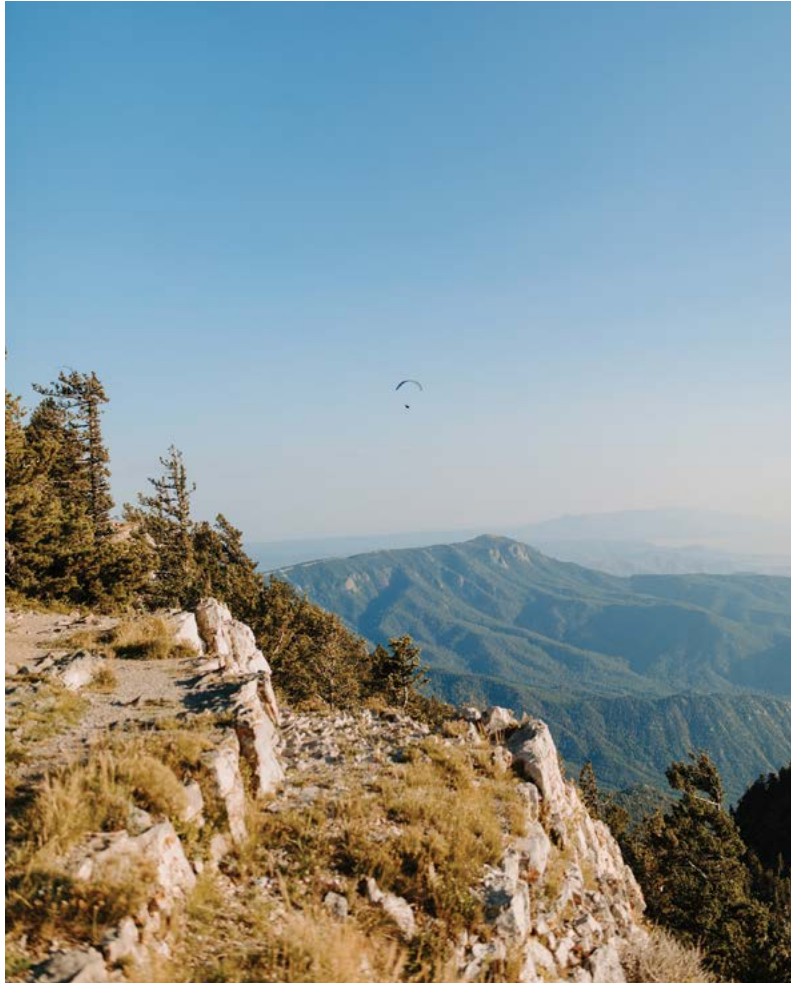


BAR BULLETIN

October 13, 2021 • Volume 60, No. 19



Watermelon Float by Cassie Scott

cassiescottcaptures.com

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New Mexico State Bar Foundation
Center for Legal Education

CLE PROGRAMMING

from the Center for Legal Education



OCTOBER 14

Webinar:

Immigration Law: Economic Opportunities Through Entrepreneurship Regardless of Immigration Status

1.0 G

Noon – 1 p.m.

\$49 Standard Fee

OCTOBER 15

Webcast:

2021 Procurement Code Institute

3.0 G, 1.5 EP

8 a.m. – 12:15 p.m.

\$196 Standard Fee

OCTOBER 19

Teleseminar:

Drafting Special Needs Trusts for Vulnerable Clients

1.0 G

11 a.m. – Noon

\$79 Standard Fee

OCTOBER 20

Webinar:

Whistleblowers Bring Medicaid Fraudsters to Justice

1.5 G

10 – 11:30 a.m.

\$74 Standard Fee

OCTOBER 21

In-Person and Webcast:

2021 Solo and Small Firm Institute

4.0 G, 2.0 EP

8:45 a.m. – 4:30 p.m.

\$282 Standard Fee

OCTOBER 25

Webinar:

Rural New Mexico, Agriculture, and International Trade

2.0 G

1 – 3 p.m.

\$98 Standard Fee

OCTOBER 27

Webinar:

Recent Developments in International Trade Law – Opportunities for New Mexico’s Indian Country

3.0 G

9 a.m. – Noon

\$147 Standard Fee

OCTOBER 28

Webinar:

Pay Equity and Gender: Women and Fair Pay in the Workplace

3.0 G

1 – 4:15 p.m.

\$147 Standard Fee

NOVEMBER 2

Webinar:

The O.J. Simpson Trial: Attorney Blunders, Bungles and Bloopers – PLUS Amazing PowerPoint Trial Tips

3.0 G

11 a.m. – 2:15 p.m.

\$179 Standard Fee

NOVEMBER 4

Webinar:

Copyright + Art: Told Through Colorful Stories and Original Artwork

2.0 G

11 a.m. – 1 p.m.

\$139 Standard Fee

NOVEMBER 5

Webinar:

JLAP Well Talks - “What a Healthy Lawyer Looks Like”

2.0 EP

9 – 11 a.m.

\$98 Standard Fee

Webinar:

60 Tips, Tricks, Apps & Websites in 60 Minutes

1.0 G

Noon – 1 p.m.

\$49 Standard Fee

NOVEMBER 9

Webinar:

How To Make Cross-Examination An Open Book Exam at Trial and at In-Person or Online Depositions

1.5 G

11 a.m. – 12:30 p.m.

\$129 Standard Fee

NOVEMBER 16

Webinar:

Strategies and Techniques for Rural Community Organizing and Legal Advocacy

1.5 G

1 – 2:30 p.m.

\$74 Standard Fee

NOVEMBER 30

Webinar:

Me Too: Sexism, Bias, and Sexual Misconduct in the Legal Profession

1.0 EP

11 a.m. - Noon

\$89 Standard Fee

DECEMBER 6

Webinar:

Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204

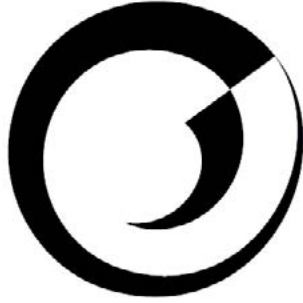
1.0 EP

1:30 – 2:30 p.m.

\$55 Standard Fee

*In-person programs subject to current public health guidelines. Should changing guidance make meeting in-person not possible, registrants will be transferred to virtual format or given a refund. All visitors to the State Bar Center are encouraged to read the latest COVID information at the CDC website and take any actions to keep themselves and others comfortable and healthy as we continue to transition out of the pandemic. NOTE: Face masks must be worn at all times in the public areas of the building, regardless of vaccination status.

Register online at www.sbnm.org/CLE or call 505-797-6020



ALB

**PAIN MANAGEMENT
& SPINE CARE**

www.albpainclinic.com

ALB Pain Management & Spine Care (APMSC) is dedicated to the diagnosis and treatment of pain conditions related to an automobile accident. APMSC specializes in interventional pain medicine and neurology. Our providers are dedicated to restoring the health and comfort of our patients. Our mission is to provide the best evidence-based treatment options in an environment where patients will experience first-class medical care with compassionate staff.

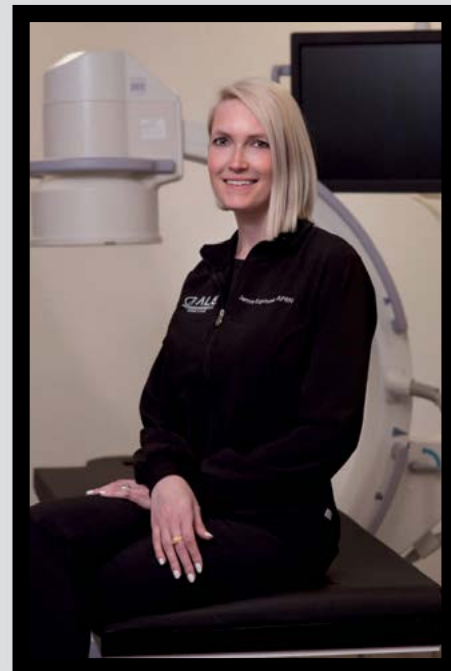
Letters of protection accepted.

**4620 Jefferson Lane NE
Suites A & B
Albuquerque, NM 87109**



Aldo F. Berti, MD

Board Certified in Pain Medicine & Neurology



Jamie Espinosa, APRN

**Phone: (505) 800-7885
Fax: (505) 800-7677
info@albpainclinic.com**

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From the New Mexico Supreme Court

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Meetings

October

13

Children's Law Section Board

Noon, Children's Court, Albuquerque

13

Tax Section Board

9 a.m., teleconference

14

Business Law Section Board

4 p.m., teleconference

15

Family Law Section Board

9 a.m., teleconference

19

Solo and Small Firm Section Board

10:30 a.m., State Bar Center

21

Public Law Section Board

Noon, Legislative Finance Committee, Santa Fe

Workshops and Legal Clinics

October

27

Consumer Debt/Bankruptcy Workshop

6-8 p.m., Video Conference
For more details and to register, call
505-797-6094

November

3

Divorce Options Workshop

6-8 p.m., Video Conference
For more details and to register, call
505-797-6022

December

1

Divorce Options Workshop

6-8 p.m., Video Conference
For more details and to register, call
505-797-6022

8

Consumer Debt/Bankruptcy Workshop

6-8 p.m., Video Conference
For more details and to register, call
505-797-6094

About Cover Image and Artist: Cassie Scott, born and raised in Tijeras, N.M., purchased her first digital camera while in high school in preparation for earning her degree in Media Arts at UNM. Throughout college, Scott dabbled in portrait photography after she realized that landscape photography was not her strong suit, nor did it interest her at the time. By the time Scott graduated had college, she decided that she would take her hobby more seriously and thus officially founded Cassie Scott Captures, LLC, in 2019. Scott, who works full-time as the communications coordinator for the State Bar of New Mexico, does portrait and wedding photography on weekends as her "side hustle". When on trips out of state, Scott started the habit of bringing her camera along to photograph the stunning landscapes and applying her knowledge of editing and composition to discover that landscape photography may be just as rewarding and beautiful as portraits.



State Bar of
New Mexico
Est. 1886

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Executive Director Richard Spinello
Director of Communications and Member Services, Evann Laird
Graphic Designer Julie Sandoval
jsandoval@sbnm.org
Account Executive Marcia C. Ulibarri
505-797-6058 • mulibarri@sbnm.org
Communications Coordinator Cassandra Scott
505-797-6040 • notices@sbnm.org

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Fax: 505-828-3765 • address@sbnm.org

October 13, 2021 • Vol. 60, No. 19

www.sbnm.org



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. Library Hours: Monday-Friday 8 a.m.-noon and 1 p.m.-5 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit <https://lawlibrary.nmcourts.gov>.

U. S. District Court for the District of New Mexico Proposed Amendments to Local Rules of Criminal Procedure

Proposed amendments to the Local Rules of Criminal Procedure of the U.S. District Court for the District of New Mexico are being considered. A "red-lined" version (with the addition of rule 44.2 Self-Representation and proposed amendments to Attachment 1: Standard Discovery Order) and a clean version of these proposed amendments are posted on the Court's website at www.nmd.uscourts.gov. Members of the Bar may submit comments by email to clerkofcourt@nmd.uscourts.gov or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: Cynthia Gonzales, no later than Oct. 30.

Ninth Judicial District Court Judicial Appointment and Notice of Mass Reassignment

Governor Michelle Lujan Grisham has announced the appointment of Benjamin S. Cross of Clovis to fill the vacancy in Division I of the Ninth Judicial District Court. Effective Oct. 1, a mass reassignment of cases will occur. All cases previously assigned to District

Professionalism Tip

With respect to my clients:

I will be loyal and committed to my client's cause, and I will provide my client with objective and independent advice.

Judge Matthew E. Chandler, Division I, will be reassigned to District Judge Benjamin S. Cross, Division I. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Oct. 27 to challenge or excuse the judge pursuant to Rules 1-088.1 and 5-106.

STATE BAR NEWS

Board of Bar Commissioners Appointment to Client Protection Fund Commission

The Board of Bar Commissioners will make one appointment to the Client Protection Fund Commission for a three-year term. To be eligible, you must be an active status member of the State Bar with a principal office in New Mexico. Members who would like to serve on the Commission should send a letter of interest and brief resume by Nov. 17 to bbc@sbnm.org.

COVID-19 Pandemic Updates

The State Bar of New Mexico is committed to helping New Mexico lawyers respond optimally to the developing COVID-19 coronavirus situation. Visit <https://www.sbnm.org/covid> for a compilation of resources from national and local health agencies, canceled events and frequently asked questions. This page will be updated regularly during this rapidly evolving situation. Please check back often for the latest information from the State Bar of New Mexico. If you have additional questions or suggestions about the State Bar's response to the coronavirus situation, please email Executive Director Richard Spinello at rspinello@sbnm.org.

New Mexico Judges and Lawyers Assistance Program
NMJLAP is on Facebook! Search "New Mexico Judges and Lawyers Assistance Program" to see the latest research, stories, events and trainings on legal well-being!

Monday Night Attorney Support Group

- Oct. 18 at 5:30 p.m.
- Oct. 25 at 5:30 p.m.
- Nov. 1 at 5:30 p.m.

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 pmoore@sbnm.org or Briggs Cheney at BCheney@DSCLAW.com and you will receive an email back with the Zoom link.

NMJLAP Committee Meetings

- Jan. 8 at 10 a.m.
- April 2 at 10 a.m.
- July 9 at 10 a.m.

