drill site so as to make it more probable that a full crew would be on hand, the accident did occur within the course of and arise out of the employment of these claimants."); *Messenger v. Sage Drilling Co.*, 680 P.2d 556, 560 (Kan. Ct. App. 1984) (holding that the trial court did not err in concluding that the employee's travel was of substantial benefit to the employer, and thus covered by workers' compensation, when the oil rig workers had no set place of employment, were required to travel long distances daily, and were compensated for their mileage); *Lassabe v. Simmons Drilling, Inc.*, 743 P.2d 568, 570-71 (Mont. 1987) (concluding that the employer's policy required the driller to transport his crew to the rig at the start of a shift, rendering the accident compensable by the workers' compensation scheme); *Christian v. Nicor Drilling Co.*, 653 P.2d 185, 186, 188 (Okla. 1982) (noting that, "[w]hen drilling sites are at locations remote from population centers, transportation is commonly provided by the employer for the mutual benefit of all parties," and concluding that workers traveling in their private vehicle because they missed the employer-provided transportation were covered by the traveling employee exception); *Texas Emp'rs Ins. Ass'n v. Byrd*, 540 S.W.2d 460, 462 (Tex. Civ. App. 1976) ("[H]olding . . . that the requirement of the employees being in the course and scope of their employment in the furtherance of the employer's affairs is satisfied by the undisputed facts as to the plan of getting them to and from the job location in a remote area and the benefits which such plan conferred upon the employer.").

{18} Some courts have focused their analysis specifically on the special hazards encountered by oil rig workers. The Ohio Supreme Court, in *Ruckman v. Cubby Drilling, Inc.*, applied a special hazard test to a workers' compensation claim by oil rig workers who worked at a fixed site[3] and concluded that their injuries incurred when traveling to the rig site were covered. 689 N.E.2d 917, 924 (Ohio 1998). *Ruckman* stated that travel to a rig site is a special hazard of oil rig workers' employment because: (1) the rig sites are temporary in nature and constantly changing; (2) workers are unable to "fix their commute in relation to these remote work sites"; and (3) workers are required to travel vast distances as conditions of their employment. *Id.* The court held that "because of the combination of all these factors, the riggers have established a risk quantitatively greater than risks common to the public," and accordingly were entitled to recovery under the workers' compensation scheme. *Id.*; *see also Falls v. Union Drilling Inc.*, 672 S.E.2d 204, 212-13 (W.Va. 2008) (concluding that a "special hazard or increased risk" existed in the scope of the employment when an oil rig worker worked an extra shift and then fell asleep during his lengthy trip home, thus precluding a negligence cause of action against the employer).

{19} While we believe all of the above-stated factors are important considerations to be

[3] *Ruckman*'s definition of "fixed situs" distinguishes it from a situation in which travel *is* the job, *e.g.*, traveling salesman, stating that a fixed-site employee "may be reassigned to a different work place monthly, weekly, or even daily." 689 N.E.2d at 920-21. This definition is consistent with that utilized by *Flores*, 2008-NMCA-123, ¶ 27 ("The rig itself was a fixed work site.").

undertaken by the WCJ and reviewing courts, we find the "zone of special danger" or "special hazard" factor to be most significant to resolving this case.[4] *See Barrington*, 51 N.M. at 177, 181 P.2d at 169-70. As discussed above, the traveling employee exception to the going and coming rule permits recovery under the Act for employees injured while traveling when that travel is an integral part of the employment. For an employee to be a traveling employee due to a special hazard of employment, two factors are required: (1) "but for the employment, the employee would not have been at the location where the injury occurred"; and (2) "the risk is distinctive in nature or quantitatively greater than risks common to the public." 82 Am. Jur. 2d *Workers' Compensation* § 284 (2003). This analysis, along with the requirement that the travel provide some benefit to the employer, helps determine whether travel is an integral part of employment, which, in turn, ensures that only those individuals whose injuries arose out of and in the course of employment receive compensation, maintaining the balanced approach to the Act intended by the Legislature. *See* §§ 52-1-19 and 52-5-1. It ensures that not every employee who is injured on the road receives benefits under the Act but that those who must be on the road as an "integral part of their jobs" are covered.

{20} We now return to the record in this appeal and conclude that the facts of this case indicate Workers fall squarely within the traveling employees exception because their travel provided a mutual benefit to the employer and employee and the conditions of employment placed the employees in a zone of special danger out of which the injury arose. The rig site to which Workers were traveling when the accident occurred was some sixty or seventy miles away from Workers' residences in Hobbs, and lodging was not available at the rig site. Workers did not have a stationary work site but were required to move to another site every seven to eight days, preventing them from fixing their commute in relation to the rig site. Permian benefitted from having a mobile work crew that resided in a central location and could travel to different sites weekly without having to change residences. Permian incurred a substantial benefit by having its employees provide their own transportation, while subsidizing only the driller's transportation, rather than providing daily transportation for all employees. Rodriguez, the driller, was compensated for his mileage and was expected to arrive at the drilling site with a full crew and for having a valid license and proof of insurance on file with Permian. His crew was not compensated for their travel, but this is not required if the circumstances indicate the travel was for the purpose of fulfilling their duties of employment and benefit of the travel was incurred by the employer.[5] We conclude that these special characteristics attendant to employment in the oil rig field satisfy the requirement that travel be mutually beneficial to employer and employee.

{21} The conditions of employment placed Workers in a zone of special danger from which arose their injuries. The long hours, long and varied travel time, and lack of choice in decreasing the commute gave rise to risks distinct from those of an average traveler on a public highway. Extensive travel is an integral part of the work of oil rig drillers and crew members, particularly for mobile rigs such as the ones on which Workers were employed, and as such distinguishes the travel to the rigs from a commute. The special hazards faced by Workers in their travel to and from the rig site were a requirement of their employment, and the accident giving rise to their claims would not have occurred but for the required travel. We conclude that the WCJ erred in its application of the traveling employee

[4] Although certain states appear to apply the special hazard or special danger as a separate exception to the going and coming rule, *see*, *e.g.*, *Parks v. Workers' Comp. Appeals Bd.*, 660 P.2d 382, 384-85 (Cal. 1983), we approve of the doctrine only as a tool to interpret the traveling employee exception.

[5] Permian argues that the stop at a local gas station en route to the rig site to purchase food and water when Workers were not directed to do so by their employer mandates affirmance of the WCJ's order denying compensation. Even if the stop at the gas station were an unauthorized deviation, a point on which we pass no opinion, *see*, *e.g.*, *Parr v. N. M. State Highway Dep't*, 54 N.M. 126, 131, 215 P.2d 602, 605-06 (1950), Workers were injured on the road, not at the gas station, so the stop does not affect our analysis.

exception of the going and coming rule to Workers, and that substantial evidence in the whole record supports the conclusion that Workers were injured in the course of their employment.[6]

IV. CONCLUSION

{22} For the foregoing reasons, we conclude that the Court of Appeals and WCJ erred in their conclusion that Workers' injuries are non-compensable under the Act. We reverse the Court of Appeals' memorandum opinion and remand to the WCJ for further proceedings consistent with this Opinion.

{23} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

[6] Because we conclude the injuries to Workers arose out of and in the course of their employment under the traveling employee exception, we do not address Rodriguez' separate claim that the mileage payment meant that he was fulfilling a duty of his employment at the time he was injured. We note simply that the mileage payment adds further support to the conclusion that Rodriguez' injury arose out of and in the course of his employment.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-008

Filing Date: March 29, 2012

Docket No. 31,241

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

STEVE TOLLARDO,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
Eugenio S. Mathis, District Judge

Jacqueline L. Cooper, Acting Chief Public Defender
William A. O'Connell, Assistant Appellate Defender
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for Appellant.

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for Appellee.

OPINION

SERNA, Justice.

{1} Defendant Steve Tollardo was convicted by a jury of first-degree murder (accessory), kidnapping (accessory), conspiracy to commit murder, and conspiracy to commit kidnapping. He was acquitted of aggravated arson (accessory) and conspiracy to commit aggravated arson. This Court has jurisdiction over Defendant's direct appeal pursuant to Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A)(1) NMRA.

{2} We address only one of the issues Defendant raises on appeal: whether the district court erred in advising the jury that two other individuals were convicted of conspiracy to commit second-degree murder in connection with the same homicide underlying the charges against Defendant. We conclude that the district court did err in mentioning the co-conspirators' convictions, and that the error was not harmless. Accordingly, we reverse Defendant's convictions and remand to the district court for a new trial. In reaching this holding, we reexamine our harmless error analysis and clarify that a review of the particular circumstances in each case, rather than mechanical application of a multi-factor test, must guide the inquiry into whether a given trial error requires reversal.

I. BACKGROUND

{3} This appeal arises out of the gruesome killing of Juan Alcantar (Victim) in Taos on September 6-7, 2003. The underlying facts of the crime are detailed in the Court's prior opinion in *State v. Gallegos*, 2011-NMSC-027, ¶¶ 5-14, 149 N.M. 704, 254 P.3d 655, which resolved an appeal filed by Lawrence Gallegos, one of Defendant's co-conspirators. Additional facts are set forth below to provide context for the resolution of the present appeal.

{4} Testimony at Defendant's trial established the following sequence of events. On the night of September 6, 2003, Defendant and Victim visited a sports bar in Taos, where they were denied entry. Ivan Romero, a friend of Defendant, exited the sports bar, approached Defendant and Victim in the bar's parking lot, and punched Victim. Defendant and Victim then left the parking lot together, and Ivan Romero left separately.

{5} Later that night, Defendant and Victim were "kicking back" at Richard Anaya's house with

Anaya himself, Gallegos, Luis Trujillo, and Racquel Gonzales, later joined by Ivan Lujan. Apparently without warning, Trujillo and Gallegos began kicking and hitting Victim. Defendant and Trujillo then drove to the house of Elias Romero, the father of Ivan Romero. Elias Romero was in the house along with his girlfriend Michelle Martinez, who would be the State's main witness, and his nephew Jaime Romero. Defendant, who appeared "hyped up," told the occupants of the house about the altercation between Ivan Romero and Victim and added that Victim was tied up at Anaya's house. Defendant explained that after the incident at the sports bar he had gone to see Ivan Romero, who disliked Victim and suggested that Elias Romero "would know what to do" with Victim. Defendant also told Elias Romero that Victim had a gun and had threatened to kill Ivan Romero. Jaime Romero mentioned that he had "some soldiers" who could "take care of it." Defendant replied that it was not his "viaje," meaning not his problem. Elias Romero gave a syringe containing a lethal dose of heroin to Martinez and instructed her to "inject [Victim] and make it look like he overdosed."

{6} Martinez then traveled with Defendant and Trujillo to Anaya's house. When they arrived, Victim was lying on the kitchen floor with his hands tied and a black eye. Gallegos was standing over Victim with a kitchen knife. Martinez sat on Victim's hand and injected him with the lethal dose of heroin. Victim cried out to Defendant for help and said, "Steve, please help me." Defendant told Victim that "he shouldn't have fucked with Diablo," a nickname for Ivan Romero.

{7} After Victim stopped moving and Martinez believed him to be dead, Defendant, Gallegos, and Trujillo moved Victim onto a tablecloth. The other individuals, Anaya, Lujan, and Gonzales, were elsewhere in the house during this time. When Victim was moved onto the tablecloth, he began moaning. Martinez was afraid that Victim might regain consciousness, so she instructed Defendant, Gallegos, and Trujillo to leave Victim alone. A short time later, Defendant and Gallegos carried Victim to Victim's car and placed him on the passenger's seat.

{8} Martinez testified that "the plan" laid out by Elias Romero was for her to drive Victim's car and leave Victim in a secluded place to make it appear as though Victim died of a drug overdose. Martinez drove Victim's car with Gallegos and Victim inside, attempting to follow Defendant and Trujillo who were driving in a separate car. Martinez was unable to follow Defendant and Trujillo, so she drove to a nearby church parking lot. Eventually, Defendant and Trujillo arrived at the parking lot, at which point Martinez and Gallegos got into the car with Defendant and Trujillo, leaving the unconscious Victim in his car.

{9} During the drive back to Elias Romero's house, Gallegos and Defendant discussed burning Victim's car to destroy Gallegos' fingerprints and other evidence that might show that Victim did not die of a drug overdose. At Elias Romero's house, Gallegos obtained lantern fuel and left with Defendant and Trujillo. Some time later, Defendant, Gallegos, and Trujillo returned once again to Elias Romero's house. Defendant told Martinez that he, Gallegos, and Trujillo used the lantern fuel and a cherry bomb to set fire to Victim's car with Victim inside.

{10} Seven individuals were prosecuted in connection with Victim's death: Defendant, Lawrence Gallegos, Luis Trujillo, Elias Romero, Michelle Martinez, Jaime Romero, and Ivan Romero. Gallegos was convicted by a jury of first-degree murder, aggravated arson, kidnapping, and three counts of conspiracy. *Id.* ¶ 2. Trujillo was convicted by a jury of first-degree murder, aggravated arson, conspiracy to commit first-degree murder, conspiracy to commit kidnapping, and conspiracy to commit aggravated arson. *Trujillo*, No. 31,500, slip op. at 2 (N.M. Sup. Ct. June 27, 2011). Elias Romero was acquitted of first-degree murder and conspiracy to commit first-degree murder. Martinez pleaded guilty to conspiracy to commit first-degree murder. Jaime Romero and Ivan Romero also resolved the charges against them through pleas, with the former apparently pleading guilty to conspiracy to commit second-degree murder, and

the latter pleading no contest to the same charge.[1] This Opinion will refer to these latter two pleas as "the Romeros' pleas" or "the Romeros' convictions."

{11} At Defendant's trial, defense counsel acknowledged during his opening statement that Defendant was present at the home of Richard Anaya on September 6-7, 2003, where Victim was forcibly held before being killed. Defense counsel asked the jury to "look closely" at Defendant's "real involvement" in Victim's death, explaining that "it's not enough that [Defendant] was there. . . . There has to be something more by the State to show that [Defendant] actually helped, encouraged or caused this crime to be committed." Amplifying this point, defense counsel stated that three other individuals who were also present at Anaya's home that night–Anaya himself, Racquel Gonzales, and Ivan Lujan–were not charged in connection with Victim's death. Defense counsel clarified that while Anaya was charged initially, the State dropped charges after further investigation.

{12} Later on in the trial, during direct examination of John Wentz, a detective with the Taos Police Department who investigated Victim's death, the prosecutor asked if Detective Wentz had personal knowledge as to whether Ivan Romero and Jaime Romero had been convicted in connection with Victim's death. Defense counsel objected that the question was irrelevant. Outside the presence of the jury, the State responded that the disposition of the charges against Ivan Romero and Jaime Romero was relevant because

> [w]ithout asking that question, we would be left with the jury wondering what happened, if Ivan and Jaime were ever convicted. . . .
>
> For the jury not to have any information as to the particular people who this detective's investigation revealed, their not having been charged and convicted would leave a hole in the evidence for the jury that we believe we could fill this way.

{13} The district court acknowledged that defense counsel's objection "[wa]s somewhat well taken in that this testimony [wa]s being offered to prove the truth of the matter asserted." Nevertheless, the district court decided that the fact that Ivan Romero and Jaime Romero were convicted through pleas in connection with Victim's death would be presented to the jury, and that the "best route" to doing so would be for the court to take judicial notice of the Romeros' pleas rather than allowing Detective Wentz to testify on that matter.

{14} After the State rested its case (the defense did not call any witnesses), and before closing arguments, the district court informed the jury that

> there are certain facts that you must accept as true. You can give them whatever weight you want to give it [sic]. But there was a question asked of Detective Wentz while he was testifying as to whether or not certain people have been convicted. I am going to instruct you, without requiring testimony or otherwise, that the court has taken notice that Jaime and Ivan Romero were convicted of conspiracy to commit second degree murder. Ivan Romero was convicted pursuant to a no contest plea. A no contest plea means that a defendant does not admit or deny guilt, but will accept a conviction.

You may, but are not required to accept this as a fact. And you may give this evidence whatever weight you believe it deserves.

The jury convicted Defendant on the charges listed above, including first-degree murder. This appeal followed.

[1] The record is not conclusive as to whether Jaime Romero and Ivan Romero entered pleas of guilty or no contest to conspiracy to commit second-degree murder, although the district court and counsel consistently referred to Ivan Romero as having pleaded no contest to the charge.

II. DISCUSSION

A. Admitting the Romeros' Convictions Violated Defendant's Sixth Amendment Right to Confrontation

{15} Defendant argues that introducing the Romeros' convictions to the jury violated his right, under the Sixth Amendment to the United States Constitution, to confront the witnesses against him. Claimed violations of the Sixth Amendment right to confrontation are reviewed de novo. *State v. Cabezuela*, 2011-NMSC-041, ¶ 49, 150 N.M. 654, 265 P.3d 705. Under the Sixth Amendment, every criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42 (2004). The Confrontation Clause "applies to witnesses against the accused–in other words, those who bear testimony. Testimony, in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (internal quotation marks and citation omitted).

{16} The United States Supreme Court, however, to date has avoided establishing a firm definition of what constitutes a "testimonial statement." *Id.* Instead, the Supreme Court has identified a "core class" of testimonial statements:

> [*E*]*x parte* in-court testimony or its functional equivalent–that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52 (internal quotation marks and citations omitted). These formulations "all share a common nucleus." *Id.* at 52. "[A]t a minimum," the Supreme Court explained, the term "testimonial" covers "testimony at a preliminary hearing, before a grand jury, or at a formal trial." *Id.* at 68. Considering the types of statements deemed to be testimonial by the United States Supreme Court, this Court recently noted that "[w]hat these examples have in common is that they lend themselves to an analysis that focuses largely on surrounding circumstances to separate testimonial from non-testimonial statements." *State v. Mendez*, 2010-NMSC-044, ¶ 29, 148 N.M. 761, 242 P.3d 328. We therefore look at the circumstances surrounding how pleas of guilty and no contest are entered in New Mexico to determine whether such pleas are testimonial or non-testimonial statements.

{17} Before a court accepts a defendant's plea of guilty or no contest, the court must first personally address the defendant in open court, "informing the defendant of and determining that the defendant understands" certain rights and consequences surrounding the plea offer. Rule 5-303(F) NMRA. Once the court has so informed the defendant and determined that the defendant understands those rights and consequences, the court must then determine that the defendant is entering a plea of guilty or no contest voluntarily. Rule 5-303(G); *see also State v. Garcia*, 1996-NMSC-013, 121 N.M. 544, 546-47, 915 P.2d 300, 302-03 (describing the procedures New Mexico courts follow to ensure that a defendant's guilty plea is knowing and voluntary).

{18} The procedures a court must follow in accepting a defendant's plea ensure that the defendant knows and understands the gravity of the statement he or she is about to make, and that the defendant is making the statement voluntarily, to a judge in open court, with a full understanding of his or her rights and the consequences of making such a statement. Under these circumstances, a plea is more akin to "a formal statement to government officers" than "a casual remark." *Crawford*, 541 U.S. at 51. It is reasonable to conclude that such a knowing and voluntary statement

"would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52. We hold, therefore, that a plea of guilty or no contest constitutes a "testimonial statement" under *Crawford*. *See United States v. McClain*, 377 F.3d 219, 221 (2d Cir. 2004) ("[I]t is clear that a plea allocution constitutes testimony, as it is formally given in court, under oath, and in response to questions by the court or the prosecutor."); *State v. Fields*, 168 P.3d 955, 965 (Haw. 2007) (listing "plea allocutions" as "undeniably testimonial under the sixth amendment"); *People v. Duff*, 872 N.E.2d 46, 50 (Ill. App. Ct. 2007) (concluding that a co-defendant's guilty plea is "testimonial" under *Crawford*); *see also United States v. Massino*, 319 F. Supp. 2d 295, 298 (E.D.N.Y. 2004); *Morten v. State*, 856 A.2d 595, 600 (D.C. 2004). As a testimonial statement, a co-defendant's plea of guilty or no contest is inadmissible against a defendant to prove the truth of the matter asserted unless the demands of the Confrontation Clause have been met, in other words that the defendant has an opportunity to cross-examine the co-defendant concerning the plea agreement. *See Crawford*, 541 U.S. at 53-54 (holding that a prior opportunity to cross-examine the witness satisfies the Confrontation Clause).

{19} In *Kirby v. United States*, the United States Supreme Court held that it was a violation of the Confrontation Clause to admit the convictions of co-defendants to prove a "vital fact involved in the charge against" a defendant. 174 U.S. 47, 61 (1899). This Court adopted that holding in *State v. Martino*, ruling that the guilty plea of a gambler could not be admitted against the defendant, who was standing trial for permitting the gambling to take place on his premises. 25 N.M. 47, 47, 176 P. 815, 815-16 (1918) (citing *Kirby*, 174 U.S. 47). We reiterated this principle in *State v. Jackson*, where we reversed a defendant's convictions and noted that a co-defendant's guilty plea was "particularly not admissible as to elements of the offense as against a person not a party to the proceeding." 47 N.M. 415, 415, 143 P.2d 875, 877 (1943). Similarly, in *State v. Urioste*, the Court of Appeals addressed a situation where a defendant was charged with conspiracy to commit murder. 94 N.M. 767, 768, 617 P.2d 156, 157 (Ct. App. 1980). The theory of the State's case was that the defendant conspired with another person to kill the victim. *Id.* The State asked the court to take judicial notice that the co-defendant pleaded guilty to conspiracy to commit murder, arguing that the conviction was relevant "to prove that this man was part of the conspiracy, admitted that he was, in fact, a member of that conspiracy, and that he did, in fact, conspire with [the defendant]." *Id.* at 768-69, 617 P.2d at 157-58 (internal quotation marks omitted). The Court of Appeals held that it was error to admit the co-defendant's convictions "[b]ecause it deprived [the defendant] of the right to confront witnesses against her." *Id.* at 769, 617 P.2d at 158; *see also Bisaccia v. Att'y Gen. of the State of N.J.*, 623 F.2d 307, 314 (3d Cir. 1980) (Seitz, J., concurring) (reasoning that admitting the guilty plea of another person violated the defendant's confrontation rights, not with respect to the person who tendered the plea but with respect to "the witnesses that the government would have presented in a trial of the third person").

{20} Defendant argues that the conviction of a co-defendant is entirely inadmissible at trial. A co-defendant's conviction, however, may be admissible when it is introduced to impeach that co-defendant if he or she testifies, rather than as substantive evidence of the defendant's guilt. *See State v. Gilbert*, 98 N.M. 77, 83, 644 P.2d 1066, 1072-73 (Ct. App. 1982) (distinguishing *Jackson* and *Urioste* and allowing the admission of the co-defendants' convictions because "the purpose of questioning [the co-defendants] regarding their guilty pleas clearly was not solely to prove existence of a conspiracy in which [the] defendant participated," but was also used to attack the credibility of those co-defendants); *see also United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983) ("[E]ither the government or the defense may elicit evidence of a guilty plea for the jury to consider in assessing the codefendant's credibility as a witness.").

{21} Indeed, here defense counsel elicited testimony from Martinez about her guilty plea in

connection with Victim's death in an effort to impeach her credibility. In contrast to Martinez, neither Jaime Romero nor Ivan Romero testified at Defendant's trial, and thus their credibility was never at issue. Their convictions, therefore, could not be admissible for impeachment purposes under the above rationale.

{22} We reject the State's claim that the otherwise inadmissible convictions were properly placed before the jury to remedy the assertedly "unfair" reference by defense counsel to the fact that other named individuals (Anaya, Gonzales, and Lujan) had not been charged in connection with Victim's death. When a defendant makes a claim that "opens the door" to inadmissible evidence, the doctrine of curative admissibility in some circumstances may permit the State to rebut that claim with otherwise inadmissible evidence. *See State v. Ruiz*, 2001-NMCA-097, ¶ 47, 131 N.M. 241, 34 P.3d 630 (citing *State v. Baca*, 120 N.M. 383, 390 n.2, 902 P.2d 65, 72 n.2 (1995)). The State, however, does not explain the supposed equivalence between the convictions of the Romeros (who *were not* present at Anaya's house where Victim was held against his will prior to being killed), and defense counsel's statement that no charges were filed against Anaya, Gonzales, and Lujan (who *were* present at Anaya's house).[2] Furthermore, the prosecutor sought testimony about and the district court took judicial notice of the Romeros' convictions, not just the charges filed against them. We need not decide here whether the doctrine of curative admissibility may be used to admit testimonial statements in violation of the Confrontation Clause, because curative admissibility is inapplicable to this case.

[2] The prosecutor obtained testimony that easily could have been used to dispel any concern that the jury would be confused about the role of different individuals in the events leading up to Victim's death. For instance, Detective Wentz testifiedthat in his interview with Martinez, she implicated some individuals as being involved in Victim's death and others as merely being present at Anaya's house. Martinez herself testified on direct examination that she never saw Anaya, Gonzales, or Lujan "do anything" to Victim. And Detective Wentz testified that another individual, Elias Romero, was charged in connection with Victim's death.

{23} The district court's effective admission of the Romeros' testimonial plea agreements, therefore, violated Defendant's Sixth Amendment right to confront the witnesses against him. *See, e.g.*, *State v. Lopez*, 2007-NMSC-037, ¶ 21, 142 N.M. 138, 164 P.3d 19 (finding a "per se" Sixth Amendment violation in admitting testimonial statements of co-defendants who did not testify at the defendant's trial where the defendant did not have an opportunity to cross-examine the co-defendants).

{24} Although not necessary for the resolution of this appeal, we note that the introduction of the Romeros' convictions also presents a serious due process problem. Every criminal defendant has a right "to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *United States v. Toner*, 173 F.2d 140, 142 (3d Cir. 1949); *see also Bisaccia*, 623 F.2d at 312-13 (relying in part on *Toner*, holding that admission of a co-conspirator's guilty plea violated the defendant's due process rights, and remanding to the district court for harmless error review). Just as it would be improper to allow the introduction of a co-conspirator's acquittal to show that the defendant himself should be acquitted, it would be similarly improper to admit evidence of a non-testifying co-conspirator's conviction to establish that the defendant himself is guilty. *See United States v. Sanders*, 95 F.3d 449, 454 (6th Cir. 1996) ("[U]nder a parallel treatment for guilty pleas and acquittals, [a co-conspirator's] acquittal may not be admitted" (citing *United States v. Fernandez-Roque*, 703 F.2d 808, 813 (5th Cir. 1983))). Here, even though the district court recognized the danger in allowing testimony about Ivan and Jaime Romero's involvement in Victim's murder, it nonetheless informed the jury about the Romeros' convictions. By instructing the jury that the convictions were facts that it "must accept as true," the district court created the risk that Defendant's guilt or innocence would in some part be determined by "what . . . happened with regard to a criminal prosecution against someone else." *Toner*, 173 F.2d at 142.

