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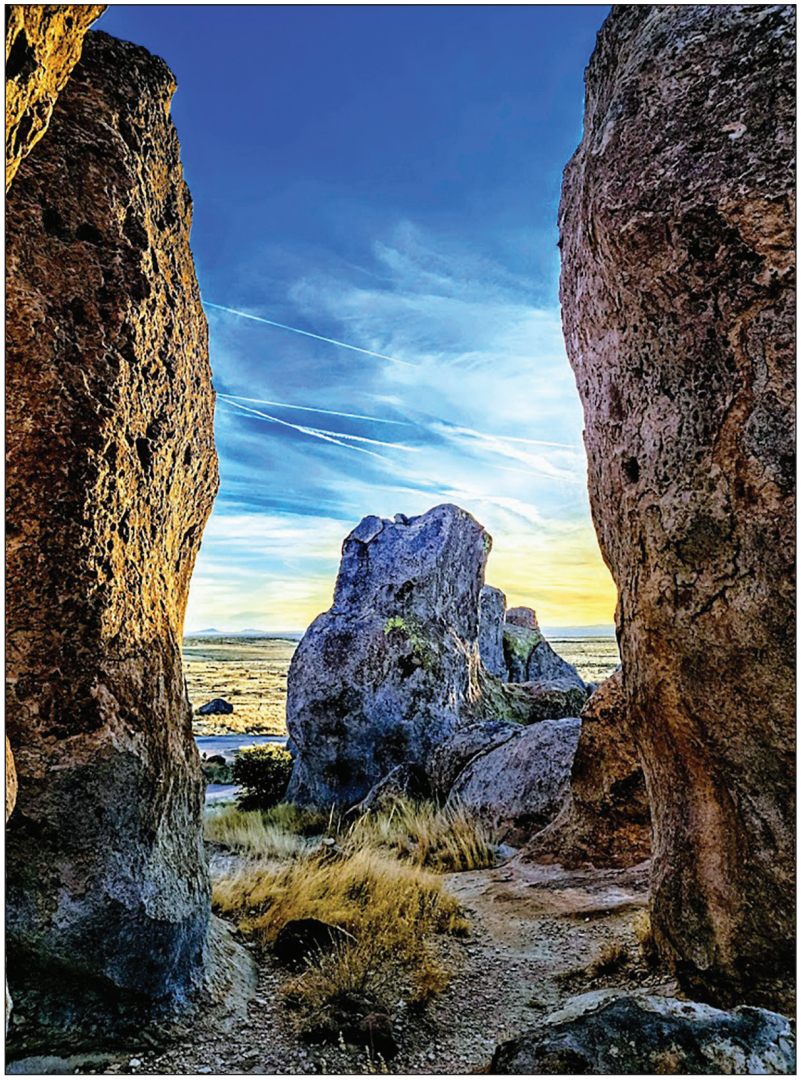
Bar Bulletin

July 26, 2023 • Volume 62, No. 14



City of Rocks, by Jonathan Miller (see page 3) rattlesnakelaw.com

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Meetings

July

28
Immigration Law Section
Noon, virtual

August

1
Health Law Section
9 a.m., virtual

2
Employment and Labor Law Section
12:30 p.m., virtual

8
Tax Section
9 a.m., virtual

11
Health Law Section
Noon, virtual

15
Public Law Section
9 a.m., virtual

17
Public Law Section
Noon, virtual

22
Intellectual Property Law Section
Noon, virtual

Workshops and Legal Clinics

July

26
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

August

2
Divorce Options Workshop
6-8 p.m., virtual

15
Common Legal Issues for Senior Citizens Workshop
11 a.m.-noon, Virtual
For more details and to register, call
505-797-6005

23
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

September

5
Common Legal Issues for Senior Citizens Workshop
11 a.m.-noon, Virtual
For more details and to register, call
505-797-6005

6
Divorce Options Workshop
6-8 p.m., virtual

27
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

About Cover Image and Artist: Jonathan Miller is an attorney/author based out of Albuquerque. Jonathan travels around the state providing indigent criminal defense. He frequently stops along the highway to snap his photos on the way to court using his smart phone. He's also become addicted to the "layout app."

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

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

Supreme Court Law Library

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

N.M. Administrative Office of the Courts

Learn About Access to Justice in New Mexico in the "Justice for All" Newsletter

Learn what's happening in New Mexico's world of access to justice and how you can participate by reading "Justice for All," the New Mexico Commission on Access to Justice's monthly newsletter! Email atj@nmcourts.gov to receive "Justice for All" via email or view a copy at https://accesstojustice.nmcourts.gov/.

Thirteenth Judicial District Court

Notice of Mass Reassignment of Cases

Thirteenth Judicial District Court Chief Judge James A. Noel provides notice of the following case reassignments. All PQ cases in Valencia County (D-1314) currently assigned to Judge Allen R. Smith, which are in Adjudicated Case- Report Review Status shall be reassigned to Judge George P. Eichwald. This reassignment of cases is effective July 10. Pursuant to 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days from Aug. 9 to file their peremptory excusals.

Professionalism Tip

With respect to parties, lawyers, jurors and witnesses:

I will not employ hostile, demeaning or humiliating words in opinions or in written or oral communications.

United States District Court, District of New Mexico

Notice Concerning Reappointment of Incumbent United States Magistrate Judge

The current term of office of Full-Time United States Magistrate Judge Gregory J. Fouratt is due to expire on Feb. 28, 2024. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term. The duties of a magistrate judge in this court include the following: (1) presiding over most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) presiding over various pretrial matters and evidentiary proceedings on delegation from a district judge, (4) taking of felony pleas and (5) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court. Comments may be submitted by email to MJMSP@nmcourt.uscourts.gov. Questions or issues may be directed to Monique Apodaca, 575-528-1439. Comments must be received by Aug. 17.

Notice of Judicial Portrait Unveiling for Senior United States District Judge Martha Vazquez

The official unveiling of the Honorable Martha Vázquez's Judicial Portrait will be taking place on Aug. 4 at 3:30 p.m. (MT) in the Aspen Courtroom at the Santiago E. Campos United States Courthouse in Santa Fe, N.M. (106 S. Federal Place, Second Floor). A reception hosted by the Federal Bench and Bar of the United States District Court for the District of New Mexico will follow at the Courthouse Park. All members of the Federal Bench and Bar are cordially invited to attend; however, reservations are requested. RSVP if attending at https://rsvp.nmcourt.uscourts.gov/Vazquez/ or by email to usdcevents@nmd.uscourts.gov.

State Bar News

Board of Bar Commissioners

Appointment to NM Risk Management Advisory Board Vacancy

There is currently a vacancy on the Risk Management Advisory Board for an unexpired four-year term, which expires June 30, 2026. Pursuant to Section 15-7-4 NMSA 1978, the President of the Board of Bar Commissioners makes one appointment to the Risk Management Advisory Board. The Advisory Board is charged with, among other duties, reviewing insurance policies to be purchased by the Risk Management Division, professional services and consulting contracts and agreements, companies and agents that submit proposals, rules and regulations promulgated by the division, certificates of coverage to be issued by the division, and investments to be made by the division. Applicants must be licensed to practice law in New Mexico. Members who wish to apply to serve on the Board should send a letter of interest and brief resume by July 31 to bbc@sbnm.org.

Employee Assistance Program

Free Leadership Webinar

The Solutions Group Employee Assistance Program is hosting a free one-hour webinar for those in leadership about the methods of support the Solutions employs for leaders and managers. Topics include Critical Incident Stress Debriefings (CISD) and Grief Group Support, Formal vs. Informal Referrals, Mediation/Conflict Resolution, Consultation, Coaching and Substance Abuse Services. The webinar will be taking place on July 26 from 2 to 3 p.m. Visit https://attendee.gototraining.com/rt/3484636454548334080 to sign up.

Q3 Free Webinars

The Solutions Group will be running three free webinars in the third quarter of 2023. Visit www.solutionsbiz.com to view the following upcoming webinars.

- Unexpected Outcomes: Loneliness (Aug. 8)
- Winning Practices for Boosting Children's Confidence (Sept. 13)

Corrections to Court of Appeals Opinions

In the *Bar Bulletin* publication issued June 14, 2023, Opinion No. A-1-CA-38797 (p. 39) featured the same Introduction of Opinion as that of Opinion No. A-1-CA-38023 (p. 38). Below is the Introduction of Opinion No. A-1-CA-38797:

Defendant Orchard Metal Capital Corporation (OMC) appeals the district court's entry of partial summary judgment and an injunction in favor of Plaintiff the Acequia Compound Association (the Association), as well as the dismissal without prejudice of the Association's remaining claim. We affirm.

In the *Bar Bulletin* publication issued June 28, 2023, thre were two Court of Appeals opinions that listed incorrect authors. In Opinion No. A-1-CA-38808 (p. 44), Hon. Zachary A. Ives is the correct author, with Judge Kristina Bogardus and Judge Jacqueline R. Medina as the participants. In Opinion No. A-1-CA-36256 (p. 46), Hon. Megan P. Duffy is the correct author, with then-Judge Jennifer L. Attrep in concurrence and then-Chief Judge J. Miles Hanisee dissenting in part and concurring part.

Equity in Justice Program

Have Questions?

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

New Mexico State Bar Foundation

Announcement of Fundraising Events at the 2023 Annual Meeting

The New Mexico State Bar Foundation is hosting two fundraising events at this year's Annual Meeting; all of the proceeds will go to the Bar Foundation to support its mission. The first is a raffle for a chance to win a vacation package valued at $2,500 and includes a Southwest Airlines Gift Card and a Visa Gift Card. The tickets are $100 and can be purchased during the Annual Meeting at the Registration Desk anytime on Thursday, July 27, or Friday, July 28 at the Hyatt Regency Tamaya Resort & Spa. The drawing will take place on the evening of July 28, and you don't have to be present to win. If you will be unable to attend the Annual Meeting, you can still purchase raffle tickets using the secure Jotform and we will enter your name in the raffle. For questions please contact info@sbnm.org. The other event that will take place at the Annual Meeting is a "Snag a Bag" event. The tickets are $50 and everyone is a winner! Pick up your bag at the Registration Desk. Purchase raffle tickets at form.jotform.com/sbnm/BarFoundationRaffle.

New Mexico Lawyer Assistance Program

Monday Night Attorney Support Group

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

NM LAP Committee Meetings

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

New Mexico Medical Review Commission

Notice Seeking Additional Panelists

The New Mexico Medical Review Commission seeks additional volunteer attorney panelists to serve on the Commission's screening panels under the New Mexico Medical Malpractice Act. Each screening panel is made up of three medical professionals and three attorneys of the State Bar of New Mexico. Hearings are held Monday through Thursday at 7 p.m. (MT) by Zoom.

Medical records and other panel materials are provided to each panelist a few days prior to the hearing. Attorneys who participate in panel hearings are eligible for one self-study CLE credit per panel hearing and up to four credits per year. Please fill out a panelist form at https://forms.office.com/pages/responsepage.aspx?id=UUe4lvuTBEu9Ca6-oN8Enk-RV4L2OL7xKgbdoNY4m8i1UNDJOW-jk5TUVLUlRKNUFZREQwVjJVT1R-WVy4u.

UNM School of Law

Law Library Hours

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

Other News

Equal Access to Justice

Newly Released Annual Report

View Equal Access to Justice's 2022-23 Annual Report online at www.eaj-nm.org. See the impact made possible by the many attorneys, solo practitioners, law firms and community members who continue to invest in our community through their generous support of civil legal services. For 35 years, Equal Access to Justice has been helping break down barriers to justice, by providing unrestricted, noncompetitive grants to New Mexico Legal Aid, the New Mexico Center on Law and Poverty and DNA People's Legal Services.

ABA Free Legal Answers is a virtual legal advice portal where qualifying users request brief advice about a specific civil legal issue and pro bono volunteer attorneys provide information and basic legal advice.

Register as a volunteer attorney today and you will be able to provide answers 24/7/365. The platform can be accessed anytime, anywhere at ***your*** convenience.

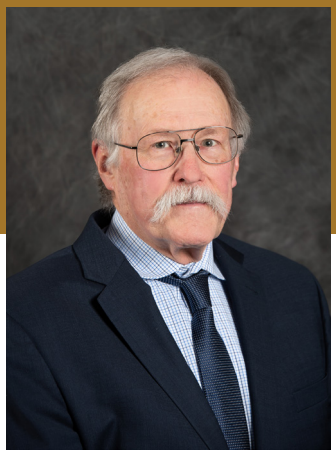
To Register as a volunteer attorney:

- Go to https://nm.freelegalanswers.org/
- Click on "Attorney Registration" and follow the prompts

ABA AMERICAN BAR ASSOCIATION Free Legal Answers

New Mexico State Bar Foundation

The NEW MEXICO STATE BAR FOUNDATION is the State Administrator of the ABA Free Legal Answers Program



A Message from New Mexico State Bar Foundation President Hon. Carl J. Butkus

Dear Friends and Colleagues,

I hope you are enjoying the summer and are using this as a time to unwind and recharge through vacations or other means of improving your well-being. Now, with more than half of the year gone by, it's a good time to take a pause and recognize the achievements of the New Mexico State Bar Foundation ("the Bar Foundation") thus far in 2023 and look at its future in helping the people of New Mexico.

The Bar Foundation has remained steadfast in its approach to helping low-income New Mexicans with access to legal services. Through our new and ambitious Modest Means Helpline, which continues to grow thanks to additional funding from the state legislature, nearly 2,500 New Mexican residents have received invaluable legal assistance since the helpline's inception in October 2022. Due to this initial success and additional funding, the program has been able to hire additional staff, including three attorneys and one intake screener. This will enable the Modest Means Helpline to provide its services more effectively to even more New Mexicans of modest means as we bring these resources online.

While the Modest Means Helpline has certainly seen very significant growth since the helpline's launch, the Bar Foundation's other programs also hold strong as supportive legal tools for members of the public. From the Legal Resources for the Elderly Program to the Bar Foundation's role as state administrator for the American Bar Association Free Legal Answers, the Bar Foundation's variety of successful legal services encapsulates one of its purposes: to establish a robust legal support system that members of the public can rely on when the need arises.

With all of these effective tools, programs and services comes the opportunity for us to celebrate as well. This is why we will be hosting two separate events at the 2023 Annual Meeting at the Hyatt Regency Tamaya Resort & Spa from July 27 through 29. The first will be a ticketed "Snag-a-Bag" event, which will give Annual Meeting attendees the opportunity to redeem a gift bag containing gift certificates, sporting events, spas, art and other goodies. The second event will be a raffle where one lucky attendee will win a vacation package valued at $2,500! While we at the Bar Foundation are dedicated to serving the public, we are also eternally grateful to our members who continue to provide so much for our great state and its diverse community.

As we celebrate our achievements, it's important to recognize that the New Mexico State Bar Foundation is an always-evolving institution striving to serve the public as effectively as it can. The Bar Foundation is striving to expand and grow in its ability to help New Mexicans of modest means. Let us continue to focus the Bar Foundation's goals and achieve excellence for the public into the future.

Sincerely,

Hon. Carl J. Butkus
President, New Mexico State Bar Foundation

STATE BAR OF NEW MEXICO

2023 ANNUAL MEETING

Hyatt Regency Tamaya Resort & Spa • July 27–29

www.sbnm.org/AnnualMeeting2023

Download the App!

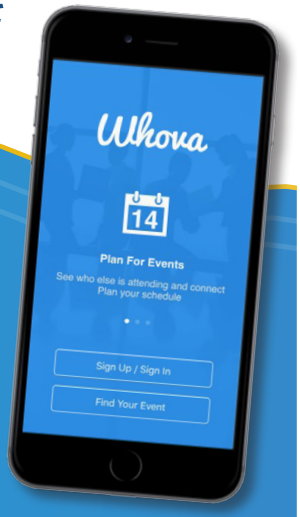
Whova

Invitation Code:
sbnm2023am

We look forward to seeing you there!

The Annual Meeting is only two weeks away! **Register by July 19** and use this QR code to download the **Whova app**, which will have all the information you need for the 2023 Annual Meeting!

- Explore the **professional profiles** of event speakers and attendees
- Send **in-app messages** and **exchange contact info**
- **Network and find attendees** with common affiliations, educations, shared networks, and social profiles
- Receive **update notifications** from organizers
- Access the **event agenda**, GPS guidance, maps, and parking directions at your fingertips



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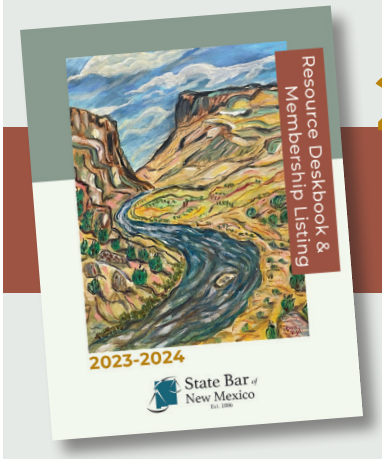
Check your mail for your copy of the

2023-2024 Resource Deskbook & Membership Listing



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

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

Don't forget the extra copies for your staff!

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

State Bar of New Mexico
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Santiago Piza Cossio has joined Modrall Sperling's Transactions Department. Santiago received his J.D. from the University of New Mexico School of Law, after obtaining a Law Degree and Master's Degree from the Sorbonne University. He has worked in the nonprofit sector and in finance and investing. He now assists with commercial transactions, real estate, and renewable energy development in a legal capacity.

Tim Van Valen of Van Valen State Tax Law LLC was recently elected a Fellow of the American College of Tax Counsel (ACTC). College membership is limited to 700 Fellows elected by the Board of Regents after a rigorous vetting process. Tim is the only New Mexico Fellow and one of the relatively few Fellows who practice state and local tax law. Tim's state tax law clients are primarily large multi-state businesses.

Deian McBryde (McBryde Law LLC) has been appointed to the American Bar Association Center for Innovation's Governing Councill by ABA President-Elect, Mary Smith. Beginning in August, Deian will serve a one-year term on the Center's governing council which consists of leaders in technology, innovation, design thinking, and the legal services industry.

Katy M. Duhigg has joined Sutin, Thayer & Browne where she focuses on general litigation, and also on cannabis law, including licensure, regulatory compliance, administrative advocacy and contracts. In 2021, Katy was elected to represent New Mexico Senate District 10 as State Senator. She is Chair of the Senate Rules Committee and Vice Chair of the Senate Judiciary Committee.

Gallagher & Kennedy is pleased to announce that it has been ranked among the law best firms in Arizona and New Mexico by Chambers & Partners, publishers of Chambers USA: America's Leading Lawyers for Business. For 2023, Chambers USA recognized nine G&K attorneys, including **David P. Kimball III, David Wallis, Dalva L. Moellenberg, Anne Leary, Stanton Curry, Chris S. Leason, Lee Decker, Kevin E. O'Malley** and **Terence W. Thompson**. and Chambers USA also recognized G&K in four practice areas, including Environment, Corporate/M&A, Litigation: General Commercial and Natural Resources & Environment.

Appellate attorney **Philip M. Kovnat** is the most recent addition to the Santa Fe office of Durham, Pittard & Spalding, LLP. Phil previously joined the United States Equal Employment Opportunity Commission, where he served as a first-chair trial attorney and as appellate counsel, briefing and arguing appeals in circuits throughout the country.Phil joins Santa Fe-based colleagues **Justin Kaufman, Rosalind Bienvenu** and **Caren Friedman** and brings a wealth of appellate expertise to the firm. DP&S specializes in appeals and strategic litigation support, working with plaintiffs' trial lawyers and firms throughout New Mexico and around the country..

Amy Diaz, a shareholder in Brownstein Hyatt Farber Schreck's Real Estate Department, has joined the board of directors of Corrales Cultural Arts Council (CCAC). In her role, she will advocate for CCAC and its mission, attend the Music in Corrales concert series and Music in Schools events, and help with organizational oversight through participation in CCAC board and committee meetings.

Cyndi Sanchez, a top leader of the New Mexico Law Offices of the Public Defender, has been elected president of the Board of Directors for the National Association of Public Defense, which serves as a national professional organization for more than 30,000 public defenders and a key voice in advocacy for public defense policy and reform.

In Memoriam

James W. Catron Jr., 73, of Baldwin City, KS passed away Sunday, January 23, 2022 at Lawrence Memorial Hospital in Lawrence, KS. He was born December 18, 1948 in Hobbs, NM the son of James W. and Jimmy Ruth (Dobins) Catron. He earned a Bachelor's of Arts degree from the University of New Mexico in Albuquerque, NM. He later earned a Juris Doctor degree from the University of New Mexico. James was a County Attorney with the 7th Judicial District in Truth or Consequences, NM. He retired in 2008 and moved to Lebanon, OK to run the family ranch. In 2014, he moved to Baldwin City, KS where he has lived since. He served our country as a Sergeant in the Army/Air Force during the Vietnam War. He was a member of the Ancient Free & Accepted Masons while living in New Mexico and also a Shriner in New Mexico and Sons of Confederate Veterans Member. Surviving family includes two sons, Joseph Catron of Baldwin City, KS and James R. Catron of Nacogdoches, TX; a daughter, Lisa Erbes of Burnsville, MN; two sisters, Barbara Catron of Enis, OK and Nila Catron of Texas; and eight grandchildren.