The NMJLAP 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. Over the years the NMJLAP 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 Judges and Lawyers Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

Employee Assistance Program Managing Stress Tool for Members

NMJLAP contracts with The Solutions Group, The State Bar's EAP service, to bring you the following: FOUR FREE counseling sessions per issue, per year. This EAP service is designed to support you and your direct family members by offering free, confidential counseling services. Want to improve how you manage stress at home and at work? Visit <https://mystresstools.com/registration/tsg-nmsba>, or visit the www.solutionsbiz.com. MyStressTools is an online suite of stress management and

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Printed Circulation	Average	Actual (Vol. 60, No. 18)
Total Number of Copies	6564	6562
Paid Subscriptions Outside-County	1132	1105
Paid Subscriptions In-County	5432	5457
Sales Through Dealers, Carriers, etc.	0	0
Other Classes Mailed Through the USPS	0	0
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Free Distribution by Mail		
Outside-County	0	0
In-County	0	0
Other Classes Mailed Through the USPS	0	0
Free Distribution by Mail	0	0
Total Free Distribution	213	200
Total Distribution	6777	6762
Copies not Distributed	0	0
Total	6777	6762
Electronic Circulation	Average	Actual
Requested Electronic Copies	8863	9083
Total Printed and Electronic Circulation	15640	15845
Percent Paid	98.64%	98.74%

I Certify that the statements made above are true and complete.

Evann Laird, *Bar Bulletin* Director of Communications and Member Services

— *Featured* —

Member Benefit



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sales@meetingbridge.com or visit
meetingbridge.com/371.**

resilience-building resources that will help you improve your overall well-being, anytime and anywhere, from any device! The online suite is available at no cost to you and your family members. Tools include:

- **My Stress Profiler:** A confidential and personalized stress assessment that provides ongoing feedback and suggestions for improving your response to 10 categories of stress, including change, financial stress, stress symptoms, worry/fear and time pressure.
- **Podcasts and videos available on demand:** Featuring experts in the field, including Dan Goleman, Ph.D., emotional intelligence; Kristin Neff, Ph.D., self-compassion; and David Katz, M.D., stress, diet and emotional eating.
- **Webinars:** Covering a variety of topics including A Step Forward: Living Through and With the Grief Process, Creating a Mindfulness Practice, and Re-entering the Workforce.

Call 505-254-3555, 866-254-3555, or visit www.solutionsbiz.com to receive FOUR FREE counseling sessions, or to learn more about the additional resources available to you and your family from the Solutions Group. Every call is completely confidential and free.

N.M. Well-Being Committee

The N.M. Well-Being Committee was established in 2020 by the State Bar of New Mexico's Board of Bar Commissioners. The N.M. Well-Being Committee is a standing

committee of key stakeholders that encompass different areas of the legal community and cover state-wide locations. All members have a well-being focus and concern with respect to the N.M. legal community. It is this committee's goal to examine and create initiatives centered on wellness.

2021 Campaign - What a Healthy Lawyer Looks Like

N.M. Well-Being Committee Meetings:

- Nov. 30, at 1 p.m.

Upcoming Legal Well-Being in Action Podcast Release Dates:

- Oct. 27th: Lawyering By Video Pt. 2
- Nov. 11th: Compassion Fatigue Pt. 2

Defenders in Recovery!

Defenders in Recovery meets every Wednesday night at 5:30 p.m. Our meeting schedule is as follows:

- 1st Wednesday of the month: AA meeting—discussion
- 2nd Wednesday of the month: NA Meeting—discussion
- 3rd Wednesday of the month—Book study. We will start on the AA Big Book and work our way through different AA and NA literature, including the Big Book, the Blue Book, Living Clean, 12x12, etc.
- 4th Wednesday of the month—Recovery Speaker and Monthly Birthday Celebration.

These meetings are open to all who seek recovery. We are a group of defenders supporting each other, sharing in each other's recovery. We are an anonymous group and not affiliated with any agency or business. Anonymity is the foundation of all of our traditions. Who we see in this meeting, what we say in this meeting, stays in this meeting. For the meeting link, send an email to defendersinrecovery@gmail.com or call Jen at 575-288-7958.

UNM SCHOOL OF LAW Law Library Hours

Due to COVID-19, UNM School of Law is currently closed to the general public. The building remains open to students, faculty and staff, and limited in-person classes are in session. All other classes are being taught remotely. The law library is functioning under limited operations, and the facility is closed to the general public until further notice. Reference services are available remotely Monday through Friday, from 9 a.m.-6 p.m. via email at UNMLawLibref@gmail.com or voicemail at 505-277-0935. The Law Library's document delivery policy requires specific citation or document titles. Please visit our Library Guide outlining our Limited Operation Policies at: <https://libguides.law.unm.edu/limiteddops>.



**NEW MEXICO RENTERS,
DO YOU NEED HELP PAYING YOUR RENT OR UTILITIES?**

WE CAN HELP.

The state of New Mexico will grant **\$170M of federal aid to New Mexicans for rental and utility assistance** to households experiencing financial hardship due to the COVID-19 outbreak.

What is covered?

Rent, utility bills (electric and gas), water and sewer, trash removal, and other expenses related to housing costs such as hotel/motel costs.

APPLY TODAY AT
RENTHelpNM.ORG OR CALL 1-833-485-1134

A New Approach to CLE

New Mexico lawyers now can earn CLE credits by weighing evidence rather than sitting passively through presentations, by serving on one-time panels of the **New Mexico Medical Review Commission**. Serving on panels also may count towards the pro bono requirements of Rule 16-601 NMRA.

Under Rule 18-204(C) NMRA, volunteer attorney panelists can earn one hour of self-study CLE credit for each panel they complete, up to four hours per compliance period. The panels of three lawyers and three health-care providers review medical malpractice claims against health care providers who are "qualified" under New Mexico's Medical Malpractice Act, NMSA 1978, Sections 41-5-1 to -29 (1976). Panelists do not need any prior experience with medicine or medical malpractice claims and both active and inactive attorney members of the State Bar can serve as panelists.

Many panels last less than two hours, and very few last more than three. Currently all panel hearings are held via Zoom, and participants choose the panels for which they are available. Panelists are drawn from members of the State Bar's Medical Review Committee; the procedures joining the committee and scheduling panelists as well as the rules of procedure for the New Mexico Medical Review Commission can be found at www.sbnm.org/Leadership/Committees/NM-Medical-Review-Committee.

Application for Family Law Initial Specialty/Exam Development Committee

As of Oct. 8, the State Bar of New Mexico will be accepting applications for the Initial Family Law Specialty/Exam Development Committee on behalf of the Legal Specialization Commission. The Committee comprises ten members who meet the minimum requirements, which can be found in the Legal Specialization Policies and Procedures.

Once available, the application will be posted online.

For the application and policies and procedures, visit www.sbnm.org/legalspecialization.

It will remain open until close of business Monday, Nov. 8.

Please contact Kate Kennedy at kkennedy@sbnm.org or 505-797-6059 with any questions.



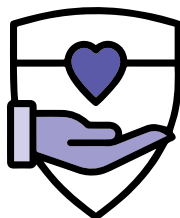
State Bar of New Mexico
Legal Specialization

Defenders in Recovery!

Recovery Meeting Available to All Legal Professionals!

Defenders in Recovery meets every Wednesday night at 5:30 p.m.
Our meeting schedule is as follows:

- ▶ **First Wednesday of the month:** AA meeting—discussion
- ▶ **Second Wednesday of the month:** NA Meeting—discussion
- ▶ **Third Wednesday of the month:** Book study—We will start on the AA Big Book and work our way through different AA and NA literature, including the Big Book, the Blue Book, Living Clean, 12x12, etc.
- ▶ **Forth Wednesday of the month:** Recovery Speaker and Monthly Birthday Celebration



These meetings are **OPEN TO ALL** who seek recovery. We are a group of defenders supporting each other, sharing in each other's recovery. We are an anonymous group and not affiliated with any agency or business.

Anonymity is the foundation of all of our traditions. Who we see in this meeting, what we say in this meeting, stays in this meeting.
For the meeting link, we can be reached at defendersinrecovery@gmail.com
or Jen at 575-288-7958, Jaime at 505-225-9330, JJ at 307-321-4752.

Feeling overwhelmed about the coronavirus? We can help!
FREE SERVICE FOR MEMBERS!

Employee Assistance Program

Get help and support for yourself, your family and your employees.

FREE service offered by NMJLAP.



State Bar of New Mexico
Judges and Lawyers
Assistance Program

Services include up to four **FREE** counseling sessions/issue/year for ANY mental health, addiction, relationship conflict, anxiety and/or depression issue. Counseling sessions are with a professionally licensed therapist. Other **FREE** services include management consultation, stress management education, critical incident stress debriefing, video counseling, and 24X7 call center. Providers are located throughout the state.



The
Solutions
Group

To access this service call 855-231-7737 and identify with NMJLAP. All calls are **CONFIDENTIAL**.
Brought to you by the New Mexico Judges and Lawyers Assistance Program

www.sbnm.org

Legal Education

October

- 13 **Child Sex Abuse Cases: Pretrial Strategies and Proceeding to Trial**
2.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 14 **Immigration Law: Economic Opportunities Through Entrepreneurship Regardless of Immigration Status**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 15 **2021 Procurement Code Institute**
3.0 G, 1.0 EP
In-Person and Live Webcast
Center for Legal Education of NMSBF
www.sbnm.org
- 19 **Drafting Special Needs Trusts for Vulnerable Clients**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org
- 20 **Drafting Arbitration Agreements in Business and Commercial Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org
- 20 **Don't Hack your Way through Cybersecurity**
1.0 G
Live Webinar
Albuquerque Bar Association
dchavez@vancechavez.com
- 20 **Whistleblowers Are Heroes: Bringing Medicaid Fraudsters to Justice**
1.5 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 21 **2021 Solo and Small Firm Institute**
4.0 G, 2.0 EP
In-Person and Live Webcast
Center for Legal Education of NMSBF
www.sbnm.org
- 22 **2021 Elder Law Institute**
5.5 G, 1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 25 **Rural New Mexico, Agriculture, and International Trade**
2.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 27 **Recent Developments in International Trade Law: Opportunities for New Mexico's Indian Country**
3.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 28 **Pay Equity and Gender: Women and Fair Pay in the Workplace**
3.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org
- 28-31 **Mediation Training**
30.0 G, 2.0 EP
Live Seminar
UNM School of Law
lawschool.unm.edu/cle/upcoming.html
- 29 **Ethics of Identifying Your Client: It's Not Always Easy**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

November

- 2 **The O.J. Simpson Trial: Attorney Blunders, Bungles and Bloopers – PLUS Amazing PowerPoint Trial Tips**
3.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 4 **Copyright + Art: Told Through Colorful Stories and Original Artwork**
2.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 4-7 **Mediation Training**
30.0 G, 2.0 EP
Live Seminar
UNM School of Law
lawschool.unm.edu/cle/upcoming.html

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.

- | | | |
|---|--|--|
| <p>5 Ethics in Discovery Practice
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>9 Family Law Update PANEL
1.0 G
Live Webinar
Albuquerque Bar Association
dchavez@vancechavez.com</p> | <p>17 Lawyer Ethics When Storing Files in the Cloud
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>5 Cross-Examination: The Big Picture and the Three Keys to Question Formation at Trial and at Depositions
1.5 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>10 Trust and Estate Planning for Retirement Plans - IRAs, 401(k)s, and More
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Structuring Minority Ownership Stakes in Companies
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>5 60 Tips, Tricks, Apps & Websites in 60 Minutes
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>15 Sketching Competing Solutions in Access to Justice
1.5 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>23 Going Over: Employment Law Issues When a Key Employee Leaves for a Competitor
1.0 G
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Julia Lacy Armstrong
Armstrong & Armstrong, PC
4630 NDCBU
218 Beimer St.
Taos, NM 87571
575-751-4818
575-751-4817 (fax)
jlarla@taoslaw.com

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On September 1, 2021:
David Wayne Barr
Office of the Third Judicial
District Attorney
845 N. Motel Blvd., 2nd Floor,
Suite D
Las Cruces, NM 88007
575-524-6370
dbarr@da.state.nm.us

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Effective September 8, 2021:
Brett Carter
Lindsey Law Office
920 Mitchell Street
Clovis, NM 88101
575-763-8900
575-763-1771
brett.lindseylaw@gmail.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

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Amy L. Glasser
1530 Southland Road
Venice, FL 34293
941-468-7997
amyglasser@outlook.com

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On September 8, 2021:
Phillip John Gloudemans
New Mexico Public Education
Department
300 Don Gaspar Avenue
Santa Fe, NM 87501
505-827-5800
phillip.gloudemans@state.
nm.us

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Effective July 28, 2021:
Tammy M. Holt
Durham, Pittard & Spalding,
LLP
PO Box 224626
2223 W. Jefferson Blvd.
(75208)
Dallas, TX 75222
214-946-8000
tholt@dpslawgroup.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS AND CHANGE OF ADDRESS

Effective September 8, 2021:
Sarah M. Karni
3440 Calle Del Monte, NE
Albuquerque, NM 87106
505-437-8513
sarahkarni777@gmail.com

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Effective September 10, 2021:
Markus W. Kolber
204 Bendix Drive, Unit B
Taos, NM 87571
575-758-3769
866-611-1542 (fax)
mwkolber@gmail.com

CLERK'S CERTIFICATE OF NAME AND ADDRESS CHANGE

As of July 16, 2021:
Allison C. LeBoeuf
f/k/a **Allison C. Warren**
3022 Rosewood Lane
Oklahoma City, OK 73120
806-470-3169
allicwarren@gmail.com

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On August 16, 2021:
Anna Terése Nassiff
Law Offices of the Public
Defender
505 Marquette Avenue, NW,
Suite 120
Albuquerque, NM 87102
505-369-3600
anna.nassiff@lpd.nm.us

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Carol M. Parker
2 Calle Ponderosa
Placitas, NM 87043
505-259-1827
cmparker822@gmail.com

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On August 11, 2021:
Parker Pollard
Office of the Second Judicial
District Attorney
520 Lomas Blvd., NW
Albuquerque, NM 87102
505-222-1079
505-241-1000 (fax)
parker.pollard@da2nd.state.
nm.us

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective August 13, 2021:
Monique M. Rangel
John Wayne Higgins & Asso-
ciates
515 Roma Avenue, NW
Albuquerque, NM 87102
505-765-5545
505-247-4462 (fax)
moniquemrangel@gmail.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective August 31, 2021:
Margaret Yvonne Romero
MY Romero Law, LLC
114 Dona Luz
Taos, NM 87571
575-758-2026
myr@homesintoas.com

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OF REINSTATEMENT
TO ACTIVE STATUS**

Effective August 4, 2021:
Luke M. Salyer
Smart Schofield Shorter
5320 900 E. #120
Salt Lake City, UT 84117
562-900-2164
lsalyer@gmail.com

**CLERK'S CERTIFICATE
OF LIMITED
ADMISSION**

On September 8, 2021:
Rebecca Fae Sherman Sheff
ACLU of New Mexico
PO Box 566
Albuquerque, NM 87103
505-266-5915
505-266-5916 (fax)
rsheff@aclu-nm.org

**CLERK'S CERTIFICATE
OF REINSTATEMENT
TO ACTIVE STATUS
AND CHANGE OF
ADDRESS**

Effective September 8, 2021:
Patricia Sue Toler
PO Box 92603
Albuquerque, NM 87199
505-702-3270
ptol9@aol.com

**CLERK'S CERTIFICATE
OF LIMITED
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On August 16, 2021:
Yvonne Zylan
Supreme Court of New
Mexico
PO Box 848
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505-827-4860
supyz@nmcourts.gov

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Advance Opinions

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

Opinion Number: 2020-NMSC-010

No: S-1-SC-37370 (filed April 6, 2020)

BEVERLY PEAVY, Deceased, by
THE PERSONAL REPRESENTATIVE
OF THE WRONGFUL DEATH ESTATE,
KEITH PEAVY,
Plaintiff-Respondent,

v.

