Official Publication of the State Bar of New Mexico

BAR BULLETIN

March 23, 2016 • Volume 55, No. 12

Kayenta Volcanic Core by Robert A. Martin

Inside This Issue

Atkinson, Thal & Baker, P.C.

Proudly Announces
the Retirement of

John S. Thal

"Happy Trails To You, John"

The Firm Is Also Proud
to Announce that

Justin D. Rodriguez

Has Become a Shareholder

The Firm Will Continue To Practice As

Atkinson, Baker & Rodriguez, P.C.

201 Third Street NW, Suite 1850
Albuquerque, NM 87102
505-764-8111

The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin,* PO Box 92860, Albuquerque, NM 87199-2860.

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Cover Artist: Robert A. Martin began photographing at 8 years old and continues into his eigth decade, enjoying a wide variety of subjects. Martin was a member of the State Bar, practicing from 1967–2002. He enjoys traveling extensively. View more of his work online at https://www.flickr.com/photos/94779902@N00/.

Notices

Court News

New Mexico Supreme Court

Proposed Amendments to Rules of Practice and Procedure

Several Supreme Court Committees are considering whether to recommend for the Supreme Court's consideration proposed amendments to the rules of practice and procedure summarized in the March 16 issue of the *Bar Bulletin* (Vol. 55, No. 10). To view and comment on the proposed amendments summarized below before they are submitted to the Court for final consideration, submit comments electronically through the Supreme Court's website at http://nmsupremecourt.nmcourts.gov, by email to nmsupremecourtclerk@nmcourts.gov, by fax to 505-827-4837, or by mail to Joey D. Moya, Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, New Mexico 87504-0848

Comments must be received by the Clerk on or before April 6 to be considered by the Court. Note that any submitted comments may be posted on the Supreme Court's website for public viewing.

New Mexico Board of Bar Examiners

Services for Attorneys

The New Mexico Board of Bar Examiners provides the following services to New Mexico attorneys: duplicate licenses; certification of bar application and examination dates, bar passage, MPRE scores, and admission dates; copies of bar applications; and reinstatement applications. Attorneys must request their own file documents and certifications; these items are not available to the general public. For information and fees, visit http://nmexam.org/attorney-services/.

New Mexico Court of Appeals 50th Anniversary Celebration

Join the New Mexico Court of Appeals in celebrating its 50th Anniversary at an open house reception from 4–6 p.m., April 1, at the Pamela B. Minzner Law Center. R.S.V.P.. to the COA Clerks' Office at 505-841-4618 or by email to Aletheia Allen at coaava@nmcourts.gov by March 25. Parking is available in the L lot only.

Second Judicial District Court

Notice to Attorneys:

Gov. Susana Martinez appointed David Williams to fill the vacancy of Division IX at the Second Judicial District Court. Effective Feb. 29, Judge Williams will be assigned criminal court cases previously assigned to Judge Judith Nakamura's special calendar. Individual notices of reassignment will be sent for active pending cases. Inactive cases will be reassigned to Judge Williams by March 11. Check Odyssey to determine if an inactive case has been reassigned to Judge Williams. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from April 13 to excuse Judge David Williams.

Fifth Judicial District Court

Announcement of Vacancy

A vacancy will exist in the Fifth Judicial District Court, Chaves County, as of April 2 due to the retirement of Hon. Steven L. Bell on April 1. This will be for the Division X bench assignment. Inquiries regarding additional details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. Alfred Mathewson, chair of the Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 8 of the New Mexico Constitution. Applications can be found at http://lawschool.unm.edu/judsel/application.php. The deadline is 5 p.m., April 19. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Commission will meet at 9 a.m. on April 28 at the Chaves County Courthouse, 400 N. Virginia, Roswell, to evaluate the applicants. The Commission meeting is open to the public and members of the public who have comments about any of the candidates will have an opportunity to be heard.

Retirement Celebration for Judge Steven L. Bell

The judges and employees of the Fifth Judicial District Court invite members of the legal community to attend a retirement ceremony for the Hon. Steven L. Bell. The celebration will be at 3 p.m., March 25, at the Chaves County Courthouse, Historic Courtroom 1. A reception will follow on the first floor of the courthouse in the historic rotunda.

Professionalism Tip

With respect to opposing parties and their counsel:
I will not make improper statements of fact or of law.

Ninth Judicial District Court

Notice of Exhibit Destruction

The Ninth Judicial District Court, Roosevelt County, will destroy the following exhibits by order of the court if not claimed by the allotted time: 1) All unmarked exhibits, oversized poster boards/maps and diagrams; 2) Exhibits filed with the court, in criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases for the years 1993–2012 may be retrieved through April 30; and 3) All cassette tapes in criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases for years prior to 2007 have been exposed to hazardous toxins and extreme heat in the Roosevelt County Courthouse and are ruined and cannot be played, due to the exposures. These cassette tapes have either been destroyed for environmental health reasons or will be destroyed by April 30. For more information or to claim exhibits, contact the Court at 575-359-6920.

State Bar News

Attorney Support Groups

- April 4, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)
- April 11, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (the group meets on the second Monday of the month). To increase access, teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- April 18, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

Board of Bar Commissioners

Appointments

The BBC will make the following appointments. Members who want to serve

should send a letter of interest and brief résumé to executive director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 505-828-3765; or e-mail to jconte@nmbar.org.

ABA House of Delegates

The BBC will make one appointment to the American Bar Association House of Delegates for a two-year term, which will expire at the conclusion of the 2018 ABA Annual Meeting. The delegate must be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. The deadline is April 15.

Civil Legal Services Commission

The BBC will make one appointment to the Civil Legal Services Commission for a three-year term. The deadline is April 15.

Judicial Standards Commission

The Board of Bar Commissioners will make one appointment to the Judicial Standards Commission for a four-year term. The responsibilities of the Judicial Standards Commission are to receive, review and act upon complaints against State judges, including supporting documentation on each case as well as other issues that may surface. Experience with receiving, viewing and preparing for meetings and trials with substantial quantities of electronic documents is necessary. The commission meets once every eight weeks in Albuquerque and additional hearings may be held as many as four to six times a year. The time commitment to serve on this board is significant and the workload is voluminous. Applicants should consider all potential conflicts caused by service on this board. The deadline is April 15.

Risk Management Advisory Board

A vacancy exists on the Risk Management Advisory Board and a replacement needs to be appointed for the remainder of the term expiring June 30, 2018. The appointee is requested to attend the Risk Management Advisory Board meetings. A summary of the duties of the advisory board, pursuant to §15-7-5 NMSA 1978, are to review: specifications for all insurance policies to be purchased by the risk management division; professional service and consulting contracts or agreements to be entered into by the division; insurance companies and agents to submit proposals when insurance is to be purchased by negotiation; rules and regulations to be promulgated by the division; certificates of coverage to be issued by the division; and investments made by the division. The deadline is March 31.

Entrepreneurs in Community Lawyering

Announcement of New Program

The New Mexico State Bar Foundation announces its new legal incubator initiative, Entrepreneurs in Community Lawyering. ECL will help new attorneys to start successful and profitable, solo and small firm practices throughout New Mexico. Each year, ECL will accept three licensed attorneys with 0-3 years of practice who are passionate about starting their own solo or small firm practice. ECL is a 24 month program that will provide extensive training in both the practice of law and how to run a law practice as a successful business. ECL will provide subsidized office space, office equipment, State Bar licensing fees, CLE and mentorship fees. ECL will begin operations in October and the Bar Foundation is now accepting applications from qualified practitioners. To view the program description, www.nmbar.org/ECL. For more information, contact Director of Legal Services Stormy Ralstin at 505-797-6053.

Young Lawyers Division

Roswell Happy Hour

Join the Young Lawyers Division for a happy hour event from 5:30-7 p.m., March 23, at The Liberty. R.S.V.P.s are not necessary. Co-sponsors include the UNM School of Law, the New Mexico Hispanic Bar Association and the New Mexico Women's Bar Association. Hennighausen & Olsen will sponsor a limited hosted bar. For more information, contact Anna C. Rains, acrains@sbcw-law.com.

Volunteers Needed for Wills for Heroes Event in Santa Fe

YLD is seeking volunteer attorneys for its Wills for Heroes event at 9 a.m. to noon, on Saturday, April 23, at the Santa Fe County Station 60-Rancho Viejo, 37 Rancho Viejo Boulevard, Santa Fe. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders Volunteers need no prior experience with wills. Contact Jordan Kessler at jlkessler@hollandhart.com.

Featured
Member Resource

Fee Arbitration Program

This program helps to resolve fee disputes between attorneys and their clients or between attorneys. Call 505-797-6054 or 1-800-876-6227.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

Attorneys/Law Students
505-228-1948 • 800-860-4914
Judges
888-502-1289
www.nmbar.org > for Members > Lawyers/Judges Asswistance

UNM

Law Library

Hours Through May 14

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10a.m.–6p.m.
Sunday	Noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed

Mexican American Law Student Association

21st Annual Fighting for Justice Banquet

The Mexican American Law Student Association invites members of the legal community to the 21st Annual Fighting for Justice Banquet at 6 p.m., April 16, at Hotel Albuquerque in Old Town. Tickets and sponsorship packages can be bought at http://malsaorg.wix.com/ffj2016 or by contacting MALSA President Jazmine Ruiz at ruizja@law.unm.edu. MALSA will award Hon. Justice Cruz Reynoso of the

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

2016–2017 Bench & Bar Directory

Update Your Contact Information by March 25

To verify your current information: www.nmbar.org/FindAnAttorney

To submit changes (must be made in writing):
Online: Visit www.nmbar.org > for Members > Change of Address
Mail: Address Changes, PO Box 92860, Albuquerque, NM 87199-2860
Fax: 505-828-3765
Email: address@nmbar.org

Publication is not guaranteed for information submitted after March 25.

California Supreme Court (ret.) with the 2016 Fighting for Justice Award for his remarkable work in civil rights. Justice Reynoso will be introduced by his former colleague, emeritus professor and former dean of the UNM School of Law Leo Romero.

Other Bars

Albuquerque Lawyers Club

April Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its lunch meeting at noon, April 6, at Seasons Rotisserie & Grill. Jean Bernstein, CEO of Flying Star Cafes and Satellite Coffee, will be presenting. The luncheon is free for members and for $30 non-members. For more information, email ydennig@Sandia.gov.

American Bar Association Criminal Justice Section

Spring Meeting in Albuquerque

The American Bar Association Criminal Justice Section's Spring Meeting, co-sponsored by the State Bar of New Mexico, will be "Neuroscience: Paving the Way for Criminal Justice Reform." The meeting will be held April 28-30 at Hotel Albuquerque at Old Town in Albuquerque. Topics include how neuroscience is paving the way to criminal justice reform, neuroscience and environmental factors, neuroscience and solitary confinement and the neuroscience of hate: the making of extremist groups. New Mexico Supreme Court Justice Charles W. Daniels will be the luncheon keynote speaker. Roberta Cooper Ramo, the first woman to become president of the American Bar Association, will provide opening remarks. State Bar of New Mexico members can register for the discounted rate of $75. For more information and to register, visit: http://ambar.org/cjs2016spring.

Women Rainmakers Event: Using Persuasion to Win

Women of the New Mexico legal community are invited to attend the upcoming ABA Women Rainmakers Spring 2016 Workshop "Don't Be Afraid to Persuade: Using Persuasion to Win" from 3:30–5:30 p.m., April 7, at the Albuquerque Country Club. The workshop is hosted by Roybal-Mack Law, PC, and the Law Offices of Erika E. Anderson, LLC. During the workshop, attendees will explore the art of persuasion in depth, using sound principles and group exercises to help them gain the confidence you need to succeed at appropriately influencing others. Women attorneys at all levels of experience can benefit from learning how to successfully use persuasion in their interactions with clients, colleagues and others. The workshop is free but space is limited and registration is required: http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=239632793.

New Mexico Criminal Defense Lawyers Association

Civil Rights Solitary Confinement CLE Program

By popular demand, the New Mexico Criminal Defense Lawyers Association is hosting a special civil rights CLE (5.2 G, 1.0 EP) on solitary confinement on April 8 in Albuquerque for criminal defense and civil rights plaintiffs' attorneys. Learn how to protect the constitutional rights of clients subjected to solitary confinement while in pre-trial custody, or in post-conviction detention. Taught by some of the state's top practitioners, this CLE also provides a road map of the civil rights litigation process in the context of solitary confinement, including hurdles which face a civil rights attorney. Visit www.nmcdla.org to register.

Other News

Dine' Hoghaan Bii Development Inc.

Veterans Mini Stand Down

Dine' Hoghaan Bii Development Inc. calls for attorney volunteers for its first annual Veterans Mini Stand Down from 8:30 a.m.– 3:30 p.m. on March 25 at the Fire Rock Casino in Church Rock (just east of Gallup). There will be two-hour shifts with two attorneys for each shift. To schedule a shift or for more information, contact bernadinem25@gmail.com.

New Mexico Workers' Compensation Administration

Notice of Public Hearing

The New Mexico Workers' Compensation Administration will conduct a public hearing on the adoption of new WCA Rules at 1:30 p.m., April 8, at the WCA, 2410 Centre Avenue SE, Albuquerque. Copies of the proposed rule amendments will be available on March 21 at http://www.workerscomp.state.nm.us/ or by calling 505-841-6083. Written comments on the rule changes will be accepted until the close of business on April 20. Comments made in writing and at the public hearing will be taken into consideration. The WCA is proposing new rules regarding tests, testing and cutoff levels for intoxication or influence as well as other miscellaneous revisions to Part 3. Individuals with disabilities who want to participate in the hearing should contact the general counsel office at 505-841-6083.