Carroll Don "Bud" Martin passed peacefully from this life into eternal life on Sunday, June 6, 2021, in Midland, Texas surrounded by his loving family. Bud was born on March 24, 1943, in Seminole, Oklahoma to Delia and Donald Curtis Martin. Later their family moved to Hereford, Texas. Bud graduated in 1964 with a B.S. from the University of North Texas and received his J.D. in 1967 from The University of Texas School of Law and was a member of Phi Delta Phi fraternity. Bud was licensed in both Texas and New Mexico. Bud Martin began his law career with the Hinkle Law Firm in Roswell, New Mexico in 1967. He was later named partner and moved to Midland office of the Hinkle Law Firm. He was honored to serve as managing partner for many years. Later the Midland Hinkle Law firm was acquired by Kelly Hart but he remained partner until he retired. Bud was past president of the Midland County Bar Association, former Chairman of the Midland City Planning and Zoning Commission and has served as Local Director of the University of Texas Law School Association. He served as a Trustee of the Petroleum Museum and was a member of the Advisory Board of the University of Texas Permian Basin College of Arts & Sciences. Bud served on the Community Board of Directors of Wells Fargo Bank Texas. Bud was a member of, and also served as General Counsel to The Permian Basin Petroleum Association. He was a member of the Permian Basin Landmen's Association. Bud was admitted to the federal courts of New Mexico and the Western and Northern Districts of Texas. He was a Life Fellow of the Texas Bar Foundation and a Fellow of the New Mexico Bar Foundation. Bud was very involved on the board of The Association of the Blind in honor of his mother. Bud was the best husband, father and grandfather and loved his family deeply. We will miss him dearly. Survivors include his loving wife of 47 years, Judy Kulbeth Martin, daughter Jennifer Martin Turney; two grandchildren Walker Martin Turney and wife Allie, Emily Carroll Harbuck and husband Kyle; two great grandchildren Nina Marie Turney and Olivia Carroll Harbuck all of Fort Worth, Texas and his beloved dog and companion Darby. Bud was preceded in death by his parents Delia and Donald Curtis Martin and his daughter, Stephanie Paige Martin. A deep heartfelt appreciation for his wonderful caretakers and doctors through the past few years. His biggest fan and cheerleader was his sweet and faithful wife Judy. Celebration of Life Service will be held on Thursday, June 17 at 2 p.m. at First Presbyterian Church Midland. Honorary pallbearers are Bill Burford, Tom Craddick, Farrell Davis, John Elphick, Doug Forshagen, Harold Hensley, Tevis Herd, Dr. Raja Naidu, Dr. Raj Patel, Mike Sanchez, Bob Spears, Walker Turney and Kyle Harbuck. In lieu of flowers, donations can be made to Midland Memorial Hospital, the Midland SPCA, or a charity of your choice. Arrangements are under the direction of Nalley-Pickle & Welch Funeral Home & Crematory in Midland. Online condolences may be made at www.npwelch.com.

Malcolm L. Shaw, 87, of Dallas, Texas, passed away at his home on Wednesday, November 2, 2022. Born September 6, 1935, in Dallas, Texas, Malcolm was the only child of Milton Amos Shaw and Fay Turner Shaw. He graduated from Highland Park High School. An athlete his entire life, he excelled in school as a baseball pitcher, having played many games at Reverchon Ballpark in a wool uniform in the stifling Texas heat. He lettered in baseball at Southern Methodist University, being named an All-Southwest Conference pitcher in 1956. Before attending law school, he played baseball professionally on the local Washington Senators farm club. Malcolm graduated from Southern Methodist University's Dedman School of Law in June 1960 and was admitted to the Texas and New Mexico Bars and to practice before the United States Supreme Court. He served as Assistant District Attorney for New Mexico's Fifth Judicial District, after which he returned to Dallas, where he practiced general civil law, probate and estate planning, and taxation until his death. A lifelong learner and indefatigable reader, he earned five degrees, including a Master of Laws in Taxation, a Master of Business Administration, and a Master of Science in Economics, in addition to his undergraduate and Juris Doctor degrees. Among his professional interests, Malcolm also contributed articles to the SMU Law Review. He served with the 49th Armored Division, Texas National Guard, and was stationed at Fort Polk in 1961-1962. During that time, he built a baseball diamond and was player/coach of the Fort Polk baseball team. One of its highlights during his tenure was beating the 4th Army. Malcolm was an active Freemason for more than 65 years. Initiated into Tannehill Lodge No. 52, A.F. & A.M., in 1957, he served as its Master in 1986 and received the prestigious Golden Trowel Award in 1999. He was especially active in Scottish Rite Masonry, where he received the 33rd Degree Inspector General Honorary and served as Wise Master of the Dallas Scottish Rite Chapter of Rose Croix. There is a class photo on display at the Dallas Scottish Rite Cathedral showing Jack Hightower, Audie Murphy, and Malcolm Shaw among its new graduates. He was also a member of Hella Shrine, a Past Sovereign of Saint Mark Conclave No. 13, Red Cross of Constantine, and a Past President of the 14th District Masters, Wardens, and Secretaries Association. A Past Commander of Dallas Commandery No. 6, Knights Templar, he received its esteemed Excalibur Award in 2016. Malcolm's was a life of exploration. In addition to Freemasonry and intellectual pursuits, his many activities and interests included boating, flying, hunting, fishing, and photography. He held an instrument-rated private pilot's license and was a certified flight instructor. He was a valued member of the Dallas Sail and Power Squadron of America's Boating Club for more than fifty years, having served as its Squadron Commander and Squadron Law Officer. He attained the rank of Senior Navigator, the highest educational level USPS offers, and was a member of its Governing Board Emeritus, having earned fifty years of Merit Marks. Malcolm's electric personality and incisive wit will be sorely missed by all who knew and loved him.

Jerald "Jerry" Valentine, age 78, passed away in Las Cruces on October 26, 2021. He was born November 27, 1942, in Clovis, NM to Nadine and J.A. Valentine. Jerry graduated from Clovis High School in May of 1960. He attended New Mexico State University majoring in Mechanical Engineering. During this time he was a work study student employed by NMSU Physical Science Laboratory which included work in Brazil at a naval satellite tracking site and work at White Sands Missile Range. He graduated from NMSU in 1966.After Graduation he was employed by the DuPont Company and worked as a mechanical engineer at Sabine River Works in Orange, Texas. He resigned from the DuPont Company to enroll in law school at the University of Texas in Austin graduating in December 1971. He started law practice in Las Cruces, New Mexico in 1972. He served one year as the President of the Dona Ana Bar Association. He served on the Board of Directors of the New Mexico State University Alumni Association, and which included his one year as its Chairman. For several years he lectured on Products Liability for Mechanical Engineering classes. After 21 years of private law practice including a stint as a contract public defender, he was appoint-ed to the position of District Judge of the Third Judicial District in June 1993 by former Gov. Bruce King. He served primarily as Civil Division Judge, but his case load also included serving as Presiding Judge on several major criminal law cases. For approximately six years he served as the Presiding Judge for the Lower Rio Grande Stream Adjudication. He wrote a paper on water law published by the National Center for State Courts. He served as Chief Judge on the Third Judicial District for five years. He was appointed by the New Mexico Supreme Court serve on numerous statewide judicial committees, including among others, Chair of the state Judicial Strategic Plan and Chair of the Judicial Performance Committee. He served one year as the State District Judges Association President of New Mexico. Jerry retired from the bench in December 2010. When he retired he was awarded the Justice Seth D. Montgomery Distinguished Judicial Service Award. Jerry's hobby was wood working. He designed his home and did finish work for his home. Jerry is survived by his sister Lyndal Valentine Benedict and her husband Thomas Benedict, his brother Jack Valentine and wife Linda and numerous nephews, nieces, grandnephews, and grandnieces. He was preceded in death by his Parents.

Lotario D. Ortega passed away peacefully at home on Saturday, January 28, 2023. He celebrated his 100th birthday in August 2022 with family and friends. He was preceded in death by his parents, Lotario Ortega and Lucy Ortega; his beloved wife of 67 years, Mary Smalley Ortega; infant son, John; son, Lotario E. Ortega of Albuquerque, and son, Thomas J. Ortega of Milan, NM. He is survived by his brother-in-law, John Smalley and wife, Janice and children; Mary L. Ortega, Teresa O. Heaphy and husband, Steve, Ann C. Johnson, Peter G. Ortega and wife, Malinda, Paul B. Ortega and wife, Michele, Philip A. Ortega, and Angelica K. Benavidez and husband, Mario; and numerous grandchildren, great-grandchildren, nieces, nephews, and friends. Lotario came from humble beginnings, growing up in the vast open space of New Mexico at a trading post bordering the Navajo Nation near the NM/AZ border. He developed a great love and respect for the land, water, wildlife, and native people that would later shape his career and work life. He graduated from Sacred Heart High School in Gallup NM in May of 1940 as valedictorian and then attended Loyola University in CA working summers to earn tuition at the trading post and at Ft. Wingate where he managed the ammunition storage bunkers. WWII interrupted his studies because he enlisted in the Navy in October 1942 and served in the South Pacific Theater until his discharge in January 1946. After basic training, he returned to Gallup and met the love of his life, Mary Smalley who became his wife on June 19, 1946. He then returned to Loyola University where he completed his undergraduate and law degree in five Years. Dad became an attorney to follow in his uncle Leo Duran's footsteps. He began in private practice in Gallup NM and later became an assistant DA in Gallup. In 1960, as his family grew, he relocated to Albuquerque in order to provide educational opportunities for his children. He continued his career working for the Department of Interior as an assistant Field Solicitor. Later, he was promoted to Field Solicitor in the S.W. region until his retirement. His knowledge of Native American culture and NM wildlife and lands was an asset in his career working with the BIA, Department of Fish and Wildlife, and US Forest Service. To keep busy during retirement, he worked at ABQ and Santa Fe Downs racetracks. He continued his career working for the State of NM MVD as a Hearing Officer. He also served as a Hearing Officer for the Department of Fish and Wildlife on cases involving endangered species and their habitats in western and southwestern regions. He had many interests including fishing, hunting, canning, gardening, history of NM, and genealogy. Dad was a die-hard LA Dodgers baseball fan since their inception in Brooklyn, NY. He was a longtime parishioner of Our Lady of the Assumption parish where he served as a eucharistic minister and a member of several church and school committees. A lifelong learner, our father instilled in us a love of learning, a deep faith in God, and the importance of family.

United States Air Force **Captain Morgan L. Taylor**, 31, of Colorado, formerly of Phillipsburg, NJ, passed away unexpectedly November 12, 2022, in a tragic vehicular accident in Kansas. Born December 19,1990, she was the daughter of Neil M. and Lorna L. (Spiwak) Taylor of Phillipsburg, NJ. After graduating from Phillipsburg High School, Morgan earned her Bachelor of Arts degree in Criminal Justice and Political Science from Rutgers University and Juris Doctor from the University of Maine School of Law. She completed Officer Training School, Judge Advocate Staff Officer Course; completed the Special Victims Capabilities Course and US Army Police School, both at Ft. Leonard Wood; completed the Accident Investigation Course and Air Force Judge Advocate General's School at Maxwell AFB; and completed the Arctic Regional Security Orientation Course in Alaska. Morgan's assignments included Joint Base McGuire-Dix-Lakehurst, NJ, where she was a Legal Extern, and Joint Base Elmendorf-Richardson, AK, where she was an Assistant Staff Judge Advocate with the 673rd Air Base Wing. At the time of her death, Morgan was the Deputy Chief of Military Justice at the United States Air Force Academy in Colorado Springs, CO. In this role, she served as legal counsel to the Academy's Superintendent, Commandant of Cadets, Dean of Faculty, Director of Athletics, headquarters staff, USAFA Preparatory School, 10th Air Base Wing, and all subordinate organizations on matters relating to legal assistance. She was in the process of training to obtain a promotion to the rank of Major. Morgan was passionate about animals and was dedicated to her beloved cat, Aina. She loved board games and hosting game nights for friends. In high school, she competed for the swim and track teams, specializing in pole vaulting. In high school, she participated in the Future Farmers of America and other extracurricular activities. Morgan also previously worked as a lifeguard at the Lopatcong Pool. In addition to her parents, Morgan is survived a sister, Melissa Taylor and her fiancé Keenan Randolph; grandmother, Carole Taylor; grandparents George and Roseanne Spiwak; aunts and uncles Lynne Taylor, Monique Spiwak, Graham and Janith, and Colin and Stacey; cousins Ashley and Emma Taylor and her godfather, Gary Garrison.

Thomas Smidt II, father, husband, friend, tax attorney, and a resident of Albuquerque since 1976, passed away surrounded by his loving family on May 1, 2023. Mr. Smidt was born in New York City to Thomas R. Smidt and Camilla Cole Smidt on January 15, 1946. He grew up in Mt. Kisco, NY and attended the Bedford Rippowam School through the ninth grade. He then attended Choate, followed by The Lawrenceville School in 1964. In 1968, Mr. Smidt graduated from The University of Virginia and then attended American University School of Law where he graduated top of his class earning him an esteemed internship with the Department of Justice in Washington D.C. for five years. In 1976, Thomas, or 'Tom' as he was known by friends, moved with his family across the country to Albuquerque, New Mexico. After some years with local firms, Mr. Smidt opened his own firm and practiced there until his death. The last 19 of which were partnered with his eldest son. Mr. Smidt was extremely involved with his community, serving on many boards throughout the state of New Mexico. He was a generous supporter of numerous no-kill animal shelters, including Watermelon Mountain Ranch. In his younger years, Tom was an avid tennis player, with a serve of which his opponents were wary. He took numerous photos of his children and family and put together sensational slide shows. In later years, neighbors would know him by his early morning walks with his beloved rescue dogs, no matter the weather. He also had an amazing green thumb and was able grow some of the most arduous of plants. He loved being involved with his children and grandchildren and attended countless soccer games, gymnastics competitions, swim meets, musical performances and numerous other activities. He even stepped in to help coach when asked. He especially loved visiting his cherished Deerwoods property on the Hudson with as many family members and friends who were able to join. Tom had just celebrated his 30th anniversary with his devoted wife Vicki. They loved each other deeply and shared a devotion to their children and grandchildren as well as many rescue animals. They also enjoyed traveling together to various destinations. They would regularly visit Hawaii, often with close family and friends in attendance. In previous years, they would make annual trips with Tom's mother to places she had expressed interest in and most certainly, at their shared loved of the Deerwoods property where they regularly hosted family and friends from near and far, long time friends, and new acquaintances. All were welcome to enjoy the splendor and magic of the revered grounds. Mr. Smidt had a servant's heart. No matter his schedule or how busy he might be, he would help anyone who was in need. He was kindhearted, generous and inclusive. Always the diplomat, Tom was known as the glue that bound his family together. And, if you knew Tom, you would receive a call on your birthday every year without fail. He was preceded in death by his mother Camilla Smidt, his father Thomas R. Smidt, and many beloved pets. He is survived by his wife, Victoria S. Smidt of Albuquerque, his children Marie Smidt Reinarz (Cole Reinarz) of Cedar Park, Texas, Thomas 'Tommy' Smidt III (Annie Smidt) of Albuquerque, David M. Smidt (Aimee Smidt) of Albuquerque, John B. Smidt (Danielle Smidt) of Denver, CO, Miranda Alongi (Michael Alongi) of West Hills, CA, grandchildren, Will Hamic, Lauren Hamic, Grete' Hamic, Cole Smidt, Ryan Smidt, Wheeler Smidt, Oakley Smidt and Vance Alongi. A celebration of Tom's life was held in Albuquerque, NM on Sunday, June 11, 2023 from 2-5pm in an open house format at the Tramway Plaza Event Center, 9600 Tennyson Street NE, Albuquerque, NM 87122. Eulogies will take place starting at around 3:00. If you know Tom's favorite color, please wear it proudly! A second celebration will be held on Saturday, July 22, 2023 at Deerwoods in Cornwall, NY for friends and family as well. Tom loved to reminisce and share stories and fond memories. A website has been created for family and friends to visit and share their own personal memories of Tom. Please visit tsmidt2.com. In lieu of flowers, if you would like to contribute to Tom's memory, please consider a donation to Watermelon Mountain Ranch (mailing: 1380 Rio Rancho Blvd. SE, Suite 374 Rio Rancho, NM 87124/or visit: https://www.wmranch.org).

From the New Mexico Supreme Court

Opinion Number: 2023-NMSC-004
No: S-1-SC-38130 (filed February 27, 2023)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
CHRISTOPHER T. RODRIGUEZ,
Defendant-Petitioner

ORIGINAL PROCEEDING ON CERTIORARI
Brett R. Loveless, District Judge

Bennett J. Bauer,
Chief Public Defender
Allison H. Jaramillo,
Assistant Appellate Defender
Santa Fe, NM

for Petitioner

Hector H. Balderas, Attorney General
John J. Woykovsky,
Assistant Attorney General
Santa Fe, NM

for Respondent

American Civil Liberties Union
of New Mexico
Leon Howard, III
Albuquerque, NM

Juvenile Law Center
Marsha L. Levick
Philadelphia, PA

for Amici Curiae Juvenile Law Center,
Campaign for Youth Justice, and The
Sentencing Project

OPINION

VIGIL, Justice.

{1} The Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2021), directs that a "youthful offender" who has been found guilty of committing certain felonies is entitled to an amenability hearing to determine if the child will receive an adult sentence or juvenile sanctions. Section 32A-2-20. Defendant Christopher T. Rodriguez pleaded guilty to felony offenses committed when he was sixteen years old under a plea and disposition agreement, and following an amenability hearing, the district court imposed an adult sentence.

{2} Defendant appealed the amenability determination, and on its own motion, the Court of Appeals held that under the plea and disposition agreement, Defendant waived his right to appeal. *State v. Rodriguez*, A-1-CA-37324, mem. op. ¶¶ 1, 9 (N.M. Ct. App. Nov. 27, 2019) (nonprecedential). We granted certiorari to determine whether a juvenile waives the right to appeal an amenability determination by entering into a plea and disposition agreement. We hold that the right is not waived, reverse the Court of Appeals, and remand the case to the Court of Appeals to decide Defendant's appeal on the merits.

I. BACKGROUND

A. District Court

{3} In the plea and disposition agreement, Defendant agreed to plead guilty to one count of aggravated burglary (deadly weapon), pursuant to NMSA 1978, Section 30-16-4(A) (1963) and NMSA 1978, Section 31-18-16 (1993, amended 2022); two counts of conspiracy to commit aggravated burglary (deadly weapon), pursuant to NMSA 1978, Section 30-28-2 (1979) and Section 30-16-4(A); one count of unauthorized use of the card of another, pursuant to NMSA 1978, Section 58-16-16(B) (1990); three counts of residential burglary, pursuant to NMSA 1978, Section 30-16-3(A) (1971); and two counts of auto burglary, pursuant to Section 30-16-3(B).

{4} The plea and disposition agreement provided that "[s]ome of the charges make [Defendant] a 'youthful offender,[']therefore an amenability hearing will need to be held to determine whether [Defendant] will receive a juvenile or adult sentence." The agreement further provided a "waiver of defenses and appeal" provision that stated:

> Unless this plea is rejected or withdrawn, [Defendant] gives up all motions, defenses, objections, or requests which he has made or could make concerning the [c]ourt's entry of judgment against him if that judgment is consistent with this agreement. [Defendant] specifically waives his right to appeal as long as the court's sentence is imposed according to the terms of this agreement.

{5} The potential adult sentence listed in the agreement was thirty-one years and six months of incarceration, and there were "no other agreements as to sentencing." Defendant verbally acknowledged that he read, understood, and agreed to the terms of the agreement, and also noted his approval by signing the agreement. The agreement was then signed by Defendant's attorney, the prosecutor, and the district court judge.

{6} Following the amenability hearing, the district court entered its order finding that Defendant was "not amenable to treatment as a juvenile." Defendant was sentenced as an adult to thirty-one years and six months with seventeen years and six months suspended pursuant to Section 32A-2-20(A), (B).

B. Court of Appeals

{7} Defendant appealed to the Court of Appeals, arguing that the district court abused its discretion in finding that he was not amenable to treatment in the juvenile system. The Court of Appeals did not address the merits of Defendant's argument. *See Rodriguez*, A-1-CA-37324, mem. op. ¶¶ 6-10. Instead, after raising the issue on its own, the Court proceeded to determine whether Defendant waived his right to appeal under the plea and disposition agreement. *Id.* ¶ 6. Concluding that because the sentence imposed was within the parameters set forth in the plea and disposition agreement, the Court of Appeals held that Defendant waived his right to appeal the outcome of the amenability hearing and dismissed the appeal. *Id.* ¶¶ 8, 10. We granted Defendant's petition for a writ of certiorari to review this holding.