SKILLED HEALTHCARE GROUP,
INC., SKILLED HEALTHCARE, LLC,
THE REHABILITATION CENTER OF
ALBUQUERQUE, LLC, and
PATRICIA WALKER, LPN,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI

DENISE BARELA-SHEPHERD, District Judge

Released for Publication September 8, 2020.

Rodey, Dickason, Sloan, Akin &
Robb, P.A.
JOCELYN C. DRENNAN
SANDRA L. BEERLE
Albuquerque, NM
for Petitioners

Pitman, Kalkhoff, Sicula & Dentice,
S.C.
JEFFREY ALAN PITMAN
MILWAUKEE, WI
FELIZ ANGELICA RAEL
Albuquerque, NM
for Respondent

UNM School of Law
MICHAEL B. BROWDE
DAVID J. STOUT
Albuquerque, NM

Treinen Law Office PC
ROB TREINEN
Albuquerque, NM
for Amici Curiae
New Mexico Trial Lawyers
Association and
American Association for Justice

Opinion

C. Shannon Bacon, Justice.

{1} This appeal concerns the substantive conscionability of an arbitration agreement that exempts a nursing home's likeliest claim from arbitration, but requires its residents to arbitrate their likeliest claims. We are presented with the question of what analysis a court should follow when a party seeks to make an evidentiary showing that an arbitration agreement with a facially one-sided provision—e.g., exclusion of a party's likeliest claim from mandatory arbitration—is not unconscionable because

it is reasonable and fair to except such a claim from arbitration.

{2} In 2012, the estate of Beverly Peavy filed a wrongful death lawsuit against several defendants, including The Rehabilitation Center of Albuquerque, LLC (Facility), a skilled nursing facility where Ms. Peavy was a resident. In response, the Facility filed a motion to compel arbitration, citing an arbitration agreement (Agreement) that was attendant to Ms. Peavy's admission agreement to the facility. After a two-day evidentiary hearing, the district court concluded that the Agreement was substantively unconscionable because it forced residents to arbitrate their

most likely and most important claims, but allowed the Facility to litigate its most likely claims. This appeal followed and our Court of Appeals affirmed the district court's ruling in a memorandum opinion. See *Peavy v. Skilled Healthcare Grp., Inc.*, A-1-CA-35494, mem op. ¶ 24 (N.M. Ct. App. Oct. 22, 2018) (non-precedential).

{3} Concluding that insufficient evidence was presented to justify the one-sidedness of the Agreement, we affirm the district court's order denying the motion to compel arbitration.

I. FACTS AND PROCEEDINGS

{4} Ms. Peavy was a resident of the Facility from 2007 until her death in 2010. Ms. Peavy's son, Plaintiff Keith Peavy, admitted Ms. Peavy to the Facility. Ms. Peavy's admission included Plaintiff entering into a seventy-eight page admission agreement on his mother's behalf. The admission agreement included the Agreement currently at issue. Under the Agreement, the parties would first attempt to mediate a claim, then, if necessary, arbitrate the claim before a panel of three arbitrators. The Facility would pay mediators' and arbitrators' fees, and each side would bear their own attorneys' fees.

{5} The Agreement specified that:

By signing this Arbitration Agreement, the Facility and the Resident relinquish their right to have any and all disputes associated with this Arbitration Agreement and the relationship created by the Admission Agreement and/or the provision of services under the Admission Agreement (including, without limitation, class action or similar proceedings; claims for negligent care or any other claims of inadequate care provide [sic] by the Facility; claims against the Facility or any of its employees, managers, or members) (each, a "Dispute" and, collectively, the "Disputes"), resolved through a lawsuit, namely by a judge, jury or appellate court, except to the extent that New Mexico law provides for judicial action in arbitration proceedings.

The Agreement, however, provided the following exception: "This Arbitration Agreement shall not apply to either the Facility or the Resident in any disputes pertaining to collections or discharge of residents."

{6} Ms. Peavy died in 2010. Plaintiff brought a wrongful death lawsuit against the Facility and several other defendants (collectively Defendants) alleging various causes of action arising out of Ms. Peavy's

relationship with the Facility. Relying on the Agreement, Defendants responded by filing a motion to dismiss or, alternatively, stay litigation and compel arbitration. Opposing arbitration, Plaintiff argued, *inter alia*, that the Agreement was substantively unconscionable and therefore unenforceable. The thrust of Plaintiff's substantive unconscionability argument was that the Agreement was unconscionable because the exceptions to the Agreement—collections and discharge of residents—were claims most likely to be brought by the Facility, which rendered the Agreement unfairly one-sided. Defendants requested an evidentiary hearing in part to present evidence showing that the Agreement's collections exception was not unfair or unreasonable.¹ The district court granted Defendants' request, and held a two-day evidentiary hearing (Hearing) addressing the conscionability of the Agreement.²

{7} Regarding substantive conscionability, the sole evidence offered by Defendants at the Hearing was the testimony of Kathy Correa, an administrator at the Facility. As will be discussed herein, Ms. Correa's testimony was not reliable or persuasive. After the Hearing, the district court entered its findings of fact and conclusions of law. The district court found the Agreement to be substantively unconscionable because the Agreement exempted the Facility's likeliest claim, collections disputes, while requiring its residents to arbitrate its likeliest disputes. The district court concluded that, "The evidence presented by [the Facility] as to the application of the Arbitration provision failed to rebut that the practical effect of the Agreement unreasonably favors the [Facility]." The district court further concluded that the Agreement was "ostensibly bilateral on its face" but substantively unconscionable because "it mandates arbitration of Plaintiff's most important and most likely claims while exempting from arbitration the claims most likely to be brought by the [Facility] and, as such, is unfair and unreasonably one-sided." Accordingly, the district court denied Defendants' motion to compel arbitration.

{8} Defendants appealed the district court's ruling. In a memorandum opinion, a Court of Appeals majority affirmed the district court's denial of Defendants' motion to compel arbitration. See Peavy, A-1-CA-35494, mem op. ¶ 24. The majority held that the Agreement was facially

one-sided in that the collections exception was "for a claim most likely to be pursued by Defendants." *Id.* ¶ 20. Additionally, the majority held that Defendants failed to present evidence sufficient to justify the one-sidedness of the Agreement. *Id.* A narrow dissent focused only on the evidence adduced at the Hearing, and argued that the evidence did justify the Agreement's one-sidedness. See *id.* ¶¶ 26-31 (Kiehne, J., dissenting).

II. STANDARD OF REVIEW

{9} "We apply a *de novo* standard of review to a district court's denial of a motion to compel arbitration." *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901. Questions regarding substantive unconscionability present questions of law that are also reviewed *de novo*. See *id.*

III. DISCUSSION

A. Substantive Unconscionability

{10} Unconscionability is an affirmative defense to contract enforcement. See *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 3, 304 P.3d 409. "Unconscionability is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party." *Cordova*, 2009-NMSC-021, ¶ 21. The party alleging unconscionability bears the burden of proving that a contract is unenforceable on that basis. See *Strausberg*, 2013-NMSC-032, ¶ 48. The burden of proving unconscionability, however, does not require an evidentiary showing. See *Dalton v. Santander Consumer USA, Inc.*, 2016-NMSC-035, ¶ 7, 385 P.3d 619. In other words, the party bearing the burden of proving unconscionability does not have to make any "particular evidentiary showing," but rather can persuade the factfinder "by analyzing the contract on its face." *Id.* ¶ 8.

{11} Unconscionability can be analyzed from both the substantive perspective and the procedural perspective. See *Fiser v. Dell Comput. Corp.*, 2008-NMSC-046, ¶ 20, 144 N.M. 464, 188 P.3d 1215. Although the presence of both forms of unconscionability increases the likelihood of a court invalidating the agreement, there is no requirement that both forms be present. See *id.* ¶ 22 (invalidating an arbitration clause based on substantive unconscionability alone). Procedural unconscionability

considers the factual circumstances of a contract's formation. See *Cordova*, 2009-NMSC-021, ¶ 23. "Substantive unconscionability concerns the legality and fairness of the contract terms themselves." *Id.* ¶ 22. "The substantive analysis focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns." *Id.* Substantively unconscionable contract provisions include provisions that unreasonably benefit one party over another. See *id.*; see also *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 14, 133 N.M. 661, 68 P.3d 901 (concluding an arbitration provision was substantively unconscionable because it limited only one party's ability to appeal arbitration awards).

{12} Arbitration agreements are a species of contract subject to generally applicable contract law, including unconscionability. See *Horne v. Los Alamos Nat'l Sec., L.L.C.*, 2013-NMSC-004, ¶ 16, 296 P.3d 478; see also *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (acknowledging that states may invalidate arbitration agreements based on generally applicable state contract law). Arbitration agreements are substantively unconscionable when they are unfairly and unreasonably one-sided. See *Cordova*, 2009-NMSC-021, ¶ 32 (stating that "settled standards of New Mexico unconscionability law" render unfairly and unreasonably one-sided arbitration agreements substantively unconscionable). New Mexico conscionability case law has consistently found arbitration agreements to be unfairly and unreasonably one-sided when they unjustifiably require the non-drafting party to arbitrate its likeliest claims, while allowing the drafting party to pursue its likeliest claims through litigation. See, e.g., *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶¶ 53-54, 150 N.M. 398, 259 P.3d 803; *Cordova*, 2009-NMSC-021, ¶ 32; *Padilla*, 2003-NMSC-011, ¶¶ 10, 14; *Bargman v. Skilled Healthcare Grp., Inc.*, 2013-NMCA-006, ¶¶ 20-21, 292 P.3d 1; *Ruppelt v. Laurel Healthcare Providers, LLC*, 2013-NMCA-014, ¶ 1, 293 P.3d 902; *Figuroa v. THI of N.M. at Casa Arena Blanca, LLC*, 2013-NMCA-077, ¶ 30, 306 P.3d 480.

{13} Despite this consistency, "[n]othing in these cases expressly lays down a bright-line, inflexible rule that excepting

¹The Agreement excepts both collections disputes and disputes related to the discharge of residents. The discharge aspect of the Agreement is not at issue in this case, because federal law and state law require discharge-related issues to be handled in an administrative proceeding, which necessarily exempts such issues from arbitration. See 42 C.F.R. § 483.15 (2017); 8.354.2.10 NMAC (8/1/2014). The parties agree on this point. The Agreement's discharge provision is not in controversy and not discussed here.

²At the Hearing, the parties put on evidence regarding both the procedural and substantive conscionability of the Agreement. The district court ultimately found that the Agreement was not procedurally unconscionable. The district court's finding regarding the procedural conscionability of the Agreement was not appealed and is not an issue before us.

from arbitration any claim most likely to be pursued by the defendant drafter will void the arbitration clause as substantively unconscionable. . . . [C]ases should still be examined on a case-by-case basis.” Bargman, 2013-NMCA-006, ¶ 17. A one-sided arbitration agreement is not substantively unconscionable merely by way of its one-sidedness. Rather, our substantive unconscionability law requires a determination that the one-sidedness of an arbitration agreement is unfair and unreasonable. See Dalton, 2016-NMSC-035, ¶ 21 (“Gross unfairness is a bedrock principle of our unconscionability analysis.”); Cordova, 2009-NMSC-021, ¶ 32 (concluding an arbitration agreement was substantively unconscionable because it was unreasonable and unfairly one-sided).

B. The Substantive Unconscionability Analysis

{14} We address Defendants’ arguments that the district court and Court of Appeals applied the wrong analytical standard in concluding that the Agreement was substantively unconscionable. We conclude that the lower courts applied the correct analysis, and we take this opportunity to clarify the analysis a district court should engage in when analyzing the substantive unconscionability of an arbitration agreement.

1. The lower courts applied the correct analysis

{15} According to Defendants, New Mexico conscionability case law sets forth the possibility that a defendant may present evidence showing that an arbitration exception is reasonable and fair despite that exception’s facial one-sidedness—that the arbitration exception is one-sided, but justifiably fair and reasonable in light of the evidence presented. Defendants rely on Bargman, 2013-NMCA-006, for this proposition. Defendants contend there is a contrasting analytical approach, derived from Ruppelt, 2013-NMCA-014, that holds that a defendant may present evidence rebutting the presumption of an arbitration agreement’s one-sidedness. The distinction between these two proposed approaches hinges on what the evidence must show: that an arbitration agreement’s one-sidedness is justified because it is reasonable and fair, or that an arbitration agreement is not actually one-sided. Defendants argue that both the district court and Court of Appeals applied the Ruppelt approach, instead of the Bargman approach, which was in error because Defendants presented evidence to show the reasonableness and fairness of the Agreement, not to rebut the presumed one-sidedness of the Agreement.