B. Applicable Standard for Harmless Error Review

{25} Improperly admitted evidence is not grounds for a new trial unless the error is determined to be harmful. *State v. Macias*, 2009-NMSC-028, ¶ 37, 146 N.M. 378, 210 P.3d 804; *State v. Barr*, 2009-NMSC-024, ¶ 47, 146 N.M. 301, 210 P.3d 198. A "very limited class of errors," not at issue here, is deemed structural and is not reviewed for harmless error but instead "require automatic reversal." *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 51, 136 N.M. 309, 98 P.3d 699. Where, as here, a constitutional error has been established, the State bears the burden of proving that the error is harmless. *See, e.g.*, *State v. Gutierrez*, 2007-NMSC-033, ¶ 18, 142 N.M. 1, 162 P.3d 156 ("The State has the burden of establishing that [a] constitutional error was harmless beyond a reasonable doubt." (internal quotation marks and citation omitted)).

{26} The concept of harmless error arose "as a reaction to an era marked by automatic reversal of cases for any procedural error." *Barr*, 2009-NMSC-024, ¶ 47 (citing 7 Wayne R. LaFave et al., *Criminal Procedure* § 27.6(a), at 99-100 (3d ed. 2007)). The harmless error rule originally developed outside the context of constitutional review, simply to "require appellate courts to affirm lower courts notwithstanding technical errors, defects, or exceptions which did not affect the substantial rights of the parties." *Barr*, 2009-NMSC-024, ¶ 48 (quoting 7 LaFave, *supra*, § 27.6(a) at 101 internal quotation marks and brackets omitted)).

{27} Although not always employing the term "harmless error," New Mexico courts historically evaluated claims of error by inquiring into how severely the defendant was affected thereby. In *State v. Coyle*, for example, this Court considered whether or not a trial error worked a "prejudice" against the defendant, concluding that the error was harmless because "[n]one of the evidence here in question could have influenced the jury." 39 N.M. 151, 155, 42 P.2d 770, 772 (1935); *see also State v. Pruett*, 22 N.M. 223, 235, 160 P. 362, 366 (1916) (A trial error was not harmless because improperly admitted testimony was "highly prejudicial" to the defendant.); *State v. Varos*, 69 N.M. 19, 23, 363 P.2d 629, 631 (1961) (improperly admitted testimony about a lie-detector test was reversible error because its "net effect . . . was to cast doubt upon the truth and veracity of the defendant in a manner not countenanced by the courts," thereby "taint[ing]" the jury's verdict.); *State v. Rowell*, 77 N.M. 124, 128, 419 P.2d 966, 969 (1966) (The prosecution's inquiry into the defendant's prior conviction "was fraught with such harm to defendant as to be irremediable." (internal quotation marks and citation omitted)).

{28} In the 1960s, "with the unprecedented expansion of federal constitutional protections into the criminal process, harmless error analysis was imported into the constitutional context." *Barr*, 2009-NMSC-024, ¶ 49 (citing 7 LaFave, *supra*, § 27.6(a) at 101). In *Fahy v. Connecticut*, the United States Supreme Court held that the erroneous admission of unconstitutionally obtained evidence required reversal, noting that the Supreme Court was "not concerned . . . with whether there was sufficient evidence on which the [defendant] could have been convicted" absent the erroneously admitted evidence, but rather whether there was a "reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. 85, 86-87 (1963). The Supreme Court refined this principle in *Chapman v. California*, holding that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt," 386 U.S. 18, 24 (1967), which tracked the prosecution's burden of proof for establishing guilt in the first instance. The Supreme Court made clear that constitutional errors meeting this standard would be found "so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 18, 22. Within a few years, appellate courts in New Mexico were applying this emerging federal constitutional standard to their

harmless error review.[3] *See, e.g.*, *State v. Jones*, 80 N.M. 753, 753-54, 461 P.2d 235, 235-36 (Ct. App. 1969) (State failed to show beyond a reasonable doubt that a prosecutor's comment to the jury about the defendants' failure to testify was harmless.); *State v. Spearman*, 84 N.M. 366, 369, 503 P.2d 649, 652 (Ct. App. 1972) (State did not meet its burden to show beyond a reasonable doubt that the trial court's failure to give a jury instruction was harmless.).

{29} In 1980, this Court departed significantly from the harmless error standard developed in *Fahy* and *Chapman*, and announced a new three-part test for reviewing courts to apply in their harmless error analysis:

> For an error by the trial court to be considered as harmless, there must be: (1) substantial evidence to support the conviction without reference to the improperly admitted evidence, (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear so minuscule that it could not have contributed to the conviction, and (3) no substantial conflicting evidence to discredit the State's testimony.

State v. Moore, 94 N.M. 503, 504, 612 P. 2d 1314, 1315 (1980).

{30} In *Moore*, the defendant was convicted of criminal sexual penetration, among other crimes. *Id.* He appealed his convictions to the Court of Appeals on the ground that the trial court erred in permitting the prosecution to admit testimony of the victim concerning her mental state following the rape. *Id.* "The Court of Appeals reversed on the basis of possible prejudice from the admission into evidence of improper testimony." *Id.* On review, this Court agreed with the Court of Appeals' conclusion that the victim's testimony was improperly admitted. *Id.* The Court went on, however, to apply the three-part test quoted above to conclude that the erroneous admission of the victim's testimony was harmless. *Id.*

{31} *Moore* announced the three-part test without analysis or persuasive precedent. The two cases cited in support, *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct. App. 1978), and *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975), neither adopted the three-part test nor provided a logical foundation for its use. Rather, *Day* held that an error is only harmless if the reviewing court concludes "that the evidence of guilt was so overwhelming that there is no reasonable probability that the misconduct contributed to the conviction." 91 N.M. at 573-74, 577 P.2d 878, 881-82.[4] *Self* cited two prior Court of Appeals opinions, neither of which anticipates the three-part test created by *Moore*. One of those opinions, *State v. Thurman*, explained that an error would be treated as harmless if there was "no reasonable possibility that evidence improperly admitted, and then stricken by the trial court, contributed to the conviction." 84 N.M. 5, 9, 498 P.2d 697, 701 (Ct. App. 1972) (citing *Schneble v. Florida*, 405 U.S. 427 (1972)). The other opinion*, State v. Lopez,* determined that a trial error was harmless because "'[t]he evidence, exclusive of the improperly admitted exhibits, points so overwhelmingly[5] to the guilt of defendant of the crime of which he was convicted, that there is no reasonable possibility that the admission into evidence of these improperly received ex-

[3] Our Rules of Criminal Procedure also explicitly recognize the concept of harmless error and instruct courts that trial errors are not grounds for "granting a new trial or for setting aside a verdict, for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take any such action appears to the court inconsistent with substantial justice." Rule 5-113(A) NMRA; Rule 6-704(A) NMRA; Rule 7-704(A) NMRA; Rule 8-704(A) NMRA.

[4] This holding echoed the standard set forth in *Fahy*, 375 U.S. at 86-87, although modified from "reasonable possibility" to "reasonable probability" for reasons the Court of Appeals did not articulate, but perhaps owing to the non-constitutional nature of the error at issue. *See Barr*, 2009-NMSC-024, ¶ 53.

[5] The United States Supreme Court's decision in *Schneble* is the source of the principle that "overwhelming" evidence of guilt may help establish harmless error, although *Schneble* retained *Chapman's* requirement that harmlessness be "clear beyond a reasonable doubt." 405 U.S. at 430. *Chapman* itself expressed hesitation at the "emphasis, and perhaps overemphasis" of "overwhelming evidence" in harmless error review. 386 U.S. at 23.

hibits contributed to his conviction.'" 80 N.M. 599, 458 P.2d 851 (Ct. App. 1969) (quoting *State v. Gray*, 79 N.M. 424, 428, 444 P.2d 609, 613 (Ct. App. 1968)), *abrogated on other grounds by State v. Holly*, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844.

{32} These opinions from the dozen or so years preceding *Moore* all provide slightly different phrasings of the same concept–that a trial error should be held harmless if there is "no reasonable possibility" (if the claimed error is constitutional in nature) or "no reasonable probability" (if the claimed error is evidentiary or procedural but does not implicate the defendant's constitutional rights) that the error contributed to the defendant's conviction, which might be determined in part by the overall strength of the evidence that the State marshaled against the defendant.

{33} No opinion of this Court prior to *Moore*, including the cases *Moore* relied upon that are discussed above, employed a three-part test for evaluating harmless error, and none appears to have made any reference to the third *Moore* factor–the presence or absence of "substantial conflicting evidence" from the defendant. 94 N.M. at 505, 612 P.2d at 1316. *Moore*, then, shifted the harmless error inquiry away from an assessment of an error's impact on the verdict, and toward a more mechanical approach that requires appellate courts to weigh an error against properly admitted evidence in favor of conviction as well as any contrary evidence discrediting the prosecution's case. *Id.*

{34} In addition to lacking a reasoned foundation in New Mexico law for its existence, the *Moore* test has never been fully adopted by this Court, casting further doubt on its legitimacy and utility. While numerous cases have relied on *Moore*, many other opinions have avoided discussion of the three-part test altogether and instead followed the well-established principle of federal harmless error review that whether a given error requires reversal depends upon the "reasonable possibility" or "reasonable probability" that the error contributed to the conviction. *See, e.g.*, *State v. Gonzales*, 2000-NMSC-028, ¶ 42, 129 N.M. 556, 11 P.3d 131 (applying the "reasonable probability" standard to a non-constitutional error); *Alvarez-Lopez*, 2004-NMSC-030, ¶ 25 (applying the "reasonable possibility" standard to a constitutional error); *State v. Zamarripa*, 2009-NMSC-001, ¶ 52, 145 N.M. 402, 199 P.3d 846 (applying both the "reasonable possibility" standard and the requirement that the error be proven harmless beyond a "reasonable doubt"). Other opinions, without specifically invoking the "reasonable possibility" or "reasonable probability" standard, have remained focused on the likelihood that the error contributed to the underlying verdict. *See, e.g.*, *State v. Paiz*, 2011-NMSC-008, ¶ 19, 149 N.M. 412, 249 P.3d 1235 (analyzing whether error in misjoinder resulted in "prejudice" through a "substantial and injurious effect or influence" on the verdict (internal quotation marks and citation omitted)); *Fuson v. State*, 105 N.M. 632, 634, 735 P.2d 1138, 1140 (1987) (determining that impairment of a petitioner's right to a peremptory challenge "prejudice[d]" the petitioner, requiring a new trial).

{35} The present appeal is not this Court's first effort to address *Moore's* divergence from established standards of harmless error review. In *Barr*, we examined how New Mexico courts had up to that point applied the *Moore* test, noting that the test had in some cases replaced the "reasonable possibility" (or "reasonable probability") standard in determining whether an error is harmless. *Barr*, 2009-NMSC-024, ¶ 52; *see also State v. Williams*, 117 N.M. 551, 562, 874 P.2d 12, 23 (1994) (Montgomery, C.J., specially concurring) (suggesting that *Moore* provides a measure of "harmless error" that is different from the "reasonable possibility" standard).

{36} In *Barr*, the defendant was tried for the murder of a former roommate. Another former roommate testified on behalf of the State, and defense counsel attempted to impeach that witness by citing inconsistencies between his in-court testimony and a videotaped statement that he had made to police. 2009-NMSC-024, ¶ 17. The State then introduced, and the district court admitted, the videotaped statement, in which the witness detailed the defendant's killing of the

victim and reflected on the defendant's bad character. *Id.* ¶¶ 13-16. After being convicted, the defendant appealed on the basis that the admission of the videotaped statement was improper. *Id.* ¶ 22. The State responded that even if the admission of the statement was error, that error was harmless. *Id.* ¶ 46. We agreed that the error was harmless, and went on to clarify the standard that appellate courts must apply in making such determinations. We "re-fortif[ied] the boundary between non-constitutional and constitutional error for the purpose of harmless error analysis," *id.* ¶ 53, explaining that "it is appropriate to review non-constitutional error with a lower standard than that reserved for our most closely held rights," *id.* ¶ 51, and therefore reviewing courts "should only conclude that [a constitutional] error is harmless when there is no reasonable *possibility* it affected the verdict." *Id.* ¶ 53. By comparison, a non-constitutional error is harmless "when there is no reasonable *probability* the error affected the verdict." *Id.* ¶ 53. Recognizing the federal constitutional underpinnings for such a distinction, *id.* ¶¶ 49-51, we observed that "the reasonable possibility standard continues to resemble the reasonable doubt standard while the reasonable probability standard requires a greater degree of likelihood that a particular error affected a verdict." *Id.* ¶ 54. We reaffirm that holding here.

{37} *Barr* then discussed the "long-standing three-part test" from *Moore*, which we noted "makes no mention of the 'reasonable possibility' standard." *Barr*, 2009-NMSC-024, ¶ 52. We proceeded to sanction the three *Moore* factors, not as a mandatory test as they had been utilized to date, but rather as a "useful framework" which would "provide . . . a reliable basis for determining whether an error is harmless." *Id*. ¶ 55. Since *Barr*, however, courts have continued to employ the *Moore* factors as an inflexible test when assessing the harmfulness of erroneously admitted evidence. *See, e.g.*, *State v. Wilson*, 2011-NMSC-001, ¶¶ 40-42, 149 N.M. 273, 248 P.3d 315; *State v. Tom*, 2010-NMCA-062, ¶ 20, 148 N.M. 348, 236 P.3d 660. Because this Court has a responsibility to "correct a judicial misinterpretation of our caselaw that may otherwise remain on the books as an erroneous precedent," *Rivera v. Am. Gen. Fin. Servs., Inc*., 2011-NMSC-033, ¶ 41, 150 N.M. 398, 259 P.3d 803, we overrule *Moore* to the extent that it mandated the three-part test as the proper analytical framework for reviewing harmless error. For the reasons discussed below, we also overrule that portion of *Barr* that recognized the legitimacy of *Moore*, even when its factors are used more flexibly, as well as all other cases to the extent that they applied *Moore* to resolve a claim of harmless error.[6]

{38} In sum, we no longer recognize the *Moore* three-part test or any of the factors thereof as accurate statements of law. To explain our renunciation of *Moore*, we examine the factors

[6] Our review has located the following cases where our appellate courts analyzed harmless error under the *Moore* test. Any other opinions that similarly applied the *Moore* test are also overruled to the extent they did the same: *State v. Wilson*, 2011-NMSC-001, ¶¶ 39-42, 149 N.M. 273, 248 P.3d 315; *State v. Branch*, 2010-NMSC-042, ¶¶ 15-17, 148 N.M. 601, 241 P.3d 602; *State v. Aragon*, 2010-NMSC-008, ¶¶ 35-36, 147 N.M. 474, 225 P.3d 1280; *State v. Marquez*, 2009-NMSC-055, ¶¶ 21-25, 147 N.M. 386, 223 P.3d 931; *State v. Macias*, 2009-NMSC-028, ¶¶ 39-44, 146 N.M. 378, 210 P.3d 804; *State v. McClaugherty*, 2003-NMSC-006, ¶¶ 32-34, 133 N.M. 459, 64 P.3d 486; *State v. Gonzales*, 2000-NMSC-028, ¶ 42, 129 N.M. 556, 11 P.3d 131; *State v. Duffy*, 1998-NMSC-014, ¶¶ 38-41, 126 N.M. 132, 967 P.2d 807; *State v. Ross*, 1996-NMSC-031, 122 N.M. 15, 27, 919 P.2d 1080, 1092; *State v. Williams*, 117 N.M. 551, 559, 874 P.2d 12, 20 (1994); *State v. Compton*, 104 N.M. 683, 687, 726 P.2d 837, 841 (1986); *Sanchez v. State*, 103 N.M. 25, 27-28, 702 P.2d 345, 347-48 (1985); *State v. Skinner*, 2011-NMCA-070, ¶¶ 22-26, 150 N.M. 26, 256 P.3d 969; *State v. Tom*, 2010-NMCA-062, ¶¶ 17-20, 148 N.M. 348, 236 P.3d 660; *State v. McClennen*, 2008-NMCA-130, ¶¶ 13-15, 144 N.M. 878, 192 P.3d 1255; *State v. Morales*, 2002-NMCA-052, ¶¶ 24-25, 132 N.M. 146, 45 P.3d 406; *State v. Barragan*, 2001-NMCA-086, ¶¶ 19-20, 131 N.M. 281, 34 P.3d 1157; *State v. Glasgow*, 2000-NMCA-076, ¶ 20, 129 N.M. 480, 10 P.3d 159; *State v. Gutierrez*,1998-NMCA-172, ¶¶ 11, 13-14, 126 N.M. 366, 969 P.2d 970; *State v. Elinski*, 1997-NMCA-117, ¶¶ 25-27, 124 N.M. 261, 948 P.2d 1209; *State v. Tave*, 1996-NMCA-056, ¶¶ 17-18, 122 N.M. 29, 919 P.2d 1094; *State v. Aragon*, 116 N.M. 291, 295-96, 861 P.2d 972, 976-77 (Ct. App. 1993); *State v. Sansom*, 112 N.M. 679, 683, 818 P.2d 880, 884 (Ct. App. 1991); *State v. Pacheco*, 110 N.M. 599, 603, 798 P.2d 200, 204 (Ct. App. 1990); *State v. Lara*, 109 N.M. 294, 298, 784 P.2d 1037, 1041 (Ct. App. 1989); *State v. Roybal*, 107 N.M. 309, 312-13, 756 P.2d 1204, 1207-08 (Ct. App. 1988); *State v. Gonzales*, 105 N.M. 238, 242, 731 P.2d 381, 385 (Ct. App. 1986); *State v. Dobbs*, 100 N.M. 60, 68, 665 P.2d 1151, 1159 (Ct. App. 1983).

individually, beginning with the first factor: whether there is "substantial evidence to support the conviction without reference to the improperly admitted evidence." *Barr*, 2009-NMSC-024, ¶ 56. This factor, through its use of the phrase "substantial evidence," runs the risk of allowing the more deferential "sufficiency of the evidence" standard of appellate review to seep into a court's harmless error analysis. *See, e.g.*, *State v. Aragon*, 2010-NMSC-008, ¶ 36, 147 N.M. 474, 225 P.3d 1280 (focusing on the sufficiency of the evidence that supports a conviction to conclude an error was harmless); *Tom*, 2010-NMCA-062, ¶ 19 (relying on the "sufficiency of the evidence" standard when applying the first *Moore* factor).

{39} Where a defendant appeals from a conviction on the ground that it was not supported by sufficient evidence, the appellate court must determine "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Alvarez-Lopez*, 2004-NMSC-030, ¶ 30 (internal quotation marks and citation omitted). In conducting such a review, the court "indulg[es] all reasonable inferences and resolv[es] all conflicts in the evidence in favor of the verdict." *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). By contrast, "[t]he jury verdict should not automatically be afforded deference when a constitutional error has infected the trial," and so in harmless error review the verdict is entitled to deference "*only* when the State has established beyond a reasonable doubt that the jury verdict was not tainted by the constitutional error." *Alvarez-Lopez*, 2004-NMSC-030, ¶ 30.

{40} The second *Moore* factor directs courts to consider whether the prosecution presented "such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear so minuscule that it could not have contributed to the conviction." *Barr*, 2009-NMSC-024, ¶ 52 (quoting *Moore*, 94 N.M. at 504, 612 P.2d at 1315). The first two factors are closely linked and invite the same type of potential misuse: that an error may be deemed harmless simply because of the sheer volume of other evidence supporting conviction. There are "some circumstances where . . . the evidence of a defendant's guilt is sufficient even in the absence of the trial court's error," that still require the reviewing court "to reverse the conviction if the jury's verdict appears to have been tainted by error." *Macias*, 2009-NMSC-028, ¶ 38; *see also State v. Johnson*, 2004-NMSC-029, ¶ 11, 136 N.M. 348, 98 P.3d 998 ("[C]onstitutional error must not be deemed harmless solely based on overwhelming evidence of the defendant's guilt."). There are several reasons why it is improper for "overwhelming evidence" of a defendant's guilt to serve as the main determinant of whether an error was harmless. First, such an approach moves the inquiry away from its appropriate "central focus," which is "whether there is a reasonable possibility" or probability, depending on whether the error offends the defendant's constitutional rights, that "the erroneous evidence might have affected the jury's verdict." *Id.* In addition, excessive reliance on "overwhelming evidence" of guilt also ignores the principle that "even if conviction *appears* inevitable, there is a point at which an error becomes too great to condone as a matter of constitutional integrity and prosecutorial deterrence." *Alvarez-Lopez*, 2004-NMSC-030, ¶ 31 (internal quotation marks and citation omitted); *see also Moore*, 94 N.M. at 505, 612 P.2d at 1316 (Sosa, C.J., dissenting) ("Though evidence of guilt was great in this case, I believe that prosecutors should nonetheless conform to legal standards in obtaining convictions. . . . Convictions should not be obtained at any cost, but should be obtained in accordance with the rules of evidence."). In addition, when an appellate court gives too much consideration to "overwhelming evidence," it risks simply weighing the evidence in favor of and against guilt, which "would usurp the role of the jury." *State v. Stephen F.*, 2008-NMSC-037, ¶ 41, 144 N.M. 360, 188 P.3d 84; *see also Macias*, 2009-NMSC-028, ¶ 38 ("[I]t is not the role of the appellate court to re-weigh the evidence to decide a defendant's guilt or innocence.").

{41} The third *Moore* factor queries whether there is "substantial conflicting evidence to discredit the State's testimony." *Barr*, 2009-NMSC-024, ¶ 56. In addition to the same potential for confusion posed by the term "substantial" evidence, discussed above, the third factor runs the risk of inappropriately shifting the burden of proof from the state to the defendant. *See, e.g.*, *State v. Ross*, 122 N.M. 15, 27, 919 P.2d 1080, 1092 (1996) (holding error to be harmless in part because defendant "failed to offer substantial conflicting evidence to discredit the State's testimony" (internal quotation marks and citation omitted)); *State v. McClennen*, 2008-NMCA-130, ¶ 15, 144 N.M. 878, 192 P.3d 1255 (holding error to be harmless in part because the defendant did not testify and "[t]hus, there is not substantial evidence in the record to discredit the State's evidence"). The burden of proof in the underlying criminal proceeding will always rest with the State. *See* UJI 14-5060 NMRA ("The burden is always on the state to prove guilt beyond a reasonable doubt."); *see also Moeller v. Weber*, 689 N.W.2d 1, 16 (S.D. 2004) (the defense "cannot be required to present any evidence whatever."). Similarly, once a constitutional error has been established it is the State's burden to demonstrate that the error is harmless. *See Gutierrez*, 2007-NMSC-033, ¶ 18. Because the third *Moore* factor appears to reduce that burden, it cannot be a proper component of our harmless error analysis. 94 N.M. at 504, 612 P.2d at 1315.

{42} Considering the *Moore* test as a whole, perhaps most significant and most problematic is what it omits: the central inquiry of whether an error was likely to have affected the jury's verdict. By limiting their harmless error review to the weight or volume of evidence in favor of guilt, courts avoid inquiring into the nature and likely impact of the very error at issue. *See United States v. Coughlin*, __ F. Supp. 2d __, 2011 WL 5301602 at *5 (D.D.C. 2011) ("The inquiry is 'whether the error itself had substantial influence." (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946))). In sum, even if applied more flexibly as a "useful framework" rather than as a rigid test, *Barr*, 2009-NMSC-024, ¶ 55, the *Moore* factors misstate the law and distort the proper focus of harmless error review from "whether the verdict was impacted by the error" to "whether, in spite of the error, the right result was reached." *Barr*, 2009-NMSC-024, ¶ 57.

{43} We now turn to what relevant considerations reviewing courts may use in place of the *Moore* factors when assessing the reasonable possibility (or reasonable probability) that impermissible evidence contributed to a defendant's conviction. To be sure, there are "no scientific answers to the ultimate question of whether the trier of fact was influenced by an error," as the reviewing court cannot conclusively determine "what went on in the mind of another or of twelve others." Roger J. Traynor, *The Riddle of Harmless Error* 23 (Ohio State Univ. Press 1970). But in reaching a judgment as to the likely effect of the error, courts should evaluate all of the circumstances surrounding the error. This requires an examination of the error itself, which depending upon the facts of the particular case could include an examination of the source of the error and the emphasis placed upon the error. Of course, evidence of a defendant's guilt separate from the error may often be relevant, even necessary, for a court to consider, since it will provide context for understanding how the error arose and what role it may have played in the trial proceedings; but such evidence, as discussed above, can never be the singular focus of the harmless error analysis as it was under *Moore*. As we have previously explained, when reviewing an error's role in the trial, courts may, depending upon the circumstances of the cases before them, examine "the importance of the [erroneously admitted evidence] in the prosecution's case," as well as "whether the [error] was cumulative" or instead introduced new facts. *Johnson*, 2004-NMSC-029, ¶ 11 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). These considerations, we are careful to note, are not a substitute "test" provided in place of *Moore*; for instance, "improperly admitted evidence that is cumulative[7] is not

[7] We explained in *Johnson* that "[c]orroborative evidence tends to corroborate or to confirm, whereas cumulative evidence merely augments or tends to establish a point *already*

ipso facto harmless beyond a reasonable doubt." *Johnson*, 2004-NMSC-029, ¶ 37.

{44} Reviewing courts must keep in mind that harmless error review necessarily requires a case-by-case analysis. *See Sullivan v. Louisiana*, 508 U.S.275, 279 (1993) ("The inquiry . . . [is] whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."); *see also Macias*, 2009-NMSC-028, ¶ 37 ("[H]armless error analysis requires an appellate court to review the effect of an error in the unique context of the specific evidence presented at a given trial."). When assessing two cases that are factually analogous, with similar errors, the reviewing court thus may find the impact of the error harmful in one case and harmless in the other. In addition, because an error may be prejudicial with respect to one conviction, but harmless with respect to another, courts must separately assess the effect the error may have had on each of the defendant's convictions. *See Johnson*, 2004-NMSC-029, ¶ 31.