STATE BAR of NEW MEXICO

2016 Annual Meeting– Bench & Bar Conference

Call for Nominations

State Bar of New Mexico 2016 Annual Awards

Nominations are being accepted for the 2016 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2015 or 2016. The awards will be presented August 19 during the 2016 Annual Meeting—Bench and Bar Conference at the Buffalo Thunder Resort in Santa Fe. All awards are limited to one recipient per year, whether living or deceased. *Previous recipients for the past five years are listed below.*

Distinguished Bar Service Award-Lawyer

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

Previous recipients: Jeffrey H. Albright, Carol Skiba, Ian Bezpalko, John D. Robb Jr., Mary T. Torres

Distinguished Bar Service Award–Nonlawyer

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

Previous recipients: Kim Posich, Rear Admiral Jon Michael Barr (ret.), Hon. Buddy J. Hall, Sandra Bauman, David Smoak

Justice Pamela B. Minzner* Professionalism Award

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

Previous recipients: S. Thomas Overstreet, Catherine T. Goldberg, Cas F. Tabor, Henry A. Kelly, Hon. Angela J. Jewell

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

Outstanding Legal Organization or Program Award

Recognizes sections, committees, local and voluntary bars and outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: Pegasus Legal Services for Children, Corinne Wolfe Children's Law Center, Divorce Options Workshop, United South Broadway Corp. Fair Lending Center, N.M. Hispanic Bar Association

Outstanding Young Lawyer of the Year Award

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

Previous recipients: Tania S. Silva, Marshall J. Ray, Greg L. Gambill, Robert L. Jucero Jr., Keya Koul

Robert H. LaFollette* Pro Bono Award

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

Previous recipients: Robert M. Bristol, Erin A. Olson, Jared G. Kallunki, Alan Wainwright, Ronald E. Holmes

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

Seth D. Montgomery* Distinguished Judicial Service Award

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

Previous recipients: Hon. Cynthia A. Fry, Hon. Rozier E. Sanchez, Hon. Bruce D. Black, Justice Patricio M. Serna (ret.), Hon. Jerald A. Valentine

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

A letter of nomination for each nominee should be sent to Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax 505-828-3765; or email jconte@nmbar.org. **Please note that we will be preparing a video on the award recipients which will be presented at the awards reception, so please provide names and contact information for three or four individuals who would be willing to participate in the video project in the nomination letter.**

Deadline for Nominations: May 20

Legal Education

March

23 **Avoiding Family Feuds in Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Full Implementation Navigating the ACA Minefield**
6.6 G
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com

25 **Legal Technology Academy for New Mexico Lawyers**
4.0 G, 2.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

28 **Tech Tock, Tech Tock: Social Media and the Countdown to Your Ethical Demise**
3.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

28 **What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics—2016 Edition**
3.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

29 **Drafting Demand Letters**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Fair or Foul: Lawyers' Duties of Fairness and Honesty to Clients, Parties, Courts, Counsel and Others**
2.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

31 **Working With Expert Witnesses**
3.0 G
Live Seminar and Webcast
Center for Legal Education of NMSBF
505-797-6020
www.nmbar.org

April

5 **Planning Due Diligence in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **Treatment of Trusts in Divorce**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **2015 Land Use Law in New Mexico**
5.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **More Reasons to be Skeptical of Expert Witnesses Part VI (2015)**
5.0 G, 1.5 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **Federal Practice Tips and Advice from U.S. Magistrate Judges**
2.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **Invasion of the Drones: IP – Privacy, Policies, Profits (2015 Annual Meeting)**
1.5 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **Civil Rights: Solitary Confinement**
5.2 G, 1.0 EP
Live Program, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

14 **Governance for Nonprofits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Update on New Mexico Rules of Evidence**
2.0 G
Live Program
New Mexico Legal Aid
505-768-6112

15 **Guardianship in New Mexico: The Kinship Guardianship Act**
5.5 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

18 **Disciplinary Process Civility and Professionalism**
1.0 EP
Live Program
First Judicial District Court
505-946-2802

22 **Ethics for Estate Planners**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Employees, Secrets and Competition: Non-Competes and More**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

April

27 **Landlord Tenant Law Lease Agreements Defaults and Collections**
5.6 G, 1.0 EP
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com

28 **Annual Advanced Estate Planning Strategies**
11.2 G
Live Program
Texas State Bar
www.texasbarcle.com

29 **2016 Legislative Preview**
2.0 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

29 **2015 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

29 **Criminal Procedure Update**
1.2 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

30 **Law Day CLE**
3.0 G
Live Program
State Bar of New Mexico
Paralegal Division
505-888-4357

May

4 **Ethics and Drafting Effective Conflict of Interest Waivers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Public Records and Open Meetings**
5.5 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Foundation for Open Government
www.nmfog.org

6 **Best and Worst Practices Including Ethical Dilemmas in Mediation**
5.0 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

11 **Adding a New Member to an LLC**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **Spring Elder Law Institute**
6.2 G
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

17 **Workout of Defaulted Real Estate Project**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **2016 Retaliation Claims in Employment Law Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **The New Lawyer – Rethinking Legal Services in the 21st Century**
4.5 G, 1.5 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

20 **Legal Writing – From Fiction to Fact: Morning Session (2015)**
2.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

20 **Social Media and the Countdown to Your Ethical Demise (2016)**
3.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

20 **What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics (2016 Edition)**
3.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

20 **Ethics and Virtual Law Practices**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

6 **2016 Estate Planning Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Negotiating and Drafting Issues with Small Commercial Leases**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Legal Ethics in Contract Drafting**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Ethics and Social Media: Current Developments**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective February 26, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,779	State v. Harvey	COA 33,724	02/26/16
No. 35,777	N.M. State Engineer v. Santa Fe Water Resource	COA 33,704	02/25/16
No. 35,776	State v. Mendez	COA 34,856	02/25/16
No. 35,775	Northern N.M. Federation v. Northern N.M. College	COA 33,982	02/25/16
No. 35,774	State v. Damon C.	COA 33,962	02/24/16
No. 35,773	State v. Simpson	COA 33,723	02/24/16
No. 35,772	Castillo v. Arrieta	COA 34,108	02/24/16
No. 35,771	State v. Garcia	COA 33,425	02/24/16
No. 35,768	State v. Begay	COA 34,409	02/22/16
No. 35,767	State v. Gallegos	COA 34,698	02/22/16
No. 35,765	State v. Perez	COA 31,678	02/19/16
No. 35,764	State v. Kingston	COA 32,962	02/19/16
No. 35,758	State v. Abeyta	COA 33,461	02/15/16
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No. 35,653	Pallares v. Martinez	12-501	12/09/15
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No. 35,268	Saiz v. State	12-501	12/01/15
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No. 35,581	Salgado v. Morris	12-501	11/02/15
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No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,466	Garcia v. Wrigley	12-501	08/06/15
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No. 35,422	State v. Johnson	12-501	07/17/15
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No. 35,370	Chavez v. Hatch	12-501	06/15/15
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No. 34,937	Pittman v. N.M. Corrections Dept.	12-501	10/20/14
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No. 34,067	Gutierrez v. Williams	12-501	03/14/13
No. 33,868	Burdex v. Bravo	12-501	11/28/12
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No. 33,539	Contreras v. State	12-501	07/12/12
No. 33,630	Utley v. State	12-501	06/07/12

Certiorari Granted but Not Yet Submitted to the Court:

(Parties preparing briefs)			Date Writ Issued
No. 33,725	State v. Pasillas	COA 31,513	09/14/12
No. 33,877	State v. Alvarez	COA 31,987	12/06/12
No. 33,930	State v. Rodriguez	COA 30,938	01/18/13
No. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
No. 34,274	State v. Nolen	12-501	11/20/13
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No. 34,669	Hart v. Otero County Prison	12-501	06/06/14
No. 34,650	Scott v. Morales	COA 32,475	06/06/14
No. 34,784	Silva v. Lovelace Health Systems, Inc.	COA 31,723	08/01/14
No. 34,812	Ruiz v. Stewart	12-501	10/10/14
No. 34,830	State v. Le Mier	COA 33,493	10/24/14
No. 34,929	Freeman v. Love	COA 32,542	12/19/14
No. 35,063	State v. Carroll	COA 32,909	01/26/15
No. 35,121	State v. Chakerian	COA 32,872	05/11/15
No. 35,116	State v. Martinez	COA 32,516	05/11/15
No. 34,949	State v. Chacon	COA 33,748	05/11/15
No. 35,296	State v. Tsosie	COA 34,351	06/19/15
No. 35,213	Hilgendorf v. Chen	COA 33056	06/19/15
No. 35,279	Gila Resource v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,289	NMAG v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,290	Olson v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,318	State v. Dunn	COA 34,273	08/07/15
No. 35,278	Smith v. Frawner	12-501	08/26/15
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No. 35,446	State Engineer v. Diamond K Bar Ranch	COA 34,103	08/26/15
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No. 35,438	Rodriguez v. Brand West Dairy	COA 33,104/33,675	08/31/15
No. 35,426	Rodriguez v. Brand West Dairy	COA 33,675/33,104	08/31/15
No. 35,499	Romero v. Ladlow Transit Services	COA 33,032	09/25/15
No. 35,456	Haynes v. Presbyterian Healthcare Services	COA 34,489	09/25/15
No. 35,437	State v. Tafoya	COA 34,218	09/25/15
No. 35,515	Saenz v. Ranack Constructors	COA 32,373	10/23/16
No. 35,614	State v. Chavez	COA 33,084	01/19/16
No. 35,609	Castro-Montanez v. Milk-N-Atural	COA 34,772	01/19/16
No. 35,512	Phoenix Funding v. Aurora Loan Services	COA 33,211	01/19/16
No. 34,790	Venie v. Velasquez	COA 33,427	01/19/16
No. 35,680	State v. Reed	COA 33,426	02/05/16

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)			Submission Date
No. 33,884	Acosta v. Shell Western Exploration and Production, Inc.	COA 29,502	10/28/13
No. 34,093	Cordova v. Cline	COA 30,546	01/15/14
No. 34,287	Hamaatsa v. Pueblo of San Felipe	COA 31,297	03/26/14
No. 34,613	Ramirez v. State	COA 31,820	12/17/14
No. 34,798	State v. Maestas	COA 31,666	03/25/15
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No. 34,997	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,993	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,726	Deutsche Bank v. Johnston	COA 31,503	08/24/15
No. 34,826	State v. Trammel	COA 31,097	08/26/15
No. 34,866	State v. Yazzie	COA 32,476	08/26/15
No. 35,035	State v. Stephenson	COA 31,273	10/15/15
No. 35,478	Morris v. Brandenburg	COA 33,630	10/26/15
No. 35,248	AFSCME Council 18 v. Bernalillo County Comm.	COA 33,706	01/11/16
No. 35,255	State v. Tufts	COA 33,419	01/13/16
No. 35,183	State v. Tapia	COA 32,934	01/25/16
No. 35,101	Dalton v. Santander	COA 33,136	02/17/16
No. 35,198	Noice v. BNSF	COA 31,935	02/17/16
No. 35,249	Kipnis v. Jusbasche	COA 33,821	02/29/16
No. 35,302	Cahn v. Berryman	COA 33,087	02/29/16
No. 35,349	Phillips v. N.M. Taxation and Revenue Dept.	COA 33,586	03/14/16
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	03/16/16
No. 35,297	Montano v. Frezza	COA 32,403	03/28/16
No. 35,214	Montano v. Frezza	COA 32,403	03/28/16
No. 35,386	State v. Cordova	COA 32,820	03/28/16
No. 35,286	Flores v. Herrera	COA 32,693/33,413	03/30/16
No. 35,395	State v. Bailey	COA 32,521	03/30/16
No. 35,130	Progressive Ins. v. Vigil	COA 32,171	03/30/16

Opinion on Writ of Certiorari:

		Date Opinion Filed
No. 35,298	State v. Holt	COA 33,090 02/25/16
No. 35,145	State v. Benally	COA 31,972 02/25/16

Petition for Writ of Certiorari Denied:

		Date Order Filed
No. 35,733	State v. Meyers	COA 34,690 02/26/16
No. 35,732	State v. Castillo	COA 34,641 02/26/16
No. 35,705	State v. Farley	COA 34,010 02/24/16
No. 35,551	Ortiz v. Wrigley	12-501 02/24/16
No. 35,540	Fausnaught v. State	12-501 02/24/16

Opinions

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

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Effective March 11, 2016

Published Opinions

No. 33902	7th Jud Dist Soccorro LR-13-3, STATE v J MAXWELL (reverse and remand)	3/10/2016

Unublished Opinions

No. 34710	2nd Jud Dist Bernalillo CV-14-5358, J BARNCASTLE v B CLARK (affirm)	3/07/2016
No. 34838	12th Jud Dist Lincoln JR-14-32, STATE v NICHOLAS G (affirm)	3/07/2016
No. 34939	2nd Jud Dist Bernalillo CR-13-4730, STATE v D MAHO (reverse)	3/07/2016
No. 34947	2nd Jud Dist Bernalillo CV-13-4066, DEUTSCH BANK v S ROBINSON-VANN (affirm)	3/07/2016
No. 34937	2nd Jud Dist Bernalillo CR-12-4119, STATE v K MCNEW (affirm)	3/07/2016
No. 34940	2nd Jud Dist Bernalillo CR-11-1041, STATE v J LINAM (affirm)	3/07/2016
No. 34895	2nd Jud Dist Bernalillo CV-11-8351, P LUCERO v GMAC MORTGAGE (affirm)	3/08/2016
No. 35031	11th Jud Dist San Juan CV-14-842, C TSOSIE v NMPD (dismiss)	3/08/2016
No. 35066	2nd Jud Dist Bernalillo CV-13-10076, SUBURBAN MORTGAGE v M DURAN (affirm)	3/08/2016
No. 34756	2nd Jud Dist Bernalillo CV-12-9404, J BASSETT v NM RACING COMM (dismiss)	3/09/2016
No. 34847	2nd Jud Dist Bernalillo CR-95-1311, STATE v K JUDD (dismiss)	3/09/2016
No. 34993	2nd Jud Dist Bernalillo CV-15-3993, R BOUGHTON v COMMUNITY HOUSING (dismiss)	3/09/2016
No. 34363	3rd Jud Dist Dona Ana CR-11-223, STATE v J VALLEJOS (affirm in part, vacate in part and remand)	3/10/2016

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective March 9, 2016

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

Please see the special summary of proposed rule amendments published in the March 9 issue of the Bar Bulletin. *The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is April 6, 2016.*

Recently Approved Rule Changes Since Release of 2015 NMRA:

Second Judicial District Court Local Rules

LR2-400	Case management pilot program for criminal cases.	02/02/16

For 2015 year-end rule amendments that became effective December 31, 2015, and that will appear in the 2016 NMRA, please see the November 4, 2015, issue of the Bar Bulletin or visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us/nmrules/NMRules.aspx.

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

From the New Mexico Supreme Court

Opinion Number: 2015-NMSC-036

No. S-1-SC-34974 (filed December 17, 2015)

CATHY MOSES and PAUL F. WEINBAUM,
Plaintiffs-Petitioners,
v.
HANNA SKANDERA, Designate Secretary of Education,
New Mexico Public Education Department,
Defendant-Respondent,
and
ALBUQUERQUE ACADEMY, et al.,
Defendants/Intervenors-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
SARAH M. SINGLETON, District Judge

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Opinion

Edward L. Chávez, Justice

{1} Intervenors' motion for rehearing is denied. However, our prior opinion filed on November 12, 2015 is withdrawn and the following is substituted in its place.

{2} Since the adoption of the New Mexico Constitution on January 21, 1911, New Mexico has had a constitutional responsibility to provide a free public education for all children of school age. N.M. Const. art. XII, § 1. However, "*no part* of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational *or private school*, college or university." N.M. Const. art. XII, § 3 (emphasis added). The New Mexico Department of Public Education's (Department) Instructional Material Bureau purchases non-religious instructional materials selected by public or private schools, with funds appropriated by the Legislature and earmarked for the schools, and lends these materials to qualified students who attend public or private schools. NMSA 1978, § 22-15-7 (2010); *see also* NMSA 1978, § 22-8-34 (2001). The question we address in this case is whether the provision of books to students who attend private schools violates Article XII, Section 3. We conclude that the New Mexico Constitutional Convention was not willing to navigate the unclear line between secular and sectarian education, or the unclear line between direct and indirect support to other than public schools. Indeed, in 1969 the voters rejected a proposed constitutional amendment that would have required New Mexico to provide free textbooks to all New Mexico school children. *See Proposed New Mexico Constitution* (*as adopted by the Constitutional Convention of 1969*) 45 (October 20, 1969). We hold that the plain meaning and history of Article XII, Section 3 forbids the provision of books for use by students attending private schools, whether such schools are secular or sectarian.