{16} To begin, we reject Defendants’ argument that Ruppelt sets forth any discernable analytical standard. Ruppelt’s

conscionability focus was whether the arbitration agreement in that case was facially one-sided. 2013-NMCA-014, ¶¶ 10-15. Ruppelt acknowledged the possibility that evidence could be offered in determining the conscionability of an arbitration agreement, but did not offer any analytical guidance because the defendants in that case expressly declined the Court of Appeals’ suggestion to remand the case for further evidentiary development. Id. ¶ 17.

{17} We do, however, agree that Bargman contemplates that a defendant drafter may present evidence justifying the facial one-sidedness of an arbitration agreement. In Bargman, our Court of Appeals was confronted with the substantive unconscionability of an arbitration agreement contained in a defendant nursing home’s admission agreement. 2013-NMCA-006, ¶ 1. That arbitration agreement exempted from arbitration disputes pertaining to collections. Id. ¶ 4. In evaluating this exception, the Court of Appeals stated that New Mexico conscionability case law does not “lay[] down a bright-line, inflexible rule that excepting from arbitration any claim most likely to be pursued by the defendant drafter will void the arbitration clause as substantively unconscionable. . . . [C]ases should still be examined on a case-by-case basis.” Id. ¶ 17. Applying this case-by-case approach, the Bargman court determined the arbitration agreement was facially one-sided, but remanded the case to the district court so that the defendant nursing home could present evidence “tending to show that the collections exclusion [was] not unreasonably or unfairly one-sided such that enforcement of it [would be] substantively unconscionable.” Id. ¶ 24.

{18} Bargman aptly pointed out that no New Mexico case has proposed a “bright-line, inflexible rule” that excepting a defendant drafter’s most likely claim from arbitration necessarily renders an arbitration agreement unconscionable. Id. ¶ 17. Instead, New Mexico conscionability cases establish that an arbitration agreement is substantively unconscionable if its exemptions are unreasonably and unfairly one-sided. See, e.g., Dalton, 2016-NMSC-035, ¶ 21 (“We are not persuaded that allowing both parties in this case complete access to small claims proceedings, even if one party is substantially more likely to bring small claims actions, is at all unfair.” (emphasis added)); Rivera, 2011-NMSC-033, ¶ 54 (holding an arbitration agreement was unconscionable because it was unfairly one-sided); Cordova, 2009-NMSC-021, ¶ 32 (concluding that a loan company’s “arbitration scheme it imposed on its borrowers [was] so unfairly and unreasonably one-sided that it [was] substantively unconscionable” (emphasis added));

Figueroa, 2013-NMCA-077, ¶ 30 (“[W]e refuse to enforce an agreement where the drafter unreasonably reserved the vast majority of his claims for the courts, while subjecting the weaker party to arbitration on essentially all of the claims that party is likely to bring.” (emphasis added)). Indeed, under New Mexico law, unfair and unreasonable one-sidedness renders a contract substantively unconscionable. See, e.g., Dalton, 2016-NMSC-035, ¶ 21 (“Gross unfairness is a bedrock principle of our unconscionability analysis.”); State ex rel. King v. B&B Inv. Grp., Inc., 2014-NMSC-024, ¶ 32, 329 P.3d 658 (holding signature loan contracts were substantively unconscionable because of their unfair and unreasonable interest rates).

{19} While no bright-line rule exists, New Mexico cases have consistently found arbitration agreements to be one-sided when the agreements exclude the drafting party’s likeliest claims from arbitration while subjecting the non-drafting party’s likeliest claims to arbitration. See, e.g., Rivera, 2011-NMSC-033, ¶ 54; Cordova, 2009-NMSC-021, ¶ 32; Ruppelt, 2013-NMCA-014, ¶ 18; Figueroa, 2013-NMCA-077, ¶ 30. These cases have focused on the facial one-sidedness of the arbitration agreements that is readily apparent from analyzing the language of the agreements. Evidence was not considered in any of these cases to show that the arbitration exceptions were not unreasonable or unfair. We conclude that under New Mexico conscionability law a presumption of unfair and unreasonable one-sidedness arises when a drafting party excludes its likeliest claims from arbitration, while mandating the other party arbitrate its likeliest claims. This presumption stems from the lack of mutuality that correlates with overly one-sided contracts. See, e.g., New v. GameStop, Inc., 753 S.E.2d 62, 77 (W. Va. 2013) (recognizing that “in assessing substantive unconscionability, the paramount consideration is mutuality” (alteration, internal quotation marks, and citation omitted)); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000) (finding an arbitration agreement substantively unconscionable because the agreement’s one-sidedness created a lack of mutuality); Iwen v. U.S. W. Direct, 1999 MT 63, ¶ 32, 977 P.2d 989 (concluding an arbitration agreement lacked mutuality, and contained unreasonably one-sided arbitration exceptions), superseded on other grounds by Tedesco v. Home Sav. Bancorp, Inc., 2017 MT 304, ¶ 22, 407 P.3d 289. We emphasize, however, that this presumption may be overcome by an evidentiary showing that justifies the one-sidedness of the arbitration agreement. In other words, a defendant drafter may offer evidence showing that an arbitration agreement’s

exceptions are reasonable and fair, such that enforcement of the agreement is not substantively unconscionable. See Bargman, 2013-NMCA-006, ¶ 24.

{20} With this reasoning, we clarify the two-step analysis a court should apply when confronted with the substantive conscionability of an arbitration agreement.³ First, the court should analyze the arbitration agreement on its face. The court should look to the face of the arbitration agreement “to determine the ‘legality and fairness of the contract terms themselves.’” Dalton, 2016-NMSC-035, ¶ 8 (quoting Cordova, 2009-NMSC-021, ¶ 22). As noted above, an arbitration agreement is facially one-sided when it excludes the drafting party’s likeliest claim from arbitration, but requires the non-drafting party to arbitrate its likeliest claims.

{21} Second, if the court determines the arbitration agreement is facially one-sided, the court should allow the drafting party to present evidence that justifies the agreement is fair and reasonable, such that enforcement of the agreement would not be substantively unconscionable. See Bargman, 2013-NMCA-006, ¶ 24. The evidence need not show that the agreement is not one-sided, but rather must justify that the agreement’s exceptions are fair and reasonable. See Dalton, 2016-NMSC-035, ¶ 21 (emphasizing that fairness is the key consideration in the unconscionability analysis); Cordova, 2009-NMSC-021, ¶ 22 (“The substantive analysis focuses on such issues as whether the contract terms are commercially reasonable and fair[.]”).

{22} In the case at bar, both the Court of Appeals and the district court engaged in an analysis consistent with the approach clarified above. At the district court level, the court began its substantive unconscionability analysis by concluding that, on its face, the Agreement was one-sided because it exempted the Facility’s likeliest claim, but required its residents to arbitrate their claims. Next, the district court concluded that Defendants had failed to present evidence justifying the one-sidedness of the Agreement. These two conclusions by the district court demonstrated that it 1) analyzed the Agreement on its face, and 2) considered evidence of whether the Agreement’s one-sided exceptions were justified. Our Court of Appeals likewise engaged in the two-part analysis by first determining that the Agreement was facially one-sided, and then by next addressing “whether Defendants presented sufficient evidence to show why . . . the collections exclusion was not unfairly one-sided and was justified.” Peavy, A-1-CA-35494, mem op. ¶ 15.

2. Defendants misapply Dalton

{23} We reject Defendants’ attempt to draw analytical support from our opinion in Dalton. Dalton is decidedly distinguishable from the case at hand. In Dalton, this Court confronted an arbitration agreement that allowed either party to compel arbitration for any claim that exceeded the jurisdiction of small claims court (\$10,000). 2016-NMSC-035, ¶ 1. This Court found that such an agreement was not “at all unfair,” even considering that the drafting party was “substantially more likely to bring small claims actions[.]” Id. ¶ 21. Our decision in Dalton was heavily grounded in the fact that the arbitration agreement in that case exempted any claim—not just specific claims—from mandatory arbitration as long as that claim did not exceed \$10,000. Id. ¶ 22. Moreover, Dalton pointed out the fairness of this \$10,000 threshold, because it bilaterally allowed either party to avail itself of the benefits, economy, and efficiency of small claims court. Id. In the instant case, only a specific claim—the Facility’s likeliest—is exempted from arbitration. Additionally, unlike Dalton, no language exists in the Agreement that limits the extent of the Agreement’s exceptions.

{24} We disagree with Defendants that Dalton marks an analytical departure from New Mexico conscionability case law. Dalton reaffirmed, rather than departed from, existing substantive conscionability case law. Dalton did so by illustrating that a court should first look to an arbitration agreement on its face to determine if the agreement benefits the drafting party in a one-sided manner. See id. ¶ 8; accord Rivera, 2011-NMSC-033, ¶¶ 53-54 (determining an arbitration agreement was substantively unconscionable because it unreasonably benefited the drafting party by excluding its likeliest claims from mandatory arbitration); Cordova, 2009-NMSC-021, ¶ 25 (“Contract provisions that unreasonably benefit one party over another are substantively unconscionable”). The Dalton Court was not tasked with considering evidence to justify a one-sided arbitration agreement. Nor was it necessary for the Court to consider evidence of justification, because the Court concluded that the arbitration agreement in that case was unambiguously beneficial to both parties. In other words, the Dalton Court did not have to consider evidence to justify the arbitration agreement’s “practical consequences” because the benefits to both parties to the agreement were facially apparent. See 2016-NMSC-035, ¶¶ 22-23. Evidence was not presented in Dalton

because the arbitration agreement in that case was not one-sided. In light of the differences in the language of the arbitration agreement in Dalton and the Agreement in the case at bar, we fail to see what guidance Dalton offers to the case before us.

C. The Agreement is Substantively Unconscionable

{25} Having clarified the conscionability analysis to be applied to arbitration agreements, we turn now to the Agreement before us. We hold the Agreement is facially one-sided in that it excludes the Facility’s likeliest claim from mandatory arbitration, but requires its residents to arbitrate their likeliest claims. We conclude that Defendants did not justify this one-sidedness because they did not present evidence showing that the Agreement’s collections exception was reasonable and fair. We therefore hold that the Agreement is substantively unconscionable.

1. The Agreement is facially one-sided

{26} As set forth above, we begin by analyzing the Agreement on its face. Our Court of Appeals has confronted arbitration agreements with the exact same language as the Agreement currently before us. In those cases our Court of Appeals found the language of the arbitration agreement to be one-sided. See Bargman, 2013-NMCA-006, ¶¶ 1, 4; Ruppelt, 2013-NMCA-014, ¶¶ 1, 3; see also Figueroa, 2013-NMCA-077, ¶ 28 (addressing similar language to the Agreement). We see no reason to disagree here. Relying on this established case law, we hold that the Agreement is one-sided on its face because it exempts the Facility’s likeliest claim, but requires its residents to arbitrate their likeliest claims. We now turn to whether evidence presented at the district court justified the one-sidedness of the Agreement as fair and reasonable.

2. Defendants failed to justify the one-sidedness of the Agreement because the evidence did not show that the Agreement’s collections exception was fair and reasonable

{27} The district court specifically held the Hearing to address the conscionability of the Agreement, including determining whether the Agreement’s one-sidedness was fair and reasonable. Defendants presented the testimony of Ms. Correa at the Hearing in order to show the Agreement’s exceptions were fair and reasonable. Ms. Correa’s duties at the Facility included ensuring the Facility complied with its internal policies and procedures, monitoring the Facility’s accounts receivable, and pursuing informal collection efforts if

³Our decision today does not alter our holdings in *Strausberg*, 2013-NMSC-032. Under *Strausberg*, the party raising the affirmative defense of substantive unconscionability has the initial burden of persuading the factfinder that the contract should not be enforced on that basis. *Id.* ¶ 48.

needed. Ms. Correa detailed the Facility's collections policy, which included "aggressive collection efforts," such as sending letters to residents threatening legal action, and ultimately allowed for the Facility to sue a resident. Ms. Correa further testified that: 1) in her experience the Facility had never sued a resident for a collections claim despite Facility policy and the Agreement allowing for such action; 2) the range of debt owed by a resident typically ranged from \$1-\$10,000, but in her experience the debt could exceed \$10,000, even getting as high as \$76,000; 3) she believed that it was not in the Facility's best interest to sue residents over debts less than \$10,000 because she believed it was not cost-effective; and 4) in her estimate the costs of arbitrating a collections claim under the Agreement's arbitration scheme was not financially feasible due to the typically lower sums involved in resident collections actions. This evidence was not disputed.

{28} Defendants maintain that this evidence sufficiently shows that arbitrating collections claims would be cost-prohibitive, such that it is fair and reasonable to except those claims under the Agreement. We disagree. Ms. Correa's testimony failed to quantify the costs associated with hiring arbitrators. Ms. Correa merely speculated as to the costs of arbitrating and litigating a collections action. Defendants could have, but did not, present evidence showing that the costs associated with arbitrating collections disputes were so cost-prohibitive that they warranted exception from arbitration. Even assuming *arguendo* that it is fair and reasonable to avoid arbitrating collections claims because they involve lower sums of money, the Agreement would still fail because that same rationale would apply to any low-value claim, not just collections claims. Cf. Dalton, 2016-NMSC-035, ¶ 22 (concluding that an arbitration agreement was fair and reasonable because it excepted any claim under \$10,000 from arbitration, thus avoiding the costs of arbitration for any claim involving lower sums of money).