C. Admission of the Romeros' Convictions Was Not Harmless

{45} Having clarified how courts are to analyze harmless error, we return to a consideration of whether the erroneous admission of the Romeros' convictions at Defendant's trial was harmless. As we have discussed, the district court effectively admitted evidence of the convictions in violation of Defendant's right of confrontation under the Sixth Amendment. The error, therefore, was a constitutional error, which is harmless only if we conclude that there is no reasonable possibility the error contributed to the jury's decision to convict Defendant. *See Barr*, 2009-NMSC-024, ¶ 53; *see also Zamarripa*, 2009-NMSC-001, ¶ 52 ("When a statement is admitted in violation of the Confrontation Clause, we next inquire into whether the error was harmless," and "[t]o preclude reversal, the error must be harmless beyond a reasonable doubt.").

proved by other evidence." 2004-NMSC-029, ¶ 39 (internal quotation marks and citation omitted).

{46} Here, the State fails to meet its burden to show that there was no reasonable possibility that admission of the Romeros' convictions affected the jury's verdict. First, we note that the State introduced considerable evidence in support of Defendant's conviction for first-degree murder, kidnapping, and the conspiracy charges, although most of the evidence directly linking Defendant to those crimes came from a single witness, Michelle Martinez. According to her testimony, Defendant conferred with Ivan Romero about "what to do" with Victim, and later initiated a similar discussion with Elias Romero, Jaime Romero, and Martinez herself, after telling the others that he had Victim tied up at Richard Anaya's house. During that later discussion at Elias Romero's house, Defendant warned the others against letting Victim go free. Defendant traveled with Martinez and Luis Trujillo to Anaya's house where Victim was being held, and once there assisted Trujillo and Lawrence Gallegos in moving Victim after he was injected with heroin. Defendant helped carry the then-unconscious Victim to his own car, drove to the church parking lot where Victim's car would be left, discussed with Gallegos the plan to burn Victim's car with Victim inside, and proceeded to enact that plan by using a cherry bomb to set Victim's car ablaze.

{47} Martinez's testimony strongly implicated Defendant in the kidnapping and murder of Victim, as well as in the conspiracy to commit those acts. Martinez, however, was herself an active co-conspirator in the crimes committed against Victim, and therefore was subject to extensive cross-examination on her credibility and motives. In response to defense counsel's questioning, Martinez testified that she initially told Detective Wentz that Defendant had injected Victim with heroin, later changed her story to indicate that Elias Romero had done so, and only after four interviews with investigators admitted her own involvement in Victim's killing. Martinez admitted lying about other material facts, including the whereabouts of the syringe used to inject Victim with heroin. Defense counsel further attempted to impeach Martinez's credibility by asking her if she "cut a deal with the State"

in exchange for her testimony, and by getting Martinez to acknowledge that she faced a sentence of 108 years for various charges, including the murder of Victim, but as a result of her plea agreement was sentenced to a maximum of only fifteen years. In addition, defense counsel elicited testimony from Martinez that she faced additional charges for unrelated criminal acts, including forgery, larceny and credit card fraud.

{48} In contrast to Martinez, whom defense counsel characterized in his closing argument as telling "lie, after lie, after lie," as being a longtime resident of the "drug world," and as being driven by a desire to reduce her own sentence by cooperating with the prosecution, Jaime Romero and Ivan Romero could not be questioned about their credibility or motives because they did not testify. Martinez's plea deal, criminal history, and prior false statements to law enforcement all could have provided the jury with legitimate reasons to doubt her testimony. *See State v. Martinez*, 1996-NMCA-109, ¶ 17, 122 N.M. 476, 927 P.2d 31 ("A jury, when judging a witness's credibility, should be able to take into consideration whether a witness hoped to curry favor by cooperating with the prosecution." (emphasis omitted)). In this light, the Romeros' convictions provided a potentially important and unimpeachable piece of evidence that a criminal conspiracy to kill Victim had occurred, and that such conspiracy included two men who were linked with Defendant through the testimony of Martinez and several other witnesses.

{49} Although the error here–the district court's instruction to the jurors that they "must accept as true" the fact that "Jaime and Ivan Romero had been convicted of conspiracy to commit second-degree murder"–was only uttered once, it cannot be characterized as a stray remark. Trial testimony associated Ivan Romero with Defendant in myriad ways. He sold drugs to Victim, a close friend of Defendant; was reported to have disliked Victim; approached Defendant and Victim in the sports bar parking lot and attacked Victim in the evening before Victim's death; and spoke with Defendant about "what to do" with Victim. In addition, on the night of Victim's death several phone calls were made between Ivan Romero's cell phone and Anaya's home phone, a fact that the prosecutor referenced in his closing argument. Ivan Romero also was explicitly identified as having been "involved" in Victim's death. Perhaps most vividly, Defendant invoked Ivan Romero as the reason why Victim was being injected with an apparently lethal dose of heroin when Defendant told Victim that "he shouldn't have fucked with Diablo," a nickname for Ivan Romero.

{50} Much less trial evidence connected Jaime Romero to Defendant, although Martinez testified that Jaime Romero told Defendant and others that his (Jaime Romero's) "soldiers" could "take care of" Victim, and in his closing argument the prosecutor suggested that Defendant had entered into a conspiracy with Jaime Romero. The fact that the Romeros were not only charged but convicted of conspiracy to murder Victim strengthened the State's case that a conspiracy existed and that Defendant was a part of that conspiracy. *See Urioste*, 94 N.M. at 768-69, 617 P.2d at 157-58 (quoting the State's argument that a co-defendant's conviction for conspiracy was relevant to prove that a conspiracy existed and that the defendant was part of the conspiracy).

{51} Here, the Romeros' convictions were brought to the jury's attention by the district court rather than by the prosecutor or witness testimony. No curative instruction could be given, and the improperly admitted evidence bore the imprimatur of judicial authority. *See generally State v. Caputo*, 94 N.M. 190, 192, 608 P.2d 166, 168 (1980) ("[B]ecause of the judge's position and the respect and confidence reposed in him (or her) and in his learning and assumed impartiality, a jury is likely to attach undue weight to any participation by the judge in the conduct of the trial."). Although the district court's instruction to the jury was somewhat contradictory and reflected its attempt to reach a compromise between the State's and Defendant's positions regarding admission of the convictions, the district court invited the jury to utilize the convictions to bolster the State's case if they chose to do so.

{52} In addition, the district court's statement about the Romeros' convictions was the last piece of information that the jury received before formal instructions and closing arguments, magnifying the risk that the error would factor into the jury's assessment of Defendant's guilt. *See generally State v. Sosa*, 2009-NMSC-056, ¶ 24, 147 N.M. 351, 223 P.3d 348 (discussing questionable comments made during closing arguments and warning of the increased potential for prejudice due to the proximity to the end of trial); *Caputo*, 94 N.M. at 192, 608 P.2d at 168 ("[T]he information elicited [by the trial court] was the last evidence of the trial heard by the jury and its significance in all probability was pondered during the jury's deliberations.").

{53} Finally, although Jaime Romero and Ivan Romero were convicted only of conspiracy to commit murder, while Defendant was convicted of the additional crimes of first-degree murder and kidnapping, there is at least a reasonable possibility that admission of the Romeros' convictions affected the verdict in its entirety. The dissent is correct that first-degree murder and kidnapping are separate offenses from conspiracy–and therefore require proof of different elements for conviction. The evidence concerning the conspiracy and the substantive crimes, however, was significantly intertwined. The jury heard testimony about the altercation between Ivan Romero and Victim that apparently set the entire criminal venture in motion, Defendant's statement implying that Victim would die because he had crossed Ivan Romero, and suggestions that both Ivan Romero and Jaime Romero made to Defendant about "what to do" with Victim. Any possible ambiguity about what Ivan Romero or Jaime Romero may have meant when they discussed "what to do" with Victim would have been dispelled by Martinez's testimony that Elias Romero then told her "to go and do it," which as she elaborated meant to "inject [Victim] and make it look like he overdosed" in order to kill him. The jury also heard testimony that while Victim was tied up at Anaya's house, someone (whom the prosecutor implied, and the jury certainly could have inferred, was Defendant) placed multiple calls from Anaya's home phone to Ivan Romero's cell phone. According to Martinez, after setting Victim's car on fire Defendant went to Ivan Romero's home and watched smoke rising from the burning car. Defendant's main concern, after watching Victim's car burn, was that he had "disrespected Ivan by taking [Victim] to the bar in the first place."

{54} All of the substantive crimes charged against Defendant were based on an accessory theory of liability. A defendant may be convicted of a crime as an accessory if that defendant "procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted." NMSA 1978, § 30-1-13 (1972); *see also State v. Carrasco*, 1997-NMSC-047, ¶ 6, 124 N.M. 64, 946 P.2d 1075 ("A person who aids or abets in the commission of a crime is equally culpable as the principal."). Here, the prosecutor emphasized this point in his closing argument, reminding the jury that "the law says that if you help, encourage or cause a crime to be committed, you can be just as guilty as the one who did the crime. Just as guilty. Why? I think it's obvious. Because if it weren't for those acts of encouragement, of help, of assistance some of those crimes wouldn't even be committed." The district court then gave the jury the following instruction regarding accessory liability:

> The defendant may be found guilty of a crime even though he himself did not do the acts constituting the crime, if the state proves to your satisfaction beyond a reasonable doubt that:
>
> 1. The defendant intended that the crime be committed;
>
> 2. The crime was committed;
>
> 3. The accused helped, encouraged or caused the crime to be committed.

Regarding conspiracy, the district court instructed the jury that to find Defendant guilty of the conspiracy crimes, the State must prove

beyond a reasonable doubt that "[t]he defendant and another person by words or acts agreed to commit [the specified crime]," and that "[t]he defendant and the other person intended to commit [the specified crime]."

{55} Accessory liability and conspiracy "are distinct and separate concepts," *State v. Baca*, 1997-NMSC-059, ¶ 46, 124 N.M. 333, 950 P.2d 776 (citation omitted), with the "gist" of conspiracy being "an agreement between two or more persons to commit a felony." *Gallegos*, 2011-NMSC-027, ¶ 25 (quoting *State v. Deaton*, 74 N.M. 87, 89, 390 P.2d 966, 967 (1964)). It is apparent, however, that much of Martinez's trial testimony could be used to support both the conspiracy and the substantive charges against Defendant. For example, Martinez's statement that Ivan Romero and Defendant discussed "what to do" with Victim could provide evidence both that Defendant "helped" or "encouraged" the kidnapping and murder of Victim (accessory liability), as well as that Defendant "by words or acts agreed to commit" and "intended to commit" those crimes (conspiracy liability). The prosecutor acknowledged this substantial evidentiary overlap during his closing argument, asking the jury to apply the "same analysis" from the substantive crimes to the parallel conspiracy charges and even noting that the conspiracy charges involve the "same elements" as their substantive counterparts. Under these circumstances, it would be unreasonable to simply assume that the jurors separated the concepts of conspiracy and accessory liability, and considered the Romeros' convictions when deliberating on the conspiracy charges but not when deliberating on the charges of carrying out the object of that same conspiracy.

{56} In the dissent's view, Defendant's convictions for first-degree murder and kidnapping should be affirmed because "direct" evidence in the form of Martinez's testimony "convinced the jury of Defendant's guilt, wholly apart from the misbegotten evidence of the conspiracy pleas of others." But the fact that other evidence apart from the error supports conviction, even if that evidence is overwhelming, cannot be the determinant of whether the error is harmless. *See Johnson*, 2004-NMSC-029, ¶ 11 ("[C]onstitutional error must not be deemed harmless solely based on overwhelming evidence of the defendant's guilt."). Furthermore, the jury here had at least some serious doubts about Martinez's credibility, because it acquitted Defendant of the aggravated arson and conspiracy to commit aggravated arson charges, which like the first-degree murder and kidnapping charges (and their conspiracy counterparts) were supported almost exclusively by Martinez's testimony.

{57} Evaluating harmless error, as our discussion indicates, can be a complex and difficult process. In the final analysis, determining whether an error was harmless requires reviewing the error itself and its role in the trial proceedings, and in light of those facts, making an educated inference about how that error was received by the jury. This process comes down to a judgment call based on experience and analysis, and as with many human judgments, reasonable minds may often differ. Our review and consideration of the evidence in this case persuades us that there is a reasonable possibility that admitting the Romeros' convictions contributed to Defendant's convictions. The district court's error, therefore, was not harmless.

III. CONCLUSION

{58} We vacate Defendant's convictions and remand the case to the district court for proceedings consistent with this Opinion.

{59} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

EDWARD L. CHÁVEZ,
Justice

RICHARD C. BOSSON, Justice
(concurring in part and dissenting in part)

CONCURRING IN PART AND DISSENTING IN PART OPINION

BOSSON, Justice (concurring in part and dissenting in part).

{60} I concur in the majority's analysis of the trial court's error. The majority's revitalized analysis of harmless error is commendable, leading hopefully, to a clearer, more consistent application of the relevant standards for deciding that important question. It is the result in this particular case, however, with which I cannot agree. More specifically, I am not persuaded to reverse Defendant's convictions for first-degree murder and kidnapping. I do agree that we must reverse the convictions for conspiracy.

{61} It is relatively easy to conclude that the conspiracy offenses cannot stand. If A is accused of conspiring with B and C, and the jury hears evidence that the latter two have already been found guilty of that same conspiracy, well then, the prosecution is more than half way home without even firing a shot. Common sense and common experience teach that the state cannot carry its burden on the question of harmless error. No one could conclude that there is no reasonable *possibility* of any effect on the jury from such erroneous evidence with respect to the convictions for conspiracy.

{62} I cannot reach the same conclusion, however, regarding Defendant's convictions for first-degree murder and kidnapping. Defendant was convicted of these crimes, either as a principal or an accessory, based upon direct, eyewitness evidence demonstrating his presence at and active participation in most of the horrifying events of that evening, including murder and kidnapping. This eyewitness testimony was, I concede, subjected to forceful cross-examination and impeachment on a variety of grounds. But in my mind that eyewitness convinced the jury of Defendant's guilt, wholly apart from the misbegotten evidence of the conspiracy pleas of others. I cannot join in a conclusion that the jury may have reached a decision based not upon direct evidence of guilt, but upon evidence that someone else was guilty of a different, albeit related, crime.

{63} With respect, therefore, I would affirm the convictions for murder and kidnapping while I join in reversing the convictions for conspiracy.

RICHARD C. BOSSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-009

Filing Date: March 22, 2012

Docket No. 32,776

RUDY SAIS,

Appellant-Respondent,

v.

NEW MEXICO DEPARTMENT OF CORRECTIONS,

Appellee-Petitioner.

Original Proceeding on Certiorari
John W. Pope, District Judge

New Mexico Corrections Department
James R.D. Brewster, General Counsel
Santa Fe, NM

for Petitioner.

Melendres, Melendres & Harrigan, P.C.
A. Paul Melendres
Albuquerque, NM

for Respondent.

OPINION

BOSSON, Justice.

{1} This Court has previously established the principle that when an employer disciplines two public employees, arrested or convicted of driving while intoxicated (DWI), in a significantly different manner yet based on substantially similar conduct, the employer owes a legal duty to explain that difference satisfactorily with evidence in the record. If not, the court will reverse the action taken as arbitrary and capricious. *See In re Termination of Kibbe*, 2000-NMSC-006, ¶¶ 14-19, 128 N.M. 629, 996 P.2d 419. The present case offers this Court an additional opportunity to apply and amplify the principles we articulated over twelve years ago in *Kibbe*. In doing so, we conclude that the employer here, unlike *Kibbe*, did place substantial evidence in the record to justify the action taken and to explain any alleged differences in the treatment of other employees. Accordingly, we reverse the decision of the district court and uphold the State Personnel Board.

BACKGROUND

{2} In June 2005, the New Mexico Department of Corrections (DOC) adopted the Employee DWI Policy (the Policy). The Policy notes that "New Mexico continues to suffer from a relatively high rate of DWI and . . . [t]he Department incarcerates in its prisons and supervises on probation or parole, a large number of offenders who have been convicted of DWI." Accordingly, the Policy requires "[a]ll employees who are charged with, arrested for, adjudicated guilty, or convicted of the criminal offense DWI" to submit a written report regarding the incident to the employee's supervisor within three working days "of such occurrence."

{3} In addition, the Policy imposes certain minimum sanctions based on the number of offenses a particular employee incurred. According to the Policy, a first offense requires at least a five-day suspension, while a second offense requires dismissal. Notably, the term "offense" is not explicitly defined. The sanctions section of the Policy, however, makes clear that "[d]iscipline for DWI will not necessarily be dependent upon a criminal conviction, a finding of guilt, or any other final adjudication by a court," but also states that "the disposition of any criminal or administrative charges may be considered in determining the appropriate discipline."

{4} DOC hired Rudy Sais (Respondent) in April 2006 as a Correctional Officer I.

Respondent reviewed the Policy and signed a DWI acknowledgment form, noting that he received a copy of the Policy and he understood its requirements.

{5} On November 8, 2006, Respondent was arrested on suspicion of aggravated DWI. Pursuant to the Policy, Respondent reported the arrest to his supervisor the next day. Respondent received a seven-day suspension as a result of the arrest. The criminal charges against Respondent were ultimately dismissed without an adjudication of guilt or innocence.

{6} On March 13, 2008, Respondent was again arrested on suspicion of DWI. Again, Respondent's arrest was reported to DOC and an investigation was conducted. After the investigation, Respondent was dismissed based on a second offense under the Policy. The criminal charges against Respondent were once again dismissed without a finding of guilt or innocence.

{7} Respondent appealed his termination to the State Personnel Board (the Personnel Board) and a hearing was held before an administrative law judge (ALJ). At the hearing, Respondent claimed that he was treated differently than other employees under the Policy. He submitted evidence that at least three other DOC employees had been arrested two or more times for DWI but were still employed by DOC.

{8} DOC responded with explanatory evidence for each of the individuals still employed. Elona Cruz, Human Resource Bureau Chief for DOC, testified that DOC did not count DWI offenses that occurred prior to the date the Policy began. DOC still employed Officer Taracina Morgan, who Respondent claimed had two prior DWI arrests, because she had only one arrest after the Policy was put in place.

{9} Elona Cruz also testified that DOC had no record of any arrests for the second individual, Officer Armando Rel. Respondent attempted to put this fact in doubt. He admitted into evidence a printout from the "Case Lookup" on www.nmcourts.gov which showed that Officer Rel had been charged with a fourth and later, oddly enough, a third DWI *after* the Policy was adopted. But, it was not clear from this report if these charges were the result of separate arrests or when any prior arrests occurred. The third DWI was charged on the same date as a plea hearing, suggesting that it was the result of a plea agreement that reduced the original charge from a fourth DWI to a third. In addition, Mike Sanchez testified that he had heard rumors, before he became Captain of Investigations for DOC, of multiple DWI arrests for Officer Rel. Nevertheless, Captain Sanchez explained that he does not commence investigations under the Policy until an employee self-reports, and apparently Rel made no such reports. Warden Robert Ulibarri testified, however, that one investigation was commenced based on an anonymous letter and he believed police officers have notified DOC after an arrest of a DOC employee.

{10} The third individual, Raymond De La Cruz, testified that he had been arrested twice for DWI after the Policy was in effect, once in 2006 and again in 2007, but was still employed by DOC. Instead of being terminated, Officer De La Cruz received a five-day suspension for his second offense. In response, Elona Cruz testified that when Officer De La Cruz was arrested for the second time, the Policy was under review and as a result he was not terminated. No other evidence, such as meeting minutes or internal memoranda, was offered in support of the statement by Elona Cruz. Ultimately, after review, the Policy was not changed and was fully enforced after that time. According to Elona Cruz, six or seven DOC employees had been terminated as a result of a second offense under the Policy.

{11} In addition to this explanatory evidence, DOC also offered evidence of Respondent's arrests. Regarding Respondent's first arrest, DOC entered into evidence a letter from his supervisor, Warden Ulibarri, detailing the circumstances surrounding his arrest, including the results of a failed breath test and the discipline imposed. To prove the circumstances of the second arrest, the full report of Sanchez, who was charged with investigating the incident for DOC, was admitted

into evidence. The Sanchez report contained the official police reports of the two state police officers who were present during Respondent's arrest and a criminal complaint that indicated Respondent had again failed two breath tests with a blood-alcohol content more than twice the legal limit. The parties stipulated that both of these state police officers would testify that Respondent was arrested for suspicion of DWI. None of this evidence was impeached nor was its admission contested.

{12} After the hearing, the ALJ submitted an extensive recommended decision to the Personnel Board that supported Respondent's termination. The recommended findings of fact included DOC's discussions concerning the Policy at the time of Officer De La Cruz's second arrest, and concluded that Officer "De La Cruz is the only [DOC] employee who has not been dismissed after a second DWI arrest; all other offending employees have been disciplined strictly by policy." The Personnel Board adopted the ALJ's proposed findings of fact and conclusions of law in their entirety and upheld Respondent's termination.

{13} Respondent then appealed to the district court. In his statement of appellate issues, Respondent continued to argue that he was treated differently from others under the Policy. He also argued, for the first time, that the Policy itself was contrary to law because NMSA 1978, Section 28-2-4(A) (1997)[1] requires that termination of public employees be based upon conviction of a crime, not a mere arrest. The district court reversed the Personnel Board, finding that "[t]he termination of [Respondent] was arbitrary, capricious and contrary to law" because "he was not treated in a similar fashion to several other officers in similar circumstances." In addition, the district court's order stated that "[t]he hearing officer was required to hear 'explanatory evidence' in accord with the holding in . . . *Kibbe*, [2000-NMSC-006, ¶ 19], and failed to comply with this requirement." The district court did not rule on Respondent's statutory argument regarding Section 28-2-4(A). The order required Respondent to be reinstated to his former position with back pay and benefits.

{14} DOC then petitioned for certiorari to the Court of Appeals, which denied the petition. We granted certiorari in order to address the important policy issues implicated when DWI and public employment intersect, especially in light of this Court's precedent on the same subject. *See Kibbe*, 2000-NMSC-006, ¶ 19. For the following reasons, we reverse.

DISCUSSION

Standard of Review

{15} "[W]e apply the same administrative standard of review as the district court sitting in its appellate capacity." *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 15, 137 N.M. 161, 108 P.3d 1019. Thus, we "review the [Personnel Board's] order to determine if it is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or, otherwise not in accordance with law." *Id.* (internal quotation marks and citation omitted).

{16} Such a ruling "is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Id.* ¶ 17 (internal quotation marks and citation omitted). Though we must perform a whole record review, "[w]e must be careful not to substitute our own judgment for that of the agency. . . ." *Id.* Rather, "we must consider all evidence bearing on the findings, favorable or unfavorable, to determine if there is substantial evidence to support the result." *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320 (internal

[1] NMSA 1978, §§ 28-2-1 to -6 (1974, as amended through 2010) is known as the Criminal Offender Employment Act. Its purpose is to remove barriers for criminal offenders or ex-convicts to employment "in a lawful trade, occupation or profession . . . to make rehabilitation feasible." Section 28-2-2. Section 28-2-4 governs when a public employee may have such employment revoked for criminal activity, and only discusses certain circumstances involving convictions, not arrests.

quotation marks and citation omitted). "Where the testimony is conflicting, the issue on appeal is not whether there is evidence to support a contrary result, but rather whether the evidence supports the findings of the trier of fact." *Id.* (internal quotation marks and citation omitted).

Disparate Treatment

{17} A worker's termination may be arbitrary and capricious if one employee is treated differently compared with others who are similarly situated and no rational explanation is offered for the difference. *See Kibbe*, 2000-NMSC-006, ¶ 19. Respondent has argued throughout these proceedings, and persuaded the district court, that he was treated disparately and should be reinstated as a result.

{18} Both the district court and Respondent rely on this Court's previous opinion in *Kibbe* to support their position that Respondent was disparately treated. In *Kibbe*, a school teacher was arrested for driving under the influence and was then terminated from his employment. *Id.* ¶¶ 3-4. Nothing indicated that the school district had a policy regarding DWI arrests. *Id.* ¶¶ 2-10. Appearing as a witness for the school district, the school superintendent offered no evidence of any previous instances in which discipline had been imposed in a manner similar to Kibbe. To the contrary, the superintendent testified about another teacher in the same district who had pled guilty to DWI while she was employed by the district, not only as a teacher but also as a substitute bus driver. *Id.* ¶ 8. Unlike Kibbe, the prior teacher was not disciplined by the school board, *id.*, and the superintendent "testified that under no circumstances would he have recommended terminating the other . . . teacher for her behavior, even if it had occurred at the present time," *id.* ¶ 17. This Court concluded "that the drastic difference in the school board's treatment of Kibbe compared to another . . . teacher for substantially similar conduct with no explanatory evidence in the record renders Kibbe's termination arbitrary and capricious." *Id.* ¶ 19. *Kibbe* remains good law today, and we reaffirm its holding in this Opinion.

{19} Relying upon *Kibbe*, Respondent argues that the decision to terminate him was arbitrary and capricious because he was treated differently from Officers De La Cruz and Rel. According to Respondent, those officers had multiple DWI arrests while the Policy was in place, yet were not terminated. Respondent's claim of disparate treatment failed to persuade the Personnel Board, and we conclude that the evidentiary record supports the Personnel Board's decision.

{20} Most tellingly, Respondent's argument focused on Officers De La Cruz and Rel and overlooked the fact that he was treated *in the same manner* as at least six other DOC employees who self-reported a second DWI arrest, all of whom were terminated. Rather than being treated differently from other employees, as was the situation in *Kibbe*, the record shows that Respondent was treated the same as all but one similarly-situated corrections officer. Based on this record, Respondent is the norm, not the exception, to the rule.

{21} If anything, Officer De La Cruz is the exception, not Respondent. It was Officer De La Cruz who was not terminated for a second DWI offense, while at least seven others including Respondent were terminated. As we stated in *Kibbe*, a "decision not to impose disciplinary action against an employee for certain conduct does not foreclose disciplinary action against a different employee in the future for similar conduct" as long as there is a "meaningful distinction" between the employees. *Kibbe*, 2000-NMSC-006, ¶ 17.

{22} Unlike the record in *Kibbe*, a review of this record shows a consistent pattern in the enforcement of the Policy. Generally, if a DOC employee gets arrested twice for DWI, that employee is terminated. Even if an exception had been made in Officer De La Cruz's case, one exception cannot preclude enforcement of the Policy against all others for the foreseeable future. *See Archuleta*, 2005-NMSC-006, ¶ 34 (A "'decision not to impose disciplinary action against an employee for certain conduct does not foreclose disciplinary action against a different employee in the future for similar conduct.'" (quoting

Kibbe, 2000-NMSC-006, ¶ 17)). One exception cannot be allowed to swallow the rule.