See Rule 12-502 NMRA.

II. DISCUSSION

{8} Defendant asserts that he did not and could not waive his right to challenge the district court's amenability determination. Because "[t]he right to appeal is a matter of substantive law," our review of whether Defendant is entitled to appeal the result of the amenability hearing is de novo. *State v. Cruz*, 2021-NMSC-015, ¶ 31, 486 P.3d 1 (alteration, internal quotation marks, and citation omitted). Defendant contends that the Court of Appeals' ruling is "inconsistent with [our holding] in *State v. Jones*, 2010-NMSC-012, ¶ 38, 148 N.M. 1, [229 P.3d 474,] . . . that a juvenile defendant cannot bargain away the amenability determination." The State argues that Defendant did not specifically reserve the right to appeal the amenability hearing in the plea and disposition agreement, and therefore, the waiver of defenses and right to appeal in the agreement controls. In response, Defendant makes two arguments. First, Defendant contends that because the amenability determination cannot be waived by the child, "[i]t only follows that the child retains the right to appeal [an amenability determination], as it affects the very authority of the district court to impose an adult sentence." Second, he argues that the sentence imposed was illegal because there was not clear and convincing evidence to support a finding that he was not amenable to treatment. Because we agree with Defendant's first argument and because the question of whether Defendant waived his right to appeal the amenability determination was the sole issue granted on certiorari, we address only this point. *See* Rule 12-502(C)(2)(b).

{9} We begin by briefly reviewing the statutorily created right to an amenability determination. *See* § 32A-2-20(B), (C). We then discuss our holding in *Jones*, 2010-NMSC-012, and how an amenability determination cannot be waived by a juvenile. Finally, we review the types of sentencing claims that may be raised on appeal despite a valid guilty plea and appellate waiver. Concluding that a juvenile's guilty plea may neither waive the right to an amenability determination nor the right to appeal the outcome of such a determination, we reverse and remand to the Court of Appeals for consideration of the merits of Defendant's challenges to the amenability determination.

A. The Statutory Right to an Amenability Determination

{10} Under our Delinquency Act, §§ 32A-2-1 to -33, there are three classes of juvenile offenders: serious youthful offenders, youthful offenders, and delinquent offenders. *See* § 32A-2-3(C), (H), and (J). One definition of a "youthful offender" includes a "delinquent child subject to adult or juvenile sanctions" who is fourteen to eighteen years old at the time of the offense and who is guilty of any of a series of listed offenses, including aggravated burglary. Section 32A-2-3(J)(1)(k). Because Defendant pleaded guilty to aggravated burglary and was sixteen at the time of the offense, he is a youthful offender.

{11} Youthful offenders are not automatically subject to adult sanctions—certain procedural protections afforded by the Delinquency Act must be met before an adult sentence can be imposed upon a juvenile. Notably, "the court *shall* make the following findings in order to invoke an adult sentence: (1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and (2) the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders." Section 32A-2-20(B) (emphasis added). In making these findings, the court *shall* consider the following factors:

> (1) the seriousness of the alleged offense;
> (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
> (3) whether a firearm was used to commit the alleged offense;
> (4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;
> (5) the maturity of the child as determined by consideration of the child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability;
> (6) the record and previous history of the child;
> (7) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available; and
> (8) any other relevant factor, provided that factor is stated on the record.

Section 32A-2-20(C) (emphasis added); *see also* Rule 10-247(F) NMRA. To "consider" a factor, the court must "think about this evidence with a degree of care and caution." *State v. Doe*, 1979-NMCA-122, ¶ 13, 93 N.M. 481, 601 P.2d 451 (internal quotation marks and citation omitted). Further, the court must make findings as to each factor. *State v. Sosa*, 1997-NMSC-032, ¶ 8, 123 N.M. 564, 943 P.2d 1017, *abrogated on other grounds by State v. Porter*, 2020-NMSC-020, ¶¶ 6-10, 476 P.3d 1201; *see also Jones*, 2010-NMSC-012, ¶ 41 (explaining that "none of those factors, standing alone, is dispositive").

{12} The plain language, "the court shall make the following findings in order to invoke an adult sentence," § 32A-2-20(B), and the court "shall consider the following factors," § 32A-2-20(C), demonstrates "that the Legislature intended the court to make an amenability determination whenever it considers imposing an adult sentence," and in making that determination, the court must take into account certain criteria. *Jones*, 2010-NMSC-012, ¶ 24. However, this was not always the case.

{13} In 1975, the Legislature "lowered the threshold for transfer to district court for certain serious offenses." *Id.* ¶ 30; *see* 1975 N.M. Laws, ch. 320, § 4(A)(1). The 1975 amendment allowed the "discretionary transfer to criminal court" by the children's court, which only had to hold a hearing to "consider[]" the juvenile's amenability to treatment and find "that there [were] reasonable grounds to believe that the child committed the alleged delinquent act." 1975 N.M. Laws, ch. 320, § 4(A)(1), (4), (5); *see also State v. Doe*, 1983-NMSC-105, ¶ 5, 100 N.M. 649, 674 P.2d 1109 (holding that this statute only required the court to consider child's amenability, rather than make a specific finding).

{14} In 1993, with the passage of the Delinquency Act, the Legislature removed the relaxed requirements to transfer a juvenile proceeding to the district court for an adult trial and extended protections of the juvenile system to all juvenile offenders except "serious youthful offenders" charged with first-degree murder. *See* 1993 N.M. Laws, ch. 77, § 32(H); *see also* § 32A-2-3(H). A court can no longer merely "consider" the child's amenability to treatment. *See* § 32A-2-20(B)(1). Instead, it has to make the specific finding that "the child is not amenable to treatment or rehabilitation as a child in available facilities," *id.*, and that finding must be based on consideration of the Section 32A-2-20(C) factors listed above. Hence, the legislative history demonstrates "an evolving concern that children be treated as children so long as they can benefit from the treatment and rehabilitation provided for in the Delinquency Act." *Jones*, 2010-NMSC-012, ¶ 32.

{15} In addition to the legislative history, other parts of the Delinquency Act "reflect the Legislature's intent to insulate delinquent children from the potentially life-long consequences under the adult criminal justice system that may flow from a bad decision." *Id.* ¶ 37. For example, the primary purpose of the Delinquency Act is "consistent with the protection of the public interest, to remove from children

committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable for their actions to the extent of the child's age, education, mental and physical condition, background and all other relevant factors." Section 32A-2-2(A). "Thus, unlike the adult criminal justice system, with its focus on punishment and deterrence, the juvenile justice system reflects a policy favoring the rehabilitation and treatment of children." *Jones*, 2010-NMSC-012, ¶ 35 (internal quotation marks and citation omitted). Another example is Section 32A-2-19, which "delimits the court's authority and discretion to hold a child accountable after being adjudicated delinquent." *Jones*, 2010-NMSC-012, ¶ 37; *see* § 32A-2-19(B) (limiting the dispositions following a delinquent adjudication).

{16} Knowing the Legislature tailored the Delinquency Act to promote rehabilitation and treatment of children and that there is a statutorily created right to an amenability determination, we now turn to our holding in *Jones*, 2010-NMSC-012.

B. An Amenability Determination Cannot Be Waived

{17} In *Jones*, we held that a "finding of non-amenability is the trigger for the court's authority to sentence a youthful offender as an adult," and that the statutory right to an amenability hearing may not be waived. *Id.* ¶¶ 38, 46. Said another way, an amenability determination is a nonwaivable "condition precedent to a court invoking an adult sentence." *Id.* ¶ 24. The juvenile defendant in *Jones* was originally charged with first-degree murder and classified as a serious youthful offender. *Id.* ¶ 1. However, the juvenile defendant pleaded guilty to a lesser crime and was then classified as a youthful offender. *Id.* ¶¶ 1, 22. As such, the defendant "was entitled to the full range of protections afforded by the Delinquency Act." *Id.* ¶ 22.

{18} The plea agreement in *Jones* included a provision stating, "There is no agreement as to sentencing other than that [the juvenile defendant] agrees to be sentenced as an adult." *Id.* ¶ 7 (internal quotation marks omitted). As such, the district court sentenced the defendant to the maximum adult sentence allowed without making an amenability determination. *Id.* ¶¶ 1, 8. The defendant appealed, arguing that "[a]s a youthful offender, . . . the children's court lacked the authority to sentence him as an adult without first determining his amenability to treatment or rehabilitation as a juvenile, even if he did not ask for such a hearing and appeared to waive it." *Id.* ¶¶ 2, 9. We agreed. *Id.* ¶ 3. Concluding that a finding of nonamenability is "the necessary leverage to dislodge a youthful offender from the protective dispositional scheme of the Delinquency Act," we invalidated the defendant's plea agreement. *Id.* ¶¶ 3, 38.

C. An Amenability Determination Can Be Challenged on Appeal Despite the Entry of a Valid Guilty Plea and Appellate Waiver

{19} We now turn to the question of whether a challenge to an amenability determination is a jurisdictional defect that may be raised on appeal, notwithstanding the entry of a valid guilty plea and appellate waiver. Questions of subject matter jurisdiction are also reviewed de novo. *State v. Chavarria*, 2009-NMSC-020, ¶ 11, 146 N.M. 251, 208 P.3d 896.

{20} The Delinquency Act is part of the Children's Code, NMSA 1978, §§ 32A-1-1 to -28-42 (1993, as amended through 2022). "Because proceedings under the Children's Code are special statutory proceedings," the right to appeal falls under NMSA 1978, Section 39-3-7 (1966), which provides that any aggrieved party may appeal "the entry of any final judgment or decision, . . . or any final order after entry of judgment which affects substantial rights, in any special statutory proceeding in the district court." *State v. Nehemiah G.*, 2018-NMCA-034, ¶¶ 14-15, 417 P.3d 1175 (alteration in original) (brackets, internal quotation marks, and citation omitted) (applying Section 39-3-7 for the right to appeal an amenability determination); *see* NMSA 1978, § 32A-1-5 (1993) (establishing the children's court as a division of the district court). That said, "a voluntary guilty plea ordinarily constitutes a waiver of the defendant's right to appeal his conviction *on other than jurisdictional grounds*." *Chavarria*, 2009-NMSC-020, ¶ 9 (emphasis added) (internal quotation marks and citation omitted). To put it another way, a plea may waive the right to appeal statutory or constitutional rights, *see id.*, but it "may not waive the right to challenge on appeal whether a sentence was imposed without jurisdiction." *State v. Tafoya*, 2010-NMSC-019, ¶ 6, 148 N.M. 391, 237 P.3d 693; *see also State v. Trujillo*, 2007-NMSC-017, ¶ 8, 141 N.M. 451, 157 P.3d 16 ("[A] plea of guilty does not waive jurisdictional errors."); Rule 12-321(B)(1) NMRA (providing that jurisdictional challenges may be raised for the first time on appeal). Accordingly, whether Defendant may raise a challenge to the amenability determination on appeal turns on whether that claim is jurisdictional. *See Chavarria*, 2009-NMSC-020, ¶¶ 9-10.

{21} In *Chavarria*, we addressed the meaning of "jurisdictional" in the context of sentencing. We explained that "[t]he only relevant inquiry in determining whether the court has subject matter jurisdiction is to ask whether the matter before the court falls within the general scope of authority conferred upon such court by the constitution or statute." *Id.* ¶ 11 (alteration, internal quotation marks, and citation omitted). A court's "power to sentence is derived exclusively from statute." *Id.* ¶ 12 (internal quotation marks and citation omitted). Thus, "a court's sentencing power properly is considered part of its subject matter jurisdiction." *Tafoya*, 2010-NMSC-019, ¶ 7; *cf. State v. Wyman*, 2008-NMCA-113, ¶ 2, 144 N.M. 701, 191 P.3d 559 ("A claim that a sentence is illegal and unauthorized by statute is jurisdictional and may be raised for the first time on appeal."). Consequently, whether a sentencing court acts within its jurisdiction hinges on whether the defendant's sentence was authorized by the sentencing statute. *See Chavarria*, 2009-NMSC-020, ¶¶ 11-12.

{22} Here, the sentencing statute is Section 32A-2-20, which is titled "Disposition of a youthful offender." As reflected above, Section 32A-2-20(B) and (C) mandates that "in order to invoke an adult sentence," the court must find that "the child is not amenable to treatment or rehabilitation as a child" and in making that finding, must consider certain factors. As we said in *Jones*, "The finding of non-amenability is the trigger for the court's authority to sentence a youthful offender as an adult." 2010-NMSC-012, ¶ 38. *See* Rule 10-247(B) ("The court shall not impose adult sanctions without holding an amenability hearing."). Because of this, we conclude that a challenge to an amenability determination presents a challenge to the jurisdiction of the district court to impose an adult sentence, and it may be raised on appeal notwithstanding the entry of a valid guilty plea and appellate waiver. This conclusion is reinforced by the concern of the Legislature "that children be treated as children so long as they can benefit from the treatment and rehabilitation provided for in the Delinquency Act." *Jones*, 2010-NMSC-012, ¶ 32.

{23} If we were to conclude that a juvenile defendant waived the right to appeal an amenability determination—by express waiver or, as in this case, implicitly with a general appellate waiver provision—we would render the amenability hearing itself, the factors detailed in Section 32A-2-20(C), and our holding in *Jones*, pointless. If a juvenile defendant waived the ability to appeal the outcome of an amenability hearing, a hearing we said in *Jones* could not "be bargained away," 2010-NMSC-012, ¶ 46, a court could simply "consider" the child's amenability, ignoring the factors of Section 32A-2-20(C), and find that the child is not amenable to treatment or rehabilitation as a juvenile. This would reduce the amenability hearing to nothing more than window dressing and effectively reinstate the 1975 "discretionary transfer to criminal court." *See* 1975 N.M. Laws, ch.

320, § 4(A). Given the interests at stake, we do not condone such an outcome.

{24} "We are hard-pressed to conceive of a decision that cuts closer to the core of society's interest than an election to give up on one of its children." *Jones*, 2010-NMSC-012, ¶ 46. We will not declare an amenability determination—a determination that implicates the interests of the child, the child's family, and society as a whole—nothing more than an empty shell along the path to imposing an adult sentence upon a juvenile. Because Defendant could not waive the ability to appeal the outcome of his amenability hearing, we reverse the Court of Appeals.

III. CONCLUSION

{25} We conclude that a juvenile's guilty plea may neither waive the right to an amenability determination, *id.*, nor can it waive the right to appeal the outcome of an amenability determination. Without a finding of nonamenability, the court lacks the authority to sentence a juvenile defendant as an adult. *See id.* ¶ 38. As such, a challenge to an amenability determination presents a jurisdictional argument that may be raised on appeal notwithstanding the entry of a valid guilty plea and appellate waiver. *Cf. Tafoya*, 2010-NMSC-019, ¶¶ 6-8 (stating that the defendant's plea agreement did not waive the right to appeal a claim that the district court erroneously applied the Earned Meritorious Deductions Act in fashioning his sentence); *Trujillo*, 2007-NMSC-017, ¶¶ 7-9 (treating as a jurisdictional matter the issue of whether the trial court could enhance the defendant's sentence as a habitual offender).

{26} "Because we see no justification for applying today's rule retroactively, we hold that the rule applies only to this and all other cases in which a verdict has not been reached and those cases on direct review in which the issue was raised and preserved below." *Jones*, 2010-NMSC-012, ¶ 49 (internal quotation marks and citation omitted). Accordingly, we reverse and remand to the Court of Appeals to consider the merits of Defendant's challenges to the amenability determination.

{27} IT IS SO ORDERED.

MICHAEL E. VIGIL, Justice

WE CONCUR:

C. SHANNON BACON, Chief Justice

DAVID K. THOMSON, Justice

BRIANA H. ZAMORA, Justice

T. GLENN ELLINGTON, Judge

Sitting by designation

From the New Mexico Supreme Court

Opinion Number: 2023-NMSC-005
No: S-1-SC-39129 (filed March 6, 2023)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
ALBERT FERNANDEZ,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Michael H. Stone, District Judge

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

for Petitioner

Hector H. Balderas, Attorney General
John Kloss,
Assistant Attorney General
Santa Fe, NM

for Respondent

OPINION

VARGAS, Justice.

I. INTRODUCTION

{1} Defendant Albert Fernandez appeals his conviction for battery upon a peace officer contrary to NMSA 1978, Section 30-22-24 (1971). We granted Defendant's petition for writ of certiorari to determine whether (1) the district court incorrectly admitted Defendant's prior conviction for battery upon a peace officer, (2) cumulative error deprived Defendant of a fair trial, and (3) the Court of Appeals improperly decided Defendant's appeal without considering his reconstructed testimony. We hold that the district court abused its discretion in admitting Defendant's prior conviction for battery upon a peace officer. We therefore reverse the Court of Appeals and remand for a new trial. In light of our reversal, we conclude that it is unnecessary to address the merits of Defendant's claim of cumulative error. Finally, we conclude that Defendant's request to supplement the record with his reconstructed testimony was resolved by the Court of Appeals and is therefore moot.

II. BACKGROUND

A. Factual Background

{2} Officer Jorge Soriano stopped Defendant after observing him driving erratically. Officer Soriano was then joined at the scene by Officer Seth Ford. The lapel camera footage of the arrest shows that the officers approached Defendant's car and asked that he submit to a field sobriety test to which Defendant initially agreed. After getting out of his car, Defendant failed to follow the instructions of Officer Ford, the officer administering the field sobriety test, became argumentative, used profanities, and slurred his speech. He was then handcuffed and arrested for driving under the influence of alcohol.

{3} As Officer Ford walked Defendant over to the police car, a muffled sound is heard coming from the lapel camera's microphone. Officer Ford then told Defendant, "Stop, you're gonna get more charges, sir," and Defendant responded with an expletive. Before getting into the police car, more muffled sounds are heard, Defendant's arm is seen moving, and Officer Ford then said, "Alright you just got yourself another charge." Defendant asked, "For?" and Officer Ford responded, "Battery on a peace officer, you just hit me with your head." Defendant then yelled, "Are you fucking serious?" to which Officer Ford responded, "Are you done?" Defendant continued to yell profanities. During this interaction, Defendant's head is not visible in relevant portions of the lapel footage.

{4} Following this exchange, several officers struggled to place Defendant in the police car. This portion of the lapel camera footage is dark and blurry. Officer Ford asked another officer, "Do you want me to twist him?" and then, between muffled sounds, Officer Ford told Defendant, "Stop kicking me." Defendant yelled back, "I didn't kick you, fucking bitch." During this struggle, Defendant's legs and feet are not visible in the lapel camera footage. Once Defendant was in the police car, Officer Ford pulled out his taser and sparked it, and then told Defendant that he would be tased if he did not sit up. Defendant sat up, the officers shut the police car door, and Defendant was transported to the local jail. Defendant was charged with one count of battery upon a peace officer, among other charges not relevant to Defendant's appeal.

B. Procedural Background

1. Proceedings in the District Court

{5} The day of the trial, before opening statements, defense counsel orally moved to suppress any evidence that Defendant was on probation at the time of his arrest, along with evidence of the underlying crime for which Defendant was on probation.[1] At the time of the arrest, Defendant was on probation for a conviction for battery upon a peace officer. Criminal Information, *State v. Fernandez*, D-506-CR-2016-00628 (5th Jud. Dist. Ct. Aug. 16, 2016); *see also* Order of Probation, *id.* (Sept. 19, 2017). Though no mention was made of the nature of the crime for which Defendant was serving probation, the district court judge granted Defendant's motion to suppress any evidence that Defendant was on probation at the time of the arrest and evidence of the underlying crime because the State did not give Defendant proper notice of its plan to use this evidence and the evidence's "prejudice . . . greatly outweighs any probative value."

{6} At trial, Officers Soriano and Ford testified, and the State introduced the lapel camera footage. Both officers testified that Defendant head-butted and kicked Officer Ford as he was being placed in the police car. In his case-in-chief, Defendant testified that he did not hit Officer Ford. On cross-examination, Defendant again denied head-butting or kicking Officer Ford. Following Defendant's denials, the State asked to approach the bench. Because the recording of the bench conference is inaudible, the Court of Appeals later remanded the case for the limited purpose of reconstructing the record of the bench conference. *State v. Fernandez*, A-1-CA-38110, mem. op. ¶ 5 (N.M. Ct. App. Nov. 15, 2021) (nonprecedential). The district court's reconstruction of the bench conference, in pertinent part, reads:

[1] Defendant did not invoke a rule of evidence in his motion to suppress.