For example, if a resident had a breach of contract action against the Facility alleging damages under \$10,000, the claim would be arbitrated and the Facility would bear the very same costs that Defendants deem prohibitive in collections actions. The evidence fails to justify why only collections actions, as opposed to any low-value claim, are excepted from the Agreement.

{29} We are unpersuaded that Ms. Correa's testimony established that the Facility would not sue a resident in a collections action unless it was financially feasible to do so. We note that Ms. Correa lacked any capacity to speak on behalf of the Facility. At the Hearing, she was not tendered as a witness under Rule 1-030(B)(6) NMRA, and to the extent she could speak about the Facility's policy, she clarified that the information she offered was her own "personal philosophy." Moreover, Ms. Correa's testimony fails to indicate at what monetary threshold the Facility would pursue a collections claim. The benefits of arbitration would certainly avail themselves when collections claims have higher value. High-value collections claims were not an unrealistic possibility to the Facility; Ms. Correa testified that it was not uncommon for a resident's debt to exceed \$10,000, and she personally knew of one resident whose debt was well over \$75,000. Defendants failed to present evidence justifying why it would be reasonable and fair to except high-value collections claims from arbitration. Indeed, if we allowed the Facility to unjustifiably circumvent arbitrating high-value collection claims, we would be upholding a contract that disfavors arbitration. Such an action by this Court would be in conflict with our State's strong public policy favoring resolution of disputes through arbitration. See Horne, 2013-NMSC-004, ¶ 16.

{30} Finally, we address the Court of Appeals' dissent. In the dissent's view, evidence presented by Defendants did justify the Agreement's collections exception. See Peavy, A-1-CA-35494, mem op.

¶ 31 (Kiehne, J., dissenting). According to the dissent, the "practical effect" of the exception was null, since the Facility had never brought [a collections claim against a resident], nor was it likely to do so." *Id.* This reasoning is unavailing. The practical effect of the Agreement was to exclude the Facility's likeliest claim from arbitration. See Bargman, 2013-NMCA-006, ¶ 19; Ruppelt, 2013-NMCA-014, ¶ 15. Defendants were afforded the opportunity to present evidence justifying the Agreement's collections exception as reasonable and fair, but failed to do so. Moreover, although the Facility had not sued a resident in a collections action, that offers little import as to why the exception existed within the Agreement at all, or how that fact would indicate that the Facility would not sue a resident in the future. As the Court of Appeals' majority pointed out, "we consider the mere fact that thus far it is too expensive for a facility to pursue [a collections claim] to be little assurance that one day it will not be." Peavy, A-1-CA-35494, mem. op. ¶ 17.

IV. CONCLUSION

{31} Defendants failed to present evidence justifying the one-sidedness of the Agreement as fair and reasonable. Without this justification the Agreement is substantively unconscionable. For these reasons, and reasons discussed above, we affirm the district court's order denying the motion to compel arbitration. We remand this matter to the district court for further proceedings consistent with this opinion.

{32} **IT IS SO ORDERED.**
C. SHANNON BACON, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
BARBARA J. VIGIL, Justice
DAVID K. THOMSON, Justice
JAROD K. HOFACKET, Judge
Sitting by designation

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

Opinion Number: 2020-NMSC-011

No: S-1-SC-36932 CONSOLIDATED WITH
No. S-1-SC-36933 (filed June 25, 2020)

STATE OF NEW MEXICO,
Plaintiff-Respondent/Cross-Petitioner,

v.

RICHARD J. SENA,
Defendant-Petitioner/Cross-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

STEPHEN K. QUINN, District Judge

Released for Publication September 8, 2020.

BENNETT J. BAUR,
Chief Public Defender
ALLISON H. JARAMILLO,
Assistant Appellate Defender
Santa Fe, NM
for Petitioner/Cross-Respondent

HECTOR H. BALDERAS,
Attorney General
MARKO DAVID HANANEL,
Assistant Attorney General
Santa Fe, NM
for Respondent/Cross-Petitioner

Opinion

Michael E. Vigil, Justice.

{1} A jury found Defendant guilty of one count of each of the following crimes: criminal sexual penetration (CSP) in the first degree in violation of NMSA 1978, Section 30-9-11(D)(2) (2009); kidnapping in the first degree in violation of NMSA 1978, Section 30-4-1 (2003); armed robbery in violation of NMSA 1978, Section 30-16-2 (1973); aggravated burglary in violation of NMSA 1978, Section 30-16-4(C) (1963); and criminal sexual contact (CSC) in violation of NMSA 1978, Section 30-9-12(C)(3) (2003). In addition, Defendant entered a no contest plea to being a felon in possession of a firearm in violation of NMSA 1978, Section 30-7-16 (2001, amended 2018, 2019), and admitted to being a habitual offender and subject to an enhanced sentence. Defendant was sentenced to the New Mexico Department of Corrections for a total of forty years and six months. Defendant appealed to the Court of Appeals. *State v. Sena*, 2018-NMCA-037, 419 P.3d 1240, cert. granted, 2018-NMCERT-___ (S-1-SC-36932, May 25, 2018).

{2} In the Court of Appeals, Defendant asserted the following errors: (1) the district court failed to grant a mistrial

when Defendant did not testify, and the prosecutor in closing arguments argued that Defendant's demeanor during Victim's trial testimony was evidence of Defendant's guilt, (2) the instruction on kidnapping was erroneous in failing to require a finding that the restraint used during the kidnapping was not merely incidental to another crime, (3) Defendant's convictions of both aggravated burglary and CSP and CSC were double jeopardy violations, (4) the State failed to present sufficient evidence to support the convictions of CSP and kidnapping, and (5) the district court abused its discretion by admitting the results of DNA testing into evidence. *See id.* ¶¶ 1, 7, 20, 26, 27, 32, 34, 51.

{3} In a formal opinion the Court of Appeals (1) rejected Defendant's argument that the district court erred in denying his motion for a mistrial, (2) held that the omission of incidental restraint in the instruction on kidnapping constituted fundamental error, and (3) held that Defendant's convictions of aggravated burglary, CSP, and CSC were double jeopardy violations. *See id.* ¶¶ 7-19, 20-25, 34-48. The Court of Appeals also determined that the State presented sufficient evidence to support the convictions of CSP and kidnapping and that the district court did not err in admitting the results of DNA testing into evidence. *See id.* ¶¶ 26-33, 49-55.

{4} We granted the petitions for certiorari

filed by Defendant and the State to review the foregoing conclusions. We hold that the Court of Appeals (1) erred in affirming the district court order denying Defendant's motion for a mistrial, (2) erred in reversing Defendant's kidnapping conviction for fundamental error on grounds that the elements instruction did not address incidental restraint, (3) erred in concluding that Defendant's convictions for aggravated burglary, CSP, and CSC violated double jeopardy, and (4) correctly held that the State presented substantial evidence to support Defendant's convictions for CSP and kidnapping. Because we remand for a new trial, it is not necessary, and we decline to address, whether the district court erred in admitting the results of DNA testing into evidence.

A. BACKGROUND

{5} Victim, who lived alone and was in her seventies, awoke at 3:30 a.m. to Defendant's gloved hand over her mouth and a knife to her head. When Victim tried to scream, Defendant told her to stop and threatened to kill her. Defendant then ordered Victim out of bed and demanded she undress. As Victim undressed, Defendant asked Victim where her purse was, and Victim replied that it was in the closet. Defendant took Victim's wallet containing thirty dollars.

{6} Victim told Defendant that she needed to use the restroom. Defendant allowed Victim to go to the restroom while he watched and began masturbating. After she finished using the restroom, Defendant ordered Victim back to bed, telling her to lie face down on a pillow. Defendant got on top of Victim and penetrated Victim's vagina and anus with his penis. After a few minutes, Defendant instructed Victim to get on her knees and continued penetrating Victim's vagina and anus with his penis. Defendant then told Victim to turn over, at which point he began fondling Victim's breasts and digitally penetrating Victim's vagina.

{7} After the sexual assaults, Defendant asked Victim about a rifle leaning against the bedroom wall. Defendant proceeded to leave the bedroom, and after waiting a few minutes, Victim attempted to inch out of bed. Defendant, who was watching Victim from the living room, ordered Victim back into bed. After waiting awhile longer, Victim got out of bed and entered the living room where she found her front door wide open. Victim discovered that her wallet and rifle were missing, as were the cordless telephones from the living room and Victim's bedroom. Victim also noticed an open sliding window in the dining room. Victim closed the front door, locked it, and called police.

{8} Police arrived shortly thereafter, discovering shoe prints directly below the open sliding window. Police tracked the shoe prints to the residence of Defendant's stepmother and stepfather, where Defendant was hiding wearing socks but no shoes. Inside the residence, police collected a pair of sneakers consistent with the shoe print found at Victim's home. Police also followed tire tread tracks to a Honda parked outside the residence, which was identified as belonging to Defendant. After obtaining a search warrant for the Honda, police found leather gloves, a rifle, and a large knife. The gloves were consistent with the description that Victim provided. Victim also identified the rifle as the one stolen by Defendant and the knife as the one used during the incident.

{9} Following the incident, Victim was examined by a sexual assault nurse examiner (SANE). The examination revealed a half centimeter "open area" consistent with force on Victim's vagina. The SANE obtained various swabs from both Victim and Defendant for DNA testing, including a swab of Victim's left, upper thigh and a swab of Defendant's lower abdomen. No semen was detected on any of the swabs that were tested, but Victim's DNA was detected on Defendant's hands.

{10} We now address the issues raised by Defendant and the State in their respective petitions for certiorari.

B. DISCUSSION

1. The Prosecutor's Arguments During Closing Arguments

{11} The Court of Appeals held that "commenting on the demeanor of a non-testifying defendant is improper, as it is neither probative of innocence or guilt, nor is it evidence that an appellate court can properly review." *Sena*, 2018-NMCA-037, ¶ 12. We agree with this holding. However, the Court of Appeals erred in concluding that the prosecutor's arguments in this case "did not invade a distinct constitutional protection" and did not deprive Defendant of a fair trial. *Id.* ¶¶ 18, 19 (internal quotation marks and citation omitted). For the reasons that follow, we reverse and remand for a new trial.

{12} While the prosecutor was making her closing arguments, the following exchanges took place.

OPEN COURT

Prosecutor:

Did you notice, also, ladies and gentlemen, when she [Victim] testified, that man [Defendant] wouldn't even look at her. He watched every other witness on the stand.

Defense Counsel:

Objection, your honor. There's no evidence of that. May I approach the bench?

Prosecutor:

Judge, this is . . . (unintelligible)
SIDEBAR CONFERENCE

Defense Counsel:

That's commenting on his silence. He's not testifying. What he did or didn't do is not in the record at all. We object and, strongly object to her reference of what □ against his presumption of innocence. He didn't testify. There was absolutely no evidence. That's done to inflame. We move for a mistrial.

Prosecutor:

Judge, that is not . . . (unintelligible)

Defense Counsel:

No one testified to that.

Prosecutor:

(unintelligible)

Defense Counsel:

No one testified to that.

Court:

The jury's just going to have to rely on their own memories of what they observed. And she's not commenting on his silence, she's just commenting on what he did. So, objection is overruled.

OPEN COURT

Court:

Objection is overruled. The jury will have to rely on their own memories as to what they observed (unintelligible).

Prosecutor:

Did you watch him in the courtroom when she took the stand? He wouldn't even look at her. He looked at every other witness in the eye, but he wouldn't look at her. And why wouldn't he look at her? Because he knew what he'd done. He knew what he did.

{13} Defendant contends that the Court of Appeals erred when it held that while the prosecutor's arguments were improper, they were not prejudicial. Defendant asserts that the district court erred because the prosecutor's arguments were not only improper but were prejudicial and contributed to Defendant's convictions.

{14} The State concedes that the prosecutor's arguments were improper because they "elevated [Defendant's] courtroom demeanor to the status of evidence and encouraged the jury to treat it as evidence of guilt." However, the State contends the Court of Appeals correctly held that the comments were not prejudicial because "Defendant's right to have his guilt or innocence determined solely on the basis of the evidence introduced at trial" does not "transform any reference to matters not in evidence into a Fifth Amendment violation." (Internal quotation marks and citations omitted.) We disagree and reverse the Court of Appeals.

a. Standard of review

{15} We review a district court's denial of a motion for mistrial under an abuse of discretion standard. *State v. Johnson*, 2010-NMSC-016, ¶ 49, 148 N.M. 50, 229 P.3d 523. "We will find an abuse of discretion if a court's ruling is clearly untenable or contrary to logic and reason. Additionally, a court abuses its discretion if it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *Freeman v. Fairchild*, 2018-NMSC-023, ¶ 29, 416 P.3d 264 (internal quotation marks and citations omitted). See also *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (stating that a decision premised on a misapprehension of the law may be characterized as an abuse of discretion). In addressing Defendant's arguments that raise questions of constitutional law, which we review de novo, see *State v. DeGraf*, 2006-NMSC-011, ¶ 6, 139 N.M. 211, 131 P.3d 61 (holding that this Court reviews questions of constitutional law de novo), we ask whether the district court applied the wrong legal standard in denying Defendant's motion for mistrial.

b. The prosecutor's arguments resulted in reversible error

{16} In *State v. Sosa*, we identified three factors to consider when reviewing error in closing arguments: "(1) whether the statement invades some distinct constitutional protection; (2) whether the statement is isolated and brief, or repeated and pervasive; and (3) whether the statement is invited by the defense." 2009-NMSC-056, ¶ 26, 147 N.M. 351, 223 P.3d 348.

{17} Considering the first factor, we are more likely to conclude that there is reversible error when the prosecutor's comments invade "a distinct constitutional protection." *Id.* ¶ 27. The prosecutor's comments in this case implicated Defendant's Fifth Amendment right to silence and thus, invaded a "distinct constitutional protection."