I. The Instructional Material Law is funded by appropriations

{3} The Instructional Material Law (IML), NMSA 1978, §§ 22-15-1 to -14 (1967, as amended through 2011), grants the Department's Instructional Material Bureau statutory authority to lend approved instructional materials[1] to "[a]ny qualified student . . . attending a public school, a state institution *or a private school* approved by the department in any grade from first through the twelfth grade of instruction . . . ." Section 22-15-7(A) (emphasis added). "Instructional material shall be distributed to school districts, state institutions and private schools *as agents* for the benefit of students entitled to the free use of the instructional material." Section 22-15-7(B) (emphasis added). In turn, "[a]ny school district, state institution or private school *as agent* receiving instructional material pursuant to the Instructional Material Law is responsible for distribution of the instructional material for use by eligible students and *for the safekeeping* of the instructional material." Section 22-15-7(C) (emphasis added).

[1] " '[I]nstructional material' means school textbooks and other educational media that are used as the basis for instruction, including combinations of textbooks, learning kits, supplementary material and electronic media." Section 22-15-2(C); *see also* § 22-15-3(A) ("The 'instructional material bureau' is created within the department of education [public education department]." (alteration in original)).

Students or their parents are "responsible for the loss, damage or destruction of instructional material while the instructional material is in the possession of the student." Section 22-15-10(B).

{4} The Department is required to publish a "multiple list" of state-approved instructional materials. Section 22-15-8(A), (B); § 22-15-2(D) (" '[M]ultiple list' means a written list of those instructional materials approved by the department."). Using the multiple list of state-approved instructional materials, "each school district, state institution or private school as agent may select instructional material for the use of its students . . . ." Section 22-15-8(B). "At least ten percent of instructional material on the multiple list concerning language arts and social studies shall contain material that is relevant to the cultures, languages, history and experiences of multi-ethnic students." Section 22-15-8(A). Moreover, "[t]he Department shall ensure that parents and other community members are involved in the adoption process at the state level." *Id.*

{5} The IML is funded through a non-reverting "instructional material fund" established by the State Treasurer "consist[ing] of appropriations, gifts, grants, donations and any other money credited to the fund." Section 22-15-5(A). In 1931, the Legislature enacted the State School Building, Text Book and Rural Aid Fund to purchase instructional materials with unappropriated federal funds obtained through the Mineral Lands Leasing Act (MLLA), 30 U.S.C. §§ 181 to 287 (1920, as amended through 2012). N.M. Laws 1931, ch. 138, § 2 ("There is hereby appropriated for the purposes of this fund, annually, all of the balance, not otherwise appropriated, in the [MLLA] Fund . . . ."). Today the Department's Instructional Material Bureau continues to purchase instructional materials for New Mexico students using federal MLLA funds. *See* § 22-8-34(A) ("Except for an annual appropriation to the instructional material fund and to the bureau of geology and mineral resources of the New Mexico institute of mining and technology . . . all other money received by the state pursuant to the provisions of the federal [MLLA], shall be distributed to the public school fund." (citation omitted)).

{6} Each public and private school is allocated a percentage of money available in the IML fund based on the number of students enrolled in their school. Section 22-15-9(A). "Private schools may expend up to fifty percent *of their instructional material funds* for items that are not on the multiple list; provided that *no funds* shall be expended for religious, sectarian or nonsecular materials . . . ." Section 22-15-9(C) (emphasis added). Such instructional material purchases must be identified and purchased through the Department's in-state depository. Section 22-15-9(C), (E); *see also* § 22-15-4(D). "Any balance remaining in an instructional material account of a private school at the end of the fiscal year shall remain available for reimbursement by the department for instructional material purchases in subsequent years." Section 22-15-9(F). The Department's Instructional Material Bureau has the authority to "withdraw or withhold the privilege of participating in the free use of instructional material in case of any violation of or noncompliance with the provisions of the Instructional Material Law or any rules adopted pursuant to that law." Section 22-15-4(C).

{7} In summary, the Legislature appropriates instructional materials funds and private schools are allocated a percentage of the funds based on the number of students enrolled in their schools. Private schools select instructional materials from a multiple list, but they may spend up to 50 percent of their instructional materials funds on items that are not on the multiple list, as long as the material is not religious in content. Any money remaining in the private schools instructional material fund may be carried over to subsequent years. Once the materials are purchased, the materials are loaned to the students. Hereafter in this opinion we will refer to this process as a "schoolbook loan program" for ease of reference.

II. Procedural history

{8} Plaintiffs-Petitioners Cathy Moses and Paul F. Weinbaum (Petitioners) are New Mexico residents and have been taxpayers for at least the past five years. Petitioners currently have one or more children enrolled in elementary and/or secondary public schools in New Mexico. As New Mexico residents and taxpayers, Petitioners assert that the IML violates their constitutional rights because it supposedly forces them to "support[] and aid[] the religious dictates of others with whom they disagree"; appropriates or donates public funds to private parties; and supports "sectarian, denominational or private school[s]."

{9} Petitioners filed a verified complaint for declaratory judgment in the district court against Defendant-Respondent Hanna Skandera (Respondent), Secretary of the Department, seeking a declaration that the State issuing instructional materials to students attending private schools is unconstitutional because doing so supports sectarian, denominational, or private schools in violation of New Mexico Constitution Article XII, Section 3; forces them as taxpayers to support the religious dictates of others in violation of New Mexico Constitution Article II, Section 11; and appropriates or donates public funds to private parties in violation of New Mexico Constitution Article IX, Section 14. Petitioners also relied on *Zellers v. Huff*, 1951-NMSC-072, 55 N.M. 501, 236 P.2d 949 to support their allegation that the schoolbook loan program is unconstitutional.

{10} Petitioners filed a motion for summary judgment, and Respondent and Albuquerque Academy, et al. (Intervenors) each filed a memorandum in opposition. The district court ruled that *Zellers* did not control and the provisions of the IML challenged by Petitioners did not violate the New Mexico Constitution. The district court then entered its order denying Petitioners' motion for summary judgment and granted summary judgment to Respondent.

{11} Petitioners appealed to the Court of Appeals, which affirmed the district court's grant of summary judgment to Respondent. *Moses v. Skandera*, 2015-NMCA-036, ¶¶ 3, 54, 346 P.3d 396, *cert. granted*, 2015-NMCERT-001. We granted Petitioners' petition for writ of certiorari to consider the following issues: (1) whether this Court's decision in *Zellers* constituted dicta; (2) whether the IML violates Article XII, Section 3 of the New Mexico Constitution; (3) whether the IML violates Article IV, Section 31 of the New Mexico Constitution; (4) whether the IML violates Article IX, Section 14 of the New Mexico Constitution; and (5) whether the IML violates Article II, Section 11 of the New Mexico Constitution.

{12} We conclude that the schoolbook loan program violates Article XII, Section 3, and therefore we do not address the remaining issues. We reverse both the Court of Appeals and the district court.

III. The IML violates Article XII, Section 3 of the New Mexico Constitution

{13} Article XII, Section 3 provides:

> The schools, colleges, universities and other educational institutions provided for by this

> constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational *or private school*, college or university.

(Emphasis added.)

{14} Whether the schoolbook loan program violates the New Mexico Constitution is a question of law that we review de novo. *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 11, 289 P.3d 1232. "It is well settled that there is a presumption of the validity and regularity of legislative enactments." *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 11, 306 P.3d 457 (internal quotation marks and citations omitted). Petitioners bear the burden of proof to overcome the presumption of the validity and regularity of the IML. *Id.* We will uphold the constitutionality of the IML unless we are satisfied beyond all reasonable doubt that the Legislature exceeded the bounds of the New Mexico Constitution in enacting the IML. *Id.*

{15} "[T]he rules of statutory construction apply equally to constitutional construction." *State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830 (internal quotation marks and citation omitted). "[W]e examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868 (internal quotation marks and citation omitted).

{16} The Court of Appeals interpreted Article XII, Section 3 to provide protection only against the establishment of religion, similar to the Establishment Clause of the First Amendment to the United States Constitution and the Establishment Clause of Article II, Section 11 of the New Mexico Constitution. *Moses*, 2015-NMCA-036, ¶ 22. Accordingly, the Court of Appeals relied primarily on First Amendment cases to hold that the IML did not violate Article XII, Section 3. *Moses*, 2015-NMCA-036, ¶ 34 (citing *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 33, 284 P.3d 428).

{17} We might agree with the Court of Appeals if the language of Article XII, Section 3 only prohibited the use of any public funds for the support of sectarian or denominational schools. The plain language of Article XII, Section 3 is more restrictive, and it therefore stands as a constitutional protection separate from the Establishment Clause as illustrated by the difference in language in each provision.

{18} The Establishment Clause provides, in relevant part, that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. In contrast, Article XII, Section 3 provides:

> The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational *or private school*, college or university.

(Emphasis added.) The plain language of Article XII, Section 3 expressly restricts the use of public funds to other than sectarian schools, and therefore our analysis cannot be restricted by cases that analyze the Establishment Clause.

{19} The historical context in which Article XII, Section 3 was adopted helps explain why this constitutional provision was not a recodification of the Establishment Clause of the New Mexico Constitution. During the early nineteenth century, public education was provided in public schools known as "common schools." *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 558 (2003). "The common school was designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority." Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 668 (1998). "Protestant ministers and lay people were in the forefront of the public-school crusade and took a proprietary interest in the institution they had helped to build. They assumed a congruence of purpose between the common school and the Protestant churches." *Id.* (internal quotation marks and citation omitted). "In many cases, it was difficult to distinguish between public and private institutions because they were often housed in the same building." *Id.* at 664. State statutes at the time authorized Bible readings in public schools and state judges generally refused to recognize the Bible as a sectarian book. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 Notre Dame L. Rev. 1097, 1103-04 nn.22-23 (citing Miss. Const. of 1890, art. 3, § 18); *Hackett v. Brooksville Graded Sch. Dist.*, 87 S.W. 792 (Ky. 1905); *Donahoe v. Richards*, 38 Me. 379 (1854)); Viteritti, *supra*, at 667-68.

{20} By the middle of the nineteenth century, the Catholic immigrant population rose significantly. Viteritti, *supra*, at 669. The influx of Catholic immigrants created a demand for Catholic education, and consequently Catholics and other minority religionists challenged the Protestant influence in the common schools. *Id.* at 667-68; Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 44 (1992). By the 1870s, Catholic church leaders began to lobby their state legislatures for public funds to develop their own educational system. Viteritti, *supra*, at 668; Green, *supra*, at 44. This rise in Catholic influence created an obvious tension between the Protestant majority and the mostly Catholic minority on the issue of education, *see* Viteritti, *supra*, at 670-72, because the Protestant-run "common school was designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority." *Id.* at 668.

{21} In response, "[o]pposition to aid to 'sectarian' schools acquired prominence in the 1870's . . . ." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "[I]t was an open secret that 'sectarian' was code for 'Catholic.' " *Id.* Common school leaders successfully lobbied their state legislatures to adopt amendments prohibiting the use of state funds to support sectarian schools by the mid-to-late nineteenth century. *See, e.g.*, Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; N.D. Const. art. VIII, §§ 1, 5; Ohio Const. art. VI, § 2. "In September of 1875, President Ulysses S. Grant responded to mounting political pressure when he publicly vowed to '[e]ncourage free schools, and resolve that not one dollar be appropriated to support any sectarian schools.' " Viteritti, *supra*, at 670 (alteration in original). President Grant called on Congress to draft a proposed constitutional amendment that would deny public support to religious institutions. *Id.*

{22} Congressman James G. Blaine of Maine agreed to sponsor an amendment to the First Amendment that fulfilled President Grant's request. *See id.* at 670-71. Congressman Blaine's proposed constitutional amendment read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects and denominations.

Green, *supra*, at 38 n.2 (quoting 4 Cong. Rec. 5453 (1876) (quotation marks omitted)). Congressman Blaine believed that his proposed constitutional amendment would correct a "constitutional defect" because at the time, the Establishment Clause had not been interpreted to apply to the states under the Fourteenth Amendment. Viteritti, *supra*, at 671 n.66 (citing *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 589, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws . . . .").

{23} Despite the fact that Congressman Blaine's proposed amendment failed to pass in the United States Senate, several states amended their constitutions to include a ban on funding of sectarian education. Viteritti, *supra*, at 672. "By century's end [congressional] leaders had come to understand that federal aid could be used as a wedge for manipulating public policy. . . . Particularly vulnerable to the Republican agenda were those new territories seeking statehood." *Id.* at 672-73. "As a matter of course, [new territories seeking statehood] would be required to incorporate Blaine-like provisions into their new constitutions in order to receive congressional approval." *Id.* at 673.

{24} Congress granted New Mexico statehood on the explicit condition that it adopt a similar "Blaine" provision in the New Mexico Constitution. *See* Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, ch. 310, § 8 (Enabling Act).[2] In the Enabling Act, "Congress set forth the terms by which New Mexico would be admitted as a state." *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 6, 130 N.M. 368, 24 P.3d 803. In an election held on January 21, 1911 to vote on the New Mexico Constitution adopted by the Constitutional Convention of 1910, New Mexico voters ratified all of the terms of the Enabling Act in Article 21, Section 9 of the 1911 New Mexico Constitution. *See Constitutions of New Mexico 1910-34*. Article 21, Section 10 of the 1911 New Mexico Constitution provides that "[t]his ordinance is irrevocable without the consent of the United States and the people of this State, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of Congress." *Id.*; Enabling Act § 2; *see also* N.M. Const. art. 21, §§ 1-11 (incorporating all Enabling Act measures into the New Mexico Constitution and making the Enabling Act irrevocable without the consent of Congress and the citizens of New Mexico). Because the Enabling Act was adopted during New Mexico's 1910 Constitutional Convention, N.M. Const. art. 21, §§ 1-11, it functions as a "fundamental law to the same extent as if it had been directly incorporated into the Constitution." *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 3, 149 N.M. 330, 248 P.3d 878 (internal quotation marks and citation omitted).

{25} Sections 6 through 9 of the Enabling Act pertain to specified public lands that were granted to New Mexico to be held in trust "for the support of common schools." Enabling Act § 6. To the extent that lands "are mineral, or have been sold, reserved or otherwise appropriated or reserved by or under the authority of any act of congress," they are to be treated as all other public lands specified under Sections 6 through 9 of the Enabling Act. Enabling Act § 6.

> Congress contemplated that any change . . . to the use of the proceeds of the lands granted to the state should be effectuated by amendment to the Constitution, and . . . any change in the use and application of the proceeds of these land grants may . . . be done by way of a constitutional amendment.

Lyons, 2011-NMSC-004, ¶ 4 (first and third omissions in original) (internal quotation marks and citation omitted).

{26} Grants of land were made to New Mexico specifically for, among other things, "university purposes, . . . schools and asylums for the deaf, dumb and the blind, . . . normal schools, . . . agricultural and mechanical colleges, . . . school of mines, [and] military institutes." Enabling Act § 7. Lands granted to New Mexico and any proceeds derived from them are to be held in trust. Enabling Act § 10, ¶ 1. If the lands or money so derived are used for something other than the named purposes, it is a breach of the Enabling Act. Enabling Act § 10, ¶ 2. The Enabling Act "is binding and enforceable and the legislature is without power to divert the fund for another purpose than that expressed." *State ex rel. Interstate Stream Comm'n v. Reynolds*, 1963-NMSC-023, ¶ 22, 71 N.M. 389, 378 P.2d 622.

