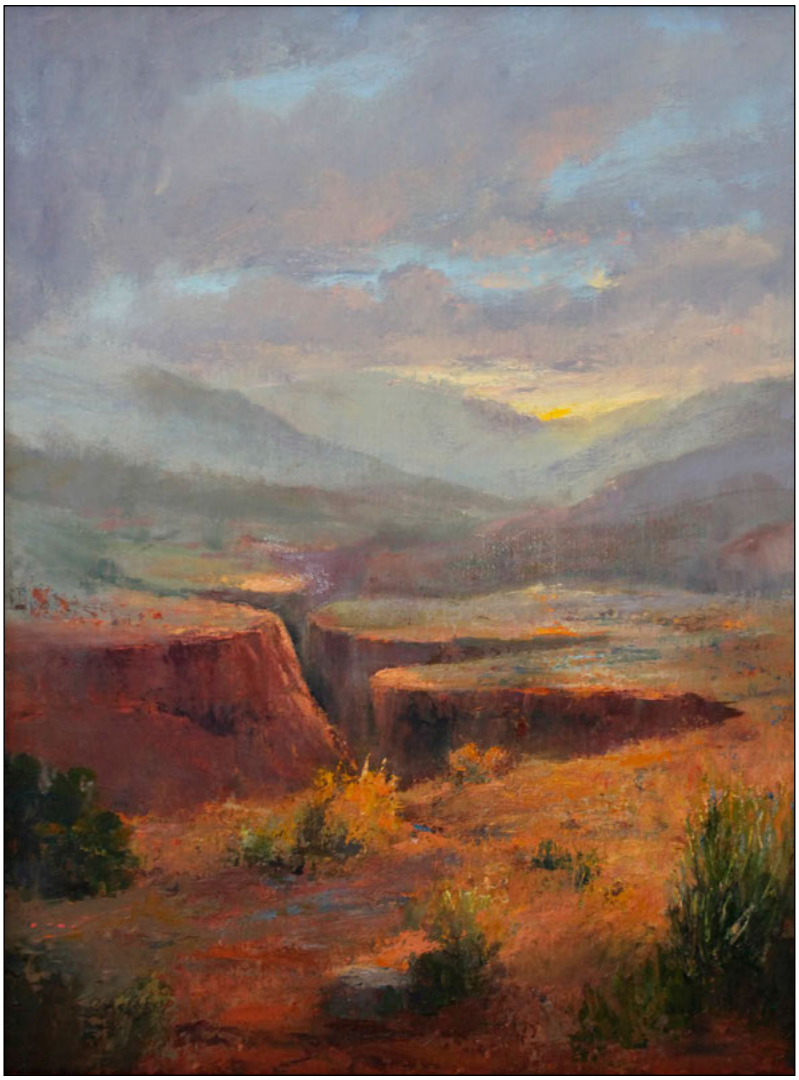
BAR BULLETIN

Official Publication of the State Bar of New Mexico

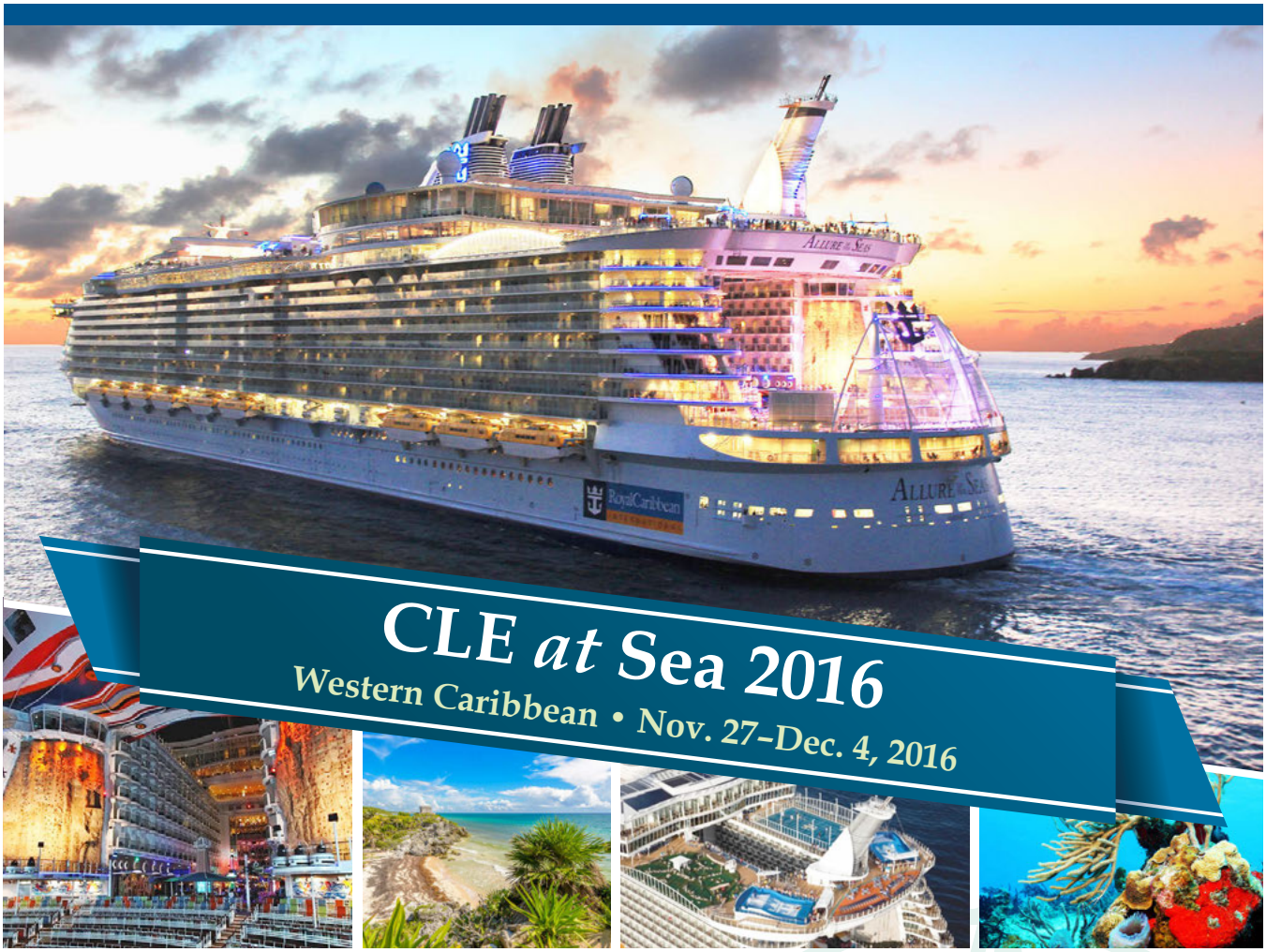
April 13, 2016 • Volume 55, No. 15



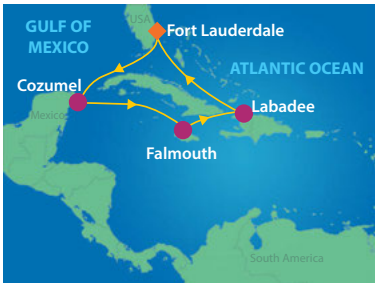
Taos Gorge Aglow, 24x18, oil on linen/panel
by Karen Halbert

Marigold Arts Gallery, Santa Fe

Inside This Issue



Join State Bar President Brent Moore for this incredible trip and enter the holiday season CLE stress free. One year's worth of CLE credits will be provided.



Seven Night Roundtrip from Fort Lauderdale

Ports of call on the Royal Caribbean Allure of the Seas:
Cozumel, Mexico • Falmouth, Jamaica • Labadee, Haiti

Prices per person based on double occupancy (including port expenses)

$679 Interior
$901 Obstructed ocean view
$939 Superior ocean view, deck 10 or 11 with balcony
$949 Superior ocean view, deck 12 or 14 with balcony

Plus taxes and fees

Contact Terri Nelson with Vacations To Go by April 29 to guarantee a room.
Flight reservations may be made on your own or through Terri.
1-800-998-6925, ext. 8704 • tnelson@vacationstogo.com

CLE course information is forthcoming.
Teach a one to two hour class and get free CLE registration ($325).
Send proposals to Christine Morganti, cmorganti@nmbar.org.

State Bar of New Mexico
Center for Legal Education

For more information go to www.nmbar.org, for Members, CLE at Sea

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505-797-6000 • 800-876-6227 • Fax: 505-828-3765
email: address@nmbar.org • www.nmbar.org

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27
Consumer Debt/Bankruptcy Workshop:
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

May

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10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

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Family Law Clinic:
10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

25
Consumer Debt/Bankruptcy Workshop:
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

Cover Artist: Karen Halbert, a former computer scientist and college professor of mathematics, transforms the beauty and patterns she sees in the numerical universe into the natural world of her paintings. Halbert spent her childhood in the American West and, following in the footsteps of many artists, returned to her roots to capture on canvas the particular quality of the Southwest. It is in Santa Fe that Halbert has found her true home. She can be seen painting plein-air in the fields throughout New Mexico. In her studio, Halbert uses sketches and photographs from her plein-air work to create images full of the emotions she feels while working out-of-doors. She is active in Plein-Air Painters of New Mexico, serving as volunteer website administrator (www.papnm.org). For more of her work, visit www.karenhalbert.com.

Notices

Court News

Second Judicial District Court

Reassignment of Cases

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.

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.

Professionalism Tip

With respect to opposing parties and their counsel:
I will not use litigation, delay tactics, or other courses of conduct to harass the opposing party or their counsel.

State Bar News

Attorney Support Groups

- April 18, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)
- May 2, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)
- May 9, 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#.

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 email 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.

Committee on Women and the Legal Profession

Golf Swing Clinic

The Committee on Women and the Legal Profession invites women to a Golf Swing Clinic on from 10 a.m.–noon, Saturday, April 23, at Sandia Resort & Casino. The instruction will be followed by lunch. The price is $65 per person which includes instruction, rental clubs (if needed) and lunch. Registration is not limited to attorneys. All lady golfers of all skill levels are welcome. Register online at https://www.cgmarketingsystems.com/onlineshop/index.asp?id=9495&courseid=1083. For more information, contact Jocelyn Castillo at jcastillosd@yahoo.com or 505-844-7346.

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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 over his or her career 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

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Criminal Law Section

District Attorney Candidate Forum

The Criminal Law Section invites members of the legal community, public and the media to its Second Judicial District Attorney Candidate Forum at 5:30-7:30 p.m., May 12, at the State Bar Center in Albuquerque. Democratic primary opponents Raul Torrez and Ed Perea and Republican candidate Simon Kubiak are anticipated to participate. The event will be moderated by Elaine Baumgartel, news director at KUNM and local host of NPR's Morning Edition. Seating is first come, first serve. Proposed candidate questions will be accepted until April 29. Questions will be chosen by the Criminal Law Section Board of Directors and will be provided to the candidates prior to the event. Candidates will have 3 minutes for opening statements, 15 minutes to answer each question, 1 minute for rebuttal responses when appropriate, and 2 minutes for closing statements. To submit candidate questions (anonymously or not) or for additional information, contact Criminal Law Section Chair, Julpa Davé or Joshua Boone at NMCrimLawSection@gmail.com.

Entrepreneurs in Community Lawyering

Now Acepting Applications

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.

Paralegal Division

Law Day CLE

The State Bar Paralegal Division invites members of the legal community to attend the Division's Law Day CLE program (3.0 G) from 9 a.m. to 12:15 p.m., April 30, at the State Bar Center. Topics include working with medicare, presented by Daniel Ulibarri, current issues in immigration presented by Christina Rosado; and recent changes to the federal rules of Civil Procedure. Remote connections for audio or video will not be available. Registration is $35 for Division members, $50 for non-member paralegals and $55 for attorneys. Send checks for registration (no credit cards or cash) to Paralegal Division, PO Box 92860, Albuquerque, NM 87199-2860. Include printed name, State Bar member number and phone number in order to receive CLE credit. Pre-registrations must be received by April 22. Registrations will be accepted at 8:30 a.m. the day of the program, but availability of materials will be limited. For more information, contact Carolyn Winton, 505-888-4357 or visit www.nmbar.org/About us/Divisions/Paralegal Division/CLE Programs.

Solo and Small Firm Section

April Presentation features Discussion of Relations with Cuba

Only a few weeks after President Obama's controversial visit to Cuba, three Albuquerque attorneys (who have all separately traveled to Cuba in recent years) will moderate a vigorous discussion regarding the political, socioeconomic and personal consequences of how and whether to continue relations with the island neighbor. David Serna, Leon Encinias and John Samore will present "The Emerging Future of Legal Relationships with Cuba" at noon, April 19, at the State Bar Center in Albuquerque. The event is free and lunch is provided to those who R.S.V.P. to Breanna Henley, bhenley@nmbar.org.

Young Lawyers Division

ABA YLD District 23 Representative Vacancy

The ABA District Representative position for New Mexico and Arizona (District 23) will be vacant following the 2016 ABA Annual Meeting. The State Bar YLD Board of Directors will appoint a New Mexico young lawyer to fill this position. YLD seeks a motivated person who can represent the interest of New Mexico and Arizona with the ABA YLD. The position requires attending the ABA Annual and Midyear meetings as well as the ABA YLD Spring and Fall Meetings in order to serve on the ABA YLD Council. This position is also a voting member of the State Bar YLD Board of Directors.

To be eligible, applicants must be a member of the State Bar YLD (36 years of age or younger or in practice five years or less), be a member of the ABA and have attended an ABA meeting in the past year. If appointed, this last requirement may be satisfied by attending the ABA YLD Spring Conference in St. Louis on May 5. Interested applicants should send a one to two page letter of interest to YLD Chair Spencer Edelman (spencer.edelman@modrall.com) by April 15. The appointment will be made by April 22. For more information contact Edelman or YLD Chair-elect Tomas Garcia.

Apply for a Summer Fellowship

YLD is currently accepting applications for its 2016 Summer Fellowships. YLD is offering two fellowships for the summer of 2016 to law students who are interested in

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

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Judges
888-502-1289
www.nmbar.org > for Members > Lawyers/Judges Assistance

working in public interest law or the government sector. The fellowship awards are intended to provide the opportunity for law students to work for public interest entities or in the government sector in an unpaid position. The fellowship awards, depending on the circumstances of the position, could be up to $3,000 for the summer. Applications must be received or postmarked by April 29. For details and eligibility or to apply, contact YLD Board Member Robert Lara, robunm@gmail.com or visit http://www.nmbar.org/NmbarDocs/AboutUs/YoungLawyersDivision/2016SummerFellowships.pdf

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.

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 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

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.

American Constitution Society: New Mexico Lawyer Chapter

Inaugural Event with Speaker Juan Melendez

The American Constitution Society New Mexico Lawyer Chapter is hosting Juan Melendez as its inaugural speaker at 5:30 p.m., April 20, at the UNM School of Law, Room 2402. Melendez spent nearly 18 years on Florida's death row for a crime he did not commit. In January 2002, he became the 99th death-row inmate to be exonerated and released since 1973. Don't miss this opportunity to learn about Melendez' struggle for freedom and his inspirational story of human resilience, courage, faith and forgiveness. The talk is followed by a discussion on wrongful convictions by Prof. Rahn Gordon. This event is free and open to the public and CLE credit will be offered ($5 fee). For more information, contact Hooman Hedayati, hooman.hedayati@alumni.law.unm.edu.