> The State requested . . . permission to approach the bench during its cross-examination of Defendant. At the bench the State said[,] "State intends to impeach the witness at this point with prior felony convictions[."] Defense counsel starts to respond[,] saying "at this time" and as defense counsel spoke, the court stated[,] "[H]e can ask, he can ask[."] Defense counsel objected that it would be more prejudicial than probative, and the court informed defense counsel that the defense had opened the door, without expanding on how. The State informed the court that it had disclosed [the] judgement and sentence to the Defense.

Following the bench conference, the State impeached Defendant with his prior felony conviction for battery upon a peace officer:

> State: Mr. Fernandez, I'm going to ask you, do you have a felony conviction?
> Defendant: I do.
> . . . .
> Defense Counsel: Objection, once again for the record, he did not open the door to this.
> Judge: For the record, I note your objection. I'll overrule it. You may proceed, Mr. Moore.
> State: You have a conviction in CR 2016 628?
> Defendant: I don't know what that refers to.
> State: It was a 2016 case. Do you remember what you were charged with?
> Defendant: I have a couple.
> State: Alright. Do you remember what your charges were?
> Defendant: Criminal damage to property.
> State: Do you remember that you were charged with battery on a peace
> officer in that case?
> . . . .
> Defendant: Yes.
> Defense Counsel: Your honor, I will make . . . an ongoing objection.
> Judge: Noted. Overruled.
> State: Thank you, nothing further.

In its rebuttal to defense counsel's closing argument, the State argued that Defendant's prior conviction for battery upon a peace officer showed absence of mistake and impeached Defendant's credibility. The jury found Defendant guilty of battery upon a peace officer. Defendant appealed.

2. Proceedings in the Court of Appeals

{7} The Court of Appeals concluded that notwithstanding the fact that the district court did not explain how it arrived at its decision to admit evidence of Defendant's prior conviction, including whether it balanced the probative value against the prejudicial effect, it must indulge every presumption "in favor of the correctness and regularity of the [district] court's judgment." *Fernandez*, A-1-CA-38110, mem. op. ¶ 13 (internal quotation marks and citation omitted). Then, applying the six factors established in *State v. Lucero*, 1982-NMCA-102, ¶ 12, 98 N.M. 311, 648 P.2d 350, the Court of Appeals held that the district court did not abuse its discretion when it admitted evidence of Defendant's prior conviction for battery upon a peace officer, *Fernandez*, A-1-CA-38110, mem. op. ¶¶ 14-20, and affirmed Defendant's conviction. *Id*. ¶ 43. Defendant filed a petition for writ of certiorari in this Court, which we granted on all questions presented.

III. DISCUSSION

A. Admission of Defendant's Prior Conviction

1. Standard of Review

{8} "We review the district court's decision to admit or exclude evidence for an abuse of discretion." *State v. Guerra*, 2012-NMSC-014, ¶ 36, 278 P.3d 1031. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Smith*, 2016-NMSC-007, ¶ 27, 367 P.3d 420 (internal quotation marks and citation omitted). "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." *State v. Adams*, 2022-NMSC-008, ¶ 35, 503 P.3d 1130 (brackets, internal quotation marks, and citation omitted). Further, "[a] misapprehension of the law upon which a court bases an otherwise discretionary evidentiary ruling is subject to de novo review." *State v. Lymon*, 2021-NMSC-021, ¶ 36, 488 P.3d 610 (internal quotation marks omitted) (quoting *State v. Martinez*, 2008-NMSC-060, ¶ 10, 145 N.M. 220, 195 P.3d 1232).

{9} Defendant argues that this Court should apply a de novo standard of review because the district court misapprehended the law when it "stated that it lacked discretion to limit impeachment with prior convictions because [Defendant] opened the door by testifying." The State, on the other hand, contends that this Court should review the district court's decision for an abuse of discretion because the record does not indicate that the district court stated it lacked discretion to limit impeachment with prior convictions. We agree with the State.

{10} Although the law does not require the district court to explain its exercise of discretion on the record, "the better practice for a judge relying upon discretionary authority is to place on the record the circumstances and factors critical to the decision," *State v. Trejo*, 1991-NMCA-143, ¶ 7, 113 N.M. 342, 825 P.2d 1252, to facilitate appellate review. In this case, not only is it unclear whether the district court believed it lacked discretion to limit impeachment, as Defendant contends, it is also unclear whether the district court judge knew and considered the nature of Defendant's prior conviction before admitting it for purposes of impeachment. The record in this case is silent on the "circumstances and factors critical to the [district court's] decision" to admit Defendant's prior conviction. *See id*. Nonetheless, "[w]here there is a doubtful or deficient record, every presumption must be indulged by the reviewing court in favor of the correctness and regularity of the [district] court's judgment." *State v. Rojo*, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). We therefore presume that the district court judge did know the nature of Defendant's prior conviction and considered it in the context of the proper legal standard before making its ruling. Thus, we review the district court's decision to admit Defendant's prior conviction for an abuse of discretion.

2. Rule 11-609(A)(1)(b) NMRA

{11} Under Rule 11-609(A)(1)(b), proffered evidence of a prior felony conviction that is less than ten years old must be admitted for the purpose of impeaching a defendant's "character for truthfulness . . . if the probative value of the evidence outweighs its prejudicial effect to that defendant." This standard is higher than the Rule 11-403 NMRA standard, which allows the district court to exclude evidence only "if its probative value is *substantially* outweighed by a danger of . . . unfair prejudice." (emphasis added). Rule 11-609(A)(1)(b) protects defendants against any "prejudicial effect" from evidence of prior convictions, while Rule 11-403 protects witnesses other than criminal defendants "only against the danger of 'unfair prejudice' from evidence of their prior convictions." 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 609.05[3][a] (Mark S. Brodin, ed., Matthew Bender 2d ed. 2022). "These distinctions acknowledge that a jury is more likely to use a prior conviction against the defendant as propensity evidence than it would when faced with a government witness's prior conviction." *Id*.

3. The *Lucero* Factors

{12} To determine whether the probative value of a prior felony conviction not

involving dishonesty outweighs its prejudicial effect under Rule 11-609(A)(1)(b), New Mexico courts weigh:

> (1) the nature of the crime in relation to its impeachment value as well as its inflammatory impact; (2) the date of the prior conviction and witness' subsequent history; (3) similarities, and the effect thereof, between the past crime and the crime charged; (4) a correlation of standards expressed in Rule [11-]609(a) with the policies reflected in [Rule 11-404 NMRA]; (5) the importance of the defendant's testimony[;] and (6) the centrality of the credibility issue.

Lucero, 1982-NMCA-102, ¶ 12 (citing *United States v. Mahone*, 537 F.2d 922 (7th Cir. 1976); *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965)). These factors "are not to be considered mechanically or in isolation." *Trejo,* 1991-NMCA-143, ¶ 9.

a. Nature of the crime

{13} At common law, any individual who had been convicted of a felony or a crime involving dishonesty "was incompetent as a witness." 4 Weinstein, *supra*, § 609App.100. Rather than brand a witness as incompetent, we now allow the jury to learn of the witness's felony convictions and convictions for crimes involving dishonesty, with a view toward evaluating the witness's character for truthfulness. *See* Rule 11-609 ("Impeachment by evidence of criminal conviction."). However, we recognize that the value of such an assessment is questionable because "[m]any crimes . . . do not . . . support the inference that the person who committed them has a specific proclivity for lying on the witness stand." 4 Weinstein, *supra*, § 609App.100. This is particularly true for impeachment with a conviction for a violent crime. "The relationship between crimes of violence and truth-telling is particularly tenuous, resting not only on the assumption that persons convicted of violent crimes are bad, but also that bad (i.e., violent) persons are liars." *Id.* This dubious relationship causes us to look with suspicion on the impeachment of a witness with a conviction for a violent crime.

{14} Nevertheless, while a conviction for a violent crime "has less bearing on an individual's honesty than a conviction for a crime involving dishonesty or deceit, [we have] determined that such convictions are probative of credibility," as demonstrated by our adoption of Rule 11-609(A)(1). *State v. Conn*, 1992-NMCA-052, ¶ 16, 115 N.M. 101, 847 P.2d 746 (citation omitted). So, while Rule 11-609(A)(1) allows for the admission of prior felony convictions for purposes of impeachment (including those for crimes of violence), our rules also require that the district court judge weigh the probative value of the conviction against its prejudicial effect. Rule 11-609(A)(1)(b); *see also Lucero*, 1982-NMCA-102, ¶ 12.

{15} Defendant was convicted of battery upon a peace officer after pleading guilty to the charge in August 2017. Judgment and Sentence, *Fernandez*, D-506-CR-2016-00628 (5th Jud. Dist. Ct. Aug. 24, 2017). The Court of Appeals concluded that "the prior conviction was probative of Defendant's credibility." *Fernandez*, A-1-CA-38110, mem. op. ¶ 15. Though Defendant's conviction is probative of credibility, *see Conn*, 1992-NMCA-052, ¶ 16, we conclude that the impeachment value of his conviction for battery upon a peace officer—a violent crime shedding little light on Defendant's character for truthfulness—is minimal compared to its inflammatory impact. *But cf. State v. Hall*, 1987-NMCA-145, ¶¶ 31-32, 107 N.M. 17, 751 P.2d 701 (holding that the district court did not abuse its discretion in admitting the defendant's prior conviction for assault with a deadly weapon upon a peace officer for impeachment purposes in the defendant's trial for second degree murder, despite the similarity of the crimes). In this instance, the admission of the prior conviction likely had a highly inflammatory impact because it is identical to the charged offense in this case. Further, although "there is proven dishonesty when the defendant goes to trial, denies the offense, and then is convicted," *Trejo*, 1991-NMCA-143, ¶ 10, that is not the case here because Defendant plead guilty in his prior conviction. Thus, this factor weighs in favor of excluding Defendant's prior conviction.

b. Date of prior conviction

{16} "The remoteness or nearness of the acts giving rise to the prior conviction is an important factor to be considered by the court. An act occurring several years before the trial and followed by years of lawful conduct is less probative because of its remoteness." *Id.* ¶ 11. Defendant's prior conviction was about a year before the trial in this case. *See* Judgment and Sentence, *Fernandez,* D-506-CR-2016-00628. The Court of Appeals concluded that it fell within the district court's discretion to afford this factor some probative value. *Fernandez*, A-1-CA-38110, mem. op. ¶ 16. We also conclude that the district court could have properly weighed this factor in favor of admission because Defendant's prior conviction was very near in time to his trial in this case.

c. Similarity of the crimes

{17} Defendant's prior conviction and the charge at issue in this case are identical: battery upon a peace officer. *See* Judgment and Sentence, *Fernandez,* D-506-CR-2016-00628. "[C]onvictions for the same crime should be admitted sparingly. Nevertheless, we have held that evidence of a prior offense is not prohibited for impeachment purposes solely on the basis of its similarity with the presently charged crime." *Trejo*, 1991-NMCA-143, ¶ 12 (citation omitted). Given that Defendant's prior conviction and the charge at issue in this case are identical, the prejudicial effect of the prior conviction "may well outweigh its probative value" because it suggests "a propensity to commit the crime." 4 Weinstein, *supra*, § 609.05[3][d]. The Court of Appeals concluded that even though "Defendant's prior conviction is identical to the charges for which he was on trial and therefore had some prejudicial impact against Defendant, the prejudice arising from this similarity is not alone dispositive of the question of admissibility." *Fernandez*, A-1-CA-38110, mem. op. ¶ 17. The Court of Appeals understates the prejudicial effect that the admission of a prior conviction for an *identical* crime—not merely a similar one—may have against Defendant. Admitting a prior conviction for an identical crime is particularly prejudicial because it could lead jurors to believe that "if [a defendant] did it before [the defendant] probably did so this time." *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), cert denied, 390 U.S. 1029 (1968). This factor strongly weighs in favor of excluding Defendant's prior conviction.

d. Correlation with Rule 11-404 policies

{18} Rule 11-404(A)(1) prohibits the use of character evidence "to prove that on a particular occasion the person acted in accordance with the character or trait." This factor looks to the correlation of the standards in Rule 11-609(a) with the *policies* underlying Rule 11-404; we do not evaluate whether the evidence would be admissible under Rule 11-404. *See Lucero*, 1982-NMCA-102, ¶ 12. Rule 11-404 excludes propensity evidence because "it injects a prejudicial effect into the proceeding that substantially outweighs the benefits of whatever slight, probative value it may have" and "creates the unnecessary risk that a jury will convict a defendant on the basis of former behavior and not the conduct charged." *State v. Phillips*, 2000-NMCA-028, ¶ 21, 128 N.M. 777, 999 P.2d 421. The Court of Appeals concluded that "the stated purpose for which the State sought admission of Defendant's prior conviction under Rule 11609 appears to correlate with the policies reflected in Rule 11-404" because the State argued "that Defendant testified that if he struck anyone it was inadvertent and therefore his prior conviction for battery upon a peace officer was relevant to show an 'absence of

mistake or lack of accident.'" *Fernandez*, A-1-CA-38110, mem. op. ¶ 18.

{19} But, here, the chain of inferences that flows from the prior conviction is one of propensity, not absence of mistake. When evidence is tendered to show absence of mistake, the reasoning is that "(1) looking at each event in isolation, it would be difficult to say whether the defendant was responsible; but (2) looking at the events as a whole, either the defendant is remarkably unlucky or he is the cause of both events." 1 Robert P. Mosteller et al., *McCormick on Evidence* § 190.4 (8th ed. 2020). Looking at the two instances of alleged battery upon a peace officer together, there is nothing that would allow the fact-finder to reasonably conclude that Defendant was responsible for both instances of alleged battery. That is, nothing about Defendant's prior offense could help the fact-finder conclude that Defendant did indeed have the requisite intent to batter a peace officer in *this instance*. Conversely, when evidence is presented for the impermissible purpose of showing that a defendant has a propensity to commit certain crimes, "the reasoning is that (1) a defendant who committed a similar offense is predisposed to commit the offense charged, and therefore (2) it is more probable that [the defendant] did so." *Id*. Here, Defendant's prior conviction would more likely lead the fact-finder to conclude that Defendant is predisposed to commit the offense charged and, therefore, it is more probable that he did so in this instance. This is an impermissible use of a prior conviction under the policies of Rule 11-404, injecting prejudice while adding little probative value.

{20} In *Trejo*, 1991-NMCA-143, ¶ 13, the Court of Appeals concluded that "we give this factor little weight" because "[t]his factor does not appear in the authorities relied on in *Lucero*[, 1982-NMCA-102]." We do not find this approach persuasive. The policies underlying Rule 11-404 are useful because they allow the district court to consider whether the state is introducing impermissible character evidence under the guise of impeaching a defendant's character for truthfulness. *See* 4 Weinstein, *supra*, § 609App.100 ("A defendant who takes the stand faces impeachment by proof of prior convictions and the consequent danger that the jurors instead of considering the convictions as relevant to credibility, will regard them as evidence of guilt, despite instructions to the contrary."). Thus, we give this factor equal weight as the others and conclude that it also weighs in favor of excluding Defendant's prior conviction.

e. Importance of Defendant's testimony

{21} Defendant's testimony was important to the defense's theory because the lapel camera footage of the arrest did not conclusively show whether Defendant kicked, head-butted, or otherwise battered the arresting officer in this case. The prosecution of battery upon a peace officer turned on the testimony of Defendant and the arresting officers. The Court of Appeals erroneously stated that "Defendant failed to specifically object or request that the district court preclude the State from revealing the identity of his prior convictions." *Fernandez*, A-1-CA-38110, mem. op. ¶ 19. In fact, Defendant chose to testify knowing that the district court judge had made an oral ruling prior to trial excluding any evidence about Defendant's prior convictions for which he was on probation at the time of the arrest. Even though it is within the district court judge's discretion to revisit a ruling during the trial, *State v. Morris*, 1961-NMSC-120, ¶ 5, 69 N.M. 89, 364 P.2d 348, "[a] defendant's decision about whether to testify may be based in part on whether prior convictions will be admitted for impeachment. Thus, the fact that a defendant's testimony is important to demonstrate the validity of his or her defense constitutes a factor weighing against the admission of a prior conviction." 4 Weinstein, *supra*, § 609.05[3][e] (footnote omitted). Here, Defendant made the strategic decision to testify knowing that the judge had excluded his prior conviction. Thus, viewed in the context of the factors discussed above, this factor also weighs in favor of excluding Defendant's prior conviction.

f. Centrality of the credibility issue

{22} In this instance, the centrality of the credibility issue is directly tied to the importance of Defendant's testimony. Specifically, the issue of Defendant's credibility was a central issue because the jury's decision about whether Defendant battered a peace officer hinged on whether it found Defendant or the State's witnesses (the arresting officers) more credible. The Court of Appeals weighed this factor in favor of admission, reasoning that when "the trial 'boil[s] down to a swearing match . . . it bec[omes] more, not less, compelling to explore all avenues which would shed light on which of the two witnesses was to be believed.'" *Fernandez*, A-1-CA-38110, mem. op. ¶ 19 (alterations in original) (quoting *Trejo*, 1991-NMCA-143, ¶ 15). But, the Court of Appeals took this proposition too far when it considered this factor in isolation of the remaining factors that overwhelmingly favor exclusion of the evidence. *See Trejo*, 1991-NMCA-143, ¶ 9 ("[The *Lucero* factors] are not to be considered mechanically or in isolation."). In a situation like this one, where the jury's decision comes down to a credibility determination, this highly prejudicial piece of evidence that has little bearing on Defendant's character for truthfulness could improperly tip the scale in favor of the State. *See, e.g.*, *United States v. Sanders*, 964 F.2d 295, 299 (4th Cir. 1992) ("In such a situation, evidence having no possible basis except to show a propensity for violence on the part of the defendant obviously has the capacity to tip the balance in such a swearing contest."). This factor also weighs in favor of excluding Defendant's prior conviction.

g. Balancing the *Lucero* factors and harmless error

{23} Considering the *Lucero* factors together, we conclude that the probative value of Defendant's prior conviction for battery upon a peace officer did not outweigh its prejudicial effect to Defendant and the district court abused its discretion by admitting the prior conviction as impeachment evidence.

{24} Next, we consider whether the admission of the evidence is harmless error. "A non-constitutional error is harmless when there is no reasonable probability the error affected the verdict." *State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110 (internal quotation marks and citation omitted). This Court has said:

> When assessing the probable effect of evidentiary error, courts should evaluate all of the circumstances surrounding the error. This includes the source of the error, the emphasis placed on the error, evidence of the defendant's guilt apart from the error, the importance of the erroneously admitted evidence to the prosecution's case, and whether the erroneously admitted evidence was merely cumulative. These considerations, however, are not exclusive, and they are merely a guide to facilitate the ultimate determination—whether there is a reasonable probability that the error contributed to the verdict.

State v. Serna, 2013-NMSC-033, ¶ 23, 305 P.3d 936 (internal quotation marks and citations omitted). In this instance, evidence of Defendant's guilt turned on the jury's evaluation of the credibility of Defendant and the officers since the lapel camera footage did not conclusively show whether Defendant battered Officer Ford. The improper impeachment of Defendant with his prior felony conviction discredited his testimony and there is a reasonable probability that it contributed to his conviction. *See Clark v. State*, 1991-NMSC-079, ¶ 10, 112 N.M. 485, 816 P.2d 1107. ("We note that where the improper evidence has been used for impeachment purposes, not only does the error permit

the jury to consider the substantive effect of the evidence itself; it also discredits the testimony of the witness, including, of course, the defendant if he or she has testified. Both effects must be considered in determining whether the error was harmless.").

{25} Further, the erroneously admitted evidence was not merely cumulative because it was not admitted prior to the State's cross-examination of Defendant. The evidence likely had a significant impact on the jury because Defendant's prior conviction was the last piece of evidence admitted at trial and the State highlighted it in its rebuttal, moments before the jury retired to deliberate. *See Conn*, 1992-NMCA-052, ¶ 19 (concluding that evidence of the defendant's prior conviction may have had a significant impact on the jury when it was "literally the final piece of evidence admitted in the case"). Thus, the admission of the evidence is not harmless error because there is a reasonable probability that the district court's failure to exclude the evidence contributed to Defendant's conviction. Because the error is not harmless, it requires reversal. *See Tollardo*, 2012-NMSC-008, ¶ 25.

4. Rule 11-404 NMRA

{26} The State argues in the alternative that Defendant's prior conviction was admissible under Rule 11-404. We are not persuaded by this argument because Defendant's prior conviction for battery upon a peace officer more likely lead the jury to conclude that Defendant had a propensity to commit the crime rather than helping the jury conclude whether Defendant had the requisite intent in this case. Further, before admitting evidence of other crimes under Rule 11-404, "the [district] court must find that the evidence is relevant to a material issue other than the defendant's character or propensity to commit a crime, and must determine that the probative value of the evidence outweighs the risk of unfair prejudice, pursuant to Rule 11-403." *State v. Otto*, 2007-NMSC-012, ¶ 10, 141 N.M. 443, 157 P.3d 8. We conclude that, even if the district court did in fact admit the prior conviction under Rule 11-404, such an admission would constitute an abuse of discretion because the probative value of the prior conviction did not outweigh the risk of unfair prejudice, for the reasons described above under our analysis of the *Lucero* factors.