{27} Specifically relevant to our inquiry is Section 8 of the Enabling Act, which may be characterized as a Blaine provision because of the time of its adoption and because it precludes the use of public funds for the support of sectarian or denominational schools.

> [T]he schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university.

Id. This language is nearly identical to that of Article XII, Section 3, with two critical differences. The Enabling Act prohibits the use of "proceeds arising from the sale or disposal of any lands granted [in the Enabling Act] for educational purposes" to support sectarian schools. Enabling Act § 8. In contrast, the drafters of the New Mexico Constitution restricted the use of proceeds from *any* lands granted to New Mexico by Congress, not only those granted in the Enabling Act, and they also restricted the use of any funds appropri-

[2]Section 8 of the Enabling Act explicitly requires that

> [t]he schools, colleges and universities provided for in this act shall forever remain under the exclusive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university.

ated, levied, or collected for educational purposes for the support of not only sectarian schools, but also the much broader category of private schools. Through these changes, the Constitutional Convention decided to provide for additional restrictions on public funding of education beyond the restrictions required by Section 8 of the Enabling Act. *See Highlights of the August 15, 1969, Session of the 1969 Constitutional Convention Submitted August 14, 1969* at 4. The members of the Constitutional Convention chose to play it safe—by broadening the provision to reach all private schools, they avoided drawing a line between secular and sectarian education. In addition, they were not willing to limit the funds that would be restricted from use for private schools—they went well beyond "proceeds arising from the sale or disposal of any lands granted" under Section 8 of the Enabling Act and chose to restrict the use of "any other funds appropriated, levied or collected for educational purposes." N.M. Const. art. XII, § 3.

{28} The MLLA appropriates funds to New Mexico "to be used by such State and its subdivisions, as the legislature of the State may direct . . . , for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service." 30 U.S.C. § 191(a). MLLA funds are not specifically allocated for schools or school books. The Legislature, which has the constitutional responsibility to appropriate funds, *see* New Mexico Constitution Article IV, Section 30, has discretion to appropriate MLLA funds for any purpose consistent with the broad purposes described in the MLLA. Intervenors contend that the provision of school books for children attending both public and private schools constitutes a "public service." Although we agree with this broad philosophical statement, the provision of school books is an educational purpose. Article XII, Section 3 controls the Legislature's discretion when money is appropriated for educational purposes by prohibiting the appropriation of educational funds to private schools.

{29} Intervenors contend that the MLLA preempts any state constitutional restriction on the Legislature's discretion with respect to MLLA funds as long as the Legislature appropriates the funds consistent with the broad purposes of the MLLA. In support of their argument, Intervenors cite to *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975 and *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256 (1985). These cases are inapposite. The *Sego* Court held that the Legislature does not have the power to control the manner and extent of the use or expenditure of funds received by institutions of higher learning from Congress or from private donations. 1974-NMSC-059, ¶¶ 48-51. In *Lawrence*, the United States Supreme Court held that a federal statute specifically providing local governments with discretion in distributing federal funds preempted a state statute attempting to control how local governments allocated such funds. 469 U.S. at 261-68. Stated simply, Congress appropriated the funds to local governments, not to the State; therefore, the State did not have authority to dictate how local governments spent the money directly allocated to them by Congress. Similarly, when Congress appropriates money to New Mexico institutions of higher learning, under this Court's holding in *Sego*, the Legislature lacks authority to direct the use of such funds. The MLLA does not specifically appropriate funds to or for school purposes. Simply because the MLLA gives discretion to our Legislature does not mean that the Legislature is at liberty to ignore state constitutional limitations on its discretion. The MLLA has neither expressly nor impliedly preempted the application of Article XII, Section 3 because restricting funds appropriated for educational purposes to public schools is not incompatible with the purposes announced in the MLLA. Thus, Intervenors' argument that funds from the MLLA that are used for the Instructional Material Fund are federal funds which are "not subject to state constitutional limitations" is without merit.

{30} The Court of Appeals held that the direct recipients of the IML financial program are the parents of the children, and therefore the benefit to private schools is not direct enough to violate Article XII, Section 3. *Moses*, 2015-NMCA-036, ¶ 40. We can not agree that Article XII, Section 3 only prohibits direct support to private schools. The broad language of this provision and the history of its adoption and the efforts to amend it evince a clear intent to restrict both direct and indirect support to sectarian, denominational, or private schools, colleges, or universities. Our interpretation is supported by the failed attempt in 1969 of the delegates to the New Mexico Constitutional Convention to amend the precursor of Article XII, Section 3. *Report of the Constitutional Revision Commission* 158 (1967). Using the Alaska Constitution as a template, the Constitutional Revision Commission proposed revising the precursor of Article XII, Section 3 to read "[t]he public schools and institutions of the state shall be free from sectarian control. No money shall be paid from public funds for the *direct benefit* of any religious or other private educational institution." New Mexico Legislative Council Service, *Workbook of Selected Constitutions Prepared For Delegates to the New Mexico Constitutional Convention 1969* (July 15, 1969) (emphasis added). This proposed revision would not have been necessary if a reasonable interpretation of Article XII, Section 3 as written only precluded direct support of sectarian and private schools. However, the proposed revision was never submitted to the voters for ratification in December 1969. *See generally Proposed New Mexico Constitution* (*as adopted by the New Mexico Constitutional Convention of 1969*) (October 20, 1969).

{31} Instead, the Constitutional Convention proposed a constitutional amendment that would address the crux of the question: may public funds be used to provide free textbooks to all students, including those who attend private schools? *See id.* at 45. The constitutional amendment submitted to the voters for adoption read: "The legislature shall provide for a system of free textbooks for use by school children of this state. The system shall be administered by the state board of education." *Id.* The Legislative Council Service warned the Constitutional Convention that "[t]his [provision] violates the Enabling Act and conflicts with other provisions of the proposed constitution." New Mexico Legislative Council Service, *A New Constitution for New Mexico? An Analysis of Major Changes and Arguments For and Against* 43 (October 31, 1969). Specifically, the Legislative Council Service was concerned that "[t]his provision requires the state to indirectly aid and support sectarian and denominational schools." *Id.* Notwithstanding the Legislative Council Service's concerns, the Constitutional Convention submitted this constitutional amendment to the voters for ratification, which the voters rejected. *See Proposed New Mexico Constitution* at 45; N.M. Const. art. XII, § 3.

{32} The history of Congressman Blaine's attempt to amend the United States Constitution coupled with the New Mexico Enabling Act demonstrates why Article XII, Section 3 cannot be interpreted under

jurisprudence analyzing the Establishment Clause. Article XII, Section 3 must be interpreted consistent with cases analyzing similar Blaine amendments under state constitutions. For example, in *California Teachers Ass'n v. Riles*, the California Supreme Court addressed a challenge to a California law authorizing the Superintendent of Public Instruction to lend to students attending non-profit, nonpublic schools textbooks used in the public schools without charge. *See generally* 632 P.2d 953 (Cal. 1981). Article IX, Section 8 of the California Constitution provided that "[n]o public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools . . . ." Similar to Article XII, Section 3 of the New Mexico Constitution, this constitutional provision incorporated a Blaine-like amendment for sectarian and denominational schools, but it also extended the restriction to nonpublic schools. Additionally, Article XVI, Section 5 of the California Constitution provided:

> Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever . . . .

{33} In *California Teachers Ass'n*, the California Supreme Court was critical of the "child benefit theory" in light of its state constitutional provision because the "doctrine may be used to justify any type of aid to sectarian schools[;] . . . practically every proper expenditure for school purposes aids the child." 632 P.2d at 957, 960 (internal quotation marks and citation omitted). The California Supreme Court reasoned that "the application of the 'child benefit' theory in this circumstance 'ignores substance for form, reality for rhetoric, *and would lead to total circumvention of the principles of our Constitution*.' " *Id.* at 963 (emphasis added) (citation omitted). The California Supreme Court noted that the broad language of Article IX, Section 8 and Article XVI, Section 5 of the California Constitution "do not confine their prohibition against financing sectarian schools *in whole or in part* to support for their religious teaching function, as distinguished from secular instruction." *California Teachers Ass'n*, 632 P.2d at 964 (emphasis added). As a result, a full majority of the California Supreme Court concluded that the textbook program could not survive state constitutional scrutiny, even if the benefit to the schools was only incidental. *See id.* at 961-62 n.12.

{34} In *Gaffney v. State Department of Education*, the Nebraska Supreme Court addressed the constitutionality of a textbook lending program under Article VII, Section 11 of the Nebraska Constitution:

> Neither the state Legislature nor any county, city or other public corporation, shall *ever* make *any appropriation* from any public fund, or grant any public land *in aid of any sectarian* or denominational *school or college,* or any educational institution which is not *exclusively owned and controlled* by the *state* or a *governmental subdivision* thereof.

220 N.W.2d 550, 553 (Neb. 1974) (quoting Neb. Const. art. VII, § 11 (emphasis in original) (internal quotation marks omitted)). The Nebraska Supreme Court relied on the broad language of Article VII, Section 11 of the Nebraska Constitution to hold that the textbook loan program unconstitutionally furnished aid to private sectarian schools. *Gaffney*, 220 N.W.2d at 557. The Nebraska Supreme Court concluded that the fact that the loan of textbooks was to the parents and students was not determinative because the program "lends strength and support to the school and, although indirectly, lends strength and support to the sponsoring sectarian institution." *Id.*

{35} The Supreme Courts of Oregon, Massachusetts, and Missouri interpreted similar Blaine-like state constitutional provisions and determined that even indirect aid to the sectarian, denominational, or private schools violates the constitutional provision. *See Dickman v. Sch. Dist. No. 62C, Or. City, of Clackamas Cty.*, 366 P.2d 533, 543 (Or. 1961) (en banc) (holding that "the aid is extended to the pupil only as a member of the school" the pupil attends, and although the pupil may share in the indirect benefit, "such aid is an asset to" the sectarian or private school); *see also Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578, 580 (Mass. 1978) (same); *Paster v. Tussey*, 512 S.W.2d 97, 104 (Mo. 1974) (en banc) (same).

{36} South Dakota and Hawaii have reached similar conclusions under their state constitutions. This is important because like New Mexico, these states were required to adopt Blaine-like amendments into their respective state constitutions for their admission into the Union. For example, in *In re Certification of a Question of Law from the United States District Court, District of South Dakota, Southern Division*, the South Dakota Supreme Court addressed a textbook lending program in which the defendants raised arguments similar to those raised by Respondent and Intervenors in this case. *See generally* 372 N.W.2d 113 (S.D. 1985). The South Dakota Supreme Court noted that it was charged "with the responsibility of interpreting provisions of [its] state constitution that are more restrictive than the Establishment Clause of the United States Constitution." *Id.* at 116, 118 ("[T]hose provisions of our constitution . . . are not mere reiterations of the Establishment Clause of the United States Constitution but are more restrictive as prohibiting aid in every form." (internal quotation marks and citation omitted)). In ultimately holding that the textbook loan program was unconstitutional, the South Dakota Supreme Court specifically rejected the defendants' analogy between the textbook lending program "and the lending of books by the public libraries in the state," because any benefit to sectarian or private schools violated its state constitutional provision. *Id.* at 117.

{37} In addition, Hawaii, which was the last state admitted into the Union, has a constitutional provision similar to New Mexico's. Article X, Section 1 of the Hawaii Constitution provides: "[N]or shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution . . . ." Like the New Mexico Constitution, the Hawaii Constitution is more restrictive than the federal Establishment Clause. In *Spears v. Honda*, the Hawaii Supreme Court addressed the constitutionality of a statute requiring state-subsidized bus transportation for all school children, including sectarian and private school students. 449 P.2d 130, 132, 135, 135 n.5 (Haw. 1968). The Court attributed great significance to the history of what was then Article IX, Section 1 of the Hawaii Constitution, now codified as Hawaii Constitution Article X, Section 1. *Spears*, 449 P.2d at 134-36. The Court's review of the constitutional history

of Article IX, Section 1 revealed that the prohibition on using public funds to benefit private schools in Hawaii was intended to narrow the gap between the quality of education provided by private schools and public schools. *Spears*, 449 P.2d at 132-33, 135 n.5.

{38} The *Spears* Court concluded that it was important to understand that, unlike the Establishment Clause of the United States Constitution, what was then Article IX, Section 1 of the Hawaii Constitution was not exclusively about religion. 449 P.2d at 137-38. The Court found that

> [(1)] the bus subsidy buil[t] up, strengthen[ed] and ma[d]e successful the nonpublic schools[; (2)] the subsidy induce[d] attendance at nonpublic schools, where the school children are exposed to a curriculum that, in many cases, if not generally, promotes the special interests and biases of the nonpublic group that controls the school[; and (3)] to the extent that the State [paid] out funds to carriers owned by the nonpublic schools or agents thereof, the State [gave] tangible support or benefit to such schools.

Id. (internal quotation marks omitted). The *Spears* Court ultimately held that the bus subsidy violated Article IX, Section 1, because it constituted an appropriation of public funds to non-public schools. *Id.* at 139. It is worth noting that the *Spears* Court suggested that the Legislature "return to the people to ask them to decide whether their State Constitution should be amended to grant the Legislature the power that it seeks, in this case, the power to provide 'support or benefit' to nonpublic schools." *Id.*

{39} Article XII, Section 3 of the New Mexico Constitution prohibits the use of any part of the proceeds from the sale or disposal of any land granted to the state by Congress or any other funds appropriated, levied, or collected for educational purposes for sectarian, denominational schools. The framers of our Constitution chose to further restrict the use of public funds by prohibiting their use for the support of private schools. As a result, a public school under the control of the State can directly receive funds, while a private school not under the exclusive control of the State can not receive either direct or indirect support.

{40} It is clear that private schools in New Mexico have control of what instructional materials will be purchased with their allocation of instructional material funds. The fact that students who attend private schools, just like students who attend public schools, are only loaned these instructional materials is not material to the analysis. Private schools benefit because they do not have to buy instructional materials with money they obtain by tuition or donations and they can divert such money to other uses in their schools. Consistent with the rules of statutory construction and the majority of jurisdictions interpreting similar state constitutional provisions, the IML violates Article XII, Section 3 because it provides support to private schools.

IV. Conclusion

{41} We reverse the Court of Appeals and the district court and determine that the IML violates New Mexico Constitution Article XII, Section 3.

{42} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:
BARBARA J. VIGIL, Chief Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice, Retired, Sitting by designation
CHARLES W. DANIELS, Justice

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-001

No. S-1-SC-34549 (filed November 19, 2015)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
JEREMY NICHOLS,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
CARL J. BUTKUS, District Judge

JORGE A. ALVARADO
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Opinion

Richard C. Bosson, Justice

{1} A jury convicted Jeremy Nichols of child abuse resulting in death or great bodily harm, finding him guilty on a theory of negligently permitting medical neglect of his six-month-old son Kaden Nichols that allegedly resulted in the child's death. Finding the conviction unsupported by substantial evidence in the record, we reverse the conviction and dismiss the charge.

BACKROUND

{2} Alycia Nichols,[1] Jeremy Nichols' wife, gave birth to Kaden and his twin brother Bryce in September 2005. The twins were delivered by Caesarean section after the doctor made several unsuccessful attempts to get Kaden into a position where he could be delivered naturally. Kaden was stuck in the birth canal for a period of time, resulting in bruising over the majority of his body. Alycia described Kaden as "black and blue from head to toe."