First Judicial District Bar Association

April Luncheon and Ethics CLE

Join the First Judicial District Bar Association for a buffet luncheon and one hour ethics CLE from noon to 1:30 p.m., April 18, at the Hilton Hotel in Santa Fe. William Slease, chief disciplinary counsel for the New Mexico Supreme Court Disciplinary Board, will discuss the most common complaints received by the Board and the types of complaints that result in discipline. Discussion will include what behavior crosses the Rules of Professional Conduct lines and what to do when faced with this behavior. Attendance is $15 and includes a buffet lunch. R.S.V.P. by April 14 to Erin McSherry, erin.mcsherry@state.nm.us.

New Mexico Criminal Defense Lawyers Association

'Four Corner Forensics' CLE in Durango

The New Mexico Criminal Defense Lawyers Association will partner with the Colorado and Utah criminal defense bars to host "Four Corner Forensics" (6.2 G), a CLE on May 6 at the Fort Lweis College Student Union Building in Durango, Colo. Plan a relaxing long weekend and learn about forensics and scientific evidence while surrounded by the beautiful landscapes (and restaurants) of Durango. Topics include an update on the NAS report, mobile forensics, fundamentals of DNA and cross of forensic experts. For more information or to register, visit www.nmcdla.org or call 505-992-0050.

New Mexico Defense Lawyers Association

Seminars on Mediation and Medical Negligence Defense

The New Mexico Defense Lawyers Association presents two half-day seminars on April 29. The morning session, "Maximizing a Case's Settlement Posture," is chaired by Robert Sabin. The afternoon session, "Insights into Medical Negligence Defense," is chaired by Mary M. Behm. The two seminars offer up to 4.7 G, 1.0 EP and will be held at State Bar Center in Albuquerque. Registration is available at www.nmdla.org or by calling 505-797-6021.

New Mexico Trial Lawyers Foundation

Tort Law CLE

The New Mexico Trial Lawyers Foundation presents the "35th Annual Update on New Mexico Tort Law" (5.2 G, 1.0 EP) on April 22 in Albuquerque. Visit www.nmtla.org or call 505-243-6003 to register.

Law Day Call-in Program

NEEDED: **Volunteer attorneys who can answer questions about many areas of law including:**

- Family law
- Landlord/tenant disputes
- Consumer law
- Personal injury
- Collections
- General practice

During the Young Lawyers Division Law Day Call-in Program

Saturday, April 30 • 9 a.m. to noon

(volunteers should arrive at 8 a.m. for breakfast and orientation)

Alamogordo, Albuquerque, Farmington, Las Cruces and Roswell

Volunteer attorneys will provide very brief legal advice to callers from around the state in the practice area of their choice. Attorneys who speak Spanish are always needed.

Earn pro bono hours!

For more information or to volunteer, contact the following YLD board member in your area:

Alamogordo: Erin M. Akins, atkinser@gmail.com
Albuquerque: Sonia Russo, soniarusso09@gmail.com
Farmington: Evan R. Cochnar, ecochnar@da.state.nm.us
Las Cruces: Robert Lara, robunm@gmail.com
Roswell: Anna C. Rains, acr@sbcw.com

State Bar of New Mexico
Young Lawyers Division

Legal Education

April

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 Seminar
New Mexico Legal Aid
505-768-6112

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

14 **Evolution of Family Adoption and Estate Planning Law Impacting Same Sex Relationships**
1.0 G
Live Seminar
Davis Miles McGuire Gardner
www.davismiles.com

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

20 **Midyear Meeting**
6.0 G
Live Seminar
American Judges Association
www.americanjudgesassociation.net

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

22 **35th Annual Update on New Mexico Tort Law**
5.2 G, 1.0 EP
Live Seminar
New Mexico Trial Lawyers Foundation
www.nmtla.org

26 **Spring AODA Conference**
11.2 G, 4.0 EP
Live Seminar
Administrative Office of the District Attorneys
www.nmdas.com

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

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 Seminar
Texas State Bar
www.texasbarcle.com

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

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

29 **Criminal Procedure Update (2015)**
1.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Lawyers' Duties of Fairness and Honesty (Fair or Foul 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Law Day CLE**
3.0 G
Live Seminar, Albuquerque
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

4 **Annual Estate Planning Update**
6.0 G, 1.0 EP
Live Seminar
Wilcox Law Firm
www.wilcoxlawnm.com

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**
3.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Nonprofit Financing**
1.0 G
Live Seminar, Santa Fe
Center for Legal Education of NMSBF
www.nmbar.org

6 **Four Corner Forensics**
6.2 G
Live Seminar, Durango, Colo.
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

May

10 **Arbitration: An Overview of Current Issues**
1.0 G
Live Seminar
H. Vearle Payne Inns of Court
505-321-1461

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
Webcast/Live Seminar, Albuquerque
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

18 **Trusts 101**
5.0 G, 1.0 EP
Live Seminar
NBI Inc.
www.nbi-sems.com

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 (2015)**
4.5 G, 1.5 EP
Live Replay, Albuquerque
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, Albuquerque
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, Albuquerque
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, Albuquerque
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

7 **Conflicts of Interests (Ethicspalooza Redux—Winter 2015 Edition)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **Beyond Sticks and Stones (2015 Annual Meeting)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **The 31st Annual Bankruptcy Year in Review (2016 AM Session)**
3.5 G
Live Replay, Albuquerque
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

July

15 **The Ethics of Creating Attorney-Client Relationships in the Electronic Age**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Essentials of Employment Law**
6.6 G
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com

21 **Drafting Sales Agents' Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Legal Technology Academy (Afternoon Session 2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **2nd Annual Symposium on Diversity (2016): Implicit Bias and How To Address It**
1.0 G
Live Replay, Albuquerque
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 April 1, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,832	State v. Baxendale	COA 33,934	03/31/16
No. 35,831	State v. Martinez	COA 33,181	03/31/16
No. 35,830	Mesa Steel v. Dennis	COA 34,546	03/31/16
No. 35,828	Patscheck v. Wetzel	12-501	03/29/16
No. 35,825	Bodley v. Goodman	COA 34,343	03/28/16
No. 35,827	Serna v. Webster	COA 34,535/34,755	03/24/16
No. 35,824	Earthworks Oil and Gas v. N.M. Oil & Gas Association	COA 33,451	03/24/16
No. 35,823	State v. Garcia	COA 32,860	03/24/16
No. 35,822	Chavez v. Wrigley	12-501	03/24/16
No. 35,820	Martinez v. Overton	COA 34,740	03/24/16
No. 35,821	Pense v. Heredia	12-501	03/23/16
No. 35,818	State v. Martinez	COA 35,038	03/22/16
No. 35,817	State v. Nathaniel L.	COA 34,864	03/22/16
No. 35,816	State v. McNew	COA 34,937	03/18/16
No. 35,815	State v. Sanchez	COA 34,170	03/18/16
No. 35,813	State v. Salima J.	COA 34,904	03/17/16
No. 35,812	State v. Tenorio	COA 34,994	03/17/16
No. 35,814	Campos v. Garcia	12-501	03/16/16
No. 35,811	State v. Barreras	COA 33,653	03/16/16
No. 35,810	State v. Barela	COA 34,716	03/16/16
No. 35,809	State v. Taylor E.	COA 34,802	03/16/16
No. 35,805	Trujillo v. Los Alamos Labs	COA 34,185	03/16/16
No. 35,804	Jackson v. Wetzel	12-501	03/14/16
No. 35,803	Dunn v. Hatch	12-501	03/14/16
No. 35,802	Santillanes v. Smith	12-501	03/14/16
No. 35,795	Jaramillo v. N.M. Dept. of Corrections	COA 34,528	03/09/16
No. 35,793	State v. Cardenas	COA 33,564	03/09/16
No. 35,777	N.M. State Engineer v. Santa Fe Water Resource	COA 33,704	02/25/16
No. 35,771	State v. Garcia	COA 33,425	02/24/16
No. 35,758	State v. Abeyta	COA 33,461	02/15/16
No. 35,749	State v. Vargas	COA 33,247	02/11/16
No. 35,748	State v. Vargas	COA 33,247	02/11/16
No. 35,747	Sicre v. Perez	12-501	02/04/16
No. 35,746	Bradford v. Hatch	12-501	02/01/16
No. 35,722	James v. Smith	12-501	01/25/16
No. 35,711	Foster v. Lea County	12-501	01/25/16
No. 35,718	Garcia v. Franwer	12-501	01/19/16
No. 35,717	Castillo v. Franco	12-501	01/19/16
No. 35,702	Steiner v. State	12-501	01/12/16
No. 35,682	Peterson v. LeMaster	12-501	01/05/16
No. 35,677	Sanchez v. Mares	12-501	01/05/16
No. 35,669	Martin v. State	12-501	12/30/15
No. 35,665	Kading v. Lopez	12-501	12/29/15
No. 35,664	Martinez v. Franco	12-501	12/29/15
No. 35,657	Ira Janecka	12-501	12/28/15
No. 35,671	Riley v. Wrigley	12-501	12/21/15
No. 35,649	Miera v. Hatch	12-501	12/18/15
No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310	12/16/15
No. 35,661	Benjamin v. State	12-501	12/16/15
No. 35,654	Dimas v. Wrigley	12-501	12/11/15
No. 35,635	Robles v. State	12-501	12/10/15
No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,612	Torrez v. Mulheron	12-501	11/23/15
No. 35,599	Tafoya v. Stewart	12-501	11/19/15
No. 35,588	Torrez v. State	12-501	11/04/15
No. 35,522	Denham v. State	12-501	09/21/15
No. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,440	Gonzales v. Franco	12-501	07/22/15
No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,374	Loughborough v. Garcia	12-501	06/23/15
No. 35,372	Martinez v. State	12-501	06/22/15
No. 35,370	Chavez v. Hatch	12-501	06/15/15
No. 35,353	Collins v. Garrett	COA 34,368	06/12/15
No. 35,335	Chavez v. Hatch	12-501	06/03/15
No. 35,371	Pierce v. Nance	12-501	05/22/15
No. 35,266	Guy v. N.M. Dept. of Corrections	12-501	04/30/15
No. 35,261	Trujillo v. Hickson	12-501	04/23/15
No. 35,097	Marrah v. Swisstack	12-501	01/26/15
No. 35,099	Keller v. Horton	12-501	12/11/14
No. 34,937	Pittman v. N.M. Corrections Dept.	12-501	10/20/14
No. 34,932	Gonzales v. Sanchez	12-501	10/16/14
No. 34,907	Cantone v. Franco	12-501	09/11/14
No. 34,680	Wing v. Janecka	12-501	07/14/14
No. 34,777	State v. Dorais	COA 32,235	07/02/14
No. 34,775	State v. Merhege	COA 32,461	06/19/14
No. 34,706	Camacho v. Sanchez	12-501	05/13/14
No. 34,563	Benavidez v. State	12-501	02/25/14
No. 34,303	Gutierrez v. State	12-501	07/30/13
No. 34,067	Gutierrez v. Williams	12-501	03/14/13
No. 33,868	Burdex v. Bravo	12-501	11/28/12
No. 33,819	Chavez v. State	12-501	10/29/12
No. 33,867	Roche v. Janecka	12-501	09/28/12
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
No. 34,443	Aragon v. State	12-501	02/14/14
No. 34,522	Hobson v. Hatch	12-501	03/28/14
No. 34,582	State v. Sanchez	COA 32,862	04/11/14
No. 34,694	State v. Salazar	COA 33,232	06/06/14
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. 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
No. 35,427	State v. Mercer-Smith	COA 31,941/28,294	08/26/15
No. 35,446	State Engineer v. Diamond K Bar Ranch	COA 34,103	08/26/15
No. 35,451	State v. Garcia	COA 33,249	08/26/15
No. 35,499	Romero v. Ladlow Transit Services	COA 33,032	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
No. 35,751	State v. Begay	COA 33,588	03/25/16

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)			Submission Date
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
No. 34,630	State v. Ochoa	COA 31,243	04/13/15
No. 34,789	Tran v. Bennett	COA 32,677	04/13/15
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. 34,826	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 Commission	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 & Revenue Dept.	COA 33,586	03/14/16
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	03/16/16
No. 35,386	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
No. 35,456	Haynes v. Presbyterian Healthcare Services	COA 34,489	04/13/16
No. 34,929	Freeman v. Love	COA 32,542	04/13/16
No. 34,830	State v. Le Mier	COA 33,493	04/25/16
No. 35,438	Rodriguez v. Brand West Dairy	COA 33,104/33,675	04/27/16
No. 35,426	Rodriguez v. Brand West Dairy	COA 33,675/33,104	04/27/16
No. 35,297	Montano v. Frezza	COA 32,403	08/15/16
No. 35,214	Montano v. Frezza	COA 32,403	08/15/16

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,794	State v. Brown	COA 34,905	04/01/16
No. 35,792	State v. Garcia-Ortega	COA 33,320	04/01/16
No. 35,730	State v. Humphrey	COA 34,601	04/01/16
No. 35,593	Quintana v. Hatch	12-501	04/01/16
No. 35,790	Castillo v. Arrieta	COA 34,180	03/30/16
No. 35,789	State v. Cly	COA 35,016	03/30/16
No. 35,788	State v. Thompson	COA 34,559	03/30/16
No. 35,786	State v. Pacheco	COA 33,810	03/30/16
No. 35,785	State v. Aragon	COA 34,817	03/30/16
No. 35,784	State v. Diaz	COA 35,079	03/30/16
No. 35,783	State v. Jason R.	COA 34,562	03/30/16
No. 35,781	State v. Bersame	COA 34,686	03/30/16
No. 35,739	State v. Angulo	COA 34,714	03/30/16
No. 35,690	Healthsouth Rehabilitation v. Brawley	COA 33,593	03/30/16
No. 35,581	Salgado v. Morris	12-501	03/30/16
No. 35,575	Thompson v. Frawner	12-501	03/30/16

Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective April 1, 2016

Published Opinions

No. 33127	1st Jud Dist Santa Fe CV-12-622, A RODARTE v PRESBYTERIAN (reverse)	3/28/2016
No. 33850	1st Jud Dist Santa Fe CV-12-3577, ELDORADO COMM v. S BILLINGS (reverse)	3/28/2016
No. 34167	2nd Jud Dist Bernalillo CV-11-5563, V GARCIA v BOARD OF REGENTS (reverse)	3/29/2016
No. 34096	3rd Jud Dist Dona Ana CV-11-244, B SHAH v R DEVASTHALI (reverse and remand)	3/30/2016

Unublished Opinions

No. 33021	8th Jud Dist Taos CV-09-298, ONEWEST BANK v E ROMERO (reverse and remand)	3/29/2016
No. 33777	1st Jud Dist Santa Fe CV-12-2655, P RAMIREZ v R VALENCIA (reverse and remand)	3/29/2016
No. 35004	2nd Jud Dist Bernalillo LR-14-13, STATE v J CHARLEY (affirm)	3/29/2016
No. 35081	5th Jud Dist Lea CV-14-460 D SNOW v K TAYLOR (affirm)	3/30/2016
No. 35056	2nd Jud Dist Bernalillo CV-15-780, S CHRISTOFFEL v J CLOUD (affirm)	3/30/2016
No. 34684	2nd Jud Dist Bernalillo JQ-14-30, CYFD v NATALIE W P (affirm)	3/31/2016

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

Recent Rule-Making Activity

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 April 6, 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:

Rules of Criminal Procedure for the Magistrate Courts

Rule 6-506	Time of commencement of trial	05/24/16

Rules of Criminal Procedure for the Metropolitan Courts

Rule 7-506	Time of commencement of trial	05/24/16

Rules of Procedure for the Municipal Courts

Rule 8-506	Time of commencement of trial	05/24/16

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.