{18} The Fifth Amendment to the United States Constitution establishes a sacrosanct constitutional right in its direction that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. The Bill of Rights of the New Mexico Constitution likewise directs, "No person shall be compelled to testify against himself in a criminal proceeding[.]" N.M. Const. art. II, § 15. When a prosecutor makes a comment that invites the jury to draw an adverse conclusion from a defendant's failure to testify, the defendant's Fifth Amendment privilege is violated. *DeGraf*, 2006-NMSC-011, ¶ 8 (citing *Griffin v. California*, 380 U.S. 609, 614 (1965)). Such remarks compromise a defendant's right to a fair trial and result

in fundamental error. *State v. Rojo*, 1999-NMSC-001, ¶ 55, 126 N.M. 438, 971 P.2d 829.

{19} Prosecutor comments on a defendant's right not to testify may be direct or indirect. *State v. Rice*, 573 S.W.3d 53, 75 (Mo. 2019) (en banc). A direct comment explicitly refers to the fact that the defendant did not testify, whereas an indirect comment is "one reasonably apt to direct the jury's attention to the defendant's failure to testify." *Id.* (internal quotation marks and citation omitted). Both direct and indirect comments on a defendant's failure to testify are forbidden. See *State v. Clark*, 1989-NMSC-010, ¶ 48, 108 N.M. 288, 772 P.2d 322, *disapproved of on other grounds by State v. Henderson*, 1990-NMSC-030, ¶ 38, 109 N.M. 655, 789 P.2d 603. Thus, all prosecutorial arguments drawing the jury's attention to the fact that it has not heard from the defendant during trial because the defendant has exercised his constitutional right not to testify are impermissible and violate the defendant's right against self-incrimination. See *Rice*, 573 S.W.3d 53, 74 (holding that once a defendant has invoked the right to remain silent, "any reference to [that] silence is improper" (emphasis in original)).

{20} In her closing argument, the prosecutor asked the jury, "Did you watch [Defendant] in the courtroom when [Victim] took the stand? He wouldn't even look at her. He looked at every other witness in the eye, but he wouldn't look at her." The argument had no purpose other than to invite the jury to draw an adverse conclusion from Defendant's failure to get on the stand and explain why he would not look at Victim as she testified. After Defendant objected, the jury heard the district court overrule the objection, which placed the "stamp of judicial approval" on the improper argument, further magnifying the prejudice. See *Boulden v. State*, 787 S.W.2d 150, 153 (Tex. Ct. App. 1990) (internal quotation marks and citation omitted) ("[W] here a trial court overrules an objection to improper argument, it places 'the stamp of judicial approval' on the argument, magnifying the harm." (citation omitted)). Having obtained the district court's stamp of judicial approval, the prosecutor compounded the prejudice by repeating the statement and adding, "And why wouldn't he look at her? Because he knew what he'd done. He knew what he did." We would be remiss if we did not add that the closing arguments were recorded and we have the benefit of knowing not only what words the prosecutor spoke but her tone as well. The prosecutor's accusatory tone was tantamount to pointing a finger at Defendant.

{21} "Closing argument is an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment

by which the States are bound." *Hughes v. State*, 437 A.2d 559, 568 (Del. 1981) (internal quotation marks and citation omitted). A prosecutor's arguments during summation regarding a nontestifying defendant's courtroom demeanor are irrelevant as it is not evidence that is in the record and therefore is beyond the scope of summation. *Id.* at 572. "Moreover, the practice is pregnant with potential prejudice. A guilty verdict must be based upon the evidence and the reasonable inferences therefrom, not on an irrational response which may be triggered if the prosecution unfairly strikes an emotion in the jury." *Id.*

{22} Reference to a nontestifying defendant's courtroom demeanor is not merely a reference to something not in evidence, it is an attack on a defendant's Fifth Amendment right not to testify. *United States v. Carroll*, 678 F.2d 1208, 1209 (4th Cir. 1982). In *United States v. Schuler*, 813 F.2d 978, 979 (9th Cir. 1987), the prosecutor commented that the defendant laughed as witnesses testified. The *Schuler* court determined that such comments by a prosecutor "tend to eviscerate the right to remain silent by forcing the defendant to take the stand in reaction to or in contemplation of the prosecutor's comments." *Id.* at 982. Even drawing subtle attention to a defendant's failure to testify is not permissible. *United States v. Rodriguez*, 627 F.2d 110, 112 (7th Cir. 1980). In *Rodriguez*, the prosecutor commented that the defendant was "very quiet at the end of counsel table." *Id.* at 111. The *Rodriguez* Court counseled that "[t]he remarks, harmless or not, infringing upon such a basic and elementary constitutional underpinning of our justice system, simply should not occur." *Id.* at 113.

{23} *Dickinson v. State*, 685 S.W.2d 320 (Tex. Crim. App. 1984) (en banc), applied these principles. Commenting on the defendant's courtroom manner, the prosecutor stated, "And you know, another pretty important [piece of] evidence that you can consider is what you've observed in this courtroom. The demeanor in this courtroom of this man right here. You know, when [the complainant] was led into that courtroom she hid her face. She hid her face in shame." *Id.* at 325 (second alteration in original). The prosecutor added, "You haven't seen one iota of remorse, one iota of shame." *Id.* The *Dickinson* Court concluded that these were not comments on the defendant's demeanor but indirect comments on the defendant's failure to testify, characterizing the comments as a "transparent attempt to call the jury's attention to the appellant's invocation of his right to remain silent." *Id.* at 324-25.

{24} The principles were reiterated in *Coyle v. State*, 693 S.W.2d 743 (Tex. App. 1985), when the prosecutor stated, "I want

to talk about what he [the defendant] looks like in the courtroom right now. You've looked at him throughout the trial—and that's all I'm talking about, just his actions here in this courtroom while you've watched him." *Id.* at 743. Applying *Dickinson*, the *Coyle* Court held that the prosecutor's comments "amounted to directing the jury's attention to the failure of the appellant to testify[.]" *Id.* at 744-45 (internal quotation marks and citation omitted).

{25} *Dickinson* and *Coyle* are highly persuasive. The prosecutor's arguments in this case were a direct comment on Defendant's exercise of his constitutional right not to testify and were highly improper. The prosecutor's arguments directly asked the jury to draw adverse conclusions from the fact that Defendant did not take the witness stand and explain himself. The district court applied an incorrect legal standard in construing the prosecutor's arguments as referring to Defendant's demeanor rather than his failure to testify.

{26} The second factor requires us to consider whether the prosecutor's comments were brief and isolated or repeated and pervasive. *Sosa*, 2009-NMSC-056, ¶ 29. The State asserts that while the argument was repeated, it was isolated and brief. It lasted twenty seconds within a twenty-minute closing argument, and it was not mentioned elsewhere at trial and was "certainly not pervasive."

{27} We are not persuaded. After hearing the prosecutor's improper argument, the jury heard the district court overrule Defendant's objection to the argument. "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Griffin*, 380 U.S. at 614. The prosecutor then took advantage of the ruling and repeated and embellished her improper argument, giving it additional emphasis. We once again remind prosecutors of what we said over fifty years ago:

The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be

heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.

State v. Rowell, 1966-NMSC-231, ¶ 11, 77 N.M. 124, 419 P.2d 966 (quoting *Miller v. Territory of Oklahoma*, 149 F. 330, 339 (8th Cir. 1906)).

{28} Finally, we turn to the third factor—whether the error was invited by the defense. *Sosa*, 2009-NMSC-056, ¶ 26. The State does not argue, and we decline to conclude, that Defendant somehow “opened the door” to the prosecutor’s comments. All three *Sosa* factors support a conclusion of reversible error. We therefore proceed to the State’s argument that no prejudice resulted.

{29} In the case of a constitutional error, “it is harmless only if the challenger can prove there is no reasonable possibility that the error affected the verdict.” *State v. Thomas*, 2016-NMSC-024, ¶ 33, 376 P.3d 184 (quoting *State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110). “We must reverse a conviction if the erroneously admitted evidence might have contributed to it” *Thomas*, 2016-NMSC-024, ¶ 33. “[T]he existence of other evidence to support the verdict does not cure a constitutional error when there is a reasonable possibility that the erroneously admitted evidence influenced the jury’s verdict.” *Id.* ¶ 34. Although *Sosa* directs a finding of reversible error when “the prosecutors’ comments materially altered the trial or likely confused the jury by distorting the evidence,” *Sosa*, 2009-NMSC-056, ¶ 34, this case involves an intrusion on a “distinct constitutional protection.” Applying a higher standard to reverse in the context of constitutional error would be in direct conflict with our jurisprudence. Thus, we apply *Sosa*’s factors for guidance, but because we find constitutional error, we then apply a harmless error standard. The State has the burden to demonstrate that there was no reasonable possibility that the error affected the verdict.

{30} The State argues that the prosecutor did not explicitly mention Defendant’s failure to testify or ask the jury to draw an adverse conclusion from that fact because the arguments did not suggest that Defendant failed to come forward with evidence or to correct misstatements to police before or after arrest. We disagree and conclude that the State has failed to meet its burden in demonstrating that there was “no reason-

able possibility” that the comment on Defendant’s right to silence affected the jury’s verdict. Therefore, we are left to presume the error indeed affected the verdict in this case and deprived Defendant of a fair trial.

{31} The prosecutor’s arguments violated Defendant’s Fifth and Fourteenth Amendment rights and deprived Defendant of a fair trial, resulting in reversible error. Prosecutors do not have license to make improper and prejudicial arguments with impunity. We reverse the Court of Appeals holding that Defendant received a fair trial, and we remand to the district court for a new trial.

2. Instruction on Kidnapping

{32} The Court of Appeals agreed with Defendant’s argument that it was fundamental error not to include the incidental restraint limitation to kidnapping described in *State v. Trujillo*, 2012-NMCA-112, ¶ 39, 289 P.3d 238 in the essential elements instruction on kidnapping. *Sena*, 2018-NMCA-037, ¶¶ 22-25. We disagree with the Court of Appeals, and we reverse on this issue as well. Although we would not ordinarily address an issue pertaining to an instruction after reversing all of a defendant’s convictions and remanding for a new trial, we do so in this case because the Court of Appeals reached a result we disagree with in a published, formal opinion.

{33} In *Trujillo*, the Court of Appeals held that “the Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime.” 2012-NMCA-112, ¶ 39. In agreeing with Defendant’s argument, the Court of Appeals reasoned that “omission of incidental restraint” from the instruction resulted in fundamental error in this case “as the jury could have convicted Defendant based upon a deficient understanding of the legal meaning of restraint as an essential element of kidnapping.” *Sena*, 2018-NMCA-037, ¶ 25. We disagree because *Trujillo* does not apply to the facts of the case before us.

a. Standard of review

{34} Our review is limited to determining whether the kidnapping instruction as given to the jury resulted in fundamental error because there was no objection to the instruction. See *State v. Sandoval*, 2011-NMSC-022, ¶ 13, 150 N.M. 224, 258 P.3d 1016 (stating that we review instructions for fundamental error instead of reversible error if the alleged error was not preserved in the district court). “The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice.” *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633. In reviewing a failure to instruct for fundamental error, we “determine whether a reasonable juror would

have been confused or misdirected by the jury instruction.” *Id.* ¶ 19. “[J]uror confusion or misdirection may stem . . . from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law.” *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. In addition, “[f]undamental error occurs when jury instructions fail to inform the jurors that the State has the burden of proving an essential element of a crime and we are left with ‘no way of knowing’ whether the jury found that element beyond a reasonable doubt.” *State v. Samora*, 2016-NMSC-031, ¶ 29, 387 P.3d 230 (citation omitted).

b. Omission of the incidental restraint limitation to kidnapping in the elements instruction was not fundamental error

{35} We begin with the statutory elements of kidnapping. Pertinent to the case before us, Section 30-4-1(A)(4) defines kidnapping as “the unlawful . . . restraining . . . or confining of a person, by force [or] intimidation . . . with intent . . . to inflict . . . a sexual offense on the victim.” In accordance with UJI 14-403 NMRA (1997), the district court instructed the jury as follows:

For you to find [D]efendant guilty of kidnapping . . . , the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [D]efendant restrained or confined [Victim] by force or intimidation;
2. [D]efendant intended to inflict a sexual offense on [Victim];
3. This happened in New Mexico on or about the 17th day of November, 2012.

This instruction correctly tracks the language of the statute, setting forth all the essential elements of kidnapping. Thus, the jury was properly instructed on every essential element of kidnapping. *State v. Martinez-Rodriguez*, 2001-NMSC-029, ¶ 38, 131 N.M. 47, 33 P.3d 267 (concluding that a kidnapping instruction which accurately tracked the language of the statute properly informed the jury of all the essential elements of the offense), *abrogated on other grounds as recognized by State v. Forbes*, 2005-NMSC-027, ¶ 6, 138 N.M. 264, 119 P.3d 144.

{36} In addition, the evidence fully supports the jury’s verdict finding Defendant guilty of kidnapping under the instruction. As already described above, the evidence was that at approximately 3:30 a.m., Victim was awakened with a gloved hand over her mouth and a knife to her head. When Victim tried to scream, Defendant told her to stop and threatened to kill her. Defendant then ordered Victim

to get out of bed and demanded that she undress. While Victim was undressing, Defendant took Victim's wallet. Victim said she needed to use the restroom and was permitted to walk to the restroom with Defendant following closely behind. Defendant then masturbated while Victim used the restroom. At this point, the crime of kidnapping was complete. Defendant had restrained Victim with the intent of inflicting a sexual offense on Victim. *See State v. McGuire*, 1990-NMSC-067, ¶ 10, 110 N.M. 304, 795 P.2d 996 ("Once [the] defendant restrained the victim with the requisite intent to hold her for service against her will, he had committed the crime of kidnapping, although the kidnapping continued throughout the course of [the] defendant's other crimes[.]"); *see also State v. Jacobs*, 2000-NMSC-026, ¶ 24, 129 N.M. 448, 10 P.3d 127 ("[T]he key to finding the restraint element in kidnapping, separate from that involved in criminal sexual penetration, is to determine the point at which the physical association between the defendant and the victim was no longer voluntary.").