{3} Because the babies were six weeks premature at delivery they remained hospitalized in the neonatal intensive care unit (NICU) at Presbyterian Hospital in Albuquerque for several weeks. They both had a gastroesophageal reflux disorder, a condition that allows food and acid to come from the stomach into the esophagus and mouth and causes irritation. They also had episodes of bradycardia, a condition that causes the heart rate to drop and requires "stimulation or oxygen to get it back up again."

{4} Kaden was discharged on October 24, 2005, after spending about six weeks in NICU. Bryce was sent home two weeks later. Following release from Presbyterian, the babies continued on medications to help with the reflux and slept with apnea monitors that measured breathing and chest wall movement.

{5} A few months after bringing the babies home, the parents started noticing little bruises, identified as petechiae, on both babies' arms and legs. At first, the parents thought the bruising was caused by swaddling the babies too tightly or by the way they burped the babies or by the way they held the babies in the air while playing. The bruising continued, however, and seemed to be worse on Kaden than on Bryce. Kaden also had experienced nosebleeds and bleeding around his gums.

{6} At the babies' four-month well-child appointment on January 24, 2006, Alycia told Dr. Eric Keller, the babies' pediatrician, that Kaden had a bloody nose almost every day and some bleeding gums. Dr. Keller decided not to administer vaccinations to either baby because he was concerned about the unresolved bleeding problems.

{7} Dr. Keller referred Kaden to Tricore Lab and ordered several blood tests. The blood test results were abnormal, so Dr. Keller advised the parents to take Kaden to a hematologist at University of New Mexico Hospital (UNMH). Shortly after the referral was made for Kaden, Alycia's mother called Dr. Keller's office and asked that the doctor also refer Bryce, stating, "Bryce['s] bruising [is] worse than Kaden['s]." Both babies were seen by the hematologist.

{8} Following the appointment with the hematologist, UNMH left Alycia a message stating that the blood test results were normal for both babies. Alycia then rescheduled the babies' four-month vaccinations with a nurse at Dr. Keller's office. Shortly before that appointment, however, the parents noticed bruising on Bryce's abdomen.

{9} On the morning of March 15, 2006—two days before Jeremy was criminally accused of medical neglect—Alycia and Jeremy took the babies to Dr. Keller's office for the vaccination appointment and showed Bryce's abdominal bruise to the nurse. The nurse called Dr. Keller. Dr. Keller asked the parents whether they had the results from the hematologist appointment and then called UNMH himself to get a clear answer. Dr. Keller decided not to administer the shots at that time and scheduled another exam for the following week.

{10} That night, Alycia and Jeremy went out to dinner with relatives. Jeremy's sister, Jennifer, babysat Kaden and Bryce at the Nichols' apartment. Alycia asked Jennifer to keep the babies awake until Alycia and the others returned from dinner because she wanted the relatives to meet the twins. She also asked Jennifer to feed the babies and put them in clean outfits.

{11} After dinner, everyone returned to the Nichols' apartment to see the babies. Both babies were recovering from colds, and Jennifer informed the parents that the babies had been a little fussy. Alycia noticed "[Kaden] was acting very different than he normally acts." Alycia took the babies' temperatures, which were normal, and checked on the babies during the night. She was "worried about [Kaden] because of how he was acting, and woke up like every forty five minutes just from

[1]Alycia Nichols and Jeremy Nichols are divorced. During the course of these proceedings Alycia remarried and changed her name. However, she was Alycia Nichols at the time the events in this case took place.

worrying, touching him and touching his tummy to make sure he was still breathing."

{12} On the morning of March 16—the day of Kaden's death—Alycia woke the babies up at about 6:45 a.m., fed them bottles, and bathed them. She put the babies in their room and left around 9:00 a.m. to run errands. She testified that the babies appeared to be acting normally. "As far as I can recall, [Kaden] was himself. I don't remember him being sick or pale or anything like that. I remember him just being himself."

{13} While Alycia was gone, Jeremy tried to feed the babies cereal. Bryce ate, but Kaden would not eat and was blowing the food out of his mouth. Jeremy said it appeared that Kaden was hungry but just could not swallow the food. When Alycia came home, Bryce was napping and Jeremy was holding Kaden, who was fussy. Alycia took a shower and got dressed, and then at about noon she and Jeremy awoke the babies to feed them. According to Alycia, the babies appeared normal, "[p]erfect" in fact. Alycia then left for a 12:45 hair appointment at a nearby mall.

{14} Jeremy, in an attempt to calm Kaden, put on a movie and sat with him on the couch. According to Jeremy, Kaden would go "in and out" between being content and being fussy. Jeremy tried to feed Kaden a bottle because he thought Kaden was hungry, but Kaden only took about two cubic centimeters, which was much less than he normally took.

{15} When Alycia finished her hair appointment, she called Jeremy to see if she should go to the store. She could hear crying in the background, a cry she described as an "I want to be held" cry, not an inconsolable cry. Jeremy told Alycia that the boys were acting fussy and asked her to come straight home.

Emergency Treatment: Kaden

{16} Alycia arrived home approximately fifteen minutes later, around 3:15 p.m. When she walked in, Jeremy was rocking Kaden on the couch, and Bryce was in his crib. Alycia noticed that Kaden's legs seemed "ashy" and thought his diaper was too tight or that Jeremy was holding him too tightly. Kaden also appeared to be lethargic. Alycia took Kaden's temperature and it was 95. Jeremy wrapped Kaden in a blanket and gave him "baby Tylenol." Five or ten minutes later, Jeremy and Alycia retook Kaden's temperature and it was 95.7.

{17} Thinking Kaden was "just sick" and not in a "life threatening" situation, Alycia called her aunt for advice on how to treat him. Her aunt was a pediatric nurse who provided healthcare advice by phone. Alycia was on the phone with her aunt for about fifteen minutes. While Alycia was on the phone with her aunt, Jeremy noticed Kaden's breathing become increasingly lighter and Alycia noticed his legs getting more discolored. Alycia's aunt advised Alycia to call 911.

{18} At 3:39 p.m., Alycia called 911. Jeremy began infant CPR on Kaden. While Alycia was on the phone with the 911 operator, Jeremy told her that Kaden had stopped breathing.

{19} The paramedics arrived eight minutes later at 3:47 p.m. and went to the back bedroom where Jeremy was giving Kaden CPR. Kaden was unconscious, was not breathing on his own, and had no pulse. The paramedics initiated CPR, attempted to ventilate Kaden with a bag-valve mask, and inserted an intraosseous line to administer medications to the bloodstream.

{20} Having no success with resuscitation, the paramedics transported Kaden by ambulance to the Lovelace West Mesa Medical Center (Lovelace). Kaden arrived at Lovelace at 4:28 p.m. Dr. Sanjay Kholdwadwala, the emergency room doctor who took over Kaden's care, continued CPR and administrated medications but Kaden never regained consciousness. Kaden was pronounced dead at 4:47 p.m. An autopsy of Kaden revealed pooled blood in his abdomen and a large laceration to his liver. His cause of death was determined to be loss of blood associated with blunt abdominal trauma and the lacerated liver.

Emergency Treatment: Bryce

{21} Bryce was also transported to Lovelace on March 16. The paramedic attending to Bryce told Alycia that Bryce's "vitals were fine" and his temperature and heart rate were likely elevated because of the commotion, but Alycia insisted that he was in need of treatment. She told the paramedics that "just minutes ago Kaden looked the same way as Bryce does right now, and Bryce is heading in the same direction and whatever is happening to Kaden is happening to Bryce." The paramedics finally agreed and transported Bryce and Alycia in an ambulance to Lovelace.

{22} Bryce arrived at Lovelace at 4:45 p.m. Dr. Kholdwadwala, after leaving Kaden, checked Bryce's vital signs and ordered a transfer to UNMH for treatment because Lovelace did not have a pediatric intensive care unit. Bryce was admitted to UNMH that day. CT films revealed fluid around his liver indicating a mild liver injury. Bryce was discharged from UNMH on March 21, 2006.

Criminal Charges

{23} On suspicion that the injuries to both babies were a result of child abuse, detectives from the Albuquerque Police Department were dispatched to Lovelace to conduct an investigation. After several interviews with both parents and several of the medical professionals who attended to Kaden and Bryce, the detectives identified Jeremy as the sole suspect. On March 17, 2006, the day after Kaden died, Jeremy was arrested and charged with multiple counts of first-degree felony child abuse contrary to NMSA 1978, Section 30-6-1(D)(1) (2005, amended 2009).

DISCUSSION

{24} Section 30-6-1(D)(1) defines the crime of child abuse: "Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be . . . placed in a situation that may endanger the child's life or health." Abuse of a child that does not result in death or great bodily harm is, for the first offense, a third-degree felony. *See* § 30-6-1(E). However, if the abuse results in great bodily harm to or death of the child, then the offense is a first-degree felony with a mandatory sentence of at least eighteen years' incarceration. *See id.* (providing that child abuse resulting in great bodily harm is a first-degree felony); § 30-6-1(F) (providing that negligent child abuse resulting in the death of a child is a first-degree felony); § 30-6-1(G) (providing that intentional child abuse resulting in the death of a child twelve to eighteen years of age is a first-degree felony); NMSA 1978, § 31-18-15(A)(3) (2005, amended 2007) (providing that the basic sentence for a first-degree felony is eighteen years imprisonment); *see also* § 30-6-1(H) (providing that child abuse resulting in the death of a child less than twelve years of age is a first-degree felony); § 31-18-15(A)(1) (providing that the basic sentence for a first-degree felony resulting in the death of a child is life imprisonment).

{25} At trial, the State alleged more than one theory for how Jeremy had placed Kaden in a situation that endangered his life and caused his death and a theory of how Jeremy had placed Bryce in a situation that endangered him and caused him great bodily harm. The State's theories were, in summary:

(1) that Jeremy either intentionally or negligently caused or permitted the fatal abdominal and liver injuries that resulted in Kaden's death; the jury found Jeremy *not guilty* of all such charges;

(2) that Jeremy either intentionally or negligently *caused* endangerment to Kaden by medical neglect, failing to provide or obtain medical care necessary for Kaden's well-being, resulting in his death or great bodily harm; the jury also found Jeremy *not guilty* of all such charges;

(3) that Jeremy negligently *permitted* endangerment to Kaden by the same medical neglect resulting in death or great bodily harm, for which the jury found Jeremy *guilty* of a single charge;

(4) that Jeremy permitted endangerment to Kaden by medical neglect *not* resulting in death or great bodily harm; the jury found Jeremy *not guilty* of this charge; and

(5) that Jeremy either intentionally or negligently caused or permitted endangerment to Kaden's brother, Bryce, that resulted in great bodily harm; the jury found Jeremy *not guilty* of all such charges.

{26} To recapitulate, after a fourteen-day trial the State was unsuccessful in proving beyond a reasonable doubt that Jeremy caused or permitted Kaden's fatal injuries or that Jeremy caused endangerment by medical neglect. Out of multiple charges and alternative charges, the jury found Jeremy guilty of a single count: negligently permitting endangerment by medical neglect resulting in Kaden's death. Jeremy's conviction for permitting medical neglect of Kaden was based on a theory not of inflicting the fatal injuries but on one of not providing or obtaining necessary medical care to save Kaden's life. The district court sentenced Jeremy to the basic term of eighteen years' imprisonment.

{27} Jeremy appealed his conviction on several grounds including, relevant to this opinion, that the jury verdict was not supported by substantial evidence. After reviewing the evidence, our Court of Appeals affirmed Jeremy's conviction. *State v. Nichols*, 2014-NMCA-040, ¶¶ 1, 2, 321 P.3d 937. We granted certiorari. 2014-NMCERT-003.

{28} The theory on which the State presented its one successful count—negligently permitting medical neglect—gives rise to at least one legal issue in the context of this case where the jury also found Jeremy not guilty of causing medical neglect. We address that legal issue—and the hopeless confusion left by conflicting jury verdicts—in the hope of providing clarity for the benefit of future prosecutions. We then proceed to the main question: whether Defendant's single conviction finds evidentiary support in the record.

In the context of medical neglect, *causing* and *permitting* define identical criminal acts, giving rise to conflicting verdicts in this case

{29} As previously set forth, the State presented separate charges for causing endangerment by medical neglect and permitting endangerment by medical neglect. First, the State charged that Jeremy "caused" Kaden's medical neglect (either intentionally or negligently) by failing to obtain necessary medical care, which resulted in Kaden's death. The jury returned not guilty verdicts on these charges, thereby establishing a jury finding that Jeremy did not cause medical neglect.

{30} The State also submitted a charge that Jeremy negligently "permitted" medical neglect of Kaden. The district court gave the following instruction:

> For you to find Jeremy Nichols guilty of child abuse resulting in death or great bodily harm, . . . the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. Jeremy Nichols permitted Kaden Nichols to be placed in a situation which endangered the life or health of Kaden Nichols, to wit: medical neglect;
>
> 2. The defendant acted with reckless disregard and without justification. To find that Jeremy Nichols acted with reckless disregard, you must find that Jeremy Nichols knew or should have known the defendant's actions or failure to act created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the failure to act or conduct and to the welfare and safety of Kaden Nichols;
>
> 3. Jeremy Nichols was a parent, guardian or custodian of the child, or the defendant had accepted responsibility for the child's welfare;
>
> 4. Jeremy Nichols's actions or failure to act resulted in the death of or great bodily harm to Kaden Nichols;
>
> 5. Kaden Nichols was under the age of 18;
>
> 6. This happened in New Mexico on or between the 15th day of March, 2006 and the 16th day of March, 2006.

{31} The jury, after finding Jeremy not guilty of causing medical neglect, found him guilty of negligently permitting medical neglect, meaning that the jury must have drawn a distinction between *causing* and *permitting* medical neglect. Jeremy, in a post-trial motion, argued that there was no meaningful distinction between causing and permitting medical neglect in the context of this case, thus properly preserving the issue for appellate review. *See State v. Lopez*, 2007-NMSC-037, ¶ 15, 142 N.M. 138, 164 P.3d 19 ("In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon.").

{32} Our courts have repeatedly stated that "causing" and "permitting" child abuse are distinct theories, one premised upon active abuse (causing), the other upon "the passive act of allowing the abuse to occur" (permitting). *See State v. Cabezuela*, 2011-NMSC-041, ¶ 26, 150 N.M. 654, 265 P.3d 705 (quoting *State v. Leal*, 1986-NMCA-075, ¶¶ 13, 19, 104 N.M. 506, 723 P.2d 977 (internal quotation marks omitted)). Our Court of Appeals in *Leal* held that ordinarily these theories must be charged in the alternative, unless "it is not clear who actually inflicted the abuse, but the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur." 1986-NMCA-075, ¶¶ 13-14. The exception recognized in *Leal* typically would arise when the evidence shows that a child was abused in the presence of two or more caregivers, one who actually inflicted the abuse while the other stood by, passively permitting the abuse to take place. *See id.* ("Thus, properly charged and proven, the statute covers the situation where it is not clear which individual actually inflicted the injury."). Absent such evidence the general rule would apply, that *causing* and *permitting* child abuse are distinct theories that must be charged in the alternative when supported by the evidence.

{33} Implicit in *Leal*'s reasoning is that *causing* child abuse is synonymous with inflicting the abuse, and *permitting* child

abuse refers to the passive act of failing to prevent someone else—a third person—from inflicting the abuse.[2] Put another way, causing and permitting abuse correlate with primary and secondary responsibility for the victim's injury. By including both theories in the statute, the Legislature ensured that both active and passive abusers would be held equally responsible.