Certiorari Denied, November 17, 2015, No. 35,560

From the New Mexico Court of Appeals

Opinion Number:2016-NMCA-004

No. 33,979 (filed September 28, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHARLES SUSKIEWICH,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
JAMES A. HALL, District Judge, Pro Tempore

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Albuquerque, New Mexico
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JORGE A. ALVARADO
Chief Public Defender
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Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Michael D. Bustamante, Judge

{1} Defendant Charles Suskiewich appeals his conviction for second degree murder on the ground that he was deprived of his right to a speedy trial. He also argues that his sentence of twelve years incarceration is cruel and unusual punishment. We disagree and affirm.

BACKGROUND

{2} Defendant was arrested on December 25, 2011, for the fatal shooting of Dylan Breternitz. He was indicted on January 19, 2012, for first degree murder, tampering with evidence, and receiving stolen property.[1] He was convicted of second degree murder after a jury trial in January 2014. The total time elapsed between December 25, 2011, and the first day of trial, January 13, 2014, was twenty-four months and nineteen days. Defendant was incarcerated throughout this period. Additional facts are included in our discussion of Defendant's arguments.

DISCUSSION

{3} On appeal, Defendant makes two main arguments. First, he maintains that he was denied a speedy trial in violation of the United States and New Mexico Constitutions. *See* U.S. Const. amend VI; N.M. Const. art. II, § 14. Second, he maintains that his twelve-year sentence denied him due process and subjected him to cruel and unusual punishment. We begin with Defendant's speedy trial argument.

A. Defendant's Right to a Speedy Trial Was Not Violated

{4} Both the United States and New Mexico Constitutions provide for a speedy trial. U.S. Const. amend. VI (stating that "the accused shall enjoy the right to a speedy and public trial"); N.M. Const. art. II, § 14 (stating that the accused has a right to "a speedy public trial"). "It is ultimately the state's responsibility to bring a defendant to trial in a timely manner." *State v. Flores*, 2015-NMCA-081, ¶ 3, __ P.3d ___ (alterations, internal quotation marks, and citation omitted), *cert. denied*, 2015-NMCERT-008, ___ P.3d ___. Whether a defendant's right to a speedy trial has been violated depends on analysis of four factors: the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972). "Each of these factors is weighed either in favor of or against the State or the defendant, and then balanced to determine if a defendant's right to a speedy trial was violated." *State v. Spearman*, 2012-NMSC-023, ¶ 17, 283 P.3d 272; *see Barker*, 407 U.S. at 533 ("[T]hese factors have no talismanic qualities; courts must . . . engage in a difficult and sensitive balancing process."). Speedy trial claims are assessed on a case-by-case basis. *State v. Palacio*, 2009-NMCA-074, ¶ 9, 146 N.M. 594, 212 P.3d 1148. In each case, we defer to the district court's factual findings but assess the weight of each factor de novo. *Flores*, 2015-NMCA-081, ¶ 4.

Length of Delay

{5} We assess the length of delay for two purposes. First, we consider whether the period from arrest to trial is presumptively prejudicial as defined by our Supreme Court: "A delay of trial of one year is presumptively prejudicial in simple cases, fifteen months in intermediate cases, and eighteen months in complex cases." *Spearman*, 2012-NMSC-023, ¶ 21; *see Barker*, 407 U.S. at 530 ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."). Here, the district court determined that the case was of intermediate complexity, and the parties appear to agree with this assessment. *See State v. Plouse*, 2003-NMCA-048, ¶ 42, 133 N.M. 495, 64 P.3d 522 ("We give due deference to the district court's findings as to the level of complexity."). We therefore employ the presumptively prejudicial threshold of fifteen months.

{6} We pause here to note that the district court did not include in its calculation of the time between arrest and trial, the five months during which the State's interlocutory appeal was under review. Since it excluded this period, the district court calculated the length of the delay as nineteen months (four months beyond the presumptively prejudicial threshold) instead of twenty-four (nine months beyond the presumptively prejudicial threshold). We disagree that this period should be excluded altogether from a speedy trial analysis. In *United States v. Loud Hawk*, the Court held that "[u]nder *Barker*, delays in bringing the case to trial caused by the Government's interlocutory appeal may be weighed in determining whether a

[1]The latter two charges were dismissed prior to trial.

defendant has suffered a violation of his rights to a speedy trial." *Loud Hawk*, 474 U.S. 302, 316 (1986). In *Flores*, this Court included a sixteen-month period related to the state's appeal in its calculation of the length of delay and in its assessment of the reasons for delay. 2015-NMCA-081, ¶ 7 (stating that the delay was sixty-two months); *id.* ¶¶ 27-29 (discussing whether the period on appeal weighed against the State). We conclude that the district court should have included the time spent in the appellate process in its calculation of the length of delay in the present case.

{7} The parties agree on appeal that approximately twenty-four months elapsed between Defendant's arrest and trial. Thus, the delay here exceeds the presumptively prejudicial threshold by approximately nine months. The fifteen-month threshold period having been exceeded, we proceed to assess the *Barker* factors, including the weight of the length of delay beyond the threshold. *State v. Garza*, 2009-NMSC-038, ¶ 21, 146 N.M. 499, 212 P.3d 387 (stating that "a 'presumptively prejudicial' length of delay is simply a triggering mechanism, requiring further inquiry into the *Barker* factors"). "[W]e consider how long the delay extends beyond [the] presumptively prejudicial period, because the greater the delay the more heavily it will potentially weigh against the state." *Flores*, 2015-NMCA-081, ¶ 5 (alteration, internal quotation marks, and citation omitted).

{8} In other intermediate complexity cases, we have held that a delay of six months beyond the threshold weighed only slightly against the state. *State v. Montoya*, 2011-NMCA-074, ¶ 17, 150 N.M. 415, 259 P.3d 820. We have also held that a delay of twelve months beyond the threshold weighed "moderately to heavily" against the state. *State v. Montoya*, 2015-NMCA-056, ¶ 15, 348 P.3d 1057. We conclude that here the nine-month delay beyond the fifteen-month threshold weighs moderately against the State.

Reasons for Delay

{9} Defendant argues that the delay in proceedings was caused by (1) "the State's failure to timely and adequately produce discovery," (2) "the State's motion for reconsideration of the [district] court's suppression of . . . evidence," and (3) the State's appeal of the district court's suppression of evidence. Different reasons for delay are assigned different weights. *State v. Lujan*, 2015-NMCA-032, ¶ 15, 345 P.3d 1103. "There are three types [of delay]: (1) deliberate or intentional delay; (2) negligent or administrative delay; and (3) delay for which there is a valid reason." *Id.* (internal quotation marks and citation omitted). The first type weighs "heavily against the government[,]" whereas "[n]egligent or administrative delay weighs against the [s]tate, though not heavily." *Id.* (internal quotation marks and citation omitted).

{10} We begin with a review of the events leading to trial. After arraignment, trial was set for August 2012. All told, trial was subsequently postponed four times until it was finally held in January 2014. The first continuance (from August 2012 to November 2012) was at the request of Defendant with the State's concurrence. At the May 2012 hearing, at which Defendant first requested the continuance, Defendant stated that he would "waive all time limits" but the written motion to continue did not include any waiver of Defendant's speedy trial rights. The ground for Defendant's motion was "that discovery is continuing and the parties anticipate requiring additional time to complete discovery." The trial was postponed to November 26, 2012. The day after the May hearing, Defendant filed a demand for discovery.

{11} When the State did not respond to Defendant's demand for discovery, Defendant sent two follow-up letters in June and July 2012. The State did not respond. Defendant then filed a motion to compel discovery and requested an expedited hearing on the motion. The hearing was held in October 2012. Defendant stated at the hearing that some of the items requested had been provided and enumerated those still pending. The State explained that it was awaiting receipt of some of the remaining items from law enforcement. The district court granted the motion to compel, ordered Defendant to draft an order listing the missing items, and set a deadline for receipt of the materials or an explanation for their unavailability. Defendant notified the district court that a second continuance might be necessary due to the delay in discovery. On November 13, 2012, the State filed a stipulated motion for continuance, citing a need for time for both discovery and "evaluat[ion of] the [district c]ourt's ruling on [a] motion to suppress [evidence]." The November 2012 trial date was continued.

{12} From November 2012 through February 2013, the case took a number of interesting twists and turns. First, in December 2012 Judge Andria L. Cooper granted Defendant's motion to suppress evidence, including a gun found in Defendant's home and inculpatory statements Defendant made to officers. Shortly thereafter, Judge Cooper, who had been assigned to the case from its inception but who was not retained in the general election, was replaced by Judge Jeff F. McElroy. January 2013 saw a flurry of activity. The State moved for reconsideration of the suppression of evidence. Judge McElroy reset the trial for May 21, 2013. On January 17, 2013, Defendant exercised his right to excuse Judge McElroy and Judge Sarah C. Backus was assigned the case. The day after the assignment, Judge Backus recused herself. The case was then assigned to Judge John M. Paternoster, but he was excused on motion by the State. Finally, on February 15, 2013, the Supreme Court appointed Judge James A. Hall to oversee the case.

{13} After a scheduling conference in March 2013 in which the State represented that it could be ready for trial in July 2013 and Defendant agreed with the State that "July-August might be reasonable" for trial, Judge Hall continued the trial a third time, setting it for July 22, 2013. After reviewing the record developed before Judge Cooper regarding the suppression motion, Judge Hall denied the State's motion for reconsideration in April 2013. That same month, the State filed an appeal of the denial of its reconsideration motion. The notice of appeal stated that it was "not taken for the purpose of delay, and that the evidence is a substantial proof of a fact material in the proceeding."

{14} But the State erroneously filed the notice of appeal with this Court rather than with the Supreme Court, which has jurisdiction over interlocutory appeals in cases in which "a defendant may possibly be sentenced to life imprisonment or death." *State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821. After Defendant pointed out the error to the State, the matter was transferred to the Supreme Court, which did not occur until June 5, 2013. *State v. Suskiewich*, 2014 NMSC 040, ¶ 4, 339 P.3d 614 (decision). The Supreme Court dismissed the appeal on September 12, 2013, holding that "the State may ask the district court to reconsider a suppression order while at the same time preserving the State's right to appeal the suppression order, provided that the State files its motion to reconsider within ten days of the filing of the suppression order." *Id.* ¶ 1. Since the State did not file its motion to reconsider within that time

period, "the State failed to preserve its right to appeal." *Id.* The Court did not address the merits of the State's appeal. *Id.*

{15} When the State filed its appeal in this case, the district court lost jurisdiction over the case and the July 2013 trial date was necessarily vacated while the appeal was pending. *See Flores*, 2015-NMCA-081, ¶ 27. The case was remanded to the district court in October 2013 and within two weeks, was set for trial to be held January 13, 2014.

{16} We turn now to Defendant's arguments. Although Defendant concurred in three of the trial continuances, he maintains that the continuances were only necessary because the State deliberately failed to provide him with required discovery despite his repeated requests. He argues that therefore this delay should weigh heavily against the State. *See Garza*, 2009-NMSC-038, ¶ 25 (stating that "a deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." (alteration, internal quotation marks, and citation omitted)). But Defendant acknowledged in hearings in the district court that the parties were "working cooperatively" to review the evidence and that he was aware that the State was having difficulty obtaining the requested evidence from law enforcement. Moreover, in the scheduling conference leading to the third continuance, Defendant agreed with the State's proposal to reset the trial and stated that some of the outstanding items requested from the State were "minor." On appeal, he points to no evidence that the State "had intentionally held back in its prosecution of [the defendant] to gain some impermissible advantage at trial." *Id.* (internal quotation marks and citation omitted).

{17} We conclude that, even if these continuances were the result of the State's failure to provide discovery, they fall into the "negligent or administrative" category of delay, which weighs against the State. *See id.* ¶ 28 (holding that since "[t]here [was] nothing in the record to suggest that the [s]tate caused [a] four-month delay intentionally or in bad faith[,]" the "delay was negligent and weighs against the [s]tate"). "Our toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial." *Id.* ¶ 26 (alteration, internal quotation marks, and citation omitted). In *Garza*, the Court held that administrative delay weighed only slightly against the State where the length of the delay was just over ten months in a simple case. *Id.* ¶¶ 23, 30. Similarly, here, the delay attributed to these continuances was approximately eleven months and, therefore, we weigh it only slightly against the State.[2]

{18} Defendant next argues that the State failed to file a timely motion to reconsider the district court's suppression of evidence and that it "instead mov[ed] to reconsider the suppression order not before the judge who issued the order but before a fellow [prosecutor-turned-judge, Judge McElroy] who . . . took over the case in an effort to re-open the issue and introduce evidence it had a full opportunity to introduce at the suppression hearing." But Defendant does not explain how the State's motion for reconsideration delayed his trial. The State's motion for an evidentiary hearing on the suppression issue was denied, as was the motion to reconsider. Even if the State deliberately sought to have the motion to reconsider heard before the prosecutor-turned-judge, that plan was thwarted when Defendant peremptorily excused that judge.

{19} Finally, Defendant argues that the State deliberately delayed the case by "appealing the denial of its motion to reconsider in an effort to circumvent the statutory time limits for appealing the suppression order, which was the heart of the State's appeal." "The assurance that motions to suppress evidence or to dismiss an indictment are correctly decided through orderly appellate review safeguards both the rights of defendants and the rights of public justice." *Loud Hawk*, 474 U.S. at 313 (internal quotation marks and citation omitted). In *Loud Hawk*, the Supreme Court held that "an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay." *Id.* at 315. However, "a delay resulting from an appeal would weigh heavily against the Government if the issue were clearly tangential or frivolous." *Id.* at 315-16. When reviewing whether a delay caused by an appeal is justified, we may consider "the strength of the Government's position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime." *Id.* at 315. "Moreover, the charged offense usually must be sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal." *Id.* at 316.

{20} Here, Defendant argued in his motion to suppress, among other things, that Article II, Section 15 of the New Mexico Constitution provides greater protections than the Fifth Amendment of the U.S. Constitution. More specifically, he argued that the reasoning in *United States v. Patane*, 542 U.S. 630 (2004), was flawed and inconsistent with the New Mexico Constitution. *See State v. Gomez*, 1997-NMSC-006, ¶¶ 19-20, 122 N.M. 777, 932 P.2d 1 (adopting "the interstitial approach" to interpretation of state constitutions and stating that under this approach "[a] state court . . . may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics"). *Patane* holds that, under the United States Constitution, "the failure to give *Miranda* warnings did not require suppression of evidence that was the fruit of a suspect's unwarned but voluntary statements." *State v. Adame*, 2006-NMCA-100, ¶ 10, 140 N.M. 258, 142 P.3d 26. The district court agreed with Defendant and concluded that the reasoning in *Patane* was flawed and also that the New Mexico Constitution had distinct characteristics that provide greater protections than the United States Constitution. It concluded that "it is clear that Article II, Section 15 [of the New Mexico Constitution] provides that physical evidence obtained as a result of a *Miranda* violation should be suppressed."

{21} In its motion to reconsider the suppression of evidence, the State argued that "*Patane* is valid law in New Mexico[,]" citing *State v. Olivas*, 2011-NMCA-030, ¶ 18, 149 N.M. 498, 252 P.3d 722, and that several recent New Mexico cases state that Article II, Section 15 has not been interpreted to provide more protections than the Fifth Amendment, citing *State v. Randy J.*, 2011-NMCA-105, ¶ 28,

[2]Although Defendant does not make an argument related to any delay related to multiple reassignments of judges, we note that any delay caused by the shuffle of judges in January and February 2013 is an administrative delay that weighs only slightly against the State. *Id.* ¶¶ 29-30. *But see State v. Parrish*, 2011-NMCA-033, ¶ 25, 149 N.M. 506, 252 P.3d 730 (weighing the period in which judges were reassigned neutrally where the State "produced discovery, identified witnesses, and requested discovery from [the d]efendant" and "the case progressed with customary promptness during this period").