{23} Far from a random exception, however, the record shows that DOC put forth a defensible, policy-based reason for allowing Officer De La Cruz to remain employed. The uncontroverted testimony of Elona Cruz established that, at the time of Officer De La Cruz's second DWI arrest, DOC was reviewing its policy to determine whether it was appropriate to terminate employees based on mere arrests and not convictions. Accordingly, it was within DOC's discretion to refrain from terminating an officer during a period when DOC was not yet convinced termination was appropriate. The fact that the Policy was not ultimately changed is of no consequence, for if it were, any review of a policy by any state agency would then require some change to be made to that policy. However, we stress that the defense against irregular applications of a policy on the basis that the policy is under review is limited in scope. For example, if an employee could show that an employer claimed that a policy was repeatedly "under review" to let certain employees keep their jobs despite policy violations while holding others accountable under the policy, that pattern would suggest an arbitrary application of the policy.

{24} Explanatory evidence is required under *Kibbe* to show a "meaningful distinction" between employees who are treated differently. 2000-NMSC-006, ¶¶ 17, 19. A whole record review shows that DOC offered such evidence. Contrary to the conclusion of the district court, the ALJ and the Personnel Board could have rationally concluded that Respondent's termination was appropriate based upon the record and that Officer De La Cruz's situation did not require a different result. When the district court concluded that Respondent "was not treated in a similar fashion to several other officers in similar circumstances," the court was simply incorrect based upon the record before it.

{25} In addition, we do not find Respondent's comparison of himself to Officer Morgan apt. These two employees were not similarly situated, as Officer Morgan has only been arrested once for DWI during the Policy period. Accordingly, we do not find this to be an appropriate comparison to determine disparate treatment. *See Archuleta*, 2005-NMSC-006, ¶ 24 (noting that differences may mean employees are not similarly situated).

{26} Respondent's comparison to Officer Rel is equally misplaced. While court records show that Officer Rel may have had multiple DWI arrests during the period when the Policy was in effect, it is also uncontroverted that Officer Rel did not report those arrests to his superiors, and therefore those arrests do not appear in DOC's records. While Captain Sanchez admitted that he had heard rumors about Officer Rel's arrests, Respondent did not offer any evidence that this informal and perhaps unreliable notice sufficed to trigger an obligation to investigate. Because the evidence does not indicate that management had an obligation to investigate Officer Rel's alleged arrests, Respondent has failed to show that he and Officer Rel are similarly-situated employees. In theory, a failure to report, if proven, could itself justify discipline, but the present record does not allow us to speculate on other charges involving other employees.

{27} We recognize the problems inherent in a policy that rewards those who disregard its requirements, while punishing those who comply. Such a policy can easily be abused which could lead to arbitrary enforcement. DOC should be mindful of that potential for abuse in carrying out its obligation to review personnel policy for all employees. In this case, however, the merits of the Policy itself, as opposed to its application, were not challenged either before the Personnel Board or the district court, and therefore we decline to pass judgment on that issue. In the end, DOC had no record of Officer Rel's arrests, and thus Rel was not similarly situated to Respondent for purposes of a *Kibbe* analysis. *See Archuleta*, 2005-NMSC-006, ¶ 24.

NMSA 1978, § 28-2-4 (1997)

{28} Respondent argues that the Policy is unlawful based upon the New Mexico Criminal Offender Act, NMSA 1978, §§ 28-2-1 to -6 (1974, as amended through 1997). Respondent

interprets that Act to limit when public employment can be terminated, based upon a criminal conviction and not a mere arrest. However, this argument was not made to the ALJ and a ruling was not invoked before the Personnel Board. As such, we decline to address it. *Selmeczki v. N.M. Dep't of Corr.*, 2006-NMCA-024, ¶ 23, 139 N.M. 122, 129 P.3d 158 (requiring a ruling from the ALJ "sitting as the trier of fact, or the Personnel Board as the ultimate decision maker," in order to preserve an issue for review on appeal).

CONCLUSION

{29} Accordingly, we reverse the district court and affirm the ruling of the Personnel Board.

{30} IT IS SO ORDERED.

RICHARD C. BOSSON,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES,
Justice

EDWARD L. CHÁVEZ,
Justice

PATRICIO M. SERNA,
Justice (specially concurring)

SERNA, Justice (specially concurring).

{31} I concur in this opinion because it is legally correct based on the record and the arguments advanced by the parties. I write separately only to express my discomfort in that my conscience tells me the result is unjust. In this case we have an employee with several DWI's that was not terminated because he failed to "self report" his DWI's. The Respondent, on the other hand, along with several other employees, followed the "self reporting" rule and were terminated. It seems unfair to me. Martin Luther King, Jr. said: "Our lives begin to end the day we become silent about things that matter." Justice Potter Stewart stated: "Fairness is what justice really is."

{32} It is the duty and responsibility of a Judge to adhere to the rule of law and apply it free of any personal belief, and therefore, I specially concur. However, I cannot remain silent about something that matters and seems unfair to me.

PATRICIO M. SERNA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-022

Filing Date: July 2, 2012

Docket No. 32,695

JHETTE DIAMOND,

Petitioner-Petitioner,

v.

ADRIENNE DIAMOND,

Respondent-Respondent.

Original Proceeding on Certiorari
Barbara J. Vigil, District Judge

Pegasus Legal Services for Children
Peter H. Klages
Tara Ford
Grace Catherine Spulak
Elizabeth V. McGrath
Albuquerque, NM

for Petitioner.

Donna J. Lynch
Santa Fe, NM

for Respondent.

OPINION

SERNA, Justice.

{1} This appeal presents this Court with a matter of first impression: does the New Mexico Emancipation of Minors Act, NMSA 1978, §§ 32A-21-1 to -7 (1995) (the Act), which provides that a minor may be emancipated for "one or more purposes" set forth in the Act, *see* Section 32A-21-7(D), authorize a district court to declare a minor emancipated for some rather than all of those enumerated purposes? Based on the plain language and legislative purpose of the Act, we answer that question in the affirmative and accordingly reverse the Court of Appeals.

I. BACKGROUND

{2} Petitioner Jhette Diamond (Daughter), then sixteen years old, petitioned the district court in January 2007 for a declaration of emancipation pursuant to the Act. Daughter left the home of her mother Adrienne Diamond (Mother) at age thirteen and had been living with several different households since that time.

{3} The district court held a hearing on Daughter's petition in February 2007. Mother did not appear at the hearing or otherwise oppose the petition. Daughter, represented by counsel, told the district court that she had moved out of Mother's home due to domestic violence and substance abuse issues. Daughter had been working since the age of eleven, including for the past several years as a restaurant server and busser, while maintaining a high grade-point average as a sophomore at Española Valley High School. Counsel described Daughter as "focused on her future," and thriving with the support of the couple with whom she was living. Daughter had no intention of returning to live with Mother, who maintained a relationship with the man whose violent behavior and substance abuse had contributed to Daughter's decision to leave Mother's home in the first place.

{4} The district court concluded that by all accounts Daughter was capable of making appropriate choices for herself and covering her own expenses, describing Daughter's situation as "a classic case" for emancipation. Because Mother had not provided any financial support to Daughter before or after Daughter began living apart from Mother, Daughter asked if the emancipation order could be styled to reserve her right to pursue financial support from Mother. The

court agreed provided that counsel could confirm that the Act authorized the court to do so.

{5} The district court issued a "Declaration of Emancipation of Minor" in March 2007, finding that Daughter had been living independently and managing her own financial affairs without support from Mother, determining that emancipation would be in Daughter's best interest, and declaring Daughter "an emancipated minor in all respects, except that she shall retain the right to support from [Mother]" pursuant to Section 32A-21-5(D) of the Act. Mother filed a pro se motion to set aside the declaration because she had not received adequate notice of the original emancipation hearing. Mother additionally argued that she had supported Daughter even after Daughter moved out by paying for Daughter's traffic tickets, medical and dental care, and school clothes, and "[was] always giving [Daughter] spending money." Mother also disputed that Daughter was managing her own financial affairs.

{6} The district court held a hearing on Mother's pro se motion in April 2007. Mother repeated her objections to Daughter's emancipation because, in her view, Daughter was not mature enough to act in her own best interest. The district court asked Mother for evidence or examples of Daughter's lack of maturity, and Mother could not think of any.

{7} Consistent with her prior representations to the court, Daughter testified that she had been working since age eleven. Daughter added that during the time she was still living with Mother, her earnings went to household expenses such as utility bills, and stated that "whenever my mom asked me for money, I gave it to her." Daughter also reiterated that she had left Mother's home due to violence that Mother's boyfriend perpetrated against both Mother and Daughter, as well as the boyfriend's chronic alcohol and drug abuse.

{8} The incident precipitating Daughter's decision to stop living with Mother, Daughter testified, took place in October 2003. One evening, in the course of an argument, Mother's boyfriend shook Mother and threw her against a bed. Mother began to have a panic attack, and her boyfriend departed. Although she was only thirteen years old at the time, Daughter drove Mother to the hospital. Some time after Mother and Daughter returned from the hospital, Mother's boyfriend reappeared at their home and demanded to see Mother. Daughter told him to leave. Mother's boyfriend pushed his way into the home, and when Daughter continued to block his access to Mother, the boyfriend picked Daughter up and threw her over a couch. Daughter kicked the boyfriend in the face and he again left the home.

{9} After this altercation, Daughter told Mother that she did not want Mother's boyfriend to come over to their home anymore. Instead of asking her boyfriend to stay away, Mother went to live with him at his home, leaving Daughter alone in their trailer with no water, gas, or electricity service due to unpaid bills. Daughter remained in the trailer until being evicted several months later in the middle of winter. During this period, Daughter continued to work and attend school full time. Because there was no food at Mother's home, Daughter frequently obtained food from a woman who employed her at a local restaurant.

{10} Daughter then lived for several months with neighbors, again while attending school full time and remaining employed. She later moved in with the brother of one of her neighbors, where she lived for several years, continuing to work at a local restaurant, paying for her own expenses and contributing to rent and other household expenses. Several months before filing her petition for emancipation, Daughter began living with members of the same extended family, a couple who allowed her to stay with them rent-free so that she could focus on school.

{11} Disputing Mother's assertions about having covered certain expenses, Daughter testified that it was actually a concerned teacher who paid for her traffic ticket, that Daughter herself paid for dental care, and that Medicaid covered the cost of medical care when Daughter broke her arm at school. Daughter acknowledged that on a single occasion Mother had purchased several items of clothing for her, but that she could not

recall Mother ever providing her with spending money, contrary to Mother's claim that she "always" did so. Daughter testified that since living apart from Mother, she would visit Mother at her home approximately once a month but that she could remember only a handful of occasions when Mother visited her or otherwise attempted to contact her, including once when Mother turned up at Daughter's school to ask her for money.

{12} Daughter also explained why she was seeking emancipation. Although at that point in time she had already been living apart from her Mother for two to three years, paying her own expenses, attending school, and working, Daughter testified that she had difficulty obtaining medical insurance, accessing her school report cards, or applying for a driver's permit, all of which required parental consent. Emancipated status also would allow Daughter to open a bank account. Daughter stated that she would be uncomfortable if she were required to resume living with Mother, especially because Mother's abusive boyfriend remained a presence in Mother's home, and because she was doing well on her own.

{13} After hearing testimony from Mother and Daughter, the district court ruled from the bench that even assuming that all of Mother's contentions were true, emancipation remained in Daughter's best interest. The district court then re-declared Daughter to be emancipated and issued a formal order to that effect, which included the same provision as the court's prior order that Daughter was "an emancipated minor in all respects, except that she shall retain the right to support from [Mother]" pursuant to Section 32A-21-D(5) of the Act.

{14} As permitted by the district court's emancipation orders, in February 2008 Daughter filed a petition asking the district court to order Mother to pay retroactive and prospective child support to Daughter.[1] Although Daughter's support petition was not expressly denominated as such, the parties and the district court treated it as an action to establish parentage and for support under the Uniform Parentage Act, NMSA 1978, §§ 40-11-1 to -23 (1986, as amended through 2004) (repealed and recodified at NMSA 1978, §§ 40-11A-101 to -903 (2009)).

{15} A hearing officer determined that Mother had not provided a home or financial support for Daughter since Daughter's emancipation. The hearing officer recommended that Mother be ordered to make support payments to Daughter in the amount of $390.00 per month from March 1, 2008 until Daughter reached the age of eighteen[2] or graduated from high school, whichever event occurred later. The hearing officer reserved for later determination the issue of any child support obligation predating March 1, 2008 (including periods of time both predating and following Daughter's emancipation). The district court affirmed the hearing officer's report over Mother's written objections, and in January 2009 directed that a portion of Mother's retirement benefit, her sole source of income, be garnished and paid to Daughter.

{16} The parties filed several subsequent motions before the district court in summer and fall 2009, with Mother now represented by counsel. Mother principally argued that "New Mexico law does not allow child support for an emancipated minor." In these subsequent proceedings, Mother and Daughter repeated much of their prior testimony regarding disputed facts germane to the support issue. In addition, Daughter clarified that her separation from Mother took

[1] Daughter's petition for support payments also sought damages for abandonment, a claim Daughter later withdrew in open court. In addition, Daughter's petition requested establishment of paternity, stating that "[Mother] has always indicated to [Daughter] that she was conceived by artificial insemination, but [Daughter] has no independent information concerning the validity of that claim." At a hearing on Daughter's petition before a Domestic Relations Hearing Officer, Mother testified that she conceived Daughter through artificial insemination, and later agreed to sign a release so that Daughter could obtain confirming records. Daughter ultimately conceded the issue.

[2] Eighteen is the age of majority in New Mexico unless otherwise specifically provided by law. *See* NMSA 1978, § 28-6-1 (1975).

place in October 2004, rather than October 2003 as she had originally claimed. Daughter also testified that since petitioning for emancipation she had graduated from high school and was now a student at New Mexico State University. Mother, meanwhile, testified that she and Daughter were living together until December 2004 or January 2005. Mother also acknowledged that until March 2009, well past the time of Daughter's emancipation, she maintained an on-again, off-again relationship with the same boyfriend who had behaved violently toward Daughter.

{17} The district court reaffirmed its prior ruling that emancipation does not necessarily cut off a minor's right to child support. The court determined that Daughter began living apart from Mother permanently in January 2005, but that Mother's support obligation would begin in March 2005. The court concluded that Daughter was entitled to support from that time through May 2009, when Daughter graduated from high school at age eighteen, in an amount based on statutory guidelines and Mother's income. Accordingly, the court entered judgment in Daughter's favor in the amount of $15,278.00 (with $13,640.00 of that total owed as pre-emancipation support, and $1,638.00 owed as the remaining balance from the period post-dating Daughter's emancipation), and directed Mother to make specified monthly payments to fulfill her support obligation.

{18} Mother appealed the judgment entered against her in the support proceeding and a related order from the original emancipation proceeding. The Court of Appeals consolidated the two appeals. *Diamond v. Diamond*, 2011-NMCA-002, ¶ 1, 149 N.M. 133, 245 P.3d 578. Agreeing with Mother, the Court of Appeals held that "New Mexico law does not permit a minor emancipated pursuant to [the Act] to collect child support payments," *id.* ¶ 2, and does not permit "an emancipating court to pick and choose the purposes for which a child is emancipated," *id.* ¶ 21. The Court of Appeals reached this conclusion by determining that "a minor cannot be 'managing his own financial affairs,'" a prerequisite to emancipation under the Act, "if he is subject to his parent's control and is not allowed to retain the wages he has earned. Similarly, a minor cannot be 'managing his own financial affairs' if he is receiving financial and other support from his parents." *Id.* ¶ 23.[3]

{19} Daughter subsequently petitioned this Court for writ of certiorari, presenting three closely interrelated questions, all of which require this Court to resolve whether the Act permits a district court to declare a minor emancipated for certain purposes while reserving that minor's right to seek support from her parent.

II. THE EMANCIPATION OF MINORS ACT

{20} The Legislature first adopted the Act in 1981, NMSA 1978, §§ 28-6-2 to -8 (1981, repealed and recodified at NMSA 1978, §§ 32A-21-1 to -7 (1995)), in response to a concern that "the law of this state is unclear as to the definition and consequences of emancipation of minors [and] that a legislative statement is required." *Id.* § 28-6-3. The Legislature therefore passed the Act to provide such a statement to "defin[e] emancipation and its consequences and to permit an emancipated minor to obtain a court declaration of his status." *Id.*; Section 32A-21-2.

{21} The Act defines an emancipated minor as any person sixteen years of age or older who "has entered into a valid marriage, whether or not the marriage was terminated by dissolution," who "is on active duty with any of the armed forces of the United States of America," or who has received a declaration of emancipation" pursuant to the Act. Section 32A-21-3. The Act

[3] The Court of Appeals considered several other issues that are not before this Court. Mother asserted that the district court lacked jurisdiction to enter an order granting Daughter's petition for child support, an argument that the Court of Appeals rejected. *Diamond*, 2011-NMCA-002, ¶ 9. The Court of Appeals held that the district court did not abuse its discretion in ordering Mother to pay pre-emancipation child support to Daughter. *Id.* ¶ 33. The Court of Appeals also determined that the Uniform Parentage Act is an appropriate procedural vehicle for an emancipated minor or adult to seek retroactive support for the period of time pre-dating emancipation. *Id.* ¶ 31.

sets forth three prerequisites to emancipation by judicial declaration. "Any person sixteen years of age or older may be declared an emancipated minor for one or more purposes enumerated in the [Act] if he is [1] willingly living separate and apart from his parents, guardian or custodian, [2] is managing his financial affairs and [3] the court finds it in the minor's best interest." Section 32A-21-4.

{22} In addition, the Act provides a procedural mechanism for a minor to obtain a declaration of emancipation. A minor seeking to be emancipated must file a verified petition with the children's court[4] that "set[s] forth with specificity the facts" in support of such relief, Section 32A-21-7(A), and the court shall provide notice of the petition to the minor's parent, guardian or custodian, Section 32A-21-7(B). If the court determines the minor to be sixteen years of age or older and to fulfill the preconditions for emancipation, "the court may grant the petition unless, after having considered all of the evidence introduced at the hearing, it finds that granting the petition would be contrary to the best interests of the minor." Section 32A-21-7(C). Upon granting the petition, the court "shall immediately issue a declaration of emancipation containing specific findings of fact and one or more purposes of the emancipation, which shall be filed by the county clerk." Section 32A-21-7(D). Such a declaration "shall be conclusive evidence that the minor is emancipated." Section 32A-21-7(G).

{23} As for the legal effect of emancipation, under the Act

> [a]n emancipated minor shall be considered as being over the age of majority for one or more of the following purposes:
>
> A. consenting to medical, dental or psychiatric care without parental consent, knowledge or liability;
> B. his capacity to enter into a binding contract;
> C. his capacity to sue and be sued in his own name;
> D. his right to support by his parents;
> E. the rights of his parents to his earnings and to control him;
> F. establishing his own residence;
> G. buying or selling real property;
> H. ending vicarious liability of the minor's parents . . . or
> I. enrolling in any school or college.

Section 32A-21-5.

III. STANDARD OF REVIEW

{24} "The setting of child support is within the trial court's discretion and is reviewed on appeal only for an abuse of that discretion." *Styka v. Styka*, 1999-NMCA-002, ¶ 8, 126 N.M. 515, 972 P.2d 16. This appeal, however, does not implicate the district court's discretion in awarding support to Daughter so much as its determination that the Act allows an emancipated minor to pursue child support. "Statutory interpretation is a question of law, which we review de novo." *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69.

{25} In interpreting a statute, the Court's "primary goal is to ascertain and give effect to the intent of the legislature." *Jolley v. AEGIS*, 2010-NMSC-029, ¶ 8, 148 N.M. 436, 237 P.3d 738 (internal quotation marks and citation omitted). In assessing intent, "we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Oldham v. Oldham*, 2011-NMSC-007, ¶ 10, 149 N.M. 215, 247 P.3d 736 (internal quotation marks and citation omitted); *see also DeWitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 29, 146 N.M. 453, 212 P.3d 341 ("The first and most obvious guide to statutory interpretation is the wording of the statutes themselves."). When interpreting a statute, all sections of the statute "must be read together so that all parts are given effect." *High Ridge*

[4] The children's court is a division of the district court, NMSA 1978, § 32A-1-5(A) (1993), with its own rules of procedure, *id.* § 32A-1-5(B); *see also* Rule 10-101 NMRA (governing children's court procedures).

Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. Where the language of a statute is "clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583, 227 P.3d 73 (quoting *State v. Jonathan M.*, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990)).

IV. DISCUSSION

A. Plain Language and Legislative History of the Act

1. "One or More . . . Purposes"

{26} Emancipation confers on eligible minors some or all of "the rights and status of adults." *Ortega v. Salt Lake Wet Wash Laundry*, 156 P.2d 885, 890 (Utah 1945). In setting forth the nine possible legal effects of emancipation, the Act refers to "one or more of the [enumerated] purposes." Section 32A-21-5. Daughter interprets the Act to authorize a district court to "craft an order of emancipation to address only those purposes which meet the best interests of the child seeking emancipation," and asserts that there is nothing absurd about granting a minor many of the legal privileges of adulthood while in appropriate circumstances allowing that minor to pursue parental support. Mother in turn argues that where the Act refers to "one or more . . . purposes" of emancipation, the phrase should be interpreted to mean "all the purposes." According to Mother, allowing a district court to decide the individual purposes for which a minor is emancipated would lead to an "absurd scenario" where the minor could be freed from parental control but prevented from, for instance, establishing his or her own residence. In Mother's view, loss of any entitlement to parental support therefore is a necessary consequence of emancipation, because "[t]here's no such thing as a limited emancipation."

{27} The plain meaning of the phrase "one or more . . . purposes" is that a minor may be declared to be emancipated under the Act for a single enumerated purpose, for all nine enumerated purposes, or for any intermediate number of enumerated purposes. "As a rule of construction, the word 'or' should be given its normal disjunctive meaning unless the context of a statute demands otherwise," *Hale v. Basin Motor Co.*, 110 N.M. 314, 318, 795 P.2d 1006, 1010 (1990), or if "adherence to the literal use of the word leads to absurdity or contradiction," *State v. Block*, 2011-NMCA-101, ¶ 21, 150 N.M. 598, 263 P.3d 940. Our courts have employed this common-sense principle in a variety of statutory contexts. *See generally State v. Dunsmore*, 119 N.M. 431, 433, 891 P.2d 572, 574 (Ct. App. 1995) ("The use of the disjunctive 'or' indicates that the statute may be violated by any of the enumerated methods."); *State v. Tsosie*, 2011-NMCA-115, ¶ 27, 150 N.M. 754, 266 P.3d 34 (Where a statute offers a list of various alternative definitions for a particular term, "[t]he Legislature's use of the word 'or' indicates that any of the listed definitions" could apply.); *Schneider Nat'l, Inc. v. State Taxation & Revenue Dep't*, 2006-NMCA-128, ¶¶ 9-10, 140 N.M. 561, 144 P.3d 120 (The word "or," in a statute providing that a limitations period begins after "mailing or delivery," "indicate[s] that mailing and delivery are alternative acts."); *see also State v. Downey*, 2008-NMSC-061, ¶ 26, 145 N.M. 232, 195 P.3d 1244 ("The use of the disjunctive 'or' in Rule 11-702 permits a witness to be qualified under a wide variety of bases . . .").

{28} The Act's reference to "one or more of the following purposes" for which emancipation may be granted cannot be viewed as haphazard or isolated. The Act employs this key phrase not only in enumerating the nine possible grounds for emancipation, Section 32A-21-5, but also in investing the district court with the authority to declare a minor to be emancipated, Section 32A-21-4 ("Any person sixteen years of age or older may be declared an emancipated minor for one or more of the purposes enumerated in the [Act]" if specified prerequisites are met.). The Act also directs a district court granting a minor's petition to "immediately issue a declaration of emancipation containing specific findings of fact and

one or more purposes of the emancipation." Section 32A-21-7(D). This last reference to "one or more purposes" is especially significant, because there is no logical reason for requiring courts to identify the specific purposes for which emancipation is being granted if every emancipation automatically fulfills *all* of the enumerated purposes.

{29} "We must assume the legislature chose its words advisedly to express its meaning unless the contrary intent clearly appears." *State v. Maestas*, 2007-NMSC-001, ¶ 22, 140 N.M. 836, 149 P.3d 933 (quoting *Varoz v. N.M. Bd. of Podiatry*, 104 N.M. 454, 456, 722 P.2d 1176, 1178 (1986) (internal quotation marks and brackets omitted)). Not only does the Act fail to evidence any legislative intent contrary to the plain meaning of "one or more purposes," the history of its enactment provides persuasive indications of the Legislature's intent that district courts should tailor emancipation orders to the best interests of the minor in each particular case.

{30} As originally introduced, the legislation that ultimately became the Act included language consistent with Respondent's (and the Court of Appeals') interpretation, namely that "[a]n emancipated minor shall be considered as being over the age of majority *for the purpose of* " the nine specific grounds. H.B. 271, § 5, 35th Legislature, 1st session (N.M. 1981) (emphasis added). The Legislature considered and rejected this phrasing, opting instead for the more flexible alternative of "one or more of the following purposes." House Judiciary Committee Substitute for H.B. 271, § 5, 35th Legislature, 1st session (N.M. 1981); § 28-6-6 (1981, repealed and recodified at NMSA 1978, §§ 32A-21-1 to -7 (1995)).

{31} Other revisions to the bill prior to enactment further illustrate the Legislature's preference that district courts retain the discretion to emancipate a minor in a manner consistent with that minor's individual circumstances and needs. Besides incorporating the "one or more" language, the Legislature added a requirement that the district court must, before granting a declaration of emancipation, determine that doing so would be in the minor's best interest, § 28-6-5; made a court's grant of a qualifying emancipation petition discretionary rather than mandatory, § 28-6-8(C); and added a requirement that the emancipation declaration set forth findings of fact and the specific purposes for which emancipation is granted, § 28-6-8(D). The history of the Act's passage thus provides further confirmation that the plain meaning of "one or more purposes" is consistent with the Legislature's intent. Contrary to the Court of Appeals' determination that the Act does not authorize partial emancipation, *Diamond*, 2011-NMCA-002, ¶ 24, we hold that the Act's directive that emancipation may be declared for "one or more purposes" expressly authorizes partial emancipation.

