Official Publication of the State Bar of New Mexico

Bar Bulletin

May 24, 2023 • Volume 62, No. 10

Charlene, by Christopher Owen Nelson (see page 5)

Inside This Issue

13th DISTRICT ATTORNEY
BARBARA ROMO
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The 13th Judicial District Attorney Has Positions Open for Trial Attorneys in Three Different Offices Bernalillo, Belen, and Grants, New Mexico

The 13th Judicial District Attorney prioritizes your work life balance and mental health, while ethically and vigorously prosecuting offenders.

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"I have worked at a few different District Attorney Office's across the State from the North to the South and in between. The 13th allows for greater discretion and flexibility than any other office I have worked in. Further, it is an atmosphere with little contentiousness, especially compared to other offices. If you wish to be a career prosecutor, this is where you belong." John L. – Trial Attorney

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"I'm not only committed to a fair judicial process, but also to the creation and practice of principled policies for the People of the 13th Judicial District"

– District Attorney Barbara Romo

State Bar of New Mexico
Est. 1886

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www.sbnm.org

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About Cover Image and Artist: Christopher Owen Nelson's work has been strongly focused in the greater southwestern region. As a Colorado native, he studied fine arts at Rocky Mountain College of Art and Design. He combines elements of his skills like painting, construction and song writing to tell his story. Recently, Nelson's achievements in the arts have been featured in several national publications including: Western Art Collector, Luxe Interiors and Design, Western Art and Architecture, Santa Fean magazine and American Art Collector.

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do.

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m.(MT). Library Hours: Monday-Friday 8 a.m.-noon and 1-5 p.m. (MT). For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

Second Judicial District Court

Notice of Temporary Closure

The Second Judicial District Court will be closed on Friday, June 16 for staff training. The courthouse will reopen on June 20 following the Juneteenth holiday.

Twelfth Judicial District Court

Notice of Proposed Changes to Rules

The New Mexico Supreme Court's Equity and Justice Commission's Subcommittee on Judicial Nominations has proposed changes to the Rules Governing New Mexico Judicial Nominating Commissions. These proposed changes will be discussed and voted on during the upcoming meeting of the Twelfth Judicial District Court Judicial Nominating Commission. The Commission meeting is open to the public beginning at 9:30 a.m. (MT) on May 26 at the Otero County District Court located at 1000 New York Avenue, Alamogordo, N.M. Please email Beverly Akin (akin@law.unm.edu) if you would like to request a copy of the proposed changes.

Twelfth Judicial District Court Judicial Nominating Commission

Announcement of Applicants

Three applications have been received in the Judicial Selection Office as of 5 p.m., May 5, for the vacancy on the Twelfth Judicial District Court due to the retirement of the Honorable Judge Steven E. Blankinship, effective as of May 13. The Twelfth Judicial District Court Judicial Nominating Commission will convene on May 26 at 9:30 a.m. (MT) to interview applicants for the position at the Otero County District Court located at 1000 New York Avenue, Alamogordo, N.M. The Commission meeting is open to the public, and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard. The applicants include **Debora Gerads**, **Albert R. Greene III** and **Stephen Ochoa**.

U.S. District Court, District of New Mexico

Notice of Investiture Ceremony

The Investiture of Hon. Jennifer M. Rozzoni will take place at 3:30 p.m. on June 9 in the Rio Grande Courtroom at the Pete V. Domenici United States Courthouse in Albuquerque, N.M. (333 Lomas Blvd. NW, Third Floor). The Federal Bench and Bar of the United States District Court for the District of New Mexico will follow from 6 to 8 p.m. at Hotel Albuquerque at Old Town (800 Rio Grande NW, the Pavilion and Spanish Gardens). All members of the Federal Bench and Bar are cordially invited to attend; however, reservations are requested. RSVP, if attending, to Cynthia Gonzales at 505-348-2001, or by email to usdcevents@nmd.uscourts.gov.

State Bar News

2023 Annual Meeting

Resolutions and Motions

Resolutions and motions will be heard at 1 p.m. (MT) on July 27 at the opening of the State Bar of New Mexico 2023 Annual Meeting at Hyatt Regency Tamaya Resort and Spa in Bernalillo. For consideration, resolutions or motions must be submitted in writing by June 26 to Executive Director Richard Spinello, PO Box 92860, Albuquerque, N.M. 87199; fax to 505-828-3765; or email to richard.spinello@sbnm.org.

Professionalism Tip

With respect to the public and to other persons involved in the legal system:

I will commit to the goals of the legal profession, and to my responsibilities to public service, improvement of administration of justice, civic influence, and my contribution of voluntary and uncompensated time for those persons who cannot afford adequate legal assistance.

Annual Awards

Open for Nominations

Nominations are being accepted for the 2023 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in the past year. The awards will be presented at the 2023 Annual Meeting on Thursday, July 27 at the Hyatt Regency Tamaya Resort & Spa. The deadline is June 1. View previous recipients, instructions for submitting nominations, and descriptions of each award at www.sbnm.org/CLE-Events/State-Bar-of-New-Mexico-Annual-Awards.

Board of Bar Commissioners

Appointment of Young Lawyer Delegate to American Bar Association House of Delegates

Pursuant to the American Bar Association Constitution and Bylaws (Rules of the Procedure House of Delegates) Article 6, Section 6.4, the Board of Bar Commissioners will make one appointment of a young lawyer delegate to the American Bar Association (ABA) House of Delegates for a two-year term, which will expire at the conclusion of the 2025 ABA Annual Meeting. Members wishing to serve as the young lawyer delegate to the ABA HOD must have been admitted to his or her first bar within the last five years or be less than 36 years old at the beginning of the term; they must also be a licensed New Mexico attorney and a current ABA member in good standing throughout the tenure as a delegate and be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meeting. Qualified candidates should send a letter of interest and brief resume by May 31 to bbc@sbnm.org.

Equity in Justice Program

Have Questions?

Do you have specific questions about equity and inclusion in your workplace or in general? Send in questions to Equity in Justice Program Manager Dr. Amanda Parker. Each month, Dr. Parker will choose one or two questions to answer for the Bar Bulletin. Go to www. sbnm.org/eij, click on the Ask Amanda link and submit your question. No question is too big or too small.

Legal Specialization Commission

Notice of Commissioner Vacancy

The State Bar of New Mexico is accepting applications for one available commissioner seat on the Legal Specialization Commission. Applicants must be lawyers who have passed the bar examination, are licensed and in good standing to practice law in New Mexico and have practiced law for a minimum of seven years. To apply, please send a letter of intent and resume to kate.kennedy@sbnm.org.

New Mexico Lawyer Assistance Program

Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. (MT) on Mondays by Zoom. This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam Moore at pam.moore@sbnm.org or Briggs Cheney at bcheney@dsc-law.com for the Zoom link.

NM LAP Committee Meetings

The NM LAP Committee will meet at 4 p.m. (MT) on July 13, Oct. 5 and Jan. 11, 2024. The NM LAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. The NM LAP Committee has expanded their scope to include issues of depression, anxiety, and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Lawyer Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

The New Mexico Well-Being Committee

The next NM WBC meeting is on May 30 at 3 p.m. (MT). Please email Pam Moore, pam.moore@sbnm.org, for the Zoom link. All passionate about helping with well-being efforts are welcome to attend. The NM WBC is focused on creating a long term culture change towards greater health and well being for the NM legal community. In addition, the WBC plans and organizes well-being events, including educational presentations, and offers well being resources and services through its subcommittees.

UNM School of Law

Law Library Hours

The Law Library is happy to assist attorneys via chat, email, or in person by appointment from 8 a.m.-8 p.m. (MT) Monday through Thursday and 8 a.m.-6 p.m. (MT) on Fridays. Though the Library no longer has community computers for visitors to use, if you bring your own device when you visit, you will be able to access many of our online resources. For more information, please see lawlibrary.unm.edu.

Nominations for the Distinguished Achievement Awards and Alumni Promise Award Now Open

Nominations are now open for the Distinguished Achievement Award and the Alumni Promise Award. The deadline for nominations is June 4. Nominations can be made at https://forms.unm.edu/forms/daad_nomination.

In Memoriam

BRADFORD ZEIKUS

December 7, 1936 -
April 1, 2023

Brad was very active in the legal community. He was the UNM Law School Alumni Association President for many years, president of the Albuquerque Bar Association, chairman of the State Bar of New Mexico Senior Lawyers Division and member of the State Bar of New Mexico Board of Bar Commissioners. He was key in the founding of many programs to help the Law School, lawyers and the community. Brad's unique and boundless sense of humor and optimism are missed.

State Bar *of* New Mexico
Senior Lawyers Division

STATE BAR OF NEW MEXICO

2023 ANNUAL MEETING

SPONSORSHIPS AND EXHIBITOR BOOTHS ARE AVAILABLE!

Learn how you can support the Annual Meeting and promote your firm or business to our attendees.

Contact Marcia Ulibarri, Advertising and Sales Manager
marketing@sbnm.org • 505-797-6058

July 27-29

HYATT REGENCY TAMAYA RESORT & SPA

www.sbnm.org/AnnualMeeting2023

State Bar of New Mexico
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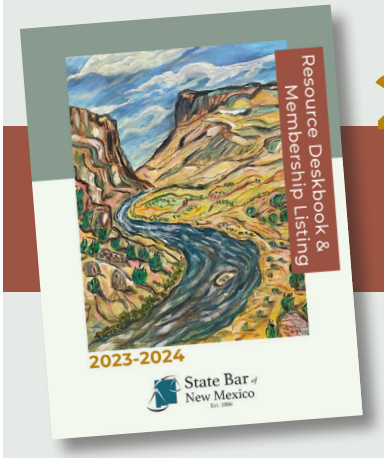

Check your mail for your copy of the

2023-2024 Resource Deskbook & Membership Listing

Featuring helpful information for every State Bar of New Mexico member:

- State Bar programs, services and contact information
- A comprehensive list of courts and government entities in New Mexico
- A summary of license requirements and deadlines
- A membership directory of active, inactive, paralegal and law student members

Don't forget the extra copies for your staff!

www.sbnm.org/News-Publications/Resource-Deskbook-Membership-Listing-2023-24

State Bar of New Mexico
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Call for Nominations

STATE BAR OF NEW MEXICO 2023 Annual Awards

Nominations are being accepted for the 2023 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in the past year. The awards will be presented at the 2023 Annual Meeting on Thurs., July 27, at the Hyatt Regency Tamaya Resort & Spa. All awards are limited to one recipient per year, whether living or deceased, with the exception of the Justice Pamela B. Minzner Professionalism Award, which can have two recipients, an attorney and a judge. Nominees may be nominated for more than one award category. Previous recipients for the past three years are listed below.

To view the full list of previous recipients, visit
https://www.sbnm.org/CLE-Events/State-Bar-of-New-Mexico-Annual-Awards

— Distinguished Bar Service Award - Nonlawyer —

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: Juan Abeyta, Bernice Ramos, Renee Valdez

— Excellence in Well-Being Award —

Many individuals have made significant contributions to the improvement of legal professional well-being including destigmatizing mental health, strengthening resiliency, and creating a synergic approach to work and life. This new award was created to recognize an individual or organization that has made an outstanding positive contribution to the New Mexico legal community's well-being. As the State Bar of New Mexico is committed to improving the health and wellness of New Mexico's legal community, we strongly encourage self-nominations and peer nominations for any lawyer, judge or nonlawyer working in some capacity with the NM legal community.

Previous recipient (created in 2022): Pamela Moore

— Judge Sarah M. Singleton* Distinguished Service Award —

Recognizes attorneys who have provided valuable service and contributions to the legal profession, the State Bar of New Mexico and the public over a significant period of time.

Previous recipients: Michael P. Fricke, Joey D. Moya, Deborah S. Dungan

**This award was renamed in 2019 in memory of Judge Singleton (1949-2019) for her tireless commitment to access to justice and the provision of civil legal services to low-income New Mexicans. She also had a distinguished legal career for over four decades as an attorney and judge.*

— Justice Pamela B. Minzner* Professionalism Award —

Recognizes attorneys and/or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

Previous recipients: Judge James J. Wechsler and Quentin P. Ray, Frederick M. Hart (posthumously) and F. Michael Hart, William D. Slease

**Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994 to 2007.*

— Outstanding Legal Organization or Program Award —

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: Pueblo of Pojoaque Path to Wellness Court, Intellectual Property Law Section Pro Bono Fair, New Mexico Center on Law and Poverty, New Mexico Immigrant Law Center

— Outstanding Young Lawyer of the Year Award —

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: Lauren E. Riley, Maslyn K. Locke, Veronica C. Gonzales-Zamora

— Robert H. LaFollette* Pro Bono Award —

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney.

Previous recipients: Darlene T. Gomez, Torri A. Jacobus, Julia H. Barnes

**Robert LaFollette (1900–1977), Director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.*

— Seth D. Montgomery* Distinguished Judicial Service Award —

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and the bar; generally given to judges who have or soon will be retiring.

Previous recipients: Judge Henry A. Alaniz, Judge Mary W. Rosner, Judge Alvin Jones (posthumously)

**Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989 to 1994.*

Nominations should be submitted through the following link:
https://form.jotform.com/sbnm/2023amawards
Additional information or letters may be uploaded with the form and submitted with the nomination.

Deadline for Nominations: Thursday, June 1st

For more information or questions, please contact Kris Becker at kris.becker@sbnm.org or 505-797-6038.

Gallagher & Kennedy is pleased to announce that 14 attorneys have been recognized as 2023 Southwest Super Lawyers, with an additional four attorneys selected as 2023 Southwest Super Lawyers Rising Stars. In addition, G&K shareholder **Shannon L. Clark** has been recognized as a "Top 50 Attorney" in Arizona for his work in plaintiff's personal injury and wrongful death litigation.

Kurt A. Somner will serve as president of the American College of Trust and Estate Counsel (ACTEC). He was officially presented as the 2023-2024 president at the "passing of the gavel" ceremony on March 3, 2023 at the ACTEC Annual Business Meeting in New Orleans. Somner has held various roles at ACTEC for over 20 years, including its Region Chair of the Rocky Mountain Region.

McCoy Leavitt Laskey LLC is pleased to announce that **Lauren M. Swol** has joined the firm as an associate. She graduated cum laude from the University Of Arizona James E. Rogers College Of Law, where she served as the Senior Note Editor of the Arizona Law Review. Lauren also holds Bachelor of Science in Sociology from Northern Arizona University.

McCoy Leavitt Laskey LLC has elected **Brandon Meyers** to Income Partner. Meyers has been with the firm since 2017 and continues to refine his practice in civil litigation. Meyers concentrates his practice on cases involving personal injury, products and premises liability, construction defect, wrongful death, and catastrophic fires and explosions. Super Lawyers recently selected Meyers to the 2023 New Mexico Rising Stars list.

Equal Access to Justice (EAJ) has announced their new elected Board of Directors. This includes EAJ **President M. Karen Kilgore**, **Vice-President Charles K. Purcell** and **Treasurer Susan Miller**. As well, the Board nwo includes **Dan Akenhead**, **Sonya Bellafant**, **Bruce Cottrell**, **Sireesha Manne**, **Rodolfo D. Sanchez, Jeanine Steffy** and **David Stout**. The newly elected board is instrumental in supporting EAJ's longstanding efforts to break down barriers to justice by increasing resources for civil legal aid nonprofits.

George "Dave" Giddens of Giddens + Gatton Law, P.C., was recently recognized on the 2023 Southwest Super Lawyers website. Giddens was named a Super Lawyer for the 12th time. Giddens has been practicing law for 40 years and is an active member of St. Stephen's United Methodist Church. Giddens earned an undergraduate degree and juris doctor from the University of Kansas.

Gallagher & Kennedy welcomes **Kyle T. Geiger** to its litigation department. Geiger brings 14 years of civil and commercial litigation experience representing individual and corporate clients in disputes ranging from commercial, construction, products, transportation, professional liability and insurance cases. Prior to joining G&K, Kyle earned his law degree from the University of Dayton School of Law.

Deian McBryde has been appointed to a one-year term as Judge Pro Tempore for the Tonto Apache Tribe in Payson, Arizona. Judge McBryde is a Past Chair of SBNM's Solo & Small Firm Section, a Fellow of the American Bar Foundation and a current Board member of the Albuquerque Bar Association. McBryde is a solo practicing family law guardian ad litem and settlement faciliation at McBryde Law LLC.

The nineteen Judges of the Bernalillo County Metropolitan Court have elected the **Honorable Joshua J. Sánchez** the next Chief Judge of the state's busiest court. His three-year term has begun as of May 15. Judge Sánchez succeeds Judge Maria I. Dominguez, who had served as Chief Judge of the court since August 2020. **Judge Michelle Castillo Dowler** will remain the Presiding Judge over the court's Criminal Division, and **Judge Frank A. Sedillo** will remain the court's Presiding Civil Division Judge.

In Memoriam

William (Bill) Tryon of Rio Rancho, NM passed away on Friday, January 6, 2023, at the age of 73. He had battled Parkinson's for several years. Bill was born on Thursday, March 3, 1949, at Portsmouth Naval Hospital, NH. He was the 4th son of Frank and Marian Tryon. The family would ultimately grow to 8 children. As an Army "brat", Bill followed his family and father Frank Sr., through various Army assignments. An accomplished athlete in his youth, Bill excelled at tennis and was named All-Europe as a quarterback for the Heidelberg High School Lions (Heidelberg, GE). He won an appointment to the United States Military Academy matriculating in 1967 where he majored in Russian and graduated in 1971 as the president of the Class of 1971. Bill was commissioned a Second Lieutenant, Artillery Corps (Field Artillery) and attended the U.S. Army Field Artillery School at Ft. Sill, OK before being assigned to an Artillery unit in Germany. While on his first tour of duty, Bill was accepted into the Army excess leave program and was sent to the University of New Mexico School of Law where he received his Juris Doctorate in 1976. He resigned his commission in 1978. He remained in Albuquerque, beginning his legal career as an Assistant City Attorney. Entering private practice after serving in the City Attorney's office, Bill was associated with a number of small practices over the next several years. Ultimately, he opened an office as a sole practitioner in Rio Rancho and was active in that capacity until 2019. Bill leaves behind his beloved daughters, Brett Tryon of Albuquerque, NM and Erin Tryon Farley of Oklahoma City, OK; as well as 2 granddaughters. He also leaves his brothers, Captain Frank Tryon, Jr (USN ret), Dr. James Tryon, Lt Gen Richard Tryon (USMC ret), Captain Michael Tryon (USN ret), LTC Steve Tryon (USA ret) and sister Mary Ann Tryon. He is predeceased by his parents LTC Frank and Marian Tryon; and brother, LTC John Tryon (USA ret).

James George Chakeres, 89, passed away peacefully at his home in Santa Fe on July 25 surrounded by the love and comfort of his family. Born at George Washington University Hospital in Washington, D.C. on November 5, 1932, "Jimmy" was the youngest of three children born to George and Adamantia Chakeres. He excelled in school, skipping two grades, and graduated from Roosevelt High School as the class president and a letterman in football, baseball, and track and field. Jim attended college and law school night classes while working at the family restaurant. He completed his studies at the Washington College of Law and passed the District of Columbia Bar at age 21, beginning a 55-year career as an attorney. He always said that he loved practicing law because he enjoyed helping others. His primary areas of practice were worker's compensation and personal injury. Additionally, Jim served as an officer in the United States Navy, first in active duty and then in the Navy Reserves, ultimately achieving the rank of Captain. His service included tours in the Mediterranean, Europe, and Africa. Jim married Pauline Annette Mian in 1975, and they moved to Santa Fe in 1979, where they raised three boys on strong principles, love, and playfulness. Jim was known for never missing an occasion or athletic event of one of his sons, regardless of how far afield the event took him. Jim was also deeply devoted to his nieces and nephews. He enjoyed sharing with them his love of tennis and sailing, taking them to concerts and other events, and following their athletic exploits and professional careers. He was a beloved and proud father, uncle, and grandfather. Jim loved his family, straight-ahead jazz, tennis, the Stoics, early modern poetry, traveling, fine dining, and looking up uncommon words in the dictionary. He was known for his generosity, stories, "antique" cars, lists (you'd never guess the most important things to have in a kitchen or a car…), big laugh, and fiercely competitive yet fun-loving personality. Jim was preceded in death by his wife Pauline. He is survived by his sisters Pauline Demas and Anita Savides. He is also survived by his sons and their spouses: Chris & Sheena, Nat & Almea, and Jon & Jeralee. Finally, he is survived by his four beloved grandchildren: Aristide, Mian, Everett, and River.

William (Bill) Thomas Caniglia, 87, Denver, CO, passed away on Wednesday, June 15, 2022, with family by his side. Bill was born to Samuel L. and Lillian H. (Morgano) Caniglia on July 2, 1934 in Omaha, NE, where he graduated from Cathedral High School. He went on to Creighton University, where he earned B.A. and J.D. degrees and enrolled in the Reserve Officers' Training Corps. He served his Army commission at Ft. Knox, KY. Back in Omaha, he practiced law and raised five children with Janet M. (Osborn) Caniglia (md.1960-1977). In 1974, an opportunity with the John Madden Company of Greenwood Village, CO took him and the family to the Denver area. Bill gradually transitioned his career from law to real estate development (save for an early 1980s foray into food: opening an outpost of Omaha's Pefferoni's Pizza at Denver's University Hills Mall). He worked in Mason City, IA. with his brother Ross; Tampa, FL. and Albuquerque, NM. In retirement, he managed the homeowner's association for his residence in Denver's Central Park (formerly Stapleton) neighborhood. Skiing was a longtime passion. Years before moving to Colorado, Bill traveled and organized many trips there with the Omaha Ski Club. He continued to enjoy the sport with his family after building a cabin in Dillon, along with mountain hikes, off-roading in a vintage Willys jeep, running and jogging and, in his later years, walking. Cooking and baking were favorite pastimes; he tinkered with bread and pizza recipes but stayed true to the biscotti and Italian fried dough he grew up with and passed on to his children and grandchildren. He deeply appreciated a wide range of music, and simple pleasures like good food, wine and conversation and soaking up the sun. While living in Albuquerque, Bill enjoyed a long partnership with Joanna Contreras, the love of his life. She preceded him in death in 2011, as did his brother Ross Caniglia (2007), son John Joseph Caniglia (2000) and former spouse Janet (2011). Bill is survived by his twin sister, Jean (Paul) McCullough, Bremerton, WA; former spouse, Mary Helen Tierney, Aurora, CO; daughters, Patricia Winslow of Montrose, CO; Catherine LeDuke, Wheat Ridge, CO; Julie Caniglia, Minneapolis, MN; and Christina Madsen, LaVeta, CO; and grandchildren: Ethan, Deryn, Charlotte, and Frances LeDuke; Evan and Arthur McGhee; and Henry, Oliver, and Elliot Madsen.

Legal Education

May

24 **Ethics of Shared Law Offices, Working Remotely & Virtual Offices**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

24 **Wellness Wednesday - REPLAY: Being a Lawyer Should Not Hurt! (2022)**
1.0 EP
Webcast
Center for Legal Education of NMSBF
www.sbnm.org

25 **Ethical Considerations in Employment Law: Navigating the Investigation and Negotiation Process and the World of Social Media**
1.0 G, 2.0 EP
Virtual Program
U.S. Equal Employment Opportunity Commission, St. Louis District
https://www.research.net/r/2023_EEOC_Phoenix_StLouis05252023

26 **How to Stay "Professional" When Videoconferencing: It's Not As Hard As You Think!**
1.0 EP
Webcast
Center for Legal Education of NMSBF
www.sbnm.org

26 **REPLAY: Special Immigrant Juvenile Status: An Update on Regulations and Deferred Action (2022)**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

30 **Ethics of Co-Counsel and Referral Relationships**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

31 **60 Years of Asking the Difficult Questions**
20.5 G
Live Program
Association of Family and Conciliation Courts
www.afccnet.org

31 **Wellness Wednesday - REPLAY: Emerging Legal Issues and Opportunities in Behavioral Health (2022)**
1.0 G
Webcast
Center for Legal Education of NMSBF
www.sbnm.org

June

1-30 **Self-Study - Tools for Creative Lawyering: An Introduction to Expanding Your Skill Set**
1.0 G, 2.0 EP
Online On-Demand
The Ubuntuworks Project
www.ubuntuworksschool.org

2 **AEquitas Workshop Series: Prosecuting Sexual Assault Not Jut a Credibility Contest**
1.5 G
Web Cast (Live Credits)
New Mexico Coalition of Sexual Assault Programs
www.nmcsap.org

2 **AEquitas Workshop Series: Prosecuting Sexual Assault Prosecuting Cases Involving Victims with DD**
1.5 G
Web Cast (Live Credits)
New Mexico Coalition of Sexual Assault Programs
www.nmcsap.org

2 **REPLAY: 2023 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

2 **Tools for Creative Lawyering: An Introduction to Expanding Your Skill Set**
1.0 G, 2.0 EP
Video Replay with Monitor (Live Credits)
The Ubuntuworks Project
www.ubuntuworksschool.org

9 **Young Lawyer Boot Camp**
6.0 G
Live Program
New Mexico Defense Lawyers Association
www.nmdla.org
Live Program
Association of Family and Conciliation Courts
www.afccnet.org

15 **New Exemption and Garnishment Law in New Mexico**
1.0 G
Live Program
Bankruptcy Section of the State Bar of New Mexico
www.sbnm.org

26 **RISE23**
22.7 G, 11.0 EP
Live Program
National Association of Drug Court Professionals
Live Program
www.nadcp.org

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@sbnm.org. Include course title, credits, location/course type, course provider and registration instructions.

