BAR BULLETIN

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New Mexico Gold, by Michael Rizzo Jr.

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28
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30
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5
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5
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Workshops and Legal Clinics

June

15
Family Law Clinic:
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

15
Common Legal Issues for Senior Citizens Workshop:
10–11:15 a.m., workshop
Noon–1 p.m., POA AHCD clinic,
Campos Senior Citizens Center, Santa Rosa, 1-800-876-6657

21
Cibola County Free Legal Clinic:
10 a.m.–2 p.m., 13th Judicial District Court, Grants, 505-287-8831

22
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6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

29
Common Legal Issues for Senior Citizens Workshop:
9:30–10:45 a.m., workshop
12:15–1:15 p.m., POA AHCD clinic,
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6
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6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

About the Cover Image: *New Mexico Gold*, digital photograph
Michael Rizzo Jr. works in several mediums. He started out in film photography and now works digitally and enjoys the freedom of Photoshop. He also creates serigraphs using some of those digital images and finds the rich colors of screen printing exciting to experiment with. For more information, contact Rizzo at rizzo_art@hotmail.com

Notices

Court News

Administrative Office of the Courts Judicial Compensation Committee

Notice of Public Meeting

The Judicial Compensation Committee will meet at 9 a.m.–noon, June 21, in room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe, to discuss fiscal year 2018 compensation for judges of the magistrate, metropolitan and district courts, the Court of Appeals and justices of the Supreme Court. The Commission will thereafter provide its judicial compensation report and recommendation for FY18 compensation to the Legislature during the 2017 session. The meeting is open to the public. For an agenda or more information call San Nithya, Administrative Office of the Courts, 505-476-1000.

State Bar News

Attorney Support Groups

- June 13, 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#.
- June 20, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)
- Aug. 1, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)

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

Children's Law Section

Donate to the Annual Art Contest Fund

The Children's Law Section seeks donations for its annual art contest fund. The contest aims to help improve the lives of New Mexico's youth who are involved with the juvenile justice system. The generous donations received each year from the community help defray the cost of supplies, prizes and an award reception. Through the years, the contest has demonstrated that communicating ideas and emotions through art and writing fosters thought and discussion among youth on how to change their lives for the better. To make a tax deductible donation, make a check out to the New Mexico State Bar Foundation and write "Children's Law Section Art Contest Fund" in the memo line. Mail checks to: State Bar of New Mexico, Attn: Breanna Henley, PO Box 92860, Albuquerque, NM 87199. For more information contact Ali Pauk, alison.pauk@lopdnm.us.

Young Lawyers Division

Lunch with the Judges of Chaves County

The "Lunch with the Judge" program is designed to allow Young Lawyers Division members to meet with local judges in an informal setting and ask questions of the judges and receive advice relating to their career paths in the legal profession. The next event will be at noon, June 29, featuring Chaves County judges. R.S.V.P. by June 28 to R.S.V.P. to Anna Rains at acrains@sbcw-law.com or 575-622-5440. Space is limited to the first 10 members Upon R.S.V.P., the lunch restaurant will be provided. All attendees will be responsible for payment of their own meal.

UNM

Law Library

Hours Through Aug. 21

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed
Holiday Closures	
Independence Day: July 4	

Natural Resources Journal

Call for Papers

The *Natural Resources Journal* seeks academic articles for its Winter 2017 issue, Volume 57.1, on water governance. Suggested topics include: institutional analysis and jurisprudence, collaborative approaches to water governance, drought planning and climate adaptation, water and equity, markets, water and economic development, interplay of human and natural systems and politics and conflict in water governance. To submit an article, email (1) a manuscript of the article with citations and (2) a link to or copy of the author's CV to nrj@law.unm.edu. Submissions should be received by July 1, 2016. Authors who receive a commission will be notified by July 31. Additional information, including an archive of past issues, is available at http://lawschool.unm.edu/nrj/.

Professionalism Tip

With respect to the courts and other tribunals:
I will refrain from filing frivolous motions.

Other Bars

First Judicial District Bar Association

June Buffet Luncheon with Judge Martha Vázquez

Join the First Judicial District Bar Association for its June buffet luncheon from noon– 1 p.m., June 20, at the Hilton Hotel, 100 Sandoval Street, Santa Fe. Hon. Martha Vázquez, U.S. District Judge for the District of New Mexico, will speak about practice in the federal courts and matters affecting the District of New Mexico and will answer questions. Attendance is $15 and includes a buffet lunch. R.S.V.P. by 5 p.m. on June 16 to Erin McSherry at erin.mcsherry@state.nm.us.

New Mexico Criminal Defense Lawyers Association

Evidence and Jury Trials CLE

Law and technology change the playing field in today's trial practice. Learn evidentiary issues involving the internet, character evidence and biased jurors at the New Mexico Criminal Defense Lawyers Association's "Evidence & Jury Trials in the 21st Century" CLE (6.0 G) on June 17 in Albuquerque. This seminar includes NMCDLA's annual membership meeting and Driscoll Award ceremony. Afterwards, NMCDLA members and their families and friends are invited to the annual membership party and silent auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar today.

New Mexico Defense Lawyers Association

Save the Date: 'Women in the Courtroom' Seminar

The New Mexico Defense Lawyers Association will present "I'm with her! Women in the Courtroom VI: Uniting for Success" (4.5 G, 1.0 EP) Aug. 5 at the Albuquerque Jewish Community Center. This dynamic day-long CLE seminar will enhance the skills of all female attorneys. It will conclude with a wine tasting reception. Save the date; registration will open in July at www.nmdla.org. For more information call NMDLA at 505-797-6021.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

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

Featured Member Resource

Attorney Resource Helpline

Provides State Bar members and non-admitted attorneys information and referrals in the areas of attorney regulation, ethics, registrations (non-admitted, pro hac vice, legal service and emeritus), rules, and general practice.
Contact the Office of General Counsel, rspinello@nmbar.org, 800-876-6227.

Entrepreneurs *in* Community Lawyering

New Mexico's Solo and Small Practice Incubator

Program Goals

- Train new attorneys to be successful solo practitioners
- Ensure that modest -income New Mexicans have access to affordable legal services
- Expand legal services in rural areas of New Mexico

Participants Receive

- Hands-on legal training
- Training in law practice management
- Help establishing alternative billing models
- Subsidized office space/equipment
- Access to client referral programs
- Networking opportunities
- Free CLE, bar dues, mentorship fees
- Free legal research tools, forms bank
- Low-cost malpractice insurance

Who can apply?

- Licensed attorneys with up to three years of practice
- Visit **www.nmbar.org/ECL** to apply, for the official Program Description and additional resources.

Currently accepting applications for the first three participating attorneys!

State Bar of New Mexico Foundation

For more information, contact Stormy Ralstin at 505-797-6053.

Legal Education

June

16–17 **Ninth Annual New Mexico Legal Service Providers Conference: Holistically Addressing Poverty and Advancing Equity for Women and Families in New Mexico**
10.0 G, 2.0 EP
Live Seminar, Albuquerque
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

17 **Evidence & Jury Trials in the 21st Century**
6.0 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

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

24 **Guardianship in New Mexico: the Kinship Guardianship Act (2016)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

July

13 **Hydrology and the Law**
6.5 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

14 **Natural Resource Damages**
10.0 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

15 **Best and Worst Practices Including Ethical Dilemmas in Mediation (2016)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **The Trial Variety: Juries, Experts and Litigation (2015)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **Writing and Speaking to Win (2014)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **The Ethics of Creating Attorney-Client Relationships in the Electronic Age**
1.0 EP
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

28 **Reciprocity—Introduction to the Practice of Law in New Mexico**
4.5 G, 2.5 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Talkin 'Bout My Generation: Professional Responsibility Dilemmas Among Generations (2015)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Civility and Professionalism (Ethicspalooza Redux – Winter 2015 Edition)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Everything Old is New Again - How the Disciplinary Board Works (Ethicspalooza Redux – Winter 2015 Edition)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

August

2 **Due Diligence in Real Estate Acquisitions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Charging Orders in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Role of Public Benefits in Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **13th Annual Comprehensive Conference on Energy in the Southwest**
13.2 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

19–20 **2016 Annual Meeting–Bench & Bar Conference**
12.5 CLE credits (including at least 5.0 EP)
Live Seminar, Santa Fe
Center for Legal Education of NMSBF
www.nmbar.org

23 **Drafting Employment Separation Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Lawyer Ethics and Disputes with Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

September

9 **2015 Fiduciary Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Liquidated Damages in Contracts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **2015 Mock Meeting of the Ethics Advisory Committee**
2.0 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 **Legal Writing—From Fiction to Fact (Afternoon Session 2015)**
2.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Spring Elder Law Institute (2016)**
6.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Estate Planning for Firearms**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics and Keeping Secrets or Telling Tales in Joint Representations**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Estate Planning for Liquidity**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

October

4 **Indemnification Provisions in Contracts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Managing Employee Leave**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10–14 **Basic Practical Regulatory Training for the Natural Gas Local Distribution Industry**
24.5 G
Live Seminar, Albuquerque
Center for Public Utilities New Mexico State University
business.nmsu.edu

14 **Citizenfour—The Edward Snowden Story**
3.2 G
Live Seminar
Federal Bar Association, New Mexico Chapter
505-268-3999

YLD Wills for Heroes

The YLD Wills for Heroes program is off to a great start this year providing simple wills, powers of attorney, and advanced health care directives to first responders during events in Santa Fe and Las Cruces.

The success of the Wills for Heroes program would not have been possible without volunteer assistance.

The **Las Cruces** event was held at NMSU on May 21 and served 56 first responders. Thank you volunteers!

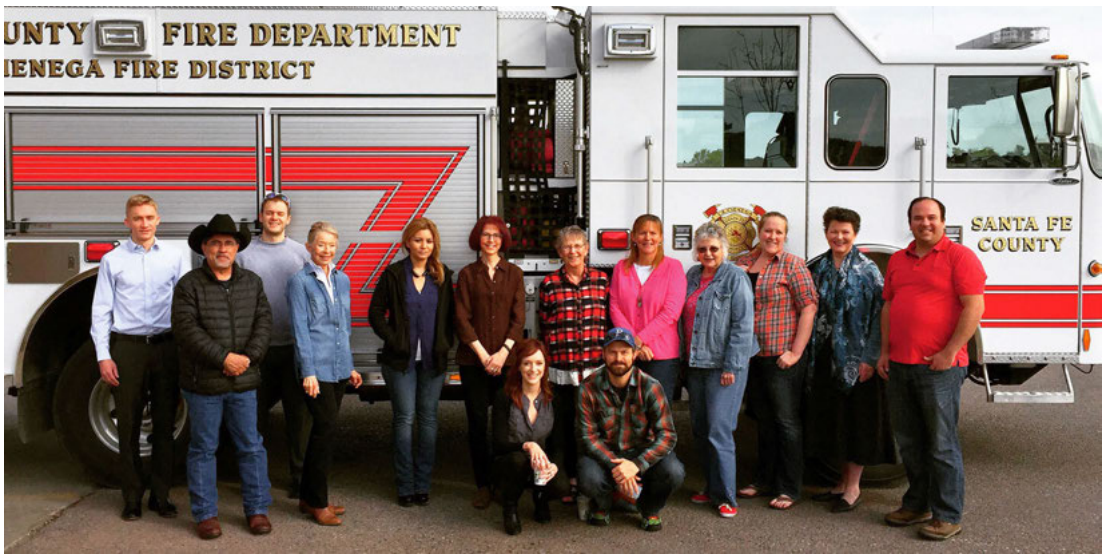
Volunteer Attorneys:

Lauren Armstrong
Erin Atkins
Justin Bateman
Allison Block-Chavez
Rosenda Chavez
Spencer Edelman
Sean FitzPatrick
Tomas Garcia
Jill Johnson Vigil
Robert Lara
Noemi Lopez
Leonardo E. Maldonado
Elena Moreno Hanson
Anna Rains
Frank Schrieber
Petria Schrieber
Matthew Watson
Rick Wellborn
Antonio Williams
Casey Williams

Volunteer Witnesses and Notaries:

Lilly Atencio
Marina Banegas
Julie Bauer
Jaquetta Bazier
Sherry Brooks
Ismael Camacho
Evan Cochnar
Teresa Daumueller
Sonia Russo
Michelle Sanchez
Vanessa Sanchez
Frank Schieder
Isaac D. Vigil
Beverly Zubia

The **Santa Fe** event was held at the Santa Fe County Station on April 23 and served 35 first responders. Thank you attorney and paralegal volunteers!



From left: (first row) Taylor Lieuwan, Eddy Gallegos, Sean Fitzpatrick, Lyn Herbert, Melissa Martinez, Jennifer Van Wiel, Kay Homan, Shannon Bulman, Linda Murphy, Kait Alley, Yvonne Chicoine, Spencer Edelman, (second row) Jordan Kessler and Brian Parrish

State Bar of New Mexico
Young Lawyers Division

Wills for Heroes
New Mexico

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 May 20, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,903	Las Cruces Medical v. Mikeska	COA 33,836	05/20/16
No. 35,900	Lovato v. Wetsel	12-501	05/18/16
No. 35,898	Rodriguez v. State	12-501	05/18/16
No. 35,897	Schueller v. Schultz	COA 34,598	05/17/16
No. 35,896	Johnston v. Martinez	12-501	05/16/16
No. 35,894	Griego v. Smith	12-501	05/13/16
No. 35,893	State v. Crutcher	COA 34,207	05/12/16
No. 35,891	State v. Flores	COA 35,070	05/11/16
No. 35,895	Caouette v. Martinez	12-501	05/06/16
No. 35,889	Ford v. Lytle	12-501	05/06/16
No. 35,886	State v. Otero	COA 34,893	05/06/16
No. 35,885	Smith v. Johnson	12-501	05/06/16
No. 35,884	State v. Torres	COA 34,894	05/06/16
No. 35,882	State v. Head	COA 34,902	05/05/16
No. 35,880	Fierro v. Smith	12-501	05/04/16
No. 35,873	State v. Justin D.	COA 34,858	05/02/16
No. 35,876	State v. Natalie W.P.	COA 34,684	04/29/16
No. 35,870	State v. Maestas	COA 33,191	04/29/16
No. 35,864	State v. Radosevich	COA 33,282	04/28/16
No. 35,866	State v. Hoffman	COA 34,414	04/27/16
No. 35,861	Morrisette v. State	12-501	04/27/16
No. 35,863	Maestas v. State	12-501	04/22/16
No. 35,857	State v. Foster	COA 34,418/34,553	04/19/16
No. 35,858	Baca v. First Judicial District Court	12-501	04/18/16
No. 35,853	State v. Sena	COA 33,889	04/15/16
No. 35,849	Blackwell v. Horton	12-501	04/08/16
No. 35,835	Pittman v. Smith	12-501	04/01/16
No. 35,828	Patscheck v. Wetzel	12-501	03/29/16
No. 35,825	Bodley v. Goodman	COA 34,343	03/28/16
No. 35,822	Chavez v. Wrigley	12-501	03/24/16
No. 35,821	Pense v. Heredia	12-501	03/23/16
No. 35,814	Campos v. Garcia	12-501	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. 35,771	State v. Garcia	COA 33,425	02/24/16
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. 35,522	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. 35,422	State v. Johnson	12-501	07/17/15
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. 34,775	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. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
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. 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. 34,798	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 Comm.	COA 33,706	01/11/16
No. 35,255	State v. Tufts	COA 33,419	01/13/16
No. 35,183	State v. Tapia	COA 32,934	01/25/16
No. 35,101	Dalton v. Santander	COA 33,136	02/17/16
No. 35,198	Noice v. BNSF	COA 31,935	02/17/16
No. 35,249	Kipnis v. Jusbasche	COA 33,821	02/29/16
No. 35,302	Cahn v. Berryman	COA 33,087	02/29/16
No. 35,349	Phillips v. N.M. Taxation and Revenue Dept.	COA 33,586	03/14/16
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	03/16/16
No. 35,386	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. 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

Writ of Certiorari Quashed:

			Date Order Filed
No. 33,930	State v. Rodriguez	COA 30,938	05/03/16

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,869	Shah v. Devasthali	COA 34,096	05/19/16
No. 35,868	State v. Hoffman	COA 34,414	05/19/16
No. 35,865	UN.M. Board of Regents v. Garcia	COA 34,167	05/19/16
No. 35,862	Rodarte v. Presbyterian Insurance	COA 33,127	05/19/16
No. 35,860	State v. Alvarado-Natera	COA 34,944	05/16/16
No. 35,859	Faya A. v. CYFD	COA 35,101	05/16/16
No. 35,851	State v. Carmona	COA 35,851	05/11/16
No. 35,855	State v. Salazar	COA 32,906	05/09/16
No. 35,854	State v. James	COA 34,132	05/09/16
No. 35,852	State v. Cunningham	COA 33,401	05/09/16
No. 35,848	State v. Vallejos	COA 34,363	05/09/16
No. 35,634	Montano v. State	12-501	05/09/16
No. 35,612	Torrez v. Mulheron	12-501	05/09/16
No. 35,599	Tafoya v. Stewart	12-501	05/09/16
No. 35,845	Brotherton v. State	COA 35,039	05/03/16
No. 35,839	State v. Linam	COA 34,940	05/03/16
No. 35,838	State v. Nicholas G.	COA 34,838	05/03/16
No. 35,833	Daigle v. Eldorado Community	COA 34,819	05/03/16
No. 35,832	State v. Baxendale	COA 33,934	05/03/16
No. 35,831	State v. Martinez	COA 33,181	05/03/16
No. 35,830	Mesa Steel v. Dennis	COA 34,546	05/03/16
No. 35,818	State v. Martinez	COA 35,038	05/03/16
No. 35,712	State v. Nathan H.	COA 34,320	05/03/16
No. 35,638	State v. Gutierrez	COA 33,019	05/03/16
No. 34,777	State v. Dorais	COA 32,235	05/03/16