150 N.M. 683, 265 P.3d 734, and *State v. Quinones*, 2011-NMCA-018, ¶¶ 16-18, 149 N.M. 294, 248 P.3d 336. *Olivas*, however, contains no mention of Article II, Section 15 and its discussion of *Patane* cites to *Adame*, in which this Court expressly stated that its analysis was based only on the United States Constitution. *See Olivas*, 2011-NMCA-030, ¶ 18; *see also Adame*, 2006-NMCA-100, ¶ 9 (stating that it considered the issue "solely as a question of federal law because [the d]efendant did not argue at trial and does not argue on appeal that *Patane* should not be followed as a matter of state constitutional law"). In *Randy J.*, the Court declined to review the appellant's arguments regarding greater protections under Article II, Section 15 because they were undeveloped. 2011-NMCA-105, ¶ 30. Similarly, in *Quinones*, this Court stated that the defendant there "provide[d] us with no specific argument as to why the existing federal analysis is flawed" and that "[the d]efendant also [did] not argue that there are any structural differences between our state and the federal government or that distinctive New Mexico characteristics would militate in favor of greater protections under our state constitution." 2011-NMCA-018, ¶ 17. Neither *Randy J.* nor *Quinones* stands for the proposition that Article II, Section 15 will never be interpreted more expansively than its federal counterpart.

{22} Further, none of the six New Mexico cases that cite *Patane* addresses whether Article II, Section 15 requires the suppression of physical evidence obtained as a result of a *Miranda* violation. *See, e.g.*, *State v. Mark*, No. 34,025, dec. ¶ 18 n.1 (N.M. Sup. Ct. Apr. 13, 2015) (nonprecedential) (assessing the suppression of physical evidence obtained as a result of unwarned statements, applying *Patane*, and noting that the Court's analysis was based only on federal law because the defendant did not argue that the New Mexico Constitution provided him with greater protections); *State v. Garcia*, No. 33,756, dec. ¶ 41 (N.M. Sup. Ct. June 26, 2014) (nonprecedential) (relying on *Olivas* and not addressing Article II, Section 15); *Olivas*, 2011-NMCA-030, ¶ 18 (relying on *Adame* and not addressing Article II, Section 15); *State v. Perry*, 2009-NMCA-052, ¶ 31, 146 N.M. 208, 207 P.3d 1185 (stating that "[the d]efendant [did] not demonstrate[] that Article II, Section 15 of the New Mexico Constitution requires investigators to clarify whether a suspect has invoked the right to remain silent"); *State v. Verdugo*, 2007-NMCA-095, ¶ 17, 142 N.M. 267, 164 P.3d 966 (referencing only the Fifth Amendment); *Adame*, 2006-NMCA-100, ¶ 9 (addressing whether unwarned statements can be the basis for a search warrant and addressing it "solely as a question of federal law because [the d]efendant did not argue at trial and does not argue on appeal that *Patane* should not be followed as a matter of state constitutional law").

{23} We provide this discussion of the State's arguments not to address them on the merits, but to point out that one of the bases for the district court's suppression of the evidence rested on an issue of law not yet resolved in New Mexico. The fact that the Supreme Court ultimately dismissed the appeal as untimely has no bearing on whether the appeal was frivolous or not. Thus, we agree with the district court that the State's appeal of that decision addressed a question of law that was not frivolous. We conclude that the five-month period during which the State's appeal was pending therefore does not weigh against either party. *See Flores*, 2015-NMCA-081, ¶ 29.

Assertion of Speedy Trial Right

{24} "In determining the weight to assign to a defendant's assertion of his speedy trial right, we assess the timing of the defendant's assertion and the manner in which the right was asserted." *Lujan*, 2015-NMCA-032, ¶ 17 (internal quotation marks and citation omitted). The State argues that Defendant first asserted the right in his motion to dismiss, and the district court so found. Defendant appears to concede that he did not make an explicit demand for trial or assertion of his right before the motion to dismiss was filed, but counters that he nevertheless adequately asserted his speedy trial right by moving to compel discovery, "[taking] it upon himself to notify the State when it filed its appeal in the wrong appellate court" and moving to dismiss the State's appeal. In *Lujan*, this Court held that the defendant adequately asserted his right "by filing his motion to dismiss about nine months after the [s]tate refiled the charges against him and about five months before he was scheduled to go to trial." *Id.* ¶ 19. We noted that "a motion to dismiss based on speedy trial grounds is an assertion of the right that is weighed against the government, although it is generally not weighed heavily." *Id.* ¶ 18. Even if we construe Defendant's other actions as efforts to move the case to trial, we conclude that this factor weighs only slightly in his favor.

Prejudice to Defendant

{25} "The heart of the right to a speedy trial is preventing prejudice to the accused." *Garza*, 2009-NMSC-038, ¶ 12. There are "three interests under which we analyze prejudice to the defendant: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* ¶ 35 (internal quotation marks and citation omitted). "The evidence must . . . establish that the alleged prejudice occurred as a result of the delay in trial beyond the presumptively prejudicial threshold as opposed to the earlier prejudice arising from the original indictment." *Montoya*, 2015-NMCA-056, ¶ 25. Defendant argues that he was prejudiced because he suffered from anxiety and concern, and his defense was impaired because "two of the eight potential defense witnesses who could have provided testimony essential to [his] defense . . . were no longer available to testify."

{26} Recognizing that "some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting trial[,]" we consider only the anxiety that is "undue." *Garza*, 2009-NMSC-038, ¶ 35 (alterations, internal quotation marks, and citation omitted). At the hearing on the motion to dismiss, Defendant presented testimony by Dr. Kotsch, a psychologist who treated Defendant while he was incarcerated. Dr. Kotsch testified about the effects of forced idleness on inmates, including uncertainty, a sense of loss and hopelessness, and a lack of purpose. He stated that Defendant was experiencing anxiety due to the lack of routine and uncertainty while incarcerated. Critically, Defendant did not present evidence that his anxiety increased over time or was tied to the nine-month delay in the trial date beyond the fifteen-month threshold. *See Montoya*, 2015-NMCA-056, ¶ 32 (distinguishing between anxiety caused by indictment and anxiety caused by delay and stating that in that case the "initial harm [caused by indictment] was unnecessarily prolonged by the [s]tate's failure . . . to . . . move this case forward to a timely trial").

{27} The district court found that the anxiety suffered by Defendant was not greater than that suffered by any person awaiting trial on similar charges. Defendant argues that the district court's analysis was flawed because "[a] defendant is not required to show that he experienced greater anxiety and concern than that

attending most criminal prosecutions." *Id.* ¶ 25 (internal quotation marks and citation omitted). Instead, "[t]he operative question is whether the anxiety and concern, once proved, has continued for an unacceptably long period." *Id.* (internal quotation marks and citation omitted). In *Montoya*, the Court held that prejudice was demonstrated where the defendant "had become depressed, paranoid, and isolated; . . . his participation in his church and his relationship with his children deteriorated; [and] he lost about thirty pounds due to the anxiety of the pending charges." *Id.* ¶ 31. These effects continued for an "unacceptably long period" because the state "fail[ed] over the course of fourteen months to make its witnesses available to the defense." *Id.* ¶¶ 31-32. The Court agreed with the district court that the defendant's showing of prejudice weighed "slightly to moderately" in his favor. *Id.* ¶ 32.

{28} We agree with the district court that Defendant failed to demonstrate that the anxiety he suffered was undue, because Defendant failed to show that the anxiety he suffered was due to the State's failure to prosecute the case, and not due to the indictment itself, stipulated continuances, or the State's appeal, which we have already concluded was taken in good faith. We note further that even in *Montoya*, where the defendant demonstrated substantial anxiety due to the delay and that the delay was due to the state's failure to move the case along, the Court nevertheless weighed the prejudice only "slightly to moderately" in his favor. *Id.*

{29} Finally, Defendant argues that his defense was impaired by the delay. Specifically, he maintains that two defense witnesses were unavailable at the time of trial due to the delay. Defendant states on appeal that these witnesses "could have provided testimony essential to [his] defense of inability to form specific intent[.]" After hearing testimony by an investigator about what he learned from the witnesses, the district court found that it was speculative whether the witnesses would have been available to testify earlier and that other witnesses could testify to Defendant's intoxication around the time of the shooting. "[W]e defer to the district court's factual findings concerning each [*Barker*] factor as long as they are supported by substantial evidence[.]" *Montoya*, 2015-NMCA-056, ¶ 12.

{30} Furthermore, although Defendant was charged with first degree murder, the jury found that he did not have the requisite specific intent required for that charge and instead convicted him of second degree murder. *See State v. Brown*, 1996-NMSC-073, ¶ 35, 122 N.M. 724, 931 P.2d 69 ("We hold that evidence of intoxication may be considered to reduce first[]degree depraved mind murder to second[]degree murder."). Even without these witnesses, Defendant's defense based on lack of specific intent was obviously successful to reduce first degree murder to second degree murder. But since Defendant conceded at trial that he shot Breternitz and intoxication is not a defense to second degree murder, additional testimony on Defendant's intoxication would not have had an impact on the outcome of the trial. *Id.* (stating that evidence of intoxication "may not be used . . . to reduce second[]degree murder to voluntary manslaughter, or involuntary manslaughter or to completely excuse a defendant from the consequences of his unlawful act"). The unavailability of these two defense witnesses therefore was not prejudicial to Defendant's defense. "[W]e hold that [the d]efendant failed to make a particularized showing of prejudice that is cognizable under the prejudice factor." *Parrish*, 2011-NMCA-033, ¶ 34.

Balancing the Factors

{31} In sum, the length of delay weighs moderately in Defendant's favor, while the reasons for delay and Defendant's assertion of the speedy trial right weigh slightly in his favor. Nevertheless, because Defendant has failed to demonstrate that he was prejudiced by the delay, we conclude that his right to a speedy trial was not violated. *Garza*, 2009-NMSC-038, ¶ 40 (holding that where "[the d]efendant failed to show prejudice, and the other factors do not weigh heavily in [the d]efendant's favor . . . [the Supreme Court could not] conclude that [the d]efendant's right to a speedy trial was violated"); *Montoya*, 2011-NMCA-074, ¶ 24 ("Thus, [the d]efendant's failure to make an affirmative showing of particularized prejudice precludes a determination that his speedy trial right was violated because the other three factors weigh only slightly against the [s]tate.").

B. Defendant's Sentence Was Legally and Constitutionally Sound

{32} The basic sentence for second degree murder is fifteen years. NMSA 1978, § 30-2-1(B) (1994); NMSA 1978, § 31-18-15(A)(4) (2007). The sentence may be enhanced by one year if it involves the use of a firearm. NMSA 1978, § 31-18-16(A) (1993). If the district court finds aggravating or mitigating circumstances, the sentence may deviate from these guidelines. *State v. Cumpton*, 2000-NMCA-033, ¶ 8, 129 N.M. 47, 1 P.3d 429.

{33} Here, the district court sentenced Defendant to sixteen years, but suspended four years, for a total sentence of twelve years of incarceration followed by two years of parole. Defendant argues that, although his sentence was legal, it was cruel and unusual and denied him due process. *See* U.S. Const. amends. V, VIII, XIV; N.M. Const. art. II, §§ 13, 18. While acknowledging that the sentence was "similar to sentences imposed for the same offense in New Mexico[,]" Defendant argues that "his punishment is excessive in light of the fact that he took responsibility for his actions, was completely remorseful, and was deemed a candidate for rehabilitation" in several evaluations.

{34} Apparently conceding that this issue was not preserved below and relying on *State v. Sinyard*, Defendant maintains that "[a]n unconstitutional sentence is an illegal sentence that may be challenged for the first time on appeal." *See* 1983-NMCA-150, ¶ 1, 100 N.M. 694, 675 P.2d 426. Defendant's reliance is misplaced. In *State v. Chavarria*, the Court noted that Sinyard's challenge was to the legality of the sentence under a statute, not the constitutionality of the sentence. 2009-NMSC-020, ¶ 14, 146 N.M. 251, 208 P.3d 896. The *Chavarria* Court reiterated that "a sentence authorized by statute, but claimed to be cruel and unusual punishment under the state and federal constitutions, does not implicate the jurisdiction of the sentencing court and, therefore, may not be raised for the first time on appeal." *Id.* Since Defendant's argument was not preserved, we review it only for fundamental error. *State v. Castillo*, 2011-NMCA-046, ¶ 28, 149 N.M. 536, 252 P.3d 760 (recognizing that "an appellate court may consider jurisdictional questions and questions involving fundamental error even where the party failed to preserve those issues"); Rule 12-216(B)(2) NMRA.

{35} "The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice. The error must shock the conscience or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." *Castillo*, 2011-NMCA-046, ¶ 29 (internal quotation marks and citations omitted). Because the Legislature is charged with defining crimes and setting

penalties, "in almost all cases a statutorily lawful sentence does not constitute cruel and unusual punishment." *Id.* ¶ 31 (internal quotation marks and citation omitted).

{36} The essence of Defendant's argument is that the district court refused to mitigate his sentence. But the district court heard from nine witnesses on Defendant's behalf, including Defendant. The fact is that, after hearing this evidence, the district court "merely did not mitigate." *Cumpton*, 2000-NMCA-033, ¶ 9. To decline to mitigate is within the district court's discretion. *Id.* ¶ 12 ("There is no obligation on the part of a judge to depart from the basic sentence. The opportunity for a district court to mitigate a sentence depends solely on the discretion of the court and on no entitlement derived from any qualities of the defendant."). Moreover, because Defendant's sentence was consistent with the governing statutes, we discern no fundamental error. "Defendant is entitled to no more than a sentence prescribed by law, and he received one in this case." *Id.*

CONCLUSION

{37} Having found no violation of Defendant's right to a speedy trial and that the sentence imposed was legally and constitutionally sound, we affirm Defendant's conviction and sentence.

{38} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
JONATHAN B. SUTIN, Judge

Certiorari Denied, December 2, 2015, No. 35,573

From the New Mexico Court of Appeals

Opinion Number:2016-NMCA-005

No. 33,628 (filed October 1, 2015)

GREENTREE SOLID WASTE AUTHORITY, a New Mexico quasi-public agency,
Plaintiff-Appellant,
v.
COUNTY OF LINCOLN, NEW MEXICO and
ALTO LAKES WATER & SANITATION DISTRICT a New Mexico quasi-municipal agency; and NEW MEXICO FINANCE AUTHORITY,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
SARAH M. SINGLETON, District Judge

J. ROBERT BEAUVAIS
J. ROBERT BEAUVAIS, P.A.
Ruidoso, New Mexic
for Appellant

DANIEL C. OPPERMAN
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ALAN P. MOREL
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Ruidoso, New Mexico
for Appellee County of Lincoln, New Mexico

Opinion

Michael E. Vigil, Chief Judge

{1} Greentree Solid Waste Authority (Greentree) sued Lincoln County and Alto Lakes Water and Sanitation District (the District), seeking a declaratory judgment and an injunction. According to Greentree's petition, a series of joint powers agreements between Greentree, the County, and several municipalities, along with various other ordinances and agreements, resulted in the contractually binding transfer to Greentree of all authority to collect solid waste in the unincorporated areas of the County. Greentree claimed that the creation of the District to manage the collection of solid waste in one particular unincorporated area of the County violated these contractual commitments, and it sought an injunction precluding the District from undertaking waste collection services. Greentree also sought damages from the County for breach of contract.

{2} The district court granted summary judgment to the District and dismissed all of Greentree's claims against the District and the County. Greentree appeals, and we affirm.