2. "Managing [One's] Own Financial Affairs"

{32} The Act requires that a minor must be living independently and "managing his own financial affairs" in order to be emancipated. Section 32A-21-4. Mother argues that "in the context of [the Act], 'managing his financial affairs' is synonymous with being financially independent, self-supporting, self-sufficient . . . , it is axiomatic that to be emancipated you must be self-supporting and if you are self-supporting you are not in need of or entitled to support." Daughter responds that managing one's financial affairs is not the equivalent of total financial self-sufficiency. We agree with Daughter.

{33} The Act does not define the phrase "managing [one's] financial affairs," but that term logically would include obtaining income and transacting for the necessities of life. Our caselaw usually employs the term in guardianship and conservatorship proceedings, where, for example, a court must find an adult "incapacitated and unable to manage an estate and financial affairs" in order to appoint a conservator for that person. *In re Conservatorship of Chisholm*, 1999-NMCA-025, ¶ 12, 126 N.M. 584, 973 P.2d 261. Here, the district court determined that Daughter had been living independently and that Daughter had paid for all of her expenses out of her own

earnings since March 2005, with no support from Mother. Daughter sought emancipation, in part, to obtain health insurance and open a bank account, further evidence of her intent and capacity to manage her own affairs but for certain legal impediments of minority.

{34} The Court of Appeals agreed with Mother and found the district court's interpretation of the Act "paradoxical," explaining that "a minor cannot be 'managing his own financial affairs' if he is receiving financial and other support from his parents." *Diamond*, 2011-NMCA-002, ¶ 23. We do not see management of one's financial affairs and entitlement to support as inherently contradictory. Certainly, in other proceedings courts routinely award support without any finding or implication that the recipient is incapable of managing his or her affairs. *See generally Mitchell v. Mitchell*, 104 N.M. 205, 214, 719 P.2d 432, 441 (Ct. App. 1986) (awarding spousal support based on circumstances of supporting spouse and recipient spouse).

{35} The Act itself contemplates that an emancipated minor may receive public assistance: An emancipated minor "shall not be denied benefits from any public entitlement program which he may have been entitled in his own right prior to the declaration of emancipation." Section 32A-21-6. A minor entitled to public assistance is necessarily not entirely self-supporting, at least not after he or she begins to receive the assistance payments. Under the Court of Appeals' interpretation of the Act, Daughter would be managing her own financial affairs if she were receiving financial support from the State, but not if she were receiving support from Mother. Mother does not offer any explanation for why the *source* of the support should be determinative of Daughter's ability to manage her affairs, and indeed such an approach would be inconsistent with our "strong public policy" favoring parental support where appropriate. *In re Estate of DeLara*, 2002-NMCA-004, ¶ 10, 131 N.M. 430, 38 P.3d 198. Finally, in the present case, the district court expressly did *not* emancipate Daughter with respect to her entitlement to support, so for that sole purpose she retained the status of minority. That determination explains why the district court set Daughter's eighteenth birthday or high school graduation, whichever occurred later, as the date terminating Mother's support obligation. Up until that moment, for support purposes only, Daughter remained a minor.

B. Partial and Complete Emancipation in Other States

{36} Although we find ample support for our interpretation of the Act in its plain language and legislative intent, a brief review of several other states' emancipation statutes, illustrative rather than exhaustive, indicates a diversity in approach to defining the legal effects of emancipation. Some states have determined that emancipation should always entail a fixed rather than a flexible set of legal consequences. For example, in contrast to the Act's provision that emancipation may be ordered for "one or more purposes," California's emancipation statute directs that an emancipated minor "shall be considered as being an adult for the following purposes," Cal. Fam. Code Ann. § 7050 (West 1992, operative Jan. 1, 1994), that is, for *all* of the seventeen purposes enumerated by the California statute, including "the minor's right to support by the minor's parents," *id.* § 7050(a), the parent's rights to "the minor's earnings and to control the minor," *id.* § 7050(b), and the minor's capacity to "establish [his or her] own residence," *id.* § 7050(e)(15). California courts have recognized the California legislature's deliberate choice to create a form of statutory emancipation with the same set of legal consequences for each affected minor. *See W. Shield Investigations & Sec. Consultants v. Superior Court*, 98 Cal. Rptr. 2d 612, 621 (Ct. App. 2000) ("[I]f the trial court could pick and cho[o]se among the list of legal consequences of emancipation set forth in [the California statute], the result would be partial emancipation, with different emancipated minors holding different adult powers. This undesirable result is exactly what the Legislature sought to eliminate when it enacted the Emancipation Act.").

{37} Consistent with California's approach and in contrast to ours, Vermont law provides that

an emancipation order "shall recognize the minor as an adult for *all purposes* that result from reaching the age of majority, including . . . terminating parental support and control of the minor and [parental] rights to the minor's income." Vt. Stat. Ann. tit. 12, § 7156(a) (West 1995) (emphasis added), § 7156(a)(6). Pennsylvania state law does not set forth a specific statutory mechanism for a minor to obtain a declaration of emancipation, but nonetheless expressly provides that "[a] court shall not order either or both parents to pay for the support of a child if the child is emancipated." 23 Pa. Cons. Stat. Ann. § 4323(a) (West 1985).

{38} Other states, while perhaps not favoring parental support for emancipated minors, do not foreclose it either. Under Nevada law, for example, an emancipation decree confers the right of majority for six enumerated purposes, including entering into contracts or incurring debts, Nev. Rev. Stat. § 129.130(3)(a) (1987, as amended through 2003), obtaining medical care without parental consent, *id.* § 129.130(3)(d), and establishing the minor's own residence, *id.* § 129.130(3)(f), but not elimination of support from a parent. Whether to award support, however, is left to the discretion of the court considering the emancipation petition, with the default under the statute for support to cease upon emancipation: "Unless otherwise provided by the [emancipation] decree, the obligation of support otherwise owed a minor by his or her parent or guardian is terminated by the entry of the decree." *Id*.

{39} On the other hand, New Mexico is far from the only state where a minor's emancipation does not presumptively extinguish a parent's support obligation. Montana's emancipation statute probably resembles New Mexico's most closely. If a Montana court grants a petition for emancipation, it must issue an order that "specifically set[s] forth the rights and responsibilities that are being conferred upon the youth[, which] may include but are not limited to one or more" of a list of six purposes. Mont. Code Ann. § 41-1-503 (2) (2009). Those purposes include the right to live in housing of the minor's choice, *id.* § 41-1-503(2)(b), the right to enter into contracts and incur debts, *id.* § 41-1-503(2)(d), the right to consent to medical care, *id.* § 41-1-503(2)(e), and the right to "directly receive and expend money to which the youth is entitled and to conduct the youth's own financial affairs," *id.* § 41-1-503(2)(c). The Montana statute, like ours, does not define emancipation to automatically end a parent's support obligation.

{40} At least one state goes further than New Mexico by not merely permitting but *mandating* parental support for emancipated minors. Under Michigan's emancipation statute, a court may declare a minor emancipated "for the purposes of, but not limited to, all of the following [fourteen purposes]," Mich. Comp. Laws Ann. § 722.4e(1) (West 1968, as amended through 1988, effective Mar. 30, 1989), a list that does not include child support. Instead, Michigan law explicitly provides that "[t]he parents of a minor emancipated by court order are jointly and severally obligated to support the minor," except that the parents are not liable for debt incurred by the minor during the period of emancipation, *id.* § 722.4e(2).

{41} The point of the foregoing review is to illustrate the wide variety of approaches states employ to determine what legal consequences emancipation should have, particularly with respect to the provision of child support. Our Legislature could easily have decided that emancipation *ipso facto* extinguishes a parent's support obligation to a child, an alternative that it initially considered and that some other states have adopted. Instead, the Legislature ultimately chose to confer authority on the district courts to determine in each particular case whether an emancipated minor is entitled to support.

C. Emancipation at Common Law

{42} While our holding that the Act allows a district court to reserve a minor's right to financial support from a parent follows from the plain language of the Act, it is consistent with the treatment of emancipation under the common law. Historically, American courts recognized

a "correlative" relationship between a parent's duty to support his or her minor child and the parent's entitlement to the child's services and earnings. 1 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 9.3, at 548-49 (2d ed. 1987). Under this approach,

> the father [was] entitled to the services and earnings of his minor children, because he [was] bound to support and educate them. The right grows out of the obligation, and is correlative to it. When one ceases the other ceases also. The helplessness of the infant, demanding the tutelage and support of the father, in contemplation of law terminates in ordinary cases at twenty-one [then the age of majority], and the child becomes emancipated from parental control and entitled to his own earnings.

Campbell v. Cooper, 34 N.H. 49, at *10 (1856); *see also Nightingale v. Withington*, 15 Mass. 272, 274 (1818) (instructing that the "obligation of the parents to nurture and support their children . . . is compensated by a right to their services, or to the fruits of them"); *Memphis Steel Constr. Co. v. Lister*, 197 S.W. 902, 904 (Tenn. 1917) ("The duties and obligations of parent and child are, in some measure, reciprocal. The natural and legal duty of the parent is to support the child; and by way of return the father has a right to the services of the child during minority."). More contemporary cases instead view the minor's reciprocal duty as submitting to the parent's control. *See, e.g.*, *Howard Frank, M.D., P.C. v. Superior Court of Ariz.*, 722 P.2d 955, 958 (Ariz. 1986) (noting that "emancipation frees parents and children from the reciprocal legal obligations of support and obedience").

{43} Emancipation developed largely to protect minors from claims against their wages asserted by their parents or by third parties. *See, e.g.*, *Am. Prods. Co. v. Villwock,* 109 P.2d 570, 580 (Wash. 1941) (noting that emancipation may be invoked "to protect the minor's earnings against the unfortunate parent's creditors." (quoting 1 James Schouler & Arthur W. Blakemore, *A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations*, § 807, at 897 (6th ed. 1921)); *Lackman v. Wood*, 25 Cal. 147, 151 (1864) (Emancipation frees a minor "from parental control; he can claim his earnings thereafter as against his father."). A minor could only be emancipated through parental consent, although that consent could be implied as well as express. *Inhabitants of Lowell v. Inhabitants of Newport*, 66 Me. 78, 89 (1876). A parent's abandonment of a minor, or even oral expressions of an intent to abandon the minor, could constitute an implied consent to emancipation. *Kidd v. Joint Sch. Dist. No. 2, City of Richland Ctr. and Town of Richland*, 216 N.W. 499, 500 (Wis. 1927); *see also Nightingale*, 15 Mass. at 274 ("But where the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, there is no principle, but that of slavery, which will continue his right to receive the earnings of the child's labor. Thus, if the father should refuse to support a son . . . the law will imply an emancipation of the son. . . .").

{44} Courts have long recognized that common-law emancipation may be partial, that is, conferring some but not all of the aspects of adult status on the minor. *See Lufkin v. Harvey*, 154 N.W. 1097, 1098 (Minn. 1915) ("A minor may be emancipated for some purposes and not for others."); *P.J. Hunycutt & Co. v. Thompson*, 74 S.E. 628, 629 (N.C. 1912) ("There may be a total emancipation or a partial emancipation."); *Swartz*, 8 Cal. at 123; *see also* Black's Law Dictionary 468 (5th ed. 1979) ("[A] 'partial emancipation' frees a child for only a part of the period of minority, or from only a part of the parent's rights, or for some purposes, and not for others."). While courts typically treated complete emancipation as "terminating the parent's legal duty to support the child," *Villwock*, 109 P.2d at 579, partial emancipation would not necessarily do so. *See In re Sonnenberg*, 99 N.W.2d 444, 448 (Minn. 1959) ("[A]n emancipation may be limited to a termination of parental rights and control without relieving the parent from his legal obligation of furnishing the child with necessary support if needed and if not otherwise provided."); *see also P.J. Hunycutt & Co.*, 74 S.E. at 629 (noting that if the father "ran [his son] off

from home, then there could be no emancipation which would relieve the father from the duty of providing necessities for the son.").

{45} Prior to passage of the Act, New Mexico courts recognized emancipation under the common law. *See generally Mason v. Mason*, 84 N.M. 720, 723, 507 P.2d 781, 784 (1973) ("[M]arriage and other conditions may earlier emancipate a child from his or her status of minority."). In contrast to the procedures provided by the Act for seeking emancipation, under our common law, as in other states, "[t]he power to emancipate a minor reside[d] in that parent or those parents having the duty to support the child." *Fevig v. Fevig*, 90 N.M. 51, 52, 559 P.2d 839, 840 (1977). As in other states, common-law emancipation in New Mexico could be express, where "the parent freely and voluntarily agrees" to allow a minor child to live independently and control his or her own earnings, *id.*, or implied, where "the child is no longer subject to parental care and discipline," *id.* at 53, 559 P.2d at 841.

{46} In *Fevig*, after their parents' divorce, two minor girls lived first with their mother and then with their father. Following a period of conflict with their father and his new wife, the girls then moved to the home of their older sister, who sought support payments from both parents on the girls' behalf. *Id*. The district court concluded that the girls became emancipated by voluntarily leaving their parents' homes, and therefore neither parent had a duty to support the minors. *Id.* This Court reversed, holding that while "there was a partial emancipation of [the girls] with respect to their parents' right to discipline and care for them. However, the parents' duty of support has not been extinguished." *Id.* This holding, consistent with the common law as it developed in other states, recognized that emancipation requires a fact-specific inquiry and that the appropriateness of support will depend on the circumstances of the individual minor and his or her family. *Id. See also* 1 Clark, *supra*, § 9.3, at 553 ("Since the issue of the right to support arises in many ways, there are situations in which a child who would be considered 'emancipated' for other purposes would not be entitled to support and others in which he would be so entitled."); *cf. State v. Langford*, 176 P. 197, 200 (Or. 1918) ("If the child is able to earn [his or her] own support, in whole or in part, the father is not obliged to support his offspring in idleness; but he is bound to furnish such portion as the child cannot, all things being considered, earn by reasonable effort.").

D. Public Policy Considerations

{47} The Legislature's decision to allow district courts to determine the extent of an emancipated minor's rights and responsibilities also comports with our state's public policy. "In New Mexico, there is a strong tradition of protecting a child's best interests in a variety of circumstances." *Sanders v. Rosenberg*, 122 N.M. 692, 694, 930 P.2d 1144, 1146 (1996) (internal quotation marks and citation omitted); *see also Bustamento v. Analla*, 1 N.M. 255, 255 (N.M. Terr. 1857) (noting, in ruling on a custody dispute, that "[i]t is to the benefit and welfare of the infant to which the attention of the court ought principally to be directed"). Furthermore, "[i]t is well-settled law that when [a] case involves children, the trial court has broad authority to fashion its rulings in [the] best interests of the children." *Sanders*, 122 N.M. at 694, 930 P.2d at 1146 (internal quotation marks and citations omitted). In legal matters concerning minors, "the rule of 'best interests of the children' is essentially equitable." *State ex rel. Children, Youth &Families Dep't v. A.H.*, 1997-NMCA-118, ¶ 8, 124 N.M. 244, 947 P.2d 1064; *see also In re Adoption of Francisco A.*, 116 N.M. 708, 713, 866 P.2d 1175, 1180 (Ct. App. 1993) ("[W]hen dealing with children, the district court is exercising its equitable powers. The touchstone of equity is that it is flexible; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties."(internal quotation marks and citations omitted)).

{48} More specifically, the district courts are properly "invested with broad discretion and flexibility in determining an award of child

support." *DeTevis v. Aragon*, 104 N.M. 793, 800, 727 P.2d 558, 565 (Ct. App. 1986) (citing *Henderson v. Lekvold*, 95 N.M. 288, 621 P.2d 505 (1980); *Spingola v. Spingola*, 91 N.M. 737, 580 P.2d 958 (1978)); *see also Fosmire v. Nicoleau*, 144 A.D.2d 8, 16 (N.Y. App. Div. 1989) (In matters involving the protection of minor children, "the court must be allowed wide latitude and broad flexibility . . . because of the endless variety of human situations which can be presented in cases of this nature. There are no preordained answers and the result in any case will be totally dependent upon the unique facts involved therein.").

{49} Giving effect to the plain meaning of the Act is consistent with our state's public policy favoring judicial determination of the best interests of the minor. A district court could, for example, where appropriate declare a minor emancipated for a single purpose, such as "consenting to medical, dental or psychiatric care without parental consent, knowledge or liability," Section 32A-21-5(A), or attending college, Section 32A-21-5(I). Similarly, a district court has the discretion to declare a minor emancipated for a greater number of purposes, or all of the purposes, set forth in the Act. The critical inquiry remains the best interests of the minor, Section 32A-21-4 and Section 32A-21-7(C), which the court determines on the basis of specific findings of fact, Section 32A-21-7(D). The mere possibility that a district court might abuse its discretion in declaring a minor emancipated for particular purposes does not provide a sufficient basis for reading words out of the Act.

V. CONCLUSION

{50} The Act provides that emancipation may be declared for "one or more purposes," including the minor's right to support by his or her parents. The district court based its decision to order post-emancipation support on a great deal of evidence regarding Daughter's and Mother's relationship, life choices, and financial circumstances. In rendering its judgment, the district court faithfully followed the procedural requirements of the Act and reached a result consistent with the Act's plain language. Because the Court of Appeals failed to give effect to that language, we reverse.

{51} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-026

Filing Date: June 28, 2012

Docket No. 32,524

REPUBLICAN PARTY OF NEW MEXICO and LYN OTT, individually and in her capacity as Help America Vote Act (HAVA) Director for the Republican Party of New Mexico,

Plaintiffs-Petitioners,

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION and LUIS CARRASCO, custodian of records for the New Mexico Taxation and Revenue Department, Motor Vehicle Division,

Defendants-Respondents.

Original Proceeding on Certiorari
Valerie A. Mackie Huling and Nan G. Nash, District Judges

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OPINION

SERNA, Justice.

{1} "All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good." N.M. Const. art. II, § 2. The co-equal branches of the government of the State of New Mexico, N.M. Const. art. III, § 1, like those of the United States of America, are expressly limited to the exercise of powers delegated to them by our citizens. Our democratic system of government necessarily "assumes the existence of an informed citizenry. . . . Without some protection for the acquisition of information about the operation of public institutions . . . the process of self-governance contemplated by the Framers would be stripped of its substance." *Houchins v. KQED, Inc.*, 438 U.S. 1, 31-32 (1978) (Stevens, J., dissenting). To give practical effect to this principle, our Legislature enacted the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2011) (IPRA). "Recognizing that a representative government is dependent upon an informed electorate," the Legislature declared "that all persons are entitled to the greatest possible information regarding the affairs of government." *Id.* § 14-2-5.

{2} Although the public's right to access information concerning the inner workings of its

government is considerable, it is not without limit. Under the New Mexico Constitution, the people delegate certain duties to elected officials, particularly the Governor, in whom is vested the "supreme executive power of the state." N.M. Const. art. V, § 4. Our constitution and laws recognize that under certain circumstances the Governor is entitled to a limited degree of privilege—that is, protection from public disclosure—in the course of performing his or her duties.

{3} This appeal, our first occasion to consider executive privilege in the context of a public records request, presents a conflict between these two important principles. Petitioners Republican Party of New Mexico and Lyn Ott, individually and as the Director of the Help America Vote Act for the Republican Party (collectively, Petitioners), requested certain government documents. Respondents New Mexico Taxation and Revenue Department, Motor Vehicle Division, and Luis Carrasco, Custodian of Records (collectively, Respondents) withheld some of those documents on several grounds, including executive privilege. While recognition of some form of executive privilege "is required by the Constitution of the State of New Mexico," *State ex rel. Att'y Gen. v. First Judicial Dist. Court*, 96 N.M. 254, 257, 629 P.2d 330, 333 (1981), it falls on this Court to delineate under what circumstances the executive may properly invoke that privilege pursuant to IPRA. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is . . . the province and duty of the judicial department to say what the law is.").

I. BACKGROUND

{4} Petitioner Ott filed an IPRA request with the Motor Vehicles Division (MVD), a division of the Taxation and Revenue Department, after she read an Associated Press article about then-Governor Bill Richardson's executive order directing the MVD to require two forms of identification before issuing a driver's license to any foreign national. With the stated aim of investigating whether individuals were using New Mexico drivers' licenses to unlawfully register to vote, Ott requested documents relating to the issuance of drivers' licenses to foreign nationals, including documents reflecting the number of such licenses issued, as well as documents relating to an audit of the license program ordered by Governor Richardson. Respondents complied with the request by mailing Ott 150 pages of material, including emails and spreadsheets, but indicated in an accompanying cover letter that certain information had been redacted pursuant to attorney-client privilege and executive privilege, as well as the federal Driver Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (1994, as amended through 2000) (DPPA) and its state analogue, NMSA 1978, § 66-2-7.1 (2007) (NMDPPA) (collectively, Privacy Acts), which prohibit the disclosure of private information related to drivers' licenses. Ott appealed directly to the Taxation and Revenue Department, requesting unredacted versions of the documents. Respondents did not send the requested unredacted documents but provided redacted copies of additional responsive documents.

{5} Petitioners filed suit in the Second Judicial District Court to compel Respondents to release the documents in unredacted form. Both parties filed motions for summary judgment. Petitioners asserted that executive privilege was inapplicable, and that disclosure was required under a research exception to the Privacy Acts.[1] Respondents argued that all documents were properly redacted. The district court consolidated the motions and held a hearing on the applicability of the Privacy Acts, executive privilege, and attorney-client privilege to the documents at issue. The district court granted Respondents' motion for summary judgment in part, concluding that private identifying information was properly redacted pursuant to the Privacy Acts. After conducting an in camera review of the documents redacted on privilege grounds, the district court concluded that both the attorney-client and executive privileges were properly invoked and not overcome by Petitioners' showing of need.

[1] This Opinion addresses only the existence and scope of executive privilege. Although the parties also briefed and argued the application of the Privacy Acts, for reasons explained below we decline to consider that issue. That portion of the Court of Appeals' opinion addressing the Privacy Acts, therefore, is not affected by our resolution of this appeal.

Petitioners filed a motion for reconsideration which the district court denied.

{6} Petitioners appealed to the Court of Appeals. The Court of Appeals affirmed the district court's grant of summary judgment regarding the Privacy Act redactions. *Republican Party of N.M. v. N.M. Dep't of Tax. & Rev.*, 2010-NMCA-080, ¶¶ 14-16, 148 N.M. 877, 242 P.3d 444. The Court of Appeals determined that the resolution of the appeal would depend on the applicability of the deliberative process privilege, *id.* ¶ 32, which the court characterized as "protect[ing] the government's decision-making process," *id.* ¶ 34. The court then concluded that the deliberative process privilege shielded the documents at issue from disclosure. *Id.* ¶¶ 34-36. The court also held that Respondents properly invoked attorney-client privilege to withhold certain documents. *Id.* ¶ 40.

{7} Petitioners then petitioned this Court for certiorari, which we granted to review Respondents' redactions pursuant to the Privacy Acts and executive privilege. Amicus New Mexico Foundation for Open Government joined Petitioners in requesting that this Court reverse the Court of Appeals' ruling on executive privilege and the Privacy Acts. Petitioners did not seek this Court's review over the Court of Appeals' upholding of redactions made on the basis of attorney-client privilege. Eight documents thus remained at issue, six of which Respondents had redacted pursuant to claims of executive privilege, and two of which they had redacted pursuant to the Privacy Acts. The documents redacted on the grounds of executive privilege included communications regarding New Mexico's negotiations with the Mexican government regarding access to certain identity documents, and discussions related to implementing the audit of the driver's license program. *See Republican Party*, 2010-NMCA-080, ¶ 26.

II. MOOTNESS

{8} Events occurring since this Court granted certiorari require a close look at whether we may exercise jurisdiction over this appeal. *See Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300 ("[I]t is incumbent upon the appellate court to raise jurisdiction questions sua sponte when the Court notices them."). Shortly after taking office, Governor Susana Martinez issued Executive Order 2011-003, entitled "Limiting the Claim of Executive Privilege to Promote Transparency and Open Government." This order states that executive privilege "can only be invoked with written authorization from the Office of the Governor," and may be invoked to shield from disclosure certain "communications between or among the Governor, a Cabinet Secretary, an agency head or any of their high-level advisors." In addition, subsequent to our grant of certiorari, the parties filed a joint motion to approve a settlement that would permit all documents requested to be transferred to the Secretary of State rather than to Petitioners, and would require this Court to vacate the Court of Appeals' opinion. We denied that motion.

{9} At oral argument, the parties stated that they now agreed that executive privilege did not protect the remaining documents from disclosure. Respondents also indicated that the current administration would not have invoked executive privilege in the first instance with respect to the disputed documents. While we acknowledge and commend the efforts of the parties to resolve their dispute, it is for this Court to decide whether the case is moot and whether we retain jurisdiction to issue an opinion.

{10} "As a general rule, this Court does not decide moot cases." *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008. When no actual controversy exists for which a ruling by the court will grant relief, an appeal is moot and ordinarily should be dismissed. *Id.* In New Mexico, however, courts recognize two exceptions to the prohibition on deciding moot cases: cases which present issues of substantial public interest, and cases "which are capable of repetition yet evade review." *Id.* ¶ 10. A case presents an issue of substantial public interest if it involves a constitutional question or affects a

fundamental right such as voting. *See Garcia v. Dorsey*, 2006-NMSC-052, ¶ 17, 140 N.M. 746, 149 P.3d 62 (procedural due process); *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶¶ 24-28, 140 N.M. 77, 140 P.3d 498 (Election Code); *Gunaji*, 2001-NMSC-028, ¶ 10 (election contest); *Mowrer v. Rusk*, 95 N.M. 48, 52, 618 P.2d 886, 890 (1980) (separation of powers); *see also State ex rel. Newsome v. Alarid*, 90 N.M. 790, 793, 568 P.2d 1236, 1239 (1977) (describing "the right to inspect public documents" as an issue of public importance). An issue is "capable of repetition" yet evading review if the issue is likely to arise in a future lawsuit, regardless of the identity of the parties. *Gunaji*, 2001-NMSC-028, ¶ 11; *see also Cobb*, 2006-NMSC-034, ¶¶ 29-32 (time frame of election); *Howell v. Heim*, 118 N.M. 500, 503, 882 P.2d 541, 544 (1994) (budget crisis). The Court's review of moot cases that either raise an issue of substantial public interest or are capable of repetition yet evading review is discretionary. *See Cobb*, 2006-NMSC-034, ¶ 14 (noting that the Court "may review moot cases" that fall within either of the two exceptions).