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 June 3, 2016

Unublished Opinions

No. 34780 6th Jud Dist Luna DM-09-105, K SEATS v J GARCIA (dismiss) 5/31/2016

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

Dated June 6, 2016

Clerk's Certificate of Address and/or Telephone Changes

Samantha M. Adams
Adams+Crow, PC
5051 Journal Center Blvd. NE, Suite 320
Albuquerque, NM 87109
505-427-3227
505-212-0439 (fax)
sam@adamscrow.com

Evan McCarty Arendell
Law Offices of the Public Defender
100 S. Avenue A
Portales, NM 88130
575-219-6317
evan.arendell@lopdnm.us

Robert J. Blanch
Office of the Thirteenth Judicial District Attorney
101 S. Main Street, Suite 201
Belen, NM 87002
505-861-0311
505-861-7016 (fax)
rblanch@da.state.nm.us

Alexandra Emily Bochte
Office of the Second Judicial District Attorney
520 Lomas Blvd. NW
Albuquerque, NM 87102
505-222-1225
abochte@da2nd.state.nm.us

Michael W. Brennan
Michael W. Brennan, PA
PO Box 1234
Santa Fe, NM 87504
505-216-3060
505-988-2987 (fax)
mwbrennanlaw@gmail.com

Kathryn H. Colbert
PO Box 7204
Albuquerque, NM 87194
505-508-0149 (phone/fax)
kathryncolbert47@gmail.com

Judith A. Cregan
230 Grove Acre Avenue #129
Pacific Grove, CA 93950
530-388-0955
jcregan1@earthlink.net

Timothy V. Daniel
Timothy V. Daniel, LLC
PO Box 2103
Santa Fe, NM 87504
505-946-7043
505-629-1528 (fax)
tim@timvdaniel.com

Thomas S. Dean
Miller Stratvert, PA
PO Box 25687
500 Marquette Ave. NW, Suite 1100 (87102)
Albuquerque, NM 87125
505-842-1950
505-243-4408 (fax)
tdean@mstlaw.com

Aaron B. Ezekiel
PO Box 26154
Albuquerque, NM 87125
505-553-5328
aaron.ezekiel@gmail.com

Rachel Patrick Giron
U.S. Court of Appeals for the Tenth Circuit
201 Third Street NW, Suite 1870
Albuquerque, NM 87102
505-843-6196
rachel_giron@ca10.uscourts.gov

M. Clea Gutterson
Chapman and Charlebois, PC
PO Box 92438
4100 Osuna Road NE, Suite 2-203 (87109)
Albuquerque, NM 87199
505-242-6000
505-213-0561 (fax)
clea@cclawnm.com

Jason T. Hoggard
6501 Eagle Rock Avenue NE, Suite A-3
Albuquerque, NM 87113
770-896-9110
jhoggard@mccarthyholthus.com

Allison Micheli Kamm
Office of the City Attorney
PO Box 2248
One Civic Plaza NW (87102)
Albuquerque, NM 87103
505-768-4516
akamm@cabq.gov

Owen Kellum
N.M. Office of the State Engineer
PO Box 25102
130 S. Capitol Place (87501)
Santa Fe, NM 87504
505-827-4142
owen.kellum@state.nm.us

Dawn E. Mastalir
N.M. Public Education Department
300 Don Gaspar Avenue
Santa Fe, NM 87501
505-827-6633
dawne.mastalir@state.nm.us

Shannon Murdock
Office of the Seventh Judicial District Attorney
PO Box 706
903 N. Fifth Street
Estancia, NM 87016
505-384-2800
505-384-2390 (fax)
smurdock@da.state.nm.us

Tim D. Newsom
Young & Newsom, PC
1001 S. Harrison Street, Suite 200
Amarillo, TX 79101
806-331-1800
806-398-9095 (fax)
tim@youngfirm.com

Benjamin Anthony Nucci
Snell & Wilmer
400 E. Van Buren Street, Suite 1900
Phoenix, AZ 85004
602-382-6315
bnucci@swlaw.com

Thomas A. Outler
National Nuclear Security Administration/USDOE
Sandia Site Office MS 0184
Albuquerque, NM 87185
505-845-5216
505-284-7269 (fax)
thomas.outler@nnsa.doe.gov

Lisa F. Rauch
BMW Group Legal Department
5550 Britton Parkway
Hilliard, OH 43026
614-210-7989
lisa.rauch@bmwfs.com

Noel J. Schaefer
5303 Indian School Rd. NE, Unit 512
Albuquerque, NM 87110
505-400-2357
schaefno@gmail.com

Patrick C. Schaefer
University of Texas at El Paso
508 E. Robinson Avenue
El Paso, TX 79902
505-747-5017
pcschaefer@utep.edu

Eleanor C. Werenko
Sheehan & Sheehan, PA
PO Box 271
6001 Indian School Rd. NE, Suite 400 (87110)
Albuquerque, NM 87103
505-247-0411
505-842-8890 (fax)
ecw@sheehansheehan.com

Timothy Joseph Williams
Office of the Attorney General
PO Box 1508
408 Galisteo Street (87501)
Santa Fe, NM 87504
505-827-6624
twilliams@nmag.gov

Brandon Kee Bitsuie
Navajo Nation Department of Justice
PO Box 2010
Old BIA Club Building
Window Rock, AZ 86515
bbitsuie@gmail.com

Ellen M. Cain Castille
PO Box 7560
Brookings, OR 97415
505-412-1605
ellencastille@frontier.com

Jeanine S. Copperstone
10540 E. Coopers Hawk Drive
Sun Lakes, AZ 85248
jsc139@hotmail.com

George Thomas Geran
Law Office of George Geran
4129 S. Meadows Road #1017
Santa Fe, NM 87507
505-983-1085
505-955-1941 (fax)
geranlaw@aol.com

Ameryn Maestas
PO Box 1773
Bayfield, CO 81122
amerynkreiner@gmail.com

Lidia Garza Morales
Morales Law Office
PO Box 29154
Santa Fe, NM 87592
505-473-2131
505-474-1466 (fax)
moraleslawofc@gmail.com

Eric N. Ortiz
Eric Ortiz & Associates
510 Slate Avenue NW
Albuquerque, NM 87102
505-720-0070
866-897-9491 (fax)
eric@ericortizlaw.com

David Alan Richter
837 Teagarden Court
Chico, CA 94926
davidrichter@gmail.com

Alexander MerkC Vang
1108 Colonial Parkway, Apt. A
Clovis, NM 88101
575-200-4285
amercvanglaw@gmail.com

Gregory Frank Beal Jr.
The Law Office of
Gregory F. Beal PLLC
415 W. Wall Street, Suite 105
Midland, TX 79701
281-310-0975
281-858-3075 (fax)
gbeal@optimalandgroup.com

Lynne D. Canning
Canning Law & Justice LLC
1202 Apache Avenue
Santa Fe, NM 87505
505-577-1654
ldcanning@hotmail.com

Arlyn G. Crow
Adams+Crow, PC
5051 Journal Center Blvd. NE,
Suite 320
Albuquerque, NM 87109
505-427-3227
505-212-0439 (fax)
arlyn@adamscrow.com

Rip Harwood
1700 Louisiana Blvd. NE,
Suite 240
Albuquerque, NM 87110
505-299-6314
505-298-0742 (fax)
ripharwoodrbhpc@gmail.com

Stephen R. Marshall
Hunt & Marshall
532 Old Santa Fe Trail
Santa Fe, NM 87505
505-954-4868
steve@huntandmarshall.com

Aryn Seiler
Albuquerque Business Law, PC
1801 Rio Grande Blvd. NW,
Suite B
Albuquerque, NM 87104
505-246-2878
505-246-0900 (fax)
aseiler@abqbizlaw.com

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 June 15, 2016

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2016 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

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

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-008

No. S-1-SC-34637 (filed November 12, 2015)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
MARK SERROS,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
ROBERT M. SCHWARTZ, District Judge

JORGE A. ALVARADO
Chief Public Defender
NINA LALEVIC
Assistant Appellate Defender
Santa Fe, New Mexico
for Petitioner

HECTOR H. BALDERAS
Attorney General
YVONNE M. CHICOINE
Assistant Attorney General
Santa Fe, New Mexico
for Respondent

Opinion

Richard C. Bosson, Justice

{1} Four years and three months after Defendant Mark Serros was arrested and charged with sexually abusing his nephew, the district court dismissed his case, concluding that his right to a speedy trial under the Sixth Amendment to the United States Constitution had been violated. Among other things, the district court found that Defendant had suffered extreme prejudice as a result of the length and circumstances of his detention. From the time of his arrest over four years earlier, Defendant had been held at the Bernalillo County Metropolitan Detention Center (MDC) in protective custody.

{2} In a divided memorandum opinion, the Court of Appeals reversed. *See State v. Serros*, No. 31,565, mem. op. ¶¶ 1, 58 (N.M. Ct. App. Mar. 10, 2014) (non-precedential). The majority reasoned that the delay in bringing Defendant to trial could not be attributed to the State. *See id.* ¶ 52. The majority faulted Defendant because he had agreed to numerous requests to extend the time for commencing trial and had twice requested new counsel. *See id.* By contrast, the dissent concluded that the delays resulted primarily from the "negligence and disregard" of Defendant's attorneys and that, whether or not the State was at fault, Defendant's right to a speedy trial had been violated. *See id.* ¶ 60 (Zamora, J., dissenting).

{3} We granted certiorari and now reverse. 2014-NMCERT-005. We agree with the district court's conclusion that the length and circumstances of Defendant's pretrial incarceration resulted in extreme prejudice. We therefore hold that dismissal was appropriate because Defendant did not cause or acquiesce in the numerous delays in his case and because the State failed in its obligation to bring Defendant's case to trial.

I. BACKGROUND

A. The right to a speedy trial

{4} The Sixth Amendment to the United States Constitution begins, "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." *See* N.M. Const. art. II, § 14. In *State v. Garza*, we emphasized that "[t]he heart of the right to a speedy trial is preventing prejudice to the accused." 2009-NMSC-038, ¶ 12, 146 N.M. 499, 212 P.3d 387. But we also recognized that the right is unique among the constitutional guarantees afforded a criminal defendant because of the concomitant "societal interest in bringing an accused to trial." *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 519 (1972)). As a result, merely showing delay in bringing an accused's case to trial is not enough to establish a speedy trial violation; rather, we must scrutinize every claimed violation to determine whether the accused has suffered an "actual and articulable deprivation" of the right to a speedy trial. *See id.* ¶¶ 12-13.

{5} In making that determination, we consider the four factors articulated in *Barker*: (1) the length of delay in bringing the case to trial, (2) the reasons for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) the prejudice to the defendant caused by the delay. *See* 407 U.S. at 530; *see also Garza*, 2009-NMSC-038, ¶ 13 ("[W]e have adopted the balancing test created by the United States Supreme Court in *Barker*."). We weigh these factors according to the unique circumstances of each case in light of "the State and the defendant's conduct and the harm to the defendant from the delay." *See Garza*, 2009-NMSC-038, ¶¶ 12-13. We therefore begin with a review of the circumstances in this case.

B. Factual and procedural time line

{6} Defendant was arrested on March 9, 2007, and detained at the MDC on suspicion of sexually abusing his four-year-old nephew. Due to the charges against him and because he is homosexual, MDC officials placed him almost immediately in protective custody for his safety. On March 26, 2007, a grand jury indicted Defendant on one count each of first-degree criminal sexual penetration (a child under 13), *see* NMSA 1978, § 30-9-11(C) (2003); bribery of a witness (threats or bribes—reporting), *see* NMSA 1978, § 30-24-3(A)(3) (1997); and contributing to the delinquency of a minor, *see* NMSA 1978, § 30-6-3 (1990). Defendant pleaded not guilty to all three counts, and the district court set his bond at $150,000 cash or surety. Unable to afford his bond, Defendant remained in protective custody at the MDC awaiting trial.

{7} Defendant never had a trial. Instead, more than four years after his arrest, the district court dismissed Defendant's case with prejudice, following three days of hearings on Defendant's motion to dismiss on speedy trial grounds due to ineffective assistance of counsel. The evidence introduced at the hearings, which we review in some detail throughout this opinion, included testimony from four defense witnesses, including Defendant himself; court-ordered appearances by Defendant's first two court-appointed attorneys, Houston Ross and Scott Pistone; subpoenas for Mr. Ross's and Mr. Pistone's attorney case

files and Disciplinary Board records; and extensive argument by the parties.

{8} The record shows the following time line of significant events in Defendant's case. On May 10, 2007, Mr. Ross filed a single document on Defendant's behalf that included his entry of appearance, a request for grand jury tapes, and demands for a speedy trial, discovery, and exculpatory evidence. On September 11, 2007, the district court set Defendant's case for trial on September 24, 2007. Three days later, on September 14, 2007, the State filed its first petition for an extension of time to commence Defendant's trial, noting that the State's investigation was ongoing and that Defendant had not requested or conducted any pretrial interviews. Mr. Ross later stipulated to the petition on Defendant's behalf and requested a plea offer. The district court granted the petition and extended the deadline for commencing Defendant's trial to January 2, 2008. The district court also set a plea hearing for October 23, 2007.

{9} On November 21, 2007, the district court set a pretrial hearing for December 14, 2007. On December 12, 2007, however, the State filed its second petition to extend the time for commencing Defendant's trial, again with Mr. Ross's agreement. In its second petition, the State represented that it was in the process of "formulating an offer" in response to Defendant's request for a plea agreement, that the case was not ready for trial, that Defendant had not requested or conducted any pretrial interviews, and that the parties were "hopeful that if given more time, the case will result in a non-trial disposition." The district court granted the petition, extended the deadline for commencing Defendant's trial to April 2, 2008, and set the trial for March 24, 2008. In the interim, the district court set a second plea hearing for January 25, 2008.

{10} On February 22, 2008, the district court continued the March 24, 2008 trial setting. The court noted in its continuance order that Mr. Ross had requested an "evaluation" and that "[a]dditional/new evidence [had been] disclosed recently." That order was followed on March 20, 2008, by the State's third petition to extend the deadline for commencing Defendant's trial, filed in this Court as was then required by Rule 5-604(D) NMRA, and again stipulated to by Mr. Ross. As grounds for the petition, the State represented that although it had completed its initial investigation, it had been necessary to conduct a second safehouse interview of the victim on February 20, 2008, because of a report that the victim had recanted the allegations against Defendant or possibly had named a different abuser. The State further represented that the victim had not, in fact, recanted his story at the second interview and that a supplemental report had been prepared by a detective and distributed to the parties. The State also noted that Mr. Ross was "still evaluating the case in an effort to determine whether an evaluation of his client is in order" and that Defendant had not requested or conducted any pretrial interviews. The State concluded by stating that Defendant's case had been "set for a definite trial setting on August 11, 2008, which is outside the current . . . date [permitted by Rule 5-604]," and requested an extension through October 2, 2008. This Court granted the petition on April 1, 2008, and extended the deadline for commencing Defendant's trial to September 2, 2008.

{11} In the ensuing months, the district court set pretrial conferences for May 29, 2008, and July 31, 2008, and set the case for a jury trial on August 25, 2008. But on August 18, 2008, the State—once again noting Mr. Ross's agreement on Defendant's behalf—filed its fourth petition to extend the time to commence Defendant's trial. The State represented to this Court that it had made a plea offer to Mr. Ross that had not yet been accepted, that Mr. Ross had refused the State's request "that a sex offender [evaluation] be completed," and that Mr. Ross had not requested or conducted any pretrial interviews. The State also represented that, because it had not heard from Mr. Ross about the plea offer and because the parties would not be ready for trial on August 25, 2008, the district court had re-set the matter at the parties' request for trial on December 8, 2008, which the State noted was after the previous deadline set by this Court. The State therefore requested, and this Court granted on August 25, 2008, an order extending the time to commence Defendant's trial to March 2, 2009. On September 2, 2008, the district court set a plea hearing for October 14, 2008, and on October 14, 2008, the district court set Defendant's case for a jury trial on December 1, 2008.

{12} Here, the case took an unexpected turn. On October 23, 2008, after over 17 months of Mr. Ross's representation, Defendant filed a pro se motion to appoint substitute counsel. The motion was simple, alleging only that Defendant had been in custody since March 9, 2007, and that he believed that Mr. Ross was "not able to adequately represent [his] interests" in the case.

{13} In the weeks that followed, the State filed several documents suggesting that the parties were preparing for trial. Most notably, the State submitted two stipulated orders that the district court granted. The first, entered on November 3, 2008, provided for the production to Defendant of the victim's safehouse interviews and for the protection of the victim's privacy. The second, entered on November 7, 2008, ordered production to the State of treatment and medical records from the Bernalillo County Fire Department related to its response to the victim's home on March 2, 2007.

{14} Instead of proceeding with Defendant's trial, which had been set to begin on December 1, 2008, the district court granted Defendant's pro se motion to appoint substitute counsel that same day and removed Mr. Ross from the case. In its order, the district court found that "while there is no indication that [Mr. Ross] has not fully and effectively represented . . . [D]efendant, it is in the interest of justice to appoint new counsel in view of [D]efendant's . . . unwillingness to work with [Mr. Ross]." The court therefore ordered that the case be returned to the Public Defender for reassignment and specifically ordered that "any delay caused by the change of counsel be charged against the defendant for speedy trial purposes." Also on December 1, 2008, the district court rescheduled Defendant's trial for February 9, 2009.