IV. CONCLUSION

{27} We reverse the Court of Appeals and remand for a new trial consistent with this opinion. Because we reverse and remand for a new trial, it is unnecessary for us to address Defendant's remaining claims of error.

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

JULIE J. VARGAS, Justice

WE CONCUR:

C. SHANNON BACON, Chief Justice

MICHAEL E. VIGIL, Justice

DAVID K. THOMSON, Justice

BRIANA H. ZAMORA, Justice

From the New Mexico Supreme Court

Opinion Number: 2023-NMSC-006
No: S-1-SC-37698 (filed March 13, 2023)

IN THE MATTER OF VICTOR R. MARSHALL,
An Attorney Suspended from the Practice of Law in the Courts of the State of New Mexico

Anne L. Taylor,
Chief Disciplinary Counsel
Jane Gagne,
Assistant Disciplinary Counsel
Albuquerque, NM

for The New Mexico Disciplinary Board

The Baker Law Group
Jeffrey L. Baker
Renni Zifferblatt
Albuquerque, NM

for Respondent

OPINION

PER CURIAM.

{1} Our judicial system depends on the public's confidence in its fairness and authority. It cannot function if the public is misled to believe that judicial officers lack the necessary integrity or qualifications to perform their duties. The Preamble to Rule Set 16 NMRA, the New Mexico Rules of Professional Conduct, reflects this essential truth. The Preamble states that it is the duty of "a lawyer [to] further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." Rule Set 16-Preamble. A corollary of this basic principle is that false or reckless statements made by an attorney "can unfairly undermine public confidence in the administration of justice." Rule 16-802 NMRA comm. cmt. 1; Rule 16-802(A) NMRA.

{2} In this opinion, we address the failure of Respondent Victor Marshall to fulfill his professional duties by making numerous unfounded statements about the integrity of a judge presiding over a case to which Marshall's clients were parties. In doing so, we first clarify the standard for determining whether an attorney has made statements about the "integrity of a judge" with "reckless disregard as to [the statements'] truth or falsity," in violation of Rule 16-802(A) of the Rules of Professional Conduct. We hold that a lawyer makes a statement with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge when the lawyer makes the statement in the absence of an objectively reasonable factual basis. Applying this standard, we conclude that Marshall violated Rule 16-802(A). We further conclude that Marshall's conduct also violated Rule 16-301 NMRA (prohibiting the filing of frivolous motions) and Rule 16-804(D) NMRA (prohibiting conduct "prejudicial to the administration of justice"). Because Marshall continues to deny wrongdoing and steadfastly refuses to take responsibility for his actions, we believe discipline is necessary to prevent him from engaging in this type of conduct in the future. Therefore, Marshall is indefinitely suspended from the practice of law for at least eighteen months.

I. BACKGROUND

{3} This disciplinary proceeding arose out of statements Marshall made in pleadings on appeal from an adjudication regarding water rights in the San Juan River.[1] The adjudication was initiated in 1975 and concerned rights asserted by the Navajo Nation, the United States, and the State of New Mexico, in addition to individual water users and water-user associations. Beginning in 2006, Marshall represented the San Juan Agricultural Water Users Association and other groups and individuals interested in the adjudication. Three years later, in 2009, Judge James J. Wechsler, retired, was appointed to preside over the adjudication as judge pro tempore. The Navajo Nation, the United States, and the State of New Mexico had reached a settlement agreement regarding the Navajo Nation's water rights. *See State ex rel. State Engineer v. United States*, 2018-NMCA-053, ¶¶ 4-5, 425 P.3d 723. In 2013 Judge Wechsler entered an order approving the settlement over objection from Marshall's clients. Marshall appealed the order to the Court of Appeals. *See id.* ¶¶ 8-9.

{4} While the case was pending in the Court of Appeals, Marshall filed an emergency motion with the Court of Appeals to disqualify Judge Wechsler from the adjudication. The motion and supportive brief were replete with attacks on Judge Wechsler's integrity and candor. Marshall began his pleading by asserting that, in early 2018, "disquieting rumors about Judge Wechsler [had circulated] in the New Mexico Legislature, prompting some legislators to ask whether or not the rumors could be substantiated." Marshall then alleged that Judge Wechsler had violated Rule 21-211 NMRA by not disclosing that he "previously worked as a lawyer for the Navajo Nation" and by exhibiting bias in favor of his "former clients." According to Marshall, because Judge Wechsler had worked for DNA People's Legal Services (DNA) as an attorney and had lived on the Navajo Reservation during the early 1970s, he possessed "extrajudicial knowledge about the Navajo Nation" from which he could draw in order "to award water to the Navajo people—the people he represented as an attorney." Marshall claimed that DNA was "an agency and instrumentality of the Navajo Nation" and, as a result, Judge Wechsler had "a one-way bias" in favor of the Navajo Nation. Marshall also alleged that Judge Wechsler had not "act[ed] with independence, integrity, and impartiality, to avoid impropriety or even the appearance of impropriety, and to promote public confidence in the judiciary." Marshall claimed "the record provides ample evidence of bias and favoritism during these proceedings." He specifically stated that Judge Wechsler "favored his former client" through his substantive and procedural decisions in the adjudication. Finally, Marshall concluded his brief by asserting that "the public might reasonably wonder whether the judge fixed this case for his former client."

[1] Marshall also released a statement to the press quoting some of the allegations he made in the pleadings. Because Marshall's conduct in filing the pleadings is sufficient to prove the disciplinary charges, we need not address the press release.

{5} The Court of Appeals denied Marshall's motion to disqualify Judge Wechsler from the case and, based on Marshall's statements impugning Judge Wechsler's integrity, imposed sanctions against him and awarded attorney's fees to the Navajo Nation and the United States. The Court found that Marshall's allegations were "void of any factual foundation" and that "[b]asic inquiry and simple investigation would or should have informed [Marshall] that the motion was without factual foundation." The Court concluded that Marshall had filed "a frivolous motion" that "needlessly caused [the] Court and the parties to expend resources," had "violated the Rules of Professional Conduct," and had "attempted to discredit a judge with absolutely no basis for doing so." It referred the matter to the Disciplinary Board of the Supreme Court of the State of New Mexico (Disciplinary Board).

{6} Marshall responded by filing a motion for rehearing. Now on notice that his conduct before the Court likely violated the Rules of Professional Conduct, he nonetheless repeated his claim that Judge Wechsler worked for the Navajo Nation because he once served as counsel for DNA, and again asserted that DNA was an "agency or instrumentality" of the Navajo Nation. Marshall complained that the Court of Appeals panel had been misled by counsel for the Navajo Nation and claimed that "new evidence" offered support for "the legitimate questions which the acequias raised under Rule 21-211." He attached a 1971 New Mexico Law Review article and a 1969 DNA newsletter as the purported evidence.

{7} Shortly thereafter, Disciplinary Counsel filed a specification of charges against Marshall with the Disciplinary Board, alleging that Marshall violated the Rules of Professional Conduct by "attacking Judge Wechsler's integrity [without] basis in fact or law." *See* Rule 17-309 NMRA (providing for the institution of formal disciplinary proceedings and designation of a hearing officer or committee). After the Court of Appeals summarily denied his motion for rehearing, (Order on Motion for Rehearing, *State ex rel. State Engineer v. United States*, A-1-CA-33535 (N.M. Ct. App. May 14, 2018)) and having twice been placed on notice that his statements calling into question Judge Wechsler's integrity likely violated his ethical obligations, Marshall filed a petition for writ of certiorari in this Court (Acequias' Petition for Certiorari Concerning Rule 21-211 and Sanctions, *State ex rel. State Engineer v. United States*, S-1-SC-37100 (N.M. June 13, 2018)) reprising his claim that Judge Wechsler had "concealed his ties to the Navajo Nation in order to award water to his former clients without a trial."

{8} This Court denied Marshall's petition for writ of certiorari (Order, *State ex rel. State Engineer v. United States*, S-1-SC-37100 (N.M. Aug. 13, 2018)), and a committee of the Disciplinary Board (hearing committee) subsequently conducted a hearing on the disciplinary matter. The hearing committee concluded that Marshall violated Rules 16-301, 16-802(A), and 16-804(D). It specifically found that Marshall violated Rule 16-802(A) "by making statements with reckless disregard as to the truth of the statements concerning the integrity of a judge." The committee recommended that Marshall be suspended from the practice of law indefinitely.

{9} Upon Marshall's request, a panel of the Disciplinary Board (hearing panel) held a hearing on the committee's findings. The hearing panel largely adopted the findings of the hearing committee, concluding, "Sufficient evidence supports the finding that a reasonable attorney *would not* objectively and reasonably believe that Judge Wechsler either had an actual conflict or a material appearance of a conflict in the case." Because Marshall failed to admit wrongdoing or express remorse, the hearing panel was concerned that Marshall might engage in similar conduct going forward and therefore recommended indefinite suspension.

{10} The hearing panel then petitioned this Court to approve the findings of the hearing committee and suspend Marshall from the practice of law indefinitely. Marshall replied to the petition, alleging "serious legal and constitutional errors" committed by the hearing committee and hearing panel. Following full briefing and oral argument, we concluded that Marshall violated Rules 16-802(A), 16-301, and 16-804(D). Pursuant to Rule 17-206(A)(3) NMRA, we issued an order indefinitely suspending him from the practice of law. This opinion sets out our reasoning in issuing that order.

II. DISCUSSION

A. Standard of Review

{11} "[T]he hearing committee is the entity responsible for taking evidence in disciplinary proceedings," and we therefore view "the evidence in the light most favorable to the hearing committee's decision and resolv[e] all conflicts and reasonable inferences in favor of the decision reached by the hearing committee." *In re Bristol*, 2006-NMSC-041, ¶¶ 16, 26, 140 N.M. 317, 142 P.3d 905 (per curiam). We defer to the hearing committee's factual determinations if they are supported by substantial evidence. *Id.* ¶ 16. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *McDonald v. Zimmer Inc.*, 2020-NMCA-020, ¶ 23, 461 P.3d 930 (internal quotation marks and citation omitted). Our interpretation of the rules and our review of disciplinary bodies' legal conclusions is de novo. *See Bristol*, 2006-NMSC-041, ¶¶ 18, 27 (confirming that this Court reviews a hearing committee's legal conclusions under the same standard of review applied by a hearing panel, which is de novo).

B. Marshall Violated Rule 16-802(A) by Making Statements About Judge Wechsler's Integrity with Reckless Disregard for Their Truth or Falsity

1. A lawyer makes a statement with reckless disregard for its truth or falsity when the lawyer lacks an objectively reasonable factual basis for the statement

{12} Marshall's central argument is that the hearing committee erred in finding he had acted with reckless disregard for the truth or falsity of his statements when he made his allegations about Judge Wechsler's integrity. Marshall's argument requires us to first elucidate the proper standard to apply when determining whether a statement has been made with reckless disregard for purposes of applying Rule 16-802(A).

{13} The same rules of construction apply to the Rules of Professional Conduct as are applicable to the interpretation of statutes. *Cf. Kipnis v. Jusbasche*, 2017-NMSC-006, ¶ 10, 388 P.3d 654 ("When construing our procedural rules, we use the same rules of construction applicable to the interpretation of statutes." (internal quotation marks and citation omitted)). "We begin by examining the plain language of the rule as well as the context in which it was promulgated, including the history of the rule and the object and purpose." *State v. Sanchez*, 2020-NMSC-017, ¶ 12, 476 P.3d 889 (internal quotation marks and citation omitted). "When the language in a statute is clear and unambiguous, we give effect to that language and refrain from further statutory interpretation." *State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50.

{14} Rule 16-802(A) provides, "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." The plain language of the rule is straightforward. First, Rule 16-802(A) distinguishes statements that a lawyer *knows* to be false from those for which the lawyer displays a "reckless disregard" as to their truth or falsity. Both types of conduct are prohibited, but Marshall was charged by the hearing committee with violating only the latter.

{15} Second, "reckless disregard" is readily defined. *Black's Law Dictionary* defines "reckless" as "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk." *Reckless*, *Black's Law Dictionary* (11th ed. 2019). It defines "disregard" as "[t]he action of ignoring or treating without proper respect or consideration." *Disregard*, *Black's Law Dictionary* (11th ed. 2019). Consequently, *Black*'s defines "reckless disregard" as a "[c]onscious indifference to the consequences of an act." *Reckless disregard*, *Black's Law Dictionary* at 594 (11th ed. 2019). Considering these definitions together, it is plain that "having reckless disregard as to [the truth or falsity of a statement]" means displaying a conscious indifference as to whether the statement has a factual basis or not, without regard for the consequences of the statement.

{16} It is equally plain, given this construction of Rule 16-802(A), that the speaker *need not know* that a statement is false to display a "reckless disregard" for the truth or falsity of the statement. It is enough that the speaker has no adequate factual basis for making the statement. Indeed, if a Rule 16-802(A) determination that a speaker exhibited "reckless disregard as to [a statement's] truth or falsity" required a finding that the speaker knew the statement to be false, the first part of the rule would be superfluous. *See State v. Vest*, 2021-NMSC-020, ¶ 18, 488 P.3d 626 (reiterating that statutes should not be interpreted to render any part superfluous). Speaking in the absence of an adequate factual grounding creates "a substantial and unjustifiable risk of harm to others" arising from the possibility that the statement is not, in fact, truthful. *Reckless*, *Black's Law Dictionary* (11th ed. 2019). Moreover, Rule 16-802(A)'s focus on a statement's truth or falsity makes clear that the factual basis required must be measured objectively; the rule does not inquire whether the speaker *believes* the statement to be true but whether it *is* true. Accordingly, we conclude that the plain language of Rule 16-802(A) establishes that, in determining whether an attorney has exhibited reckless disregard in making a statement about the integrity or qualifications of a judicial officer, the proper inquiry is whether the attorney's factual basis[1] for making the statement at issue was objectively reasonable.

{17} Notwithstanding this plain language, Marshall argues that we should adopt a standard based on First Amendment jurisprudence governing civil defamation actions arising from statements critical of public officials. He invites us to apply an "actual malice" standard to alleged violations of Rule 16-802(A), which would require the disciplinary authority alleging reckless disregard to prove (1) that the statement made by the attorney was in fact false; and (2) that the attorney made the false statement "with a high degree of awareness of probable falsity or entertained serious doubts as to the truth of his publication." *See In re Green*, 11 P.3d 1078, 1083-85 (Colo. 2000) (en banc) (per curiam) (text only)[2] (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989)). We decline this invitation.

{18} Rule 16-802 is derived from the American Bar Association's ABA Model Rule 8.2,[3] which addresses the same conduct. The fifty states have adopted a rule that is identical or substantially similar to ABA Model Rule 8.2. *See* Am. Bar Ass'n, CPR Policy Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct: Rule 8.2: Judicial and Legal Officials* (Dec. 12, 2018).[4] Our review of the law of these jurisdictions reveals that a majority have embraced an objective standard governing the rule, while a small minority apply a subjective, actual malice standard. *See In re Cobb*, 838 N.E.2d 1197, 1212-13 (Mass. 2005) ("A majority of state courts that have considered the question have concluded that the standard is whether the attorney had an objectively reasonable basis for making the statements."). In *Cobb*, the Massachusetts Supreme Court expressly addressed an attorney's claim of free speech protections "when defending against charges that he impugned the integrity of a judge, without basis, during a pending case." *Id.* at 1211. After examining the approaches taken by other states, the court determined that a state's "interest in protecting the public, the administration of justice, and the legal profession supports use of an objective knowledge standard in attorney discipline proceedings involving criticism of judges in pending cases." *Id.* at 1214 (citing *In re Graham*, 453 N.W.2d 313, 322 (per curiam) (Minn. 1990)).

{19} The Colorado Supreme Court has held otherwise. In adopting the actual malice test for attorney discipline cases involving criticism of a judge, that court emphasized the interest in protecting attorney criticism of judges to "safeguard[] public discussion of governmental affairs." *Green*, 11 P.3d at 1085. It noted, "Restrictions on attorney speech burden not only the attorney's right to criticize judges, but also hinder the public's access to the class of people in the best position to comment on the functioning of the judicial system." *Id.* The *Green* Court concluded that those interests warranted applying the actual malice test to disciplinary cases in which an attorney makes a statement of fact, "proven . . . false," that is critical of a judge. *Id.*

{20} We agree with the majority of states that have adopted the objective standard. Not only is this standard consistent with the plain language of Rule 16-802(A), it is also the approach most consistent with the rule's purpose, which is to protect the public and the public's perception of the legal profession and our judicial system. *See In re Key*, 2005-NMSC-014, ¶ 8, 137 N.M. 517, 113 P.3d 340 (per curiam); *see also In re Ordaz*, 1996-NMSC-034, ¶ 16, 121 N.M. 779, 918 P.2d 365 (per curiam) ("[I]t is not the purpose of the disciplinary system to punish attorneys, but to protect the public."). While jurisdictions that apply the actual malice test purport to do so to protect the public's interest in a fair and honest judiciary by applying a

[2] Just as we reject imposing a requirement that the statement be, in fact, false, so we reject a requirement that it be demonstrably true. What is important is whether the attorney has exhibited a conscious indifference to the statement's truth or falsity. If an attorney possesses an objectively reasonable factual basis for making a statement, the attorney cannot be said to be indifferent to its truthfulness.

[3] The "text only" parenthetical as used herein indicates the omission of all of the following—internal quotation marks, ellipses, and brackets—that are present in the quoted source, leaving the quoted text itself otherwise unchanged.

[4] Available at https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule82/ (last visited Mar. 3, 2023) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.").

[5] Available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_2.pdf (last visited Mar. 3, 2023). The jurisdictions that adopt the model rule but deviate from the exact language differ in the kinds of officials that the rule covers. See, e.g., Mass. R. Prof. Conduct 8.2 (applying rule only to "a judge or a magistrate, or . . . a candidate for appointment to judicial or legal office"); R. Regulating Fla. Bar 4-8.2(a) (applying rule to a "judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office").

heightened standard to statements made by those "in the best position to comment" on the judiciary, *Green*, 11 P.3d at 1085, we conclude that the public's interest is best served by *ensuring* that an attorney has an objectively reasonable basis for challenging the integrity or qualifications of a judicial officer.

{21} Indeed, the proximity of attorneys to judicial officers necessitates a rule prohibiting attorneys from making baseless accusations against them. When an attorney casts unfounded doubt on the integrity of a judge, the public's perception of the legal system is at great risk because attorneys are rightly perceived by the public as being in a unique position to comment on the judiciary. *See Anthony v. Virginia State Bar, ex rel. Ninth Dist. Committee*, 621 S.E.2d 121, 126 (Va. 2005) ("Because lawyers have special access to information within the judicial system, their statements may pose a threat to the fairness of a pending proceeding, such statements being likely perceived as especially authoritative."). Requiring that attorneys have an objectively reasonable factual basis for making a statement about the integrity of a judge provides an essential safeguard against this risk. Such a requirement does not deprive attorneys of their free-speech rights in pending cases; it simply means that attorneys must not make accusations against judicial officers in the absence of an adequate factual grounding. *See Cobb*, 838 N.E.2d at 1214.

{22} Our conclusion is unchanged by the fact that Rule 16-802(A) includes the heading "Defamation," while ABA Model Rule 8.2 does not. Marshall argues that "Rule 16-802 includes the word 'Defamation' because the rules of ethics *must comply* with the First Amendment's standards for defamation of a public official" (emphasis added). Yet the United States Supreme Court has recognized that attorney speech may be regulated without running afoul of the First Amendment, particularly where the conduct at issue arises in a pending case. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991) (stating that "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed" and citing prior authority for the proposition that "lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be"). Attorneys are officers of the court, and "[m]embership in the bar is a privilege burdened with conditions." *Id.* at 1066 (internal quotation marks and citation omitted).

{23} Additionally, while Marshall draws our attention to the heading of Rule 16-802(A), he ignores the heading for Article 8 of the Rules of Professional Conduct, of which Rule 16-802(A) is a part. That heading makes clear that the rules set out in Article 8 are intended to "Maintain[] the Integrity of the Profession," not protect the reputational interests of individual lawyers or judges—the defining quality of a defamation action. *See Fikes v. Furst*, 2003-NMSC-033, ¶ 12, 134 N.M. 602, 81 P.3d 545 ("The primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to that most personal and prized acquisition, one's reputation." (internal quotation marks and citation omitted)). Because defamation is a wrong against an individual, the remedy for such an offense is a personal redress of that wrong. *See In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam). By contrast, professional misconduct is a wrong against the public, threatening the preservation of a fair and impartial judicial system, and is addressed through application of the rules of professional discipline. *Id.*; *see also* Rule Set 16-Preamble ("The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.") The inclusion of the word "Defamation" in the heading to Rule 16-802(A) does not and cannot alter the rule's essential purpose, nor can it overcome its unambiguous plain language. *Cf. Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 18, 289 P.3d 1232 ("A statute's title may be used only to resolve existing doubts or ambiguities as to the statutory meanings and not to create ambiguity where none existed." (internal quotation marks and citation omitted)).