BACKGROUND

Facts

{3} In 1991, the County, several municipalities (Town of Carrizozo, Village of Capitan, Village of Corona, Village of Ruidoso, and Village of Ruidoso Downs), and Greentree entered into a joint powers agreement "for the purpose of providing an inter-governmental cooperative agreement for the financing and operation of [Greentree]." The agreement authorized Greentree to develop and implement a solid waste system for the people living in the County. The term of the agreement was "indefinite."

{4} In order to address refuse in the areas of the County that were outside the municipalities, the County enacted an ordinance in 1992 that provided for a "mandatory system of solid waste collection" in the unincorporated areas of the County not covered by the 1991 joint powers agreement. Also in 1992, the County entered into another joint powers agreement with Greentree to provide for a waste collection and management system in the unincorporated areas of the County, consistent with the 1992 ordinance. The agreement gave Greentree the authority to develop and implement the solid waste disposal system for these unincorporated areas. Thus, as of 1992, Greentree managed the solid waste systems in the County's municipalities and in the unincorporated areas.

{5} The District came into existence in 2005, after the 1991 and 1992 joint powers agreements described above were executed. The District is a water and sanitation district created pursuant to the Water and Sanitation District Act, NMSA 1978, §§ 73-21-1 to -55 (1943, as amended through 2013), which permits the establishment of community systems such as sewer, waste disposal, and waterworks systems. *See* Section 73-21-3 (stating purposes for which water and sanitation systems may be created). The District was created to serve a specific unincorporated area of the County that primarily consisted of properties owned by members of the Alto Lakes Golf & Country Club. It appears to be undisputed that these property owners complied with the statutory requirements for establishing a water and sanitation district. These requirements included, among other things, approval of the Lincoln County Special District Commission, a special election in which a majority of qualified electors in the proposed district approved the creation of the District, and an order of the district court declaring the District to be a corporation.

{6} Shortly after the District was established, the County entered into another agreement with Greentree for the "collection of solid waste within the unincorporated limits of the County." The agreement stated that the County granted to Greentree "the sole and exclusive franchise, license and privilege to provide solid waste collection, removal or disposal services" for the County. Notably, however, the agreement further provided that "[t]he County includes all territory within the County except the municipalities *and that territory which is a Special District having been created pursuant to [Section] 73-21-3 B*[.] (emphasis added).

The County enacted a corresponding ordinance for the mandatory collection of solid waste, which allowed the County to contract "with any municipality, county or other local unit of government, including [Greentree]," but it did not apply "to property inside the boundaries of incorporated municipalities or water and sanitation districts[.]"

{7} For its part, the District also entered into an agreement with Greentree whereby Greentree operated the District's solid waste services. However, the District was apparently dissatisfied with aspects of Greentree's service. As a result, several months before the agreement's expiration date of November 30, 2012, the District issued a request for proposals for continued operation of the District's solid waste services. Greentree did not submit a proposal in response to this request. The District then retained a different entity to provide solid waste services, and this lawsuit followed.

Procedural History

{8} As previously mentioned, Greentree filed a lawsuit seeking a declaratory judgment, an injunction, and damages. Greentree asked the district court to declare, among other things, that: (1) the County "contractually transferred all its jurisdiction and authority in favor of [Greentree] for the collection of solid waste in the unincorporated areas[,] including the area designated as the . . . District"; and (2) the "creation of the [District] did not statutorily confer the exclusive power to collect solid waste within its jurisdiction[,] or if such power was conferred, it was not superior to . . . the existing contractual rights" established by the agreements between the County and Greentree. Greentree further asked the district court to enjoin the County and the District "from collecting solid waste in the unincorporated areas of [the] County" and to order that the County could not "abrogate any contractual obligation giving the exclusive right to collect solid waste to [Greentree]." Greentree also sought damages from the County.

{9} The District filed motions to dismiss Greentree's complaint for failure to state a claim and for summary judgment, and the County joined in those motions. The District argued that Greentree did not have an exclusive right to serve the District and that its remedy for loss of the contract for services in the District was either to protest the formation of the District or to file a grievance under the Procurement Code. In response to the motion for summary judgment, Greentree did not offer any evidence or dispute any of the District's asserted material facts. Instead, it attacked the District's proffered facts as incorrect legal conclusions or as irrelevant.

{10} Greentree filed its own motion for partial summary judgment, in which it argued that the statutory scheme permitting the formation of water and sanitation districts does not give such districts the exclusive right to collect and dispose of solid waste. It further argued that the County's 2008 ordinance, which excluded water and sanitation districts from mandated solid waste provisions, unconstitutionally impaired Greentree's contract rights under the 1992 joint powers agreement, which had granted Greentree the authority to collect solid waste in the County's unincorporated areas.

{11} Following a hearing, the district court granted the District's motions to dismiss and for summary judgment and dismissed all claims against the District and the County "because as a matter of law [the] County could not prohibit or stop formation of [the District] and does not [have] the authority to prohibit [the District] from establishing a solid waste collection system as permitted by [Section] 73-21-3(B)." The court denied Greentree's motion for partial summary judgment. This appeal followed.

DISCUSSION

{12} On appeal, we understand Greentree to present two primary reasons why it contends summary judgment in favor of the County and the District was error.[1] First, it maintains that various statutes confer exclusive authority on counties to collect solid waste and to assign that authority by way of a joint powers agreement and that the 1992 joint powers agreement assigned to Greentree the County's exclusive authority in this regard. Second, Greentree maintains that summary judgment in favor of the County and the District impairs its contractual rights in violation of the New Mexico Constitution. Greentree makes three additional arguments that we decline to address.

Standard of Review

{13} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. Greentree concedes that the material facts are not in dispute and that the appeal presents a question of law.

{14} This case requires us to interpret contracts and statutes. "We review a district court's interpretation of an unambiguous contract de novo[.]" *Smith & Marrs, Inc. v. Osborn*, 2008-NMCA-043, ¶ 10, 143 N.M. 684, 180 P.3d 1183 (internal quotation marks and citation omitted). "The purpose, meaning and intent of the parties to a contract is to be deduced from the language employed by them; and where such language is not ambiguous, it is conclusive." *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 27, 150 N.M. 398, 259 P.3d 803 (internal quotation marks and citation omitted). We also review statutory construction de novo. *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 18, 147 N.M. 523, 226 P.3d 622. "When construing statutes, [the appellate court's] guiding principle is to determine and give effect to legislative intent." *Albuquerque Bernalillo Cnty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 52, 148 N.M. 21, 229 P.3d 494 (internal quotation marks and citation omitted). "In discerning the Legislature's intent, [the appellate courts] are aided by classic canons of statutory construction, and we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* (alteration, internal quotation marks, and citation omitted). In addition, "the provisions of a statute must be read together with other statutes *in pari materia* under the presumption that the legislature acted with full knowledge of relevant statutory and common law." *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 4, 115 N.M. 573, 855 P.2d 562.

Greentree Did Not Have Exclusive Authority Over Solid Waste

{15} Greentree relies on several statutes and a federal case to support its contention that it had the exclusive authority to manage solid waste in the unincorporated parts of the County. It contends that two statutes "authorize[] local public bodies to organize, operate, and, when appropriate, assign the collection and disposal of solid waste generated within the jurisdiction."

[1]Greentree does not address any of its arguments to the district court's order granting the District's motion to dismiss but limits its contentions to the order granting the District's motion for summary judgment. We limit our discussion accordingly.

See NMSA 1978, § 3-48-3 (2003); NMSA 1978, § 4-56-3 (1971). Once the County assigned this authority to Greentree under the 1992 joint powers agreement, Greentree's argument continues, the assignment was binding and precluded the District's operation of a solid waste system in the County. Greentree claims that its exclusive right to operate in the County is supported by *Seay Brothers, Inc. v. City of Albuquerque*, 601 F. Supp. 1518 (D.N.M. 1985).

{16} Greentree is correct that Sections 3-48-3 and 4-56-3 permit municipalities and counties to establish systems for the disposal of refuse. Section 3-48-3(A) (permitting municipalities to "provide for the collection and disposal of refuse"); § 4-56-3(A) (permitting counties to "establish[] a system of collection and disposal of refuse"). It is further correct that the 1991 joint powers agreement gave Greentree the authority to manage solid waste in the municipalities that were parties to the agreement, and that the 1992 joint powers agreement gave Greentree the same authority in the unincorporated areas of the County. But these facts do not lead to the conclusion that Greentree had exclusive and permanent authority over the area for which the District was created.

{17} The 1991 and 1992 joint powers agreements were authorized by the Joint Powers Agreements Act, NMSA 1978, §§ 11-1-1 to -7 (1961, as amended through 2009). According to that Act, "two or more public agencies by agreement may jointly exercise any power common to the contracting parties[.]" Section 11-1-3. A "public agency" includes "a county, municipality, public corporation or public district of this state[.]" Section 11-1-2(A). Greentree is a "public district" because it was created pursuant to the Community Service District Act. Thus, the parties to the 1991 joint powers agreement were the County, the specified municipalities, and Greentree. The parties to the 1992 joint powers agreement were the County and Greentree.

{18} Notably, the District was *not* a party to either agreement because it did not exist until 2005. Under basic tenets of contract law, a contract cannot ordinarily bind an entity that is not a party to the contract. Apparently recognizing this legal precept, Greentree argues that the joint powers agreements bound the County and that the County somehow breached the agreements by allowing the District to manage solid waste in one unincorporated part of the County.

{19} The problem with Greentree's argument is that the District came into existence under a statutory scheme over which the County had no control. Water and sanitation districts, like the District in this case, are governed by the Water and Sanitation District Act. This Act provides that "[w]ater and sanitation districts may be created for the purpose of . . . purchasing, acquiring, establishing or constructing sanitary sewers or a system of sewage disposal, garbage or refuse disposal[.]" Section 73-21-3(B). A water and sanitation district cannot exist until it has undergone a procedurally intense process, which includes the filing of a petition signed by at least twenty-five percent of the tax-paying electors in the proposed district, Section 73-21-6(A); approval by a county special district commission, Section 73-21-8; approval of the petition by the district court after consultation with the state engineer and the environmental improvement division of the department of environment, Section 73-21-9(D); approval by a majority of votes cast in an election submitted to the tax-paying electors in the proposed district, Section 73-21-9(F)-(I); and filing of a district court order establishing the district, Section 73-21-9(J). A county's only contribution to this process is the appointment of two of the five members of the county special district commission. *See* NMSA 1978, § 4-53-3(A)(1) (1965). Thus, the County in the present case played no role in the creation of the District or the District's assumption of solid waste management.

{20} Greentree apparently had no complaint about the County or the District during

the time period when the District contracted with Greentree to perform solid waste management. Greentree's disgruntlement began when the District elected to contract with another entity to perform those services. But it is difficult to understand how Greentree had any basis for complaint because it failed to submit a proposal in response to the District's request for proposals in 2012, when the District's contract with Greentree was about to expire. It appears that Greentree's exclusivity argument in this case was an after-the-fact attempt to revive the contractual arrangement with the District.

{21} We see nothing in the statutory schemes or the joint powers agreements that supports Greentree's view that it had an exclusive right to manage solid waste disposal in the area covered by the District. To the contrary, the Legislature apparently adopted the Water and Sanitation District Act to permit more densely populated unincorporated areas in the State's various counties to provide their own quasi-municipal services to benefit their residents. The Legislature permitted the creation of water and sanitation districts because they "will serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants of said districts." Section 73-21-1. Such districts relieve the counties in which they exist from part of the burden of providing services to unincorporated areas. In this case, the District would have considered Greentree as a potential provider of services, but Greentree failed to submit a proposal in response to the District's request for proposals. Absent such a proposal, Greentree gave up any potential contractual right to provide services in the District.

{22} We are not persuaded by Greentree's reliance on *Seay Brothers*. In that case, the United States District Court for the District of New Mexico rejected a private refuse collector's antitrust challenge to ordinances enacted by the City of Albuquerque that precluded private refuse collectors from collecting refuse in the city. 601 F. Supp. at 1519. The court held that the city met the requirements of the state action exemption to the Sherman Antitrust Act. *Id.* at 1523.

{23} We fail to see how the *Seay Brothers* case has any relevance to the present case. The case before us does not implicate the Sherman Act, the state action exemption, or a municipality. At most, *Seay Brothers* stands for the notion that our Legislature, in Section 3-48-2, authorized municipalities to manage their own refuse collection. It says nothing about the exclusivity of a county's contract with a waste management entity, as Greentree argues.

The Summary Judgment Does Not Impair Greentree's Contractual Rights

{24} Greentree contends that the summary judgment in favor of the District impairs its contractual rights in violation of Article II, Section 19 of the New Mexico Constitution. It claims that creation of the District via the Water and Sanitation District Act impairs its right to collect solid waste that was contractually conferred upon it by the joint powers agreements.

{25} Greentree does not develop this argument, apart from citing *Whitely v. New Mexico State Personnel Board*, 1993-NMSC-019, 115 N.M. 308, 850 P.2d 1011. *Whitely* is inapposite because it held that

the contract clause in the constitution does not apply where there is no contract subject to impairment. *Id.* ¶ 9. In the present case, Greentree clearly had a contract with the County, and creation of the District obviously reduced the unincorporated areas covered by that contract. But Greentree's argument fails because the purpose of its contract with the County—waste removal—is an activity that is subject to legislative regulation. And, as the United States Supreme Court said in connection with the federal constitution's contract clause, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them." *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

Arguments That We Decline to Address

{26} Greentree makes three additional arguments that we decline to address—two because they are undeveloped and one because it was raised for the first time in the reply brief.

{27} Greentree cursorily argues that: (1) summary judgment in favor of the District was erroneous because, in the course of creating a water and sanitation district, the residents of the area served by the District failed to establish that their solid waste management needs were unserved or underserved at the time; and (2) the district court should have granted Greentree's motion for partial summary judgment. In connection with the first argument, Greentree does not elaborate on its conclusory assertion, nor does it point to a specific provision in the Water and Sanitation District Act in support of its contention. With regard to its second argument, Greentree appears only to maintain that if summary judgment in favor of the County and the District was wrong, then summary judgment in favor of Greentree must be right. We decline to consider either of these undeveloped arguments. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 ("We will not review unclear arguments, or guess at what [a party's] arguments might be.").

{28} Finally, Greentree argues for the first time in its reply brief that its joint powers agreement with the County "preempted the ability of [the District] from exercising the same statutory power previously exercised by [the] County . . . on behalf of the entire unincorporated areas of the county." Ordinarily, we will not consider an argument raised for the first time in a reply brief unless it is directed to new arguments or authorities presented in the answer brief. *Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 29, 127 N.M. 282, 980 P.2d 65. The answer brief in this case did not discuss the concept of preemption.

CONCLUSION

{29} For the foregoing reasons, we affirm the summary judgment entered in favor of the County and the District.

{30} IT IS SO ORDERED.

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
CYNTHIA A. FRY, Judge

Certiorari Denied, December 7, 2015, No. 35,584

From the New Mexico Court of Appeals

Opinion Number:2016-NMCA-006

No. 32,838 (filed October 5, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
GREGORY M. HOBBS,

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
FREDDIE J. ROMERO, District Judge

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Opinion

Linda M. Vanzi, Judge

{1} Defendant Gregory Marvin Hobbs appeals his conviction for voluntary manslaughter with a firearm enhancement, contrary to NMSA 1978, § 30-2-3(A) (1994), and NMSA 1978, § 31-18-16(A) (1993). Defendant raises three issues, which we have reorganized and address as follows: (1) whether Defendant's right to a public trial was violated when the district court partially closed the courtroom during the testimony of one of his witnesses, (2) whether Defendant received ineffective assistance of counsel, and (3) whether the district court erred in denying Defendant's request for a new trial. We affirm.