{15} On January 23, 2009, Defendant's second attorney, Scott Pistone, entered his appearance and filed a notice of demand for discovery and a demand for a speedy trial. On February 13, 2009, the district court issued a notice setting Defendant's case for trial on July 20, 2009, and on February 16, 2009, the State filed its fifth petition to request an extension of time to commence Defendant's trial. The State represented that it had been contacted by Mr. Pistone on January 28, 2009, that he had indicated that he would not be ready for trial on February 9, 2009, and that he would "stipulate to whatever was needed to continue the trial setting." The State further explained that on February 3, 2009, the State had learned that Mr. Pistone was out of the state tending to his ill father and that a few days later, Mr. Pistone's father had passed away. The

State said that it had notified the district court of Mr. Pistone's unavailability, the court had agreed to continue the trial set for February 9, 2009, and it had set a new trial date of July 20, 2009, which was after the deadline for commencing Defendant's trial under Rule 5-604. The State then requested an extension of the time to commence Defendant's trial until September 2, 2009, which this Court granted on February 24, 2009.

{16} The next entry in the district court record, entered on July 10, 2009, is an order staying the case pending a determination of Defendant's competency to stand trial. The order states only that the court had "considered information from both counsel and [found] that there is evidence that . . . [D]efendant may not be competent to proceed in this case." The court therefore stayed the case and all deadlines under Rule 5-604 "until an order is filed finding . . . [D]efendant competent to stand trial or until further order of the court."

{17} The record does not show any further activity in Defendant's case until approximately six months later, when Mr. Pistone filed an unopposed motion to withdraw as Defendant's counsel. Mr. Pistone alleged that Defendant had filed a disciplinary complaint against him, that Defendant was filing his own motions, that Defendant was not complying with Mr. Pistone, and that the attorney-client relationship had deteriorated. The district court held a hearing on the motion to withdraw on March 24, 2010, and granted Mr. Pistone's request. The court did not issue an order with formal findings and conclusions, but in the transcript of the hearing—at which Defendant was present but did not testify—the district court admonished Defendant that "the next attorney you get, you're stuck with. I'm not going to play this game with you, so that's the way it's going to be. Your next attorney, whether you like him or her, ain't gonna matter."

{18} On May 19, 2010, Liane Kerr entered her appearance on Defendant's behalf and demanded a speedy trial. That same day, Ms. Kerr filed Defendant's first witness disclosure in the case; a notice of discovery demand; and a notice of non-availability for several dates in October, November and December of 2010. The case remained quiescent until October 18, 2010, when the district court entered an order submitted by Ms. Kerr that lifted the stay in Defendant's case. The order explained that a competency evaluation had been completed and that Ms. Kerr was satisfied "that there [were] no competency issues." Also on October 18, 2010, more than three-and-a-half years after Defendant's arrest, Ms. Kerr filed a motion to dismiss the case against Defendant "on speedy trial grounds due to ineffective assistance of counsel."

{19} Unfortunately, the filing of Defendant's motion to dismiss did not end the delays in his case. The district court originally set the motion for a hearing on November 17, 2010, one of the dates that Ms. Kerr had indicated she would not be available. The court then reset the hearing for December 16, 2010, and later vacated that setting after Ms. Kerr filed an unopposed motion to continue the hearing because she had learned that she would be recovering from a medical procedure through the end of 2010. On November 29, 2010, the district court set Defendant's case for a jury trial on February 28, 2011, noting that "THERE WILL BE NO MORE CONTINUANCES." But on February 22, 2011, the court retreated from that position and set a hearing on Defendant's motion to dismiss for March 23, 2011, five months after Ms. Kerr had filed the motion to dismiss. That hearing took place and it was followed by two other hearings over the next two months—one on April 15, 2011, and one on May 24, 2011—and finally, on June 23, 2011, the district court granted Defendant's motion, dismissed the case against him with prejudice, and ordered his release.

II. DISCUSSION

{20} In its dismissal order, the district court weighed the *Barker* factors and concluded that Defendant's right to a speedy trial had been violated. In reviewing a district court's ruling on a speedy trial violation claim, we defer to the court's findings of fact, and we weigh and balance the *Barker* factors de novo. *State v. Spearman*, 2012-NMSC-023, ¶ 19, 283 P.3d 272.

{21} Before we begin our analysis, we note that the circumstances of this case are extreme. As we will explain in further detail, the parties agree that Defendant was held without a trial for over four years and three months under segregated circumstances. These circumstances necessarily color our entire analysis.

A. Length of delay

{22} The first factor, the length of delay, has a dual function: it acts as a triggering mechanism for considering the four *Barker* factors if the delay crosses the threshold of being "presumptively prejudicial," and it is an independent factor to consider in evaluating whether a speedy trial violation has occurred. *See Garza*, 2009-NMSC-038, ¶¶ 21, 23. We have established benchmarks for presumptively prejudicial delay according to the complexity of a case: one year for a simple case, 15 months for a case of intermediate complexity, and 18 months for a complex case. *See id.* ¶ 48.

{23} The district court found a delay in Defendant's case of almost four and one half years. The court, however, made no findings about the level of complexity of Defendant's case or about whether the length of delay weighed for or against either party. The State concedes that the length of delay may have become presumptively prejudicial irrespective of the case's complexity. Given the extreme length of delay, we find it unnecessary to determine whether the case should have been tried within 15 or 18 months; from Defendant's perspective, it makes little difference whether he was entitled to a trial a full three years before his release or a "mere" two years and nine months before his release. Either way, he remained in jail without a trial far longer than was presumptively allowed. We therefore hold that the district court correctly considered the four *Barker* factors. *See Garza*, 2009-NMSC-038, ¶ 23 ("If a court determines that the length of delay is 'presumptively prejudicial,' then it should consider the length of delay as one of four factors in the analysis . . . .").

{24} In evaluating the first *Barker* factor, we previously have held that "the greater the delay[,] the more heavily it will potentially weigh against the State." *Garza*, 2009-NMSC-038, ¶ 24. The district court did not explicitly weigh the length of delay for or against either party. But given the extreme length of the delay in this case, we do not consider this to be a difficult question. The delay of over 51 months was extraordinary, and therefore it weighs heavily in Defendant's favor. *See, e.g.*, *State v. Fierro*, 2012-NMCA-054, ¶ 36, 278 P.3d 541 (holding that a period of almost 55 months between the defendant's arrest and trial weighed heavily in his favor); *cf. Garza*, 2009-NMSC-038, ¶ 24 (holding that a delay of one month and six days beyond the guideline for presumptive prejudice "was not extraordinary and [did] not weigh heavily in Defendant's favor").

{25} We pause before turning to the other *Barker* factors to address the Court of Appeals majority's analysis on this point. As we explain more fully below, the district court found that the State was not at fault for the delay in bringing Defendant's case

to trial, and it found that all of the delay was attributable to Defendant's attorneys. Relying on these findings, the Court of Appeals majority concluded that the length of delay "cannot . . . weigh[] even slightly against the State. At the very least, we weigh this factor slightly against Defendant." *Serros*, No. 31,565, mem. op. ¶ 17. The State agrees and argues that *Garza* stands for the proposition that "[w]here the State is not at fault, it is inappropriate to weigh even lengthy delays against it."

{26} We disagree and clarify that the parties' fault in causing the delay is irrelevant to the analysis of the first *Barker* factor. *See State v. Stock*, 2006-NMCA-140, ¶ 16, 140 N.M. 676, 147 P.3d 885 ("While . . . it would seem to make sense to consider the reason for delay in deciding what weight to assign to the length of delay[,] . . . our cases have not seemed to proceed in this manner."); *cf. State v. Urban*, 2004-NMSC-007, ¶ 13, 135 N.M. 279, 87 P.3d 1061 ("Although not all of the delay can be attributed to the State, we do not consider the extent to which the delay can be attributed to the State or Defendant when first determining whether the delay is presumptively prejudicial."). The length of delay is an objective determination that is capable of measurement with some precision, and once established, it colors the rest of the speedy trial analysis. A delay that crosses the threshold for presumptive prejudice necessarily weighs in favor of the accused; the only question is, how heavily? *See Stock*, 2006-NMCA-140, ¶ 17 ("[E]ven where a defendant bears some responsibility for delay, the sheer fact of lengthy incarceration or other restraint on liberty should count for something in the speedy trial analysis."). A delay that "scarcely crosses the 'bare minimum needed to trigger judicial examination of the claim'" is of little help to a defendant claiming a speedy trial violation. *Garza*, 2009-NMSC-038, ¶ 24 (quoting *Doggett v. United States*, 505 U.S. 647, 652 (1992)). Conversely, an extraordinary delay, like the delay in this case, weighs heavily in favor of a defendant's speedy trial claim, bearing in mind that no single factor is dispositive of whether a violation has occurred. *See id.* ¶¶ 23-24.

{27} We acknowledge that our framing of this factor as potentially weighing "*against* the State" may have invited some consideration of fault. *Id.* ¶ 24 (emphasis added). Indeed, the Court of Appeals majority apparently was reluctant to weigh this factor "*against* the State" because the district court had specifically found that the State was not at fault for the delay. *Serros*, No. 31,565, mem. op. ¶ 17 (emphasis added). But as the majority's holding illustrates, faulting the parties at this stage of the analysis can lead to an incongruous result, especially in a case such as this one, when the objective length of delay offers perhaps the clearest evidence that a violation may have occurred. To weigh a delay of over four years against *Defendant*—even slightly—is simply unjust, keeping in mind that the right at stake is Defendant's right to a speedy trial. The remaining *Barker* factors leave ample room to consider whether the other circumstances in the case, including the fault of the parties, outweigh the length of the delay.

{28} In sum, we conclude that the length of delay in this case was presumptively prejudicial and weighs heavily in favor of Defendant's claim that his speedy trial rights were violated. We therefore look to the other *Barker* factors to determine whether they tip the balance back in favor of the "societal interest in bringing [Defendant] to trial." *Garza*, 2009-NMSC-038, ¶ 12.

B. Reason for the delay

{29} The second factor in the *Barker* analysis, the reason for the delay, requires a court to evaluate "'the reason the government assigns to justify the delay.'" *Garza*, 2009-NMSC-038, ¶ 25 (quoting *Barker*, 407 U.S. at 531). "'The reasons for a period of the delay may either heighten or temper the prejudice to the defendant caused by the length of the delay.'" *Id.* (quoting *State v. Maddox*, 2008-NMSC-062, ¶ 13, 145 N.M. 242, 195 P.3d 1254). We previously have recognized three types of delay that may be attributed to the State and weighted against it at varying levels. First, "'[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government.'" *Id.* (quoting *Barker*, 407 U.S. at 531 (alteration in original)). Second, "negligent or administrative delay . . . 'should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'" *Id.* ¶ 26 (quoting *Barker*, 407 U.S. at 531). As the length of delay increases, negligent or administrative delay weighs more heavily against the State. *See id.* And third, "appropriate delay," justified for "a valid reason, such as a missing witness," is neutral and does not weigh against the State. *Id.* ¶ 27 (quoting *Barker*, 407 U.S. at 531). The U.S. Supreme Court also has recognized a fourth type of delay that this Court has not yet considered, delay "caused by the defense," which weighs against the defendant. *See Vermont v. Brillon*, 556 U.S. 81, 90, 94 (2009) (holding that the defendant's "deliberate attempt to disrupt proceedings" weighed heavily against the defendant).

{30} Since filing his motion to dismiss, Defendant consistently has blamed the delay in this case not on the State, but on Mr. Ross and Mr. Pistone, the first two attorneys appointed to represent him. Indeed, Defendant's motion to dismiss purportedly relied on ineffective assistance of counsel as the basis for the violation of Defendant's right to a speedy trial. But Ms. Kerr later clarified at the hearing on the motion to dismiss that her use of that term was imprecise; she instead argued that Defendant's speedy trial rights were violated due to attorney neglect, as recognized by the Court of Appeals in *Stock*. *See* 2006-NMCA-140, ¶¶ 21-22 (holding that the defendant's right to a speedy trial was violated when, among other things, delays caused by the "neglect" of his attorneys could not be held against him for speedy trial purposes because they were "unreasonable and unnecessary" and "solely attributable to [defense] counsel"). Similarly, the district court referred to ineffective assistance of counsel in its dismissal order, but it expressly based its dismissal on *Stock* and did not engage in an ineffective-assistance-of-counsel analysis. *See, e.g.*, *State v. Astorga*, 2015-NMSC-007, ¶17, 343 P.3d 1245 ("'To establish ineffective assistance of counsel, a defendant must show: (1) 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.'" (quoting *State v. Paredez*, 2004-NMSC-036, ¶ 13, 136 N.M. 533, 101 P.3d 799)). We therefore analyze the performances of Mr. Ross and Mr. Pistone in this case under *Stock* and do not reach the adequacy of their representation under the Sixth Amendment right to effective assistance of counsel. *Cf. State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317 ("In interpreting statutory language as well as in much of the other work courts are called on to perform, it is necessary to think thoughts and not words.").

{31} The district court agreed with Defendant that the delay was attributable to Mr. Ross and Mr. Pistone and that the State did not cause the delay. The court concluded in its dismissal order (1) that the State had not intentionally caused any of the delay in Defendant's case or sought to interfere with Defendant's right to a

speedy trial, (2) that the State "reasonably acquiesced to requested changes in defense counsel and defense continuances," and (3) that Mr. Ross and Mr. Pistone were "responsible for the delay in this case." Regarding Mr. Ross, the district court found that although he was not ineffective under *Stock*, he had delayed Defendant's trial by "schedul[ing] plea hearings when the defendant did not request them." As for Mr. Pistone, however, the court found that he was ineffective and that he had delayed the case by raising the issue of Defendant's competency just before a trial setting in July 2009 without actually seeking or obtaining a competency evaluation, and by seeking to withdraw from the case because of a disciplinary complaint against him that actually was never filed. As with the length of delay, the district court did not explicitly weigh the reasons for the delay against either party when it dismissed Defendant's case.

{32} The Court of Appeals majority agreed with the district court that the State had not intentionally caused the delay in this case. *See Serros*, No. 31,565, mem. op. ¶ 19. The Court therefore concluded that "the reasons for the delay . . . do not weigh against the State," and it "turn[ed] to examine whether the delay was attributable to Defendant or his counsel." *Id.* The Court of Appeals then considered the three periods during which Defendant was represented by Mr. Ross, Mr. Pistone, and Ms. Kerr, respectively, and concluded that all but three months of the delay in the case weighed heavily against Defendant. *See id.* ¶¶ 12, 19-38. The Court primarily faulted Defendant for either not objecting to or stipulating to the "numerous continuances and extensions" in the case and for seeking to replace Messrs. Ross and Pistone at "crucial time[s]" in the case. *Id.* ¶¶ 22, 33, 36.

{33} Defendant continues to argue in this appeal that the reasons-for-delay factor should not weigh against him because the delays were caused by his attorneys' neglect. Although Defendant agrees with the district court and the Court of Appeals that the State did not act "in any way to cause the delay," he contends that there is a difference between "the State's lack of affirmative action to delay the trial and the State's knowledge that [Defendant's] attorneys were doing nothing to move the case forward." Because of the latter contention, Defendant argues that the State was "at least partly responsible [for the delay] due to its inaction." Defendant therefore contends that, as in *Stock*, this factor should weigh against the State because it failed in its "obligation to move [the case] forward and to see that justice is done."

{34} We have never considered the contours of the Court of Appeals' holding in *Stock* or how it might apply in a case like the one before us, in which Defendant was subjected to extraordinary delay while being held in custodial segregation. We therefore review the analysis and holding of *Stock* before we consider whether it applies in this case.

1. *We adopt the reasoning of* State v. Stock *in speedy trial cases when the delay is extraordinary and the accused is held in custody*

{35} In *Stock*, our Court of Appeals held that the defendant's speedy trial rights had been violated after a "particularly egregious" delay of three and-a-half years, during which time the defendant had been incarcerated and "harassed and assaulted in jail." *See* 2006-NMCA-140, ¶¶ 18, 36. Analyzing the reasons for the delay, the Court focused on a period of nearly two and-a-half years in which the defendant's court-appointed attorney had (1) requested a competency evaluation; (2) received the results of the evaluation, which determined that the defendant was competent, but failed to share the results with the State and the district court for over eight months; (3) requested a second competency evaluation; and (4) received the results of the second evaluation and again failed to share them with the State or the district court for nearly a year. *Id.* ¶ 20.

{36} Judge Pickard, writing for a unanimous Court, began by noting that a delay caused by a competency evaluation ordinarily should not count against the State because the evaluation is for the defendant's benefit. *Id.* ¶ 19. Nonetheless, the Court held that both parties shared responsibility for the delay. *Id.* First, the Court acknowledged "the general rule that a defendant must be held accountable for the actions of his or her attorneys," but it reasoned that the delays in the defendant's case, which had not been requested or consented to by the defendant, amounted to "neglect" by his attorneys. *Id.* ¶ 22. As such, the delays could not be held against the defendant for speedy trial purposes because they were "unreasonable and unnecessary" and "solely attributable to [defense] counsel." *Id.* ¶¶ 21-22.

{37} Second, *Stock* concluded that the "extraordinary delay [was] partially attributable to the State" because the State had done "little or nothing to ascertain what was happening in the case or to move the case forward." *Id.* ¶ 25. The Court observed, "It is ultimately the state's duty to make sure that defendants are brought to trial in a timely manner." *Id.* The Court therefore concluded that while the delay was "technically attributable to [the defendant], because it was occasioned by his counsel pursuing or, more accurately, failing to pursue, the issue of his competency," the reasons for the delay weighed against the State because of its "failure to monitor the case and ensure that steps were being taken to bring [the defendant] to trial in a timely manner." *Id.* ¶ 29. Thus, the Court held on the one hand that the delays occasioned by defense counsel did not weigh against the defendant, and it held on the other hand that the particularly egregious delay weighed against the State because of its failure to push the case to trial.