{24} Accordingly, we hold that an attorney who lacks an objectively reasonable factual basis when making a statement about the integrity or qualifications of a judge or other judicial officer has made the statement with "reckless disregard as to its truth or falsity" within the meaning of Rule 16-802(A).

2. After-acquired evidence is not relevant to the determination of whether an attorney made a statement with reckless disregard for its truth or falsity

{25} Much of Marshall's briefing and argument before this Court has focused on what he contends are the hearing committee's and the hearing panel's errors in refusing to consider evidence which Marshall purports to support his statements about Judge Wechsler and which Marshall acquired after he filed his pleadings in the Court of Appeals. Marshall argues that the hearing committee and hearing panel "have departed from the function of the judiciary, which is to seek the truth." He further argues that, because truth is a defense to a civil defamation action, he should have been able to present this after-acquired evidence. Disciplinary Counsel argues that the relevant inquiry is what Marshall knew when he made the statements at issue and, therefore, any evidence acquired after Marshall filed his pleadings in the Court of Appeals is immaterial. We agree with Disciplinary Counsel.

{26} Marshall was charged with making statements with reckless disregard for their truth or falsity. Under the objective standard that we have adopted for Rule 16-802(A), when we evaluate whether an attorney has made a statement with reckless disregard for its truth or falsity, we consider only whether the attorney possessed an objectively reasonable factual basis for the statement at the time it was made. *See Cobb*, 838 N.E.2d at 1214. As a matter of logic, any evidence an attorney may have acquired after making a statement could not have formed the basis for making it. *See State ex rel. Counsel for Discipline of the Nebraska Supreme Court v. Gast*, 896 N.W.2d 583, 597 (Neb. 2017) (per curiam) ("Because the relevant inquiry is whether [the attorney] made the 'cover-up' statement . . . with reckless disregard as to its truth or falsity, we will focus on his knowledge at that time."). To conclude otherwise would defeat the purpose of the rule, which, as we have discussed herein, is to ensure that an attorney does not act with conscious indifference to truth or falsity when speaking about the integrity or qualifications of a judicial officer. "A system that permits an attorney without objective basis to challenge the integrity . . . of a judge presiding over a case elevates brazen and irresponsible conduct above competence and diligence, hallmarks of professional conduct." *Cobb*, 838 N.E.2d at 1214.

{27} We conclude that the hearing committee and hearing panel did not err when they declined to consider evidence acquired by Marshall after he made the statements impugning the integrity of Judge Wechsler.

3. Substantial evidence supports the hearing committee's and hearing panel's conclusions that Marshall violated Rule 16-802(A)

{28} Having clarified the appropriate standard, we now evaluate whether substantial evidence supports the hearing committee's factual findings and supports its conclusion that Marshall violated Rule 16-802(A).

{29} As a threshold matter, we note that the statements Marshall made in his filings with the Court of Appeals and in his petition for a writ of certiorari in this Court were statements "about the qualifications

or integrity of a judge" within the meaning of Rule 16-802(A). Accusing Judge Wechsler of bias and favoritism (specifically in his procedural and substantive rulings), implying that he could have "fixed the case in favor of his former client," and suggesting that he "concealed his ties to the Navajo Nation in order to award water to his former clients" all impugn Judge Wechsler's ethical and professional integrity as a judge.

{30} At the disciplinary hearing,[5] Marshall argued that the exhibits he attached to his pleadings and his experience in the Legislature dealing with the Navajo Nation supported his assertion that DNA was an agency or instrumentality of the Navajo Nation and that, because Judge Wechsler had represented DNA, he should have recused himself from the water rights adjudication. However, as the hearing committee found, the only exhibit attached to the emergency motion and brief filed in the Court of Appeals, an excerpt from a book, Peter Iverson, *Diné: A History of the Navajos*, contained no assertion that DNA was an agency of the Navajo Nation. On the contrary, the text made clear that the Navajo Nation had general counsel who were not DNA attorneys. Although DNA was initially a program of the Office of Navajo Economic Opportunity (ONEO), the book excerpt explained that DNA "attracted opposition and animosity from the outset" and that DNA "split off from the ONEO" soon after 1966. The hearing committee also found that a 1971 law review article Marshall appended as an exhibit to his combined motion and brief for rehearing "disprove[d]" Marshall's "allegations that Judge Wechsler was an attorney for the Navajo Nation" and "that DNA was an agent or instrumentality of the Navajo Nation" because the article stated that DNA opposed the Navajo Nation in tribal court and was "100% federally funded" (internal quotation marks and citation omitted).

{31} Similarly, Marshall's assertion at the hearing that he knew, based on his time in the Legislature, that DNA "was funded by The Navajo Nation, with money they received from the federal government" and that he knew "from the [L]egislature that whoever controls the checkbook controls the enterprise" was lacking in evidentiary support. Even if Marshall's experience in the Legislature could provide the kind of factual support required under the rule, it is unavailing here because the document attached to his brief directly contradicted his allegations. Moreover, before the hearing committee, Marshall admitted that his provocative statement concerning "disquieting rumors about Judge Wechsler" circulating among members of the Legislature in early 2018 was without a factual basis.

{32} Finally, the hearing committee rejected Marshall's claim that Judge Wechsler's litigation on behalf of individual Navajo people "equate[d] to representation of the Navajo Nation." None of the cases Marshall cited lists the Navajo Nation as a party. *See Haceesa v. Heim*, 1972-NMCA-088, 84 N.M. 112, 500 P.2d 197; *Natonabah v. Bd. of Educ. of Gallup-McKinley Cnty. Sch. Dist.*, 355 F. Supp. 716 (D.N.M. 1973); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973) (lacking reference in the published opinion to Judge Wechsler's representation of any party to the case notwithstanding the reference in Iverson, *supra* at 252, to language quoting Judge Wechsler on the significance of its ruling); *Mancari v. Morton*, 359 F. Supp. 585 (D.N.M. 1973), *rev'd*, 417 U.S. 535 (1974).

{33} Substantial evidence supports the hearing committee's determination that Marshall did not have an objectively reasonable factual basis to support his allegations of bias and lack of candor against Judge Wechsler. Accordingly, we conclude that the hearing committee did not err in determining that Marshall violated Rule 16-802(A) by making statements with reckless disregard for their truth or falsity about the integrity of a judge.

C. Marshall Violated Rule 16-301 by Filing Frivolous Pleadings

{34} Marshall's conduct in violating Rule 16-802(A) also forms the basis of the charge that Marshall violated Rule 16-301. Rule 16-301 states, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." An issue or pleading is frivolous, which is synonymous with "groundless" if "there is no arguable basis in law or fact to support" the argument. *See G.E.W. Mech. Contractors, Inc., v. Johnston Co.*, 1993-NMCA-081, ¶¶ 23, 24, 115 N.M. 727, 858 P.2d 103 (concluding that the term "groundless" under the Unfair Practices Act has the same meaning as "frivolous" as it is used in Rule 16-301 (internal quotation marks omitted)). We have stated that, while Rule 16-301 recognizes as an exception the right of an attorney to pursue an expansion of the law, that exception may not be used for tactical reasons or to pursue meritless claims in the hopes of achieving a litigation advantage. *See In re Estrada*, 2006-NMSC-047, ¶ 22, 140 N.M. 492, 143 P.3d 731 (per curiam).

{35} We have already concluded that Marshall did not have an objectively reasonable factual basis for the allegations that Judge Wechsler was employed by the Navajo Nation, worked for an instrumentality of the Navajo Nation, or was in any way biased in favor of the Navajo Nation. Marshall counters that the committee commentary to Rule 16-301 and the Preamble to the Rules of Professional Conduct "expressly authorize lawyers to take action based on incomplete information." The committee commentary explains,

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.

Rule 16-301 comm. cmt. 2. We reject Marshall's overly expansive interpretation of the committee commentary.

{36} As we have explained, the facts and circumstances as they existed at the time Marshall filed his pleadings did not support his allegations or his claim for relief. *See* Rule Set 16-Preamble ("[A]ssessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question."). Nor can it fairly be said that the facts fell short because they were not yet "fully substantiated." *See* Rule 16-301 comm. cmt. 2. Marshall's pleadings were grounded solely in innuendo and supposition, and were directly contradicted by the documentary evidence he attached to the briefs in support of his motions. Accordingly, Marshall did not possess a good-faith basis to advance the claim that Judge Wechsler "participated personally and substantially" in the water rights adjudication when he was at DNA. *See* Rule 21-211(A)(5)(b) (requiring a judge to self-disqualify in a proceeding if the judge "served in governmental employment, and in such capacity participated personally and substantially as a lawyer

[6] Before this Court, Marshall generally asserts that many of the hearing committee's findings regarding the basis for his allegations against Judge Wechsler were in error or lacked substantial evidence. However, he fails to explain the basis of those assertions. Additionally, Marshall waived any contention that the hearing committee's findings of fact were not supported by substantial evidence by failing to provide a summary of proceedings in his brief in chief that "includes the substance of the evidence bearing on the proposition." Rule 12-318(A)(3) NMRA.

or public official concerning the proceeding"). We have previously affirmed hearing committee determinations of Rule 16-301 violations where attorneys have proceeded with claims in the face of clearly contrary evidence. *See Estrada*, 2006-NMSC-047, ¶¶ 23, 27; *In re Montoya*, 2011-NMSC-042, ¶¶ 34, 41, 46, 150 N.M. 731, 266 P.3d 11 (per curiam). We find no error in the hearing committee's conclusion that Marshall violated Rule 16-301 by filing frivolous pleadings in this case.

D. Marshall Violated Rule 16-804(D) by Engaging in Conduct Prejudicial to the Administration of Justice

{37} Marshall was also charged with violating Rule 16-804(D), which provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." "Our legal profession must vigilantly strive to maintain the confidence of the public and to earn a reputation as a profession that pursues justice without personal attacks and unnecessary expense." *In re Ortiz*, 2013-NMSC-027, ¶ 14, 304 P.3d 404. Our previous decisions make clear that conduct in violation of the Rules of Professional Conduct that wrongfully impedes the timely and just adjudication of claims, especially when an attorney engages in it repeatedly, will amount to "conduct prejudicial to the administration of justice." *See In re Neal*, 2003-NMSC-032, ¶¶ 20-22, 134 N.M. 594, 81 P.3d 47 (per curiam) (holding that an attorney violated Rule 16-804(D), observing that "if all lawyers behaved like [the attorney], the principles of judicial economies and administration of justice could be compromised," and concluding that the attorney's "conduct inconvenienced other counsel, litigants . . . , and the court itself"). "Protection of the public includes safeguarding the resources of the legal system for the use of the public." *In re Allred*, 2001-NMSC-019, ¶ 21, 130 N.M. 490, 495, 27 P.3d 977 (per curiam).

{38} In *Ortiz*, 2013-NMSC-027, ¶¶ 6-7, 14, we concluded that an attorney's conduct violated Rule 16-802(A) and Rule 16-804(D), among other rules, when she made disparaging remarks about the integrity of several judicial officers and other attorneys. We noted that the attorney's misconduct "adversely impacted the progress of the litigation in which she was involved[, and b]y her intolerable behavior, [the attorney] caused unnecessary additional expense and sought to intimidate and improperly influence those who stood in her way." *Ortiz*, 2013-NMSC-027, ¶ 14. This Court also held that an attorney's "tactics in pursuing a baseless claim and then ignoring efforts to dispose of the claim amounted to conduct prejudicial to the administration of justice in violation of Rule 16-804(D)." *In re Bloomfield*, 1996-NMSC-017, ¶ 7, 121 N.M. 605, 916 P.2d 224 (per curiam). Marshall's conduct in this case was similarly vexatious and disparaging of the judicial system.

{39} The underlying case at issue in this proceeding is a complex water rights adjudication that began in 1975, with twenty-eight named parties on appeal. *See State ex rel. State Engineer v. United States*, 2018-NMCA-053, ¶ 4 (describing the settlement agreement reached in the adjudication after more than a decade of litigation, Congress's approval and implementation of the settlement agreement, the New Mexico Legislature's appropriation to pay the State's cost of the settlement agreement, and the Legislature's authorization of the State Engineer to bring a lawsuit seeking judicial approval regarding the State's share of the water). Late in the year of filing of the Court of Appeals opinion, the hearing committee found that Marshall filed numerous baseless pleadings, failed to contact opposing counsel before filing these pleadings, and disregarded the rules governing recusals. Substantial evidence therefore supports the conclusion that Marshall wrongfully injected needless delays and complications in a case that was already complex and time consuming. Additionally, Marshall persisted in advancing his claims well after he was placed on notice that they were so lacking in factual basis and legal merit that they likely amounted to violations of the Rules of Professional Conduct. *Cf. Bloomfield*, 1996-NMSC-017, ¶ 7 (concluding that an attorney failed to make reasonable efforts to expedite litigation by "pursuing a baseless claim and then ignoring efforts to dispose of the claim . . . in violation of Rule 16-804(D)").

{40} By his conduct, Marshall failed to uphold his duty to "vigilantly strive to maintain the confidence of the public" in our profession. *Ortiz*, 2013-NMSC-027, ¶ 14. Marshall's statements undermined public confidence in the judiciary by, for example, implying that a judge "fixed this case" in favor of his former clients, exhibited "bias and favoritism," and failed to act with integrity in overseeing the adjudication. The public would not and should not have any confidence in a system that would permit a judge to do what Marshall alleged Judge Wechsler had done. *Cf. In re McBee*, 2006-NMSC-024, ¶ 13, 139 N.M. 482, 134 P.3d 769 (per curiam) (concluding that a judge breached several "fundamental ethical duties," including the duty to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," by failing to recuse from a case in which he had a personal relationship with the defendant's counsel (internal quotation marks and citation omitted)).

{41} For these reasons, we conclude that substantial evidence supports the hearing committee's conclusion that Marshall violated Rule 16-804(D) "by engaging in conduct prejudicial to the administration of justice."

E. Discipline

{42} We decide the appropriate discipline "independently as the final arbiter of attorney discipline without [deference] to the legal conclusions and recommendations of either a hearing committee or hearing panel." *Bristol*, 2006-NMSC-041, ¶ 27. We look to the ABA Standards for Imposing Lawyer Sanctions (Am. Bar Ass'n 1992) (ABA Standards)[6] for guidance in determining appropriate lawyer disciplinary sanctions. *Key*, 2005-NMSC-014, ¶ 5. The ABA Standards direct us to consider (1) the ethical duty violated by the lawyer, (2) the lawyer's mental state, (3) the extent of actual or potential injury caused by the lawyer's misconduct, and (4) aggravating or mitigating circumstances. ABA Standards, Part II.

{43} Disciplinary Counsel initially recommended a public censure, while the hearing committee recommended an indefinite suspension. The hearing panel also recommended indefinite suspension because it was concerned that Marshall could engage in similar conduct in the future since he continued to deny that he did anything improper. At oral argument, Disciplinary Counsel changed her recommendation to indefinite suspension, in light of Marshall's continued reluctance to admit wrongdoing.

{44} Marshall violated his duty to the public by violating Rule 16-802(A) and violated his duty to the legal system by violating Rules 16-301 and 16-804(D). ABA Standards, Part II; *see also* ABA Standards, Part III.C.5.0 & 6.0 (prescribing sanctions for violating "duties owed to the public" and "duties owed to the legal system"). He violated these rules knowing the potential consequences his statements would have on the public's perception of the judicial system. Additionally, Marshall's statements had the potential to undermine public confidence in the judiciary by leveling unfounded accusations against Judge Wechsler concerning his impartiality and integrity as a judge.

{45} There are several aggravating and mitigating factors present. *See* ABA Standards, Part III.C.9.2-9.3. (defining aggravation and mitigation and specifying factors on behalf of each). Mitigating factors include Marshall's lack of a prior

[7] Available at http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Girardi_sanctions.pdf (last visited Mar. 3, 2023).

disciplinary record and his cooperation in these disciplinary proceedings. *See* ABA Standards, Part III.C.9.32. Aggravating factors include Marshall's substantial experience in the practice of law, the fact that he violated multiple rules of professional conduct on several instances even after he had notice that his actions potentially violated several rules of professional conduct, and his failure to acknowledge the wrongful nature of his conduct. *See* ABA Standards, Part III.C.9.22. At oral argument, Marshall was given the opportunity to take responsibility for his actions and acknowledge his wrongful conduct. He did not take advantage of that opportunity. Instead, he said he regretted being "put in this position" by the judge and stated that, although he could have raised the question of recusal differently, the substance of the pleadings would have been the same.

{46} Marshall's response at oral argument led us to conclude, as the hearing panel did, that Marshall could engage in similar conduct in the future. His failure to take responsibility for his actions necessitated serious repercussions. For that reason, we agreed with the hearing panel's recommendation of indefinite suspension.

{47} To be clear, we did not impose this discipline because Marshall filed a motion for recusal, which he was well within his rights to do. *See* Rule 1-088.1(G) NMRA. What Marshall did *not* have the right to do was make serious, disparaging allegations impugning Judge Wechsler's integrity as a judicial officer without a factual basis. It was the groundless, provocative, and legally meritless quality of his allegations, not his filing of a motion to recuse, that we sanctioned.

III. CONCLUSION

{48} Substantial evidence supports the hearing panel's conclusion that Marshall violated Rules 16-301, 16-802(A), and 16-804(D) of the Rules of Professional Conduct. Based on these violations, Marshall is suspended for an indefinite period of no less than eighteen months from the date of our January 13, 2022, order.[7] He may petition for reinstatement after at least eighteen months under the procedure outlined in Rule 17-214 NMRA. As conditions of his reinstatement, Marshall must complete a minimum of four hours of Minimum Continuing Legal Education ethics credits, take the Multistate Professional Responsibility Examination and receive a score of at least eighty, and pay the costs of the disciplinary proceeding.

{49} IT IS SO ORDERED.

C. SHANNON BACON, Chief Justice
MICHAEL E. VIGIL, Justice
DAVID K. THOMSON, Justice
JULIE J. VARGAS, Justice
BRIANA H. ZAMORA, Justice

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 6/1/2023

No. A-1-CA-40307

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
DEBBIE DAWES,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
Curtis R. Gurley, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Emily Bowen, Assistant Attorney General
Albuquerque, NM

for Appellant

Bennett J. Baur, Chief Public Defender
Thomas J. Lewis, Assistant Appellate Defender
Santa Fe, NM

for Appellee

▶ Introduction of Opinion

Defendant Debbie Dawes was convicted by a jury in magistrate court of aggravated driving while under the influence of liquor or drugs (.16 or above) (third offense), pursuant to NMSA 1978, Section 66-8-102(D)(l), (F)(2) (2016). Defendant appealed her judgment to the district court, where she moved to suppress evidence related to her arrest. The district court granted her motion. The State appeals, arguing that the arresting officer permissibly questioned Defendant via a "knock and talk" and that the officer had reasonable suspicion to detain Defendant. We agree, reverse, and remand for proceedings consistent with this opinion.

Michael D. Bustamante, Judge, retired, sitting by designation
WE CONCUR:
Zachary A. Ives, Judge
Shammara H. Henderson, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40307**

MEMORANDUM OPINION

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Filed 6/6/2023

No. A-1-CA-40344

STATE OF NEW MEXICO ex rel. CHILDREN, YOUTH & FAMILIES DEPARTMENT,
Petitioner-Appellee,
v.
NELLIE M.,
Respondent-Appellant,
and
CHRISTOPHER M.,
Respondent,

IN THE MATTER OF BRUCE W.,
Child.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
Thomas F. Stewart, District Court Judge

Children, Youth & Families Department
Mary McQueeney,
Chief Children's Court Attorney
Santa Fe, NM
Kelly P. O'Neill, Children's Court Attorney
Albuquerque, NM

for Appellee

Law Offices of Nancy L. Simmons, P.C.
Nancy L. Simmons
Albuquerque, NM

for Appellant

Rio Law Firm
Francis J. Rio, III Clovis, NM

Guardian Ad Litem

▶ Introduction of Opinion

Nellie M. (Mother) appeals from the district court's adjudication of child neglect. The district court adjudicated Mother and Christopher M.'s (Father) son (Child) neglected, pursuant to NMSA 1978, Section 32A-4-2(G)(2) (2018), based on Mother and Father's failure to safeguard Child against ingesting marijuana, amphetamine, and methamphetamine. On appeal, Mother argues (1) expert evidence received at the adjudicatory hearing violated her constitutional rights, (2) there was insufficient evidence to support a determination that Child was neglected due to marijuana exposure, and (3) the district court's finding that Mother exposed Child to amphetamine and methamphetamine after the initiation of the abuse and neglect proceedings was erroneous on numerous grounds. We affirm.