{37} The question presented here is whether *Trujillo*, 2012-NMCA-112, alters the foregoing conclusions. In *Trujillo*, the victim and his wife were awakened at around 2:30 a.m. by two men holding flashlights, who had broken into the home armed with metal bars or wooden bats. *Id.* ¶ 2. When the defendant started hitting the victim with a metal bar, the victim fought back and gained the upper hand, and while the victim was on top of the defendant hitting him, the defendant restrained the victim and called to his accomplice for help. *Id.* ¶¶ 2-3. The accomplice started hitting the victim, allowing the defendant to get free, and the two assailants continued to beat the victim before leaving. *Id.* ¶ 3. The entire incident lasted two to four minutes. *Id.*

{38} Convicted of both aggravated battery and kidnapping, in addition to other crimes, the defendant in *Trujillo* argued on appeal that "the Legislature did not intend to punish restraint incidental to an aggravated battery as kidnapping." *Id.* ¶ 6 (brackets omitted). In the factual context of the case, the Court of Appeals agreed with the defendant, concluding "that the restraint described by the testimony—a momentary grab in the middle of a fight—is as a matter of law insufficient to support a conviction for kidnapping." *Id.* The Court of Appeals was able to make this determination as a matter of law, recognizing that in a different factual scenario, a jury question might be presented as to whether the restraint relied upon to support a conviction for kidnapping was merely incidental to another crime. *See id.* ¶ 42.

{39} In the case before us, the Court of Appeals said that according to the evidence, Victim "was restrained both before and after the sexual offense occurred[.]" Under these circumstances, the Court of Appeals concluded that it was "for the jury to determine whether either or both of these restraints were slight, inconsequential, or incidental to the commission of the sexual offense." *Sena*, 2018-NMCA-037, ¶ 25. This conclusion was in error. Having already kidnapped Victim, Defendant then ordered Victim, who was still unclothed, to go back to the bed where he sexually assaulted her numerous times. Any restraint incidental to the sexual assaults was separate and distinct from the restraint that Defendant used to complete the kidnapping. These facts differ vastly from those in *Trujillo* and present no factual question for a jury to decide. *See* UJI 14-403, Use Note 8 (providing that the jury receives an instruction on incidental restraint "if the evidence raises a genuine issue of incidental conduct[.]"). *Trujillo* is inapplicable to the facts in this case.

{40} *Trujillo* was decided in 2012, before Defendant's trial in 2014. In partial response to *Trujillo*, UJI 14-403 was amended, but not until 2015. *See* UJI 14-403, Committee Commentary. Even if this version of the instruction had been in effect at the time of Defendant's trial, a finding consistent with UJI 14-403(4) on whether the restraint of Victim resulting in the kidnapping was "slight, inconsequential, or merely incidental" to the commission of another crime was not required in this case. *Id.* Submitting the question to the jury is only required "if the evidence raises a genuine issue of incidental conduct[.]" UJI 14-403, Use Note 8. As we have already discussed, incidental restraint, as considered in *Trujillo*, was not at issue in this case.

{41} The integrity of a criminal conviction in our judicial system requires a jury verdict to rest "on a legally adequate basis" and when it does not, the integrity of the judicial system is undermined, and fundamental error results. *State v. Mascareñas*, 2000-NMSC-017, ¶ 21, 129 N.M. 230, 4 P.3d 1221. Generally, therefore, "fundamental error occurs when the trial court fails to instruct the jury on an essential element." *State v. Sutphin*, 2007-NMSC-045, ¶ 16, 142 N.M. 191, 164 P.3d 72. In certain situations, a missing definitional instruction may be of "central importance to a fair trial" because without that instruction the jury verdict could be based on a deficient understanding of the legal meaning of an essential element. *Barber*, 2004-NMSC-019, ¶ 25. In other words, failing to instruct the jury on a definition or amplification of the elements of the crime may prevent the jury from making a "critical determination akin to a missing elements instruction."

Mascareñas, 2000-NMSC-017, ¶ 20; *cf. State v. Stephens*, 1979-NMSC-076, ¶ 20, 93 N.M. 458, 601 P.2d 428 ("[T]he failure to instruct the jury on the definition or the amplification of the elements does not constitute error."), *overruled on other grounds by State v. Contreras*, 1995-NMSC-056, ¶ 19, 120 N.M. 486, 903 P.2d 228. Whether the restraint used to kidnap Victim was merely incidental to the sexual offenses was not a "critical determination" for the jury to make in this case, nor was it of "central importance" in arriving at a legally correct verdict. There was no fundamental error in failing to instruct the jury on the limitation to kidnapping identified in *Trujillo*. The Court of Appeals having ruled otherwise, we reverse the Court of Appeals on this point.

3. Double Jeopardy

{42} The Court of Appeals held that Defendant's separate convictions for aggravated burglary, CSP, and CSC violate the Fifth Amendment prohibition against double jeopardy because they result in multiple punishments for the same act. *See Sena*, 2018-NMCA-037, ¶¶ 34-45. The State contends that the Court of Appeals should be reversed because it misapplied the relevant precedent in arriving at its conclusion. Although we reverse for a new trial, we must address the Court of Appeals' flawed application of the *Foster* presumption. For the reasons explained below, we agree with the State and reverse the reasoning of Court of Appeals.

a. Standard of review

{43} Appellate review of a claim that multiple punishments have been imposed for the same offense in violation of the Fifth Amendment prohibition against double jeopardy presents a question of law which we review de novo. *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747.

b. Analysis

{44} The Fifth Amendment to the United States Constitution directs, in pertinent part, that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb[.]" Defendant does not argue that the New Mexico Constitution affords greater rights than the Fifth Amendment, so we limit our review to the federal right, which is made applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). One of the protections of the Fifth Amendment is the prohibition of "multiple punishments for the same offense." *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M. 3, 810 P.2d 1223 (internal quotation marks omitted) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989)). Multiple punishment cases are of two types: those cases in which a defendant

is charged with multiple violations of a single statute based on a single course of conduct (“unit of prosecution” cases) and those cases in which a defendant is charged with violating different statutes in a single course of conduct (“double-description” cases). *Swafford*, 1991-NMSC-043, ¶¶ 8-9. {45} Defendant argues that his convictions of aggravated burglary, CSP, and CSC violate his Fifth Amendment protection against double jeopardy because they arise from a single course of conduct. This is therefore a double-description case. In *Swafford*, this Court established a two-part analysis for deciding whether the same offense was committed in double-description cases. *Id.* ¶ 25. The first part focuses on the conduct and asks “whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates [multiple] statutes.” *Id.* If the question is answered in the affirmative, we proceed to the second part, which focuses on the statutes at issue “to determine whether the legislature intended to create separately punishable offenses.” *Id.* Double jeopardy protection prohibits multiple punishments in the same trial only when (1) the conduct is unitary and (2) it is determined that the Legislature did not intend multiple punishments. *Id.*

{46} We first determine whether Defendant’s conduct was unitary. When “sufficient indicia of distinctness” separate the illegal acts, the conduct is not unitary, and a defendant does not face conviction and punishment for “the same factual event.” *Swafford*, 1991-NMSC-043, ¶¶ 26-28. “Sufficient indicia of distinctness” are present when the illegal acts “are sufficiently separated by either time or space (in the sense of physical distance between the places where the acts occurred).” *Id.* ¶ 28. If these considerations do not suffice to make the determination, “resort must be had to the quality and nature of the acts or to the objects and results involved.” *Id.* Thus, in determining whether there are such sufficient indicia of distinctness, we have also looked to the elements of the charged offenses, the facts presented at trial, and the instructions given to the jury. *Id.* ¶ 27 (“The conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial.”); *DeGraff*, 2006-NMSC-011, ¶¶ 28-30 (considering the statutory definition of the crime, the instructions given to the jury, and the evidence presented at trial). Unitary conduct is not present when one crime is completed before another is committed, or when the force used to commit a crime is separate from the force used to commit another crime. *Id.* ¶¶ 27, 30.

{47} In *State v. Foster*, 1999-NMSC-007, ¶ 28, 126 N.M. 646, 974 P.2d 140, *abrogated on other grounds by Kersey v.*

Hatch, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683, this Court held that because we cannot assume that jurors will know how to reach a verdict without violating the Double Jeopardy Clause, “we must presume that a conviction under a general verdict requires reversal if the jury is instructed on an alternative basis for the conviction that would result in double jeopardy, and the record does not disclose whether the jury relied on this legally inadequate alternative.” This presumption is based on the holding of *State v. Olguin*, 1995-NMSC-077, ¶ 2, 120 N.M. 740, 906 P.2d 731, that “a conviction under a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate[.]” The parties agree that *Foster* provides the analytical framework for determining whether Defendant’s acts were unitary but disagree on what the proper result is under *Foster*. We therefore examine *Foster* in some detail.

{48} In *Foster*, the Court considered in pertinent part whether convictions for first-degree felony murder, aggravated kidnapping, and armed robbery violated the Double Jeopardy Clause. 1999-NMSC-007, ¶ 1. The convictions resulted from the robbery and death of one victim. *Id.* ¶ 14. The victim was found in the den of her home on her stomach with a broken ashtray in front of the body and an electrical cord tied around her neck and ankles. *Id.* The ashtray was a heavy, faceted crystal ashtray with blood on it. *Id.* ¶ 19. There was a contusion around the victim’s eye, several lacerations on her head, and a ligature mark on her neck. *Id.* ¶ 14. Deep lacerations found on the victim’s head were caused by being hit with a heavy glass dish or ashtray, consistent with the broken ashtray at the scene. *Id.* The blows to the head could have rendered the victim unconscious. *Id.* ¶ 16. The bruising caused by the ligature was consistent with use of the extension cord and with the victim being alive when it was tightened around her neck. *Id.* ¶ 17. The chief medical investigator testified that the head injuries probably occurred first, rendering her unconscious, and that the victim was then tied up and strangled with the extension cord. *Id.* ¶ 18.

{49} Regarding the convictions for armed robbery and aggravated kidnapping, the State argued that the conduct underlying those offenses and the conduct underlying the murder was not unitary. *Id.* ¶ 26. Specifically, the State argued that the conduct in committing aggravated kidnapping was not unitary because the jury could have found that the kidnapping was committed by gaining entry to the victim’s house by deception, and the conduct in committing armed robbery was not unitary because the stolen items were located in a room separate from where the victim was

murdered. *Id.* ¶ 26. This argument relied “on the assumption that, when the jury instructions provide alternative bases for a conviction and there is no indication of which alternative the jury relied upon in reaching a general verdict, we may affirm the conviction if at least one of the alternatives does not violate the Double Jeopardy Clause.” *Id.* ¶ 26. This Court rejected making this assumption, and in fact, as we have already stated, made the opposite presumption: that the convictions were based on an alternative in the jury instructions that would result in double jeopardy. *Id.* ¶ 28.

{50} Under that presumption, this Court in *Foster* assumed that the jury found that the aggravated kidnapping was committed by force. The instruction on the elements of aggravated kidnapping in *Foster* required the jury to find that the defendant acted with force or deception and inflicted great bodily harm on the victim. *Id.* ¶ 29. The defendant argued that the conduct was therefore unitary because the same force used to commit the kidnapping was also used to commit the killing. *Id.* ¶¶ 29-30. This Court, however, rejected the defendant’s argument. The state’s theory on the kidnapping was that the defendant held the victim to rob her and to this end knocked her unconscious with the glass ashtray. *Id.* ¶ 31. As she lay unconscious, the defendant tied the victim up and strangled her to death with the electrical cord tied around her neck and ankles. *Id.* In other words, force was used two separate times, once to kidnap the victim to rob her and once to kill her. This conclusion was possible because under the instructions, the jury was required to find that in committing the aggravated kidnapping, the defendant inflicted great bodily harm. *Id.* ¶ 33. Thus, the kidnapping was completed when the defendant hit the victim on the head with the ashtray, causing the victim great bodily harm. *Id.* ¶¶ 32-33. This Court concluded there was sufficient indicia of distinctness when the defendant used force to hit the victim on the head with the ashtray, which completed the crime of aggravated kidnapping, *id.* ¶¶ 32-33, and then separately used force to strangle the victim with an extension cord. *Id.* ¶ 34.

{51} In *Foster*, this Court separately addressed the defendant’s armed robbery conviction. *Id.* ¶ 36. The jury instruction on armed robbery also allowed the jury to reach a guilty verdict under various alternatives. *Id.* Because the record did not demonstrate which alternative the jury relied on, and because the jury was allowed to find that the defendant committed armed robbery “while armed with a ligature,” which was the same extension cord that was used to commit the murder, this Court applied the presumption that

this was the alternative used by the jury. *Id.* ¶¶ 37-39. In addition, because the jury was allowed to find the defendant guilty of armed robbery by taking the victim's "car keys and/or a 1985 Crown Victoria and/or U.S. currency" and the record did not demonstrate which alternative was selected by the jury, this Court presumed that the armed robbery conviction was based on the defendant's taking of the property in closest proximity to the room where the victim was killed. *Id.* ¶¶ 36, 39. Applying the presumptions, the *Foster* court concluded that the defendant's conviction and sentence for armed robbery resulted from unitary conduct and violated the Double Jeopardy Clause. *Id.* ¶¶ 37-39. Because the instruction allowed the jury to find that the defendant committed armed robbery while armed with a ligature, but also, that the murder was committed by use of a ligature, the Court determined that the conduct was unitary. *Id.* ¶¶ 38-39. The evidence presented at trial, the Court reasoned, did "not show a significant separation in time or physical distance between the armed robbery and the murder." *Id.* ¶ 39.