{38} We find *Stock*'s reasoning compelling, particularly in a case like the one before us, when the delay is extraordinary and the defendant is detained while awaiting trial. Under such circumstances, we agree that it may be appropriate to shift the focus to the State's efforts to bring the case to trial, at least when the record demonstrates that the defendant did not affirmatively cause or consent to the delay. *Accord, e.g.*, *Barker*, 407 U.S. at 527 ("A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." (footnotes omitted)); *Maddox*, 2008-NMSC-062, ¶ 26 ("Because the State has the burden of bringing a case to trial, we will weigh unreasonable periods of delay against the State."); *State v. Marquez*, 2001-NMCA-062, ¶ 8, 130 N.M. 651, 29 P.3d 1052 ("It is primarily the responsibility of the State to bring a case to trial within a reasonable period of time.").

{39} The State implies that *Stock* may be on shaky footing since the U.S. Supreme Court decided *Brillon*. We disagree. *Brillon* reversed the Vermont Supreme Court's holding that weighed the delay caused by appointed defense counsel's "'inaction' or failure 'to move [the] case forward'" against the State. *See* 556 U.S. at 92 (quoting *State v. Brillon*, 2008 VT 35, 955 A.2d 1108, 1111, 1112) ("An assigned counsel's failure 'to move the case forward' does not warrant attribution of delay to the State."). The United States Supreme Court faulted the Vermont Supreme Court's reasoning that assigned counsel are essentially state

actors for purposes of a speedy trial claim because they are "part of the criminal justice system." *See id.* (quoting *Brillon*, 955 A.2d at 1121). The United States Supreme Court held, instead, that "the individual counsel here acted only on behalf of [the defendant], not the State," and counsel's conduct therefore must be attributed to the defendant under the general rule that "the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation." *Id.* at 90, 92 (alteration in original) (internal quotation marks and citation omitted). A contrary rule, the Court reasoned, could create an incentive for defense counsel "to delay proceedings by seeking unreasonable continuances." *Id.* at 93. The Vermont Supreme Court's rule also would create an arbitrary and unjustified distinction between the conduct of appointed and privately retained defense counsel in speedy trial cases. *See id.*

{40} *Brillon* also held that the Vermont Supreme Court had failed to take into account the defendant's conduct during the first year of the proceedings against him. The United States Supreme Court noted that the defendant had sought to dismiss his first attorney on the eve of trial, had behaved stridently and aggressively toward, and had even threatened, his second attorney, and had sought the dismissal of a third attorney, despite the trial court's warning about delay. *See id.* The Court reasoned, "Just as a State's deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the [State], so too should a defendant's deliberate attempt to disrupt proceedings be weighted heavily against the defendant." *Id.* at 93-94 (alteration in original) (internal quotation marks and citation omitted). The Court therefore concluded that the delays in the case were the result of the defendant's "deliberate efforts to force the withdrawal of [his first two attorneys]," without which "no speedy-trial issue would have arisen." *Id.* at 94.

{41} We view *Brillon* as strengthening, rather than undermining, our Court of Appeals' holding in *Stock*. First, *Stock* did not transfer blame for defense counsel's failure to move the case forward to the State based on a theory of state action. Rather, in attributing delay to the State, our Court of Appeals focused on the *State's* obligation to monitor and move the case forward and its failure to do so "during extraordinary periods of delay." 2006-NMCA-140, ¶ 29. This is an important distinction; *Brillon* did not forbid holding the State accountable for its own inaction, particularly in the face of its duty to bring a defendant to trial.

{42} Second, *Brillon*'s holding that the defendant's "deliberate attempts to disrupt proceedings" must weigh against him is nothing new. *See, e.g.*, *State v. Talamante*, 2003-NMCA-135, ¶ 14, 134 N.M. 539, 80 P.3d 476 (weighing delays against the defendant when he failed to appear at two arraignments and a hearing). *Stock* did not hold to the contrary, and instead considered the fairness of attributing to the defendant delays caused by defense counsel when the defendant was effectively blameless. The Court of Appeals' conclusion that such delay should not weigh against the defendant reflects the reality that the defendant has no duty to bring himself to trial. *See Barker*, 407 U.S. at 527.

{43} We therefore view *Stock* as an important, well-reasoned part of our speedy trial jurisprudence in cases when the delay is extraordinary and the defendant is held in custody. Accordingly, we adopt and extend *Stock*'s two-part approach for determining whether the reasons for the delay in such a case should weigh against a defendant or the State. We first consider whether Defendant is to blame for the delays in this case because he has personally caused or acquiesced to the delay in his case. If not, then we consider whether the State has met its obligation to bring Defendant's case to trial.

2. *Defendant did not cause or acquiesce in the continuances or extensions of time in his case*

{44} The State argues that the Court of Appeals correctly determined that Defendant caused the delays in his case by either failing to object to or agreeing to all of the continuances and extensions in his case and by twice seeking to substitute his counsel at crucial times during the proceedings. We consider each of these contentions in turn.

{45} The Court of Appeals' conclusion that Defendant either failed to object or agreed to all of the continuances and extensions in his case is not supported by the record.[1] To the contrary, the district court explicitly found that the evidence showed that Defendant had "continually asserted his right to a speedy trial to his defense attorneys." That finding is not disputed on appeal, and it is supported by Defendant's uncontradicted testimony at the hearing on his motion to dismiss. Defendant testified that from the beginning of his case, he had insisted to his attorneys that he did not want to plead guilty and that he wanted to go to trial. Defendant also testified that he "never agreed to any of those extensions [in his case]" and that he only found out about them after they had been granted. While the district court was free to disregard Defendant's self-serving testimony, the court's finding demonstrates that it found Defendant credible when he testified that Mr. Ross and Mr. Pistone had stipulated to the State's requests *without* Defendant's consent.

{46} We are mindful that the actions of defense counsel ordinarily are attributable to the defendant. *See Brillon*, 556 U.S. at 90-91. But when the evidence found by the district court shows that both defense counsel were acting contrary to Defendant's wishes when they agreed to the State's requests to delay the trial, we will not weigh their actions against Defendant. Applying the rule we have taken from *Stock*, we therefore hold that Mr. Ross's and Mr. Pistone's repeated stipulations to the State's requests to extend the time for commencing Defendant's trial do not weigh against Defendant because Defendant neither caused nor consented to those stipulations.

{47} The more difficult question is whether, by seeking substitute counsel, Defendant caused or consented to the delays in his case. We agree with the Court of Appeals dissent that this inquiry effectively pits Defendant's right to a speedy trial against his right to effective assistance of counsel, and he should not have to surrender one right to assert the other. *See Serros*, No. 31,565, mem. op. ¶ 74 (Zamora, J., dissenting); *cf., e.g.*, *State v. Gutierrez*, 1995-NMCA-018, ¶ 19, 119 N.M. 618, 894 P.2d 395 ("'[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.'" (quoting *Simmons v. United States*, 390 U.S. 377, 394 (1968))). We therefore will only weigh Defendant's assertion of his right to effective assistance

[1]We also question the propriety of weighing extensions that are agreed to by both parties against Defendant. *See, e.g.*, *State v. Valencia*, 2010-NMCA-005, ¶ 21, 147 N.M. 432, 224 P.3d 659 (weighing the delay from "an agreed-upon continuance" neutrally). However, because we hold that Defendant did not agree to the extensions, we do not reach this issue.

of counsel against him for speedy trial purposes if his assertion was unreasonable. Towards that end, we review the legal representation actually provided by each attorney to assess the reasonableness of Defendant's untimely efforts to remove them as counsel.

3. *Defendant's motion to replace Mr. Ross as defense counsel was not unreasonable*

{48} Beginning with Mr. Ross, we already have noted the district court's finding that Mr. Ross had delayed Defendant's case by "schedul[ing] plea hearings when the defendant did not request them." The court, however, also found that Mr. Ross was not ineffective under *Stock* because he "engaged in plea negotiations with the State, investigated the feasibility of a sex offender evaluation to assist in plea negotiations, and conducted a number of pre-trial interviews with the State's witnesses." We also note that the district court found that it had permitted Mr. Ross to withdraw because Defendant had filed a disciplinary complaint against him. When the court permitted Mr. Ross to withdraw, it explicitly found "no indication that [he had] not fully and effectively represented [Defendant]." The court therefore concluded that "any delay caused by the change of counsel be charged against [Defendant] for speedy trial purposes."

{49} Based on our review of the record and the evidence submitted at the hearing on Defendant's motion to dismiss, we conclude that Defendant's request to replace Mr. Ross as defense counsel was not unreasonable. It appears from the record that Mr. Ross did little in Defendant's case for over 17 months. His involvement, at least on paper, was limited to belatedly agreeing to the State's first petition to extend the time for commencing Defendant's trial, stipulating to three additional petitions to extend the time for commencing trial, and appearing at five plea hearings. Other than his entry of appearance, which included a one-sentence demand for a speedy trial, Mr. Ross did not file a single witness list, motion, response, or other pleading with the district court before he was removed from the case in December 2008. And as of August 18, 2008, Mr. Ross had not requested or conducted any pretrial interviews, had not responded to a plea offer from the State, had refused a request by the State to obtain a sex offender evaluation, and was not prepared for the trial set for August 25, 2008, 17 months after Defendant's arrest.

{50} Defendant's testimony at the hearing on his motion to dismiss supports our view of the record about Mr. Ross's performance. Defendant testified that Mr. Ross never answered or returned Defendant's telephone calls, never responded to Defendant's requests to see the discovery in his case, never mentioned the possibility of a sex offender evaluation, and never showed Defendant "plea paperwork." Defendant also testified that on the occasions when he met with Mr. Ross, "all [Mr. Ross] would ask [Defendant] to do" was accept a plea offer from the State, to which Defendant consistently responded that he did not want to plead guilty and that he wanted to go to trial.

{51} Defendant filed a pro se motion to appoint substitute counsel on October 23, 2008, and he admitted during cross-examination that he had sent a letter to the Disciplinary Board complaining about Mr. Ross's performance in the case shortly after filing his pro se motion. These filings followed the fifth plea setting that Mr. Ross had scheduled against Defendant's wishes, which took place on October 14, 2008. At that hearing, Defendant insisted to the district court, to Mr. Ross, and to the State that he did not want to accept a plea offer and that he wanted to go to trial. Defendant alleged in his motion that he "ha[d] reason to believe . . . that [Mr.] Ross [was] not able to adequately represent the defendant's interests." And he wrote in his letter to the Disciplinary Board that "[Mr. Ross] only wants to offer me plea bargains and keeps requesting extensions of time without my consent."[2]

{52} Defendant also admitted on cross-examination that unbeknownst to him, Mr. Ross had conducted a number of witness interviews in November 2008.[3] Defendant denied having any knowledge of these witness interviews until Ms. Kerr entered the case. Defendant also admitted that when he filed his motion to appoint substitute counsel in October 2008, he was aware that a trial had been set for December 1, 2008, that the State had indicated that it would be ready to proceed to trial by that date, and that Defendant proceeded nonetheless with his motion to appoint substitute counsel, which the district court granted on December 1, 2008.

{53} We are troubled by Defendant's decision to ask the district court to replace Mr. Ross on what amounted to the eve of trial, and we acknowledge that other courts, including our Court of Appeals, have heavily weighed such a choice against the defendant. *See, e.g.*, *Fierro*, 2012-NMCA-054, ¶ 40 (attributing to the defendant over two years of delay that followed his request to change counsel less than a month before trial); *see also Brillon*, 556 U.S. at 93-94 (holding that the defendant's dismissal of his first attorney on the eve of trial was a "deliberate attempt to disrupt proceedings" that weighed heavily against him). Generally speaking, such last-minute pleas to change counsel should be reviewed skeptically.

{54} But under the circumstances of this case, we hold that Defendant's motion to replace Mr. Ross was not unreasonable. The district court credited Defendant's testimony that Mr. Ross had failed to consult with him, and had failed to heed his wishes about whether to negotiate a plea agreement and whether to agree to continuances or extensions of time. The district court also accepted the State's time line of events in the case, which reflected that the State had sent its plea offer to Mr. Ross in January 2008 and that the last plea hearing in the case occurred on October 14th, 2008, nearly nine months later. And although Mr. Ross did not testify at the hearings on Defendant's motion to dismiss, Ms. Kerr reported during closing arguments—without objection from the State—her conversation with Mr. Ross that corroborated Defendant's testimony. Specifically, Mr. Ross had admitted that Defendant had said from the beginning that he did not want a plea bargain and that he wanted to go to trial.[4] According to Ms. Kerr, Mr. Ross also admitted

[2]The hearing transcripts indicate that Mr. Ross consented to sharing his disciplinary file with the district court and the parties. Defendant's letter to the disciplinary board, however, was not formally entered into evidence. Ms. Kerr read the language quoted above into the record without objection during her closing argument on the motion to dismiss.

[3]Based on the State's representations, it appears that Mr. Ross interviewed as many as ten witnesses in November 2008 but that he had not yet interviewed the victim or the victim's caregivers, including the victim's mother who had reported the alleged abuse.

[4]We note that at the district court's request Mr. Ross appeared at the second hearing on Defendant's motion to dismiss, but for reasons we cannot fathom, he was not asked to testify, nor was he directed to appear at a subsequent hearing.

that he kept asking for plea settings for Defendant because he "was hoping that he could talk [Defendant] into it." While allegations of counsel generally are not considered evidence, *see, e.g.*, *Spearman*, 2012-NMSC-023, ¶ 39, we note that Mr. Ross's purported recollection is consistent with Defendant's own testimony, and the State did not provide any evidence to the contrary.

{55} Mr. Ross's failure to heed Defendant's repeated refusals to accept a plea offer, as found by the district court, and conceded by defense counsel himself, raises serious concerns about the adequacy of his representation. *See*, *e.g.*, Rule 16-104 NMRA (providing that a lawyer shall, among other things, "reasonably consult with the client about the means by which the client's objectives are to be accomplished"; "keep the client reasonably informed about the status of the matter"; and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"). It also undermines the district court's findings that Mr. Ross was not ineffective in part because he had "engaged in plea negotiations with the State [and had] investigated the feasibility of a sex offender evaluation to assist in plea negotiations."[5] These efforts, irrespective of whether Mr. Ross communicated them to Defendant, were contrary to Defendant's express wishes that he did not want to accept a plea offer and that he wanted to go to trial. And as we previously have observed, the record is devoid of any other efforts by Mr. Ross to prepare for trial until after Defendant filed his motion to appoint substitute counsel. Thus, at the time that Defendant filed his motion, all that he had to show for Mr. Ross's 17 months of representation—17 months in which Defendant had been held in custodial segregation—were Mr. Ross's repeated, unwelcome attempts to convince Defendant to accept a plea bargain.

{56} Without commenting on the actual level of Mr. Ross's preparation for trial or whether his representation was constitutionally effective, under the circumstances of this case, we do not fault Defendant for seeking to have Mr. Ross replaced less than six weeks before a trial setting, regardless of the State's preparedness for trial. Based on the evidence presented on Defendant's motion to dismiss and on the district court's finding that Mr. Ross had delayed Defendant's case by requesting plea settings when Defendant did not want them, Defendant's allegation in his motion to appoint substitute counsel that he "ha[d] reason to believe . . . that [Mr.] Ross[] is not able to adequately represent the Defendant's interests" was not unreasonable. Finding no indication that Defendant either caused or acquiesced in the delays during Mr. Ross's representation, we hold that this period of time does not weigh against Defendant.

4. *Defendant's attempt to replace Mr. Pistone was not unreasonable*

{57} Turning to Mr. Pistone's representation of Defendant, we note that the district court concluded that he was ineffective under *Stock* based on two explicit findings. First, the court found that Mr. Pistone had sought and obtained a stay in the case pending a determination of Defendant's competency ten days before a July 2009 trial setting, without taking steps to obtain an evaluation over the course of the ensuing five months. And second, the district court found that Mr. Pistone had filed a motion to withdraw from the case based on Defendant's alleged filing of both a pro se motion to appoint substitute counsel and a disciplinary complaint, neither of which were actually filed.

{58} We view the district court's conclusion that Mr. Pistone was ineffective under *Stock* as a determination that the delays occasioned by his neglect of Defendant's case should not weigh against Defendant. Based on our review of the record, the district court's conclusion was well-founded. Over the course of 14 months as Defendant's attorney, Mr. Pistone filed three documents in the case. The first two were his entry of appearance and his demand for evidence and a speedy trial, both of which were filed on January 23, 2009. The third was his motion to withdraw as counsel, which he filed on January 4, 2010. In the intervening year, the only activity in the case was a notice that Defendant's trial had been rescheduled for July 20, 2009, an accompanying petition and order granting the State's fifth request for an extension of time, and an order entered on July 10, 2009, staying the proceedings pending an evaluation of Defendant's competency. The July 10, 2009, order remained in effect until October 18, 2010, effectively preventing any chance of Defendant's case going to trial during that time.

{59} At the hearing on Defendant's motion to dismiss, Defendant testified that Mr. Pistone never met, spoke, or corresponded with him during the 14 months he spent as Defendant's attorney. Defendant learned from his MDC caseworker that Mr. Pistone had been assigned to the case, and after looking up Mr. Pistone's telephone number in the Yellow Pages, Defendant called Mr. Pistone's office about 12 times to request discovery. Defendant also testified that he learned from Mr. Pistone's assistant after the July 2009 trial setting had passed that his case had been stayed because the State had requested a competency evaluation, and that "it was up to [Defendant] whether [he] wanted to take it or not." Defendant testified that he told Mr. Pistone's assistant that he "felt . . . fully competent and [that he] felt kind of insulted, as well." According to Defendant, neither Mr. Pistone nor his assistant ever explained to Defendant the purpose of a competency evaluation or why Mr. Pistone or the State believed that a competency evaluation was necessary.