Jennifer L. Attrep, Chief Judge
WE CONCUR:
Shammara H. Henderson, Judge
Gerald E. Baca, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40344**

FORMAL OPINION

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Filed 6/7/2023

No. A-1-CA-39539

BISHNU RAUTH, M.D.,
Appellant-Petitioner,
v.
NEW MEXICO MEDICAL BOARD,
Appellee-Respondent.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Maria Sanchez-Gagne, District Court Judge

Barnhouse Keegan Solimon & West LLP
Michelle T. Miano
Randolph H. Barnhouse
Los Ranchos de Albuquerque, NM

for Petitioner

Margaret McLean, Special Counsel
Santa Fe, NM

for Respondent

▶ Introduction of Opinion

Petitioner Bishnu Rauth appeals the district court's affirmance of underlying administrative decisions by Respondent New Mexico Medical Board (the Board), by which Rauth's license to practice medicine was revoked. Rauth raises a single issue on appeal: whether the district court erred in upholding the Board's denial of Rauth's request to exercise a peremptory excusal of a hearing officer under the Uniform Licensing Act (the ULA), NMSA 1978, § 61-1-7(C) (1993). Section 61-1-7(C) provides in pertinent part that "[e]ach party may peremptorily excuse one board member or a hearing officer by filing with the board a notice of peremptory excusal at least twenty days prior to the date of the hearing." At issue in this case is a matter of first impression regarding the meaning of "the hearing" as written in Section 61-1-7(C). Concluding there to be no error below regarding the interpretation and application of Section 61-1-7(C), we affirm.

J. Miles Hanisee, Judge
WE CONCUR:
Megan P. Duffy, Judge
Katherine A. Wray, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39539**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/8/2023

No. A-1-CA-39472

JESUS PALACIOS,
Worker-Appellant,
v.
NEW MEXICO EXPO and NEW MEXICO GENERAL SERVICES DEPARTMENT RISK MANAGEMENT DIVISION,
Employer/Insurer-Appellees.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
Rachel A. Bayless,
Workers' Compensation Judge

Pizzonia Law, LLC
Lydia Pizzonia
Albuquerque, NM

for Appellant

Paul L. Civerolo, L.L.C.
Paul L. Civerolo
Albuquerque, NM

for Appellees

▶ Introduction of Opinion

Jesus Palacios (Worker) appeals an order from the Workers' Compensation Administration granting a motion for summary judgment in favor of his former employer New Mexico Expo and its insurer the State of New Mexico General Services Department, Risk Management Division (collectively, Employer). The Workers' Compensation Judge's (WCJ) order was based on the conclusion that Worker's claim was time-barred. On appeal, Worker argues: (1) the WCJ erred in concluding that there was no genuine issue of material fact as to the existence of a "compensation order" in this case, and thus that the two-year statute of limitations found in NMSA 1978, Section 52-5-9(B) (1989) should have applied; (2) alternatively, the WCJ's finding that he was terminated from his employment with Employer was erroneous, and thus the one-year statute of limitations found in NMSA 1978, Section 52-1-31(A) (1987) should have been tolled; and (3) the WCJ's application of the one-year statute of limitations in Section 52-1-31(A) to this case was contrary to law. We affirm.

Zachary A. Ives, Judge
WE CONCUR:
Kristina Bogardus, Judge
Shammara H. Henderson

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39472**

DECISION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/9/2023

No. A-1-CA-40558

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
DANIEL CLOWERS-YARNELL,
Defendant-Appellee.

▶ Order Dismissing the Appeal

This matter has come before the Court on the Court's own motion. We note the following:

1. The State seeks to appeal from an order of the district court denying Defendant's motion for interlocutory appeal as premature, continuing the trial setting, and ordering the State to seek to procure the presence of Dr. Seena Singh, the pathologist who perfonned the autopsy of the alleged victim, as a \vitness at trial. The district court's order provided that, if the State was unable to find Dr. Singh, it must then file a notice of unavailability and provide particularized reasons. 'The district court"s order further stated that, once the district court determines that Dr. Singh is unavailable, the State may then seek to have a substitute expert testify regarding the cause and manner of death.

2. The State filed a motion to reconsider the district court's order on April 13, 2022, and the district court entered an order denying the motion on May 2, 2022. Thereafter, on May 16, 2022, the State filed a notice of its intent to call a different expert in forensic pathology at trial without making a showing of Dr. Singh's unavailability. On the same day, the State filed a notice of appeal in this Court.

3. The district court has not issued a ruling regarding whether it will permit the State's substitute expert to testify at trial. **View full PDF online.**

J. Miles Hanisee, Judge
Katherine A. Wray, Judge

To read the entire decision, please visit the following link: **https://bit.ly/A-1-CA-40558**

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/12/2023

No. A-1-CA-38700

CHRISTOPHER GUEST, as Personal Representative of THE ESTATE OF SUZANNE R. GUEST, Deceased,
Plaintiff-Appellee/Cross-Appellant,
v.
ALLSTATE INSURANCE COMPANY,
Defendant-Appellant/Cross-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Raymond Z. Ortiz, District Court Judge

Wilson Law Firm, P.C.
Alan R. Wilson
Albuquerque, NM

for Appellee

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Jennifer A. Noya
Albuquerque, NM

Dentons US LLP
Richard L. Fenton
Chicago, IL

for Appellant

▶ Introduction of Opinion

Defendant Allstate Insurance Co. (Allstate) appeals the district court's judgment on remand awarding Plaintiff Suzanne Guest and The Guest Law Firm, P.C. (collectively, Guest) $3,445,093.66 in attorney fees and costs, and $1,842,900 in punitive damages.1 This case comes to us after proceedings were held in district court on remand from our New Mexico Supreme Court. Allstate raises numerous claims of error concerning the remand proceedings, including the propriety of the attorney fees and costs award, the calculation of punitive damages, and the imposition of compound interest. Because we hold that the district court followed our Supreme Court's mandate on attorney fees and costs, and Guest, who was an attorney at times acting pro se, was properly awarded attorney fees for her own time litigating this matter, we affirm in part. However, the district court failed to follow the mandate on punitive damages and impermissibly awarded compound interest, and so we reverse in part, and remand for further proceedings consistent with this opinion.

Shammara H. Henderson, Judge
WE CONCUR:
Jennifer L. Attrep, Chief Judge
Zachary A. Ives, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-38700**

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/12/2023

No. A-1-CA-40049

ASHLEY IMMING f/k/a ASHLEY CORBUS,
Plaintiff-Appellant,
v.
OSVALDO DE LA VEGA and SOUTHWEST HEALTH SERVICES, P.A.,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
James T. Martin, District Court Judge

The Furth Law Firm, P.A.
Ben Furth
Paul Hibner
Las Cruces, NM

Dixon Scholl Carrillo, P.A.
Steven S. Scholl
Albuquerque, NM

for Appellant

Cervantes Law Firm, P.C.
Joseph Cervantes
Las Cruces, NM

L. Helen Bennett
Albuquerque, NM

for Appellees

▶ Introduction of Opinion

Plaintiff Ashley Imming obtained a judgment against Defendants Osvaldo De La Vega and Southwest Health Services P.A. in the amount of $867,971.07. Plaintiff made several unsuccessful attempts to collect the judgment before filing a motion to pierce the corporate veil of Mesilla Capital Investments, LLC, (MCI). In her motion, Plaintiff alleged that MCI was the alter ego of Defendant De La Vega and that "reverse piercing" was appropriate because Defendant De La Vega had transferred his personal assets to MCI at some point after trial in order to avoid paying the judgment. MCI was not a party to the underlying proceedings. The district court denied Plaintiff's motion, observing that Plaintiff was attempting to assert a new cause of action against a nonparty and concluding that it lacked jurisdiction to entertain Plaintiff's request. Because MCI was not made a party to the proceedings, we affirm.

Megan P. Duffy, Judge
WE CONCUR:
Kristina Bogardus, Judge
Jacqueline R. Medina, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40049**

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/13/2023

No. A-1-CA-40005

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
VICTOR M. CASTILLO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
Fred Van Soelen, District Court Judge

Raul Torrez, Attorney General
Santa Fe, NM
Charles J. Gutierrez, Assistant Attorney General
Leland M. Churan, Assistant Attorney General
Albuquerque, NM

for Appellee

Attorney and Counselor at Law, P.A.
Eric D. Dixon
Portales, NM

for Appellant

▶ Introduction of Opinion

Defendant Victor Castillo pleaded guilty to multiple counts of sexual exploitation of a child (both possession and manufacturing) in 2013. Nearly seven years later, Defendant was permitted to withdraw his plea. In the two months before the case was set for trial on the remaining charges, Defendant filed three motions, seeking to (1) dismiss on speedy trial grounds, (2) suppress evidence obtained pursuant to a search warrant, and (3) dismiss for violation of his right to effective assistance of counsel. The district court denied all three motions. Shortly thereafter, Defendant entered into a conditional plea agreement that reserved his right to appeal the district court's denial of his "motion to dismiss and motion to suppress." Detecting no error in the district court's rulings, we affirm.

Megan P. Duffy, Judge
WE CONCUR:
Jane B. Yohalem, Judge
Katherine A. Wray, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40005**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/14/2023

No. A-1-CA-39555

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
KIM KREITZER JENSEN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
Thomas F. Stewart, District Court Judge

Raúl Torrez, Attorney General
Benjamin Lammons, Assistant Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Santa Fe, NM
Luz C. Valverde, Assistant Appellate Defender
Albuquerque, NM

for Appellant

▶ Introduction of Opinion

A jury convicted Defendant Kim Jensen of resisting, evading or obstructing an officer (Count 3 or the resisting charge), contrary to NMSA 1978, Section 30-22-1 (1981), and assault upon a peace officer, (Count 4 or the assault charge), contrary to NMSA 1978, Section 30-22-21 (1971). Defendant appeals, and we affirm.

Katherine A. Wray, Judge
WE CONCUR:
J. Miles Hanisee, Judge
Zachary A. Ives, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39555**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/15/2023

No. A-1-CA-39513

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
PATRICK LADON SANDERS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
William G.W. Shoobridge, District Court Judge

Raúl Torrez, Attorney General
Maris Veidemanis, Assistant Attorney General
Santa Fe, NM

for Appellee

Harrison, Hart & Davis, LLC
Nicholas T. Hart
Albuquerque, NM

for Appellant

▶ Introduction of Opinion

Defendant Patrick London Sanders was twice put on trial after he participated in a drive-by shooting that resulted in the death of a passenger in another vehicle. The first jury found Defendant guilty of being a felon in possession of a firearm, contrary to NMSA 1978, Section 30-7-16(A) (2001, amended 2022), but could not reach a verdict on the other charges, resulting in a mistrial. The second jury convicted Defendant of aggravated assault with a deadly weapon, contrary to NMSA 1978, Section 30-3-2(A) (1963); shooting at or from a motor vehicle resulting in great bodily harm, contrary to NMSA 1978, Section 30-3-8(B) (1993); and voluntary manslaughter, contrary to NMSA 1978, Section 30-2-3(A) (1994). The district court later vacated the manslaughter conviction on double jeopardy grounds.

Defendant appeals, arguing (1) the district court erred by finding him competent to stand trial and be sentenced, contrary to his expert's testimony, and not staying further proceedings; (2) the district court erred when it denied his motion to reconsider his sentence without a hearing; (3) the district court erred by refusing to instruct the jury on involuntary manslaughter; (4) his speedy trial rights were violated; and (5) there was cumulative error warranting reversal of each of his convictions. For reasons that follow, we affirm.

Shammara H. Henderson, Judge
WE CONCUR:
J. Miles Hanisee, Judge
Megan P. Duffy, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39513**

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/20/2023

No. A-1-CA-39784

ROBISON MEDICAL RESEARCH GROUP, LLC,
Protestant-Appellee,
v.
NEW MEXICO TAXATION & REVENUE DEPARTMENT,
Respondent-Appellant,

IN THE MATTER OF THE PROTEST OF ROBISON MEDICAL RESEARCH GROUP, LLC TO THE ASSESSMENT ISSUED UNDER LETTER ID NO. L0625306288.

APPEAL FROM THE ADMINISTRATIVE HEARINGS OFFICE
Dee Dee Hoxie, Hearing Officer

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Zachary L. McCormick
Ian W. Bearden
Albuquerque, NM

for Appellee

Raúl Torrez, Attorney General
David Mittle, Special Assistant Attorney General
Santa Fe, NM

for Appellant

▶ Introduction of Opinion

The Legislature has repeatedly amended NMSA 1978, Section 7-9-93(A)(2004, as amended through 2021). See also H.B. 547, 2023 Leg., 56th Sess., § 36 (N.M. 2023).1 The Statute relates to a tax deduction for the provision of medical services. In the present case, the New Mexico Taxation and Revenue Department (the Department) disputes the hearing officer's determination that taxpayer Robison Medical Resource Group, LLC (Robison), a medical staffing company, is entitled to take the Deduction of gross receipts on behalf of its nurse employees under the previous historical statutes, either NMSA 1978, Section 7-9-93(A) (2007) or NMSA 1978, Section 7-9-93(A) (2016). Based on the circumstances of the present case, we affirm.

Katherine A. Wray, Judge
WE CONCUR:
Kristina Bogardus, Judge
Zachary A. Ives, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39513**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/20/2023

No. A-1-CA-40024

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ZACHARY B. TROWER,
Defendant-Appellant,

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Conrad F. Perea, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Emily Bowen, Assistant Attorney General
Albuquerque, NM

for Appellee

Michael E. Cain Las Cruces, NM

for Appellant

▶ Introduction of Opinion

Defendant Zachary Trower appeals the district court's orders denying his motion to suppress evidence as well as his subsequent motion to reconsider such denial. Defendant had previously entered a conditional plea agreement in magistrate court, in which he (1) reserved his right to appeal, in district court, the magistrate court's denial of his motion to suppress, and (2) pled no contest to aggravated driving while intoxicated, first offense, contrary to NMSA 1978, Section 66-8-102(C)(1) (2016); failure to maintain a traffic lane, contrary to NMSA 1978, Section 66-7-317(A) (1978); and no proof of insurance, contrary to NMSA 1978, Section 66-5-205 (2013). Defendant argues on appeal that the district court erred in denying his motions because Defendant did not violate Section 66-7-317(A) and reasonable suspicion did not support initiation of the traffic stop that resulted in Defendant's arrest. The facts of this case are similar to those in State v. Siqueiros-Valenzuela, 2017-NMCA-074, ¶ 26, 404 P.3d 782, where we addressed whether a defendant's "isolated, momentary touching the left shoulder line" while passing another vehicle gave rise to reasonable suspicion of a violation of Section 66-7-317(A). **View full PDF online.**

J. Miles Hanisee, Judge
WE CONCUR:
Kristina Bogardus, Judge
Zachary A. Ives, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40024**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/20/2023

No. A-1-CA-38557

RACHEL DELGADO n/k/a RACHEL DURAN,
Petitioner-Appellant,
v.
DAVID DELGADO,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Marci E. Beyer, District Court Judge

Rachel Duran
Las Cruces, NM

Pro Se Appellant

David Delgado
Las Cruces, NM

Pro Se Appellee

▶ Introduction of Opinion

Petitioner Rachel Duran appeals from the district court's denial of spousal support. For the reasons stated below, we reverse the district court and remand for further proceedings.

Shammara H. Henderson, Judge
WE CONCUR:
Jennifer L. Attrep, Chief Judge
Jane B. Yohalem, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-38557**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/20/2023

No. A-1-CA-40114

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
CHRISTOPHER MIDDLEBROOK,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
Curtis R. Gurley, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Walter Hart, Assistant Attorney General
Albuquerque, NM

for Appellant

Bennett J. Baur, Chief Public Defender
Nina Lalevic, Assistant Appellate Defender
Santa Fe, NM

for Appellee

▶ Introduction of Opinion

The State appeals the district court's dismissal of the criminal information charging Defendant Christopher D.L. Middlebrook with homicide by vehicle (reckless driving), contrary to NMSA 1978, Section 66-8-101(D) (2016) and great bodily injury by vehicle (reckless driving), contrary to Section 66-8-101(E).1 The State argues that the district court impermissibly decided the merits of the case by implicitly engaging in fact finding in its dismissal of the complaint, pursuant to Defendant's pretrial Foulenfont motion. See State v. Foulenfont, 1995-NMCA-028, ¶ 6, 119 N.M. 788, 895 P.2d 1329 (allowing the dismissal of criminal charges on purely legal grounds when the district court assumes the factual predicate underlying the charges to be true). Because the question of whether Defendant drove recklessly is an issue of fact for the jury to decide and the State presented circumstantial evidence that Defendant acted in a reckless manner, we reverse.

Kristina Bogardus, Judge
WE CONCUR:
Shammara H. Henderson, Judge
Michael D. Bustamante, Judge, retired, sitting by designation

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40114**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/21/2023

No. A-1-CA-38978

REPUBLICAN PARTY OF NEW MEXICO and MIKE TELLEZ,
Plaintiffs-Appellants,
v.
MAGGIE TOULOUSE OLIVER, in her official capacity as Secretary of State of the State of New Mexico; and AMANDA LOPEZ ASKIN, in her official capacity as the County Clerk of Doña Ana County,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
James T. Martin, District Court Judge

Harrison & Hart, LLC
Carter B. Harrison IV
Albuquerque, NM

for Appellants

Dylan K. Lange, General Counsel
Santa Fe, NM

for Appellee Maggie Toulouse Oliver, Secretary of State

Nelson J. Goodin, Doña County Attorney
Las Cruces, NM

for Appellee Amanda Lopez Askin, Doña County Clerk

▶ Introduction of Opinion

Plaintiffs Republican Party of New Mexico (RPNM) and Mike Tellez filed a complaint against the Secretary of State of New Mexico (the Secretary) and the County Clerk of Doña Ana County (collectively, Defendants), alleging that the Secretary issued an erroneous interpretation of a provision in the Election Code to the Doña Ana County Absent Voter Election Board (AVEB), leading the AVEB to incorrectly qualify certain ballots. Plaintiffs appeal the district court's order dismissing their complaint for lack of standing. In their briefs, Plaintiffs argued the district court erred in concluding that they lack standing and, even if they do lack standing, this Court should confer standing due to questions of great public importance raised by the case. Plaintiffs thus contended that this Court should reach the merits of the case to correct the Secretary's erroneous interpretation of the Election Code. During the pendency of this appeal, however, the Legislature amended the provision of the Election Code that Plaintiffs had requested that we interpret. Based on the Legislature's amendment, we conclude the case is moot and dismiss the appeal.

Kristina Bogardus, Judge
WE CONCUR:
Megan P. Duffy, Judge
Zachary A. Ives, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-38978**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/21/2023

No. A-1-CA-38172

SANDRA SMITH,
Plaintiff-Appellant,
v.
CILLE DICKINSON and SARAH DOCKERY,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
Daniel A. Bryant, District Court Judge

J. Robert Beauvais, P.A.
J. Robert Beauvais
Ruidoso, NM

for Appellant

Richard A. Hawthorne, P.A.
Richard A. Hawthorne
Ruidoso, NM

for Appellees

▶ Introduction of Opinion

In this landlord-tenant dispute, Plaintiff Sandra Smith appeals from a judgment in favor of Defendants Cille Dickinson and Sarah Dockery following a bench trial. On appeal, Plaintiff argues that the district court erred in: (1) concluding that the absence of a written rental agreement was not a material violation of the Uniform Owner-Resident Relations Act (UORRA), NMSA 1978, §§ 47-8-1 to -52 (1975, as amended through 2007); (2) concluding that Defendants did not impose a landlord's lien on Plaintiff's property; (3) concluding that Plaintiff failed to establish that Defendants breached the covenant of good faith and fair dealing; (4) concluding that Plaintiff failed to prove that Defendants committed intentional infliction of emotional distress (IIED); and (5) entering finding of fact 48. Unpersuaded, we affirm.

Zachary A. Ives, Judge
WE CONCUR:
Kristina Bogardus, Judge
Michael D. Bustamante, Judge, retired, sitting by designation, Judge (concurring in result only).

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-38172**

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/22/2023

No. A-1-CA-38585

UNITED PARCEL SERVICE INC. (OHIO) & AFFILIATES,
Protestant-Appellee,
v.
NEW MEXICO TAXATION & REVENUE DEPARTMENT,
Respondent-Appellant,

IN THE MATTER OF THE PROTEST OF ASSESSMENT ISSUED UNDER LETTER ID NO. L1388538320.