{52} Here, the applicable instruction on aggravated burglary required the jury, in pertinent part, to find that Defendant entered Victim's dwelling without authorization and "was armed with a knife; OR . . . became armed with a firearm after entering; OR . . . touched or applied force to [Victim] in a rude or angry manner while entering or leaving, or while inside." The applicable instruction on CSP required the jury, in pertinent part, to find that Defendant inserted his finger into Victim's vagina and "used physical force or physical violence OR . . . used threats of physical force or physical violence against [Victim]." The instruction on CSC in turn required the jury, in pertinent part, to find that Defendant "touched or applied force" to Victim's unclad breast without Victim's consent. There is no way to determine which alternative(s) the jury relied on in finding Defendant guilty of aggravated burglary, CSP, and CSC.

{53} In arriving at its conclusion, the Court of Appeals applied the *Foster* presumption to assume not only that the jury relied on the battery alternative for each crime, but that the same conduct was also used to commit all three offenses. *Sena*, 2018-NMCA-037, ¶¶ 40-41. Having

determined that Defendant's conduct was unitary based on a misapplication of the *Foster* presumption, the Court of Appeals went on to rule that under the modified *Blockburger* analysis set forth in *State v. Gutierrez*, 2011-NMSC-024, ¶¶ 58-59, 150 N.M. 232, 258 P.3d 1024, the Legislature did not intend multiple punishments for these offenses, and held Defendant was subjected to multiple convictions for the same offense in violation of double jeopardy. *Sena*, 2018-NMCA-037, ¶¶ 42-45.¹

{54} Because it is indeterminate upon which alternative the jury relied, like the Court of Appeals, we apply the *Foster* presumption and presume the jury relied on the battery alternative in convicting Defendant of aggravated burglary, CSP, and CSC. However, contrary to the Court of Appeals' holding, *Foster* does not require a further presumption that the same conduct was then relied upon by the jury in convicting Defendant of each crime—particularly when the record indicates three distinct batteries were committed. Although the instructions allowed the jury to convict under the battery alternative for each crime, the *Foster* presumption is rebutted by evidence that each crime was completed before the other crime occurred.

{55} A battery was used to commit aggravated burglary when Victim was awakened at 3:30 a.m. with Defendant's gloved hand over her mouth and a knife to her head. After Victim got out of bed and was undressing as Defendant ordered, Defendant asked Victim where her purse was, and Victim replied that it was in the closet. Defendant took Victim's wallet containing thirty dollars. Victim was then allowed to go to the restroom while Defendant watched and began masturbating. After Victim finished using the restroom, Defendant ordered Victim back to bed, telling her to lie face down on a pillow. Victim testified that Defendant then penetrated Victim's vagina and anus with his penis, and after a few minutes, Defendant instructed Victim to get on her knees and continued penetrating Victim's vagina and anus with his penis. Defendant was not found guilty of these penetrations. However, Defendant then committed CSP and CSC by means of a second, and then a third battery when Defendant ordered Victim to turn over, and fondled Victim's breasts and digitally penetrated Victim's

vagina.

{56} We therefore conclude that the Court of Appeals erred in its application of the *Foster* presumption. Although the instructions permitted the jury to convict Defendant of aggravated burglary, CSP, and CSC under the same alternative, the evidence demonstrates that the crimes were committed by three separate, identifiable batteries separated by sufficient indicia of distinctness. Thus, Defendant's conduct was not unitary. The initial battery and aggravated burglary were completed before the second battery and CSP, and these crimes were separated by both time and intervening events. *See DeGraff*, 2006-NMSC-011, ¶ 27 ("In our consideration of whether conduct is unitary, we have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed."). In addition, Defendant's conduct in committing CSP and CSC was not unitary because the battery he used to commit the CSP was separate and distinct from the battery he used to commit CSC.

{57} Having concluded that Defendant's conduct in committing aggravated burglary, CSP, and CSC was not unitary, there was no double jeopardy violation. *Swick*, 2012-NMSC-018, ¶ 11. We therefore reverse the Court of Appeals' conclusion that Defendant's convictions for aggravated burglary, CSP, and CSC violate double jeopardy.

Sufficiency of the Evidence

{58} Having reviewed the record and the arguments of the parties, we affirm the Court of Appeals' holding that the State presented sufficient evidence to support the convictions for CSP and kidnapping. *See Sena*, 2018-NMCA-037, ¶¶ 26-33, 49-55.

CONCLUSION

{59} We reverse Defendant's convictions and remand the case to the district court for a new trial consistent with this opinion.

**{60} IT IS SO ORDERED.
MICHAEL E. VIGIL, Justice**

**WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
BARBARA J. VIGIL, Justice
C. SHANNON BACON, Justice
DAVID K. THOMSON, Justice**

¹In its application of the modified *Blockburger* test, the Court of Appeals reasoned: "Because the State failed to provide any legal theory of the crime, and we have found none in the record, we conclude that Defendant's aggravated burglary conviction is subsumed by the CSP/CSC convictions[.]" *Sena*, 2018-NMCA-037, ¶ 45. In light of our conclusion that Defendant's conduct was not unitary, whether this is a correct application of the modified *Blockburger* test is not before us.

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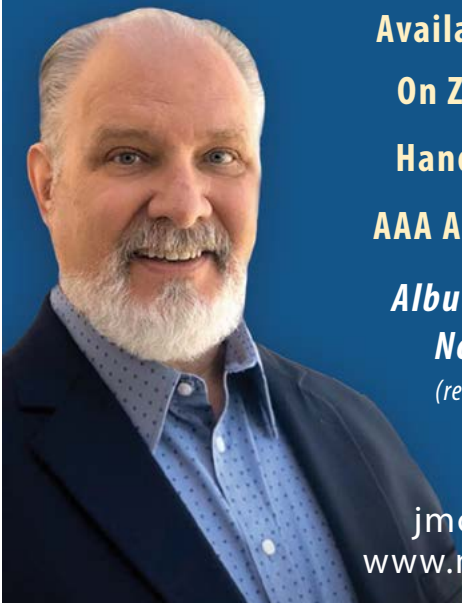
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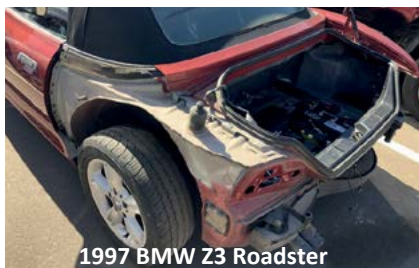
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Assistant District Attorney

The Fifth Judicial District Attorney's office has immediate positions open for new or experienced attorneys, in our Carlsbad, Hobbs and Roswell offices. Salary will be based upon the New Mexico District Attorney's Salary Schedule with starting salary range of an Assistant Trial Attorney to a Senior Trial Attorney (\$58,000 to \$79,679). Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs, NM 88240-8335 or e-mail to 5thDA@da.state.nm.us.

Experienced Prosecutor

The 13th Judicial District Attorney's Office has created a new position. We are looking for an experienced prosecutor who is self-motivated, can handle a smaller but complex case load covering different types of felony's with little to no supervision. This position will carry cases in all three of our district offices so travel will be required. This position can be based in the county office of choice (Belen, Bernalillo or Grants). Schedule will be flexible but dependent upon scheduled court hearings. Salary commensurate with experience. Contact Krissy Fajardo kfajardo@da.state.nm.us for an application.

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Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney's Office, which includes Curry and Roosevelt counties. Employment will be based primarily in Curry County (Clovis). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Email resume, cover letter, and references to: Steve North, snorth@da.state.nm.us.

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Experienced Trial Attorney

The Ninth Judicial District Attorney's Office is seeking an experienced trial attorney for our Clovis office. Come join an office that is offering jury trial experience. In addition, we offer in depth mentoring and an excellent work environment. Salary commensurate with experience between \$75k-90k per year. Send resume and references to snorth@da.state.nm.us.

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Eleventh Judicial District Attorney's Office, Div II

The Eleventh Judicial District Attorney's Office, Division II, Gallup, New Mexico is seeking qualified applicants for Trial Attorney. The Trial Attorney position requires advanced knowledge and experience in criminal prosecution, rules of evidence and rules of criminal procedure, trial skills, computer skills, ability to work effectively with other criminal justice agencies, ability to communicate effectively, ability to research/analyze information and situations. Applicants must hold a New Mexico State Bar license preferred. The McKinley County District Attorney's Office provides a supportive and collegial work environment. Salary is negotiable. Submit a letter of interest and resume to District Attorney Bernadine Martin, Office of the District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to bmartin@da.state.nm.us. Position will remain opened until filled.

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Katz Herdman MacGillivray & Fullerton in Santa Fe seeks an associate attorney with an interest in family law and civil litigation. Our boutique practice also includes real estate, water law, estate planning, business, and construction. Send your resume, statement of interest, transcript and writing sample to ctc@santafelawgroup.com. All levels considered, with ideal candidates having 1-3 years of practice experience.

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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 - APD Compliance; Assistant City Attorney - Office of Civil Rights; Assistant City Attorney - Environmental Health; Assistant City Attorney - Employment/Labor. For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

Public Defender – Pueblo of Santa Ana

The Pueblo of Santa Ana is accepting contractual bids for the position of the Public Defender (32 hour a week). Please see the RFP for the position at <https://santaana-nsn.gov/tribalcourt-front-page/>. The bid process will close on October 15, 2021.

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The New Mexico Center on Law and Poverty is hiring a part-time Paralegal to advance litigation and advocacy with legal research, case development and investigation, client communication, preparation and organization of documents, and legal filing. Required: Strong commitment to social, racial, and economic justice, excellent research skills, good communicator, organized with attention to detail, and college degree with paralegal certification or equivalent experience. Apply in confidence by emailing a resume and cover letter to contact@nmpovertylaw.org.

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Rodey's Santa Fe office is accepting resumes for a legal assistant position. Candidate must have excellent organizational skills; demonstrate initiative, resourcefulness, and flexibility, be detail-oriented and able to work in a fast-paced, multi-task legal environment with ability to assess priorities. Responsible for calendaring all deadlines. Must have a high school diploma, or equivalent, and a minimum of three (3) years' experience as a legal assistant, proficient with Microsoft Office products and have excellent typing skills. Paralegal skills a plus. Firm offers comprehensive benefits package and competitive salary. Please send resume to jobs@rodey.com with "Legal Assistant - Santa Fe" in the subject line, or mail to Human Resources Manager, PO Box 1888, Albuquerque, NM 87103.

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Sutin, Thayer & Browne is looking to hire a full-time Public Finance Paralegal. Please visit our website for full job description, <https://sutinfirm.com/our-firm/careers/>. Competitive salary and full benefits package. Send resume to sor@sutinfirm.com.

Paralegal

The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, performing legal research, managing legal documents, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, setting up and maintaining a calendar with deadlines, and other matters as assigned. Excellent organization skills and the ability to multitask are necessary. Must be a team player with the willingness and ability to share responsibilities or work independently. Starting salary is \$20.69 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to \$21.71 per hour. Competitive benefits provided and available on first day of employment. Please apply at <https://www.governmentjobs.com/careers/cabq>.

eNews

Get Your Business Noticed!



Welcome to Our New Website!

We are so excited that our new website is ready! For the last six months we have been busy transitioning to a new association management system (AMS) which has now replaced our membership database and website. The transition is complete and we are so excited that we can welcome you to the new experience.

Join us now at www.sbnm.org! Our new website has a fresh new look, new members can enjoy credits, licensing renewal, event registration spot, an updated

Advertise in our email newsletter, delivered to your inbox every Friday.

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State Bar of New Mexico

Est. 1886

Contact Marcia Ulibarri,
at 505-797-6058 or email mulibarri@sbnm.org

Legal Assistant

5+ years' experience in civil litigation Extensive experience with practice management, calendaring, word processing, state and federal court filings required. Must be highly organized and detail oriented with good customer service and multi-tasking skills. Position needs include support for multiple attorneys producing a high volume of work in a fast-paced office. Please send your resume to humanresources@cplawnm.com.

Paralegal/Legal Assistant

Well established Santa Fe personal injury law firm is in search of an experienced paralegal/legal assistant. Candidate should be honest, highly motivated, detail oriented, organized, proficient with computers & excellent writing skills. Duties include requesting and reviewing medical records and bills, meeting with clients, opening claims with insurance companies and preparing demand packages. We offer a very competitive salary, a retirement plan funded by the firm, full health insurance benefits, paid vacation and sick leave, bonuses and opportunities to move up. We are a very busy law firm and are looking for an exceptional assistant who can work efficiently. Please submit your resume to personalinjury2020@gmail.com

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Expert Witness

Lee King is providing Forensic & Clinical Evaluations. Contact us at 575-518-4011. lee@drleeking.com <https://www.drleeking.com/>

Miscellaneous**Want To Purchase**

Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

Search for Will

Seeking information concerning the Will of Sharon A Jones and of Sam P Jones, Placitas, NM. Contact Richard Gale 307-689-3736

Moving Sale:

Office Furniture for sale, desks, file cabinets, shelves, conference room tables, chairs, décor, and binderteks. Please contact Desiree O'Cleireachain, Office Manager at 505-888-4357 or by email at dmo@carterlawfirm.com for details.

For Sale

Retired Albuquerque attorney wants to sell five black four drawer legal size file cabinets. \$50 each. Must pick up. Call Bob (505)822-9052.

For Sale - NM Statutes Annotated

West's NM Statutes Annotated- Supplemented to 2019. \$300 or best offer. You pick up. 575-644-5165.

2021 Bar Bulletin Publishing and Submission Schedule

The *Bar Bulletin* publishes twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, three weeks prior to publication.**

For more advertising information, contact: Marcia C. Ulibarri at 505-797-6058 or email mulibarri@sbnm.org

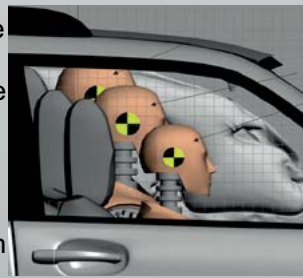
The publication schedule can be found at
www.sbnm.org

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