{60} Defendant also testified that the only time that he actually met Mr. Pistone was at the hearing in March 2010, "the day when he said he was going to not represent [Defendant] anymore." Mr. Pistone had filed a motion to withdraw as counsel on January 4, 2010, claiming that Defendant had filed a bar complaint against him, was filing pro se motions, and was not complying with him. Defendant confirmed at the hearing on his motion to withdraw that he had filed a disciplinary complaint against Mr. Pistone "around the middle or towards the end of 2009" because Mr. Pistone was not communicating with him or undertaking any efforts in his defense. Defendant also testified that he had filed "another [motion to] substitute counsel" after about nine months of being represented by Mr.

[5]The record is inconsistent about who actually raised the possibility of a sex offender evaluation in this case. The issue first arose in a February 2008 order in which the district court continued the March 2008 trial setting because the "[d]efense [was] requesting an evaluation." In the subsequent stipulated motion to extend the time limit for commencing trial, the State represented to the district court that "Defense counsel is still evaluating the case in an effort to determine whether an evaluation of his client is in order." Five months later, the State represented to this Court that Mr. Ross had refused *the State's* request for a sex offender evaluation.

Pistone because he had not heard from Mr. Pistone and because he kept getting the runaround from Mr. Pistone's assistant. The district court was unable to find a record of either of these documents while it was considering Defendant's motion to dismiss, despite Mr. Pistone's grudging consent to view his disciplinary file.[6]

{61} The district court granted Mr. Pistone's motion to withdraw after a hearing on March 24, 2010, at which Defendant was present but did not testify. The only evidence presented at that hearing were Mr. Pistone's representations parroting the allegations in his motion to withdraw. Although the court did not issue any formal findings in its order granting Mr. Pistone's motion, it cautioned Defendant from the bench, stating "Mr. Serros, let me advise you that the next attorney you get, you're stuck with. I'm not going to play this game with you, so that's the way it's going to be. Your next attorney, whether you like him or her, ain't gonna matter." After taking evidence on Defendant's motion to dismiss approximately 15 months later, the district court revised its position when it dismissed Defendant's case, stating "I will tell you now, if I knew then what I know now, I would have never allowed Mr. Pistone to withdraw from the case."

{62} We have little trouble concluding that the delay occasioned by Mr. Pistone should not weigh against Defendant. As the district court observed, during the time of Mr. Pistone's representation of Defendant, "absolutely nothing was filed, no witnesses were interviewed, and a competency evaluation was asked for approximately a week to ten days prior to the trial setting in this case." The record supports the district court's finding that Mr. Pistone delayed Defendant's case by raising the question of Defendant's competency and then failing to pursue an evaluation once the case had been stayed. Allowing Defendant's case to languish for six months after the stay was entered—when Defendant already had been detained for nearly two and a half years in custodial segregation—is inexcusable. And then letting another two months of inactivity slip by after filing a motion to withdraw shows utter disregard on Mr. Pistone's part for Defendant's circumstances.

{63} We acknowledge that it is not clear in the record whether Defendant actually filed either a motion to replace Mr. Pistone or a disciplinary complaint against him. The absence of these documents from court records and from Mr. Pistone's disciplinary file apparently troubled the district court, given its decision to permit Mr. Pistone to withdraw from the case. But even assuming that Mr. Pistone's motion to withdraw was prompted by Defendant's filing of such documents, we conclude again that, based on the circumstances, Defendant's actions were not unreasonable. We therefore hold that none of the delays during the period that Mr. Pistone represented Defendant weighs against Defendant.

5. *Defendant did not cause or acquiesce in the delays during Ms. Kerr's representation*

{64} The district court's findings about the delays during Ms. Kerr's representation of Defendant were limited to her role in obtaining a competency evaluation. The court found that Ms. Kerr was appointed after the withdrawal of Mr. Pistone, and that although she did not believe that Defendant was incompetent, she investigated whether a competency evaluation had been done because a stay was in place pending a determination of Defendant's competency. Upon learning that Mr. Pistone had neither arranged nor requested an evaluation of Defendant's competency, Ms. Kerr sought an expedited competency evaluation, in which Defendant was deemed competent to proceed. The district court drew no conclusions from these findings.

{65} The Court of Appeals majority concluded that Ms. Kerr was not responsible for any of the delay in Defendant's case. However, the Court held without explanation that all but three months of the time that Ms. Kerr represented Defendant weighed heavily against him. *See Serros*, No. 31,565, mem. op. ¶¶ 34, 38. It appears implicitly that the Court faulted Defendant for "caus[ing] the delay by trying to have Mr. Pistone removed from the case." *See id.* ¶ 38; *see also Fierro*, 2012-NMCA-054, ¶ 40 (weighing over two years of delay against the defendant because his requests for new counsel at crucial times in the case required "repeated continuances so defense counsel could adequately prepare a defense"). As for the remaining three months, the Court held that the period from March to June 2011, in which the district court "set four separate hearings on the motion [to dismiss]," counted as negligent delay that weighs against the State. *See Serros*, No. 31,565, mem. op. ¶ 34.

{66} We see nothing in the record during the time of Ms. Kerr's representation of Defendant to suggest that Defendant either caused or acquiesced in delays during that period of time. Ms. Kerr entered her appearance and demand for a speedy trial on May 19, 2010, along with a witness disclosure and a notice of discovery demand. Five months later, Ms. Kerr filed Defendant's motion to dismiss, and the district court entered an order lifting the stay because Defendant's competency had been evaluated and Ms. Kerr was satisfied that Defendant was competent to stand trial. Defendant testified at the hearing on his motion to dismiss that he had agreed to have his competency evaluated "right away, just to make things start going on" after Ms. Kerr had explained to him that the case "couldn't move forward without that exam or evaluation." The period of time from October 2010 until the first hearing on Defendant's motion to dismiss on March 23, 2011, resulted from the district court's settings and resettings of the hearing due to Ms. Kerr's unexpectedly long recovery from a medical procedure and from the district court's calendaring process. Given the advanced state of the proceedings and Defendant's cooperation with Ms. Kerr during this period, we do not weigh this time against Defendant.

{67} Finally, we consider the three months that the district court took to hear evidence and render a decision on Defendant's motion to dismiss. The State contends that the Court of Appeals improperly weighed this period of time against the State because the hearings were continued as a result of Defendant's failure to meet his burden on his claims of ineffective of counsel. Based on our review of the proceedings and the cases cited by the State, we disagree. The delays were caused by the State's failure to call Mr. Ross and Mr. Pistone to testify at the first hearing, by the district court's subsequent attempts to secure their testimony and their disciplinary files, and by the district court's taking the matter under advisement for a month before it ruled on the motion to dismiss.

[6]We note that like Mr. Ross, Mr. Pistone appeared at the second hearing on Defendant's motion to dismiss at the district court's request, but for reasons we cannot fathom, also like Mr. Ross, Mr. Pistone was neither asked to testify nor directed to appear at a subsequent hearing.

The Court of Appeals correctly determined that the three-month delay was negligent delay that weighs against the State.

6. *The State negligently failed to move Defendant's case to trial*

{68} Having concluded that Defendant did not unreasonably cause or consent to the delays in this case, we address whether the State met its obligation to move Defendant's case to trial. We agree with the district court that nothing in the record suggests that the State intentionally delayed Defendant's trial or interfered with his right to a speedy trial. In fact, the State appears to have diligently pursued its case during the time that Mr. Ross represented Defendant. In that time, the State made numerous discovery disclosures, filed a witness list which it amended several times, pursued DNA analysis, investigated a possible recantation by the victim, put together a plea offer in consultation with the victim's family, and interviewed and prepared witnesses for trial. While the State's efforts are less apparent during the time that Mr. Pistone and Ms. Kerr represented Defendant, its inactivity can be explained, at least somewhat, by the State's contention that it was prepared for trial on December 1, 2008.

{69} At the same time, we note that the State filed all five of its petitions to extend the time to commence Defendant's trial in this case. In each petition, the State represented that Defendant had been detained since the date of his arrest, and it presented a detailed description of the work in the case that had yet to be completed before it could go to trial. It was the State that filed the August 18, 2008 petition in this Court—over 17 months after Defendant's arrest—reporting a near-total lack of preparation for trial by Mr. Ross. Thus, the State was intimately aware of the status of Mr. Ross's trial preparations, yet it effectively enabled his neglect of Defendant by seeking more time to bring him to trial. When pressed by the district court about why the State had not "push[ed] the case," the State responded that until the plea hearing on October 14, 2008, it believed that "this case would probably plea." We acknowledge the crucial role that plea negotiations play in our criminal justice system, but it is well settled that the possibility of a plea agreement does not relieve the State of its duty to pursue a timely disposition of the case. *See Maddox*, 2008-NMSC-062, ¶ 26 ("The State must affirmatively seek to move the case to trial, even while plea negotiations are pending.").

{70} As for the time that Mr. Pistone represented Defendant, the State similarly assumed responsibility for postponing the case. Shortly after Mr. Pistone was appointed, the State filed its fifth petition for an extension on February 16, 2009, explaining that Mr. Pistone had left the state shortly after being assigned to the case to tend to his father, who was ill. The State also prepared and submitted the order staying the case pending an evaluation of Defendant's competency after meeting with Mr. Pistone and learning that he would not be ready for the July 2009 trial setting. Over the course of the ensuing five-and-a-half months, nothing happened in the case until Mr. Pistone filed his motion to withdraw, and it took another two months before the State requested a hearing on Mr. Pistone's motion and the status of Defendant's competency evaluation. We cannot condone the State's permitting more than eight months to pass from July 2009 until March 2010 with full knowledge that Defendant had been detained since March 2007.

{71} Another aspect of the State's conduct that influenced this case, and therefore deserves scrutiny, is its policy to restrict interviews of the victim and the victim's family in cases with allegations of sexual abuse. The State alluded to this policy during its cross-examination of one of Defendant's witnesses at the hearing on Defendant's motion to dismiss. The witness, an experienced defense attorney, testified that in sexual abuse cases involving child victims, it is important to interview the victim and the victim's family early in the process because a child's memory, in particular, "is susceptible to the passage of time."

> State:
> Now, you also mentioned that in sex offense cases, the thing that you want to do is talk to family members and the child fairly early on; is that right?
> Witness: Yes.
> State:
> Are you aware of the policy or the procedure, basically, of the District Attorney's Office to try to negotiate a case prior to an interview with the child to avoid the trauma of the child coming to an interview?
> Witness:
> Sure. I'm not aware of that, but I can imagine why you would do that.
> State:
> And in this case, you're aware that the child was about four at the time of the disclosure?
> Witness: Yes.

Though the policy's precise contours are unclear, Mr. Ross purportedly delayed requesting interviews during plea negotiations because he believed that if he had asked the State to permit him to interview the victim, the State would not have extended any kind of a plea offer to Defendant. Ms. Kerr similarly explained that the State had informed her that it "would rather not provide the child and the very important witnesses [to be interviewed] until and unless you're going to trial." The State acknowledged that it had prevented Ms. Kerr from interviewing the victim while Defendant's speedy trial motion was pending to avoid "pressure from the family."

{72} We are mindful of the need to avoid re-traumatizing victims and their families. This case, however, illustrates the havoc that such a policy can wreak on an accused's right to a speedy trial. The district court summed up the problem at the hearing on Defendant's motion to dismiss: "And so defense attorneys are saying . . . , 'Well, how the hell am I supposed to know if I should seek a plea deal for my client when I don't know what the evidence is?'" Indeed, to this day, Defendant has never had the opportunity to interview the critical witnesses in his case.

{73} In light of the State's actions, we conclude that the State at least shares blame for the extraordinary delay in this case. On the one hand, the State enabled Mr. Ross's and Mr. Pistone's neglect of Defendant's case by repeatedly requesting to delay Defendant's trial on their behalf. On the other hand, the State's policy of restricting interviews of the victim and the victim's family effectively prevented Defendant's attorneys from fully developing a defense; that policy contributed to their delay in preparing for trial. We stress that nothing in the record hints that the State's actions were deliberately aimed at delaying Defendant's trial. However, we hold that in light of the State's obligation to bring Defendant to trial, its actions amounted to negligent delay. And given the extraordinary length of the delay, we hold that this factor weighs heavily against the State. *See Garza*, 2009-NMSC-038, ¶ 26 ("The degree of weight we assign against the State for negligent delay is closely related to the length of delay: '[O]ur toleration of such negligence varies inversely with its

protractedness, and its consequent threat to the fairness of the accused's trial.'" (quoting *Doggett*, 505 U.S. at 657)).

{74} Thus, looking at the reasons for the delay as a whole under the approach that we have adopted from *Stock*, we hold that Defendant was not responsible for the extraordinary delay in this case. He did not affirmatively cause or acquiesce in the delays in his case, and his attempts to replace Mr. Ross and Mr. Pistone were not unreasonable based on the district court's findings and the evidence presented on Defendant's motion to dismiss. We acknowledge that much of the evidence was one-sided because neither Mr. Ross nor Mr. Pistone testified. However, the State was given the opportunity to call the two attorneys as witnesses at the close of Defendant's evidence and it expressly declined to do so. The State also made no effort to question them when they appeared before the district court at the second hearing on Defendant's motion to dismiss. Finally, the State did not object at the third hearing on the motion to dismiss when the district court and Ms. Kerr agreed that it was not necessary to call Mr. Ross or Mr. Pistone to testify because both men had agreed to disclose their disciplinary files. The State therefore was largely responsible for the lack of evidence in the record to contradict Defendant's testimony if, in fact, such evidence existed. Moreover, the district court remained free to disregard Defendant's testimony, yet the court still found much of it to be credible. Under these circumstances, we defer to the district court's findings, and we do not weigh the reasons for the delay against Defendant.

{75} We also hold that the State negligently failed in its duty to bring Defendant to trial, and that because of the extended nature of the delay, this factor weighs heavily against the State. We emphasize that our holding is based on the State's conduct in this proceeding, which we hold contributed to the extraordinary delay in this case.

C. Assertion of the right

{76} Under the third factor, whether Defendant asserted his right to a speedy trial, we "accord weight to the 'frequency and force' of the defendant's objections to the delay[, and we] also analyze the defendant's actions with regard to the delay." *Garza*, 2009-NMSC-038, ¶ 32 (quoting *Barker*, 407 U.S. at 529). "[T]he timeliness and vigor with which the right is asserted may be considered as an indication of whether a defendant was denied needed access to [a] speedy trial over his objection or whether the issue was raised on appeal as [an] afterthought." *Id.*

{77} The district court found that, "[a]lthough [Defendant] did not specifically enter a pleading on his behalf, the evidence shows that [he] continually asserted his right to a speedy trial to his defense attorneys, although he never asserted that right to the State or the Court until the filing of the [motion to dismiss]." We note initially that part of this finding is contradicted by the record. As we previously explained, each of Defendant's three court-appointed attorneys filed a demand for a speedy trial when each entered an appearance on his behalf. Although these were pro forma assertions of the right, they still are entitled to some weight. *See, e.g.*, *Garza*, 2009-NMSC-009, ¶ 34 (holding that a single demand for a speedy trial, "tucked within the waiver of arraignment and not guilty plea," was sufficient to assert the defendant's right and weighed slightly in the defendant's favor because there was no evidence that the defendant had acquiesced to the delay). We therefore reverse the district court's finding that Defendant did not assert his right to a speedy trial to the district court until he filed his motion to dismiss.

{78} The more difficult question is whether the district court correctly concluded that Defendant had asserted his right to a speedy trial to his attorneys. The Court of Appeals majority concluded that this factor did not weigh in Defendant's favor because (1) the demands for a speedy trial were pro forma and entitled to minimal weight, (2) Defendant had "either stipulated to, moved for, or failed to object to any of the State's requested continuances or extensions of time," (3) Defendant had filed a pro se motion to appoint substitute counsel "in late October 2008, knowing that his trial was scheduled for December 1, 2008, and that the State was prepared to proceed," and (4) Defendant had failed to assert his right to a speedy trial at either hearing to appoint substitute counsel. *Serros*, No. 31,565, mem. op. ¶¶ 40-41. The Court of Appeals also specifically disregarded the district court's finding that Defendant had asserted his right to a speedy trial to his attorneys because it "came only from Defendant himself at the hearing on his motion to dismiss." *Id.* ¶¶ 27, 42.

{79} We take a different view of the record on this factor than did the Court of Appeals majority. We initially see a distinction in this case between *Defendant* agreeing to the State's requests to extend the time for commencing his trial and *Defendant's attorneys* agreeing to such requests. As we explained in our analysis of the reasons for the delay, there was ample evidence from which the district court could have concluded—and did conclude—that Defendant did not agree to the requests to extend the time for commencing his trial. The State offered no evidence to the contrary.

{80} Defendant introduced less evidence of his efforts to assert his right to a speedy trial to Mr. Pistone, but he testified that he repeatedly attempted to contact Mr. Pistone's office and view the discovery in his case. He also testified that, when he learned from Mr. Pistone's assistant that he would not be going to trial in July 2009 because the State had raised a question of his competency, he responded that he did not want a competency evaluation and that he just wanted to go to trial. The district court implicitly found this testimony credible, and we defer to that finding.