BACKGROUND

{2} It is undisputed that Defendant shot and killed Ruben Archuleta, Jr. (Ruben Jr.) and Ruben Archuleta, Sr., also known as Hammer (Victim), during an altercation that occurred on June 15, 2012. The State did not prosecute Defendant for Ruben Jr.'s death because it determined that the killing of Ruben Jr. was legally justified. Defendant was, however, charged with and convicted for voluntary manslaughter for causing Victim's death. Defendant appeals his conviction and raises three independent issues. The facts relevant to each issue will be discussed below.

DISCUSSION

Courtroom Closure

{3} Britini S., a minor, witnessed the struggle between Defendant and Victim. She testified at Defendant's preliminary hearing and was later subpoenaed by Defendant to testify at his trial. Defendant considered Britini's testimony to be crucial to his theory of self-defense.

{4} Britini failed to appear on the first day of trial, so the district court issued a bench warrant for her arrest. After her father called the judge's chambers to express concern for his daughter's safety, the judge held a conference regarding the conditions under which Britini would testify. The judge and counsel for the State and Defendant interviewed Britini in the presence of Defendant and Britini's mother.

{5} Britini, who was six and one-half months pregnant at the time of trial, explained that she was not comfortable testifying in front of an audience because she feared retaliation from Victim's family. She stated that approximately two weeks after she testified at the preliminary hearing she was physically assaulted by a girl whom she did not know, but who was with two of Victim's sons. Britini informed the court that she was afraid that she would not be able to defend herself if she were attacked again due to her pregnancy, and she felt like she had to watch her back. Likewise, Britini's mother expressed concern for Britini's safety and the safety of her unborn grandchild.

{6} Defense counsel proposed that Britini be deemed unavailable and suggested that Britini's testimony from the preliminary hearing be admitted in lieu of testimony at the trial. The State agreed that Britini's fear of retaliation was reasonable because her attacker had been in the company of Victim's sons. However, the State opposed using Britini's testimony from the preliminary hearing and argued that the situation did not rise to the level of deeming Britini unavailable. The judge also expressed his concern for Britini's safety but stated that he did not think that he had the authority to exclude the public from the proceedings. In response, defense counsel asked the judge, "[n]ot even upon stipulation of the parties[,] your honor?" Counsel then stated that "the defense would be happy to stipulate for the purpose of her testimony that the court could be cleared . . . of everyone but the bailiffs [and] parties[.]" The State also agreed to the stipulation.

{7} The judge and counsel for the State and Defendant discussed Defendant's rights, Victim's rights, the public's rights, and how these rights could be affected if the district court agreed to partially close the courtroom during Britini's testimony. After careful consideration, and based upon the parties' stipulation to a partial closure of the courtroom, the district court decided to exclude members of Victim's *and* Defendant's families from the courtroom while Britini testified. The judge explained to Britini that he would exclude Victim's and Defendant's families while she testified but that he could not seal the courtroom. The judge further said that if someone from the newspaper was in the audience, the attorneys could ask that person "[t]o give some consideration so that [her] name [was not published] in the newspaper." The following day, Britini testified on behalf of Defendant. Her testimony and the partial courtroom closure lasted less than twenty minutes.

{8} On appeal, Defendant argues that the partial courtroom closure during Britini's testimony violated his Sixth Amendment right to a public trial, despite the fact that his defense counsel stipulated to the closure. He claims that the unconstitutional closure constitutes structural error requiring a new trial. He further argues that structural errors are subject to a relaxed preservation requirement and that they are not subject to a harmless error analysis. The State, on the other hand, asserts that

Defendant did not preserve this issue for appellate review, that Defendant stipulated to the closure, and that Defendant's stipulation has the effect of a waiver of this issue on appeal.

{9} "In a criminal trial, the accused shall enjoy the right to a speedy and public trial." *State v. Turrietta*, 2013-NMSC-036, ¶ 1, 308 P.3d 964 (citing U.S. Const. amend. VI; N.M. Const. art. II, § 14). The right to a public trial, however, "is not absolute and may give way in certain cases to other rights or interests." *Id.* Whether Defendant's constitutional rights were violated is a question of law and, therefore, our review is de novo. *Id.* ¶ 14.

{10} As an initial matter, Defendant appears to concede that he did not preserve this issue for appellate review, and we agree. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]"); *see also State v. Vandenberg*, 2003-NMSC-030, ¶ 52, 134 N.M. 566, 81 P.3d 19 ("In analyzing preservation, we look to the arguments made by Defendant below."); *State v. Jacobs*, 2000-NMSC-026, ¶ 12, 129 N.M. 448, 10 P.3d 127 ("In order to preserve an issue for appeal, it is essential that a party must make a timely objection that specifically apprises the [district] court of the claimed error and invokes an intelligent ruling thereon."). Despite Defendant's failure to preserve his Sixth Amendment claim, however, we address his assertion that the alleged unconstitutional closure violates his right to a public trial and constitutes a structural error requiring a new trial. *See Waller v. Georgia*, 467 U.S. 39, 49 (1984).

{11} "A structural error is a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *State v. Nguyen*, 2008-NMCA-073, ¶ 9, 144 N.M. 197, 185 P.3d 368 (internal quotation marks and citation omitted). "If a hearing is closed in violation of the Constitution, the denial of the right to a public trial is a structural error; thus, it is not subject to a harmless error analysis." *State v. Hood*, 2014-NMCA-034, ¶ 6, 320 P.3d 522. Therefore, if Defendant's right to a public trial was violated, such error would be a structural error.

{12} When determining the constitutionality of a courtroom closure, our Supreme Court in *Turrietta* adopted the "overriding interest" standard, discussed by the United States Supreme Court in *Waller*, 467 U.S. 39, and *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984). *See Turrietta*, 2013-NMSC-036, ¶¶ 17, 19. In *Waller*, the United States Supreme Court held that a closure "over the objections of the accused" must meet the following "overriding interest" four-pronged test:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [district] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Waller, 467 U.S. at 47-48.

{13} Defendant asserts that none of these prongs were satisfied. Specifically, he argues that: (1) neither party demonstrated an overriding interest for the closure; (2) the closure was overly broad; (3) the district court failed to adequately assess possible alternatives to closure; and (4) the district court failed to make adequate findings to support closure. Conversely, the State contends that the four prongs were met in this case. It contends that: (1) Britini's safety and the safety of her unborn child were the overriding interests for the closure; (2) the partial closure was not overly broad in scope or duration; (3) the district court considered alternatives and determined that the partial closure was the best option; and (4) the district court interviewed Britini and her mother in the presence of counsel for Defendant and the State and made sufficient factual findings to support the closure. For the reasons that follow, we conclude that Defendant waived his right to a public trial when his attorney expressly consented to the partial courtroom closure during Britini's testimony. Therefore, his structural error argument fails and consideration of the "overriding interest" standard is not required. We explain.

{14} "Fundamental rights, including constitutional rights, can be waived." *State v. Singleton*, 2001-NMCA-054, ¶ 11, 130 N.M. 583, 28 P.3d 1124. While "[s]ome rights are considered so personal to the defendant they necessitate inquiry into the individual defendant's decision-making process[,] . . . [o]ther rights generally pertaining to the conduct of trial may be waived through counsel and without an inquiry on the record into the validity of the waiver." *Id.* ¶ 12. "Defense attorneys make a wide variety of tactical decisions during the course of a criminal trial, and many of these decisions implicate the constitutional rights of a defendant." *Nguyen*, 2008-NMCA-073, ¶ 24. "A personal waiver by the defendant is not required for all of these decisions." *Id.* Furthermore, the United States Supreme Court has "uniformly recognized the public-trial guarantee as one created for the benefit of the defendant." *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (internal quotation marks and citation omitted). The right to "a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned," and "encourages witnesses to come forward [while] discourag[ing] perjury." *Waller*, 467 U.S. at 46 (internal quotation marks and citations omitted); *see also Peretz v. United States*, 501 U.S. 923, 936 (1991) (recognizing that a defendant may waive most basic rights, including his or her right to a public trial); *Levine v. United States*, 362 U.S. 610, 611, 619-20 (1960) (holding that the defendant's due process and public trial rights were not violated after the public had been excluded from the courtroom, in what began as a grand jury proceeding and continued as a hearing for the defendant's criminal contempt; the Supreme Court noted that the defendant made no request at any time to open the courtroom and simply "raise[d] an abstract claim only as an afterthought on appeal").

{15} In this case, Defendant believed that Britini's testimony was critical and would bolster his theory of self-defense. But Britini did not want to testify in front of an audience because she feared retaliation from Victim's family. After the district court denied defense counsel's request to use her preliminary hearing testimony in lieu of having her testify at trial, defense counsel proposed closing the courtroom for Britini's testimony. Counsel further stated that Defendant would stipulate to excluding everyone from the courtroom except the bailiffs and parties. Defendant was present when his attorney proposed this stipulation, and there is no indication in the record that he objected to it. Based on these facts, it is clear that Defendant waived his right to a public trial when his counsel expressly stipulated to—and even encouraged—the partial courtroom closure. *See Knighten vs. Commandant*, 142 Fed. Appx. 348, 351 (10th Cir. 2005) (unpublished) (holding that the defendant's counsel's express waiver of objection to the trial court's closure of courtroom during the victim's testimony

during court-martial on criminal charges precluded review of claim on military prisoner's application for writ of habeas corpus); *id.* ("The right to a public trial . . . may be waived, so long as the waiver is knowing and intelligent. . . . Counsel can waive the right on behalf of a client, at least in the absence of an objection by the client." (citations omitted)); *see also Addai v. Schmalenberger*, 776 F.3d 528, 533 (8th Cir. 2015) ("A defendant may certainly consent to the closure of the courtroom if he believes it to be in his favor, and if he chooses to do so, he can hardly claim on appeal that the closure violated his Sixth Amendment right."); *Crawford v. Minnesota*, 498 F.3d 851, 855 (8th Cir. 2007) (stating that, in Minnesota, a defendant's passive failure to object to closing the courtroom does not waive compliance with the public trial mandates set forth by statute and *Waller*, "[b]ut if the defendant acting through his attorney agrees to closure (and assuming no member of the public lodges a First Amendment objection), the issue is procedurally defaulted on appeal"). Given that defense counsel did not object to the partial courtroom closure during Britini's testimony and affirmatively encouraged it, Defendant is in no position to now claim that his Sixth Amendment right to a public trial was violated.

{16} Because we conclude that Defendant expressly consented to the closure to make his witness feel more comfortable during her testimony, we need not determine whether the *Waller* "overriding interest" four-pronged standard was met. *See Waller*, 467 U.S. at 47 (holding that, under the Sixth Amendment, a courtroom closure must meet the four-prong test when the accused has objected to the courtroom closure); *see also Addai*, 776 F.3d at 534 (explaining that, in a case where the defendant expressly consents to a courtroom closure, the court is not required to balance the interests described in *Waller*). Accordingly, we affirm on this issue.

Ineffective Assistance of Counsel

{17} Defendant claims that he received ineffective assistance of counsel because his attorney failed to retain or call an expert on bullet trajectories. Defendant contends that such expert testimony could have corroborated his self-defense theory and effectively rebutted the State's evidence. Defendant raises this issue as an alternative to his newly discovered evidence argument, which we discuss later in this Opinion.

{18} It is well established that criminal defendants have a constitutional right to effective assistance of counsel. *See Patterson v. LeMaster*, 2001-NMSC-013, ¶ 16, 130 N.M. 179, 21 P.3d 1032 ("The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, guarantees not only the right to counsel but the right to the effective assistance of counsel." (internal quotation marks and citation omitted))." We review the legal issues involved with claims of ineffective assistance of counsel de novo. . . [and] . . . defer to the findings of fact of the [district] court if substantial evidence supports the court's findings." *State v. Crocco*, 2014-NMSC-016, ¶ 11, 327 P.3d 1068 (citations omitted).

{19} Defendant bears the burden of showing that his counsel's performance was deficient and that he suffered prejudice as a result of the deficiency. *See State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. "When an ineffective assistance claim is first raised on direct appeal, we evaluate the facts that are part of the record." *Id.* "If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition[.]" *Id.*; *see also State v. Herrera*, 2001-NMCA-073, ¶ 37, 131 N.M. 22, 33 P.3d 22 ("When the record on appeal does not establish a prima facie case of ineffective assistance of counsel, this Court has expressed its preference for resolution of the issue in habeas corpus proceedings over remand for an evidentiary hearing.").

{20} Here, the jury convicted Defendant of voluntary manslaughter on February 1, 2013. On February 14, 2013, defense counsel filed a motion for a new trial and asserted that, while preparing for a different trial on February 6, 2013, she discovered that Nelson Welch, an expert witness whom she had retained in a different case, is qualified to give expert opinions regarding situations where two people are struggling over a weapon, as well as weapon discharges, trajectory, and angles of bullets. Had she known about his expertise in this area before Defendant's trial, defense counsel says she would have hired Welch to testify on behalf of Defendant because he would have provided useful information central to Defendant's theory of self-defense. For the reasons that follow, we are not persuaded that defense counsel's failure to hire Welch rises to the level of ineffective assistance of counsel.

{21} Even if Defendant could show that counsel's performance was deficient because there was no tactical or strategic basis for failing to retain or consult with Welch or another trajectory expert, *see State v. Aragon*, 2009-NMCA-102, ¶¶ 9-15, 147 N.M. 26, 216 P.3d 276, Defendant "must demonstrate that his counsel's errors prejudiced his defense such that there was a reasonable probability that the outcome of the trial would have been different." *Id.* ¶ 16 (internal quotation marks and citation omitted). In the present case, Defendant claims that he suffered prejudice as a result of counsel's failure to call an expert witness to corroborate his theory of self-defense; however, there is no evidence in the record that the outcome would have been different if counsel had retained or called a trajectory expert to testify on his behalf. To the contrary, Dr. Sam Andrews from the Office of the Medical Investigator (OMI) testified regarding the path of the bullets through Victim's body, including that the fatal bullet was shot very close to the body and from a position above Victim's chest. Further, there was evidence presented regarding the struggle between Defendant and Victim for the firearm, which would have supported Dr. Andrews' testimony. Other than being possibly cumulative or contradictory, Defendant does not show a probability that an expert's testimony regarding a struggle for a firearm and the trajectory of bullets would change the outcome if a new trial was granted.

{22} Defendant's claim of prejudice is based on mere speculation. Without specifying what an expert would have testified to, Defendant asserts that the expert "could have provided useful information . . . central to the theory of defense[;]" "could have reviewed Dr. Andrews' analysis to confirm or contest his findings[;]" "could have corroborated Dr. Andrews' theories if accurate, and if contradictory, would have provided necessary assistance for effective cross-examination of those theories" and "could have offered scientific evidence" that would have bolstered his self-defense theory. This conjecture is not enough to establish prejudice. *See In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 ("An assertion of prejudice is not a showing of prejudice.").

{23} Therefore, we conclude that Defendant has not established a prima facie case of ineffective assistance of counsel. *See State v. Grogan*, 2007-NMSC-039, ¶ 11, 142 N.M. 107, 163 P.3d 494 ("The defendant has the burden to show both

incompetence and prejudice."). Absent a prima facie case of ineffective assistance of counsel, Defendant's remedy is through habeas proceedings. *State v. Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31 (stating that "[t]his Court has expressed its preference for habeas corpus proceedings over remand when the record on appeal does not establish a prima facie case of ineffective assistance of counsel").