{34} Causing and permitting abuse seem to lose their distinction, however, when the charge is based on a theory of endangerment by medical neglect. In that context, there is no distinct active and passive, or primary and secondary, conduct. Medical neglect, by definition, can only be charged when someone fails to seek or provide necessary medical care, a theory that implies passive involvement. *See Black's Law Dictionary* 1196 (10th ed. 2014) (defining "medical neglect" as "[f]ailure to provide medical, dental, or psychiatric care that is necessary to prevent or to treat serious physical or emotional injury or illness"); *see also* § 30-6-1(A)(2) ("'[N]eglect'" [for purposes of the child abandonment or abuse statute] means that a child is without proper parental care and control of subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parents, guardian or custodian or their neglect or refusal, when able to do so, to provide them.").

{35} Logically, however, permitting endangerment by medical neglect makes no sense. A person, acting alone, does not permit himself or herself to fail to seek medical care. And in the case of two or more people present when the medical neglect occurs, each person independently either fails to act and is culpable for endangerment by medical neglect, or does not fail to act in which case there is no neglect. In both situations, each person who fails to act is primarily responsible and therefore must have caused the abuse.

{36} Thus, while causing and permitting child abuse are in most cases distinct theories that can be charged in the alternative, in the specific context of endangerment by medical neglect, charging a defendant with permitting abuse is likely to cause confusion. In this case, the State alleged that Jeremy both caused and permitted endangerment by medical neglect, without providing any explanation of the difference between the two theories. The State cannot offer a confusing array of evidence, submit several vague jury instructions on various potential theories, and leave to the jury the responsibility of putting it all together to find a basis for a conviction. *Cf., e.g.*, *State v. Cabezuela*, 2015-NMSC-016, ¶ 37, 350 P.3d 1145 ("Part of the fundamental-error analysis is 'whether a reasonable juror would have been confused or misdirected by the jury instruction.'" (quoting *State v. Sandoval*, 2011-NMSC-022, ¶ 13, 150 N.M. 224, 258 P.3d 1016)). As a result, the verdicts rendered by the jury—not guilty of causing medical neglect and guilty of permitting medical neglect—hopelessly conflict under our legal analysis and preclude any determination of which culpable act was the actual basis for the jury's conviction of Jeremy.

{37} However, we need not base our ultimate decision on the foregoing legal analysis. Our review of the record demonstrates that the State did not prove, and indeed presented *no evidence* to prove, an essential element in the crime—that Jeremy's alleged endangerment by medical neglect actually caused Kaden's death. The State also failed to prove that Jeremy acted "with reckless disregard." For those reasons, his conviction must be reversed and the charges vacated.

The evidence presented does not establish that medical neglect caused Kaden's death

{38} For this Court to uphold a conviction of first-degree child abuse on a theory of endangerment by medical neglect, the statute requires proof of causation. In this case, as the jury was instructed, the State had to prove that Jeremy's "actions or failure to act resulted in the death of or great bodily harm to Kaden Nichols." Under the statute, "[i]f the abuse results in great bodily harm to [or death of] the child, the [accused] is guilty of a first-degree felony." Section 30-6-1(E)-(F). On the other hand, child abuse by endangerment "that does not result in the child's death or great bodily harm is, for a first offense, . . . a third degree felony," § 30-6-1(E), for which the jury found Jeremy not guilty.

{39} Causation must be proved by substantial evidence. As we recently stated in *State v. Consaul*, issued by this Court after the trial in the case at bar, "[w]ithout any proof of causation, the charge of criminal negligence (or now criminal recklessness) [resulting in death or great bodily harm] completely fails for lack of substantial evidence . . . ." 2014-NMSC-030, ¶ 49, 332 P.3d 850. To illustrate, under the State's overarching, yet unsuccessful, theory of culpability—that Jeremy inflicted the liver injury—proving causation would not have been a problem. The medical evidence clearly established a connection between the liver injury and Kaden's death. But the jury found Jeremy not guilty of inflicting the liver injury.[3]

{40} Under a theory of medical neglect that results in death or great bodily harm, the State must prove more than just the neglect itself. In this case, the State was required to put forth substantial evidence that Jeremy's neglect "resulted in" Kaden's death or great bodily harm, meaning that medical neglect was at least a significant cause of his death or great bodily injury. *See Consaul*, 2014-NMSC-030, ¶¶ 48-49; *see also* UJI 14-251 NMRA (requiring the jury to find in a homicide case that "[t]he act of the defendant was a significant cause of the death of [the victim]"). In other words, the State needed medical evidence that if Jeremy had obtained medical care

[2]The latter notion that permitting child abuse requires evidence of an active abuser is reflected in our caselaw. *Accord, e.g.*, *State v. Lopez*, 2007-NMSC-037, ¶¶ 8, 35 (affirming the defendant-mother's convictions of negligently permitting child abuse when the father admitted that he had dropped the infant-victim after throwing her into the air and hitting her against the ceiling); *State v. Vasquez*, 2010-NMCA-041, ¶¶ 1-2, 148 N.M. 202, 232 P.3d 438 (affirming the defendant-mother's conviction for negligently permitting child abuse at the hands of the victim's father); *but cf.*, *State v. Trossman*, 2009-NMSC-034, ¶ 24, 146 N.M. 462, 212 P.3d 350 (reversing defendant's conviction for negligently permitting child abuse where there was no evidence of active abuse (exposure to chemicals used to manufacture methamphetamine) by another).

[3]We note that even with respect to its charge that Jeremy inflicted the fatal injuries, the State also relied on a theory of child abuse by endangerment under Section 30-6-1(D)(1): that Jeremy "caused Kaden Nichols to be placed in a situation that endangered the life or health of Kaden Nichols." We do not reach the propriety of that theory under the evidence presented in this case, but we note that Section 30-6-1(D)(2) would be a better fit. *See id.* ("Abuse of a child consists of a person knowingly, intentionally or negligently . . . causing or permitting a child to be . . . tortured, cruelly confined or cruelly punished . . . .").

earlier, Kaden would have lived or at least would have had a significantly greater chance of living—evidence that the alleged neglect actually contributed to the tragic result. But the State never offered any such evidence.

{41} Kaden's autopsy revealed that the cause of death was loss of blood associated with blunt abdominal trauma and a lacerated liver. Dr. Jeff Nine, the forensic pathologist who supervised Kaden's autopsy, testified that "there was a large laceration . . . mean[ing] that something, a blunt object of some sort, had struck the decedent or the decedent had struck a blunt object that caused pressure on the abdomen so severely that it broke the liver essentially in half from the back to the front."

{42} Dr. Nine testified that it is possible to survive a severe liver injury with the right kind of treatment, but stated he "[did not] think someone could have survived this injury without pretty extensive medical intervention because that's a laceration that goes all the way through the liver." Dr. Shawn Ralston, the pediatric hospitalist who treated Bryce, testified that a liver can repair itself without surgery but that such injuries often require a blood transfusion to replace the blood that is lost.

{43} This is evidence that liver injuries may be treatable, but sheds no light on when that intervention would have been necessary to save Kaden or give him an appreciably better chance of survival. Had Dr. Nine or Dr. Ralston been asked to testify that two hours, one hour or even twenty minutes would have made a material difference in Kaden's chance of survival, then the jury would have had some factual basis for its decision to convict Jeremy of a crime *resulting* in death. But there was no such testimony, and we wonder whether any medical expert could have provided such testimony.

{44} Without such testimony, the jury was left to speculate that if Jeremy had called 911 sooner, then perhaps the doctors would have had time to diagnose Kaden's condition and treat him successfully, such as with a blood transfusion, to prevent him from bleeding to death. Indeed, the prosecutor *invited* the jury to speculate. During closing argument, all the prosecutor could say about medical neglect was:

> And maybe, as you heard from the testimony, maybe had Kaden gotten medical attention after [his liver] injury was inflicted on him, maybe he would have survived as Bryce did. Bryce's injuries, of course, were not as severe as Kaden's, but perhaps Kaden would have been able to celebrate his first birthday.

{45} Clearly, a suggestion that "maybe" or "perhaps" something would or would not have happened, even if based on evidence, is not probative of anything. It is certainly not probative beyond a reasonable doubt that something would have happened—in this case the statutory element included in the jury instruction that "Jeremy Nichols' actions or failure to act resulted in the death of or great bodily harm to Kaden." Without some evidence to establish that causal connection, we are left with no more than medical neglect in a vacuum, which can constitute criminal endangerment, but not a first-degree felony.[4] *See* § 30-6-1(E) ("A person who commits abuse of a child that does not result in the child's death or great bodily harm is, for a first offense, guilty of a third degree felony . . . .").

{46} Our review of the trial transcript brings one possible reason for the lack of causation evidence to light. This trial was really never about medical neglect; it was about the State's theory that Jeremy battered Kaden. The State pointed repeatedly to evidence of bruising and similar injuries on both children over time, and the State blamed Jeremy. The State's theory of the fatal liver injury was that Jeremy, acting alone, caused it during the last three hours of Kaden's life before Alycia's last-minute return, when both children were alone with Jeremy. The State argued,

> The Defendant, for whatever reason, and there doesn't have to be a reason, took the life of Kaden Nichols on March 16th of '06. Whether he was being fussy because he wasn't eating because he couldn't use a spoon yet, because he was just tired, Defendant was tired of watching after the kids. He took care of those kids for about six hours. Alycia was home for a short portion of that time, checked on the kids, they were fine. The evidence that you have in front of you is that those kids were fine at 12:30 before Alycia left. Alycia didn't kill Kaden, the Defendant killed Kaden and the Defendant caused those injuries to Bryce that day on March 16th of 2006.

{47} Only then, almost as an afterthought to her closing, did the prosecutor speculate that "maybe" Kaden would have survived if he had gotten medical attention "after that injury was inflicted on him." Those few lines in the State's closing argument are the *only* mention of medical neglect in the State's entire closing. The rest was all about battery—inflicting the liver injury. And, of course, the jury returned a not-guilty verdict on that battery charge. Because the State lost the jury on its principal theory and failed to offer substantial evidence to prove its fall-back position, the State cannot be heard to complain. Jeremy's conviction must be reversed and the charges against him vacated for lack of substantial evidence.

The State did not present substantial evidence to establish beyond a reasonable doubt that Jeremy acted with reckless disregard

{48} In addition to proving causation, the State had to offer substantial evidence that Jeremy's conduct, in failing to provide medical care early enough, amounted to reckless disregard for the welfare and safety of Kaden. As stated above, the jury was instructed that "[t]o find that Jeremy Nichols acted with reckless disregard, you must find that Jeremy Nichols knew or should have known [his] . . . failure to act created a substantial and foreseeable risk, [he] disregarded that risk and . . . was wholly indifferent to the consequences of his failure to act."

{49} If the jury had found that Jeremy inflicted the blows that lacerated Kaden's liver, or that he was on notice that someone else had inflicted those blows, then Jeremy would have been on notice of the need for medical care. He would have observed the resulting symptoms in Kaden and, more importantly, he would have been on notice that those symptoms were serious and required immediate medical attention. Had Jeremy failed to act under those circumstances, the jury could easily

[4]We note the novelty of the State's theory of medical neglect as a form of child endangerment. While we do not find the theory objectionable on its face, this case demonstrates the care that must be taken to ensure that every theory presented to the jury is supported by the evidence. *Cf. State v. Montoya*, 2015-NMSC-010, ¶ 42, 345 P.3d 1056 ("When a defendant is charged with intentional child abuse resulting in the death of a child under twelve, the instruction on the lesser-included offense of reckless child abuse should only be given if the evidence could support such a theory.").

have returned a verdict—supported by substantial evidence—that Jeremy was "wholly indifferent" to Kaden's welfare and "the consequences of his failure to act." But the jury found Jeremy *not guilty* of inflicting those blows. And it is undisputed that during those three hours from noon to 3:00 p.m. on March 16, 2006, before Alycia returned home, Jeremy was alone with the babies; no other adult was present whom Jeremy could have witnessed inflicting those tell-tale blows. Without first-hand knowledge of the source or severity of Kaden's injuries, the State had to offer other evidence to prove that Kaden's symptoms were so clear and obvious that Jeremy was criminally reckless in failing to seek immediate medical attention.

{50} In its briefing to this Court, the State argues that mundane observations like Kaden's fussiness and his decreased appetite should have alerted Jeremy to Kaden's need for medical care. Yet this was a baby with multiple, birth-related problems and concomitant symptoms almost his entire life. Kaden had been taken to regular medical appointments as well as to specialized follow-up appointments. The day before his death, *both* parents took Kaden to a medical appointment at which his symptoms were discussed with medical personnel. That night the babysitter, who was Jeremy's sister, and other family members observed Kaden. The State pointed out in closing argument that on the day of Kaden's death, March 16, 2006, Kaden's condition, both early in the morning and at noon, appeared to Alycia to be unremarkable. Alycia saw no need to call for any medical assistance. If Jeremy was criminally reckless earlier that day or before, then it would appear so too were Alycia and perhaps others.

{51} No one called for emergency assistance until around 3:00 that afternoon, when Kaden's breathing began to falter. On what evidence then, was the jury to have concluded that Jeremy was guilty of "reckless disregard" and being "wholly indifferent to the consequences of his failure to act"? Nothing in this record provides a satisfactory answer to that question. We cannot write an opinion saying that an infant's fussiness and lack of appetite are of such moment that a parent's failure to call 911 might put him in jail for felony child abuse. And, as we have previously explained, any theory that Jeremy was reckless for not calling 911 during the time when he had exclusive control from noon until 3:00 p.m. is inconsistent with the jury finding him not guilty of inflicting the fatal injuries during that same time.

{52} Based on this record, we cannot say with any degree of confidence what evidence would have put Jeremy on notice of Kaden's critical need of medical care, in light of the jury's finding that Jeremy did not inflict the injuries that resulted in Kaden's death. Even the State's legal arguments fail to offer any guidance. We are left utterly confused by the jury's verdict.

{53} Substantial evidence might have supported a verdict that Jeremy inflicted the fatal blow to Kaden's liver, but the jury was not so persuaded. Instead, the jury found that Jeremy was "wholly indifferent" and "reckless" for not seeking medical care, a verdict altogether unsupported by substantial evidence in the record. We cannot sustain any verdict on that basis.

CONCLUSION

{54} We reverse Jeremy Nichols' child abuse conviction under Section 30-6-1 and order that the charge be dismissed with prejudice.

{55} IT IS SO ORDERED.

RICHARD C. BOSSON, Justice, Retired, Sitting by Designation

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

Certiorari Denied, November 5, 2015, No. 35,550

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-118

No. 33,921 (filed October 5, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
FERLIN BEN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY
GRANT L. FOUTZ, District Judge

HECTOR H. BALDERAS
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KENNETH H. STALTER
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Albuquerque, New Mexico
for Appellee

JORGE A. ALVARADO
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for Appellant

Opinion

Linda M. Vanzi, Judge

{1} At issue in this appeal is a unique application of the constitutional bar against retrial after acquittal. Defendant Ferlin Ben was charged and convicted in a nonjury trial in magistrate court for driving while intoxicated (DWI), contrary to NMSA 1978, Section 66-8-102 (2010). Defendant's conviction was expressly based on the "per se" provision of Subsection (C)(1), which is one of two statutory alternative means of committing the single offense of DWI. *See State v. Lewis*, 2008-NMCA-070, ¶ 27, 144 N.M. 156, 184 P.3d 1050.