{81} But perhaps the clearest example of Defendant's efforts on this factor were his motion to appoint substitute counsel and his disciplinary complaint against Mr. Ross.[7] Defendant filed both documents in the aftermath of the fifth plea setting requested by Mr. Ross, at which Defendant insisted to the court, Mr. Ross, and the State that he did not want to plead guilty and that he wanted to go to trial. Defendant stated in his motion to dismiss that he believed that Mr. Ross was "not able to adequately represent [his] interests" in the case, and his disciplinary complaint elaborated on that point: "[Mr. Ross] only wants to offer me plea bargains and keeps requesting extensions of time without my consent." As we previously explained, we do not fault Defendant for

[7]Defendant also testified that he had filed a disciplinary complaint and a pro se motion to substitute counsel against Mr. Pistone because he could not get in touch with him and he kept getting the runaround from Mr. Pistone's assistant. Mr. Pistone referred to these filings in his motion to withdraw; however, neither the disciplinary board nor the district court could find any record of these documents. We therefore do not rely on them as evidence of Defendant's efforts to assert his right to a speedy trial.

filing the motion and complaint "knowing that his trial was scheduled for December 1, 2008, and that the State was prepared to proceed." *Serros*, No. 31,565, mem. op. ¶ 40. Under these circumstances, we view Defendant's motion and complaint as clear—though perhaps misguided—attempts to assert his right to a speedy trial, while also seeking to assert his right to effective assistance of counsel. As the Court of Appeals dissent observed, these rights should not be mutually exclusive. *See id.* ¶ 74 (Zamora, J., dissenting) ("A defendant should not be put in a position to have to choose between proceeding with his criminal trial with inadequately prepared legal counsel and the possibility of waiving his right to a speedy trial by filing a pro se motion to have his ill-prepared legal counsel removed from his case.").

{82} We also are not concerned by the district court's initial rulings that expressly weighed any delay against Defendant resulting from the substitutions of counsel. Over the course of the hearing on Defendant's motion to dismiss, the district court retreated from its prior findings as more information came to light about Mr. Ross's and Mr. Pistone's representation of Defendant. Regarding Mr. Pistone, the district court expressly stated at the hearing granting Defendant's motion to dismiss, "I will tell you now, if I knew then what I know now, I would have never allowed Mr. Pistone to withdraw from the case." We therefore do not afford much deference to the district court's earlier pronouncements.

{83} In sum, we conclude that Defendant asserted his right to a speedy trial throughout the proceedings in the best way he knew. That Mr. Ross and Mr. Pistone did not further Defendant's efforts should not be held against him. Consequently, we weigh this factor in Defendant's favor.

D. Prejudice

{84} Regarding the fourth and final factor, whether Defendant has suffered prejudice from the delay in bringing his case to trial, we analyze three interests that are affected by the right to a speedy trial: "(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." *Garza*, 2009-NMSC-038, ¶ 35 (quoting *Maddox*, 2008-NMSC-062, ¶ 32).

{85} The third interest, which *Barker* characterized as the "most serious," protects the defendant's ability to assert an adequate defense at trial from the prejudicial effect of the passage of time, such as the death or disappearance of a witness or the loss of memory. *Garza*, 2009-NMSC-038, ¶ 36 (quoting *Barker*, 407 U.S. at 532). A defendant who claims this type of prejudice must show "with particularity what exculpatory [evidence] would have been offered [and] that the delay caused the [evidence's] unavailability." *Id.* (quoting *Jackson v. Ray*, 390 F.3d 1254, 1265 (10th Cir. 2004)).

{86} Ordinarily, a defendant bears the burden of proof on this factor by showing "particularized prejudice" when claiming a speedy trial violation. *Garza*, 2009-NMSC-038, ¶ 39. However, "if the length of delay and the reasons for the delay weigh heavily in defendant's favor and defendant has asserted his right and not acquiesced to the delay, then the defendant need not show prejudice for a court to conclude that the defendant's right has been violated." *Id.*

{87} We already have determined that the first three factors weigh heavily in Defendant's favor, and we therefore need not consider whether Defendant has made a particularized showing of prejudice. We address this factor, however, to clarify what we view as a misapplication of the law by the Court of Appeals majority, which concluded that Defendant had failed to show that he was prejudiced by the extreme delay in his case.

{88} We start with the district court's conclusion that, "[t]he fact that [Defendant had] been in custody in segregation for almost four and one-half (4-1/2) years with no adjudication, resulted in extreme prejudice." This conclusion was based on Defendant's *unchallenged* testimony at the hearing on his motion to dismiss, in which he described his living conditions for the previous four years. Defendant testified that, from the time that he was first incarcerated, he had been segregated and placed in protective custody "without [his] request or knowledge of where [he] was going." He described being held alone in a private cell, except for two 20-minute periods per day in which he was permitted to tend to his personal needs, such as bathing, cleaning his cell, and attempting to communicate with his attorneys or his family. Defendant also explained that as a result of being placed in segregation, he did not have access to the educational programs, library time, or recreational time available to the inmates housed with the jail's general population. He further testified that he had made written requests to be moved out of segregation "all the time" "because of the way the inmates . . . in segregation are treated, but because of the nature of [his] charges, . . . [jail officials wouldn't] allow [him] to move." And Defendant testified that he had been subjected to "a lot" of sexual, physical, and verbal harassment; that he had been labeled a "Chester" (a slang term for child molester) by his fellow detainees and by MDC officials; and that he had been physically attacked by other inmates in his pod because he is gay.

{89} For the first two interests relevant to our prejudice inquiry, avoiding oppressive pretrial incarceration and minimizing anxiety and concern of the accused, we have noted that, because "'[s]ome degree of oppression and anxiety is inherent for ever[y] defendant who is jailed while awaiting trial'," we only find prejudice when the defendant makes a "particularized showing" that the "pretrial incarceration or the anxiety suffered is undue." *Garza*, 2009-NMSC-038, ¶ 35 (quoting *Maddox*, 2008-NMSC-062, ¶ 32) (alterations in original). "The oppressive nature of the pretrial incarceration depends on the length of incarceration, whether the defendant obtained release prior to trial, and what prejudicial effects the defendant has shown as a result of the incarceration." *Id.*

{90} Defendant's testimony easily establishes that the delay in his case caused him to suffer oppressive pretrial incarceration. It is undisputed that, because Defendant could not afford to pay his $150,000 bond, he was incarcerated for over four years without an adjudication of guilt, a length of time that we hold is oppressive on its face.[8] *Cf., e.g., id.* ¶ 37 (holding that the

[8]We recently reaffirmed that "the New Mexico Constitution requires that '[a]ll persons shall . . . be bailable by sufficient sureties' and that '[e]xcessive bail shall not be required.'" *State v. Brown*, 2014-NMSC-038, ¶ 21 (quoting N.M. Const. art. II, § 13). This case illustrates the dangers of requiring excessive bail. Nothing in the record suggests that either Defendant or society in general benefitted from locking up Defendant for over four years because he could not afford his bond. *Contra Fierro*, 2012-NMCA-054, ¶ 58 (concluding that the defendant's 55 months in solitary confinement was not prejudicial because it was "for [his] own safety" and because he had threatened the victim and her family).

defendant had not established prejudice when he was held for two hours before he was released on bond). That Defendant was held in segregation for all of that time only compounds the prejudicial effect of his excessive pretrial incarceration.

{91} The Court of Appeals majority concluded that Defendant's four-year placement in segregation was not oppressive because he was "placed in protective custody for his own safety" and because "the two attacks . . . were isolated incidents." *Serros*, No. 31,565, mem. op. ¶ 46. To the extent the majority was suggesting that Defendant was better off in segregation than with the general population, Defendant's testimony that he repeatedly requested to be transferred out of protective custody contradicts that notion. This testimony also suffices to establish prejudice to the second interest, that the delay caused Defendant to suffer undue anxiety and concern.

{92} As for prejudice to the third interest, Defendant's ability to present an adequate defense, the length of the delay again was enough to meet Defendant's burden under the circumstances of this case. The Court of Appeals majority concluded that Defendant had failed to identify specific exculpatory evidence that was lost due to the passage of time. While that may be true, Defendant established that the victim in this case was four years old at the time of the alleged abuse, and that in the subsequent four years that Defendant's case sat untried—a period of time in which the victim's age doubled—the State did not permit Defendant to interview either the victim or the victim's family members. As a result, the only contemporaneous account of the incident was the victim's recorded safehouse interview, which was not subject to cross-examination. We are persuaded that the passage of over four years without the ability to interview the victim or the victim's family, particularly in light of the victim's very young age, was sufficient to demonstrate that the delay would have prejudiced Defendant's ability to present an adequate defense if his case had gone to trial.

{93} In sum, we agree with the district court that Defendant's four years and three months in custodial segregation without a trial resulted in extreme prejudice.

E. Balancing the factors

{94} We hold that the extreme length of the delay in this case of over four years, coupled with Defendant's incarceration in custodial segregation for the entire time, resulted in extreme prejudice to Defendant and established a presumption that his right to a speedy trial was violated. We further hold that the reasons for the delay do not weigh against Defendant, but they weigh heavily against the State, and that Defendant adequately asserted his right to a speedy trial under the circumstances of this case.

{95} In reaching this conclusion, we acknowledge that we have never before considered the Court of Appeals' holding in *Stock*, except in *Stock* itself, in which we granted review and later quashed our writ of certiorari. *See* 2006-NMCA-140, *cert. granted*, 2006-NMCERT-011, *cert. quashed*, 2007-NMCERT-001. *Stock* and this case teach that as the delay mounts in bringing a defendant to trial, the State's obligation to alert the district court becomes increasingly pressing, especially when the defendant is held in custody awaiting trial. Ideally, the State, the defendant, defense counsel, and the district court all would be aligned in their efforts to bring the defendant to trial in a timely fashion.

{96} We acknowledge that there are times when defense counsel may prefer delay in the best interests of his client. When the client expressly concurs, that delay will continue to be attributed to the accused. But it is the State that is ultimately tasked with bringing the accused to trial in a timely manner. Accordingly, we do not deem it unfair to impose upon the prosecution the burden of monitoring the progress of the case and, at some point, alerting the trial court of potential speedy trial consequences.

{97} That does not relieve the remaining participants from their own obligations to protect the constitutional rights of the accused. But it is uniquely the duty of the prosecution—as the State's representative—to ensure that the accused is prosecuted in a manner consistent with the Constitution. This is no less true for the right to a "speedy and public trial" under the Sixth Amendment than it is for the right to counsel and confrontation under that same amendment, and the rights against self-incrimination under the Fifth Amendment and against unreasonable searches and seizures under the Fourth Amendment. The State must ensure that justice is done.

{98} That means that at some point the delay simply becomes intolerable. As Judge Schwartz, himself formerly a long-time district attorney, explained when he dismissed this case: "[U]nfortunately, it's the duty of the State to work both sides of the street sometimes." Although perhaps inelegantly phrased, the judge got it right. His quote captures the essence of the State's duty—as complex and frustrating as it may be—in our modern society in which everyone, big or small, is governed by the same Constitution and the rule of law.

III. CONCLUSION

{99} We reverse the Court of Appeals and remand to the district court for further proceedings consistent with this opinion.

{100} IT IS SO ORDERED.

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

WE CONCUR:
BARBARA J. VIGIL, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-009

No. S-1-SC-33969 (filed February 18, 2016)

SAFEWAY, INC.,
Defendant/Cross-Claimant-Respondent,
v.
ROOTER 2000 PLUMBING AND DRAIN SSS,
Defendant/Cross-Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
LOUIS E. DEPAULI, JR., District Judge

EMILY A. FRANKE
JANE LAFLIN
BUTT THORNTON & BAEHR PC
Albuquerque, New Mexico
for Petitioner

GREGORY D. STEINMAN
MINAL P. UNRUH
MADISON & MROZ, P.A.
Albuquerque, New Mexico
for Respondent

Opinion

Petra Jimenez Maes, Justice

{1} This appeal arises out of a cross-claim for contractual and traditional indemnification. The complaint alleged that Plaintiffs, Briana Fierro and Jason Fierro, suffered injuries when a baby changing table collapsed in a Safeway store, and that the collapse was the result of negligence on the part of Safeway, Inc. (Safeway) and Rooter 2000 Plumbing and Drain SSS (Rooter). The central issue is whether the right to traditional indemnification is available notwithstanding New Mexico's adoption of comparative fault where the jury compared and apportioned fault among concurrent tortfeasors. After reviewing the genesis of traditional indemnification and the adoption of contribution and comparative negligence, we hold that traditional indemnity does not apply when the jury finds a tortfeasor actively at fault and apportions liability using comparative fault principles. The second issue on appeal is whether the duty to insure and defend provision of the Standard Service Provider Terms and Conditions Agreement (Agreement) between Rooter and Safeway is void and unenforceable under NMSA 1978, Section 56-7-1 (1971, amended 2005). We hold that it is. Therefore, we reverse the Court of Appeals and affirm the district court's grant of summary judgment in favor of Plaintiffs.

I. FACTS AND PROCEDURAL HISTORY

{2} Safeway owns and operates a grocery store in Gallup, New Mexico. Thirteen months after Rooter installed a diaper changing table in Safeway's Gallup store bathroom, Briana Fierro and her baby, Jaye Fierro (Plaintiffs), suffered personal injuries when the changing table became dislodged and fell from the wall because the butterfly bolts were apparently installed backwards. Plaintiffs' initial complaint against Safeway alleged negligence and personal injuries resulting from the faulty changing table. Plaintiffs filed a second amended complaint naming Rooter as a defendant and alleging that Rooter was negligent in its installation of the baby changing station. Plaintiffs further alleged negligence per se, strict liability, breach of implied warranty, and claims under the doctrine of respondeat superior against all defendants. Safeway filed a cross-claim against Rooter seeking defense, indemnification, contribution, and damages pursuant to both New Mexico common law and the Agreement signed by both parties. The relevant provision of the Agreement provides that:

> [Rooter] shall indemnify, defend and hold [Safeway] harmless from and "against;" any and all claims, losses, damages, liabilities, and expenses (including the costs of investigation and attorney's fees) in connection with any claim or cause of action arising from any act or omission of [Rooter;], its employees, agents, and representatives, in the performance of its obligations under this Agreement, except where the claim, loss or damage is caused by the sole negligence of [Safeway].

The Agreement also stated that Rooter was to name Safeway as an additional insured under its insurance policy. Both Rooter and its insurance carrier refused to defend or indemnify Safeway. Rooter took the position that New Mexico's anti-indemnification statute, Section 56-7-1, voided any obligation it had to Safeway, and Rooter's insurance company denied coverage because it had not been named as an insured on the Rooter policy; thus the policy did not cover Safeway.

{3} Rooter then filed a motion for summary judgment on Safeway's cross-claim, asserting that Safeway had no right to indemnification. The district court found as a matter of law that there is no dispute that Safeway will not have to pay for any negligence that is found to have been committed by Rooter. Safeway did not object to or dispute the district court's finding. The district court granted Rooter's motion for summary judgment, finding that the Agreement's contractual indemnification requirements were void and unenforceable as a matter of New Mexico law, foreclosing Safeway's rights to indemnity, defense, and insurance. In granting Rooter's motion for summary judgment, the district court thereby dismissed Safeway's claim for contractual indemnification." The district court did not indicate whether it applied the original 1971 of the anti-indemnification statute, or the version as amended in 2003 that specifically invalidates agreements to insure and defend against an indemnitee's negligence, when it concluded that the contractual indemnification was void. *See* NMSA 1978, Section 56-7-1(A) (2003, as amended in 2005). The district court further found that Plaintiffs were not seeking liability or damages from Safeway for Rooter's acts or omissions and thus similarly dismissed Safeway's claim for common law indemnification. The district court determined that Safeway could request that Rooter be included on a special verdict form for the purpose of allocating fault.

{4} Plaintiffs ultimately settled all of their claims against Rooter, so those two parties filed a joint motion to dismiss all claims against Rooter, which the district court granted. The case then proceeded to trial on Plaintiff's claims against Safeway. At the close of evidence, the jury returned a comparative fault special verdict form.

{5} The special verdict form submitted to the jury asked four questions. The first asked, "[w]as [Safeway] negligent?" The jury answered yes. The second question asked, "[w]as any negligence of [Safeway] a cause of Plaintiff's injuries and damages?" Again, the jury answered yes. The third question and answer established the total damages suffered by Plaintiff to be $450,000. The fourth question asked the jury to do the following:

> Question No. 4: Compare the negligence of the following persons or entities and find a percentage for each. The total of the percentages must equal 100%, but the percentage for any one or more of the persons or entities named may be zero [if] you find that such person or entity was not negligent or that any negligence on the part of such person or entity was not a cause of damage.
> Safeway _____%
> Rooter 2000 _____%
> 100% TOTAL

The jury entered "40" for Safeway's negligence because as alleged in Plaintiff's Uniform Jury Instruction 13-302 NMRA, Safeway either failed to exercise ordinary care to (1) provide proper hardware to Rooter, (2) supervise the installation of the baby changing table, or (3) conduct reasonable inspection of the table during the ensuing thirteen months. The jury entered "60" for Rooter's negligence.

{6} Safeway appealed to the Court of Appeals for review of the district court's order granting summary judgment in favor of Rooter, thus denying Safeway's cross-claim against Rooter for common law indemnification, as well as Safeway's cross-claims alleging Rooter had a contractual duty to indemnify, defend, and insure Safeway. The Court of Appeals, considering New Mexico's common law of indemnity, and the importance of the instant jury's apportionment of fault amongst Safeway and Rooter, determined that "[t]he fact that the jury apportioned fault between the parties at trial does not strip away Safeway's common law right of indemnification to obtain full recovery for damages assessed against it from Rooter, assuming that Safeway is found by the jury to be a passive tortfeasor." *Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS*, 2013-NMCA-021, ¶ 23, 297 P.3d 347 (citations omitted). Because the Court of Appeals determined that there were still genuine issues of material fact regarding whether Rooter owed Safeway a common law right of indemnification, and whether Rooter's duty to insure Safeway was breached, it reversed the district court's grant of summary judgment. *See Id.* ¶¶ 24, 30-31.The Court of Appeals also held that the 1971 version of Section 56-7-1 applied to the parties' contract and that the statute voided Rooter's "agreement to indemnify but not its agreement to defend and insure." *Safeway,* 2013-NMCA-021, ¶¶ 1, 26-27.