{11} While this case is arguably moot, as the Secretary of State has by now received from the MVD at least a portion of the documents sought by Petitioners and has undertaken the task Petitioners had asserted they were intending to perform upon receipt of those documents, the substantial public interest exception to the mootness doctrine compels the issuance of an opinion in this appeal. We conclude that the scope of the Governor's executive privilege is an issue of substantial public interest and therefore address the issue de novo, even though the documents that originally gave rise to the lawsuit underlying this appeal are no longer in dispute. *See Mowrer*, 95 N.M. at 52, 618 P.2d at 890 ("The parameters of the separation of powers doctrine presents a recurring problem of great public interest."); *Pub. Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, ¶ 10, 129 N.M. 487, 10 P.3d 166 (stating that questions of privilege are reviewed de novo). We will not, however, address the issue of withholding information under the Privacy Acts, as that issue does not here rise to the requisite level of public interest to permit an exception to the mootness doctrine.

III. DISCUSSION

A. Exceptions to Disclosure Under IPRA

{12} Our Legislature enacted IPRA to promote the goal of transparency in our state government:

> Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.

Section 14-2-5. "IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve." *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 16, 150 N.M. 64, 257 P.3d 884. "The citizen's right to know is the rule and secrecy is the exception." *Newsome*, 90 N.M. at 797, 568 P.2d at 1243.

{13} Under IPRA, "[e]very person has a right to inspect public records," § 14-2-1(A), by making a request pursuant to the procedures set forth in Section 14-2-8. This right is limited only by the Legislature's enumeration of certain categories of records that are excepted from inspection. *See* Section 14-2-1(A)(1) to (7) (*inter alia*, attorney-client privileged information, law enforcement records that reveal confidential sources, and governmental emergency response plans).[2] In addition to the specifically enumer-

[2] After the parties submitted briefing and presented oral arguments in this appeal, the Legislature amended IPRA, reducing the number of enumerated exceptions from eleven to seven. 2011 N.M. Laws, ch. 134, § 2. The Court of Appeals' opinion refers to the "as otherwise provided by law" provision under its former subsection, Section 14-2-1(A)(12). *Republican Party*, 2010-NMCA-080, ¶ 24. The exceptions re-

ated exceptions, records may be excepted from inspection under IPRA "as otherwise provided by law." *Id.* § 14-2-1(A)(8). This "catch-all" exception includes statutory and regulatory bars to disclosure, such as the Privacy Acts. *See City of Las Cruces v. Pub. Emp. Labor Relations Bd.*, 1996-NMSC-024, 121 N.M. 688, 690-91, 917 P.2d 451, 453-54. The "catch-all" exception also includes constitutionally mandated privileges, as recognized by the parties and the Court of Appeals, *Republican Party*, 2010-NMCA-080, ¶ 24, as well as privileges established by our rules of evidence, *Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 7, 139 N.M. 671, 137 P.3d 611; *see also* Rule 11-501 NMRA (limiting privileges that may be asserted to those grounded in the constitution, the rules of evidence, and other rules adopted by the Court). Although courts may use common law principles when interpreting IPRA, *see San Juan Agric. Water Users Ass'n*, 2011-NMSC-011, ¶ 20, this does not mean common law privileges provide a valid basis for withholding documents from public scrutiny when we do not otherwise recognize such privileges in our courts of law or by statute, *see Estate of Romero*, 2006-NMSC-028, ¶ 11; *First Judicial*, 96 N.M. at 257, 629 P.2d at 333. Without proof of the Legislature's intent to the contrary, we do not construe IPRA to contemplate privileges not applicable elsewhere in our state government.

{14} In order to determine whether an exception not specifically identified in IPRA shielded the documents at issue from disclosure, the Court of Appeals applied the "rule of reason," *Republican Party*, 2010-NMCA-080, ¶ 24, an approach we introduced in *Newsome*, 90 N.M. at 797, 568 P.2d at 1243; *see also Cox v. N.M. Dep't of Public Safety*, 2010-NMCA-096, ¶ 7, 148 N.M. 934, 242 P.3d 501. The plaintiff in *Newsome* was a reporter for the University of New Mexico *Daily Lobo* who sought access to university personnel records. 90 N.M. at 792, 568 P.2d at 1238. When the university denied him access to some of the records, the plaintiff filed suit under the then-existing version of IPRA, which shielded from disclosure only the first three specific categories of documents exempted today—medical records of institutionalized individuals, certain letters of reference, and documents expressing matters of opinion in personnel or student files—and "as otherwise provided by law." *Id.* at 793-94, 568 P.2d at 1239-40 (citing NMSA 1953, § 71-5-1 (Supp. 1975)). The university withheld some of the disputed records on the basis of enumerated exceptions. *Id.* at 792, 568 P.2d at 1238. Other documents, the university contended, while not specifically exempted from disclosure by IPRA were "of a personal or sensitive nature . . . that, for reasons of public policy, should be kept confidential and not be subject to disclosure." *Id.* at 794, 568 P.2d at 1240. Acknowledging that no New Mexico court at that time had "face[d] this issue squarely," *id.*, *Newsome* reviewed caselaw from other states and concluded that the list of enumerated exceptions to public records disclosure should not be treated as exhaustive. *Id.* at 794-97, 568 P.2d at 1240-43. *Newsome* cited approvingly to a California Supreme Court case which held that the public's right to access government records is "not absolute, but [is] subject to an implied rule of reason" by which a court can create additional exceptions to disclosure. *Id.* at 797, 568 P.2d at 1243 (quoting *Bruce v. Gregory*, 423 P.2d 193, 199 (Cal. 1967)).

{15} Following *Bruce* and other cases, *Newsome* adopted an approach whereby courts determine whether records not specifically exempted by IPRA nonetheless should be withheld from the requester on the grounds that disclosure "would not be in the public interest." 90 N.M. at 798, 568 P.2d at 1244. *Newsome* stated that

> [i]t would be helpful to the courts for the Legislature to delineate what records are subject to public inspection and those that should be kept confidential in the public interest. Until the Legislature gives us direction in this regard, the courts will have to apply the "rule of reason" to each claim for public inspection as they arise.

moved by the amendment concerned records regarding applicants for university presidencies and certain veterans' discharge papers, and therefore are not relevant to this appeal.

Id. at 797, 568 P.2d at 1243.

{16} The Legislature has since responded to the Court's request, obviating any need that existed for application of the "rule of reason," by enumerating specific exceptions to disclosure, including attorney-client privilege, § 14-2-1(A)(6), and maintaining the exception "as otherwise provided by law," § 14-2-1(A)(8). Accordingly, courts now should restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by this Court or grounded in the constitution. Therefore, cases applying the "rule of reason" to all of the exceptions enumerated by the Legislature are overruled to the extent they conflict with this Opinion. *See*, *e.g.*, *City of Farmington v. The Daily Times*, 2009-NMCA-057, ¶ 8, 146 N.M. 349, 210 P.3d 246; *Bd. of Comm'rs of Doña Ana Cnty. v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 11, 134 N.M. 283, 76 P.3d 36.

B. Executive Privilege

{17} Executive privilege is a broad term used to define the many asserted justifications for nondisclosure by the executive branch of the government to its co-equal branches and to the public. *See In re Sealed Case*, 121 F.3d 729, 736-37 (D.C. Cir. 1997) ("Since the beginnings of our nation, executive officials have claimed a variety of privileges to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government."); *see generally EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1375-83 (D.N.M. 1974) (providing a thorough survey of cases discussing assertions of executive privilege from the presidencies of Washington through Nixon); Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L.J. 845, 845 n.3 (1990) (identifying the various subspecies of privilege that have been invoked by the executive branch). We now review the development of executive privilege in the federal courts, then inquire how other states have addressed the privilege, and conclude by determining the contours of the privilege that the Governor may assert pursuant to our state constitution.

1. Executive Privilege in the Federal Courts

{18} Federal courts have long recognized that the President of the United States, the nation's executive, may withhold military and state secrets. *See Gen. Dynamics Corp. v. United States*, ___ U.S. ___, ___, 131 S. Ct. 1900, 1905 (2011) ("We have recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets."); *see also United States v. Nixon*, 418 U.S. at 683, 710-11 (1974). Federal courts also have permitted the executive to withhold information about government informants and pending investigations under some circumstances. *See In re Sealed Case*, 121 F.3d at 736-37. The two categories of federal executive privilege that are of "primary" importance to this appeal, though, are the presidential communications privilege and the deliberative process privilege. *Republican Party*, 2010-NMCA-080, ¶ 18.

a. Presidential Communications Privilege

{19} The United States Court of Appeals for the District of Columbia Circuit has succinctly described the difference between the presidential communications privilege and the deliberative process privilege:

> While the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have different scopes. Both are executive privileges designed to protect executive branch decisionmaking, but one applies to decisionmaking of executive officials generally, the other specifically to decisionmaking of the President. The presidential privilege is rooted in constitutional separation of powers principles

> and the President's unique constitutional role; the deliberative process privilege is primarily a common law privilege. . . .
>
> In addition, unlike the deliberative process privilege, the presidential communications privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.

In re Sealed Case, 121 F.3d at 745 (citations omitted).

{20} The presidential communications privilege was explicitly established by the United States Supreme Court in *Nixon*, 418 U.S. 683. In that case, President Nixon argued that he was not required to comply with a subpoena from the Watergate special prosecutor. *Id.* at 687-88. The Court agreed that communications between certain high-level advisers and the President are presumptively privileged because "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708. The Court found such protection from public scrutiny to be justified in part by the "unique role" of the President under the United States Constitution, including the President's authority to conduct foreign affairs. *Id.* at 715-16. This privilege, the Court determined, "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708. The same concern for separation of powers, however, required the Court to reject "an absolute, unqualified privilege" which would impair "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707. In *Nixon*, the Court concluded that the assertion of executive privilege "cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713; *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448-49 (1977) (holding that a former President could also invoke the communications privilege, but that such a claim is given less weight than a claim of privilege asserted by a sitting President).

{21} Two cases from the federal circuit court for the District of Columbia are instructive in considering the parameters of the presidential communications privilege. *In re Sealed Case* involved a subpoena duces tecum served on the White House Counsel by a grand jury that was investigating a cabinet secretary. 121 F.3d at 734-35. The White House identified responsive documents, producing some and withholding others, originally on the stated basis of the deliberative process privilege. *Id.* at 735. After the Office of the Independent Counsel moved to compel production, *id.* at 734-36, the White House later additionally invoked the presidential communications privilege with respect to the withheld documents, *id.* at 735 & n.2. *In re Sealed Case* reaffirmed that in *Nixon* "the existence of the presidential [communications] privilege was definitively established as a necessary derivation from the President's constitutional status in a separation of powers regime." *Id.* at 739-40. The court then proceeded to consider the President's invocation of the presidential communications privilege in the case at hand. *Id.* at 740. President Clinton had not viewed any of the reports or drafts for which the executive privilege was being asserted. *Id.* at 746. Noting that *Nixon* did not clarify whether the privilege applied only to communications directly with the President, or also included communications with advisers who assisted the President in making policy decisions, *id.* at 747, the court reviewed the reasons in favor of both a narrow and a broad construction of the privilege. A concern for separation of powers supported restricting the privilege to communications that directly included the President, as "the Constitution assigns [Article II] responsibilities to the President alone, arguably the privilege of confidentiality that derives from them also should be the President's alone." *Id.* at 748. A narrow construction of the privilege would also facilitate open government, especially "where the public's ability to know how

its government is being conducted is at stake." *Id.* at 749.

{22} The court concluded, however, that the "arguments for a limited extension of the privilege beyond the President to his immediate advisors [are] more convincing." *Id.* Stating that "pre-decisional documents are usually highly revealing as to the evolution of advisers' positions and as the different policy options considered along the way," *In re Sealed Case* concluded that such documents should be covered by the presidential communications privilege because "[i]f these materials are not protected by the presidential privilege, the President's access to candid and informed advice could well be significantly circumscribed." *Id.* at 750.

{23} Although concluding that the presidential communications privilege extended beyond communications made directly to the President, *In re Sealed Case* was careful not to interpret the privilege too broadly. "[T]he privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate." *Id.* at 752. The court then determined under this standard that the privilege applied to documents authored by the White House counsel, deputy counsel, chief of staff, and press secretary, notes at meetings attended by these advisers, documents prepared by associate counsel, and a memo prepared by a legal intern at the direction of counsel. *Id.* at 758. Ultimately, however, the court concluded that although these documents fell under the privilege, the Office of the Independent Counsel demonstrated sufficient need to overcome the assertion of privilege in most instances, and therefore the court of appeals remanded to the district court for further review. *Id.* at 762.

{24} Another instructive case, *Judicial Watch, Inc. v. Department of Justice*, confirmed the narrow scope of the presidential communications privilege in the context of a Freedom of Information Act (FOIA)[3] request for documents relating to the President's exercise of his pardon power. 365 F.3d 1108, 1109-10 (D.C. Cir. 2004). The court of appeals refused to extend the presidential communications privilege to all officials whose duties included preparing documents for use in advising the President on the exercise of his pardon power. The *Judicial Watch* court relied on *In re Sealed Case* in reaching the conclusion that "the presidential communications privilege applies only to those pardon documents '*solicited and received*' by the President or his *immediate* White House advisers who have 'broad and significant responsibility for investigating and formulating the advice to be given the President.'" *Id.* at 1114 (quoting *In re Sealed Case*, 121 F.3d at 752) (emphases added).

{25} *Judicial Watch* stated, correctly in our view, that "the demands of the privilege become more attenuated the further away the advisers are from the President operationally." 365 F.3d at 1115. *Judicial Watch* determined that the privilege did not apply to documents obtained from other agencies, particularly when they were never submitted to the Office of the President, because "the same confidentiality and candor concerns calling for application of the presidential communications privilege in [the *Nixon* cases] and *In re Sealed Case* do not apply as forcefully." *Id.* As a result, the court held that internal agency documents were not protected by the presidential communications privilege. *Id.* at 1118. "Extending the presidential communications privilege to cover such internal Department documents would be both contrary to executive privilege precedent and considerably undermine the purposed of FOIA to foster openness and accountability in government." *Id.* The pardon attorney, a Department of Justice official who "is at least twice removed from the President," was not permitted to invoke the presidential communications privilege, *id.* at 1120, nor were the

[3] FOIA, 5 U.S.C. § 552(a) (1966, as amended through 2009), the federal analogue to IPRA, "requires federal agencies to make Government records available to the public" upon request, subject to enumerated exceptions. *Milner v. Dep't of the Navy*, ___ U.S. ___, ___, 131 S. Ct. 1259, 1261-62 (2011).

deputy attorney general or his staff, *id.* at 1121. Extension of the privilege to such individuals who were not close advisers of the President, "with the attendant implication for expansion to other Cabinet officers and their staffs, would . . . 'pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President.'" *Id.* (quoting *In re Sealed Case*, 121 F.3d at 752).

b. Deliberative Process Privilege

{26} Unlike the presidential communications privilege, which is "rooted in constitutional separation of powers principles and the President's unique constitutional role," *In re Sealed Case*, 121 F.3d at 745, the deliberative process privilege is a creation of the common law and is invoked primarily by executive agencies. *Id.* at 737. The deliberative process privilege has been developed with the stated purpose of protecting the "frank and open discussions of ideas" and "the confidentiality of the give-and-take that occurs among agency members in the formulation of policy." *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988). Unlike the presidential communications privilege, the deliberative process privilege only covers material that is predecisional and deliberative; it "does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737.

{27} The deliberative process privilege has been incorporated into FOIA, which contains an exemption expressly privileging "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption (Exemption 5) allows for the withholding of all documents that would be privileged in litigation, and also has been interpreted to privilege predecisional and deliberative agency communications. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (noting that both the attorney work product privilege and the deliberative process privilege fall under Exemption 5 of FOIA); *Tax Analysts v. IRS*, 294 F.3d 71, 76 (D.C. Cir. 2002) (Exemption 5 has been "interpreted to encompass, *inter alia*, three evidentiary privileges: the deliberative process privilege, the attorney-client privilege, and the attorney work product privilege."). Consistent with the recognized core purpose of the deliberative process privilege, Exemption 5 protects only predecisional agency communications, not communications about decisions that have already been made. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) ("[I]t is difficult to see how the quality of a decision will be affected by communications . . . occurring after the decision is finally reached.").

{28} FOIA and IPRA are not identical, as we recently explained in *San Juan Agric. Water Users Ass'n*. 2011-NMSC-011, ¶¶ 38-41 (discussing many of the differences between IPRA and FOIA and concluding that federal court interpretations and applications of FOIA are not binding on New Mexico courts construing IPRA). Although the two statutes share the common purpose of providing public access to government documents, FOIA jurisprudence is of limited persuasion when interpreting IPRA, because IPRA ensures greater access to government records than does FOIA. *See id.* ¶ 38 (stating that IPRA's text "underscore[s] a legislative intent to ensure that New Mexicans have the greatest possible access to their public records"); *cf. Hearst Corp. v. Hoppe*, 580 P.2d 246, 249, 251-52 (Wash. 1978) (noting that the state disclosure act "closely parallels FOIA . . . and thus judicial interpretations of that act are particularly helpful in construing our own" (internal citation omitted)).

2. Executive Privilege in Other States

{29} States that recognize a gubernatorial version of executive privilege have premised that

privilege on an analogy between the relationship of a governor to his or her state, and that of the President to the United States. *See Hamilton v. Verdow*, 414 A.2d 914, 921 (Md. 1980) ("Our cases have recognized . . . that the Governor bears the same relation to this State as does the President to the United States, and that generally the Governor is entitled to the same privileges and exemptions in the discharge of his duties as is the President."). Consequently, the few state high courts that have considered the issue explicitly have concluded that governors enjoy an executive communications privilege analogous to the federally recognized presidential communications privilege. *See, e.g.*, *Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978). For example, over a strong dissent, the Ohio Supreme Court held that the governor may assert a qualified executive communications privilege (which that court denominated as a "gubernatorial-communications privilege."). *State ex rel. Dann v. Taft*, 848 N.E.2d 472 (Ohio 2006). The court determined that the governor

> has a qualified gubernatorial-communications privilege that protects communications to or from the governor when the communications were made for the purpose of fostering informed and sound gubernatorial deliberations, policymaking, and decisionmaking. This qualified gubernatorial-communications privilege is overcome when a requester demonstrates that the requester has a particularized need to review the communications and that that need outweighs the public's interest in according confidentiality to communications made to or from the governor.

Id. at 485. A dissent from the majority opinion argued that the recognition of the executive communications privilege was contrary to the policy of openness of the Ohio government. *Id.* at 490 (Pfeifer, J., dissenting). That dissenting opinion also disputed the conclusion that a governor should be entitled to the same privileges as the President, nothing that "though [the President's and a governor's] roles may be analogous, their duties and responsibilities are far from equal," and urging that "[t]he scale of the privilege should reflect the difference in scale between the offices." *Id.* at 491.

{30} Although only a relative handful of state courts have ruled on the existence of an executive communications privilege, a greater number have addressed the applicability of a deliberative process privilege. Some states, parallel to the deliberative process privilege created by the federal courts, recognize a privilege available not only to the governor, but also to executive agencies responding to public records requests. *See, e.g.*, *Gwich'in Steering Comm. v. Office of the Governor*, 10 P.3d 572, 578-79 (Alaska 2000); *City of Colorado Springs v. White*, 967 P.2d 1042, 1049-50 (Colo. 1998) (en banc); *DR Partners v. Bd. of Cnty. Comm'rs of Clark Cnty.*, 6 P.3d 465, 469-70 (Nev. 2000); *In re Liquidation of Integrity Ins. Co.*, 754 A.2d 1177, 1182 (N.J. 2000); *Commonwealth v. Vartan*, 733 A.2d 1258, 1263-64 (Pa. 1999); *Herald Ass'n, Inc. v. Dean*, 816 A.2d 469, 474-75 (Vt. 2002). In a few instances, state public records statutes track Exemption 5 of FOIA and expressly exempt from disclosure agency-generated documents reflecting policy deliberations. *See, e.g.*, *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000) (citing Tex. Gov't Code Ann. § 552.111 (West 1993)). More typically, state high courts recognize a deliberative process privilege based purely on common law principles. *See, e.g.*, *City of Colorado Springs*, 967 P.2d 1042, 1049-51 (distinguishing the deliberative process privilege's common law origin from the executive communications privilege's constitutional basis); *see also Gwich'in Steering Comm.*, 10 P.3d at 578 (noting that the deliberative process privilege is not grounded in "constitutional notions of separation of powers").

{31} Other states have considered and rejected a common law deliberative process privilege. *See, e.g.*, *Rigel Corp. v. Arizona*, 234 P.3d 633, 640-41 (Ariz. Ct. App. 2010); *People ex rel. Birkett v. City of Chicago*, 705 N.E.2d 48, 53 (Ill. 1998); *News & Observer Publ'g Co. v. Poole*, 412 S.E.2d 7, 20 (N.C. 1992) ("We refuse to engraft upon our Public Records Act exceptions

based on common-law privileges, such as a 'deliberative process privilege,' to protect items otherwise subject to disclosure."); *Sands v. Whitnall Sch. Dist.*, 754 N.W.2d 439, 458 (Wis. 2008) ("Wisconsin does not recognize a deliberative process privilege. [State statute] precludes the extension of common law privileges by the court on a case-by-case basis, but rather requires common law privileges not originating in the constitution to be adopted by statute or court rule."); *see also Freudenthal v. Cheyenne Newspapers, Inc.*, 233 P.3d 933, 942 (Wyo. 2010) (declining to rule on whether Wyoming's public records law incorporates the deliberative process privilege).

{32} One state, Massachusetts, does not recognize *any* form of executive privilege. The Massachusetts Supreme Judicial Court held that neither constitutional nor common law executive privilege could be invoked to shield documents from production in a civil action. *Babets v. Sec. of the Exec. Office of Human Servs.*, 526 N.E.2d 1261, 1264 (Mass. 1988). The court in *Babets* concluded that the doctrine of separation of powers did not compel recognition of an executive privilege, as "[w]hat [the] doctrine interdicts is the interference by one branch of government with the power or functions of another," and the decision not to recognize an executive privilege "does not constitute the exercise of nonjudicial power or interfere with the Executive's power." *Id.* at 1263. The court then refused to create a common law executive privilege, noting that privileges in Massachusetts are normally conferred by the legislature. *Id.* at 1264-65. The court rejected the executive's argument that the privilege was necessary to promote "candid and unconstrained communication and exchange of ideas between and among executive policymakers and their advisors . . . in light of the long history of the Commonwealth and the lack of any showing of real harm that has accrued from the absence of the privilege." *Id.* at 1266.

3. Executive Privilege in New Mexico

{33} Having reviewed executive privilege in the federal courts and our sister states, we now turn to the proper scope of the privilege in New Mexico. The assertion of executive privilege in response to an IPRA request is a matter of first impression for this Court. We previously have concluded, however, that some form of executive privilege is mandated by the separation of powers clause of the New Mexico Constitution. *First Judicial*, 96 N.M. at 257, 629 P.2d at 333.

{34} We decided *First Judicial*, our formative opinion on executive privilege, in response to a discovery dispute in civil cases arising from the 1980 state penitentiary riot. The Attorney General conducted an extensive investigation into the riot, and claimed that all of the information gathered during the course of that investigation was privileged from discovery in any matter. *Id.* at 256-57, 629 P.2d at 332-33. We agreed with the Attorney General that he was entitled to withhold information pursuant to executive privilege. *Id.* at 258, 629 P.2d at 334.

{35} *First Judicial* explained that "for a privilege to exist in New Mexico, it must be recognized or required by the Constitution, the Rules of Evidence, or other rules of this Court." *Id.* at 257, 629 P.2d at 333. We reaffirm that holding here. We then held that "recognition of an executive privilege is required by the Constitution of the State of New Mexico[,]" specifically the separation of powers clause contained in Article III. *Id.* Citing *Nixon*, 418 U.S. 683, and *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd* 384 F.2d 979 (D.C. Cir.1967), we stated:

> The purposes of the executive privilege are to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure. Executive personnel who fear or expect public dissemination of their remarks may temper their comments because of their concern for their own personal interests, safety, or reputation.

Id. at 258, 629 P.2d at 334. The executive privilege *First Judicial* recognized is not absolute, as that "would conflict with the constitutional duty

of the courts to do justice in matters brought before it." *Id.*

{36} *First Judicial* went on to instruct that in the context of civil discovery, the trial court must determine whether the privilege was properly invoked and then balance the competing interests in order to determine whether the privilege has been overcome. *Id. First Judicial*'s balancing test requires that the movant show good cause for the production of the material over which the privilege has been asserted. *Id.* The trial court must then conduct an in camera review of the material to determine if it "would be admissible in evidence and that it is otherwise unavailable by exercise of reasonable diligence." *Id.* Finally, the trial court must assure that the balance of interests weighed in favor of disclosure. *Id. First Judicial* identified the competing interests as "the public's interest in preserving confidentiality to promote intra-governmental candor," and "the individual's need for disclosure of the particular information sought." *Id.* (citing *Nixon*, 418 U.S. 712, and *Armstrong Bros. Tool Co. v. United States*, 463 F. Supp. 1316, 1320 (Cust. Ct. 1979) (discussing the balancing necessary before an assertion of deliberative process privilege will be honored)). The competing interests implicated by a claim of executive privilege are more accurately characterized as the public's interest in disclosure weighed against the government's interest in nondisclosure. *See Lamy v. N.H. Pub. Utils. Comm'n*, 872 A.2d 1006, 1010 (N.H. 2005) (identifying the central tension as between "the public interest in disclosure against the government interest in nondisclosure" as well as any individual privacy interests in favor of nondisclosure); *Denver Post Corp. v. Ritter*, 230 P.3d 1238, 1240 (Colo. App. 2009) (noting that Colorado's public records law "balances the public's interest in access to information . . . against the privacy interests of public officials and employees"). As we explain below, when the Governor invokes executive privilege in response to an IPRA request, however, courts do not apply *First Judicial*'s balancing test.