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

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Effective March 10, 2023

PUBLISHED OPINIONS

A-1-CA-39199	State v. B Valenzuela	Affirm	03/07/2023
A-1-CA-38334	Beecher Carlson Insurance Serv. v California Medical Grp	Affirm	03/09/2023

UNPUBLISHED OPINIONS

A-1-CA-38344	Grand River Enterprises v. New Mexico Attorney General	Affirm	03/07/2023
A-1-CA-40245	W Carruth v. Harris Ranch, LLC	Affirm	03/07/2023

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A-1-CA-39687	S Roser v. J Hufstedler	Reverse	03/13/2023

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A-1-CA-38066	State v. A Puentes	Affirm	03/13/2023
A-1-CA-39464	State v. E Reger	Reverse	03/13/2023
A-1-CA-40753	Home Rejuvenation v. R Torres	Affirm	03/13/2023
A-1-CA-39168	M Steele v. Galles Chevrolet	Affirm	03/14/2023
A-1-CA-40051	In the Matter of E Chavez	Affirm	03/14/2023
A-1-CA-40751	F Diaz v. Mayorga Roofing Corp.	Reverse	03/14/2023
A-1-CA-40408	State v. R Serrano	Affirm	03/15/2023
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A-1-CA-40813	State v. G Puentes Perez	Affirm	03/16/2023

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A-1-CA-39046	Mimbres Hot Springs Ranch v. D Vargas	Affirm	03/20/2023
A-1-CA-39869	State v. G Steele	Affirm	03/20/2023
A-1-CA-39984	State v. J Stalter	Affirm	03/21/2023

UNPUBLISHED OPINIONS

A-1-CA-38926	M Swart v. A Saiia	Affirm/Reverse/Remand	03/20/2023
A-1-CA-39238	State v. I Archer	Affirm/Remand	03/20/2023
A-1-CA-39747	City of Aztec v. E Morrow	Affirm	03/20/2023
A-1-CA-40536	CYFD v. Jasmine T.	Affirm	03/20/2023
A-1-CA-38371	Online Radiology v. NM Tax & Rev	Affirm	03/21/2023
A-1-CA-39892	CYFD v. Howard S	Affirm	03/21/2023
A-1-CA-38452	State v. S Charles	Affirm	03/23/2023

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Opinions

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Effective March 31, 2023

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A-1-CA-37402	K Hall v. City of Carlsbad	Affirm	03/31/2023
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A-1-CA-39334	C Flora v. The Village of Corrales	Affirm	03/27/2023
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A-1-CA-39810	State v. J Maldonado	Affirm	03/27/2023
A-1-CA-39517	L Braswell v. S Whitefeather	Affirm	03/28/2023
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A-1-CA-40715	State v. J Rocha	Affirm	03/31/2023
A-1-CA-40724	State v. J Vallejos	Affirm/Reverse/Remand	03/31/2023
A-1-CA-40841	State v. R Burciaga	Reverse	03/31/2023

Effective April 7, 2023

PUBLISHED OPINIONS

A-1-CA-38640	State v. J Hixon	Affirm	04/04/2023

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A-1-CA-39931	Wilmington Savings Fund v. M Knoll	Affirm	04/03/2023
A-1-CA-40092	S Venegas v. Redrock Foods	Dismiss	04/03/2023
A-1-CA-40703	G Coppler v. K Coppler	Affirm	04/03/2023
A-1-CA-40802	State v. P Cooper	Affirm	04/03/2023
A-1-CA-40668	State v. G Sandlin	Affirm	04/04/2023
A-1-CA-40427	CYFD v. Jesus G.	Affirm	04/07/2023

Effective April 14, 2023

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A-1-CA-38642	Wilmington Savings Fund Society v. M Romero	Reverse/Remand	04/10/2023
A-1-CA-39669	M Grano v. HCA Healthcare, Inc.	Affirm	04/12/2023

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From the New Mexico Supreme Court

Opinion Number: 2022-NMSC-023
No: S-1-SC-37389 (filed September 19, 2022)

STATE OF NEW MEXICO,
Petitioner,
v.
RYAN JAMES ALAN THOMPSON,
Respondent.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
Sarah L. Weaver, District Judge

Hector H. Balderas, Attorney General
Maris Veidemanis,
Assistant Attorney General
Santa Fe, NM

for Petitioner

Bennett J. Baur, Chief Public Defender
Charles Agoos,
Assistant Appellate Defender
Santa Fe, NM

for Respondent

OPINION

VIGIL, Justice.

{1} In every felony case in which a sentence of imprisonment is imposed, the defendant is required to serve a period of parole after that sentence. *See* NMSA 1978, § 31-18-15(C) (2022) (imposing period of parole for felony convictions resulting in a sentence of more than one year). Parole may be served within the penitentiary (in-house parole) or outside the penitentiary (in the community). After completing a sentence for a first-, second-, or third-degree felony, a defendant must serve two years of parole, and for a fourth-degree felony, one year of parole. NMSA 1978, Section 31-21-10(C) (2005, amended 2009). Sex offenders face much longer, indeterminate, supervised parole requirements: five to twenty years for certain sex offenses, and five years to life for more serious sex offenses. NMSA 1978, § 31-21-10.1(A)(1), (2) (2004, amended 2007). To determine whether a sex offender's parole will terminate at five years or continue, the parole board holds a duration-review hearing at which the State has the burden of proving that the sex offender should remain on parole. Section 31-21-10.1(B) (2004) (amended and recompiled as Section 31-21-10.1(C) in 2007). Sex offenders are entitled to this hearing before the parole board after serving "the initial five years of supervised parole, [and] at two and one-half year intervals" thereafter. *Id.*

{2} The question presented in this habeas corpus case is whether, under the 2004 version of Section 31-21-10.1, the version that was in effect when the criminal complaint in this case was filed, a period of in-house parole counts toward "the initial five years of supervised parole," § 31-21-10.1(B) (2004), needed to receive a duration-review hearing, or only parole served outside the penitentiary in the community counts. It is undisputed that if in-house parole counts, Respondent Ryan James Alan Thompson is entitled to a duration-review hearing, and if it does not count, he is not. Thompson filed a petition for habeas corpus in the district court contending that he was entitled to a duration-review hearing or, because he had not received one, release from parole. The State argued that Thompson was not entitled to a duration-review hearing because only parole served for five consecutive years in the community counts.

{3} The district court agreed in part with Thompson and ordered a duration-review hearing but denied Thompson's request for release from parole. The State appeals. This Court has jurisdiction pursuant to Rule 12-102(A)(3) NMRA. We affirm the district court, and we decline to address Thompson's argument, raised for the first time in his answer brief, that Section 31-21-10.1(B) (2004) is facially unconstitutional.

I. BACKGROUND

A. Factual Background

{4} Thompson was charged with several counts of manufacturing and possessing child pornography in August 2005, and in 2007 pleaded no contest to one count of manufacturing child pornography contrary to NMSA 1978, Section 30-6A-3(D) (2001, amended 2016), a second-degree felony. Thompson received a basic sentence of nine years, which was suspended in favor of a five- to twenty-year period of supervised probation. Thompson was also ordered to serve a five- to twenty-year period of indeterminate supervised parole sentence upon completion of his prison term as required by Section 31-21-10.1(A) (2004).

{5} As a consequence of probation violations, Thompson was ultimately ordered to serve out his basic sentence in prison. Thompson's basic sentence expired in July 2013. He was not immediately released from prison to parole in the community but, instead, remained in prison until November 2013, serving in-house parole. In-house parole is "commonly known as the time period where an inmate has completed his basic sentence but is still incarcerated [and] in the custody of the Corrections Department." See New Mexico Corrections Department, Institutional Classification, Inmate Risk Assessment and Central Office Classification, 20 (2001), https://www.cd.nm.gov/wp-content/uploads/2021/07/CD-080100-Institutional-Classification-Inmate-Risk-Assessment-and-Central-Office-Classification.pdf (last visited Sept. 20, 2022) (requiring a determination as to whether "the inmate's legal status needs to be changed to in-house parole").

{6} In November 2013, after serving one hundred thirty-seven days of in-house parole, Thompson was released and began serving parole in the community. He had been on parole in the community for about a year when he violated parole and was returned to the Corrections Department. Forty-two days later, a parole revocation hearing was held, and Thompson's parole in the community was revoked, meaning he would once again begin serving in-house parole. The notice of action memorandum letting Thompson know his parole in the community had been revoked stated, "You will be granted full credit while on parole." The memorandum also stated that the parole board "will review for reconsideration upon inmate written request in twelve months." It is up to the discretion of the parole board whether

an inmate should be released to the community upon reconsideration. See NMSA 1978, § 31-21-25(B)(1) (2001). From then on, Thompson's parole period continued to be a combination of parole in the community and parole in-house, with more time spent in-house.

{7} In 2015, while serving in-house parole, Thompson wrote a letter to the parole board asking when his duration-review hearing would be. The director of the parole board responded, "Your 5 year review hearing must be an uninterrupted term of parole and you have not yet met that. When you reparole the 5 years will start once again." Two months later the director clarified, "you can do up to the 18 or so years you have remaining on parole incarcerated if you don't reparole." In 2018, Thompson again inquired as to his duration-review hearing and this time the director said, "Review hearings are when you have been in the community successfully for at least five years."

B. The District Court Ruling

{8} After exhausting his remedies with the parole board, Thompson filed a pro se petition for habeas corpus in district court. Counsel was appointed, and his attorney filed an amended petition for habeas corpus. In the petition, Thompson raised the legal argument presented to this Court: that under Section 31-21-10.1(B) (2004), the parole board is required to hold a duration-review hearing after five years of parole, regardless of whether the parole served is in-house or in the community. The petition lacked any argument about the constitutionality of Section 31-21-10.1 (2004). Thompson requested that the district court order a duration-review hearing because, when counting his in-house parole, he had served more than five years of parole. In his supplemental brief, Thompson requested discharge from parole because, in his view, his parole term expired because of the State's failure to provide him with a duration-review hearing.

{9} The State did not challenge whether Thompson would be entitled to a hearing if his in-house parole counted toward duration-hearing eligibility. However, the State contended that Thompson's in-house parole time did not count toward the five years for a duration-review hearing, and that only parole served in the community did. The State relied on the definition of parole set forth in NMSA 1978, Section 31-21-5(B) (1991), which states, "'parole' means the release to the community of an inmate of an institution by decision of the board or by operation of law subject to conditions imposed by the board and to its supervision."

{10} On May 8, 2020, the district court granted Thompson's requested relief in part, declining to terminate his parole altogether and instead ordering a duration-review hearing without delay. The district court ruled "that the 'initial five years of supervised parole' that triggers the duration-review hearing required under [Section] 31-21-10.1(B) [(2004)] refers to all periods of time following completion of the basic sentence in prison." And because Thompson, as of March 31, 2020, had "been under the constraint of the Corrections Department for approximately 6 years and 10 months," he was entitled to a duration-review hearing. In its order, the district court provided a detailed explanation for its decision.

{11} The district court agreed that while the plain meaning of the definition of "parole" in Section 31-21-5(B) as "time served in the community" supported the State's argument, it could not agree that this led to the inexorable conclusion that time spent in prison could never be said to be part of the service of parole under Section 31-21-10.1(B) (2004). The district court gave three reasons for its ruling.

{12} First, parole is served in prison when an inmate is serving consecutive sentences. This is because, when "an inmate who is serving consecutive sentences completes the basic sentence of the first crime . . . the inmate immediately begins to serve the associated parole, in prison, while simultaneously beginning service of the basic sentence for the next crime." See Brock v. Sullivan, 1987-NMSC-013, ¶ 13, 105 N.M. 412, 733 P.2d 860 ("[I]n the case of consecutive sentencing, the parole period of each offense commences immediately after the period of imprisonment for that offense, and such parole time will run concurrently with the running of any subsequent basic sentence then being served.").

{13} Second, service of parole in prison is recognized by statute. For example, NMSA 1978, Section 31-21-11 (2005) provides, "Prisoners who are otherwise eligible for parole may be paroled to . . . serve another sentence within the penitentiary . . . or residential treatment program determined necessary by the board." The district court also pointed to Section 31-21-10(D) (2005). Under Section 31-21-10(D) (2005), if an inmate is eligible for release on parole but does not have an approved parole plan or refuses to sign the statement of parole conditions, the inmate must remain in the institution in which the sentence was served. Any time served under these conditions counts towards the inmate's parole sentence. Id.

{14} Third, the district court determined that the State's interpretation of Section 31-21-10.1(B) (2004) "leads to a nonsensical result." The result referenced by the district court was that an inmate could remain in prison for the entire duration of the parole period—either twenty years or a life term, depending on the offense—without being afforded the duration-review hearing contemplated by the Legislature.

{15} The district court therefore concluded that "there exists a level of ambiguity that requires application of the rule of lenity" notwithstanding that the statutory definition of "parole" is "facially plain," and the district court applied the rule of lenity to "resolve doubts about the meaning of paroled in [Section] 31-21-10.1(B) [(2004)] in favor of [Thompson]." The State appealed.

II. DISCUSSION

{16} Section 31-21-10.1(B) (2004) directs, in relevant part, "When a sex offender has served the initial five years of supervised parole, the board shall . . . review the duration of the sex offender's supervised parole." At each duration-review hearing, the state has the burden of proving that the sex offender should remain on parole. *Id.* Here, the specific question raised by the State's appeal is whether, under Section 31-21-10.1(B) (2004), "parole" includes in-house parole—parole served in prison—or only parole served outside the prison—in the community.

A. Standard of Review

{17} This case presents a question of statutory construction that is subject to de novo review. *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868. This Court's "primary goal is to ascertain and give effect to the intent of the Legislature." *Id.* The primary indicator of legislative intent is the plain language of a statute. *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 23, 147 N.M. 523, 226 P.3d 622. And yet, "we must exercise caution in applying the plain meaning rule." *State v. Maestas*, 2007-NMSC-001, ¶ 16, 140 N.M. 836, 149 P.3d 933. "In interpreting statutory language as well as in much of the other work courts are called on to perform, it is necessary to think thoughts and not words." *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317. "Statutes are enacted as a whole, and consequently each section or part should be construed in connection with every other part or section, giving effect to each, and each provision is to be reconciled in a manner that is consistent and sensible so as to produce a harmonious whole." *Lion's Gate Water*, 2009-NMSC-057, ¶ 23 (internal quotation marks and citation omitted).

{18} In determining legislative intent, we consider the legislative history of the act under consideration, including its historical amendments as well as the context in which the act under consideration was adopted. *Maestas*, 2007-NMSC-001, ¶¶16-19. We also presume that the Legislature is well informed and aware of existing statutory and common law. *Id.* ¶ 21. "If the

result of adopting a strict construction of the statutory language would be absurd or unreasonable, then we interpret the statute according to its obvious spirit or reason." *Lion's Gate Water*, 2009-NMSC-057, ¶ 23 (internal quotation marks and citation omitted); *see also In re Grace H.*, 2014-NMSC-034, ¶ 34, 335 P.3d 746 ("[T]he Court rejects a formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute." (internal quotation marks and citation omitted)).

B. Section 31-21-10.1(B) (2004) Mandates a Duration-Review Hearing After Five Years of Supervised Parole, Whether In an Institution or the Community

{19} The State relies almost entirely on the plain meaning of parole as defined in Section 31-21-5(B): "'parole' means the *release to the community* of an inmate of an institution by decision of the board or by operation of law subject to conditions imposed by the board and to its supervision." (Emphasis added.) In addition to the definition of parole, the State argues that the language in Section 31-21-10.1(C) (2004) and Section 31-21-10.1(E) (2007) proves that parole cannot be served in prison. Section 31-21-10.1(C) (2004) provides, "The board may order a sex offender *released on parole* to abide by reasonable terms and conditions of parole." (Emphasis added.) Similarly, Section 31-21-10.1(E) (2007) provides, "The board shall require electronic real-time monitoring of every sex offender *released on parole*." (Emphasis added.) The reference to these statutes does not meaningfully advance the State's position because neither does much to connect the statutory definition of parole to legislative intent or to the rest of the related statutory scheme. *See, e.g.*, § 31-21-11 (providing that a parolee may be "paroled to detainers to serve another sentence within the penitentiary"). The State's argument rises or falls with the force of the definitional statute, § 31-21-5(B).

{20} In tension with the definition of parole in Section 31-21-5(B), there are statutes and case law that contemplate in-house parole. Importantly, the Legislature's statement of purpose of the Probation and Parole Act explicitly states that parole can be served in an institutional setting "when a period of institutional treatment is deemed essential in the light of the needs of public safety and [the parolee's] own welfare." NMSA 1978, § 31-21-4 (1963). In addition, Section 31-21-10(E) (2005), as the district court discussed, provides that an inmate who is otherwise eligible for release to the community but does not have an approved parole plan or refuses to sign-off on the conditions of parole must remain in prison. That time in prison counts as time served on the parole sentence. *See* § 31-21-10(D) (2005) ("Time served from the date that an inmate refuses to accept and agree to the conditions of parole or fails to receive approval for [the inmate's] parole plan shall reduce the period, if any, to be served under parole at a later date."). Section 31-21-11, which was also discussed by the district court, provides that inmates who are parole-eligible "may be paroled to detainers to serve another sentence within the penitentiary" or to any other therapeutic or rehabilitative institution at the discretion of the parole board. NMSA 1978, Section 31-20-5(B)(2) (2003) also refers to parole service in prison: "if parole is revoked, the period of parole served in the custody of a correctional facility shall not be credited as time served on probation." These statutes are incompatible with the definition of parole in Section 31-21-5(B).

{21} Although no case squarely addresses the question presented here, cases have acknowledged or contemplated parole served in an institution. The *Brock* Court, for example, held that an inmate serving consecutive sentences can serve the parole sentence that follows the basic sentence for one conviction while serving the basic sentence in prison for another. 1987-NMSC-013, ¶¶ 1-2, 12-13; *see also Gillespie v. State*, 1988-NMSC-068, ¶¶ 1-3, 5, 107 N.M. 455, 760 P.2d 147 (holding in the context of consecutive sentences that parole could be served in prison). Other cases also acknowledge that parole can be served in an institution, if in passing. *See, e.g.*, *State v. Utley*, 2008-NMCA-080, ¶¶ 2, 9, 144 N.M. 275, 186 P.3d 904 (noting that the district court ordered the defendant to serve her two-year parole period "in an intensive in-patient treatment program"); *Stephens v. Thomas*, 19 F.3d 498, 499 (10th Cir. 1994) (stating that the inmate, "after having served six years and four months on his life sentence, . . . was paroled 'in house'"). In reality, then, parole is sometimes served in institutions, including prison, and not exclusively in the community.

{22} The State implicitly concedes one pivotal idea established by the statutes and cases described above: namely, that Section 31-21-5(B)'s definition of parole is not categorically applicable. The State acknowledges that time spent in prison by a sex offender during the parole period counts for jurisdictional purposes. It also notes that the parole board agrees that in-house parole counts "towards . . . [p]arole time." And the State recognizes that parole can be served in prison in the context of consecutive sentences. The State's concession—and more importantly, the meaning of the statutes and case law discussed above—demonstrate that parole cannot be categorically defined by the plain meaning of the words in Section 31-21-5(B).

{23} Under the literal statutory definition of parole, it is unclear what, exactly, a parolee who has completed his or her basic sentence is doing in prison if not serving parole. As explained above, a parolee can be incarcerated during the parole period that follows the completion of the basic sentence for several reasons: (1) because of the lack of an approved parole plan, (2) because the inmate refused to approve conditions of parole, or (3) as a consequence of a parole violation. But what term describes a person's confinement under those circumstances? Under Thompson's definition of parole, the explanation is straightforward: that person is on parole. Similarly, if a parolee was placed in an institution during the parole period, as in *Utley*, 2008-NMCA-080, ¶¶ 2, 9, the person is serving parole. But, if parole must be served in the community as defined in Section 31-21-5(B), what is a person doing in prison or an institution after completing the basic sentence for his or her crime? The State offers no meaningful explanation. The strict application of the statutory definition of parole leads to an unreasonable result, thereby undermining a literal reading of the statutory definition. *See Morris v. Brandenburg*, 2016-NMSC-027, ¶ 15, 376 P.3d 836 ("Unless it would lead to an unreasonable result, we regard a statute's definition of a term as the Legislature's intended meaning."); *Wilschinsky v. Medina*, 1989-NMSC-047, ¶ 26, 108 N.M. 511, 775 P.2d 713 ("While courts normally are bound to follow legislative definitions, they are not bound when a definition would result in an unreasonable classification."); 2A Norman J. Singer & Shambie Singer, *Sutherland Statutory Constr*. § 47.7 (7th ed. 2014) ("Courts may not be bound by statutory definitions where they are arbitrary and result in unreasonable classifications, or if they are uncertain, or defeat a statute's major purpose, or where some other contrary intent clearly appears." (footnote omitted)).

{24} The legislative history of the applicable statutes and the context in which they were enacted provides us with an answer as to whether the Legislature intended in-house parole to count toward "the initial five years of supervised parole" needed to receive a duration-review hearing under Section 31-21-10.1(B) (2004). Pertinent to the issue before us, in 1963, the Legislature described how it intended the Probation and Parole Act to be construed and its intended purpose as follows:

> The Probation and Parole Act shall be liberally construed to the end that the treatment of persons convicted of crime [shall be treated according to] their individual characteristics, circum-

> stances, needs and potentialities . . . and that such persons shall be dealt with in the community . . . under probation supervision instead of in an institution, *or under parole supervision when a period of institutional treatment is deemed essential* in the light of the needs of public safety and their own welfare.

Section 31-21-4 (emphasis added). In 1980, the Legislature enacted Section 31-21-10(D) providing that an inmate who does not have an approved parole plan for any reason "shall not be released" and that the time served counts as time served under parole. *See* 1980 N.M. Laws, ch. 28, § 1. Further, the 1982 version of Section 31-21-11 allowed for in-house parole when a prisoner is "paroled to detainers to serve another sentence." 1982 N.M. Laws, ch. 107, § 2. Thereafter, in 1991, the Legislature amended the statutory definition of parole. *See* 1991 N.M. Laws, ch. 52, § 1. However, the Legislature did not tamper with or modify Section 31-21-10(E), the 1982 version of Section 31-21-11, or any other statutes recognizing in-house parole.

{25} Then, in 2003, the Legislature required sex offenders to serve "not less than five years" of supervised parole and mandated that the parole board review the duration of the sex offender's supervised parole when the sex offender "has served the initial five years of supervised parole." 2003 N.M. Laws, 1st Spec. Sess., ch. 1, § 9; *see also* § 31-21-10.1(A), (B) (2004). Again, the Legislature did not modify or change any of the provisions allowing for in-house parole when it had another opportunity to eliminate in-house parole as parole. Further, it is unmistakable that the Legislature intended that the duration-review hearing be conducted after the sex offender has served the initial minimum five years of mandatory parole. *See* § 30-21-10.1(B) (2004) (providing for the board's review after "a sex offender has served the initial five years of supervised parole"). After the sex offender serves the minimum five years of parole, the offender gets a hearing to see if he or she should remain on parole. *Id.* This makes sense. We give effect to the Legislature's clear intent by recognizing that the term "initial five years of supervised parole" in Section 31-21-10.1(B) (2004) includes all time served during the parole sentence, whether in prison as set forth in Section 31-21-10(D) (2005), a rehabilitative institution pursuant to Section 31- 21-11, or the community as provided by Section 31-21-5(B). *See Maestas*, 2007-NMSC-001, ¶¶14-17.

{26} The rule of lenity also supports our conclusion. Under the rule of lenity, "the tie must go to the defendant." *United States v. Santos*, 553 U.S. 507, 514 (2008). Where "text, structure, and history fail to establish that the government's position is unambiguously correct," the rule of lenity applies. *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see also State v. Ogden*, 1994-NMSC-029, ¶ 26, 118 N.M. 234, 880 P.2d 845 ("[L]enity is reserved for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies[] of the statute" (internal quotation marks and citation omitted)). And this Court relies on the rule of lenity to "resolve any doubt concerning the construction of a sentencing statute." *Brock*, 1987-NMSC-013, ¶ 8; *see also United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (stating that the rule of lenity is applied to resolve ambiguity in sentencing). Because the tension between statutory provisions addressing the scope of parole service may obscure the intent of the Legislature or render it ambiguous, the rule of lenity applies to resolve any doubt in favor of Thompson and, accordingly, the definition of parole adopted by the district court should be affirmed.

C. We Decline to Address Thompson's Constitutional Challenges to Section 31-21-10.1(B) (2004) Because They Are Not Properly Before Us

{27} There are significant procedural concerns about Thompson's constitutional challenges to Section 31-21-10.1(B) (2004) that he raises for the first time in his answer brief. Thompson petitioned the district court for a writ of habeas corpus, requesting to be released from parole or, in the alternative, granted a duration-review hearing. The district court granted the requested relief in part by ordering a duration-review hearing. The State then appealed pursuant to Rule 5-802(N)(1) NMRA and Rule 12-102(A)(3). The State's appeal is the only issue before this Court. Thompson neither petitioned for a writ of certiorari pursuant to Rule 5-802(N)(2) nor filed a cross-appeal pursuant to Rule 12-201(B)(1) NMRA regarding the constitutional issues. As such, he is before this Court in a strictly defensive posture, defending the district court's ruling, and he cannot attack the ruling of the district court from his answer brief.

{28} Rule 12-201(C), entitled "Review without cross-appeal," provides:

> An appellee may, without taking a cross-appeal or filing a docketing statement or statement of the issues, raise issues on appeal for the purpose of enabling the appellate court to affirm, or raise issues for determination only if the appellate court should reverse, in whole or in part, the judgment or order appealed from.

Under this rule, "an appellee need not cross-appeal to raise an issue that would preserve the judgment below." *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 16, 356 P.3d 564 (internal quotation marks and citation omitted), *aff'd*, 2016-NMSC-027, ¶ 58.

{29} Here, by arguing that Section 31-21-10.1(B) (2004) is facially unconstitutional, Thompson is not raising an issue that would preserve the judgment below. Because we affirm the district court on statutory grounds, we decline to address Thompson's constitutional challenges to Section 31-21-10.1(B) (2004). *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so." (internal quotation marks and citation omitted)).

III. CONCLUSION

{30} We hold that the term "initial five years of supervised parole" in Section 31-21-10.1(B) (2004) includes all time served during the parole sentence, whether in prison as contemplated by Section 31-21-10(D) (2005), a rehabilitative institution pursuant to Section 31- 21-11, or the community as set forth in Section 31-21-5(B). We do not address whether Thompson should be released from parole. Such a decision lies within the expertise and powers of the parole board. *See* 67A C.J.S. *Pardon & Parole* § 49 (2022) ("Under statutory authority, a parole may be granted by, and only by, the board or other body or officer on whom the authority is conferred."); *Id.* § 50 ("Broad authority with respect to paroles may be delegated to a parole board, and the basic responsibility of such a board may be to determine when a prisoner is to be released from prison."). We therefore affirm the district court and order the State to afford Thompson a duration-review hearing without delay.

{31} IT IS SO ORDERED.

MICHAEL E. VIGIL, Justice

WE CONCUR:

JULIE J. VARGAS, Justice

BRIANA H. ZAMORA, Justice

C. SHANNON BACON, Chief Justice, concurring in dissent

DAVID K. THOMSON, Justice, dissenting

THOMSON, Justice (dissenting).

{32} The consequences of a legislative policy embodied in an unambiguous statute are matters for the Legislature, not for this Court. *Irvine v. St. Joseph Hosp., Inc.*, 1984-NMCA-107, ¶ 15, 102 N.M. 572, 698 P.2d 442. As such, it is the province of the Legislature and not the court to change a statute. *Varos v. Union Oil Co. of Cal.*, 1984-NMCA-091, ¶ 6, 101 N.M. 713, 688 P.2d 31. Respectfully, I conclude that the statutory language requiring a sex offender

to successfully serve parole in the community for five years before that person is entitled to a parole review hearing is clear. The majority's efforts to find ambiguity where none exists usurp the authority of the Legislature to decide matters of policy. For that reason, I respectfully dissent.

{33} Our Legislature has decided, "When a sex offender has served the initial five years of supervised parole, and at two and one-half year intervals thereafter, the board shall review the duration of the sex offender's supervised parole." NMSA 1978, § 31-21-10.1(C) (2007). As the law is currently written, parole is defined as "the release *to the community* of an inmate of an institution by decision of the board or by operation of law subject to conditions imposed by the board." NMSA 1978, § 31-21-5(B) (1991) (emphasis added). The core question is whether the Legislature intended to make a parole review hearing available for a convicted sex offender who has not shown the ability to abide by conditions of release in the community.[1] *See* § 31-21-10.1(B)(4), (C), (D); *see also* NMSA 1978, § 31-21-5(B).