{2} After a de novo appeal to the district court, Defendant was subsequently acquitted of the per se violation and convicted of the alternative provision in Subsection (A), which requires a finding of impairment to the slightest degree. Defendant now contends that double jeopardy and jurisdictional principles prevented the State from arguing impaired DWI to the jury after the magistrate court failed to convict him on that theory in the first trial. Unpersuaded, we affirm.

BACKGROUND

{3} The scant record from the magistrate court sets forth the following facts and allegations, which, for our purposes, are not in dispute. On September 19, 2013, state police stopped Defendant after observing multiple traffic violations. Defendant admitted to drinking "two beers," performed poorly on field sobriety tests, and later registered a breath alcohol concentration (BAC) of .08. The State charged Defendant in the McKinley County Magistrate Court with several traffic offenses, including misdemeanor DWI. That offense is committed when a person drives a vehicle with a BAC of .08 or higher (a per se violation), *see* § 66-8-102(C)(1), or, in the alternative, when a person drives while "under the influence" of intoxicating liquor or drugs (an impaired to the slightest degree violation), *see* § 66-8-102(A).

{4} After a nonjury trial, the court found Defendant guilty of DWI. Although the criminal complaint asserted violations of both subsections of the DWI statute, the court specified in its judgment and sentence that Defendant violated Subsection (C)(1), which is the per se violation. The judgment and sentence did not refer to the impaired DWI provision of Subsection (A).

{5} Defendant sought de novo review in the district court, where, over Defendant's objection, the State alleged both theories of DWI. A jury convicted Defendant of impaired DWI under Subsection (A) but found no violation of per se DWI under Subsection (C)(1). On appeal, Defendant now contends that (1) the magistrate court's silence as to Subsection (A) impliedly acquitted him of impaired DWI, precluding the district court's retrial on that theory according to principles of double jeopardy, and (2) the district court lacked jurisdiction to consider the theory. We review these related contentions de novo. *See Victor v. N.M. Dep't of Health*, 2014-NMCA-012, ¶ 22, 316 P.3d 213; *State v. Andazola*, 2003-NMCA-146, ¶ 14, 134 N.M. 710, 82 P.3d 77.

DISCUSSION

Double Jeopardy

{6} "All appeals from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below, except as otherwise provided by law." NMSA 1978, § 39-3-1 (1955). By its own terms, this statute is necessarily subject to the Constitutions of the United States and New Mexico, which guarantee that no person shall be "twice put in jeopardy" for the same offense.[1] U.S. Const. amend. V; N.M. Const. art. II, § 15; NMSA 1978, § 30-1-10 (1963); *Ludwig v. Massachusetts*, 427 U.S. 618, 631 (1976); *State v. Baca*, 2015-NMSC-021, ¶¶ 2, 21, 46, 352 P.3d 1151 (applying double jeopardy retrial principles to a de novo appeal from magistrate court). In this case, jeopardy attached to the nonjury trial in the magistrate court "when the trial judge first start[ed] hearing evidence." *Baca*, 2015-NMSC-021, ¶ 46.

{7} The Double Jeopardy Clause operates to protect an individual from repeated attempts by the state, "with all its resources and power[,]" to secure a conviction, with the consequent anxiety, embarrassment, and undue expense to a defendant that results from retrial. *Cnty. of Los Alamos v. Tapia*, 1990-NMSC-038, ¶ 16, 109 N.M. 736, 790 P.2d 1017 (internal quotation marks and citation omitted), *overruled on other grounds by City of Santa Fe v. Marquez*, 2012-NMSC-031, ¶ 25, 285 P.3d 637. In common parlance, the state, upon failing to convict a defendant

[1]Neither party has argued that there is any difference in the application of the state and federal constitutional provisions to this case. We therefore "assume the two clauses require the same analysis and result." *State v. O'Kelley*, 1991-NMCA-049, ¶ 5, 113 N.M. 25, 822 P.2d 122.

after a full and fair opportunity to do so "is barred from a second bite of the apple." *State v. Orosco*, 1982-NMCA-181, ¶ 11, 99 N.M. 180, 655 P.2d 1024; *see also Burks v. United States*, 437 U.S. 1, 16 (1978) (noting that the United States Supreme Court necessarily affords "finality to a jury's verdict of acquittal—no matter how erroneous its decision" (emphasis omitted)).

{8} On the other hand, there is no constitutional prohibition against retrial after a conviction is set aside, except where the conviction is vacated for insufficient evidence. *State v. Lizzol*, 2007-NMSC-024, ¶¶ 13-14, 141 N.M. 705, 160 P.3d 886. The distinction between retrial after an acquittal and retrial after a conviction reversed for trial error has historically been justified on various rationales, including the legal fiction of waiver—that a defendant who successfully appeals his conviction for trial error "waives" any objection to a second prosecution, *see Trono v. United States*, 199 U.S. 521, 530-31 (1905), and the doctrine of continuing jeopardy—that jeopardy terminates upon an acquittal but continues through an appeal and into the subsequent retrial. *Justices of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 308 (1984) ("Interests supporting the continuing jeopardy principle involve fairness to society, lack of finality, and limited waiver.").

{9} However justified, these principles unquestionably govern our state's two-tier system of de novo appeals from off-record inferior courts, including, of course, the McKinley County Magistrate Court.

> A defendant who elects to be tried [d]e novo . . . is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these circumstances, it long has been clear that the [s]tate may reprosecute.

Ludwig, 427 U.S. at 631-32; *see also Lydon*, 466 U.S. at 309 ("While technically the defendant is tried again, the second stage proceeding can be regarded as but an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings during which, sooner or later, a defendant receives more—rather than less—of the process normally extended to criminal defendants in this nation." (alteration, internal quotation marks, and citation omitted)). Thus, having been *convicted*—and not acquitted—of DWI in the magistrate court, Defendant was in the same position as any individual who successfully appeals his conviction for trial error. "Under these circumstances, it has long been clear that the [s]tate may reprosecute." *Lydon*, 466 U.S. at 305. To escape this conclusion, Defendant divides the single offense of DWI into its alternative theories, contending that his conviction in the first trial on one theory of DWI (the per se theory) necessarily constitutes an implied acquittal on the alternative theory on which no conviction was entered (the impaired DWI theory).

{10} The genesis of the modern implied acquittal doctrine is *Green v. United States*, 355 U.S. 184 (1957). In *Green*, the United States Supreme Court held that a verdict convicting a defendant of a lesser included offense of second degree murder, but silent as to the greater offense of first degree murder, constituted an implied acquittal of the greater offense, prohibiting retrial. *Id.* at 190-91. In brief, the Court believed the case was no different, for double jeopardy purposes, "than if the jury had returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.' " *Id.* at 191; *see also Price v. Georgia*, 398 U.S. 323, 329 (1970) ("[T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge." (footnote omitted)).

{11} Our cases have neither read *Green* as broadly as Defendant suggests nor applied *Green* outside the context of lesser included offenses. *See State v. Torrez*, 2013-NMSC-034, ¶ 13, 305 P.3d 944 (citing with approval the observation that "courts have refused to imply an acquittal unless a conviction of one crime logically excludes guilt of another crime" (alteration, internal quotation marks, and citation omitted)); *O'Kelley*, 1991-NMCA-049, ¶ 14 ("An implied acquittal generally occurs when the jury is instructed to choose between a greater and a lesser offense, and chooses the lesser."). "Only where the jury is given the full opportunity to return a verdict either on the greater or alternatively on the lesser offense does the doctrine of implied acquittal obtain." *O'Kelley*, 1991-NMCA-049, ¶ 16. In fact, the United States Supreme Court itself has long since disclaimed a broad reading of *Green*. *See United States v. Tateo*, 377 U.S. 463, 465 n.1 (1964) (stating that *Green* "holds only that when one is convicted of a lesser offense included in that charged in the original indictment, he can be retried only for the offense of which he was convicted rather than that with which he was originally charged").

{12} When a defendant is convicted based on one of two alternative means of committing a single crime, which is the situation presented in this case, the near uniform majority of jurisdictions that have considered the issue have refused to imply an acquittal on the other alternative. *See United States v. Ham*, 58 F.3d 78, 84-86 (4th Cir. 1995); *United States v. Wood*, 958 F.2d 963, 971-72 (10th Cir. 1992); *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1047, 1049-50 (2d Cir. 1972); *Beebe v. Nelson*, 37 F. Supp. 2d 1304, 1308 (D. Kan. 1999); *Schiro v. State*, 533 N.E.2d 1201, 1207-08 (Ind. 1989); *State v. Pexa*, 574 N.W.2d 344, 347 (Iowa 1998) ("A failure to consider an alternative definition of the offense charged does not constitute an acquittal of that offense for double jeopardy purposes."); *State v. Wade*, 161 P.3d 704, 715 (Kan. 2007); *Commonwealth v. Carlino*, 865 N.E.2d 767, 774-75 (Mass. 2007); *People v. Jackson*, 231 N.E.2d 722, 728-30 (N.Y. 1967); *State v. Wright*, 203 P.3d 1027, 1035 (Wash. 2009) (en banc); *State v. Kent*, 678 S.E.2d 26, 30-33 (W. Va. 2009); *cf. State v. Terwilliger*, 104 A.3d 638, 651-52 (Conn. 2014) (refusing to imply an acquittal where a general verdict form made it impossible to know which theory supported the defendant's conviction); *Torrez*, 2013-NMSC-034, ¶¶ 10-14 (same). *But see Terry v. Potter*, 111 F.3d 454, 458 (6th Cir. 1997); *State v. Hescock*, 989 P.2d 1251, 1256-57 (Wash. Ct.App. 1999) (applying *Terry*).

{13} In *Wright*, for instance, the Washington Supreme Court recognized that the logic of *Green* does not follow when a defendant is prosecuted for a single offense that can be committed in multiple ways because "jeopardy attaches to the offense as a whole rather than to the particular form in which it is tried, so that if an individual succeeds in getting a conviction set aside, the defendant's 'continuing jeopardy' applies to any alternative way of committing the same offense." *Wright*, 203 P.3d at 1035. Several other courts have taken this approach. *See, e.g.*, *Wood*, 958 F.2d at 972 (holding that, where the jury was instructed on one offense, and the defendant was convicted of that offense, retrial was not barred); *Terwilliger*, 104 A.3d at 667-68 (Roger, C.J., concurring); *Beebe*, 37 F. Supp. 2d at 1307. Their reasoning is persuasive because "[a] defendant charged and tried under multiple statutory alternatives experiences the same jeopardy as one charged and tried on a single theory." *Wright*, 203 P.3d at 1035.

That defendant "is in jeopardy of a single conviction and subject to a single punishment, whether the [s]tate charges a single alternative or several." *Id.*

{14} In another example, the Court of Appeals of New York came to the same result by applying the waiver theory of double jeopardy (discussed briefly above) as opposed to the continuing jeopardy doctrine.

> The defendant's argument stands or falls on his contention that felony murder and premeditated murder are separate offenses and that the jury was given the opportunity to return a verdict on the felony murder offense but failed to do so. If felony murder and premeditated murder constitute one and the same offense—viz., murder in the first degree— [the defendant] was not put in double jeopardy at his second trial when he was tried for felony murder as well as premeditated murder; for if a defendant is convicted of a single offense and takes a successful appeal from his judgment of conviction, he waives his constitutional protection against double jeopardy for that offense[.]

Jackson, 231 N.E.2d at 729. In sum, these cases stand for the sound proposition that a conviction on only one theory of an offense is no less a conviction, and typical double jeopardy retrial principles apply to the offense as a whole.

{15} However, there is a limited exception to this general rule, evident in decisions that read *Green* as simply applying collateral estoppel (issue preclusion) notions in a double jeopardy case. According to this analysis, the defendant's conviction of second degree murder in *Green* "established the existence of a fact (the state of mind required for that offense) that was inconsistent with his being guilty of first[]degree murder, so his subsequent conviction of that offense was barred." *Kennedy v. Washington*, 986 F.2d 1129, 1134 (7th Cir. 1993). "That is all that 'implied acquittal' means." *Id.*

{16} These issue-preclusion cases essentially state the following rule: A conviction based on one of several statutory means of committing a single offense may imply an acquittal only when the conviction necessarily involves a factual finding inconsistent with guilt on the other theory. *See, e.g.*, *Schiro v. Farley*, 510 U.S. 222, 236 (1994) (distinguishing *Green* because "[t]he failure to return a verdict does not have collateral estoppel effect . . . unless the record establishes that the issue was actually and necessarily decided in the defendant's favor"); *Ham*, 58 F.3d at 85 ("A jury's failure to decide an issue will be treated as an implied acquittal only where the jury's verdict necessarily resolves an issue in the defendant's favor."); *Carlino*, 865 N.E.2d at 775 (recognizing that the appellate court "[could not] discern the jury's intention from their silence."); *State v. Gause*, 971 N.E.2d 341, 344-45 (N.Y. 2012) (holding that a conviction for depraved indifference murder necessarily precluded a subsequent finding that the defendant committed intentional murder because those alternative theories are inconsistent counts under New York law).

{17} This approach was taken by the highest court in Massachusetts in an opinion that has been discussed favorably by our own Supreme Court. *See Torrez*, 2013-NMSC-034, ¶¶ 12-14 (discussing *Carlino* for double jeopardy purposes). In *Carlino*, the defendant was tried and convicted on two alternative theories of first degree murder. 865 N.E.2d at 769. However, the defendant was also charged with a third alternative theory (felony murder), but the verdict slip did not indicate whether he was acquitted or convicted on that theory. *Id.* The murder conviction was later reversed, and the defendant was tried again and found guilty under all three theories, including felony murder. *Id.* at 770. He appealed and made the same argument that Defendant makes in this case: that the fact finder's failure to mark one of several alternative theories on a verdict slip is tantamount to an acquittal on that theory, prohibiting retrial. *Id.* at 772-73. The *Carlino* court rejected that argument because "a true acquittal requires a verdict on the facts and merits." *Id.* at 775 (alteration, internal quotation marks, and citation omitted). Nothing in the defendant's convictions for two theories of first degree murder "logically require[d] the conclusion that the jury must have acquitted the defendant of felony-murder." *Id.* at 774.

{18} We can think of no reason that the principles discussed at length in this Opinion do not apply in the present context, involving a de novo appeal from a nonjury trial in magistrate court. *See Ludwig*, 427 U.S. at 631 ("A defendant who elects to be tried [d]e novo . . . is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial."). Defendant has not made any factual argument about what occurred in the off-record proceedings below. He has limited his argument to the doctrine of implied acquittal, while citing to cases that are inapposite to that doctrine.

{19} We hold that there is no implied acquittal when a fact finder convicts an individual for violation of one of multiple alternative means of committing a single offense, unless the conviction necessarily resolves a fact in the defendant's favor. This holding is consistent with the analysis of implied acquittal and collateral estoppel applied in the majority of jurisdictions and discussed with approval by our own Supreme Court in *Torrez*, 2013-NMSC-034, ¶ 13 ("[C]ourts have refused to imply an acquittal unless a conviction of one crime logically excludes guilt of another crime." (internal quotation marks and citation omitted)). It is also supported by society's interest in a decision on the merits in a criminal case and by our state's general understanding "that what constitutes an acquittal . . . is whether the ruling of the judge . . . actually represents a resolution, *correct or not*, of some or all of the factual elements of the offense charged." *Lizzol*, 2007-NMSC-024, ¶ 9 (internal quotation marks and citations omitted). Since Defendant was convicted in magistrate court based on the per se theory of DWI, and since that conviction is not logically inconsistent with a finding of impaired DWI, Defendant's double jeopardy rights were not violated when he was retried de novo on the impaired theory in the district court.