Denial of Request for New Trial

{24} Defendant asserts that the district court abused its discretion in denying his request for a new trial on three grounds: (1) juror bias, (2) newly discovered evidence, and (3) the district court's failure to instruct the jury regarding the timing of a break during Defendant's closing argument. "The general rule is that a motion for a new trial is not favored and this Court will only reverse a denial of a motion for new trial upon a showing of a clear abuse of discretion by the trial court." *State v. Curry*, 2002-NMCA-092, ¶ 18, 132 N.M. 602, 52 P.3d 974.

Juror Bias

{25} Defendant asserts that his right to a fair trial was compromised because a juror failed to disclose during voir dire that he knew one of the State's witnesses. *See State v. Johnson*, 2010-NMSC-016, ¶ 35, 148 N.M. 50, 229 P.3d 523 ("The Sixth Amendment of the United States Constitution guarantees defendants the right to trial by a fair and impartial jury and is implicated during voir dire."); *State v. McFall*, 1960-NMSC-084, ¶ 6, 67 N.M. 260, 354 P.2d 547 (emphasizing that the New Mexico Constitution guarantees a trial by an "impartial" jury). Specifically, he contends that the juror concealed that he knew witness Trisha Hart during voir dire.

{26} Tricia Hart investigated the crime scene on behalf of the OMI and was called to testify by the State. Prior to testifying, and outside the presence of the jury, Hart disclosed that she knew the juror from church and that the juror probably knew her "as Jerry's wife." Defense counsel stated that she had no objection to the juror, as long as the relationship was not a close and personal one. Although Defendant did not object to the juror at the time, he later argued in his post-trial motion and now on appeal that the district court erred by not asking the juror whether his acquaintance with Hart would affect his impartiality. Additionally, Defendant contends that he would have used a peremptory challenge to excuse the juror if the juror had disclosed his connection to Hart during voir dire. In its response to Defendant's motion for a new trial on this issue, the State attached an affidavit from the juror. The affidavit stated that the juror only realized that he and Hart attended the same church after the conclusion of the trial. It also stated that his verdict and consideration of the evidence was not influenced by any prior knowledge of Hart.

{27} While we recognize that "a lone biased juror undermines the impartiality of an entire jury," *State v. Gardner*, 2003-NMCA-107, ¶ 10, 134 N.M. 294, 76 P.3d 47, "Defendant bears the burden to establish that the jury was not fair and impartial, and must demonstrate bias or prejudice on the part of the remaining jurors." *State v. Gallegos*, 2009-NMSC-017, ¶ 22, 146 N.M. 88, 206 P.3d 993. Here, Defendant did not object to Hart's disclosure about the juror and made no attempt to inquire further into any relationship between Hart and the juror. Further, he makes no real argument that the juror was biased nor does he challenge the juror's sworn statement that the juror did not recognize Hart at the time of trial and only realized that they attended the same church when Hart introduced herself on the Sunday after the trial had concluded. Defendant has not come forth with any evidence that the juror recognized or knew Hart during the trial or that they had any relationship requiring the district court to hold an evidentiary hearing. Accordingly, we hold that Defendant has not sustained his burden of showing that this juror was biased or impartial. *See State v. Mann*, 2002-NMSC-001, ¶ 20, 131 N.M. 459, 39 P.3d 124 ("The essence of cases involving juror . . . bias is whether the circumstance unfairly affected the jury's deliberative process and resulted in an unfair jury."). The district court did not abuse its discretion in denying Defendant a new trial on this basis.

Newly Discovered Evidence

{28} This is an alternative argument to Defendant's ineffective assistance of counsel claim. It is unclear when counsel learned about Welch's trajectory expertise. In the State's response to the motion for a new trial, the State argued that defense counsel knew about Welch and his expertise before Defendant's trial because Welch had performed an examination of a firearm and viewed evidence in the other case months before Defendant's trial. During the hearing on Defendant's motion for a new trial, defense counsel advised the district court only that she hired Welch as a firearms expert in the other case, Welch has been an expert witness since 1974, and that she did not learn about his trajectory expertise until after Defendant's trial. The district court did not make a finding as to when defense counsel learned about Welch's trajectory expertise. Instead, the district court determined that the proffered expert testimony did not constitute newly discovered evidence or grounds for a new trial. The court based its decision on the fact that defense counsel had already argued trajectory issues in closing argument based on testimony presented to the jury.

{29} In his ineffective assistance of counsel claim, Defendant acknowledges that trajectory experts existed before his trial. And he states specifically that his attorney "discovered the usefulness of a bullet trajectory expert in a separate case prior to [Defendant's] trial." Now, however, Defendant claims that this is newly discovered evidence and that his attorney did not learn about trajectory experts until after Defendant's trial and this discovery constitutes newly discovered evidence that warrants a new trial. Defendant cannot have it both ways.

{30} A motion for a new trial based on an allegation of newly discovered evidence must meet six requirements to be granted: (1) "it will probably change the result if a new trial is granted;" (2) "it must have been discovered since the trial;" (3) "it could not have been discovered before the trial by the exercise of due diligence;" (4) "it must be material;" (5) "it must not be merely cumulative; and" (6) "it must not be merely impeaching or contradictory." *State v. Garcia*, 2005-NMSC-038, ¶ 8, 138 N.M. 659, 125 P.3d 638 (internal quotation marks and citation omitted).

{31} The allegedly newly discovered evidence was Welch, an expert in bullet trajectory who had previously been retained by defense counsel in a separate case. Defendant claims that Welch could have testified about the trajectory in this case and, in particular, the position of Victim's body when the bullets entered his body. According to Defendant, the angle of the lethal shot could have assisted his self-defense argument. We conclude that counsel's realization that a trajectory expert may have bolstered Defendant's theory of self-defense does not constitute newly discovered evidence. *See Curry*, 2002-NMCA-092, ¶¶ 17-19 (holding that the testimony of a witness known before trial, but who was not available at

trial, did not constitute newly discovered evidence). Even if defense counsel did not learn about Welch's trajectory expertise until after Defendant's trial, the existence of trajectory experts could have been discovered before trial by the exercise of due diligence. Moreover, because it is unclear what Welch, or another trajectory witness, would have testified, we cannot assess whether the evidence would probably change the result if a new trial is granted or whether the evidence would be material, cumulative, impeaching, or contradictory. *See Garcia*, 2005-NMSC-038, ¶ 8.

{32} "Given the wide latitude we provide to district courts in resolving motions for a new trial based on newly discovered evidence, we cannot conclude that an abuse of discretion occurred on these facts." *State v. Gallegos*, 2011-NMSC-027, ¶ 77, 149 N.M. 704, 254 P.3d 655; *see also State v. Sosa*, 1997-NMSC-032, ¶ 16, 123 N.M. 564, 943 P.2d 1017 (explaining that motions for a new trial based on newly discovered evidence are "not encouraged" and the "denial of such a motion will only be reversed if the district court has acted arbitrarily, capriciously, or beyond reason"); *Curry*, 2002-NMCA-092, ¶ 21 (affirming denial of motion for new trial thus rejecting the defendant's attempt to "take another bite at the apple").

Jury Break

{33} During Defendant's closing argument, the State asked for a bench conference and among other issues, asked the district court to admonish the spectators for their disruptive actions. Following the bench conference, the district court sent the jury out for a break in order to address the trial spectators. The court did not inform the jury of the reason for the break, and Defendant did not object or request a curative instruction to address the timing of the break.

{34} After the jury convicted him of voluntary manslaughter, Defendant argued that he was entitled to a new trial because the timing of the break may have left the jury with the impression that defense counsel did or said something inappropriate to cause the break and that the appearance of impropriety prejudiced him. The district court denied Defendant's request for a new trial, and Defendant raises the same argument on appeal.

{35} Defendant acknowledges that he did not preserve this issue for appellate review, and he raises this cursory argument as fundamental error pursuant to Rule 12-216(B)(2) NMRA. Parties alleging fundamental error must demonstrate the existence of circumstances that "shock the conscience" or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked. *State v. Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176; *see also State v. Barber*, 2004-NMSC-019, ¶ 17, 135 N.M. 621, 92 P.3d 633 (providing that fundamental error only occurs in "cases with defendants who are indisputably innocent, and cases in which a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused").

{36} Defendant provides no argument concerning this hypothetically perceived prejudice to him based on the timing of the break and the district court's failure to give a curative instruction. Indeed he contends only that the timing "*might* have led the jury to believe that defense counsel's conduct caused the break." (Emphasis added.) This equivocal statement simply does not rise to the level of fundamental error and does not demonstrate the existence of circumstances that "shock the conscience." Therefore, we hold that the district court did not abuse its discretion in denying Defendant a new trial on this basis.

CONCLUSION

{37} For the foregoing reasons, we affirm.

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

LINDA M. VANZI, Judge

WE CONCUR:
MICHAEL E. VIGIL, Chief Judge
MICHAEL D. BUSTAMANTE, Judge

Certiorari Denied, December 7, 2015, No. 35,591

From the New Mexico Court of Appeals

Opinion Number:2016-NMCA-007

No. 32,663 (filed October 7, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOE ANDERSON,
Defendant-Appellant,

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
JACQUELINE D. FLORES, District Judge

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Opinion

Roderick T. Kennedy, Judge

{1} Defendant appeals from his conviction for second degree murder asserting that fundamental error was committed when the district court failed to give a necessary instruction that it had agreed to give. Defendant asserts this was fundamental error. Because the instruction was critical to the jury's determination on the issue of self-defense and because the district court had a duty to fully instruct the jury on all relevant aspects of the law, we agree with Defendant, reverse his conviction, and remand for a new trial.

I. BACKGROUND

{2} The trial presented differing accounts to the jury of what happened between Defendant and Vicente Sanchez the night of November 19, 2010. It appears, however, that the following events occurred, subject to some variation.

A. Altercation

{3} Sanchez attended a house party on November 19, 2010, at which Defendant was present. The two men took an immediate dislike to each other and got into an argument. When Sanchez's girlfriend tried to intervene, Defendant moved her out of the way, and Sanchez punched Defendant. Defendant fell backward into the next room, and a brawl began between several individuals with apparent loyalties to either Sanchez or Defendant. Sanchez's girlfriend armed herself with a handgun taken from Sanchez's pocket and, upon brandishing the handgun, brought the brawl to a momentary standstill. During the lull, Defendant removed himself and hid behind the doorway of the room into which he fell where he, too, drew a handgun. Believing Sanchez had obtained the gun from his girlfriend by this time, Defendant came out from behind the doorway with his gun raised and fired six shots from a distance of approximately two to three feet, four of which hit Sanchez. Sanchez died from the wounds he sustained, and Defendant was charged with murdering Sanchez.

B. Trial—Diagrams

{4} Detective Anton Maltby created diagrams of the home where the altercation occurred as part of his investigation of the incident. The diagrams gave a rough depiction of the location of the house, yard, surrounding buildings, cars, and rooms, as well as provided the layout of the furniture in the rooms. Defense counsel objected to the State's proffer of these diagrams, both during trial and in a motion in limine, claiming that they should be excluded under Rule 11-403 NMRA, asserting they were cumulative because the jury could understand the layout of the buildings and rooms by examining photographs, and misleading because they were not drawn to scale and did not accurately portray the location of the furniture in the living room. The district court overruled the objection because it believed the diagrams were instructive to the jury and because witnesses had acknowledged that they were not drawn to scale.

C. Trial—Jury Instructions

{5} During trial, Defendant requested a self-defense instruction (UJI 14-5171 NMRA) and a stand-your-ground (or no-retreat) instruction (UJI 14-5190 NMRA). The district court allowed the self-defense instruction. In response to the State's objection to the no-retreat instruction, the district court held that it was for the jury to decide whether Defendant was standing his ground or re-involving himself in the conflict and that the jury should be able to make an informed decision on that issue. As such, the district court decided to submit the no-retreat instruction to the jury as well.

{6} It is undisputed that, although the district court determined that both a general self-defense instruction and a stand-your-ground instruction were warranted in the case, it did not instruct the jury on New Mexico's stand-your-ground law, either orally or in the written instructions.[1] The omission of UJI 14-5190 appears to have been the result of an oversight on the part of the district court and all counsel. During the course of deliberations, the jury submitted a question to the district court asking if there was a "stand-your-ground" law in New Mexico. The jury ultimately withdrew the question because it had "found what [it was] looking for." Defense counsel mistakenly believed that the no-retreat instruction had been included in the written instructions given to the jury and offered the district court reassurances to that effect. Counsel's reassurance, coupled with the withdrawal of the jury's question, ended the court's discussion with counsel regarding the stand-your-ground instruction. The jury ultimately found Defendant guilty of second degree murder, and he appeals.

II. DISCUSSION

{7} Defendant makes several assertions of error, which we consolidate as an assertion of fundamental error based on the

[1]The written jury instructions appear in consecutive order in the record proper with no gaps and do not include UJI 14-5190.

missing jury instruction, an assertion of error based on the admission of a diagram of the house where the altercation occurred, and an assertion of error based on the district court's denial of a modification to UJI 14-250 NMRA.

A. The Omission of the Jury Instruction Was Fundamental Error

1. Fundamental Error

{8} Defendant did not object to the absence of UJI 14-5190 from the jury instructions when they were given. We therefore review only for fundamental error. *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 ("The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the error has been preserved we review the instructions for reversible error. If not, we review for fundamental error." (citation omitted)); *State v. Cunningham*, 2000-NMSC-009, ¶ 8, 128 N.M. 711, 998 P.2d 176. An error is fundamental when it " 'goes to the foundation or basis of a defendant's rights.' " *Cunningham*, 2000-NMSC-009, ¶ 13 (quoting *State v. Garcia*, 1942-NMSC-030, ¶ 25, 46 N.M. 302, 128 P.2d 459). "We will not 'uphold a conviction if an error implicated a fundamental unfairness within the system that would undermine judicial integrity if left unchecked.' " *State v. Rodarte*, 2011-NMCA-067, ¶ 10, 149 N.M. 819, 255 P.3d 397 (quoting *State v. Barber*, 2004-NMSC-019, ¶ 18, 135 N.M. 621, 92 P.3d 633).

{9} When reviewing jury instruction issues for fundamental error, we first apply the standard for reversible error by determining if a reasonable juror would have been "confused or misdirected" by the jury instructions that were given. *Barber*, 2004-NMSC-019, ¶ 19. Juror confusion or misdirection may stem "from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Benally*, 2001-NMSC-033, ¶ 12. If we determine that a reasonable juror would have been confused or misdirected by the instructions given, our fundamental error analysis requires us to then " 'review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the [d]efendant's conviction was the result of a plain miscarriage of justice.' " *State v. Sandoval*, 2011-NMSC-022, ¶ 20, 150 N.M. 224, 258 P.3d 1016 (quoting *Barber*, 2004-NMSC-019, ¶ 19). If such a miscarriage of justice exists, we deem it fundamental error.

2. The Jury Was Misdirected by the Instructions Issued

{10} The State makes no challenge to the district court's decision that the instruction was warranted but states it was solely Defendant's responsibility to ensure it was given. We disagree with this limited view. Where there is any evidence to establish a self-defense theory, it is the duty of the court to fully and clearly instruct the jury on all relevant aspects of self-defense. *Benally*, 2001-NMSC-033, ¶ 41; *State v. Heisler*, 1954-NMSC-032, ¶ 23, 58 N.M. 446, 272 P.2d 660 (stating that "where self-defense is involved in a criminal case and there is any evidence, although slight, to establish [self-defense], it is not only proper for the court, but its duty as well, to instruct the jury fully and clearly on all phases of the law on the issue that are warranted by the evidence"). The district court's conclusion that there was evidence to support the issuance of both the general self-defense instruction and the no-retreat instruction triggered the district court's duty to fully and clearly instruct the jury on both self-defense and no-retreat. *See Heisler*, 1954-NMSC-032, ¶ 23.