{34} The majority's reading of the parole statute concludes that the district court's grant of habeas relief was proper because all the time Defendant served on his sentence after he completed his basic sentence of incarceration counted toward the five-year period before a review hearing. This includes time when he was removed from the community and put back in prison for violating parole, *see maj. op.* ¶¶ 16, 19. I disagree with my colleagues' conclusion for two reasons. First and foremost, the majority ignores the plain reading of the statute and in doing so amends the sex offender parole statutes to write out a critical requirement that parole be served by an individual released "to the community." Section 31-21-5(B). Next, it creates an ambiguity where none exists by confusing the term of parole a defendant serves with the defendant's first opportunity for a parole review hearing. *See maj. op.* ¶ 25. My reasoning herein explains that the Legislature's goal was to provide sex offenders with an opportunity to reintegrate with the community, demonstrate a capacity for rehabilitation, and earn the public's trust.

{35} Defendant was remanded "to the custody of the New Mexico Corrections Department to be confined for a term of nine (9) years" and released under "supervised parole for a period of not less than five (5) years and not in excess of twenty (20) years subject to the statutory provision relating to conditions of parole and supervision and the return of parolees." *See* NMSA 1978, § 31-18-15(A)(6) (2007); *see also* § 31-21-10.1(A). Part of Defendant's sentence was initially suspended, but his probation was revoked for violating "a substantial condition," and he had to serve the remainder of his suspended sentence in custody.

{36} Immediately after completing his sentence of imprisonment, Defendant was conditionally released on parole in the community with the understanding that he would adhere to all standard conditions of release and several special conditions, including but not limited to (1) having no contact with any victim, no social networking, and no contact with anyone under eighteen years of age, (2) participating in a sex offender treatment program, and (3) registering as a sex offender within ten days of release. Defendant served about one year of parole in the community before he was returned to custody for violating multiple conditions of release. A pattern of release on parole in the community and return to custody for failure to comply with the imposed conditions of release continued, with Defendant spending more time in prison than out. In my view, these facts highlight the need to apply the clear language of the sex offender parole statute.

{37} The district court acknowledged, as the majority must, that the plain meaning of "parole . . . supports [the State's a]rgument that parole means only time served in the community." The statutory analysis involved in this case is not complicated. We must remember that "[w]hen a term is . . . defined in a statute" there is no need to construe the term, because the Legislature has expressly defined it. *State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863. Only "[w]hen a term is not defined in a statute [do] we . . . construe it, giving those words their ordinary meaning absent clear and express legislative intention to the contrary." *Id.* (internal quotation marks omitted). As our statute provides, sex offenders can have their parole terms reviewed, but there are two eligibility conditions. The first condition is provided by Section 31-21-10.1(C), which requires that the "sex offender has served the initial five years of supervised parole" before the offender is eligible for a review hearing; and the second condition set by Section 31-21-5(B) requires that parole be served during "the release *to the community*." (Emphasis added.)

{38} Rather than applying the Legislature's express definition of *parole* in Section 31-21-5(B), and reading the parole statutes harmoniously, the majority finds the term *parole* in Section 31-21-10.1, to be ambiguous. *Maj. op.* ¶ 26. The majority reasons that if *in-house* time (the time Defendant served while in custody for failing to comply with his conditions of release) counts towards the total term of Defendant's parole sentence, it must also count as *parole*, as that term of art is used in granting Defendant a review hearing. *Maj. op.* ¶¶ 20, 24. This analysis confuses the policy differences between the calculation of time that counts toward the term of parole and time that counts toward a review hearing. It creates a conflict where none exists and abandons our duty, "[w]henever possible, [. . . to] read different legislative enactments as harmonious instead of as contradicting one another." *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M 372, 98 P.3d 1022 (internal quotation marks and citation omitted).

{39} To create an ambiguity in Section 31-21-10.1 and thus apply the rule of lenity in favor of granting Defendant a parole review hearing, the majority seizes on another section of the parole statute unrelated to this question. The majority reasons, and Defendant now argues, that the Legislature's allowance contained in NMSA 1978, Section 31-21-11 (2005) altered the meaning of the Legislature's express definition of *parole* in Section 31-21-5(B). *Maj. op.* ¶¶ 21-23. The majority bolsters its conclusion by observing that time served *in-house* while awaiting release prior to the approval of an initial parole plan, or while returned to custody for violating the conditions of release pending a new parole plan, also counts toward the total amount of time served, subject to state jurisdiction, under a sentence.

{40} The district court framed the question this way. "If the four (4) years, seven (7) months, and four (4) days [Defendant] has been in prison since he completed his basic sentence is not parole, then what is it?"[2] The direct answer to both the district court and the majority is that although those four years, seven months, and four days count towards the completion of Defendant's maximum *sentence*, including his sentence of parole, this time does not nec-

[1] Pending disposition in this case, this Court currently holds in abeyance its review of nine cases with similar underlying issues. Five of the nine—State v. Padilla, S-1-SC-38668; State v. Pelt, S-1-SC-38669; State v. Padilla, S-1-SC-38919; State v. Pinto, S-1-SC-38927; and State v. Aragon, S-1-SC-39194—like this case, are state's appeals under Rule 12-102(A)(3) NMRA. Each of the remaining four—Barker v. Martinez, S-1-SC-38796; Emord v. Martinez, S-1-SC-38798; Ronquillo v. Martinez, S-1-SC-39166; and Aragon v. Martinez, S-1-SC-39172—is a defendant's petition for writ of certiorari under Rule 12-501 NMRA, two of which this Court has granted.

[2] The majority asks, "[W]hat is a person doing in prison or an institution after completing the basic sentence for his or her crime . . . if parole must be served in the community as defined in Section 31-21-5(B)?" Maj. op. ¶ 23.

essarily count toward the period of time that triggers the required duration review hearing for sex offenders because the time was not served "in the community." *See* § 31-21-5(B); NMSA 1978, § 31-21-10(E) (2009) (providing that "[e]very person while on parole shall remain in the legal custody of the institution from which the person was released, but shall be subject to the orders of the board" and providing prerequisites for release).

{41} The majority's construction of the statutory provisions at issue effectively permits an exception that swallows the rule. The majority rewrites Section 31-21-11☐and, in effect, Section 31-21-5(B)☐to require all time served, whether *in-house* or "in the community," to count when calculating the five-year period triggering the sex offender's right to a hearing. *Maj. op.* ¶¶ 23-25. I acknowledge that the time served *in-house* counts toward the term of Defendant's indefinite parole sentence, but that is not the issue. *See maj. op.* ¶ 22. Even though time served *in-house* for violating conditions of release decreases the amount of time a parolee must serve under a sentence of parole, whether such time served in-house advances a sex offender's opportunity for a parole review hearing is a different matter.

{42} The Legislature expressly defined *parole* in Section 31-21-5(B): "As used in the Probation and Parole Act, . . . 'parole' means the release to the community of an inmate of an institution by decision of the board or by operation of law subject to conditions imposed by the board and to its supervision." This express definition controls. *See Johnson*, 2009-NMSC-049, ¶ 10. Section 31-21-11 creates exceptions that allow the time a defendant serves *in-house* to count toward the total length of the defendant's sentence, during which the state retains jurisdiction, whether or not the defendant is imprisoned or released into parole in the community. Section 31-21-11 does not nullify the express definition of *parole*, which distinguishes time served under supervision "to the community." Nor does Section 31-21-11 create an ambiguity. The majority's construction of *parole* as used in Section 31-21-10.1(C) ignores the Legislature's public policy goals for permitting release on parole, and these must be considered.

{43} Generally, under New Mexico's sentencing scheme, the Legislature has provided the parole board with authority to grant and supervise a period of release into the community following service of an inmate's sentence of incarceration for felony and capital offenses. *See* NMSA 1978, § 31-21-10 (2009) (providing authority to grant parole to individuals, including those sentenced to life imprisonment with the possibility of parole, if certain conditions are met and establishing required periods of parole for inmates convicted of felony offenses "[e]xcept for . . . sex offenders").

{44} The goal of sex offender parole is to constructively rehabilitate convicted individuals "in the community . . . in the light of the needs of public safety." NMSA 1978, § 31-21-4 (1963). "Prior to placing a sex offender on parole," the parole board must consider "the danger to the community posed by the sex offender." Section 31-21-10.1(B)(4). Although constructive rehabilitation in the community is the goal, in some instances, a convicted individual may be returned to incarceration for violating the conditions of release to the community. *See* NMSA 1978, § 31-21-14(C) (1963) ("Upon arrest and detention, the board shall [hold] a parole revocation hearing on the parole violation charged, . . . [and i]f violation is established, the board may continue or revoke the parole . . . .").

{45} Because of the particular concerns with recidivism based on the general nature of sex offenses, the Legislature chose to impose different requirements for the parole of sex offenders, including an indeterminate term of parole rather than a defined term. *Compare* NMSA 1978, § 31-21-10 (2003, amended 2009) (establishing "[p]arole authority and procedure" generally), *with* NMSA 1978, § 31-21-10.1 (2003, amended 2007) (establishing the special authority and procedures for parole concerning certain sex offenders); *see also* 2004 N.M. Laws, ch. 1, § 9 (1st Spec. Sess.) ("AN ACT RELATED TO SEX OFFENDERS: . . . PROVIDING THAT A SEX OFFENDER MAY BE PLACED ON PAROLE FOR A PERIOD OF UP TO TWENTY YEARS . . . ."). In 2007, the Legislature amended Section 31-21-10.1 and reaffirmed its intent to subject sex offenders to "indeterminate period[s]" of parole, which require periodic review by the parole board to determine whether the sex offender should remain on supervised parole. *See* 2007 N.M. Laws, ch. 68, § 4; 2007 N.M. Laws, ch. 69, § 4. Section 31-21-10.1 grants the parole board authority to supervise a sex offender's parole, set the terms and conditions of the parole, and shorten a sex offender's indeterminate period of parole to "less than the maximum" period if certain conditions are met. *Id.*

{46} The 2007 amendments also mandated "electronic real-time monitoring of every sex offender released on parole for the entire time the sex offender is on parole." 2007 N.M. Laws, ch. 69, § 4; § 31-21-10.1(E) The amendment to Section 31-21-10.1 thus included specific requirements to be in place when a sex offender is "released on parole" *in the community*. For example, a sex offender is responsible for ensuring that the battery powering the individual monitoring unit remains charged and that the unit remains in contact with the monitoring system. *See, e.g.*, *State v. Chavez*, 2019-NMCA-068, ¶¶ 4, 26, 451 P.3d 115 (discussing a sex offender's probation violations for failure to maintain continual contact through the electronic monitoring system as evidence affirming that the offender should not be released from his indeterminate period of supervised probation). That is, the Legislature made clear its intent that if a person is convicted of a sex offense and is on Section 31-21-10.1 parole, that person is monitored *in the community*. It follows that when a convicted individual is incarcerated for violating the conditions of release, as in the present case, the time served in custody does not satisfy the plain language of the definitional statute, § 31-21-5(B). Respectfully, it is absurd given this clear policy expression that the Legislature would approve a reading that the statute allows a sex offender returned to custody for having violated conditions of release to count that time in custody toward the sex offender's review hearing.

{47} More broadly, the majority opinion, in my view, fails in its misunderstanding of the fundamentals of parole. This leads to rewriting a statute that directly contradicts the policy choice of the legislative branch. When one properly understands the history and background of the Criminal Sentencing Act and its impact on the Parole and Probation Act, no ambiguity can be derived from the plain language of Section 31-21-5(B).

{48} Defendant's argument, accepted by the majority, is based on an unsupported inference that the Criminal Sentencing Act was enacted in 1977 in part to transform the nature of parole, ostensibly in a manner that would ease the burden of sanctions for criminal behavior. In fact, the opposite was true. The Criminal Sentencing Act, intending to provide tougher sanctions for criminal behavior, reconfigured the concept of parole in New Mexico as an extended period of post-incarceration state control to deter recidivism. Allison G. Karslake & Kathleen Kennedy Townsend, *Definite Sentencing in New Mexico: The 1977 Criminal Sentencing Act*, 9 N.M. L. Rev. 131, 131-34 (1979).

{49} The threat of potential incarceration for violating the terms of release to parole serves a deterrent function, encouraging compliance with a convicted individual's conditions of release. However, the possibility of being returned to incarceration, and allowing part of a sentence of parole to be served while incarcerated, does not render the Legislature's express definition of *parole* meaningless or ambiguous.

{50} Parole, as it is understood in New Mexico, was altered in 1977, when the Legislature passed the Criminal Sentencing Act. *See* 1977 N.M. Laws, ch. 216, § 1; NMSA 1978, §§ 31-18-1 to -26 (1977, as amended through 2022). In so doing, New Mexico created a scheme of "definite sentencing"; the "'primary objective'" was to "'get tough on criminals'" and "require lengthier periods of incarceration." Karslake & Townsend, *supra* at 131-32 (citation omitted). Prior to the passage of the Criminal Sentencing Act, New Mexico's "indefinite" sentencing scheme allowed a judge to sentence a convicted individual to be incarcerated for "a range of years, and the Parole Board" would decide when that individual would "be released from prison. If [the individual was] released before the expiration of [the] maximum sentence, [the individual would be] released conditionally, or on parole." *Id.* at 131. Such a sentence of incarceration was described as "indefinite." *Id.*

{51} Prior to 1977 and unlike the current sentencing scheme, an individual's parole was not set at sentencing. Instead, parole was a discretionary act of clemency that allowed release from incarceration back in to the community before the expiration of a sentence of imprisonment. *See Robinson v. Cox*, 1966-NMSC-210, ¶ 6, 77 N.M. 55, 419 P.2d 253 ("A release on parole is an act of clemency or grace resting entirely within the discretion of the parole board. One who is paroled is not thereby released from custody but is merely permitted to serve a portion of his sentence outside the walls of the penitentiary.").

{52} In contrast, New Mexico sanctioned parole after 1977 as a period of supervised release to the community following the basic sentence of incarceration during which an individual could be returned to imprisonment so long as the total term of the maximum sentence had not expired. *See* 1977 N.M. Laws, ch. 216, § 4(C); § 31-18-15(C) (2022) (stating that "the period of parole shall be deemed to be part of the sentence of the convicted person"). The sentence of parole became a definite part of the sentencing scheme, set at sentencing, directly following the "basic sentence" of imprisonment. *See Brock v. Sullivan*, 1987-NMSC-013, ¶¶ 7, 9-10, 105 N.M. 412, 733 P.2d 860. Thus, a convicted individual's maximum sentence often contains a sentence of parole geared toward, but not completely functioning as, rehabilitation. *See* § 31-21-4 (providing that "rehabilitation . . . in the light of the needs of public safety" is the goal of parole). The sentence of parole retains a punitive aspect, which is intended to act as a deterrence—the potential return to incarceration of an individual who has not adhered to specified conditions of release. *See* § 31-21-14(C).

{53} Although the Legislature's decision to allow individuals "who are otherwise eligible for parole" to "be paroled to detainers to serve another sentence" superficially appears to be at odds with the holding I support, it is not. That is, Section 31-21-11 (providing for the possibility of in-house parole) simply disallows the practice of "stacking . . . multiple parole periods," which would "compel [a] prisoner to serve [a] sentence in installments." *Brock*, 1987-NMSC-013, ¶¶ 6, 10 (internal quotation marks omitted). Again, allowing time served while incarcerated to count against the ultimate term that an individual is required to serve on a sentence that provides for the possibility of parole does not relate to (nor change the statute that creates) eligibility of a sex offender to have a parole review hearing.

{54} The threat of incarceration while an individual remains on parole operates functionally as a *stick*, as opposed to a corresponding *carrot*, which is release under conditions and supervision in the community. *See* 1977 N.M. Laws, ch. 216, § 11(B) (amending the previous definition of "parole" in the Probation and Parole Act, 1963 N.M. Laws, ch. 301, § 3(B), by omitting "prior to the expiration of [the prisoner's] term" and adding "or by operation of law"); *see also* 1977 N.M. Laws 1977, ch. 216, § 4(C) ("The period of parole . . . shall be part of the sentence."). The hybrid construction of parole was a compromise that allowed the New Mexico criminal justice system to retain some measure of rehabilitative justice. *See* Karslake & Townsend, *supra* at 133-34.

{55} After a convicted sex offender has served the basic sentence of imprisonment, the goal should be to find a way to successfully release the incarcerated defendant to supervised parole within the community in the hope that the defendant ultimately will be rehabilitated and released early from parole. *See* § 31-21-10.1(C). This is entirely consistent with other policy decisions of the Legislature governing the monitoring of sex offenders. *See, e.g.*, § 31-21-10.1(D) (authorizing "intensive supervision," including "alcohol testing, drug testing or polygraph examinations used to determine if the sex offender is in compliance with the terms and conditions of the sex offender's parole" and prohibiting "contact with certain persons or classes of persons"); § 31-21-10.1(E) (requiring continuous and accurate "real-time monitoring of every sex offender released on parole for the entire time the sex offender is on parole").

{56} The purpose of parole is to allow an individual the opportunity to reintegrate into the community after a period of incarceration to prove the individual's capacity for rehabilitation. And when an individual has repeatedly demonstrated an inability to adhere to conditions of release as in this case, it seems futile to require a hearing where the purposes of parole have not been fulfilled and where persistence of "clear and convincing evidence that the sex offender should remain on parole" is likely. Section 31-21-10.1(C).

{57} Based on the foregoing, I would hold that there is no ambiguity in Section 31-21-10.1(C). I would therefore reverse the district court and vacate the order granting Defendant's petition for a writ of habeas corpus.

DAVID K. THOMSON, Justice

I CONCUR:

C. SHANNON BACON, Chief Justice

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-053
No: A-1-CA-38173 (March 23, 2022)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
PRESCILIANO C. ANCIRA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
James Waylon Counts, District Judge

Hector H. Balderas, Attorney General
Van Snow, Assistant Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Mary Barket, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

BACA, Judge.

{1} Following a jury trial, Presciliano Ancira (Defendant) was found guilty of breaking and entering, contrary to NMSA 1978, Section 30-14-8 (1981); attempt to commit breaking and entering, contrary to Section 30-14-8 and NMSA 1978, Section 30-28-1 (1963); criminal trespass (unposted) contrary to NMSA 1978, Section 30-14-1(B) (1995); and resisting, evading, or obstructing an officer, contrary to NMSA 1978, Section 30-22-1(B) (1981). In this appeal, Defendant argues that (1) the State's amendment of the criminal trespass charge during trial to change the address of the location of the alleged trespass amounts to a new charge in violation of Rule 5-204(A) NMRA; (2) the uniform jury instruction (UJI) for criminal trespass, UJI 14-1402 NMRA, does not accurately describe the elements of the offense, as set forth in Section 30-14-1(B), and that fundamental error occurred when the district court instructed the jury based on UJI 14-1402; (3) the jury instructions for breaking and entering and attempted breaking and entering suffered from fundamental error; (4) the State invited the jury to consider the consequences of its verdict by arguing that Defendant's charges were "serious"; and (5) insufficient evidence supported his conviction for breaking and entering.

{2} We agree that the amendment of the criminal trespass charge during trial amounted to a new charge in violation of Rule 5-204(A) and reverse Defendant's conviction for criminal trespass on that ground. We also hold that UJI 14-1402 "should have known" language is erroneous, and therefore suggest that UJI 14-1402 be modified to conform to the statutory language. Unpersuaded by Defendant's remaining arguments, we affirm.

BACKGROUND

{3} On the morning of August 15, 2018, Defendant reached through the dog door on the back door to Mr. Johnnie Noblitt's home. Defendant was attempting to unlock the deadbolt of the back door. Mr. Noblitt, who was home, kicked Defendant's arm, and yelled at Defendant. Defendant pulled his arm out from the dog door and ran. Mr. Noblitt opened the door and saw Defendant running away. Mr. Noblitt saw Defendant jump into his neighbor Randy Duran's backyard over a five-foot-high brick wall that separated their back yards. Mr. Noblitt subsequently called the police.

{4} Law enforcement responded, and Officer Martin saw Defendant running through an alley but lost him. Defendant was subsequently located by Mr. Alberto Muniz, who found Defendant passed out and snoring in his bathtub when he got home from work. Mr. Muniz stated that it looked as if his bathroom had been ransacked, and the screen to his bathroom window was on the floor as if someone pushed it in from outside the window. Mr. Muniz called the police, and Defendant was arrested.

{5} Defendant testified that after he ran from the police he entered the home of Mr. Muniz through an unlocked back door. Defendant stated that he went into this yard because it had a cinderblock wall. Defendant denied entering Mr. Muniz's home through the bathroom window. He testified that he would not have gone through the window because of its height and because he was afraid of being seen. However, Mr. Muniz testified that he locked the back door before leaving for work, and that the bathroom window had been forced and broken.

{6} Defendant testified that, after being sober for fourteen months, he smoked methamphetamine on the morning of the incident. After smoking, Defendant became very paranoid and, in his mind, he was trying to escape from people who wanted to rob him. Defendant stated that he was "terrified" and that he was attempting to get somewhere safe by breaking into Mr. Noblitt's home.

{7} Defendant was convicted at trial of breaking and entering into the home of Mr. Muniz; attempted breaking and entering for sticking his arm through Mr. Noblitt's dog door; criminal trespass for the unauthorized entry of Mr. Duran's back yard; and resisting, evading, or obstructing an officer for running from Officer Mitchell, an Alamogordo Police Officer. This appeal followed.

DISCUSSION

I. Amendment of the Criminal Trespass Charge Amounted to a New Charge Under Rule 5-204(A)

{8} Defendant argues that amending the trespassing charge by changing the address of the location of the alleged trespass from 1000 Dewey to 1002 Dewey amounts to a new charge in violation of Rule 5-204(A). We agree.

{9} We review the application of Rule 5-204 de novo. *State v. Stevens*, 2014-NMSC-011, ¶ 49, 323 P.3d 901. Rule 5-204(A) states, in pertinent part, that "[t]he court may at any time prior to a verdict cause the complaint, indictment or information to be amended in respect to any such defect, error, omission or repugnancy if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

{10} Rule 5-204(A) allows a court to amend an information prior to the verdict to correct a defect or error, "but [it] does not allow the [district] court to amend if there is an additional or different offense charged." *State v. Roman*, 1998-NMCA-132, ¶¶ 9, 11, 125 N.M.

688, 964 P.2d 852. As we explained in *Roman*, the distinction lies in the difference between an "amendment to an information" and an "amended information." *Id.* ¶ 12 (internal quotation marks omitted). "An amendment to an information occurs when an otherwise adequate information is supplemented. An amendment to an information does not include the addition of a new charge. An amended information adds a new or different charge. It acts as the filing of a new instrument that supersedes the original." *Id.* (internal quotation marks and citations omitted).

{11} The State contends here that there was no new charge added, that instead it merely corrected a typographical error in the address where the trespass occurred. The State relies on *State v. Lucero*, 1968-NMCA-021, ¶¶ 6-7, 79 N.M. 131, 440 P.2d 806, where a change in the address given was held to be the correction of an error that did not prejudice the defendant, and was therefore permissible. We are not persuaded. There are important differences between a case like *Lucero*, where the defendant was indicted on a single charge of burglary, *id.* ¶ 1, and this case. In that case, a mistake in the address burglarized was found to be a typographical error, which did not prejudice the defendant. *Id.* ¶¶ 6-7. In that case, the defendant was able to identify the basis of the accusation from the date and the charge and recognize that the address was a simple error. His trial preparation was not affected. *See id.*

{12} In this case, however, Defendant was charged with the offense of breaking and entering at the address identified on the criminal information. The alleged "typo" correctly informed Defendant that he also faced the lesser included offense of trespassing at that same address if the jury acquitted him of breaking and entering. There was no reason for Defendant to doubt the accuracy of the address in this case. Defendant was not on notice prior to trial under these facts that the State actually intended to charge a separate count of trespass at a different location. We therefore conclude that the State sought to add a new charge after the close of the evidence.

{13} The record shows that Defendant was prejudiced by the addition of this new charge without adequate notice. *See Roman*, 1998-NMCA-132, ¶ 13 (noting that post-evidence amendments are particularly prejudicial because they add a new charge without giving a criminal defendant sufficient notice). The post-evidence amendment that occurred here is particularly prejudicial because, believing trespass was charged only as a lesser included offense of breaking and entering, Defendant focused his defense on encouraging the jury to find trespass instead of breaking and entering. Defendant mounted no defense to the new charge of trespassing and, indeed, his counsel did not interview the key witness on that charge. Counsel almost certainly would have done so had he been aware the witness was central to an additional charge. Defense counsel was not on notice when he cross-examined the State's newly listed witness that he was being called by the State to testify as the victim of an additional charge of trespass. Under these circumstances, particularly where the two addresses, 1000 and 1002 Dewey, were both locations where Defendant had been during the course of the events leading to the charges filed in this case, we conclude Defendant was prejudiced by the lack of adequate notice of the amended charge against him. *See State v. Armijo*, 1977-NMCA-070, ¶ 25, 90 N.M. 614, 566 P.2d 1152 ("To permit the jury to convict on the basis of action resulting in personal injury, by adding this charge after the evidence was concluded in a trial where personal injury was not in issue, is prejudice."). Because we conclude that the amendment to the criminal trespass charge violated Rule 5-204(A), we reverse Defendant's conviction as to that count.

II. UJI 14-1402 Does Not Accurately Describe the Mens Rea for Criminal Trespass

{14} Defendant argues that his conviction for criminal trespass should also be reversed, in the alternative, because there is a conflict in the mens rea requirements of the criminal trespass statute, Section 30-14-1(B) and UJI 14-1402.

{15} Defendant argues that the UJI utilizes a lower mens rea requirement than what is statutorily mandated. He points out that the criminal trespass statute requires that a person committing criminal trespass "knowingly enter[] or remain[] upon the unposted lands of another *knowing* that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof," § 30-14-1(B), whereas UJI 14-1402 requires only that "[t]he defendant knew *or should have known* that permission to enter . . . had been denied." (Emphasis added.) Thus, he argues, UJI 14-1402 applies a lower mens rea requirement than that required by Section 30-14-1(B).

{16} 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*, 1994-NMSC-009, ¶ 6, 116 N.M. 793, 867 P.2d 1175. Uniform jury "[i]nstructions are sufficient if, considered as a whole, they fairly present the issues and the applicable law." *State v. Rhea*, 1974-NMCA-030, ¶ 9, 86 N.M. 291, 523 P.2d 26. "When a jury instruction is facially erroneous, as when it directs the jury to find guilt based upon a misstatement of the law, a finding of juror misdirection is unavoidable." *State v. Dowling*, 2011-NMSC-016, ¶ 17, 150 N.M. 110, 257 P.3d 930.