{37} In contrast to its recognition of a constitutionally-based executive communications privilege, *First Judicial* rejected the assertion of a common law "public interest privilege." *Id.* The Attorney General had argued that the Court should recognize such a privilege to protect his communications with individuals outside of the executive department exchanged in the course of his investigation. *Id.* at 258-59, 629 P.2d at 334-35. In the Attorney General's view, the "rule of reason" exception to disclosure set forth in *Newsome*, discussed above, supported the existence of a public interest privilege. *Id.* at 260, 629 P.2d at 336. *First Judicial* concluded, however, that neither the constitution nor the evidentiary rules mandated such a privilege or any other common law evidentiary privileges, noting that if such privileges were accepted, "there would be no limit to the communications that could be protected." *Id.* at 260, 629 P.2d at 336. Two justices dissented in part in *First Judicial*, arguing that the Court should recognize a public interest privilege. *Id.* at 262, 629 P.2d at 338 (Easley, C.J., dissenting in part and concurring in part). The dissenting opinion concluded that the constitution supported the existence of a privilege for information gathered from the public by the Attorney General in the course of an investigation. *Id.* In addition, the dissent opined that New Mexico had adopted the common law privileges, and urged that *Newsome*'s rule of reason provided the basis for the public interest privilege in this case. *Id.* at 263, 629 P.2d at 339.

{38} *First Judicial*'s acknowledgment of constitutionally-based privileges and rejection of common law privileges is analogous to the New Mexico Rules of Evidence, which contemplate privileges only as "required by [the] constitution, [the Rules of Evidence] or in other rules adopted by the supreme court," not common law privileges. Rule 11-501. We discern no legally sound reason to recognize privileges applicable to public records requests where we have not done so in the context of litigation. This conclusion flows from the language of IPRA itself, which mandates that New Mexicans "are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." Section 14-2-5. Allowing the executive to resist disclosure on the basis

of a common law deliberative process privilege not otherwise recognized under our state's constitution would frustrate IPRA's guiding purpose of promoting government transparency. *See San Juan Agric. Water Users Ass'n*, 2011-NMSC-011, ¶ 16 ("In order for government to truly be of the people and by the people, and not just for the people, our citizens must be able to know what their own public servants are doing in their name."). As a result, consistent with *First Judicial* we reject the Court of Appeals' adoption of the common law deliberative process privilege.

{39} We reaffirmed *First Judicial*'s outlining of executive privilege in *Estate of Romero.* 2006-NMSC-028, ¶ 12. In that case, the City of Santa Fe attempted to assert executive privilege to preclude discovery of law enforcement investigatory materials. *Id.* ¶ 10. We refused the city's invitation to revisit *First Judicial*'s disallowance of common law evidentiary privileges. *Id.* ¶ 11. We also rejected an expansion of the executive privilege to city agencies, underscoring that constitutional separation of powers does not extend beyond the entities "contemplated in the Constitution as part of the executive branch." *Id.* ¶ 13 (citing *State ex rel. Chapman v. Truder*, 35 N.M. 49, 52, 289 P. 594, 596 (1930)).

{40} We acknowledge that *First Judicial* used language consistent with both an executive communications privilege and a deliberative process privilege. At its heart, *First Judicial* recognized a form of executive privilege based on separation of powers principles enshrined in our state constitution, 96 N.M. at 257, 629 P.2d at 333, that would necessarily embrace an executive communications privilege but exclude a common law deliberative process privilege. *First Judicial* also identified "the valid need for protection of *communications*" within the executive branch. *Id.* at 258, 629 P.2d at 334 (emphasis added).

{41} On the other hand, *First Judicial* described the purpose of executive privilege as "to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure," *id.*, a rationale that, depending on the actors involved, could support the executive communications privilege, the deliberative process privilege, or both. We are not persuaded, though, that *First Judicial* clearly embraced the deliberative process privilege. Although the Court of Appeals in this case relied on a general citation to *Carl Zeiss* as an indication that *First Judicial* intended the deliberative process privilege to be included in the constitutionally-mandated executive privilege, *Republican Party*, 2010-NMCA-080, ¶ 32, we find it unlikely that this Court intended to adopt the common law deliberative process privilege endorsed by *Carl Zeiss* shortly after disavowing common law privileges. In fact, *First Judicial* applied the privilege to documents that appear to have been neither "communications" nor "deliberative," but instead consisted of written responses to interview questionnaires and other information compiled by the Attorney General's staff in the course of investigating the penitentiary riot. *Id.* at 256-57, 629 P.2d at 332-33.

{42} We disavow *First Judicial* to the extent that it could be read to support the adoption of the deliberative process privilege, *see Republican Party*, 2010-NMCA-080, ¶ 32, and hold emphatically that no deliberative process privilege exists under New Mexico law. In addition to apparently conflating the executive communications privilege and the deliberative process privilege, *First Judicial* also left many unanswered questions about the boundaries of executive privilege. At the time we decided *First Judicial*, executive privilege jurisprudence was in its early stages of development; although we cited generally to *Nixon*, we did not discuss the different categories of the executive privilege that courts were beginning to recognize, nor the rationales for how to define the contours of that privilege.

{43} Following the principles established by *First Judicial*, we hold that our jurisprudence supports a limited form of executive privilege derived from the constitution. This privilege is similar in origin, purpose, and scope to the presidential communications privilege recognized by the federal courts and the executive communications privilege recognized by some other state

high courts. Having determined the form of executive privilege recognized under New Mexico law, we now clarify which documents may potentially qualify for the privilege and who may invoke the privilege. The Governor, of course, may opt to exercise his or her executive privilege in a more limited fashion than provided by the constitution, but the delineation of the privilege's outer limits remains this Court's responsibility: "[I]t is the judiciary (and not the executive branch itself) that is the ultimate arbiter of executive privilege." *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 103 (D.D.C. 2008); *see also Nixon v. Sirica*, 487 F.2d 700, 713 (D.C. Cir. 1973) (Holding that applicability of executive privilege is for the courts, not the executive itself, to define).

{44} First, executive privilege in New Mexico can only apply to "communications," because the privilege exists solely to protect the executive's "access to candid advice," *In re Sealed Case*, 121 F.3d at 745, not to keep all information related to the executive beyond the reach of the public. *Cf. Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 592 F. Supp. 2d 111, 118-19 (D.D.C. 2009) ("[T]he presidential communications privilege, as its name and the Circuit's opinions suggest, extends only to *communications*."). The court in *Citizens for Responsibility & Ethics in Washington* determined that White House visitor logs, the records at issue in that case, "shed[] no light on the content of communications between the visitor and the President or his advisers, whether the communications related to presidential deliberation or decisionmaking, or whether any substantive communications even occurred." We agree that the privilege can only extend to documents that are communicative in nature.

{45} More specifically, in light of the privilege's central purpose of "fostering candid expression of recommendations and advice" to the Governor, *First Judicial*, 96 N.M. at 258, 629 P.2d at 334, the privilege is "limited to materials connected to [the chief executive's] decisionmaking, as opposed to other executive branch decisionmaking," *In re Sealed Case*, 121 F.3d at 745, and "should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the [chief executive]." *Id.* at 752. Furthermore, because the privilege derives its force and legitimacy from the constitution, the communications at issue must relate to the Governor's constitutionally-mandated duties. *Cf. id.* at 748 (identifying "the President's Article II powers and responsibilities as the constitutional basis of the presidential communications privilege" (citing *Nixon*, 418 U.S. at 705 & n.16)); *Judicial Watch*, 365 F.3d at 1115 (concluding that "the presidential communications privilege is rooted in the President's need for confidentiality in the communications of his office in order to effectively and faithfully carry out his Article II duties," and noting that both *Judicial Watch* and *In re Sealed Case* involved a claim of privilege over documents relating to "a non-delegable duty of the President under Article II, Section 2 of the Constitution" (internal quotation marks and citation omitted)). We see no basis for sanctioning an executive communications privilege broader than the privilege afforded to the President of the United States. *See Dann*, 848 N.E.2d at 490 (Pfeifer, J., dissenting). In New Mexico, then, to be eligible for protection from disclosure by operation of the executive communications privilege, the documents at issue must concern the Governor's decisionmaking in the realm of his or her core duties.

{46} Second, our executive privilege does not cover all communications in furtherance of gubernatorial decisionmaking, but is limited to those communications to or from individuals in very close organizational *and* functional proximity to the Governor. In *In re Sealed Case*, the D.C. Circuit approved a "limited extension of the privilege beyond the President to his immediate advisers." 121 F.3d at 749. While not deciding exactly "how far down the chain of command the presidential communication privilege extends," *id.* at 749-50, the court limited the privilege to communications authored or received by the President's closest advisers, "who have broad and significant responsibility for investigating and formulating the advice to be given the

President on the particular matter to which the communications relate." *Id.* at 752. The court explained that "[o]nly communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers." *Id.* We find persuasive the analysis from *In re Sealed Case* that the executive (here, the Governor) need not have personally authored, or solicited and received, a document in order for the privilege to apply. To be subject to the privilege, however, the document in question must have been authored, or solicited and received, by either the Governor or an "immediate adviser," *Judicial Watch,* 365 F.3d at 1115, with "broad and significant responsibility" for assisting the Governor with his or her decisionmaking. *In re Sealed Case*, 121 F.3d at 752.

{47} Third, the privilege, rooted as it is in separation of powers, is not available to the entire executive branch, as Respondents originally argued, but instead reserved to the constitutionally-designated head of the executive branch—the Governor. *See Dann*, 848 N.E.2d at 485-86 ("[A] governor must formally assert the privilege by declaring that he or she has reviewed the requested materials and concluded that the materials meet the criteria of the privilege, i.e., that they constitute a communication either to or from him [or her] and were made for the purpose of fostering informed and sound gubernatorial deliberations, policymaking and decisionmaking." (footnote omitted)); *cf. Blumenthal v. Drudge*, 186 F.R.D. 236, 242 (D.D.C. 1999) ("The President alone possesses [the] authority" to invoke executive privilege.); *but cf. Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) (permitting executive agency to invoke presidential communications privilege on behalf of unnamed "senior presidential advisers"). The D.C. Circuit has noted that "[t]he issue of whether a President must personally invoke the privilege remains an open question." *Judicial Watch*, 365 F.3d at 1114. We hold, however, that while the privilege can extend to communications *authored* by close advisers, the privilege's constitutional foundation requires limiting its *invocation* to the Governor. As we do not recognize a common law deliberative process privilege, cabinet agencies that are simply under the ultimate control of the Governor may not assert a privilege to protect internal memoranda, contrary to the Court of Appeals' determination that the MVD could do so because it "is a cabinet department in the executive branch." *Republican Party*, 2010-NMCA-080, ¶ 29.

{48} We set forth these limitations in order to minimize unwarranted claims of privilege, lessen undue burden on courts in resolving privilege disputes, and curb encroachments on the public's access to records relating to the activities of their government. These requirements for invocation of the privilege are consistent with the legislative purpose of IPRA: "[T]hat all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." Section 14-2-5.

{49} Importantly, as we explained in *First Judicial*, 96 N.M. at 258, 629 P.2d at 334, executive privilege in New Mexico is a qualified privilege. *First Judicial* directed courts to "balance the public's interest in preserving confidentiality to promote intra-governmental candor with the individual's need for disclosure of the particular information sought." *Id.* As we discuss above, this balancing test requires a show of "good cause for the production of the requested information." *Id.* If the party seeking disclosure makes such a showing, the court then conducts an in camera review of the disputed documents and should order disclosure "provided that the public's interest in preserving confidentiality does not outweigh the specific needs of the movant." *Id. First Judicial*, however, involved a discovery dispute, not a public records request. Unlike a party seeking discovery in civil litigation, a party requesting public records under IPRA need not assert any particular need for disclosure. Section 14-2-8(C) ("No person requesting records shall be required to state the reason for inspecting the records."). *First Judicial*'s instruction that courts should balance the competing needs of the executive and the party seeking disclosure, therefore, does not apply to claims of executive privilege under IPRA. Instead, courts considering the application of executive privilege to an IPRA request must independently determine

whether the documents at issue are in fact covered by the privilege, and whether the privilege was invoked by the Governor, to whom the privilege is reserved. Where appropriate, courts should conduct an in camera review of the documents at issue as part of their evaluation of privilege.

{50} Under these standards, it is evident that the records that prompted the underlying lawsuit here would not qualify for the privilege. The records that were at issue are principally internal emails between MVD staff, not communications with Governor Richardson or his immediate advisers. The record only contains redacted versions of the emails, so it is impossible to ascertain their contents, but Respondents never claimed that the emails contained policy recommendations to the former Governor or otherwise evidenced his deliberations on a policy matter. Ultimately, Respondents acknowledged that the communications were not directed to Governor Richardson or his immediate advisers and were not "used by any such official to make policy recommendations or decisions," but instead "involve employees implementing policies and otherwise performing the routine functions of the agencies for which they work." In addition, the entity that attempted to assert privilege over the documents was the MVD, not the Governor, which in itself renders that claim of privilege invalid.

IV. CONCLUSION

{51} Transparency is an essential feature of the relationship between the people and their government. This foundational principle far predates IPRA, New Mexico's statehood, and even George Washington's first term as our nation's President. In 1788, during debate on the ratification of the United States Constitution, the patriot Patrick Henry so eloquently stated:

> Give us at least a plausible apology why Congress should keep their proceedings in secret. . . . The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them. . . . [T]o cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man, and every friend to this country.

3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787 169-70 (Jonathan Elliott ed., 1881).

{52} The constitution is the heart, the soul, the genius of our system of government, and its safeguarding is this Court's "highest duty and most sacred function." *Dolese v. Pierce*, 16 N.E. 218, 221 (Ill. 1888). Our constitution expressly limits the powers of the three co-equal branches, and is at its apex when the people have access to the information necessary to determine whether their elected officials are faithfully fulfilling their duties. To protect the people's vital right to access information about the workings of government, we hold that executive privilege must be confined to the constitutional limits set forth in this Opinion.

{53} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

CHARLES W. DANIELS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-032

Filing Date: August 23, 2012

Docket No. 32,939

UNITED NUCLEAR CORPORATION,

Plaintiff-Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Respondent.

Original Proceeding on Certiorari
Louis E. DePauli, Jr., District Judge

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OPINION

SERNA, Justice.

{1} This appeal turns on our construction of a single word, "sudden," within a pollution exclusion clause in a series of liability insurance policies barring coverage for certain damages unless the events causing those damages were "sudden and accidental"—an issue of first impression in New Mexico, although one already considered by numerous courts in other jurisdictions. Concluding that "sudden" lacks a single clear meaning, we reverse the Court of Appeals' holding that the word unambiguously signifies "quick, abrupt, or a temporarily short period of time." *United Nuclear Corp. v. Allstate Ins. Co.*, 2011-NMCA-039, ¶ 20, 149 N.M. 574, 252 P.3d 798. Under well-established principles of insurance law, we construe this ambiguity in favor of the insured, Petitioner United Nuclear Corporation (United Nuclear), and interpret the term "sudden" in the insurance policies at issue in this dispute to mean "unexpected." We remand to the district court for further proceedings consistent with this Opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} United Nuclear operated several uranium mines in New Mexico from the 1960s through the early 1980s, one of which was the Northeast Church Rock Mine (Church Rock Mine) in McKinley County. Although the parties do not mention this fact in their briefs, in July 1979, a breach opened in a dam at the Church Rock Mine and about 94 million gallons of radioactive liquid escaped from a tailings pond and poured into the nearby Rio Puerco. *See United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 482, 709 P.2d 649, 651 (1985). This spill was "the largest accidental release of radioactive material in U.S. history." Judy Pasternak, *Yellow Dirt: An American Story of a Poisoned Land and a People Betrayed* 150 (Free Press 2010). Remediation of the area around the Church Rock Mine continues to this day. *See* U.S. Envtl. Prot. Agency, EPA Seeks Comment on the Surface Soil Proposed Plan for the United Nuclear Corporation Superfund Site, 4-5,July 2012, available at http://www.epa.gov/region6/6sf/pdffiles/unc_pplan_fs_7-16-2012.pdf (last visited August 20, 2012). Although these facts do not affect the narrow issue of insurance policy interpretation presented here, they help make tangible the dispute underlying this appeal.

{3} To insure its mining operations, United Nuclear obtained commercial general liability and umbrella liability insurance policies from a number of carriers, including the polices relevant to this dispute (the Policies), which were issued by two predecessor corporations of Respondent Allstate Insurance Company (Allstate). Together, the Policies were in effect between August 1, 1977 and June 1, 1981.

{4} United Nuclear either incurred actual costs or was exposed to potential liability for environmental contamination resulting from its mining operations through several different proceedings. Those proceedings included a 1996 lawsuit filed by the New Mexico Mining Commission ultimately requiring United Nuclear to remediate three of its mines (including the Church Rock Mine), *see N.M. Mining Comm'n v. United Nuclear Corp.*, 2002-NMCA-108, ¶ 1, 133 N.M. 8, 57 P.3d 862; a 1997 lawsuit that the mineral lessor at the Church Rock Mine filed in state district court over environmental damage caused by United Nuclear's "mining and disposal practices"; notices in 2002 and 2004 from the New Mexico Environment Department requiring United Nuclear to abate excess use of water at two of its mines (including the Church Rock Mine); notices of claim from the United States Forest Service in 2001 holding United Nuclear responsible for environmental remediation at two of the sites; and an investigation by the Environmental Protection Agency into "alleged radiation claims on Indian lands adjacent to the [Church Rock] mine." United Nuclear tendered the defense and indemnity of the two lawsuits to Allstate in 1997, and notified Allstate about the administrative notices and determinations in 2002 and 2004. Allstate denied any duty to United Nuclear with respect to the tendered claims.

{5} United Nuclear ultimately filed a third-party complaint in the 1997 lawsuit filed by the mineral lessor, seeking a declaration that Allstate and various other insurers are required to defend and indemnify United Nuclear in the underlying suit. By April 2005, United Nuclear had amended the third-party complaint to seek declaratory relief against Allstate and the other insurers for all of its actual and potential liabilities mentioned above.

{6} In February 2006, Allstate moved for summary judgment on the sole ground that the Policies contain an exclusion clause removing from coverage all claims for damages caused by pollution or contamination unless the underlying discharges were "sudden and accidental." Allstate further asserted that the term "sudden" as used in the Policies connotes an abrupt event or events, and because the discharges that lead to the contamination at United Nuclear's mines occurred over a period of years, those events were not "sudden" and thus are excluded from coverage.

{7} In October 2008, the district court granted Allstate's motion. The court found "the word 'sudden' and the word 'accidental' . . . [to be]

clear and unambiguous. . . . The word 'sudden' means quick, abrupt or otherwise a temporarily short period of time. . . . The word 'accidental' means unintended, unexpected or by chance." United Nuclear appealed the district court's determination to the Court of Appeals. In its opinion, a divided panel upheld the district court's grant of summary judgment to Allstate on the meaning of "sudden" as used in the Policies' pollution exclusion clause. *United Nuclear*, 2011-NMCA-039, ¶¶ 1, 14, 21, 28.

{8} As the district court had done, the Court of Appeals relied heavily on the reasoning and holding of *Mesa Oil, Inc. v. Ins. Co. of North America*, 123 F.3d 1333, 1339-41 (10th Cir. 1997). *United Nuclear*, 2011-NMCA-039, ¶¶ 7, 12-14. In *Mesa Oil*, the Tenth Circuit acknowledged an absence of New Mexico case law interpreting the term "sudden," but surmised that New Mexico courts "would likely honor the plain meaning of the word 'sudden' and conclude that the term encompasses a temporal component." *Mesa Oil*, 123 F.3d at 1340. The court concluded that "[t]he word 'sudden' clearly expresses a meaning of quickness or abruptness, particularly in light of the fact that it would be entirely redundant when paired with the word 'accidental' if it merely meant 'unexpected.'" *Id.*

II. STANDARD OF REVIEW

{9} This Court reviews de novo an order granting or denying summary judgment. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. Summary judgment should be granted "only when there are no issues of material fact, with the facts viewed in the light most favorable to the non-moving party." *Summers v. Ardent Health Servs., L.L.C.*, 2011-NMSC-017, ¶ 10, 150 N.M. 123, 257 P.3d 943. Similarly, the interpretation of terms within an insurance policy is "a matter of law about which the court has the final word," *Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 60, 123 N.M. 752, 945 P.2d 970, and is subject to de novo review, *Battishill v. Farmers Alliance Ins. Co.*, 2006-NMSC-004, ¶ 6, 139 N.M. 24, 127 P.3d 1111.

III. DISCUSSION

A. Analytical Principles

1. Ambiguities Construed Against The Insurer

{10} As with other contracts, where an insurance policy's terms "have a common and ordinary meaning, that meaning controls in determining the intent of the parties." *Id.* ¶ 13. Reviewing courts should not "create ambiguity where none exists, and an ambiguity does not exist merely because the parties hold competing interpretations" about the meaning of a policy provision. *City of Santa Rosa v. Twin City Fire Ins. Co.*, 2006-NMCA-118, ¶ 7, 140 N.M. 434, 143 P.3d 196 (citing *Battishill*, 2006-NMSC-004, ¶ 17). But where a policy term is "reasonably and fairly susceptible of different constructions," it is deemed ambiguous and "must be construed against the insurance company as the drafter of the policy." *Knowles v. United Servs. Auto. Ass'n*, 113 N.M. 703, 705, 832 P.2d 394, 396 (1992). Insurance policies almost always are contracts of adhesion, meaning that "the insurance company controls the language" and "the insured has no bargaining power." *Cal. Cas. Ins. Co. v. Garcia-Price*, 2003-NMCA-044, ¶ 20, 133 N.M. 439, 63 P.3d 1159; *accord Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 14 n. 3, 133 N.M. 661, 68 P.3d 901. As this Court explained in *Sanchez v. Herrera*,

> [t]he 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).

{11} Cognizant of this imbalance in power, "as a matter of public policy" courts "generally construe[]" ambiguities "in favor of the insured and against the insurer." *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 26,

129 N.M. 698, 12 P.3d 960; *see also* 2 Steven Plitt et al., *Couch on Insurance* § 22:14 (3d ed. 2010). Where a term in an insurance policy is found to be ambiguous, "[t]he court's construction of [the] policy will be guided by the reasonable expectations of the insured." *Rummel*, 1997-NMSC-041, ¶ 22; *see also Phx. Indem. Ins. Co. v. Pulis*, 2000-NMSC-023, ¶ 23, 129 N.M. 395, 9 P.3d 639 (quoting *W. Commerce Bank v. Reliance Ins. Co.*, 105 N.M. 346, 348, 732 P.2d 873, 875 (1987)) ("[T]he 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."). Finally, "[i]t is unnecessary to show that a construction against the insurer is more logical than a construction against the insured," so long as both constructions are reasonable. 2 Plitt, *supra*, § 22:17, at 22-98 to 22-99.

2. Consideration of Extrinsic Evidence in Assessing Ambiguity

{12} Because the Court of Appeals' majority opinion held the term "sudden" to have a plain and unambiguous meaning, it did not consider extrinsic evidence necessary to resolve the appeal. *United Nuclear*, 2011-NMCA-039, ¶ 21. In the dissent's view, though, various factors, discussed below, support a finding of ambiguity, and "the entire matrix" shows "that 'sudden and accidental' does not have only one meaning as a matter of law. . . ." *Id.* ¶ 66 (Vigil, J., dissenting).

{13} "New Mexico law . . . allows the court to consider extrinsic evidence to make a preliminary finding on the question of ambiguity." *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). This general principle of New Mexico contract law has been reaffirmed in the specific context of insurance coverage disputes. *See, e.g.*, *Ponder*, 2000-NMSC-033, ¶ 13 (interpreting provisions of an automobile insurance policy and noting that "[i]n 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"); *see also, e.g.*, *Mesa Oil*, 123 F.3d at 1340-41 ("New Mexico courts generally allow a party to introduce extrinsic evidence of a[n insurance] contract's meaning to determine whether an ambiguity exists and how that ambiguity should be resolved."). Therefore, we consider extrinsic evidence to help evaluate whether the term "sudden," as used in the Policies' pollution exclusion, is ambiguous.

B. Interpreting the Word "Sudden"

1. Relevant Policy Terms

{14} The Policies' general coverage forms provide that Allstate will defend and indemnify United Nuclear for "damages on account of . . . Property Damage . . . caused by or arising out of each Occurrence. . . ." The Policies define an "Occurrence" as "an accident, event or happening including continuous or repeated exposure to conditions which results, during the policy period, in . . . Property Damage . . . neither expected nor intended from the standpoint of the Insured. . . . All such . . . Property Damage . . . caused by one event or by continuous or repeated exposure to substantially the same conditions shall be deemed to result from one Occurrence."

{15} The Policies do not apply to every conceivable incident of property damage; they contain various exclusions, including the pollution exclusion at issue here which bars coverage for property damage "arising out of the discharge, dispersal, release or escape of . . . toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but th[e] exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*" (Emphasis added).[1] The Policies' pollution exclusion is a boilerplate form that once was widely used in the liability insurance industry. *See, e.g.*, *Century In-*

[1] One of the four policies in question (the 1980-81 Policy), has a slightly different version of the exclusion, providing that coverage does not apply if the discharge "is both sudden and accidental."

dem. Co. v. Liberty Mut. Ins. Co., 708 F. Supp. 2d 202, 206 (D.R.I. 2010); *City of Northglenn v. Chevron U.S.A., Inc*., 634 F. Supp. 217, 223 (D. Colo. 1986). Although wording of the pollution exclusion may vary slightly from policy to policy, numerous courts in other jurisdictions have considered functionally identical language from policies issued by dozens of different insurers. *See, e.g.*, *State v. Allstate Ins. Co.*, 201 P.3d 1147, 1153 (Cal. 2009) (discussing insurance policies with identical pollution exclusions to the Policies at issue in this appeal); *Textron, Inc. v. Aetna Cas. & Sur. Co.*, 754 A.2d 742, 744 (R.I. 2000) (same). As an exception to an exclusion, the "sudden and accidental" clause acts as a restoration of coverage under the conditions specified and therefore should be construed broadly in favor of the insured as if the exclusion did not exist. *See Allstate Ins. Co.*, 201 P.3d at 1154; *see also Bering Strait Sch. Dist. v. RLI Ins. Co.*, 873 P.2d 1292, 1295 (Alaska 1994) ("Grants of coverage should be construed broadly while exclusions are interpreted narrowly." (citation and internal quotation marks omitted)).