{7} Rooter appealed the following two issues to this Court pursuant to Rule 12-502 NMRA: (1) whether the Court of Appeals erred in holding that there are genuine issues of material fact regarding whether Safeway has any common law right to indemnification against Rooter where Rooter had settled and satisfied its proportionate share of liability with the Plaintiffs; and (2) whether the Court of Appeals erred in holding that Rooter owes Safeway its defense fees and costs even though the contractual indemnification provision between Safeway and Rooter is void and unenforceable as a matter of law. We granted certiorari. *Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS*, 2013-NMCERT-001 (No. 33,969, Jan. 28, 2013).

II. STANDARD OF REVIEW

{8} This appeal requires this Court to review a lower court's grant of summary judgment. "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 (citation omitted). A lower court's grant or denial of summary judgment is reviewed de novo. *See id.* "The validity of an indemnification agreement and interpretation of statutes raises issues of law, which we review de novo." *J.R. Hale Contracting Co., Inc. v. Union Pac. R.R.*, 2008-NMCA-037, ¶ 62, 143 N.M. 574, 179 P.3d 579 (citation omitted). All issues raised in this appeal are legal issues, which we review de novo.

III. DISCUSSION

{9} Rooter argues that because it satisfied its proportionate share of negligence with the Plaintiffs, and because Safeway was never held liable for Rooter's negligence, Safeway does not have a right to traditional indemnification against Rooter. Rooter further asserts that traditional indemnification is inapplicable where fault can be apportioned under comparative negligence principles to the party seeking indemnification. Rooter, therefore, concludes that because each party was held liable for their proportionate share of the fault, there is no basis for traditional indemnification and the district court's grant of summary judgment was proper.

{10} Safeway responds that it is entitled to traditional indemnification from Rooter because a jury's apportionment of fault does not preclude Safeway's right to common law indemnification against Rooter. Safeway argues that "[n]otwithstanding the doctrine of comparative negligence, New Mexico still adheres to traditional and proportional indemnity principles in some circumstances." Such circumstances include vicarious liability cases, to which Safeway analogizes to the nondelegable duty doctrine that also being the theory under which Plaintiffs had originally sought damages.

{11} The doctrines of indemnity are perplexing as a result of their often misunderstood relationship to contribution. Indeed, the parties in this case often confuse or incorrectly interchange traditional and proportional indemnity in their arguments. In addition, our shift from contributory negligence to comparative negligence and several liability has further confused the doctrines. We take this opportunity to clarify the relationships between traditional indemnification, proportional indemnification, contribution, and comparative negligence. We refer to common law indemnification, sometimes called equitable indemnification, as traditional indemnification for the sake of clarity and consistency.

A. The origins of traditional indemnity sought to mitigate the common law rule against contribution among tortfeasors

{12} The common law did not permit contribution or any form of pro rata contribution among tortfeasors. *See Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 1969-NMSC-089, ¶ 6, 80 N.M. 432, 457 P.2d 364; *Merryweather v. Nixan*, 8 Term R. 186, 101 Eng. Rep. 1337 (K.B. 1799). The basic theoretical bar at common law to any apportionment among those who committed torts, whether by indemnity or by contribution, was the unwillingness of the law as a matter of policy to make relative value judgments of degrees of culpability. *See* 42 C.J.S. *Indemnity*, § 27 (2015). Additionally, tort law was considered punitive, thus distribution among tortfeasors diluted its impact. *See* Francis H. Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 Cornell L. Rev. 552, 557-59 (1936)(footnotes omitted). Commentators and scholars criticized the doctrine's all-or-nothing philosophy terming it a "chronic invalid who will not die." W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts* § 65, at 453 (5th ed. 1984).

{13} As a result of the common law rule against contribution, courts resorted to

the doctrine of indemnity to mitigate the harshness of the no-contribution rule. *See Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d 561, 573 (Wyo. 1992) ("[Traditional] indemnity's growth may be directly traced to a reaction to the common law prohibition of contribution." (citation omitted)). This Court likewise "realized that the bar against contribution often worked inequities," which "led to the recognition of actions for indemnification which provided for a complete shifting of liability from one party to another in cases where a party was held only vicariously liable." *Otero v. Jordan Rest. Enters.*, 1996-NMSC-047, ¶ 9, 122 N.M. 187, 922 P.2d 569 (emphasis, internal quotation marks, and citation omitted).

{14} Courts began to discover, however, that the bar to contribution among fault-bearing tortfeasors worked injustice in certain other cases in which the indemnitee, while to some degree personally at fault, was much less culpable than the indemnitor. Some courts thus expanded indemnity to include cases where the difference in relative degrees of fault was so great that the negligence of one tortfeasor could be judged "active" in relation to the "passive" negligence of the other. *See Am. Motorcycle Ass'n v. Super. Ct.*, 578 P.2d 899, 908 (Cal. 1978) ("[T]he equitable indemnity doctrine originated in the common sense proposition that when two individuals are responsible for a loss, but one of the two is more culpable than the other, it is only fair that the more culpable party should bear a greater share of the loss."); *Dole v. Dow Chem. Co.*, 282 N.E.2d 288, 292-95 (N.Y. 1972) *superseded by statute as stated in N.Y. Hosp. Medical Ctr. Of Queens v. Microtech Contracting Corp.,* 5 N.E.3d 993, 998 (N.Y. 2014) (discussing origins of distinction between active and passive tortfeasors and role played by common-law lack of contribution).

{15} New Mexico first adopted the active/passive and in pari delicto tests in the 1940s and continues to follow these doctrines today. *See Krametbauer v. McDonald*, 1940-NMSC-049, ¶¶ 43, 50, 44 N.M. 473, 104 P.2d 900 (holding that indemnity was not allowed because negligence of both parties was "active"). Acting in pari delicto simply refers to the parties being "negligent in an equal degree." *Trujillo v. Berry*, 1987-NMCA-072, ¶ 7, 106 N.M. 86, 738 P.2d 1331 (internal quotation marks and citation omitted). The right to traditional indemnification "involves whether the conduct of the party seeking indemnification was passive and not active or in pari delicto with the indemnitor." *Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc. (In re Consol. Vista Hills Retaining Wall Litig.)*, 1995-NMSC-020, ¶ 10, 119 N.M. 542, 893 P.2d 438 (*Amrep*).

> Active conduct 'is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had [a duty to perform]'. Passive conduct occurs when the party seeking indemnification fails to discover and remedy a dangerous situation created by the negligence or wrongdoing of another.

Id. ¶ 12 (citations omitted). "In essence, traditional indemnification is a judicially created common-law right that grants to one who is held liable an all-or-nothing right of recovery from a third party . . . ." *Id.* ¶ 7.

{16} New Mexico also enacted the Uniform Contribution Among Tortfeasors Act (UCATA) in 1947 as another method to avoid the harshness of the rule against contribution without changing the underlying law of joint and several liability. *See* NMSA 1978, §§ 41-3-1 to -8 (1947, as amended through 1987). The purpose of this Act was "to provide for a proportionate allocation of the burden among tortfeasors who are liable", *Rio Grande Gas Co.*, 1969-NMSC-089, ¶ 6 (citations omitted), and "to prevent [the injured person] from relieving one joint tortfeasor of the obligation of contribution except where the injured person has also released the other tortfeasors from [their] pro rata share of the common liability". *See Garrison v. Navajo Freight Lines, Inc.*, 1964-NMSC-099, ¶ 6, 74 N.M. 238, 392 P.2d 580 (omission in original) (citation omitted); *see also Burt v. W. Jersey Health Sys.*, 771 A.2d 683, 687 (N.J. Super. Ct. App. Div. 2001) ("The Joint Tortfeasors Contribution Law is also designed to 'alleviate the evident harshness and inequity of the common-law rule . . . pursuant to which there was no right of joint tortfeasors to seek allocation among themselves of the burden of their fault.'" (citation omitted)). The UCATA expressly reserved the right to indemnity in New Mexico. *See* Section 41-3-6 (providing that this Act "does not impair any right of indemnity under existing law").

{17} In conclusion, both traditional indemnity and the UCATA sought to soften the all-or-nothing rule of common law contributory negligence. Traditional indemnification and the active/passive test evolved as a restitutionary device designed to ensure that the most culpable party, as between the two wrongdoers, bore the ultimate loss. In contrast, whereas traditional indemnification implies shifting 100% of the loss to the passive tortfeasor, contribution contemplates a shift of only part of the loss to the other tortfeasor. *See Rio Grande Gas Co.*, 1969-NMSC-089, ¶ 13 ("[T]he difference between indemnity and contribution in cases between persons liable for an injury to another is that, with indemnity, the right to recover springs from a contract, express or implied, and enforces a duty on the primary wrongdoer to respond for all damages; with contribution, an obligation is imposed by law upon one joint tortfeasor to contribute his share to the discharge of the common liability.").

B. New Mexico adopts comparative fault and several liability but retains the rights to indemnity and contribution

{18} The move to comparative negligence began with this Court's ruling in *Scott v. Rizzo*, 1981-NMSC-021, ¶ 30, 96 N.M. 682, 634 P.2d 1234, *superseded by statute as stated in Delfino v. Griffo*, 2011-NMSC-015, ¶ 23, 150 N.M. 97, 257 P.3d 917. This Court established a system of comparative fault which, rather than barring a plaintiff's recovery completely if the plaintiff was at fault, allows liability for damages to be split amongst negligent actors who contribute to a harm suffered.

> The thrust of the comparative negligence doctrine is to accomplish (1) apportionment of fault between or among negligent parties whose negligence proximately causes any part of [a] loss or injury, and (2) apportionment of the total damages resulting from such loss or injury in proportion to the fault of each party.

Id. ¶ 20.

{19} Comparative negligence limits a party's liability in such a way that joint and several liability does not: "[A]ll parties [are] fully responsible for their own respective acts to the degree that those acts have caused harm," and a "jury must ascertain the percentage of negligence of all participants to an occurrence," so that no party is held liable under comparative negligence for the harm that party did not inflict. *Garcia v. Gordon*, 2004-NMCA-114, ¶ 8, 136 N.M. 394, 98 P.3d 1044 (internal quotation marks and citation omitted).

The *Scott* court noted that the pure form of comparative negligence has three benefits: (1) it denies recovery for one's own fault; (2) it permits recovery to the extent of another's fault; and (3) it holds parties responsible to the degree that they have caused harm. *See* 1981-NMSC-021, ¶ 29.

{20} Not long after *Scott*, the Court of Appeals held that "[j]oint and several liability is not to be retained in our pure comparative negligence system on a theory of one indivisible wrong. The concept of one indivisible wrong, based on common law technicalities, is obsolete, and is not to be applied in comparative negligence cases in New Mexico." *Bartlett v. N.M. Welding Supply, Inc.*, 1982-NMCA-048, ¶ 33, 98 N.M. 152, 646 P.2d 579 (citation omitted), *superseded by statute as stated in Payne v. Hall*, 2006-NMSC-029, ¶ 11, 139 N.M. 659, 137 P.3d 599 (citation omitted).

{21} The New Mexico Legislature codified the principles of *Scott* and *Bartlett* in 1987. *See* NMSA 1978, §§ 41-3A-1 to -2 (1987); *Reichert v. Atler*, 1992-NMCA-134, ¶ 34, 117 N.M. 628, 875 P.2d 384 ("Following our Supreme Court's decision in *Scott* and this Court's decision in *Bartlett*, our [L]egislature enacted legislation continuing the doctrine of joint and several liability in certain situations." (Footnote and citation omitted)). The statute provides that:

> In any cause of action to which the doctrine of comparative fault applies, the doctrine imposing joint and several liability upon two or more wrongdoers whose conduct proximately caused an injury to any plaintiff is abolished except as otherwise provided hereafter. The liability of any such defendants shall be several.

Section 41-3A-1(A). The same section further provides that a defendant who is severally liable shall be liable only for the amount of harm that the defendant's damage caused, and not jointly liable for any harm another party caused:

> In causes of action to which several liability applies, any defendant who establishes that the fault of another is a proximate cause of a plaintiff's injury shall be liable only for that portion of the total dollar amount awarded as damages to the plaintiff that is equal to the ratio of such defendant's fault to the total fault attributed to all persons, including plaintiffs, defendants and persons not party to the action.

Section 41-3A-1(B).

{22} The Legislature reserved the application of joint-and-several liability to the following specific situations:

> (1) to any person or persons who acted with the intention of inflicting injury or damage;
>
> (2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;
>
> (3) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or
>
> (4) to situations not covered by any of the foregoing and having a sound basis in public policy.

Section 41-3A-1(C).

{23} This Court has applied Section 41-3A-1 to mean that, "[u]nder our comparative negligence system, each negligent party is charged an amount representing its percentage of fault." *Gutierrez v. City of Albuquerque*, 1998-NMSC-027, ¶ 11, 125 N.M. 643, 964 P.2d 807 (citing Section 41-3A-1(B)). Tortfeasors must now accept responsibility for damages commensurate with their own relative culpability unless one of the specified exceptions to joint and several liability apply. *See Otero*, 1996-NMSC-047, ¶ 11 ("New Mexico tort law is premised on the notion that each concurrent tortfeasor should bear responsibility for an accident in accordance with his or her fault.").

{24} Several liability incorporates the *Scott/Bartlett* approach of limiting several liability to particular causes of action. Section 41-3A-1(A) states that the doctrine of several liability applies to "any cause of action to which the doctrine of comparative fault applies," unless the statute provides an exception. In this context, comparative fault is the affirmative defense that reduces the defendant's liability by the percentage of fault attributable to the plaintiff—the doctrine created in *Scott*. Unless a provision of the statute provides otherwise, several liability applies to any cause of action to which the partial affirmative defense of comparative negligence applies to plaintiff's cause of action.

{25} In addition, this Court modified traditional indemnification in 1995 by adopting proportional indemnity, "under which a defendant who is otherwise denied apportionment of fault may seek partial recovery from another at fault." *Amrep*, 1995-NMSC-020, ¶ 36. *Amrep* reasoned proportional indemnification goes hand-in-hand with New Mexico's adoption of comparative fault.

> [T]o establish an equitable system in which a defendant who cannot raise the fault of a concurrent tortfeasor as a defense because of the plaintiff's choice of remedy, we adopt the doctrine of proportional indemnification . . . [to fill] a void in the overall picture that contemplates proration of liability among all those at fault. . . . By embracing proportional indemnification, this Court takes comparative fault and several liability another logical step.

Id. ¶¶ 36, 40-41. Proportional indemnification applies when the one seeking indemnification "has been adjudged liable for full damages on a third-party claim that is not susceptible under law to proration of fault among joint tortfeasors." *Id.* ¶ 38. "[P]roportional indemnification applies only when contribution or some other form of proration of fault among tortfeasors is not available." *Id.* ¶ 39. "[P]roportional indemnification does not apply when [the UCATA] provides for proration of damages among joint tortfeasors." *Id.* ¶ 37 (citation omitted). For example, actions for negligence are governed by comparative fault, which apportions fault among tortfeasors, so traditional indemnity principles apply because each tortfeasor is liable only for his or her share of the fault and will never pay more damages than his or her share. On the other hand, when a plaintiff chooses to sue under breach of contract, a defendant "should be able to seek proportional indemnification for that percentage of fault attributable to" another. *Id.* ¶ 41.

{26} Therefore, indemnification now takes several forms in New Mexico. "[T]raditional indemnification is a judicially created common-law right that grants to one who is held liable an all-or-nothing right of recovery from a third party . . . ." *Id.* New Mexico also recognizes proportional indemnification, which allows defendants to recover from a third-party for the portion of a plaintiff's loss which the third-party's conduct caused, even when the law does not apportion fault amongst tortfeasors under a theory of comparative fault. "When applicable, proportional indemnification allows a defendant to seek partial recovery from another for his or her fault." *N.M. Pub. Schs. Ins. Auth.*

v. Gallagher & Co., 2008-NMSC-067, ¶ 23, 145 N.M. 316, 198 P.3d 342. And, although joint-and-several liability was for the most part abolished when New Mexico adopted a comparative fault regime, joint-and-several liability has been retained in certain matters by statute, which allows a tortfeasor to seek contribution or indemnification from a fellow tortfeasor. *See* § 41-3A-1.

C. Traditional indemnity does not apply when the jury finds a tortfeasor actively at fault and apportions liability using comparative fault principles

{27} The parties differ as to the effect *Amrep* has on a party's right to traditional indemnification. Safeway asserts that this Court made it clear that traditional indemnification was to survive the adoption of comparative fault and proportional indemnification. Rooter, however, argues that *Amrep* specifically indicated that traditional indemnification is not applicable where fault for negligence is to be apportioned under New Mexico's system of comparative fault.

{28} Because recovery under traditional indemnification requires at least one active tortfeasor and one passive concurrent tortfeasor, the remedy only applies in a limited number of tort cases premised on vicarious or derivative liability. For example, the Restatement (Third) of Torts: Apportionment of Liability § 22 (Am. Law Inst. 2000) provides:

> (a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:
>
> (1) the indemnitor has agreed by contract to indemnify the indemnitee, or
>
> (2) the indemnitee
>
> (I) was not liable except vicariously for the tort of the indemnitor, or
>
> (ii) was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable.
>
> (b) A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought would not be liable to the plaintiff.

The Restatement (Third) of Torts is consistent with our past observations in *Amrep* that:

> [t]he right to indemnification may arise through vicarious or derivative liability, as when an employer must pay for the negligent conduct of its employee under the doctrine of respondeat superior or when a person is directed by another to do something that appears innocent but is in fact wrongful. Further, traditional indemnification principles apply in both negligence and strict liability cases involving persons in the chain of supply of a product, and in breach of warranty cases.