{17} Our Supreme Court had the opportunity to review the criminal trespass statute in *State v. Merhege*, 2017-NMSC-016, 394 P.3d 955. However, the conflict raised by Defendant was not directly challenged. The *Merhege* Court noted that the defendant "[did] not provide [the Court] with an opportunity to examine the propriety of the model instruction" because the defendant did not challenge the "knew or should have known" language in the model jury instruction, nor did the defendant "argue that the statutory mens rea of 'knowing' requires actual knowledge." *Id.* ¶ 10 n.2 (internal quotation marks and citation omitted). Defendant urges us to address this discrepancy now. Although not essential to our decision given our resolution of Defendant's claim that criminal trespass was improperly charged, we address this question because of its importance and because it will likely be repeated, given the reliance of our trial courts on the UJI for guidance.

{18} We begin with the plain language of the statute, which is "[t]he primary indicator of legislative intent." *State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863. Section 30-14-1(B) requires a finding beyond a reasonable doubt that a defendant "*knowingly* enter[s] or remain[s] upon the unposted lands of another *knowing* that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof." (Emphasis added.) However, the jury instruction for criminal trespass, UJI 14-1402, which is based upon Section 30-14-1[1] and which was given to the jury in this case, requires a finding beyond a reasonable doubt that "[D]efendant *knew or should have known* that permission to enter [the land] had been denied." UJI 14-1402 (emphasis added). "[S]hould have known" adds civil negligence as an alternative to the statute's requirement of actual knowledge. *State v. Consaul*, 2014-NMSC-030, ¶ 39, 332 P.3d 850 (internal quotation marks omitted); *see id.* (noting that the close association between the phrase "knew or should have known" and principles of civil negligence (internal quotation marks omitted)). It allows the jury to convict of trespass based on its belief that a reasonable person would have understood that access was barred. However, New Mexico law requires proof beyond a reasonable doubt of actual knowledge that permission to enter the land had been denied.

[1] See cross-references in annotations to UJI 14-1402 referring to Section 30-14-1(A) and (B).

{19} Our New Mexico Supreme Court's decision in *State v. Suazo*, 2017-NMSC-011, 390 P.3d 674, guides our analysis here. In *Suazo*, the state tendered a modified jury instruction for second-degree murder, which "inserted 'knew or should have known' in place of the word 'knew,' but was otherwise consistent with the model instruction." *Id.* ¶ 14. The statute at issue in *Suazo*, NMSA 1978, § 30-2-1(B) (1994), read: "Unless he is acting upon sufficient provocation . . . a person who kills another human being without lawful justification or excuse commits murder in the second degree if . . . he [or she] *knows* that such acts create a strong probability of death." *Suazo*, 2017-NMSC-011, ¶ 16 (internal quotation marks and citation omitted). The Court determined that the plain language of Section 30-2-1(B) requires that the defendant "possess knowledge of the probable consequences of his or her acts." *Suazo*, 2017-NMSC-011, ¶ 16. Therefore, the Court held that "the instruction . . . misstated the mens rea element of second-degree murder, and it was therefore error for the district court to provide this instruction to the jury." *Id.* ¶ 25.

{20} Just as in *Suazo*, the UJI here conflicts with the plain language of Section 30-14-1(B), because the UJI uses "knew or should have known" as its mens rea requirement, while Section 30-14-1(B) requires actual knowledge. *Compare* UJI 14-1402, *with* § 30-14-1(B). Due to this misstatement of the mens rea required by Section 30-14-1(B) in UJI 14-1402, the jury in this case was instructed that it could find Defendant guilty of criminal trespass if it found that Defendant should have known that permission to enter had been denied. As pointed out above, this instruction was not an accurate rendition of the law. *See* Rule 5-608(A) NMRA ("The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury."); *State v. Osborne*, 1991-NMSC-032, ¶ 10, 111 N.M. 654, 808 P.2d 624 (treating Rule 5-608(A) as requiring the trial court to instruct the jury on all essential elements of a crime, even when the relevant UJI leaves out an element). Because we hold that UJI 14-1402's "should have known" language is erroneous, we therefore suggest that UJI 14-1402 be modified to conform to the statutory language. *See Wilson*, 1994-NMSC-009, ¶ 6.

III. Sufficient Evidence Supports Defendant's Breaking and Entering Conviction

{21} Defendant next argues that insufficient evidence supported his conviction for breaking and entering. "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Ford*, 2019-NMCA-073, ¶ 7, 453 P.3d 471 (internal quotation marks and citation omitted). Under this test, "we view the evidence in the light most favorable to the state, resolving all conflicts and making all permissible inferences in favor of the jury's verdict." *State v. Ledbetter*, 2020-NMCA-046, ¶ 6, 472 P.3d 1287 (alteration, internal quotation marks, and citation omitted). "Our appellate courts will not invade the jury's province as fact-finder by second-guessing the jury's decision concerning the credibility of witnesses, reweighing the evidence, or substituting its judgment for that of the jury." *State v. Gwynne*, 2018-NMCA-033, ¶ 49, 417 P.3d 1157 (internal quotation marks and citation omitted). "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883.

{22} At trial, the jury was instructed that to find Defendant guilty of breaking and entering, the State was required to prove the following elements beyond a reasonable doubt:

> 1. [D]efendant entered 1109 Cauthen, Alamogordo, NM without permission;
> 2. The entry was obtained by the dismantling of the north side bathroom window.

{23} Defendant argues that the State did not present sufficient evidence that he dismantled the bathroom window. We disagree. First, Mr. Muniz testified that he always locks his back door, front door, and bathroom window when he leaves the house. Second, when Mr. Muniz got home, he found Defendant asleep in his bathroom. Third, Mr. Muniz testified that the bathroom window was wide open, the crank that opens the bathroom window was broken, and the screen to this window was on the floor inside his bathroom, as if someone pushed it inside from outside the window. Fourth, he saw footprints outside of the bathroom window. Finally, he discovered that his bathroom had been ransacked and his belongings were scattered about the floor of the bathroom, but nothing else in the house was disturbed. Together, these facts provide substantial evidence from which the jury could have concluded that Defendant broke into the house through the bathroom window. While Defendant argues contrary evidence supports reversal, "[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

IV. The Jury Instructions for Breaking and Entering and Attempted Breaking and Entering Did Not Suffer From Fundamental Error

{24} Defendant challenges the breaking and entering and attempted breaking and entering instructions given to the jury because the instructions omitted knowledge that Defendant does not have permission to enter the dwelling or structure, which Defendant contends is an essential element of the crime. Defendant concedes that he did not object to the challenged instructions at trial; therefore, we review these instructions for fundamental error. *See Osborne*, 1991-NMSC-032, ¶¶ 35, 38 (explaining that the failure to instruct the jury on the essential elements of an offense may constitute fundamental error, even if the defendant failed to object to an inadequate instruction). Determining fundamental error is a two-step inquiry: (1) we determine whether error occurred; and (2) we determine whether this error is fundamental. *See State v. Ocon*, 2021-NMCA-032, ¶¶ 7-8, 493 P.3d 448. To determine whether error occurred, we ask "whether a reasonable juror would have been confused or misdirected by the jury instruction." *State v. Barber*, 2004-NMSC-019, ¶ 19, 135 N.M. 621, 92 P.3d 633. Jury instructions cause confusion or misdirection when, "through omission or misstatement," they do not provide "an accurate rendition" of the essential elements of the law. *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134.

{25} If we determine that a reasonable juror would have been confused or misdirected by the instructions given, our fundamental error analysis requires us to "review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the defendant's conviction was the result of a plain miscarriage of justice." *State v. Sandoval*, 2011-NMSC-022, ¶ 20, 150 N.M. 224, 258 P.3d 1016 (alteration, internal quotation marks, and citation omitted). "If such a miscarriage of justice exists, we deem it fundamental error." *State v. Anderson*, 2016-NMCA-007, ¶ 9, 364 P.3d 306.

{26} "[A]n appellate court may affirm a conviction notwithstanding the absence of an implicit jury finding on an omitted element if the jury, having considered the parties' legal and factual presentations and returned a guilty verdict on the given instructions, undoubtedly would have found the essential element if properly instructed." *Ocon*, 2021-NMCA-032, ¶ 12. "That conclusion is possible only where proof of the omitted element is so strong that no rational jury could have failed to find that element." *Id.* "[I]rrespective

of the strength of the [s]tate's case, a reviewing court cannot conclude that the jury undoubtedly would have found an omitted element when that element was 'disputed' or 'in issue' at trial." *Id.* "Reversal is mandatory regardless of a defendant's trial strategy if 'any evidence or suggestion in the facts, however slight' would have permitted a rational jury to conclude that the [s]tate failed to meet its burden to prove the omitted element beyond a reasonable doubt." *Id.* (quoting *State v. Orosco*, 1992-NMSC-006, ¶ 10, 113 N.M. 780, 833 P.2d 1146).

A. The Breaking and Entering Instructions Did Suffer From Error, but This Error Was Not Fundamental

{27} Relying on *State v. Contreras*, 2007-NMCA-119, ¶ 17, 142 N.M. 518, 167 P.3d 966, Defendant argues that the breaking and entering instructions submitted to the jury omitted the requirement that a defendant must have actual knowledge that he or she does not have permission to enter the dwelling or structure. We agree.

{28} At trial, the jury was instructed, based on UJI 14-1410 NMRA, that to find Defendant guilty of breaking and entering, the State was required to prove the following elements beyond a reasonable doubt:

> 1. [D]efendant *entered* 1109 Cauthen, Alamogordo, NM *without permission*;
>
> 2. The entry was obtained by the dismantling of the north side bathroom window.

{29} New Mexico's statute for breaking and entering into a dwelling or structure describes three elements: (1) entering, (2) without permission, (3) by fraud, deception, breaking or dismantling any part of the dwelling or structure. *See* § 30-14-8(A). We have previously held that "the mental state which accompanies the 'without permission' element of breaking and entering is *knowledge of* the lack of permission." *Contreras*, 2007-NMCA-119, ¶ 17 (emphasis added). Therefore, the State was required to prove that Defendant had actual knowledge that he did not have permission to enter 1109 Cauthen, Alamogordo, New Mexico, the home of Mr. Muniz.

{30} Had Defendant requested such an instruction, it would have been appropriate for the district court to include it. Because Defendant made no objection to the jury instruction given, however, we must now decide whether the omission of this element was fundamental error requiring reversal. *See Sandoval*, 2011-NMSC-022, ¶ 20.

{31} We conclude that this error did not amount to fundamental error requiring reversal because the element was not "disputed" or "in issue" at trial, *Ocon*, 2021-NMCA-032, ¶ 12 (internal quotation marks omitted), and because the circumstantial evidence that Defendant knew he did not have permission to enter the home of Mr. Muniz is so strong that no rational jury, having found the other elements of breaking and entering, could have found otherwise. *See id.* The jury's verdict included findings, beyond a reasonable doubt, that Defendant had entered a locked house by prying open and breaking the mechanism on a locked window located above his head. It is simply not reasonable to conclude that Defendant broke in through the bathroom window and that he thought he had permission to do so. Neither the evidence nor the arguments presented by the parties suggested to the slightest extent that Defendant forcibly entered believing that he had permission to do so. Having rejected Defendant's defense that he walked in through an unlocked door, a reasonable jury could not have concluded Defendant believed he had permission to enter. Accordingly, we hold that the knowledge element was not disputed at trial and that, based on the strength of the evidence, no rational jury, having found that Defendant broke in through the bathroom window, could have failed to find that Defendant knew that he did not have permission to enter the home of Mr. Muniz. Therefore, we affirm Defendant's conviction for breaking and entering.

B. Though Erroneous, the Attempted Breaking and Entering Instructions Did Not Suffer From Fundamental Error

{32} Defendant was convicted of attempted breaking and entering based on his attempt to enter Mr. Noblitt's house by reaching through a dog door to unlock the back door. Defendant argues that the attempted breaking and entering instructions given to the jury are flawed, for the identical reason that the instruction for breaking and entering instruction are flawed. To find Defendant guilty of attempted breaking and entering, the jury was instructed, pursuant to UJI 14-2801 NMRA, that the State was required to prove the following elements beyond a reasonable doubt:

> 1. [D]efendant intended to commit the crime of breaking and entering;
>
> 2. [D]efendant began to do an act which constituted a substantial part of the breaking and entering but failed to commit the breaking and entering.

{33} Pursuant to the use notes of the attempted breaking and entering instruction, it was necessary for the district court to instruct the jury on the essential elements of breaking and entering, which included the essential element that Defendant had actual knowledge that he did not have permission to enter Mr. Noblitt's home to find him guilty.[2] *See Contreras*, 2007-NMCA-119, ¶ 17. Just as we concluded for the instruction of breaking and entering, we conclude that the essential element of knowledge was omitted from the instructions for attempted breaking and entering. This was error because the jury was given an incomplete instruction for this charge. *See Benally*, 2001-NMSC-033, ¶ 12.

{34} While error occurred here, this error cannot be said to be fundamental because the element of knowledge was not "disputed" or "in issue" at trial and because the jury undoubtedly would have found the essential element of knowledge if properly instructed. *See Ocon*, 2021-NMCA-032, ¶ 12. No reasonable juror could conclude under the circumstances here that someone who attempted entry through a dog door and ran when the owner opened the door, believed he had permission to enter the house. This was not Defendant's defense, and neither party presented any evidence that suggested to even the slightest degree that Defendant did not know that he lacked permission to enter.

{35} As to this charge, Mr. Noblitt testified that he saw Defendant try to get into his home by reaching through the dog door and attempt to unlock the deadbolt to the back door of his house. Mr. Noblitt stated that he kicked Defendant's arm, and yelled at Defendant, who was trying to get inside. Mr. Noblitt opened the door and Defendant ran away. Moreover, Defendant testified that he was attempting to get somewhere safe by breaking into Mr. Noblitt's home and admitted that he was the man Mr. Noblitt saw running away. From these facts, no rational jury could have failed to find that Defendant knew that he did not have permission to enter the home of Mr. Noblitt if they were properly instructed. *See id.* Just as we did with the instruction for breaking and entering and for the same reasons, we conclude that the issue of knowledge was not "disputed" or "in issue" at trial. *See id.* Accordingly, we hold that the error in the attempted breaking and entering jury instructions was not fundamental and we affirm.

[2] Use note 1 of UJI 14-2801 directs that "[t]he essential elements of the felony must be given immediately following this instruction, unless they are set out in an instruction dealing with the completed offense." Consequently, UJI 14-1410 (breaking and entering; essential elements) was also given to the jury as a part of this instruction. We concluded in the immediately preceding section of this opinion that UJI 14-1410 lacked the essential element of knowledge.

V. The Instructions Did Not Encourage the Jury to Consider the Consequences of Its Verdict

{36} Defendant finally argues that the State invited the jury to consider the consequences of its verdict by arguing that Defendant's charges were "serious." In New Mexico, it is well established that "a jury must not consider the consequences of its verdict." *State v. Brown*, 1997-NMSC-029, ¶ 12, 123 N.M. 413, 941 P.2d 494. "[T]he jury's function is to determine guilt or innocence, not to participate in the imposition of punishment." *State v. Evans*, 1973-NMCA-053, ¶ 6, 85 N.M. 47, 508 P.2d 1344.

{37} Concerning this argument, Defendant first challenges the criminal trespass instruction. Since we have already addressed this instruction and reversed Defendant's conviction for criminal trespass, we do not address that instruction here. Next, Defendant challenges the instruction for attempted breaking and entering. For Defendant to be found guilty of this charge, the jury was instructed, in pertinent part, that

> 1. [D]efendant intended to commit the crime of breaking and entering;
>
> 2. [D]efendant began to do an act which constituted a substantial part of the breaking and entering but failed to commit the breaking and entering.

{38} This instruction, Defendant argues, informed the jury of the seriousness of the offense and invited the jury to consider the consequences of its verdict. We are not persuaded. This instruction does not ask the jury to "participate in the imposition of punishment," and they do not discuss the nature or severity of the crime. *Brown*, 1997-NMSC-029, ¶ 14 (internal quotation marks and citation omitted). Rather, the instruction unambiguously and succinctly outline what the State must prove for the jury to find Defendant guilty of the crime of attempted breaking and entering. *See id.* ¶ 12.

{39} Defendant cites *State ex rel. Schiff v. Madrid*, 1984-NMSC-047, 101 N.M. 153, 679 P.2d 821, in support of his argument. Defendant's reliance on *Madrid* is misplaced. In *Madrid*, the district court issued a modified instruction encouraging the jury to consider the consequences of its verdict on a firearm enhancement. *Id.* ¶ 5. This modification, our Supreme Court held, "was clearly an impermissible modification . . . expressly direct[ing] the jury to consider the mandatory firearm enhancement sentence, directly and blatantly contradicting the admonishment of UJI Crim. 50.06[3] that a jury is not to consider the consequences of its verdict." *Madrid*, 1984-NMSC-047, ¶ 7. In comparison to *Madrid*, the instruction for breaking and entering here does not, in any manner, encourage the jury to consider the consequences of its verdict.

{40} We also "assume the jury followed the court's instruction." *State v. Stallings*, 1986-NMCA-086, ¶ 13, 104 N.M. 660, 725 P.2d 1228. Here, the district court gave a specific instruction to the jury that they must not concern themselves with the consequences of their verdict. Therefore, we assume they did not concern themselves with the consequences of Defendant's verdict. *See id.* Accordingly, we affirm Defendant's conviction for attempted breaking and entering.

CONCLUSION

{41} For the reasons stated above, we reverse Defendant's conviction for criminal trespass. Finding no error that requires the reversal of Defendant's remaining convictions, we affirm them.

{42} IT IS SO ORDERED.

GERALD E. BACA, Judge

WE CONCUR:

ZACHARY A. IVES, Judge

JANE B. YOHALEM, Judge

[3] NMSA 1978, UJI Crim. 50.06 (Repl. Pamp. 1982) is now UJI 14-6007 NMRA.

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-054
No: A-1-CA-38569 (April 18, 2022)

DIANE GARRITY, as Court-Appointed Guardian Ad Litem for
ABRAHAM RIDER, a minor,
Plaintiff,
and
CHRISTOPHER RIDER and YOLANDA RIDER,
Husband and Wife, individually,
Plaintiffs-Appellants,
v.
CHRISTOPHER DRISKILL, M.D. and LEA REGIONAL HOSPITAL, LLC
d/b/a LEA REGIONAL MEDICAL CENTER,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Francis J. Mathew, District Judge

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OPINION

BOGARDUS, Judge.

{1} Christopher and Yolanda Rider (Parents) appeal the district court's order dismissing as time-barred their claim for loss of consortium arising from injuries sustained by their minor child (Child) due to alleged medical malpractice. We conclude that because Parents' claim was filed within the time period prescribed for filing Child's medical malpractice claim, Parents' claim was timely. Accordingly, we reverse.

BACKGROUND

{2} The background to our analysis is comprised of the well-pled facts in the complaint, which we accept as truthful for purposes of reviewing the district court's ruling on Defendants' motion to dismiss. *Thompson v. City of Albuquerque*, 2017-NMSC-021, ¶ 2, 397 P.3d 1279. On September 6, 2013, Child sustained injuries during the course of his birth and delivery at Lea Regional Medical Center (LRMC). As a result of allegedly negligent medical care provided by Child's doctor, Christopher Driskill, Child suffered a brachial plexus injury to his shoulder causing scapular winging, weakness, and difficulty with arm positioning as well as additional injury resulting in developmental delays, including learning disabilities and speech defects.

{3} Approximately five years later, on October 29, 2018, Child's guardian ad litem and Parents (collectively, Plaintiffs) filed a complaint, asserting various claims. Child's guardian ad litem brought several claims, including claims for negligent medical care against Dr. Driskill, his employer, Premier OBGYN, LLC (Premier),[1] and LRMC (collectively, Defendants). Parents' sole claim in the complaint was for loss of consortium against all Defendants.

{4} The district court granted Defendants' Rule 1-012(B)(6) NMRA motion to dismiss Parents' loss of consortium claim, concluding Parents brought their claim outside the three-year limitations period under both the Medical Malpractice Act's (MMA) statute of repose, NMSA 1978, § 41-5-13 (1976, amended 2021),[2] and the general statute of limitations for personal injuries, NMSA 1978, § 37-1-8 (1976). Parents appeal.

DISCUSSION

I. Standard of Review

{5} We review the dismissal of Parents' claim for loss of consortium damages under Rule 1-012(B)(6) de novo. *See Fitzjerrell v. City of Gallup ex rel. Gallup Police Dep't*, 2003-NMCA-125, ¶ 8, 134 N.M. 492, 79 P.3d 836 (noting whether a motion to dismiss under Rule 1-012(B)(6) was properly granted is a question of law). To address Parents' loss of consortium claim, we must construe Section 37-1-8, NMSA 1978, Section 37-1-10 (1975), and

[1] Premier is no longer a party to this appeal. Upon stipulation of the parties and upon agreement that Premier be dismissed as a party in the district court, this Court dismissed Premier from this appeal.

[2] The Legislature approved multiple amendments to the MMA in the 2021 legislative session, which took effect January 1, 2022. See NMSA 1978, §§ 41-5-1 to -29 (1976, as amended through 2021). All citations in this opinion to the MMA or any of its provisions refer to the MMA as it existed before 2022.

Section 41-5-13 as they apply to the facts of this case. We review such matters de novo. *See Bd. of Comm'rs of Rio Arriba Cnty. v. Greacen*, 2000-NMSC-016, ¶ 4, 129 N.M. 177, 3 P.3d 672 ("This is primarily a matter of statutory construction and thereby concerns a pure question of law, subject to de novo review."); *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960 ("We review de novo the [district] court's application of the law to the facts in arriving at its legal conclusions.").

II. Statutes at Issue

{6} Because Parents brought their loss of consortium claim against both qualified and nonqualified health care providers, two separate statutes are at issue on appeal: the MMA's statute of repose, Section 41-5-13, and the general statute of limitations for personal injuries, Sections 37-1-8 and 37-1-10. Defendant Driskill is a qualified health care provider pursuant to Section 41-5-5(C) of the MMA and is therefore entitled to the MMA's benefits. *See id.* (defining the qualifications needed for health care providers to qualify under the MMA and explaining that health care providers that do not meet the qualifications under that "section shall not have the benefit of any of the provisions of the [MMA] in the event of . . . malpractice claim[s] against [them]"). As a result, Section 41-5-13 is controlling as to whether Parents' loss of consortium claim against Defendant Driskill was timely filed. *See Moncor Tr. Co. ex rel. Flynn v. Feil*, 1987-NMCA-015, ¶ 6, 105 N.M. 444, 733 P.2d 1327 ("Under the [MMA] . . . Section 41-5-13 is controlling as to whether an action grounded upon a claim of medical malpractice has been timely filed."). Section 41-5-13 provides, in relevant part:

> No 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 *except that a minor under the full age of six years shall have until his ninth birthday in which to file*.

(Emphases added.)

{7} As for Parents' claim against Defendant LRMC, which is not a health care provider as defined in the MMA, the parties agree that Sections 37-1-8 and -10 control whether Parents' loss of consortium claim was timely filed. Section 37-1-8 provides in relevant part that "[a]ctions must be brought . . . for an injury to the person . . . within three years," but Section 37-1-10 provides an exception allowing a minor one year from his or her eighteenth birthday within which to sue. *See Gomez v. Chavarria*, 2009-NMCA-035, ¶ 7, 146 N.M. 46, 206 P.3d 157. We refer to the exceptions for minors provided by Sections 41-5-13 and 37-1-10 as "minority tolling provisions." *See Maestas v. Zager*, 2005-NMCA-013, ¶ 22, 136 N.M. 764, 105 P.3d 317 (referring to the Tort Claims Act's minority tolling provision), *rev'd on other grounds*, 2007-NMSC-003, ¶ 1, 141 N.M. 154, 152 P.3d 141.

{8} It is undisputed that Parents brought their loss of consortium claim outside the general three-year limitations period provided by Sections 41-5-13 and 37-1-8, but during Child's minority as defined in both minority tolling provisions at issue. Thus, the sole issue on appeal is whether a parent's claim for loss of consortium in a medical malpractice case is tolled alongside the minor's claim from which it is derived, pursuant to the minority tolling provisions of Sections 41-5-13 and 37-1-10.

III. The Parties' Arguments

{9} Defendants argue that a parent's claim for loss of consortium should not be so tolled. They contend the plain language of the minority tolling provisions at issue provides no exception to the general three-year limitations period for a parent's loss of consortium claim. Defendants urge us to apply the principle of strictly construing exceptions to limitations periods and follow our precedent applying this principle. Defendants also argue that, because loss of consortium claims are independent actions, they can be brought separately from the underlying injury claim.

{10} Parents argue the minority tolling provisions' silence as to their applicability to loss of consortium claims makes the statutes ambiguous since loss of consortium claims did not exist when the tolling provisions were enacted. Likewise, Parents contend the cases upon which Defendants rely to support a strict construction of the minority tolling provisions at issue are of limited value because loss of consortium claims did not exist when those cases were decided. Parents argue that in light of later-developed loss of consortium precedent, refusing to extend the minority tolling provisions at issue to a parent's loss of consortium claim would lead to illogical results and frustrate public policies favoring judicial economy and avoiding piecemeal litigation.

{11} For the reasons we discuss, we conclude that a parent's claim for loss of consortium in a medical malpractice case is tolled alongside the minor's claim from which it is derived when such claims are brought in the same cause of action. Because our conclusion applies to the minority tolling provisions of Sections 41-5-13 and 37-1-10, and because our reasoning applies equally to both, we do not separately analyze each statute.

IV. Legislative Intent

{12} "When construing statutes, our guiding principle is to determine and give effect to legislative intent." *El Paso Elec. Co. v. N.M. Pub. Regul. Comm'n*, 2010-NMSC-048, ¶ 7, 149 N.M. 174, 246 P.3d 443 (internal quotation marks and citation omitted); *accord Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 15, 149 N.M. 162, 245 P.3d 1214 ("This Court's primary goal when interpreting statutes is to further legislative intent."). We "us[e] the plain language of the statute as the primary indicator of legislative intent." *State v. Willie*, 2009-NMSC-037, ¶ 9, 146 N.M. 481, 212 P.3d 369 (alteration, internal quotation marks, and citation omitted). However, "[i]f the plain meaning of the statute is doubtful, ambiguous, or if an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, we will construe the statute according to its obvious spirit or reason." *Id.* (alteration, internal quotation marks, and citation omitted).

{13} We start with the plain language. As discussed, Defendants contend the plain language of Sections 37-1-8, -10 and 41-5-13 provides no exception to the three-year limitation for a parent's loss of consortium claim so that the language of these statutes is unambiguous. In contrast, Parents argue both that the statutory text is ambiguous and that absurd and unjust results would ensue from Defendant's plain meaning interpretation.