APPEAL FROM THE ADMINISTRATIVE HEARINGS OFFICE
Brian VanDenzen, Chief Hearing Officer

Joe Lennihan
Santa Fe, NM

for Appellee

Raúl Torrez, Attorney General
Peter Breen, Special Assistant Attorney General
Santa Fe, NM

for Appellant

▶ Introduction of Opinion

The New Mexico Department of Taxation and Revenue appeals from the decision of the Administrative Hearing Officer (AHO) abating the Department's assessment of corporate income taxes due for tax years 2007-2009 by United Parcel Service, Inc. (Ohio) & Affiliates (collectively, Taxpayer). In this tax protest, Taxpayer challenged the use of the Department's special multistate trucking apportionment regulation, 3.5.19.15 NMAC, to calculate the portion of Taxpayer's multistate sales revenue attributable to Taxpayer's New Mexico business operations. The AHO found that Taxpayer established by clear and cogent evidence that the Department's use of the special mileage formula in 3.5.19.15 NMAC to determine New Mexico's share of Taxpayer's multistate revenue for income tax purposes resulted in gross distortion of Taxpayer's actual business activities in New Mexico, contrary to the fair apportionment requirement of the Commerce Clause of the United States Constitution, U.S. Const., art. 1, § 8, cl. 3, a requirement adopted by statute, see NMSA 1978,§ 7-4-19 (1986) of New Mexico's Uniform Division of Income for Tax Purposes Act (UDIPTA), NMSA 1978, §§ 7-4-1 to -21 (1965, as amended through 2020).
View full PDF online.

Jane B. Yohalem, Judge
WE CONCUR:
Gerald E. Baca, Judge
Katherine A. Wray, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-38585**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/22/2023

No. A-1-CA-39307

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MARK TIMOTHY HICE,
Defendant,

IN RE SHERI A. RAPHAELSON,
Attorney-Appellant.

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY
Maria Sanchez-Gagne, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Meryl E. Francolini, Assistant Attorney General
Albuquerque, NM

for Appellee

Michael L. Stout
Las Cruces, NM

for Appellant

▶ Introduction of Opinion

The district court held attorney Sheri Raphaelson in direct criminal contempt for violating court-mandated COVID-19 screening protocols that restricted access to the courthouse. Raphaelson appeals, arguing the district court erred by using summary procedures reserved for direct contempt because any contempt was in fact indirect, and that additional procedures would reveal insufficient evidence to support her contempt conviction. Because we are persuaded that Raphaelson was at most in indirect contempt of court, the district court's summary adjudication and punishment was inappropriate. We reverse and vacate Raphaelson's conviction.

Shammara H. Henderson, Judge
WE CONCUR:
Kristina Bogardus, Judge
Jacqueline R. Medina, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39307**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/22/2023

No. A-1-CA-39586

JAMES SANDERSON, Deceased, by the Personal Representative of the Wrongful Death Estate, ERIN PEARSON,
Plaintiff-Appellee,
v.
GENESIS HEALTHCARE, INC.; GENESIS HEALTHCARE, LLC; GENESIS ADMINISTRATIVE SERVICES, LLC; ST. CATHERINE HEALTHCARE AND REHABILITATION CENTER, LLC; and KAREN JENKINS, Administrator,
Defendants-Appellants,
and
AISHA JONES, LLC and AISHA JONES,
Defendants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Benjamin Chavez, District Court Judge

Harvey and Foote Law Firm, LLC
Jennifer J. Foote
Dusti Harvey
Albuquerque, NM

for Appellee

Quintairos, Prieto, Wood & Boyer, P.A.
Frank Alvarez
Jo Beth Drake
Dallas, TX

for Appellants

▶ Introduction of Opinion

Genesis Healthcare, Inc., Genesis HealthCare LLC, Genesis Administrative Services, LLC, Summit Care, LLC, St. Catherine Healthcare and Rehabilitation Center, LLC, and Karen Jenkins, Administrator (collectively, Defendants) appeal the district court's denial of their motion for reconsideration to compel arbitration or, alternatively, to compel discovery. At issue is whether Plaintiff Erin Pearson, the personal representative of her father's wrongful death estate, had authority to bind her father, James Sanderson (Mr. Sanderson), to a Voluntary Binding Arbitration Agreement (the Agreement) signed as part of Mr. Sanderson's admission paperwork to Bear Canyon Rehabilitation Center (the Center). Defendants argue the district court erred by refusing to enforce the Agreement and denying Defendants' motion to compel discovery related to Plaintiff's authority to sign the Agreement. For the following reasons, we affirm.

Kristina Bogardus, Judge
WE CONCUR:
J. Miles Hanisee, Judge
Jane B. Yohalem, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39586**

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 6/26/2023

No. A-1-CA-39694

SANDRA CHAVEZ, as Personal Representative of the Estate of Briana Chavez,
Plaintiff-Appellant,
v.
CONVERGYS CORPORATION; CONVERGYS CUSTOMER MANAGEMENT GROUP, INC.; and SPIRIT CS LAS CRUCES NM, LLC,
Defendants-Appellees,
and
BINNS CONSTRUCTION, INC.; BINNS LTD. CO.; and ADEVCO CORPORATION,
Defendants.

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY
Francis J. Mathew, District Court Judge

Jaramillo Law Firm
David J. Jaramillo
Albuquerque, NM

Liles White PLLC
Stuart R. White
Kevin W. Liles
Rob George
Corpus Christi, TX

for Appellant

Butt, Thornton & Baehr, P.C.
Monica R. Garcia
Rheba Rutkowski
Sarah L. Shore, Et al.
Albuquerque, NM

for Appellees Convergys Corporation and Convergys Customer Management Group, Inc.

▶ Introduction of Opinion

This case requires us to revisit the duty analysis for a premises liability claim in light of Rodriguez v. Del Sol Shopping Center Associates., L.P., 2014-NMSC-014, ¶¶ 1, 19, 326 P.3d 465. Plaintiff Sandra Chavez, as personal representative of the estate of Briana Chavez (Decedent), asserts that Decedent was hit and killed by a bus adjacent to property owned and leased by Defendants in this case. The district court decided that Defendants—the landlord and tenant—owed no duty to Decedent and granted summary judgment. Plaintiff appeals. Concluding that both the landlord and tenant did owe Decedent a duty, we reverse and remand to the district court for further proceedings consistent with this opinion.

Michael D. Bustamante, Judge, retired, sitting by designation
WE CONCUR:
Jane B. Yohalem, Judge
Gerald E. Baca, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39694**

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 6/26/2023

No. A-1-CA-39757

MARIE HOVEY-JARAMILLO and ANGELA JARAMILLO,
Plaintiffs-Appellants,
v.
LIBERTY MUTUAL INSURANCE and UNKNOWN JANE DOE,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Daniel E. Ramczyk, District Court Judge

Roybal Mack & Cordova, P.C.
Antonia Roybal-Mack
Amelia P. Nelson
Albuquerque, NM

for Appellants

Allen Law Firm, LLC
Meena H. Allen
Kerri L. Allensworth
Albuquerque, NM

for Appellees

▶ Introduction of Opinion

This case presents an opportunity to consider whether an insurance company has any duty in tort to its policyholders apart from its obligation to act honestly and in good faith in the performance of the contract as described in UJI 13-1701 to -1704 NMRA. Disagreeing with the district court's conclusion that Defendant Liberty Mutual Insurance (Liberty Mutual) and its employees "did not owe any legally cognizable duty to Plaintiffs," we reverse.

Michael D. Bustamante, Judge, retired, sitting by designation
WE CONCUR:
Kristina Bogardus, Judge
Jane B. Yohalem, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39757**

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 6/26/2023

No. A-1-CA-40113

TED JOSE GARCIA and CINDY GARCIA,
Plaintiffs-Appellants/Cross-Appellees,
v.
NEW MEXICO DEPARTMENT OF TRANSPORTATION,
Defendant-Appellee/Cross-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Bryan Biedscheid, District Court Judge

Keller & Keller, LLC
Michael G. Duran
Samantha L. Drum
Albuquerque, NM

Grayson Law Office, LLC
Brian G. Grayson
Albuquerque, NM

for Appellants

Park & Associates, L.L.C.
Alfred A. Park
Lawrence M. Marcus
Albuquerque, NM

for Appellee

▶ Introduction of Opinion

The direct appeal in this case involves a federal statutory evidentiary privilege created by 23 U.S.C. § 407 (hereinafter § 407).1 The cross-appeal challenges the district court's denial of a bill of costs. Plaintiffs Ted Jose Garcia and Cindy Garcia appeal the district court's exclusion of the Final Project Prioritization Plan for the NM 599 Corridor (the Plan) pursuant to the privilege. Plaintiffs contend that Defendant New Mexico Department of Transportation (DOT) waived its right to assert the privilege. Alternatively, Plaintiffs contend that the district court improperly applied too broad an interpretation of the privilege. DOT cross-appeals the district court's subsequent bill of costs denial, arguing that the district court erred by failing to include in its order the required "good cause" for the denial. We affirm the district court's exclusion of the Plan, reverse the bill of costs denial, and remand with instructions that the district court file an amended order in which it specifies the reasons for its decision to deny costs for reconsideration.

Michael D. Bustamante, Judge, retired, sitting by designation
WE CONCUR:
Kristina Bogardus, Judge
Jacqueline R. Medina, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40113**

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 6/26/2023

No. A-1-CA-39198

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
GERALD CHAVEZ,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Cindy Leos, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Meryl Francolini, Assistant Attorney General
Albuquerque, NM

for Appellant

Bennett J. Baur, Chief Public Defender MJ Edge,
Assistant Appellate Defender Santa Fe, NM

for Appellee

▶ Introduction of Opinion

The State appeals the district court's order quashing a search warrant and suppressing the evidence collected during its execution. The metropolitan (metro) court issued the warrant in a criminal case that was pending trial in the district court. In its order, the district court found the warrant to be invalid for three reasons: (1) the metro court lost jurisdiction over the case once the indictment was filed in district court and likewise lost jurisdiction to authorize a search warrant; (2) the State violated Defendant's due process rights by circumventing "traditional" motions practice to obtain body standards; and (3) the affidavit supporting the warrant omitted material facts. We hold that the district court erred in suppressing evidence obtained, pursuant to the search warrant under the facts and circumstances present in this case; therefore, we reverse and remand for proceedings consistent with this opinion.

Gerald E. Baca, Judge
WE CONCUR:
Jacqueline R. Medina, Judge
Megan P. Duffy, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39198**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 6/26/2023

No. A-1-CA-39943

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JACOB CARROLL,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Jane Shuler Gray, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Walter Hart, Assistant Attorney General
Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Nina Lalevic, Assistant Appellate Defender
Santa Fe, NM

for Appellant

▶ Introduction of Opinion

Defendant Jacob Carroll appeals the district court's order revoking his probation. On appeal, Defendant argues his right to due process was violated in multiple ways and contends the petition to revoke his probation should have been dismissed for violation of the time limits in Rule 5-805 NMRA. Because Defendant's appeal is moot and he has not convinced us that we should exercise our discretion to reach the merits, we dismiss this appeal.

Jennifer L. Attrep, Chief Judge
WE CONCUR:
Jacqueline R. Medina, Judge
Zachary A. Ives, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39943**

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 6/29/2023

No. A-1-CA-39585

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
ERIK LEA,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Courtney Weaks, District Court Judge

Raúl Torrez, Attorney General
Laurie Blevins, Assistant Attorney General
Santa Fe, NM

for Appellant

Bennett J. Baur, Chief Public Defender
Santa Fe, NM
Mark A. Perlata-Silva,
Assistant Appellate Defender
Albuquerque, NM

for Appellee

▶ Introduction of Opinion

In this interlocutory appeal, the State challenges the district court's grant of a motion to suppress DNA evidence collected by a sexual assault nurse examiner (SANE) who passed away between the time of examination and testing. We first addressed this topic, regarding the same deceased SANE, in State v. Carmona, 2016-NMCA-050, ¶ 13, 371 P.3d 1056, cert. denied, S-1-SC-35851 (N.M. May, 11, 2016), in which, guided by our New Mexico Supreme Court's holding in State v. Navarette, 2013-NMSC-003, 294 P.3d 435, this Court held that "the Confrontation Clause prohibits the admission of DNA evidence collected by an unavailable SANE and any expert testimony based thereon when the primary purpose animating the SANE's collection of such evidence is to assist in the prosecution of an individual identified at the time of the collection." Carmona, 2016-NMCA-050, ¶ 13, 371 P.3d 1056 (emphasis added). Applying Carmona, the district court suppressed the DNA evidence on Confrontation Clause grounds. The State appeals, arguing that Carmona does not control this case because the perpetrator was unknown at the time of the SANE exam. **View full PDF online.**

Megan P. Duffy, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39585**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filed 6/29/2023

No. A-1-CA-38511

CHAZ NIXON,
Worker-Appellant,
v.
HYDROTECH SERVICES and ZURICH,
Employer/Insurer-Appellees.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
Shanon S. Riley, Workers' Compensation Judge

Dorato & Weems LLC
Derek Weems
Albuquerque, NM

for Appellant

Butt, Thornton & Baehr, P.C.
Jane A. Laflin
Scott F. Stromberg
Nicholas D. Nuñez
Sarah L. Shore
Albuquerque, NM

for Appellee Hydrotech Services

Guebert Gentile & Piazza P.C.
Robert F. Gentile
Lawrence A. Junker
Kendall M. Barnett
Albuquerque, NM

for Appellee Zurich

▶ Introduction of Opinion

Chaz Nixon (Worker) appeals the Workers' Compensation Judge's (WCJ) order granting in part and denying in part Worker's application for bad faith and unfair claims processing. The WCJ found that Hydrotech (Employer) and Zurich (Insurer) engaged in unfair claims processing and awarded Worker a statutory benefit penalty under NMSA 1978, Section 52-1-28.1(B) (1990) of the Workers' Compensation Act (the Act). Worker appeals, arguing that the WCJ (1) misconstrued the Act in issuing the benefit penalty, and (2) erroneously refused to assess his common law bad faith claims. We affirm.

Megan P. Duffy, Judge
WE CONCUR:
Zachary A. Ives, Judge
Shammara H. Henderson, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-38511**

FORMAL OPINION

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Filing Date: 6/30/2023

No. A-1-CA-38510

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
EDWARD CEBADA,
Defendants-Appellants,

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
Jacqueline D. Flores, District Court Judge

Raúl Torrez, Attorney General
Van Snow, Assistant Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Joelle N. Gonzales,
Assistant Appellate Defender
Santa Fe, NM

for Appellant

Introduction of Opinion

A jury convicted Defendant Edward Cebada of one count of criminal sexual penetration of a minor (CSPM) for digitally penetrating the vagina of a sixteen-year-old female (Victim) by force or coercion, contrary to NMSA 1978, Section 30-9-11(E)(1) (2009).1 Defendant appeals his conviction, arguing: (1) the jury should have been instructed on the age of consent in New Mexico; (2) the jury's question of the age of consent in New Mexico should have been answered; and (3) the district court should have granted a new trial based on the jury's responses to polling that indicated it was confused about the age of consent in New Mexico. The district court instructed the jury that a conviction of CSPM required the act to have been unlawful, including that it was committed without consent. We again reiterate that lack of consent is not a necessary element of CSPM by force or coercion. See State v. Begaye, 2022-NMCA-012, ¶¶ 10-12, 505 P.3d 871, cert. denied (S-1-SC-39078, Feb. 17, 2022). However, no one having complained on appeal about that instruction, we take the opportunity to explain that under the facts of this case the jury was not required to be further instructed on the age of consent in New Mexico. We accordingly reject Defendant's arguments and affirm.

Shammara H. Henderson, Judge
WE CONCUR:
Kristina Bogardus, Judge
Gerald E. Baca, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-38510**

FORMAL OPINION

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Filing Date: 6/30/2023

No. A-1-CA-39549

NANCY HENRY,
Plaintiff-Appellant,
v.
JULIE GAUMAN, Records Custodian for the New Mexico Livestock Board,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Joshua A. Allison, District Court Judge

Harrison & Hart, LLC
Daniel J. Gallegos
Nicholas T. Hart
Ramón Soto
Albuquerque, NM

for Appellant

Hatcher Law Group, P.A.
Scott P. Hatcher
Robert A. Corchine
Carl J. Waldhart
Santa Fe, NM

for Appellee

▶ Introduction of Opinion

This appeal is brought under New Mexico's Inspection of Public Records Act (IPRA), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2023). Plaintiff Nancy Henry appeals the district court's order denying her petition to compel the records custodian for the New Mexico Livestock Board (the Board) to make available for inspection an investigative report (the Whetham Report) concerning the conduct of livestock inspector Kenneth Whetham, a Board employee. Henry claims on appeal that the district court erred in concluding that the Whetham Report in its entirety is exempt from disclosure under Section 14-2-1(C) of IPRA, the exemption for "letters or memoranda that are matters of opinion in personnel files." We agree with the district court that the entire report is exempt from disclosure and that, under the circumstances of this case, in camera review of the report by the district court was unnecessary. Concluding that IPRA was correctly applied and is determinative of the result we reach, we do not consider Henry's argument concerning Rule 1.7.1.12(C) NMAC.

Jane B. Yohalem, Judge
WE CONCUR:
Jacqueline R. Medina, Judge
Gerald E. Baca, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-39549**

Bar Bulletin - July 26, 2023 - Volume 62, No. 14 56

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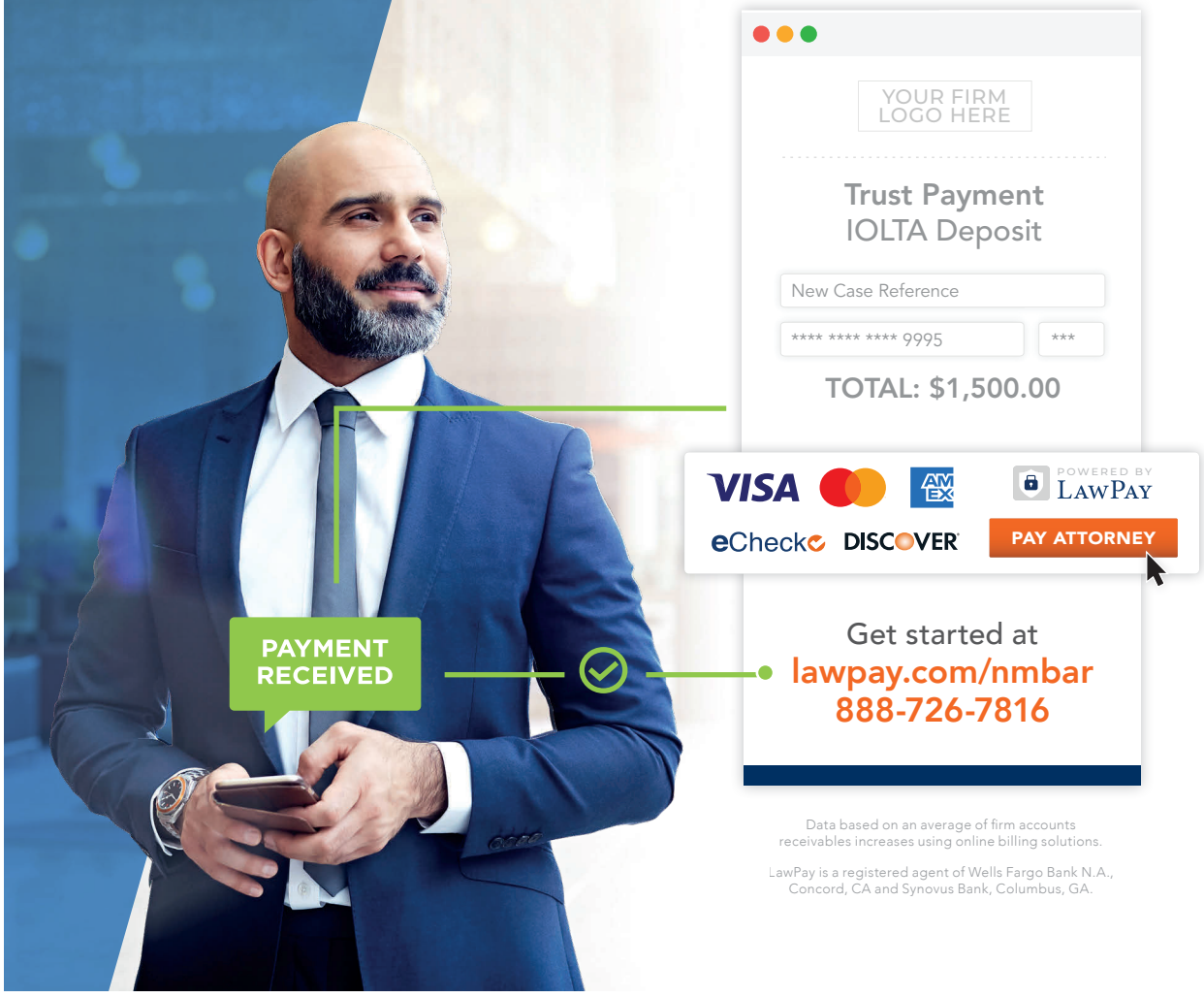

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