{11} The jury was informed of the elements of self-defense: (1) Defendant was put in fear by an apparent danger of immediate death or great bodily harm, (2) the killing resulted from that fear, and (3) Defendant acted reasonably when he or she killed. *State v. Rudolfo*, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170; *see also* UJI 14-5171 (enumerating the elements of self-defense). The jury was not, however, informed as required by UJI 14-5190 that a person "who is threatened with an attack need not retreat. In the exercise of his right of self[-]defense, he may stand his ground and defend himself."

{12} Because of the omission, the jury's understanding of all of the elements of the law governing self-defense was deficient. We conclude not only that a reasonable juror would have been misdirected by the jury instructions given, but also that the jury in Defendant's case was misdirected. As such, there was reversible error below; we now turn to an analysis of whether there was fundamental error.

{13} The State maintains that UJI 14-5190 is a definition or amplification of an essential self-defense element and that its omission from the given instructions therefore does not rise to the level of fundamental error. *See State v. Coffin*, 1999-NMSC-038, ¶ 17, 128 N.M. 192, 991 P.2d 477 (stating that "it is error to refuse a requested instruction defining or amplifying an element only if 'the element was not adequately covered by the instructions given' " (citation omitted)). While failure to instruct on a definition does not ordinarily rise to the level of fundamental error, some definitional instructions provide "a determination critical to understanding the elements instruction" and, as such, can be of central importance to a fair trial. *Barber*, 2004-NMSC-019, ¶¶ 20, 24-25 (discussing *State v. Mascareñas*, 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221). In order to determine whether UJI 14-5190 is a definitional instruction that "provided a determination critical to understanding" the self-defense instruction, we must consider all the facts and circumstances and decide "whether the missing instruction caused such confusion that the jury could have convicted [the d]efendant based upon a deficient understanding" of the law regarding self-defense. *Barber*, 2004-NMSC-019, ¶ 25 (concluding amplification of an instruction to provide a critical definition can prevent juror confusion). If such confusion existed, even if UJI 14-5190 is viewed as a definitional instruction, its omission may nevertheless constitute fundamental error.

{14} Where the evidentiary basis for the instruction has been laid, UJI 14-5190 informs jurors of what is reasonable under the third prong of UJI 14-5190, and it is therefore critical to understanding the third element of a general self-defense instruction. *See Barber*, 2004-NMSC-019, ¶ 25 (recognizing the necessity for jury instruction when absence of clarification would render the jury's understanding of the law deficient). Because Defendant's self-defense theory rests on the argument that, under the circumstances, he had no duty to retreat from the confrontation with Sanchez, and it is undisputed that that theory rests upon a correct statement of the law, we agree that the instructions provided to the jury failed to fully and adequately inform them of the law of self-defense relevant to the case. The jury was required to make a critical determination of whether Defendant acted reasonably when he killed Sanchez and could not make that determination without being informed as to whether New Mexico law deems it reasonable to stand-your-ground when retreat is possible. Omission of UJI 14-5190 alters what "reasonable" means in the context of self-defense in this case.

3. The No-Retreat Instruction Was Critical to the Jury's Self-Defense Determination

{15} We recognize that courts generally disfavor finding fundamental error where a definition is omitted from jury instructions. That reluctance is premised on the concept that many definitions carry common meanings that are comparable to legal meanings and, as such, their omission does not prejudice a defendant's rights. *See Barber*, 2004-NMSC-019, ¶ 22 (acknowledging that potential for jury confusion exists where the legal definition of a term is "not necessarily rooted in common discourse"); A.M. Swarthout, Annotation, *Duty in Instructing Jury in Criminal Prosecution to Explain and Define Offense Charged*, 169 A.L.R. 315, III(g) (acknowledging that while trial courts may have a "duty to define or explain technical words[,]" they often have no duty to define "nontechnical, self-explaining words or phrases which are of easy comprehension to the ordinary layman"). That is not the case here. Rather, the term "reasonable" in the third prong of the self-defense instruction carries a different meaning when read in conjunction with the no-retreat instruction than it does alone. Read alone, a person exercising the "degree of attention, knowledge, intelligence, and judgment that society requires of its members" is acting reasonably. *Black's Law Dictionary* (10th ed. 2014) (defining "reasonable person"). When read together with the no-retreat instruction, however, a person who, when threatened with an attack, does not retreat and stands his ground when exercising his right of self-defense is acting reasonably. *See* UJI 14-5190; *cf. Brown v. United States*, 256 U.S. 335, 344 (1921) (acknowledging that retreat, or failure to retreat, is a fact to be considered in determining whether actions made in self-defense were reasonable); *Rowe v. United States*, 164 U.S. 546, 558 (1896) (holding that a defendant's self-defense acts were reasonable where the law did not require him to retreat when threatened with a deadly weapon). Thus, we conclude that once the district court determined the propriety of giving it, the failure to provide the no-retreat instruction that informed a determination critical to the case was akin to a missing elements instruction. *Cf. Mascareñas*, 2000-NMSC-017, ¶ 20 (concluding that the definition of "reckless disregard" was not a mere amplification of a term and instead was more akin to an element instruction because it was aimed at preventing confusion of the standard necessary to sustain a conviction).

{16} Given the difference between the reasonableness standard of a self-defense instruction alone and a self-defense instruction read in conjunction with the no-retreat instruction, there is simply no way to determine to which standard Defendant was held. The jury's specific question on the subject and the absence of the instruction specifically informing the jury of the law, reinforce our conclusion. We therefore cannot determine that the jury delivered its verdict on a legally sound basis. The jury answered its own question regarding no-retreat with other information than the correct instruction. It was not fully and clearly informed as to the law governing the case and likely made its decision based, at least in some part, on a deficient understanding of the law governing self-defense.

{17} We conclude the jury's question regarding New Mexico's "stand-your-ground" law and its subsequent withdrawal of that question, is evidence that the jury needed the no-retreat instruction not only to be fully apprised of all relevant aspects of the law governing self-defense but also in order to avoid being misdirected by the instructions given. *See State v. Navarez*, 2010-NMCA-049, ¶ 25, 148 N.M. 820, 242 P.2d 387 (concluding that jury confusion was established by the jury's question to the trial court judge). The jury ultimately withdrew the question because it had "found what [it] was looking for[,]" namely, the "stand-your-ground" standard in New Mexico. We have no way of knowing what the jury found to clear up its confusion, but it was not UJI 14-5190.

B. Waiver Does Not Prohibit Fundamental Error Analysis

{18} The failure of defense counsel to realize that the complete UJI 14-5190 was not given, does not bear upon our fundamental error analysis. The very nature of fundamental error review is to protect rights that are essential to a defendant's defense and "which no court could or ought to permit him to waive." *State v. Garcia*, 1942-NMSC-030, ¶ 25, 46 N.M. 302, 128 P.2d 459. Fundamental error provides a means of relief that may not otherwise be available to defendants: "Where a man's fundamental rights have been violated, while he may be precluded by the terms of the statute or the rules of appellate procedure from insisting . . . upon relief . . . , this court has the power, in its discretion, to relieve him and to see that injustice is not done." *Id.* ¶ 23 (internal quotation marks and citation omitted). As such, the fundamental error doctrine stands as "[a]n exception to the general rule barring review of questions not properly preserved below." *State v. Osborne*, 1991-NMSC-032, ¶ 38, 111 N.M. 654, 808 P.2d 624 (internal quotation marks and citation omitted). Our courts have consistently acknowledged that waiver does not preclude courts from protecting a defendant's rights on appeal where fundamental error exists. *See, e.g.*, *State v. Villa*, 2004-NMSC-031, ¶ 15, 136 N.M. 367, 98 P.3d 1017 ("*Except in cases of fundamental error*, timely objections to improper instructions must be made or error, if any, will be regarded as waived in every case." (emphasis added) (alteration, internal quotation marks, and citation omitted)); *State v. Boeglin*, 1987-NMSC-002, ¶ 11, 105 N.M. 247, 731 P.2d 943 (concluding that, although the defendant's failure to object to incomplete instructions constituted a waiver of the objection, appellate courts "nevertheless will grant relief if fundamental error has occurred in a particular case").

{19} In light of existing precedent, even if Defendant did waive his objection to the omitted jury instruction, his waiver would not preclude our fundamental error analysis. *Cf. State v. Foxen*, 2001-NMCA-061, ¶ 12, 130 N.M. 670, 29 P.3d 1071 (declining to characterize omission of instruction as invited error where deficiencies in the jury instructions "were simply the result of oversight or neglect[,]" applying fundamental error analysis). We therefore conclude that, in light of the importance that self-defense and no-retreat had in Defendant's case, allowing his conviction to stand without adequate jury instructions would undermine judicial integrity and the legitimacy of the jury's verdict. *See Cunningham*, 2000-NMSC-009, ¶ 21 (inclining toward reversal if error indicated a fundamental unfairness within the system that would undermine judicial integrity). We conclude that Defendant's conviction was tainted by fundamental error and must be reversed. *See State v. Gee*, 2004-NMCA-042, ¶ 8, 135 N.M. 408, 89 P.3d 80 (stating that appellate courts "reverse for fundamental error when the foundation or basis of a defendant's case . . . is affected").

{20} Although this Opinion could end here with reversal, other issues raised by Defendant are likely to arise upon a retrial of the case. *See State v. Beal*, 1944-NMSC-011, ¶ 28, 48 N.M. 84, 146 P.2d 175. We therefore proceed to consider whether

the district court erred in allowing the diagrams to be admitted and whether it erred by refusing Defendant's modifications to UJI 14-250.

C. The District Court Did Not Abuse its Discretion in Admitting the Diagrams

{21} Appellate courts review a district court's decision to admit or exclude evidence for an abuse of discretion. *State v. Guerra*, 2012-NMSC-014, ¶ 36, 278 P.3d 1031. District courts have broad discretion when applying Rule 11-403. *Guerra*, 2012-NMSC-014, ¶ 36 (citing *State v. Chamberlain*, 1991-NMSC-094, ¶ 9, 112 N.M. 723, 819 P.2d 673).

{22} Defendant contends that under Rule 11-403, the district court abused its discretion by admitting diagrams that an investigating detective made because they had the potential to mislead the jury. Rule 11-403 allows the court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

{23} We conclude that the district court did not abuse its discretion in determining that the danger that the jury would be misled as to the size of the living room did not outweigh the probative value of the diagrams. This was especially true because several witnesses testified to the actual size of the space. In addition, photographs entered into evidence showed the space and revealed the actual placement of the furniture. The district court even attached a caption to each diagram to emphasize that they were not drawn to scale. In light of the foregoing, we conclude that Defendant has not demonstrated that the district court abused its discretion.

D. The District Court Did Not Err in Refusing Defendant's Modification of the UJI

{24} Although Defendant asserts the district court erred in refusing to allow his modified version of UJI 14-250, which addresses jury procedure for the various degrees of homicide, we conclude that it properly refused the requested instruction. The district court was bound to give UJI 14-250 "without substantive modifications or substitution." UJI Crim. General Use Note NMRA (stating that "when a uniform instruction is provided for the elements of a crime, a defense or a general explanatory instruction on evidence or trial procedure, the uniform instruction must be used without substantive modification or substitution"); *see, e.g.*, *State v. Watchman*, 2005-NMCA-125, ¶ 15, 138 N.M. 488, 122 P.3d 855 (stating that "there are a host of cases standing for the proposition that the uniform jury instructions and use notes are to be followed without substantial modification" (internal quotation marks and citation omitted)). Defendant requested the district court to submit an instruction to the jury stating, "If you find the state has not proved beyond a reasonable doubt that the defendant did not act in self-defense, you do not need to consider whether the defendant acted with sufficient provocation, and you must find the defendant not guilty." Even without the general use note setting forth a requirement that UJIs not be modified, the instructions given to the jury were sufficient to assuage any concern that the jury was not adequately instructed on the necessary standards.

{25} Reviewing all of the jury instructions as a whole, it is unlikely a reasonable juror would have been confused or misdirected. *State v. Laney*, 2003-NMCA-144, ¶ 38, 134 N.M. 648, 81 P.3d 591. The language that the district court rejected and Defendant complains should have been included, is virtually the same as the language included at the end of UJI 14-5190, the self-defense instruction. *See* UJI 14-5171 ("The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self[-]defense. If you have a reasonable doubt as to whether the defendant acted in self-defense you must find the defendant not guilty."). We therefore conclude that the district court properly rejected Defendant's proffered modifications to UJI 14-250.

III. CONCLUSION

{26} Defendant was deprived of a fair trial by the absence of a no-retreat instruction. We therefore reverse his conviction and remand for a new trial. We conclude there was no abuse of discretion in the district court's decision to allow the diagrams into evidence, subject to a limiting instruction. We also conclude there was no error in the district court's refusal to modify UJI 14-250.

{27} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

CYNTHIA A. FRY, Judge

Classified

Positions

New Mexico Association Of Counties Litigation Attorney

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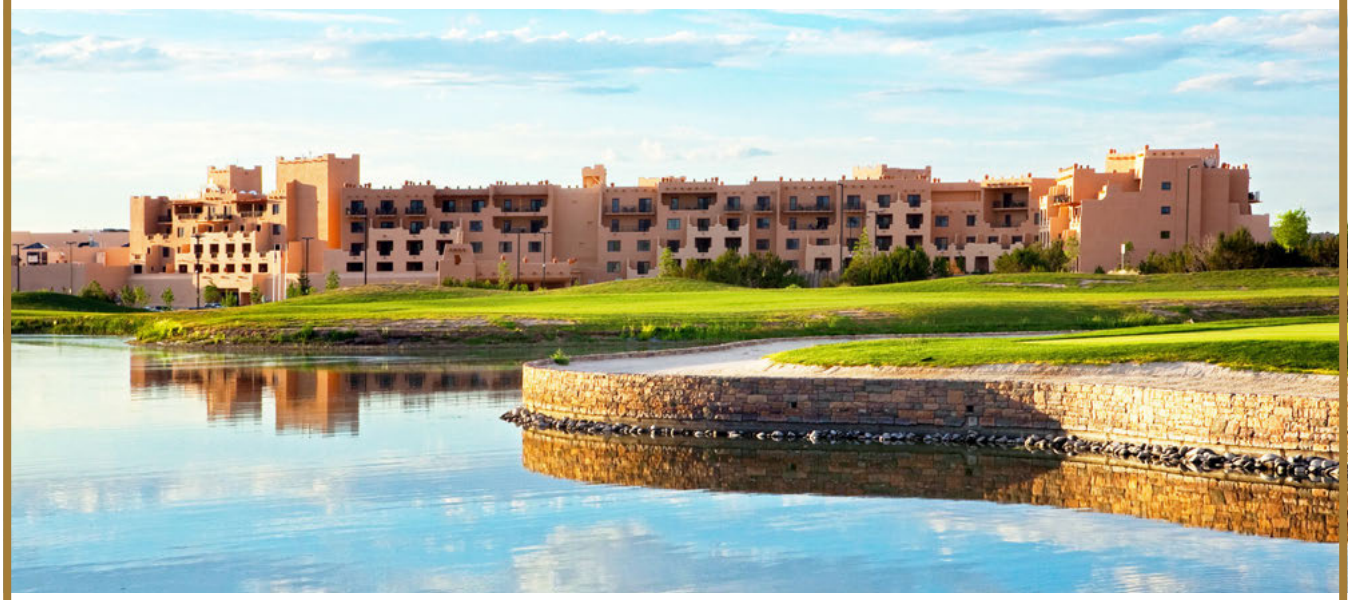

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