{14} If we were to examine the text of Sections 37-1-8, -10, and 41-5-13 in isolation, Defendants' strict construction argument might be persuasive. We, however, do not believe it is appropriate to take such a view of the statutory text given the circumstances in this case. Our Legislature last amended Section 37-1-10 in 1975 and Section 37-1-8 in 1976, and enacted Section 41-5-13 in 1976. Loss of consortium claims, however, were not recognized until 1994. *See Romero v. Byers*, 1994-NMSC-031, ¶¶ 13, 24, 117 N.M. 422, 872 P.2d 840 (recognizing a claim for loss of spousal consortium). It is reasonable to conclude, therefore, that the Legislature did not intentionally fail to address loss of consortium claims in these statutes. *See Wilschinsky v. Medina*, 1989-NMSC-047, ¶ 25, 108 N.M. 511, 775 P.2d 713 ("[A] specific cause of action [later] recognized by [our Supreme Court] did not exist in 1976. Therefore, the [L]egislature did not intentionally fail to address this issue."). Moreover, as we later discuss, we agree with Parents that Defendants' construction would lead to illogical and unjust results that the Legislature did not intend. *See State v. Bennett*, 2003-NMCA-147, ¶ 10, 134 N.M. 705, 82 P.3d 72 (departing from the plain meaning to avoid "an absurdity

that the [L]egislature could not have intended" (internal quotation marks and citation omitted)). Accordingly, we look beyond the plain meaning of the statutory text to discern legislative intent. *See id.*; *Wilschinsky*, 1989-NMSC-047, ¶ 26.

A. Purpose of the MMA

{15} In support of its interpretation of the language of Section 41-5-13 in particular, Defendant Driskill points out that the Legislature enacted the MMA to limit the liability of health care providers, and contends that expanding its minority tolling provision would undermine this purpose. *See* § 41-5-2 (1976) (repealed 2022).[3] ("The purpose of the [MMA] 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."). We are unpersuaded.

{16} The MMA's purpose was not solely to limit the liability of qualified health care providers. *See* § 41-5-2; *Montaño v. Frezza*, 2017-NMSC-015, ¶ 32, 393 P.3d 700 (noting one purpose of the MMA as promoting the health and welfare of the people of New Mexico by ensuring "that individuals receive adequate compensation for injuries caused by medical negligence"); *Baker v. Hedstrom*, 2013-NMSC-043, ¶¶ 17, 19, 309 P.3d 1047 (describing that the MMA created a "balanced scheme" to encourage health care providers to opt into the MMA by balancing benefits to providers and patients, and listing the benefits to patients). Moreover, expanding Section 41-5-13's minority tolling provision leaves unchanged many of the MMA's most significant limitations on the liability of qualified health care providers: the $200,000 personal liability limit; the $600,000 cap on damages; and the requirement that plaintiffs submit malpractice claims to the medical review commission for permission to sue the provider in district court. *See id.* ¶ 18 (reviewing the MMA's benefits to qualified health care providers). Finally, as we discuss below, expanding Section 41-5-13's minority tolling provision protects qualified health care providers from exposure to multiple lawsuits based on the same conduct. Accordingly, we conclude that tolling a parent's claim for loss of consortium alongside the minor's medical malpractice claim does not undermine the MMA's benefits for qualified health care providers, nor is it contrary to the purpose of the MMA.

B. Canons of Strict Construction

{17} Defendants next urge us to apply the principle of strictly construing exceptions to limitation periods. *See Regents of Univ. of N.M. v. Armijo*, 1985-NMSC-057, ¶ 5, 103 N.M. 174, 704 P.2d 428 ("Generally the right of action is favored over the right of limitation. Exceptions, however, to statutes of limitations are strictly construed in New Mexico."). Defendants contend that the Legislature must be presumed to have been aware of this longstanding principle of strict construction when it enacted the statutes at issue, and that we should follow our precedent applying this principle. *See Moncor Tr. Co.*, 1987-NMCA-015, ¶¶ 8, 13, 16 (noting the principle of strictly construing exceptions to statutes of limitations and concluding that Section 41-5-13's minority tolling provision "appl[ied] only to minors who suffer an alleged act of malpractice and not to minors who are beneficiaries under the Wrongful Death Act" in part because "minority disability saving a person from the operation of the statute of limitations is a personal privilege limited to the minor under the disability only and cannot confer rights on other persons asserting actions"); *accord Armijo v. Regents of Univ. of N.M.*, 1984-NMCA-118, ¶¶ 1-2, 15, 103 N.M. 183, 704 P.2d 437 (concluding that a parent's individual claims for pain and suffering and loss of companionship could not be "tacked on to the claims of the infant, thereby avoiding the operation of the two-year limitation period [under the Tort Claims Act]" because "[a] disability, such as minority, which saves one from the operation of a limitation statute is a *personal* privilege of the person under the disability only"), *rev'd in part on other grounds*, 1985-NMSC-057, ¶ 1. We acknowledge *Moncor Tr. Co.*, 1987-NMCA-015, and *Armijo*, 1984-NMCA-118, suggest that the minority tolling provisions at issue do not inure to the benefit of Parents' loss of consortium claim. In light of later precedent regarding loss of consortium claims, however, we conclude these authorities are not controlling.

{18} As an initial matter, precedent defining loss of consortium claims did not exist when *Moncor Tr. Co.* and *Armijo* were decided because loss of consortium was not yet recognized as a cause of action. Further, we conclude that strictly construing the minority tolling provisions at issue, as *Moncor Tr. Co.* and *Armijo* suggest, would be inconsistent with this later-developed precedent regarding loss of consortium.[4] Specifically, as we explain, refusing to extend the minority tolling provisions at issue to a parent's loss of consortium claim in a medical malpractice case would lead to multiple lawsuits and the possibility for inconsistent decisions, contrary to our precedent requiring joinder of a parent's loss of consortium claim with the child's negligence action and at odds with the policies underlying this joinder requirement.[5]

C. Subsequent Development of Loss of Consortium Law

{19} In *Fernandez v. Walgreen Hastings Co.*, our Supreme Court followed other jurisdictions in "*requiring* joinder of a parent's or grandparent's loss of consortium claim with the child's negligence action." 1998-NMSC-039, ¶ 28, 126 N.M. 263, 968 P.2d 774 (emphasis added). The policy underlying the adoption of this joinder requirement was to prevent increased litigation and multiple claims that would otherwise result from filing a parent's or grandparent's loss of consortium claim separately from the child's underlying negligence action. *See id.* ("[The d]efendant's argument that recognition of a grandparents' claim for loss of consortium would lead to increased litigation and multiple claims is . . . easily solved by requiring joinder of [these claims].").

{20} In support of its decision to follow other jurisdictions in adopting this joinder requirement, the *Fernandez* court cited the Wisconsin Supreme Court's decision *Shockley v. Prier*, which likewise required "that the parent's [loss of consortium claim be] combined with that of the child for the child's personal injuries." 225 N.W.2d 495, 501 (Wis. 1975). Relying on *Shockley*'s requirement that a parent's loss of consortium claim be combined with the child's injury claim, the Wisconsin Supreme Court went on to decide the issue we face today in *Korth ex rel. Lukas v. Am. Fam. Ins. Co.*, 340 N.W.2d 494 (Wis. 1983). We find the Wisconsin Supreme Court's reasoning in *Korth* to be consistent with our precedent requiring joinder and therefore persuasive.

{21} In *Korth*, an injured minor and her parents filed suit after the three-year statute of limitations for personal injuries had expired but during the child's minority. *Id.* at 495.

[4] Insofar as Defendant Driskill argues that the Legislature's inaction in the face of this later development in loss of consortium law is evidence of legislative intent to adopt its reading of the MMA's minority tolling provision, we are unpersuaded. See Garcia v. Schneider, Inc., 1986-NMCA-127, ¶ 11, 105 N.M. 234, 731 P.2d 377 ("While a number of decisions have held that legislative inaction following a judicial interpretation of a statute affords some evidence that the [L]egislature intends to adopt the interpretation, legislative inaction has been called a weak reed upon which to lean and a poor beacon to follow in construing a statute." (alteration, internal quotation marks, and citation omitted)).

[5] To the extent language in Moncor Tr. Co., 1987-NMCA-015, and Armijo, 1984-NMCA-118, conflicts with our decision, those cases are no longer good law.

Construing a substantially similar limitations provision, the Wisconsin Supreme Court concluded that since the parents' claim for loss of society and companionship and medical expenses was filed along with the minor's claims, the parents' claim was also entitled to the benefit of the statute tolling the period for filing the minor's claims. *See id.* In so concluding, the court relied on its precedent from *Shockley* requiring the parent's cause of action for loss of society and companionship to be brought in the same action as that of the minor's claim for personal injuries. *See id.* at 496-97. The court highlighted the policies underlying *Shockley*'s joinder requirement: protecting defendants from multiple litigation and inconsistent judgments, and protecting the public's interest in the prompt, complete and efficient settlement of controversies in one proceeding. *Id.* at 496. The court reasoned that applying the minor tolling provision to loss of consortium claims would encourage these policies underlying the joinder requirement and allow the minor or the minor's representative the benefits of a longer limitations period. *See id.* at 497.

{22} The *Korth* court also reasoned that allowing the parents' claims to be filed during the period available to the minor applied a "fair and reasonable construction" to the statutes at issue. *Id.* While the court noted "statutes creating limitations . . . should not be extended by judicial construction," *id.* (alteration omitted), it stated that were it to hold otherwise, its joinder requirement would mean that parents bringing a claim for loss of society and companionship would "of necessity" be forced to initiate the minor's claim within the general three-year limitations period, despite the minor tolling provision. *Id.* Finally, the court noted that granting parents the benefit of the minor tolling provision would not unduly burden defendants since they would have had to preserve evidence or maintain their readiness to defend the minor's claim. *Id.*

{23} We likewise find persuasive a more recent case from the Rhode Island Supreme Court addressing whether that state's statute of limitations applicable to a minor's medical malpractice claim inured to the benefit of a parent's loss of consortium claim. *See Ho-Rath v. Rhode Island Hosp.*, 115 A.3d 938, 940, 951 (R.I. 2015). In *Ho-Rath*, the Rhode Island Supreme Court concluded that "a parent's claim for loss of consortium in a medical malpractice case should be tolled alongside the minor's claim from which it is derived." *Id.* at 950. In so concluding, the court relied on its precedent establishing that the parents' loss of consortium claims "must be joined with the child's claims if it is feasible to do so." *Id.* The court reasoned that "[t]he sound rationale for this joinder rule is to prevent duplicative litigation, multiple recoveries, and inconsistent results." *Id.*

{24} We find the reasoning from Wisconsin and Rhode Island supportive of the conclusion that a parent's claim for loss of consortium in a medical malpractice case is tolled alongside the minor's claim, pursuant to the minority tolling provisions at issue. This conclusion is consistent with our precedent "requiring joinder of a parent's . . . loss of consortium claim with the child's negligence action," and the policies underlying this precedent: protecting individuals from the burden of litigating multiple lawsuits, promoting judicial economy, and minimizing the possibility of inconsistent decisions. *Fernandez*, 1998-NMSC-039, ¶ 28; *see id.* (adopting the joinder requirement to prevent "increased litigation and multiple claims" that would result from filing a parent's or grandparent's derivative loss of consortium claims separately from the child's negligence action); *see also* Rule 1-019(A)(2)(b) NMRA (mandating, if feasible, joinder of a party claiming an interest relating to the subject of the action when his or her absence would "leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations"). In our view, this conclusion provides fairness to the parties—to the defendants by reducing multiple lawsuits and to the plaintiffs by ensuring that they are not foreclosed from bringing meritorious claims—and, importantly, promotes the policies of the MMA and the minority tolling provisions.

{25} Were we to conclude otherwise, a parent would need to bring his or her loss of consortium claim within the applicable three-year limitations period, yet—pursuant to the minority tolling provisions at issue—a minor's malpractice claim could go forward separately years later. Such a scenario would increase the possibility of inconsistent decisions given that "a plaintiff who sues for loss of consortium damages must prove—as an element of loss of consortium damages—that the alleged tortfeasor caused the wrongful injury or death of someone who was in a sufficiently close relationship to the plaintiff." *Thompson*, 2017-NMSC-021, ¶ 14.

{26} We acknowledge that *Fernandez*'s joinder requirement could in theory be upheld without extending the minority tolling provisions at issue to a parent's loss of consortium claim by obligating the minor's claim to be brought together with the parent's claim within the general three year limitations period. But requiring the minor to bring their claim within the general limitations period would render superfluous the minority tolling provisions at issue. *See Am. Fed'n of State, Cnty. & Mun. Emps. v. City of Albuquerque*, 2013-NMCA-063, ¶ 5, 304 P.3d 443 ("Statutes must . . . be construed so that no part of the statute is rendered surplusage or superfluous." (internal quotation marks and citation omitted)).

{27} Moreover, extending the minority tolling provisions at issue to a parent's loss of consortium claim is consistent with New Mexico's "long tradition of interpreting laws carefully to safeguard minors." *Rider v. Albuquerque Pub. Schs.*, 1996-NMCA-090, ¶ 13, 122 N.M. 237, 923 P.2d 604; *see also Gomez*, 2009-NMCA-035, ¶ 10 ("The intent of the Legislature in enacting Section 37-1-10 was to give minors a reasonable period of time after reaching majority within which to file an action."). Otherwise, a parent might feel compelled by *Fernandez*'s joinder requirement to bring the minor's claim within the general three-year limitations period to preserve the parent's derivative loss of consortium claim.[6] *Accord Korth*, 340 N.W.2d 494 at 497 (noting that, in light of its joinder requirement, were it to hold that the minor tolling provision at issue did not inure to the parents' benefit, parents claiming loss of society and companionship would "of necessity" be forced to initiate the minor's claim within the general three-year limitations period). Such a scenario would frustrate rather than facilitate the purposes of minority tolling provisions. *See Regents*, 1985-NMSC-057, ¶ 7 ("Minority savings clauses are enacted to allow time for the full scope of a child's injury to become apparent, to enable the child to become competent to testify, or to allow the child to act for himself after the disability has been removed."); *In re Portal*, 2002-NMSC-011, ¶ 5, 132 N.M. 171, 45 P.3d 891 ("Statutes are to be read in a way that facilitates their operation and the achievement of their goals." (internal quotations marks and citation omitted)).

{28} Defendants disagree about the scope

[6] Defendants point out that the district court has the power to stay loss of consortium claims in cases in which the claimant knows he or she has a claim but does not yet know the full extent of his or her damages. See Belser v. O'Cleireachain, 2005-NMCA-073, ¶ 3, 137 N.M. 623, 114 P.3d 303 (stating that "a district court has the discretion to grant and lift a stay of proceedings[]" as part of the court's "inherent authority . . . to manage the cases before it"). We view this discretionary power as insufficient in light of Fernandez's joinder requirement.

of *Fernandez*'s joinder requirement, arguing that a parent's loss of consortium claim need not be joined with a child's medical malpractice claim. Defendants contend Parents' reliance on *Fernandez*'s joinder requirement ignores *Thompson*, which allows loss of consortium claims to be brought separately from the underlying injury claim. We do not agree that *Thompson* is controlling under the circumstances of this case, or that it conflicts with the joinder requirement set forth in *Fernandez.*

{29} In *Thompson*, a parent was killed, but the parent's estate did not sue for wrongful death damages. 2017-NMSC-021, ¶ 1. The plaintiffs, parent's minor children, sued for loss of consortium damages under the New Mexico Tort Claims Act. *Id.* ¶¶ 1, 5. The relevant issue before our Supreme Court was: "May the minor children of a parent whom they allege was wrongfully shot and killed by a law enforcement officer . . . bring their lawsuit [for loss of consortium damages] even if the parent's estate did not sue for wrongful death damages?" *Id.* ¶ 1.

{30} The Court held that the "[p]laintiffs in this case may bring the claim for loss of consortium damages independent of the underlying battery claim." *Id.* ¶ 18. The Court reasoned that "claims for loss of consortium damages are independent," and stated that "[a]lthough claims for loss of consortium damages derive from injury to another, the claimant has also suffered a direct injury for which he or she may seek recovery separately from the underlying tort." *Id.* ¶¶ 16, 18. "The direct injury alleged by a loss of consortium claimant is one to a relational interest with another who was physically injured." *Id.* ¶ 16. Thus, the Court stated, "A derivative claim for loss of consortium damages need not be brought along with the underlying tort claim because loss of consortium claimants suffer a direct injury separate from the physical injury to another." *Id.* ¶ 17.

{31} We do not view *Thompson*'s holding or reasoning as altering *Fernandez*'s joinder requirement or foreclosing its application in the present case. *Fernandez*'s joinder requirement is necessarily limited to instances in which a loss of consortium claim is brought along with the claim for the underlying tort injury. *See Fernandez*, 1998-NMSC-039, ¶ 28 (citing *Ueland v. Reynolds Metals Co.*, 691 P.2d 190, 193-94 (Wash. 1984) (en banc)), for the proposition that a "child's claim for loss of consortium of parent [must] be joined with [a] parent's underlying claim *whenever possible*." (emphasis added)). In *Thompson*, by contrast, the underlying tort action was never pursued. 2017-NMSC-021, ¶ 1. *Thompson*'s holding does not address the scenario contemplated in *Fernandez*, and at issue here, in which both the loss of consortium claim and the underlying tort action were brought. And although "a minor child c[an] pursue a claim for loss of consortium damages separate from an underlying wrongful death claim," *Id.* ¶ 17 (citing *State Farm Mut. Auto. Ins. Co. v. Luebbers*, 2005-NMCA-112, ¶ 37, 138 N.M. 289, 119 P.3d 169), neither *Fernandez* nor this case presents such a scenario.

CONCLUSION

{32} In sum, we conclude—based on our construction of the applicable statutes, in view of our precedent requiring joinder of a parent's loss of consortium claim with the child's negligence action and the policies inherent in that precedent, and our long tradition of interpreting laws carefully to safeguard minors—that a parent's claim for loss of consortium in a medical malpractice case is tolled alongside the minor's claim from which it is derived, pursuant to the minority tolling provisions of Sections 41-5-13 and 37-1-10.

{33} For the foregoing reasons, we reverse the dismissal of Parents' loss of consortium claim and remand to the district court for proceedings consistent with this opinion.

{34} IT IS SO ORDERED.

KRISTINA BOGARDUS, Judge

WE CONCUR:

JENNIFER L. ATTREP, Judge

JACQUELINE R. MEDINA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-055
No: A-1-CA-38632 (April 25, 2022)

JENNIFER MCKINLEY, as Personal Representative of the ESTATE OF WILLIAM MCKINLEY,
Plaintiff-Appellant,
v.
INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB and FARMERS INSURANCE COMPANY OF ARIZONA,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Lisa C. Ortega, District Judge

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Scott P. Hatcher
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for Appellee Farmers Insurance Company of Arizona

OPINION

WRAY, Judge.

{1} **{1}** Plaintiff Jennifer McKinley, on behalf of the Estate of William McKinley, appeals the district court's grant of summary judgment in favor of Interinsurance Exchange of the Automobile Club (Auto Club) and Farmers Insurance Company of Arizona (FICA) (collectively, Defendants). Plaintiff additionally brought claims against Defendants Tyler Hernandez and Craig Whited (collectively, the Hernandez Defendants), which were dismissed by stipulation.

{2} **{2}** The sole issue on appeal is whether the district court correctly ruled, based on stipulated facts, that the intentional stabbing of William McKinley was not covered by either of the identified uninsured/underinsured motorist (UM/UIM) policies under which he could be considered an insured. Our Supreme Court's standard, set forth in *Britt v. Phoenix Indemnity Insurance Company*, 1995-NMSC-075, 120 N.M. 813, 907 P.2d 994, has long been applied to evaluate whether a UM/UIM insurance policy includes coverage for an intentional tort committed by an uninsured or underinsured tortfeasor. Applying *Britt*, we conclude that the stipulated facts in the present case did not demonstrate that the Hernandez Defendants used the vehicle to facilitate the harm. We therefore affirm.

{3} BACKGROUND

{4} **{3}** For the purposes of summary judgment, the relevant facts were stipulated in the district court and before us on appeal. On December 26, 2015, the Hernandez Defendants drove to a neighborhood in an uninsured vehicle and carried out a series of car burglaries. Around 4:00 a.m., the Hernandez Defendants parked the uninsured vehicle at the bottom of Mr. McKinley's driveway, walked up the driveway to Mr. McKinley's parked truck, and broke a window. Mr. McKinley caught the Hernandez Defendants stealing property from his truck. As the Hernandez Defendants fled, they dropped some of the stolen property at the bottom of Mr. McKinley's driveway but managed to get his tool bag into the uninsured vehicle. Mr. McKinley chased the Hernandez Defendants into the uninsured vehicle and fought with them there. During the fight, one of the Hernandez Defendants stabbed Mr. McKinley, and they both drove off in the uninsured vehicle. Mr. McKinley died from his injuries later that day. Hernandez was criminally charged and convicted for Mr. McKinley's death.

{5} **{4}** Because the Hernandez Defendants' vehicle was uninsured or minimally insured, Plaintiff brought claims for UM/UIM coverage under two policies issued by Defendants. The FICA policy regarding "Uninsured Motorist Coverage (Including Underinsured Motorist Coverage)" stated:

{6} We will pay all sums which an insured person is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of . . . [b]odily injury sustained by the insured person. The bodily injury must be caused by accident and arise out of the ownership, maintenance or use of the uninsured motor vehicle.

{7} The Auto Club policy contained similar language. Defendants moved for summary judgment and argued that no coverage existed, because Mr. McKinley's injuries did not arise from the "use" of an uninsured vehicle. Plaintiff filed a similar cross-motion for partial summary judgment. All three motions sought a ruling based on competing analyses of essentially stipulated material facts. The district court granted Defendants' motions and denied Plaintiff's motion. Plaintiff appeals from the district court's order granting Defendants' motions.

{8} DISCUSSION

{9} **{5}** Plaintiff's claims for coverage arise from the two UM/UIM policies. UM/UIM coverage is governed both by the language of the insurance policy itself and by New Mexico's uninsured motorist statute. NMSA 1978, § 66-5-301 (1983). The *Britt* Court explained that generally "the uninsured motorist statute and contracts arising thereunder should be construed liberally in favor of coverage in order to implement the remedial purposes behind that statute." 1995-NMSC-075, ¶ 11. That purpose is "to expand insurance coverage and to protect individual members of the public against the hazard of culpable uninsured motorists." *Id.* (internal quota-

tion marks and citation omitted). Because of these statutory policies, the burden to establish UM/UIM coverage may be "something less" than the burden to prove liability when making "an *insured* motorist claim." *Id.* ¶ 12. Nevertheless, to establish coverage under the policy, the injuries must arise from "the use of an uninsured vehicle." *Id.* ¶¶ 3, 15. The *Britt* test thus seeks a balance between the broad protections of the UM/UIM statute and the requirements of the insurance contract. *See id.* ¶¶ 9, 15-16.

{10} **{6}** The parties agree the *Britt* test applies in the present case. As Plaintiff notes, "[t]he parties agreed to have the [d]istrict [c]ourt decide the coverage issue on cross-motions for summary judgment, deciding as a matter of law on stipulated facts." Our role on appeal is therefore to determine whether the district court properly applied the summary judgment standard and the *Britt* test to the stipulated facts, in order to evaluate whether the policies at issues extended coverage as a matter of law to Mr. McKinley's injuries.

I. Summary Judgment and the Standard of Review

{11} **{7}** "Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Romero Excavation & Trucking, Inc. v. Bradley Const., Inc.*, 1996-NMSC-010, ¶ 4, 121 N.M. 471, 913 P.2d 659 (internal quotation marks and citation omitted). At the summary judgment stage, if the moving party satisfies its initial burden to make a prima facie factual showing warranting summary judgment, "the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citation omitted). If the party opposing summary judgment adduces evidence regarding material disputed facts and/or reasonable inferences, summary judgment is inappropriate. *Id.* ¶¶ 10-11. "Even where the basic facts are undisputed, if equally logical but conflicting inferences can be drawn from the facts, summary judgment should be denied." *Fischer v. Mascarenas*, 1979-NMSC-063, ¶ 10, 93 N.M. 199, 598 P.2d 1159.

{12} **{8}** The parties in the present case approached summary judgment based on stipulated facts and did not dispute the inferences to be drawn from the facts. Plaintiff asserted additional facts, but did not support them with additional evidence. Although Plaintiff filed a motion for partial summary judgment based on one of the *Britt* requirements, the motion relied on the same evidence Defendants presented in their motions for summary judgment. Plaintiff did not identify for the district court reasonable inferences to be drawn in her favor from the stipulated facts that would create a dispute of fact, nor does she argue to this Court that the district court improperly failed to draw reasonable inferences from the stipulated facts in her favor. When parties stipulate to the facts, as in the present case, on appeal, they "are bound by the facts as stipulated." *Romero Excavation & Trucking, Inc.*, 1996-NMSC-010, ¶ 4. We therefore review the grant of summary judgment de novo and consider whether the district court "correctly applied the law" to the stipulated facts. *See id.* ¶ 5.

II. The *Britt* Requirements

{13} **{9}** The law, in the present case, is the three-part test established in *Britt* and developed in subsequent precedents. In *Britt*, our Supreme Court considered whether UM/UIM policy language that limited coverage to accidents "arising out of the ownership, maintenance, or use of the uninsured motor vehicle" applied to cover injuries resulting from an intentional tort—a stabbing—committed after an uninsured vehicle caused a collision. 1995-NMSC-075, ¶¶ 1-3 (internal quotation marks omitted). The *Britt* Court determined that the stabbing was an "accident" under the policy, *id.* ¶ 8, and subsequently adopted a three-part test to determine "whether intentional conduct and its resulting harm arises out of the use of an uninsured vehicle." *Id.* ¶¶ 15-16. This Court recently articulated the three-part test as follows:

{14} (1) whether a sufficient causal connection exists between the use and the harm, which requires that the vehicle be an active accessory in causing the injury; (2) whether an act of independent significance has broken the causal link; and (3) whether the use to which the vehicle was put was a normal use of that vehicle.

{15} Haygood v. United Servs. Auto. Ass'n, 2019-NMCA-074, ¶¶ 10, 12, 453 P.3d 1235 (alterations, quotation marks, and citation omitted). A court may only determine that the "causal connection required by statutory and policy language has been established and that coverage exists" if the analysis of each of the three requirements results "favorably for the insured." *Id.* ¶ 10. In the present case, the district court relied on the second *Britt* requirement and determined that "independent acts of significance broke any causal link between the use of the uninsured vehicle and the intentional stabbing." We agree, but first consider the *Britt* holding in greater detail.