1995-NMSC-020, ¶ 9 (citations omitted); *see also Otero*, 1996-NMSC-047, ¶¶ 3 n.2, 14 (affirming the district court's finding that a restaurant "would be entitled to indemnification from the contractor and architect for whose negligence [the restaurant] is liable" because "[t]his reasoning accords with the general rule that one held vicariously liable has an action for traditional indemnification against the person whose act or omission gave rise to the vicarious liability." (citations omitted)).

{29} In each one of these factual scenarios, traditional indemnification would allow a party who has been found liable without active fault to seek restitution from someone who was actively at fault. Importantly, a finding of negligence does not necessarily mean a finding of active conduct. For example, if a claim alleges that a contractor failed to discover and remedy a dangerous condition, that is passive conduct—if the contractor in the exercise of ordinary care could not have discovered the dangerous condition—and traditional indemnification would be available from the active concurrent tortfeasor who created the dangerous condition. *See Amrep*, 1995-NMSC-020, ¶¶ 12-13 (defining passive conduct and providing an example to distinguish passive conduct from active conduct in failing to discover and remedy a dangerous situation). Alternatively, if the contractor discovered, or should have discovered, the dangerous condition and did not remedy the dangerous condition, that is active conduct, and traditional indemnification is not available. *See id.* ¶ 19. In strict liability cases, only if the retailer was blameless—passive conduct—is the retailer entitled to full indemnification from the manufacturer. *See id.* ¶ 24.

{30} Retaining traditional indemnification is consistent with the equitable goals of our comparative fault regime. *Id.* ¶ 36. Comparative fault ensures that all actively negligent parties pay for their respective faults. *See id.* ¶ 37. Traditional indemnification ensures that a party who is not actively at fault can force the actively at fault party to pay. *See id.* ¶ 10.

{31} Comparative fault is inapplicable under true vicarious and derivative liability scenarios because the " 'vicariously liable party has not committed any breach of duty to the plaintiff but is held liable simply as a matter of legal imputation of responsibility for another's tortious acts.' " *Valdez v. R-Way, LLC*, 2010-NMCA-068, ¶ 7, 148 N.M. 477, 237 P.3d 1289 (quoting Restatement (Third) of Torts: Apportionment of Liab. § 13 cmts. b, c). The Legislature therefore excluded true vicarious and derivative liability from several liability because those whose liability is only vicarious are only liable because "someone else's fault is imputed to them by operation of law." *Id.* (internal quotation marks and citations omitted). Our Legislature left traditional indemnification as the only scheme for a passive joint tortfeasor to recover from the active joint tortfeasor under the four categories of vicarious and derivative liability listed above. *See id.* ¶ 6.

{32} Preserving traditional indemnification by limiting its application to situations of vicarious and derivative liability situations where the indemnitee is not actively negligent, is consistent with the approach adopted by a majority of jurisdictions that have adopted comparative fault; these jurisdictions follow the indemnification principles summarized in the Restatement (Third) of Torts: Apportionment of Liability.[1] Previously,

[1]*See, e.g.*, *Mizuho Corp. Bank (USA) v. Cory & Assocs., Inc.*, 341 F.3d 644, 652-653 (7th Cir. 2003) (applying Illinois law); *Nichols v. Citi-Group Global Mkts., Inc.*, 364 F. Supp. 2d 1330, 1339-40 (N.D. Ala. 2004) (applying Alabama law); *Orient Overseas Container Line v. John T. Clark & Sons of Boston, Inc.*, 229 F. Supp. 2d 4, 15 (D. Mass. 2002) (applying Massachusetts law); *Barry v. Hildreth*, 9 A.D.3d 341, 342, 780 N.Y.S.2d 159, 161 (N.Y.App. Div. 2004); *Bowyer v. Hi-Lad, Inc.*, 609 S.E.2d 895, 914 (W.Va. 2004); *Horowitz v. Laske*, 855 So.2d 169, 174 (Fla. Dist. Ct. App. 2003); *INS Investigations Bureau, Inc. v. Lee*, 784 N.E.2d 566, 575-76 (Ind. Ct. App. 2003); *Med James, Inc. v. Barnes*, 61 P.3d 86 (Kan. Ct. App. 2003); *Hamway v. Braud*, 838 So.2d 803, 806-07 (La. Ct. App. 2002); *Carr v. Home Ins. Co.*, 463, 458 S.E.2d 457 (Va. 1995).

under the Restatement (Second) of Torts, an actively negligent concurrent tortfeasor could recover from a more actively negligent concurrent tortfeasor in traditional indemnification. *See* Restatement (Second) of Torts: Apportionment of Liab. § 886B (Am. Law Inst. 1979). For example, an indemnitee would have a right to indemnity when the "indemnitor supplied a defective chattel or performed defective work upon land or buildings as a result of which both were liable to the third person, *and the indemnitee innocently or negligently failed to discover the defect*." Restatement (Second) of Torts: §886B(2)(d) (emphasis added).

{33} Therefore, we reiterate that traditional indemnity survives and co-exists with comparative negligence, several liability, and proportional indemnification in New Mexico because it "addresses other considerations of contractual right or of restitution to which a passive wrongdoer is entitled." *Amrep*, 1995-NMSC-020, ¶ 40. We also adopt the Section 22, Restatement (Third) of Torts, in place of Section 886B, Restatement (Second) of Torts, because it correctly limits the application of traditional indemnity to cases truly premised on vicarious or derivative liability.

{34} Accordingly, traditional indemnity is not applicable in this case because Plaintiffs clearly advanced, and the jury found, theories of liability that alleged Safeway to be an active tortfeasor. The parties agreed at a summary judgment motion hearing that Safeway would not have to pay for any negligence that is found to have been committed by Rooter and that is exactly what occurred. The district court therefore instructed the jury on the following four active negligence theories: (1) failure to provide proper instructions and hardware for the baby changing station installation, (2) failure to supervise the station installation, (3) failure to inspect the station after installation, and (4) failure to periodically inspect the station between the time of installation and the time of Plaintiff's injury. Safeway acknowledges as much in its docketing statement, and concedes that in the comparative negligence context, it has no right to indemnification from Rooter for its own active negligence.

{35} Further, this is not a true vicarious or derivative liability case that would entitle Safeway to traditional indemnity because the jury found Safeway actively at fault. Safeway and Rooter were adjudged liable for their proportion of fault–40% Safeway, 60% Rooter. To hold either party liable for more or less of their fault would be inequitable and contrary to the goals of both comparative negligence and traditional indemnity. Therefore, we reverse the Court of Appeals and affirm the district court's dismissal of Safeway's cross-claim for traditional indemnification.

D. Rooter does not have a duty to defend under the Agreement because the whole indemnification clause is void and unenforceable under the 1971 version of Section 56-7-1 and is against public policy

{36} As mentioned above, the Agreement between Rooter and Safeway provided that:

> [Rooter] shall indemnify, defend and hold [Safeway] harmless from and against; any and all claims, losses, damages, liabilities, and expenses (including the costs of investigation and attorney's fees) in connection with any claim or cause of action arising from any act or omission of [Rooter,] its employees, agents, and representatives, in the performance of its obligations under this Agreement, except where the claim, loss or damage is caused by the sole negligence of [Safeway].

{37} This Court must determine whether the contractual provision requiring Rooter to defend and maintain liability insurance and name Safeway as an additional insured is enforceable under Section 56-7-1.

{38} "Our primary goal is to ascertain and give effect to the intent of the Legislature. In doing so, we examine the plain language of the statute as well as the context in which it was promulgated . . . ." *State v. Office of Pub. Def. ex rel. Muqqddin*, 2012-NMSC-029, ¶ 13, 285 P.3d 622 (internal quotation marks and citation omitted). "Under the rules of statutory construction, [w]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2015-NMSC-004, ¶ 9, 345 P.3d 310 (alteration in original) (internal quotation marks and citation omitted). We also "look at the overall structure and function of the statute, as well as the public policy embodied in the statute." *Delfino*, 2011-NMSC-015, ¶ 12 (citations omitted) ; *see also State Bd. of Educ. v. Bd. of Educ. of Alamogordo Pub. Sch. Dist. No. 1*, 1981-NMSC-031, ¶ 14, 95 N.M. 588, 624 P.2d 530 ("In ascertaining the legislative intent, we look not only to the language used in [a] statute, but also to the object sought to be accomplished and the wrong to be remedied." (citation omitted)).

{39} The 1971 version of Section 56-7-1 provides:

> Any provision, contained in any agreement relating to the construction, installation, alteration, modification, repair, maintenance . . . of any real property . . . by which any party to the agreement agrees to indemnify the indemnitee, or the agents and employees of the indemnitee, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by, or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, or the agents or employees of the indemnitee, or any legal entity for whose negligence, acts or omissions any of them may be liable, is against public policy and is void and unenforceable . . .

In 2003, Section 56-7-1 was amended to specifically include agreements to insure and defend against the indemnitee's negligence, stating: "A provision in a construction contract that requires one party to indemnify, hold harmless, insure or defend the other party to the contract" against liability for the negligence, act or omission of the indemnitee "is void, unenforceable and against the public policy of the state." NMSA 1978, Section 56-7-1(A) (2003, amended 2005). The Court of Appeals held that the 1971 version of Section 56-7-1 applies in this case and that issue is not disputed. *See Safeway*, 2013-NMCA-021, ¶ 27. Because the agreement was signed by the parties on November 26, 2002, we agree.

{40} The Court of Appeals concluded, though, that while the indemnification provision under the contract was void and unenforceable under NMSA 1978, Section 56-7-1 (1971, amended 2005), Rooter still had a duty to defend Safeway. *Safeway*, 2013-NMCA-021, ¶¶ 26-27, 29. The Court of Appeals reasoned that the duty to defend is "distinct and separate from an agreement to indemnify" and that the 1971 version of Section 56-7-1 did not prohibit such agreements. *Safeway*, 2013-NMCA-021, ¶ 28 (citation omitted). The Court of Appeals further noted that Section 56-7-1 (1971) does not preclude

defend and insure provisions in construction contracts, unlike the 2003 version of Section 56-7-1. *Safeway*, 2013-NMCA-021, ¶ 26.

{41} Rooter cites *Sierra v. Garcia*, 1987-NMSC-116, 106 N.M. 573, 746 P.2d 1105 to support its assertion that Section 56-7-1 voids the entire contractual agreement, and not merely part of it. In contrast, Safeway argues that pursuant to *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, 146 N.M. 717, 213 P.3d 1146, *(BPLW)* the indemnity provision can be read out of the agreement leaving the defense provision intact because Rooter's duty to defend and insure is separate and distinct from Rooter's duty to indemnify Safeway.

{42} In *Sierra*, a general contractor was sued for the wrongful death of a subcontractor's employee and filed a third-party complaint against the subcontractor asserting that the subcontractor had agreed to indemnify the general contractor. 1987-NMSC-116, ¶ 1. The agreement between the contractor and general contractor provided that "Subcontractor shall defend at its own cost and indemnify and hold harmless Contractor and Owner, their agents and employees from any and all liability, damages, losses, claims and expenses, however caused resulting directly or indirectly from or connected with the performance of this subcontract." *Sierra,* 1987-NMSC-116, ¶ 4. This Court rejected the notion that portions of the agreement could be read out in order to render any part of the provision enforceable. *Id.* ¶¶ 6, 10. Instead, *Sierra* held "that the contract is voided in its entirety by . . . [Section 56-7-1 (1971, amended 2005)]." *Id.* ¶ 10.

{43} *BPLW* involved a "dispute over an indemnification clause in a contract between the City of Albuquerque and BPLW Architects & Engineers, Inc." after a pedestrian was injured at the facility. *BPLW*, 2009-NMCA-081, ¶ 1. The City requested that BPLW provide its defense pursuant to the agreement, which BPLW denied. *Id.* In examining whether BPLW was contractually obligated to defend the City, the Court of Appeals examined the language of the defend and indemnify clause, which provided that BPLW agreed "to defend, indemnify, and hold harmless the City . . . against all suits . . . brought against the City because of any injury or damage received or sustained by any person . . . arising out of or resulting from any negligent act, error, or omission of [BPLW] . . . arising out of the performance of this Agreement." *Id.* ¶ 14 (alteration and omissions in original). The Court of Appeals concluded that "there [was] no language in the contract that limit[ed] BPLW's duty to defend the City" and that "the plain language of [the] clause indicate[d] that the duty to defend applies to *all suits* against the City arising out of a negligent act, error, or omission of BPLW arising out of the performance of the agreement." *Id.* Thus, the Court of Appeals held that "BPLW ha[d] a duty to defend the City, even if only the City [was] alleged to be negligent, as long as the cause of action [arose] from the alleged negligent act, error, or omission of BPLW." *Id.* ¶ 15. The Court noted that this interpretation of the contract furthered the policy behind both versions of Section 56-7-1, which is to promote "safety in construction projects by holding each party to the contract accountable for injuries caused by its own negligence." *Id.* ¶ 19 (citation omitted).

{44} The Agreement in this case does not require Rooter to defend Safeway only for claims arising out of Rooter's negligence in performance of the contract. Instead, the Agreement also requires a defense of Safeway for Safeway's own negligence, "except where the claim, loss or damage is caused by the sole negligence of [Safeway]." *Sierra* made clear that the anti-indemnity statute voids the entire contractual agreement, not merely part of it, when the clause requires the indemnitor to indemnify the indemnitee for the indemnitee's own negligence. This case and *Sierra* are distinct from BPLW because BPLW only had to indemnify the city against suits "arising out of or resulting from any negligent act, error, or omission of [BPLW]." *BPLW*, 2009-NMCA-081, ¶ 14.

{45} The indemnification provision in this case is statutorily void and unenforceable because it requires Rooter to indemnify Safeway for Safeway's own negligence. Similarly, as a matter of both law and policy, Rooter should not have to pay for Safeway's legal defense caused by Safeway's own fault where Rooter settled with Plaintiffs for its share of fault. As noted by *BPLW*,

> Both the current version and the version in effect at the time the contract was executed, however, have the same effect because both ensure that an indemnitor only has to indemnify for causes of action that arise from the indemnitor's own negligent conduct. In addition, both versions of the statute are based on a public policy promoting safety in construction projects by holding each party to the contract accountable for injuries caused by its own negligence.

2009-NMCA-081, ¶ 19 (citation omitted). This public policy is frustrated if we order Rooter to pay Safeway's defense costs for Safeway's own negligence that the jury clearly found and appropriately apportioned using comparative fault. Accordingly, we reverse the Court of Appeals on the issue of the contractual duty to defend and affirm the district court's grant of summary judgment.

IV. CONCLUSION

{46} We hold that traditional indemnity is not applicable in this case because the jury apportioned fault under comparative negligence principles. And because we hold that Rooter's contractual duty to indemnify, defend, and insure Safeway under the Agreement is unenforceable, we reverse the Court of Appeals' holding that Section 56-7-1 (1971, as amended through 2005) did not render the defense and insurance requirements of the Agreement void and unenforceable. Therefore, we reverse the Court of Appeals and affirm the district court's grant of summary judgment finding that Rooter owed no common law or contractual duties to Safeway. This case is remanded to the district court for proceedings consistent with this opinion.

{47} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:
BARBARA J. VIGIL, Chief Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice
JUDITH NAKAMURA, Justice, not participating

Classified

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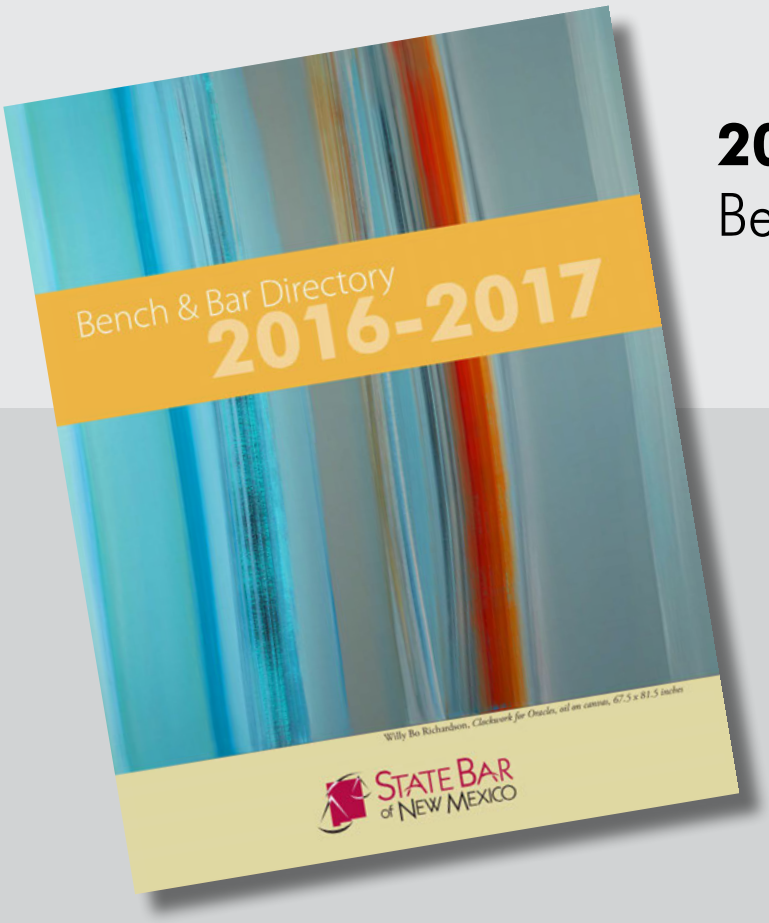

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