2. Sources for the Possible Meaning of "Sudden"

a. Other Provisions in the Policies

{16} Our inquiry begins with the other relevant terms of the Policies. *See Rummel*, 1997-NMSC-041, ¶ 20 ("[W]e will first look to whether [a disputed term's] meaning and intent is explained by other parts of the policy."). Insurance policy terms "cannot be analyzed in a vacuum," and a policy "must be construed in its entirety, with each clause interpreted in relation to others contained therein." 2 Plitt, *supra*, § 21:19, at 21-76 to 21-80. The Policies do not provide any definition for the word "sudden" or for the phrase "sudden and accidental." Although far from dispositive, the lack of a definition in a policy may be one indication of ambiguity. *See Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d 1263, 1270 (Cal. 1993).

{17} United Nuclear presents both persuasive and unpersuasive arguments for the proposition that the Policies contain other language that inherently contradicts Allstate's preferred meaning of the word "sudden." One of the four Policies (the 1978-79 Policy), contains an endorsement, or modification, that alters coverage to exclude property damage caused by "*seepage*, pollution or contamination" unless the discharge "is caused by accident and results in property damage," or subsequent to the discharge, "an accident ensues which causes property damage." (Emphasis added). To the extent an endorsement conflicts with the terms of the main coverage forms, the policy will be deemed ambiguous. *See Ivy Nelson Grain Co. v. Commercial Union Ins. Co. of N.Y.*, 80 N.M. 224, 226, 453 P.2d 587, 589 (1969). If Allstate were correct that "sudden" is equivalent to "abrupt," the 1978-79 Policy's coverage of damages caused by "seepage" would be in conflict with the language of the pollution exclusion, because "seepage" indicates a gradual rather than an abrupt process. *See Queen City Farms, Inc. v. Cent. Nat'l. Ins. Co. of Omaha*, 827 P.2d 1024, 1049 (Wash. Ct. App. 1992) (noting that one policy in question covered "leakage" and another policy covered "seepage," and that both of these words "generally connote a gradual process"), *aff'd Queen City Farms*, 882 P.2d 703 (Wash. 1991); *accord City of Northglenn*, 634 F. Supp. at 222. This specific endorsement is found in only one of the four Policies, however, and therefore does not aid United Nuclear in establishing an ambiguity in the other three Policies.

{18} United Nuclear also attempts to establish an inconsistency between the pollution exclusion clause and the promise in the Policies' general 'insuring agreement' to provide coverage for damages or claims arising from occurrences "including *continuous or repeated exposure* to conditions which results . . . in . . . Property Damage . . . neither expected nor intended from the standpoint of the Insured." (Emphasis added). United Nuclear's argument that this language is inconsistent with defining "sudden" within the pollution exclusion as requiring abruptness or a short duration is not persuasive. An exclusion does not conflict with an insurance policy's insuring agreement simply because it affords less or different coverage as compared with what the policy would provide without the exclusion; that is the very purpose of

an exclusion, to restrict the scope of the policy beyond what would otherwise be covered. *See Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 42 Cal. App. 4th 121, 129, 49 Cal. Rptr. 2d 567, 572 (Ct. App. 1996) (A "policy must be read as a whole and it cannot be said that an exclusion is in 'conflict' with an insuring clause. The very purpose of an exclusion is to withdraw coverage which, but for the exclusion, would otherwise exist."). We now look to evidence outside of the Policies to evaluate whether the word "sudden" as used therein is ambiguous.

b. Dictionary Definitions

{19} When a term is undefined in the policy, a reviewing court "may look to that term's 'usual, ordinary, and popular' meaning, such as found in a dictionary." *Davis v. Farmers Ins. Co. of Ariz.*, 2006-NMCA-099, ¶ 7, 140 N.M. 249, 142 P.3d 17 (quoting *Battishill*, 2006-NMSC-004, ¶ 8); *see also Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 619 (Colo. 1999) (noting that "it is . . . appropriate [for courts] to rely on dictionary definitions of undefined terms used in an insurance contract"). Courts routinely refer to dictionaries for aid in assessing the meaning of undefined terms in insurance policies. *See, e.g.*, *Estate of Galloway v. Guar. Income Life Ins. Co.*, 104 N.M. 627, 628, 725 P.2d 827, 828 (1986) (Court referenced dictionary in interpreting meaning of insurance policy term "suicide."); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 897-98 (Pa. 2006) (Pennsylvania Supreme Court consulted dictionary where relevant policy did not provide definition for term "accident."); *Builders Mut. Ins. Co. v. Parallel Design & Dev. LLC*, 785 F. Supp. 2d 535, 546-47 (E.D. Va. 2011) (District court first looked to "reputable dictionaries" for guidance as to meaning of term "pollutant" where policy failed to define the term.); *Kratz v. Kratz*, 905 P.2d 753, 755 (Okla. 1995) (consulting Black's Law Dictionary to define "benefit" in the context of an insurance policy).

{20} Although "the mere existence of multiple dictionary definitions of a word, without more," does not create an ambiguity, *Citation Ins. Co. v. Gomez*, 688 N.E.2d 951, 953 (Mass. 1998), dictionary definitions "can serve as an appropriate starting point for analysis." *United Nuclear*, 2011-NMCA-039, ¶ 58 (Vigil, J., dissenting); *see also Vegas v. Compania Anonima Venezolana de Navegacion*, 720 F.2d 629, 631 (11th Cir. 1983) (acknowledging that dictionary definitions "provide at least a starting point in th[e] inquiry.").

{21} Dictionaries define "sudden" as either synonymous with "unexpected," or as the temporal descriptor of a brief occurrence, or both. Webster's Third New International Dictionary defines sudden as "unexpected," "to come up, occur unexpectedly," "happening without previous notice or with very brief notice," and "not foreseen or prepared for," which do not necessarily convey a temporal meaning; as well as "characterized by or manifesting hastiness," and "characterized by swift action," which do convey a temporal meaning. Webster's Third New International Dictionary 2284 (1993). Black's Law Dictionary defines "sudden" as "[h]appening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for." Black's Law Dictionary 1432 (6th ed. 1990). While "[h]appening with . . . very brief notice" may connote a temporal limitation, "occurring unexpectedly" does not. Similarly, another standard dictionary gives primary meanings of "sudden" as "[1] [h]appening or coming without warning; [2] unexpected, unforeseen; [3] abrupt, hasty," the first two of which do not necessarily include a temporal element and the third of which does. 2 Shorter Oxford English Dictionary 3131 (5th ed. 2002). The Court of Appeals did not explain its preference for one set of these definitions over the other, but simply concluded that "the word 'sudden' . . . ordinarily means: quick, abrupt, or a temporarily short period of time." *United Nuclear*, 2011-NMCA-039, ¶ 20. The only support for that conclusion derives from *Mesa Oil*, which we discuss below. Allstate offers no arguments here as to why, where numerous sources indicate that there are multiple commonplace definitions for the word "sudden," most of those definitions should be disregarded.

{22} The Rhode Island Supreme Court considered the competing definitions of "sudden" to demonstrate the ambiguity of the term:

> Giving the word "sudden" its "plain everyday meaning" is no easy task. Both sides muster dictionary support of their respective positions, half of which accord a temporal meaning to the word and the other half of which give it the meaning of unexpected. This diversity proves only that the word's meaning is legitimately subject to different interpretations - in other words, that it is ambiguous.

Textron, 754 A.2d at 748; *see also id.* at 748 n. 1; *accord Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 573 (Wis. 1990) ("The very fact that recognized dictionaries differ on the primary definition of 'sudden' is evidence in and of itself that the term is ambiguous.").

{23} Other courts, while not relying quite so heavily on dictionaries, nonetheless have found the conceptually distinct definitions of "sudden" to render the term ambiguous. *See St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1217 (Or. 1996) (citing Webster's Third New Internat'l Dictionary, Oregon Supreme Court determined that "'sudden' *may* have, but *need not* always have, a temporal element"); *Queen City Farms*, 882 P.2d at 727 ("There is . . . wide recognition that various dictionaries define the word 'sudden' both as 'unexpected,' and in terms connoting a temporal idea of abrupt, instantaneous, short in duration, or the like.").

c. Divergence of Opinion Among Courts

{24} Perhaps more consequential than the fact that "sudden" has multiple definitions in the abstract is the split among other courts that have considered the issue in similar insurance coverage disputes. While it is true that "[a] split in legal authority may be indicative of an ambiguity in the policy, [it] does not establish one." *Davis*, 2006-NMCA-099, ¶ 7. Courts from around the country "have divided nearly evenly on the meaning of 'sudden,'" with "[n]early half" concluding that the term is ambiguous. *Va. Prop., Inc. v. Home Ins. Co.*, 74 F.3d 1131, 1134 (11th Cir. 1996) (applying Georgia law to define "sudden" as "unexpected"). The Rhode Island Supreme Court similarly found "no clear majority among state or federal courts concerning whether this word entails a temporal element. Both sides claim to hold the majority view, but the numbers are close enough that any slight preponderance of one position over the other is not particularly meaningful." *Textron*, 754 A.2d at 748 (internal punctuation omitted).[2]

{25} The Tenth Circuit opinion relied upon by the district court and Court of Appeals in the present case, *Mesa Oil*,123 F.3d 1333, determined that "sudden" is unambiguous for two reasons. First, contrary to this Court's observations, *Mesa Oil* notes that "the trend in this area is to read 'sudden and accidental' as requiring that [the] pollution must occur quickly and abruptly. . . ." *Id.* at 1339 (citing *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1525-30 (10th Cir. 1995)); *contra Textron*, 754 A.2d at 748 (noting that there is "no clear majority" among courts on whether "sudden" is ambiguous, although "[b]oth sides claim to hold the majority view").

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[2] States whose high courts have found the term "sudden" to be ambiguous include Colorado, Georgia, Illinois, Oregon, South Carolina, Washington, and Wisconsin. *See, e.g.*, *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083 (Colo. 1991); *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204 (Ill. 1992); *St. Paul Fire & Marine Ins. Co.*, 923 P.2d 1200; *Greenville County v. Ins. Reserve Fund*, 443 S.E.2d 552 (S.C. 1994); *Queen City Farms*, 882 P.2d 703; *Just*, 456 N.W.2d 570.

States whose high courts have held the term "sudden" to be unambiguous include Florida, Massachusetts, Michigan, Nebraska, Oklahoma, South Dakota, and Utah. *See, e.g.*, *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp*., 636 So. 2d 700 (Fla. 1993); *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc*., 555 N.E.2d 568 (Mass. 1990); *Upjohn Co. v. N.H. Ins. Co.*, 476 N.W.2d 392 (Mich. 1991); *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 716 N.W.2d 87 (Neb. 2006); *Kerr-McGee Corp. v. Admiral Ins. Co.*, 905 P.2d 760 (Okla. 1995); *Demaray v. De Smet Farm Mut. Ins. Co.*, 801 N.W.2d 284 (S.D. 2011); *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127 (Utah 1997).

{26} The second basis for the Tenth Circuit's determination is that "the word 'sudden' would be superfluous if it did not impose a temporal requirement on the exemption." *Mesa Oil*, 123 F.3d at 1339; *accord Dimmitt Chevrolet*, 636 So. 2d at 704; *N. Ins. Co. of. N.Y. v. Aardvark Assocs., Inc*., 942 F.2d 189, 192 (3d Cir. 1991). We disagree that defining "sudden" as "unexpected" would automatically render the term redundant with "accidental." While "accidental" may be defined as "unexpected," *see* Black's Law Dictionary, *supra*, at 16, it has just as plausibly been defined as "occurring unintentionally," *see* The American Heritage Dictionary of the English Language 11 (4th ed. 2000); *see also Hecla Mining Co.*, 811 P.2d at 1092. Even if the terms "sudden" and "accidental" are "partially coextensive, . . . insurance policies routinely use words that, while not strictly redundant, are somewhat synonymous." *Hudson v. Farm Family Mut. Ins. Co.*, 697 A.2d 501, 504 (N.H. 1997) (internal quotation marks, citation, and alterations omitted); *see also Hatco Corp. v. W.R. Grace & Co.—Conn*., 801 F. Supp. 1334, 1350, 1350 n.7 (D.N.J. 1992) (finding the phrase "sudden and accidental" ambiguous because "it is equally plausible that the phrase was meant as a string of terms of similar meaning, a practice routinely engaged in by drafters of insurance contracts," and noting that insurance policies are replete with synonymous terms, discussing by way of example that "[t]he difference, if any, between 'happening' and 'event' escapes recognition").

{27} Numerous courts finding ambiguity in the phrase "sudden and accidental" have interpreted the term to mean "unexpected and unintended"—two words that, while conceptually related, are not identical in meaning. *See, e.g.*, *Queen City Farms*, 882 P.2d at 721 (noting that interpreting "sudden" as "unexpected" does not render policy language duplicative because "'accidental' has independent effect as 'unintended'"); *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 821 (Colo. 2004) (interpreting the phrase "sudden and accidental' as meaning 'unexpected and unintended'") (quoting *Hecla Mining*, 811 P.2d at 1091-92).

{28} Even assuming, arguendo, that defining "sudden" as "unexpected" renders the term superfluous, this fact alone does not preclude our holding the term to be ambiguous. New Mexico's public policy of protecting the reasonable expectations of insureds, *see Montano v. Allstate Indem. Co.*, 2004-NMSC-020, ¶ 25, 135 N.M. 681, 92 P.3d 1255, should take precedence over rescuing an insurer from redundancies in its own policy, *cf. Wis. Realtors Ass'n, Inc. v. Town of West Point*, 747 N.W.2d 681, 685 (Wis. Ct. App. 2008) (noting that interpreting statutory terms to avoid redundancy "is only one rule of . . . construction[, and] is not absolute."). *Mesa Oil*'s holding that "sudden" clearly means "abrupt" was premised on two assumptions we view to be erroneous, and thus provided inadequate support for the district court's and the Court of Appeals' reliance on that case.

{29} Many courts have reasonably concluded, both inside and outside of the insurance context, that such a lack of interpretive consensus is itself an indicator of ambiguity. *See Greenville*, 443 S.E.2d at 553 (S.C. 1994) ("That different courts have construed the language of an insurance policy differently is some indication of ambiguity."); *Bankwest v. Fid. & Deposit Co. of Md.*, 63 F.3d 974, 978 (10th Cir. 1995) ("The fact that judicial opinions have interpreted identical policy provisions differently may demonstrate ambiguity."); *see also Salazar v. Butterball, LLC*, 644 F.3d 1130, 1137 (10th Cir. 2011) (The court concluded that the disputed term was ambiguous in part because of the "differing interpretations of several courts" and a federal agency.); *INS v. Errico*, 385 U.S. 214, 218 (1966) ("The sharp divergence of opinion among . . . judges . . . indicates that the meaning of the words 'otherwise admissible' is not obvious."). We do not resolve this appeal simply by tallying reported decisions that have addressed the issue before. However, the conspicuous division among courts on the meaning of the term "sudden" is another indication that the term may be reasonably susceptible to two distinct interpretations.

d. Industry Practice and Drafting History

{30} United Nuclear urges this Court to consider the "custom and usage" of the phrase

"sudden and accidental" within the insurance industry, arguing that prior use of the term in other kinds of insurance policies supports "a non-temporal construction." United Nuclear similarly asks the Court to consider the drafting history of the pollution exclusion, arguing that documentation from the drafting process supports the understanding that the pollution exclusion was intended to only disallow coverage for deliberate pollution.

{31} In support of its argument, United Nuclear points to court decisions involving boiler and machinery insurance policies, which are policies that insure losses or breakdowns to equipment and fixtures. Boiler and machinery policies had employed the term "sudden" within the policies prior to use of the term's use in the pollution exclusion context. *See Ala. Plating Co. v. U.S. Fid. & Guar. Co.*, 690 So.2d 331, 336 (Ala. 1996). In cases addressing coverage under such policies, some courts have interpreted "sudden" to mean "unexpected." *See Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Cas. Co.*, 333 P.2d 938, 941 (Wash. 1959) ("We do not so construe the word 'sudden,' when its primary meaning, in common usage, is not 'instantaneous' but rather 'unforeseen and unexpected.'"). Several courts have relied on the interpretation of "sudden" in decisions involving boiler and machinery policies in order to construe "sudden" as it appears within the pollution exclusion. For example, in *Queen City Farms*, the Washington Supreme Court reasoned that, in the boiler and machinery context, the risk to insurer is the same regardless of "whether a break is instantaneous or began with a crack which developed over a period of time," and concluded that defining "sudden" as "instantaneous" would be inconsequential. 882 P.2d at 720 (citing *Anderson*, 333 P.2d at 940-41). The court then by extension held "sudden" to mean "unforseen and unexpected" rather than "instantaneous" within a pollution exclusion clause. *Id.* at 720.

{32} More recent decisions analyzing "sudden and accidental" in the context of other types of insurance policies are also instructive. For instance, the New Hampshire Supreme Court found "sudden and accidental" to be ambiguous in a 'special farm package policy' that provided coverage for, among other events, "[s]udden and [a]ccidental [d]amage from [a]rtific[i]ally [g]enerated [e]lectrical [c]urrent." *Hudson*, 697 A.2d at 504. In doing so, the court relied in part on dictionaries and an insurance treatise which appeared to favor a definition of "sudden" as "unexpected." *Id.* ("[T]he term 'sudden and accidental' is at least reasonably susceptible to an interpretation consistent with 'unexpected and unintended.'"). In litigation involving homeowners' insurance policies, a federal district court applying Louisiana law defined "sudden and accidental" as "an event which is either abrupt (though expected), or unexpected," and which "occur[s] from an unknown cause or [is] an unusual result of a known cause." *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 834 (E.D. La. 2010) (internal quotation marks and citation omitted). Thus, varying interpretations of "sudden" from cases considering other types of insurance, while not governing the outcome here, cast doubt on Allstate's assertion that there is a single obvious meaning to the term.

{33} Turning to the drafting history of the pollution exclusion, "[a]round 1970," United Nuclear asserts, "the insurance industry 'tacked' the pollution exclusion onto general liability policies as a way to distance insurers 'in the public mind from deliberate polluters.'" United Nuclear contends that documents from the policy drafting process show "the insurance industry expected the exclusion merely *to clarify* the industry's intention to exclude pollution events that are expected or intended. . . ." The propriety and necessity of considering drafting history in evaluating the meaning of the term "sudden" has featured prominently in prior decisions. Our Court of Appeals, however, deemed it unnecessary to do so in this case because "[t]he hypothetical reasonable insured with limited knowledge of insurance law would understand the word 'sudden' to mean what it ordinarily means: quick, abrupt, or a temporarily short period of time." *United Nuclear*, 2011-NMCA-039, ¶ 20. We do not conclude, as did the Court of Appeals, that "sudden"

has only one reasonable meaning. Moreover, unlike the Court of Appeals we view the consideration of extrinsic evidence as important to the initial determination of whether an ambiguity exists in the insurance policy. *See generally Ponder*, 2000-NMSC-033, ¶ 13.

{34} The crux of United Nuclear's argument with respect to drafting history is that the insurance industry sought regulatory approval for the pollution exclusion without being required to reduce premiums by reassuring state regulators that the exclusion was merely a clarification, rather than a limitation, of coverage. Allstate offers two substantive arguments in response. First, it contends that the drafting history "concerns alleged representations only by third parties. . . . Neither [United Nuclear] nor Allstate participated in either the drafting or the approval of the form language." The purpose of exploring the drafting history of the pollution exclusion, however, is not to demonstrate Allstate's participation in the drafting of the pollution exclusion or even its assent to other insurers' representations, but rather to show that the term acquired a particular meaning as the pollution exclusion worked its way through the regulatory approval process. *See generally Queen City Farms*, 882 P.2d at 721, 722 ("[I]nsurance industry statements examined by [prior] courts may be considered insofar as they represent a reasonable construction of the ambiguous policy language.").

{35} Second, Allstate asserts that a reasonable insured would not be apprised of the intricacies of the insurance industry's common trade practices, and therefore such information should not be considered. This argument contradicts the policy rationale underlying the "reasonable expectations" standard and the ultimate resolution of ambiguities in favor of the insured. As we have established, a reviewing court may use extrinsic evidence to answer the preliminary question of whether the language of an insurance agreement is clear on its face. *See Mark V*, 114 N.M. at 781, 845 P.2d at 1235. Then, after the resolution of this preliminary question, the court resolves the question of whether a reasonable person would or could interpret the agreement differently. *Id.* Due to the inherent power imbalances previously discussed, we construe any resulting ambiguities in favor of the insured. *See generally Ponder*, 2000-NMSC-033, ¶ 26. The purpose of the "reasonable expectations" doctrine is not to restrict a court from considering relevant sources in interpreting a policy term, but rather to protect the insured from disclaimers based on information that is hyper-technical, obscure, or hidden. *See Fed. Ins. Co. v. Century Fed. Sav. & Loan Ass'n*, 113 N.M. 162, 169, 824 P.2d 302, 309 (1992) (focusing the reasonable expectations inquiry on "protecting the one for whose benefits premiums have been paid for insurance coverage") (internal quotation marks and citation omitted); *Thompson v. Occidental Life Ins. Co. of Cal.*, 90 N.M. 620, 626, 567 P.2d 62, 68 (Ct. App. 1977) ("The doctrine of 'reasonable expectations' is an equitable approach" which allows a court to read a policy to "yield the maximum of protection to, and the reasonable expectation of, the insured" to prevent the insurer from "tak[ing] an unconscionable advantage.") (Sutin, J., concurring in part and dissenting in part); *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985) (applying reasonable expectations doctrine to prevent insurer from denying coverage on the basis of a "technical definition" that was "hidden" in the policy); *Whole Enchilada, Inc. v. Travelers Prop. Cas. Co. of Am.*, 581 F. Supp. 2d 677, 690 (W.D. Pa. 2008) ("[T]he 'reasonable expectations' doctrine is intended to protect against the inherent danger, created by the nature of the insurance industry, that an insurer will agree to certain coverage when receiving the insured's application, and then unilaterally change those terms when it later issues a policy.") (internal quotation marks and citation omitted).

{36} As the dissent to the Court of Appeals' opinion recognizes, "[t]he events leading up to the creation of the pollution exception by the insurance industry are 'well-documented and relatively uncontroverted.'" *United Nuclear*, 2011-NMCA-039, ¶ 40 (Vigil, J., dissenting) (quoting *Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am.*, 629 A.2d 831, 848 (N.J. 1993)). Many courts from around the country have examined the drafting history of this exclusion to

decode the intended scope of the clause, and have concluded that the insurance industry introduced the clause merely to clarify its stance on intentional pollution, not to substantively change the coverage itself. *See, e.g.*, *Textron*, 754 A.2d at 752 ("Our examination of the pollution-exclusion clause's drafting history . . . suggests that its original purpose–at least as the industry represented it to regulators–was to deny coverage to reckless or intentional polluters."); *Queen City Farms*, 882 P.2d at 721-22 ("As reported in published decisions, representations were made to state insurance regulators that the pollution exclusion was intended to exclude coverage for intentional polluters and clarify the occurrence clause."); *Joy Techs., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 499 (W. Va. 1992) ("In this Court's view, the insurance industry thus represented to the State of West Virginia, acting through the West Virginia Commissioner of Insurance, that the exclusion which is in issue in the present case merely clarified the pre-existing 'occurrence' clause."). Allstate insists that we should ignore the drafting history of the pollution exclusion because United Nuclear did not introduce evidence of that history in an admissible form before the trial court. This argument misses the point of our, and other courts', reference to that history. Interpreting an ambiguous term in an insurance policy is a question of law, *see Richardson v. Farmers Ins. Co.*, 112 N.M. 73, 74, 811 P.2d 571, 572 (1991), and we need not blind ourselves to prior judicial exploration of the origins of the language employed in the exclusion in the course of addressing the identical interpretive question that we confront here.

{37} Judge Vigil's dissent viewed the industry's proferred meaning of the pollution exclusion during the drafting and approval process to be in tension with the meaning that Allstate urges, as do we. *See United Nuclear*, 2011-NMCA-039, ¶ 48 (Vigil, J., dissenting) ("I do not agree that insurance companies can represent to regulators that they intend a phrase to mean one thing in a policy when they seek its approval, then assert that it means something else when a claim is subsequently filed."). Although a review of the origins of the pollution exclusion does not by itself determine ambiguity, that history provides another indication that the word "sudden" in the phrase "sudden and accidental" did not then, and does not now, bear a single obvious meaning. *See id.* ¶ 50 (Vigil, J., dissenting).

III. CONCLUSION

{38} The absence of a definition of the term in the Policies, taken together with diverging definitions in standard dictionaries and the lack of any consensus among courts nationwide, we hold that the meaning of the term "sudden" as used in the Policies is ambiguous. In recognizing the inherent imbalance of the two parties to an insurance contract—that often times "language in standard policies does not involve mutual negotiations between the insurers and the insureds"—we must resolve such ambiguities against the insurer. *Queen City Farms*, 882 P.2d at 721. "Where exceptions to or limitations upon coverage are concerned, this principle applies with added force." *Id.*

{39} Typically, the determination that a term in an insurance policy is ambiguous is "a matter of law rather than a factual determination." *Rummel*, 1997-NMSC-041, ¶ 19. Where facts relating to the term at issue are in dispute, or where a credibility determination is required, an ambiguity may be remanded to the trier of fact for resolution. *See, e.g., Ellingwood v. N.N. Investors Life Ins. Co.*, 111 N.M. 301, 305, 307-08, 805 P.2d 70, 74, 76-77 (1991). Where there are no disputed material facts, however, courts routinely view construction of a term in an insurance policy "as purely a question of law and construe[] any ambiguities" in the insured's favor. *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 575 (2009); *see also Clarendon Nat'l Ins. Co. v. Ins. Co. of the West*, 442 F. Supp. 2d 914, 922 (E.D. Cal. 2006) ("Unless it turns on the credibility of conflicting extrinsic evidence or on underlying facts that are in dispute, the interpretation of an insurance policy is solely a question of law.") Here the parties do not disagree about any facts material to the interpretation of the term "sudden," but only dispute the significance

of those facts. We hold, therefore, as a matter of law that the term "sudden," in the Policies' pollution exclusion, means "unexpected," rather than indicating a temporal limitation on the occurrence. Our holding does not necessarily mean that United Nuclear is entitled to coverage under the Policies. United Nuclear must still prove that its operations led to discharges that were in fact "sudden and accidental," and Allstate may have other policy defenses to coverage not raised in its summary judgment motion and this appeal. We reverse the Court of Appeals' grant of summary judgment to Allstate, and remand the case to the district court for further proceedings consistent with this Opinion.

{40} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

CHARLES W. DANIELS,
Justice