{16} **{10}** In *Britt*, our Supreme Court considered the impact of an intentional tort on UM/UIM coverage. *See* 1995-NMSC-075, ¶ 1. In *Britt*, the plaintiff was a passenger in a vehicle that was struck from behind by an uninsured vehicle, after which the plaintiff was stabbed by a passenger from the uninsured vehicle. *Id.* ¶¶ 12. Our Supreme Court determined that (1) "there well may have been a sufficient causal link between the use of the uninsured vehicle for transportation and [the plaintiff's] injuries," and (2) "transportation would be a normal use." *Id.* ¶¶ 15-16. Whether, however, the "attack by the passengers" from the uninsured vehicle independently broke the causal link between the use of the vehicle and the injury depended on the intent of the driver of the uninsured vehicle. *Id.* ¶ 16. The Court explained that the causal link would remain intact if the uninsured driver rear-ended the front vehicle "in complicity with the assailants or in order to facilitate the attack." *Id.* If, however, the intent to attack developed after the collision, the stabbing would have broken "the causal link between the use of the vehicle and [the plaintiff's] injury." *Id.*; *see also Haygood*, 2019-NMCA-074, ¶ 16 (applying the intent principles from *Britt* and concluding that "nothing in the record suggests the use of the car as storage facilitated [the] assault and nothing suggests [the assailant] even contemplated the assault in engaging in this use"). Thus, when a normal use of an uninsured vehicle is interrupted by an intentional tort that is a cause of the injury, a UM/UIM policy may still provide coverage if the insured can prove that the vehicle was used to facilitate the circumstances that caused the harm.[1]

{17} **{11}** Plaintiff maintains that the Hernandez Defendants used the vehicle to cause the injury, because the vehicle provided the Hernandez Defendants with "access to a deadly weapon," the structure of the car facilitated the attack, and the Hernandez Defendants "were clearly in the process of using the [vehicle] to escape apprehension when the stabbing occurred." Plaintiff contends that "Hernandez was clearly prepared to use deadly force and was able to quickly and easily access a deadly weapon upon entering the [vehicle] to flee the scene." Plaintiff argues that the record does not support a conclusion that the Hernandez Defendants "meant to thieve, not to kill." The stipulated facts, however, do not support an inference that

[1] Nothing in Britt suggests that the actual outcome, the specific harm, must have been intended in order to establish coverage. The Britt Court did not require that the uninsured driver intend for the ultimate stabbing to occur, only that the vehicle was used "to facilitate the attack." 1995-NMSC-075, ¶ 16.

the Hernandez Defendants used the vehicle to facilitate an attack on Mr. McKinley, either based on access to the knife, the structure of the car, or the potential for escape.

{18} **{12}** For the Hernandez Defendants to have used the vehicle to facilitate the attack based on the access to weapons, the record would have to indicate at least that the Hernandez Defendants kept weapons in the vehicle to facilitate attacks. In *Miera v. State Farm Mut. Auto. Ins. Co.*, we noted that the vehicle in question "held both a person and an instrumentality" that the uninsured driver "knew to be dangerous." 2004-NMCA-059, ¶ 14, 135 N.M. 574, 92 P.3d 20. The record in the present case does not reveal where or when the knife was acquired. The record does not show whether the knife was on Hernandez's person or in the vehicle, or whether it was acquired during the robberies, was always in the vehicle, or carried for protection. The stipulated facts show only that a knife was used to injure Mr. McKinley after he was at least partially inside the vehicle. In short, the record does not reveal whether the Hernandez Defendants used the vehicle for access to weapons.

{19} **{13}** In *Miera*, access to the weapon was considered in combination with other facts, including the known dangerousness of the passenger and the use of the car "to maneuver to a point that accelerated the confrontation." *Id.* This is similar to Plaintiff's contention that the Hernandez Defendants used the structure of the vehicle to facilitate the attack. The stipulated facts, however, show only that the Hernandez Defendants ran away from Mr. McKinley to the vehicle, Mr. McKinley followed, an altercation occurred inside the vehicle, and Mr. McKinley was fatally stabbed. Using the vehicle to benefit from its inherent characteristics suggests some level of planning or intent to attack that is not logically inferred from the bare stipulated facts in the present case. *See Romero*, 2010-NMSC-035, ¶ 10 ("An inference is not a supposition or a conjecture, but is a logical deduction from facts proved and guess work is not a substitute therefor." (internal quotation marks and citation omitted)); *State Farm Ins. Co. v. Bell*, 39 F. Supp. 3d 1352, 1357-58 (D. N.M. 2014) (describing evidence offered to show the connection between the use of a car's inherent characteristics and harm); *see also Barncastle v. Am. Nat'l Prop. & Cas. Cos.*, 2000-NMCA-095, ¶ 10, 129 N.M. 672, 11 P.3d 1234 (concluding that "[n]o act of independent significance broke the casual chain," when "the vehicle allowed the driver and the shooter to pull alongside [the p]laintiff's vehicle at the red light in an innocent manner," was running at all times, and concealed the identity of the driver and the shooter (internal quotation marks omitted)). Although the evidentiary burden is not high, *see Britt*, 1995-NMSC-075, ¶ 12, and circumstantial evidence may suffice to overcome summary judgment, *see Schneider Nat'l, Inc. v. N.M. Tax'n & Revenue Dep't*, 2006-NMCA-128, ¶ 18, 140 N.M. 561, 144 P.3d 120, some evidence is required to permit an inference that the Hernandez Defendants used the vehicle's inherent characteristics to facilitate the attack on Mr. McKinley.

{20} **{14}** In *Britt*, our Supreme Court required some evidence that the ultimate harm, a stabbing, was connected to use of the uninsured vehicle. 1995-NMSC-075, ¶ 16. The *Britt* Court explained an unbroken connection between the use of an uninsured vehicle, an intentional tort, and an injury could be established by showing the vehicle was used to facilitate the attack. *Id.* Otherwise, the use of the vehicle would be interrupted by the attack itself. *Id.* As this Court stated in *Haygood*, "had the intent to attack [in *Britt*] developed independently of the collision, the attack would have severed any connection between the injury and the earlier qualifying use of the vehicle." 2019-NMCA-074, ¶ 16. In *Haygood*, we affirmed dismissal of the plaintiff's claim because the stipulated facts did not support a conclusion that the asserted normal use of the vehicle created an unbroken causal connection with the attack. *Id.* The *Haygood* plaintiff argued that the "normal use" of storing drugs in the uninsured vehicle was causally connected to the shooting, because the assailant believed the victim was stealing those drugs. *Id.* ¶ 15. We concluded that nothing in the stipulated facts suggested the *Haygood* assailant "even contemplated the assault in engaging in [these] use[s]." *Id.* ¶ 16. Similarly, in the present case, the stabbing of Mr. McKinley interrupted the use of the vehicle to flee, unless Plaintiff could establish that the Hernandez Defendants used the vehicle to facilitate an attack.

{21} **{15}** Plaintiff paints a broad picture of the uses of the vehicle from "transport[ing] the thieves to and from the places they intended to plunder, and then to transport the stolen property," up to using the vehicle "to protect themselves from apprehension by Mr. McKinley by stabbing him in the close confines of the [vehicle] and then using the [vehicle] to facilitate their escape." This broad view of the vehicle's use initially offers an obvious distinction from the facts of *Haygood*, because in *Haygood*, the vehicle remained parked before, after, and during the attack. 2019-NMCA-074, ¶ 2. In contrast, the Hernandez Defendants drove the vehicle before and after the assault in the present case. Neither the stipulated facts, however, nor any reasonable inference, indicates that the Hernandez Defendants anticipated any attack as they used the uninsured vehicle to rob other vehicles, park in Mr. McKinley's driveway, or when they ran toward the vehicle and got inside. Nor does any intended use of the vehicle to flee or protect property, under these circumstances, demonstrate use of the vehicle to facilitate an attack against Mr. McKinley. Without evidence to connect flight or protection of the stolen property to the attack, *see Bell*, 39 F. Supp. 3d at 1357-58, the reasonable inference is that the Hernandez Defendants' attempt at flight was interrupted by the attack on Mr. McKinley.

{22} **{16}** Thus, if we take Plaintiff's broad view of the stipulated facts, beginning with driving into the neighborhood, no evidence suggests that at that time, the Hernandez Defendants used the vehicle to facilitate the attack on Mr. McKinley, or commit violence generally. *See Miera*, 2004-NMCA-059, ¶¶ 12-14 (considering a sequence of facts to determine that the vehicle "amounted to little more than a holster on wheels"). If we telescope in, and take a more and more narrow view of the events in Mr. McKinley's driveway and the Hernandez Defendants' flight to the uninsured vehicle, evidence that the Hernandez Defendants used the vehicle to facilitate the attack on Mr. McKinley remains elusive. By this point, our view of the stipulated facts has taken us inside the vehicle, with the Hernandez Defendants, Mr. McKinley, and the weapon, with no evidence that the vehicle was started or moving. From here, the stipulated facts in the present case and in *Haygood* bear a striking resemblance to each other: a brutal attack that is situated in a vehicle. 2019-NMCA-074, ¶ 2. We therefore take our direction from *Haygood*'s analysis to hold that the stipulated facts in the record do not satisfy *Britt*. As a result, the circumstances in this case do not trigger coverage under the policies at issue, because Mr. McKinley's death did not arise from the use of an uninsured vehicle as set forth in *Britt* and *Haygood*.

{23} **CONCLUSION**

{24} **{17}** We affirm the district court's judgment dismissing Plaintiff's claim for UM/UIM coverage.

{25} **{18} IT IS SO ORDERED.**

{26} **KATHERINE A. WRAY, Judge**

{27} **WE CONCUR:**

{28} **ZACHARY A. IVES, Judge**

{29} **SHAMMARA H. HENDERSON, Judge**

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-056
No: A-1-CA-39144 (June 15, 2022)

JUAREZ
Plaintiff-Appellee
v.
THI OF NEW MEXICO AT SUNSET VILLA, LLC, a foreign limited liability company, d/b/a SUNSET VILLA CARE CENTER,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Francis J. Mathew, District Judge

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OPINION

MEDINA, Judge.

{1} Defendant THI of New Mexico at Sunset Villa, LLC (Sunset Villa) appeals the district court's denial of Defendant's motion to compel arbitration, pursuant to the New Mexico Uniform Arbitration Act (NMUAA), NMSA 1978, § 44-7A-29(a)(1) (2001). We reverse, and remand.

BACKGROUND

{2} In July 2018, Plaintiff Beatrice Juarez was admitted to Sunset Villa care facility for rehabilitation following a knee replacement surgery. As a condition of her admission, Plaintiff signed both an "Admission Agreement" and an arbitration agreement titled "Agreement for Dispute Resolution Program" (DRP), which were provided to Plaintiff at the same time, along with other admission materials. Plaintiff alleges that she signed the Admission Agreement and DRP the day after she was admitted to the facility, while Defendant asserts that she was presented with the documents and executed them at the time of admission and that the contracts are dated accordingly.

{3} In bold at the beginning of the document, the DRP stated:

> YOUR ADMISSION TO THE FACILITY IS CONTINGENT ON YOU AND YOUR REPRESENTATIVE, IF ANY, ENTERING INTO THIS AGREEMENT TO PARTICIPATE IN THE DRP. BY CHOOSING TO HAVE DISAGREEMENTS RESOLVED THROUGH THE DRP, YOU WILL BE WAIVING THE RIGHT TO HAVE A JUDGE OR A JURY RESOLVE ANY SUCH DISAGREEMENT IN COURT. INSTEAD, IF THERE IS A DISPUTE BETWEEN US, IT WILL BE RESOLVED THROUGH THE DRP. THIS MEANS THAT, IF ALL ELSE FAILS, OUR DISPUTE WILL BE RESOLVED BY A DECISION BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY.

The DRP also stated that all parties "acknowledge that they are agreeing to mutual arbitration, regardless of who makes the claim" so long as it does not fall into the small claims exception; that "[Defendant] will pay for 100% of the fees charged by the mediator and the arbitrators"; and that "[Defendant] will pay up to $5,000 in attorney[] fees that you actually incur if our dispute is arbitrated."

{4} The DRP contained a delegation clause, which stated in part:

> The arbitrator is required to apply and enforce the terms of this [a]greement. To the fullest extent permitted by law, any disagreements regarding the applicability, enforceability or interpretation of this [a]greement will be decided by the arbitrator and not by a judge or jury.

Additionally, the DRP specified "[p]rocedurally, and unless otherwise governed by the [Federal Arbitration Act (FAA)], the arbitration will follow the rules and procedures of the Judicial Arbitration and Mediation Services (JAMS)." Finally, the DRP notified the parties that "[t]his [a]greement relates to matters, among others, that are covered by the Admission Agreement, incorporates the Admission Agreement and should be read together with the Admission Agreement."

{5} The Admission Agreement stated that "this [a]greement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written," and that "[t]he undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand[s] that these documents are made a part of this [a]greement by reference herein."

{6} Approximately seven months after her admission to Sunset Villa, Plaintiff filed a complaint against Defendant, alleging claims of medical negligence; respondeat superior and vicarious liability; and negligent hiring, training, supervision, and retention of employees. After filing an answer, Defendant moved to compel arbitration, asserting that there was no dispute that Plaintiff signed the DRP, that Defendant was entitled to enforce the DRP, that the DRP was a valid, enforceable agreement supported by consideration, and that the delegation clause clearly required any questions about arbitrability be submitted to the arbitrator.

{7} Plaintiff responded that the DRP was substantively unconscionable because it contained provisions that were unfair and against public policy. Plaintiff also argued that the circumstances of signing the agreement made the DRP procedurally unconscionable. Plaintiff attached an affidavit in support, alleging, among other things, that Plaintiff did not read the paperwork, was not asked to review the paperwork, felt as if she had no choice but to sign, and was on medication at the

time of signing. Plaintiff stated that "Plaintiff also challenges this 'delegation clause' under the same grounds she challenges the 'Agreement.'"

{8} In reply, Defendant argued that Plaintiff failed to specifically challenge the delegation clause and, therefore, a court is prevented from considering the contract enforcement challenges to the arbitration agreement under New Mexico law. Instead, the challenges are required to be submitted to an arbitrator. Defendant also maintained that Plaintiff failed to establish both procedural and substantive unconscionability.

{9} In May 2020, the district court held a hearing on Defendant's motion to compel arbitration. Plaintiff's counsel reiterated that "the delegation clause in the [DRP] is unenforceable for the same reasons that I have mentioned here, that the [DRP] itself is unenforceable." The district court denied Defendant's motion, citing four grounds for the denial. The district court found that (1) Defendant "failed to present evidence as to the reasonableness of the arbitration provision"; (2) Defendant failed to provide an affidavit to contradict Plaintiff's, although Defendant "referred to and challenged [the affidavit] in argument"; (3) if the DRP was signed before the Admission Agreement, then "it was superseded by the [A]dmission [A]greement"; and (4) if vice versa, "then [there is] no consideration." The district court did not explain its reasoning for rejecting Defendant's argument that the district court was prevented from considering the unconscionability arguments because of the delegation clause. This appeal followed.

DISCUSSION

{10} On appeal, Defendant maintains that the district court erred in considering Plaintiff's contract enforceability arguments because the language of the delegation clause in the DRP requires these questions be submitted to the arbitrator and not the district court. In the alternative, if we were to consider Plaintiff's enforcement arguments, Defendant argues Plaintiff failed to show both substantive and procedural unconscionability. Further, Defendant argues that the district court erred in denying the motion on contract validity grounds because (1) neither party raised these issues below; (2) the DRP is supported by multiple forms of consideration; and (3) the DRP was not superseded by the Admission Agreement, but rather the two documents should be construed together.

{11} We hold that the district court erred in denying the motion to compel arbitration on contract validity grounds because the DRP was supported by alternative consideration, and under the facts of this case, we construe the DRP and Admission Agreement as one instrument. We additionally hold that the language of the delegation clause requires that questions regarding enforceability and unconscionability be submitted to the arbitrator. We therefore do not address Plaintiff's enforcement arguments on appeal.

{12} "Arbitration agreements are a species of contract, subject to the principles of New Mexico contract law." *Hunt v. Rio at Rust Ctr., LLC*, 2021-NMCA-043, ¶ 12, 495 P.3d 634 (internal quotation marks and citation omitted). "Accordingly, we apply New Mexico contract law in the interpretation and construction of the arbitration agreement." *Id.* (alterations, internal quotation marks, and citation omitted). "We review questions of contractual interpretation de novo." *Id.* "We apply a de novo standard of review to a district court's denial of a motion to compel arbitration." *Peavy ex rel. Peavy v. Skilled Healthcare Grp., Inc.*, 2020-NMSC-010, ¶ 9, 470 P.3d 218 (internal quotation marks and citation omitted).

I. There Was a Valid Contract to Arbitrate Between the Parties

{13} We begin with the district court's decision to deny Defendant's motion to compel arbitration on contract validity grounds. "A legally enforceable contract is a prerequisite to arbitration under the [NMUAA], and without such a contract, the parties will not be forced to arbitrate." *Luginbuhl v. City of Gallup*, 2013-NMCA-053, ¶ 15, 302 P.3d 751 (internal quotation marks and citation omitted). "For such a contract to be legally enforceable, New Mexico courts require evidence of an offer, acceptance, consideration, and mutual assent." *Id.* (alteration, internal quotation marks, and citation omitted). "Consideration consists of a promise to do something that a party is under no legal obligation to do or to forbear from doing something he has a legal right to do." *Id.* (internal quotation marks and citation omitted). "Furthermore, a promise must be binding. When a promise puts no constraints on what a party may do in the future—in other words, when a promise, in reality, promises nothing—it is illusory, and it is not consideration." *Talbott v. Roswell Hosp. Corp.*, 2005-NMCA-109, ¶ 16, 138 N.M. 189, 118 P.3d 194 (internal quotation marks and citation omitted).

{14} Although not raised by the parties, the district court based its denial of the motion to compel arbitration on either (1) Plaintiff's contention that she was already admitted to the facility when she signed the DRP or (2) the district court's interpretation of the Admission Agreement and DRP as distinct contracts such that one superseded the other. Because the district court denied Defendant's motion to compel arbitration on these grounds, we consider the parties' arguments on these issues made for the first time on appeal. *See Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶¶ 16-17, 137 N.M. 57, 107 P.3d 11.

{15} We turn first to the district court's conclusion that if Plaintiff signed the DRP after she signed the Admission Agreement, the DRP lacked consideration and was therefore an invalid contract. A review of the terms included in the DRP reveal various forms of consideration. The DRP requires Defendant and Plaintiff to bring all claims arising out of Plaintiff's admission to the facility that fall outside of the small claims exception to arbitration. When both parties are mutually bound to arbitration, a mutual obligation exists, and the arbitration agreement is supported by consideration that is not illusory. *See Sisneros v. Citadel Broad. Co.*, 2006-NMCA-102, ¶ 34, 140 N.M. 266, 142 P.3d 34.

{16} In addition, the terms of the DRP require Defendant to pay up to $5,000 of Plaintiff's attorney fees when resolving a claim through arbitration and to cover all costs and fees of arbitration. Although Plaintiff argues this is illusory, we disagree. *See N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 9, 127 N.M. 654, 986 P.2d 450 ("New Mexico adheres to the so-called American rule that, absent statutory or other authority, litigants are responsible for their own attorney[] fees." (internal quotation marks and citation omitted)); *see also* NMSA 1978, § 44-7A-22(d) (2001) ("An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award."); JAMS Comprehensive Arbitration Rules & Procedures, Rule 31(a) (June 1, 2021), https://www.jamsadr.com/rules-comprehensive-arbitration/ ("Each [p]arty shall pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the [a]rbitration, unless the [p]arties agree on a different allocation of fees and expenses."). Here, Defendant has promised to do something it is not under a legal obligation to do, therefore creating adequate consideration to support the DRP. Consequently, the district court erred in denying Defendant's motion to compel arbitration by determining that the DRP was not supported by consideration.

{17} Second, to the extent the district court alternatively found that if Plaintiff signed the DRP before she signed the Admission Agreement, the Admission Agreement superseded the DRP, we disagree. While the Admission Agreement does state "this [a]greement represents the entire agreement and understanding between the parties and supersedes all previous representations understandings or agreements, oral or written," the Admission Agreement and the DRP were signed

at the same time and therefore one did not supersede the other. We explain.

{18} Superseding requires two separate agreements, instruments, or contracts between the parties that take place at different times. *See, e.g.*, *LensCrafters, Inc. v. Kehoe*, 2012-NMSC-020, ¶ 22, 282 P.3d 758 (stating that nonrenewal letters that included new, different sublease contracts superseded the defendant's right to renew the existing contracts); *Cont'l Life Ins. Co. v. Smith*, 1936-NMSC-074, ¶¶ 2, 22, 41 N.M. 82, 64 P.2d 377 (stating that the "verbal contract was in full force and effect until it was superseded by the written contract" signed two years later); *West v. Wash. Tru Sols., LLC*, 2010-NMCA-001, ¶¶ 2, 18, 147 N.M. 424, 224 P.3d 651 (stating that a previous agreement or representation may be superseded by other representations made later); *see also Supersede*, *Black's Law Dictionary* (11th ed. 2019) ("To annul, make void, or repeal by taking the place of."). But here, we view the DRP and the Admission Agreement as one instrument because they were presented to Plaintiff at the same time, executed at the same time, and involved the same parties. *Randles v. Hanson*, 2011-NMCA-059, ¶ 24, 150 N.M. 362, 258 P.3d 1154 ("In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together." (alterations, internal quotation marks, and citation omitted)). Although Plaintiff argues that there is no intent to read the Admission Agreement and the DRP together, the Admission Agreement references other admission materials, including the DRP, and the DRP explicitly mentions the Admission Agreement. This provides additional support that the parties intended these two documents to be read together and construed as one instrument. *Master Builders, Inc. v. Cabbell*, 1980-NMCA-178, ¶ 9, 95 N.M. 371, 622 P.2d 276 ("Another situation in which two documents are properly construed together is when one or both documents refer to the other.").

{19} Because the Admission Agreement and the DRP are read together, neither document could supersede the other because superseding requires two distinct instruments. *See, e.g.*, *LensCrafters, Inc.*, 2012-NMSC-020, ¶ 22. Therefore, we hold the district court erred in denying Defendant's motion to compel arbitration by determining that the Admission Agreement superseded the DRP.

II. Framework to Determine the Scope of an Arbitration Delegation Clause

{20} We next turn to the district court's decision to deny Defendant's motion to compel arbitration on contract enforceability grounds and Defendant's argument that the delegation clause required these arguments be submitted to the arbitrator. "The general rule is that the arbitrability of a particular dispute is a threshold issue to be decided by the district court unless there is *clear and unmistakable evidence* that the parties decided otherwise under the terms of their arbitration agreement." *Hunt*, 2021-NMCA-043, ¶ 13 (internal quotation marks and citation omitted); *see Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) ("We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("This Court, however, has . . . added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." (alterations, internal quotation marks, and citation omitted)). The NMUAA, NMSA 1978, §§ 44-7A-1 to -32 (2001), enforces this position, providing that a court shall order the parties to arbitrate if it finds that there is an enforceable agreement to do so. *See* § 44-7A-8(b).

{21} Even though the parties' agreement is subject to the FAA, we previously explained that "although the FAA has limited the role of courts in the arbitration context, certain gateway issues involving arbitration provisions have remained within the purview of judicial review." *Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, ¶ 17, 149 N.M. 681, 254 P.3d 124, *aff'd on other grounds*, Nos. 33,011, 33,013, dec. (N.M. Sup. Ct. Aug. 23, 2012) (nonprecedential). "These gateway arbitrability issues include matters such as the validity of an arbitration provision, the scope of an arbitration provision, or whether an arbitration agreement covers a particular controversy." *Hunt*, 2021-NMCA-043, ¶ 14 (internal quotation marks and citation omitted). Like the United States Supreme Court, we have recognized that a delegation clause should be upheld when there is "clear and unmistakable" intent to have these gateway questions determined by an arbitrator rather than a court. *Id.*

{22} However, even if there is a clear and unmistakable intent to arbitrate, a court may still consider a challenge to the delegation clause in an arbitration agreement under certain circumstances. "[A] party must specifically challenge the delegation provision in order for a court to consider the challenge rather than referring the matter to an arbitrator." *Clay v. N.M. Title Loans, Inc.*, 2012-NMCA-102, ¶ 11, 288 P.3d 888 (internal quotation marks and citation omitted). "The challenge need not be made in a specific document, such as the complaint; rather, what matters is the substantive basis of the challenge." *Id.* (alteration, internal quotation marks, and citation omitted). "Our inquiry, then, turns on two questions: (1) was there a clear and unmistakable agreement to arbitrate arbitrability? and (2) did [the challenger] mount a 'specific challenge' to that agreement?" *Id.* With this framework in mind, we now turn to Defendant's argument that the district court erred in determining the merits of Plaintiff's unconscionability arguments instead of submitting the questions to an arbitrator.

A. The Delegation Clause Clearly and Unmistakably Delegates Questions of Arbitrability to the Arbitrator

{23} Defendant argues that the language of the delegation clause clearly delegates the question of arbitrability. Defendant also argues that the DRP's incorporation of the JAMS rules further shows a clear intent to delegate questions of arbitrability. Plaintiff contends that the delegation clause does not clearly and unmistakably delegate because the delegation clause does not delegate questions of "validity" or "voidness." Plaintiff further argues that the JAMS rules only apply to procedural matters and that incorporating "an entire set of rules, without reference to the particular rule that is meant to govern arbitrability, does not clearly and unmistakably indicate an intent for the arbitrator to decide arbitrability." Defendant replies that there is no authority separating "validity" from "enforcement," and that questions of unconscionability are considered questions of contract enforcement.

{24} Here, we hold that the plain language of the delegation clause presents clear and unmistakable evidence that the parties intended to have an arbitrator decide the threshold issue of arbitrability. The delegation clause states, "[t]o the fullest extent permitted by law, *any* disagreements regarding the *applicability*, *enforceability* or *interpretation* of this [a]greement will be *decided by the arbitrator and not by a judge or jury*." (Emphases added.) The emphasized language is clear and unmistakable evidence that the parties intended to arbitrate questions of arbitrability. *See Felts*, 2011-NMCA-062, ¶ 22 ("Our Supreme Court has stated that courts must interpret the provisions of an arbitration agreement according to the rules of contract law and apply the plain meaning of the contract language in order to give effect to the parties' agreement." (alteration, internal quotation marks, and

citation omitted)).

{25} In addition, the language of the delegation clause here is similar to language we have previously held showed clear and unmistakable intent to delegate questions of arbitrability. *Compare Clay*, 2012-NMCA-102, ¶ 12 (holding delegation clause language of "disputes about the validity, enforceability, arbitrability or scope" are subject to arbitration "was clear and unmistakable evidence of the parties' intent to 'have an arbitrator decide threshold issues of arbitrability'" (internal quotation marks and citation omitted)), *and Felts*, 2011-NMCA-062, ¶ 23 (holding delegation clause language of "any and all claims, disputes or controversies arising out of [the a]greement to [a]rbitrate [a]ll [d]isputes including disputes as to the matters subject to arbitration" to be clear and unmistakable evidence of intent (citation omitted) (text only)), *with Hunt*, 2021-NMCA-043, ¶ 15 (holding that the delegation clause language that "any disputes regarding the interpretation of [the] agreement shall be submitted to arbitration" was not clear and unmistakable evidence of intent because the agreement failed to specify that "distinct threshold questions of *arbitrability* (i.e. questions about the validity, enforceability, or scope of the arbitration agreement) should also be resolved by an arbitrator" (alterations and internal quotation marks omitted)).

{26} Although Plaintiff argues that the inclusion of the JAMS rules in the DRP should not be considered evidence of clear and unmistakable intent, our case law requires the opposite conclusion. The DRP states "[p]rocedurally, and unless otherwise governed by the FAA, the arbitration will follow the rules and procedures of the [JAMS]." JAMS Rule 11 states,

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which [a]rbitration is sought, and who are proper [p]arties to the [a]rbitration, shall be submitted to and ruled on by the [a]rbitrator. The [a]rbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

JAMS Comprehensive Arbitration Rules & Procedures, *supra*, Rule 11(b). Further, Rule 11(c) states, "[d]isputes concerning the appointment of the [a]rbitrator shall be resolved by JAMS." JAMS Comprehensive Arbitration Rules & Procedures, *supra*, Rule 11(c). Incorporation of rules of arbitration that give the arbitrator authority to decide questions of arbitrability is considered clear and unmistakable evidence of intent to delegate questions of arbitrability. *See Felts*, 2011-NMCA-062, ¶ 24.