Jurisdiction

{20} Defendant also makes a cursory argument that the district court lacked jurisdiction to consider the impaired DWI theory since the magistrate court never ruled on it. "All appeals from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below, except as otherwise provided by law." Section 39-3-1. In this case, the district court had appellate jurisdiction to "conduct[] a new trial, as if the trial in the lower court had not occurred." *State v. Heinsen*, 2004-NMCA-110, ¶ 11, 136 N.M. 295, 97 P.3d 627 (alteration, internal quotation marks, and citation omitted), *aff'd*, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040. The only potential limitation on its authority to retry Defendant de novo was the Double Jeopardy Clause, and we have already held that double jeopardy was not violated.

CONCLUSION

{21} Defendant's conviction is affirmed.

{22} **IT IS SO ORDERED**

LINDA M. VANZI, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

TIMOTHY L. GARCIA, Judge

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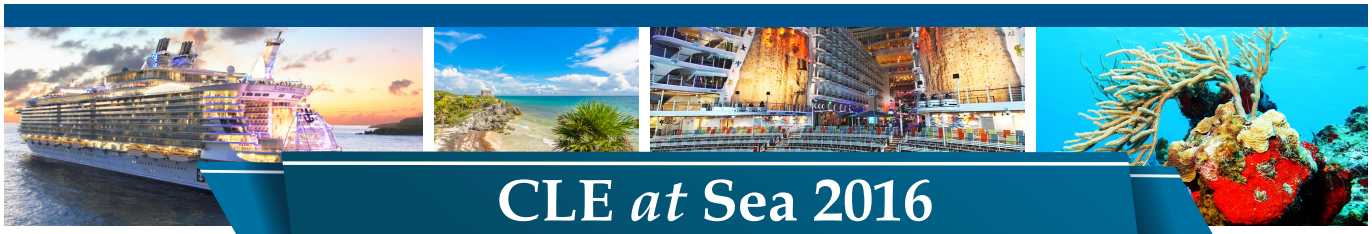

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Riley, Shane & Keller, P.A., an AV-rated defense firm in Albuquerque, seeks an associate attorney for an appellate/research and writing position. We seek a person with appellate experience, an interest in legal writing and strong writing skills. The position will be full-time with flexibility as to schedule and an off-site work option. We offer an excellent benefits package. Salary is negotiable. Please submit a resumes, references and several writing samples to 3880 Osuna Rd., NE, Albuquerque, NM 87109 c/o Office Manager, (fax) 505-883-4362 or mvelasquez@rsk-law.com

Associate Attorney Position

Riley, Shane & Keller, P.A., an Albuquerque AV-rated defense firm, seeks an Associate to help handle our increasing case load. We are seeking a person with one to five years experience. Candidate should have a strong academic background as well as skill and interest in research, writing and discovery support. Competitive salary and benefits. Please fax or e-mail resumes and references to our office at 3880 Osuna Rd., NE, Albuquerque, NM 87109 c/o Office Manager (fax) 505-883-4362 or mvelasquez@rsk-law.com

Lawyer

Busy Uptown law office seeks lawyer with 0-5 years' experience in transactional work. Tax or accounting experience preferred. Strong work ethic, self-starting nature, and excellent research and writing skills required. Applicants should be licensed to practice law in New Mexico. Salary commensurate with experience; attractive benefits package in place. Send cover letter, resume and writing sample to glw@sutinfirm.com. Applications will be held confidential

Associate Attorney

Associate Attorney with at least five years insurance defense experience, wanted for fast paced, well established, litigation defense firm. Please send your resume, a writing sample and references to Anne Garcia, Civerolo, Gralow & Hill, P.A., P.O. Drawer 887, Albuquerque, N.M. 87103 or fax to 505-764-6099.

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Why New Mexico Bank & Trust-We offer friendly, exceptional service and great banking products. Our customers have the unique opportunity to develop relationships with banking professionals who care. We take pride in giving our customers the very best banking experience possible. New Mexico Bank & Trust is a member of Heartland Financial USA, Inc., a $7.7 billion multibank holding company offering uniquely different banking solutions for business and personal clients. Heartland's independent community banks are chartered in the states of Iowa, Illinois, Wisconsin, New Mexico, Arizona, Montana, Colorado, Kansas, California and Minnesota. The Wealth Advisor is the primary relationship manager for High Net Worth individuals, businesses, and non-profit organizations for the financial planning, investment management and trust services provided by Wealth Advisory Services. Please submit your resume on our website at https://www.nmb-t.com/careers.EOE/AA Employer, M/F/Disabled/Vet

Attorney
O'Brien & Padilla, P.C., insurance defense firm, is seeking an attorney with 2-8 years of civil experience. Litigation experience a plus. Competitive salary and benefits offered. Send resume and references to: rpadilla@obrienlawoffice.com

Eleventh Judicial District
Attorney's Office, Div II
The McKinley County District Attorney's Office is currently seeking immediate resumes for one (1) Assistant Trial Attorney. Position is ideal for persons who recently took the bar exam. Persons who are in good standing with another state bar or those with New Mexico criminal law experience in excess of 5 years are welcome to apply. Agency guarantees regular courtroom practice and a supportive and collegial work environment. Salaries are negotiable based on experience. Submit letter of interest and resume to Kerry Comiskey, Chief Deputy District Attorney, or Gertrude Lee, Deputy District Attorney 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter and resume to Kcomiskey@da.state.nm.us or Glee@da.state.nm.us by 5:00 p.m. April 1, 2016.

Associate Attorney – Santa Fe
The Santa Fe office of The Rothstein Law Firm seeks an associate attorney with 3 plus years of litigation experience. Candidates should have a strong academic background and excellent research and writing skills. Please email a resume and writing sample to info@rothsteinlaw.com.

Attorney
Butt Thornton & Baehr, PC seeks an attorney with at least 4 years' experience in civil litigation. Our growing firm is in its 57th year of practice. We seek an attorney who will continue our tradition of excellence, hard work, and commitment to the enjoyment of the profession. Please send letter of interest and resume to jhjohansen@btblaw.com

Executive Director
SEARCH REOPENED - Extraordinary opportunity to lead a highly effective, financially sound advocacy organization. The New Mexico Center on Law and Poverty seeks a highly competent leader to join the organization as Executive Director. Job duties include leading the organization, fundraising, managing finances and operations, liaising with the board and taking an active role in advocacy. Ideal candidate is an outstanding leader, having been successful in leading advocacy campaigns, non-profit management, fundraising, working with public officials and media, and having a background in poverty or civil rights advocacy. History in NM and strong Spanish language skills preferred. Reasonable non-profit salary. Good benefits. EEOE. To apply, send letter of interest and resume to veronica@nmpovertylaw.org.

Case Manager
US Bankruptcy Court seeks a Case Manager responsible for managing the progression of cases from opening to final disposition. Applicants with legal or court experience preferred; bankruptcy experience desirable. Go to the employment information link at www.nmb.uscourts.gov/employment to find the complete job posting and application requirements. Initial review of resumes starts April 11, 2016 but position will remain open until filled. Incomplete applications will not be considered.

Legal Assistant
Estate planning firm seeks Legal Assistant for drafting of correspondence and legal documents; filing pleadings with court. Must have 5 years of experience and Bachelor's degree. Proficient in M/S Office apps: Word, Excel, Outlook, and PowerPoint. Must be willing to work evenings or weekends, if needed. Send your resume with cover letter including salary requirements to Wilcox Law Firm, P.C., PO Box 70238, Alb. NM 87197. No phone calls please.

Paralegal
Must have at least 3 years experience with court filing, including efiling; legal research; scheduling; client/court contract; and AP/AR. Small office. Good working atmosphere. Fax resume to (505) 888-7907.

Paralegal
Experienced paralegal needed for busy family law firm in Albuquerque. Family law experience preferred. We are looking for a highly organized professional who can work independently. Exceptional people skills are needed due to substantial client interaction. Must be able to multi-task in a fast paced environment. Excellent work environment, benefits and salary. Please provide resume to ninap@waltherfamilylaw.com.

PARALEGAL
(Job IRC48672)
Los Alamos National Laboratory's office of the General Counsel is seeking an experienced paralegal for its Litigation Management Group. Incumbent will interact professionally with all levels of staff and management at the Lab, DOE/NNSA, and other external organizations, including court personnel and outside counsel. LANL is an AA/EOE and supports a diverse and inclusive workforce. All employment practices are based on qualification and merit, without regards to race, color, national origin, ancestry, religion, age, sex, gender identity, sexual orientation or preference, marital status or spousal affiliation, physical or mental disability, medical conditions, pregnancy, status as a protected veteran, genetic information, or citizenship within the limits imposed by federal laws and regulations. For job requirements and to apply on line refer to job IRC48672: http://www.lanl.gov/careers/career-options/jobs/index.php For specific questions about the status of this job call 505-606-0784. EOE

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Contract Paralegal
Paralegal with 25+ years of experience available for work in all aspects of civil litigation on a freelance basis. Excellent references. civilparanm@gmail.com.

Office Space

Need Office Space?
Plaza500 located in the Albuquerque Plaza Office building at 201 3rd Street NW offers all-inclusive office packages with terms as long or as short as you need the space. Office package includes covered parking, VoIP phone with phone line, high-speed internet, free WiFi, meeting rooms, professional reception service, mail handling, and copy and fax machine. Contact Sandee at 505-999-1726 or sgalietti@allegiancesw.com.

Downtown Law office located at 1st and Gold
Eight private offices, open areas, reception, conference room, kitchen, built-in rolling file storage room and private balconies on the 2nd floor. $4,500/month including utilities and three onsite parking spaces. Call Brent or Cheryl at Maestas & Ward @ 878-0001

3500 Comanche NE
SOPHISTICATED fully furnished office plus separate space for legal assistant. Rent includes utilities, wifi, parking, shared conference room, kitchen, referrals and collaboration with other attorneys. $550 - $900/month depending upon your need. Contact jmarshall@rainesdivorcelaw.com.

Office Space Available Near Downtown Albuquerque
We have office space available near downtown Albuquerque at 1429 Central Avenue. With two separate offices, private bathrooms and lounge space, the approx 510 sq ft modern space is perfect for two people. Office space is available at $18/ft and comes with two parking spots included. For further information contact Cibola Land Corporation at 505-242-2050 and ask for Kathryn.

620 Roma N.W.
620 ROMA N.W., located within two blocks of the three downtown courts. Rent includes utilities (except phones), fax, internet, janitorial service, copy machine, etc. All of this is included in the rent of $550 per month. Up to three offices are available to choose from and you'll also have access to five conference rooms, a large waiting area, access to full library, receptionist to greet clients and take calls. Call 243-3751 for appointment to inspect.

Offices For Rent
Offices for rent, one block from courthouses, all amenities: copier, fax, telephone system, conference room, internet, phone service, receptionist. Call Ramona at 243-7170.

Office Wanted

Santa Fe Office Wanted
Attorney seeks office share/office in Santa Fe. 930-2407.

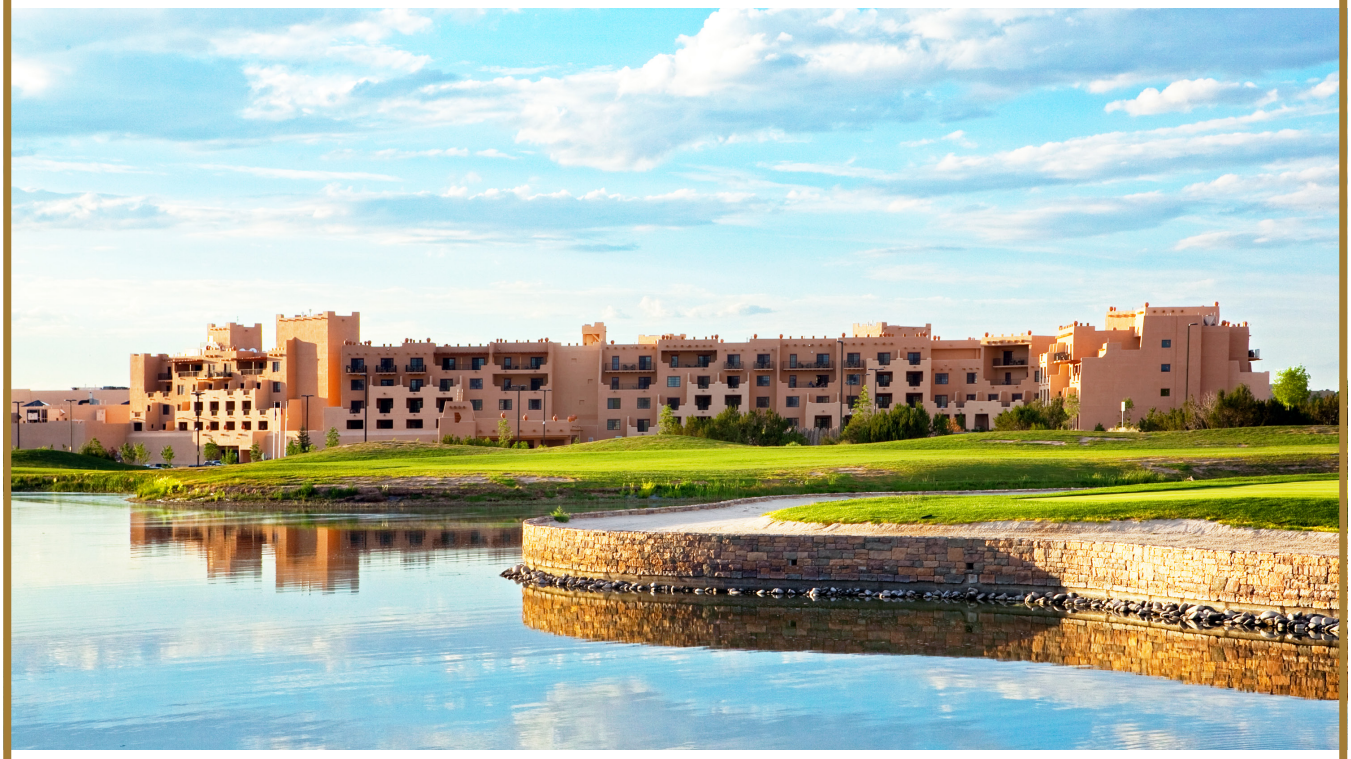
Miscellaneous

Search For Will
William Andrew Hall died February 22, 2016. He resided in Santa Fe, N.M. We are seeking the attorney who may have written his will. Email Barbara at attorneywhetten@gmail.com

For Sale

Law Books For Sale
New Mexico Reports Volumes 1-135 (1852 – 2004) Includes rare leather bound volumes 1-21 (1852 – 1916) All books in good condition and would make a classy and useful addition to any office. $750.00 Inquiries 575-526-5872 tsh1959@hotmail.com

2016 Annual Meeting– Bench & Bar Conference



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