{27} To the extent Plaintiff contends that the absence of the words "validity" or "voidable" in the delegation clause invalidates it because unconscionability is a question of contract validity, and the delegation clause does not send issues of validity to the arbitrator, we disagree. In New Mexico, unconscionability is a question of contract enforcement and not a question of validity. *See Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 44, 304 P.3d 409 ("A showing of unconscionability may render an otherwise valid contract voidable, revocable, and unenforceable."); *see also Figueroa v. THI of N.M. at Casa Arena Blanca, LLC*, 2013-NMCA-077, ¶¶ 17-18, 306 P.3d 480 (stating "consideration and unconscionability are two different analyses under contract law," and explaining that "[c]onsideration is a prerequisite to the legal formation of a valid contract" whereas "[u]nconscionability, on the other hand, is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party," and therefore "New Mexico law does not equate adequate consideration with a conscionable contract" (emphasis, internal quotation marks, and citations omitted)). We cannot agree with such a narrow reading of the delegation clause as argued for by Plaintiff to create ambiguity in the intent to submit arbitrability questions to the arbitrator.

{28} Because we hold that the delegation clause clearly and unmistakably delegates questions of arbitrability to the arbitrator, we next turn to whether Plaintiff specifically challenged the delegation clause.

B. Plaintiff Did Not Specifically Challenge the Delegation Clause

{29} Defendant argues that Plaintiff's challenge to the delegation clause on the same grounds as her challenge to the DRP as a whole is not a specific challenge and that the record does not support Plaintiff's claim that her procedural unconscionability argument was directed specifically to the delegation clause. Plaintiff maintains that the procedural unconscionability argument goes to the circumstances of signing the agreement, which includes the delegation clause, and therefore, the argument specifically challenges the delegation clause. Plaintiff additionally argues that her challenge to the JAMS rules should be considered a specific challenge to the delegation clause.

{30} We first addressed the requirement of a specific challenge in *Felts*. In *Felts*, the plaintiff entered into three online loans with various payday lending organizations. 2011-NMCA-062, ¶ 4. The plaintiff signed virtually identical loan agreements that contained a delegation provision stating "any and all claims, disputes or controversies between the borrower and lender shall be resolved by binding individual (and not class) arbitration by and under the Code of Procedure of the National Arbitration Form (NAF)." *Id.* ¶¶ 4-5 (alteration and internal quotation marks omitted). The arbitration agreement contained a similar "class action ban" in the body of the agreement. *Id.* ¶ 5. The plaintiff brought a class action complaint against the lending organization, and the named defendant moved to compel arbitration. *Id.* ¶¶ 7-8. The district court denied the motion, finding that it had jurisdiction to decide the validity of the arbitration agreement and that the class action ban was against public policy, making the agreement unenforceable. *Id.* ¶ 9.

{31} A second defendant then also moved to compel arbitration, arguing that the district court lacked jurisdiction and that arbitrability questions must be submitted to an arbitrator. *Id.* ¶ 10. The district court denied the second motion on the same grounds as it denied the first motion to compel arbitration. *Id.* ¶ 11. Both defendants appealed, and the appeals were consolidated before this Court. *Id.* ¶ 12.

{32} This Court clarified that there are two categories of challenges to a delegation provision: "(1) those challenging specifically the validity of the agreement to arbitrate; and (2) those challenging the contract as a whole, either on a ground that directly affects the entire agreement or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Id.* ¶ 19 (citation omitted) (text only). We held that a "district court is precluded from deciding a party's claim of unconscionability unless that claim is based on the alleged unconscionability of the delegation provision itself." *Id.* ¶ 20.

{33} We agreed with the plaintiff in *Felts* that their argument was a specific challenge to the delegation clause. *See id.* ¶ 30. The plaintiff argued that the delegation clause itself was invalid because it also contained a class action ban, and because the delegation clause was impossible to follow because the NAF had stopped performing consumer arbitration services. *See id.* As such, the "arguments were both clearly directed against the validity of the delegation clause alone, and were distinct from [the plaintiff's] claims against the [l]oan [a]greements [on other grounds]." *Id.* We therefore affirmed the district court in denying the motions to compel arbitration and ruling on the merits of the plaintiff's unconscionability arguments. *See id.* ¶¶ 33, 45.

{34} We next addressed a specific challenge to a delegation clause in *Clay*. *Clay* involved a loan agreement signed by the plaintiff using his vehicle as collateral that contained a delegation arbitration clause

applying to "any claim, dispute or controversy" between the plaintiff and the defendant "that in any way arises from or relates to [the a]greement" and included "disputes about the validity, enforceability, arbiltrality or scope of [the a]rbitration [p]rovision or [the a]greement." 2012-NMCA-102, ¶¶ 2, 12 (emphasis and internal quotation marks omitted). The plaintiff failed to pay back the loan, and was permanently injured during an altercation when the defendant attempted to repossess the vehicle. *Id.* ¶ 2. The plaintiff brought suit for the injury, and the defendant moved to compel arbitration under the agreement. *Id.* ¶ 3. The district court denied the motion, finding the delegation provision substantively unconscionable. *See id.*

{35} On appeal, this Court agreed that the plaintiff had specifically challenged the delegation clause. *Id.* ¶ 13. The plaintiff argued that the defendant fraudulently induced the contract by allegedly misrepresenting the neutrality of the two organizations identified to administer the arbitration proceedings, the NAF and the American Arbitration Association, because the organizations had stopped arbitrating collection actions. *Id.* We compared this argument to the argument made in *Felts* because both the delegation clauses were "'rendered impossible because the NAF had ceased its consumer arbitration business.'" *Id.* (omission omitted) (quoting *Felts*, 2011-NMCA-062, ¶ 30). Therefore, like in *Felts*, this argument was a specific challenge to the delegation clause because it went directly to the delegation clause itself. *See id.*

{36} Here, Plaintiff asks us to interpret her procedural unconscionability argument as only directed to the delegation clause and argues for the first time on appeal that her challenge to the JAMS rules should also be considered a specific challenge to the delegation clause. However, "[w]e will not entertain an argument made for the first time on appeal." *State Farm Mut. Auto. Ins. Co. v. Barker*, 2004-NMCA-105, ¶ 20, 136 N.M. 211, 96 P.3d 336. "Appellate courts review only those matters that were presented to the trial court." *Id.* Therefore, we decline to address Plaintiff's argument regarding the JAMS rules.

{37} In her response to Defendant's motion to compel arbitration, Plaintiff argued that she "also challenges this 'delegation clause' under the same grounds she challenges the '[DRP],'" and during the hearing on the motion, Plaintiff similarly stated "the delegation clause in the [DRP] is unenforceable for the same reasons that I have mentioned here, that the [DRP] itself is unenforceable." Neither of these statements sufficiently challenges the delegation clause.

{38} Plaintiff's statements attack the validity of the delegation clause only so far as the delegation clause is included in the DRP because Plaintiff's procedural unconscionability argument both in the district court and on appeal is directed at the validity of the DRP in its entirety. As such, this argument is "challenging the contract as a whole" and is not "clearly directed against the validity of the delegation clause alone." *Felts*, 2011-NMCA-062, ¶¶ 19, 30 (alteration, internal quotation marks, and citation omitted); *see also Rent-A-Center*, 561 U.S. at 70 (stating that "challenges [to] the contract as a whole" are not "relevant to a court's determination whether the arbitration agreement at issue is enforceable" (alteration, internal quotation marks, and citation omitted)).

{39} Finally, Plaintiff's other substantive unconscionability arguments that (1) the DRP is facially one-sided when read in conjunction with the Admission Agreement and the JAMS rules; (2) the JAMS rules unreasonably favor defendants; and (3) the DRP contains a small claims exception to arbitration are also not specific attacks on the delegation provision. None of these arguments discuss the language or the application and enforcement of the delegation clause, which is required to make a specific challenge. *See Clay*, 2012-NMCA-102, ¶ 13; *Felts*, 2011-NMCA-062, ¶ 30. We therefore hold that Plaintiff did not specifically challenge the delegation clause.

{40} Because the parties clearly and unmistakably delegated questions of arbitrability to the arbitrator, and Plaintiff did not specifically challenge the delegation clause, the proper forum for Plaintiff to bring her claims and raise defenses to the DRP is arbitration and not the district court. *See Felts*, 2011-NMCA-062, ¶ 20. "When a party agrees to a non-judicial forum for dispute resolution, the party should be held to that agreement." *Lisanti v. Alamo Title Ins. of Tex.*, 2002-NMSC-032, ¶ 17, 132 N.M. 750, 55 P.3d 962. Therefore, the district court erred in denying Defendant's motion to compel arbitration by reaching Plaintiff's contract enforcement arguments.

CONCLUSION

{41} We reverse and remand with instructions for the district court to enter an order compelling arbitration.

{42} IT IS SO ORDERED.

JACQUELINE R. MEDINA, Judge

WE CONCUR:

KRISTINA BOGARDUS, Judge

GERALD E. BACA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-057
No: A-1-CA-39379 (June 22, 2022)

IN THE MATTER OF THE DIRECT CRIMINAL CONTEMPT OF
ALAN H. MAESTAS,
Attorney-Appellant.

APPEAL FROM THE DISTRICT COURT OF UNION COUNTY
Melissa A. Kennelly, District Judge

Hector H. Balderas, Attorney General
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for Appellee

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for Appellant

OPINION

DUFFY, Judge.

{1} Attorney Alan Maestas was held in contempt of court after he refused to proceed with trial. The district court sentenced Maestas to 182 days of incarceration with 152 days suspended, a $999 fine, $55 in fees, and an undetermined amount of restitution. On appeal, Maestas challenges the propriety of his conviction for direct criminal contempt as well as the district court's sentence. We affirm Maestas's conviction for direct contempt. However, viewing the district court's sentence as an abuse of discretion, we remand for resentencing.

BACKGROUND

{2} Maestas's contempt conviction arose during the course of his representation of a criminal defendant when Maestas refused to go forward with trial. The background of the criminal case is relevant to our analysis and the following recitation of events is gleaned from the record below. We emphasize, however, that none of the allegations against the defendant had been tested or proven at trial by the time this matter came to us on appeal, and therefore, nothing in this opinion should be construed as a determination on the matters at issue in the separate criminal case against the defendant.

{3} The defendant, a semi-truck driver from Texas transiting through northern New Mexico, was stopped by law enforcement in Union County in March 2017 after he failed to stop at the port of entry. During a search of the defendant's truck, officers discovered J.V., the 12-year-old daughter of the defendant's girlfriend, along with a narcotic pain pill, two opened condoms, and a bottle of lubricant. The defendant was placed on a twenty-four-hour driving hold and parked overnight at a travel stop in Clayton. The following day, officers returned to the truck to conduct a welfare check on J.V., during which they took custody of her and transferred her to the care of the Children, Youth and Families Department. J.V. underwent an initial safe house interview where she made no disclosure of sexual abuse and declined to undergo a sexual assault exam. In two subsequent safe house interviews, however, J.V. alleged that the defendant had sex with her while traveling through New Mexico. J.V. then underwent a sexual assault exam, which revealed injuries consistent with her allegations. The defendant was arrested and charged with criminal sexual penetration of a minor, child abuse resulting in great bodily harm, and enticement of a child.

{4} Maestas entered his appearance in the defendant's case in September 2018, after the case had been pending for nearly a year and a half.[1] Maestas developed a defense theory that centered on discrediting the interview methods used to elicit the allegations J.V. made during her safe house interviews. Maestas retained Dr. Susan Cave, a clinical and forensic psychologist, as an expert witness who would provide testimony supporting the defense theory. The court qualified Dr. Cave as an expert witness after a *Daubert* hearing, and Dr. Cave's expert testimony became a crucial part of the defendant's defense.

{5} Maestas and the state vigorously litigated the case over the next two years. Trial was set and continued twelve times in total by either the defendant or the state, for a variety of reasons, or due to complications relating to the COVID-19 pandemic that struck New Mexico in March 2020. We focus here on the final continuance granted by the district court, and the ensuing trial setting itself, as these are the events that led to Maestas's contumacious conduct.

{6} On August 25, 2020, the district court issued an order continuing and resetting the jury trial scheduled to take place that day because the defendant's mother—whom he lived with and cared for—tested positive for COVID-19. Trial was reset for October 26, 2020. On October 9, Dr. Cave informed Maestas that she would be having surgery on October 27 and would not be able to testify during the October trial setting. Two business days later, Maestas filed a motion requesting a one-month trial continuance, citing Dr. Cave's unavailability and his recent discovery that the state had not disclosed or provided statements for two witness interviews that had occurred before Maestas took over as defense counsel. The district court held a hearing on the motion and questioned Dr. Cave directly. Dr. Cave explained that she could not remember when Maestas told her that the trial had been continued to October 26. She further stated that her surgery had been scheduled for five weeks and that Maestas had told her about the new trial date at some point after that. During the hearing, the court ruled that Maestas had failed to timely notify Dr. Cave about the October trial date and concluded that failure was a matter of attorney negligence rather than an extraordinary circumstance necessitating a continuance.[2] In its written order, the court found that the case had been pending for three and one-half years, that Maestas had moved to continue the trial six times, and that "[i]t has become apparent to the Court that it is part of defense's strategy to delay trial for as long as possible in this matter." The district court denied the continuance and ordered the

[1] The defendant was initially represented by two other attorneys before retaining Maestas.

case to proceed to trial.

{7} In response to that order, Maestas filed a motion on October 22—four days before trial—arguing that denial of the continuance violated the defendant's due process rights. Maestas indicated that he intended to appear in court on the trial date and would inform the court that he could not provide effective assistance of counsel without Dr. Cave's testimony. Maestas expressly stated that the purpose of the motion was to provide the court with notice to "call off jurors and to schedule other judicial matters." The court denied this motion the next day and ordered Maestas to appear at trial, stating that "[a]ny party or attorney who violates this order shall be subject to contempt of court and appropriate sanctions as permitted by law."

{8} One final event delayed the October 26 trial setting: on the evening of October 25, the judge and district court staff arrived at the county courthouse in Clayton and were promptly snowed in by a storm that closed the courthouse for three days, delaying trial until the morning of October 29. That morning, Maestas filed a twenty-nine-page brief informing the court that he found himself in a dilemma: he was forced to choose between obstruction by disobeying the district court's command that he participate in the trial of the defendant or to proceed without being able to vigorously advocate on behalf of the defendant given his inability to present otherwise admissible expert testimony as to Defendant's theory of defense. Maestas's choice in resolving that dilemma would become clear during the morning's proceedings.

{9} The court called the case and, outside the presence of the jury, reiterated its ruling on the October 22 motion and asked Maestas how he wished to proceed. Citing American Bar Association (ABA) standards for representation of criminal defendants, Maestas responded by first outlining his argument that he was incapable of providing effective assistance of counsel and that he had informed the defendant of his inability to adequately represent him at trial. Maestas further stated that he had explained the ABA guidelines to the defendant, and since the defendant indicated he was unsure whether he wanted Maestas to continue or not, the defendant should be allowed to seek independent counsel in order to protect his constitutional rights.

{10} The court responded that effective assistance of counsel was a legal question for the court, not a determination to be made unilaterally by defense counsel. The court then provided a detailed explanation of why the denial of the continuance did not render counsel's assistance ineffective and did not deprive the defendant of due process. The court stated it found Meastas's attempt to essentially call off the trial by placing the court and the state on notice of his intentions not to proceed to be a "highly improper, unlawful, and unjustified obstruction of the administration of justice." The court ruled that Maestas was not rendered ineffective and ordered him to proceed with trial or be held in contempt. Before allowing Maestas to respond, the court reiterated that Maestas was on notice that he would be held in direct criminal contempt should he refuse to proceed, and that the maximum fine and a significant jail sentence would be imposed.

{11} Maestas responded by emphasizing his duty to his client and the Constitution as a criminal defense attorney. He noted that he appeared in front of the court with knowledge that he could be held in direct criminal contempt, and rather than simply refusing to appear and instead facing indirect contempt proceedings, possibly in front of a different judge, he appeared as directed. Speaking directly to the district court judge, Maestas stated that he would not subject his client to ineffective assistance of counsel, a conviction, and a lengthy appeals process, and would instead refuse to proceed. He then asked the court to review the brief he filed on the morning of trial, and should the court find him in direct contempt, asked that he be jailed in Taos County so that he could receive visitors.

{12} Instead of delaying proceedings to read Maestas's brief, the court allowed him to make an oral record. The court asked Maestas one final time if he intended to proceed. Maestas refused, and the court held him in direct criminal contempt. The court then sentenced Maestas to a $1,000 fine, court costs, 364 days imprisonment with 334 days suspended followed by unsupervised probation, with the term of incarceration to be served in Union County. At the state's suggestion, the court also ordered restitution. The following week, the court sua sponte reduced Maestas's sentence to 182 days imprisonment, suspending 152 days, for a total term of incarceration of thirty days, and ordered him to report to the Union County Sheriff's office ten days later to begin serving his sentence. The court also reduced his fine to $999 and ordered him to pay $55 in fees, while leaving restitution to be determined at a later hearing. Maestas timely appealed, which stayed the execution of his sentence under NMSA 1978, Section 39-3-15(A) (1966).

STANDARD OF REVIEW

{13} "Criminal contempt convictions may be routinely reviewed on appeal for arbitrariness and abuse of discretion." *Concha v. Sanchez*, 2011-NMSC-031, ¶ 46, 150 N.M. 268, 258 P.3d 1060. "The only limit on a contempt sentence is the trial court's discretion, which is reviewable on appeal." *Case v. State*, 1985-NMSC-103, ¶ 5, 103 N.M. 501, 709 P.2d 670. *But see State v. Case*, 1983-NMCA-086, ¶ 13, 100 N.M. 173, 667 P.2d 978 (noting that "[s]entences exceeding six months for criminal contempt may not be imposed absent a jury trial or waiver thereof"); *Seven Rivers Farm, Inc. v. Reynolds*, 1973-NMSC-039, ¶ 42, 84 N.M. 789, 508 P.2d 1276 (holding that a jury trial is not required as long as the fine imposed does not exceed $1,000). "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 11, 314 P.3d 688 (internal quotation marks and citation omitted).

DISCUSSION

{14} Maestas advances two primary arguments on appeal. First, Maestas challenges the propriety of holding him in direct criminal contempt. He argues that he had a complete defense to criminal contempt or, alternatively, that he should have been subject to indirect criminal contempt proceedings. Second, Maestas argues that the district court abused its discretion by imposing an excessive sentence and restitution. We are unpersuaded by Maestas's challenge to the propriety of his conviction. We do, however, perceive two abuses of discretion in the district court's sentencing decision.

[2] We pause here to address the district court's focus on "extraordinary circumstances." The court provided a detailed explanation of events in its "decision & judgment and sentence on direct criminal contempt," noting that "[o]n January 7, 2020, the Court entered a scheduling order that advised the parties there would be no further trial continuances unless extraordinary circumstances required it." The court concluded that the unavailability of the defendant's expert witness "was not an extraordinary circumstance that justified another trial continuance." However, the same "extraordinary circumstances" language also appears in an earlier scheduling order, entered one month before the January 7, 2020, scheduling order on December 6, 2019. The December 6 scheduling order set the trial to occur in February. Shortly after that order was entered, the state requested a continuance because its "key witness," a SANE nurse, was unavailable. The court granted the continuance and this is what gave rise to the January 7, 2020, scheduling order that, ten months later, the court relied on as justification for denying the defendant's request for a continuance due to Dr. Cave's unavailability.

I. The District Court Did Not Err by Holding Maestas in Direct Criminal Contempt

{15} Under statutory and common law, judges are vested with inherent power to compel obedience to their orders and maintain decorum in their courtrooms. *Concha*, 2011-NMSC-031, ¶¶ 22-23. Contempt powers allow courts to guard their proceedings against anything that interferes with the orderly administration of justice. *Case*, 1985-NMSC-103, ¶ 5. Civil contempt proceedings are intended to obtain compliance with a court order, *State v. Pothier*, 1986-NMSC-039, ¶ 4, 104 N.M. 363, 721 P.2d 1294, while "[c]riminal contempt proceedings are instituted to punish completed acts of disobedience that have threatened the authority and dignity of the court." *Concha*, 2011-NMSC-031, ¶ 26. "Criminal contempts are further delineated as direct or indirect." *Id.* ¶ 24 (internal quotation marks and citation omitted). Direct contempt involves "charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court [and] are actually observed by the court." *Id.* ¶ 35 (internal quotation marks and citation omitted). Indirect criminal contempt arises "[w]hen the judge has not personally witnessed the defendant's contemptuous behavior in the course of a court proceeding." *Id.* ¶ 28.

{16} Since "criminal contempt is a crime in the ordinary sense," a criminal contempt defendant is entitled to due process protections, the extent of which depend on whether the contempt charge is categorized as direct or indirect. *Id.* ¶ 26 (alteration, internal quotation marks, and citation omitted). In direct contempt proceedings, a judge may punish the contemnor summarily without the need for further evidentiary proceedings. *Id.* ¶ 27. In indirect proceedings where the judge has not personally witnessed the defendant's contumacious actions, the contempt "must be resolved through more traditional due process procedures." *Id.* ¶ 28; *see also State v. Stout*, 1983-NMSC-094, ¶ 9, 100 N.M. 472, 672 P.2d 645 (recognizing that "some kind of formal notice and hearing was required because the contempt was not committed in the presence of the court").

{17} We turn now to Maestas's two challenges to the propriety of his conviction. Maestas first argues that he had a complete defense to direct criminal contempt because he had a good-faith belief that he could not comply with the court's order. Maestas contends that the court's order to proceed with trial "put [him] in an untenable position: refuse to proceed and face contempt charges or proceed to trial without the necessary expert and all but ensure his client would be deprived of effective assistance of counsel, convicted of a serious crime, and almost certainly incarcerated for years while the appellate process played out." While we appreciate the precarity of Maestas's position, we are unpersuaded that the court erred in holding him in contempt.

{18} At bottom, this line of argument challenges the sufficiency of the evidence supporting Maestas's contempt conviction. As with any criminal conviction, a criminal contempt conviction must be based on evidence constituting proof beyond a reasonable doubt. *In re Stout*, 1984-NMCA-131, ¶ 11, 102 N.M. 159, 692 P.2d 545. And while an "[i]nability without fault to comply with a court's order is a defense to a contempt charge," *id.* ¶ 13, we are unpersuaded that this defense is applicable here.

{19} Cases applying the inability to comply defense are factually distinct from the circumstances presented in this case. In *In re Stout*, for instance, this Court reversed an attorney's contempt conviction for failure to appear at a sentencing hearing because the attorney was required to be in another court at the same time and had arranged for substitute counsel, thereby excusing his absence. *Id.* ¶¶ 14-15. Similarly, in two Depression era cases, our Supreme Court reversed contempt convictions for destitute men unable to pay judgments arising out of divorce proceedings, holding that inability to pay was a defense to contempt for failure to satisfy the judgments. *See Sears v. Sears*, 1939-NMSC-010, ¶ 13, 43 N.M. 142, 87 P.2d 434; *Andrews v. McMahan*, 1938-NMSC-074, ¶ 14, 43 N.M. 87, 85 P.2d 743.

{20} But here, Maestas has only shown that he had a good-faith belief that proceeding to trial without his expert would deny his client effective assistance of counsel. Regardless of whether that assessment was correct, Maestas could have proceeded with trial and attempted to defend his client to the best of his abilities. Unlike *In re Stout*, where a lawyer could not physically be in two places at once, or *Sears* and *Andrews*, where destitute men lacked money to pay judgments and could not find jobs during a historic economic calamity, there were no circumstances making it impossible for Maestas to comply with the district court's order.

{21} Maestas also offers an alternative argument that the district court should have referred him for prosecution for indirect, rather than direct, criminal contempt and afforded him the additional due process protections inherent in that charge. Maestas contends that direct contempt proceedings were inappropriate because there was additional evidence outside the presence of the court that bears on his good-faith defense. This argument is unpersuasive for two reasons.

{22} First, Maestas's defense based on his perceived inability to comply with the court's order was not sufficient to excuse his contumacious conduct. Second, Maestas has provided no authority indicating that indirect contempt proceedings are necessary where a defendant openly and directly disobeys a court order in the presence of the court. Maestas analogizes this case to *State v. Diamond*, 1980-NMCA-026, 94 N.M. 118, 607 P.2d 656, and *In re Stout*, 1984-NMCA-131, where attorneys were subject to indirect contempt proceedings after failing to appear in court. This analogy fails for the simple reason that in both of those cases, the contumacious conduct occurred outside the presence of the court. Summary adjudication was improper because the judge did not directly observe the contumacious acts in either case. *See Diamond*, 1980-NMCA-026, ¶ 12 (citing *Johnson v. Mississippi*, 403 U.S. 212, 214 (1971) for the proposition that summary contempt proceedings are proper where the judge directly observes the contumacious act); *In re Stout*, 1984-NMCA-131, ¶¶ 10-11. In contrast, Maestas appeared in court and refused to follow the court's order, even stating that he expected to be held in direct criminal contempt, despite the fact that he could have refused to appear and been subject to indirect contempt proceedings. Maestas's admission speaks for itself. His conduct is exactly the type that constitutes direct criminal contempt, and we hold Maestas was not entitled to indirect contempt proceedings.

{23} Finally, though we are not unsympathetic to the position in which Maestas found himself, we reiterate our recent observation in *State v. Hildreth* that "attorneys in New Mexico are not empowered with decisional autonomy regarding when trials commence and when they do not commence. District courts are." 2019-NMCA-047, ¶ 16, 448 P.3d 585, *aff'd in part, rev'd in part on other grounds*, 2022-NMSC-012, 506 P.3d 354. Maestas's belief that he could not provide effective assistance of counsel does not relieve him of culpability in refusing to obey a court order. We see no abuse of discretion in the district court's decision to hold Maestas in direct criminal contempt, nor do we view the evidence presented here as insufficient to support his conviction. Accordingly, we affirm the district court's finding of direct criminal contempt.

II. The District Court Abused Its Discretion in Sentencing Maestas

{24} Maestas next challenges the propriety of his sentence. Specifically, Maestas argues that the district court abused its discretion in sentencing him to 182 days of incarceration with 152 days suspended,

a $999 fine, and court costs. Maestas also contends that the district court erred in imposing restitution. We address each issue in turn.

A. The District Court Abused Its Discretion by Imposing a Uniquely and Disproportionately Harsh Sentence

{25} Our Supreme Court has cautioned that a judge's inherent contempt authority is an "extraordinary unilateral power[]" that requires judges to exercise "extraordinary self-restraint" to avoid abuses of that power. *Concha*, 2011-NMSC-031, ¶ 30; *see also Case*, 1985-NMSC-103, ¶ 5 (stating that "contempt powers of the court should be used cautiously and sparingly"). "A judge's exercise of the contempt power must be tailored to the contemptuous conduct, exerting just enough judicial power to right the wrong; no more, no less." *Concha*, 2011-NMSC-031, ¶ 45; *see also Case*, 1985-NMSC-103, ¶ 4 ("The punishment imposed should be reasonably related to the nature and gravity of the contumacious conduct."). As numerous reported cases have emphasized, judges "should not exercise more than the least possible power adequate to the end proposed." *Pothier*, 1986-NMSC-039, ¶ 31.

{26} In *Pothier*, our Supreme Court articulated three factors courts must consider when imposing punishment for criminal contempt: (1) the severity of the consequences of the contempt; (2) the public's interest in terminating the contemnor's defiance; and (3) the importance of deterring future defiance. *Id.* ¶ 32. The first two *Pothier* factors do not clearly cut for or against the sentence imposed here. Maestas maintains that the main consequence of his conduct was that the defendant's trial did not proceed. The State responds that a defense attorney refusing to go forward with trial is serious in itself, *see Hildreth*, 2019-NMCA-047, ¶ 16 (observing that such conduct violates an attorney's "constitutional responsibility to his client and his duty to the tribunal for which, as a licensed attorney, he serves as an officer"), and wastes the court's time and resources, as well as the time of witnesses and jurors. Though the State makes a compelling argument, we note that Maestas attempted before the trial date to mitigate those consequences: he requested the continuance twelve days before trial, soon after he learned of Dr. Cave's scheduling conflict, and he filed a motion putting the court on notice of his intended course of action.

{27} Similarly, the parties offer competing arguments on the public's interest. Maestas reminds us that the public directly benefits from "fearless, vigorous, and effective advocacy" for criminal defendants, and quotes *In re McConnell*, 370 U.S. 230, 236 (1962) for the proposition that counsel must "be able to make honest good-faith efforts to present their clients' cases." The State counters that the public has a strong interest in having persons obey lawful court orders and that both the public and criminal defendants have a strong interest in the speedy adjudication of serious crimes. We view both of these interests as important.

{28} Ultimately, however, there is no question that deterring future defiance is very important and punishment is necessary. The *Pothier* Court analyzed the deterrent value of a contempt sentence by comparing the sentence imposed to what New Mexico courts have done in previous cases. *See* 1986-NMSC-039, ¶ 35. We use the same analysis to evaluate the district court's sentencing decision and look to cases in which attorneys have been held in contempt. We confine our review in this manner in recognition that Maestas's conduct can fairly be characterized as purely on behalf of his client's interest, to his own detriment. While we have found no reported cases in which an attorney has gone to the same lengths in service of a client's interests, the choice Maestas faced arose from a perceived conflict in his professional and ethical obligations to his client and to the court. The tension created by those dual obligations, and the corresponding balancing of interests, is unique to attorneys acting in their professional role and seemingly absent in contempt cases involving laypeople. *See, e.g.*, *Case*, 1985-NMSC-103, ¶ 3 (addressing criminal contempt punishment for a defendant who was given use immunity against prosecution but subsequently refused to answer questions in a homicide case). For this reason, the appropriate comparative analysis should focus on contempt punishments imposed on attorneys acting in their professional role.

{29} Compared to reported contempt sentences imposed on New Mexico attorneys, the district court's sentence in this case was undeniably harsh. Indeed, our review of New Mexico jurisprudence reveals no reported appellate decision affirming—or even considering—a contempt sanction against an attorney as severe as this one. The majority of reported decisions involve the imposition of no more than a monetary fine in circumstances where an attorney failed to comply with a district court's instructions or rules of procedure. *See, e.g.*, *In re Avallone*, 1978-NMSC-056, ¶¶ 5, 10, 91 N.M. 777, 581 P.2d 870 (affirming this Court's imposition of a $250 fine on an attorney who failed to conform to the rules of appellate procedure); *State v. Wisniewski*, 1985-NMSC-079, ¶¶ 1, 22, 103 N.M. 430, 708 P.2d 1031 (upholding $100 contempt citations imposed on two prosecutors and two police officers who failed to comply with discovery requirements under the Rules of Criminal Procedure). In *In re Byrnes*, 2002-NMCA-102, ¶¶ 1, 3-7, 132 N.M. 718, 54 P.3d 996, this Court affirmed a $1,000 contempt fine imposed on an attorney who continually interrupted and argued with the district court judge during a custody hearing, despite several admonitions to stop.

{30} In another illustrative case, *In re Cherryhomes*, an attorney was summarily held in contempt after he became combative and belligerent. 1985-NMCA-108, ¶ 3, 103 N.M. 771, 714 P.2d 188. The district court imposed a $10,000 fine, which this Court determined was excessive since it required a trial by jury under New Mexico law. *Id.* ¶ 7 (noting that the New Mexico Supreme Court has held that "a fine in excess of $1,000 gives the defendant the right to a jury trial"). The case was remanded with instructions to reduce the fine to $1,000 or to proceed with a jury trial. *Id.* ¶ 9. The same attorney came before this court again in *State v. Cherryhomes*, 1992-NMCA-111, ¶¶ 2-3, 114 N.M. 495, 840 P.2d 1261, when the district court imposed a $50 contempt fine after the attorney refused to take off a bandana and put on a tie while in court, as required by local court rules. The attorney appealed, and we affirmed the conviction and sentence. *Id.* ¶ 23.

{31} Our Supreme Court has also imposed serious contempt punishments for attorney misconduct, but we have not found any published case in which the Court issued a sentence comparable to the one imposed here. In *In re Palafox*, our Supreme Court imposed $250 fines on two attorneys who violated rules governing non-admitted counsel. 1983-NMSC-078, ¶¶ 6, 8, 100 N.M. 563, 673 P.2d 1296. Likewise, in a series of three disciplinary proceedings against the same attorney, the

[3] Maestas further argues that the district court imposed a sentence in excess of six months, which deprived him of his due process right to a jury trial. See Case, 1983-NMCA-086, ¶ 13. Because we hold that the district court's sentence was a substantive abuse of discretion, we do not consider (1) whether the sentence of 182 days is, in fact, a sentence that exceeds six months, and (2) whether we measure the total sentence imposed or, as the State argues, only the term of incarceration. See Allen v. LeMaster, 2012-NMSC-001, ¶ 28, 267 P.3d 806 ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so." (internal quotation marks and citation omitted)).

Court used its contempt power to first impose a $500 fine on an attorney for violating discovery orders. *In re Herkenhoff* (*Herkenhoff I*), 1993-NMSC-081, ¶ 10, 116 N.M. 622, 866 P.2d 350. After the attorney refused to comply with the initial disciplinary order, the Court imposed a $1540 fine—$10 per day of noncompliance—at a 15 percent interest rate. *In re Herkenhoff* (*Herkenhoff II*), 1995-NMSC-011, ¶ 12, 119 N.M. 232, 889 P.2d 840. The Court also disbarred the attorney. *Id.* ¶ 11. After the attorney continued to practice law despite his disbarment, the Court again held him in contempt and imposed a five-month sentence of incarceration, but suspended the entire sentence, conditioned on the attorney's compliance with the prior disciplinary orders. *In re Herkenhoff* (*Herkenhoff III*), 1997-NMSC-007, ¶¶ 20-21, 122 N.M. 766, 931 P.2d 1382. The court issued an almost identical sentence in *In re Schmidt*, where a disbarred attorney continued to practice law in direct violation of a prior disciplinary order. 1997-NMSC-008, ¶ 15, 122 N.M. 770, 931 P.2d 1386 (per curiam). As in *Herkenhoff III*, the Court imposed a five-month suspended sentence with conditions that the attorney cease practicing law and begin complying with the prior disciplinary order. *In re Schmidt*, 1997-NMSC-008, ¶ 15.

{32} Finally, we have found only one reported decision in which a district court imposed a sentence of incarceration against a contumacious attorney, and the conduct meriting the contempt punishment was comparatively more egregious. *State v. Driscoll*, 1976-NMSC-059, ¶¶ 5-10, 89 N.M. 541, 555 P.2d 136. In *Driscoll*, an attorney disobeyed a court's order not to mention a witness affidavit during opening argument, and after being admonished by the court, removed his tie and coat and aggressively approached the bench. *Id.* The judge immediately remanded the attorney into custody but released him a few hours later, stating that the matter would be taken up by another judge in a show-cause proceeding. *Id.* ¶¶ 7-9. At the show-cause proceeding, the attorney was sentenced to ten days of incarceration, but our Supreme Court reversed the sentence and conviction on double jeopardy grounds. *Id.* ¶¶ 11, 19.

{33} Taken together, these cases demonstrate the unusual severity of the contempt punishment imposed by the district court in this case. The harshest fine imposed on an attorney was the $1540 collective fine imposed in *Herkenhoff II*, 1995-NMSC-011, ¶ 12, and when our Supreme Court has imposed incarceration as a contempt punishment in disciplinary proceedings, it has suspended the sentences in full. In this case, the district court sentenced Maestas to thirty days' incarceration (182 days incarceration with 152 days suspended), a $999 fine, $55 in court costs, and restitution. By all accounts, Maestas's sentence is extraordinary in that it significantly exceeds that of any sentence imposed in a contempt case arising from attorney misconduct. Viewed through the lens of deterrence, the imposition of a month-long jail sentence and the specter of a full six months in jail if he happened to violate the conditions of his probation may well be an effective means of deterring an attorney from ever again engaging in this sort of behavior. But the question is not simply whether the punishment will deter future defiance, it is whether this was the least possible punishment necessary do so. *See Concha*, 2011-NMSC-031, ¶ 45; *Pothier*, 1986-NMSC-039, ¶ 31. When compared to other cases, we conclude that it was not.

{34} We are cognizant that district courts are afforded broad discretion in their exercise of the contempt power. However, that discretion is not without limits, and the unilateral nature of direct criminal contempt proceedings requires judges to exercise extraordinary restraint in imposing contempt sentences. *See Concha*, 2011-NMSC-031, ¶ 30 (cautioning that the contempt power is an "extraordinary unilateral power[]" that requires judges to exercise "extraordinary self-restraint" to avoid abuses of the authority). It has been repeated often enough: the sentence must be narrowly tailored to exert "just enough judicial power" to vindicate the court's authority and dignity, so as to avoid abuses of those powers. *See id.* ¶¶ 30, 45. Because the sentence in this case exceeded that threshold, we determine that it was an abuse of the district court's discretion and remand for resentencing.

B. Restitution Is Not Appropriate in This Case

{35} In its sentencing order, the district court required Maestas to pay restitution to "the people of Union County" in an amount to be determined at a future restitution hearing. Criminal restitution is authorized by statute. *See* NMSA 1978, § 31-17-1 (2005). Maestas argues that the district court misapplied the statute and wrongly imposed a sentence of restitution. We agree.

{36} We review the district court's restitution order for an abuse of discretion. *State v. George*, 2020-NMCA-039, ¶ 4, 472 P.3d 1235. A trial court abuses its discretion when it imposes a sentence contrary to law. *State v. Lente*, 2005-NMCA-111, ¶ 3, 138 N.M. 312, 119 P.3d 737. In order to determine whether the court acted contrary to law, we review the district court's interpretation of Section 31-17-1 de novo. *See State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50.

{37} Section 31-17-1(A) states, "It is the policy of this state that restitution be made by each violator of the Criminal Code . . . to the victims of his criminal activities to the extent that the defendant is reasonably able to do so." Restitution is intended to "make whole the victim of the crime to the extent possible." *State v. Lack*, 1982-NMCA-111, ¶ 12, 98 N.M. 500, 650 P.2d 22 (noting that "[r]estitution in a proper case may oftentimes be a compelling reminder of the wrong done and meaningfully contribute to the rehabilitation process" (internal quotation marks and citation omitted)). Section 31-17-1(A)(1) defines a "victim" as "any person who has suffered actual damages as a result of the defendant's criminal activities." "Actual damages" are those that "a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and [non-economic] damages." Section 31-17-1(A)(2). Before approving a sentence of restitution, a trial court must consider a number of factors, including the actual damages suffered by each victim. Section 31-17-1(E).

{38} New Mexico courts have never construed an order of restitution in the context of criminal contempt. But the plain language and purpose of the statute indicate that restitution, as applied, is not an appropriate punishment here. The State identified "the people of Union County" as victims for purposes of restitution under Section 31-17-1(A)(1). In this case, there has been no showing that the people of Union County suffered or would be able to recover actual damages from Maestas in a civil action. *See* § 31-17-1(A)(2); *George*, 2020-NMCA-039, ¶ 8 (stating that a victim may receive restitution only when there is "a direct relationship between the crime for which there is a plea of guilty or verdict of guilty, and the damages asserted by the victim" (internal quotation marks and citation omitted)). Further, while the State points out that this Court has previously recognized that state entities can be considered victims for purposes of restitution, *see, e.g.*, *State v. Ellis*, 1995-NMCA-124, ¶ 7, 120 N.M. 709, 905 P.2d 747, the court's order of restitution in this case does not identify a particular state entity, such as Union County itself. Rather, the court ordered Maestas to pay restitution to an ill-defined group of individuals with no showing that *this* group suffered an actual loss as a result of Maestas's contempt. In short, the State has not demonstrated how "the people of Union County" qualify as victims under Section 31-17-1. Accordingly, we reverse the district court's order of restitution. *See Lente*, 2005-NMCA-111, ¶ 3.

CONCLUSION

{39} We affirm Maestas's conviction for direct criminal contempt. However, the district court's sentencing order is vacated, and the case remanded for resentencing consistent with this opinion.

{40} IT IS SO ORDERED.

MEGAN P. DUFFY, Judge

WE CONCUR:

J. MILES HANISEE, Chief Judge

JANE B. YOHALEM, Judge

Stuart Deaton Shanor

It is with sadness but many fond memories that the attorneys and staff of Hinkle Shanor LLP announce that Stuart Deaton Shanor, 85, passed away peacefully on Wednesday April 12, 2023, in Huntington, W.V. He was preceded in death by his wife of 53 years, Ellen B. Shanor. Stu and Ellen were the soul of our Firm for decades.

Stuart is survived by daughter, Sheryl Mahaney, her husband John H. Mahaney, son, Stephen S. Shanor, his wife Heidi E. Shanor, and five grandchildren.

Stuart was a highly respected lawyer, practicing for nearly six decades with more than 50 years of that practice as a partner with Hinkle Shanor LLP which proudly bears his name. Throughout his career, Stuart tried many high-profile cases within New Mexico. He was a driving force in the drafting and adoption of the State Bar of New Mexico's Lawyer's Creed of Professionalism. Stuart was the embodiment of every word of that Creed. Throughout his years of practice, Stuart was proud to mentor countless young lawyers.

Stuart was a Fellow in the American College of Trial Lawyers and served on its Board of Regents for many years. He also served as the President of the College from 2001 to 2002.

Stuart gave generously of his time both to his legal community and his local community in Roswell. He was active in the State Bar of New Mexico and served on many Supreme Court boards and Commission, including the Client Protection Fund, the New Mexico State Bar Foundation, the Supreme Court Task Force on Professional Conduct, and as a Hearing Officer for the New Mexico State Disciplinary Board.

A Memorial Service for Stuart D. Shanor will be held at St. Andrew's Episcopal Church (505 N. Pennsylvania Ave, Roswell, NM 88201) on Saturday, May 27, 2023, at 2:00 p.m. Immediately following the Memorial Service Hinkle Shanor LLP will host a reception in their Roswell offices (400 N Pennsylvania Ave, Ste. 640) across the street. We invite all who knew and respected Stu to join us in celebrating his life.

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The NM Department of Health published Notice of a Request for Proposals for the Provision of Hearing Officer Services in Adjudicative and Rulemaking Hearings (RFP no. 23-OGC-001) in the May 10, 2023 issue (Issue 9) of the NM Bar Bulletin. Please review that Notice for complete information to respond by June 7, 2023. All questions about the contents of the RFP document shall be directed to: Procurement Manager: Mark Lujan, Procurement Manager Address: P.O. Box 26110, 1190 South St. Francis Dr., Ste. N-3052 Santa Fe, NM 87505 Email: Mark.Lujan@doh.nm.gov.

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The First Judicial District Attorney's Office is seeking an experienced attorney in the Espanola Office. Salary is based on experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "DA Employment," PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us

Various Assistant City Attorney Positions

The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. The Legal Department's team of attorneys provides a broad range of legal services to the City, as well as represent the City in legal proceedings before state, federal and administrative bodies. The legal services provided may include, but will not be limited to, legal research, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and negotiating contracts, litigating matters, and providing general advice and counsel on day-to-day operations. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: Five (5)+ years' experience as licensed attorney; experience with government agencies, government compliance, real estate, contracts, and policy writing. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Current open positions include: Assistant City Attorney – Employment/Labor; Assistant City Attorney – Property & Finance; Assistant City Attorney – Municipal Affairs (IPRA). For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

Attorney – Minimum 3-5 Years' Experience

The Law Offices of Erika E. Anderson is looking for an attorney with a minimum of 3-5 years of experience. Prior medical malpractice experience is a plus. The law firm is a very busy and fast-paced AV rated firm that specializes in civil litigation on behalf of Plaintiffs. We also do Estate Planning and Probate litigation. The candidate must be highly motivated and well organized, pay close attention to detail, be willing to take on multiple responsibilities, and be highly skilled when it comes to both legal research and writing. This is a wonderful opportunity to join an incredible team that works hard and is rewarded for hard work! The position offers a great working environment, competitive salary and a generous benefits package. If interested, please send a resume to erika@eandersonlaw.com.

Trial Attorney
1st Judicial District Attorney

The First Judicial District Attorney's Office is seeking a Trial Attorney located in the Santa Fe Office. Salary is based on experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "DA Employment," PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us

Attorneys

The mission of U.S. Attorney's Office for the District of New Mexico is to uphold the rule of law, keep New Mexico and the nation safe, and to protect civil rights. The office values differences in people and ideas and treating parties, witnesses, and colleagues with fairness, dignity, and compassion. Civil AUSAs enforce federal civil rights and other federal statutes, combat fraud in the government, and defend the United States and its agencies and employees in civil litigation. The Civil Division works every day to provide the highest levels of service to the American people, seek fair and impartial justice; adhere to the highest standards of ethical behavior; and be a responsible steward of the taxpayers' dollars. Applicants must be able to independently manage all aspects of their assigned cases, including overall strategy, preparing pleadings and motions, taking depositions, preparing and answering discovery, negotiating settlements, and trying cases. We are also looking for applicants with an expertise employment law. If you are interested in serving the public and representing the people of the United States in a manner that will instill confidence in the fairness and integrity of the USAO and the judicial system, and have the experience necessary to do so, please apply before the vacancy closes on June 5, 2023. Qualification: Applicants must possess a J.D. Degree, be an active member in good standing of a bar (any jurisdiction) and have at least one (1) years of post-J.D. legal or other relevant experience. Salary: AUSA pay is administratively determined based, in part, on the number of years of professional attorney experience. The pay for this position is $69,777 - $182,509 including locality pay. The complete vacancy announcement may be viewed at https://www.usajobs.gov/GetJob/ViewDetails/722961000. All applicants must apply through USAJobs.

Attorneys

For more than sixty years, Butt Thornton & Baehr PC has been known as a law firm of quality and integrity. We are proud of the position of trust and respect the firm has earned in New Mexico's business, legal and governmental communities. Our commitment is to continue to meet the high standards that have earned us that reputation into the twenty-first century. BTB attorneys work together to analyze legal issues and provide legal counsel to clients. New attorneys are exposed to all areas of civil litigation, from legal research and drafting documents, to taking and defending depositions, trial preparation and trial, and working directly with clients. If you are licensed to practice law and are seeking an opportunity to enjoy the practice law with plenty of room for growth, please send letter of interest, resume, and writing samples to Agnes Padilla at afpadilla@btblaw.com.

Full-Time Attorney

NM Divorce & Custody Law, LLC seeks a full-time attorney to join our team. The ideal candidate will have at least three years' experience in the practice of law. The candidate will manage their own case load with staff support and will have a strong desire to practice in family law (divorce, child custody & visitation, child support, grandparent visitation, kinship guardianship, modifications, etc.). Our ideal candidate must be responsive to clients and respectful of fellow co-workers. It is expected that each member of our team will be highly organized and reliable, and possess good judgment and communication skills. We expect our attorneys to own their work product. The candidate must be able to prioritize deadlines and case commitments. Most importantly, the attorney that joins our office will understand that we don't just serve clients as knowledgeable and assertive advocates – we also have a responsibility to manage client expectations and to make good decisions on how to get the best possible result for the client without incurring unnecessary expense. The team at NM Divorce & Custody Law, LLC operates within a positive and friendly work environment. We understand that success in one's career means that one must maintain a healthy balance between one's home and work life. To that end, the new attorney will benefit from a reasonable billable hour requirement and a flexible work schedule. We offer competitive pay, generous paid time off, and a generous benefits package that includes health, dental, and vision insurance, a matching Simple IRA, and ½ day work days on Fridays. Please send a cover letter and resume tlh@nmdivorcecustody.com. All replies will be maintained as confidential.

New Mexico Public Education Department – Attorney Position

The New Mexico Public Education Department (PED) is seeking an attorney to fill a position within its Office of General Counsel. Strong writing and interpersonal skills are essential. More details about positions and how to apply are provided on the State Personnel Office website at http://www.spo.state.nm.us/. Please check the website periodically for updates to the list of available positions.

SAUSA Attorney 1st Judicial District Attorney

The United States Attorney's Office for the District of New Mexico has a Special Assistant United States (SAUSA) vacancy. Duty station will be in the United States Attorney's Office in Albuquerque, New Mexico. The attorney selected will be assigned a variety of firearms, violent crimes and narcotics-related criminal investigations and prosecutions. Requirements: Licensed attorney to practice law in good standing either in New Mexico or another state with a New Mexico limited license, plus a minimum of four (4) years as a practicing attorney in criminal law or three (3) years as a prosecuting attorney. Must be eligible to be licensed to practice law in the Federal District Court in the District of New Mexico and the Tenth Circuit Court of Appeals. This is a non-federal position and the employer is the Office of the First Judicial District Attorney. The terms, conditions and salary of this position will be administered by the Office of the First Judicial District Attorney. The selectee will be cross-designated as a SAUSA. This position does not confer status as a federal employee. Salary is based on experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "DA Employment," PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us

Litigation Paralegal

Small Albuquerque law firm seeking a litigation paralegal. Experience is preferred in general civil practice, including employment, insurance defense, medical malpractice defense, personal injury and civil rights. Candidates should have excellent writing and research skills, and the ability to work independently. A paralegal certificate or degree is a plus. Competitive salary and benefits. All inquiries kept confidential. Please email resume and salary requirements to jertsgaard@parklawnm.com

Experienced Civil Litigation Paralegal Needed:

Albuquerque Plaintiffs firm with a significant focus on medical malpractice seeking experienced civil litigation paralegal. Upon hiring, the paralegal will be involved in all stages of litigation from discovery to trial prep/assistance. Ideal candidate will have seven years of prior experience in civil litigation with knowledge of State and Federal District Court rules and filing procedures, factual and legal online research and document management and processing. Remote work allowed. All inquiries confidential. Salary DOE, benefits included. Email resume and cover letter to: info@collinsattorneys.com

Paralegal

Giddens & Gatton Law, P.C., a dynamic and growing law firm in Albuquerque, NM, is seeking an experienced and passionate paralegal to join our busy team in a full-time role in its bankruptcy, commercial litigation, and real estate practice. As paralegal you will be required to assist lawyers throughout the firm. You will have at least 3 years of experience, excellent attention to detail, research skills, the ability to work under pressure and great communication and organizational skills. Experience in the following areas a plus but not required: title review, foreclosures, bankruptcy, trial preparation, discovery and garnishment/collections. The successful candidate will be friendly, talented, dedicated, ambitious and a team player. Must thrive in a team environment and believe that client service is the most important mission of a paralegal. The candidate will align with our core values of respect, customer focus, accountability, integrity and commitment to community. In return you will get the opportunity to work with a great, hard-working team where you will expand your skills and knowledge within the legal field. Skills & abilities: Excellent: Oral, written, interpersonal & communications. Strong: Analytical, logical, reasoning, research, organizational, time management, customer service, personal service, knowledge of the law and legal precedence. Ability to use Lexis Nexis, MS Office and other computer programs. Compensation: Competitive salary depending on experience. Stellar benefits offered. TO APPLY: Please email cover letter and resume to: Denise DeBlassie-Gallegos, at giddens@giddenslaw.com. DO NOT CONTACT OUR OFFICE DIRECTLY BY PHONE; EMAIL ONLY.

Legal Secretary

AV rated insurance defense firm seeks full-time legal assistant. Position requires a team player with strong word processing and organizational skills. Proficiency with Word, knowledge of court systems and superior clerical skills are required. Should be skilled, attentive to detail and accurate. Excellent work environment, salary, private pension, and full benefits. Please submit resume to mvelasquez@rileynmlaw.com or mail to 3880 Osuna Rd. NE, Albuquerque, NM 87109

Office Space

Office Suites-No Lease-All Inclusive-

Office Suites-NO LEASE-ALL INCLUSIVE- virtual mail, virtual telephone reception service, hourly offices and conference rooms available. Witness and notary services. Office Alternatives provides the infrastructure for attorney practices so you can lower your overhead in a professional environment. 2 convenient locations-Journal Center and Riverside Plaza. 505-796-9600/ officealternatives.com.

Pro Bono Spotlight

Volunteer Attorney Program

Volunteer Attorney Program
A Program of New Mexico Legal Aid

NEW MEXICO LegalAid

LSC America's Partner for Equal Justice
LEGAL SERVICES CORPORATION

The **Volunteer Attorney Program (VAP)** a program of New Mexico Legal Aid is excited to welcome its new Statewide Pro Bono Coordinator, **Nedia Isabella Zayani (Bella)**. She graduated from the University of New Mexico School of Law in 2019 and practiced family law prior to joining VAP. Bella is excited to collaborate with the pro bono committees of each of the thirteen judicial districts, to expand pro bono services to low income New Mexicans. In addition to pro bono service efforts, Bella looks forward to connecting with more private attorneys who are willing to make a difference in the lives of those in need!

VAP continues to increase access to justice for low-income New Mexicans by connecting pro se clients with members of the private bar. It achieves this goal in two ways: (1) direct case placement with pro bono attorneys through its direct representation track and (2) brief advice and counsel with pro bono attorneys through its legal clinic/legal fair track.

Contact us

If you would like to volunteer with the Volunteer Attorney Program of New Mexico Legal Aid, we would love to connect you with our low-income pro se clients!

To volunteer for brief advice and counsel consultations through our upcoming **Teleclinics or Fairs**, please contact Isabella (Bella) Zayani at nediaz@nmlegalaid.org.

To volunteer for brief, limited, or extended representation, through our **direct representation track**, please contact Becky O. O'Gawa at rebeccao@nmlegalaid.org.

Volunteer Attorney Program, New Mexico Legal Aid, Inc.
505 Marquette NW, Suite 1820 Albuquerque, NM 87102
P.O. Box 25486 Albuquerque, NM 87125-5486
www.newmexicolegalaid.org